LORD ELLENBOROUGH'S STATE TRIALS*

Ellenborough's[1] state trials are a series of *causes célèbres* tried by him in the Court of King's Bench during his sixteen year reign as Lord Chief Justice of England from 1802. They were typically prosecutions of a distinctly political complexion for the crimes of treason, seditious libel, libel, conspiracy and torture. As such, they were cases of intense public interest, raising far greater questions of fact than of law[2]. They are significant both for their intrinsic interest and as a record of the legal system's response to a period of social conflict spawned by the Age of Reason, inspired by the American and French Revolutions, and culminating in the *Reform Act* of 1832.

The state trials are also significant biographically. The issue in this kind of case may be decisively affected by the attitude of the bench and its instructions to the jury. The pages of the *State Trials*,[3] recording verbatim the complete proceedings of Ellenborough's cases, are important source materials by which to assess his approach to the exercise of criminal jurisdiction. Ellenborough was nothing if not a

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* This article is part of a larger study of Lord Ellenborough, to be published separately, undertaken by the author at the University of Exeter in 1974 and subsequently at the University of Western Australia.

1 Edward Law, the first Baron Ellenborough, was born in 1750, the fourth son of Edmund Law who was Master of Peterhouse, Cambridge, and Bishop of Carlisle. Law successfully defended Warren Hastings (1787-1795); became Attorney-General in Addington's government (1801) and entered the House of Commons; became Lord Chief Justice of England and a peer (1802); and with dubious constitutional propriety accepted a position in the 'All-Talents' Cabinet (1806). He died, virtually in office, in 1818.
Ellenborough has never been the subject of a definitive biography. The best brief account of his career is contained in Lord Campbell's LIVES OF THE CHIEF JUSTICES OF ENGLAND IV. Other sources of information are: Brougham, HISTORICAL SKETCHES II; Foss, JUDGES OF ENGLAND and BIOGRAPHIA JURIDICA; Romilly, MEMOIRS; Townsend, THE LIVES OF TWELVE EMINENT JUDGES I; also the DICTIONARY OF NATIONAL BIOGRAPHY.

2 Two cases raising significant points of law are R v Peltier (1803) 28 S T 529 and R v Johnson (1805) 28 S T 411, vide infra 241, 244.

3 The term 'state trial' is legally something of a misnomer since English law knows no doctrine of the State. As used by Howell the term denotes trials for offences of a political nature, offences by individuals of high rank, offences by Crown servants or contractors in relation to their employment, and cases raising important issues of constitutional law.

strong judge.[4] Equally a personage of vigorous intellect and immense legal erudition, he was often unceremonious with counsel and harsh in sentencing.[5] The proceedings in his court were, indeed, sometimes so great a model of celerity as to inspire Brougham's *mot* that whereas the defects of the early nineteenth century Court of Chancery were *oyer sans terminer* those of the Lord Chief Justice's Court were *terminer sans oyer*.[6] As we shall see, Ellenborough was given to making up his own mind about the jury's proper verdict; and he sometimes did not hesitate to make up the jury's mind as well.[7] But the weight of evidence shows that Ellenborough was generally a good trial judge and that his defects were those of temperament rather than of purpose.[8]

TREASON TRIALS

It may be indicative of a British preference for political talk as opposed to political violence that even during this turbulent period prosecutions for treason were few whereas prosecutions for libel and seditious libel were many.[9] Apart from Ellenborough's own trials of Despard and his associates in 1803 and of the Watsons in 1817, the only treason trials during the period of Ellenborough's Chief Justiceship were those of Robert Emmet and eighteen co-conspirators at Dublin in September and October 1803 for the Irish Insurrection, and that of Brandreth and others at Derby in October 1817.[10] The law of treason had been strengthened by the *Traitorious Correspondence Act* of 1793 and by the *Treason Act* of 1795.[11] But although Despard and Watson

4 See, for example, Brougham, WORKS IV, 192; Townsend, THE LIVES OF TWELVE EMINENT JUDGES I, 329. See also the cases of Hone and Cochrane, infra 247, 249.

5 Brougham, op cit; Campbell, LIVES OF THE CHIEF JUSTICES OF ENGLAND IV, 163-164.

6 Brougham, HISTORICAL SKETCHES II, 184-185.

7 Brougham, WORKS IV, 192. See also the cases of Despard (1803) 28 S T 345, Peltier (1803) 28 S T 529, Cobbett (1804) 29 S T 1, Johnson (1805) 29 S T 81, Leigh and John Hunt (1811) 31 S T 367, Hone in Campbell, op cit, 233, and Cochrane (1814) 3 M & S 66; but note also the discussion of the effects of Fox's Libel Act, infra. And cf R v Perry (1810) 31 S T 335, 363-368 where Ellenborough's summing up is a model of impartiality, vide infra 246.

8 Campbell, op cit, 163-164; Brougham, WORKS IV, 192.

9 See n 27, infra.

10 This statement is based upon the evidence of the STATE TRIALS. It is conceivable that the record of treason cases therein is incomplete.

