



# THOMAS ERSKINE: SAVIOUR OF ENGLISH LIBERTY

 **Libertarian  
Alliance**

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Though largely now forgotten, the name of Thomas Erskine (1750-1823) deserves a place in the heart of everyone who values freedom and the rule of law. But for his resolute stand at a moment of crisis, the subsequent course of English history might well have been very different - and very much less of an inspiration to other peoples.

I speak of England, though Erskine was, in fact, a Scotsman. He was born the youngest son of the tenth Earl of Buchan. His father's title was grand, but its reality was otherwise. The political turmoils of the previous century had left the Scottish nobility on the whole impoverished; and the economic benefits of the 1707 Union with England had been felt chiefly by the mercantile classes. The family lived, on £200 a year, in an upper flat in one of the less fashionable areas of Edinburgh. Even this was beyond its means; and, in 1762, it moved out to St Andrews. Taught first at home, and then in various local schools, Thomas received what, by the standards of his day, was a patchy education. From his earliest boyhood, he read both widely and deeply in the English classics. But his Latin was never more than moderate, and he had no Greek whatever. For a while, he studied mathematics and natural philosophy at the St Andrews University, but left without having matriculated. Though he wished to enter one of the professions, his father was too poor to assist him. Unable even to afford a commission in the army, he at last, in the March of 1764, joined the navy, as a midshipman aboard the *Tarter*. He sailed at once for the West Indies, and the view of Scotland that he had before it vanished below the north-eastern horizon was his last for nearly sixty years.

He passed four years on the West Indies station, as before reading widely in his preferred subject, if without plan. Not having gained more than acting promotion - and this not being confirmed, he left the navy on his ship's return to Portsmouth; and, his father now dead, he laid out his entire legacy on the military commission which had been his first preference. Around this time, he married. The next two years he spent with his wife on garrison duty at Minorca, then a British possession. In 1772, he went on leave to London. There, through his noble connections and engaging conversation - and, it would be foolish to deny, his great physical beauty - he gained ready entry into the high social and intellectual life of the capital. He put himself on good terms with Samuel Johnson, Boswell, Burke, Edward Gibbon, and the other leading figures of what was perhaps the most brilliant age of English

## **Libertarian Heritage No. 1**

ISSN 0959-566X ISBN 1 870614 92 5

An occasional publication of the Libertarian Alliance,  
25 Chapter Chambers, Esterbrooke Street, London SW1P 4NN  
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This essay first appeared in *The Freeman*, July 1989, Vol. 39, No. 7.

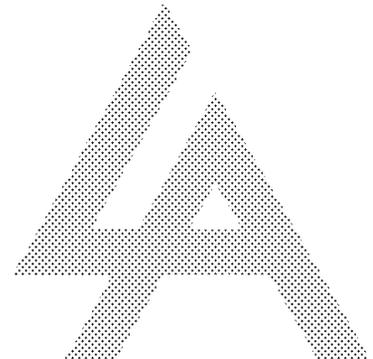
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prose. Shortly after, however, now back on garrison duty, this time in England, he made another acquaintance no less grand, but of indefinitely greater importance to his future career.

### **ERSKINE TOOK TO THE LAW**

One day, acting on a casual whim, he strolled into a courtroom where Lord Chief Justice Mansfield was sitting as an assize judge. Mansfield no sooner looked on Erskine than he was captivated by what he saw. He went so far as inviting the young man to sit beside him on the bench and have the case in progress explained. His interest aroused, Erskine decided to take to the law. He enrolled himself in one of the Inns of Court, which are situated on the north bank of the Thames just outside the old bounds of the City of London; and, in spite of financial hardship and a growing family, he pressed forward with his studies, being called to the English bar on the 3rd July, 1778. Then, as now, this in itself was no guarantee of an income. But, within just a few months, poverty was behind him.

One Captain Thomas Baillie RN had accused Lord Sandwich, a notorious debauchee, and at the time First Lord of the Admiralty, of corruption. Sandwich began a suit for criminal libel - a type of civil action still sometimes brought, though more often threatened, which can result not only in damages but also in imprisonment. Out for an evening walk, Erskine was caught in a shower of rain. He took refuge at the house of a friend, where Baillie was part of the company sitting down to dinner. Baillie observed, was impressed, and, the next day, retained Erskine as one of his defending counsel. The opening stage of the action went badly, and three of the other four counsel retained had advised a settlement out of court. Told to fight, they preferred to dwell, on their first day in court, less on the facts of the case than on points of law. When the Solicitor General rose to reply, it seemed that the likeliest future of Baillie's whole estate, less legal costs, was to go in partial satisfaction of the First Lord's more pressing gambling debts.

