

Lord Neuberger gives the first annual Seckford Lecture at Woodbridge School

Lord Erskine and Trial by Jury

18 October 2012

(i) Introduction¹

1. It is a pleasure and honour to have been asked to give this, the inaugural, Seckford lecture. And, indeed, it was an honour to have been asked to follow the greatly missed Lord Bingham as President of the Seckford Foundation. He was one of Britain's great lawyers, principled and humane in outlook, clear and persuasive in style, as one sees from reading his judgments, his lectures and his gem of a book, *The Rule of Law*. He is the epitome of a very hard act to follow.

2. Lord Bingham is the most recent of a long line of great judges, advocates, and academics who have contributed to the development of the common law through the ages. Judges and academics are, at least normally, respected, and, at their best, like

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

Lord Bingham, highly influential. Occasionally, Judges are quite famous figures. Lord Coke in the 17th century, Lord Mansfield in the 18th century, Sir George Jessel in the 19th century, and Lord Denning in the 20th century, remain well-known today.

3. Judges may be more influential when it comes to maintaining the rule of law and the development of the law, but, with the (dis)honourable exception of the misnamed Judge John Deed, advocates provide far better copy than judges. Advocates, with their more theatrical professional lives and less cloistered private lives have provided something of a glut of English TV series about fictional barristers, ranging from Rumpole of the Bailey in the 1970s to Silk in the 2010s.
4. Some real life barristers have been immortalised in print, film and on television. Edward Marshall-Hall, the great defence advocate 100 years ago, who famously almost defended Dr Crippen but in the event had to return the brief, was the subject of a television series in the late 1980s. More recently William Garrow, another

great defender and, it would appear, the person responsible for introducing the phrase '*innocent until proven guilty*'² into our criminal law, has been brought back to public notice through the recent television series *Garrow's Law*, which, it has to be said, departs more and more from historical reality from one series to the next.

5. William Garrow was by no means the only great 18th century defender practising in the criminal courts. There was a greater advocate, who, it was noted by a near contemporary of his was widely considered to have been '*probably the greatest forensic advocate that has ever appeared at the English bar . . .*'³ He was Thomas, later Lord, Erskine.

6. It is difficult to say whether or not such opinions of Erskine are accurate or not. Many have thought them true, and if you read the transcripts of his cases you may think them true too. Viewers of *Garrow's Law*, which had a rather unimpressive Erskine acting for

² C. Moore, *The Law Society of Upper Canada and Ontario's lawyers, 1797–1997* (1997) (University of Toronto Press) at 37.

³ H. Flanders, *Lord Erskine*, 57 U. Pa. L. Rev. (1909) 353 at 353.

Sir Arthur Hill in his claim for criminal conversation – damages for adultery – against Garrow, may find it hard to believe that he was a great advocate. I thought that in my lecture tonight I might look at Erskine’s background and career as an advocate, and see how it looks to modern eyes.

(ii) Erskine’s background

The facts

7. Erskine was born in Edinburgh in 1750, the youngest son of the 10th Earl of Buchan. On his father’s side, he was related to Sir Thomas Hope of Craighall, a great 17th century Scottish jurist and Lord Advocate; thus he is an indirect ancestor of the current Deputy President of the UK Supreme Court, Lord Hope of Craighead. On his mother’s side, he was a grandson of a Solicitor-General for Scotland, a Lord Advocate and James Dalrymple, Lord Stair, one of Scotland’s most influential lawyers⁴.

⁴ J. A. Lovat-Fraser, *Lord Chancellor Erskine*, 18 Jurid. Rev. (1906 – 1907) 357 at 357 - 358

8. With such a background, it might have been thought that a career at the Scottish Bar beckoned. That was not to be. For all these historic connections, his parents had fallen on hard times. Such was the degree to which they were impoverished that the young Erskine was moved to describe, in a childhood poem entitled *Threadpaper Rhymes*, the prospects of what he may have for his dinner

*'Papa is going to London,
And what will we get then, oh!
But sautless kail, and an old cow's tail,
And half the leg of a hen, oh!'⁵*

Well, at least it rhymes.

