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CYRUS GRIFFIN:
VIRGINIA'S FIRST FEDERAL JUDGE

By HENRY S. RORER*

Cyrus Griffin was a friend and colleague of many of the young republic's principal leaders, including Washington, Jefferson, Madison, Henry, Marshall and Franklin. He was successively a member of the Virginia House of Delegates, Congressman, Judge of the Court of Appeals in Cases of Capture, and Judge of the United States District Court for Virginia. For more than thirty years he served his state and nation, but for more than a hundred and fifty years he has remained a forgotten man. He deserves better.

Cyrus Griffin was born in Farnham Parish of Richmond County in 1748,¹ the sixth son of Captain LeRoy Griffin, a prosperous tobacco-plantation owner of Welsh ancestry. His father died when Cyrus was two years old. At the age of eighteen, Cyrus demanded his share of his father's estate, then held in trust by his older brothers.² As soon as he received it, he sailed aboard a tobacco-carrying ship to Scotland, where he enrolled at Edinburgh University.

There was nothing unusual about Griffin's going to Edinburgh to study. Between 1765 and 1770 no fewer than eleven Virginians from the Northern Neck alone were students at London and Edinburgh. Among these were five members of the Lee family and two of the Ball family.³

It is a matter of record that Cyrus Griffin's education at Edinburgh University was at first a somewhat leisurely affair, resembling an extended vacation. For four consecutive years he arrived in Edinburgh and enrolled in the University in the month of December, two months late. This was due to the fact that he always sailed on a tobacco-carrying ship. Virginia tobacco was not cut, cured, packed in hogsheads and shipped until October, and the voyage required from fifty-eight to eighty-three days.⁴ For the first two years he registered in only one

*Principal, Mary Calcott School, Norfolk, Virginia. B.S. 1926, M.A. 1938, University of Virginia.

¹12 W. & M. College Q. Hist. Mag. 184 (1904).

²23 Va. Mag. of Hist. & Biog. 58 (1915).

³21 Va. Mag. of Hist. & Biog. 198 (1914).

⁴Ballagh, Letters of Richard Henry Lee 84 (1911).

class—Moral Philosophy. The third year he added two more classes, Natural Philosophy and Civil Law. In 1769 he dropped all classes except Civil Law, which is the first evidence that Cyrus had become interested in a law career.

At Edinburgh University, Cyrus met Charles Stuart, Lord Linton, and was invited to spend the Christmas holidays at Linton's home, Traquair House, located twenty-five miles south of Edinburgh.⁵ Here he met and wooed Charles's fifteen year old sister, Lady Christina. The courtship resulted in an elopement, four years later, and the marriage was entered in the "Register of Marriages Within the City of Edinburgh" as follows:

"Sab. 29, Aprile 1770 Cyrus Griffen Residenter in Tolbooth Kirk Parish and Miss Christian Stewart Daughter of the Deceast Charles Stewart farmer at Peebles now in New North Kirk Parish."⁶

The deceit recorded in the register of marriages is quite apparent. If Lady Christina's father had been deceased, her brother Charles's title would have been Earl of Traquair, instead of Lord Linton. The title of Lord in England and Scotland is applied by courtesy to the eldest son of an earl.⁷ Cyrus, therefore, was using his knowledge as a member of the Church of England to make a desirable marriage. Marriage to the daughter of a *living* Earl of Traquair would have required the publishing of banns, and a delayed ceremony; whereas if the marriage involved only the daughter of a deceased farmer, no banns would have been required. Christina was a Catholic and Cyrus a member of the Church of England. Both churches required the publishing of banns.⁸

A son, John, was born on April 20, 1771.⁹ Forty-one days later Griffin enrolled at the Middle Temple in London, where he remained for three years, to continue his study of the Civil Law.¹⁰ The prestige which he gained by studying there served him well in his later career in America.

In 1775, Griffin brought his family to Virginia, and the following year he returned to London alone.¹¹ On that trip he carried a letter of introduction from the Reverend Isaac William Gibbern, Church

⁵Gilbert, *Virginia Historical Portraiture* 258 (1930).

