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BRITISH TRIALS FOR DISLOYAL ASSOCIATION DURING THE FRENCH REVOLUTION

ARTHUR E. SUTHERLAND, JR.

Every government that professes freedom as an ideal must plot a difficult course somewhere between complete political liberty for its citizens and full security against its enemies at home and abroad. The choice is never simple. It is never easy to guard effectively against "all sedition, privy conspiracy, and rebellion" without making life an intolerable process of spies and prosecutions. It is just as difficult to allow decent freedom to the people without so exposing them to covert or open invasion that they risk the loss of their independence. The reconciliation of these aims is the more perplexing because treachery is apt to wear the disguise of economic and social benevolence; and because the innocent advocacy of genuinely good causes is sometimes denounced as subversive.

When suspicion of one man's loyalty rests only on his association with others against whom a case is already proven, the difficulty becomes greater. Joining is dear to us. Leagues, associations, councils, parties multiply, all with innocent-sounding names and with professed aims which are beyond cavil. Where such an association turns out in fact to be a sham, and its leaders are shown to have treasonable purposes, what is the position of the member who joined in gullible reliance on the pious aims expressed in the by-laws? What if an originally worthy group accepts a few members who ultimately capture and use the organization for seditious purposes? How soon does the guilt of the captors affect the other members? When must the others resign or be taken to endorse the seditious program? These questions are not academic abstractions. There are on trial in the Southern District of New York men whose indictment charges that they

"did conspire with each other, and with divers other persons to the Grand Jurors unknown, to organize as the Communist Party of the United States a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence. . . ."

If the Government establishes its case against these defendants, what of other joiners? While one might suppose that to join or to stay in the Communist party thereafter without a clear idea of its purposes would require extraordinary gullibility, still such innocence of mind is conceivable. If such a credulous person exists, will he risk a conviction of

a violation of the Smith Act of 1940¹ without proof of more than his continued membership in the Party?² And what of membership in some one of the numerous innocent-sounding Leagues or Societies which may turn out to have Communists on their rolls? Is the earnest and unsuspecting citizen in danger because he mailed in a membership application and a check for dues?

That history repeats itself is so stale an observation that its truth is surprising. A century and a half ago England was troubled by the spectacle of revolution abroad and its influence among her own people.³ There is a curious similarity in the relationship between England and France in 1794, and that between the United States and Russia today. France, too, in her time felt moved to aid world-wide revolution. After the French had beaten the Prussians at Valmy in the fall of 1792, and had begun to feel some confidence in their military capabilities, the National Convention issued this decree:

"The French nation declares that it will treat as enemies every people who, refusing liberty and equality or renouncing them, may

¹ 54 STAT. 670 (1940), as amended, 18 U.S.C. § 2385 (1948). Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government, i.e. the federal, or a State or territorial government by force or violence; or becomes or is a member, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

In *Dunne v. United States*, 138 F. 2d 137 (1943), *cert. denied*, 320 U. S. 790, 64 Sup. Ct. 205 (1943) which arose under the quoted, and other, sections of the Smith Act, the Eighth Circuit Court of Appeals said, at p. 144:

"Finally it is argued that every member of a group or party is penally responsible for the conduct of every other member and 'for every phrase in the statements and documents which are adjudged to reflect party views.' If by this is meant the responsibility of a co-conspirator under a conspiracy charge for what is said or done to effectuate the conspiracy, the statement is true. If, as seems likely, it is meant that such acts and expressions of others could be used to prove the unlawful purpose of the group, then the statement is too broad. Such responsibility is not indefinitely sweeping. It attaches only to authoritative statements of which the member has knowledge; and it depends upon what he does or does not do or say, as manifesting his approval or disapproval, after he has such knowledge."

Affiliation with the Communist Party was considered by the Supreme Court in *Bridges v. Wixon*, 326 U. S. 135, 65 Sup. Ct. 1443 (1945). The case arose under a statute directing deportation of aliens "affiliated" with an organization advocating the overthrow of the Government of the United States by force. The court held that affiliation was not made out by a showing of cooperation with a proscribed organization only in the legitimate portion of its activities. 40 STAT. 1012 (1918), as amended, 8 U. S. C. § 137 (1946).

² Dangers besetting the well-intentioned who tarry too long among the wrong people are illustrated by *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927).

³ There is, of course, an endless literature concerning the influence of the French revolution on England. A convenient book which discusses the whole subject in brief compass is *THE FRENCH REVOLUTION IN ENGLISH HISTORY*, by PHILIP ANTHONY BROWN (1918) cited simply as BROWN. It is particularly good for background material on the treason trials of 1794. A larger book, with a fuller discussion of political matters is W. E. H. LECKY, *HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY* (1892). The point of view of the prosecution in the English trials is well set out in HORACE TWISS, *LIFE OF LORD ELDON* (2d ed. 1844).

wish to maintain, recall or treat with a prince and the privileged classes; on the other hand, it engages not to subscribe to any treaty and not to lay down its arms until the sovereignty and independence of the people whose territory the troops of the republic shall have entered shall be established, and until the people shall have adopted the principles of equality and founded a free and democratic government."³

Unsuccessful attempts by other European countries to invade France and put down her revolution succeeded only in strengthening her determination,—much the same effect as produced by the efforts of the Allies in Russia in 1919. And in England during the early 1790's there existed in the minds of many men a confusion between the military success of revolutionary France and the advancement of political reform at home,—a confusion suggesting one sometimes noted today in the United States.

The experiences of England in that difficult time, her efforts to protect herself from sedition but still to permit reasonable political protest, are well worth some thought. A great advantage of studying the reform movements, the sedition and charges of sedition, of a century and a half ago, is the perspective afforded by time. The complexity of men's motives, the difficulty of distinguishing that which is genuine from that which is sham, the possibility of tragic error, all become more clearly apparent when fears no longer matter, and ambitions have quieted. The great lesson of time is patience.

* * * *

Revolutionary evangelization from France found acceptance in England in direct proportion to the sense of wrong, justified or otherwise, felt by those among whom it was circulated. For several reasons England was a good field for propaganda. Freedom of speech and writing had been a boast there for generations,—particularly freedom of political criticism. In parts of the country large elements of the population had no voice in the election of the national legislature; it was easy to persuade some of these people to admire the professions of the revolutionaries, in whose country, at least in theory, every man had a chance to play some part in government.⁴ The cost of the recent war with France and the

³ Quoted in HAYES, *POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE* 504 (1926).

⁴ Those who are struck with the likenesses of the situation of the United States today and England in the 1790's should not overlook fundamental differences. No congressional district even remotely resembles such "rotten boroughs" as were relatively common in England. The county of Bute is said to have had twenty-one electors for its member of Parliament, of whom only one was a resident. On one occasion this gentleman nominated and elected himself to Parliament. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 630 (10th ed. 1947). Our textile workers do not have to pick and boil nettles to eat. BROWN 165. Nor is it easy to point to satisfactory modern analogies of Charles James Fox, or Richard Brinsley Sheridan, or of that great trial lawyer Erskine.

American colonies had greatly increased British taxes and prices, adding economic distress to other fertile discontents.

The administration of the country in this time of suspicion and peril was in the hands of the younger Pitt. Still in his mid-thirties, he had been Prime Minister since 1785 and had years ago given up his early attempts to reform the electoral system. By this time he stood firm for conservatism and the King's policies, and held his parliamentary majority by the electoral system he had once denounced. Henry Dundas, the Home Secretary, was Pitt's chief of political intelligence. His secret agents were numerous, without scruple, and apt to be present at any gathering where antagonism to the government might be expressed. The civil list of George III contributed funds which, used where election could be had for a price, helped keep Pitt and his government in office.⁵

English politics in the eighties and nineties begot, among other offspring, a great number of clubs and societies, more or less interrelated, devoted to parliamentary reform and to various degrees of admiration for the French. As in the United States a century and a half later, men joined such groups for motives ranging from tepid curiosity to violent antipathy toward the government. To a conservative Englishman, the Jacobin clubs of France must have seemed to have English counterparts. "The Society for Promoting Constitutional Information," or Constitutional Society for short, was founded in 1780.⁶ Its members were noblemen, country gentlemen and men of letters; although its subscriptions were expensive, the toasts at its dinners had a democratic tone. In 1782 the Duke of Richmond (who two years before had introduced a bill to give a vote to all commoners and to hold annual parliaments) joined in drinking to "The Majesty of the People" and "America in our Arms, Despotism at our Feet." In early 1793, on the eve of the war between France and England, Citizens Barrère and Roland of the French Convention, were elected honorary members of the Constitutional Society. One of its most notable and active members was Mr. John Horne Tooke, a plainly dressed, smallish man who lived at Wimbledon, spending his mornings in his garden and his afternoons over his books. He was a noted philologist.⁷ His father, a well-to-do poultry

⁵ 5 LECKY 98; TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 626 (10th ed. 1947).