Suddenly, Erskine got on his feet. He found courage, he later said, by thinking his children were about him, plucking at his gown and crying for bread. In any event, he made a ferocious, if not at all regular, attack on Lord Sandwich. His eloquence and bearing were such as to throw the Court almost into a trance of amazed admiration. Against every expectation, Baillie won the case. Erskine had won instant fame, and more work was soon coming his way than he could handle.

In 1779, he defended Admiral Lord Keppel on a charge of incompetence in the face of the enemy - the enemy being the French, who, with a coalition of the European powers, had come to the aid of the revolted North American colonies. His defence was entirely successful, and he was given £1,000 by Keppel - at the time an enormous fee.

Two years later, he defended Lord George Gordon on a charge of High Treason. Gordon was, by any standard, at least eccentric. Later in his life, he would become one of the very few persons between the early middle ages and the second half of this century to convert to Judaism. He died in Newgate singing the Marseillaise. But, in the June of 1780, he had been a convinced Protestant, and, in that capacity, had raised the London mob against the Government for having brought in a bill to relieve the Roman Catholics of some onerous, though long since obsolete, penal laws. Crying "No Popery", the mob had gone on a looting and burning spree which came to an end only with the arrival of armed troops specially diverted from embarking for the American war. Thirty six separate fires had blazed unchecked. Parliament had been besieged. The prisons had been opened and their inmates released to join in the rioting. The distilleries near St Paul's had been broken into; and, when rivers of gin flowed down Holborn Hill, dozens had lain on their bellies and drunk until they died. The "Gordon Riots" were the greatest single shock to respectable opinion in England so far that century. When his trial came on, the following February, Gordon's conviction seemed assured.

### **ONE SMOOTH AND PERSUASIVE FLOW OF ARGUMENT**

The Court had sat all day and all evening; and, when Erskine began his address to the Jury, it was past midnight. His speech is a model of advocacy. The Attorney General had spoken in praise of religious toleration. Erskine replied in terms still more enlightened. He condemned bigotry - and reminded the Jury of how bigoted Bloody Mary had been. He declared that no one should suffer just on account of his faith - and reminded the Jury of how the Roman Catholics had supported James II and worked against the Protestant succession. He agreed that the penal laws, whatever once had been the case, were perhaps no longer necessary - and reminded the Jury of how precipitately they had been repealed. It was only reasonable that loyal Englishmen should feel some concern, and should meet to express this. It was a pity how ill this meeting had turned out - but was rioting on a par with High Treason? He proceeded to demolish the testimony as to Gordon's having incited the mob. Erskine never tried to dazzle with epigrams of the kind that have made the oratory of Cicero and of Demosthenes a mine of quotations these past two thousand years. Come upon in isolation, or even only in moderate groupings, his sentences often strike the reader as insipid. His genius lay rather in taking what was confused or obscure and making it absolutely plain, and in the arrangement of a great mass of points into one smooth and persuasive flow of argument. His voice was clear and melodious, and had been carefully trained out of that accent which had made David Hume and, to a lesser extent, Adam Smith sound uncouth to English ears. His expression and gestures were calculated to reinforce the effect of his speaking. His gifts, natural and acquired, were such as, on occasion, to make him irresistible in argument. He spoke in defence of Gordon to a jaded and sceptical Jury. He secured a complete acquittal.

Erskine continued his spectacular progress right through the 1780s. He specialised in commercial law and - there being no regular divorce law until 1857 - in actions for adultery, or what was then called Criminal Conversation. In 1783, Lord Mansfield's influence ever behind him, he was made a King's Counsel, receiving the coveted silk gown at an unusually early age. In the same year, he was appointed Attorney General to the Prince of Wales, whose personal friend he had become. By 1791, his annual income had reached an incredible £10,000. He was the highest paid counsel in the history of the English bar. It is not, however, on these successes that his claim to immortality rests.

### **FROM HOPE TO BUTCHERY**

The French Revolution is an event too well known to need retelling. Everyone knows how it began with the fairest hopes, and slid inexorably into the frenzied bloodletting of the Terror. Certainly, the Old Regime was radically bad; and when its financial collapse in 1788 showed the world exactly how bad, it was plain that nothing short of drastic reconstruction would do. But, of all conceivable groups, what became the French political class was perhaps the very least suited to carrying through any work of reconstruction. Its collective head was stuffed with theories of natural right, applicable without regard to circumstances. There was some knowledge of the English and American revolutions. But knowledge of the first was mingled with contempt for the timidity of its leading actors, of the second with an enthusiasm that debased the events of July, 1776 from the solemn founding of a nation into crude melodrama. Of practical wisdom, there was none. The result was obvious.