9. The family's circumstances did not improve as Erskine grew up. There was no money to purchase a commission in the army, which was what he wanted, so, at the age of 14, it was service in the Royal Navy as a midshipman. After he had served four years at sea, his father died leaving him enough to buy that commission. Three years later, he married Frances Moore at Gretna Green,

⁵ Cited in J. A. Lovat-Fraser, *ibid* at 358.

against his family's wishes. They wanted him to marry for money, but he married for love⁶. And after that he was posted with his regiment to Minorca. The best that can be said about his time there is that it was well-spent learning '*Dryden and much of Shakespeare by heart.*'⁷

10. Erskine's Minorcan idyll lasted two years before he found himself, his wife and young children in England with his regiment, and according to one biographer a man of '*no special ambition, and apparently careless of promotion*'⁸. Loafing around one day in August 1774, he wandered into the local assizes, where the court was in session, presided over by the Lord Chief Justice, Lord Mansfield, who happened to have been a friend of his father⁹ as well as the uncle of the Captain of the ship Erskine had served on whilst in the Navy¹⁰.

⁶ A. Stephens, *Thomas Lord Erskine*, 50 Am. Law. Rev. (1916) 196 at 198.

⁷ W. Pannill, *Thomas Erskine: Lawyer for the Ages*, 27 Litigation (2001) 53 at 53.

⁸ A. Stephens, *ibid* at 202.

⁹ W. Pannill, *ibid* at 53.

¹⁰ H. Flanders, *ibid* at 355

11. Noticing the young soldier, Mansfield enquired as to his identity. On learning who he was, he invited Erskine to sit with him on the bench. Everything has to start somewhere, and for Erskine, his legal career started then and there. Campbell in his *Lives of the Lord Chancellors* takes up the story,

*‘Erskine heard tried a cause of stirring interest, in which the counsel were supposed to display extraordinary eloquence. Never undervaluing his own powers, he thought within himself that he could have made a better speech than any of them . . . Yet these gentlemen were the leaders of the circuit, each making a larger income than the pay of all the officers of [Erskine’s regiment] put together . . .’*¹¹,

12. Given that self-assessment, it is unsurprising that Erskine would in later life be known as ‘*Counsellor Ego*¹²’, and that when he became a peer it was said that he should ‘*take the title of ‘Baron Ego . . .’*¹³. A contemporary newspaper once ‘*apologised for breaking off the report of one of his speeches at a public dinner by explaining that their stock of the capital letter “I” was quite*

¹¹ Campbell, *Lives of the Lord Chancellors* cited at Pannill, *ibid* at 53.

¹² J. A. Lovat-Fraser, *ibid* at 367

¹³ J. A. Lovat-Fraser, *ibid* at 368.

exhausted.¹⁴ Lord Byron noted after meeting Erskine at a friend's house, that he was '*... intolerable ... [and] would read his own verses, his own paragraphs, and tell his own stories again and again ...*'¹⁵ - perhaps a prime example of the pot and the kettle.

13. Mockery and critical write-ups were for the future, as Erskine sat beside Lord Mansfield that day. Buoyed on by self-belief, he became a student at Lincoln's Inn - and a gentleman commoner at Trinity College, Cambridge, as a Cambridge MA was a quick way to become a barrister in those days. Thus it was that in 1778 he was awarded his MA and was called to the Bar by Lincoln's Inn.

Reflections on Erskine's early life

14. Two points stand out to me from Erskine's early career. The first is that he did not go straight to the bar, like most barristers did then, and do now: he rather drifted into his profession. Perhaps I am biased as someone who similarly did not consider becoming a lawyer till relatively late (I had never looked at a law book till I

¹⁴ J. A. Lovat-Fraser, *ibid* at 367.

¹⁵ J. A. Lovat-Fraser, *ibid* at 367.

was 25), but I consider that this is no bad thing. In an advisory profession, some wider general experience and a few wrinkles and greying hairs may well assist your credibility. So, too, a bit of early adversity increases your determination to succeed, and makes you appreciate success all the more.

15. In Erskine's time life expectancy once you reached 20 was significantly lower than it is now. So, it seems to me that people leaving school and university in 2012 should not feel that they have to find their life careers immediately. If you are almost certain to be working till you are 70, with a very good prospect of a long retirement after that, it is unlikely to matter much if you only find the right career when you are 30. Of course, if you are lucky enough to find it when you are 20, good for you.

16. The other point which emerges from the story so far is Erskine's self-centredness and arrogance. There is no doubt that self-confidence is necessary for success in most fields of endeavour, and that is particularly true of the bar, with its theatrical quality and

reputation for expertise. But, although self-confidence all too easily shades into arrogance and egotism, as it appears to have done in Erskine's case, it does not have to do so. With its long hours, responsibilities, and unexpected setbacks, the bar can be a challenging career as well as a rewarding one, and self-confidence is important, but it is not the only quality required. Early on in my career, I heard a wise old QC say that one of the most important characteristics for success at the bar was high spirits. Well, to see some high spirits, we must turn to Erskine's first case.