⁶ BROWN 16.

⁷ Dr. Johnson read Horne Tooke's "Letter to Mr. Dunning on the English Particle," and said of it:

"Were I to make a new edition of my Dictionary, I would adopt several of Mr. Horne's etymologies. I hope they did not put the dog in the pillory for his libel; he has too much literature for that." 3 BOSWELL'S *LIFE OF JOHNSON* 27 (Rev. ed. 1934).

Tooke was originally known as Horne; he added Tooke which was the name of a benefactor. The pillory remark of Dr. Johnson refers to a scrape which occurred many years before the treason trials.

dealer, sent his son to Eton and Cambridge and put him in holy orders but the young man did not take kindly to clerical life. He studied for the Bar but was never called. As he had a reasonable fortune he was able to enjoy his leisure and to entertain his friends with a somewhat mordant wit. He came to be one of the intellectual powers in the parliamentary reform movement, and was proportionately distrusted and feared by the party in power.

"The Society of Friends of the People" was formed by some advanced Whigs, "to restore the freedom of election and a more equal representation of the people in Parliament" and "to secure to the people a more frequent exercise of their right of electing their representatives." A cluster of young Foxite peers belonged,—the Society had been organized one night after a dinner at Lord Porchester's.⁸ There were also the usual intellectuals and professional men. There was Richard Brinsley Sheridan, M.P., who had written "The Rivals," and turned to politics a few years before. There was a barrister of note, who had held commissions in both the navy and the army in his younger days, had taken to the law when he had a wife and children to support, made a notable success, become Attorney-General to the Prince of Wales, and lost the post through political heterodoxy without losing his slashing courage in defense of unpopular causes. He was Sir Thomas Erskine, and before the nineties were out a number of his friends owed their lives to him.⁹

Not all the Societies were formed of peers and bright well-to-do young commoners of talent and fashion. The London Corresponding Society, and its associated groups in the northern industrial cities, were workingmen's electoral reform clubs, with dues of a penny a week. There were English affiliates in Sheffield, Manchester, Stockport and Warwick; but the industrial cities in Scotland furnished the most radical membership.¹⁰

The London Corresponding Society's most notable member was named Thomas Hardy. He was a Scots shoemaker of about forty years, tall,

⁸ Advanced political views and the drinking of many toasts seem to have been closely associated in Georgian England. The young radicals of Pitt's day were in earnest without being dismal.

⁹ Erskine has of course been much written about. The account in CAMPBELL, 6 LIVES OF THE LORD CHANCELLORS (3d ed. 1847) is sprightly reading. 'Mr. Lloyd Paul Stryker's recent biography FOR THE DEFENSE (1947) is a dramatic account by a lawyer in the Erskine tradition. There are good papers on his advocacy by S. W. Burr, 18 A. B. A. J. 183 (1932) and by O. R. Barrett, 22 A. B. A. J. 341 (1936).

¹⁰ The Constitution of the London Corresponding Society appears in 24 Howell's State Trials 575. Another society, the "London Revolution Society," was a much less inflammatory group than its name would indicate. It was made up largely of men of Dissenting religious belief and took its name from the Glorious Revolution of 1688 (a highly respectable revolution, to which George III owed his throne). The Revolution Society was devoted to the principle that all civil authority was derived from the people, that its abuse justified resistance, that freedom of election, freedom of the press, freedom of conscience, and trial by jury were inviolable rights. The third Earl Stanhope, son-in-law of Pitt the Elder, was a member. BROWN 25.

quiet, thoughtful. Hardy, with the encouragement of Horne Tooke did most of the active work of correspondence with allied groups in England and Scotland. There were many other similar societies,—for example, the “Southwark Friends of the People,” one of whose leading members was John Thelwall, an ex-shopkeeper and ex-law student who had turned to writing and who had come to be a popular lecturer on reform politics.¹¹ Horne Tooke, Hardy, Thelwall and Erskine were all to play important parts in treason trials which even today can be read with suspense and excitement.

The most suspect organization of all, Scots or English, was “The British Convention of the Delegates of the Friends of the People Associated to obtain Universal Suffrage and Annual Parliaments,” which met at Edinburgh in the fall of 1793.¹² The very name “Convention” had a French sound; and worse, delegates called one another “Citizen.” Citizen Margarot was a delegate from the London Corresponding Society, and Margarot was French by birth. The Convention during its sittings in Edinburgh sent groups of members nightly to dine with Thomas Muir who had been convicted of sedition a few weeks before, and who was in the Tolbooth prison, awaiting transportation.

The formation of radical clubs caused the formation of conservative counterparts. In London the Crown and Anchor Association (named from the inn where its headquarters were) was formed “for protecting Liberty and Property against republicans and levellers.” It was popular and prosperous. The Goldsmiths’ Hall Association in Edinburgh followed its lead, and five of its members sat on a jury that sent the young Scotsman Thomas Muir to a penal colony for circulating Tom Paine’s books.

Most of the literary men of the time were on the side of reform.¹³ Wordsworth and Blake wrote in its favor, and felt a sympathy for the French. These were writers for the elect; but there were popular pens as well. Citizen Tom Paine’s writings were as generally known, and as respectively admired, or condemned, in England of 1793 as his earlier works had been in the United States nearly twenty years before. And of the thousands who have read Burns’ “For a’ that and a’ that,” how many realize that it was written on the same theme as Paine’s *Rights of Man*?

¹¹ Thelwall’s lectures used to be attended by government secret agents. One night, for their benefit, he lectured on “The Moral Tendency of Spies and Informers.” BROWN 112.

¹² 23 Howell’s State Trials 391. This collection will be cited as “State Trials” in the rest of this paper.

¹³ Dr. Johnson was a sturdy conservative, of course; but he had died ten years before the treason trials here discussed.

“It’s coming yet for a’ that,
That man to man, the world o’er,
Shall brithers be for a’ that.”¹⁴

And who now thinks, when he recites “Scots, wha hae wi’ Wallace Bled,” that Burns composed it is September 1793 on hearing the news of the conviction of Thomas Muir for sedition, before the High Court of Justiciary at Edinburgh?

Muir was a young Scots lawyer, whose tradesman father was sufficiently prosperous to send his boy to Glasgow University, from which he was expelled for writing squibs against the professors! He became a member of the Faculty of Advocates,¹⁵ and took an active part in the movement for parliamentary reform. At the same time he was cautious in his speeches, deprecated violence and urged reform by act of Parliament only. His worst sin appears to have been the recommendation of Tom Paine’s *Rights of Man* to friends and relatives,—a maidservant in his father’s house used to be sent out to a bookseller to buy copies for those to whom Muir recommended the book. He had also taken up the cause of the United Irishmen, and was in touch with the Corresponding Societies in England. In the fall of 1792 he had been speaking at meetings in the industrial districts in Scotland, criticizing the government, and comparing it disadvantageously to that of the French. He had a considerable following among young factory hands, and if he did not actually present a clear and present danger to the national welfare of Britain, he was certainly a menace to the political management of Henry Dundas who delivered the Scots vote for Pitt. Muir was brought by the authorities before the Sheriff-deputy of Edinburgh where he signed a statement; but he was not otherwise interfered with. However, he left for France immediately thereafter—only a few days before the execution of the King and the outbreak of active war between France and England. In his absence he was indicted in Scotland for sedition. He sailed from France with a passport¹⁶ and a passage for the United States, but turned up in Ireland late in July, where he was recognized and arrested.

