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Jeremy Bentham, *A Protest against Law-Taxes* [1818]

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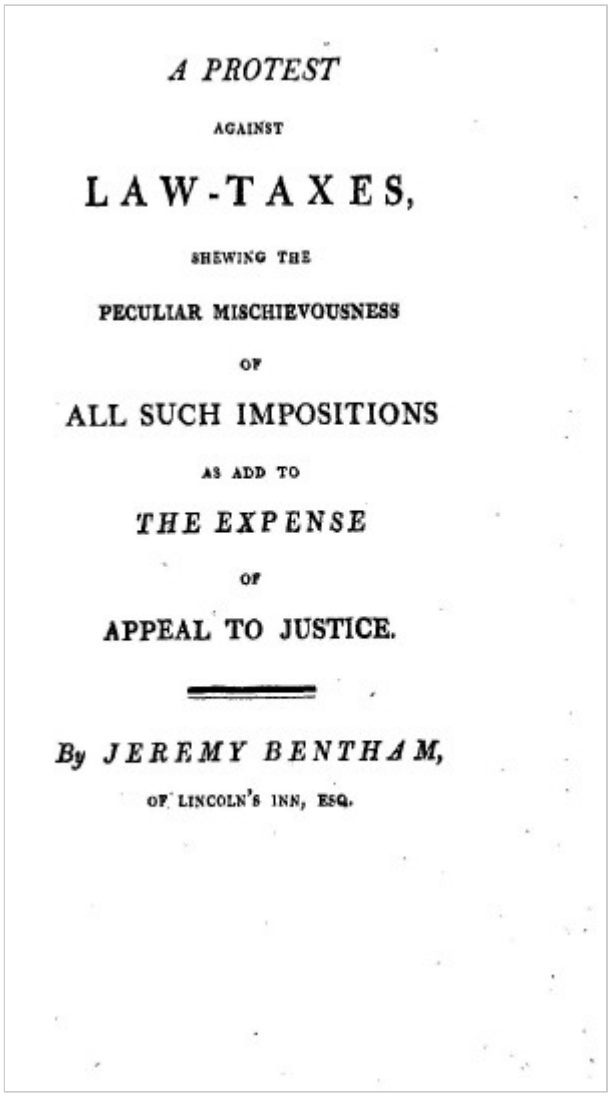

A PROTEST

AGAINST

LAW-TAXES,

SHEWING THE

PECULIAR MISCHIEVOUSNESS

OF

ALL SUCH IMPOSITIONS

AS ADD TO

THE EXPENSE

OF

APPEAL TO JUSTICE.

By JEREMY BENTHAM,

OF LINCOLN'S INN, ESQ.

Edition Used:

Defence of Usury; shewing the Impolicy of the Present Legal Restraints on the Terms of Pecuniary Bargains; in Letters to a Friend. To which is added A Letter to Adam Smith, Esq. LL.D. on the Discouragements opposed by the above Restraints to the Progress of Inventive Industry; and to which is also added, A Protest against Law-Taxes (London: Payne and Foss, 1818).

Author: Jeremy Bentham

About This Title:

From an 1818 edition which combines Bentham's defence of the practice of charging interest on loans with a critique of certain taxes which increased the cost of appearing before the courts.

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A PROTEST

AGAINST

LAW-TAXES.

TAXES on law-proceedings constitute in many, and perhaps in all nations, a part of the resources of the state. They do so in Great Britain: they do so in Ireland. In Great Britain, an extension of them is to be found among the latest productions of the budget: in Ireland, a further extension of them is among the measures of the day. It is this impending extension that calls forth the publication of the present sheets, the substance of

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Taxes on law-proceedings constitute in many, and perhaps in all nations, a part of the resources of the state. They do so in Great Britain: they do so in Ireland. In Great Britain, an extension of them is to be found among the latest productions of the budget: in Ireland, a further extension of them is among the measures of the day. It is this impending extension that calls forth the publication of the present sheets, the substance of which has lain upon the shelf these many years.

It is a well-known parliamentary saying, that he who reprobates a tax ought to have a better in his hand.* A juster condition never was imposed. I fulfil it at the first word. My better tax is—any other that can be named.

The people, when considered with a view to the manner in which they are affected by a tax of this description, may be distinguished into two classes: those who in each instance of requisition have wherewithal to pay, and those who have not: to the former, we shall find it more grievous than any other kind of tax, to the latter a still more cruel grievance.

Taxes on consumption cannot fall but where there is some fund to pay them: of poll taxes, and taxes on unproductive property, the great imperfection is, that they may chance to bear where such ability may be wanting. Taxes upon law-proceedings fall upon a man just at the time when the likelihood of his wanting that ability is at the utmost. When a man sees more or less of his property unjustly withholden from him, then is the time taken to call upon him for an extraordinary contribution. When the back of the innocent has been worn raw by the yoke of the oppressor, then is the time which the appointed guardians of innocence have thus pitched upon for loading him with an extra ordinary burthen.* Most taxes are, as all taxes ought to be, taxes upon affluence: it is the characteristic property of this to be a *tax upon distress*.

A tax on bread, though a tax on consumption, would hardly be reckoned a good tax; bread being reckoned in most countries where it is used, among the necessaries of life. A tax on bread, however, would not be near so bad a tax as one on law-proceedings: A man who pays to a tax on bread, may, indeed, by reason of such payment, be unable to get so much bread as he wants, but he will always get some bread, and in proportion as he pays more and more to the tax, he will get more and more bread. Of a tax upon justice, the effect may be, that after he has paid the tax, he may, without getting justice by the payment, lose bread by it: bread, the whole quantity on which he depended for the subsistence of himself and his family for the season, may, as well as any thing else, be the very thing for which he is obliged to apply to justice. Were a three-penny stamp to be put upon every three-penny loaf, a man who had but three-penny to spend in bread, could no longer indeed get a three-penny loaf, but an obliging baker could cut him out the half of one. A tax on justice admits of no such

retrenchment. The most obliging stationer could not cut a man out half a *latitat* nor half a *declaration*. Half justice, where it is to be had, is better than no justice: but without buying the whole weight of paper, there is no getting a grain of justice.

