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MODERN ESTIMATES OF TWO "INFAMOUS" JUDGES AND THE LESSON OF THE REPUTATIONS OF JEFFREYS AND BRAXFIELD¹

Frank W. Grinnell²

The Whig pictures of Jeffreys and others and the "Popish Plot" in the 17th century, and of Lord Braxfield and the Scotch sedition trials of the end of the 18th century, have been re-studied by various men who have given us a more balanced picture of them and their background which helps us to get the history of the criminal law in perspective.

LORD BRAXFIELD

Robert McQueen, Lord Braxfield, was born in 1722, the grandson of a gardener of the Earl of Selkirk and the son of the Earl's baron-baillie. He became the leading counsel at the Scottish bar, was appointed to the bench in 1776, rather against his inclination, was promoted to the position of Lord Justice—Clerk—the Chief Criminal Judge in Scotland—in 1788, and presided at many of the sedition trials in Scotland at the time of the French Revolution. He died in 1799. Lord Cockburn, then a boy, and later a Scottish Whig who became a judge of the early nineteenth century, left us, in his "Memorials," this picture:

"But the giant of the Bench was Braxfield. His very name makes people start yet. Strong built and dark, with rough eyebrows, powerful eyes, threatening lips, and a low growling voice, he

was like a formidable blacksmith. His accent and his dialect were exaggerated Scotch; his language, like his thoughts, short, strong, and conclusive. Illiterate and without any taste for refined enjoyment, strength of understanding, which gave him power without cultivation, only encouraged him to a more contemptuous disdain of all natures less coarse than his own.' With regard to his Lordship's conduct as a criminal judge, Cockburn describes it as a disgrace to the age, and says he was never so much in his element as when taunting some wretched culprit, and sending him to Botany Bay or the gallows with an insulting jest."³

Writing of the subject of the picture, on his bicentenary in 1922, William Roughead, a most readable author, tells us that of the several ways by which the eminence of a "bicentenary" may be attained:

"there is one that surely leads to posthumous renown. . . . A high reputation for wickedness is an unailing passport to immortality. . . . Whether you proudly reign with Ahab and Caligula, or take humbler rank with Bluebeard or the Tichborne claimant, the benefit of infamy is assured."

"Something of this invidious fame has been conferred by Lord Cockburn upon Lord Braxfield. Cockburn was in no sense of the term a great judge, but he was a good man and a writer of much charm, so he justly enjoys wide popularity and his opinions are generally received. Braxfield, a rough diamond, inelegant of manner, broad, convivial,

¹ Read before the Massachusetts Historical Society.

² Editor of the Massachusetts Law Quarterly,

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³ "The Riddle of the Ruthvens and Other Studies," Roughead, p. 48.

strong in mind as in body, humorous after the fashion of Ben Jonson, passionately patriotic, an inveterate Tory, and above all a great lawyer, was the full-blooded son of the Eighteenth Century. Cockburn, well bred, urbane, fastidious, physically slight, a resolute Whig of the Reform brand, and, both intellectually and professionally, less distinguished than the other, was a child of the new era. Had they met as men—for Cockburn was a boy when Braxford died—my Lord might conceivably have called his learned colleague a 'daam'd auld wife'; Cockburn's retort, if more genteelly phrased, would have been none the less unflattering. But they never did so meet, for Cockburn was not admitted to the Bar till the Justice-Clerk was in his grave, and the forbidding portrait of 'the Jeffreys of Scotland' in the *Memorials* is painted by a partisan brush with other people's colours. . . .

"In this age of compromise and coalition we can hardly conceive the inflammatory effect upon our forebears of divergent political views. The Scot of those days regarded differences in politics and doctrine as equally vital, and imported into the one a bitterness more properly reserved for the other. Cockburn, in writing his *ex parte* account of the sedition trials, says that he recognised the duty of never letting Braxfield and the years 1793 and 1794 be forgotten,' and that he only refrained from publishing it in his lifetime out of consideration for the feelings of the other judges' relatives (a). His endeavour thus to perpetuate the memory of 'this coarse and dexterous ruffian,' a singular labour of love, might have failed of its purpose. Fortunately for Lord Braxfield's fame there was exhibited at Edinburgh one autumn in the 'seventies a collection of paintings by Sir Henry Raeburn, into which a certain young advocate,⁴ with nothing better to do, found his way. The half-length of Robert M'Queen of Braxfield irresistibly attracted him; the result was the de-

lightful sketch in *Some Portraits by Raeburn*, and the living picture in *Weir of Hermiston*."** . . .

"In pronouncing moral judgment on the great figures of history the mistake is often made of applying our modern standards to their so different conditions. . . .

