

# The Edinburgh Sir Walter Scott Club

Sir Walter Scott's Journal, 9<sup>th</sup> June 1826

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Thank you Madam Chair—this contribution raises a question about the Journal entry of 9 June 1826

And the question is: does the entry give a clue as to why Scott changed the setting of *The Bride of Lammermoor* from before to after the Union of Scotland with England?

There is a larger question, of course, Madam Chair. Is historical fiction escapism pure and simple? Or is it a commentary, more or less veiled, on contemporary events? It can be both of course. In the case of Sir Walter Scott, I believe we can be reasonably satisfied that certain passages reflect preoccupations of the author's own day.

The relevant passages are in *The Bride of Lammermoor*, not the original text of 1819 but the revised *Magnum* edition text of 1830. There is a clue—an unmistakable clue I suggest once we know the background—in Scott's journal entry of 9 June 1826.

Here is the journal entry:

*"One effect of running cases fast through the courts below is that they go by scores to appeal and Lord Gifford—(this is Gifford spelled G-I-F-F-O-R-D, pronounced "Jifford", not Gifford as we should say it, an Englishman, Lord Chief Justice and then Master of the Rolls, the first Baron Gifford, deputy Speaker who, in the Lord Chancellor's absence, chaired the judicial sittings of the House of Lords)—my father warned me "never trust a man who cannot pronounce his own name"—anyway, going back to the Journal... "cases go by scores to appeal and Lord Gifford has hitherto decided them with such judgement and so much rapidity as to give great satisfaction—in parenthesis I deduce that Scott was referring somewhat tartly to the "great satisfaction" of litigants, and one litigant in particular, as we shall see, who had recently been successful in London—The consequence will in time be that the Scottish Supreme court—i.e. historically the Inner House of the Court of Session— will be in effect situated in London. Then down fall—as national objects of respect and veneration—the Scottish bench—the Scottish Bar—the Scottish Law herself—And—And—there is an end of an auld sang. Were I as I have been I would fight knee deep in blood ere it came to that—But it is a catastrophe which the great course of events brings daily nearer."*

I'm sure Madam Chair the reference is familiar: "the end of an old song", words spoken by Scotland's Lord Chancellor Seafield on the sealing of the Union with England. The independence of the Scottish courts and Scots Law was meant to be preserved by the Act of Union. Scott's journal entry foresees the disappearance of that legal vestige of Scotland's nationhood.

So what prompted Scott's journal outburst?

There are two preliminaries. First I must acknowledge the inspiration I have derived from the work of the late Sir Eric Anderson, and the late Professor Jane Millgate and from Dr Iain Gordon Brown and Professors John Cairns and Peter Garside, Peter being this year's Club President. Secondly, in what follows, I have sometimes, by omitting wordage superfluous to my purpose, compressed or paraphrased quotations from Scott's writing.

To begin at the beginning.

*The Bride of Lammermoor* tells of the tragic love affair between the dispossessed royalist, Edgar, Master of Ravenswood, and Lucy, daughter of the arriviste lawyer-politician, Lord Keeper Sir William Ashton, a low church man. The castle and lands of Ravenswood have, by questionable means in Scotland's Court of Session, been forfeited to the Lord Keeper. The original 1819 text of *The Bride* places the action before the Act of Union of 1707: the text of the *Magnum* edition of 1830 puts the action afterwards. The alteration means that Ravenswood's threatened legal challenge to Ashwood's dubious appropriation of the Ravenswood estate, a *protestation* as it was called, to the Scottish Parliament, *for remeid of law*, becomes a threatened *appeal* to the British House of Peers, in other words to the House of Lords.

The change is illustrated in the interleaved version—a binding with blank pages interleaved for manuscript changes—which shows Scott's abrupt manuscript emendations of the previously printed text. The passage that had previously read “*if the Scottish Parliament should be disposed to act upon the protestation of the Master of Ravenswood for remeid of law*” has been revised to read “*if the English House of Lords should be disposed to act on an appeal from the Master of Ravenswood...*”

The re-dating allows Scott to use the fictional anxieties of Lord Keeper Ashton's circle as a vehicle for actual concerns about appeals to the House of Lords in the novelist's own day. In the *Magnum* edition, Scott suggests that the earlier text did not sufficiently bring out the contrast between the black-letter justice of the Session and Parliamentary equity. The contrast—and the dramatic effect—are heightened by moving the appeal to a distant forum which, insofar as conversant with the Law of Scotland, is possibly contemptuous of it, and where the outcome is beyond the Lord Keeper's provincial influence.

And there is an added dimension already alluded to—the threat to Scotland's national identity as manifested in its separate legal system.

Now a critical difference between protestations for remeid and appeals is that the former did not automatically suspend enforcement of the court judgment complained of, while the latter— for a century from and after the Greenshields case in 1711—did.

