

## LORD ERSKINE



THOMAS, LORD ERSKINE, a British chancellor, orator, and famed jurist, was a Scot by birth, having been born at Edinburgh, Jan. 10, 1750. He was educated at the High School, Edinburgh, and at St. Andrews University, after which he desired to enter the army, but was dissuaded by Lord Mansfield to study law in preference, which he fortunately did at Cambridge, and was called to the Bar at Lincoln's Inn, London, in July, 1778. Even at the outset of his legal career he took high rank as a lawyer, and after a brief service in Parliament he held the offices of attorney-general and chancellor to the then Prince of Wales. It was, however, at the Bar that he made his great reputation, partly by his legal acumen and a rare eloquence, and partly by the singular grace and attractiveness of his manner. This success was attested in many cases with which he had to do, and chiefly in his defence of Captain Baillie for libel, a defence which Lord Campbell characterized as "the most wonderful forensic effort of which we have any account in our annals"; and again in the court-martial of Admiral Keppel for incapacity at the battle of Ushant, at which Erskine conducted the defence; again in the defence of Stockdale, who had published a pamphlet by Logan, a Scotch minister, upholding Warren Hastings against his impeachers (see below); and once more, in the defence of Lord George Gordon for treason, and, finally, in defence of Tom Paine. In 1806, he was made lord-chancellor and elevated to the Peerage. In the following year when the Tories attained power, he resigned his office and lived for nearly ten years in retirement, returning for a short while to public life to take part in some useful legislation, and to aid in securing a fair trial for Queen Caroline. Among his writings is a work, very popular in its day, "A View of the Causes and Consequences of the Present War with France." His strength as a lawyer lay "in the keenness of his reasoning faculty, in his dexterity and the ability with which he disentangled complicated masses of evidence, and, above all, in his unrivalled power of fixing and commanding the attention of juries." He died at Almond, Linlithgowshire, Scotland, Nov. 17, 1823.

### SPEECH IN BEHALF OF STOCKDALE

DELIVERED AT HIS TRIAL FOR LIBEL ON THE HOUSE OF COMMONS, IN THE COURT OF KING'S BENCH, DEC. 9, 1789

**G**ENTLEMEN OF THE JURY,—Mr. Stockdale, who is brought as a criminal before you for the publication of this book, has, by employing me as his advocate, reposed what must appear to many an extraordinary degree of confidence; since, although he well knows that I

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am personally connected in friendship with most of those whose conduct and opinions are principally arraigned by its author, he nevertheless commits to my hands his defence and justification.

From a trust apparently so delicate and singular, vanity is but too apt to whisper an application to some fancied merit of one's own; but it is proper, for the honor of the English bar, that the world should know that such things happen to all of us daily and of course; and that the defendant, without any knowledge of me, or any confidence that was personal, was only not afraid to follow up an accidental retainer from the knowledge he has of the general character of the profession. Happy indeed is it for this country that, whatever interested divisions may characterize other places of which I may have occasion to speak to-day, however the counsels of the highest departments of the state may be occasionally distracted by personal considerations, they never enter these walls to disturb the administration of justice; whatever may be our public principles or the private habits of our lives, they never cast even a shade across the path of our professional duties. If this be the characteristic even of the bar of an English court of justice, what sacred impartiality may not every man expect from its jurors and its bench?

As, from the indulgence which the court was yesterday pleased to give to my indisposition, this information was not proceeded on when you were attending to try it, it is probable you were not altogether inattentive to what passed at the trial of the other indictment, prosecuted also by the House of Commons; and therefore, without a restatement of the same principles, and a similar quotation of authorities to support them, I need only remind you of the law applicable to this subject as it was then admitted by the attorney-

general in concession to my propositions and confirmed by the higher authority of the court, namely:

First, that every information or indictment must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer.

Secondly, that the jury may appear to be warranted in their conclusion of guilty or not guilty.

And, lastly, that the court may see such a precise and definite transgression upon the record as to be able to apply the punishment which judicial discretion may dictate or which positive law may inflict.

It was admitted also to follow as a mere corollary from these propositions, that where an information charges a writing to be composed or published of and concerning the Commons of Great Britain, with an intent to bring that body into scandal and disgrace with the public, the author cannot be brought within the scope of such a charge unless the jury, on examination and comparison of the whole matter written or published, shall be satisfied that the particular passages charged as criminal, when explained by the context and considered as part of one entire work, were meant and intended by the author to vilify the House of Commons as a body, and were written of and concerning them in Parliament assembled.

These principles being settled, we are now to see what the present information is.