11 34 Geo III c 27 and 36 Geo III c 7 respectively. The former Act was a response to the activities of the Corresponding Societies, who 'corresponded' with the French political clubs. The latter Act placed constructive treason upon a statutory basis (s 1), and made it a misdemeanour to stir up hatred or contempt of the king or government by writing or speeches (s 2). See n 14, infra.

were both charged on, *inter alia,* two counts under the latter Act neither of these trials involved Ellenborough in interpreting this legislation in any novel way.[12]

R v Despard[13]

This case arose out of a harebrained scheme to effect a coup through the joint forces of certain republican radicals and low class Irish workmen. The immediate plan was to shoot the King as he passed down The Mall in his carriage and to seize the Tower and the Bank of England.

Despard and several co-conspirators were apprehended at a public house upon the disclosures of an informer shortly before the date set for the event. They were charged with three counts of treason under the ancient statute of Edward III and under the *Treason Act* of 1795.[14] In his defence Despard was unable to adduce any direct evidence in contradiction of the overwhelming body of evidence against him, relying solely upon testimonials as to character given, among others, by Lord Nelson and Sir Evan Napean. The defence admitted the existence of a plot but denied Despard's part in it. Much of the Crown evidence was supplied by co-conspirators and by the informer. In relation to the former Ellenborough held the witnesses to be competent but charged the jury with caution. He nevertheless made his own opinion of the facts clear:

> 'We can only look to the plain evidence of external acts, to the uncontradicted history of his recent conduct which is now before us. If you believe all the witnesses to be generally unworthy of credit, or if in the particular facts sworn to by them you cannot bring yourselves to believe Windsor and Emblin, Francis and Blades, notwithstanding the confirmation they have all received

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12 In Despard's case Ellenborough held that words alone were capable of amounting to treason 'if they are addressed to persons with an intent to excite and to confirm them in the prosecution of measures which have for their declared object the assassinating or deposing of the king by force of arms': (1803) 28 S T 345, 487. This would seem to have been an established part of the law of constructive treason. See n 11, supra, and n 14, infra.

13 (1803) 28 S T 345.

14 The offence of treason was defined in the Statute of Treasons 25, Edward III st 5 c 2 (1351), as compassing or imagining the king's death, levying war against the king within his realm, and adhering to the king's enemies. The Act of 1795 made it also treason to compass the bodily harm, imprisonment, or restraint of the king's person, or his deposition; to levy war in order to compel him to change his measures and councils or to overawe one or both Houses of Parliament; and to move or stir any foreigner to invade the realm.

> from so many various sources, then this person ought to be exempted from the consequences of the charge made upon him; but if you do believe them, I am afraid in that case, that as there is no doubt upon any question of law, so neither will there be much room for doubt upon any of the questions of fact, which are now fully left to you for your consideration.'[15]

After deliberating for twenty-five minutes the jury found Despard guilty, adding a strong recommendation for mercy. The trial of twelve of Despard's co-conspirators began the following day. Nine were convicted. Ellenborough passed sentence of death on the prisoners at two o'clock in the morning, making it clear that he hoped their example would deter 'all persons in the same class and condition as yourselves'[16] from similar follies, but expressed the hope that ' . . . your ardent and effectual penitence (will) obtain for you all, hereafter, that mercy which a due and necessary regard to the interest and security of your fellow-creatures will not allow of you receiving here'.[17]

The jury's recomemndation of mercy in Despard's case was of no avail. The treason sentence was duly carried out some ten days later.[18]

R v Watson[19]

Despard was the first of Ellenborough's great trials: the trial of James Watson was to be the last. The Watsons, *père et fils,* belonged to the 'Societies of Spencean Philanthropists', a club founded in 1814 to propogate the teachings of the agrarian socialist Thomas Spence whose precepts included the abolition of freehold tenure, its

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15 (1803) 28 S T 345, 524.

16 Ibid 528.

17 Ibid.

18 Although not, as the report laconically notes, in its entirety: 'On Monday the 21st February (the prisoners) were, according to their sentence, drawn on a hurdle round the yard of the gaol. They then ascended the stair case to the top of the gaol, where the platform for executions is erected, and were severally hanged, after having been suspended for nearly half an hour they were cut down, and their heads were severed from their bodies; the executioner exhibiting each head separately to public view, said "this is the head of — a traitor," — "this is the head of — another traitor" &c The king graciously remitted the execution of the remainder of their sentence, and their bodies were delivered to their respective friends'. Ibid 528.
The parts of the sentence 'graciously remitted' were that the prisoner be 'hanged by the neck, but not until he was dead, but that he be taken down again, and whilst he was yet alive, his bowels be taken out and burnt before his face; and that afterwards . . . his body be divided into four quarters, and his head and quarters be at the King's disposal'. One hopes that the prisoners were grateful for the remission.