An established order, whatever its merit, whatever its faults, usually commands a certain habitual respect. It existed before those living within it were born, and it seems almost natural that it should do so when they are dead. New orders have no such advantage. Approval depends on estimates of personal benefit. If everyone approves, all well and good. But anyone who disapproves is restrained by no sense of loyalty. Given enough disapproval, and the seeds are there of civil war. When, therefore, change is required, the wisest policy of those directing it is not to

flaunt the fact, but at all costs to conceal it. New institutions never look so well as behind old facades. The French thought otherwise. Everything, defective or not, was done again from scratch. Titles, tenures, the map of France - the very clock and calendar - all were remodelled. And, with every substantive reform, some other large or powerful interest was alienated. What consensus there had been at the beginning melted steadily away. Over the reform of the Church it disintegrated altogether. At the same time, relations with the other European states drifted into war. This gave the extremists their chance; and what they called saving the Revolution involved the butchering of some 370,000 French civilians.

The effect of this outside of France was to kill the European Enlightenment stone dead. For nearly half a century, it had been increasingly the fashion among the continental monarchies to preach, if not always practise, a rather timid liberalism. After 1789, the mood changed. If, as a practical doctrine, the Rights of Man were a failure, their abstraction made them supremely portable. Wherever there were intellectuals able to read French, the revolutionary doctrines found an audience - and there were governing classes ready to take fright. Censorships were toughened, spies and informers encouraged, secret police reformed or established. The intellectual tone of the old age had been set, in large degree, by Voltaire and his followers. The intellectual tone of the new, when it finally emerged, was set by the sonorous, if vapid, Chateaubriand, by the fanatical de Maistre, and by the various Germans. Unless we are to see the metric system as sufficient reward, the French Revolution must be accounted an unmitigated disaster for European civilisation.

#### FROM ENCOURAGEMENT TO HOSTILITY

The reaction in England, if less extreme than elsewhere, was still considerable. For some thirty years, there had been a movement within the English-speaking world dedicated to making government more responsive to the wishes of the governed. The American branch of this movement had grown strong enough to bring about a successful war of independence. Efforts in England were concentrated on a reform of Parliament. The electoral system had evolved over three or four centuries, and now showed no obvious rationality. Manchester and Sheffield, towns fast growing wealthier and more populous than many foreign capitals, were unrepresented. Old Sarum, with seven electors, and Gatten, with two, each returned two Members. Within these extremes, elections were usually occasions for breathtaking corruption. In some places, candidates bid openly against each other for votes. In others, seats were the virtual property of the wealthiest local family. Reform was not the pet scheme of a few theorists. In 1785, the Prime Minister himself, the younger William Pitt, had introduced a Bill for a modest redistribution of seats. It failed; but the general idea did seem, before 1789, to be on the practical political agenda.

Events in France were at first an encouragement to the reform movement. Here, after all, was a people casting off the chains of a thousand years, and advancing further towards liberty in a few months than the English had moved in a century. In their enthusiasm, the more radical reformers not only began a habit of fraternal correspondence with the French political clubs, but also sometimes adopted the new French way of calling each other Citizen this and Citizen that.

But this was about the limit of approval of things French. Leaving aside an insignificant minority, the reformers were convinced that a revolution in England was neither necessary nor possible. Everything they wanted they saw already there in the Constitution, only waiting till successful persuasion should bring it out. But, French veneer or none, advocacy of reform was fast going out of fashion.

Open hostility was first put into words by Edmund Burke. He saw on what wretched foundations the new order in France stood; and, in exposing them, he created the first great masterpiece of English conservative thought. As, one after another, his predic-

tions of the course of French events came true, the possessing classes took alarm as in Europe. The reformers fell increasingly under suspicion of plotting revolution. After the French declared war on England, in the February of 1793, alarm ripened into panic, and the cry went up for suppression.

#### HIGH TREASON

The Government found all this highly convenient. Arguments over France and domestic reform had already split the Whig opposition and reduced its larger half to impotence. Giving in to public opinion could only consolidate a strong position. For a couple of years, the radical reformers had been harried and spied on. Now, the spies were set to work with a will - steaming letters open, eavesdropping, starting conversations and writing down what was said. As the cost of war mounted, and its conduct on land brought only embarrassment, defeat of "the enemy within" gradually became a priority. In the middle of 1794, the Government pounced. The leaders of the reform members were arrested and their papers seized. The Habeas Corpus Act was suspended. Charges were made of High Treason. This was defined by the Ministers as having distributed the works of Tom Paine and the other radical philosophers, and of having corresponded with the French Assembly before the outbreak of war - and therefore of being men of violent intention.

