

ART. IV.—1. *Circuit Journeys.* By the late Lord COCKBURN. Edinburgh: 1888.

2. *An Examination of the Trials for Sedition which have hitherto occurred in Scotland.* By the late Lord COCKBURN. In 2 vols. Edinburgh: 1888.

THOSE who are already acquainted with the writings of Lord Cockburn will turn with eager interest to the perusal of the two works named above, which have just been published by Mr. David Douglas, more than thirty years after the death of their author. Few books give a more delightful picture of Scottish and especially Edinburgh cultivated life than Cockburn's 'Memorials of his Time' (1800-1830) and Cockburn's 'Journal, 1830-1854,' whilst his 'Life of Lord Jeffrey' is recognised as one of the very best of those lives of the lawyers which constitute so large and interesting a portion of modern biographical literature. And no one assuredly could have been better fitted than Cockburn to draw a faithful picture of Scottish life during the first half of the present century. A Scotchman himself to the tips of his fingers; by birth and parentage, in his school life and his university career, at the bar and on the bench, deeply interested and taking an active part in those special controversies of his countrymen which few Englishmen care to take the trouble even to understand, yet not withholding, out of any absorption in merely local politics, the exercise of his influence in the wider field of British politics and thought. He loved Edinburgh and Edinburgh life. He delighted in the picturesqueness of the old Scottish capital, and the associations in which it is so rich. Few men were more social than Cockburn. Indeed, he tells us that he doubts whether there was more than one day in the month, throughout his town life, from the date of his marriage for forty years, when he closed the day alone and in his own house. Collecting his friends around him at supper, or enjoying their hospitality, his evenings were almost invariably spent in free social intercourse with men and women who not merely constituted the best set in Edinburgh, but whose attainments and characters would have added lustre and charm to any cultivated society in the world. Thus there is no book better fitted than the 'Memorials' to recall to the mind, one may almost say to the eyes and ears, of readers the quaint persons of bygone judges and philosophers and ministers, the kindly vigorous

old ladies, with their strong individuality and masculine intellects, the racy talk, the social life and fun of old Edinburgh. Whilst in the 'Journal' with much of lighter matter there is to be found one of the very best and fairest accounts that have ever been given of the merits of that bitter politico-ecclesiastical controversy which raged in Scotland during a large portion of Lord Cockburn's judicial life.

Henry Cockburn was born in 1779, at which time his father, a Scottish advocate of note, afterwards Baron of Exchequer, was sheriff of Midlothian. His mother was a daughter of Captain Rennie of Melville, another of whose daughters was the wife of Henry Dundas, afterwards Lord Melville. His family connexions and early influences were such as would almost certainly have conducted an ordinary boy along the broad way which led to Toryism. His uncle was the presiding genius for many years of Scottish Toryism. His father's house was a centre where Edinburgh Tories used to congregate, and many a time young Henry Cockburn went off to bed shuddering at the fears and anticipations of excellent gentlemen who had been frightened out of their senses by the excesses of the French Revolution. Fortunately, his keen, active mind brought him in contact in very early manhood with that brilliant set of young men who, resisting every inducement which professional prospects had to offer, and every pressure which social narrowness and exclusion could bring to bear, manfully upheld in Scotland the trodden-down principles of the Whigs, and from Edinburgh itself influenced opinion over the whole United Kingdom by the ability, the brilliancy, and the independent spirit of their writings in the 'Edinburgh Review.'

His early youth gave little promise of his brilliant future. His father's house was situated on the south side of the Meadows, whence at that time the unfenced country stretched to the Pentlands and onwards in almost unbroken moorland to the wild hills of Selkirkshire; and here he acquired in many a ramble of his boyhood that taste for nature and the country, especially for wild country, which was a marked characteristic of the man throughout his life.

Cockburn tells us how in his boyhood he used to watch with reverence and awe the still surviving philosophers and divines of an almost extinct generation—Principal Robertson, Dr. Adam Ferguson, Dr. John Erskine, Dr. Henry the historian, and Sir Henry Moncreiff (who, however, lived for many a later day), and many more.\*

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\* Memorials of His Time, p. 57.

' These men were all great peripatetics, and the Meadows was their academic grove. There has never in my time been any single place in or near Edinburgh which has so distinctly been the resort of our philosophy and our fashion. Under these poor trees walked and talked and meditated all our literary and scientific, and many of our legal worthies. I knew little then of the grounds of their reputation, but saw their outsides with unquestioning and traditionary reverence; and we knew enough of them to make us fear that no such other race of men, so tried by time, such friends of each other and of learning, and all of such amiable manners and such spotless characters, could be expected soon to arise and again ennoble Scotland.'