⁶Letter from Edinburgh Register General to Henry S. Rorer, dated, Mar. 17, 1938.

⁷Webster's *New International Dictionary*, Second Edition 77 (1956).

⁸Banns of Marriage, 3 *Encyclopedia Britannica* 77 (1956).

⁹23 *Va. Mag. of Hist. & Biog.* 432 (1915).

¹⁰Jones, *American Members of Inns of Court* 10 (1924).

¹¹17 *Va. Mag. of Hist. & Biog.* 435 (1910).

of England rector at Warsaw, Virginia, addressed to Lord Dartmouth.¹² When Griffin called at Dartmouth's home, he left for him a proposed "Plan of Reconciliation" between England and the revolting American Colonies. Dartmouth endorsed this document on the back "C. Griffin 30 December, 1775," and placed it in his files where it remained unpublished until 1940, when the present Earl of Dartmouth allowed the writer to edit it for publication.¹³

The true purpose of Griffin's return to England was to secure from the Earl of Traquair that share of the Traquair estate which Lady Christina, under Scottish law, would inherit upon the death of her father. In his petition to Lord Germaine for a passport, Griffin explained this: "Your Lordships Petitioner having been educated in Great Britain upon which Education he has spent the greatest part of his little Fortune and while pursuing the Study of Civil Law at the College of Edinburgh having contracted a marriage with the eldest Daughter of the Earl of Traquair which said Daughter altho' unalienably intitled to the valuable Estate of that Family upon the Death of her only Brother without an Heir of his Body should such Event come to pass and which in Possibility may come to pass the said Brother having been married some years without any such heir. . . ."¹⁴

Under the Scottish law of inheritance of real property, males are preferred to females and the doctrine of primogeniture controls. With personal property, however, all who are related in the same degree to the deceased share equally in the estate regardless of sex.¹⁵ Lady Christina's brother, Charles, had been married for three years without issue, and Griffin was pressing for a division of the estate on the assumption that there would be none. In this, Griffin was mistaken, for Charles's wife, Mary, bore a daughter, Louisa, on March 20, 1776,¹⁶ about the time that Griffin was embarking to return to Virginia. Five years later, in 1781, Charles's son and heir was born. Meanwhile, the old Earl of Traquair lived until 1779,¹⁷ and circumstances proved that Griffin was premature in pressing a claim. Griffin needed the money, and he had hoped Christina's father would be generous.

Until his death in 1878, James Louis Corbin Griffin, grandson of Cyrus Griffin, claimed to be the rightful heir to the Traquair title

¹²Ibid.

¹³Journal of Southern History 98-101 (1939).

¹⁴Colonial Office Records 115 fo. 393.

¹⁵Inheritance, 12 Encyclopedia Britannica 355 (1956).

¹⁶Burke, Genealogical History of the Dormant, Abeyant, Forfeited, and Extinct Peerages of the British Empire 519 (1883).

¹⁷Ibid.

and estate.¹⁸ His claim was invalidated soon after the death of Charles, the eighth Earl, for in 1876 the Traquair estate, but not the title, was awarded to the Honorable Henry Constable Maxwell.¹⁹ The American claimant might have been in a favorable position to advance his claim if he had been able to locate the record of Cyrus' marriage to Lady Christina. However, he did not realize the zeal with which the Scots preserve old records, or he could have written to Edinburgh and secured a copy of the marriage record for three and sixpence.

While in London, Cyrus Griffin became alarmed at reports of a possible uprising in Virginia due to Lord Dunmore's proclamation freeing the slaves.²⁰ By petitioning Lord Germaine, Secretary for the Colonies, he secured permission in 1776 to return to Virginia.²¹ Shortly after his return in April, 1776, Griffin was elected to represent Lancaster County in the Virginia House of Delegates.²² Thus began his life of public service that was to continue for more than thirty years.

On May 5, 1777, the first day that Griffin appeared in the Assembly, he was appointed to the Committee for Courts of Justice.²³ On this committee there were two other distinguished men, Thomas Jefferson and Patrick Henry. Soon thereafter, these three Virginians served together on three other committees: "a committee for regulating the proceedings in the County Courts; a committee for establishing a General Court and Courts of Assize; and a committee to prepare proper instructions to the delegates representing this Commonwealth in General Congress." Thus within twelve months after his return to America, after a long absence, Griffin was associated with some of the best legal minds in Virginia, and was considered by virtue of his studies at Edinburgh and the Temple to be qualified to sit on committees of great importance.