Anywhere in Europe, the accused would no sooner have come under suspicion than been arrested, and thrown without charge into prison. They might have been tortured. They would certainly have been questioned under very oppressive conditions. Any trials would have been held in secret, and for no better reason than the gathering of names for a new wave of arrests. Those arrested in Scotland, indeed, which had a legal system based on the Roman Law, and where juries could be hand-picked from the Bench, had the merest pretences of trials. Following the lead set them by Lord Justice-Clerk Braxfield, the conduct of the Scottish Judges throughout this period was as shameful as that of Scroggs and Jeffreys had been in England a century before. Now in England, however, the accused had the full benefit of law. They were allowed counsel. Packing juries was almost impossible. Court proceedings were freely reported in the press. But, as some modern instances bear ready witness, even the best safeguards of justice can be ineffective against a determined panic. By 1794, the very mob had turned patriot, and had taken to assaulting anyone so much as suspected of radical intentions. There was perhaps only one man alive capable of taking on the prosecutions for High Treason and defeating them.

Erskine was a Whig by birth and by conviction, and the close friend of Fox and Sheridan. He had entered Parliament in 1782 - though, strangely enough, he never shone there. In Court matchlessly eloquent, in the Commons he was a wretched speaker. On one occasion, he broke down so badly in the course of a speech that another had to continue for him. But he contrived to advance his ideals at the Bar. It was his continued submission in libel suits - that the question of whether a publication were libellous was for the Jury and not for the Judge to decide - that led to the passing, in 1792, of Fox's Libel Act.

He had visited France in 1790, and returned to England, as many in those early days had, favourably impressed with the Revolution. His opinion of France gradually altered, but in his Whiggism he never faltered. In 1792, he undertook the defence of Tom Paine on a charge of Seditious Libel. The second part of *The Rights of Man* had come out earlier that year. The first part was left in free circulation. But its sequel was alleged to insult the Constitution and the Royal Family, and moves were begun to suppress it. The trial came on in December, the Attorney General prosecuting.

#### FAILURE

Erskine's opening speech had been a month in preparation, and was the best he had delivered so far. "[E]very man" he asserted, "not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have

dictated to him as truth, may address himself to the universal reason of a whole nation, either upon the subject of governments in general, or upon that of our own particular country.”<sup>1</sup> He quoted from Lord Chesterfield’s famous speech on the benefits of a free press. He quoted Locke and Sidney from the previous century, showing that much of what was objected to in Paine’s work had not merely been said already, but been said by the classic philosophers of English liberty. He scorned the notion that a few pamphlets could bring the whole Constitution crashing down. Yet, for all its grand structure and force of reasoning, the speech was an utter failure. As he spoke, he was heckled by the Jury. When he finished, the Foreman rose and stopped the trial. The Attorney General could make reply, he said contemptuously, but none was required. A verdict of guilty was brought in immediately. For his part in the proceedings, Erskine was dismissed from the Prince of Wales’ service.

He had no better success with his defence the next year of John Frost, a lawyer who had uttered seditious words while drunk. Again, the Jury convicted. If, in some other cases, he defeated the Crown, the balance was tipping steadily against the defence in state trials. Erskine knew, when he agreed to defend the reform leaders, that this was a last stand. If he should fail here, and the accused be convicted of High Treason, a precedent would be set by which the whole system of constitutional government established in England after 1688 could be dismantled.

#### **PERHAPS THE GREATEST SPEECH EVER DELIVERED IN AN ENGLISH COURT**

The trials began on the 28th October 1794 at the Old Bailey, Lord Chief Justice Eyre presiding. First for hearing was the case against Thomas Hardy. A shoemaker by occupation, Hardy was a quiet, amiable man just entering on middle age. Though not a great writer or speaker, he had helped, in 1791, to found a group called the London Corresponding Society. Its end was parliamentary reform. For this, he was now made to put up his hand and swear himself guilty or not guilty of having compassed the King’s death. Sir John Scott, the previous year appointed Attorney General, and subsequently known as Lord Chancellor Eldon, directed the prosecution. He opened with a tremendous speech nine hours long. A minute examination of all Hardy’s acts was varied with reminders of the dreadful frenzy across the Channel only recently ended. Seized papers were read out, and the worst construction put on them. Next came the Crown witnesses - Government spies, these, or others of the arrested, intimidated into turning King’s evidence. Set out over five days, the prosecution case had an obviously strong effect on the Jury. Erskine opened for the defence in what seemed an even weaker position than in Paine’s case, two years before.