A tax on necessaries is a tax on this or that article, of the commodities which happen to be numbered among necessaries: a tax on justice is a tax on all necessaries put together. A tax on a necessary of life can only lessen a man's share of that particular sort of article: a tax on justice may deprive a man, and that in any proportion, of all sorts of necessaries.

This is not yet the worst. It is not only a burthen that comes in the train of distress, but a burthen against which no provision can be made.

All other taxes may be either foreseen as to the time, or at any rate provided for, where general ability is not wanting: in the instance of this tax, it is impossible to foresee the moment of exaction, it is equally impossible to provide a fund for it. A tax to be paid upon the loss of a husband, or of a father on whose industry the family depended, a tax upon those who have suffered by fire or inundation would seem hard, and I know not that in fact any such modes of taxation have ever been made choice of: but a tax on law-proceedings is harder than any of these. Against all those misfortunes, provision may be made; it is actually made in different ways by insurance: and, were a tax added to them, pay so much more, and you might insure yourself against the tax. Against the misfortune of being called upon to institute or defend one's self against a suit at law, there neither is nor can be, any *office of insurance*.*

Such is the cruelty of this species of tax, to those who have wherewithal to pay, and do pay to it accordingly. To those who do not, it is much more cruel: it is neither more nor less than *a denial of justice*.

Justice is the security which the law provides us with, or professes to provide us with, for every thing we value, or ought to value: for property, for liberty, for honour, and for life. It is that possession which is worth all others put together: for it includes all others. A denial of justice is the very quintessence of injury, the sum and substance of all sorts of injuries. It is not robbery only, enslavement only, insult only, homicide only: it is robbery, enslavement, insult, homicide, all in one.

The statesman who contributes to put justice out of reach, the financier who comes into the house with a law-tax in his hand, is an accessary after the fact to every crime: every villain may hail him brother, every malefactor may boast of him as an accomplice. To apply this to intentions would be calumny and extravagance. But as far as consequences only are concerned, clear of criminal consciousness and bad motives, it is incontrovertible and naked truth.

Outlawry is the engine applied by the law, as an instrument of compulsion to those who fly from civil justice. Outlawry is the engine employed as an instrument of punishment, against the most atrocious of malefactors. This self-same load of mischief, the financier with perfect heedlessness, but with unerring certainty, heaps on

the head of unsuspected innocence. Besides outlawry, which in the cases where the offender could not otherwise be affected, comes in as subsidiary in lieu of other punishment, there are certain offences for which a man is subjected, expressly and in the first instance, to a similar punishment, under the name of *forfeiture of the protection of the law*. The same fate attends a man thus at different periods, according to his merits. If guilty, it lays hold of him after conviction, for a particular cause, and without excluding the hope of pardon: if innocent, and poor, and injured—before conviction, and without conviction, and for no cause at all, and as long as he continues poor, that is, as long as he lives.

What a contrast! What inconsistency! The judge and the legislator, deliberating with all gravity, each in his separate sphere, whether to inflict or not this heavy punishment, on this or that guilty individual, or narrow description of guilty individuals. The legislator on the other hand, merely to get a little money which he could better get from any other source whatever, heaping the same doom upon thousands, not to say millions, of innocent and injured subjects, without consideration or remorse.

Mark well, that of all sorts of men, it is the poor, and they the more certainly in proportion to their poverty, that are despoiled in this way of the protection of the law: the protection of the law, that inestimable jewel, which in the language of that very law is defined the citizen's universal and best birth-right: the poor and him that has none to help him, these are they to whom the help of the law is thus unfeelingly refused. The rich, were it from them that this great safeguard were withholden, have shields of their own to ward off the attacks of injury: the natural influence of wealth, the influence of situation, the power of connexion, the advantages of education and intelligence, which go hand in hand with wealth. The poor has but one strong hold, the protection of the law: and out of this the financier drives him without vouchsafing him a thought, in company with the herd of malefactors.

The poor, on account of the ignorance and intellectual incapacity inseparably attached to poverty, are debarred generally, as perhaps it is necessary, were it only for their own sake, they should be universally, from the sweets of political power: but are not so many unavoidable inequalities enough, without being added to by unnecessary injustice?

Such is the description of those from whom this sum total of all rights is torn away with one hand, while tendered with the other: what are their numbers in proportion to the sum total of subjects? I fear to say—perhaps two thirds, perhaps four fifths, perhaps nine tenths: but at the lowest computation a vast majority.*

A third description of persons may yet be distinguished, whose condition under the system of law taxes is still more deplorable than that of either of the other two. I mean those, who having wherewithal to pay the imposition at the commencement of the suit, and during more or less of its progress, see their substance swallowed up by the taxes before the termination of it. The two preceding modifications of abuse, either of them bad enough, are thus put together, and compounded into a third.

Considered with a view to the treatment given to persons of this description, a court of justice is converted into exactly the same sort of place, as the shop of a baker would be, who having ranged his loaves along his window in goodly shew to invite customers, should, instead of selling them the bread they asked for, first rob them of their money, and then turn them out of doors. To an unprejudiced imagination, the alliance between justice and finance, presents on this occasion a picture almost too near the truth to be termed an apologue. At the door of a house more predatory than any of those that are called houses of ill fame, the *Judge* in his robes presenting to unsuspecting passengers a belt to prick in; the *Lord High Treasurer* in the back ground with his staff, lying in wait, ready as soon as the victims are fairly housed, and the money on the table, to knock them down and run away with it. The difference is, that any man may choose whether he will prick in the belt of the unlicensed sharper, nor are any but the rawest louts to be so deluded: whereas the wisest men may be inveigled in, as well as the stoutest dragged in, by the exalted and commissioned plunderers—so much surer is their game.—For were the list of law taxes ever so familiar, and ever so easy to be understood, it is impossible for a man to know before hand, whether he has wherewithal to pay the bill, because it is impossible for him to know what incidents may intervene to lengthen it. Were a man even to sit down, and form a resolution to submit to every injury which he could not afford to prosecute for, and to plead guilty to every accusation which he could not afford to defend himself against, even at this price he could not save himself from the hardship of paying for justice, aggravated by the still greater hardship of not getting it.