19 (1817) 32 S T 1.

replacement by a scheme of land tenure by parish, and the establishment of a single tax to be paid to the parish corporation. After the European Peace of 1815 several Spenceans, including the Watsons, became spokesmen for the distressed labouring classes. They were joined by one Castle who was probably an informer, and who gave evidence against the elder Watson at his trial where he testified to attempts by Watson to raise an insurrection and to procure arms and explosives. Henry Hunt[20] had addressed a large gathering of labourers at Spa Fields, Islington, on 15th November 1816, and had sent a petition to the prince regent which was not received. On 2nd December Watson addressed a similar meeting at which he said:

> 'Ever since the Norman conquest kings and lords have been deluding you . . . but this must last no longer.'[21]

The mob then went through the streets to the Royal Exchange, breaking into a gunsmith's shop *en route*, where they were met by the lord mayor supported by the police. That night Watson was arrested, committed to the Tower and charged with high treason. In his lodgings were found a plan of the Tower and a list of radicals, including Watson, Hunt and Lord Cochrane,[22] who were to constitute a 'Committee of Public Safety'. Watson was indicted on four charges of treason.[23]

At the trial before Ellenborough, which lasted seven days, Watson was defended by Sir Charles Wetherell and Sergeant Copley (later Lord Lyndhurst), who succeeded in discrediting Castle as an informer, and in eliciting evidence from Hunt as to Watson's moderation. Ellenborough believed Watson to be guilty, although his final words to the jury were themselves a paradigm of moderation and impartiality. Nevertheless he was obviously dismayed, according to Lord Campbell,[24] when the jury after a brief retirement acquitted Watson. Clearly he had been guilty of a lesser offence but the facts proved only that a serious riot had occurred and the sympathies were just as clearly against a conviction for treason.

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20 (1773-1835) radical politician, not to be confused with James Henry Leigh Hunt the defendant in the seditious libel trial, vide infra 246.

21 DICTIONARY OF NATIONAL BIOGRAPHY, XX, 922.

22 Vide infra 249.

23 (1) compassing and imagining the king's death; (2) compassing and imagining to depose the king; (3) levying war against the king; (4) conspiring to levy war to force the Crown to change its measures and councils. See n 14, supra.

24 Campbell, LIVES OF THE CHIEF JUSTICES OF ENGLAND 2nd ed III, 222.

TRIALS FOR LIBEL AND SEDITIOUS LIBEL[25]

The King and government became increasingly the subject of ridicule and attack during the period of Ellenborough's reign.[25a] Ellenborough himself was attacked in a series of articles in The *Independent Whig* for which the author and owner were convicted of libel in 1808.[26] The previous year Sir Vicary Gibbs had become attorney-general. His determination to curb the licentious press was pursued with unprecedented vigour[27] until the acquittals of Lambert and Perry in 1810 and John and Leigh Hunt before Ellenborough in 1811, and Gibbs' elevation to the Common Pleas in 1812, produced a change in official attitudes to the press.

Of central importance to the understanding of Ellenborough's libel cases is Fox's *Libel Act* of 1792.[28] Prior to the enactment of this legislation juries were required to consider only the fact of publication and the truth of innuendoes. It was for the judge to decide the question of the libellous character of the publication, that is, the question of the mental element. The effect of the Act 'was to embody in the crime of seditious libel the existence of some kind of bad intention on the part of the offender'[29] and thereby to enable the jury to find a general verdict of 'guilty' or 'not guilty' (and hence to acquit) notwithstanding that the fact of publication had been proved. As Stephen put it 'a seditious libel might since the passing of (the) Act be defined (in general terms) as blame of public men, laws,

25 Seditious libel is the offence of publishing in a document or the like any words 'with the intention of exciting disaffection, hatred or contempt against the sovereign, or the government and constitution of the kingdom, or either House of Parliament, or the administration of justice, or of exciting persons to attempt, otherwise than by lawful means, the alteration of any matter in Church or State, or of exciting feelings of ill-will and hostility between different classes.' Jowett, THE DICTIONARY OF ENGLISH LAW.

25a George III became permanently insane and the regency was established in 1811. Ellenborough was a member of the Queen's Council and assisted in the formal duties attaching to the custody and care of the king.

26 R v Hart and White (1808) 30 S T 1193.

27 ' . . . from 1808 to 1810 no less than forty-two informations had been filed, while only fourteen had been filed during the preceding seven years. The wisdom of these proceedings becomes still more doubtful, when out of these forty-two informations no less than twenty-five were not prosecuted, but the subjects of them were left in a state of suspense and anxiety.' Foss, JUDGES OF ENGLAND VIII, 291.
Gibbs was an arrogant man and later a highly unpopular judge and Chief Justice of the Common Pleas: Townsend, THE LIVES OF TWELVE EMINENT JUDGES i, 275-276, 297. Trollope satirised him as Sir Rickety Giggs.

28 32 Geo III c 60.

29 Stephen, HISTORY OF THE CRIMINAL LAW OF ENGLAND II, 359.

or institutions, published with an illegal intention on the part of the publisher'.[30] But the question remained of what the judge's duty was in charging the jury. Section 2 of the Act provided that the judge 'shall, according to . . . his discretion, give . . . his opinion and directions to the jury on the matter in issue between the King and defendant . . . , in like manner as in other criminal cases'. Although, therefore, the object of the Act was to give the defendant the benefit of a finding in his favour by either judge or jury, it left the door open for a judge to instruct the jury upon the question of the libellous character of the publication. It was, indeed, upon this ground that the government was said not to have opposed the Bill: 'because it thought that it would be easier to get convictions under the new law—as indeed it was'.[31]

R v Peltier[32]

In February 1803, during a period of peace in the struggle with France, Jean Peltier was brought to trial before Ellenborough and a special jury charged with five counts of having published libels on Napoleon.[33] Like so many of Ellenborough's trials, this one occasioned widespread public interest—so much so, in fact, that the defendant's introduction to the original report of the trial states that

> Such was the nature of my affair, that, throughout the week which preceded the trial, it was a general opinion at the exchange that my acquittal would be considered in France as tantamount to a declaration of war against the first consul; and that wagers had been laid, as I was informed, that a verdict of Not Guilty would lower the funds five per cent. Indeed, I have since known that stock-jobbers had at Westminster Hall persons to run with all possible rapidity to the Stock Exchange, with the news of the vedict, if it should be pronounced before the house was shut.