(iii) Baillie's case

The facts

17. Despite his becoming a barrister, things did not look good for Erskine. One 19th century biographer described his state at this time in the following terms:

'With a growing family dependent upon him for support, without means, and without that professional and social connection with the attorney class which insures briefs and retainers, he had little reason to expect that his case would prove an exception to the tardy recognition of

*professional merit for which the English bar has become proverbial.*¹⁶,

18. Within a few months all changed, as a result of Erskine being caught by a heavy storm while out walking. He sought shelter in the home of a friend, a Mr Welbore Ellis, who was entertaining friends to dinner, and invited his unexpected and drenched guest to join the party. Erskine was sat next to a certain Captain Baillie, who was then the Lieutenant Governor of the Greenwich Hospital, and also, crucially for present purposes, the defendant in proceedings for criminal libel. He had publicised numerous abuses and frauds practised by the hospital's managers, including Lord Sandwich, the First Lord of the Admiralty. And, for good measure, he was also being dismissed from his job.

19. Baillie and Erskine, unsurprisingly, discussed the case. Erskine clearly impressed the Captain¹⁷, as shortly afterwards, and despite having already engaged four other barristers, he instructed Erskine. His brief fee was one guinea - £1.05, or around £750 in modern

¹⁶ W. Pannill, *ibid* at 54.

¹⁷ H. Flanders, *ibid* at 359 – 360.

money. Given the potential for scandal if the case went to court, the government attempted an out-of-court settlement. Four of Baillie's barristers advised him to settle. But Erskine said that, while his advice might '*savour more of [his] late profession*', he was against compromise. This was clearly the advice his client wanted to hear. '*I'll be damned if I compromise. . . You are the man for me*', Baillie is reputed to have then said¹⁸. And so to the trial.

20. The case came on before the Court of King's Bench in a packed Westminster Hall around midday on 23rd November 1778. Lord Mansfield presided. The prosecution was opened by the very capable Sir John Scott, the Solicitor-General, who would become Lord Chancellor Eldon. Once he had finished, each of Baillie's original four counsel replied, and it appears that they were each long-winded, tedious and ineffective. As the fourth finished, Mansfield adjourned the hearing until the following morning. The following day, assuming the defence had nothing further to say,

¹⁸ Cited in H. Flanders, *ibid* at 360.

Lord Mansfield started to invite the Solicitor-General to begin his reply.

21. Up shot Erskine, with a confidence born, as he would later put it, of the thought that his young children were *‘plucking at his gown, and crying, “Now is the time Father, to get us bread¹⁹’*. He addressed Mansfield boldly but with a subtle deference, saying this,

‘[I]f the matter for consideration had been merely a question of private wrong in which the interests of society were no further concerned than in the protection of the innocent, I should have thought myself well justified – after the very able defence made by the learned gentlemen who have spoken before me – in sparing your Lordship, already fatigued with the subject, and in leaving my client to the prosecutor’s counsel and the judgment of the court.

But upon an occasion of this serious and dangerous complexion, when a British subject is brought before a court of justice only for having ventured to attack abuses which owe their continuance to the danger of attacking them, when without any motives but benevolence, justice, and public spirit, he ventured to attack them, though supported by power, and in that department, too, where it was the duty of his office to detect and expose them, I cannot relinquish the high privilege of defending such a

¹⁹ Cited in H. Flanders, *ibid* at 360.

character. I will not give up even my small share of the honour of repelling and of exposing so odious a prosecution.^{20,}

22. Erskine then proceeded to subject each point against his client to a detailed forensic analysis, and demolished the prosecution case. He then moved on to Lord Sandwich. Mansfield stopped him, pointing out that Erskine was a little ‘*heated*’ and ‘*growing personal*’²¹, on the subject, and that Sandwich was not a party to the proceedings. It is worth reflecting on the fact that this was Erskine’s first brief, and here was the Lord Chief Justice, warning him off. Almost all novices would have yielded in the face of the warning, and those that would not have done, would have regretted it for the rest of (their probably very brief) careers. Erskine neither yielded nor regretted. He displayed the courage, and the judgment, which are possessed only by the best advocates. He met the warning by ‘promot[ing] and protect[ing] fearlessly’ his clients’ best interests – to quote from the current Bar Code of Conduct.

