

consequently much more expensive, to fortify a town, so as to resist, even for a few weeks, the attack of that superior artillery. In modern times, many different causes contribute to render the defence of the society more expensive. The unavoidable effects of the natural progress of improvement have, in this respect, been a good deal enhanced by a great revolution in the art of war, to which a mere accident, the invention of gunpowder, seems to have given occasion.

In modern war, the great expense of firearms gives an evident advantage to the nation which can best afford that expense; and, consequently, to an opulent and civilized, over a poor and barbarous nation. In ancient times, the opulent and civilized found it difficult to defend themselves against the poor and barbarous nations. In modern times, the poor and barbarous find it difficult to defend themselves against the opulent and civilized. The invention of fire-arms, an invention which at first sight appears to be so pernicious, is certainly favourable, both to the permanency and to the extension of civilization.

## PART II

### Of the Expense of Justice

THE SECOND DUTY of the sovereign, that of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice, requires two very different degrees of expense in the different periods of society.

Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour; so there is seldom any established magistrate, or any regular administration of justice. Men who have no property, can injure one another only in their persons or reputations. But when one man kills, wounds, beats, or defames another, though he to whom the injury is done suffers, he who does it receives no benefit. It is otherwise with the injuries to property. The benefit of the person who does the injury is often equal to the loss of him who suffers it. Envy, malice, or resentment, are the only passions which can prompt one man to injure another in his person or reputation. But the greater part of men are not very frequently under the influence of those passions; and the very worst men are so only occasionally. As their gratification, too, how agreeable soever it

may be to certain characters, is not attended with any real or permanent advantage, it is, in the greater part of men, commonly restrained by prudential considerations. Men may live together in society with some tolerable degree of security, though there is no civil magistrate to protect them from the injustice of those passions. But avarice and ambition in the rich, in the poor the hatred of labour and the love of present ease and enjoyment, are the passions which prompt to invade property; passions much more steady in their operation, and much more universal in their influence. Wherever there is a great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many. The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy to invade his possessions. It is only under the shelter of the civil magistrate, that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate, continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government.

Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary.

Civil government supposes a certain subordination. But as the necessity of civil government gradually grows up with the acquisition of valuable property; so the principal causes, which naturally introduce subordination, gradually grow up with the growth of that valuable property.

The causes or circumstances which naturally introduce subordination, or which naturally and antecedent to any civil institution, give some men some superiority over the greater part of their brethren, seem to be four in number.

The first of those causes or circumstances, is the superiority of personal qualifications, of strength, beauty, and agility of body; of wisdom and virtue; of prudence, justice, fortitude, and moderation of mind. The qualifications of the body, unless supported by those of the mind, can give little authority in any period of society. He is a very strong man, who, by mere strength of body, can force two weak ones to obey him. The qualifications of the mind can alone give very great authority. They are however, invisible qualities; always disputable, and generally disputed. No society, whether barbarous or civilized, has ever found it convenient to settle the rules of precedency of rank and subordination, according to those invisible qualities; but according to something that is

more plain and palpable.

The second of those causes or circumstances, is the superiority of age. An old man, provided his age is not so far advanced as to give suspicion of dotage, is everywhere more respected than a young man of equal rank, fortune, and abilities. Among nations of hunters, such as the native tribes of North America, age is the sole foundation of rank and precedency. Among them, father is the appellation of a superior; brother, of an equal; and son, of an inferior. In the most opulent and civilized nations, age regulates rank among those who are in every other respect equal; and among whom, therefore, there is nothing else to regulate it. Among brothers and among sisters, the eldest always takes place; and in the succession of the paternal estate, every thing which cannot be divided, but must go entire to one person, such as a title of honour, is in most cases given to the eldest. Age is a plain and palpable quality, which admits of no dispute.

The third of those causes or circumstances, is the superiority of fortune. The authority of riches, however, though great in every age of society, is, perhaps, greatest in the rudest ages of society, which admits of any considerable inequality of fortune. A Tartar chief, the increase of whose flocks and herds is sufficient to maintain a thousand men, cannot well employ that increase in any other way than in maintaining a thousand men. The rude state of