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30 Ibid.

31 Holdsworth, H E L XIII, 156. For example, in the case of Hart and White (1808) 30 S T 1193 Grose J told the jury '" . . . under this Act of Parliament I am to give you my opinion upon these publications, and I have no hesitation in saying, that anything more libellous I never heard or read. In my opinion, they are gross, scandalous, and abominable libels. If you are of the same opinion (and it is for you to consider that question), you will return your verdict accordingly . . . If you have any doubt, I will proceed—" Foreman of the Jury—"I should hardly think it necessary to give your lordship the trouble". The Jury consulted together a few minutes, and returned a verdict of GUILTY'. (1808) 30 S T 1131, 1315-1316.

32 (1803) 28 S T 529.

33 Napoleon became First Consul on November 9-10, 1799, an event which brought the Jacobin (radical) phase of the Revolution to a close.

> It was under these unpropitious omens that I sat in the court of King's-bench, and my anxiety was naturally increased when the first objects which I saw there, were the *aid-de-camp* and the secretary of the ambassador of the first consul, placed, *en faction,* beneath the box of the jurymen.[34]

The gist of the charge against Peltier was that of

> '. . . unlawfully and maliciously devising as much as in him the said Jean Peltier lay to interrupt disturb and destroy the friendship subsisting between our said lord the king and his subjects and the said Napoleon Buonaparte the French republic and the citizens of the same republic and to excite animosity jealousy and hatred in said Napoleon Buonaparte against our said lord the king and his subjects'.[35]

Ellenborough found no difficulty in upholding the legality of the charge and in addressing the jury stated, with obvious deliberation:

> I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries. If the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the persons of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between two countries, the libel assumes a still more criminal complexion.[36]

He went on to make it quite plain to the jury that in his view the publications were libellous:

> Gentlemen, . . . it appears to me . . . that the direct and indirect tendency of (these different publications) . . . was to degrade and vilify, to render odious and contemptible, the person of the First Consul, in the estimation of the people of this country and of France . . . and likewise to excite to his assassination and destruction. That appearing to be the immediate and direct tendency of these publication, I cannot . . . do otherwise than state, that these publications having such a tendency . . . are, in point of law, libels.[37]

The jury gave a verdict of Guilty without retiring. This trial ended in anticlimax for Peltier but apparently in loss on the Stock Exchange. A note appended to the report states that

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34 (1803) 28 S T 529, 547.
35 Ibid, 531.
36 Ibid, 617.
37 Ibid, 618.

> War between Great Britain and France being renewed soon after this trial, the defendant was never called upon to receive judgment.[38]

R v Cobbett[39] *and R v Johnson*[40]

The long and troublesome Irish question, too, was ever a potential source of bitter reaction against both the English government and its Irish administration. The Union affected by Pitt in 1800 following Wolfe Tone's successful rebellion could not conceal the massive discontent of the Irish people, which Robert Emmet's abortive revolt in 1803 symbolised. Of the commentators in England, one of the most vociferous was William Cobbett who, on his return from America, in 1802 had founded his *Political Register* which became the most influential reform paper in the country.

In May 1805 Cobbett was charged with publishing libels in the *Political Register* on the Lord Lieutenant of Ireland (the Earl of Hardwicke), the Lord Chancellor of Ireland and one of the justices of the Court of King's Bench of Ireland. Cobbett's publication imputed to Hardwicke the attributes of a 'wooden-head' and of an 'apprentice politician'; submitted that government by a 'wooden-head' was detrimental to the Irish body politic; doubted the veracity of statements made by the Lord Chancellor (Lord Redesdale); implied that the Lord Chancellor had permitted his secretary to employ court fees in order for the latter to discharge the pension of an unkown annuitant from official profits to which he was entitled; and declared that Osborne J had disregarded the truth in charging a grand jury.

Ellenborough enunciated the law of criminal libel as follows:

> . . . if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule of obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime.[41]

After going through the evidence he concluded:

> The question for you to consider, if it can be a question, is, whether these libels (when I call them libels I am anticipating your decision) are capable of any other construction than what has been put upon them.[42]

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38 Ibid, 620.
39 (1804) 29 S T 1.
40 (1805) 29 S T 81.
41 (1804 29 S T 49-50.
42 Ibid, 52-53.

