Journal of Criminal Law and Criminology

Volume 19
Issue 4 *February*

Article 4

Winter 1929

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William Renwick Riddell

THE KING'S EVIL AND HIGH TREASON

WILLIAM RENWICK RIDDELL*

What was known in England as the King's Evil[1] was also called Scrofula or Struma: it manifested itself generally by swellings or sores on the neck. We now recognize it as a form of tuberculosis: Formerly, it was supposed to be cured, or, at least, much benefited by the afflicted person being touched by the hand of the King. It is not quite certain when this superstition obtained a firm footing in England, but thousands were "touched" during Tudor and Stuart times.[2]

The same sanative power was claimed for the Kings of France, the enthusiasts of either country claiming that their own King had the only true healing touch and the other's alleged virtue was apocryphal and an impudent pretence.

The practice continued through the reign of Queen Anne, the celebrated Dr. Samuel Johnson being one of the last to receive the Royal touch.

The belief was prevalent that only the rightful monarch, the King "by the Grace of God," possessed this gift: and the success of Charles II when in exile in healing by his touch those afflicted with this disease, was hailed by his adherents as a proof of his divine right to the throne—just as, after the Revolution, a similar alleged success on the part of the "Pretenders" brought comfort and joy to the hearts of loyal Jacobites.

It may be that it was because the Hanoverian monarchs knew that they were not Kings "by the Grace of God," but Kings "by grace of an Act of Parliament," that none of them has ever ventured on this superstitious nonsense—and for a couple of centuries, it has been laughed at.

From what has been said, it will be manifest that in the reign of Charles II it was a dangerous thing to express disbelief in the Royal magic which evidenced the King's right to the throne. In the

*Justice of Appeal, Ontario; Associate Editor of the Journal; LL. D., D. C. L., etc.

[1]For a full account, descriptive and historical, of the "King's Evil," see my article, *"Touching for the King's Evil,"* New York Medical Journal and Record, (December 19, 1923).

[2]Some writers hint—to put it mildly—that the custom of a coin of some value being paid to every one touched, out of the Royal Treasury, had something to do with the crowds of applicants.

common belief, if Charles could not heal the King's Evil by his touch, he was not a rightful King—and to contend that was Treason.

And this found in 1684, Thomas Rosewell, Clericus, a Presbyterian Minister, who had some ten years before come up from Wiltshire to London and was there preaching in "Conventicles"—he "had the reputation of a very honest man, a good scholar and a pious man," but this did not save him from trouble. On Sunday, September 14, 1684, Rosewell preached at a Conventicle held at the house of Captain Daniel in Rotherhithe. One Mrs. Elizabeth Smith (*nomen notabile*) who was in the habit of attending such Conventicles—"unlawful assemblies," by the way—was, according to her own story, one of his hearers and was so horrified at what he said that when she went home she put the words down in black and white and shortly thereafter went to the Recorder of London and "discovered it."

The result was that at the following Session of Oyer and Terminer held at Kingston in the County of Surrey, a True Bill for High Treason based upon the words it was alleged he had used, was found against him.

Brought up on Habeas Corpus to the Bar of the Court of King's Bench, he was arraigned Saturday, October 25, 1684, before a court composed of Chief Justice Jeffreys, and Justices Walcot and Holloway.

Jeffreys, a Puck with the callous cruelty of a fiend, was one of the most noted men of the day—a student-at-law in the troubled times between the execution of Charles I in 1649 and the Restoration in 1660, there was doubt of his having been regularly called to the Bar although undoubtedly "admitted" in the Inner Temple, May 19, 1663 (Lord Campbell says he was Called, November 22, 1668); but after being Common Serjeant of London 1671, he, in 1683, was afterwards Recorder of London, and in 1678, became Lord Chief Justice, and, later, in 1685, Lord Chancellor and a Peer of the Realm. He was at all times a slave to the King obeying his slightest intimation, but he had a fair knowledge of law though many did not hesitate to say that he was "most ignorant but most daring," "he had neither learning, law nor good manners" while his master, Charles II, said that he "had more impudence than ten carted women of the streets." Undoubtedly, he would get drunk, but that was then an amiable failing. He was considered "scandalous, vicious and was drunk every day besides a drunkenness in his fury that liked enthusiasm: He did not consider the decencies of his post" as Chief Justice. Rosewell could not possibly have had a more unfavorable Judge—he considered Conventicles, hot-beds of treason, "base sinks of rebellion," and those who preached at them, "black-coat dissenters to the Church of England" as

they were, did so not only against the law of the land but against the laws of Almighty God, while those who frequented them, he characterized as "factious, pragmatical, sneaking, whining, canting, sniveling, prick-eared, crop-eared . . . fellows, rascals and scoundrels"—"base profligate villains." The ultimate fate of Jeffreys is well known. On the landing of William of Orange, he was taken in Wapping, disguised as a sailor, and taken before the Lord Mayor of London; committed to the Tower, he died largely of fright—as did a Canadian condemned to death by me, some years ago. In my judgment, Lord Campbell in his *Lives of the Lords Chancellors,* utterly fails to appreciate the ability and scholarship of Lord Jeffreys. The contemporary jingle is not quite forgotten:

"Jeffreys was prepared for sailing
In his long tarpaulin gown
Where is now his furious railing
And his blood congealing frown?"