In 1778 Griffin was one of seven Delegates elected to Congress by the Virginia Legislature.²⁴ He was then serving in both the House of Delegates and Congress. The salary of a Delegate was only 20s. a day, whereas the salary of a Congressman was 30s. a day.²⁵

Griffin became discontented with his position as Congressman. He

¹⁸5 Brock, *Collections of the Virginia Historical Society* 10 (1886).

¹⁹Hannan, *Famous Scottish Homes* 180 (1928).

²⁰Latane, *History of the United States* 125 (1921).

²¹4 Trevelyan, *American Revolution* 70 (1929).

²²Swen & Williams, *Register of the General Assembly of Virginia* 4 (1918).

²³Journal of the House of Delegates of Virginia 2 (1827).

²⁴11 Journals of the Continental Congress 811 (Ford ed. 1908).

²⁵9 Hening, *Statutes at Large* 134 (1821).

had good reasons to want something better to which to apply his talents. Even when a Congressman's salary had risen to \$20 per day, it cost \$2 per mile to travel, \$21,000 for six months board, \$1,776 for laundry and \$1,020 for the services of a barber for the same period.²⁶ The state reimbursed a Congressman in due time, but immediate payment had to be made out of the Congressman's own pocket.²⁷ In addition, the drinking water at York, Pennsylvania, where Congress was meeting, was bad.²⁸ When, for this reason, meetings were moved to Philadelphia, there were other aggravations: Samuel Chase on August 20, 1778, gave a long oration on the subject "The Improvement of Time with the Life and Characters of Elizabeth and Mary, Queen of Scots," which inspired another silver-tongued orator immediately to hold forth on "The Comparative Beauty of Black Eyes and Blue Eyes." One candid Congressman, John Matthews, wrote to John Rutledge, beseeching him "for God's sake" to procure him leave to come home, for, he said, "I was never so sick of anything in my life: never was child more sick of a school than I am of this same business I am sent here upon."²⁹

When the Pennsylvania Court of Admiralty refused to yield to four Connecticut Yankees whose claims to the sloop "Active" had been upheld by Federal Commissioners, Congress created a Court of Appeals in Cases of Capture. Cyrus Griffin was named one of its three judges, the position carrying a salary of \$12,000, paid in advance.³⁰ Any two of the three judges of the new court were authorized to hold sessions, and they were empowered to proceed *without trial by jury*. The court could meet as far east as Hartford, or as far south as Williamsburg. To meet the expenses of the salaries of the judges, the United States was to collect in the cases handled, 1 per cent of the value of all awards made.³¹

Of the three judges originally appointed to the court, Titus Hosmer died in 1780, and William Paca resigned in 1782 to become Governor of Maryland, leaving Griffin the only original appointee to retain his office throughout the life of the court.³²

The court handled a hundred and eighteen cases during the years

²⁶ Burnett, Letters of Members of the Continental Congress 381 (1931).

²⁷ Burnett, Letters of Members of the Continental Congress 551 (1928).

²⁸ Burnett, Letters of Members of the Continental Congress xxxi (1921).

²⁹ Ibid.

³⁰ Jameson, American Historical Association Papers 386 (1889).

³¹ Ibid.

³² Ibid.

1779-1787, two of these later reaching the United States Supreme Court: *Penhallow v. Doane's Adm'r*³³ and *Jennings v. Carson*.³⁴

The Court of Appeals in Cases of Capture was favored by Hamilton, but opposed by some of the states in which trial by jury was strongly favored.³⁵ The success of this court, in spite of strong opposition to trial without jury, has caused it to be classed as the predecessor of the United States Supreme Court.³⁶ Therein lay the court's chief importance in judicial history.