Muir’s trial by jury opened at Edinburg in 1793, before the High Court of Justiciary. On the bench were the Lord Justice Clerk, Lord Braxfield, (who was to be the grim Weir of Hermiston in Stevenson’s

¹⁴ Burns, as an exciseman, was once able to get hold of some firearms confiscated from a smuggler’s brig. In a burst of enthusiasm he sent them to France! Of this his superiors in the revenue service took a poor view. BROWN 33, 88. One sometimes wonders less at the things men were tried for than at the things men were able to do with impunity.

¹⁵ The Faculty of Advocates was the Scots organized bar.

¹⁶ 23 State Trials 166 has a copy of Muir’s French passport, with a personal description. He was only about five feet three inches tall, but was a pleasant-looking young man.

novel a century later), and four lords commissioners of justiciary. Braxfield was a conspicuous judicial figure. He was of relatively humble descent, but went to the grammar school at Lanark, to Edinburgh University, and in due time became a busy member of the Scottish bar, noted for his capacity to stand drink and for his fanatic adherence to the Toryism of Henry Dundas. Lord Braxfield considered it a duty and a privilege to put down radicalism and he let this be known from the bench. In 1794 he presided at the trial of Joseph Gerrald for sedition; the defendant said at one point that Christ himself was a reformer. Braxfield responded, "Muckle he made o' that: he was hangit."¹⁷

The accusation of Muir for seditiously circulating Paine's works was not surprising. Paine himself had been indicted the preceding year in England, for seditious libel in publishing the *Rights of Man*. He had got safe away to France, and had informed the Attorney-General by a flippant letter that he would have stayed to attend the trial, had not his election as a member of the National Convention of France called him out of England, and

"The duty I am now engaged in is of too much importance to permit me to trouble myself about your prosecution; when I have leisure, I shall have no objection to meet you on that ground. . . ."

Erskine defended Paine when he was tried *in absentia*.¹⁸ The trial was little more than an opportunity to make a great speech, however; and when Erskine had finished his summary the foreman of the jury respectfully announced that there was no need for the Attorney-General to reply. The jury immediately found the defendant guilty. Paine never set foot in England again.¹⁹

Muir's indictment for sedition, principally "in that he did . . . wickedly and feloniously distribute . . . a number of seditious and inflammatory writings or pamphlets; particularly a book or pamphlet entitled *The Works of Thomas Paine, Esq.*," was thus supported by precedent. If it was seditious for Paine to write and to circulate the book, Muir was scarcely innocent for distributing it. Great Britain was at war with revo-

¹⁷ When Margarot was on trial before Braxfield, he questioned the judge about a statement Braxfield had made to a lady at dinner a few days before, to the effect that Margarot deserved a severe sentence. Braxfield refused to answer! 23 State Trials 672.

¹⁸ Erskine's statement of the duty of a lawyer to see that an unpopular cause gets a fair trial, is a fine legacy from a brave man. See 22 State Trials 412.

¹⁹ After the outbreak of war between England and France in 1793, Paine fell into disfavor because of his English birth. He spent eleven months in a French prison; when he was finally released he spent a year and a half in the house of Mr. Monroe, the American minister. The British fleet had orders to search for Paine on all vessels leaving France, but he managed to get to Baltimore in 1802. He died in 1809 and was buried on his estate in New Rochelle, which the State of New York, in 1784, had presented to him for his services during the American Revolution. His body was returned to England, however, in 1819. See a sketch of his life in POLITICAL WRITINGS OF THOMAS PAINE (1830).

lutionary France, and the French had, only a few months before, cut off their king's head. The indictment quoted Paine's book as saying:

"Monarchy is ranked in Scripture as one of the sins of the Jews, for which a curse in reserve is denounced against them. . . . In England, a king hath little more to do than to make war, and to give away places; which in plain terms, is to impoverish the nation, and set it together by the ears. A pretty business indeed for a man to be allowed eight hundred thousand pounds sterling a year for, and worshipped into the bargain! Of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived."

Muir's trial opened with a reading of the entire indictment, which takes up six pages of small print in Howell's State Trials. He orally pleaded not guilty, and announced that he would be his own counsel. He boldly told the Court,

"I admit that I exerted every effort to procure a more equal representation of the people in the House of Commons. If that be a crime I plead guilty to the charge. I acknowledge that I considered the cause of parliamentary reform to be essential to the salvation of my country; but I deny that I ever advised the people to attempt to accomplish that great object, by any means which the constitution did not sanction. I grant that I advised the people to read different publications upon both sides, which this great national question had excited, and I am not ashamed to assign my motives. I consider the ignorance of the people, on the one hand, to be the source from which despotism flows; I consider, upon the other hand, an ignorant people, impressed with a sense of grievances, and wishing to have these grievances redressed, to be exposed to certain misery and to complete ruin."

In every Scots criminal trial, the Court, as a matter of course, first passed on the sufficiency of the indictment. The four lords commissioners (associate justices) "agreed to find the libel relevant to infer the pains of law."²⁰ Braxfield, the Lord Justice Clerk, let himself go a little. He said:

"The crime here charged, is sedition; and that crime is aggravated according to its tendency; the tendency here is plainly to overturn our present happy constitution—the happiest, the best, and the most noble constitution in the world, and I do not believe it possible to make a better;—and the books which this gentleman has circulated have a tendency to make the people believe that the government of this country is venal and corrupt, and thereby to excite rebellion."

²⁰ The Scots trials read strangely to a modern American lawyer. English criminal trials of a century and a half ago sound perfectly familiar.

His lordship, therefore, agreed with his associates in sustaining the indictment.

The prisoner had equally poor luck on the selection of the jury. When Captain John Inglis of Auchindinny was called he said that as a government servant he preferred not to serve, "that he did not consider it as proper that Mr. Muir should be tried by a jury composed of servants of government." The Court told him that there was no impropriety in his serving.²¹ Muir objected to the first five jurymen on the ground that they belonged to the Goldsmiths' Hall Association, whose members had voted to exclude Muir from membership in this Association on the ground that he was an enemy of the constitution. Said Muir to the Court:

"Accused this day of sedition, of an attempt to overthrow the constitution, shall these men be my jurymen, who have not merely accused me but likewise judged and condemned me without knowing me, without leaving me the possibility of the power of vindication?"²²

Their lordships were unanimous in repelling the objection!

The parade of witnesses began. To the first, Alexander Johnston, Muir objected on the ground that Johnston had previously stated that he would do everything in his power to have Muir hanged.²³ The court observed that a witness might seek to avoid testifying by making such a statement, and might so defeat the ends of justice. Anyhow, said Braxfield, the witness' oath purged him of malice. Let him speak.

Johnston's testimony was a fair sample of the entire case for the prosecution. He swore that he had heard Muir harangue a meeting mostly of young weavers, eighteen to twenty years old, at Kirkintilloch 8 months before. Muir had criticized the representation of the Scots boroughs in Parliament and said that if a man paid twenty thousand pounds for a seat he must get something in exchange. Oddly enough to our ideas, Muir made no effort on cross-examination to show the bias of the witness. Johnston admitted that Muir recommended order and regularity to the meeting, said that tumult or disorder would ruin their cause, and "that there was no other mode of procuring redress but by applying to parliament." . . . "He likewise recommended reading political pamphlets in general."

²¹ This question seems perennial. See *United States v. Wood*, 299 U. S. 123, 57 Sup. Ct. 177 (1936), Note, 50 HARV. L. REV. 692 (1937); *Frazier v. United States*, 163 F. 2d 817 (App. D. C. 1947); *Higgins v. United States*, 160 F. 2d 223 (App. D. C. 1946).

²² 23 State Trials 134.

²³ Apparently a sufficient showing of actual malice would disqualify the witness, rather than affect only his credibility as it does with us.

