THE

CASE

OF

BAPTIS IRVINE,

IN A MATTER OF

CONTEMPT OF COURT.

WITH AN

APPENDIX,

BY A GENTLEMAN OF THE BAR.

.....

FROM THE REPORTER'S SHORT-HAND NOTES.

.....

Et saches, mon fits, que jeo ne voile que tu croies, que tout ceo que jeo ay dit en les dits livres soit ley. Littleton.

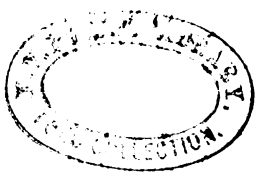
The Common Law....every thing—The Constitution

NO THING.

BALTIMORE:

PRINTED FOR THE REPORTER, BY S. MAGILL.

...1808...



ADVERTISEMENT.

IN reporting this trial, I feel myself delicately situated. If the doctrine of the decision of the Criminal Court be the law—although express permission might be received to report any trial—it is declared dangerous and contemptuous to publish it. On Saturday morning last, I was applied to by one of Mr. Irvine's Counsel, for the Notes of the Arguments in favour of the prosecution, that those who delivered them might themselves correct them. To this I consented with pleasure—and the only reason why it was not asked was, because it was considered useless. This morning I was astonished to find, that the object of procuring my notes was to publish another detail of the arguments—finding that so unfair an use was to be made of my papers, I refused to deliver them to the Lawyers who supported the prosecution. Some persons have had the MEANNESS *to say that my report would be partial and incorrect. This was said to hinder its circulation, but the artifice is unavailable.—As I am the only person who wrote during the Trial, nobody else can presume to offer an account of the proceedings on this case—and however my Report may be garbled and altered to "serve what purpose I cannot divine," I appeal to the memory and the understanding of the numerous auditory who were assembled in Court, to say if this be not the substance of all that was delivered—and I defy any person to discover a single argument weakened, a single sentiment falsified, or any one opinion imputed to the speaker to which he has not a "legal" claim.*

GEORGE BOURNE.

February 22, 1808.

....S. Magill, printer, 11, South-Street.....

THE

CASE

OF

BAPTIS IRVINE,

IN A MATTER OF

CONTEMPT OF COURT.

As this Report may be read by persons who are not acquainted with all the circumstances which are connected with the case, the following brief narration of facts cannot be unacceptable:—

The Whig was established by a company of persons during the last summer, and Mr. Irvine was engaged as the Editor. Nothing relevant to this case occurred, until November last, when the burning of the effigies of Mr. Burr and others attracted considerable notice. It has been supposed that the remarks of the Whig considerably influenced that measure. The Editor of the Whig, with several other gentlemen, were arrested by a warrant from judge Dorsey, on that occasion, as promoters of a riot. The warrants issued, and the exercise of authority which compelled the appearance of the parties, were both considered as extra judicial by the persons implicated, and contrary to the constitution. Many strictures appeared in the public papers, and particularly in the Whig upon this point. Public meetings were held, and petitions were forwarded to the legislature reprobating the conduct of the judge on that account. The strictures in the Whig were personal with regard to the judge, and they excited much public curiosity. The petition of the citizens to the legislature complaining of a violation of duty on the part of the judge was received, and his conduct was declared to be an "error of opinion" only, which did not claim legislative interference. The report of the legislature was also animadverted upon with strong irony and sarcasm.

During the month of January, Herman Bickham and Jedediah Elderkin, two workmen in the office of the Whig were dismissed by Mr. Irvine from their usual employ in the office, and two other men engaged to supply their situations. They refused to obey the order of Mr. Irvine, and ventured into the office to carry away the tools and otherwise to obstruct the new workmen in the discharge of their duties. They carried away the press-balls, and returning the next day, were, after some considerable struggling, forcibly thrust from the office. These two men immediately indicted Mr. Irvine, Mr. Warner, who heard the noise and came to see the occasion of it, with all the journeymen, for an assault and battery in the court of Oyer and Terminer and Jail Delivery for Baltimore County.

The following is the narrative of the facts, with regard to the subject of the trial for assault and battery, as published by Mr. Irvine:—

"Immediately after I arrived in Baltimore, it was agreed between the proprietors of the Whig and myself, that I, being a printer, should, when we procured a printing office, employ such workmen as I might think proper. Accordingly I engaged a very respectable foreman to come on from Philadelphia, who brought another gentleman with him. Nothing more than the common difficulties of being frequently obliged to discharge some in-

constant journeymen, and employ others, until we got *a set* of men as compositors remarkable for their sobriety and industry, occurred in the office, until about the 1st or 2d of January, when it was notified to J. Elderkin, that after the next week, we would employ him no longer. No sort of objection was *then* made by him. I ought, however, to say, that his improper behaviour in the office was the chief cause of his discharge. On the succeeding Sunday, it was intimated to the other pressman, that Mr. Tomlin disliked working with him *even for a week*; that, as it was a pretty general custom among printers, to give men a week's notice, I would pay him, at my own expence, a week's wages. He then went off. About ten o'clock, that evening, the other pressmen came to work. But, they found that the balls had been carried away. They borrowed others at a neighbouring office, and worked off Monday's paper. On *Monday*, about *ten o'clock*, I was much surprised to see the dismissed men come up stairs and *talk* about going to work! After I threatened to send for a constable they went away. Mr. Wylie, the foreman, and myself, went to dinner about two o'clock. We *met*, as we were *going*, Mr. Tomlin and Mr. Edes *coming* to work.—After I returned, about three o'clock, I learned that *whilst we were at dinner*, Elderkin and Bickham had returned; and threatened the new pressmen with being turned off, &c. They seized the balls, and were rushing out of the *room with them*, when they were intercepted; the balls taken from them, and they thrust down stairs, *without a blow* or a kick.

On the same evening, the 11th ult. about 6 or 7 o'clock, I was sitting in the front room of the office, down stairs, where I generally wrote or read. I heard their well known voices in a serious dialogue, on the street directly opposite and close to, the window; the shutters being closed. Bickham proposed to Elderkin to go up stairs, "if he had the spirit of a man," and take the balls away, as *he* had done last night. Elderkin seemed to decline the service; and hearing one of them walking up stairs, I followed, and found Bickham at the head of the stairs; he seemed surprised, when he found the other pressmen *still* there—for, it was an hour at which they *usually* were out of the office, after having worked off the first side of the paper. I told Bickham he was disappointed for that time; asked him how he dared to take away the balls last night, &c. He at first denied it; but, on being told that Mr. Myring had seen him taking them down stairs, he admitted that he had done so: I desired him to give up the key of the press room. He became very abusive; and I ordered him, entreated him over and over to go out of the office. He swore "he would stay as long as he pleased." Upon which I caught him by the collar; and hurled him down stairs without *striking* him. Some may wonder at the excessive moderation in my behaviour, I will explain it. I judged in the morning, that they must have been lectured by some body. I imagined, from the characters, that some *federal* lawyer had *prompted* them to these repeated provocations, in order to entangle us in prosecutions. I repeated this as a caution *to every man* in the office, to disappoint their schemes. This circumstance alone accounts for the "extreme forbearance" of all.

Bickham however returned, and rushed into the compositors' room without ceremony, at a time when we were closely at work, striving to get out the paper before *midnight*. He was intoxicated; though I think not quite so much as he affected. He came up to the bench, at which I was reading a proof-sheet; and threw down the key of the press-room upon it. I asked him, why he had not surrendered it before, without giving us so much trouble. He replied: "Now I will take it up again." He did so; discovering, in that *little* incident, full proof of my suggestions, that he *was set on*, to provoke a quarrel. I told him my opinion and determined to frustrate his plans; and wrenching the key out of his hand, sat down again.—At that moment, several of the men desired me to send for a constable; but I was reluctant to punish him; and, again and again desiring him to retire, I

left off all expostulation, finding it fruitless. Instead of the silence and good order of the composing room, there was now little else than din and laughter, at his drunken threats, and attempts at wit. ONE of the compositors at length, wearied with Bickham's interruption and invective, declared he would put him out. He caught him, and was thrusting him out, when Bickham's back striking the door, which had stood ajar, shut it closely, and a battle ensued between them. Bickham received a drubbing; but, after crying *cedo*, and getting up, instantly challenged Mr. D—— again. He was again forced down stairs; and AGAIN returned, swearing, &c. &c. when a neighbouring gentleman coming in, shoved him out of the office, and we saw no more of him."

George Tomlin, one of the men engaged to supply the vacancy occasioned by the removal of the prosecutors, was first tried on Wednesday the third of February, and after a trial of several hours was found guilty by the jury. On the next morning the following publication appeared in the Whig:—

"☞ *Occasional Hints.*

Suppose, a presiding judge in a court of law, exercise his legitimate power, to keep order alone, by desiring quarrelsome noisy persons to quit the place: could any one blame him if, his orders being disregarded, he compelled the disturbers to retire?

Suppose, farther, that the *foreman* in a printing-office, having discharged a couple of workmen, who, however, return, whilst this foreman *is at dinner—about a mile distant*—and in attempting to take away the tools of their successors, were thrust *down stairs* with as little force, as was possible to effect the purpose—what could any *honest juror* say, if *such men* came forward to prosecute unoffending journeymen for assault and battery?

Is not the condemnation of an innocent man, *on the oaths of perjurers*, a highly unjust proceeding?

☞ *Does not injustice too often twist a whip for the hand of Vengeance?* And may not *vengeance* be *justly* resorted to by an injured man, especially when a jury have found a verdict, on the oaths of men, who had *evidently* sworn to *three palpable falsehoods?*

Would it be any harm, if *jurors* were to reflect, that there *is a God* above us?

Is not every violation of truth, a piece of "practical atheism?"

Is it any encouragement to be orderly and patient under insult, when *extreme forbearance* towards two of the *most infamous of God's creation!* has produced seven or eight prosecutions?

Is it not obvious, that Aristotle knew nothing, being no prophet, of modern times and manners, when he said that "a liar would not be believed at any time, even "though he told the truth sometimes?"

For what purpose are *laws* intended but to coerce or punish, "to bind the villain of society!"

How often is that *holy purpose* obtained now-a-days?

Is it ever answered, when a thief and *a perjurer* can *procure* by hard swearing, the conviction of an honest man?"

On the same day Mr. Irvine's trial came before the court, and the jury returned a verdict guilty of the assault and battery alledged in the indictment. A motion was immediately introduced for a rule to shew cause why an attachment should not issue against the editor for contempt of the court, founded upon the following affidavits:—

Baltimore County, sct.

On the fifth day of February, eighteen hundred and eight, personally appeared in open court, Benjamin Berry and Samuel Cole, Hiram Cochran and Abraham Sellers, Thomas Taylor and Joseph Merryman, John Gorsuch and Benjamin Jones, Alexander Waters and William Hitchcock, and being solemnly sworn on the holy evangalists of Almighty God, deposed and said, That it is their impression and belief, that the paragraphs contained in the annexed paper called "The Whig," volume first, number ninety-four, of Thursday the fourth of February, containing certain strictures and remarks upon a certain trial then pending in the court of Oyer and Terminer and Goal Delivery for Baltimore County, was intended by the editor of the said paper styled the "Whig," to reflect upon and defame Thomas Taylor, Abraham Sellers, William Hitchcock, Benjamin Jones, Hiram Cochran, Benjamin Berry, Joseph Merryman, Samuel Cole, Thomas C. Jenkins, Alexander Waters, Peter Levering and John Gorsuch, who comprised the jury, who upon their oaths, after a fair and impartial trial returned a verdict of guilty, against George Tomlin, who, with Benjamin Edes, Nathaniel Wyley, Robert R. Maxwell, and Peter C. Frits, was indicted for assaulting and beating Jedediah Elderkin. Sworn to in open court this 5th day of February, 1808.

THOS. HARWOOD, Clk.

Baltimore County, sct.

