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'Moloch and Belial of the Bar': Chancellors Thurlow and Loughborough and the late eighteenth century Chancery judiciary

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'The Moloch and Belial of the Bar'. That's how William Edward Hartpole Lecky called Edward Thurlow and Alexander Wedderburn in his *History of England in the Eighteenth Century*. Thurlow and Wedderburn served as Chancellors from 1778 until 1801. Their posthumous reputation was mostly dreadful. I will try today to do three things: (i) to trace the history of their bad posthumous reputation; (ii) to give some idea of their actual work as Chancellors; and (iii) finally, to offer some explanations of how and why that terrible reputation appeared.

Bad Reputations

Thurlow's unique personal qualities are relatively well known, mentioned, for example, by Holdsworth. He used strong language in genteel situations, and was by all accounts something of a bully. His ascendancies both as a barrister and in the two houses of Parliament were at least partly founded on rhetorical intimidation. He favourably compared his own rise from what are called 'obscure' origins – he was a poor parson's son – to a Peerage and the woosack with the hereditary peerages of most of his House of Lords colleagues. He dispensed, as Chancellor, large amounts of ecclesiastical patronage while living in sin with Polly Humphries, the pretty barmaid from Nando's Coffee House right by the Temple. He lived with her for more than 30 years, had 3 illegitimate daughters (or 'natural' daughters, as illegitimates were then called) by her and never bothered to marry her. He was fairly loyal to George III, but conspicuously disloyal to the governments he was part of, especially to Pitt. He notoriously negotiated with the Prince of Wales – the future George IV – for a regency government while Chancellor in Pitt's government during George III's illness in late 1788; this was considered a grave breach of loyalty. Later he systematically obstructed Pitt's cherished legislative proposals, including the sinking fund, in the Lords. This made Pitt present George III with an 'either me or him' ultimatum, and the King sacked Thurlow in May 1792.

Wedderburn paid more attention to social conventions than Thurlow. A key reason he had to conform was his Scottish birth and education, which made him suspect in England. Taking after his father, he belonged to the 'moderate' party in 1750s

Scottish politics, the party favouring at least a partial Anglicization of Scottish culture. By age 20, he was on personal terms with the leading lights of the Scottish enlightenment, including Hume, Smith and Robertson. Hume owed to Wedderburn his escape from being publicly shamed as a heretic by the general assembly of the Scottish Kirk. Wedderburn edited the short-lived *Edinburgh Review*, which was intended to review everything published in Scotland, and featured, for example, an article by Smith introducing Scottish readers to Jean Jacques Rousseau. By age 25, however, he clashed publicly with the Jacobite dean of the Edinburgh faculty of advocates. His Scottish legal career was finished, and he crossed the border to pursue a similar career in England.

His English career is principally remarkable for his many switches of political allegiance. He was given a Parliament seat by Lord Bute. When we discuss his dreadful reputation, it will be well to remember that he suffered, in England, from the double prejudice resulting from being a Scot in English politics soon after the '45, and being a protégé of Bute, also a Scotsman, and much hated by many Whigs for his supposed sinister influence on the young George III, instilling the tenets of tyranny in the young King. When Bute fell from power, Wedderburn switched from government to opposition, to a seat controlled by the rich Lord Clive, recently returned from India. A few years later he switched his allegiance again, to the new government established by Lord North. He served under North throughout the 1770s, as solicitor general to Thurlow's attorney general. In 1780 he was granted a Peerage as Lord Loughborough and made Chief Justice of the Common Pleas, then the Royal court with the slimmest docket. Despite this promotion he soon jumped ship again, to the Foxite opposition, and was Chancellor-in-waiting throughout the 1780s. When the French revolution split the Whigs in the early 1790s into a peace party and a war party, Loughborough was the first Whig to join Pitt's government as Chancellor, a year before the entire moderate wing of his party, led by the Duke of Portland, did the same.