Another witness, Anne Fisher, former maidservant in the house of Muir's father, seems to have hurt most.²⁴ Young Mr. Muir, she said, used to be much busied about reading and writing, on what subjects she did not know. She saw a good many country people coming about Mr. Muir's father's shop, and Mr. Muir used to tell them that Paine's *Rights of Man* was a very good book. He would sometimes send Anne out to buy a copy for the countrymen. She once heard Muir advise his barber to buy copies, "and to keep them in his shop to enlighten the people, as it confuted Mr. Burke entirely, and that a barber's shop was a good place for reading in." Anne borrowed a copy from Muir's manservant to read herself. She had heard Muir say that France was flourishing because free; that the British constitution was good but its abuses needed a thorough reform; "that the court of justiciary would need a thorough reform too, for it was nonsense to see the parade with which the circuit lords came into Glasgow; that they got their money for nothing but pronouncing sentence of death upon poor creatures. . . ." Muir objected at this point (without success) that the indictment did not accuse him of speaking against the courts of law. Anne added that Muir had sent her "to an organist in the streets of Glasgow and desired him to play 'ça Ira.'" ²⁵

As the trial wore on, witness after witness, both for the prosecution and for the defense, testified that Muir had not advocated violence but had urged parliamentary reform. At the close of the testimony the Lord Advocate (prosecuting counsel) first addressed the jury. He praised Anne Fisher, and denounced Muir with a wealth of metaphor.

" . . . he used constantly to be reading seditious publications in the back shop;—it was there, in that cathedral of sedition, he sat like a spider, weaving his filthy web to ensnare the unwary. . . . Even the poor organist could not pass the house of this demon of mischief but he must be stopped and desired to play *ça ira*—a tune

²⁴ When Muir was asked if he wished to cross-examine Anne, he replied, "I disdain to put a question to a witness of this description." 23 State Trials 151. When he addressed the jury he called her "a domestic and well-instructed spy." She might well have been in the pay of Dundas, as he had an extensive secret-service:—the prosecution of Thomas Walker, a merchant of Manchester collapsed when Erskine demonstrated that the only Crown witness, a man named Dunn, was a government spy who, when drunk a few days before, had admitted the falsity of his story. The witness was convicted of perjury and sent to prison for two years. 23 State Trials 1166. A clergyman named Jackson was convicted of treason in Ireland in 1795 when his confidential co-conspirator, an attorney named Cokayne, turned out to be a government agent! GURNEY, TRIAL OF WILLIAM STONE 192 *et seq.* (1796); LECKY, 3 HISTORY OF IRELAND IN THE XVIII CENTURY 372 (1893). That Anne may have been a government agent does not mean her story was untrue; it has a likely sound.

²⁵ "Ca ira, Ca ira—Les aristos à la lanterne!" If you belonged to the class in question, the song may have well seemed a little pointed; lamp-posts were available in Britain as well as France.

which is made use of in that unhappy country, France, as a signal for blood and carnage.”

Muir spoke well in his own defense. He stressed the legitimacy of his motives in urging parliamentary reform; but his flight to France after he was apprehended was hard to explain. The excuse he gave,—that he intended to dissuade the revolutionaries from executing the King, seems more ingenious than credible but he urged it stoutly. When the prisoner finished his speech, Lord Braxfield was shocked to hear the crowd applaud.

The charge to the jury by the Lord Justice Clerk was strong stuff:

“I leave it for you to judge, whether it was perfectly innocent or not in Mr. Muir, at such a time, to go about among ignorant country people, and among the lower classes of the people, making them leave off their work, and inducing them to believe that a reform was absolutely necessary to preserve their safety and their liberty, which had it not been for him, they never would have suspected to have been in danger.”²⁶

He ended with a ringing denunciation:²⁷

“As Mr. Muir has brought many witnesses to prove his general good behaviour, and his recommending peaceable measures and petitions to parliament, it is your business to judge how far this should operate in his favour, in opposition to the evidence on the other side. Mr. Muir might have known that no attention could be paid to such a rabble. What right had they to representation? He could have told them that the parliament would never listen to their petition. How could they think of it? A government in every country should be just like a corporation; and in this country, it is made up of the landed interest, which alone has a right to be represented; as for the rabble, who have nothing but personal property, what hold has the nation of them? What security for the payment of their taxes? They may pack up all their property on their backs, and leave the country in the twinkling of an eye, but landed property cannot be removed.

“The tendency of such a conduct was certainly to promote a spirit of revolt; and if what was demanded should be refused, to take it by force.”

The jury came in with a verdict of “Guilty.” Muir was sentenced to transportation to New South Wales, for fourteen years. With him went his associates in the Scots movement, including the Frenchman Margarot, all of whom had been convicted of the same offense. They seem to have been well treated by the Governor of the penal

²⁶ 23 State Trials 151.

²⁷ 23 State Trials 229.

colony there.²⁸ The sentences of the prisoners awakened much sympathy among Foxite Whigs in England and among the anti-Federalists in the United States, and a project was started in America to send a ship to rescue Muir. Whether by this means or some other, he escaped to South America, and took passage to Spain, which was then at war with England. He was imprisoned as an enemy alien on his arrival in Spain. Talleyrand applied for and obtained his release, and the unfortunate Muir went to Bordeaux, where he died in exile among a people at war with his country.²⁹

The conviction of Muir and his Scots associates produced a sensation among the members of the Constitutional Society and of the Correspondence Society in London. In January 1794 the Constitutional Society passed a resolution:

“Resolved, That Law ceases to be an object of obedience, whenever it becomes an Instrument of oppression.

“Resolved, That we call to mind, with the deepest satisfaction, the merited fate of the infamous Jefferies, once Lord Chief Justice of England, who at the aera of the glorious Revolution, for the many iniquitous sentences which he had passed, was torn to pieces by a brave and injured people.

“Resolved, That those who imitate his example deserve his fate.³⁰ . . .

“Resolved, That we see with regret, but we see without fear, that the period is fast approaching when the liberties of Britons must depend, not upon reason, to which they have long appealed, nor on their powers of expressing it, but on their firm and undaunted resolution to oppose Tyranny by the same means by which it is exercised. . . .”

The Constitutional Society, at a meeting held in March, 1794, voted an “address” of commendation and sympathy which was sent to Muir and Margarot, then prisoners on the Surprise transport, lying at Spithead; and the prisoners sent appropriate answers. Rumors began to circulate that the English Societies were not only drinking toasts³¹ and

²⁸ See 23 State Trials 382 for an account of the lives of the prisoners in New South Wales.

²⁹ Of all the men transported for the Scots sedition trials of 1793-94, only Margarot ever got back to England. He had been a trouble-maker on the transport, and had become worthless and dissipated in New South Wales. He remained there until 1810; but by 1812 was testifying in London before a Committee of the House of Commons on the manner of carrying out sentences of transportation. He died in 1815 while friends were raising a subscription for him. 23 State Trials 1413.

³⁰ FIRST REPORT OF THE COMMITTEE OF SECRECY OF THE HOUSE OF COMMONS 5, 6 (1794). The inaccuracy of this account of Judge Jeffrey's death [he actually died of illness in the Tower—see CAMPBELL, 3 LIVES OF LORD CHANCELLORS (3d ed. 1848)] was probably small satisfaction to Dundas!

³¹ On January 23, 1794, the Constitutional Society voted to print and distribute copies

passing resolutions, but were accumulating a store of arms for use when the populace should rise. The French war was continuing. It was, in the opinion of the King and his ministers, time to act vigorously in defense of the realm.

At six-thirty on the morning of May 12, 1794, a group of King's Messengers arrested the shoemaker Thomas Hardy at his home in Piccadilly, and ransacked his house for papers, which they put in a sack. The Privy Council met specially and started to go through the documents, and to question the men arrested. For three days the raids continued. Thelwall, the popular lecturer, was arrested on the evening of May twelfth; Horne Tooke was one of the last to be taken up. Some of the men refused to talk; some answered in a panic.

Meantime, after Hardy's arrest, Dundas, the Home Secretary, brought to the House of Commons a royal message stating that his Majesty had received information of seditious practices, carried on by correspondence societies and tending to the mischiefs already prevalent in France; that the papers of these societies had been seized and were being sent to the House to consider, in order that it might take the necessary measures of defense.³²

The captured documents reached the House next day, and a Secret Committee of twenty-one members was appointed to consider them.³³ Three days later the Committee made its first report, which incorporated the more important of the papers taken from the various persons arrested. The evidence, it said, indicated an open attempt to supersede the House of Commons by a General Convention.³⁴ That evening Pitt introduced a bill to suspend the Habeas Corpus Act. Burke and Sir John

of the toasts drunk at the last preceding Anniversary Dinner of the Society. There were seventeen (!) toasts, including:—

"I. The rights of Man; and may Britons never want spirit to assert them.