On this fifth day of February, eighteen hundred and eight, personally appeared in open court, John Vance, and being solemnly sworn on the holy evangelists of Almighty God, did depose and say, that the annexed paper, number "ninety-four," volume the first, published on Thursday the fourth of February instant, was purchased by him the said John Vance, at the "Whig Office." Sworn to in open court the 5th of February, 1808.

THOS. HARWOOD, Clk.

Baltimore County, sct.

On the fifth day of February instant, eighteen hundred and eight, personally appeared in open court Joseph Robinson, and being solemnly sworn on the holy evangelists of Almighty God; made oath, that Baptis Irvine acts as the editor of a paper published in this city, styled "The Whig," and that the said Irvine acted as the editor of the annexed paper at the time of its publication. Sworn to in open court this 5th day of February 1808.

THOS. HARWOOD, Clk.

Baltimore County, sct.

On this fifth day of February instant, eighteen hundred and eight, personally appeared in open court, Jedediah Elderkin and Herman Bickham, and being solemnly sworn upon the holy evangelists of Almighty God, do say that it is their impression and belief that the paragraphs in the annexed paper containing a charge of *perjury, against certain witnesses* examined before this court and jury upon the trial of George Tomlin, who, together with Benjamin Eades, Nathaniel Wyley, Robert R. Maxwell, and Peter C. Frits were indicted for assaulting and beating Jedediah Elderkin, were intended to reflect upon, defame, and bring into disrepute these deponents (Jedediah Elderkin and Herman Bickham) witnesses examined in the said trial before the court of Oyer and Terminer and Jail Delivery for Baltimore county. Sworn to in open court the 5th of February, 1808.

THOS. HARWOOD, Clk.

The rule was granted, but by the request of the counsel the hearing of the argument was postponed to Thursday the 18th of February —Present, Walter Dorsey, G. G. Presbury and Job Smith: when there appeared on behalf of the motion—Mr Jennings, the attorney of the state, Mr. Meredith, Mr A.C Hanson, Mr. Irvine and Mr. Wray.* On behalf of the Respondent, Mr. Donaldson, Mr. Kell, and Mr. Glenn.† Mr Meredith rose in defence of the prayer that the attachment might issue, when a conversation ensued between Mr. Meredith and Mr Kell, respecting the right of opening and ending the case, the former contending that they had the right to commence and finish the pleadings, and the latter insisting upon their right as they were called upon to shew cause, the rule having been already granted which enforced Mr. Irvine to shew cause.

The court at length interposed, and decided that this was nothing more than a notice of a motion for an attachment, and consequently that it rested with the parties applying for that attachment to commence the argument.

MR. MEREDITH.—The decision of the court on the argument in the present case has justly excited much public expectation, and it has become of no small degree of importance. Although I come into court to support the prayer that the attachment may issue; I feel no disposition to substract from the privileges of printers. But there are the most powerful reasons why this rule should be made absolute—the tendency of such injurious examples as the present case, the conduct of the respondent, the circumstances of the trial, and other circumstances which are connected with this publication, and the high tone of menace with which it has been pursued, involve the reputation and existence of one of our most important establishments, and decidedly implicate the dignity, honour, and independence of this court. The novelty of this question affords me no small degree of consolation: no case of this kind has ever occurred in any of our courts: no man has been found daring enough to oppose the laws and insult the tribunals of justice. In the interval which has elapsed since the rule to shew cause was granted, many misrepresentations have been circulated, which are calculated to depreciate this proceeding. It has been asserted that the liberty of the press, the palladium of our rights, that pledge of our freedom, is this day threatened with destruction; but these remarks are the mere effect of party spirit. It is a duty which I owe to the gentleman

* Is it not a little extraordinary that amongst all the gentlemen of the bar, nobody, Mr. Wray excepted, who did not deliver his *most luminous and ingenious* argument, should thrust themselves forward to assist the attorney of the State in this important case but *beardless boys*.

† Mr. Glenn, our patriotic senator, volunteered his services on behalf of the Editor of the Whig.

whom I represent to renounce motives such as have been described; every action of a man's life must not be imputed to party motives. The jury themselves are of that very order of politicians whom the Respondent advocates and supports, and I must assert in duty to myself that my own political sentiments are honest—they are my own and are not connected with this question. I stand up for the safety and honour of every man. I plead for the dignity, the honour and independence of the judiciary.—During the present session of this court, the grand jury found several indictments against several persons all employed in the office of the Whig, a news-paper which is marked by a contempt of order, by a degree of violence and outrage, by a rage for defamation and by an audacity of falshood never surpassed by the most licentious print. The origin of this paper was from the worst motives, and the principles which it supports are the miniature of mobocracy—it wishes a government which would degrade all public authority and violate all private right: its fundamental principle of republicanism is entirely contemptible, rotation in office. But what gave rise to the present prosecution? On the fourth of February last the trial of George Tomlin who with others had been indicted for an assault and battery upon Jedediah Elderkin: came before the court the jury after a fair and impartial trial, in which every indulgence was shewn to the traverserser returned a verdict of guilty. No one presumed to doubt the correctness of this verdict While the sentence of the law remained to be executed, while the trials were still pending, the paper was issued upon which the motion before the court is founded. In the publication complained of, the verdict is declared to be unjust, the prosecutor is described as infamous, the witnesses are stated to be perjurers, the jury is said to have been composed of men who have forgotten the existence of a God. and denunciations of vengeance are published against all those who support the prosecution. In whatever point of view we consider this production, it is unparalelled in insolence, effrontery or falshood.

Mr. Meredith here read and commented upon the publication already inserted. In his long comment, the counsel endeavoured to shew that this publication had immediate reference to the proceedings in court of the preceding day, and that by it the jury and witnesses were grossly libelled, and that as they were libelled and as other trials were before the court in which the two witnesses were testimony, it must be considered a contempt of court. He then proceeded: I come not here to attack but to defend the liberty of the press: I profess myself its zealous and devoted friend. The press has produced many of the blessings which we enjoy, and will increase the happiness of mankind. It is a lofty citadel from which the people encourage, approve, and reward virtue. But its boundaries must be limited, its principles must not be contaminated. The press is in more danger from some of its professed friends, than from its open foes. Such guardians of the rights of the press as the Respondent, are plunging it into distress; under its holy name they strike at the foundation of our laws and the administration of justice, and will if permitted, inevitably ruin it. A proper restraint can be no infringement of the liberty of the press. But the doctrine of the freedom of the press affects not the present case. Under the pretence of the liberty of the press, some have been wild and absurd enough to destroy all decorum and to insult the worthiest individuals. The object of the press is to investigate public measures and public men; but no man ought to be insulted and menaced who is in the government. Their characters must be preserved, particulary in the judiciary department; the stream of justice must flow freely on without being tainted by the breath of calumny; and *appeals to the people even upon the subject of the conduct of the judiciary must not be allowed, because the people have neither leisure, nor knowledge, to consult and to decide upon the principles of law.* In courts must people submit to insults; shall witnesses, to gratify malice, be branded as perjurers, and shall jurors in the exercise of their duty be exposed to scorn and contempt?

The conduct of the Respondent has been infamous: is he to revile the law because he condemns it? Is he to calumniate men of integrity because they will not bend to his views? The Respondent is guilty of attempting to violate every principle of justice and law, both indecently and malignantly.—His conduct is therefore a high contempt of the dignity of this court. It was committed while a suit was still pending; for although the jury had returned their verdict, the court had not passed sentence—and a case is still until the court passes sentence subjudice Although the indictment is against several persons for the same offence still it is not to be regarded as one indictment. An arrangement was made between the counsel, that they should be tried singly, and if any informality had been discovered, the whole would have been destroyed; the case is therefore sub judice.

I shall now shew from the authorities that this power of proceeding in a summary mode by attachment is inherent in the court; without which courts of justice would become so contemptible that no contempt could be committed.

The counsel here read the definition of contempt from 5. Viner's Abridgement, 442. He next introduced 4 Blackstone, p. 283—2 Atkins, 469—from which it seems that this doctrine of contempt, and this mode of punishing it were derived from Chancery. To illuminate this part of the *Egyptian darkness which pervades all the books*, the counsel here adverted to a subsequent publication in the Whig, which was entitled, "Occasional Hints to the Emperor of China." These authorities demonstrate the argument, that the doctrine of contempt, and the summary mode of punishing this offence, are acknowledged in England:—I shall now shew that the doctrine in the cases which I have just read has been recognised by the courts of this country. He then read Oswald's case in the supreme court, Dallas 319, this was M'Kean's judgment. In the supreme court of New-York, 1 New-York Term Rep. 485. 518 Wallis Rep. p. 77. The case of Hollingsworth and Duane.* From these authorities, and I shall not trouble the court with any additional remarks, I must conclude that this is a contempt of court—it was committed during the pendency of a trial—witnesses as well as jurors have become the victims of public calumny, their injuries ought to be revenged, and their feelings receive respectful attention.

MR. DONALDSON.—If I merely regarded the individual before the court on this occasion, however an interest for my client might produce solicitude for the event, I should rest satisfied whatever was the issue, with having endeavoured to discharge my duty as an advocate, nor should I feel overpowered, as I am at this moment, with anxiety that I cannot repress, with sensations which I cannot describe. When private justice is alone involved the case of an individual ranging no farther than himself, will frequently terminate where it began, and when temporary and casual interests are alone in question, any misapprehension of fact or mistake of law, may only extend its consequences to the immediate sufferer. But in the course of human affairs, cases will from time to time occur, where the cause of one man becomes the cause of society, where principles are to be settled which may affect the great mass of the community—where ages yet unborn may be involved in the consequences of the decision, and where the individual is lost sight of in the magnitude of of the principle of law, on which his fate depends. The line at which power is checked, and from which authority retires, the limit which principle has dictated to might, "thus far shalt thou go, and no farther," when that sacred boundary becomes the subject of discrimination and discussion, cool indeed must be that judgment, which on such an occasion rises superior to perturbation, and luke-

* Whosoever wishes to labour through this *farrago of trash*, will find his trouble useless if he desires to gain information. The hearing of this stuff consumed considerably more than an hour.

warm must be his attachment to his country, who can look upon the struggle with indifference. Considering the question this day for the decision of your honours in this solemn point of view, I may be allowed to declare that my interest in the fate of Baptis Irvine, is swallowed up in my solicitude for your decision, and feeling that a task has devolved upon me to defend infinitely more than what has been entrusted to my charge, what I deem among the most sacred interests of society, I shall not be discredited when I acknowledge that this momentous occasion requires the highest powers to do it justice, and that I am indeed burdened beyond my strength.

And yet I feel strengthened in the arduous duty I have this day undertaken to discharge by a consciousness of my own motives, and a trust in your impartiality. In my endeavor to impress on you the deductions and opinions the deliberate result of my best conviction, I feel confident that I shall be heard with patience and judged with candor, that my deficiencies will be supplied by your experience, and that if in any instance I should appear in the slightest degree to trench on the inviolable respect I owe to the constituted tribunals of my country, I shall not be taken as intending the slightest personal offence. In discussing the powers of courts, a subject not unfrequently harsh and grating to the ears of authority, it would be indeed difficult to avoid every expression which might be tortured into disrespect, but if any such occur on this occasion, I do intreat this court to set them down to the proper account, and discharging my will of the intention, attribute them to the nature of the subject.