The history of Thurlow and Loughborough's bad posthumous reputations is easily traced. During Thurlow's lifetime, the good press overwhelmed the bad. His legal knowledge and courtroom abilities, both as advocate and judge, were much esteemed. On his appointment, a former friend, the popular poet William Cowper, published a laudatory poem entitled 'On the Promotion of Edward Thurlow, Esq. to the Lord High Chancellorship of England'. On his dismissal 14 years later, an anonymous author calling himself 'a loyal subject' published A 'Remonstrance to the Right Hon. Lord Thurlow, upon the Report of his Intention to Resign the Great Seal'. George Chalmers commented in his *Parliamentary Portraits* that '[n]o one who ever held the office of attorney-general, ever possessed so much legal knowledge, with so many requisites to constitute one of the first orators in the British Senate. Not more a profound lawyer than a most ready and powerful debater... [s]ince his accession to the House of Lords his merit has shone with equal lustre.' After some more high praise of Thurlow's rhetorical skills, Chalmers concluded his biographical sketch by quoting words spoken in Thurlow's praise by a political rival, Charles James Fox: Fox spoke of Thurlow's 'shining talents', which have 'justly entitled him to be considered as one of the greatest pillars of the state'. A few years later, an anonymous commentator, writing for a popular audience, wrote that '[f]ew men, while occupying that high post, have gained such a degree of popularity as Lord Thurlow'.

There were disapproving voices, too, especially regarding Thurlow's unconventional lifestyle. An anonymous author styling himself 'Cassandra' published 'A Letter to the Bishop of London. Containing a Charge of Fornication against

Edward, Lord Thurlow'. Still, Thurlow enjoyed semi-legendary status among the parliamentary class as a powerful and authoritative debater. That he fit the stereotype of a coarse, swearing and patriotic John Bull to a T helped the press make him into something of a folklore hero among the general public.

Wedderburn was less fortunate, even in his lifetime. He never overcame his problematic starting point as a Scot in xenophobic England. Unlike Mansfield, who rode to England at age 14, Wedderburn's entry to Parliament through Bute's machinations a mere 4 years after crossing the border seemed to confirm him as a strongmen's puppet of the type denigrated by eighteenth century 'Patriot' rhetoric. His legal and oratorical skills were appreciated by his fellow MPs and government employers, not to mention his private clients – one 'Lady' of Surrey published a poem starting 'Does generous Wedderburn assert our cause! What can I say to render due applause!'. But he was continuously derided by many as a cynical opportunist for his record of switching political sides.

Their posthumous reputations are almost uniformly bad. A long line of commentators stretches from Lord Campbell's 1850s *Lives of the Lord Chancellors* to Daniel Duman's 1980s studies of the eighteenth-century judiciary to condemn Thurlow and Loughborough as unsatisfactory judges. They are said to have been lazy, deciding cases in a perfunctory manner. Holdsworth memorably condemned Wedderburn for being a fan of the theatre and spending time in high society, when he should have been home with his caseload. Thurlow has been denounced as all bluster and no substance. Straitlaced Victorians have frowned over his immoral conduct and lifestyle. The two Chancellors were repeatedly described as having given price of place to the political side of their job over its judicial side, with unfortunate results for the mounting delays in Chancery. When they found time for judging they are said to have been, unlike their predecessor, Lord Bathurst, adequate – but no more than that, a description which pales against the conventional laudatory phrases describing Hardwicke's and Eldon's command of equity.

Not that these charges are completely unsubstantiated. Some of their decisions are short, at least as reported. Thurlow had a realistic picture of his way of executing his judicial function, commenting: 'I do some, a good deal does itself and the rest is not done at all. It all casts up to much the same'. Some of the decisions which he did deliver were researched and thought out for him by Lloyd Kenyon and Francis Hargrave. Wedderburn, as a central figure in the war cabinet of the 1790s, naturally put much effort into the political side of his duties.

The negative traditional picture of their judicial work makes for curiosity. Were they really as bad as reported? It also makes for ignorance: their work has been seriously under-researched. Legal historians looking at the late eighteenth century and early nineteenth century Chancery – Lobban, Horwitz, and Polden among them – have concentrated on the court's procedural deficiencies, on the resulting outcry and on the process leading to reform. Thurlow and Wedderburn's substantive work has rarely been exposed. I will now try to describe some of its highlights.

A Glance at their Substantive Work

Thurlow and Wedderburn intensified Chancery's traditional pro-debtor bias. By the late eighteenth century, the court had for more than a hundred years protected non-commercial debtors from their creditors. The best-known instance of this protection was the reification of the equity of redemption into an estate in property; but this was just one example of a much wider court policy. The court did recognise the legitimacy of creditors' interests and could on occasion lend them its aid, but, so long as non-commercial debtors were concerned, the court was clearly on their side – cases of clear fraud apart – and thought nothing of leaving their creditors with bad, unrecoupable, debts. Non-commercial debtors can be defined as all those who borrowed for personal or family purposes, for immediate or future consumption rather than in the course of their business.