"V. Citizen Maurice Margarot, the condemned Delegate of this Society; and may his manly and patriotic conduct be rewarded by the attachment of the People.

"IX. Citizens Muir and Palmer—May their sentence be speedily reversed, and Botany-Bay be peopled with a colony of real criminals.

"X. Success to the arms of freedom against whomsoever directed; and confusion to despots with whomsoever allied.

"XIV. A speedy and honourable peace with the brave Republic of France." FIRST REPORT OF THE COMMITTEE OF SECRECY OF THE HOUSE OF COMMONS 11, 12 (1794). They had harder heads in those Days! At one dinner of the Constitutional Society, Horne Tooke prefaced a speech of somewhat unusual violence first by saying that one out of fifty in the room might be considered a government spy, and then by begging the company to take notice—"that he was not in a state of inebriation; for having something to say to the company, he had taken care to refrain from his glass; and for fear of being mistaken, and being taken to be in a state of intoxication, he begged everybody present to take particular notice of what he said." 24 State Trials 751.

³² 1 Twiss, c. XII passim.

³³ 1 Twiss 239.

³⁴ FIRST REPORT OF THE COMMITTEE OF SECRECY OF THE HOUSE OF COMMONS 22 (1794).

Scott, the Attorney-General, supported Pitt; Fox, Grey³⁵ and Sheridan opposed him. The bill speedily passed both houses. The arrested men stayed through the summer in prison, some in the Tower, some in Newgate. Hardy's house was attacked by a mob in June,³⁶ and in August his wife died following the still birth of their child. A pathetic unfinished last letter from her to her husband is still preserved.³⁷

An indictment for high treason was brought in against Hardy, Horne Tooke, Thelwall and nine others. They were accused of compassing and imagining insurrection, rebellion and war against the King, the subversion and alteration of the legislature, the deposing of the King and putting him to death.

Under the statute of 25 Edward III, the crime of treason could be made out only by proof by two witnesses of an act or acts done by the accused which manifested a "compassing and imagination" of the death of the King. The proof here was weak. The judges who sat on the Privy Council considered the cases for a long time, but finally advised their fellow-Councillors that the facts made out high treason.³⁸ The Attorney-General³⁹ writes of his own difficult decision to seek convictions for treason (for he could have prosecuted for the lesser crime of sedition with more chance of success):—

"As Attorney-General, and public prosecutor, I did not think myself at liberty in the indictments to let down the character of the offense. . . . Unless the whole evidence was laid before the jury, it

³⁵ Charles, Second Earl Grey, 1764-1845. In 1830 he became Prime Minister and finally succeeded in carrying the Parliamentary Reform Bill through both houses, thus accomplishing, after 36 years, one of the principal objects of Hardy, Horne Tooke and Muir!

³⁶ It would be a mistake to assume that "the people" were always on the "liberal" side. In 1791 a Birmingham mob burnt the house, library and chemical laboratory of Dr. Priestley, the great scientist and non-conforming clergyman. The mob was incensed at his having been made a citizen of the French Republic, at his reply to Burke's "Reflections on the French Revolution," and perhaps by his religious nonconformity. Priestley later moved to America, where he declined the offer of the principalship of the University of Pennsylvania.

³⁷ BROWN 123.

³⁸ 1 TWISS 283.

³⁹ Sir John Scott, then Attorney-General, was the younger son of a Newcastle coal dealer. He was sent to Oxford, whence at the age of twenty-one he eloped to Scotland to marry Miss Elizabeth Surtees. After serious thought he declined a partnership in a grocery, considered the Church, and finally decided for the Bar. He was appointed Deputy Professor of Law at Oxford, and when he met his first class, read a lecture written by Sir Robert Chambers, the Vinerian Professor. He began the paper without knowing its contents, and to his dismay found himself reading to 140 young men a Statute (4 & 5 PHILIP & MARY, c. 8 1557) about young men who run away with maidens!

Scott was called in 1776. In his first twelve months at the bar he received a total professional income of half a guinea! He went into politics, was elected to Parliament, became a decided conservative and a great admirer of George III. During the long tenure of Pitt and his conservative successors, Scott became successively Solicitor-General, Attorney-General, Chief Justice of the Common Pleas as Lord Eldon, and finally became Lord Chancellor in 1801. He was much criticized in his later years for the delays in his court. He died in 1838, eleven years after retiring as Chancellor. His brother, William (Lord Stowell), was one of the greatest of English admiralty judges.

would have been impossible that the country could ever have been made fully acquainted with the danger to which it was exposed . . . and it appeared to me to be more essential to securing the public safety that the whole of their transactions should be published, than that any of these individuals should be convicted."

After Hardy and the others were indicted, but before they were brought to trial, a conviction for High Treason took place in Edinburgh. Robert Watt, the defendant, had once been a government informer but his services bought him no immunity. Perhaps he became a convert to treason. Watt was sentenced to be hanged, but not until he was dead; then to be disembowelled; then to be decapitated and quartered. This sentence however, was remitted except as to hanging and decapitation. He was executed twelve days before Hardy went to trial. His confession, written the day before his execution, said that he planned an armed uprising to take possession of the country,—this when Britain and France were at war! Watt's fate must have been in everyone's mind when the English cases came to trial a few days later.

The indicted defendants were arraigned at Old Bailey before Lord Chief Justice Eyre and the Attorney-General first moved Hardy's case. Erskine was assigned by the Court as counsel for the prisoners. Both sides challenged a number of veniremen; the modern lawyer regrets that there exist no notes of Scott and Erskine, to suggest why George Wade, stockbroker, and Henry Bullock, brewer, were challenged by the Crown; or why the prisoner was unwilling to accept John Powsey, a carpenter and surveyor, or Thomas Rhodes and Thomas Harrison, cowkeepers.

Scott opened the case with a speech of nine hours!⁴⁰ He was scrupulous in his fairness to the prisoner, but the foundation of the prosecution's case was shaky. The Crown had to prove that Hardy compassed the King's death, and there was not a word in Scott's outline of his proposed proof that suggested any such actual purpose on Hardy's part. The Attorney-General had to argue that his evidence would show that Hardy promoted a plan to depose George III, and that this was tantamount to taking steps to bring about his death.⁴¹

The Crown started its case by calling the King's Messengers who had raided Hardy's house, and through them the prosecution identified the seized papers. Hardy, as an officer of the Corresponding Society, had a houseful of documents, addresses, resolutions, and letters. From the point of view of the prosecution they were weak, however, as they repeated again and again the legitimate and untraitorous complaints that

⁴⁰ It occupies 64 pages of small type in volume 24 of the State Trials.

⁴¹ 24 State Trials 253.

parliamentary representation was unequal and that taxes were bearing heavily on the people who had no effective voice in their imposition. One document⁴² introduced by Scott pointed out that in the Duchy of Cornwall only 453 votes elected 42 members of Parliament, while in a group of Midland towns, including Sheffield, Manchester, Birmingham, Leeds and Wolverhampton, and having together over 300,000 population, there were no electors whatever.

To modern court lawyers, the discussion that arose at midnight after the first day of testimony seems odd: neither Court nor Counsel had any experience of a trial lasting more than one day, and the problem of what to do with the jury was a difficult one. Erskine suggested that they be allowed to go to their homes, on their undertaking on their honor not to permit anyone to approach them on the subject of the case.⁴³ Several jurors asked to go home. The Court, however, decided to keep them together for the night and the Sheriff promised beds and mattresses. Erskine somewhat plaintively said he ought to have a little time to examine papers which it had taken Scott nine hours to explain to the jury. Chief Justice Eyre said that Erskine in due course would be given a reasonable opportunity, and the Court, at a quarter past midnight, adjourned to eight o'clock the same morning!⁴⁴

The second day was occupied with more papers. An argument sprang up over the admissibility of evidence when a printer named Garrow was asked to identify an Address to the People of Great Britain and Ireland, approved at a meeting of the London Corresponding Society. Thelwall, not the prisoner Hardy, had brought the paper to the printer; and Erskine objected that while this might be evidence against Thelwall, it was not admissible against Hardy.⁴⁵ Throughout the trials runs this same troublesome question: how far are the acts of a few members of a large society provable against the other members? The Chief Justice admitted the paper as a "circumstance occurring in the conspiracy." It was addressed to "Citizens" (an ominous word at the time) and contained a good deal of stuff much like a vigorous election speech of our day. It reprinted the seventeen toasts, drunk at a Constitutional Society Dinner, and said:⁴⁶

"We are issue. We must now choose at once either liberty or

⁴² A sort of address or printed broadside. 24 State Trials 377 *et seq.*

⁴³ 24 State Trials 417.

