

**A LETTER TO THE REPRESENTATIVES
OF SCOTLAND IN PARLIAMENT,
RESPECTING THE STATE OF OUR
LAW, AND THE JURISDICTION AND
DUTIES OF THE COURT OF SESSION**

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A letter to the representatives of Scotland in parliament, respecting the state of our law, and the jurisdiction and duties of the court of session by John Borthwick

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JOHN BORTHWICK

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S. 4. 1830

A LETTER

TO THE

REPRESENTATIVES OF SCOTLAND

IN PARLIAMENT,

RESPECTING

**THE STATE OF OUR LAW, AND THE
JURISDICTION AND DUTIES**

OF THE

COURT OF SESSION.

BY

A SCOTTISH BARRISTER.



**WILLIAM BLACKWOOD, EDINBURGH:
AND T. CADELL, LONDON.**

MDCCCXXX.

738.

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LETTER, &c.

IN the discussions which have on several recent occasions taken place in Parliament, relative to the Administration of Justice in Scotland, not a little misapprehension seems to have prevailed as to the constitution of our Courts, and the duties performed by our Judges. A distinguished member of his Majesty's Government, who has earned the gratitude of his country, and secured to himself imperishable honour, by the improvements he has introduced, and is still introducing, into the law of England, has announced * certain changes which he contemplates to make in our judicial establishment. It would be

* Mr PEEL'S Speech in the House of Commons, 18th February 1830.

premature to animadvert upon the nature and probable effect of those changes ; but that they may be the more likely to be attended with the benefit which they are meant to confer, it would seem to be justifiable that every endeavour, however humble, should be made to convey to Parliament an accurate idea of what our present system has *hitherto* accomplished, and what the character of our Judges, and the practice of our Courts, has *hitherto* been. To you, my Lords and Gentlemen, as the appointed guardians of the general interests of Scotland, but still more as the protectors of the laws and judicial establishments of the country,—secured to us, as these were by the Treaty of Union,—I venture, therefore, respectfully to address the following observations, rather with a view of setting an example to others more qualified for the task of directing your attention to a subject so worthy to engage it, than with the presumptuous expectation of being able properly to canvass it.

Those who take the trouble to look back to the debates, which, from time to time, have taken place in Parliament relative to this subject, cannot fail to be struck with the change of tone which has been adopted towards the administrators of the law of Scotland, in our Supreme Courts. In the long and animated debates, for instance, which took place in the Houses of Lords and Commons, upon the sub-

ject of the act for abolishing Heritable Jurisdictions *, not a word is to be found derogatory to the character and conduct of the Scottish Judges, although there then was more occasion to have reflected upon their conduct and qualifications, than any thing which has since occurred †. In the more recent proceedings, which commenced with the Resolutions moved by Lord GRENVILLE ‡, having directly in view the administration of Justice in Scotland, and which occupied much of the time of that, and the succeeding session of Parliament, a still more striking example of the same observation is to be found. It is not my purpose to inquire what are the causes of this change of tone ; but this may be fairly dreaded, that, when such groundless and unmerited animadversions as occurred in the House of Commons during last ses-

* A. D. 1747, 14. Parl. Hist. p. 10 to 55.

† On that occasion Lord Chancellor HARDWICKE, in the speech which he afterwards caused to be printed, thus expressed himself, when adverting to the Court of Session of that day : " My Lords, I have the honour to be well acquainted with the Judges of that Court, and know them to be very able, learned, and honest men ; and, therefore, I am fully satisfied that the reasons on which they have insisted, appeared to them of the greatest weight."—14. *Parl. Hist.* 11.

‡ June 18. 1806, 7. Parliamentary Debates, 730. Lord GRENVILLE said, that " he did not mean, and he trusted he should not be understood to mean, to throw the slightest reflection upon any of the learned Judges of that Court," &c.

sion *, are allowed to pass without the answer of which they are capable, a material injury is done, through the vituperation of the Judges, *to the stability and efficiency of the law of the country itself.*

This consequence, indeed, appears to be of so much importance, that, before adverting to the various duties, which, according to the constitution of the Court of Session, our Judges have to perform, I must beg leave to detain you with a few reflections upon it.

The law of Scotland has been framed and matured in such a manner, as that it is, as a system, admirably adapted to the habits and customs of the country; whilst it is well calculated as a subject, upon which the experiment has been made, and found to succeed, to afford highly useful illustrations for the improvement of the Laws of England †. Any thing,

* May 21. 1829.

† The distinguished ancestor of one of your number who had studied, with a philosophic and impartial eye the laws of both countries, has remarked, that "although our law will admit of many improvements from that of England, yet we are rich enough to repay with interest all we have occasion to borrow from it." LORD KAMES'S Pref. to Hist. Law Tracts, p. 14.

And a more pointed acknowledgment has been made by, it may be presumed, a still more impartial person. "Scotland," said Mr BROUGHAM, in his celebrated speech upon the Law of England, "to say nothing of the Treaty of Union, so often set up as a bulwark against all change, might urge some very powerful reasons for

therefore, which has a tendency to shake the confidence of the people of Scotland in it, or to bring it into disrepute in England, must be highly detrimental to us, and proportionally prejudicial to our southern neighbours.

Lest this account of our Jurisprudence, however, may be said to be dictated by partiality, rather than sanctioned by fairness and truth, let me request you to look back for a moment to the sources from which it has been derived; and then to try it by the tests of those institutional works, which have digested and arranged its maxims, and of the opinions of foreigners who have pronounced encomiums upon it.

As to the origin of the Law of Scotland. What Montesquieu* has said of the sources of the laws that were established in the republics of Italy, during the middle ages,—that the legislators of those states rejected the law of the Lombards, which determined on some particular cases, and adopted the Roman law which embraced them all, is in a great measure descriptive of the mode in which the foundations of the Law of Scotland were laid.

The poverty of the country, and the rude and scanty materials which the customs of the inhabi-

upholding her ancient system, which we in England should vainly seek to imitate.—Speech in the House of Commons, February 7. 1828, authentic edition.

* Spirit of Laws, b. xxviii. c. 6.

tants could furnish to the students of law, impelled them to resort to other countries. They repaired to Paris, Poictiers, Bruges, Amsterdam, Leyden, and other cities, to pursue the higher branches of philosophy, and to receive their education in the Civil Law. The classical education of these students, previous to their leaving their native country—their residence at the foreign schools of jurisprudence—their enlargement of mind, from the sight of different nations and governments—united to exalt the character of many of our supreme Judges, and contributed to the formation of a system of laws in some respects more refined than even the laws of the foreign states which they imitated. Nor is it difficult to perceive how this should have been the case. Unfettered by local habits or domestic prejudices, the highly cultivated minds of many of our early lawyers in classical literature, enabled them freely to converse and correspond with the jurists of various foreign countries—to compare the laws of different states—to reject one part of them, whilst they adopted another, and thus to originate a system of jurisprudence which was calculated to make, and, in some instances, notwithstanding our domestic broils, actually did make advances to refinement, even amidst the limited judicial discussion which Scotland could afford, whilst the laws in other countries remained comparatively