his society does not afford him any manufactured produce any trinkets or baubles of any kind, for which he can exchange that part of his rude produce which is over and above his own consumption. The thousand men whom he thus maintains, depending entirely upon him for their subsistence, must both obey his orders in war, and submit to his jurisdiction in peace. He is necessarily both their general and their judge, and his chieftainship is the necessary effect of the superiority of his fortune. In an opulent and civilized society, a man may possess a much greater fortune, and yet not be able to command a dozen of people. Though the produce of his estate may be sufficient to maintain, and may, perhaps, actually maintain, more than a thousand people, yet, as those people pay for every thing which they get from him, as he gives scarce any thing to any body but in exchange for an equivalent, there is scarce anybody who considers himself as entirely dependent upon him, and his authority extends only over a few menial servants. The authority of fortune, however, is very great, even in an opulent and civilized society. That it is much greater than that either of age or of personal qualities, has been the constant complaint of every period of society which admitted of any considerable inequality of fortune. The first period of society, that of hunters, admits of no such inequality. Universal poverty establishes their universal equality; and the superiority, either of age or of

personal qualities, are the feeble, but the sole foundations of authority and subordination. There is, therefore, little or no authority or subordination in this period of society. The second period of society, that of shepherds, admits of very great inequalities of fortune, and there is no period in which the superiority of fortune gives so great authority to those who possess it. There is no period, accordingly, in which authority and subordination are more perfectly established. The authority of an Arabian scherif is very great; that of a Tartar khan altogether despotical.

The fourth of those causes or circumstances, is the superiority of birth. Superiority of birth supposes an ancient superiority of fortune in the family of the person who claims it. All families are equally ancient; and the ancestors of the prince, though they may be better known, cannot well be more numerous than those of the beggar. Antiquity of family means everywhere the antiquity either of wealth, or of that greatness which is commonly either founded upon wealth, or accompanied with it. Upstart greatness is everywhere less respected than ancient greatness. The hatred of usurpers, the love of the family of an ancient monarch, are in a great measure founded upon the contempt which men naturally have for the former, and upon their veneration for the latter. As a military officer submits, without reluctance, to the authority of a superior by whom he has always been commanded, but cannot bear

that his inferior should be set over his head; so men easily submit to a family to whom they and their ancestors have always submitted; but are fired with indignation when another family, in whom they had never acknowledged any such superiority, assumes a dominion over them.

The distinction of birth, being subsequent to the inequality of fortune, can have no place in nations of hunters, among whom all men, being equal in fortune, must likewise be very nearly equal in birth. The son of a wise and brave man may, indeed, even among them, be somewhat more respected than a man of equal merit, who has the misfortune to be the son of a fool or a coward. The difference, however will not be very great; and there never was, I believe, a great family in the world, whose illustration was entirely derived from the inheritance of wisdom and virtue.

The distinction of birth not only may, but always does, take place among nations of shepherds. Such nations are always strangers to every sort of luxury, and great wealth can scarce ever be dissipated among them by improvident profusion. There are no nations, accordingly, who abound more in families revered and honoured on account of their descent from a long race of great and illustrious ancestors; because there are no nations among whom wealth is likely to continue longer in the same families.

Birth and fortune are evidently the two circumstances which

principally set one man above another. They are the two great sources of personal distinction, and are, therefore, the principal causes which naturally establish authority and subordination among men. Among nations of shepherds, both those causes operate with their full force. The great shepherd or herdsman, respected on account of his great wealth, and of the great number of those who depend upon him for subsistence, and revered on account of the nobleness of his birth, and of the immemorial antiquity or his illustrious family, has a natural authority over all the inferior shepherds or herdsmen of his horde or clan. He can command the united force of a greater number of people than any of them. His military power is greater than that of any of them. In time of war, they are all of them naturally disposed to muster themselves under his banner, rather than under that of any other person; and his birth and fortune thus naturally procure to him some sort of executive power. By commanding, too, the united force of a greater number of people than any of them, he is best able to compel any one of them, who may have injured another, to compensate the wrong. He is the person, therefore, to whom all those who are too weak to defend themselves naturally look up for protection. It is to him that they naturally complain of the injuries which they imagine have been done to them; and his interposition, in such cases, is more easily submitted to, even by the

person complained of, than that of any other person would be. His birth and fortune thus naturally procure him some sort of judicial authority.

It is in the age of shepherds, in the second period of society, that the inequality of fortune first begins to take place, and introduces among men a degree of authority and subordination, which could not possibly exist before. It thereby introduces some degree of that civil government which is indispensably necessary for its own preservation; and it seems to do this naturally, and even independent of the consideration of that necessity. The consideration of that necessity comes, no doubt, afterwards, to contribute very much to maintain and secure that authority and subordination. The rich, in particular, are necessarily interested to support that order of things, which can alone secure them in the possession of their own advantages. Men of inferior wealth combine to defend those of superior wealth in the possession of their property, in order that men of superior wealth may combine to defend them in the possession of theirs. All the inferior shepherds and herdsmen feel, that the security of their own herds and flocks depends upon the security of those of the great shepherd or herdsman; that the maintenance of their lesser authority depends upon that of his greater authority; and that upon their subordination to him depends his power of keeping their inferiors in subordination to them. They

constitute a sort of little nobility, who feel themselves interested to defend the property, and to support the authority, of their own little sovereign, in order that he may be able to defend their property, and to support their authority. Civil government, so far as it is instituted for the security of property, is, in reality, instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all.

