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MARYLAND GAZETTE.

THURSDAY, July 10, 1806.

To the Freemen of the Fifth Diſtrict of Maryland.

[*Continued from our laſt.*]

Fellow-Citizens,

'THE argument then drawn from the common law on the ground of its being adopted or recognized by the conſtitution, being inapplicable to the ſedition act, let us proceed to examine the other arguments which have been founded on the conſtitution.'

'The part of the conſtitution which ſeems moſt to be recurred to, in defence of the "ſedition act," is the laſt clauſe of the 8th ſection of the firſt article empowering congreſs "to make all laws which ſhall be neceſſary and proper for carrying into execution the foregoing powers, and all other powers veſted by this conſtitution in the government of the United States, or in any department or officer thereof."

The plain import of this clauſe is, that congreſs ſhall have all the incidental or inſtrumental powers, neceſſary and proper for carrying into execution all the expreſs powers; whether they be veſted in the government of the United States, more collectively, or in the ſeveral departments, or officers thereof. It is not a grant of new powers to congreſs, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, thoſe otherwiſe granted, are included in the grant.

Whenever, therefore, a queſtion ariſes concerning the conſtitutionality of a particular power; the firſt queſtion is, whether the power be expreſſed in the conſtitution. If it be, the queſtion is decided. If it be not expreſſed; the next inquiry muſt be; whether it is properly an incident to an expreſs power, and neceſſary to its execution. If it be, it may be exercised by congreſs. If it be not; congreſs cannot exerciſe it.

Let the queſtion be aſked, then, whether the power over the preſs exerciſed in the "ſedition act" be found among the powers expreſsly veſted in the congreſs? This is not pretended.

Is there any expreſs power, for executing which, it is a neceſſary and proper power?

The power which has been ſelected, as leaſt remote, in anſwer to this queſtion, is that of "ſuppreſſing inſurrections;" which is ſaid to imply a power to *prevent* inſurrections, by puniſhing whatever may *lead* or *tend* to them. But it ſurely cannot, with the leaſt plauſibility, be ſaid, that a regulation of the preſs, and a puniſhment of libels, are exerciſes of a power to ſuppreſs inſurrections. The moſt that could be ſaid, would be, that the puniſhment of libels, if it had the tendency aſcribed to it, might prevent the occaſion, of paſſing or executing laws, neceſſary and proper for the ſuppreſſion of inſurrections.

Has the federal government, then, no power to prevent, as well as puniſh reſiſtance to the laws?

They have the power which the conſtitution deemed moſt proper in their hands for the purpoſe. The congreſs has power, before it happens, to paſs laws for puniſhing it; and the executive and judiciary have power to enforce thoſe laws when it does happen.

It muſt be recollected by many, and could be ſhewn to the ſatiſfaction of all, that the conſtruction here put on the terms "neceſſary and proper," is preciſely the conſtruction which prevailed during the diſcuſſions and ratifications of the conſtitution. It may be added, and cannot too often be repeated, that it is a conſtruction abſolutely neceſſary to maintain their conſiſtency with the peculiar character of the government, as poſſeſſed of particular and defined powers only; not of the general and indefinite powers veſted in ordinary governments. For if the power to *ſuppreſs inſurrections*, includes a power to *puniſh libels*; or if the power to *puniſh*, includes a power to *prevent*, by all the means that may have that *tendency*; ſuch is the relation and influence among the moſt remote ſubjects of legiſlation, that a power over a very few, would carry with it a power over all. And it muſt be wholly immaterial, whether unlimited powers be exerciſed under the name of unlimited powers, or be exerciſed under the name of unlimited means of carrying into execution, limited powers.

II. The next point which is required to be proved, is, that the power over the preſs exerciſed by the ſedition act, is poſitively forbidden by one of the amendments to the conſtitution.

The amendment ſtands in theſe words—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."

In the attempts to vindicate the "ſedition act," it has been contended, 1. that the "freedom of the preſs" is to be determined by the meaning of theſe terms in the common law. 2. That the article ſuppoſes the power over the preſs to be in congreſs, and prohibits them only from *abridging* the freedom allowed to it by the common law.