"Those who condemn Lord Braxfield as a corpulent and foul-mouthed old pagan—'his religion railing and his discourse ribaldry'—are strangely ignorant or forgetful of the manners of eighteenth-century Edinburgh. Everybody drank too much, swore too hard, laughed at everything, believed in little, and blushed at nothing. But one thing Lord Braxfield did do, faithfully, with a single eye and an undivided heart—his duty. It was a corrupt age, most officials had their price, and he was above suspicion; it was a self-indulgent age, and he wrought late and early at what work was given him to do; it was a naughty age, and he was a good husband, an affectionate father, a loyal friend, and he left to his children the heritage of his high reputation and an unstained name. If he sat too long over the decanters, and if the raciness of his humour was inordinately pronounced, these were foibles which many of his contemporaries, honourable and upright men, were content to share. His critics may be more nice of speech and less robust of stomach, but most of them would be all the better for some of his Lordship's brains."

Why was such a man referred to as "the Jeffreys of Scotland"? Because his terrifying manner of conducting criminal trials (even of guilty persons) in a hanging age of political ferment gave a "sinister conception of the trial judge" which, as Pound tells us, was brought to this country by the large number of Scotch emigrants (widows, relatives, friends and neighbors of Braxfield's victims) at the beginning of the

⁴ "Glengarry's Way and Other Studies," William Roughead (pp. 277 df. 297-8).

(a) "Examination of Trials for Sedition in Scotland," Edinburgh, 1888, i. 87.

nineteenth century, and thus contributed to a popular distrust of powerful judges in the criminal courts. The "quality of mercy" had begun its modern influence.⁵

"THE BLOODY JEFFREYS"

Turning back a century—Sir George Jeffreys, in the short space of forty years, was born, became a sergeant at law, Recorder of London, Lord Chief Justice of England and Lord Chancellor, and died in the Tower a great sufferer from the stone at the age of forty, after the abdication of James II, leaving a reputation as the most infamous judge in English history. This reputation also crossed the ocean, not only in the minds of English emigrants in large numbers, but in English literature during the rise of the Whigs in the generations following the Revolution of 1688. The most widely read accounts of this extraordinary young man are those of Lord Campbell and of Macaulay, especially. Macaulay begins his picture (in the fourth volume of his "History") as follows:

"The depravity of this man has passed into a proverb. Both the great English parties have attacked his memory with emulous violence; for the Whigs considered him as their most barbarous enemy; and the Tories found it convenient to throw on him the blame of all the crimes which had sullied their triumph. A diligent and candid inquiry will show that some frightful stories which have been told concerning him are false or exaggerated. Yet the dispassionate historian will be able to make very little deduction from the

vast mass of infamy with which the memory of the wicked judge has been loaded.

"He was a man of quick and vigorous parts, but constitutionally prone to insolence and to the angry passions. . . .

"he became the most consummate bully ever known in his profession. Tenderness for others and respect for himself were feelings alike unknown to him. He acquired a boundless command of the rhetoric in which the vulgar express hatred and contempt. The profusion of maledictions and vituperative epithets which composed his vocabulary could hardly have been rivaled in the fish-market or the bear-garden. His countenance and his voice must always have been unamiable. But these natural advantages—for such he seems to have thought them—he had improved to such a degree there were few who, in his paroxysms of rage, could see or hear him without emotion. Impudence and ferocity sat upon his brow. The glare of his eyes had a fascination for the unhappy victim on whom they were fixed. Yet his brow and his eyes were less terrible than the savage lines of his mouth. His yell of fury, as was said by one who had often heard it, sounded like the thunder of the judgment-day. These qualifications he carried, while still a young man, from the bar to the bench. . . .

"As a judge at the City Sessions he exhibited the same propensities which afterward, in a higher post, gained for him an unenviable immortality. Already might be remarked in him the most odious vice which is incident to human nature, a delight in misery merely as misery. There was a fiendish exultation in the way in which he pronounced sentence on offenders. Their weeping and imploring seemed to titillate him voluptuously; and he loved to scare them into fits by dilating with luxuriant amplification on all the details of what they were to suffer."⁶

⁵ Compare "Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System," *Mass. Law Quart. for Aug.*

1917, 591.

⁶ "Selections from Macaulay," Trevelyan (pp. 181-2).

The somewhat inaccurate details and the impressionist picture which follow this introduction have been questioned, or corrected, by the studies of H. B. Irving, John Pollock, Henry Mudiman and others, but Judge Parry writing one of the latest accounts of him, in his history of the "Bloody Assizes," published in 1929, thinks he deserved his reputation, saying:

"A great deal has been done to deodorize the memory of Jeffreys, and if it were possible to write his biography without reference to the Bloody Assize and other criminal trials, in which his lust of cruelty overpowered his common sense, some kind of entertaining inoffensive portrait might be made of a clever, self-seeking lawyer climbing to the top of an exceedingly slimy pole.