Going back a hundred years in the history of equity, Nottingham and Hardwicke were less extreme than Thurlow and Wedderburn were to be in their protection of family property against the legitimate claims of the family's creditors. Nottingham, after all, drafted the tenth section of the Statute of Frauds. This section allowed the judgment, statute or recognizance creditors of a beneficiary of freehold under a trust an equitable elegit against that freehold. Nottingham also made beneficial interests in terms of years and other chattels, as well as the equities of redemption in both the fee and a term, liable to the beneficiary or mortgagor's creditors, both during his life and after his death.

Hardwicke seems to have continued Nottingham's general approach. In one case, he justified his supplying of defective executions of powers in aid of wives and children as an extension of the court's *pro-creditor* policy.¹ In another case, *Bainton v Ward*, where a decedent's real and personal estates were both insufficient to discharge his debts, Hardwicke saw a sum the decedent, during his lifetime, was empowered to charge on his wife's estate as liable to his creditors' claims, despite his having appointed half of the sum to his two sisters.²

Thurlow, contrastingly, tended strongly in favour of the interests of debtors and their families, as against those of their creditors. The 'family' protected was not merely debtors' immediate or nuclear family, but quite a wide group of their kin. Just how wide that group was was made clear in the case of *Killet v Ford*,³ where a physician, Robert Mitchell, gave by will whatever shall be left of his personal estate after his executors shall satisfy his debts out of it, to beneficiaries which trustees were to choose at their discretion from among his 'relations', in proportions as the trustees shall think fit. In the event, the entire personal estate was insufficient to satisfy this testator's debts, so the trust declared of the residual personalty failed for lack of any trust property. Mitchell further directed, however, that a certain sum was to be raised from his real estate, to follow the trusts of the residual personalty. The question facing Thurlow was simple: who was to enjoy this sum – Mitchell's creditors or those of his relatives which the trustees were to choose? Thurlow chose the relatives, leaving the creditors with a significant loss; *Bainton* was cited to him, but to no avail. Thurlow's choice required quite a logical leap of faith, since it was at least arguable that where there was no residue left, other funds could not follow the trusts of the residue.

Note how sharp the contrast between Hardwicke's and Thurlow's attitudes was. Hardwicke in *Bainton* made property which was not even the debtor's own – rather his wife's property, on which he had a general power to charge a certain sum – liable to his debts, saying it was to be considered as his personal estate. In so ruling,

PT¹ TP*Hervey v Hervey* (1739) 1 Atk 561, 26 ER 352; Barnardiston 103, 27 ER 572.

PT² TP*Bainton v Ward* (1741) 2 Atk 172, 26 ER 507.

PT³ TP*Killet v Ford* (1788) 1 Cox 442, 29 ER 1240; Ms Abbot vol VII 84b.

Hardwicke preferred the debtor's creditors to both the wife's heirs – heirs to that part of her property which was not actively charged by the debtor with sums of money to be raised thereout – and to the debtor's own sisters, to whom he appointed part of the sum he had a power to charge on his wife's estate. In his brief decision, Hardwicke expressed a preference for those giving valuable consideration, such as the creditors, over volunteers such as the heirs, legatees and appointees. Thurlow, contrastingly, barred the creditors in *Killet* from part of their debtor's own property, despite the debtor having clearly expressed, by will, an intention that his property be used for paying his debts first, before any sums were to be passed to volunteer takers. Thurlow saved the debtor's property from his creditors against the debtor's own express intentions, not for his widow, nor for his children, but for an unascertained group of relations, the choice of beneficiaries from among whom was subject to trustees' discretion.

To preserve families' property for the family and keep it from the family's creditors, both Thurlow and Wedderburn could put quite an unlikely construction on central statutes. We'll take one example for each of the two Chancellors.