Upon a late occasion when the object of this prosecution was taking his trial on a simple indictment for an assault, a gentleman of the bar, who had joined in the prosecution, indulged in many heated and virulent, but at the same time irrelevant strictures, to his prejudice. Although totally inapplicable to the question before the jury a torrent of reproach was poured upon the head of this individual, then a party in court, and entitled to be judged not on extrinsic and adventitious circumstances, not on his merits in other transactions, but by his conduct in the cause for which he was then answering before his country. Need I recapitulate what was then said? He was styled a "Jackall;" it was alledged that he was employed as an editor for the purposes of defamation, and a jury of the country standing on the solemnity of their oaths, and bound to administer justice according to evidence, were exultingly told "that they ought to rejoice they had such a man within their power." A single consideration here presents itself. Is it not a little inconsistent that such remarks should be urged by counsel with propriety certainly at least with impunity against one who is now called upon by that counsel to answer for having said of a jury, what (be its merits what they may) had not a twentieth part of the virulence of these declarations? It is to alledge that remarks inapplicable to an issue shall be made to prejudice a party in a cause pending without remedy or redress, as coming from the lips of one man, while if they proceed from the pen of another, he shall be liable upon the extraordinary interposition of a court to have his liberty and property at once jeopardized by the summary exertion of judicial power. In the first instance it may fairly be alledged that a prejudice is done to a cause pending by considerations urged before a jury to whish they had no right to listen, and to which there was no possibility of reply at the time; in the second, the only legal ground of prosecution against the party is, that what he had written or said, "tends to the prejudice of a cause pending." To an unlearned mind it would appear not a little inconsistent, that although in the first instance an undoubted injury is done to a party in a suit, and in the second, the only allegation on which his punishment can rest is, that he has attempted to do an injury to a cause pending, that altho' in both cases the act consists in words used, and therefore that in both the consequence should be the same, yet in the first instance an entire impunity is extended to an agent, which in the second is denied to a prin-

cipal, and on one hand a latitude of abuse agsinst a *party in a cause* is entirely innocent, while on the other the slightest insinuation of that party to the prejudice of a jury becomes highly and uncommonly penal. To reconcile these absurdities with common seuse, or these contradictions with rational law, is, thank God, not my duty—it is sufficient to state them; but these remarks may be received by gentlemen, as a caution against committing the offence or falling into the error they have so zealously and laudably undertaken to prosecute. Whatever might have been their conduct on that occasion, it is to be hoped, that they will now give satisfactory proof of the purity of their motives, and prove incontestibly to the whole world that it is through an ardent and high spirited zeal for the pure administration of the laws, and not through a heated and intemperate pursuit of an individual personally obnoxious to them, where public justice is the pretext, but private revenge the motive that this prosecution has been set on foot.

It is too frequently the case, may it please your honors, that pernicious principles in law as well as in politics, are rendered palatable by becoming subservient, in the first instance, to the punishment of an obnoxious character, which if they did not aid popular or party dislike, would have been received with great caution, and perhaps upon mature reflection been rejected with indignation. A suspicious doctrine is the more readily embraced when strong prejudices are entertained against him, in whose case it becomes the rod of vengeance. Even in judging of judicial proceedings, we too often look at the man and forget the principle. Thus dangerous principles become the result of popular prejudice. The precedent once established, who is to counteract its injury? what was precedent yesterday, becomes law to day; the circumstances of irritation under which the decision took place are rarely adverted to, and what was first a scourge upon the individual becomes a scourge upon society. I know it is unnecessary as I feel it would be presumptuous, to offer these remarks as a caution to the court on this important subject; but the public, sir, are apt to look at the man alone, to call for punishment at all events, and to prefer that the law should bend to the purpose, rather than the purpose should not be answered. The interest which the case of Baptis Irvine has excited in a certain portion of this community, is obvious to every spectator. On a simple question of fact upon an indictment against him for an assault not marked by extraordinary circumstances, not distinguished from the common herd of similar cases by its wickedness, violence or atrocity, this court has been crowded by a numerous auditory not much in the habit of frequenting courts of justice, who I make bold to assert, would not have been tempted to the close and puntual attendance which they paid, by any consideration short of a desire to witness his humiliation, to triumph over his defeat. Upon this motive for crowding your court, I offer no other remark than that it shews the melancholy proneness of mankind to draw their impressions of justice from their impressions of the individual, and to square their hopes of conviction or acquittal, not by the evidence or by the law, but by their attachment to, or dislike of the individual upon his trial. If Baptis Irvine had not been the editor of the Whig, I hesitate not to give it as my opinion, that few would have attended through interest, fewer through curiosity. I mean, sir, not to reflect on those who feel this temper; I offer these remarks to shew that a strong prejudice among a party exists against my client, and that the eager solicitude and an anxious longing for his conviction, which many take no pains to conceal, and which prevail to an extraordinary degree, have thrown him more entirely on the justice, the firmness, and the impartiality of this honorable court.

Upon the first consideration of the interesting subject now for the first time before a court of justice of the state of Maryland, the novelty of the proceeding, will excite some doubts of its legality—That our courts should

have been so long in operation since the Declaration of Rights, without such a process having issued for a contempt by construction, may excite some surprize in those who do not find an argument against the exercise of such a power in this judicial silence. It can hardly be contended, that in all this space of time, no instance ever occurred, where, if the doctrine was applicable here as in England, the courts of the state had full room to exercise the power; and I trust it will not be said, that until this day, no temper ever manifested itself in the Bar or the Bench, to exert this summary authority, to protect the proceedings of our tribunals free from stricture or animadversion, public or private.—From their not having exercised the power it might fairly be inferred, that they did not think they had the right to exert it; and hence a court which for the first time adopts the proceeding, and establishes the precedent, are under peculiar obligations to proceed cautiously, to see their way clearly, and to be well satisfied that they are fully borne out and justified not only by British precedent, but by American principle. Let the maxim never be forgot, let it be indellibly engraved on every judicial mind—*Est boni judicis ampliare justitiam sed non jurisdictionem*—it is the bounden and paramount duty of a court to enlarge justice, but not to stretch their authority. If ever there was an occasion which required most imperiously the application of this maxim, it is when an exception from common rules is about to be enforced, and when new and unprecedented cases occur. On this occasion then, there is every necessity that this court should proceed cautiously, step by step, regarding as well the lights which English decisions shed upon the subject, and their applicability to our situation and circumstances, as those constitutional provisions which fairly bear on the question, and the guides which decisions from sister states may offer to their judgment. The antiquity of this mode of proceeding for contempts in England, is not to be disputed. Although its source and origin is obscure, elementary writers have insisted, that it has been practised ever since the Common Law has been a system. We know not under what restrictions it may have been originally practised, nor the enlargement of authority which, by way of modern improvement may have been introduced into the law.—Certain it is, that the system of jurisprudence and of legislation is carried on in Great Britain in so high and authoritative a tone, as not merely to keep the subject in awe of rightful authority, but extending by inference an unjust controul over his words and actions, to debar him of the free expression of his opinion, however just and true, with respect to legislative and judicial proceedings. On the first simple elementary maxim, that a court must have all the incidental powers necessary to attain the object of its establishment, an artificial system has been constructed, grateful to pride and power, although injurious to reason and to right, which has been falsely termed a part of the COMMON LAW, although of modern interpolation, and under which the freedom of the Press in that country, as it relates to a fair investigation of judicial proceedings, has been reduced to a cypher. The frame of government of G. Britain certainly possesses many noble materials—In theory it approaches nearest our own of any in existence—but its great fault, (in which I trust our own will not be said to resemble it) is, that it has rarely defined the just limits of power, and although upon many great occasions it has risen superior to state juggle, and legal artifice, yet the system, if it be at all entitled to the name, has been and is so liable to judicial misconstruction that its first plain pure elements have become covered and lost in the patch-work with which it has been botched and plaistered in consequence of the numerous and violent struggles which have there occurred between liberty and power—and never yet did legislative or judicial discretion want a pretext to change and modify its principle at will—will it not be found that this observation is equally applicable to the common law? How many modifications has it endured, to how many new readings has it been subjected, to how many artificial and unnatural constructions has it submitted? In the

copious commentaries by modern hands on antient works with which our libraries are filled, and where a plain text is frittered away into ten thousand distinctions, how often do we find it remarked "*but this is not law at this day?*" Naturally does the student enquire for the act of Parliament, by which the law of the land has been changed—He enquires in vain—judicial discretion supplies every deficiency, and nothing is less necessary than an act of parliament to alter the common law. Thus judges have frequently made the law instead of expounding it.

The applicability of these remarks to the subject before the court will appear, when we consider the first fair principle on which the modern doctrine of attachment for contempts in England is built—*Courts must have all the incidental powers necessary to attain the purposes for which they were created*—This is the great fundamental axiom, by whose test every case should be tried—On this principle what is it but a gross perversion to say that it is a contempt to publish a true account of the proceedings of a court of justice? Yet this is English law. 4 Black. 282. Establish the precedent that we are bound by British authorities in this most important particular, and not an editor of a newspaper from one end of this great confederation to the other, but is liable to be crought before the Circuit Court of the Virginia district for having dared to inform the people of these U. States of what was passing on the trial of Aaron Burr, a trial the most interesting in its issue, and hereafter perhaps the most momentous in its consequences, that has ever occurred in the annals of our country—And yet under the authority of Blackstone, the people have been informed contrary to law, and those who presumed to give the information are liable to be brought up before judges Marshall and Griffin, and fined ond imprisoned at their discretion for having so done. But who is there who would not feel mingled disgust and indignation at such an exertion of power in a country, of whose polity it is the first principle, that the people should never be debarred from a correct knowledge of the proceedings of all the departments of government—— Again, upon the authority of the same writer we are told, that it is a contempt to say aught disrespectful of a Judge, or a Court—What might be construed into disrespect where the individual who deems himself aggrieved, is to be legally the judge, as well of the tendency and meaning of the language used as of the punishment which is to be its consequence, I shall not undertake to determine, but the obvious effect of this decision is to render it dangerous indeed for popular sentiment to express itself with respect to judicial misconduct.—Here, Sir, I say we are again stopped *in limine*, by English authorities on this head of the law, utterly inapplicable to our situation, entirely irreconcileable to our modes of thinking and acting. And yet, sir, this is British law, and if we are constrained to adopt the decisions of English courts on this occasion, we are fettered and manacled by the iron shackles of the unyielding authorities of the two cases I have put; else here will indeed be an incongruous composition reducible to no certain rules where the discretion of the judge is the sole law, and where, although the only foundation upon which a doctrine rests, is that it has been adopted in another country, yet it is adopted under qualifications unknown to that country, and may become arbitrarily strained or relaxed as may best suit those who have to administer it.

But I deny that we are bound by such authorities. God forbid we should be bound by them. I deem too highly and reverently of our constitutional safeguards to admit that such disabilities extend to this free and happy country. No, sir, it cannot be that for printing a true account of judicial proceedings, or for speaking irreverently of the character of a judge, or the conduct of a court, acts which in the course of things may be highly just and necessary, a citizen shall be liable to be brought up for trial before the offended party, and there be called upon to answer upon oath to his own coudemnation, and be exposed to arbitrary fine and imprisonment

without being entitled to that great constitutional rampart, the trial by jury, the sacred avenger of innocence, the certain punisher of guilt — When I look to the charter of the land, the declaration of rights, I find this cannot be.

In the 19th section of that instrument, I find full security againt the power now contended for. Here Mr Donaldson read from the declaration of rights the 19th section in the following words :—

" XIX. That, in all criminal prosecutions, every man hath a right to be informed of the accusation against him ; to have a copy of the indictment or charge in due time (if required to prepare for his defence ;) to be allowed counsel ; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him, on oath ; and to a speedy trial by an impartial jury, without whose unanimous consent, he ought not to be found guilty."

(He then proceeded to comment on this section.) Now, Sir, is this a criminal prosecution ? If there be meaning in words, it undoubtedly is:— To ascertain this beyond all contradiction, let me ask, who are the parties ? The state and Baptist Irvine—Is he charged civilly or criminally ? What is to be the consequence of a conviction ? Punishment—fine and imprisonment. Who defends for the state ? The state's attorney This case then has every feature, distinction, and characteristic of a criminal prosecution. If it be so (and who can deny it) let ingenuity distort, let pleasure, let sophistry weave her web to entangle this victim, let industry pore her eyes out over the musty record of British precedent, here my client stands entrenched in the constitution, and invulnerable to every assault but through the judgment of his peers.