"H. B. Irving's apologia for the life of Jeffreys is a classic. It will never be better done. But reading the essay carefully again, I feel that in smoothing out the wrinkles of rascality he leaves his hero insipid and wanting in character. Jeffreys, to be true to life, must be as bloody as Macbeth without his infirmity of purpose. The attempt to canonize him was bound to fail, and in the end you cannot see the saint for the whitewash."⁷

H. B. Irving's purpose, however, was not to "canonize" Jeffreys, but to reduce him to a more human villain of less abnormal proportions who, with some of his predecessors and contemporary judicial colleagues, typified the beginning of the end of a brilliant, self-indulgent, brutal and corrupt political and social era which reeked with revolution, perjury, prejudice, credulity and fanaticism. In that era a judge (with rare exceptions like Sir Matthew Hale) was, generally, expected to be,

not an impartial officer, but an arm of the Crown, combining in one man in varying degrees, the functions of police chief, prosecutor and judge, to carry on proceedings and impose penalties which seem to us to-day diabolical in their nature, but which reflected the "mores," religious, social, and political, of seventeenth century England. Jeffreys and his associates were typical products of conditions and not isolated fiendish historical mavericks. And most of them were men of ability, especially Jeffreys, for a man who died at the age of forty could not have had such a career, even in that era of corruption, without ability. Dean Pound, in an address⁸ to the bar of South Dakota a few years ago, said of him:

"I well remember the shock when as a first-year student of law I came upon a decision of Jeffreys as Chancellor in a collection of authorities on the law of Property. With my mind full of Macaulay's invective, it seemed incredible that what such a man may have decided could possibly deserve or have any authority. Later when I had to teach the law of Trusts, and hence was led to study the old equity decisions, I was astonished to find how well Jeffrey's decisions as Chancellor had maintained themselves. I was amazed to find how much more he counted in the reports which have made our law than Somers, who is, next to William III, the hero of Macaulay's history. Still later I had to look into seventeenth-century procedure in connection with the movement at the beginning of the present century to overhaul the procedure of American courts. Here, too, I noted with astonishment that more than one procedural crudity of Matthew Hale, who is one of Campbell's heroes, did not obtain under Jeffreys. . . . What-

⁷ "The Bloody Assize," Sir Edward Parry (p. 38).

⁸ The American Attitude Toward the Trial Judge.

ever else he may have been, the law books show clearly enough that Jeffreys was a lawyer—indeed was no ordinary lawyer. . . .

“ . . . however, when Jeffreys was on the bench, the memory of the Long Parliament and the Commonwealth was green. Men then living remembered how Whiggery and non-conformity had plunged the nation into civil war, had executed a king, had suspended Magna Charta, and had set up a military despotism. When Jeffreys at the trial of Baxter said that a Presbyterian was ‘as full of treason as an egg is of meat,’ shocking as that sounds to us now, he said simply what every loyal adherent of the Restoration felt deeply to be the truth.

“Such is the background of Jeffreys. He lived and judged in a period of transition from an old England to a new.”

The background of the popular excitement and of the administration of the law of treason in England between 1670-1688 appears also in John Pollock's book on “The Popish Plot,” which was published in 1903.

Inspired, as he indicates in her preface, by the example and suggestions of Lord Acton, the eminent historian and leading Catholic layman in late Victorian England, he endeavors to steer his way between the lies of Titus Oates and others. He produces long-buried information from papers in the British Museum and elsewhere. He analyzes, and marshals, the facts as to the three-hundred-year-old mystery story of Godfrey's murder the various “plots” and the long contest between Whigs, Tories, Catholics, Anglicans, Dissenters, Charles II., James II., the Earl of Shaftsbury, and Louis XIV, who were all mixed up together in the drama which was presented from the Stuart point of view in 1681, at

the request of Charles II, by John Dryden, the poet laureate, in “Absalom and Achitophel.” In Dryden's poem Monmouth appears in the role of Absalom, Shaftsbury as Achitophel, and Charles as David. Pollock says:

“The trials of the Popish Plot have remained the most celebrated in the annals of our judicial history. Their reports occupy three volumes of the State Trials and more than two thousand pages of crowded print. They contain twenty-two trials for treason, three for murder or attempt to murder, eleven for perjury, subornation of perjury, libel, and other misdemeanours. They gave rise to proceedings in Parliament against two Lord Chief Justices, and against two judges of the Court of King's Bench. They are a standing monument to the most astounding outburst of successful perjury which has occurred in modern times. It is due to their connection with these trials that posterity has branded the names of three judges with lasting infamy, and that fourteen men executed as traitors have earned the reputation of martyrs. Not only are they filled and brimming with the romance of life and death, but there lies locked within them the kernel of that vast mass of treason, intrigue, crime, and falsehood which surrounds and is known as the Popish Plot. Strangely enough, therefore, they have been little studied and never understood. To appreciate properly the significance of the trials they must not be taken apart from their setting, and it is necessary before passing judgment upon the events recorded in them to review the past which lies behind them and the causes which influenced their nature. . . .