Griffin's services as judge of the court were not in continuous demand because the supply of cases coming before it was not constant, and so he was given other responsibilities. For example, in 1782 he was chosen to serve on a committee to settle the long-standing Wyoming Valley Dispute.³⁷ In 1785 Griffin's pay as judge was stopped, and notice given that thereafter a judge of this court would receive only a salary of \$10 per day for each day the court was in session. Griffin indicated to Congressman Reid that "A little party business had predominated in the affair."³⁸ He thereupon returned to his duties as Congressman, aligning himself with the Federalists.

On January 22, 1788, Griffin was elected President of the Congress, succeeding Arthur St. Clair of New Jersey.³⁹ Two other Virginians had held this office—Peyton Randolph and Richard Henry Lee. The title was an impressive one: President of the United States in Congress Assembled. He was referred to as President Griffin, and was, indeed, George Washington's immediate predecessor as President, remembering that Griffin's office was under the Articles of Confederation, and not under the Constitution.

The only description of President Griffin which we have is that of Jacques-Pierre Brissot de Warville, a French traveler and writer:

"I should be wanting in gratitude, should I neglect to mention the politeness and attention showed me by President Griffin. He is a Virginian of good abilities, of an agreeable figure, affable and polite. I saw at his house, at dinner, seven or eight women, all dressed in great hats, plumes, &c. It was with pain that I remarked much of pretension in some of these women; one acted the giddy, vivacious; another the woman of senti-

³³ 3 U.S. (3 Dall.) 84 (1795).

³⁴ 8 U.S. (4 Cranch) 2 (1807).

³⁵ Jameson, American Historical Association Papers 390 (1889).

³⁶ *Id.* at 392.

³⁷ Burnett, Letters of Members of the Continental Congress 439 (1933).

³⁸ Jameson, American Historical Association Papers 388 (1889).

³⁹ ³⁴ Journals of the Continental Congress 9 (Ford ed. 1937). See also 8 Burnett, Letters of Members of the Continental Congress xcvi (1936).

ment. The last had many pruderies and grimaces. Two among them had their bosoms very naked, I was scandalized at this indecency among republicans. . . . He never forgets that he is a simple citizen, and will soon return to the station of one. . . . I remarked that his table was freed from many usages observed elsewhere;—Little wine was drank after the women had retired."⁴⁰

Within four months of his inauguration on April 13, 1789, Washington had enough information about Griffin as a lawyer and Federalist supporter to appoint him a Commissioner to the Creek Indians of Georgia.⁴¹ One commissioner, General Benjamin Lincoln, was instructed to have a suit of Regimentals to impress the Indians. Another, David Humphreys, was chosen for his skill in negotiating with Indians, who might prove to be tricky. Griffin was chosen to see that any treaty made would be a binding one. The commissioners gained nothing more than a Creek promise to refrain from depredations until spring. Griffin and the rest of the commissioners were in no way to blame for the failure, which was attributed to the strong ties between the Creek and the Spanish.⁴²

During Griffin's absence on the Creek mission, he was elected to the Privy Council of Virginia,⁴³ but the House of Delegates later decided that his acceptance of the Creek commission amounted to a vacating of his Privy Council position.

When Washington learned that Griffin's faithfulness to his trust had cost him his position on the Privy Council, he appointed Griffin as the Judge of the United States Court for the District of Virginia.⁴⁴ Washington characterized the new appointee as "a man of competent abilities, and of pure character. . . who has been regularly bred in the law."⁴⁵ There were other able persons considered for this appointment, but the President rejected them all. Bushrod Washington recommended himself, and was informed by the President that his standing at the bar would not justify a nomination for such an office and that "the eyes of Argus being upon me, no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives."⁴⁶ Bushrod was not appointed to the United States Supreme Court until nine years later, by President Adams. Edmund Randolph recommend-

⁴⁰de Warville, *New Travels in the United States of America* 139 (1794).

⁴¹Sparks, *The Writings of George Washington* 272 (1836).

⁴²American State Papers, I Indian Affairs 59 (1832).

⁴³Virginia Calendar of State Papers 537 (1884).

⁴⁴10 Sparks, *The Writings of George Washington* 57 (1836).

⁴⁵Id. at 58.