After a pause of ten minutes Cobbett was convicted but not sentenced because the prosecution had other fish to fry and required a witness.[43] A few months prior to Cobbett's trial Mr Justice Johnson, one of the judges of the Irish Court of Common Pleas, had been arrested at his house in Dublin in January 1805, under a warrant issued by Ellenborough and endorsed by an Irish magistrate, to stand trial at Westminster as author of the scurrilous article and as accessory to Cobbett's libel. Johnson had been threatened with prosecution the previous year. He was in poor health and had refrained from going to Bath, whence his doctors had ordered him, from fear of arrest, notwithstanding official assurances to the contrary provided he gave bail.

In July 1804, Perceval, Lord Redesdale's brother-in-law, and one Yorke, Hardwicke's brother, had got through Parliament[44] a Bill 'to render more easy the apprehending, and bringing to trial, offenders escaping from one part of the United Kingdom to another and also from one country to another'. This Act[45] operated restrospectively, and it was under its provisions that the warrant had been first issued.

Immediately upon his arrest Johnson brought *habeas corpus* proceedings in order to thwart the attempt to have him transported immediately to England. His arguments were that although the Act provided for the expense of his transportation to England it made no provision for the expense of transporting witnesses: that is, that he could not be charged in a place where he could not defend himself. And further, that if he were charged where he could defend himself (in Ireland) he could not be convicted because the law of England did not apply in there despite the *Act of Union* of 1752.

Of the eight judges who heard argument on the return of the writ, three were for remanding the judge, three for discharge and two declined to give an opinion. Proceedings were thereupon begun on the writ in the Court of King's Bench in Ireland. On the question of the validity of the arrest the court held, on 31st January 1805, by a majority, that the restrospective statute was applicable to the warrant issued by Ellenborough and that the arrest was legal. Further writs of

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43 A *nolle prosequi* may be entered against a defendant to enable him to give evidence for the Crown against a co-defendant: R v Teal (1809) 11 East 307, 312, per Lord Ellenborough. A *nolle prosequi* can be entered after verdict: R v Leatham (1861) 7 Jur N S 674. Cobbett subsequently gave evidence for the Crown against Johnson who was charged as an accessory to Cobbett's libel. The Irish Solicitor-General subsequently sued Cobbett for the libel and was awarded £500 damages: Plunkett v Cobbett (1804) 29 S T 53.

44 2 Plowden's HISTORY OF IRELAND 386.

45 44 Geo 3 c 92.

habeas corpus were then successively obtained from both the Irish Courts of Exchequer and Common Pleas. The judgment of each court upheld the validity of the arrest.

It was thus only after very protracted and painful proceedings in Ireland that the sick judge was brought before Ellenborough in the Court of King's Bench in England. Here the preliminary plea to the jurisdiction on the ground that the defendant was a native of, and domiciled in, Ireland was rejected. This plea, said Ellenborough, was bad because Lord Mansfield had laid down in *Fabrigas v Mostyn*[46] that

> in every case, to repel the jurisdiction of the King's Court, you must show a more proper and sufficient jurisdiction; for if there be no other mode of trial, that alone will give the king's courts jurisdiction,[47]

and the plea in question admitted the commission of the crime in the city of Westminster: the proposition contended for by the defendant's counsel, said Ellenborough was in effect this:

> Admitting the defendant to have committed a crime as to the laws of England in the county of Middlesex, I still insist that he is not punishable for it by any court of this part of the United Kingdom; though I cannot show that he is punishable by an other. The stating of such a proposition carries, almost on the face of it, its own refutation, even without the conclusive authority of Lord Mansfield.[48]

Ellenborough thus ordered a trial on the merits on Saturday 23 November 1805 in the Court of King's Bench.

By this stage the case had claimed great public attention. In April, May and June of 1805 motions were proposed to amend the statute under which the arrest had initially been made. When the case came on for trial the array of legal talent on either side was as impressive as the history of the case had been ridiculous. For the Crown, the Attorney-General (Hon. Spencer Perceval himself) was assisted by Sir Vicary Gibbs, and Erskine, Garrow, Wood and Abbott.[49] For the defendant, Mr Adam, afterwards Lord Commissioner of the Jury Court of Scotland, appeared with Park, Richardson and Lockhart: Adam and Park had spoken in favour of amending the statute in the

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46 (1773) 20 S T 82.
47 (1805) 29 S T 359, 410-411.
48 Ibid, 411.
49 Each of whom became a judge.

House of Commons; Park and Richardson were both later made Judges of the Court of Common Pleas.

Ultimately the trial turned upon a question of handwriting. Johnson's defence on the facts was that a man called Card had written the libel and sent it to Cobbett. Ellenborough found it 'past my comprehension' that 'he should, from a false principle of tenderness towards the family of such a man, prefer concealing him, to the injury and utter destruction of his own character, instead of bringing him forward to meet that punishment and disgrace he so well merits, if he is the real delinquent'.[50]

Ellenborough again made his own opinion of the defendant's guilt clear to the jury who thereupon returned a verdict of Guilty. But, as in Peltier's case, the result was an anticlimax: a *nolle prosequi* was entered the following year by the new Attorney-General Piggott[51] and Mr Justice Johnson retired from the bench with honour intact to enjoy a life pension.

