Hugh. Barclay

E. H. B. Wallace

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Craigmount,
Perth.

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LAW!

WRITTEN FOR, AND PUBLISHED AT THE REQUEST OF SEVERAL OF THE ELECTORS.

"Law is a bottomless pit."
DEAN SWIFT.

By W. Forsyth,
Author of Hungar.

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Mem.—The following Letter was read in manuscript to a body of the Electors of the City of Glasgow, unconnected with any party; and is now submitted to the Candidates and Electors, and to the Public throughout Scotland generally.

TO THE ELECTORS

OF

THE CITY OF GLASGOW.

GENTLEMEN,—Now that the hurry of canvassing is in some measure over—Now that you are shortly to be called on to exercise the right of electing your own Members to represent in Parliament the interests of this great City—I presume to direct your attention to a subject which deeply concerns us all, namely, the Expenses of Litigation, and of Law Forms.

Whether we are to obtain any improvement on that, or on any other subject—Whether we are to realize our just and long cherished expectations from the Reform Bill, depend very much on the choice now to be made by you, and the other Electors generally. You have, therefore, a solemn duty to perform ; and, remember, that no Instrument ever prospered, that was not formed under the implored blessing of God. Remember that the exercise of the Elective Franchise is not only a political privilege, but that it is also a religious duty ; and that both the Electors, and those striving to be elected, (some of them perhaps thoughtlessly,) ought to do every thing for the glory of God, and the good of mankind. Remember that the unseen Eye is upon you, and upon them, and marks and detects your motives and purposes—so shall any fair and reasonable improvement more likely be brought about, that may be expedient and desirable in the present state of society.

What has been for these 10 years the probable expenditure on litigation in the City of Edinburgh ? Has it been a million, or two millions, or three millions ; or, is it possible to ascertain any thing like the exact amount ? I am far beneath the mark when I say a million, which is allowing only a hundred thousand pounds sterling per annum for law in the Court of Session.* Of course, I include in this sum, the expenses on both sides of a suit, as well as merely formal writs and diligences, and I do not include the expense of upholding the machinery of the Court—such as Judges'

* I might take the average at five times that sum.

salaries, retired pensions, the salaries of the principal clerks, and other officers of the Establishment, Public Buildings, &c., &c., which, I believe, themselves cost more than fifty thousand annually, or half a million in ten years.

Now, I do not ask, though I might do so without being guilty of High Treason, what is the return to the People for this enormous expenditure. But I ask, in the true spirit of Bœotian philosophy, whether we can get our business done as well at a cheaper rate? If it be true that the half of the business in the Court of Session goes from the City of Glasgow, we are deeply interested in the question. Is not this just so much money drained from our Industry for which we get no return; for did a man ever make any profit by prosecuting for what was justly due to him?

I make no attack upon the Court of Session. I believe that it is any thing but a Bed of Roses. I have before me two observations of Lord Wynford, which must be very painful to the Judges of that venerable Court; but which, at the same time, almost forces upon the public, the consideration, whether there is not something wrong in all this. "When two of the Judges decide one way, and three the other, how is a man to know what the law is?" This is the first. The second is, "The Judges ought to have conferred together, and have given the case more consideration before sending it here."*

It will be found that many cases decided by Mr. Reddie, the "Chancellor of Scotland," are reversed by the Court of Session, which yet are affirmed in the House of Peers, with marked approbation of his legal knowledge; and, although it were not the fact, that the House of Peers does oftener affirm the judgments of the Courts here, than those of the Court of Session, it would be difficult to show that that Court, as a Court of Review, is not a great evil, rather than a good. Why have the parties, if they are inclined to go to the House of Peers, not a right to go from a judgment pronounced here, directly to the highest authority; as if a man in the ordinary management of his affairs, would not go at once to Head Quarters for a final answer, rather than to a subordinate.

With regard to the diversity of opinion in the Court of Session, nothing can be more natural. "Many men, many minds;" and it showed but a shallow knowledge of human nature in Lord Wyn-

* Glasgow Herald, 22d October, 1832.

ford, in the case I allude to, to find fault with the Judges, because they were not all of the same mind, and to expect that the one could badger the other into his opinion.

"A man that's forc'd against his will,
Maintains his own opinion still."

This would be taking from them the free exercise of their minds, without which they could not be said to deliberate. Nor is it for me to say, whether it is in good taste for Lord Brougham to caricature the speeches of the Judges. Such undignified jarring "in high places," cannot be unknown to the public—nor the remedy far off.

Transfer the jurisdiction of the Court of Session to the Sheriffs of the Counties, and Magistrates of Royal Burghs, and you have as good a system for less than the fiftieth part of the expense incurred in Edinburgh.

Before the Sheriff or Magistrates, the expense of a suit from the commencement to the termination would be a mere trifle, if it were tried before a Jury, and written pleadings prohibited; and in a day, or perhaps an hour's time, a dispute might be decided, which is hung up for months, or years even here, and which may well be said to be interminable, when it gets the length of the Court of Session.