“Throughout the sixteenth and seventeenth centuries, from the time when Henry VIII broke the political power of Rome in England until the day when the last revolution destroyed the influence of the Jesuits in English politics, the English state lived and developed in an atmosphere charged with

the thunderstorm and resonant with the note of war. War against foes within the land and without was the characteristic condition of its existence. Besides conflict with foreign powers, war and rebellion, constant in Scotland and almost chronic in Ireland, may be counted, in eight reigns, three completed revolutions, ten armed rebellions, two great civil wars, and plots innumerable, all emanating from within the English nation alone. From beyond seas enemies schemed, almost without ceasing, to overturn religion or government or both as they were established at home. There is no need to wonder that the English government was a fighting machine. In this light it was regarded by all men. Where government is now looked on as a means of getting necessary business done, of ameliorating conditions of life, and directing the energy of the country to the highest pitch of efficiency, two centuries and a half ago it was anxiously watched as an engine of attack or defence of persons, property, and conscience. . . .

"To be 'counted to be a very pernicious man against the government' was sufficient to weigh against the credibility of a witness before the highest tribunal of the kingdom.

"The only practicable instrument of government for the defense of the state was the judicial system of the country. As there was no method known for the prevention of crime by an organised force of police, and no deterrent exerted on would-be criminals by the existence of a standing body of soldiery, the only possible weapon to be used against them was to be found in the law courts. It followed that the judges and justices of the peace, not only fulfilled the judicial and magisterial functions which are known to modern times, but constituted as well an active arm of the administration. . . .

"The justices were able administrators, dealers of small mercy to the evildoer, guardians of the peace in the name of which their commissions ran; but the judges took a place in the foremost rank as great officers of state. The

character of their office had been determined by the famous conflict between James I and Lord Chief Justice Coke which came to a head in 1616 and ended in Coke's dismissal. . . .

"The Lord Chief Justice, 'toughest of men,' and too stubborn to yield, was broken; but his brethren on the bench gave way and offered assurances of their good conduct for the future and of their devotion to the royal will. James took the opportunity of the lecture which he read to the judges in the star chamber to compare their behaviour in meddling with the prerogative of the crown to the atheism and blasphemy committed by good Christians in disputing the word of God.

"Thus the judges became, according to Bacon's wish, 'lions, but yet lions under the throne,' and carried themselves very circumspectly not to 'check or oppose any points of sovereignty.' Of their regularity in this course there can be no doubt, for if any lapsed into forbidden ways, a judge he speedily ceased to be. . . .

"Theoretically, the court was 'of counsel for the prisoner' in matters of law; and practically, as this conflicted with the judges' duty to the king and their watch over his life, the prisoner was allowed to shift for himself." . . .

Aside from the provision of tenure, during good behavior, of the judges in 1701

"the new system has emerged from the old by a procession of unconsidered changes, at different times, of varying importance, the results of which have come to be so universally known and approved, that to the backward glance they seem to be, not the outcome of long experience, but inextricable parts of a system which has existed from all time. The essential change has been *one of conduct* less than of opinion, and is to be found rather in an altered point of view than in any variation of practical arrangements. . . ."

The vehement partisanship of Jeffreys created a reputation for a trial

judge as a partisan monster which, as Pound said, was brought to this country by Monmouth's contemporaries just at the time that American courts were beginning to develop.

As the manners and personalities of strong men on the bench in the trials of persons, most of whom were guilty according to the law as it then was, in a period of brutality, shocked and obscured the popular ideas of justice in England, so we had their prototypes, to some extent, in America, not only in some colonial judges, but after the Revolution. The behavior of the stout old patriot, Samuel Chase, of Maryland, and other Federal judges who presided at trials under the "alien and sedition" acts, contributed to the Jeffersonian reaction. Pound draws the lesson from "the aftermath of these strong judges."

"... in the lax criminal law of the nineteenth century, which has given us much trouble in the present generation, in the elective judiciary, and loss of judicial independence, in legislative turning of trial judges into moderators, and in codes of procedure which bind the trial judges hard and fast.

"There is a lesson for us here when we are inclined to applaud judicial and magisterial overriding of individual claims, to set aside legal and constitutional guarantees, and to wink at invasions of private rights in the supposed interest of law and order. The reaction from these things may presently undo more than the suppressed disturbers possibly could have shaken or thrown down.

"There is no time when it is so important that justice be administered judicially, and when it is so unlikely to be administered judicially, as in times of political and economic excitement in an era of transition. The *excessive* zeal of the strong conservative judge in such an era is one of the most certain agencies of bringing about radical changes."

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