The judicial authority of such a sovereign, however, far from being a cause of expense, was, for a long time, a source of revenue to him. The persons who applied to him for justice were always willing to pay for it, and a present never failed to accompany a petition. After the authority of the sovereign, too, was thoroughly established, the person found guilty, over and above the satisfaction which he was obliged to make to the party, was like-wise forced to pay an amercement to the sovereign. He had given trouble, he had disturbed, he had broke the peace of his lord the king, and for those offences an amercement was thought due. In the Tartar governments of Asia, in the governments of Europe which were founded by the German and Scythian nations who overturned the Roman empire, the administration of justice was a considerable source of revenue, both to the sovereign, and to all the lesser chiefs or lords who exercised under him any particular jurisdiction, either over some particular tribe or clan, or over some

particular territory or district. Originally, both the sovereign and the inferior chiefs used to exercise this jurisdiction in their own persons. Afterwards, they universally found it convenient to delegate it to some substitute, bailiff, or judge. This substitute, however, was still obliged to account to his principal or constituent for the profits of the jurisdiction. Whoever reads the instructions (They are to be found in Tyrol's History of England) which were given to the judges of the circuit in the time of Henry II will see clearly that those judges were a sort of itinerant factors, sent round the country for the purpose of levying certain branches of the king's revenue. In those days, the administration of justice not only afforded a certain revenue to the sovereign, but, to procure this revenue, seems to have been one of the principal advantages which he proposed to obtain by the administration of justice.

This scheme of making the administration of justice subservient to the purposes of revenue, could scarce fail to be productive of several very gross abuses. The person who applied for justice with a large present in his hand, was likely to get something more than justice; while he who applied for it with a small one was likely to get something less. Justice, too, might frequently be delayed, in order that this present might be repeated. The amercement, besides, of the person complained of, might frequently suggest a very strong reason for finding him in the wrong, even when

he had not really been so. That such abuses were far from being uncommon, the ancient history of every country in Europe bears witness.

When the sovereign or chief exercises his judicial authority in his own person, how much soever he might abuse it, it must have been scarce possible to get any redress; because there could seldom be any body powerful enough to call him to account. When he exercised it by a bailiff, indeed, redress might sometimes be had. If it was for his own benefit only, that the bailiff had been guilty of an act of injustice, the sovereign himself might not always be unwilling to punish him, or to oblige him to repair the wrong. But if it was for the benefit of his sovereign; if it was in order to make court to the person who appointed him, and who might prefer him, that he had committed any act of oppression; redress would, upon most occasions, be as impossible as if the sovereign had committed it himself. In all barbarous governments, accordingly, in all those ancient governments of Europe in particular, which were founded upon the ruins of the Roman empire, the administration of justice appears for a long time to have been extremely corrupt; far from being quite equal and impartial, even under the best monarchs, and altogether profligate under the worst.

Among nations of shepherds, where the sovereign or chief is only the greatest shepherd or herdsman of the horde or clan, he is

maintained in the same manner as any of his vassals or subjects, by the increase of his own herds or flocks. Among those nations of husbandmen, who are but just come out of the shepherd state, and who are not much advanced beyond that state, such as the Greek tribes appear to have been about the time of the Trojan war, and our German and Scythian ancestors, when they first settled upon the ruins of the western empire; the sovereign or chief is, in the same manner, only the greatest landlord of the country, and is maintained in the same manner as any other landlord, by a revenue derived from his own private estate, or from what, in modern Europe, was called the demesne of the crown. His subjects, upon ordinary occasions, contribute nothing to his support, except when, in order to protect them from the oppression of some of their fellow-subjects, they stand in need of his authority. The presents which they make him upon such occasions constitute the whole ordinary revenue, the whole of the emoluments which, except, perhaps, upon some very extraordinary emergencies, he derives from his dominion over them. When Agamemnon, in Homer, offers to Achilles, for his friendship, the sovereignty of seven Greek cities, the sole advantage which he mentions as likely to be derived from it was, that the people would honour him with presents. As long as such presents, as long as the emoluments of justice, or what may be called the fees of court, constituted, in this manner,

the whole ordinary revenue which the sovereign derived from his sovereignty, it could not well be expected, it could not even decently be proposed, that he should give them up altogether. It might, and it frequently was proposed, that he should regulate and ascertain them. But after they had been so regulated and ascertained, how to hinder a person who was all-powerful from extending them beyond those regulations, was still very difficult, not to say impossible. During the continuance of this state of things, therefore, the corruption of justice, naturally resulting from the arbitrary and uncertain nature of those presents, scarce admitted of any effectual remedy.