I confess that it would be the best way to keep out of it, but there are restless spirits in the world that will plunge themselves into mischief, in spite of all that can be said or done to prevent them. I do not think that a prudent man would, and I rather suspect that no Christian should go to law. Any man, even the litigious themselves, must shrink at the horrors of a protracted lawsuit, if they would only reflect on the subject. The chicanery, the open fraud, the circumvention, the sophistry, the revengeful spirit, the desperate shifts, the defeat, the imprisonment, the disgrace, the bankruptcy, the incitement to crime, the perjury, the forgery, and last of all, the banishment!

The Sheriff is the highest and most ancient law officer in Scotland under the Crown, both judicially and ministerially, more ancient than even the Court of Session.* There is one for every

* It appears from ancient Writs that the Sheriff was in use to try with a Jury, even in Civil Causes, long before the Court of Session was instituted. The Court of Session, as is well known, was first instituted by one of the James's for political purposes, if I mistake not, at that dark era of our history

County. Unless it be in Edinburgh and Glasgow, and one or two northern counties, I do not know that they have almost any thing to do. Sir Walter Scott, while he was Sheriff-Depute of Selkirkshire, found time to attend his duties as a principal clerk in the Court of Session, and to write those Novels which have so much delighted the world. Here are men already receiving salaries, who could, without much additional trouble, in their own districts decide those cases which might otherwise have gone to the Court of Session; whose integrity is above all suspicion; whose knowledge is not inferior to that of the Court of Session; whose judicial qualifications are the same; and who have the advantage of the Judges of that Court, in being generally more active, and who, on the principle of division of labour, could give more attention to the cases that might come before them. We have two respectable instances of the usefulness of these officers, in our own Sheriff Robinson, and Mr. Campbell of Paisley.* The Sheriffs have all Substitutes. The Sheriff here has two in Glasgow, one in Hamilton, and one in Lanark. Thus, the business of the Court of Session might be divided out among at least sixty Sheriffs.

It is no novelty to transfer the jurisdiction of one Court to another. The jurisdiction of the Commissary Court here at one time, and the jurisdiction of the Inferior Admiralty Court at another, were transferred to the Sheriff, doubt less for the advantageof the lieges; and not later than last session, an Act was passed, transferring the Court of Exchequer to the Court of Session. The High Court of Admiralty, and the Commissary Court of Edinburgh, both supreme Courts of Law, successively had their jurisdictions transferred from one Court to another. The Reform Act transfers perhaps the most important judicial functions the Court of Session ever had, in allowing the Sheriff to judge in matters of contested elections, and declaring his decisions to be final. The Sheriff Small Debt Act was as great an alteration as the one I now propose; so that, if we trench not on the settled principles of the Law of Scotland, which I venerate with something like the same feelings I

when our culprits were sent to the Orkney Isles, then considered the *ultima Thule*, as they now are, to Van Dieman's Land.

* I speak of these gentlemen in particular, because I have seen their judgments; but by no means do I wish to disparage the other Sheriffs, who are equally ornaments of the profession. The public is happily now insured of the respectability of Sheriffs, by an Act of Parliament lately passed, prescribing their necessary qualifications.

look upon the Reformation in the Church, such changes are both safe and beneficial. The Court of Session itself is not now what it was at first. It has been split into two divisions, and it has often been proposed to split it into three—thus inhering one quality of mere inert matter, which philosophers tell us may be divided *ad infinitum*.

Brougham, in his memorable speech on Law Reform, declares that in nine cases out of ten, the right bearing, the precise turning point of the case was not discovered, even though it went to the Court of last resort; and how often does it happen, when the parties meet after it is ended, that the one stares at the other when he hears for the first time that the case turned on a point which he never dreamed of. In short, the Court of Session never does, and, indeed, from its very constitution, never can definitively settle any point. It may well be asked, then, what is the use of it, except in matters of form (*fiat ut petitur, &c.*)? It is not a place for ascertaining a matter of fact, since they must send their issues to a Jury Court; and, although it were final, they appear, from the opinion of the Lord Chancellor, and the many reversals of their judgments, to be but indifferent hands at deciding a point of law, notwithstanding the melancholy prolixity of their *rationes decidendi et dubitandi*.

I admit, and many of you may have felt, that it is an evil to go to the Sheriff; but it is a greater evil to go to the Court of Session; or first to dance here, and after you are sick and tired, to be carried *per* force to the Court of Session, and lilt it there a while, and peradventure to dance finale in the House of Peers, where, according to the Lord Chancellor, you have as poor a chance as any where of getting a decision on the real bearing of the case.

Let, then, your disputes be settled in the Sheriff Court, your native *forum*, without appeal either to the Court of Session or the House of Peers; and you will save an immense annual revenue, which will be better spent at home among yourselves than given to pamper an overgrown profession. All the appeal you will ever be the better of, (besides the advantage you have even as things stand of calling for the Depute's opinion on the Substitute's judgment,) will be under restrictions, in point of time and expense, from the Sheriff, if you are not satisfied with his decision, to five of his brethren, who, in *cases of importance*, by meeting together, might sit as a Court of Appeal, and finally and for ever adjudge the case,

after the manner prescribed in the Reform Act for finally deciding contested elections.* For variety, two such appeals are surely sufficient to satisfy the avidity of any man. It does not appear that we grow wiser the farther we go in law.