But as if this were not enough, as if the framers of this all important instrument were resolved to make "assurance doubly sure," mark: Here Mr. Donaldson read the 21st section of the declaration of rights :

" XXI. That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."

This langrage is too plain and intelligible to be misunderstood. Here there is no occasion for a resort to English law, or black letter precedent, for a correct construction of what is only obscured by interpretation and rendered doubtful by straying beyond its own clear expression for its signification. Here the learned and the unlearned, the lawyer and the farmer, the citizen and the magistrate can at once resort to an easy and obvious exposition of their most essential rights and interests .Such was the spirit and intention of those who framed these sections ; the danger was perceived of locking up the extent of the knowledge of our privileges in the breasts of the few, and rendering that a mystery inscrutable but to the professors of law, which being of general interest should be of general knowledge. Hence these wise and admirable provisions, which " he who runs may read," which guaranteee right to the citizen, and prescribe the line and limit of power to the magistrate.

But it may be said that the last section by using the words " or the law of the land," admits the doctrine now contended for, as the common law is the *law of the land.* It may be further said upon the authority of sir Wm. Blackstone, that magna charta confirms the common law power of punishing for contempts, and that this last section is a literal translation of the clause in magna charta, beginning, *nullus liber homo, &c.* To make this argument available, they must shew what was the common law, when magna charta was framed, not what has been the judicial encroachments on the common law, since the date of that instrument. But let it be remem-

bered, that whatever might be the weight of this remark, as to the last section, it has no application whatever to the first section which I read to the court. That clause in the declaration of rights stands upon its own solid foundation, without resting upon aught which might undermine its basis. But subject to this interpretation it is absurd and irrational, and endangering the noble privileges it was the object of these provisions to secure. Contradistinguish not the law of the land in criminal cases, from the law of the land as administered under the *judgment of our peers*, and what is left us? The discretion of the judge. Has the legislature this discretion? No, sir. They could, by an act declare the "law of the land," in opposition to these sacred provisions. How then can the judges? But I may be asked how is the adoption of the common law in the 3d section of the declaration of rights, to be reconciled with my interpretation of these passages. My answer is that the common law is adopted as far as it is reconcileable with constitutional provisions, and as it is adapted to our frame of government. The three sections in the declaration of rights are to be taken together. The common law is the law of the land in all civil affairs and in all criminal proceedings, where the sense and spirit of the constitution is not infringed. Admit the common law to its full extent, and where was the use of introducing these, and other great fundamental regulations; since every exception to the trial by jury which that law recognizes, flows by necessity from the words "or the law of the land." These sections are but an idle mockery of the interests, a cruel insult to the feelings; and better would it have been by far, to have left us to the wide range of uncertain principle, than to have held out the hope of constitutional protection, founded on provisions, which, however solemnly declared, are in all instances to yield to that encroachment, against which, if they have any meaning at all, they were intended to provide. Mr. Donaldson here read from 1st Tucker's Black. 409 & 426, and commented upon them:—

"And here we may remark in the way that by these constitutional declarations all the colonial laws (of whose validity, as being repugnant to the common law and statutes of England great doubts had been entertained during the colonial government) were thenceforth unquestionably established, how repugnant soever they might have been to the common law or statutes of England or the conditions of their charter. The adoption of the laws of England we see was confined to such as had theretofore been adopted, used and approved *within* the colony and usually practised in the courts of law with an exception to such parts as were repugnant to the rights and liberties contained in the constitution. It was therefore essential to the force and obligation of any rule of the common law, that it had been before that time actually adopted used or approved *in* the colony, and further that it should not be repugnant to the rights and liberties contained in the constitution. Otherwise altho' it might be found in every law treatise from Bracton and Glanville, to Coke, Hale, Hawkins and Blackstone, or in every reporter from the year-books to the days of Lord Mansfield it would have no more force in Massachusets than an edict of the emperor of China.

"What a snare is it for the feet of the citizens of the United States, if obsolete maxims of this kind, may be revived at the discretion of a judge, and enforced with severe penalties, notwithstanding they may have been expressly repealed and annulled in the most solemn manner by the authority of the states respectively! What principle can be established more inimical to the independence of sovereign states, or more destructive to the liberty, security and happiness of the citizen, than that the unwritten law of a foreign country, differing from them in the fundamental principles of government, is paramount to their own written laws, and even to those constitutions, which the *people* had sealed with their blood, and declared *for ever to be inviolable*! Such however is the necessary and inevitable consequence, of

this constructive grant of jurisdiction in all cases at common law, to the courts of the United States, or to any department of the federal government.

"In all these passages we may be told the common law is evidently referred to as the *law of the land*. This is not the case; it is referred to as a known law and might in strictness have been referred to as the law of the several states, so far as their constitutions and legislative codes respectively have admitted or adopted it. Will any man who knows any thing of the laws of England, affirm that the civil or Roman imperial law, is the general law of the land in England, because many of its maxims and its course of proceedings are generally admitted and established in the high court of chancery, which is the highest court of civil jurisdiction except the parliament in the kingdom? Or that the canon, or Roman ecclesiastical law is the general law of the land, because marriages are solemnized according to its rites; or because simony, which is an ecclesiastical offence, is also made an offence by statute?"

(Mr. Donaldson then proceeded.) If, sir, I understand at all the object and meaning of the declaration of rights, it must have been to take solid securities to establish certain principles, before subject to contest, on a secure and permanent footing, and where liberty required it, to provide against claims which might be urged under the citation and authority of that common law which is here attempted to be set up in derogation of this declaration. The famers of this instrument must have been sensible of the monstrous power which English judges had arrogated from time to time, under the cloak of law. In draughting the 19th section they might at that moment have had in their "mind's eye," this very case, with all the numerous and incalculable evils which may result from the doctrine of contempt.

But if the mode of interpreting these sections, which must be pressed by the opposite counsel, to give any color to their argument, be adopted by the court, what will be the sentence passed upon these and indeed the greater part of the provisions of the declaration of rights? That they are *useless, idle, and unnecessary*, mere surplusage in the system, and might be entirely blotted out without occasioning the slightest change in our civil relations. So did not the intelligent framers of this sacred instrument think, So I trust this court will not think. Among the rules for the interpretation of laws, we find this among the foremost, as it undoubtedly is among the wisest: "construe the whole in such a manner, that every pars will take effect," Let this seasonable rule be adopted in the explanation of the 21st section, and all is coherent, just, and reconcileable, reject the rule, and it becomes a mass of inconsistency, levity, and absurdity.

But, sir, this question on constitutional grounds does not rest here. The convention had the doctrine of contempts under consideration, and unwilling to leave it to unlicensed and arbitrary construction, on one great and leading occasion, have expressly defined and vested the power, thereby clearly inferring that where it was not positively granted, it should be considered as tacitly withheld. In the 12th section of the constitution, the power of punishing for contempts, and the limits of the power are vested and defined in the two branches of the legislature.

XII. "That the house of delegates may punish by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behaviour, or by threats to, or abuse of their members, or by any obstruction to their proceedings They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege by arresting on civil process or by assaulting any of their members, during their sitting, or on their way to or from the house of delegates, or by any assault of or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person attending on or on their way to or

from the house or by rescuing any person committed by the house: and the senate may exercise the same power in similar cases.

Now, sir, was this clause necessary to create a power? so thought the convention or I presume it would not have been unsettled. If then such an authority did not exist before to the extent of this section, and these words created the authority, why not invest the courts with similar powers if it was intended that they should equally exercise them?—If the right was so implied, it might with as much reason have been implied in the one instance as in the other. If the resort had been to *English law* in neither case would such a grant have been necessary. But the convention would not leave such powers to English precedent or legal implication A system was to be created whose great object it was to set limits to power, and landmarks to authority, and this great fundamental rule grants expressly to one department of the government, and is silent as to another. From this what is my conclusion? That the power does not exist in that department.

But let it not be understood by the court that I take upon me to question the rightful authority and inviolable duty of courts to maintain and enforce order and decency in their presence, to compel obedience to their process, and oblige their officers to do their duty, or to punish them for a breach of such duty. This power I admit to a very full extent, but this power I derive not from the common law not from English law books or British precedents, no, nor from the constitution itself; but I derive it from the most obvious principles of common sense, from an innate and inherent principle in the organization of a court of justice, from the maxim that *omne principale trahit ad se id quod est accessorum*, a maxim without which, courts would cease to exist. It is obvious that when a thing is granted, all that is necessary to the enjoyment of that thing is included in the grant. When a court is created, *every power necessary* to the discharge of its functions follows from the creation. Hence the rightful and lawful power of courts to punish for certain contempts. But I do most solemnly protest against the unnecessary enlargement of this power, beyond the immediate and pressing call of justice, in cases, which under the plausible pretext of maintaining the dignity of the administration of the laws, nay by their consequences, tie up our tongues with respect to judicial proceedings, and fetter the press the sentinel of public safety, so as to render it inoperative and inefficient in the most important particulars, converting it into a mean and miserable instrument, fearful of the truth, and strung to falshood, the base sycophant of power and the treacherous deserter of the people.

The distinction between contempts which arise from disorderly conduct in the presence of a court, from a resistance to or disobedience of certain legal process, from the corrupt and illegal conduct of the ministers of justice, and *constructive contempts*, must be obvious to every understanding.—The first species of offences ought to be styled contempts of the laws, not of a court. The second species not unfrequently involves the inconsistency of an offended and irritated party constituting himself the judge in his own cause. The first *must be* immediately punishable, the second may be left to the ordinary course of justice without any peculiar inconvenience. If a witness in a cause refuses to attend, to be sworn, or to give evidence, it is a refusal of obedience to the laws by which the course of justice is interrupted and suspended & he must be compelled to obedience, or your law is a dead letter. If in the presence of a court an individual conducts himself in a turbulent and indecent manner, it is not so much an affront to the court as it is an interruption of the administration of the laws, which must proceed. If an officer of a court acts under the cloak of his trust in an oppressive and illegal manner, such conduct is less a contempt of the court of which he is an officer, than it is of the laws of which he is a minister, and those laws having *specially* confided in him, will *specially* compel him to a discharge of

his duty, or punish him for his disobedience. But is it any contempt of the laws, to say that a court has acted or is acting illegally, that a jury has decided corruptly, or that a witness is forsworn? Shew me where the sudden and immediate recognition of such an act in derogation of common rules and in exception to common right is so necessary, that a suspension in the administration of the laws must certainly take place, if the party charged be not at once brought up, and tried without his peers. No Sir in such a case this extraordinary exertion of judicial power *is not necessary*, any more than it would be for the pursuit and punishment of any other offence against society. The distinction I then take to be clear between offences which interrupt and suspend the administration of the laws, and which therefore must of necessity be summarily punishable, and those which merely affect *the persons* who administer the laws, and which in my view of the subject, must be left fo the regular and ordinary course of legal pursuit, either by criminal prosecution, or private action.

On these grounds, sir, even admitting that according to English authority the Editor of the Whig was guilty of a contempt by construction of the publication in question, (which I shall presently take upon me to deny) I do protest against the power of this court to take cognizance of the fact in the present mode, and on the strength of constitutional provisions, do demand on his part, that if he be charged with an offence, by this publication, that he be tried therefor by a jury of the country. And here I would confidently rest his case secure and impregnable as I deem him to be in the fortress of the constitution.