²⁰ J. Ridgway (ed), *The Speeches of the Hon. Thomas Erskine*, (Eastburn & Co) (1813) (Vol. 1) at 3 <http://books.google.co.uk/books?id=YYslAAAAMAAJ&printsec=frontcover&dq=thomas+erskine+speeches+volume+1&source=bl&ots=_5sN3NH4B&sig=VWAqLiVbKlNMHBR_dOYzjyaVkCc&hl=en#v=onepage&q=thomas%20erskine%20speeches%20volume%201&f=false> accessed 17 September 2012.

²¹ J. Ridgway, *ibid* at 17.

23. Sandwich, Erskine submitted, was the prime mover behind the prosecution, and then he said this,

‘I know that he is not formally before the Court, but for that very reason, I will bring him before the Court... , He has placed [those who had brought the prosecution] in front of battle, in hopes to escape under their shelter, but I will not join in battle with them; their vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with me. I will drag him to light who is the dark mover behind this scene of iniquity.’²²

Erskine went on to say that if Sandwich did not restore Baillie to his command of the hospital and publicly disavow his prosecutors’ acts, then he would not *‘scruple to declare him an accomplice in their guilt, a shameless oppressor, a disgrace to his rank, and a traitor to his trust.’*

24. Having launched this broadside at the First Lord of the Admiralty, Erskine finished with a volley at the court itself.

²² J. Ridgway, *ibid* at 17.

‘ . . . now, my Lord, I have done; - but not without thanking your Lordship for the very indulgent attention I have received, though in so late a stage of this business, and notwithstanding my incapacity and inexperience I resign my client into your hands, and I resign him with a well-founded confidence and hope; because the torrent of corruption, which has unhappily overwhelmed every other part of the constitution, is, by the blessing of Providence, stopped here by the sacred independence of the Judges. I know that your Lordships will determine according to law; and, therefore, if an information should be suffered to be filed I shall bow to the sentence, and shall consider this meritorious publication to be indeed an offence against the laws of this country; but then I shall not scruple to say, that it is high time for every honest man to remove himself from a country, in which he can no longer do his duty to the public with safety; - where cruelty and inhumanity are suffered to impeach virtue, and where vice passes through a court of Justice unpunished and unreprieved.’²³

25. Stirring stuff, and it was said to have put the packed court into a *‘trance of amazement’²⁴*. The prosecution was dismissed with costs and Erskine found himself pressed all around by attorneys showering him with instructions. His career was made. If money is a measure of success, his earnings at the Bar between 1778 and 1806 are reported to have been £150,000, which translated into

²³ J. Ridgway, *ibid* at 18 – 19.

²⁴ W. Pannill, *ibid* at 56.

today's terms is approximately £120 million²⁵. And he managed to spend it all.

26. Baillie's case established Erskine. Within a year he was being instructed in all the leading State trials and it is these which provide his true legacy; a legacy which his fearless attitude in the face of the Court foreshadowed. I want to look at four of those cases: first, Erskine's first jury trial: then the trial of Lord George Gordon, followed by the trial of Thomas Paine, and finally the Dean of St Asaph's trial. But, before that, some points can be drawn from a few ...

Reflections on Baillie's case

27. It is striking to modern eyes that Baillie not merely had five barristers to represent him, but that they were all permitted to address the court. Today, it would be very unusual for a judge to allow more than one barrister to make a speech, and to have more than two would be virtually inconceivable. We pride ourselves on

²⁵ Based on average earnings.

efficiency. But wait a minute. Baillie's case took a day and a half to hear. If it was heard today, it would have probably lasted a week. Why do cases now last so much longer, despite our search for efficiency?

28. One obvious reason is the electronic revolution. We now have the means to produce and to retain so many more documents, which means that there are many more documents available to be used at trial. And we can copy documents easily. Before the advent of the photocopier and the word-processor, any document used in court had to be copied out by hand many times (for the judge, for the barristers and for the witnesses), so the lawyers thought very carefully before they decided to use a document in court.

29. But that's not the only reason. There are many more cases decided, and a much higher proportion of decided cases are reliably reported, than in the 18th century. And there are many more legal textbooks, and there are respected legal journals. So there is much more to argue about now. And the current culture is that one digs

deep and wide when it comes to evidence and argument. You only have to look at the much pithier judgments of the 18th and 19th centuries compared with the more discursive judgments of today.