But when, from different causes, chiefly from the continually increasing expense of defending the nation against the invasion of other nations, the private estate of the sovereign had become altogether insufficient for defraying the expense of the sovereignty; and when it had become necessary that the people should, for their own security, contribute towards this expense by taxes of different kinds; it seems to have been very commonly stipulated, that no present for the administration of justice should, under any pretence, be accepted either by the sovereign, or by his bailiffs and substitutes, the judges. Those presents, it seems to have been supposed, could more easily be abolished altogether, than effectually regulated and ascertained. Fixed salaries were appointed to

the judges, which were supposed to compensate to them the loss of whatever might have been their share of the ancient emoluments of justice; as the taxes more than compensated to the sovereign the loss of his. Justice was then said to be administered gratis.

Justice, however, never was in reality administered gratis in any country. Lawyers and attorneys, at least, must always be paid by the parties; and if they were not, they would perform their duty still worse than they actually perform it. The fees annually paid to lawyers and attorneys, amount, in every court, to a much greater sum than the salaries of the judges. The circumstance of those salaries being paid by the crown, can nowhere much diminish the necessary expense of a law-suit. But it was not so much to diminish the expense, as to prevent the corruption of justice, that the judges were prohibited from receiving my present or fee from the parties.

The office of judge is in itself so very honourable, that men are willing to accept of it, though accompanied with very small emoluments. The inferior office of justice of peace, though attended with a good deal of trouble, and in most cases with no emoluments at all, is an object of ambition to the greater part of our country gentlemen. The salaries of all the different judges, high and low, together with the whole expense of the administration and execution of justice, even where it is not managed with very good economy, makes, in any civilized country, but a very incon-



siderable part of the whole expense of government.

The whole expense of justice, too, might easily be defrayed by the fees of court; and, without exposing the administration of justice to any real hazard of corruption, the public revenue might thus be entirely discharged from a certain, though perhaps but a small incumbrance. It is difficult to regulate the fees of court effectually, where a person so powerful as the sovereign is to share in them and to derive any considerable part of his revenue from them. It is very easy, where the judge is the principal person who can reap any benefit from them. The law can very easily oblige the judge to respect the regulation though it might not always be able to make the sovereign respect it. Where the fees of court are precisely regulated and ascertained where they are paid all at once, at a certain period of every process, into the hands of a cashier or receiver, to be by him distributed in certain known proportions among the different judges after the process is decided and not till it is decided; there seems to be no more danger of corruption than when such fees are prohibited altogether. Those fees, without occasioning any considerable increase in the expense of a law-suit, might be rendered fully sufficient for defraying the whole expense of justice. But not being paid to the judges till the process was determined, they might be some incitement to the diligence of the court in examining and deciding it. In courts which consisted

of a considerable number of judges, by proportioning the share of each judge to the number of hours and days which he had employed in examining the process, either in the court, or in a committee, by order of the court, those fees might give some encouragement to the diligence of each particular judge. Public services are never better performed, than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them. In the different parliaments of France, the fees of court (called *epices* and *vacations*) constitute the far greater part of the emoluments of the judges. After all deductions are made, the neat salary paid by the crown to a counsellor or judge in the parliament of Thoulouse, in rank and dignity the second parliament of the kingdom, amounts only to 150 livres, about £6:11s. sterling a-year. About seven years ago, that sum was in the same place the ordinary yearly wages of a common footman. The distribution of these *epices*, too, is according to the diligence of the judges. A diligent judge gains a comfortable, though moderate revenue, by his office; an idle one gets little more than his salary. Those parliaments are, perhaps, in many respects, not very convenient courts of justice; but they have never been accused; they seem never even to have been suspected of corruption.

