

The Gazette.

PHILADELPHIA,

MONDAY EVENING, MAY 10.

A CHARGE,

DELIVERED TO THE GRAND JURY OF THE UNITED STATES,

For the District of Pennsylvania, in the Circuit Court of the United States for said district, held in the City of Philadelphia, April 11th, 1799.

By JAMES IREDELL,

One of the Associate Justices of the Supreme Court of the United States.

CONCLUDED.

In further illustration of this subject, I shall state a case which was determined in this Court—The United States against *Worrell*, published in Mr. Dallas's Reports, p. 384. Where there was an indictment against the defendant for attempting to bribe Mr. Cox, the Commissioner of the Revenue. The defendant was found guilty, and afterwards a motion was made in arrest of judgment, allying together with some technical objections, this general one, that the Court had no cognizance of the offence, because no act of Congress had passed creating the offence and prescribing the punishment, but it was solely on the foot of the common law. The very able and ingenious Gentleman who is the reporter of that case, and was the defendant's Counsel in it, in the course of his argument, makes the following observations, part of which are remarkably striking and pertinent to my present subject: "In relation to crimes and punishments, the objects of the delegated power of the United States are enumerated and fixed. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States; and may define and punish piracies and felonies committed on the high seas, and offences against the law of nations. Article 8. And so likewise, Congress may make all laws which shall be necessary and proper for carrying into execution the powers of the General Government. But here is no reference to the common law authority: Every power is matter or definite and positive grant; and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had undoubtedly a power to make a law, which should render it criminal to offer a bribe to the Commissioner of the Revenue; but not having made the law, the crime is not recognized by the Federal code, Constitutional or Legislative; and consequently, it is not a subject on which the Judicial authority of the Union can operate." So far the observations of the defendant's counsel. Judge Chase, who on that occasion differed from Judge Peters, as to the common law jurisdiction of the Court, held, that under the 8th section of the first article, which I am now considering although bribery is not among the crimes and offences specially mentioned, it is certainly included in that general provision; and Congress might have passed a law on the subject, which would have given the Court cognizance of the offence. Judge Peters was of opinion, that the defendant was punishable at common law; but that it was competent for Congress to pass a Legislative act on the subject.

I conclude, therefore, that the first objection is not maintainable. With regard to the second objection, which is, That this law is not warranted by that clause in the Constitution authorizing Congress to pass all laws which shall be necessary and proper for carrying into execution the powers specially enumerated, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; because it is not necessary and proper to pass any such law in order to carry into execution any of these powers, it is to be observed, that from the very nature of the power it is and must be discretionary. What is necessary and proper in regard to any particular subject, cannot be ascertained before an occasion arises, but must depend upon various extensible views of a case which no human foresight can reach. What is necessary and proper in a time of confusion and general disorder, would not perhaps be necessary and proper in a time of tranquility and order. There are considerations of policy, not questions of law, and upon which the legislature is bound to decide according to its real opinion of the necessity, and propriety of any act particularly in contemplation. It is, however, alleged, that the necessity and propriety of passing collateral laws for the support of others is confined to cases where the powers are delegated, and does not extend to cases which have a reference to general danger only. The words are general, "for carrying into execution the special powers previously enumerated, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof." If therefore there be any thing necessary and proper for carrying into execution any or all of those powers, I presume that may be constitutionally enacted. Two objects are aimed at by every rational Government, more especially by free ones. 1. That the people may understand the laws, and voluntarily obey them. 2. That if this be not done by any individual, he shall be compelled to obey them, or punished for disobedience. The first object is undoubtedly the most momentous, for as the legitimate object of every Government is the happiness of the people committed to its care, nothing can tend more to promote this than that by a voluntary obedience to the laws of the country, they should render punishments unnecessary. This can never be the case in any country but a country of slaves, where gross misrepresentation prevails, and any large body of the people