Perhaps you split on a trifling item in a running account, and hereupon you must make fools of yourselves, and furnish professional gossip to the whole of Edinburgh—about hair-splitting distinctions—nice point in law—challenge *de recenti*—breaking bulk—the practice of merchants—Brown on the Law of Sale—the same author's Synopsis of the Decisions—an excellent Index to Morrison's Dictionary, in 20 vols. quarto—and then such ado as there is about witnesses going to Edinburgh to be examined, or getting a commission to Professor Davidson or Mr. Reddie to examine them here, and a remittance to the agent in Edinburgh—and circumduction must pass unless the proof is reported *quam primum*. Answers to the Condescendence not in terms of the Act of Sederunt.—Debate before the Lord Ordinary, who seems favourable on one point at least—closing the record.—Lord Ordinary decidedly wrong.—Agent here found fault with, and changed, though perfectly right, and your best friend when you want a few pounds—another remittance—cases must be printed, enormous expense—would rather, for your part, go to the second division—liked Lord Meadowbank at the Circuit—clear-headed man—but quite ignorant—hung up for three months—Court rises in July—does not sit till November—proposal of compromise—won't agree now it has come to this of it—would sell all before you'd give in, now it has come to this of it—not so much caring about the case if your affairs were not going wrong otherwise—Agent from Edinburgh being here at any rate, would like to have his accounts adjusted—pays him up to July—Bad thing law—wish you had referred it—no time to attend to any thing else—wonders if the Reform Bill will make any change—more expensive than you could have imagined—and so on till you get heartily sick of it before it is half begun.

* No more shall the walls of the Parliament House resound to the eloquence of our first class lawyers in these interesting questions. The booksellers may now make snuff-paper of Wight on the Election Laws. But for one little clause in the Reform Bill we would have had to go to the Court of Session, and perhaps to the House of Peers, before we could get ourselves finally enrolled as freeholders. What a harvest of litigation this would have been! *Tempora mutantur.*

I cannot look at that man's quivering lip, as his favourite judge gives his opinion contrary to all law and justice (as he thinks), so hollow against him, nor give any conception of his agonizing hopes and fears as the other judges alternately give their opinions. Even if he should gain it, (there were three for and two against—I take Lord Wynford's case,) what is that?—the other party is determined to appeal to the House of Peers—they have taken the opinion of counsel. Better, I say, would it have been for the man that he had lost it. And what is all this about?—perhaps a Selvage of cloth, or a crank shaft, or a few splinters of glass in a shop window, or, in all probability, a mere trifle, which could have been settled in five minutes if the parties had not gone to law.

"There's nae place like hame, as the deil said when he fan himsel in the Court o' Session."

Before the Sheriff, it ought to be an imperative rule, that both parties attend along with their procurators; and every defender, where the case is for payment of a sum of money, ought to by asked the solemn question—"Are you, Sir, before God and the world, owing this sum or any part of it." Then the case goes on. The procurator for the defender states distinctly and articulately his matters of fact and pleas in law. To which the procurator for the pursuer makes instant replication in the same distinct manner. If it turn on a point of law, the judge decides the case at once. If it hinge on a matter of fact, the Jury is called in to the number of five, (for that number makes as good a Jury as any other,) and in terms of their verdict the Judge finds for the pursuer or defender, and there is no more about it—the parties go home and mind their business; and law becomes a thing not worth running after, because neither revenge, nor pride, nor spite, nor bad passion can get any play under a system so simple; and the lawyer will feel himself richer and happier than under the present system of Edinburgh Agents' accounts, outlays, extravagant establishments, and the thousand ills under which he now labours.

The practice of paying witnesses and jurymen is inconsistent with the genius of the Law of Scotland, and has, like some other faults, been borrowed from England. By the law of Scotland we are expected to give our testimony, and act as jurymen, without any other consideration than love of country, for which no Scotchman will ever grudge a few hours attendance once a-year. Witnesses might be paid, in some cases, travelling expenses only.

As a remedy at once speedy and effectual for all these evils, I humbly submit, and most earnestly and affectionately recommend and entreat, that you should put into the hands of one of your Members, to be laid on the Table of the House of Commons, the moment the new Parliament meets, or as soon as the forms will permit, a "Bill to transfer the powers and jurisdiction of the Court known by the name of the Court of Session, to Sheriffs of Counties and Magistrates of Royal Burghs in Scotland," where they should always have been; and I predict that there will be no opposition to it that you may not overcome.* Have you obtained reform in Parliament, and will you be refused a trifle like this? You expect, when you meet to petition Parliament on the Slave question, or the Currency question, or the East India monopoly, that you are to be heard; and why not upon this which is in reality of as much importance as any one of these questions? There is no Cerberus now to prevent your admittance.

When it goes to the Upper House, Brougham and Wynford will support you—for even there the absurdity of appeals from the Scotch Courts is not disputed. It is a practice that will not stand a moment's argument. There is not a reading man in the kingdom who does not see and confess the nonsense of a Scotch cause being taken before a majority of English noblemen, who never either studied or practised the law of Scotland. It is true that Brougham understands the law of Scotland, but this is nothing to the point—where will you find a man like that? He is one of the few universal geniuses at this moment in the world. A man of his grasp of intellect does not appear, perhaps, in a thousand years. But he was bred at the Scotch bar, which accounts for his knowledge of our law. The late Lord Chancellor did not know the meaning of a process of *Multiplepoinding*. The next may know less. May it be late in the afternoon before we see him!