R v Perry[52] *and R v Hunt*[53]

The trials of James Perry and Lambert, and John and Leigh Hunt for seditious libel in 1810 and 1811 respectively raised public interest more for the popularity of the defendants than for the magnitude of the alleged wrongs. Perry, proprietor of the *Morning Chronicle,* had published the following inflamatory paragraph:

> What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system.

He was charged with having published 'a scandalous, malicious, and seditious libel concerning our lord the king, and his administration of the government of this kingdom'.[54] In his summing up Ellenborough gave the following directions as to the law:

> I am not prepared to say that the imputing to his majesty an erroneous view of the interests of his people is imputing to him that which necessarily degrades his majesty: go one step further, and say it is from a partial, corrupt view, with an intention to favour, or to oppress any individual, and it would become most libellous.[55]

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50 (1805) 29 S T 413, 502.

51 See n 43, supra.

52 (1810) 31 S T 335.

53 (1811) 31 S T 367.

54 Ibid, 337.

55 Ibid, 366. Stephen remarks: 'I am not prepared to mention any case before this in which a judge of such high authority as Lord Ellenborough had dis-

In this case Ellenborough gave the jury no clear directions as to their verdict. On the contrary, his summing up is entitrely impartial, reasonable and restrained. He makes it absolutely clear that the proper construction of the paragraph rests entirely with them. In the result, the jury immediately acquitted both Perry and the printer charged with him.

The brothers Hunt were both familiar literary figures, especially Leigh, whose accomplishments and acquaintanceships in the field of letters are well known. Their jointly owned paper *The Examiner* flourished in the liberal cause. In an article headed 'One Thousand Lashes' the defendants had criticised the British system of military justice by flogging, by comparing it with Napoleon's somewhat less barbaric methods of maintaining discipline. This time, in a particularly strong and rhetorical summing up, which reads very like a case for the prosecution, Ellenborough told the jury that in his view the publication was libellous as tending to impugn the army and its administration and to incite the soldiery to disaffection. He concluded thus:

> I have no doubt that this libel has been published with the intention imputed to it; and that it is entitled to the character which is given to it in the information.[56]

It is a testimony equally to Brougham's advocacy and to the defendants' popularity, that after a retirement of two hours (during which they doubtless debated the expediency of conradicting the judge) the jury found both defendants Not Guilty. We have already seen[57] that the acquittals in these cases produced a change in official attitudes towards the institution of libel prosecutions.[58]

R v Hone[59]

The trial which most affected Ellenborough personally was that of William Hone in December 1817. Hone, a writer and publisher of

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tinctly said that it was no libel to say that a king was mistaken in the whole course of his policy. It is somewhat remarkable that Lord Ellenborough illustrates his view by remarking that even Oliver Cromwell was mistaken, namely, in "throwing the scale of power into the hands of France when he turned the balance against the house of Spain". This implies that Oliver Cromwell was less likely to be mistaken than other rulers of England'. HISTORY OF THE CRIMINAL LAW OF ENGLAND II, 368.

56 (1811) 31 S T 367, 414.

57 Supra, 240.

58 Two years later Leigh Hunt was convicted of a libel on the prince regent and sentenced to two years gaol. From this he emerged a popular hero, to devote himself as much to politics as to letters.

59 Campbell LIVES OF THE CHIEF JUSTICES OF ENGLAND 2nd ed. III, 223 and ff.

small radical pieces of satire, earlier in that year had produced, *inter alia,* a parody on the litany, Athanasian creed and the church catechism, and was charged on three counts of libel, over the second and third of which Ellenborough presided. Hone conducted his own defence with 'extraordinary skill and tact'[60] and aroused a great deal of public sympathy. He was acquitted on the first charge tried before Abbott J amid public acclamation. Ellenborough, who was too ill to sit, nevertheless swore to ensure a conviction by presiding the next day regardless of his health.

> 'Accordingly', writes Lord Campbell, 'he appeared in Court pale and hollow-visaged, but with a spirit unbroken, and more stern than when his strength was impaired. As he took his place on the bench, 'I am glad to see you, my Lord Ellenborough,' shouted Hone; 'I know what you are come here for; I know what you want.' 'I am come to do justice,' retorted the noble and learned Lord; 'my only wish is to see justice done.' 'Is it not rather, my Lord,' said Hone, 'to send a poor bookseller to rot in a dungeon?'[61]

Hone's gambit was to read long passages aloud from similar parodies of celebrated writers such as Swift, which caused great laughter in the court, and Ellenborough, in a rage, committed the sheriffs for failure to keep order. Finally he charged the jury:

> I will deliver to you my solemn opinion, as *I am required by Act of Parliament* to do; under the authority of that Act, and still more in obedience to my conscience and my God. I pronounce it to be a most impious and profane libel. Hoping and believing that you are Christians, I doubt not that your opinion is the same.[62]

Much to his dismay the jury quickly brought in a verdict of Not Guilty amidst loud applause. Undeterred, Ellenborough proceeded on the following day to try the third charge in the same manner as the second and with the same result. Lord Campbell's comment on the trial is enough:

> The popular opinion, however, was that Lord Ellenborough was killed by Hone's trial, and he certainly never held up his head in public after.[63]

MISCELLANEOUS TRIALS

Ellenborough tried several other cases of sufficient moment to be included in the *State Trials.* Most of them are now devoid of interest:

60 Ibid, 224.
61 Ibid.
62 Ibid.
63 Ibid, 225.

they include cases of fraud and conspiracy to defraud by Crown servants and contractors;[64] more cases of libel and blasphemous libel;[65] one against a ship's captain for casting away his vessel;[66] and a civil action in which £50 damages for libel were awarded to the plaintiff, the Catholic Archbishop of Dublin.[67] On the other hand, the trials of Cochrane and Picton are of considerable intrinsic interest and biographical significance.