His speech is perhaps the greatest ever delivered in an English court. It is certainly the greatest that anyone has found in the whole voluminous series of the State Trials. He tore the Crown’s case into pieces. Treason, he reminded the Jury, was strictly to plot against the King’s life, not simply to offend his government. Much had been said about Hardy’s “further intentions” beyond reform; but a court of law had to proceed on facts, not on probabilities. “I am not vindicating any thing that can promote disorder in the country” he said, “but I am maintaining that the worst possible disorder that can fall upon a country is, when subjects are deprived of the sanction of clear and positive laws.”<sup>2</sup> The seized papers indicated a desire to reform Parliament, not overthrow it. As for the oral evidence, that was worthless. Erskine paid special attention to that of George Lynam, a Government spy: “He professed to speak from notes, yet I observed him frequently looking up to the ceiling:- when I said to him, Are you now speaking from a note? Have you got any note of what you are now saying? he answered: Oh no, this is from recollection - Good God Almighty! recollection mixing itself with notes in a case of high treason.”<sup>3</sup> He spoke for seven hours, his voice finally dying away to a near whisper. He had done his absolute best, and it was enough. All that remained after, of defence

witnesses and closing speeches, was secondary. The Jury was out for three hours, but returned with an acquittal.

#### **ALL CHARGES DROPPED**

The Government persevered. John Horne Tooke was put on trial next. An elderly clergyman, a philologist who had corresponded with Dr Johnson, he was a friend and colleague of the Whig leaders, and had been working for parliamentary reform since the 1760s. That he might be a traitor was absurd. The tone of the proceedings sank accordingly, from high drama to farce. Erskine let Horne Tooke largely conduct his own defence. At one point, the Prime Minister himself was compelled to attend on a writ of *sub poena ad testificandum*. Had he and Horne Tooke once collaborated in bringing forward a Reform Bill? Pitt twisted and equivocated. The public gallery rocked with laughter. It was a very sullen William Pitt who was at last allowed to go back to Downing Street and the direction of the war against France. The Jury was out only eight minutes this time before returning an acquittal.

Still the Government persevered. John Thelwall, a young agitator, was now put on trial. He genuinely admired the French extremists. He actually was an English Jacobin. Had he been tried first, rather than Hardy, the prosecutions might have gone differently. But he came after, and Erskine had already shattered all belief in the Crown case. The Lord Chief Justice is said to have slept through the prosecution speech. The Jury acquitted nearly automatically. The other prisoners were released, all charges dropped. Certain of gaining convictions, the Government had drawn up 800 further arrest warrants, of which 300 were signed. These were now scrapped.

Hardy’s defence costs amounted to £25. In this, as in the other two cases, Erskine had given his services free of charge.

#### **ANTICLIMAX**

He lived nearly another thirty years, but his later career was an anticlimax. He became Lord Chancellor in 1806, but was unsuited to the post. He had never studied the specialised science of equity, and made no proper start on it now. If his decisions were generally sound, they showed quite plainly that he was no Hardwicke. He was soon followed, and wholly overshadowed, by Eldon. He passed his time thereafter in often deeply unhappy idleness. His total earnings at the bar had amounted to some £150,000. His Chancellor’s pension brought him an additional £4,000 a year. But, ever careless of money, Erskine invested much of his fortune in very bad American stock, and lost every penny. He was reduced first to embarrassment, then to actual poverty. He died in Scotland, on a visit to his elder brother, the eleventh Earl, and is buried in the family tomb at Uphall, Linlithgow.

But whose life would not be an anticlimax after the glories of 1794? Pitt remained Prime Minister into the next century. His party enjoyed a near monopoly of office until 1828. Tough new laws were brought in against conspiracy and seditious libel, and the reform movement was kept down with considerable severity and success. But one fact had been established. Whatever the situation abroad - or even in the other two kingdoms of the British Crown - power in England was confined within certain unpassable limits. Panicked by the example of France into following it, the Government had opened the Pandora’s box of proscription. Singlehanded, Thomas Erskine slammed that box shut again so tightly, it has not yet been reopened.

The debt owed him by the English people is beyond calculation.

#### **NOTES**

1. *A Complete Collection of State Trials*, various editors, London, 1809-26, vol. xxiii, col.414-5.
2. *Ibid.*, vol. xxiv, col. 936.
3. *Ibid.*, col. 962.