Once for all I protest against a certain class of lawyers interfering in this case. I mean "the petty fomentors of civil discord."† They are interested, *quo ad hoc*. "Let the galled jade wince." They can sit here neither as witnesses nor jurymen. If a person can gain or lose by the issue of a case, he is, as the law calls it, "incompetent" as a witness, and you have a right to challenge a

* The respectable part of the Profession, both here and in Edinburgh, will be in favour of it. The Press will carry it in spite of all opposition.

† Foster.

juror, if he be a latent partner in a concern engaged against you in a lawsuit. Listen not to the harpies. They will make you believe that black is white. They will tell you that it will not do; that it will be dangerous both to the law and to the constitution; that if you propose such a sweeping innovation it will rain down blood; that the sun of Britain's prosperity will set forever—as has been predicted for these twenty years by the enemies of the people, a hundred times over, but all to no purpose.

A thousand briefless lawyers of every grade, walking up and down the Parliament House—what a sight for the philanthropist!* I advise you, gentlemen, to be off—at least four-fifths of you. The game is up. The people of Glasgow will send no more "grist to your mill." Retire to your villa, like Cicero, and enjoy the *otium cum dignitate*. Retreat while your laurels are green. Go, I say, with your blushing honours thick upon you. Return to your farms. Turn your swords into ploughshares, and your spears into pruninghooks, and learn the art of war no more. Scotland is hushed into silence. This is "the piping time of peace." We are rejoicing in the triumphs of reform, and, therefore, disturb us not with your pigmy wranglings. Go with the renown which the Erskines, the Jeffreys, and the Broughams have gained for you. My soul bleeds to see the pride of Scotland's youth wasting their strength on that which is not bread. The riches of your knowledge may serve to fertilize some other department of life. But go, I say again, before the Besom comes in to sweep you out.

A printed draft of such a Bill, as I conceive, will suit the circumstances of the case, anticipating all objections, I hope, in eight or ten days, to have the honour of offering to your acceptance, that the same may be duly considered. I engage that it will be short and simple; and plain and intelligible to every person that can read the English language. Twenty years' study and practice of the Law of Scotland in every department, are surely sufficient to make any man completely master of the subject, in all its bearings—a subject after all, requiring no great profundity of thought—not much more than the invention of the Sheriff Court Small Debt

* Including advocates, W. S., S. S. C., other practitioners, clerks, apprentices whippers in, &c., &c., there are more than twice this number in Edinburgh living in some way or other by the profession. It is in decency, that I suppose, they are not half employed.

Act—profound only, because it was difficult heretofore, if not impossible, to obtain any improvement from our Legislators—profound only because every thing is so, till it be discovered.*

I now approach a subject, or rather I may say, another view of the same subject—assuredly more congenial, but by no means on your part, or on mine, to supersede the necessity of persevering steadily in all that I have proposed. In a word then, I am for you rather to settle your disputes among yourselves, or, if that be impossible, by Arbitration.

The object—at least the professed object of going to law, is to obtain a compulsitor against your debtor. But recollect, that in this you must put yourselves in an attitude of hostility to a fellow-creature, and hunt him down like a wild beast. The law intrusts you with a weapon by which you can deprive him of his personal freedom! You can "apprehend and poind his gear;" but are you sure you could make a merciful use of such a weapon. I am not so Utopian, as to think that Imprisonment for civil debt either should, or ever will be, abolished; but it is wrong to intrust the weapons of the law with a creditor who may be a capricious tyrant. Imprison, by all means, a debtor who contracts debts beyond his means of paying, but to be salutary to him, and to others, let it be done *in modum pœnæ* at sight of the magistrate, after he has been convicted. Be all this as it may, however,† I ask, if with the feelings of a brother, one Christian would desire to be put in possession of such a weapon against another.

Although I had the graphic powers of Sir Walter Scott, the pencil of Wilkie, or could command the pathetic strain of a Goldsmith, I would not choose to hold up in mimic show the distressing picture of an execution. Talk not of the mercy of man, when he "cries havoc, and lets slip the dogs of war."

"Man's inhumanity to man,
Makes countless thousands mourn."

Human nature is never seen in such a piteous plight, as when

* If I were a party man, I might test your candidates by this trifle of mine. This is the honest Law Reform that you really need. This is "out and out work," no mincing about the matter. If I were a party man, as I am not, I might say, that he that slights its spirit and object can have no claim to your votes as a Law Reformer. As an elector myself I am entitled to state my opinion. I might say, that I hold in my hand the destiny of the question, so far as law reform is concerned.

† The policy of these regulations, it is not my purpose to discuss in this shape.

one man is tearing another to pieces. Look at Wilkie's great picture of the distraining for rent, which haply you may see realized in your next door neighbour's house; or the description in Guy Mannering of an execution in Ellangowan Castle: or, if you would like to see an honest man torn from the bosom of his family, and dragged to a jail, read towards the end of the Vicar of Wakefield, and after you have done all this, you will be better able to tell whether you would choose to be intrusted with such a weapon.