Although it will be ſhewn, in examining the ſecond of theſe poſitions, that the amendment is a denial to congreſs of all power over the preſs, it may not be uſeleſs to make the following obſervations on the firſt of them.

It is deemed a ſound opinion, that the ſedition act, in its definition of ſome of the crimes created, is an abridgment of the freedom of publication, recognized by principles of the common law in England.

The freedom of the preſs, under the common law, is, in the defences of the ſedition act, made to conſiſt in an exemption from all previous reſtraint on printed publications, by perſons authoriſed to inſpect and prohibit them. It appears that this idea of the freedom of the preſs, can never be admitted to be the American idea of it: ſince a law inflicting penalties on printed publications, would have a ſimilar effect with a law authoriſing a previous reſtraint on them. It would ſeem a mockery to ſay, that no law ſhould be paſſed, preventing publications from being made, but that laws might be paſſed for puniſhing them in caſe they ſhould be made.

The eſſential difference between the Britiſh government, and the American conſtitutions, will place this ſubject in the cleareſt light.

In the Britiſh government, the danger of encroachments on the rights of the people, is underſtood to be confined to the executive magiſtrate. The repreſentatives of the people in the legiſlature, are not only exempt themſelves from diſtruſt, but are conſidered as ſufficient guardians of the rights of their conſtituents againſt the danger from the executive. Hence it is a principle, that the parliament is unlimited in its power; or in their own language, is omnipotent. Hence too all the ramparts for protecting the rights of the people, ſuch as their *magna charta*, their bill of rights, &c. are not reared againſt the parliament, but againſt the royal prerogative. They are merely legiſlative precautions, againſt executive uſurpations. Under ſuch a government as this, an exemption of the preſs from previous *reſtraint* by licencers appointed by the king, is all the freedom that can be ſecured to it.

In the United States the caſe is altogether different. The people, not the government, poſſeſs the abſolute ſovereignty. The legiſlature, no leſs than the executive, is under limitations of power. Encroachments are regarded as poſſible from the one, as well as from the other. Hence in the United States, the great and eſſential rights of the people are ſecured againſt legiſlative as well as executive ambition. They are ſecured not by laws paramount to prerogative; but by conſtitutions paramount to laws. This ſecurity of the freedom of the preſs requires, that it ſhould be exempt, not only from previous reſtraint by the executive, as in Great-Britain; but from legiſlative reſtraint alſo; and this exemption, to be effectual, muſt be an exemption, not only from the previous inſpection of licences, but from the ſubſequent penalty of laws.

The ſtate of the preſs, therefore, under the common law, can not in this point of view be the ſtandard of its freedom in the United States.

But there is another view, under which it may be neceſſary to conſider this ſubject. It may be alleged, that although the ſecurity for the freedom of the preſs be different in Great-Britain and in this country; being a legal ſecurity only in the former, and a conſtitutional ſecurity in the latter; and although there may be a further difference, in an extenſion of the freedom of the preſs here, beyond an exemption from previous reſtraint, to an exemption from ſubſequent penalties alſo; yet that the actual legal freedom of the preſs, under the common law, muſt determine the degree of freedom, which is meant by the terms, and which is conſtitutionally ſecured againſt both proviſions and ſubſequent reſtraints.

The nature of governments elective, limitted and reſponſible, in all their branches, may well be ſuppoſed to require a greater freedom of animadverſion, than might be tolerated by the genius of ſuch a government as that of Great-Britain. In the latter, it is a maxim, that the king, an hereditary, not a reſponſible magiſtrate, can do no wrong; and that the legiſlature, which in two thirds of its compoſition, is alſo hereditary, not reſponſible, can do what it pleaſes. In the United States, the executive magiſtrates are not held to be infallible, nor the legiſlatures to be omnipotent; and both being elective, are both reſponſible. Is it not natural and neceſſary under ſuch different circumſtances, that a different degree of freedom, in the uſe of the preſs, ſhould be contemplated?