For four years young Cockburn attended the lower class of the High School, which he describes as rough to a degree, the roughness of the masters in some cases amounting almost to savagery. On an average he was flogged, he tells us, once every ten days throughout the four years, at the end of which time he joined the class of the rector, Dr. Adam, the distinguished author of '*Roman Antiquities*.' Among Cockburn's contemporaries was Francis Horner, who became dux of the class. Yet, in spite of the learning of the rector and the brilliancy of his companions, young Cockburn made poor progress, carrying away from school little but the wise words of the rector's address to his class on leaving, in which he cautioned his successful scholars against overconfidence in their future, and the less fortunate ones against despondency.

To Cockburn at all events, who during his school life never got a prize, and who at the annual public examination had once 'sat boobie,' these words gave encouragement; and there is much truth in the reflection due to the experience of his later life, that whilst in good schools a boy who rises high 'will rise high in life, in bad schools it is just the 'reverse.' So at all events it was with Cockburn and his friends. 'The High School distinctions very speedily vanished; and fully as much by the sinking of the luminaries who had shone in the zenith as by the rising of those who had been lying on the horizon. I have ever since had a distrust of duxes, and thought boobies rather hopeful.'

It was when Henry Cockburn began to attend the lectures of Dugald Stewart, who then filled the chair of moral philosophy at the University of Edinburgh, that his mind first awoke.

' His lectures were to me like the opening of the heavens. I felt that I had a soul. His noble views unfolded in glorious sentences elevated me into a higher world. I was as much excited and charmed

as any man of cultivated taste would be, who, after being ignorant of their existence, was admitted to all the glories of Milton, and Cicero, and Shakespeare. They changed my whole nature.'

The philosopher himself, who produced this powerful effect on the budding mind of Cockburn, is described as follows in one of those graphic sketches in which the 'Memorials' abound:—

'Dugald Stewart was about middle size, weakly limbed, which gave an air of delicacy to his gait and structure. His forehead was large and bald, his eyebrows bushy, his eyes grey and intelligent and capable of conveying any emotion, from indignation to pity, from serene sense to hearty humour, in which they were powerfully aided by his lips, which, though rather large perhaps, were flexible and expressive. The voice was singularly pleasing, and, as he managed it, a slight burr only made its tones softer. His ear both for music and speech was exquisite. The finest reader I have ever heard.'

Had Dugald Stewart lived in ancient times,

'his memory would have descended to us as that of one of the finest of the old eloquent sages. But his lot was better cast. Flourishing in an age which requires all the dignity of morals to counteract the tendencies of physical pursuits and political convulsion, he has exalted the character of his country and his generation. No intelligent pupil of his ever ceased to respect philosophy, or was false to his principles, without feeling the crime aggravated by the recollection of the morality that Stewart had taught him.'

In 1799 he joined the Speculative Society. Petty, afterwards Chancellor of the Exchequer and Marquis of Lansdowne, had left it, but Brougham, Horner, Jeffrey, and James Moncreiff regularly attended its debates; and here went on apace that ripening of Cockburn's intellect and powers which Dugald Stewart's lectures had begun. The following year he entered the Faculty of Advocates, 'and with a feeling of 'nothingness paced the Outer House.' There was in truth much to make him despondent; for party feeling was at that time rampant, Tory ascendancy was complete, and though it was impossible to exclude from professional business the brilliant Whig lawyers whose position had become assured before the horrors of the French Revolution had turned men's heads, almost the whole of the junior practice of the time was engrossed by the Tories. Cockburn had joined the Whig lawyers. With them he lounged idly enough year after year at the north end of the Outer House, 'the known haunt 'of these doomed youths,' who, however much they might feel that for them there was no fair competition in the professional race, were yet cast down neither by their want of

business nor by their bad character, and who for the most part in their after lives, by distinction won in many fields, in literature, in politics, and in law, added lustre to their country and the age. It is creditable to Cockburn that, notwithstanding the bitterness of party feeling, he draws so pleasant a picture of the two leading Tory lawyers of the day, Robert Dundas and Charles Hope. Robert Dundas of Arniston, Lord Advocate, represented officially the Government in the persecuting policy of the time. Fortunately he was a man of kindly nature, and though he considered resistance to revolution to be his main duty, he obtained and deserved a character for moderation in performing the part of the public accuser. Indeed, throughout the many pages which in his various works Cockburn has devoted to censuring the arbitrary judicial proceedings of his early life, he seldom has any fault to find with the bar. His strictures are reserved for the judges. As to Lord Advocate Dundas, he declares that he might have had transported every political opponent whom he chose to indict, and he is grateful to him for the fewness of the victims that he brought before the courts. In 1803 he was succeeded as Lord Advocate by Charles Hope, afterwards Justice Clerk and Lord President, who, prominent Tory as he was, never lost the personal friendship of a political opponent. Hope was a distinguished volunteer, and even after he had been raised to the Bench he did not find 'the judge's wig incompatible with the 'colonel's cocked hat'—a precedent worth recalling at the present day when the robes of the Lord Justice Clerk do not completely hide from the public view the uniform of a brigadier-general.