It charges that the defendant—"unlawfully, wickedly, and maliciously devising, contriving, and intending to asperse, scandalize, and vilify the Commons of Great Britain in Parliament assembled; and most wickedly and audaciously to represent their proceedings as corrupt and unjust; and to make it believed and thought as if the Commons of Great Britain in Parliament assembled were a most wicked, tyrannical,

base, and corrupt set of persons, and to bring them into disgrace with the public"—the defendant published—what? Not those latter ends of sentences which the Attorney-General has read from his brief as if they had followed one another in order in this book; not those scraps and tails of passages which are patched together upon this record and pronounced in one breath as if they existed without intermediate matter in the same page and without context anywhere. No! This is not the accusation, even mutilated as it is: for the information charges that, with intention to vilify the House of Commons, the defendant published the whole book, describing it on the record by its title: "A Review of the Principal Charges Against Warren Hastings, Esq., late Governor-General of Bengal;" in which, among other things, the matter particularly selected is to be found. Your inquiry, therefore, is not confined to whether the defendant published those selected parts of it, and whether, looking at them as they are distorted by the information, they carry in fair construction the sense and meaning which the innuendoes put upon them; but whether the author of the entire work—I say the author, since, if he could defend himself, the publisher unquestionably can—whether the author wrote the volume which I hold in my hand as a free, manly, *bonâ fide* disquisition of criminal charges against his fellow citizen; or whether the long, eloquent discussion of them which fills so many pages was a mere cloak and cover for the introduction of the supposed scandal imputed to the selected passages, the mind of the writer all along being intent on traducing the House of Commons, and not on fairly answering their charges against Mr. Hastings.

This, gentlemen, is the principal matter for your consideration; and therefore if, after you shall have taken the book

itself into the chamber which will be provided for you, and shall have read the whole of it with impartial attention — if, after the performance of this duty, you can return here and with clear consciences pronounce upon your oaths that the impression made upon you by these pages is that the author wrote them with the wicked, seditious, and corrupt intentions charged by the information — you have then my full permission to find the defendant guilty; but if, on the other hand, the general tenor of the composition shall impress you with respect for the author, and point him out to you as a man mistaken, perhaps, himself, but not seeking to deceive others — if every line of the work shall present to you an intelligent, animated mind, glowing with a Christian compassion toward a fellow man whom he believed to be innocent, and with a patriot zeal for the liberty of his country, which he considered as wounded through the sides of an oppressed fellow citizen; — if this shall be the impression on your consciences and understandings, when you are called upon to deliver your verdict, then hear from me that you not only work private injustice, but break up the press of England, and surrender her rights and liberties forever, if you convict the defendant.

Gentlemen, to enable you to form a true judgment of the meaning of this book and of the intention of its author, and to expose the miserable juggle that is played off in the information by the combination of sentences which, in the work itself, have no bearing upon one another, I will first give you the publication as it is charged upon the record and presented by the Attorney-General in opening the case for the Crown; and I will then, by reading the interjacent matter, which is studiously kept out of view, convince you of its true interpretation.

The information, beginning with the first page of the book,

charges as a libel upon the House of Commons the following sentence:

“The House of Commons has now given its final decision with regard to the merits and demerits of Mr. Hastings. The grand inquest of England have delivered their charges, and preferred their impeachment; their allegations are referred to proof; and from the appeal to the collected wisdom and justice of the nation, in the supreme tribunal of the kingdom, the question comes to be determined whether Mr. Hastings be guilty or not guilty?”

It is but fair, however, to admit that this first sentence, which the most ingenious malice cannot torture into a criminal construction, is charged by the information rather as introductory to what is made to follow it than as libellous in itself; for the Attorney-General, from this introductory passage in the first page, goes on at a leap to page thirteen, and reads, almost without a stop, as if it immediately followed the other, this sentence:

“What credit can we give to multiplied and accumulated charges when we find that they originate from misrepresentation and falsehood?”

From these two passages thus standing together, without the intervenient matter which occupies thirteen pages, one would imagine that, instead of investigating the probability or improbability of the guilt imputed to Mr. Hastings; instead of carefully examining the charges of the Commons, and the defence of them which had been delivered before them, or which was preparing for the Lords, the author had immediately, and in a moment after stating the mere fact of the impeachment, decided that the act of the Commons originated from misrepresentation and falsehood.

Gentlemen, in the same manner a veil is cast over all that is written in the next seven pages; for, knowing that the

context would help to the true construction, not only of the passages charged before, but of those in the sequel of this information, the Attorney-General, aware that it would convince every man who read it that there was no intention in the author to calumniate the House of Commons, passes over, by another leap, to page twenty; and in the same manner, without drawing his breath, and as if it directly followed the two former sentences in the first and thirteenth pages, reads from page twenty:

“An impeachment of error in judgment with regard to the quantum of a fine, and for an intention that never was executed and never known to the offending party, characterizes a tribunal of inquisition rather than a court of Parliament.”