But a dependance has been placed in the decisions of the courts of sister states, and this court has been called upon to overcome the force of positive language, because this will not be the first instance in the union in which an express provision on this subject has yielded to the spell of common law construction, and where the ground which I have taken, has been taken in vain. If those courts conquered all scruples, why not this court? I do trust sir, that your honors will exercise your own understandings. The eyes of the union have not long since been attracted by the high and solemn spectacle of the three venerable and highly respected judges of the supreme court of Pennsylvania, answering to their country, before the senate, upon the grave and weighty impeachment of the house of representatives of that state, for having exercised the authority which this court is this day called upon to exert They were acquitted, sir, not because in the opinion of the majority of that august body they were not guilty of an oppressive, an arbitrary and unconstitutional stretch of power, but because that majority did not consist of two thirds of the whole body. Whatever may be the impression of different men from their opposing political sentiments of the proceeding against the judges for their conduct toward Passmore, all must join in the admission that the conduct of the Pennsylvania legislature amounts to a solemn protest against the doctrine, and that in the opinion of the majority of the representatives of the Freemen of that state, the power cannot be constitutionally exerted nor should it be tamely submitted to. I wish not, sir, to be understood as endeavouring to impress a warning on this court, with the hopes of deterring them from the free and unfettered exercise of their honest judgment; the high independence, the sacred impartiality of this honorable court would utterly disappoint such an expectation were I presumptuous enough to form it; and mean and miserable, indeed, would be the condition of a judge who should refuse to do his duty from a fear of the consequences. But let me ask if this legislative protest does not throw a strong shade of exception over doctrines which derogate from the rights of juries, and if the opinion of the majority of the Senate, and the great majority of the house of representatives of the state be not at least an equipoise for the act of the three judges of the supreme court, who have struggled for the assertion and maintainance of a power

in their own hands which no friend to the just and certain definition of authority would rejoice to see established. Although it may have been the fashion of late for a political denomination among us, to think and speak lightly of the Representatives of the people, and of their competency to judge of judicial matters I do not think that the expression of such an opinion argues much attachment to the government under which we live. Equal if not superior respect is due to the opinions of that body, by whose interference judicial misconduct is alone punishable; and where they express a strong sentiment of disapprobation of any doctrine as incompatible with freedom, and hostile to the rights of the people, I confess myself one of those who are accustomed to attach great weight to an objection founded on such grounds, and coming from such high authority.

But putting this legislative protest out of consideration, and admitting for argument's sake that the supreme court of Pennsylvania decided constitutionally in the cases of Oswald and Passmore, it may not be uninteresting to compare the constitutional provisions of that state with those which have been read to the court. I conceive, sir, there is a manifest distinction between them. (Mr. Donaldson here read the 9th section of the Pennsylvania constitution of 1777, and the 9th section of that of 1791, and commented upon them.) He said the words "or the law of the land," are industriously introduced into each of these two provisions, and it appears that life itself may be rendered subject to common law forfeiture, under these sections without the right to trial by jury. This is no vain power no idle feather in the cap of judicial authority in that state. Life itself has been forfeited there upon judicial construction without trial by jury. (Here Mr. Donaldson read the case of Wiatt, who received sentence of death in the year 1784 upon an outlawry.) This case flows from the same construction of the Pennsylvania constitution, which they insist lets in the monstrous doctrine and consequences of common law contempts. The same disregard for the trial by jury where a party by the strict rules of the common law was punishable by the judge alone, marks this case which distinguishes the cases of Oswald and of Passmore: let it be admitted that we are bound to receive the common law in this state to the extent that it prevails in Pennsylvania, and the case of Wiatt would be law here, although most positively revolting to the most obvious meaning of our declaration of rights. This case may at least serve to shew the extreme danger of this common law doctrine. I am struck with terror when I consider the monstrous authority which may be arrogated under this admission, and the ease with which all written conventions may be construed into nothing by the dispensing and absolving power of the common law

I trust, sir, I have shewn that the Pennsylvania decisions ought not to be received as the judicial guides of this court, that if they might be reconcileable with their constitution, they cannot be reconciled with ours; and that if they were objectionable in that state on constitutional grounds, they are much more so here, as they would oppose a stronger sanction, and more expressive language These decisions loaded with legislative obloquy, and with the charge of the violation of the law of the land, should only be considered as a beacon or a pilot to warn us of the rocks and quicksands on which the vessel freighted with the judicial independence of Pennsylvania had nearly bilged. These decisions will I hope, be considered as containing satisfactory proof, of the danger of refining on principle, and of permitting abstract and far fetched doctrines in derogation of common rule and right, to counteract the plain meaning and direct force of written conventions.

But, sir, I will read parts of the leading case on this subject— hat of Eleazer Oswald. I turn to this case because it shews the whole grounds of

this assumption of power, and because those grounds, as assigned by chief justice M'Kean, appear to my mind most insufficient in support of the doctrine—(Mr. Donaldson read different passages in the case of Oswald, 5 Dallas, 319, and commented upon them)—Upon a remark made by chief justice M'Kean that "there is nothing in the constitution of this state respecting the liberty of the Press, that has not been authorized by the constitution of Great Britain for near a century past," Mr. Donaldson observed—This is a remark calculated to rouse every national feeling, and preparing us against a surprize on account of the judgment of the court, or from the enormity of the violation of the constitution.—This indeed strikes deep upon our policy, and brings at once to our lips, the overflowing cup of judicial abominations, of which the people of England have been made to drink so deeply Here is a sweeping declaration which enacts into force, and proclaims into law every judicial oppression on the Liberty of the Press, which the conveniences, the fears, or the guilt of those in power, have ever promulgated in that devoted country—And is it so sir, is it indeed true that there is no greater security in this high and happy country for the great Palladium of Freedom (as the gentleman has been pleased to call it) in England? The learned judge has confined his remark to within the last century. When he uttered this expression Mr. Fox's famous libel bill was not the law of the land, tha bill was passed in 1792, Oswald was imprisoned in '88—so that at the date of the decision, it was English law, or at least judicial construction of that law, that juries should not decide *Libel or not Libel*, the fact of publication was alone submitted to them, the question of libel was arrogated by those who knew how to make the best advantage of it—by the judges. Had there been any declaratory act, any legislative provision which had ameliorated the English law in the respect of prosecutions for publications within that space of time? No, sir. If changed at all, it was at the discretion of the judges, who never wanted a pretext to mould this part of the law to their will. But, sir, take the English law of libel from the trial of Sacheverel, to that of the publisher of the Rights of Man, and you may find this judge's principles laid down in legible characters, but not, I trust, the principles of our constitution. (Mr. Donaldson here quoted a number of cases to shew, that the English law of libel was inapplicable in this state, inasmuch as the discussion of abstract speculative questions on the subject of government, had been punished as libels on *the British Constitution*, which he contended that "the most inveterate precedent hunter, the most rootedly attached bigot to British precedent cannot, dare not say is law in this country.) He concluded this part of his subject with remarking, that an incessant struggle to rob the jury, the true guardian of rational freedom, of their right to give a free verdict, whether libel or not libel, ever manifested the insolent rapacity for power of the judiciary of England. And he contended, that when judge M'Kean made the assertion, he made it in direct opposition to the fact, to the injury of the free Press of Pennsylvania, and that a decision founded on such principles, cannot be relied on as authority.

From some remarks of Mr Lewis, which were assented to by judge M'Kean, Mr. Donaldson endeavored to shew the tendency of the doctrine, in its inducements to perjury—(vide Lewis's remarks below in the note)—He observed that this passage exposed to view the foul and monstrous tendency of the whole doctrine and marked it with a stigma, from which every honorable mind turns in disgust. It ought to be a principle of law, as it unquestionably is of morals to place no man under an unnecessary inducement to the commission of crime—Upon this principle it has been wisely provided, that no man shall be a witness in his own cause, for it was found that the allurements of interest were in general, more than an equipoise for the obligations of truth. This salutary principle is not only wantonly

violated by this doctrine, but extraordinary inducements are held out to a person charged with a contempt, to trespass on truth—Never was there such a trap for the conscience, such a temptation to crime as the case of Oswald holds forth. Does it not say, to the wretch whose heedlessness has brought him within the fangs of its precedent, Do, good sir, come forward, and be perjured a little, to oblige the court and to save yourself, and, in consideration of your lying through thick and thin, you shall be excused? The more consummate and unprincipled your falsehood, the more full your atonement, the more meritorious your submission. The real aggravation of your offence shall entitle you to your acquittal, and the revenge which the law takes of you, is, that whereas you were before only imprudent, it has now made you criminal. But if you refuse to swear, or in swearing, only swear to the truth, expect no mercy—judicial discretion has the flood-gates of punishment at command;—and whereas you have contumeliously refused to commit a greater crime to purge yourself of a lesser one, here sheriff take into your charge this refractory and disobedient spirit, who refuses to commit perjury so avoid the consequences of a contempt, and commit him to close custody!——Gracious God! to what lengths are we not carried in tracing the consequences of this abominable doctrine?

Mr. Donaldson having read and commented on this case, observed—Thus terminates the case of Oswald, which will be long famous in the annals of Pennsylvania, as having touched the chord, "where mighty passions slept." The jealousy of judicial power in that state is commensurate with this decision; here commences the contention between the co-ordinate powers, which have no common arbiter, and long, very long will it be before the fatal effects of the dispute will be totally obliterated The question is dormant not decided, and fearful I apprehend will be the struggle when it again occurs. The maxim of *fiat justitia, ruat cælum*, is noble and admirable, but let it not be forgot, that it may be urged as well in defence of an unjustifiable precedent, as most honorably insisted upon by the magistrate prepared to do his duty in defiance of popular odium.

Mr. Donaldson then entered into a discussion of the publication on which the prosecution was founded—He premised with observing, that in the whole publication he had not been able to find a word which reflected on that court in their individual or judicial capacity—the case then was clear of all that was to affect their judgment as to any duty which they had to discharge on any matter within their jurisdiction, and not yet decided.—He said, that from an attentive consideration of the paper, it appeared to him that the only head of offences punishable as contempts, to which this case could be reduced according to English principle, was such as was cognizable in this way, as *doing a prejudice to a party in a cause pending* This, sir, may be effected by publishing or advised speaking only, in one or other of two ways—either by abusing the opposite party for his conduct in the transaction which has given rise to the cause, or by publishing a statement of the facts to the world, so as to prejudice the minds of those from whom the jury is to be taken. If the editor of the Whig be punishable at all for this publication, it must be, because it is likely to produce the mischief which has been stated.

When he considered who were the parties, the absurdity and impossibility of the thing, clearly discharged the case of this ingredient, so essential to constitute the offence—A jury had found a verdict against one George Tomlin, upon the testimony of two witnesses—*the court had not imposed the fine*—Admit the cause pending, it was only pending before the court—Who are the parties? The State and George Tomlin—The state, the commonwealth, the body politick, stands in no danger of prejudice as to her interest in this cause, and there is no affidavit filed on her account complaining of this prejudice. The reason of this may be, that Mr. Attorney was sensible of the absurdity of stating that the state, as a party, was to be

prejudiced by a publication in a cause which she had pending with a citizen. We know that her interests in a prosecution, could not be thus affected any more than by publications concerning a law which might be pending before her legislative body—No; it is no party who here complain—the state stands neuter, it is ten members of a respectable jury who complain of an injury offered, as they suppose, to themselves, it is two witnesses who think themselves marked out for infamy—who are the real prosecutors.

Of that jury, Mr D. remarked, no man thought more respectfully than himself; he was as much their friend and advocate, as those who had volunteered on their behalf; with some of them he had the pleasure of a personal acquaintance, and upon all he looked as men occupying the high ground of unimpeached character, and superior to reproach or suspicion. Such men need not the extraordinary interposition, and summary authority of a court of justice to save them from obloquy, or to avenge their quarrel, Were there an individual in society who credited an insinuation to their prejudice, (did this publication contain one) this day's proceedings would not convince him of his error. It is not this mode of proceeding which protects a bad, or vindicates a good man—These individuals have a much better protection against assault—theirs is the shield of a good name, from whence idle imputations drop harmless to the ground. This publication, however contains no reflection upon them—of this every man must be persuaded who will dispassionately read the publication.