The Puisnés were respectable characters but, with Jeffreys on the Bench, negligible.

The accused asked to be allowed Counsel, and was, of course, refused. The absurd rule that prisoners charged with Treason should not be allowed Counsel, deriving from the Civil Law principle that a prisoner cannot be convicted except upon conclusive evidence, and, therefore, Counsel could not be of any use to him, continued to disfigure the English Criminal Law for some ten years longer, while the ordinary felon had to wait nearly two centuries for the privilege.[3]

He then asked for a copy of the Indictment: that had also to be denied him, under the existing law and practice, without the consent of the Attorney General, Sir Robert Sawyer; and he would not consent. As the Chief Justice said at a later stage, "the practice has been always to deny a copy of the Indictment . . . the law is so because the practice has been so and we cannot alter the practice of the law without an Act of Parliament . . . ."[4]

[3]See the whole disgraceful story in Blackstone, *"Commentaries on the Laws of England,* Vol. iv, pp. 355, 356, and notes.

It was not till 1836 that the right to be defended by Counsel was given in England to all persons charged with felony: 6 & 7 Will. 4, ch. 114 (Imp.); those charged with treason obtained the right in 1694: 7 Will. 3, ch. 3 (Imp.).

[4]By the Act of 1694, 7 Will. 3, ch. 3 (Imp.), persons accused of High Treason were to have a copy of the Indictment, five days before trial. See Blackstone, *"Commentaries,* etc.," vol. IV, pp. 351, 352, and notes. Jeffreys says: "I think it is a hard case that a man should have counsel to defend himself in a tuppenny trespass and his witnesses examined upon oath; but if he steal, commit murder or felony, nay, high treason, where life, estate, honour and all are concerned he shall neither have Counsel, nor his witnesses examined on oath: But the . . . law is so . . ." 10 *"Howell's State Trials"* 267.

The Indictment which was in Latin was read to the accused in English and at his request, in Latin, then again in English, and Rosewell pleaded "Not Guilty, my Lord; and I bless my God for it"—he asked to be tried "By God and my country," and Sir Samuel Astry. Clerk of the Crown, uttered the time-honoured and conventional, "God send thee a good deliverance."

The charge was the prisoner, "a false traitor," "asseruit et declaravit quod populus condunationem fecere dicto Domino Regi nunc sub praetexta sanandi morbum regni (Anglicé, the King's evil) quod ipse non facere non potest; sed nos sumus illi ad quos illi debent accedere quia nos sumus sacerdotes et prophetae, qui precibus dolores ipsorum sanaremus . . . ."[5] Other treasonable language was also alleged: but the above is all we are at present concerned with In English, it reads: "Asserted and declared that the people made a flocking to our said Lord, the present King under the pretext of healing morbus regni (in English, the King's evil) which he cannot do; but we are they to whom they should come, for we are priests and prophets who by prayer shall heal their afflictions . . . ."

The prisoner objected that "morbus regni" is "in English properly the disease of the Kingdom" not "the King's evil"; the Chief Justice agreed but said that the innuendo healed the defect—which, I venture to think, is more than doubtful.

Eighteen jurors were peremptorily challenged out of the thirty-five allowed by law—to challenge peremptorily more than thirty-five meant to be sent forthwith to be pressed to death by *peine forte et dure*.[6] He was caught napping as to several, not challenging them until they had been sworn, and the rule then as now being that the jurors must be challenged "as they come to the book to be sworn, before they are sworn."

The trial went on in the usual way for the times—the witnesses for the Crown were helped over the hard places and excuses made for them—the witnesses for the defence (of course, not allowed to be sworn)[7] were insulted, badgered, offensively cross-examined by

[5]I have omitted all the many innuendoes except one: the old Latin Indictments bristled with them to reduce them to meticulous certainty, and avoid all ambiguity. The smallest defect might furnish a ground in those technical days for a successful motion in Arrest of Judgment.

[6]See as to challenges, Blackstone, "*Commentaries*, etc.," vol. IV, pp. 352-354.