The social meal of Edinburgh was the supper. Dinners were more formal entertainments, and were rendered formidable by the prevailing fashion of drinking healths, of giving rounds of toasts, and, worst of all, by the habit of inviting, and almost of compelling, the guests, male and female, to give a 'sentiment.' 'The proper sentiment was a high and pure 'production—a moral motto—and was meant to dignify and 'grace private society.' But ordinary mortals could not maintain 'the sentiment' at so high a level, and it became in general the most hackneyed commonplace. Our author gives as a good 'example of the emetical nature of the stuff swallowed,' the sentiment elaborated by the poor dominie at Arndilly, who, pressed to undertake a duty which was new to him, and observing the sort of sentiment which met with approval, gave out, after much writhing and groaning,

'The reflection of the Moon in the cawm bosom of the Lake.'

Suppers were far more friendly gatherings.

'Supper is cheaper than dinner; shorter; less ceremonious; and more poetical. . . . If there be any fun, or heart, or spirit in a man at all, it is then, if ever, that it will appear. So far as I have seen of life, its brightest sunshine has been in the last repast of the day.'

There were the Sunday suppers of old Sir Henry Moncreiff, for example—one of those who always dined 'between sermons,' and who might be seen any Sunday afternoon walking back from his house in Queen Street to his church, 'with his bands, his little cocked hat, his tall cane, and his cardinal air, where he would preach a sensible, practical sermon, and then walk home again in the same style.' At five he would drink tea, and, after spending some hours in his study, would have family prayers at nine, which, however, were not confined to his own family, and then 'the whole party sat down to the roasted hens, the goblets of claret, and the powerful talk of their host.'

As may be supposed, the Bar and the Bench did not lag behind the Church in the gaiety of these social gatherings. Amongst the Scotch judges, and often amongst the most distinguished for literary attainments, there have been generally found men who were able to dismiss for the time their professional cares and their arduous studies, and who delighted to mix in the freest and easiest intercourse with each other, and with men and women less busy than themselves. That the drinking of spirituous liquors, even in moderation, could be in itself a vice, was an idea foreign to the minds of our ancestors; and a great deal of the drinking of the day was far from moderate. Lord Cockburn tells a delightful story of the enthusiasm shown for the cause of drink by Lord Hermand, before whom and his brother judges, in Edinburgh, a young man had been convicted of the culpable homicide of his friend. It appeared that the two had been spending the evening together, first at the theatre, and afterwards over their punch, and that, owing to rashness or accident, arising from a kindly wrangle, the one had stabbed the other, without any violence, yet so as nevertheless to cause death. The majority of the court, taking the whole circumstances into consideration, had properly sentenced the survivor to only a short term of imprisonment. Lord Hermand had no sympathy with the weakness of his fellow judges; he would cast no such slur on the cause of drinking; 'let the prisoner be transported.'

'We are told that he was in liquor. In liquor! why he was drunk! And yet he murdered the very man who had been drinking with him! They had been carousing the whole night, and yet he stabbed him! After drinking a whole bottle of rum with him! Good God, my lords! if he will do this when he's drunk, what will he not do when he's sober!'

Of the old ladies of his youth Cockburn tells several capital anecdotes, illustrating the description he gives of them as a somewhat singular yet delightful race, which has almost disappeared from the more commonplace and humdrum society of the present day.

'Strong-headed, warm-hearted, and high-spirited; the fire of their tempers not always latent; merry even in solitude; very resolute, indifferent about the modes and habits of the modern world; and adhering to their own ways, so as to stand out like primitive rocks, above ordinary society. Their prominent qualities of sense, humour, affection, and spirit were embodied in curious outsides; for they all dressed and spoke and did exactly as they chose; their language, like their habits, entirely Scotch, but without any other vulgarity than what perfect naturalness is sometimes mistaken for.'

What a changed world it was, socially and politically, in the year 1854, when Cockburn's 'Journal' ends, since the day when the young Whig outcast first entered the Parliament House! The dark days of Tory ascendancy had been brightened by the rise of the 'Edinburgh Review,' and some dozen years later by the appearance of a new weekly paper, 'The Scotsman,' which has for seventy years past, through its various stages of weekly, bi-weekly, and daily, upheld, as it still upholds, the cause of Liberalism and rational progress. But in spite of these gleams of sunshine, giving promise of a better time, it was not till 1830, when Lord Grey came into office, when Francis Jeffrey became Lord Advocate, and Henry Cockburn Solicitor-General for Scotland, that the clouds really broke, or till the end of 1832 that they were finally dispelled. The return of Jeffrey and Abercromby for the city of Edinburgh was the grand triumph of the Reformers, and to their opponents Cockburn would not even allow the only consolation they could lay claim to—that their party, if weak in numbers, possessed all the wealth of the city—'for it appeared, on a careful examination, that 'their minority in point of property was as decided as in 'numbers.'\* The Reformers, moreover, had on their side the mind and the conscience of Scotland, and it is little wonder

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\* Journal, vol. i. p. 42.

that a party resting on such a foundation should have been able to secure for many years the prevailing influence in the politics of their country.