⁴⁶Id. at 24.

ed George Wythe, and Madison recommended Edmund Pendleton for the Virginia judgeship. Most disappointed of all candidates was John Tyler, Jr., who said: "Judge Griffin . . . holds my old office, which General Washington gave him because I was not for the new Federal Government without previous amendments, and of course could not be trusted in the British debt cases."⁴⁷

Six days before Judge Griffin was scheduled to open court in Richmond, he wrote to Jefferson seeking a recommendation for appointment as minister to France.⁴⁸ Jefferson ignored the request. He had known Griffin since their joint service in the Virginia House of Delegates in 1776, and he had more recently talked with him in Norfolk when upon Jefferson's return from France,⁴⁹ Griffin had delivered to him his commission as Secretary of State. He did not consider Griffin suited to fill his former position in the French court.

There was no business before the federal district court when it first met in Richmond on December 17, 1789, and it adjourned after admitting as counsel four young lawyers, including the thirty-four year old John Marshall.⁵⁰

The decisions of the Federal District Court are not reported, and it is therefore not possible to evaluate satisfactorily Griffin's services as judge during a period of twenty years. Griffin, however, did sit in as associate judge in two celebrated trials: the trial of John Thompson Callender on a charge of libelling the President of the United States, in which Justice Samuel Chase presided and was later joined by Judge Griffin; and the trial of Aaron Burr for treason.⁵¹ Thomas Jefferson had a special interest in both of these trials, and his critical attitude toward Griffin's conduct as associate judge continued until the time of Griffin's death.

Callender was a Scotsman who had been forced to flee to America on account of political offenses. He settled in Richmond and became "mud-slinger-in-chief to the Republican party of Virginia." In his book, *The Prospect Before Us*, he said: "Mr. Adams has only completed the scene of ignominy which Mr. Washington began." This was an unfortunate statement in view of the Alien and Sedition Acts. Callender was tried in the United States District Court for Virginia, having been charged with libelling the President. Under instructions

⁴⁷ Tyler, *Letters and Times of the Tylers* 246 (1884).

⁴⁸16 *Papers of Thomas Jefferson* 14-15 (Boyd ed. 1961).

⁴⁹10 *Sparks, The Writings of George Washington* 37 (1836).

⁵⁰Christian, *Richmond: Her Past and Present* 42 (1912).

⁵¹*Id.* at 49.

of the court, the jury found Callender guilty. It is worthy of note that while the prisoner was awaiting trial, Jefferson sent him one hundred dollars for his books, volume 2 of which had been written in the Richmond jail.⁵²

Jefferson's interest in the trial of Aaron Burr was considerably greater. The opinions which he expressed about the manner in which Chief Justice Marshall conducted this trial made it clear that he thought it the duty of an associate judge actively to restrain the presiding judge in an emergency. Any ruling of Marshall with which Jefferson disagreed constituted such an emergency. Jefferson was afraid that during this trial, Marshall might order him to produce in court letters addressed to Jefferson by James Wilkinson. Ired at Griffin's inaction, Jefferson wrote to George Hay: "Will not the associate judge assume to divide his court and procure a truce at least in so critical conjecture?"⁵³

The rancor of Jefferson, towards both Marshall and Griffin, was clearly shown years later when Griffin lay dying. In a letter to John Tyler, Jr., Jefferson said:

"We have long enough suffered under the base prostitution of law to party passions in one Judge [Marshall], and the imbecility of another [Griffin]. In the hands of one the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice. Nor can any milk-and-water associate maintain his own independence, and by a firm pursuance of what the law really is, extend its protection to the citizens of the republic. I believe you will do it; and where you cannot induce your colleague to do what is right, you will be firm enough to hinder him from doing what is wrong, and by opposing sense to sophistry, leave the juries free to follow their own judgment."⁵⁴

On the preceding day, May 25, 1810, Jefferson had written to President Madison recommending Tyler to succeed Griffin on the latter's death. "It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall. Tyler, I am certain, would do it . . . Tyler having been the former state judge of that court too, and removed to make way for so wretched a fool as Griffin has a kind of right of reclamation."⁵⁵

Ex-President Jefferson was anxious to see John Tyler replace Griffin in the district judgeship, because Jefferson was about to be-

⁵²Ibid.