⁴⁴ Our more lenient treatment of parties and counsel may tend to protract trials. The trial of Dennis *et al.* for sedition, in the U. S. District Court in Washington, D. C., in 1944 lasted 7½ months and ended in a mistrial when the judge died!

⁴⁵ See *DeJonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1937). This same question repeatedly arose in the English treason trials in 1794.

⁴⁶ See note 31 *supra*.

slavery for ourselves and our posterity. Will you wait until *barracks* are erected in every village, and till subsidized Hessians and Hanoverians are upon us?"

Parts of Paine's *Rights of Man* and his *Letter to the People of France* and Joel Barlow's *Advice to the Privileged Orders* were also read in evidence.⁴⁷ An account of another dinner of the Constitutional Society was put in with a note that *Ça Ira*, the *Carmagnol*, and the "Marsellois March" were sung.

The court adjourned after midnight following two days of trial. The jury, who had slept on "matrasses" in a single room in the Sessions House of Old Bailey and who had not had their clothes off in forty hours, were sent to an inn.⁴⁸

The jurymen must have speedily become confused and wearied by the endless stream of papers. To read them today is something of a bore; the persistent reiteration soon blunts the attention. Scott might have done better to pick a few good papers, and rely on the sharpness of the impression made by their partisanship with an enemy nation, whose armies and navies at the very moment were in battle with Englishmen.⁴⁹

He did have some good material to use and he must have caused Erskine some worry.⁵⁰ A Crown witness named Gurnell identified a letter as having been found in Hardy's house. It read:

"Fellow Citizen;—The bare-faced aristocracy of the present administration, has made it necessary that we should be prepared to act on the defensive against any attack they may command their newly-armed minions to make upon us. A plan has been hit upon, and if encouraged sufficiently, will, no doubt, have the effect of furnishing a quantity of pikes to the patriots great enough to make them formidable. The blades are made of steel, tempered and polished after an approved form. They may be fixed into any shafts (but fir ones are recommended) of the girth of the accompanying hoops at the top end, and about an inch more at the bottom.

"The blades and hoops (more than which cannot properly be sent to any great distance) will be charged one shilling. Money to be sent with the orders.

"As the institution is in its infancy, immediate encouragement is necessary.

"Orders may be sent to the secretary of the Sheffield Constitutional Society. (Struck out)

"Richard Davison.

⁴⁷ 24 State Trials 475, 578.

⁴⁸ 24 State Trials 572, 573.

⁴⁹ War had been continuing for over a year by the time of the trial.

⁵⁰ 24 State Trials 538. Drawings of the pikes can be seen in the FIRST REPORT OF THE COMMITTEE OF SECRECY OF THE HOUSE OF COMMONS (1794).

"Sheffield, April 24, 1794.

"To prevent post suspicion, direct to Mr. Robert Moody, joiner, Cheney-square, Sheffield. Please to forward the inclosed."
Addressed, "Citizen Hardy,
No. 9, Piccadilly, London."

Here were weapons. This looked more like treason than did a lot of loose talk about the philosophy of government. William Cammage, of the Sheffield Constitutional Society, was sworn, and testified that he and a knife-maker had shown one "Redhead Yorke," a member of the Corresponding Society and delegate of the Constitutional Society, a form of pike. Yorke approved it, but gave no public advice that arms be used.

Mr. Law (one of counsel for the Crown):⁵¹ You said he did not in public advise the use of arms; what have you heard him advise upon that subject in private?

Mr. Erskine: What he advised in private!

Lord Chief Justice Eyre: If he is proved to have been at any of the Corresponding Societies meetings.

Mr. Erskine: But what a man says in private!

Mr. Attorney-General: He was a member of the Corresponding Society, a delegate from the Constitutional Society.

Mr. Erskine: My idea is this, what an agent might say in a separate case in private—

Lord Chief Justice Eyre: He is not an agent, but a party.

Here was the old question of guilt by association. Was Hardy guilty of treason because he was a member of a society, another of whose members suggested using pikes against the aristocrats?

Q. Who were the people that thought it necessary to have arms?

A. The friends of reform, to protect their meetings.

Q. The Constitutional Society?

A. Yes.

Q. Who did you hear, what member of the Constitutional Society, express such an idea?

A. It was a general idea amongst a great many, whom I cannot name at present.

Q. And Yorke you say approved of that idea?—

A. He did.⁵²

Still the connection of Hardy with the pikes was thin. The letters were found at his house, but with no indication that he cooperated in the pike project, unless the jury could be allowed to find that every

⁵¹ In Howell's State Trials the division between questions put by the court or by counsel and the reply of the witness is not always immediately clear. I have supplied the letters "Q" and "A" where they would occur in a modern record on appeal.

⁵² 24 State Trials 591.

member, or at least every officer, of the Corresponding Society was chargeable with what any other member did.

On cross-examination by Erskine, Cammage disclaimed any intent to use arms except in self-defense, said he understood that the Bill of Rights gave him that right, and that he had no wish to see the King deposed. "God forbid," said the pious Mr. Cammage, "that I should ever live to see it."⁵³

Mr. Broomhead, a cutler of Sheffield and secretary of the Constitutional Society of that town, was sworn and testified about an ingenious little device called a "night-cat" which could easily be made in quantity, and which could be strewn on a road and effectively lame advancing cavalry. He proved a tough witness for the Crown however, and Garrow⁵⁴ did not get far with him.

- Q. I do not know whether you heard anything of the night-cats?
 A. I saw a model of one, but it was only like the plaything of a child.
 Q. Now we will have an account of the manner in which children play at Sheffield, what sort of an instrument was it?
 A. A little instrument standing up with a point about one inch high. . . .
 Q. It had four cross points?
 A. I think there were four.
 Q. So that if you threw it down it always presented a point?
 A. That did. . . .
 Q. Was there any other purpose for which these instruments were spoken of in the society to be made, except playing with them as children?
 A. Never any mention made of them in the society at all. . . .
 Q. Was there any conversation at that time when it was thrown upon the floor about Cavalry?
 A. I do not recollect any conversation at all, but merely the throwing it upon the floor.
 Q. Then you never heard any conversation at Sheffield about this night-cat or this model of a night-cat with respect to cavalry?
 A. I do not recollect any conversation about its use but a mere trifling, desultory, pleasing, irregular conversation with one another.
 Q. Now that trifling, pleasing, desultory, irregular conversation I want to have.
 A. I am sure I cannot recollect it; if I could recollect it I would. . . .
 Q. Try, do not hurry yourself.
 A. I cannot recollect anything that was said.

⁵³ 24 State Trials 598.

⁵⁴ He had relieved Scott. 24 State Trials 607. Throughout the trial, Crown counsel changed off rather frequently.

The Attorney-General had a difficult question of trial strategy to decide. Witnesses like Cammage were disconcertingly cautious about their admissions on the stand. Secret agents in the pay of the government were available however,⁵⁵ and would talk more freely, but their use as witnesses could be sneered at by the defense, and might provoke resentment in the jury. Scott tried out such a witness named Alexander,⁵⁶ who swore that he had joined Division Twenty Nine of the London Corresponding Society in 1793. At a meeting of the Society at Robinson's Coffee House toward the end of that year Redhead Yorke had made a farewell speech: he was leaving for Belgium which was ripe for revolution. Redhead Yorke, so the witness testified, said he had become a member of the French Convention and had to be back in London by Christmas or the first of the year; "at the head of them;"⁵⁷ that he hoped to see "them" all ready to join him; "and that he was in hopes that Mr. Pitt, with the different ministers he mentioned, and the King's head would be upon Temple Bar."⁵⁸

Lord Chief Justice Eyre: That who would join them?