[7]The Common Law, on the Civil Law principle already mentioned, originally refused to allow an accused to adduce witnesses—they were unnecessary if the conclusive proof were wanting, and could not displace conclusive proof if it was adduced. The practice grew up of allowing defence witnesses, but not under oath; and at length the right of every accused person to have his witnesses give evidence under oath was given by statute: 7 Will. 3, ch. 3, 1 Annae, Sess. 2, e. g. (Imp.). See Blackstone, "*Commentaries*, etc.," vol. IV, pp. 359, 360.

the Bench—the prisoner protesting his obedience to law is told by Jeffreys, "a man . . . that every day doth notoriously transgress the laws of the land (by preaching at Conventicles) need not be so fond of giving himself commendations for his obedience to the government and the laws"—he was told "It was the devil led you to talk treason" and "I do not desire any of your expositions or preachments," &c., &c. The Lord Chief Justice says to defence witnesses, "You use to go to Conventicles, all of you, I warrant you": and on it being stated that the prisoner prays for the King, says "So there was praying in this Hall (i. e., Westminster Hall) I remember for his late Majesty (i. e., King Charles I, on his trial in Westminster Hall); for the doing of him justice; we all know what that meant and where it ended." To a witness who had become confused the Chief Justice says sneeringly "You had best go out, and recollect yourself; you have forgot your cue . . ."; and in respect to a witness, "It's so hard and difficult to get out the truth from this sort of people: they do so turn and wind," and to another "It is a strange thing, truth will not come out without this wire-drawing."

It was of no avail that the accused and his witnesses insisted that when the Crown witnesses thought he was speaking of Scrofula he was, in fact, speaking of the paralysis of the arm of King Jeroboam, I Kings, xiii, vv. 6, 7, which, on the prophet praying for him, was healed. "The Prophet came to reprove him, and Jeroboam stretched out his hand against him and it dried up; and then he desired the prophet to pray for him, which he did, and his hand was healed."

The defence witnesses said they understood the preacher to refer to this evil of a particular King: the Crown witnesses said that they understood it as of the well known "King's evil"; and I, for one, cannot blame them.

The charge to the Jury (Counsel for the Crown waiving his right to address them) was grossly unfair as was to be expected in a State Trial in those days: everything was left by Crown Counsel to the presiding Judge's charge and he certainly addressed the jury in terms which now-a-days would be considered improper by Crown Counsel and a valid ground of appeal.

The Chief Justice's charge was outrageous: that "blessed martyre King, King Charles I" was pressed into service, for "lack-a-day, perhaps, there were as many rebels against the late King raised by the beating of the cushion in the pulpit as by the beating of the drum"—the "wethers of the faction . . . under pretence of religion came . . . particularly as instruments to bring that blessed martyr, King Charles the first to the block," and the like.

The result was inevitable: a verdict was returned of Guilty and the prisoner was remanded for sentence.

And now occurred what would be impossible in our day, when the King reigns but does not rule, leaving the ruling to the people to whom it rightly belongs. The King was told by many of his friends that the trial was a disgrace—as, indeed, it was—although the jury were perfectly justified in the verdict—he instructed his Attorney-General, Sir Robert Sawyer, to agree to an Arrest of Judgment. On Monday, November 24, Rosewell, being put to the Bar for sentence, while protesting his detestation of the language imputed to him, claimed that the language did not amount to High Treason: the Attorney-General, on instructions from the King agreed that Counsel should be assigned to the accused, and Mr. Wallop, Mr. Pollexfen and Mr. Thomas Bampfield were, on Rosewell's request, assigned his Counsel. The last-named is unknown to fame—than the first two, none could be more competent.

The argument came on, Die Mercurii, 26 Novembris, 1684, Wednesday, November 26, 1684—the Chief Justice, who had also received an intimation from the King, said "It is so loose a hung-together Indictment as truly I have scarce seen," and "that there might have been a good indictment framed on such words as these . . . is no question with me at all": but judgment was reserved and Rosewell remanded to the King's Bench prison. No judgment was actually given but matters were becoming awkward for the Stewarts, England never believed that they were not Roman Catholic at heart, Charles began to recognize that he must—or might—require to rely upon Presbyterians and other non-Anglicans—and he gave a free pardon to Thomas Rosewell—the prisoner presented it at the Bar of the Court of King's Bench and was discharged.

Those who desire to know more of Thomas Rosewell and his case may consult the pages of 10 *Howell's State Trials,* 147-308—reading between the lines. There is to be read the Puckish-malicious glee of Jeffreys at the difficulty the Attorney-General found himself in, in endeavoring to support a conviction which the Chief Justice had helped to obtain—or rather had obtained for him. It is certain that had the King not deemed it wise not to enforce the conviction, the motion would have been overruled and Rosewell hanged—and it is not unlikely the cup of the Stuarts would have been full. Already, however, the Crown was bidding for the support of the Dissenters which was to prove a broken reed in 1688. The reports of the case in 3 *Modern Reports,* 52 and 2 *Shower,* 411, are very defective.

But in every report of those times we should *read between the lines.*