can be induced to believe that laws are made either without authority or for the purpose of oppression. Ask the great body of the people who were deluded into an insurrection in the western parts of Pennsylvania, what gave rise to it? They will not hesitate to say, that the Government had been vilely misrepresented, and made to appear to them in a character directly the reverse of what they deserved. In consequence of such misrepresentations, a civil war had nearly desolated our country, and a certain expence of near two millions of dollars was actually incurred, which might be deemed the price of libels, and among other causes made necessary a judicious and moderate land tax, which no man denies to be constitutional, but is now made the pretext of another insurrection. The liberty of the press is indeed valuable. Long may it preserve its lustre! It has converted barbarous nations into civilized ones, taught Science to rear its head, enlarged the capacity, increased the comforts of private life, and, leading the banners of freedom, has extended her sway where her very name was unknown. But as every human blessing is attended with imperfection as what produces by a right use the greatest good, is productive of the greatest evil in its abuse, so this, one of the greatest blessings ever bestowed by Providence on his creatures, is capable of producing the greatest good or the greatest mischief. A pen in the hands of an able and virtuous man, may enlighten a whole nation, and by observations of real wisdom, grounded on pure morality, may lead it to the path of honor and happiness. The same pen in the hands of a man equally able, but with vices as great as the other's virtues, may, by arts of sophistry easily attainable, and inflaming the passions of weak minds, delude many into opinions the most dangerous, and conduct them to actions the most criminal. Men who are at a distance from the source of information must rely almost altogether on the accounts they receive from others. If their accounts are founded in truth, their heads or hearts must be to blame if they think or act wrongly. But if their accounts are false, the best head and the best heart cannot be proof against their influence; nor is it possible to calculate the combined effect of innumerable artifices, either by direct falsehood, or insidious insinuations, told day by day, upon minds both able and virtuous. Such being unquestionably the case, can it be tolerated in any civilized society that any should be permitted with impunity to tell falsehoods to the people, with an express intention to deceive them, and lead them into discontent, if not into insurrection, which is so apt to follow? It is believed no government in the world ever was without such a power. It is unquestionably possessed by all the state governments, and probably has been exercised in all of them: sure I am it has in some. If necessary and proper for them, why not equally so, at least for the government of the United States, naturally an object of more jealousy and alarm, because it has greater concerns to provide for? Combinations to defeat a particular law are admitted to be punishable. Falsehoods in order to produce such combinations, I should presume, would come within the same principle, as being the first step to the mischief intended to be prevented; and if such falsehoods with regard to one particular law are dangerous, and therefore ought not to be permitted without punishment, why should such which are intended to destroy confidence in government altogether, and thus induce disobedience to every part of it? It is said, libels may be rightly punishable in Monarchies, but there is not the same necessity in a Republic. The necessity in the latter case, I conceive greater, because in a Republic more is dependent on the good opinion of the people for its support, as they are directly or indirectly the origin of all authority, which of course must receive its bias from them. Take away from a Republic the confidence of the people, and the whole fabric crumbles into dust.

I have only to add, under this head, that in order to obviate any probable ill use of this large discretionary power, the constitution and certain amendments to it, have prohibited in express words the exercise of some particular authorities which otherwise might be supposed to be comprehended within them. Of this nature is the prohibitory clause relating to the present object which I am to consider under the next objection.

3. That objection is, That the act is in violation of this amendment to the constitution. (3d vol. Swift's Edition, p. 455. Article 3d.)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The question then is, Whether this law has abridged the freedom of the Press.

Here is a remarkable difference in expressions as to the different objects in the same clause. They are to make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. When as to one object they entirely prohibit any act whatever, and as to another object only limit the exercise of the power, they must in reason be supposed to mean different things. I presume, therefore, that Congress may make a law respecting the press, provided the law be not such as to abridge its freedom. What might be deemed the Freedom of the Press, if it had been a new subject, and never before in discussion, might indeed admit of some controversy. But so far as precedent, habit, laws and practices are concerned, there can scarcely be a more definite meaning than that which all these have affixed to the term in question.