The Act for the Relief of Creditors against Fraudulent Devises of 1691, known as the Statute of Fraudulent Devises (much in the tradition that tagged the rule permitting certain perpetuities as a rule 'against' them), provided that any devise of real estate or the income thereof was void as against the testator's specialty creditors, except any such devises directing that the realty or income was to be used for paying the testator's debts. In *Lingard v Earl of Derby*,⁴ Thomas Barlow by will directed that his debts were to be a first charge both on his personal estate and on his realty, which were to be liable to them in that order. Subject to this direction, he devised his estate on trust, the estate income to be paid, first in discharge of his wife's jointure, then in discharge of his sister's annuity, and only then in discharge of such of his debts as his personal estate should fall short of satisfying. Barlow's creditors filed a bill in Chancery. They agreed that on the correct reading of the will, any debts not satisfied out of Barlow's personalty were to be satisfied out of the income on his realty, but only subject to his wife's jointure and his sister's annuity. The creditors' having recourse to an expensive Chancery suit may be explained by their desperate situation: Barlow's personal estate amounted to £300, his debts to £8000. The estate income, minus both jointure and annuity, didn't leave an income stream adequate for the debtors' demands. Nor could a sufficient sum be raised by mortgaging the estate; a sale was the creditors' only hope, and they asked the court to order such a sale.

Loughborough refused to do so. He granted the creditors the point of construction that 'where the devise is to pay the debts out of the profits of the estate, it is equivalent to a devise to the trustees to sell, and a decree for a sale is only an execution of that trust'. But they failed on Loughborough's idiosyncratic reading of the Statute of Fraudulent Devises. He read the Statute as saying that where the will contained any provision whatsoever for the payment of debts, all of its directions were saved from being held void by operation of the Statute. This was so, he held, even in cases, like the one before him, where the provision the testator had made for paying his debts was clearly insufficient for that purpose. Barlow's creditors could, thus, only be repaid as the testator intended they shall, that is, subject to his gifts to his widow and sister. Loughborough prevented the family estate from being sold, and safeguarded the provision the testator had made for his widow and sister, but at the

PT⁴ TPLingard v Earl of Derby (1783) 1 Bro CC 311, 28 ER 115.

cost of doing significant violence to both the language and spirit of the Statute, as well as to the creditors.

Thurlow soon corrected Loughborough's reading of the Statute of Fraudulent Devises into one more consistent with both its language and spirit.⁵ But he could, on other occasions, be no less daring than his successor. In *Dundas v Dutens*,⁶ Harriet Dundas was entitled to more than £5000 under her father's will. She married Colonel Callander without her parents' consent, no settlement having been made prior to the marriage. A settlement was finally made a year later, according to which Harriet's entitlement under her father's will was to be paid to trustees, in trust, after the death of the surviving spouse, for the children of the marriage. In the event there was only one child of the marriage, a daughter. The husband, Callander, became indebted in large sums. His creditors, having pursued him at law to no avail, filed a bill in Chancery, praying that the settlement made after marriage be declared fraudulent and void, and Harriet's entitlements under her father's will be applied in paying her husband's debts. John Scott, the future Lord Eldon, and Cox, the Chancery reporter, argued that the settlement made after marriage was voluntary, since after marriage the husband and wife were one person in law, and no consideration could move between a person and himself. The settlement being voluntary, it was void as against the husband's creditors under the Statutes of Elizabeth against fraudulent alienations. They further argued that though the post-nuptial settlement was apparently based on a parol agreement made before marriage to make such a settlement, no claim could be founded on that parol agreement, since the fourth section of the Statute of Frauds provided that no action shall be brought under any 'agreement made upon consideration of marriage', unless that agreement be in writing and signed by the person to be sued.

This logical argument was rejected by Thurlow. Essentially ignoring the Statute of Frauds, he held that having by parol promised before marriage to make a settlement, and having presumably obtained the marriage based on that promise, the husband was bound by his promise, and that the settlement executed in fulfillment of that promise was not fraudulent despite having been executed after marriage, and thus not void under the Statutes of Elizabeth. On the contrary, in Thurlow's view, holding that settlement to be void would have defrauded the daughter, the only child of the marriage, of her property. The husband having already cooperated with his creditors to a certain extent, the proceedings in Chancery were in Thurlow's view 'a combination between [the husband] and his creditors to wheat [=cheat] his own children', a 'very scandalous transaction, [which] reflected great disgrace upon the Court'. To save the infant daughter from this transaction, Thurlow apparently thought nothing of ignoring a key statute. His roughshod treatment of the statute did not last long as the official position of equity. Some years later, Grant MR expressly denied that a parol promise before marriage could be valid, or that a written obligation made after marriage could give it validity, dismissing Thurlow's view to the contrary as dicta.