30. Indeed, while it is a gross generalisation, my impression is that over the past 500 years, judgments have tended to get longer and longer with the passage of time. It is essential that the law is clear and accessible. The plethora of statutes emanating from the legislature, and the welter of regulations promulgated by the executive and the EU are not conducive to respect for the rule of law; nor do they support its efficacy. The law is becoming obscure, uncertain and forbidding. We have been suffering what has been described as an ‘orgy of legislation’ by Lord Steyn the recently retired Law Lord, a view shared by a number of judges and commentators. But the problem is compounded, particularly in a common law system, where judges make as well as interpret the law, if our judgments are long and discursive, and at times even obscure. I believe that we judges are starting to reverse the tendency towards long decisions, at least in the sense that fewer

judgments are being given in the same case by different judges in appeal courts, including the Supreme Court.

31. Reverting to Baillie, I suppose that he was an early example of a whistleblower. Lawmakers in the UK, and indeed in the EU, have been slow to protect whistleblowers, but, in recent years, this has started to be remedied through for instance, the Public Interest Disclosure Act 1998. As in many areas of law, there is a difficult balancing exercise to be carried out. It is right to encourage the exposure of wrong-doing, and it takes courage for an employee to expose his employers; on the other hand, one does not want to make it easy for employees with a grievance (real or imagined) to trump up charges against their employers, potentially ruining a business.

32. So much for Baillie, I now turn to Lord George Gordon.

(iv) Lord George Gordon

The facts

33. The trial of Lord George Gordon in 1781 arose from what have become known as the Gordon Riots, so powerfully described by Dickens in *Barnaby Rudge*. Gordon was the President of the Protestant Association, which strongly objected to the Catholic Relief Act (the Papists Act) 1778, the first statute to secure Catholic emancipation in Britain. Campaigning against the 1778 Act, Gordon led a procession of around 50,000 people through the streets of London to petition Parliament for its repeal.

34. He presented his petition to Parliament, which dismissed it resoundingly in a vote in the Commons. Meanwhile, the crowd turned to mayhem, which lasted five days, caused the deaths of around 600 people, saw homes, including Lord Mansfield's house, looted and burned, and three prisons destroyed, and resulted in mass panic and general all-round terror. Gordon was charged with treason, and was committed to the Tower pending trial.

35. At that time, treason trials had to be concluded in a day's sitting, remarkable even by the standards of the day. The Court of King's

Bench and its jury was in for what promised to be a long day when the trial started on 5 February 1781; perhaps not as long a day as it would be for Gordon, who would have known that 21 rioters had already been tried, convicted and hanged²⁶. No objection was taken at the time to the fact that Lord Mansfield presided over the trial even though he had been a victim of the riots.

36. So things were not looking good for Gordon – and they got worse. The prosecution was led by the Attorney-General, well-briefed and articulate. The defence was led by Lloyd Kenyon. He was soon to be appointed Attorney-General and would ultimately succeed Mansfield as Lord Chief Justice. Despite that, he was not a good choice: he *‘was an equity lawyer with little experience of public speaking or constitutional issues.’*²⁷,

37. Kenyon duly made a poor fist of his defence speech, which was as inept as it was boring. He had made such a hash of it that Erskine, who was supposed to follow immediately afterwards,

²⁶ J. Hostettler, *Thomas Erskine and Trial by Jury*, (Rose) (1996) at 37.

²⁷ J. Hostettler, *ibid* at 38.

asked for permission to postpone his speech until after the defence witnesses had given their evidence. While there was only one previous occasion where this had been permitted, Mansfield granted the request and Erskine got the time he needed.

38. Erskine finally got to his feet to start his defence speech at midnight. One can only imagine how tired, stiff and hungry the jury must have been. He soon woke them up though. He was as brilliant as Kenyon had been awful. He first went for sympathy – not for Gordon, but (consistent with his reputation as *Counsellor Ego*) for himself. He explained to the jury that he was an inexperienced advocate, that he wasn't familiar with the criminal courts, that he was '*sinking under the dreadful consciousness of his defects*'.²⁸ He then said that the fact that he was an incompetent novice did not matter, because of the wit and wisdom of the jury. As he put it,

'I have one consolation . . . that no ignorance nor inattention on my part can possibly prevent you from

²⁸ J. Ridgway, *ibid* at 42.

*seeing . . . that the Crown has established no case of treason.*²⁹

So he excited their sympathy, contrasted himself with Kenyon, and flattered their collective ego.

39. With the jury duly primed, Erskine then took them to the law.

Having eviscerated the law of constructive treason, he filleted the witness evidence before turning to his favour the advantage which the prosecution thought it had in the identity of the trial judge.