> "My ear is pained,
> My soul is sick with every day's report
> Of wrong and outrage with which earth is filled.
> There is no flesh in man's obdurate heart.
> It does not feel for man. The nat'ral bond
> Of brotherhood is severed as the flax
> That falls asunder at the touch of fire."

I will prove, by authentic documents, that scarcely, in one case out of ten, does the adoption of either of these steps ever pay the creditor. When a man is driven to these extremities, he becomes regardless, and either by an act of bankruptcy, or by connivance, or by some legal form, or quirk, he contrives to defeat every measure of the law, till in a short time you are welcome to do the same thing over again as often as you please.*

I request that you will ponder deeply (as all such things should be) the following quotations, as the best means of satisfying your minds as to whether it is sinful or not, to go to law, and then you will agree with me, that whether it is so or not it is better to settle your differences by arbitration, if you cannot agree among yourselves. Quotation the first—"Know ye not that we shall judge Angels—how much more things that pertain to this life." After you have cogitated this solemnly, and remembered that it comes from an inspired pen, go back to quotation the second. "Dare any of you, having a matter against another, go to law before the unjust (this means the Heathen) and not before the Saints. Do ye not know that the saints shall judge the world, and if the world shall be judged by you, are ye unworthy to judge the smallest matters." (If you have any difficulty in understanding these things, read the commentators, who will satisfy you on every

* "But if ye bite and devour one another, take heed that ye be not consumed one of another."—Gal. v. 15.

particular.—It being always understood that you meditate and search in the proper spirit.) Quotation the third. "I speak to your shame. Is it so that there is not a wise man amongst you, no not one that shall be able to judge, between his brethren." Quotation the fourth. "Now, therefore, there is utterly a fault among you because ye go to law, one with another, why do you not rather take wrong, why do ye not rather suffer yourselves to be defrauded."

The mode of settling disputes by arbitration, has been often tried with happy results to the parties concerned both here and in Edinburgh. It was a fit exercise for the benevolence of a man like William M'Gavin "the Protestant," whose extensive usefulness and high character as a merchant and a philanthropist, in this city will long be remembered by his fellow-citizens. If it be considered that the Judge of the whole earth "will do that which is right," and that he hath promised by the mouth of his prophet, to be "for a spirit of judgment to him that judgeth," there will be less difficulty in deciding than is generally imagined. It appears, indeed, that in the practice of the church in former times, those least esteemed, were set to the task, that is, least in spiritual attainments, or of the meanest intellect.

Chateaubriand has truly observed, that "words are given to man to conceal his thoughts," and there is not an apprentice in a lawyer's chamber, who cannot tell that the first blush statement of a case is seldom the correct one. After the parties are driven from the redoubts of denials and evasions to which almost every man resorts, rather than tell the truth against himself, (Adam did it, as if by instinct, after he had eaten of the forbidden fruit,) it is easy by confronting them, to find a clue that will lead to moral conviction. Is it more difficult to do this, than to work a problem in mathematics, or solve a question in politics or religion, or in trade or commerce?

The expense of this mode of settling a dispute, would not exceed a few shillings, and paid equally between the parties, could not be grudged; while the time lost by both parties, in running after the vain and ruinous pursuits of law, if properly computed, would actually be found to cast the balance in one half of the litigations that take place in the world.

If the question turn upon a pure abstract point of Law, and the case is really important, the arbiter, who would always, like Mr.

M'Gavin, require to know the law of Scotland,* if he found himself inadequate, or the parties wished it—the arbiter, I say—not the parties—might coolly and impartially state the difficulty, and both sides of the question, in a memorial to Mr. Reddie, or Professor Davidson, or to any counsel at the Bar for his opinion, which would settle it, as well as, if not better than either the Sheriff or the Court of Session or the House of Peers, or the whole three Courts, with their variety and collision of opinions. How often does it happen, that after a case has been in dependence for years, and has gone the round of all the courts in the kingdom, it comes back to be amicably settled by reference to a private individual?

The truth is, generally speaking that there is no *bona fide* dispute between the parties after all. In the great majority of cases, at least, those for payment of money, it will be found, that it is something else that is wanted, than the decision or adjustment of any difficulty between them. The pursuer, or claimant, stands upon the *apex juris*, and will not budge one jot, while the other party would willingly pay, if a few shillings were taken off; and, then, he, on the other hand, catches the same spirit of obstinacy; or the creditor is known to be a harsh man, and the debtor, perhaps, "scant o' cash," merely to gain "a little delay, invents a shuffle, or as Lord Brougham calls it, "a sham defence;" and so the parties, or, I should rather say, their lawyers get deep and dour in the meshes of a case, and before either of them knows what is doing, it becomes an important affair in the Court of Session, and the parties, totally ignorant of such an honour awaiting them, figure it in Shaw and Dunlop's Reports,† most amicably side by side, an example of concord and brotherly affection to their neighbours, and, to posterity, all on the strength of what Brougham calls "a sham defence."