We derive our principles of law originally from England. There the press, I believe, is as free as in any country of the world,

and so it has been for near a century. The definition of it is, in my opinion, no where more happily or justly expressed than by the great Author of the Commentaries on the Laws of England, which book deserves more particular regard on this occasion, because for near thirty years it has been the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries and often into the favourite reading of private gentlemen; so that his views of the subject could scarcely be unknown to those who framed the Amendment to the Constitution, and if they were not, unless his explanation had been satisfactory, I presume the amendment would have been more particularly worded, to guard against any possible mistake. His explanation is as follows:

"The Liberty of the Press is indeed essential to the nature of a free state: And this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the liberty of the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force when it is shewn (by a reasonable exercise of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the controul of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press." 4 Black. Com. 151.

It is believed, that in every state in the union the common law principles concerning libels apply; and in some of the states words similar to the words of the amendment are used in the constitution itself, or a con-temporary bill of rights of equal authority, without ever being supposed to exclude any law being passed on the subjects. So that there is the strongest proof that can be of a universal concurrence in America on this point, that the freedom of the press does not require that libellers shall be protected from punishment.

But in some respects the act of Congress is much more restrictive than the principles of the common law, or than perhaps the principles of any state in the union. For under the law of the United States the truth of the matter may be given in evidence, which at common law in criminal prosecutions was held not to be admissible; and the punishment of fine and imprisonment, which at common law was discretionary, is limited in point of severity, though not of lenity. It is to be observed too, that by the express words of the act both malice and falsehood must combine in the publication, with the felonious intent particularly described. So that if the writing be false, yet not malicious, or malicious and not false, no conviction can take place. This therefore fully provides for any publication arising from inadvertency, mistake, false confidence, or any thing short of a wilful falsehood. And none surely will contend that the publication of such a falsehood is among the indefeasible rights of men, for that would be to make the freedom of liars greater than that of men of truth and integrity.

I have now said all I thought material on these important subjects. There is another upon which it is painful to speak, but the notoriety as well as the official certainty of the fact, and the importance of the danger make it indispensable. Such incessant calumnies have been poured against the government for supposed breaches of the constitution, that an insurrection has lately begun for a cause where no breach of the constitution is or can be pretended. The grievance is the land tax act, an act which the public exigencies rendered unavoidable, and is framed with particular anxiety to avoid its falling oppressive on the poor, and in effect the greatest part of it must fall on rich people only. Yet arms have been taken to oppose its execution: officers have been insulted; the authority of the law resisted: and the government of the United States treated with the utmost defiance and contempt. Not being thoroughly informed of all particulars, I cannot now say within what class of offences these crimes are comprehended. But as some of the offenders are committed for treason, and many certainly have been guilty of combinations to resist the laws of the United States, I think it proper to point your attention particularly to those subjects. The provisions in regard to the former, so far as they may at present be deemed material or instructive, are as follow:

(Here the passages referred to were read.)

The only species of treason likely to come before you is that of levying war against the United States. There have been various opinions, and different determinations on the import of those words. But I think I

am warranted in saying, that if in the case of the insurgents who may come under your consideration the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether (as for instance the land tax act, the object of their opposition) any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason. But if the intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a high offence may have been committed, it did not amount to the crime of treason. The particular motive must however be the sole ingredient in the case, for if combined with a general view to obstruct the execution of the act, the offence must be deemed treason.

With regard to the number of witnesses in treason, I am of opinion that two are necessary on the indictment as well as upon the trial in court. The provisions in the constitution, that the two witnesses must be to the same overt-act (or actual deed constituting the treasonable offence) was in consequence of a construction which had prevailed in England that though two witnesses were required to prove an act of treason, yet if one witness proved one act, and another witness another act of the same species of treason, (as for instance that of levying war) it was sufficient; a decision which has always appeared to me contrary to the true intention of the law which made two witnesses necessary—this provision being, as I conceived, intended to guard against fictitious charges of treason, which an unprincipled government might be tempted to support and encourage, even at the expence of perjury, a thing much more difficult to be effected by two witnesses than one.