Erskine started by reminding the jury that the rioters had destroyed Mansfield's house. It was, he suggested, simply '*not credible*', that Gordon could have incited them to do so, because Lord Mansfield had long been a friend to the Protestant dissenters³⁰. Gordon may have organised the march on Parliament, but it could not be said that he did so with the intention to use such force as to justify a conviction for treason.

²⁹ Cited in J. Hostettler, *ibid* at 38.

³⁰ J. Ridgway, *ibid* at 65.

40. After Erskine's tour de force there was little the Attorney-General could do by reply, and less that Lord Mansfield could do by way of his summing-up. And at 5.15 in the morning, the jury returned a verdict of not guilty. Gordon was free. But not just Gordon. Due to Erskine's eloquence, constructive treason – which as John Hostettler notes in his biography of Erskine was '*widely regarded as a highly threatening and injurious to public freedom*' – was nullified and the light of liberty shone that much brighter in Britain³¹. Not many advocates can say that through their advocacy they have persuaded a jury to nullify a law.

Reflections on Gordon's case

41. Today, of course, there would be no question of Lord Mansfield trying Gordon because his house had been destroyed in the riots. The 18th century common law did not have as strong a commitment to what has long now been a central feature of our constitutional settlement: that judges must be both independent and impartial in reality and in appearance.

³¹ J. Hostettler, *ibid* at 42.

42. As to the advocacy in the case, I have two thoughts. First, as I have said Kenyon was not so much of an advocate as he was an equity lawyer. As a former equity barrister, I should say that advocacy at the Chancery Bar has improved considerably since then: we are used to public speaking at least. Secondly, Erskine's self-deprecation to the jury highlights an important point about advocacy. Contrary to popular belief, an obviously brilliant advocate is not always the best person to persuade a judge, or even a jury. There is always the danger that the judge or jury think: well that sounds like a good point, but it would sound good because it comes from the mouth of a brilliant advocate. Hence the adage that the best barristers give the impression that the judge or jury is hearing a first class point from a third class advocate.

43. The Gordon Riots themselves emphasise that, viewed through the prism of history, the recent Tottenham riots were not as extraordinary as they seemed at the time. And hanging many of the rioters can be contrasted with the four year prison sentences for

some of the Tottenham rioters. Our sentencing of criminals may be markedly more severe than in most of the rest of Western Europe, but we have come a long way since 1782.

44. The reason why, in 2012, we consider more than one night's looting was avoidable whereas they had to suffer five days' worth of looting in 1780 is the existence of a professional police force. Without it, the choice for the government was between letting the rioting take its course or bringing in the army. The disadvantage of the latter course was apparent from the Peterloo massacre of 1819, when between 11 and 15 people were killed and some 400 – 700 injured when the cavalry charged into a crowd of around 70,000 which had gathered to demand parliamentary representation and refused to disperse.

45. In modern terms, demonstrations, with their attendant risks, give rise to another balancing issue, namely the need to balance two competing public interests, namely the rights of the demonstrators to walk the streets and express their views, and the rights of

property owners to be protected from looting, reflected in the duty of the police to prevent rioting. This has led the UK courts and the Human Rights court in Strasbourg to consider the lawfulness of the police practice of containing or ‘kettling’ demonstrators. The upshot of the courts’ thinking is that it is lawful but only as a last resort.

46. A short further word about Lord George Gordon. Some five years after the riots this arch-defender of Protestantism became converted to Judaism, taking the name Yisrael bar Avraham, and leading a devout Jewish life until his death in 1793. He died of typhoid in Newgate Prison, where he had been sent for defaming none other than Queen Marie Antoinette of France, who was herself beheaded in the French Revolution some two weeks before Gordon died

47. Let me now turn to the trial of ...

(v) Thomas Paine

48. Success breeds success and, within five years, Erskine was appointed a QC and was earning £10,000 a year³², around £7 million a year in modern money – and at a time when there was no income tax, at least until 1799, or national insurance contributions.

49. Success did not temper Erskine's commitment to his principles or to the traditions of the Bar. In 1792 he defended Thomas Paine, writer of *Common Sense* and *The Rights of Man*, American revolutionary, one of the founding father's of the United States, and of course a native of Thetford in Norfolk.

50. In 1792, Paine was in England. *The Rights of Man* had been published a year earlier and had already sold over 100,000 copies. The government was concerned: the French Revolution was three years old and going full tilt. Paine's book did not just outline how society could be reformed: it criticised and challenged the established order. Proceedings were issued against him, alleging

³² Cited in H. Flanders, *ibid* at 361.

sedition libel, which, it seemed, was intended merely to be a warm-up, with a charge of high treason to follow³³.