There is something singularly attractive in the nature of Cockburn. His life was to him full of interest and happiness. His delight in his friends and in his surroundings shines brightly out of every page of his writings. We can picture to ourselves the gaiety, the good humour, and the geniality which the presence of such a man must have generated in any society in which he moved. To him belonged that complete satisfaction with himself which it is so rare to find unaccompanied with the sense of superiority to others. Of arrogance in Cockburn's nature there was none; of sympathy there was much; and hence his geniality and his good spirits infected his companions, and made him the delight of those social gatherings for which Edinburgh was famous, and which have been described by no one so well as by himself. Whether in society or alone, Cockburn intensely enjoyed his life.

When on his circuit journeys (he became a lord of session in 1834) in the Highlands or on the Borders, north, or south, or west, he is impressed with the ever present consciousness that there is no scenery like that of Scotland, no country whose associations are of deeper interest. The Scottish tongue gives utterance to the 'sweetest and most expressive of living languages,' and he is sorry without affectation for 'the poor one-tongued Englishman,' who is incapable of appreciating the homely humour, the descriptive power and eloquence of the Ettrick Shepherd.

Bonaly, at the foot of the Pentland Hills, where, in 1811, 'he had set up his rural gods,' was 'a paradise' whence nothing less than an avenging angel should ever drive him. Here, he tells us, he

'reached the dignity of a twenty-acred laird. Everything except the two burns, the few old trees, and the mountains are my own work, and to a great extent the work of my own hands. Human nature is incapable of enjoying more happiness than has been my lot here; where the glories of the prospects, and the luxury of the wild retirement, have been all enhanced by the progress of my improvements, of my children, and of myself. I have been too happy, and often tremble in the anticipation that the cloud must come at last. Warburton says there was not a bush in his garden on which he had not hung a speculation. There is not a recess in the valleys of the Pentlands, nor an eminence on their summits, that is not familiar to my solitude. One summer I read every word of Tacitus in the sheltered crevice of a



rock (called my seat) about 800 feet above the level of the sea, with the most magnificent of scenes stretched out before me.'

Some four years after Cockburn settled at Bonaly, Jeffrey established himself in the same neighbourhood, at Craigmuck, a place that became for many years the great centre in Scotland of literary and political thought.

'The Craigmuck Saturdays during the summer session! Escape from the Court and the town, scenery, evergreens, bowls, talk, mirth, friendship, and wine inspire better luxury than that of the Castle of Indolence, without any of its dulness.'

Edinburgh society was then quite at its best. When the peaceful years following 1815 had opened the Continent to Englishmen, many of those who had visited and resided in Edinburgh naturally flocked across the Channel to see something of the European capitals; and thus there was lost to Edinburgh an element which had added considerably to the exceptionally brilliant native society of the time. At all events, it was to that period that Cockburn looked back as the palmiest age of Modern Athens (a name, by the bye, he particularly disliked).

His 'Circuit Journeys,' generally made with his wife, show that he managed to enjoy every scrap of idle time that good fortune put in his way, or which the necessity of travelling from county town to county town necessitated. The busy judge so much enjoys and so vividly describes Loch Fyne, Loch Lomond, the Trossachs, and Iona, that the reader almost fancies that he has before him the account of a holiday tour by some enthusiastic worshipper of nature. He passes a Sunday in September, 1838, on Loch Fyne. 'Being a Scotch Sunday there was no boating,' and the 'minister had gone to a horse fair at Balloch'—

'so we just sauntered on the shore, and talked, and gathered shells, and skiffed flat stones on the surface of the sea, and sat on rocks, and lay on the turf, and played with the clear water, and gazed, unceasingly gazed, on the hills, and watched the shadows of the clouds, and observed how the prospects varied with our positions and with the progress of the sun, and in short had a long luxurious day of repose and enjoyment. The day was so calm that, as I was standing on the beach before breakfast, I distinctly heard the barking of a dog on the other side of the water. . . . Loch Fyne has greatly raised even my admiration of Scotland. The whole of these Argyleshire sea lochs are glorious. The boldness and beauty of their scenery, their strange, savage history, their wild language, and (till lately) their delightful inaccessibility, all give them a character of picturesque romance which