A. That the society would.

Lord Chief Justice Eyre: Whose heads upon Temple-bar?

A. Mr. Pitt's he mentioned, the minister's, and the King's.

Crown counsel had to lead his own witness to get a good story.

Mr. Wood: Did he say anything to you about the king and queen of France?

A. Yes, he did—he made some observations upon them, but I cannot recollect the words now.

Q. But the substance of it?

A. The substance of it was, that it was what they had deserved—that they had met with their desert.

Q. Did he say anything about war?

A. I do not recollect that he did.

Q. Did he say anything about the Sans Culottes?

A. He did make mention of the Sans Culottes; that they were a set of brave fellows—He said a deal about them, that they were a set of brave fellows.

Q. Do not you recollect what he said besides?

A. I do not.

⁵⁵ BROWN 116, 122, describes the infiltrations of agents into the Societies.

⁵⁶ 24 State Trials 639 *et seq.*

⁵⁷ *Sic.* Whom?

⁵⁸ Redhead Yorke was tried in 1795 for conspiracy to "traduce, vilify and defame the Commons House of Parliament" etc. He was convicted and sentenced to two years in prison, to pay a fine of £200, and to give £1000 security for seven years' good behavior. 25 State Trials 1154. He married the daughter of the governor of the prison and turned conservative in politics! BROWN 146.

Q. Did he say anything to you about arms?

A. He did.

Q. What did he say about arms?

A. He said that he was in hopes when he came, he should find them all ready to join him, and that when the point came that he hoped they would not be afraid, and spring or shrink from what they pretended to be; he said, it was impossible to do anything without some bloodshed. . . .

This was a dangerous witness, even though he had not connected Hardy with Redhead Yorke other than by common membership in the Corresponding Society. Erskine smelled a rat and went after him: he could oblige the witness either to admit his own participation in the alleged treason to the king, or a deliberate intention to betray his own friends. Either admission would damage the prosecution.

Q. At what time of the year was it that you first went with your friend to this society?

A. Towards the latter end of the year 1793. . . .

Q. Did you not know they were a society for parliamentary reform?

A. Yes.

Q. You say you did not wish a parliamentary reform?

A. I scarce knew what they meant by it when they read it over.

Q. Did you wish a parliamentary reform when you became a member, when you heard that paper read the first night? Now mind; did you wish a parliamentary reform, or any alteration in the House of Commons or in the government in any way? Upon your oath (look across to the jury). Did you, upon your oath when you became a member of that society wish and desire to have any alteration in any part of the government? You need not look at me, I shall hear it well enough; why do you hesitate—come, cough it up, answer me that upon your oath; are you acquainted with Mr. Dunn, of Manchester?⁵⁹

A. No.

Q. I should have thought you were?

Lord Chief Justice Eyre: Why do you not answer the question?

A. I do not understand you.

Mr. Erskine: I am sorry for it; I believe you are the only one in court that does not: I will put it again to you, because I wish to be civil to you. Did you wish a parliamentary reform, or any alteration in the government, when you became a member of that society?

A. I never wished any thing of the kind. . . .

Alexander finally said that the nature of the society became plain to him when he read a paper he had got at the meeting.

⁵⁹ See note 24 *supra* for this Mr. Dunn's adventures.

- Q. Then since you took the paper read in the society home with you, and read it in the interval between the first time and the second time of your going there, you must approve of it before you went a second time?
- A. I did not.
- Q. You thought there was danger in it?
- A. I read it to two or three of my friends; they were of the same opinion as myself.
- Q. What became of the paper?
- A. I left it at Mr. Dundas's office.

[Here at last Erskine had brought out the name he wanted—Dundas, the spymaster!]

- Q. Then you went of course, the second time, for the purpose of becoming an informer?
- A. I did; I went to see what they were upon. . . .
- Q. When you were there you pretended to be a friend, no doubt, and to approve of what was going on?
- A. I did.
- Q. Whereas in fact you were a spy?
- A. So I proved at last.

Alexander had earned his pay!⁶⁰

Another witness produced a mock play-bill reading:

For
The Benefit of JOHN BULL

At the
FEDERATION THEATRE, IN EQUALITY-SQUARE,
On Thursday, the 1st of April 4971

Will be performed,
A new and entertaining Farce, called
LA GUILLOTINE;

OR,
GEORGE'S HEAD IN THE BASKET!

By Citizens Xof, Nadirehs, Yerg, Eniksre,
&c.

In the Course of the Evening will be sung,
in Full Chorus,

ÇA IRA

and

BOB SHAVE GREAT GEORGE OUR _____!⁶¹

⁶⁰ Another secret agent named Gosling appealed to Chief Justice Eyre for protection from Erskine. 24 State Trials 720. He came off badly. Eyre, however, allowed an agent named Groves to refuse to give his superior's name, when Crown counsel urged that "the channels for information must be protected." 24 State Trials 753.

⁶¹ 24 State Trials 682.

Erskine said at once, "The paper was fabricated by the spies who support the prosecution," and the charge, for the first time came close to producing an open quarrel with Scott. They must all have been getting very tired. A capital case is a tense matter. Sir John Scott was a conscientious man, trying a prisoner he thought guilty of treason against his country in a time of war. Erskine's principles, too, were involved, and a man's life might be lost if his attention flagged and damning testimony slipped in unnoticed. The law of evidence was much less established than it has since become, and in large measure counsel had to play by ear.⁶² To Erskine's other burdens was added an unavoidable lack of preparation for trial; the prosecution had all Hardy's papers with all summer to study them. Erskine had had no prior access to them. Finally the court sat, with only brief interruptions, from what would be early morning for a modern trial, to later hours at night. And Erskine was half-sick.

The Crown wound up its case on Saturday by the dramatic offer in evidence of some arms. It produced from the custody of the Sheriff of Edinburgh, some pikes found in the house of Robert Watt of that city, who had been executed for treason a few days before. There was nothing to show that Hardy had any part in forwarding them to Scotland for Watt's use; but Redhead Yorke of the Constitutional Society had approved the use of pikes, and an advertisement of pikes for defense by "patriots" against the "bare-faced aristocracy of the present administration" had been found among Hardy's papers. The evidence was received. It was a striking finish.

Erskine now opened for the defense. He agreed with Scott that anarchy was desolating France, but said that the worst evil in that country was its lawless state, ". . . every protection of law is abrogated and destroyed" . . . "no man can say, under such a system of alarm and terror, that his life, his liberty, his reputation, or any one human blessing is secure to him for a moment" . . . "if accused of federalism, or moderatism, or incivism, or of whatever else the changing fashions and factions shall have lifted up into high treason against the State, he must see his friends, his family, and the light of heaven no more. . . ." He urged the jury to protect England from such a state of lawless terrorism.

When Erskine finished, the spectators in the courtroom, who strongly favored Hardy, applauded, and the applause spread to the great crowd outside in the streets. Erskine himself went out and quieted them by urging that they rely on the justice of English laws. He pointed out that

⁶² They argued over whether leading questions were permissible on cross-examination. 24 State Trials 659.

any attempt to overawe or bias the court might endanger Hardy's life. He asked the crowd to disperse, and it did so in a few minutes.⁶³

The evidence called on behalf of Hardy was shorter than the Crown case. Several witnesses swore that the object of the Societies was legitimate parliamentary reform. The Duke of Richmond was called, and identified a printed copy of a letter he had written in 1780 recommending universal suffrage. Previous witnesses had said that the Societies in general favored the Duke of Richmond's plan. Sheridan, the playwright, testified that Hardy had told him his object was reform on the Richmond plan; and that Hardy had offered to help in opening up the entire conduct of the Societies before an investigating Committee of the House of Commons.

By the seventh day of trial the evidence and the summaries of counsel were at last finished. The Chief Justice began his charge. He went over the whole case again, paper by paper, witness by witness, for another entire day. Then he sent the jury away to consider its verdict.