R v De Berenger and Others[68]

The trial of Lord Cochrane for conspiracy at the Guildhall in 1814 was to prove the most unfortunate event in Ellenborough's public career. Professional criticism of his conduct of the case and particularly of the severity of the sentence he imposed was almost unanimous. The mild and soberly judicial Lord Campbell remarked of Ellenborough that 'his zeal to punish one whom he regarded as a splendid delinquent, carried him beyond the limits of mercy and justice'.[69] The public approbium attaching to Ellenborough was thought, indeed to hasten his own death.[70] Cochrane (later the Earl of Dundonald) enjoyed a colourful career in public life both as a naval officer in the French wars and as the somewhat radical MP for the city of Westminster.[71] By the fortuitous chance that he happened to be living in the house of his uncle, a merchant, Cochrane was thought to be implicated in a scheme devised by his uncle and one De Berenger to defraud the Stock Exchange by falsely spreading rumours of Napoleon's death and causing a rise in prices by further rumours of a peace treaty between England and France. When Lord Cochrane was charged together with the conspirators, Ellenborough seems clearly to have believed in his personal guilt: public opinion, however, was otherwise and remained so throughout. Of the trial itself Lord Campbell writes:

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64 R v Hedges (1803) 28 S T 1315; R v Davison (1808) 31 S T 99; R v Jones (1809) 31 S T 251.

65 R v Draper (1806) 30 S T 959; R v Eaton (1812) 31 S T 927.

66 R v Codling (1802) 28 S T 178.

67 Troy v Symonds (1805) 29 S T 503.

68 (1814) 3 M & S 66.

69 Campbell, LIVES OF THE CHIEF JUSTICES OF ENGLAND IV, 227.

70 The ill-feeling against Ellenborough lingered on until the present century when, in 1914, the third Lord Ellenborough published his book THE GUILT OF LORD COCHRANE IN 1814 for 'the purpose of refuting attacks made on my grandfather'.

71 See Watson's Case, supra, 235 and ff.

> Lord Ellenborough, . . . being himself persuaded of the guilt of all the defendants, used his best endeavours that they should all be convicted.[72]

On the other hand Brougham, who appeared as counsel for Cochrane later wrote:

> . . . none of us entertained any doubt that he (Ellenborough) had acted impartially, according to his conscience, and had tried it as he would have tried any other cause in which neither political nor personal feelings could have interfered. Our only complaint was his Lordship's refusal to adjourn after the prosecutor's case closed, and his requiring us to enter upon our defence at so late an hour, past nine o'clock, that the adjournment took place at midnight, and before we called our witnesses.[73]

This was perhaps the most serious charge later held out against Ellenborough: that after fifteen hours attendance he denied the defendants' counsel a short adjournment for preparation. Ellenborough did adjourn the court at 3 a.m. until 10 a.m. thus separating the defendants' arguments from their evidence. The next morning, Ellenborough, in summing up, 'laid special emphasis on every circumstance which might raise a suspicion against Lord Cochrane, and elaborately explained away whatever at first sight appeared favourable to the gallant officer'.[74]

The jury found all defendants guilty.[75] Cockrane's sentence included a fine of £1,000, twelve months imprisonment, and his standing in the pillory for one hour in the city of Westminster, Cochrane's own electorate. Upon conviction he was expelled from the Commons. Cochrane later appeared in person to move for a new trial on the ground that he had acquired new evidence to prove his innocence since the trial. Ellenborough refused the motion because, notwithstanding Cochrane's plea that he was not in a position to compel their attendance, the other defendants were not present on the motion with him. In due course, Cochrane was re-eleced as MP for Westminster; and his sen-

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72 Campbell, op cit, 228.

73 Brougham, WORKS IV, 193-194.

74 Campbell, op cit, 228.

75 On the point of law taken before sentence on a motion to arrest judgment, Ellenborough held that the indictment was not defective in failing to specify the persons who had been injured by the purchase of stock; that the public government funds meant the funds of the United Kingdom, which since the Union might mean either British or Irish funds; and that the Court would take judicial notice of a state of war between the United Kingdom and a foreign state where the war was referred to in various Acts of Parliament.

tence lead directly to the abolition of the pillory, except in cases of perjury.[76] Of this part of Cochrane's sentence Lord Campbell wrote:

> Such a rule had before been laid down, but it is palpably contrary to the first principles of justice, and it ought immediately to have been reversed.[77]

The reaction to this case was strongly against Ellenborough both because the public believed in Cochrane's innocence and because the legal profession thought that Ellenborough had punished him too severely. Townsend records that