nothing else in this country resembles. But, independently of past associations, what an interest is there in the mere present and external features of Loch Fyne! The picturesque hills, the bright water, the occasional masses and constant fringing of wood, the jutting and overlapping of the headlands, the apparent closing in of the loch, and its streaming away again into scenes of distant beauty; the fishing hamlets, with their boats slumbering in quiet bays and little rude harbours; the long poles loaded with brown nets, resting horizontally on the branches of two trees, springing from the very beach; then sailing under tanned canvas on a calm peaceful evening to set those nets, the boats sometimes lighted at night by hundreds, and sparkling like a moving city, and all moored again by the morning; the intercourse between families and villages by boats, which the narrowness of the loch seems to invite; the bright patches of grain amidst the darkness of the wood, or contrasted by the vapour of the brown hillside; the breeze-varied appearances of the surface of the water, and the shining and roaring of the mountain streams—these things give it an endless and irresistible charm. All this, to be sure, is the fascination of fine weather. But if other places also are to be judged of in bad weather, these lochs have nothing to fear. The worst thing is the contrast between the quiet little Indian-wigwam-looking hamlets, *when seen at a distance*, and their utter abomination when approached. It is horrid that human life should be passed in these disgusting holes. It is true that fishing, especially when combined with curing, cannot be conducted without filth. But there are many proofs that its slobbery nastiness may be concealed and kept apart from the fishers' dwellings, and that a fishing village may be a beautiful thing. But until the lairds be civilised, and cease to be all regularly and systematically bankrupt, it is vain to expect decency or comfort in the domestic habits of their people.\*

Since those days lairds and cottars have much improved their condition, though probably both classes still cherish the illusion that they endure a far harder lot than their ancestors. One cannot read these jottings of Cockburn's daily life as he travelled through Scotland, without being struck by the strides that Scotland has made in comfort and civilisation during the last half-century. People would not nowadays talk of the wretchedness of the houses and the inhabitants of Luss on Loch Lomond as a disgrace, 'an abomination which in such a scene is one of the unanswerable scandals of Scotland;' nor would the visitor to Drumlanrig remark that 'the pitiable state of disrepair,' the 'sacrifice of old timber, whose produce was wasted on profligacy in London, . . . and the paltriness of the natural features of the country' would always prevent its becoming a fine place. The proprietor, the effects of whose operations

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\* Circuit Journeys, p. 30.

were still visible fifty years ago to the eyes of Cockburn, was gibbeted by Burns in his stanzas on the destroyed woods of Drumlanrig:—

‘The worm that gnawed my bonny trees,  
That reptile wears a ducal crown.’

But the ill-treated Drumlanrig, under the long reign of a later and a very different duke, a model of an improving landlord, has falsified the prophecy of 1838, and is now by universal consent one of the very finest places of which Great Britain can boast.

In the same year Cockburn blushes at the badness and the fewness of Scottish inns, though tourists were beginning to flock to the Highlands. The inn at the Trossachs might accommodate a dozen people, but he saw a hundred or so apply for admittance, and after horrid altercations fifty or sixty of them were compelled to huddle together all night. ‘They were all of the upper rank, travelling mostly in private carriages . . . but the pigs were as comfortably accommodated.’

The following autumn, that of 1839, and the spring of 1841 find him on the Borders. Driving down ‘the pastoral valley of the Gala,’ dear to him from early associations, he proceeds *via* Melrose to the house of his old friend, Mr. Richardson, at Kirklands, near Ancrum. After spending the Sunday there he disposes of all the cases for trial at Jedburgh on the following day.

‘I never see Jedburgh without pleasure. Its position, its history, and its abbey impress it with that peculiar feeling of softness and of sacredness which pervades all our border scenery, but especially those parts of it which are dignified by fragments of architectural antiquity.’

Morning and evening he lingers over the ruin, and mourns over the atrocity of the conversion of one half of it into a parish church, that the heritors may be saved the expense of building a new one. A pity that Lord Cockburn should not have survived to a day when the feelings with which he was full are shared by all, when the blemishes of which he complains have been removed, and when so much of what he aspired to see accomplished has actually come to pass! It is true ‘that the four abbeys of Roxburghshire are private property;’ but there is every sign that, in the present day, to no people are they so precious as to those very owners, whose ancestors may have been guilty of neglect, but who themselves spare neither pains nor expense in the preserva-

tion of these beautiful and interesting remains of an age that is past.

As we have seen, Cockburn was generally happy. But he positively revelled in the beauty and associations of the Borders. Whether driving from Teviotdale through the quiet pastoral hills by Mosspaul to Langholm on the Esk, 'one of the most beautiful drives of the Scottish Lowlands,' or making his way *via* Selkirk and St. Mary's Loch to Moffat, he is charmed alike with the scenery itself and what it brings to his mind, 'the genius of Scott lingering in every valley, and embellishing every feature and every tale.' To Cockburn there was 'inspiration in the very words Newark, 'Yarrow, and Dryhope.'

We have no space to follow him further in these pleasant rambles, and it is time to give some attention to his work on the sedition trials in Scotland. In all, Lord Cockburn counts only some twenty-five charges of sedition as having been made in Scotland in the course of 146 years, i.e. from 1703 to 1849; and this mere handful of examples constitutes the whole body of sedition law so far as it depends on native precedent. None of them existed in 1793; and it is by the judges in the famous trials of that and the succeeding year that the sedition law of Scotland was created. The two volumes now published give an account of every one of these trials, and contain comments by the learned author on the proceedings in each case.