To the two witnesses, Mr. D. said, he had no such consolation to offer; it may indeed be of importance to them to place this court between them and the man they have injured—they may be rotten to the core, and may feel the atrocity of the libel in the severity of its truth.

But the jury *had given their verdict*, and there was no cause pending before them—and these witnesses had sworn, and whether they had sworn to truth or falshood, was matter of fact. As to the first the ten persons who have made the affidavit, were no longer a jury nor any component parts of a jury, as to the second, he who accused another of perjury a twelvemonth ago, may with as much reason be punished for a contempt as this defendant for alledging that these two witnesses committed perjury in a matter which as to them was concluded. The verdict of a jury, Mr. D. contended, when once rendered, becomes *public property*. Its merits may be discussed, its errors pointed out, its propriety disputed. Were it otherwise, the verdict of a jury would be protected by a more formidable sanction than the judgment of a court, and altho' you may dispute the legality of the decision of a tribunal of law, you must not dare to question the uprightness of a verdict. But this is an absurdity. A jury when their verdict is rendered return again into the great mass of society, from whence they have been taken, if their decision be arraigned, if their characters be assailed, if impure or improper motives be attributed, theirs is the remedy of the citizen, the great constitutional resorts of action or indictment: To give them more, is to take from jury-trial one of the great guarantees of its purity—*the fear of public opinion*, which should bind them as firmly as their oath Take away the apprehension of the open censure of their fellow citizens, and you remove one great barrier to corruption in the jury trial.

But I contend, sir, Mr D. observed, that there is not a word in this publication, which can be considered as reflecting on this jury—Here Mr. Donaldson read and commented upon the different parts of the publication. His arguments tended to prove, that the object of the writer was to stigmatize perjury, and to represent the dangerous consequences which might result from a jury believing the statement of a man in one instance who had been convicted of falsehood in another.

Upon the observation in the publication "would it be amiss if jurors were to reflect there is a God above us?" Mr. Donaldson said, This abstractedly speaking is a sentence of solemn import, and much dependance may be plac-

en upon it, to shew that the editor intended a wanton attack on the jury—If by this remark he meant to insinuate, that this jury, although bound to justice, and the discharge of their high and important duty, by the awful and sacred obligation of an oath, which is a contract to truth from the creature to his god, had wilfully deserted the sacred trust, and thrown the pledge of their creator, its author might deserve every extremity, but that the law should be strained to his punishment But if from the context of the whole piece, from what precedes and what follows, from his own repeated declarationis, the obvious sense of the passage, be, that it is the bounden duty of a jury to discredit altogether men who, under the eye of the all-searching God, polluted their lips with falshood, and that a jury should "reflect," that as "there *is* a God above us," one of whose attributes it is that he will punish falshood, so it should be with them to begin this punishment here, by setting the seal of reprobation on those guilty of a violation of truth, then,this would be a reflection, not so much on the jury, as on these witnesses, and the only imputation which could be drawn from the sentence is, that a jury had extended belief to those unworthy of credit. If it had been his intention to have said that this jury *had forgot* "*there is a god above us*," he would have used the word "*remember*," not the word "*reflect*." But he again contended that whatever might be the interpretation the court might feel disposed to give to this passage, no insinuation to the prejudice of a jury who had given their verdict could be construed into a contempt. As a jury, they no longer exist, as individuals, they are entitled to legal remedy, but as part of the administration of justice they are no longer peculiarly protected. The case of Hollingsworth *vs.* Duane, which Mr. D said he had now seen for the first time, is totally inapplicable. There a *prejudice had been done to a cause pending*, by a publication, when the most material question, the *assessment of damages*, was to be made by a jury not yet impannelled. Here all the jury could dohad been done.

But, Mr. D. observed, it might be contended that here is a contempt because there are other causes of a similar nature depending against others included in the same indictment, in which the same evidence would be rendered, and part of this jury might be impanelled. If a prejudice couldbe done at all to such causes before the juries who were to try them, it would be to the injury of the editor of this paper, and of those who were involved with him. This it cannot be denied might be the case, although, he observed, he thought too highly of jury-trial, to suppose that juries would be so readily prejudiced. But he hoped that this court would not punish an individual, because he may be weak enough to injure himself. And this remark is applicable to the witnesses Elderkin and Bickham. A man who is to be tried for an offence quarrels with a number of individuals who are to be upon his jury, and at the same time abuses two witnesses who are to give evidence against him before this jury Now could the wit of man have discovered a more effectual mode to prejudice the jury against himself, and to dispose them favorably towards his antagonists? since he most injudiciously creates a common cause between hostile witnesses and his judges. To call this a contempt is to say that to do one's self an injury is a contempt, to prejudice one's own cause is a contempt, to deprive one's self of almost a chance of acquittal is a contempt, if it be a contempt, it is an absurd contempt, it is a contempt against a man's self.

Mr. D. said he had seen no case which decides, that to speak ill of witnesses, in a cause, is contempt. In Wils. 75 an attachment issued for threatening the life of a witness—here is no comparison between the cases. There a witness might be intimidated from doing his duty, here he could be only stimulated to swear harder. It could not be credited that of the pannel, there was one who would believe that these men were perjured

from its being so said in the Whig. The fact is directly the reverse, for the jury who tried Irvine believed these witnesses, although most solemnly and positively contradicted by respectable evidence, and found a verdict against Irvine on their testimony. Perhaps this very publication had a great effect in establishing their credit.

This then appeared to Mr. D. to be a ridiculous charge. If Baptis Irvine prejudiced any person in a cause pending, he prejudiced himself and those connected with him. He injured no other party in a suit. If these ten jurors are offended, the law is open to them.

If Elderkin and Bickham wish to ascertain the value of their characters, let them ask its price at the hands of a jury. But in God's name let us not break through every boundary to get at a summary vindication of their reputation, and trespass on the constitution to maintain such characters inviolable.

Mr. D. said he had taken a concise view of the subject, and endeavored to rest it on solid foundations. He had no doubt of the ingenuity of his opponents, but he trusted the court would not be deceived by the mist with which eloquence ever delights to invest a subject, on which she employs her fascinating powers. His was not the "mighty spell which led reason captive, and madeth worse appear the better cause," and he acknowledged that were it his duty to address the court on this day on behalf of the power they are now called upon to exercise, that he would find the constitution too heavy for him, and would sink under its pressure. Happy was it for his opponents that they either had not his convictions, or having them, could still go thro' their duty with quiet hearts and composed countenances. A lively picture had been drawn of the licentiousness of the press—he deprecated the licentiousness of the press as much as any man; but this was not the mode to correct it: it was for a jury to correct the wanderings of the favorite offspring of freedom. The gentleman who commenced the argument had shewn that he had dived deep into the mine of British precedent—he would not attempt to follow him, he deemed it superfluous. In lively colors he had painted the enormity of an attempt to corrupt the streams of justice and had loudly demanded the victim. That victim he again asserted, was only assailable in this mode, thro' the liberty of the press, and the sides and breastwork of the constitution. The blow that was aimed at Irvine, if it took effect, would recoil on society. Much had been said and clamored of late about the evils of innovation, where the people were legally asserting their right of amendings the form of government of the city, to those who made this outcry, how much more dangerous must that innovation appear which is an innovation upon all practice and all right, an innovation on the constitution which subtlety itself cannot reconcile to its provisions? But the danger of permitting such examples may be insisted on, and this court called upon to check an evil in its bud before it ripens into maturity. Alas, sir, this day's proceedings will not cure the mischief. Depend upon it, resistance rises in proportion to oppression, whether real or fancied, and popularity ever takes him by the hand who appears to be the subject of party persecution. The editor of a newspaper may be furnished with constitutional weapons which may be presented to him from the hands of a court of justice. He may be punished, but his punishment may become his triumph, and instead of being silenced, he may only be enabled to address himself with more efficacy to the feelings of the great body of the people. Of public opinion, even the laws must be afraid. Instead of the petty editor of a paper, the administration of justice may have to contend with one who will be looked up to as a martyr. Over such a state of things no rational temperate man would exult, at such a state of things he should most unfeignedly lament.

Mr D. concluded with saying, that much yet remained to be urged, and many topics of argument had been entirely untouched. He was sensible he

had neither done justice to the subject, nor to his own feelings. His respected colleagues would throw great additional lights on this most important question. He had great hopes that the court see the matter in its proper point of view, and in the expectation that discarding all prepossession from their minds, and with their eyes immovably fixed on the constitution of their country, they would so decide that their judgment should be an honor to them thr ugh life, and its remembrance a consolation to them in death, he committed his client to their charge.

The following are the remarks referred to by Mr. Donaldson in his speech—page 22, 9th line from the bottom.

"*Lewis* said, that as a misrepresentation had been industriously spread abroad respecting the conduct of the court, he thought it proper at this time concisely to state the real nature of the present proceedings. It has been asserted that the court were about to compel Mr. *Oswald* to convict himself of the offence with which he is charged: but the fact is this, that it is incumbent upon the person who suggests the contempt to prove it by disinterested witnesses; and then, indeed the defendant is allowed by his own oath to purge and acquit himself in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. *Oswald* being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done) but to enable him to avoid the punishment which is the consequence of it. The court employ no compulsion in this respect. He may either, answer or not, as he pleases: if he does answer, his single oath in his own favor, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the judgment of that Court must necessarily follow.

M'KEAN *C. J.* Your statement is certainly right, and the misrepresentation, which is attempted, must either be the effect of wickedness or ignorance.

MR. HANSON.—It has been said that I made many remarks upon the former cases, which were improper, and that I made use of unwarrantable expressions—if my language was not warranted at that time it is now fully warranted. The counsel for the respondent Baptis Irvine object that this rule ought not to be made absolute, because the court have no power in the case. I contend that the court have the power to grant the rule and to punish the contempt. Some remarks have been made upon the delay which has occurred. We profess not to be dissatisfied with this delay, although the injured and insulted jury have a right to complain. The case before the court is distinguished by peculiar aggravations of the offence, and punishment ought to be inflicted in proportion to its malignity & enormity. This is the first case of the kind that ever occurred in this state, and I trust it will be a lesson to all who assault and injure innocent characters. The court are bound in this particular instance to grant the motion which we have made for the preservation of its own honor, and the dignity of the laws which they are appointed to administer; if this doctrine of contempt be not established the court will become contemptible. The law has been menaced by this Baptis Irvine, and the recollection of this menace must not be lost. If this "*hired minion to defame men*" be permitted to do as he pleases, what will become of society? Authorities have been already cited in this case to prove the points for which we contend, and it cannot be denied that the doctrine of contempt has been recognised, and that the practice of punishing for contempts in the summary mode of attachment has been adopted in this country, and that it is now incorporated with our judicial proceedings. Hence I argue that this court have the power to act in a summary manner. Besides this power has been exercised from time immemorial, and indeed it is essential to the courts of justice. During the

argument, an attempt has been made to excite the sympathy of the court—but how can the court feel any pity for Baptis Irvine? the party complained of is one of the most obnoxious men in the city. When he came to reside amongst us, our political hemisphere was all harmony and peace—he has thrown the city into disorder by the malevolence of his heart, and the slanderous productions of his pen, and notwithstanding all the rebukes which he has received, and although the civil docket groans with the load of prosecutions for libels which are commenced against him, he still persists in his infamous conduct and threatens all who oppose his proceedings. Who is Baptis Irvine that he should receive the compassion of a court? This Pennsylvania democrat, hired from the hot-bed of democracy, nurtured and brought up by Duane himself of famous newspaper memory—than whom not Moloch himself is more qualified to sow the purposes of hell. And with regard to Irvine, the jury whom he has maliciously libelled and slandered are, when their characters are compared with his, as far his superiors as Hyperia is superior to a Satyr. And this is not the first nor the last time that this court has been treated by him with contumely. This political tyger will not let this court alone, he has fastened his claws upon it and seems determined not to release it until he has devoured his prey.