51. Erskine was instructed to defend Paine. This did not go down well with the Establishment. Friends and enemies alike told him not to take the case, to hand back the brief. At the time Erskine was Attorney-General to the Prince of Wales. The Prince suggested Erskine might want to reconsider taking the brief if he wished to retain his position. Erskine stood firm. The Prince dismissed him from office. He continued to stand firm: having been retained he would act for his client. Justice demanded that he do so.

52. Pressure continued to be applied even as the trial commenced. Characteristically self-referential and characteristically canny, Erskine referred to his own position and turned an apparent problem to his client's forensic advantage. He noted how '*the whole people of England, have been witnesses to the calumnious clamour that, by every art, has been raised and kept up against*'

³³ J. Hostettler, *ibid* at 90.

himself, and, he asked: for what reason? Simply because he had not ‘*shrunk from the discharge of his duty.*’³⁴ What was the nature of this duty? Erskine’s answer was a strong and clear defence of the advocate’s role. Explaining to the jury, and to all those who had tried to force him to give up the brief, he said this,

‘I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge; . . .

53. In the event, and notwithstanding the fact that in this case Paine was innocent, not even Erskine’s brilliance could save him from a guilty verdict. The spirit of the age, or perhaps a packed jury, was against Paine. We can draw the conclusion that the jury was perhaps not as independent as it might have been as it insisted on returning its verdict before the Attorney-General had concluded his

³⁴ J. Ridgway, *ibid* at 275 – 276.

³⁵ J. Ridgway, *ibid* at 276.

reply to Erskine and before Kenyon, now Lord Chief Justice, had even considered embarking on his summing up. Paine was not all that troubled by the verdict however. He had fled to France before the trial began: the trial was conducted in his absence, a point perhaps which underpins just how committed Erskine was to defend the notion that everyone is entitled to a proper defence.

Thoughts on Paine's case

54. There is perhaps a tendency to underplay what it means to have – and why we need – an independent Bar. Erskine's decision to proceed with Paine's defence meant that he lost a lucrative position and could well have lost future work. If he had had a purely commercial approach or was answerable to shareholders, he may well have had second thoughts and handed back the brief. He only had his conscience and his duty to ensure that justice was done to concern him. If Paine was guilty the prosecution would demonstrate the truth of that proposition and the jury (assuming it was a true jury rather than the seemingly packed one Paine actually

faced) would find accordingly notwithstanding the best defence Erskine could give him.

55. It is not a case that an advocate defends the guilty. Guilt is a question for the court, and in important criminal trials, the jury. It is not for an advocate to presume to determine guilt, to set aside the presumption of innocence. Just as importantly it is not for the advocate to connive in the subversion of the rule of law, which he would do if he refused or was able to refuse to defend. The rule of law is only meaningful if it applies to all of us, even those accused of the most offensive of crimes. If it does not apply to all then we have sacrificed justice for caprice and tyranny. Erskine's defence of his duty – not his right, but his duty – to defend Paine is a defence of a duty owed to us all by the State: a right to impartial justice.

56. Before turning to my last case, it is perhaps worth noting that the aspects of Paine's books which caused such concern to the government were seditious proposals calling for the introduction of

old age pensions, unemployment benefit, child benefit, and a progressive income tax. Today's heterodoxy is tomorrow's orthodoxy.

57. I now turn to ...

(vi) The Dean of St Asaph's case

The facts

58. The Dean was prosecuted for seditious libel: he was said to have incited disloyalty to the Crown and armed rebellion. Erskine acted for the defence, and one of the points was whether the jury could determine the question whether the publication for which the Dean was said to be responsible was a libel or whether it was a matter for the judge to determine whether there had been a libel. The Crown would have preferred the question whether there was a libel to be one for the judge. Erskine argued that it was a matter for the jury. Erskine's argument did not succeed either at trial or on appeal. It did however succeed in Parliament, which in 1792 enacted what became known as the Libel Act which affirmed that it was for

juries to determine whether or not a publication was a libel.

Through this and similar cases it is important to note Erskine helped to establish a fundamental aspect of our democratic settlement: freedom of the press. In this case though he also emphasised another fundamental feature of that settlement.