> The house of Lord Ellenborough was attacked and his person insulted, but he remained steadfast and refused to join in the recommendation to mercy.[78]

Despite the strength of public and professional feeling the better view seems to be that Ellenborough was moved in his undoubtedly unfair conduct of the case more by his desire to make an example of a man whom he believed to be guilty of a crime affecting the investments of thousands of people than by any personal or political considerations. In this opinion both Brougham and Townsend concur. Cochrane himself, however, was not easily appeased. Immediately upon his release from gaol thirteen articles of charge in which he 'ransacked the English language for terms of vituperation'[79] were laid by him on the table of the House of Commons charging Ellenborough with 'partiality, misrepresentation, injustice and oppression'.[80] It is perhaps an indication of the respect in which Ellenborough was held and of the general belief in his judicial integrity that on the question of referring the charges to a committee the motion was defeated unanimously by the House[81] and immediately afterwards a motion expunging the question from the Journals was passed with virtual unanimity on the voices.

R v Picton[82]

In a period of colonial expansion the criminal law of England also maintained the rule of law in British possessions overseas. In 1816 Thomas Picton, governor of Trinidad, was brought to trial in Eng-

76 Pillory Abolition Act 56 Geo III c 138 (1816).
77 Campbell, op cit, 228.
78 Townsend, THE LIVES OF TWELVE EMINENT JUDGES I, 358.
79 Townsend, op cit, 358.
80 Cochrane was, of course, protected by parliamentary privilege.
81 Cochrane himself, being a teller, did not vote.
82 (1804-1812) 30 S T 225.

land on charges of having tortured and assaulted an eleven year old girl for the purpose of obtaining information relating to a theft.

Picton had suspended his victim from a gaol ceiling by one hand with the great toe of one foot being placed upon a sharp spike, her other hand and foot being tied behind her body such that the whole body weight was borne by the suspending rope and the spike. In his trial before Ellenborough in the Court of King's Bench Picton was found guilty, although the decision for the jury turned upon the question of whether a judge, pursuant to Spanish law in Trinidad at the date of cession to Britain, had the discretion to apply torture.[83] Dallas, for the defence, thereupon gave notice of motion for a new trial and the proceedings continued thereafter for a further six years: in February 1808 the motion was made absolute and upon the second trial in June the jury found a special verdict. Ellenborough now instructed the jury that the practice of torture had obtained in Trinidad at the date of cession. The jury was also required to enter a finding on the question of personal malice. On the latter question, Ellenborough with grotesque understatement, said in the course of his summing up:

> As this (method of torture), however, was a new process, which had never before been applied in that island, it might have been better if General Picton, in inflicting so severe a punishment upon a person of delicate frame, had acted with greater caution.[84]

The jury found that by the law of Spain torture existed in Trinidad at cession and that no personal malice existed in the defendant's mind, but requested the court to decide upon the question of guilt. In February 1810, therefore, argument was commenced before Ellenborough on the special verdict, upon the conclusion of which no further proceedings took place until Hilary Term 1812 when Ellenborough ordered the defendant's recognizances to be respited until further order. During the summer of 1809, however, General Picton had been appointed to the command of a brigade and became a leading figure in Wellington's glorious peninsula campaign. After the battle of Vittoria on 13 June 1813 he returned to England because of ill health, was elected to the House of Commons, knighted to the Order of the Bath, and on 11 November the unanimous thanks of the House were presented to him for his military services. He immediately returned to the war in Spain, in June 1814 again received the thanks

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83 Trinidad, being a conquered colony with an established system of law, remained a jurisdiction in which that law continued to apply.

84 (1804-1812) 30 S T 805, 868.

of the Commons and a year later fell at Waterloo 'gloriously leading his division to a charge with bayonets . . . '[85]

CONCLUSION

Ellenborough's state trials deserve to be rescued from oblivion both for the light they shed upon the judicial system's response to the liberal and radical reform movements between 1802 and 1818 and as biographical data by which to assess Ellenborough's performance as a judge in criminal cases.

The strengthening of the law of treason by the *Traitorious Correspondence Act* of 1793 and the *Treason Act* of 1795 proved in large measure to be of cautionary effect only. Prosecutions for treason were few, and convictions fewer. On the other hand, the law of criminal libel was for a significant period during this time employed successfully as a means of controlling an admittedly licentious press. Fox's *Libel Act,* a Whig measure intended to work to the accused person's advantage, was so inexactly drafted as to produce, at least for some of this period, and in Ellenborough's court, the opposite effect. A judge who, under the authority of the Act, could in his discretion instruct the jury upon the libellous character of a publication would often not hesitate to do so.

Ellenborough did not hesitate to do so when he believed a conviction was required. He was not alone in this. His naturally strong and opinionated personality sometimes gave the impression of abuse of the judicial office. But the evidence for this is not on the whole convincing enough for us to be able to label Ellenborough so simply. He was a judge of strong moral principles and he let them show. And contemporary accounts of his judicial behaviour, as well as a careful reading of the State Trials, show that his lapses from the highest standards of judicial behaviour were the exception rather than the rule.

NEVILLE CRAGO*

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[85] Ibid 957: a quotation from Wellington's despatch.

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