Is not ſuch an inference favoured by what is obſervable in Great-Britian itſelf? notwithſtanding the general doctrine of the common law, on the ſubject of the preſs, and the occaſional puniſhment of thoſe who uſe it with a freedom offenſive to the government; it is well known, that with reſpect to the reſponſible members of the government, where the reaſons operating here, become applicable to theſe, the freedom exerciſed by the preſs, and protected by the public opinion, far exceeds the limits preſcribed by the ordinary rules of law. The miniſtry, who are reſponſible to impeachment, are at all times animadverted on by the preſs with peculiar freedom; and during the elections for the houſe of commons, the other reſponſible part of the government, the preſs is employed with as little reſerve towards the candidates.

The practice in America muſt be entitled to much more reſpect. In every ſtate, probably, in the union, the preſs has excited a freedom in canvaſſing the merits and meaſures of public men, of every deſcription, which has not been confined to the ſtrict limits of the common law.—On this footing the freedom of the preſs has ſtood; on this footing it yet ſtands. And it will not be a breach, either of truth or of candour, to ſay, that no perſons or preſſes are more in the habit of unreſtrained animadverſions on the proceedings and functionaries of the ſtate governments, than the perſons and preſſes moſt zealous in vindicating the act of congreſs for puniſhing ſimilar animadverſions on the government of the United States.

The laſt remark will not be underſtood, as claiming for the ſtate governments, an immunity greater than they have heretofore enjoyed. Some degree of abuſe is inſeparable from the proper uſe of any thing; and in no inſtance is this more true, than in that of the preſs. It has accordingly been decided by the practice of the ſtates, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of thoſe yielding their proper fruits. And can the wiſdom of this policy be doubted by any who reflect, that to the preſs alone, chequered as it is with abuſes, the world is indebted for all the triumphs which have been gained by reaſon and humanity, over error and oppreſſion; who reflect that to the ſame beneficent ſource, the United States owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political ſyſtem, into a ſhape ſo auſpicious to their happineſs. Had "ſedition acts" forbidding every publication that might bring the conſtituted agents into contempt or diſrepute, or that might excite the hatred of the people againſt the authors of unjuſt or pernicious meaſures, been uniformly enforced againſt the preſs; might not the United States have been languiſhing at this day, under the infirmities of a ſickly confederation? Might they not poſſibly be miſerable colonies groaning under a foreign yoke?

To theſe obſervations one fact will be added, which demonſtrates that the common law cannot be admitted as the *univerſal* expoſitor of American terms, which may be the ſame with thoſe contained in that law. The freedom of conſcience, and of religion, are found in the ſame inſtruments, which aſſert the freedom of the preſs. It will never be admitted, that the meaning of the former, in the common law of England, is to limit their meaning in the United States.

Whatever weight may be allowed to theſe conſiderations, it is not intended, however, by any means, to reſt the queſtion on them. It is contended that the article of amendment, inſtead of ſuppoſing in congreſs, a power that might be exerciſed over the preſs, provided its freedom was not abridged, was meant as a poſitive denial to congreſs, of any power whatever on the ſubject.

To demonſtrate that this was the true object of the article, it will be ſufficient to recal the circumſtances which led to it, and to refer to the explanation accompanying the article.

When the conſtitution was under the diſcuſſions which preceded its ratification, it is well known, that great apprehenſions were expreſſed by many, leſt the omiſſion of ſome poſitive exception from the powers delegated, of certain rights, and of the freedom of the preſs particularly, might expoſe them to the danger of being drawn by conſtruction within ſome of the powers veſted in congreſs; more eſpecially of the power to make all laws neceſſary and proper, for carrying their other powers into execution.—In reply to this objection, it was invariably urged to be a fundamendal and characteriſtic principle of the conſtitution; that all powers not given by it, were reſerved; that no powers were given beyond thoſe enumerated in the conſtitution, and ſuch as were fairly incident to them; that the power over the rights in queſtion, and particularly over the preſs, was neither among the enumerated powers, nor incident to any of them; and conſequently that an exerciſe of any ſuch power, would be a maniſeſt uſurpation. It is painful to remark, how much the arguments now employed in behalf of the ſedition act, are at variance with the reaſoning which then juſtified the conſtitution, and invited its ratification.

From this poſture of the ſubject, reſulted the intereſting queſtion in ſo many of the conventions, whether the doubts and dangers aſcribed to the conſtitution, ſhould be removed by amendments, previous to the ratification, or be poſtponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the conſtitution. The latter courſe was adopted; and in moſt of the ſtates,