The mode of enforcing the awards of private arbitration, seems not at all to be understood, or even known. In this respect, there is no difficulty; for the award of an arbiter is effectual by law, as well as the decision of a Court. A minute of reference subscribed by the parties, has ultimately the same effect as the decree of a Court, even where they have gone any length in litigation, by the Judge as a matter of mere form, interponing his authority. I saw

* Respectable Merchants and Private Gentlemen study the Law of Scotland. I have known Accountants in Glasgow, whose opinion I would have taken as soon as any Lawyer's at the Bar.

† I have heard a gentleman say, that he would rather than a *L.*1000, he had not seen his name in these reports.

a case, or rather a multiplicity of conjoined cases, between a precious pair of litigants: which, after they had been discussed here, and bandied about in the Court of Session and the House of Peers, like shuttle dore and battle cock, back from the House of Peers to the Court of Session, and then thrown into the Jury Court, at an expense of at least *L.*1000 on each side; when, one morning in the Justiciary Hall, after 150 witnesses were in attendance, and just as the case was called, and the counsel and the agents on either side were ranged up in battle array, ready to commence the fight, suddenly it was announced from the far corner of the Hall, with the hurry of a Respite, that the parties had referred the whole to Mr. J——n Advocate.*

You surely understand, that you have it in your option, to enter into what is called a regular formal submission on stamped paper, under which the arbiter has all the powers of a Court of Law, in putting the parties on oath, citing witnesses, and enforcing his orders, appointing a clerk, awarding his fees, &c. In this way, which should always be adopted in important questions, the decree arbitral is enforced in the same manner as the decree of a Court; and is not reducible, neither is the award, in the instance I have given above, but on one ground, and that is bribery on the part of the arbiter. For matters of comparatively less importance, there are several other forms all equally effectual, and yet more expeditious and less expensive. Let not, then, any man keep from settling his disputes by arbitration on such pretences.

Better than all this variety, would be the moral compulsitor of honesty. The fear of God, and a good conscience, will go farther to make a man pay his debts, than Law or any other fear. The fear of law is a mere bugbear; but the fear of God, and the terrors of his law, can work repentance and honesty, and all good works.

I intend to institute in this "City of Benevolent Institutions," an Association, to be called "The private Tribunal of Justice." Whoever will, may be admitted members; and fifty or sixty intel-

* The Author of Waverley, has given an instructive history of the Conjoined Actions, Peter Peebles, *versus* Peter Planestanes, *et e contra;* to which I refer: and as the reward or consequence of a man taking up his mind too much with Law, finds it necessary to leave one of the parties in a state of mental derangement! *Quem Deus vult perdere, prius dementat,* if it were not heterodox doctrine, might apply in a case of this kind. Sir Walter, has told us in a foot note to a subsequent edition, that that melancholy history was actually founded on fact.

ligent upright men will he selected, from whom will be drawn in rotation, a quorum of three to sit as a Jury or Court, to hear and adjust disputes arising among our fellow-citizens. The Legislature, if necessary, might confer on it an executive power. By perseverance, I have no doubt, it would make an impression. After the success of Mr. Collins in a walk of life hitherto thought past all remied, I have no doubt of encouragement, where the object is so important to the peace and happiness of our country.

Another subject which I would wish to allude to, is the Expense of Conveyancing. Compared with this, the maladministration of Justice is a trifle. If the one cause an expense of a hundred thousand annually, which might be saved—the other directly and indirectly amounts to an expenditure, over the whole of Scotland, greatly more than that sum,* equally unnecessary and even more mischievous. The one may be tolerated, because it generally affects none but the litigious. The other not only affects the innocent, but acts as an embargo on trade, which, in a commercial community, should not be allowed to continue an instant.

You all know, that if you purchase an heretable subject, you may bring down an old house about your ears. Not to speak of the unavoidable expense of getting yourself infeft, and making a 40 years' search in the records of incumbrances, &c., there may be a latent flaw in the title, which not even the prurient eye of a lawyer can detect at first sight; and, besides losing your property, you may get yourself—and not yourself only, but your children, and your childrens' children—into a litigation that may drain away your whole substance to the third generation.

You did not grudge your half crowns to Buckingham, to inlighten you on the East India monopoly, and you strain every nerve to give the Ladies a pernicious drug at a cheap rate. Is it because you are ignorant or afraid of the Feudal System that you suffer such an Incubus to remain? If so, then enlighten yourselves immediately. There is no mystery in the law itself. Why should you pay for the transfer of an heretable subject more than the *ad valorem* bill stamp, which you pay when you buy a lot of cotton yarns?

Lord Balgray was both witty and wise, when he said that the Notary should have "cobbled" it better.† From that expression, I

* I estimate the expense of conveyancing in Scotland, including stamps, and the expense of the general and particular Registers, at more than half a million annually.

† I bow to his Lordship's superior wisdom, but waive the inspiration of his wit.

could have guessed how the wind would blow with his Lordship's mind. I could have said that his opinion would be that the Seisin was null, because the Public Notar had not "cobbled" it properly, and so I believe the case went. It will be found in Shaw and Dunlop. Many of you may remember it. It was a competition between two freeholders, under the old system of parchment representation, which will soon only be remembered as a thing that was "a tale of other years." The dispute arose on a word that had been erased in the end of the Seisin. It was quite right in other parts of the Instrument. The word, or rather the name, was Cobblehouse, where it should have been Cobbleford, or it was Cobbleford, where it should have been Cobblehouse, I don't mind which; so that the case, which was to decide perhaps the election of a member of Parliament, was lost upon a pun!