From this passage, by another vault, he leaps over one-and-thirty pages more, to page fifty-one, where he reads the following sentence, which he mainly relies on, and upon which I shall by and by trouble you with some observations:

“Thirteen of them passed in the House of Commons, not only without investigation, but without being read; and the votes were given without inquiry, argument, or conviction. A majority had determined to impeach; opposite parties met each other, and ‘jostled in the dark,’ to perplex the political drama and bring the hero to a tragic catastrophe.”

From thence, deriving new vigor from every exertion, he makes his last grand stride over forty-four pages more, almost to the end of the book, charging a sentence in the ninety-fifth page.

So that, out of a volume of one hundred and ten pages, the defendant is only charged with a few scattered fragments of sentences picked out of three or four. Out of a work consisting of about two thousand five hundred and thirty lines of manly, spirited eloquence, only forty or fifty lines are culled

from different parts of it, and artfully put together, so as to rear up a libel out of a false context by a supposed connection of sentences with one another which are not only entirely independent, but which, when compared with their antecedents, bear a totally different construction. In this manner the greatest works upon government, the most excellent books of science, the sacred Scriptures themselves, might be distorted into libel; by forsaking the general context and hanging a meaning upon selected parts. Thus, as in the text put by Algernon Sidney, “The fool hath said in his heart, There is no God,” the Attorney-General, on the principle of the present proceeding against this pamphlet, might indict the publisher of the Bible for blasphemously denying the existence of heaven in printing, “There is no God;”—these words alone, without the context, would be selected by the information, and the Bible, like this book, would be underscored to meet it; nor could the defendant in such a case have any possible defence unless the jury were permitted to see, by the book itself, that the verse, instead of denying the existence of the Divinity, only imputed that imagination to a fool.

Gentlemen, having now gone through the Attorney-General’s reading, the book shall presently come forward and speak for itself; but before I can venture to lay it before you it is proper to call your attention to how matters stood at the time of its publication, without which the author’s meaning and intention cannot possibly be understood.

The Commons of Great Britain, in Parliament assembled, had accused Mr. Hastings, as Governor-General of Bengal, of high crimes and misdemeanors; and their jurisdiction, for that high purpose of national justice, was unquestionably competent; but it is proper you should know the nature of this inquisitorial capacity. The Commons, in voting an

impeachment, may be compared to a grand jury finding a bill of indictment for the Crown; neither the one nor the other can be supposed to proceed but upon the matter which is brought before them; neither of them can find guilt without accusation, nor the truth of accusation without evidence. When, therefore, we speak of the accuser or accusers of a person indicted for any crime, although the grand jury are the prosecutors in form by giving effect to the accusation, yet in common parlance we do not consider them as the responsible authors of the prosecution.

If I were to write of a most wicked indictment, found against an innocent man, which was preparing for trial, nobody who read it would conceive I meant to stigmatize the grand jury that found the bill; but it would be inquired immediately who was the prosecutor and who were the witnesses on the back of it?

In the same manner I mean to contend that if this book is read with only common attention the whole scope of it will be discovered to be this: that, in the opinion of the author, Mr. Hastings had been accused of maladministration in India from the heat and spleen of political divisions in Parliament, and not from any zeal for national honor or justice; that the impeachment did not originate from government, but from a faction banded against it, which, by misrepresentation and violence, had fastened it on an unwilling House of Commons; that, prepossessed with this sentiment — which, however unfounded, makes no part of the present business, since the publisher is not called before you for defaming individual members of the Commons, but for a contempt of the Commons as a body — the author pursues the charges, article by article; enters into a warm and animated vindication of Mr. Hastings, by regular answers to each of them; and that, as far as the

mind and soul of a man can be visible — I might almost say embodied — in his writings, his intention throughout the whole volume appears to have been to charge with injustice the private accusers of Mr. Hastings, and not the House of Commons as a body, which undoubtedly rather reluctantly gave way to than heartily adopted the impeachment. This will be found to be the palpable scope of the book; and no man who can read English, and who at the same time will have the candor and common sense to take up his impressions from what is written in it, instead of bringing his own along with him to the reading of it, can possibly understand it otherwise.

But it may be said, admitting this to be the scope and design of the author, what right had he to canvass the merits of an accusation upon the records of the Commons, more especially while it was in the course of legal procedure? This, I confess, might have been a serious question; but the Commons, as prosecutors of this information, seem to have waived or forfeited their right to ask it. Before they sent the Attorney-General into this place to punish the publication of answers to their charges, they should have recollected that their own want of circumspection in the maintenance of their privileges and in the protection of persons accused before them had given to the public the charges themselves, which should have been confined to their own journals. The course and practice of Parliament might warrant the printing of them for the use of their own members; but there the publication should have stopped and all further progress been resisted by authority. If they were resolved to consider answers to their charges as a contempt of their privileges, and to punish the publication of them by such severe prosecutions, it would have well become them to have begun first with those printers who, by publishing the charges themselves throughout the