An act of Congress which I have already read to you (that commonly called the sedition act) has specially provided in the manner you have heard, against combinations to defeat the execution of the laws. The combinations punishable under this act must be distinguished from such as in themselves amount to treason, which is unalterably fixed by the constitution itself. Any combinations, therefore, which before the passing of this act, would have amounted to treason, still constitute the same crime. To give the act in question a different construction, would do away altogether the crime of treason as committed by levying war, because no war can be levied without a combination for some of the purposes stated in the act which must necessarily constitute a part though not the whole of the offence.

Long gentlemen, as I have detained you, for which the great importance of the occasion, I trust, is a just apology, it will be useful to recollect, that ever since the first formation of the present government, every act which any extraordinary difficulty has occasioned, has been uniformly opposed before its adoption, and every art practised to make the people discontented after it; without any allowance for the necessity which dictated them, some seem to have taken it for granted that credit could be obtained without justice, money without taxes, and the honor and safety of the United States only preserved by a disgraceful foreign dependence. But, notwithstanding all the efforts made to vilify and undermine the government, it has uniformly rose in the esteem and confidence of people. Time has disproved arrogant predictions; a true knowledge of the principles and conduct of the government has rectified many gross misrepresentations; credit has risen from its ashes; the country has been found full of resources, which have been drawn without oppression, and faithfully applied to the purposes to which they were appropriated; justice is impartially administered; and the only crime which is fairly imputable is, that the minority have not been suffered to govern the majority, to which they had as little pretension upon the ground of superiority of talents, patriotism, or general probity, as upon the principles of republicanism, the perpetual theme of their declamation. If you suffer this government to be destroyed, what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under foot. May that God whose peculiar providence seems often to have interposed to save these United States from destruction, preserve us from this worst of all evils! And may the inhabitants of this happy country deserve his care and protection by a conduct best calculated to obtain them!

Philadelphia, May 15th, 1799.

SIR,

THE Grand Jury of the Circuit court of the District of Pennsylvania, have heard with great satisfaction, the Charge delivered to them, on the opening of the Court.

At a time like the present, when false philosophy and the most dangerous and wicked principles are spreading with rapidity, under the imposing garb of Liberty, over the fairest countries of the Old World—they are convinced, that the publication of a Charge, fraught with such clear and just observations on the nature and operation of the constitution and laws of the United States, will be highly beneficial to the citizens thereof.

With these sentiments strongly impressed on their minds, they unanimously request, that a Copy of the said Charge may be delivered to them, for publication; especially for the information of those, who are too easily led by the misrepresentations of evil disposed persons, into the commission of crimes, ruinous to themselves, and against the peace and dignity of the United States.

ISAAC WHARTON, Foreman,
JOHN ROSS,
EDWARD PENNINGTON,
PHILIP NICKLIN,
JOSEPH PARKER NORRIS,
BENJ. W. MORRIS,
THOMAS M. WILLING,
ROBERT RALSTON,
JOHN CRAIG,

SAMUEL COATES,
DAVID H. CONYNG JAM,
JOHN PEROT,
JAMES C. FISHER,
DANIEL SMITH,
GIDEON HILL WELLS,
Wm. MONTGOMERY,
W. BUCKLEY.

Honorable
Judge IREDELL.

To the Gentlemen of the Grand Jury of the United States, for the district of Pennsylvania, Gentlemen,

I receive with great sensibility the honour of this address, from gentlemen whom I personally respect so much. Believing, as I have long done, that the constitution and laws of the United States afford the highest degree of rational liberty which the world ever saw, or of which perhaps mankind are capable, I have seen with astonishment and regret, attempts made in the pursuit of visionary chimeras, to subvert or undermine so glorious a fabric, equally contracted for public and private security. It cannot but be extremely pleasing to me, that the sentiments on this subject I delivered in my charge, should meet with your entire approbation; and as you are pleased to suppose the publication of them may be of some service in correcting erroneous opinions, I readily consent to it, considering your function of them as giving them an additional value, which will increase the hope of their producing a good effect.