Mr. Hanson here adverted to the different cases of contempt as stated by Mr Donaldson, and in opposition to the latter he stated, that upon the principles which had been defended, the summary mode of process if issued at all is a violation of the bill of rights. He then read a passage from Tucker's Blackstone to destroy the opinions which Mr Donaldson had introduced from the same work.

The common law of England, said he, is now operative upon this country, and what is the practice and power of courts of justice by the common law? Cases prove that the courts of this country have acted in a summary manner. A passage from Tilghman's decision in the case of Duane was here introduced. It remains to shew the distinction between the alledged contempt and the doctrine of the bill of rights. Mr. Hanson in adverting to the passages already quoted by Mr. Donaldson, endeavored to prove that the bill of rights did not bear upon the doctrine of contempt. It has been said, he continued, that a combination of lawyers have been set on to persecute the traversers in the former trials, and particularly Baptis Irvine. I disclaim all the insinuation conveyed in this report, although every man who does his duty as an attorney at this bar would do the same as I have done. If this man be permitted to persist in that course of conduct which he has lately pursued, the liberty of the press will be trampled under foot, and I ask any person to shew any sanction in the bill of rights to these libels—I ask where in the bill of rights does Irvine derive the right to calumniate his neighbours, & if this power be not therein given him, we will contend for the constitutional right of this court to punish in the mode which is pointed out, and we require the protection of this court that we may be preserved from calumny while acting under its authority. It has power to give this protection, and we contend that in the present case our prayer cannot be refused. This power grows out of the law and is absolutely necessary to its existence. And I assert that if such publications as these be not stopped this court will be void, and its power will be a mere shadow. And is the punishment of a violent hot-headed Irvine, who lives by defamation and who preys upon the dead carcase of polluted reputation to excite sympathy in this court? No. It is their bounden duty to root out this poisonous weed which has lately sprung up from our political institutions: and this court cannot lend its assistance to support this man's conduct; for if it could sanction such conduct as this, the most dangerous example would be proposed to the country, and there would be gained one of the most alarming triumphs over injured innocence. This doctrine, against which I contend: these mad doctrines upon the constitutionality of the

court to grant an attachment will destroy all justice and subvert all power. Mr. Hanson here read M'Kean's opinion, already quoted. In making some remark he was interrupted by Mr. Donaldson, who rectified a false quotation from his argument; and he contended that M'Kean's opinion being supported by Tilghman, rendered the law incontrovertible. Mr. Hanson next noticed the resolution of the majority of the Pennsylvania legislature upon the subject of the three judges, and read their resolution, and, says he, I hold that it is a fair deduction, that the court in that instance, honestly and fairly discharged their duty. Mr Hanson then read Lewis's opinion in the legislature, and quoted some from it, p. 520. He next introduced a case from 2 Vezey. It is objected, continued he, that there is no party upon the record against the traverser. But I contend that the counsel admitted that a contempt of court had been committed. Although the court are the party injured, the court have the power, and the law says it to punish contempt. The law of the state says, that in all prosecutions for libels, all matters of fact shall be heard in evidence, therefore I shall offer in aggravation of the offence, additional matter from the Whig, to shew Irvine's determination and resolve to insult the court and to bid defiance to its authority

Mr Kell here rose and objected to the reading of the paragraph from the paper, and particularly that of this morning, to which Mr Hanson adverted. The evidence, says he, upon the case which is now in argument, is now before the court. But I would ask is this paper, which the gentleman proposes to read in testimony, in the court? This point is so indecisive, and the idea of the gentleman to introduce this paper is so extremely improper, and his defence of himself for this illegal proceeding so dissatisfactory, that I cannot apply my objection to any object. This court is to pass its judgment upon the record of facts *already* before them But the gentleman says that my client has committed a contempt since this publication immediately before the court, so that he wants to shew that if the contempt was not committed before, it has been committed since. I cannot allow of this proceeding.

Mr. Kell having sat down, Mr. Hanson quoted the former case again.—This decision, says he, was founded upon the subject of contempt, and therefore a subsequent phblication can be introduced to shew the guilt of the party. This man has been guilty of subsequent and repeated offences; and are we forced to make new motions? No, for these are either new contempts, or continuations of the same contempt, and we can adopt them at our choice.

Mr. Kell remarked that this was totally devoid of discrimination. It was not saying what is testimony, or what is not. He here referred to the New York Term Rep. as quoted by Mr. Hanson 409. This says he, was an application to annul the decision, and therefore I argue, that upon the gentleman's own principle, he must not bring forward this paper in the present case, and he may either bring forward a new motion, or no motion, as he pleases.

Mr Hanson said, that any corroborative evidence might be introduced —I can prove either that five or six contempts have been committed, or that they are the continuation of the same contempt—and must we, although we can prove that this is an aggravation of the crime, be obliged to come forward to make new motions and to swear to new affidavits?

Mr. Meredith said, that the paper ought to be read in aggravation of the contempt.

Mr. Kell replied—I cannot admit it—the court must judge by what is already before them—but as to new motions I care not—You may, if you please, swear till you die.

The court at length decided that the papers which Mr. Hanson proposed to read could not be heard before the decision of the court, but that they

might be produced as aggaavation of the offence.—Mr. Hanson proceeded It has been said that party spirit has been excited, and that the court-house has been crowded to assist or to sanction the humiliation and destruction of the traverser. This is a wrong statement—and even if it were untrue—it would be no wonder—since the people would attend to witness the punishment of an offender brought to justice; and of the most infamous paper which ever was established It has been said that no man wishes himself punished—but Dapris Irvine has the privilege after the decision is given if he be found guilty of that contempt, to purge himself by interrogatories. It is true that after he became alarmed he endeavoured to explain away the offence by a subsequent publication—but even allowing this explanation to have been effectual he has since repeated his offence, and this proves that his was a deliberate design to attack the court, and hence I argue the necessity of punishing him. Not long since our city was peaceable, no one appeared to disturb its harmony—now it is a scene of discord and confusion. He has attacked not only the law—but a well regulated police and all our institutions which are held most sacred. His foul and defamatory writings have pervaded every corner, and so great is the disorder in the city that no family is exempt from his pestilential contagious influence. This court, therefore, cannot sanction him in his proceedings, and of its power, there can be no doubt. But is not this contempt of court? Yes—yet we are attempted to be confined to this paper by which alone we could not prove our case. Mr. Hanson here read some of the papers from the Whig which were the ground of the motion, and commented upon them.

We may directly argue, said he, from this publication, that the court sanctioned the introduction of improper witnesses to perjure themselves; and that he threatened them for this conduct. He also charges them with preventing correct evidence, or permitting the introduction of improper testimony to go before the jury. This publication is a direct charge upon witnesses; that they were perjured; and any attempt or publication to injure the court or witnesses, or jury, or any persons under their jurisdiction or protection, in the opinion of the world, is a direct contempt of that court. Besides, this man says to the jury, that they not only returned their verdict upon false evidence, but that they have actually perjured themselves; and this was Irvine's intention according to the affidavit of the jury; I therefore assert that he has been guilty of contempt. It has been said, that this case cannot come before the court upon this ground, because, if any impropriety has been committed, it is a crime which entitles the person charged with it to a trial by jury; but I argue that this is a contempt, and consequently that the matter of fact, as well as the matter of law, which are so closely connected, and indeed that the paper itself, becomes a matter for the opinion of the court; and there is the strongest analogy between this case and that of witnesses who refuse to attend, or who refuse to be sworn when in court, which the counsel has admitted. I must therefore pray that the attachment may issue.

☞ *The following cases are so extremely pertinent to the subject of this trial, and are so little known that they imperiously call for insertion, and as the proceedings of the first day are now concluded, the perusal of these curiosities will give the reader an additional zest for the remainder of the pamphlet.*

THE KING *versus* Wm. Johnston & George Drummond. } Warrant to apprehend for publishing a false, scandalous and seditious libel, tending to bring his Majesty's high and honorable court into disrespect with the people.

" Sometime during the month of December 1792, or January 1793, three journeymen printers, in a drunken frolic, went into Edinburgh Castle, and having called for liquor, drank some foolish and ridiculous toasts: amongst others it was said that they had drank d—m—n to King George, and all crowned tyrants. Not satisfied with doing so themselves, they endeavored to persuade some of the soldiers who were in the public room to do the same. The consequence of such imprudent conduct was what might have been expected. They were committed prisoners to the main guard, and next day delivered up to the civil power. Shortly after, they were served with an indictment, charging them with being guilty of an attempt to seduce his majesty's military from their duty and allegiance. They were tried and found guilty, condemned to nine month's imprisonment, and to find bail for their future good behaviour.

The editors of a newspaper then published, called the Edinburgh Gazetteer, reported the proceedings upon the above trial in their paper .In this report they also gave the opinions delivered by the judges. The opinion of the lord justice Clerk (the supreme judge of the court of justiciary) was, " *That to curse Almighty God was nothing, he was too far exalted above us, to take any notice of such foolishness;*

*but to curse our gracious sovereign was the height of impiety."**

For the publication of the speech containing the foregoing curious sentiment, Capt. Wm. Johnston the proprietor, & George Drummond the editor of the paper, were by a warrant of Lord Justice Clerk, brought to the bar of the court and charged with publishing a "false, scandalous and seditious libel upon that Majesty's High Court of Justiciary, stending to bring his High and Honorable Court into disrespect with the people." *Proof* was offered by the counse', for the defendants, that lord justice Clerk had said so, but the court refused its admission, upon the grounds that they were judges of their own privileges, and that it was a contempt of court. No other alternative was left to the accused than that of submitting themselves to the *mercy* of the court. Accordingly, on Saturday, the 23d of February, 1793, they received the following sentence. Captain Johnston to pay a fine of one hundred pounds sterling, three month's imprisonment, and find securities to keep the peace for three years, under the penalty of three hundred pounds. Mr. Drummond three months imprisonment, and to banish himself from the kingdom.

All this was done without the intervention of a jury.— However the matter might be twisted by a lawyer, the plain English of it is this : the *court* were the aggreived parties, and the *sole judges* in their *own cause.* Now, they certainly knew whether the lord Justice Clerk had, or had not spoken these words. If he did not, then the editor and printer, ought either to have apologized for their mistake, *or if wilfully misrepresented,* they deserved punishment. If they were not spoken, then the court had a fair opportunity of asserting their dignity, and of clearing the character of their presiding judge : if true, it was but justice they should have publicity.

* *This is that common law which we are told is sanctioned in this country by the bill of rights—the people ought therefore immediately to oust it completely, and from the influence of such infernal doctrines and their evil consequences, we may devoutly pray for deliverance.*

"In 1790, the printer of a newspaper in Dublin, under the title of the Phœnix, was prosecuted by a reverend divine, for a *false, scandalous and seditious* LIBEL, published in his paper of the 19th of May, same year. This was said in the indictment to reflect injuriously upon the character and conduct of the prosecutor: it accused him of having associated with, and directed a tumultuous mob, during the time of an election at Kilmainham, of having worn election ribbands in his hat and breast, and having uttered oaths and blasphemous expressions, unbecoming the character of a clergyman.

After counsel had been heard for the defendant on account of several *interlineations* in the original copy of the indictment *made after the attested copy was procured*, as well as to the admissability of the evidence, together with other objections against the legality of the proceedings all of which were overruled by the court, the prosecutor himself was the only evidence examined. Upon his cross-examination this very prosecutor admitted the TRUTH of the circumstances above stated.

The jury after being a long time enclosed, returned a verdict in the following words: "We find that the defendant is *printer* and *publisher*, not guilty of any libel."

The judge refused to accept the verdict, and told them they must return a *general* one. Accordingly they were sent back to the jury-room, and locked up until nine o'clock the next morning, when the court met, and then returned a general verdict of—NOT GUILTY!