⁵³Beveridge, *Life of John Marshall* 520 (1916).

⁵⁴1 Tyler, *Letters and Times of the Tylers* 247-48 (1884).

⁵⁵11 Ford, *Works of Thomas Jefferson* 140 (1905).

come the defendant in the "Batture Litigation."⁵⁶ The "Batture Litigation" grew out of an act of Jefferson while President, by which certain lands on the lower Mississippi were ordered sold for the benefit of the federal government. The individual who claimed these confiscated lands, Livingston, was about to sue Jefferson to recover from the latter's private fortune the value of the lands, estimated at \$100,000.

The suit would be heard in the Virginia District. If Marshall were presiding, Jefferson believed that he could hope for no quarter. The Burr trial had clearly shown this, when Marshall had ruled that President Jefferson must produce in court the secret Jefferson-Wilkinson correspondence which the defense had demanded as evidence necessary to exonerate Burr.⁵⁷

As Jefferson had anticipated, the case of *Livingston v. Jefferson*⁵⁸ was heard in the Circuit Court for the District of Virginia in Richmond on December 5, 1811. Marshall was presiding, as Jefferson had expected, and Tyler was associate judge. After the attorneys for the litigants had spoken, Tyler followed with his judicial opinion; after which Marshall, at somewhat greater length, gave his opinion and the decision of the court: "An action for a trespass committed on lands, is a local action, and the United States circuit court for the district of Virginia cannot take cognizance of a trespass committed on lands lying within the United States, but beyond the limits of the district, although the trespasser be a resident of Virginia. The law upon the demurrer is in favor of the defendant."⁵⁹

Marshall quoted Blackstone⁶⁰ to support his decision, whereas Tyler relied on his ability to belittle the counsel for the prosecution and used such expressions as the following: "The ingenious counsel, never at a loss for argument and new matter, has resorted to what he calls the general, the universal law . . . These are high-sounding words, indeed, but they only serve to . . . fill up a vacuum in the argument. This is something like the last resort of kings, when everything else fails."⁶¹ There is no evidence that Griffin's presence as associate judge would have made a difference in Marshall's decision.

Judge Griffin died at Yorktown on December 14, 1810, after a long illness.⁶² A Gilbert Stuart portrait shows him as belonging to the "John

⁵⁶4 Beveridge, *Life of John Marshall* 1-7 (1919).

⁵⁷3 Beveridge, *Life of John Marshall* 447 (1916).

⁵⁸15 Fed. Cas. 660 (No. 8411) (C.C. Va. 1811).

⁵⁹*Id.* at 663-64.

⁶⁰3 Blackstone, *Commentaries* *294.

⁶¹15 Fed. Cas. 660, 662 (No. 8411) (C.C. Va. 1811).

⁶²*Richmond Enquirer*, Dec. 10, 1810, p. 3.

Bull" type, given to gout and apoplexy. His own description of his suffering suggests that he died of hardening of the arteries, high blood pressure and gradual heart failure.

In accordance with a wish expressed in his holographic will, Judge Griffin was buried "in the Church yard of Wmsburg near beloved Christina at the smallest expence possible in every respect."⁶³ His grave is unmarked, in contrast to that of Lady Christina, which is well marked.

When Griffin was twenty-two years old, Thomas Adams described him as "a Solid Sensible young man well worthy of your Notice and Friendship."⁶⁴ When Griffin was President of the Congress, de Warville considered him "of very good abilities, affable and polite."⁶⁵ Washington considered him "a man of amiable character and of competent abilities."⁶⁶ Of all his distinguished contemporaries who knew him, only one, Thomas Jefferson, depreciated him. In the latter respect, Judge Cyrus Griffin was in good company, being with Chief Justice John Marshall.

⁶³23 Wills & Inventories, York County Court 810 (1783-1811).

⁶⁴23 Va. Mag. of Hist. & Biog. 58 (1915).

⁶⁵de Warville, *New Travels in the United States of America* 139 (1794).

⁶⁶10 Sparks, *The Writings of George Washington* 58 (1836).