Before closing with a discussion of the causes of Thurlow and Loughborough's dreadful posthumous reputation, I want to address another couple of cases, dealing with the validity of 'consent clauses' in English law. 'Consent clauses' were a common parental mechanism for controlling children, especially (though not exclusively) daughters: the children were given their portions of family wealth, to be

PT⁵ TPHughes v Doulben (1789) 2 Bro CC 614, 29 ER 338; 2 Cox 170, 30 ER 78.

PT⁶ TPDundas v Dutens (1790) 2 Cox 235, 30 ER 109; 1 Ves 196, 30 ER 298; Ms Abbot vol V 147a.

paid to them on their marriage, on condition of that marriage being consented to by the parents or a parental surrogate, such as trustees or the parents' personal representatives. This mechanism made great sense in the context of eighteenth century English propertied society. In that society, inherited and gifted wealth, rather than earned, was for many the key source of both wealth itself and the social status consequent on it. More specifically, marrying well – nailing a well-endowed bride or groom – was an important strategy for the ambitious young, or indeed for anyone looking for a windfall, as indebted persons were likely to be. In social strata among which marriage was one of the leading ways of extricating oneself from financial trouble, giving the persons expected to supply the windfall – the parents - veto power over the identity of the prospective payee seems reasonable.

Equity, however, presented a serious threat to the smooth operation of 'consent clauses'. That threat was one of the rules of Roman law which survived in equity until the late eighteenth century: the rule of the *Lex Pappia Poppaea* striking down all conditions on legacies which tended to restrain marriage in any way, as consent clauses undeniably did. This rule was an expression of the Roman pro-nuptial, and especially pro-fertility, policy at the time of Augustus, striving to increase the population of Rome, in order to make up for the losses of the civil war. The rule conflicted with the need of English propertied parents for veto power over their children's choice of spouse. Its adoption by equity is a clear case of a strand of continental 'book culture' having been imported into English law despite its conflicting with the requirements of English society. This dissonance was expressed in the complicated history of the Roman rule's reception and qualification in equity, parts of which have been briefly addressed by Susan Staves in her book *Married Women's Separate Property in England*. Seventeenth century equity came to distinguish between cases where, on the legatee infringing the condition by marrying without consent, the legacy was to go over to another taker, and those in which the infringement worked only a forfeiture. Conditions of the first type were permitted to operate, while those of the second were held void, operating simply as a scare tactic: the legacy was held absolute, that is, was held to be due to the legatee whether he married with consent or not. Though once consent conditions without a bequest over on marriage without consent were known to be ineffective they cannot have operated as a particularly effective threat.

Thurlow and Loughborough heard several 'consent clause' cases. Their different treatment of this issue illustrates their respective judicial styles. I'll restrict myself to the most significant 'consent clause' case decided by each. Thurlow's most significant case on 'consent clauses' was *Scott v Tyler*.⁷ In *Scott*, a daughter was given her portion of family wealth, in case she married before her majority, subject to her mother's consent. Consent was refused most justifiably: the husband was, as the mother observed, too old, of inferior means, and had a family by his earlier, deceased wife. Two years before Thurlow handed down his decree the husband fled overseas, leaving his two children from his former marriage dependent on his young second wife. He left her no means for taking care of either herself or them.

An obvious fault with the consent requirement in *Scott* was that the party on whose consent the legacy depended – the mother – was also the party who stood to profit, as residuary legatee, on the legacy lapsing into residue by the daughter's marriage without consent. Thurlow shrugged this difficulty off. In a long, learned

PT⁷ TP(1788) 2 Bro CC 431, 29 ER 241; 2 Dick 712, 21 ER 448; (1791) Ms Abbot vol IV 76b.

judgment⁸ he admitted that the civil law rule holding consent clauses void was part of English equity so far as legacies of personalty, not charged on land, were concerned, but noted that the numerous exceptions to this rule made conditions on marriage portions, in fact, generally good in England so long as they were not general bars on any marriage whatsoever. One of those exceptions was that conditions restraining marriage until the legatee reaches the age of 21, or another reasonable age, were held good so long as not used evasively to bar marriage generally. Such exceptions were especially approved when agreeing in substance with the *lex loci*, which conditions making children's entitlement to their portions on marrying during minority depend on parental consent did, being a powerful prod to compliance with the Clandestine Marriages Act.