If in all cases the practice is wicked, in some it is more particularly preposterous. In civil causes, and other causes where the injury to individuals affords a natural interest to prosecute, artificial expenses are cruelty and breach of faith: in a large class of penal causes, in which for want of such natural interest, prosecutors must be engaged by factitious inducements, or the law be a dead letter, the cruelty and treachery are crowned by blunder and inconsistency. Beckoned into court with one hand, men are driven away with the other. But, costly as the attractive power frequently is, the repulsive force is apt to be much stronger. Reward is subsequent, distant, uncertain, and dependent upon success. Trouble, expense, and odium, are certain and precedent.*

In favour of this species of imposition, I have seen two arguments produced.

One is, that in this case as in others, the burthen of an establishment ought to lie on those by whom the benefit is reaped. The principle is incontrovertible: the matter of fact supposed by the application of it is not true.

The argument, were it just, would not extend beyond so much of the produce of the tax as is requisite for defraying the charge of this part of the national establishment. Whether it be confined or no within these bounds, was perhaps never thought worth inquiring into, in any country where this tax was imposed. It certainly extends much beyond them in England; and it seems to be resorted to from time to time, with as little scruple, as an extension of the customs or excise. But let this pass.

As to the notion of a connexity in this case betwixt the benefit and the burthen, it has been countenanced by an authority too respectable, not to deserve the most serious notice:* but come it from whom it will, it is a mere illusion. The persons on whom the whole of the burthen is cast, are precisely those, who have the least enjoyment of the benefit: the security which other people enjoy for nothing, without interruption, and every moment of their lives, they who are so unfortunate as to be obliged to go to law for it, are forced to purchase at an expense of time and trouble, in addition to what pecuniary expense may be naturally unavoidable. Mean time, which is of most value? which most worth paying for?—a possession thus cruelly disturbed, or the same possession free from all disturbance?—So far then from being made thus wantonly to pay an extra price, a man who stands in this unfortunate predicament, ought rather to receive an indemnification at the public expense, for his time and trouble: and the danger of insidious or collusive contests, in the view of obtaining such an indemnity, is the only objection I can see, though perhaps a conclusive one, against the granting it.

Litigation may in this point of view be compared to war in sober sadness, as war has been to litigation in the way of pleasantry. The suitor is the forlorn hope in this forensic warfare. To throw upon the suitor the expense of administering justice, in addition to the trouble and the risk of suing for it, is as if, in case of an invasion, you were to take the inhabitants of the frontier and force them, not only to serve for nothing, but to defray of themselves the whole expenditure of the war.

What in our times is become inveterate practice, is stigmatized as a species of iniquity without a precedent, by Saint Paul. "*Who is there*," demands the Apostle, "*who is there that ever goes to war at his own charge?*" — "*Alas!*" cries the poor suitor, "*I do.*"

The other argument in favour of a set of taxes of this kind, is, that they are a *check to litigation*.

Litigation is a term not altogether free from ambiguity. It is used sometimes in a *neutral* sense, to denote the prosecuting or defending a suit, though perhaps more frequently in a bad one. In its neutral sense, it expresses the irreproachable exercise of an essential right: in a bad sense a species of misconduct practised under the notion of exercising such a right.

In the first sense, taxes can never have been recommended by any man as a check to litigation: in this sense, an avowed desire of checking litigation, would be neither more nor less than an avowed desire of denying justice.

In a bad sense again, the word is used on two different occasions: where the suit, whatever be the importance of the matter in dispute, is on the part of the person spoken of as maintaining it, a *groundless* one: and where the suit, however well-grounded on his part in point of title, is on account of the supposed unimportance of the matter in dispute, deemed a *frivolous*, a *trifling*, a *trivial* one: and in either case, it is of course applicable to the situation of either plaintiff or defendant; though it is apt to fix in the first instance and most readily upon the situation of the plaintiff, as being

the party, who by taking the first step on the commencement of the suit, exhibits himself as the author of it.

On either side, litigation, when *groundless*, may be accompanied or not, with what the lawyers call *in genere malitia*, meaning *consciousness of misdoing*, and in this particular case *mala fides*, consciousness of the groundlessness of the action or defence, consciousness of the *want of merits*.

Where merits are wanting, but there exists no consciousness of the want, taxes on law-proceedings do, it must be confessed, operate as a check to litigation; and that as well on the side where it is groundless as on that where it is well grounded, and in the same degree. Indeed as both of two contending parties cannot in point of law be actually in the right, though either or both may think themselves so, the impediment cannot operate to the denial of justice, but it must operate to the prevention of groundless litigation at the same time. Prevent him who is in the right from instituting a suit, you prevent him who is in the wrong from defending one. But neither is litigation prevented, any further than as justice is denied. So far then as this case extends, it is still but the other side of the same effect, the *denial of justice*.

Have they then any peculiar tendency to operate as a check to litigation, when it is not only groundless, but accompanied with a consciousness of its being so?—to *malitious*, or as it might with more propriety be termed, *anti-conscientious* litigation? On the contrary, their direct tendency and sure effect is to promote it.

They produce it on the part of the *plaintiff*.—Were proceedings at law attended with no expense nor other inconvenience, till the suit were heard and at an end, a plaintiff who had no merits, could do a defendant man no harm by suing him: he could give him no motive for submitting to an unfounded claim: malice would have no weapons: oppression would have no instrument. When proceedings are attended with expense, the heavier that expense, the greater of course is the mischief which a man who has no merits is enabled to do: the sharper the weapon thus put into the hand of malice, the more coercive the instrument put into the hand of the oppressor.

They produce it on the part of the *defendant*. Were proceedings at law attended with no expense, a defendant who knew he had no merits, a defendant who was conscious that the demand upon him was a just one, would be deprived of what is in some cases his best chance for eluding justice, in others the absolute certainty of so doing: he would lose the strongest incentive he has to make the attempt. A defendant who means not to do justice unless compelled, and who knows that the plaintiff cannot compel him without having advanced a certain sum; such a defendant, if he thinks his adversary cannot raise that sum, will persevere in refusal till a suit is commenced, and in litigation afterwards.