It is remarkable how strong and enduring was the effect produced on Cockburn's mind by the trials of 1793-94, or rather by the accounts and the reports of them, for when they took place he was too young to interest himself in such matters. Cockburn, though a strong party Whig, was certainly the reverse of a rancorous politician. He constantly deploras the party bitterness and narrowness prevailing in his youth, and he complains that professional neglect and social ostracism awaited the small band of courageous young Whig lawyers who began their careers at the Parliament House in the years immediately following the French Revolution. Doubtless it was bad enough, yet the impression one derives from Cockburn's own descriptions is that, considering all things, the lawyers, at least, of different politics were often on extremely friendly terms. Henry Erskine and Hope were the best of friends; Robert Dundas, Tory Lord Advocate in 1807, made young Cockburn one of his advocate deputes; and Henry Dundas (afterwards Lord Melville), absolute ruler as he was of the Scotch Tory party,

was always personally very popular with many of his political opponents and with the public generally. It often appears in these memoirs that Cockburn regarded with generous admiration and sincere affection those who in politics were most antagonistic to himself. He, indeed, was one of those men who are by nature inclined to like everyone, and whom consequently everyone is inclined to like. Yet he was by no means incapable of a very hearty feeling of dislike, his capacity for which sentiment seems to have been very largely concentrated on one man, namely the famous Robert McQueen, Lord Braxfield, the only personage of the many mentioned in these memoirs of whom Cockburn has no good word to say. A little boy at the time of the trials, Cockburn sixty years afterwards feels the duty incumbent upon him 'never to let Braxfield nor the years 1793-94 'be forgotten.'\* In the 'Memorials' Braxfield is called the 'Jeffreys of Scotland,' and his outward man is drawn with more than even the ordinary power of Cockburn's graphic pen. In the 'Sedition Trials' the Lord Justice Clerk is described as

'a profound practical lawyer, and a powerful man; coarse and illiterate; of debauched habits and grosser talk than suited the taste even of his gross generation; utterly devoid of judicial decorum, and though pure in the administration of civil justice where he was exposed to no temptation, with no other conception of principle in any political case except that the upholding of his party was a duty attaching to his position. Over the five weak men who sat beside him, this coarse and dexterous ruffian predominated as he chose. . . . "Bring me prisoners and I'll find you law," was said to be his common answer to his friends, the accusers, when he heard that they were hesitating. . . . Except civil and Scotch law, and probably two or three works of indecency, it may be doubted if he ever read a book in his life. His blameableness far exceeds that of his brethren. They were weak; he was strong. They were frightened; he was not. They followed; he, the head of the Court, led.'

Into the details of the trials themselves it would be impossible to enter here. It cannot be denied that men were put upon their trial for acts which at the present day would at most be thought to render them deserving of public censure for excess of political zeal; that men were convicted in cases where the evidence against them was of the very slightest; and that men so convicted were sentenced to punishment of the harshest and most cruel character, when a light sentence would equally have vindicated the law, and to all appearance

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\* Prefatory note to Sedition Trials.

have equally protected the public. Cockburn reserves his censure, and rightly, for the judges. The bar seem to have done their duty competently and in a proper spirit. The juries, to all intents and purposes chosen by the judges, acted as might have been expected. They acted as men in such a position will act in a time of panic, if not warned against prejudice and encouraged in their duty by the Court. Unfortunately the Court, whose boast it should have been to keep a calm temper and judicial mind in the midst of a public rent with faction and panic-stricken with the terrors of anticipated revolution, instead of checking, actually inflamed the prevailing passions of the moment; and consequently men were transported as criminals, who in happier times came to be looked upon as political martyrs who had fallen in the cause of freedom.

In 1844 the Martyrs' Monument was founded on the Calton Hill in honour of Muir and Palmer and the other victims of the sedition trials of 1793-94. To Cockburn it seemed that the memorial in truth recorded much more effectually the infamous conduct of the judges than the virtues or the public services of those whom they had oppressed. The names of the sufferers are inscribed on the column; 'how is it,' asks Cockburn, 'that the names of the judges are omitted, for it is in truth *their* monument?'

In the introduction which Lord Cockburn has prefixed to his examination of 'Trials for Seditious in Scotland,' we have the carefully considered opinion of an experienced judge and of a liberal-minded man, not merely as to what constitutes sedition in law, but also as to what *ought* to be punished as sedition by the wise rulers of a constitutionally governed people. 'Trials for sedition,' he remarks, 'are the remedies of a somewhat orderly age;' for in more barbarous times every opposition to authority is apt to be accounted high treason, and is rigorously suppressed. Before 1793 there is no instance of a trial for pure sedition in Scotland, and if the word was used at all it was rather to describe what amounts to insurrection or rebellion than the modern conception of the offence. The word 'seditio' was more appropriately used in Latin to signify actual riot than an act displaying a seditious intention, and in England the word 'sedition' does not by itself at the present day describe any offence known to the law.† Seditious offences, however, such as seditious words,

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\* Seditious Trials, Appendix, vol. ii.