Reflections on the Dean's case

59. In arguing the Dean's case, Erskine explained why an independent jury is such an important element of a just society. He said this,

*'Criminal justice in the hands of the people is the basis of freedom. While that remains there can be no tyranny, because the people will not execute tyrannical law against themselves. Whenever it is lost, liberty must fall along with it. . .*³⁶,

60. As he would later put it, the jury does not merely have a power to acquit, it has a '*constitutional, legal right*' to acquit and that this right was intended to '*be a protection to the lives and liberties of Englishmen, against the encroachments and perversions of*

³⁶ J. Ridgway, *ibid* at 115.

*authority in the hands of fixed magistrates.*³⁷ So it remains and so it remains the basis of freedom

61. Like Gordon's case, the Dean's case shows the importance of the jury. In a jury trial, it is entirely a matter for the jury whether they find a defendant guilty. A trial judge cannot direct a jury to reach a guilty verdict. Even if an acquittal by a jury is objectively perverse or contrary to the facts it is a valid verdict. If the jury thinks a prosecution ought not to have been brought against a particular defendant or that the law is an unjust law it can refuse to convict. In this way, as Professor Zander puts it, a jury can render ineffective '*unjust laws, oppressive prosecutions and harsh sentences*³⁸'. It does so because, to borrow this time from EP Thompson,

*'The jury attends to judgment, not only upon the accused, but also upon the justice and humanity of law . . .'*³⁹

³⁷ J. Ridgway, *ibid* at 154.

³⁸ Zander, *Response to the Auld Report*, cited at Zander, *Cases and Materials on the English Legal System* (9th edn) (Lexis Nexis Butterworths) (2003) at 509.

³⁹ Thompson, *Writing by Candlelight*, cited in Zander (2003) at 509.

62. It is perhaps for this reason above all others that the role of the jury – of each individual juror – is a fundamental aspect of our democratic settlement: a point not lost on Erskine.
63. In this country, we have now abandoned jury trials for all civil, as opposed to criminal, cases, except for defamation, malicious prosecution and false imprisonment. What is special, you may ask, about that apparent rag-bag of torts? Well, unlike claims in say trespass, negligence, nuisance, they all tended to involve claims between individuals and the state. The jury served as a bulwark ensuring that the individual got justice, despite the might of the state. A fair proportion of malicious prosecution and false imprisonment claims were made, as they are today, against the state. Libel claims in the 18th century were often brought by the state against the individual, as Paine's case shows, so juries were appropriate. However, their use is rather more questionable in the present day, given that virtually no libel cases, if any, involve the state. And protection of the individual against the might of the state explains why juries are appropriate for criminal trials.

64. The point is well illustrated by a sad little story. A man owned a house and garden surrounded by an old wall which made for very poor sightlines on the adjoining highway, and this resulted in a number of serious accidents. He offered to move and rebuild the wall at his own expense, but the local council refused him permission. His son was then killed in an accident which was caused by the poor sightlines. In his grief, the man took the law into his own hands, pulled down the wall and replaced it so that there was no more danger. In their wisdom, the local authority prosecuted him. At the end of the case, the judge summed up along these lines: ‘Members of the jury, my role is to direct you as to the law, and your role is to give a verdict. There are only two directions I will give you as to the law. The first is that the defendant has no defence to this charge. The second is that there is no appeal against a jury’s verdict of not guilty.’

(vi) Conclusion

65. I have only been able to give a brief outline of four of Erskine’s cases. I think however that they show that a case can properly be

made to support the claim that he was a more important advocate than Garrow. Garrow went on to be a judge and continued to influence events from the Bench, albeit that he became, I believe, somewhat prosecution-minded. Erskine went from the Bar at the height of his career to become Lord Chancellor in the so-called Ministry of All the Talents in 1806. He lasted eighteen months before the government fell. He would never return to the Bar: as a former judge he was barred from returning to practice. At the age of 56 his career was behind him.

66. The legacy of that career however is one which resonates today.

He defended the traditions of the Bar not just for their own sake, but because of the need for fearless advocates who are not cowed in the face of intransigent judges, who act according to their duty to Society and the rule of law, and who know they cannot pass over a defence brief because the defendant is likely to be guilty or the crime is abhorrent - a need which is as pressing today as it was then.

67. Equally his defence of free speech through many cases resonates as powerfully today as it did then. It is worth wondering perhaps what Erskine would have said in defence of individuals prosecuted for saying offensive things about people over the internet. Would he perhaps have adapted what he said in defence of Paine, that *'opinion is free and . . . conduct alone is amenable to the law'*⁴⁰?

68. Thank you.

David Neuberger

18 October 2012

⁴⁰ J. Ridgway, *ibid* at 283.