Whether they make the litigation, or whether they find it ready made, they shew most favour to the side on which anti-conscientious litigation is most likely to be found. By attaching on the commencement of the suit, they bear hardest upon the plaintiff, or him who, if they would have suffered him, would have become plaintiff. In so doing they favour in the same degree the defendant, or him who, if the party conceiving

himself injured, could have got a hearing, would have been called upon to defend himself. But it is on the defendant's side that anti-conscientious practice is most likely to be found. Setting expense out of the question, an evil of which these laws are thus far the sole cause, setting out of the question the imperfections of the judicial system, and the hope of seeing evidence perish, or the guilty view of fabricating it, a man will find no motive for instituting a suit for an ordinary pecuniary demand, without believing himself to be in the right: for if he is in the wrong, disappointment, waste of time, fruitless trouble, and so much expense as is naturally unavoidable, are by the supposition what he knows must be his fate. Whereas, on the other hand, a man upon whom a demand of that kind is made, may, although he knows himself to be in the wrong, find inducement enough to stand a suit from a thousand other considerations: from the hope of a deficiency in point of evidence on the part of the plaintiff, not to mention, as before, the rare and criminal enterprise of fabricating evidence on his own part: from the hope of tiring the plaintiff out, or taking advantage of casual incidents, such as the death of witnesses or parties: from the temporary difficulty or inconvenience of satisfying the demand, or (to conclude with the case which the weakness of human nature renders by far the most frequent) from the mere unwillingness to satisfy it.

In a word, they give a partial advantage to conscious guilt, on whichever side it is found: and that advantage is most partial to the defendant's side, on which side consciousness of guilt, as we see, is most likely to be found.

Better, says a law maxim subscribed to by every body, better that *ten* criminals should escape, than one innocent person should suffer: and this in case even of the deepest guilt. For *ten*, some read a *hundred*, some a *thousand*. Whichever reading be the best, an expedient of procedure, the effect of which were to cause ten innocent persons to suffer for every ten guilty ones, would be acknowledged to be no very eligible ingredient in the system. What shall we say of an institution, which for one culpable person whom it causes to suffer, involves in equal suffering perhaps ten blameless ones.

Thus much for *groundless* suits: there remains the plea of its tendency to check what are deemed *trivial* suits.

I know what a *groundless* suit means—I know of no such thing as a *frivolous* one. No wrong that I know of can be a trivial one, which to him to whom it is done appears a serious one, serious to such a degree, as to make it worth his while to de mand redress at the hand of justice.—Conduct is the test of feeling. I know of no right I have to set up any feelings of my own as the standard of those of my neighbour, in contradiction to a declaration of his, the truth of which is evidenced by his own conduct. What to one man again is trivial, to another man may be of high importance. In the account of wrong too must be included, not only the individual wrong taken by itself, but its effects in the way of encouragement to repetition, and its effects in the way of example. I know of no wrong so slight, that by multiplication may not become intolerable. Give me but a licence to do to any person at pleasure the minutest wrong conceivable — I need no more, that person is my slave. Allow me to rob him, though it be but of a farthing, farthing by farthing, I will find the bottom of his purse. Allow

me but to let fall a drop of water upon his head—*gutta cavat lapidem*, the power of striking his head off would be less susceptible of abuse.

In pecuniary cases, the smaller the sum in dispute, the less reserve is used in branding the conduct of the parties with the charge of litigation, of which, in such cases the reproach is apt to fall principally, if not exclusively, to the plaintiff's share. But the importance of the sum is altogether governed by the circumstances of the parties: the amount of it in pounds, shillings, and pence, shows nothing. One man's income may be a hundred, a thousand, four thousand times as great as that of another. In England there are men whose income exceeds 60,000l. a year. 15l. a year is as much as falls to the lot of perhaps the greater number of the whole body of the people. Without a particular caution, a legislator or a judge will naturally enough, like any other man, take the relation of the sum in dispute to his own feelings, that is, its ratio to his own circumstances, for the measure of importance: but by this standard he will be sure to be deceived, as often as the circumstances of the parties, or either of them, are materially different from his own. Fifty pound, for example, will be apt to appear in his eyes an object of considerable importance: an object of which a tenth or a twentieth part, or less, might be of importance sufficient to justify from the charge of litigation, the maintenance of a suit. A shilling would be almost sure to appear to him an object altogether trifling; an object by no means of magnitude enough to warrant the maintenance of a suit. Fifty pound is however a sum of less importance to a Duke of Marlborough or Bedford, than a single shilling (viz. than a four thousandth part of 50l.) to many a man, in truth to probably the majority of men in the kingdom. It is therefore more unjust, more tyrannical, to refuse to hear the demand of an ordinary working man to the amount of a shilling, than it would be to refuse to hear the demand of a Duke of Marlborough or Bedford, to the amount of 50l. The legislator, who on the plea of checking litigation, or on any other plea, exacts of a working man as a preliminary to his obtaining justice, what that working man is unable to pay, does refuse to him a hearing, does in a word refuse him justice, and that as effectually and completely, as it is possible to refuse it.

That all men should have *equal rights*, not only would be politically pernicious, but is naturally impossible: but I hope this will not be said of *equal justice*.

Trivial causes require no such factitious checks: to such causes were all expenses struck off that can be struck off, there are natural checks in abundance, that are unavoidable. There is the pain of disappointment: there is expense, of which a certain measure will every now and then be absolutely unavoidable: there is consumption of time, which to the working classes, that is, to the great majority of the people, is expense.