† See Sir James Stephen's 'History of the Criminal Law,' vol. ii.

sedition libels, seditious conspiracies, are misdemeanours in England, and are in Scotland properly described by the simple term 'sedition.' In both countries the law recognises seditiousness as criminal. In the Scotch trials of 1793-94 the judges had no precedents to guide them. Accordingly they made the law, and our author has little difficulty in showing that neither the temper of the times nor the character of the criminal courts was favourable to the production of wise judicial legislation.

According to Lord Cockburn, the guilt of sedition consists in the disrespect it involves towards the authority of the State, and the crime consists in the wicked publication of such guilty sentiment. There must be an intention to do harm on the part of the accused, including in the word 'intention' a culpable indifference to consequences. Here, as in other cases, a man must be held to intend the natural consequence of his acts. The gist of sedition is the defiance of public authority. 'It consists in the publication of any sentiment intended 'and calculated materially and speedily to obstruct or weaken 'the legal authority of the State.'\* The tendency of the publication must be mischievous, and also the intention of the person publishing, and it is obvious that no absolute rule can be laid down as to what is or is not 'sedition,' since the criminality in any particular case is not solely dependent on the nature of the acts committed. According to Lord Cockburn, if the people had no political rights it would be as easy to define and apply the law of sedition as the law of burglary. 'But they have rights, the exercise of which and the excess 'called sedition is the privilege of every subject of this realm. 'Every person may not only form, he may express, his honest 'opinion of every public principle, every supposed defect, 'every measure, and every public man as such,' and he may even try, under certain restrictions, to bring the public to his own way of thinking. Thus, if an accused is charged with sedition, it is a strictly relevant defence for him to allege that his conduct is politically beneficial, and that his intention is honest and good; and so there is at once introduced into every trial 'the legitimate consideration of political topics 'and occurrences.' Even Lord Chief Justice Holt, friend of freedom as he was, declared in *Tutchin's case* that if the law permitted persons 'to possess the people with an ill 'opinion of the Government (meaning the Ministry) no govern- 'ment could subsist.' Our author, it is scarcely necessary to

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\* Sedition Trials, Introduction.

say, agrees with Hallam and Lord Campbell, and with every modern authority, that such law, if acted upon, would be fatal to the public liberty of discussion at present enjoyed. It is easy enough to give instances of the publication of matter which in the present day would be deemed seditious, and it is equally easy to give examples of what in former times would have been deemed seditious, but in the present day would be considered within the limits of fair public criticism. But where to draw the line and how to lay down a rule capable of general application are questions which Lord Cockburn, it seems to us, does not answer more satisfactorily than his predecessors. Sedition, he says, is of three kinds:— 1st. Sedition of insult and defamation of public political bodies or their officers as such. There never was a keener friend of freedom of speech and writing than Lord Cockburn, yet little tenderness does he show to this, 'the meanest of all seditions. It is the offence of the vulgar, the awkward, and 'the intemperate, and discredits every respectable cause.' As the most effective specimen of this kind of sedition, 'excepting always the insane blackguardism of Ireland,' he refers to the savage abuse of the Prince Regent and his ministers by Hone in 1820, for which, however, he was never prosecuted. 2nd. Sedition of resistance, which may generally be traced to popular distress, wildness (i.e. temporary political excitement), or wrong. Under this head come those harangues of agitators, those holdings of meetings and getting up of demonstrations, *whose object is the trampling on the law*. 3rd. Sedition of doctrine, where a man publishes error of a kind to endanger the State, and here Lord Cockburn insists that no man can be accounted a criminal for publishing *bona fide* that which is his genuine belief. On the part of the accused there must be 'moral falsehood, not a 'mere failure to discover the truth, but the guilt of endangering society by the dissemination of opinions believed to be 'false.'

Erskine, in defending Paine in 1792, maintains the same law in language quoted by Lord Cockburn, from whom the speech draws no less high praise than that bestowed upon it by Lord Campbell in his 'Lives of the Chancellors:—

'The proposition (said Erskine) which I mean to maintain as the basis of the liberty of the press, and without which it is an empty sound, is this: that every man, not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation, either upon the subject of governments in



general, or upon that of our own particular country; that he may analyse the principles of its constitution, point out its errors and defects, examine and publish its corruptions, warn his fellow citizens against their ruinous consequences, and exert his whole faculties in pointing out the most advantageous changes in establishments which he considers to be radically defective, or sliding from their object by abuse. All this every subject of this country has a right to do if he contemplates only what he thinks would be for its advantage, and but seeks to change the public mind by the conviction which flows from reasonings dictated by conscience. If, indeed, he writes what he does not think; if, contemplating the misery of others, he wickedly condemns what his own understanding approves, or even admitting his real disgust against the government or its corruptions, if he calumniates living magistrates, or holds out to individuals that they have a right to run before the public mind in their conduct; that they may oppose by contumacy or force what private reason only disapproves; that they may disobey the law because their judgement condemns it, or resist the public will because they honestly wish to change it—he is then a criminal upon every principle of English justice, because such person seeks to disunite individuals from their duty to the whole, and excites to overt acts of misconduct in a part of the community, instead of endeavouring to change, by the impulse of reason, that universal assent which in this and every country constitutes the law for all.'