Talking of "cobbling," after the manner of his Lordship, perhaps you are not aware that the immortal Robert Burns was engaged on a Farce, which was to be called "Rab Macquechan's Elshin." It was never published, nor I believe finished, in consequence of bad health; but I have no doubt it would have been both humorous and moral.* I have known a poet moralize with "grave morality," on finding the heel of an old shoe,—

> "This ponderous heel of perforated hide,
> Compact with pegs indented many a row,
> Haply (for such its massy form bespeaks)
> The weighty tread of some rude peasant clown
> Upbore."

The story is told in the name of the Piece. King Robert Bruce was riding through Dumbarton, when the heel of his boot was like to come off. Without alighting, he called for the best "cobbler" the town could produce, who was this "Rab Macquechan;" but, in place of giving a convenient stitch to keep it on, he "rammed" the elshin into the king's heel. Now the king's life, as well as the battle of Bannockburn, might have been lost by this unskilful appliance.

I am therefore like his Lordship not for trusting the validity of our land rights to the "cobbling" of a bungling country Notary.

But I will relate an anecdote which speaks more home to the

* The moral, like the "Elshin," was pointed at Royalty itself!

purpose. I should rather call it an allegory, in case it may be conceived to be true; or a parable; or for fear of hurting feelings, I will make it a mere hypothesis.* Suppose a diligence against a person for *L.*15, and that he has been pounded. In England, they call this an execution. Execution in Scotland means hanging. There are more ways of hanging than one. The persecutors in the Church used to hang or hing people by the leg and by the arm. The poor debtor goes to the agent all pale and quivering, and prays him to let the matter stand—times are so bad—nothing doing, and so on. He will leave the Titles of an heretable subject, which cost him *L.*100, if he will only delay for eight days or a fortnight. By that time he will get in some money, and pay all handsomely—his wife would be so affronted—and such like moving appeals to the better part of the man—all is right for a fortnight. An agent—a respectable agent, you know, would wish to keep his word in a poor case. At the end of that time, a threat of removal and sale, which is like the knell of death, reaches him. Again he propitiates the man of Law—appeals to his deposit of the titles, but this is nothing. He makes it clear that the bare possession of a progress of writs, gives no security in a competition with third parties. The debtor must therefore subscribe a conveyance in favour of the agent *ex facie* absolute, but which he is most amicably willing to qualify by a back line, declaring that it is only in security of the *L.*15, and any necessary expense, and that it is redeemable if the debt be paid in three months. Kind-hearted soul, you will not go unrewarded, for such disinterested goodness to a poor man, and it were a pity you should. There is a special providence in every thing, which sooner or later rewards such private, unseen, unostentatious acts of kindness. The world does not blazon the Howards, who can relieve the distressed unknown to any, but the Supreme Being.

In about six months (the subject having been in the meantime sold for *L.*56) the debtor calls to see if he cannot get some little to help him in his urgent need. The Account of expenses, including the *L.*15, amounts exactly to *L.*75 some odd shillings; and he is told to go about his business.†

* The author of Waverley has taught us that there is both reproof and pathos in Law forms.

† This proves again the danger of intrusting the weapons of the law with a creditor.

> " Oh, for a Lodge in some vast wilderness,
> Some boundless contiguity of shade,
> Where rumour of oppression and deceit,
> Of unsuccessful and successful war,
> Might never reach me more."

That person is not a writer. He may call himself an agent. A writer is the designation of a Forensic Lawyer, an educated man, and in the strict sense of the word, a gentleman.

Now was the fault here in the agent, or in the system? In both. The agent's duty was clear—he should have sold the debtor's effects, unless interdicted by his landlord, or he should have reported to his employer that the debt was bad, and he should not have taken a conveyance, and that in his own name, and perhaps unknown to his employer, where he knew that such an expense behoved to be incurred. But although I would not palliate such oppression, I must say that the fault lay principally in the system. And, in a remote degree, you are responsible for the cruelty exercised on the poor man, and blamable for tamely allowing a system to continue under which such deeds can be done with impunity—since you can, with a word of your mouth, alter it, or at least try to do so.

The delivery of the "ipsa corpus" was once a difficulty that would have discouraged any man, at the thought of altering the present form. "Gave and delivered heretable, said and seisin, real, actual, and *corporal* possession of All and Whole the foresaid lands and others, lying bounded and described as aforesaid, and here held as repeated *brevitatis causa*, &c." This is the jargon. Twenty years ago, I wrote a series of essays on the Land Rights of Scotland. At that time I would as soon have thought of carrying up Ben Lomond below my arm and delivering it over to a purchaser, as suppose that I could transfer an heretable subject without either real or symbolical delivery. "The vulgar maxim," *Nulla sasina nulla terra*, is a doctrine so firmly rooted in our old Institutional writers, that to impugn it would be little short of impiety to a lawyer's mind without a practical demonstration. System builders long ago, used to build all upon one another, and seldom dared to think for themselves. Slavish veneration for antiquity kept down every improvement. It would be as great a sight to Craig, and Stair, and Bankton, to see an estate sold, and transferred by an

entry in a book like a bale of goods, as it would be to Rob Roy, were he to rise up and see crowds of passengers carried up to his Cave in a steam boat.