As a result, appeals to the Lords multiplied. By 1806 the situation had reached crisis point, not at that stage for the substantive Law of Scotland – decisions of the House of Lords were generally overlooked north of the Border as substantive-law precedents—but for the administration of British justice: four out of five Lords' appeals came from Scotland, and 200 Scotch appeals were in the backlog. There followed more than twenty years of initiatives to curtail appeals from the Court of Session to London.

In the century after the Union the impact of decisions by the House of Lords on the substance of Scots Law was not what might be supposed. Law reporting is how knowledge of case law precedent is disseminated. Incredibly, there was no published collection of Scotch—as they were called—Appeal reports until 100 years after the Union: David Robertson's *Reports of Cases on Appeal from Scotland, decided in the House of Peers... from the Union in 1707 to the commencement of the reign of George II [1727]* was not published until 1807. The preface to *Robertson's Reports* implies that decisions of the Court of Session, which had been reversed in London, continued to be regarded by Scots jurists as authoritative in point of law. But all this was about to change.

Scott had been “gazetted” joint Principal Clerk of Session in Dalrymple's Office on 8 March 1806, so not a lawyer-politician in the Sir William Ashton mould: but nonetheless, during the initial phase of reform, in the first rank of the supporting cast as a functionary and as a polemicist—at the Faculty of Advocates

meetings of 1807, leading opponent of the Whig Lord Grenville's radical Court Reform Bill, probably responsible too for getting the anti-Bill speeches published; secretary of the judges' delegation to the House of Lords during the Court of Session spring recess 1807; clerk to the Royal Commission for Inquiring into the Administration of Justice in Scotland established under Lord Chancellor Eldon's watered-down Tory Judicature Act 1808, clerking the Commissioners' meetings in Edinburgh and London through 1809 and 1810; and author of the anonymous article "View of the Changes Proposed and Adopted in the Administration of Justice in Scotland" in his own *Edinburgh Annual Register* published in 1810.

Scott is revealed as someone with a serious interest, both philosophical and pragmatic, in the workings of the law and the way it shapes and is shaped by society. The immediate relevance of the 1810 article is Scott's repetition of the critique which he had first offered in 1807, namely that the remedy for the perceived mischief of too many Scotch appeals lay with the House of Lords and not in changes to the Court of Session; and so it proved from the 1820s with the progressive professionalisation of appellate business in the Lords, taking the business into the hands of legally qualified peers. The landmark reforms of the Court of Session introduced by the "respectful and lenient hand" – to use Scott's words – of the Tory Lord Chancellor Eldon from 1808 did not apparently cause Scott anxiety for the future of the substantive Law of Scotland.

These reforms were structural. They divided the fifteen-judge Court of Session, Scotland's Supreme Court, into two divisions, the First Division of the Inner House chaired by the Lord President, the Second Division of the Inner House chaired by the Lord Justice-Clerk.

A subsequent phase of reform, which focused on procedures, was different. It saw Scott fulminating from the sidelines about "*the interference of these Englishmen ... with their periwigs and their parchment bags.*"

That was in 1823 when the Royal Commission on the Forms of Process and the Course of Appeals to the House of Lords was set up.

At the same time, another historical romance was in preparation, the novel to be published in the following year as *Redgauntlet* (1824), in which—no coincidence, I suggest—the dyed-in-the-wool Jacobite, Hugh Redgauntlet, mocks as "*mongrel things*" those Scottish advocates who "*must creep to learn the ultimate decision of their causes to the bar of a foreign Court, instead of pleading before the independent and august Parliament of their own native kingdom.*" Mark the words: "*a foreign Court.*"

The Royal Commission's proposals were put into effect by the Judicature Act 1825 with related Rules of Court. Sir Walter Scott officiated at the Saturday sitting of the full Court, both Divisions sitting together, on 12 November 1825 when the new Rules were appointed by the Lord President to be inscribed by him in the Books of Sederunt.

Scott sounded the alarm at the beginning of 1826 in the pseudonymous *Letters of Malachi Malagrowther*. The polemic was published in defence of the right of Scottish banks to issue their own currency: but Scott illustrated his argument with references to what was happening in the legal sphere.

Scott deprecated the error of judging another country's laws without being aware of the whole context. And he stated "*It would be no reason for planting mulberry-trees in Scotland, that they luxuriate in the south of England*".

Of the recent procedural reforms he wrote: "*I beg therefore to be considered as not speaking of the alterations themselves, but of the apparent hostility towards our municipal—*"municipal" meaning

national— *institutions, as repeatedly manifested in the course of late proceedings, tending to force and wrench them into a similarity with those of England... What I do complain of is the general spirit of slight and dislike manifested to our national establishments, by those of the sister country.*” And he complained also of the “jealousy” of “hasty and imperfectly informed” English judges who had “shown themselves so anxious to revolutionize” the Scottish legal system.