Lord Cockburn discusses the whole matter with much care, yet we cannot think that he succeeds in reducing the uncertainty which inevitably surrounds the practical operation of the law of sedition. Sedition consisting in wickedly producing political mischief, the whole question of what is political mischief is open in every case, and will be honestly answered very differently not only by juries at different periods of our history, but at the same period by different juries. One main element in every charge of sedition must be a mere matter of opinion, about which honest men, whether judges or jurymen, may, and very probably will, differ. Lord Kenyon's famous charge to the jury in Cutbill's case is, of course, a giving up of the attempt to define the crime; yet it does describe most truly what is the practical operation of the law:—

'After all,' said Lord Kenyon, 'the truth of the matter is very simple, when stripped of all the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this, that a man may publish anything which twelve of his countrymen may think is not blameable, but that he ought to be punished if he publishes that which is blameable. To tell us that to the law of England liberty of the press is dear, but that licentiousness of the press is odious, helps us little.'

In other words, says Sir James Stephen in commenting on

this charge, the jury are *ex post facto* censors of the press. So they are. And for the liberty of discussion which now prevails we have to thank much more the sentiment of the time shared in by jurymen than any special merit in the law. In Sir James Stephen's 'Digest of the Criminal Law' is to be found the latest attempt to lay down comprehensively the law of sedition (see articles of Digest 91-94). The law so stated received the approval of the very learned judges who constituted the Criminal Law Commission, and was incorporated by them in their draft code, so that it would not be easy to find any general statement of the existing law resting upon higher authority. These articles, after declaring it to be a misdemeanour to publish any matter, by speaking or writing, with a seditious intention, proceed as follows (art. 93) :—

'A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against, the person of her Majesty, her heirs and successors, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State as by law established, or to raise discontent or disaffection amongst her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of her Majesty's subjects. An intention to show that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, or to point out in order to their removal matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between different classes of her Majesty's subjects, is not a seditious intention.'

The liberty of discussion at present enjoyed in England is certainly not due to the establishment by law, either statute or judge made, of any sweeping principle of freedom to English subjects to write or say what they like without fear of punishment. A century ago the natural right to free communication of thoughts and opinions was proclaimed in France as one of the most valuable 'rights of man.' Nothing of the kind is known to our law. Liberty of discussion with us merely means the right to publish sentiments and opinions without previous license, but subject always to the risk of punishment should the matter published appear to a jury to deserve it; and hence this 'liberty' has varied at different times and seasons from unrestricted license to very severe restraint, according to the state of popular sentiment.\* However carefully lawyers may

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\* 'Freedom of discussion is, in England, little else than the right to

endeavour to define sedition, Lord Cockburn is certainly right in declaring that its confines are so easily and unconsciously passed 'that a good deal of the crime must be 'winked at.' It is rarely wise to indict for a single act of sedition, unless that act is a very atrocious one. 'But when 'sedition, by the open repetition of the crime, plainly means 'to throw down the gauntlet to the law, the guilty should 'never get the encouragement of a triumph by the law 'being compelled to decline the challenge.'

The wisdom of prosecuting for sedition evidently depends more upon the effects likely to be produced by a continuance of the sedition than upon the guilt or wickedness of the accused. A strong government can afford to despise words, however criminal and wicked, which do not endanger society or directly tend to a breach of the law. Now, as half a century ago, it is 'the insane blackguardism of Ireland' (to quote Lord Cockburn's expression) which most of all indulges in the language of insult and defamation of public officials. Yet Mr. Balfour would not dream of indicting anyone for mere abuse. When, however, newspapers are poisoning the minds of an excitable people with exhortations to outrage and incitements to rebellion, even Sir George Trevelyan clamours for additional legal restrictions on the liberty of the press.

Lord Cockburn's reflections on the law of sedition appear opportunely, and though they certainly do not make clear for purposes of practical application the line which divides the lawful from the unlawful, they nevertheless throw light on the subject, and deserve the careful consideration of lawyers and statesmen.

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'write or say anything which a jury, consisting of twelve shopkeepers, 'think it expedient should be said or written.' See Professor Dicey's admirable 'Law of the Constitution,' where the whole of this subject is well treated.