The history of symbolical delivery carries in itself a cogent argument for the total abolition of all such mummery. Not to go farther back than the eighth century. When the Normans arrived at the coast of Neustria, that they might have the pretence of some injury done to them, to wage war against the inhabitants, they sent a young stripling ashore adorned with a gold chain, not questioning but those who first encountered him, would seize upon it, which they earnestly wished. The stripling being asked by the inhabitants if he would sell or barter the chain, answered he would. They having again asked him what price he would have, he told them he would take what price they pleased. The inhabitants smiling at his simplicity took the chain from him, and as the price thereof, gave him a handful of dust from the ground. But that joke cost them dear; for the stripling returning to his countrymen, and having told them what had happened, they immediately landed their forces and took possession of the country. The inhabitants asking by what law they did that, they answered by the best and justest of all laws—a young stripling of theirs had been publicly infeft in their lands by the delivery of earth as the accustomed symbol, and that not without paying for them. Therefore they took possession of their own lands acquired by law and not by war.* Such is the splendid mockery of delivery by symbols of earth and stone, so devoutly kept up to this day.

The time is past when it would have been held as something like sacrilege to have mooted a doubt concerning the utility of these forms—these relicts of the Goths and Vandals. Thanks to Sir William Rae, who introduced, some time ago, a Bill into Parliament to abolish infeftments in heretable rights the principle of which concedes the propriety of abolishing their present form entirely. If the infeftment may be dispensed with, so may the precept of seisin; the procuratory of resignation and the assignation to the rents and writs, and all the formal, and if I may so speak, the feudal part of the conveyance. So that "bit by bit" you reduce the transaction to the simplicity of a bargain in any other

* Ars Notariatus.

commodity—which requires no more than evidence of the parties' intention.*

It would, indeed, be a meritorious action to overthrow; and that man might emphatically be called a benefactor of his country, who could overthrow such a system.

The time is not yet ripe for the full development of the Improvement. I may just hint, however, at the possibility of even a large City being laid down in streets on a ground plan—the streets divided into lots—the lots numbered—their contents measured—their boundaries ascertained—and that plan lodged with the Sheriff, —the proprietor of lot No. 2, street No. 3, *coram judice*, saying that he has sold the same to B. for *L.*500, or borrowed that sum on it, and for a shillling or two subscribing an entry to that effect, in a Book to be kept for the purpose. This would be as effectual as if he were to deliver over a cart load of Title Deeds. Upon looking into this Index, an Agent could discover in five minutes whether the title was good, and whether the subject was incumbered; and thus a saving of perhaps *L.*50 on every such loan transaction, and a corresponding saving on a simple transfer would be effected; for, say what you will, you cannot, as things stand, borrow *L.*500 for less than *L.*50. The search for 40 years will cost at least *L.*20, and the expense of the Bond and Infeftment including stamps, *L.*30 if not more.

If any gentleman having a few acres of ground, (if possible held under a Crown Charter,) which he wishes to give off for feuing, will communicate with me, I will put him on a method of trying an experiment before attempting the improvement on a larger scale. *Salvo jure cujuslibit.*

It would be thought too much to put the whole of Scotland upon this plan at first, though "to this complexion things must come at last." But if it be tried on a small scale there is every chance of succeeding. I should like to know who would be heard to object to a landed proprietor doing what he liked with his own.† Were Campbell of Blythswood and his Trustees entitled to stipulate in an Act of Parliament for authority to create a monopoly in favour of their Law Agent, and can you not lay off your feus on such terms as you and your feuars may agree?

* I am writing Mr. Kennedy of Dunure, and Mr. Joseph Hume on the subject of Sir William Rae's Bill.

† Not, however, like the Duke of Newcastle.

I have done. The administration of Justice is one of the first considerations in every well regulated State. Without an efficient form of Justice, there can be no real prosperity. You are therefore bound by every consideration, till a better order of things shall arise, to insist that it be put on the best possible footing.

In Scotland at least, it is obvious to all good men, that it is attended with a great waste of public money, that it is enormously expensive, and intolerably vexatious to the parties, and above all, that it is injurious to the morals, and to the best interests of the people.

Land, as an object of traffic, is precisely like any other commodity. Upon this proposition I stand or fall. It can be bought and sold, or exchanged, or impignorated like any Moveable,—why then suffer such an Embargo longer to continue on transactions in heretable property.

You have lately had conferred upon you a legal title to look into these things. You are now recognized as an integral part of the Constitution. In you, and in the other electors of the Kingdom, now resides the "INITIATIVE" of all Legislative enactments; and you are responsible for the proper exercise of your privileges to your country, to posterity, and to God. I have the honour, in truth and sincerity, to be the public's, and

GENTLEMEN,

Your devoted Servant,

W. FORSYTH.

Glasgow, 15th November, 1832.

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