But even let the cause be trivial, and that to such a degree as to render the act of commencing the litigation blamable, the blame is never so great on the side of the party most favoured by the tax, as on the side of the party most oppressed by it. The party most oppressed is the complainant: the party who having suffered the injury, such as it is, claims or would claim satisfaction for it at the hands of justice. But, so as there does but exist the smallest particle of an injury, the party who claims satisfaction for it can never be so much in the wrong for doing so, but that he who refuses

satisfaction must be still more so. If the demand be just, why did not he comply with it? If just, but trifling, why does he contest it? In this case then you cannot punish in this way the misconduct of one party, without rewarding the still greater misconduct of the other. If the tax applies a check where there is blame, it affords protection and encouragement where there is still greater blame.

Another injustice.—The poorer a man is, the more exposed he is to the oppression of which this supposed remedy against litigation is the instrument. But the poorer a man is, the less likely he is to be litigious. The less time a man has to spare, and the less a man can afford to expend his time (not to speak of money) without being paid for it, the less likely is he to expose himself to such a consumption of his time.

The rich man, the man who has time and money at command, he surely, if any, is the man to consume it litigiously and frivolously. No wonder however, if to a superficial glance, the poor should appear more litigious than he. There are more of the poor than of the rich: and to the eye of unreflecting opulence, the causes of the poor are all trivial ones.

We think of the poor in the way of charity, for to deal out charity gratifies not only benevolence, but pride. We think much of them in the way of charity, but we think little of them in the way of justice. Justice, however, ranks before charity: and they would need less charity, if they had more justice.

What contributes more than any thing to the indignation excited by suits that are deemed trivial and, on account of the triviality *vexatious*, is the excessive ratio of the expense of the suit to the value of the matter in dispute: especially when, the matter in dispute being pecuniary, its minuteness is more conspicuous and defined. But to what is this expensiveness owing?—As far at least as these taxes are in question, to the legislator himself. — Mark then the iniquity. He is himself the author of the wrong, and he punishes for it the innocent and the injured.

To exclude the poor from *justice* was not enough:—they must be excluded also from *mercy*. Forty shillings is the tax imposed on pardons, by a statute of King William (5. W. c. 21. § 3.) forty shillings more by another, no more than five years afterwards. (9 and 10. W. c. 25. § 3, 50.) Together, 4l.:—half a year's income of a British subject, according to Davenant's computation above quoted. What is called *mercy*, let it be remembered, is in many cases, no more than *justice:* in all cases where the ground of pardon is the persuasion of innocence, entertained either notwithstanding the verdict, or in consequence of evidence brought to light after the verdict.* All punishments are accordingly irremissible, to him who has not to the amount of half a year's income in store or credit: all fines to that amount or under, absolutely irremissible.†

Taxes on law proceedings, so far then from being a check to litigation, are an encouragement to it: an encouragement to it in every sense in which it is mischievous and blamable. Would you really check litigation, and check it on both sides?—the simple course would be a sure one. When men are in earnest about preventing misconduct in any line, they annex punishment to misconduct in that line, and to that only: a species of misconduct which cannot be practised but as it were under the eye

of the court, is of all others the easiest to cope with in the way of law. Deal with misconduct that displays itself under the eye of the court as you deal by delinquency at large, and you may be sure of succeeding to a still superior degree. Discriminate misconduct then from innocence: lay the burthen on misconduct and misconduct only, leaving innocence unoppressed. Keep back punishment, till guilt is ascertained. Keep back costs, as much as possible, till the last stage of procedure; keep off from both parties every thing of expense that is not absolutely unavoidable, where litigation is on both sides without blame: at that last stage if there be found blame, throw whatever expense of which you allow the necessity to subsist beyond what is absolutely unavoidable, throw it on that side, and on that side only, where there has been blame. If on both, then if circumstances require, punish it on both sides, by fine for instance to the profit of the public.

Litigation, though eventually it prove groundless, litigation, like any other course of conduct of which mischief is the result, is not therefore blamable: and where it is blamable, there is a wide difference whether it is accompanied with temerity only, or with consciousness of its own injustice. The countenance shewn to the parties by the law ought to be governed, and governed uniformly and proportionally, by these important differences.—So much in point of utility:—how stands establishment?—Taxes heaped on in all stages from the first to the last without distinction: — all costs given or no costs, no medium:—costs scarce ever complete, and nothing beyond costs.—No mitigation, or enhancement, in consideration of pecuniary circumstances. No shades of punishment in this way correspondent to shades of blame:—in most cases no difference so much as between consciousness of injustice and simple temerity, nor so much as betwixt either and innocence. The power of adjudging as between costs and no costs, seldom discretionary:—that of apportioning, never:—nor that of fining beyond the amount of costs:—consequently nor that of punishing both parties where both have been to blame. Were a power to be given by statute to impose on a litigious suitor convicted of litigation, a fine to an amount not exceeding what the losing party pays now, whether he be blamable or blameless, it would be cried out against perhaps as a great power, too great to be given to judges without juries.*

Justice shall be denied to no man, justice shall be sold to no man, says the first of statutes, *Magna Charta*. How is it under these later ones?—Denied, as we have seen, to nine-tenths of the people, sold to the other tenth at an unconscionable price. It was a conceit among the old lawyers, reported if not adopted by Lord Coke, that a statute made contrary to *Magna Charta*, though made in all the forms, would be a void law. God forbid, that by all the lawyers in the world, or for the purpose of any argument, I should ever suffer myself to be betrayed into any such extravagance: in a subject it would be sedition, in a judge it would be usurpation, in any body it would be nonsense. But after all it must be acknowledged, to be in some degree unfortunate, as well as altogether singular, that, of an instrument deemed the foundation of all liberty, and magnified as such even still, to a degree of fanaticism, a passage by far the most important, and almost the only one that has any application now a days, should be thus habitually trodden under foot, without remorse or reclamation.*

A tax so impolitic and so grievous, a tax thus demonstrated to be the worst of taxes, how comes it ever to have been made choice of, and when made choice of, acquiesced in?—These are not questions of mere curiosity: for acquiescence under a tax, and that so general, forms at first glance no inconsiderable presumption in its favour. A presumption it does form: but when demonstration has shewn itself, presumptions are at an end.