The fees of court seem originally to have been the principal

support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognizance of many suits which were not originally intended to fall under its jurisdiction. The court of king's bench, instituted for the trial of criminal causes only, took cognizance of civil suits; the plaintiff pretending that the defendant, in not doing him justice, had been guilty of some trespass or misdemeanour. The court of exchequer, instituted for the levying of the king's revenue, and for enforcing the payment of such debts only as were due to the king, took cognizance of all other contract debts; the plaintiff alleging that he could not pay the king, because the defendant would not pay him. In consequence of such fictions, it came, in many cases, to depend altogether upon the parties, before what court they would choose to have their cause tried, and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of justice in England was, perhaps, originally, in a great measure, formed by this emulation, which anciently took place between their respective judges: each judge endeavouring to give, in his own court, the speediest and most effectual remedy which the law would admit, for every sort of injustice. Originally, the courts of law gave damages only for breach of contract. The court of chancery, as a court

of conscience, first took upon it to enforce the specific performance of agreements. When the breach of contract consisted in the non-payment of money, the damage sustained could be compensated in no other way than by ordering payment, which was equivalent to a specific performance of the agreement. In such cases, therefore, the remedy of the courts of law was sufficient. It was not so in others. When the tenant sued his lord for having unjustly ousted him of his lease, the damages which he recovered were by no means equivalent to the possession of the land. Such causes, therefore, for some time, went all to the court of chancery, to the no small loss of the courts of law. It was to draw back such causes to themselves, that the courts of law are said to have invented the artificial and fictitious writ of ejectment, the most effectual remedy for an unjust ouster or dispossession of land.

A stamp-duty upon the law proceedings of each particular court, to be levied by that court, and applied towards the maintenance of the judges, and other officers belonging to it, might in the same manner, afford a revenue sufficient for defraying the expense of the administration of justice, without bringing any burden upon the general revenue of the society. The judges, indeed, might in this case, be under the temptation of multiplying unnecessarily the proceedings upon every cause, in order to increase, as much as possible, the produce of such a stamp-duty. It has been the cus-

tom in modern Europe to regulate, upon most occasions, the payment of the attorneys and clerks of court according to the number of pages which they had occasion to write; the court, however, requiring that each page should contain so many lines, and each line so many words. In order to increase their payment, the attorneys and clerks have contrived to multiply words beyond all necessity, to the corruption of the law language of, I believe, every court of justice in Europe. A like temptation might, perhaps, occasion a like corruption in the form of law proceedings.

But whether the administration of justice be so contrived as to defray its own expense, or whether the judges be maintained by fixed salaries paid to them from some other fund, it does not seem necessary that the person or persons entrusted with the executive power should be charged with the management of that fund, or with the payment of those salaries. That fund might arise from the rent of landed estates, the management of each estate being entrusted to the particular court which was to be maintained by it. That fund might arise even from the interest of a sum of money, the lending out of which might, in the same manner, be entrusted to the court which was to be maintained by it. A part, though indeed but a small part of the salary of the judges of the court of session in Scotland, arises from the interest of a sum of money. The necessary instability of such a fund seems, however, to render

it an improper one for the maintenance of an institution which ought to last for ever.

The separation of the judicial from the executive power, seems originally to have arisen from the increasing business of the society, in consequence of its increasing improvement. The administration of justice became so laborious and so complicated a duty, as to require the undivided attention of the person to whom it was entrusted. The person entrusted with the executive power, not having leisure to attend to the decision of private causes himself, a deputy was appointed to decide them in his stead. In the progress of the Roman greatness, the consul was too much occupied with the political affairs of the state, to attend to the administration of justice. A praetor, therefore, was appointed to administer it in his stead. In the progress of the European monarchies, which were founded upon the ruins of the Roman empire, the sovereigns and the great lords came universally to consider the administration of justice as an office both too laborious and too ignoble for them to execute in their own persons. They universally, therefore, discharged themselves of it, by appointing a deputy, bailiff or judge.

When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to what is vulgarly called politics. The persons entrusted with the great interests of the state may even without any corrupt views, some-

times imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power. The judge should not be liable to be removed from his office according to the caprice of that power. The regular payment of his salary should not depend upon the good will, or even upon the good economy of that power.

### PART III

#### **Of the Expense of public Works and public Institutions**

THE THIRD AND LAST DUTY of the sovereign or commonwealth, is that of erecting and maintaining those public institutions and those public works, which though they may be in the highest degree advantageous to a great society, are, however, of such a nature, that the profit could never repay the expense to any individual, or small number of individuals; and which it, therefore, cannot be expected that any individual, or small number of individuals, should erect or maintain. The performance of this duty requires, too, very different degrees of expense in the different periods of society.

After the public institutions and public works necessary for the defence of the society, and for the administration of justice, both of which have already been mentioned, the other works and institutions of this kind are chiefly for facilitating the commerce of the society, and those for promoting the instruction of the people. The institutions for instruction are of two kinds: those for the education of the youth, and those for the instruction of people of all ages. The consideration of the manner in which the expense of those different sorts of public works and institutions may be most properly defrayed will divide this third part of the present chapter