Scott and Scots Law

By Sarah Winter

In June 1826, within just a few weeks after the terrible blow of the illness and death of Lady Charlotte Scott, his wife and companion of thirty years, Sir Walter Scott recorded in his journal not only his attempts to sustain his relentless pace of daily writing to pay off his debts while struggling with his grief, but also his concern for the sanctity of the separate system of Scottish law as the last bastion of Scottish independence. Noting the quickness with which causes passed from the Scottish courts to appeal before Lord Gifford, Master of the Rolls of the Court of Chancery, Scott saw a harbinger of the eventual dissolution of Scottish law:

> One effect of running causes fast through the courts below is that they go by Scores to appeal and Lord Gifford has hitherto decided them with such judgement and so much rapidity as to give great satisfaction. The consequence will in time be that the Scottish Supreme court 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 […][1]

With 'there is an end of an auld Sang', Scott alludes to the response of James, 1st Earl of Scafield and Chancellor of Scotland to the 1707 Treaty of Union of the Scottish and English Parliaments.[2] Article 19 of the Treaty of Union, however, preserved the jurisdictions of the Scottish Court of Session and Court of Justiciary, and further declared that 'no Causes in Scotland be cognizable by the Courts of Chancery, Queen's-Bench, Common-Pleas or any other Court in Westminster-Hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognize, review, or alter the Acts or Sentences of the Judicatures within Scotland, to stop the Execution of the same.' After 1707, the final court of appeal for civil cases decided in the Scottish Court of Session was the House of Lords.

In 1706, Scottish patriot Andrew Fletcher of Saltoun had voiced his concern that

after the union 'judicatories for administering justice and the cognizance of all law suits shall be carried up to London, either by first instance or by way of appeal.'[3] Fletcher's contemporary George Mackenzie, the Earl of Cromarty, despite his support for a form of union that would incorporate the English and Scottish parliaments, also warned that since 'the Treaty of Union would leave Scotland nothing of sovereignty […] to reside amongst us but our sovereign courts of judicature', legal appeals from Scottish to English courts should be prohibited.[4] Echoing Fletcher's and Mackenzie's concerns more than a century later, Scott's distress at this phenomenon of frequent appeal to London presents an enduring picture of Scots law as the main repository of Scottish sovereignty as well as cultural and national honor, and its independence as a cause worth dying for.

Scott's references to the 'bench' and 'Bar' also point to his own professional connections to Scots law as an advocate. In 1826, Scott was serving as a Clerk of Session in the First Division of the Inner House, the appellate chamber of the Court of Session, the supreme civil court which sat at in Parliament House in Edinburgh. His involvement in the Scottish criminal law consisted in his service as Sheriff of Selkirkshire, an office which entailed presiding over parliamentary elections, supervising criminal investigations within the district, attending the Circuit Court at Jedburgh, and, when the Court of Session was in recess, presiding as magistrate in the Sheriff Court at Selkirk.[5] Between 1808 and 1825, multiple reforms in the Scottish legal administration had taken place, most importantly the establishment of a jury trial in civil cases in 1815 and the dissolution of the separate Scottish Court of Admiralty in 1825, with the general effect of bringing Scots law into closer accord with English law.[6] Scott had disagreed with the details and direction of these cascading reforms,[7] which seem to have contributed to the feeling of compounded professional and personal losses and impending 'catastrophe' apparent in his journal entry.

The Two Drovers image from the Walter Scott Digital Archive

Whatever the exact combination of stresses producing Scott's outburst in June 1826, a further consideration of these issues surrounding the dissolution of national identity as embodied in Scottish law appears in the literary work Scott began writing at this time, *Chronicles of the Canongate, by The Author of 'Waverly', &c.*, which would appear in October 1827. In the preface to this work, Scott also publicly acknowledged in print for the first time his identity as the 'Author of Waverly'. During June 1827, Scott composed a fable-like tale concerning the relation between English and Scottish customary law as sources of the difference between English and Scottish national characters in 'The Two Drovers', published as chapters twelve and thirteen of the first volume of the *Chronicles*. (As readers of the present publication will no doubt be aware, this story also contains the narrator Chrystal Croftangry's reference to the printer's boy as 'the imp of the devil, come to torment me for *copy*, for so they call a supply of manuscript for the press'.[8])

The tale's protagonist, the Highlander and cattle drover Robin Oig McCombich, alias MacGregor, stabs his erstwhile friend, the Yorkshireman and fellow drover Harry Wakefield, with his Scottish *skene-dhu*, or dirk, over a 'point of honour' after Wakefield knocked him down and bloodied him in front of a company of Englishmen in an inn near the border city of Carlisle in Cumberland.[9] Their dispute had been caused by competing contracts to the same grazing place for their herds, but the real cause of their deaths — Harry's murder at the hand of his friend and Robin Oig's execution by the due judgment of law — was, according to the 'charge of the venerable Judge' to the jury at Carlisle, that they were '"men acting in ignorance of each other's national prejudices, and unhappily misguided