How comes the tax to have been made choice of?—One cause we have seen already in another shape; the unscrutinized notion of its supposed tendency to check *litigation:* litigation, which where it stands for mischief, is the very mischief which the species of tax in question contributes with all its power to promote.

Another cause may possibly be, the tendency which this sort of tax has to be confounded in the eye of an incurious observer, with other sorts, which are either the best of all, or next to the best. The best of all are taxes on consumption, because not only do they fall no where without finding some ability to pay them; but where necessaries are out of the question, they fall on nobody who has not the option of not paying them if he does not choose it. Taxes on property, and those on transfer of property, such as those on contracts relative to property, are the next best: because though they are not optional like the former, they may be so selected as never to call for money but where there is ability, nay even ample ability, to pay them. Now of these two most supportable classes of taxes, the second are all of them levied by means of *stamps:* taxes on consumption too, in many instances, such as those on cards, dice, gloves, and perfumery, show to the eye as stamp-duties. But all these are very good taxes. Stamp-duties therefore are good taxes: and taxes on justice are all stamp-duties.—Thinking men look to consequences; they look to the feelings of the individuals affected: acting men look to the stamp: taxes on justice, taxes on property, taxes on consumption, are accordingly one and the same object to the optics of finance. Stamp-duties too have another most convenient property, they execute themselves, and law-taxes beyond all others: in short they exclude all smuggling.* They heap distress indeed upon distress: but the distress is not worth minding, as there is no escaping it.

But the great cause of all is the prospect of acquiescence: a prospect first presented by hope, since realized over and over again by experience. It is too much to expect of a man of finance, that he should anticipate the feelings of unknown individuals: it is a great deal if he will listen to their cries. Taxes on consumption fall on bodies of men: the most inconsiderable one when touched will make the whole country ring again. The oppressed and ruined objects of the taxes on justice, weep in holes and corners, as rats die: no one voice finds any other to join with it.

A tax on shops, a tax on tobacco, falls upon a man, if at all, immediately, and presses on him constantly: every man knows whether he keeps or means to keep a shop, whether he means to sell or to use tobacco. A tax on justice falls upon a man only occasionally: it is like a thunder-stroke, which a man never looks for till he is destroyed by it. He does not know when it will fall on him, or whether it ever will: nor even whether, when it does fall, it will press upon *him* most, or upon his adversary. He knows not what it will amount to: he has no *data* from which to calculate it: it

comes lumped to him in the general mass of law charges: a heap of items among which no vulgar eye can ever hope to discriminate: an object on which investigation would be thrown away, as comprehension is impossible. Calamities that are not to be averted by thought, are little thought of, and it is best not to think of them. When is the time for complaint? Before the thunder-bolt is fallen it would be too soon: when fallen, it is too late. Shopkeepers, tobacconists, glovers, are compact bodies: they can arm counsel: they come in force to the House of Commons. Suitors for justice have no common cause, and scarce a common name: they are every body and nobody: their business being every body's is nobody's. Who are suitors? where are they? what does a Chancellor of the Exchequer care for them? what can they do to help him? what can they do to hurt him? So far from having a common interest, they have a repugnant interest: to crush the injured, is to befriend the injurer.

May not ignorance with regard to the quantum and the source of the grievance, have contributed something to patience?—Unable to pierce the veil of darkness, that guards from vulgar eyes the avenues of justice, men know not how much of the difficulty of the approach is to be ascribed to art, and how much to nature. As the consumers of tobacco confound the tax on that commodity with the price, so those who borrow or would have wished to borrow the hand of justice, confound the artificial with the natural expense of hiring it. But if the whole of the grievance be natural, it may be all inevitable and incurable, and at any rate it may be no more the fault of lawyers or law makers, than gout and stone are of physicians.—Happy ignorance!—if blindness to the cause of a malady could blunt the pain of it!

There want not apologists-general and talkers in the air, to prove to us that this as well as every thing else, is as it should be. The expense, the delay, and all the other grievances, which activity has heaped up, or negligence suffered to accumulate, are the prices which, according to Montesquieu, we must be content to pay for liberty and justice. A penny is the price men pay for a penny loaf: therefore why not two-pence? and, if three-pence, there would be no harm done, since the loaf would be worth so much the more.

May not a sort of instinctive fellow-feeling among the wealthy have contributed something, if not to the imposition, at least to the acquiescence? It is the wealthy alone, that either by fortune, situation, education, intelligence, or influence, are qualified to take the lead in legislation: and the characteristic property of this tax, is to be favourable to the wealthy, and that in proportion to their wealth. Other taxes afford a man no indemnification for the wealth they take from him: this gives him power in exchange. The power of keeping down those who are to be kept down, the power of doing wrong, and the more generous pride of abstaining from the wrong which it is in our power to do; advantages such as these, are too precious not to be grasped at with avidity by human weakness: and, as in a country of political liberty, and under a system of justice in other respects impartial, they can only be obtained by a blind and indirect route such as this, the inconvenience of travelling in it, finds on the part of those who are well equipped for it, the more patient an acquiescence.

Will it be said that abolishing the taxes on justice would not answer the purpose, for that supposing them all abolished, justice would still remain inaccessible to the body

of the people?—This would be to justify one abuse by another. The other obstacles by which the avenues to justice have been blocked up, constitute a separate head of abuse, from which I gladly turn aside, as being foreign to the present purpose. Take off law taxes all together, the number of those to whom justice will still remain inaccessible, would still, it must be confessed, be but too great. It would however not be so great, as it is at present under the pressure of those taxes. Though you could not tell exactly to how many you would open the doors of justice, you might be sure you opened them to some. Though you would still leave the burthen but too heavy, you would at any rate make it proportionably more supportable.

If by taking off these taxes, you reduced the expense of a common action from 25l. to 20l., you might open the door, suppose, to one in five of those against whom it is shut at present. Even this would be something: at any rate whatever were the remaining quantum of abuse, which you still suffered to subsist, you would have the consolation at least of not being actively instrumental in producing it. To reform *in toto* a system of procedure is a work of time and difficulty, and would require a rare union of legal knowledge with genius:—repealing a tax may require discernment, candour, philanthropy, and fortitude; but is a work of no difficulty, requires no extraordinary measure of science, nor even so much time as the imposing of one.