It must have been a bad time for Hardy, wondering what was going on in the jury-room as one hour succeeded another. When a jury is out in a capital case, a courtroom has a curious, unrestful quiet. Men speak low and walk softly; and spectators watching the prisoner feel a little ashamed at their own exemption from his trouble. Then the bailiff comes and says the jury is ready; the room is quieter than ever, and all the tense waiting comes to a dreadful minute when the Clerk asks for the verdict.

This time, after a little over three hours, it was "Not Guilty." Hardy could have made a speech—it was customary. He only said, "My fellow-countrymen I return you my thanks." There was a crowd outside in the streets who had waited. In their triumph they pulled him in a coach to his empty house.

Horne Tooke's trial was moved nearly two weeks later, and was a different matter entirely. He said he was too ill to stay in the prisoner's dock, and so got the Court to let him sit at the counsel table; he cross-examined witnesses with dexterity; he addressed the Court with an elaborate respect, just this side of mockery. Erskine only took a hand occasionally. It was the little, sixty-year old, ailing, cynical parson Tooke's show.⁶⁴ Scott, the Attorney-General, worthy and plodding, must

⁶³ 24 State Trials 970. At the close of Eyre's charge to the Jury, he rebuked the spectators for their part in this demonstration.

⁶⁴ Tooke's wit was impudent. When Scott was summing up for the Crown he said that he hoped to leave his children an example of probity, better than riches! He wept at his own eloquence, and Mitford, the Solicitor-General, wept in sympathetic emotion. Somebody asked Tooke why he thought Mitford was crying. "At the thought of the little inheritance that poor Scott is likely to leave his children," said Tooke. Everybody in earshot giggled. 1 Twiss 280.

have been rueful as he drudged at length for the Crown through days more of the same evidence used against Hardy. The Court was almost deferential to the prisoner. The courtroom was full of his partisans. He called to the witness-stand "The Right Honourable William Pitt (First Lord of the Treasury and Chancellor of the Exchequer)," and made the Prime Minister appear a little less than completely candid. Tooke summed up his own case, and when the jury came back in eight minutes with a "Not Guilty," he made them a triumphant speech of thanks. At the end he became positively florid:

"I return your lordship thanks—I return my counsel thanks, my noble friend Mr. Erskine . . . and you, gentlemen of the jury, I return you my thanks. I am glad I have been prosecuted; and I hope this will make the attorney-general more cautious in future. . . ."

The crowd cheered while Tooke went off to supper.

Scott seeing no chance of their conviction voluntarily submitted to a directed verdict in favor of four more defendants indicted on the same charge;⁶⁵ only Thelwall, Richter and Baxter then remained of the prisoners arrested in Dundas' raids of the preceding May. Why Scott did not move to dismiss their cases with the rest now seems hard to understand. Thelwall, an experienced showman himself, had retained Erskine but wished to try his own case like Tooke. "I'll be hanged if I don't," he said; and Erskine retorted, "You'll be hanged if you do!"⁶⁶ Even if this "mot" is so pat as to be presumptively apocryphal, Erskine's unwillingness to endure another amateur defense is inherently genuine. He was an old hand at the courtroom game, where danger must be foreseen questions ahead, and avoided with a calculated combination of rashness and prudence. The strain of sitting idly by while Tooke gambolled over the mined field of cross-examination must have been fearful for Erskine. He never let Thelwall out of his control. At that, the jury took three hours to bring in an acquittal, and Thelwall must have grown a little somber while he waited.

Scott was through with treason trials. He submitted to the direction of an acquittal of the last two defendants, Richter and Baxter. Superficially, he might be thought to be beaten, but "the great object of satisfying the country and making them aware of their danger"⁶⁷ was accomplished. Men did not readily invite trials for treason, even if most of

⁶⁵ One of these, named Holcroft, insisted that he wanted to address the jury for "not more than half an hour." They had trouble shutting him up!

⁶⁶ BROWN 129.

⁶⁷ Quoted from ELDON, ANECDOTE BOOK in 2 TWISS 284.

them seemed likely to be acquitted. The knowing became cautious; and only a poor brave blinded fanatic, like O'Coigly, would try to run off to France with a store of gold and with a fatally incriminating letter in his wallet, headed "The Secret Committee of England to the Executive Directory of France."⁶⁸

The French revolution and the imperial conquests of Napoleon that succeeded it, put off parliamentary reform in England for forty years. The treason trials may well have had some propaganda value, but it was the rise of Napoleon, the domination of country after country by his troops, the Grande Armée at Boulogne waiting for a Channel crossing, that made English nurses hush children with the spectre of 'Old Boney,' and that convinced the nation that nothing could be good which even remotely resembled the revolution on the continent. Toasts and resolutions might be very well, but invasion was another matter. Mr. Justice Buller spoke for the English people in 1798 when, pronouncing sentence of death on O'Coigly, he said—

"That any set of men should work themselves up to an opinion and belief, or even to a hope, that if ever the French should conquer this country, they will afterwards relinquish it to those who invite them here, is as extravagant as the idea which prevailed in the last century, that murder in this world would prepare the way for saintship in the next."⁶⁹

Only in 1832, when Wellington had grown to be an old soldier from a war fought long ago, could one of the bright young men of 1790 take over the British administration, and give the country the reforms sought forty years before.

* * * *

The choice between freedom and security is never easy, nor once made is it a choice that has permanence. Its necessity recurs each day in the complex business of government, and good men, speaking with conviction, are always heard urging the choice, some of one alternative, some of the other. A man may say, bravely, that life without freedom is never dignified or secure, and that toleration of political evangelism is necessary for political growth. If he has read of Fox, Erskine and Hardy, he may point to their striving for popular government, and he may sus-

⁶⁸ GURNEY, THE TRIAL OF JAMES O'COIGLY FOR HIGH TREASON (1798). He was executed June 7, 1798. BROWN says he was "an heroic figure and an undoubted revolutionary." THE FRENCH REVOLUTION IN ENGLISH HISTORY 158 (1918). Philip Anthony Brown understood heroism. An officer in the Durham Light Infantry he was mortally wounded in 1915, while on a patrol. His orderly was awarded the Victoria Cross for bringing him back to the English lines. His book, published after his death, is the best brief treatment of its subject.

⁶⁹ GURNEY, THE TRIAL OF JAMES O'COIGLY FOR HIGH TREASON 537 (1798).

pect that Dundas and his friends for their own gain used the spectre of the French to scare England from worthy reform, as nurses used it to hush annoying children.

But this man, however liberal, has not told a complete story when he has decried state trials. Envy, greed and hostility are as real between nations as between individuals; and operations started by these dark promptings are easiest carried on abroad among unhappy people. The agents from revolutionary France who chose Ireland for their field in 1793, had strong reasons. To say that there ought to be no hardships or injustice to foster hatred, or disloyalty to the nation in which they are found, and that government must strive to right wrongs, not punish treachery, is merely to refuse recognition of an unpleasant truth. Unhappily these are not alternatives. A government must do both.

"Traitor" is the most shameful brand we use. Loyalty to country is a creed so deeply and widely received that a traitor is like an excommunicate in the age of faith. He has lost the last belief that is world-wide even in this age of doubt. If he betrays for an idea, he loses one loyalty and hardly gains another; and if he sells his allegiance for money or money's worth, he puts himself beyond affection and trust and is scorned by his own paymasters. This is no light curse. The pity for Captain Dreyfus, the indignation at his false conviction, and the relief at his exoneration were prompted not by his exile to Guiana, but by the degradation attaching to the man who is convicted of selling his country's safety.

When this degradation, this ultimate, shaming penalty is imposed, whether by the judgment of a court or the semi-judgment of an administrator or legislative committee, it must be adjudged with scrupulous, intelligent disinterestedness. The lesson of England's experience is that there is no easy formula to exempt us from this unhappy business of defending against sly warfare, no escape from the painful necessity of judgment.

After a century and a half, from yellowed and brittle pages, a lesson in what to avoid can still be learned of Braxfield. The worst that can be said of Scott is said in his own memoirs,—being doubtful of his case, he used charges of treason as a means of telling England what he thought she should know; and a treason trial is a dangerous medium of publicity. Chief Justice Eyre, in his way, is as memorable as Erskine for quiet judgment is as worthy an example as passionate defense. We are apt to need it in the years ahead.