rather than voluntarily erring from the path of right conduct."'[10] The Judge explains that their customary means of settling disputes, that is, the brawny, beef-eating Saxon's resort to a public display of personal, hand-to-hand combat (boxing) versus the wiry and diminutive Celt's reliance on stealth, the hidden dirk, and the threat of revenge, must both be constrained and displaced by the law's evenhandedness and monopoly on just vengeance: '"The first object of civilization is to place the general protection of the law, equally administered, in the room of that wild justice, which every man cut and carved for himself, according to the length of his sword and the strength of his arm."'[11]Although Robin Oig was attacked by Wakefield, and although he showed restraint and even proposed visiting a magistrate to settle their dispute, because he did not have his dirk in his possession and had to walk twelve miles to retrieve it from his countryman (who was holding it in safekeeping after Robin Oig's aunt's prophesy that he would shed English blood on his journey southward) before returning to plunge it into his friend's chest, he could not be sentenced to a verdict of manslaughter in self-defense. Instead, the Judge declares, despite his pity for the young man, that Robin Oig must suffer the penalty of death for '"the purpose and the act of predetermined revenge, for which law neither can, will, nor ought to have sympathy or allowance."'[12]

In its dissection of cultural stereotypes about the Scots and the English, 'The Two Drovers' resembles a political tract without straying into satire. The Judge's narrative function in summing up the legal case for Robin Oig's guilt seems to dominate the story's interpretation, so that we are tempted to read it as reaching a verdict on the compatibility of the Scottish and English legal systems, based in their shared adherence to the 'general principles of justice and equity' within the domain of Great Britain.[13]

But Robin Oig gets the final word in the tale, and troubles its resolution of contradictory English and Scottish customary laws and national prejudices via the courts. He faces execution 'with great firmness' while defending the 'wild justice' of his act and its repercussions: '[h]e repelled indignantly the observations of those who accused him of attacking an unarmed man. "I give a life for the life I took," he said, "and what can I do more?"'[14] While Scott anticipates and even mourns in advance the 'catastrophe' of the loss of Scottish legal sovereignty in the pages of his journal, the 'catastrophe of our tale had taken place' in 'The Two

Drovers' in Robin's deed of vengeance against the arrogant Englishman, for which he pays an equal penalty.[15] One of the witnesses to the blow with which Harry levels Robin Oig at the inn, the dishonest bailiff who had negotiated the invalid contract for the same pasture that had caused the quarrel between the two friends, explains to some puzzled bystanders to the fight that '"It is only a d—d Scotsman, […] whom Harry Wakefield helped to his broth to-day, who is now come to have his *cauld kail het* again."'[16] An expression of 'the ancient grudge against the Scots […] to be found lurking in the Border countries', this utterance of a Gaelic phrase by an untrustworthy English character not only undermines from within the speaker's contempt for the Scotsman but also casts doubt on the Judge's serious attempt to correct or quarantine Scottish and English 'prejudices'.[17] Like the Highlander's 'wild justice', the Scottish law and customs, far from being a cold broth reheated, or an outmoded system destined to be incorporated into the English common law, seem to possess a stubborn resilience, tied to the persistent urgency of upholding Scottish national identity and honor.[18] While Robin Oig's insistence on his revenge may be irrational and illegal, his strain of independence still inhabits Scott's own passionate defense of Scots law.

References & Further Information

[1] Entry for Thursday, 8 June 1826, in *The Journal of Sir Walter Scott*, ed. W. E. K. Anderson (1972; Edinburgh: Canongate Books, 1998), pp.179-80.

[2] *The Journal of Sir Walter Scott*, ed. W. E. K. Anderson, p.179n4.

[3] Andrew Fletcher, *State of the Controversy Betwixt United and Separate Parliaments* (1706), 20; quoted in Brian P. Levack, *The Formation of the British State: England, Scotland, and the Union 1603-1707* (Oxford: Clarendon Press, 1987), p.87.

[4] George Mackenzie, *A Letter to a Member of Parliament upon the 19th Article of the Treaty of Union Between the Two Kingdoms of Scotland and England* (1706), pp.7-8; quoted in Levack, *The Formation of the British State*, p.87.

[5] W. E. K. Anderson, 'Introduction', *The Journal of Sir Walter Scott*, pp.xxv-xxvii.

[6] *Ibid.*

[7] *Ibid.*

[8] Walter Scott, *Chronicles of the Canongate*, ed. Claire Lamont (Edinburgh: Edinburgh University Press, 1995), p.123.

[9] *Ibid.*, pp.124, 125.

[10] *Ibid.*, pp.142-43.

[11] *Ibid.*, p.146.

[12] *Ibid.*, p.145.

[13] Walter Scott, *Chronicles of the Canongate*, ed. Claire Lamont (Edinburgh: Edinburgh University Press, 1995), p.145.

[14] *Ibid.*

[15] *Ibid.*, p.140.

[16] *Ibid.*

[17] *Ibid.*, p.133.

[18] I found an explanation of the phrase '*his cauld kail* het again' in 'Dance Trivia', by John Shaw, published in *The Scottish Country Dancer*, Vol. 4, No. 1 (July/August 2007). The article explains that 'cauld kail' is also the title of a 32 bar strathspey/reel medley.