In explaining the perplexed legal situation in which English law adopted a rule of the civil law only to engraft so many exceptions upon it as to obliterate it almost completely, Thurlow noted that while the importation of the rule was in part a matter of history and in part of the desirability of harmony between the normative regimes applied by the concurrent jurisdictions of equity and the Courts Christian, the underlying attitudes of the civil law and of English law regarding parents' duty to provide for their children were different. The civil law looked on provision for children as the natural debt of the parent, and so the very referral of marriage, on which a legacy was conditioned, to the advice or discretion of another, particularly an interested person, was deemed a fraud on the law. English law, he implied, looked at things very differently. It is clear, however, that eighteenth-century English law, in fact, also attached great importance to parents providing for their children, both before and after majority. Thurlow's contrasting between the civil and the English attitudes seems to have been largely manufactured to buttress his decision to uphold the condition in the instant case. The highly imprudent choice of partner made by the legatee in that case must have seemed to exemplify the legitimacy, indeed the necessity, of such conditions.

Thurlow did not adopt the suggestion made by lawyer and legal historian Francis Hargrave in his extended argument for the assignees in bankruptcy of the mother, that equity should abandon its purported deference to the practice of the ecclesiastical courts on this issue. The ecclesiastical courts, Hargrave said, rarely heard any legacy cases since the development of Chancery's parallel jurisdiction in that area.⁹ When one was, rarely, heard, they followed temporal equity cases. Furthermore, respect for ecclesiastical practice has not hindered Chancery from developing numerous exceptions to the Roman rule, such as allowing consent requirements where there was a bequest over in case of non-compliance. Any real respect for the canon law was long gone. Under such conditions, what was the point of continued purported adherence to the Roman rule? Chancery was not, after all, a civil law forum.¹⁰

The artificiality of policing such sensitive practices of English society by civil law rules was clear to both the Chancery judges and bar, and unlike Thurlow, Loughborough was willing to heed Hargrave's call. In *Stackpole v Beaumont* he flatly rejected the civil law ban on 'consent clauses', holding such clauses clearly valid for marriages during minority (rather than void, subject to exceptions, including one for such marriages, as Thurlow effectively held in *Scott*), as completing and strengthening the consent requirement in the Clandestine Marriages Act. He said the

⁸ Fully reported by Dickens from Thurlow's own Manuscript notes: last note.

⁹ For that development see Holdsworth, vol 5, 319-20; Vol 6, 650-57.

¹⁰ See Hargrave's argument in full in Hargrave (n 10) vol 1, 22, 46.

civil law rule, being based on the anti-celibacy policy of the Roman state at the time of Augustus, should never have been adopted in England, and attributed its adoption in a Christian country to the unreasoning spirit of the 'unenlightened ages', which took what they saw in the civil law books as rules to guide them, not caring to reason whether these rules fit England. Hereinafter there were to be only two rules: consent requirements were proper during minority and impossible afterwards.¹¹

Why such Bad Reputations?

Having looked at some of Thurlow and Loughborough's work on the Chancery bench, it is clear they were competent judges who were sometimes inspired, sometimes not, just like any other judge. Why then their terrible posthumous reputations? In the minutes that remain, I shall try to offer some explanation of how and why these reputations arose.

As to the denigration of the two Chancellors as lazy judges, it is undeniable that some of their decisions were short, though both occasionally delivered an extended judgment, such as Thurlow's judgment in *Scott v Tyler*. Their decisions were no shorter than was usual among eighteenth-century Chancellors, occupied as they were with the many sides of their office. And while the delays in Chancery continued to pile up during this period, they did not, as Horwitz and Polden have shown, do so at the rate in which they did during Eldon's later time on the bench. One reason for Thurlow and Loughborough's quicker pace was the very brevity of many of their decisions, as well as their tendency to hand them down immediately, at the hearing, sometimes without hearing one of the parties. This courtroom technique must have been intended to curb delay wherever possible. There is some historical record of Thurlow having 'worked the lawyers hard' so as to quickly get through as many cases as possible. His habit of using assistants to help him get through his caseload is and was a usual one among judges, both early modern, modern and postmodern.