But by whatever plea the continuance of the subsisting taxes of this kind may be apologized for, nothing can be said in favour of any new addition to the burthen. The subsisting ones, it may be said, have been acquiesced in, and men are used to them: in this respect at least they have the advantage of any new ones which could be substituted in the room of them. But even this immoral plea, which puts bad and good upon a level, effacing all distinction but that between *established* and not *established*, even this faint plea is mute against any augmentation of this worst of evils.

To conclude—Either I am much mistaken, or it has been proved—that a law tax is the worst of all taxes, actual or possible:—that for the most part it is a denial of justice, that at the best, it is a tax upon distress:—that it lays the burthen, not where there is most, but where there is least, benefit: — that it co-operates with every injury, and with every crime:—that the persons on whom it bears hardest, are those on whom a burthen of any kind lies heaviest, and that they compose the great majority of the people:—that so far from being a check, it is an encouragement to litigation: and that it operates in direct breach of Magna Charta, that venerable monument, commonly regarded as the foundation of English liberty.

The statesman who cares not what mischief he does, so he does it without disturbance, may lay on law taxes without end: he who makes a conscience to abstain from mischief will abstain from adding to them: he whose ambition it is to extirpate mischief, will repeal them.

General error makes law, says a maxim in use among lawyers. It makes at any rate an apology for law: but when the error is pointed out, the apology is gone.

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NOTES
To The
SECOND EDITION.

Mem.—Anno, 1796. At a dinner at Mr. M. P.'s, in—Street, Mr. R. in the presence of Mr. William Pitt, (then Minister) took me aside, and told me that they had read my Pamphlet on Law Taxes; that the reasons against them were unanswerable, and it was determined there should be no more of them.

Anno, 1804, July 10, 12, 14, 18.—This being in the number of Mr. Addington's Taxes, Mr. Pitt, upon returning to office, took up all those Taxes in the lump. On the above days, this Tax was opposed in the House of Commons: and Mr. Wyndham, according to the report in the Times, on one of those days, spoke of this Pamphlet as containing complete information on the subject; observing at the same time, that it was out of print. On behalf of administration, nothing like an answer to any of the objections was attempted: only the Attorney-General (Percival) said, that the addition proposed to those Taxes, was no more than equal to the depreciation of money.

Mr. Addington, before this, had recourse to the Tax on Medicine here spoken of, (p. 22.) So that, in the course of his short administration, if the representation here given be correct, he had had the misfortune to find out and impose the two worst species of taxation possible. Compare this with Denmark, and its courts of *Natural Procedure, called Reconciliation Courts*.

26th February, 1816.—Unalleviated by any adequate hope of use, too painful would be the task, of hunting out, and holding up to view, the subsequent additions, which this worst of oppressions has, in this interval of twenty years, been receiving.

Money, it is said, must be had, and no other taxes can be found. The justification being conclusive, the tax receives its increase: next year, from the same hand, flow others in abundance.

Grievous enough is the *Income Tax*, called, lest it should be thought to be what it is, the *Property Tax*.—Grievous that tax is, whatever be its name; yet, sum for sum, compared with this tax, it is a blessing. Instead of 10 per cent. suppose it 80 per cent. Less bad would it be to add yet another 10 per cend. than a tax to an equal amount upon justice.

Grievous have been the additions, so lately and repeatedly made, to the taxes on *Conveyances* and *Agreements*. Extensive the prohibitory part of the effect, though the pressure,—confined as usual to the poor, i.e. the great majority of the community, who have none to speak for them,—is scarcely complained of by the rich. Yet, were all law-taxes taken off, and the amount thrown upon *Conveyances* and *Agreements*, this—even this—would in reality be an indulgence.

Whether the oppression be more or less grievous, is never worth a thought. Will it be submitted to?—This is the only question. Charity is kicked out of doors. Hope is fled. Faith and piety remain, and atone for every thing.

For a list of about twenty-eight other sources of factitious delay, vexation, and expense, and thence of denial of justice, produced by the judges of former times, for the augmentation of lawyers' profit, their own included,—together with a list and summary account of the devices by which these burthens have been imposed, and by which *Technical* stands distinguished from *Natural Procedure*,—see by the same author, *Scotch Reform*, &c. printed for Ridgway, Piccadilly.

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ADDITION BY A LEARNED FRIEND.

In the court of Chancery, two cases have recently occurred, which may serve as an illustration of the extnet in which the taxes upon law proceedings may operate as a denial of justice, In one case—Roe *v.* Gudgeon—the Defendant, in his answer to the Plaintiff's bill, submitted that he ought not to be compelled to set out certain accounts which had been required by the bill, as the expense of taking what is called an office copy of them,—a necessary preliminary to any further proceeding onthe part of the Plaintiff in the cause,—would amount to the sum of 29,000*l.*; an expense almost wholly arising from the Stamps on the Paper, on which the office copy of the answer is compulsorily made. In this case the court determined, that it was not necessary these accounts should be set out: but in coming to this conclusion, how far the court was determined by the nature of the particular case, or by the magnitude of the expense that would thus be occasioned;—or whether if, without any such objection, the Defendant had actually set out these accounts, the Plaintiff could have been relieved from pursuing the regular mode of procuring a copy of them, and thus incurring the above expense;—or whether, if the expense had been instead of 29,000*l.* only 28 or 27 thousand pounds, such an objection would have been listened to;—it is extremely difficult to say.

The other case alluded to is one in which from peculiar circumstances, it is not thought proper to mention the names of t he parties. It is optional with a man to be a plaintiff in a cause, it is not altogether so optional with him to be a defendant. The preceding case shews that it is not always safe for a man to become a Plaintiff, without 28,000*l.* at least in his pocket, to begin with, over and above what is necessary for his maintenance.—The following case shews that a man may not be always able to resist a demand, however unjust it may be, without being able to support an outlay of at least 800*l.* In the case in question, the writer of this has been assured,—and from authority, which he has peculiar reasong for relying upon,—that the expense of merely putting in an answer by one of the Defendants to a bill in Equity, amounted to the above sum of 800*l.*: what part of this expense was occasioned by the tax on law proceedings cannot be accurately ascertained, but it assuredly constituted a very considerable proportion of that sum.