One particular litigation conducted under the new dispensation and clerked by Scott in the First Division of the Inner House was, for Scott, the most disturbing portent of things to come. It took less than a year under the new procedures for the cause in question to go through the first instance Outer House and the appeal to the First Division of the Inner House and to reach final determination in the Lords at London. The Lords declined to affirm the decision of the First Division and remitted to the Lord President and his colleagues to consult with the Second Division judges as to whether the equitable English rule in the case of *Sitwell v Bernard* should become part of Scots Law. (The First Division, let it be said, had already determined unanimously that “[to] *apply the English doctrine, would be setting up a principle of equity against the intention of the testator.*”) This decision of the Lords was pronounced on 26 May 1826.<sup>1</sup> Within a week the news was in Edinburgh. And then Scott made the entry in his journal about the forthcoming catastrophe for the Law of Scotland.

Before I answer the question posed at the outset let me mention a curious thread running through Scott’s fictional tale of Ravenswood and Ashton. The thread is the Dalrymple family.

The original of *The Bride* story was a real-life tragedy in the Dalrymple family in 1669. The Whiggish Sir James Dalrymple became President of the Court of Session and was ennobled as Viscount Stair. The character of Sir William Ashton, the Bride’s father in the novel, is said to have been based—though Scott denied it—at least in part on the character of Viscount Stair “brilliant pliability in an age of trimming”. The Lord President’s son was made the Earl of Stair. And it was the judgment of the House of Lords in the case *John Dalrymple seventh Earl of Stair v Trustees of John Dalrymple sixth Earl of Stair* that provoked the journal outburst. When Scott came to review the *Lammermoor* text he was bound to have had in mind the recent *Seventh Earl of Stair* appeal to the House of Lords. Indeed, in the very first sentence of the *Magnum* introduction he alludes to that Earl, John William Henry Dalrymple, who succeeded to the earldom on the death of his cousin in 1821.

Is it possible that Scott felt a sense of... well, “betrayal” is too strong a word, but “disappointment” might do... disappointment that a certain deference shown by Scott to Dalrymple feelings had not been reciprocated? In the 1819 edition Scott had concealed the origin of the *Lammermoor* story out of sensitivity about this John William Henry Dalrymple and his scandalous matrimonial difficulties. And yet here was the same man, now the Earl of Stair, pressing on with his appeals to House of Lords, to the detriment of the Law of Scotland, as it were, when he could well afford to compromise.

As Scott feared, things did get worse. In the *Seventh Earl of Stair* litigation the judges of the First Division duly consulted with the judges of the Second Division and sent back exactly the same ruling to the House

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<sup>1</sup> The *Caledonian Mercury* reported remarks made by Lord Gifford when reserving judgment on 2 May 1826 as follows: “... and his Lordship took occasion to add, that he regretted that, in the Court below [*the First Division of the Inner House*], it could have been supposed that he had the most distant [*distinct?*] intention of ingrafting the law of England on the law of Scotland... It was to be regretted that, on such a novel and important point, the opinions of both Divisions had not been taken.”

of Lords, who would have none of it, and directed their lordships in Edinburgh to apply the law of England. That was in June 1827. And the forward policy of the House of Lords on Scotch appeals continued.<sup>2</sup>

And so Scott came to change the historical setting of *The Bride of Lammermoor*. The 1830 edition has the following description of the attitude of Lord Keeper Ashton's circle to an appeal to the House of Lords: "... a degradation of Scotland, the decisions of whose learned judges were thus subjected to the review of a court composed indeed of men... who ... might be supposed specially to hold in contempt [the law] of Scotland."

And thus, added to Ashton's anxiety about his personal fortunes was a professed anxiety about what would happen to the Law of Scotland:

"... if the law of Scotland, as declared in her supreme courts, were to undergo a reversal in the English House of Lords, the evils which would thence arise to the public would inflict a greater wound upon his—i.e. Lord Keeper Ashton's—heart than any loss he might himself sustain..." The Lord Keeper—unlike, let me interject, the seventh Earl of Stair, hinted that he would be prepared to compromise the dispute rather than that "*the law of Scotland should sustain a severe wound..., in the case of the barony of Ravenswood, through the intervention of what he must term a foreign court of appeal...*" There we have it again, the phrase "foreign court".

So back to the question posed in the title:

Does the Journal entry for 9 June 1826 give a clue as to why Scott changed the setting of *The Bride of Lammermoor* from before to after the Union of Scotland with England?

The answer I suggest, Madam chair, is "yes".

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<sup>2</sup> The high water mark came after Scott's death, exemplified in the dictum of Lord Chancellor Cranworth in the *Bartonshill Coal Company* case 1858: "But if such be the law of England, on what ground can it be argued not to be the law of Scotland?"