J. A. IREDELL.

Philadelphia, May 15th, 1799.

From a London paper of Jan. 26.

In a former paper we noticed the death of the gallant captain *Mortlock*, of the *Woolverine* gun vessel, who expired of his wounds at Gosport, on Thursday evening last, about half past eleven o'clock. He died as he had lived, like a Hero. His spirits were so good to the last moment, that he exerted himself to comfort an afflicted mother and brother, who attended him, by representing his death as the mere fortune of war. He spoke much of the action in which he received his wound, and of the excellence of the ship he had commanded in—The utmost height of his ambition, he said, were he to live, would be to command a frigate on the same plan as that ship.

The following particulars, we are happy in being able to add, as they cannot fail to place the name of capt. *Mortlock* high in the list of those brave officers who, in the course of the present war, have raised the character of the British navy to an unprecedented height of fame.

The *Woolverine* sailed from the Downs on the 3d inst. on a cruise on the coast of France. Being off Boulogne, she discovered the two luggers, and as it was then a thick fog, she was of course close to them before they saw one another. Capt. *Mortlock* immediately made them to be French, and his first care was how to get them brought to action, as he knew if they supposed his to be a ship of war, they would make off. He therefore put the *Woolverine's* head towards them, and hoisted Danish colours. They immediately bore down and came within hail—Being hailed by them, capt. *Mortlock* answered he was from Plymouth for Copenhagen, referring his fire till they should come abreast of him. One of the luggers was close upon the starboard quarter, and he caught her bowsprit between the mizen chains and the side of the *Woolverine*, having his main and mizen topails shivering. He kept her in this situation ready to wear. At this moment the action began with musquetry, the *Woolverine* hoisting English colours. Captain *Mortlock* now lashed the bowsprit of the vessel on board of him to his mizen chains, as he began to entertain the hope of being able to take both vessels.

The other lugger meanwhile first ahead, and got on the larboard bow of the *Woolverine*, running on board of her. In this position he was boarded by the enemy three different times from both vessels, but every Frenchman engaged in those attempts were killed. At one time the crew of the lugger on the larboard bow made so strong an attempt, that it required the assistance of almost every man in the *Woolverine* to repulse them. At the same moment an equally desperate effort was made by the other lugger on the quarter, and many Frenchmen were actually on board the *Woolverine*, but were killed by the gallantry and exertions of capt. *Mortlock*, and his brave officers and men. One Frenchman in particular was seen to cheer his men, and beat them with the flat of his sword. This man himself got on the top of the little round house of the *Woolverine*, and gave three cheers to encourage the others to follow him. This man was supposed to be the captain of the French vessel—Captain *Mortlock* ran up to him to dispute with him the possession of his post. The Frenchman presented a pistol in capt. *Mortlock's* face, which fortunately missed fire. He again cocked his pistol, but seemed in a moment struck with a panic, and captain *Mortlock* plunged his half pike into his body before he could fire, and he fell overboard. The Frenchmen now threw some leather bags into the windows of the *Woolverine's* cabin, the contents of which immediately set her on fire, with an explosion as if the magazine had blown up. The whole crew were obliged to leave the enemy for the purpose of extinguishing the flames, and in the mean time both vessels got clear of the *Woolverine*, and made off with all sail set, and as they out sailed her they got away. While they were going off, one of them fired a shot at the *Woolverine*, which unfortunately struck capt. *Mortlock*, and gave him his death wound. He had before wounded in 5 different places, but not so badly as to induce him to quit the deck.

He was first wounded in one of his fingers—a spent ball, which had passed through a hammock, hit him on the breast, and occasioned him a considerable degree of pain, and he was again wounded in the hip by a splin-