FINIS.

[*]It confines itself of course to public men, or what comes to the same thing, private men speaking in the character of public. As for individuals aggrieved, they have performed their part when they have stated their own grievance.

[*]Even in the instance of a defendant, or when the wrong is not pecuniary, the hardship of a double yoke does not cease: for the natural expense of litigation is a burthen which this artificial one finds pressing on him in any case.

[*]I say there never can be: in those other instances the event insured against is always some very simple event, such as the death of a person, which in the ordinary

course of things is not open to dispute. Here the incident which calls for contribution, is not only disputable, but by the supposition is actually in dispute. Nothing less than litigation can ascertain legally, whether litigation has been necessary. Have you engaged with a man for his paying you a sum of money whenever it shall become necessary for you to institute or defend yourself against a law-suit?—wait till the suit is at an end, and you will know whether he ought to pay you. A society indeed, and a very laudable one, has been established for purposes which come under this head: but the relief it affords is confined not only to criminal cases, but to a certain description of criminal cases; nor could it be rendered any thing like co-extensive with the grievance.

[*]In England, the expense of carrying through a common action, cannot be less than about 24l. at the lowest rate, on the plaintiff's side alone. [See Schieffer on Costs, 1792.] The average expense of civil suits of all sorts, taking equity causes into the account, can surely not be rated at less than double that amount, on that one side. The average expenditure of an English subject, infants and adults, rich as well as poor, taken together, has been computed by Davenant (as quoted on this occasion somewhere by Adam Smith) at 8l. a year. Six years' income then is what a man must have in advance, before he can be admitted to take his chance for justice. Of many estimates which Dr. Anderson had met with, 20l. was the highest, and he takes but ten pounds. [Interest of Great Britain with regard to her colonies, London, 1792.] No man then we may say at any rate, can have the benefit of justice, in the ordinary way, either in making good a just claim, or saving himself from an unjust one, who cannot find, for this purpose alone, a sum equal to several years of a man's income. From this statement it needs not much study to perceive, that for the bulk of the community, as far as ordinary cases of the civil kind are concerned, *justice* is but an empty name.

[*]This species of tax would stand absolutely alone in point of depravity, were it not for the tax on drugs, as far it extends to those used in medicine. This, as being also a tax upon distress, is so far in specie the same, but is nothing to it in degree. To recover a shilling in the way of justice, it will cost you at least 24l., of which a good part in taxes: but to be admitted to buy a shilling's worth of medicine for a shilling, it does not cost you threepence. Hospitals for the sick are not uncommon: there are none for harassed and impoverished suitors. There are *Lady Bountifuls* that relieve the sick from the tax on medicines, and the price of them into the bargain: but a *Lady Bountiful* must be bountiful indeed, to take the place of attorney and counsel, as well as of physician and apothecary, and supply a poor man with as many pounds worth of *latitats* and *pleas*, as he must have to recover a shilling. A man cannot, as we have seen, insure himself against law suits: but a man may insure himself and many thousands actually do insure themselves, against sickness. But these reliefs are neither certain nor general: and after all, a tax on him who has had a leg or an arm broken, a tax on him who has had a fit of the ague, gout, rheumatism, or stone, will be the worst possible species of tax, next to a tax on justice.

N.B. The tax on quack medicines, that is, on unknown and unapproved medicines, leaving all known and approved ones untouched, falls in a less degree, if at all, under this censure.

[*]Dr. Adam Smith, Wealth of Nations.

[*]For instance the case of Mr. Atkinson.

[†]It would be curious enough to know what profit the treasury may have drawn from that time to the present, from so extraordinary a fund: certainly, not enough to pay the salary of one of the Lords Commissioners: probably not enough to pay that of his valet de chambre.

These are busy statutes. By the prohibition and sale of justice, they run counter to Magna Charta:—by the prohibition of Mercy, they break the Coronation Oath.

[*]The distinction between temerity and consciousness of blame, a distinction pervading human nature, and applicable to every species of misbehaviour, is scarce so much as known to the English law. There are scarce words for it in the language. *Temerity* is taken from the Roman law. *Malice*, the term by which English Lawyers seem in some instances to have had in view the expressing consciousness of blame, presents a wrong idea, since in common language it implies *hatred*, an affection which in many instances of conscious guilt, may be altogether wanting:—instance offences of mere rapacity, such as theft, robbery, and homicide for lucre.

The legislator?—he talk of vexation?—He does every thing to create the evil, he does nothing to remove it.

I happened once to fall into conversation with a man, who, from an Attorney had been made Judge of one of the provinces in America. Justice, I understood from him, was on a very bad footing there: it might be had almost for nothing: the people were very litigious: he found them very troublesome. A summons cost—I forget whether it was three and sixpence, or half a crown. Whom the half crown went to I do not know: one may be pretty certain not to the Judge.—Seeing no prospect of our agreeing, I did not push the conversation far. The half crown seemed to him too little: to me it seemed all too much. The pleasant thing would have been to have enjoyed the salary in peace and quietness, without being plagued with a parcel of low people. Justice would then have been upon the best footing possible. He had accordingly a project for checking litigation by raising the fees. I don't know whether it succeeded.

[*]Let us not for the purpose of any argument, give rise or countenance to injurious imputations. Though justice is partly denied, and partly sold, the difference is certainly immense, betwixt selling it for the personal benefit of the king or of a judge, and selling it for the benefit of the public:—betwixt selling it by auction, and selling it at a fixed price:—betwixt denying it for the sake of forcing the sale of it, or denying it to a few obnoxious individuals, and denying it indiscriminately to the great majority of the people. In point of moral guilt, there is certainly no comparison: but in point of political effect, it may not be altogether easy in every part of the parallel, to say which mode of abuse is most extensively pernicious.

[*]Law paper might be forged: but the difficulty would be to issue it.