The great hostility with which posterity has treated the two judges was not, then, a result of a particularly inept tenure on the bench. It reflects, instead, the transformation of English culture between the late eighteenth and the early nineteenth centuries. Thurlow and Wedderburn were model representatives of mid-eighteenth-century English elite culture. Many elements of this culture were by the late eighteenth century strongly repudiated by the influential elements of English society who subscribed to traditional Christian values, then resurgent in the twin guises of Methodism and Evangelism. The two Chancellors attained the woollen sack in the late eighteenth century, but having been born in the early 1730s, their personalities were formed in the mid-century decades. Both fit historians' description of mid-eighteenth-century English propertied society as a masquerade society, where personal identities were fluid and social roles indistinct, exchanged frequently like masks; complex, extroverted personalities were tolerated, almost encouraged.¹² Dark-skinned Thurlow, the poor parson's son who rose to be Chancellor, was sometimes seen as socially and

¹¹ (1796) 3 Ves 89, 30 ER 909. He has earlier upheld a similar condition, without explicitly rejecting the application of the Roman rule, as Lord Commissioner of the Great Seal in *Hemmings v Mun[c]kley* (1783) 1 Bro CC 303, 28 ER 1147; 1 Cox 38, 29 ER 1052.

¹² Wahrman, 166-97.

racially indistinctive.¹³ He behaved as if exempted from conventional morality, swearing in genteel situations, delighting in publicly denying social rank, and living in sin with a coffeehouse barmaid, all while serving in the traditionally clerical office of Chancellor, the keeper of the King's conscience. His three illegitimate daughters fit into the late eighteenth century surge in illegitimacy, corrected in the nineteenth century,¹⁴ much as his general conduct exemplified the eighteenth-century lull in the normal predominance of abstemious values in England.¹⁵ Thurlow's political power, and specifically the King's high opinion of his abilities, enabled him to lead his personal life in disregard of the norms he was enforcing in his official role. Wedderburn's career evidenced indistinctiveness in many senses: he transformed from a Scot with an Anglicizing agenda to a Scottish-born English lawyer and statesman. His many changes of political allegiance resemble the progress of a masked actor, changing masks as required at every stage of his journey to the woolsack.

The late eighteenth century brought, according, for example, to Lawrence Stone and Dror Wahrman, a hardening of social roles.¹⁶ The mid-eighteenth-century normative looseness which both Thurlow and Wedderburn exploited now gradually disappeared. A society shaken by the American war, then frightened by the French revolution, needed its leadership to unambiguously obey, or at least pretend to obey, its conventional morality and religion.¹⁷ There was, as Langford wrote, 'a lower threshold of tolerance in regard to religious heterodoxy'.¹⁸ Much like effeminate men,¹⁹ judges fulminating from the bench while flouting religion and morality as private men became unacceptable. The great fear of revolution principles made Wedderburn's personal connection to the Scottish Enlightenment an image liability.

By the time of these changes in English culture, Thurlow and Wedderburn were safely ensconced in the ruling elite, which preserved islands of eighteenth-century permissiveness into the regency period. Their careers were unharmed; it were their posthumous reputations that suffered. The puritanical Kenyon did not think Thurlow a lesser lawyer than himself, yet later opinion has been much kinder to the Chief Justice than to the Chancellor. Thurlow and Wedderburn's bad posthumous reputations were, then, at least partly a reflection of prudish Victorian prejudice, and a result of nineteenth century reformers' impatience, bordering on disdain, for the eighteenth-century culture over which they have prevailed. That this hostility has been largely sustained for the last two hundred years reflects the enduring victory of the Benthamite ethos of reform, of which the modern insistence on efficiency in the public sphere was born.

¹³ Richard Tickell, *An English Green Box; or, The Green Box of the R-t H-e E-d L-d Churllow*, (G Kearsly, London 1779) 100-101.

¹⁴ Szreter and Garret (n 2) 59.

¹⁵ For this lull, *ibid.*, 58-65.

¹⁶ Wahrman, 45-82; Stone 1977, 667-80.

¹⁷ For the late eighteenth century return of evangelism, Joanna Innes, 'Politics and Morals' in Eckhart Hellmuth (ed), *The Transformation of Political Culture* (OUP, Oxford 1990); Davidoff and Hall (n 6) ch 1, who mainly discuss its influence on the social construction of gender; Boyd Hilton, *A Mad, Bad and Dangerous People? England 1783-1846* (Clarendon Press, Oxford 2006) 174-84.

¹⁸ Langford (n 3) 470.

¹⁹ A key phenomenon of the permissive mid-eighteenth-century decades were the 'macaronis', effeminate young men dressed indulgently, on whom, Langford (n 3) 576-78; Wahrman, 60-65.