The judge was displeased, and held his hands while he thanked God it was not his verdict. One of the jury told his lordship, "that the indictmeut stated the libel to be *false*, but the prosecutor by his own evidence had admitted it to be *true*, and that in consistence with their oaths, they could not have found any other verdict." The judge in reply to this, quoted the following opinion of lord Mansfield, viz. "The truth of a libel, is an aggravation of its guilt," or, "that a libel is the more a libel for being true;" the juror answered, "my lord, *we* cannot hold that opinion."

The behaviour and sentiments of this judge, was founded upon many precedents, so common had they become about this time under the British government, that they attracted the notice of one of the Scots judges, viz. Lord Grandenston. In a life and character of the celebrated George Buchannan, published by him, is the following remark:

"Though he lived and died in the bosom of treason, rapine and proscription; Buchannan would have seen with surprise our modern standard of morality. We call ourselves a FREE PEOPLE, and yet we have submitted to hear from the chair of justice, *That* TRUTH *is a libel*, a doctrine which tears up the foundation of civil society, and compared to which transubstantiation, or even the divine right of tyrants, is a modest and respectable sophism.

"It is natural enough that a *Barrister* whose life has been employed in brawling, should in the end, distort his own mind out of all sense of *equity*, and when *he* mounts the saddle of authority, such decisions may sometimes be expected; but what shall we think of those *abandoned jurors*, who sporting with the life of their fellow-citizens, have crouched under this utmost insolence of judicial corruption."

"The foregoing is not the empty declamation of a poor, discontented, and disappointed Jacobin. It is the opinion of one of the senators of the Scots College of justice in Edinburgh. The remark is supported by strong and undeniable facts both in Britain and Ireland. A variety of instances have occurred in those countries within the last thirty or forty years, of people being punished for *speaking*, and *publishing* the *truth*. Hence it must follow, that if those are to be punished who speak or publish *truth*, then they who speak or publish *falsehood* ought to be rewarded: but this *last*, is not established by *precedent*."

Friday, Februarry 19.

Mr. GLENN. It now becomes my duty to offer a few remarks upon the very interesting question now before the court. In the wide and general view of this subject—I am under no apprehension for my client—as this prosecution cannot be supported either upon the principles of the law, the constitution, or of treason. This is not as has been represented, a case between the state and Baptis Irvine—it is referring to him as an invidual only, of small importance whether he be fined, and imprisoned, or whether he shall be deprived of his liberty and property, provided that this was the sentence of the law: but this proceeding is intended and calculated to give a mortal blow to the liberty of the press, and to the right of expressing freely and without restraint, our opinions of public men and public measures. Not only as the advocate of Baptis Irvine, but the advocate of our constitution and liberty of the press do I come forward. I rise under a solemn impression of the high importance of the blessings which we enjoy, and with a conviction that our noblest privileges and that of our political happiness flow entirely from the sacred principle of the freedom of discussion. This is an attempt arbitrarily to rob us of our richest possession, and to dry up the sources of those enjoyments, which have been acquired by the freedom of the press, to which simple and single principle may be attributed the origin of all our comforts. It is therefore one of those pillars in the support of the Temple of our Rights which is most invaluable and important—and the court cannot destroy it—and I trust they will not abridge it in any of its extent. We enjoy more light than any other part of the world—knowledge is more widely diffused amongst us—and in every part of our free and happy country—the citizens are able to judge of the propriety of their governor's conduct, and to determine its consistency with the constitution. Whence was all this knowledge derived? to what source must we look for all that distinction which marks the people of the United States—when contrasted with that of any other nation upon earth? It is the general circulation of newspapers which has rendered the ignorant in some measure acquainted with the proceedings of our government—this privilege of hearing of all public acts through the medium of the press has excited every man's attention to the rulers, and has awakened every man to a just estimation of his own importance in the scale of civil society. There are no boundaries to the extent of the freedom of the press, but those which the law of the land expressly declare—therefore the distinction which some effect to make between the liberty and the licentiousness of the press—is a mere nullity—as there are no limits prescribed by the constitution, the bill of rights, or the law—how different is their labour who attempt to prove the propriety of violating every principle of liberty which is recognized in the constitution merely to serve the views of a political prejudiced party. Unless we keep ourselves close to the law of the land on all cases of criminal jurisdiction especially, we are overwhelmed with difficulty. The mode of punishment in the case now before the court is distinctly pointed out by the law.—Every man has a right to punish another who publishes any thing wrong concerning him, by a regular application to the courts of justice, and a trial of his peers. How therefore can there be any other restriction imposed upon the press than the express law of the land; and to that every individual in the community may resort who has either been slandered in his reputation, or injured in his property, the law of the land has clearly marked out and defined what publications shall constitute an offence, and what shall be considered as innocent and harmless; the prosecutors therefore upon this occasion have carefully avoided calling upon my client in the ordinary course of judicial proceeding, be-

cause they well know that neither an action nor an indictment grounded upon the publication now under consideration could be supported.

They therefore had no other means to satisfy their enmity but to proceed against him in this tyrannical mode—and force a man to appear to plead—where he has not a trial by a jury—and where the court is the party complaining—judge and jury. Besides what can result from any publication when it does not appear to be slander? It can have no ill effects upon the publick—and therefore in this proceeding I say—that it is going before the law of our country, which tacitly reprobates the principle contended for—which it has exploded from it—and which never can be admitted without the total overthrow of those liberties, which it was the object of the revolutionary contest to secure. We have no need of this hateful proceeding—our laws already fix what is slander, and what is not; and as every man is bound to know the laws of his country, if he transgresses them he is punishable:—but the court and the prosecutors know as well as I do, that there is no law which says that this particular action is a crime as referable to the jury who sat on Tomlin's case. The law cannot, without opposing the constitution, make a man guilty of constructive contempts—and as we have no law which affects this proceeding, I contend that the court are called upon to act without law—contrary to the constitution—with no boundary but their discretion—and no guide but their own notions, which are equally fallible, and liable to be mixed with prejudice and incorrectness as those of other men. Why then, I ask, apply to this uncertain remedy for an alleged wrong committed?—The law of the land has already fixed the correct plan of acting—and it is obvious to every man that the reason why it was not adopted was because my client is not guilty of any crime, and consequently he could not be punished to gratify the intemperate zeal of a political party, who boldly avow their determination to crush him But to advert to the publication which is the alleged cause of this persecution—I contend that no application can be made between the publication and the facts as they appeared upon the trial, unless the jury say that the matter published is true; and from my knowledge of that jury, with some of whom I am intimately acquainted, I assert that no man can believe it—and if any individual either knows or thinks that he is guilty of having acted as this publication insinuates that jurors may act—and thinks himself guilty of having violated his duty in the manner to which this paper alludes—I have no objection—although I do not—he may make the application, and if the allegation be true, my client is justified in the publication. I shall now read the publication in question to shew that it could have no reference to the proceedings of this court in any particular case—but that these remarks might be as well applied to most other trials. Mr. Glenn read the publication. Here, said he, there is nothing like the circumstances which appeared that day on the trial of Tomlin—nor is there any thing which bears any analogy to the proceedings of the court! The paragraph itself cannot be construed to have any reference to the testimony; and the affidavits themselves vague as they are, give us nothing to rest upon which bears any relevance to the case but the belief and the impressions of the jury and the witnesses But is no man at liberty to call in question the verdict of a jury, or the decision of a court?—Yes, I will do both—when and where I please—I will deny the propriety of a jury's verdict or a court's decision, if I think it wrong—Every citizen has a right to do the same—and if the jury in this particular case have done wrong, or if they have returned an incorrect verdict, the editor is right to call it in question if such be his apprehensions.—What! *are the courts of law to be the only department of our government whose acts shall not be examined?*—No—*this is the very part of our political system which demands most investigation.*—*What is it that has reduced the people of England and Ireland to their present degraded situation? it is the conduct of the judiciary—and if our liberties*

are ever destroyed—it will be from the same source and upon those very principles which in this case are defended on the part of the prosecution. To shew the application between the publication before me, and the facts which appeared on the trial—and this is indispensably requisite before this proceeding can have even the semblance of legality—it must be admitted that the jury acted according to the intimations of this paper, else no sophistical ingenuity can possibly apply it to the editor, so as to make it a criminal act. Here there is no name mentioned—there is no criterion by which we can judge—there is no connection which can be made to appear betwixt the case and the questions in this publication—and there is no application betwixt these sentences, which I have just read, and the case before the court. The clause upon which the gentlemen have so strongly relied—"Would it not be well for jurors to reflect that there is a God above us?" is perfectly innocent both in its nature and even in its individual application to any jury who have already returned their verdict, or who are still sitting to give judgment. Surely we are not so lost to our conceptions of the high value of our liberty and independence, that it is become a crime to admonish a man under the solemnity of an oath to act even in opposition to his prejudices and passions that he should recollect that the God to whom he has appealed is viewing his conduct, and that whilst men know not the grounds by which he is actuated, his Creator knows his most secret motives. But admitting, for the mere sake of argument, that Baptis Irvine intended to apply these hints to the trial of Tomlin upon the preceding day, the arguments of the gentlemen, to shew the application, are extremely far-fetched when they endeavour to make this the subject of a contempt. Do we not, as counsel, always endeavour to impress the jury with this idea, that they are acting under peculiar obligations, and that therefore they ought to be peculiarly watchful over their conduct. No counsel, if this doctrine of the prosecution be admitted, can be exempt from the charge of contempt, and I do not know how any lawyer is justified in defending any cause. If this be contempt, then much of our common intercourse is mutual contempt; for this is nothing more than an admonition, which it becomes every honest man to give to another, and which it becomes every honest man to receive.—This paper does not apply to the present case, or to any other particular case which has been decided—because, if the grand jury found their indictments upon this statement, which appears upon the record of the court as the ground of the present motion—they certainly acted wrong. How can we apply this writer's enigmas to satisfy the doubts of our minds? It has been said that the two witnesses are libelled, that the one is called a thief, and the other a perjurer—but upon any trial wherein discordant testimony had been given, or there were strong grounds to doubt the truth of any part of the testimony, I would make an appeal to the court or to the jury, and ask them the very same questions which are now so strongly reprobated; and I will be bold to assert, that no honest man can say that either of the questions which I have just read is improper. I cannor, without a strained and forced construction, apply the case which was before the court to the publication in question, unless it must be admitted that because a man publishes a story of something which can be twisted into a resemblance, it must be inevitably like it: but this can always be done in almost every instance—and if men are determined to make likenesses, they can do it according as it may suit their prejudices or views—but not according to the principles of reason, or common sense; and it is absurd and impossible in the present case, to attempt to make a fair application. But I shall further argue, as indeed the counsel for the prosecution have by their conduct tacitly confessed—that if the application of this paragraph to the present question could be made to appear, which I altogether deny, and if it could be positively and absolutely demonstrated to refer to the jury who tried Tomlin's case, still there is

nothing slanderous. It is nothing more than a string of interrogatories; it is merely asking questions; which every man may answer; and if in his conscience he knows himself guilty of the crime to which they advert, he would, he could not avoid to make the application. There is nothing in the whole publication which amounts to slander by the law, and there is nothing which by the law can be construed into even that consequential contempt of court upon which the counsel for the prosecution so strenuously insist. And I do declare it to be the sentiments of my mind, that Baptis Irvine, or any other man, had the most undoubted right to say all that he has said, without being thus unjustly called upon to answer a rule, and to be liable to punishment in this summary manner. How can any man say that the jury were insulted? They had discharged their duty; they had returned their verdict; they were dismissed by the court; and they were both in the eye of the law and in the knowledge of their fellow-citizens—functus officio. They were not then under the peculiar protection of the court, as part of the body which were assembled to administer justice—as their public duties were discharged; they were become solitary individuals, and were no more a part of the court than any other citizens; all or any part of whom might be summoned to attend in the discharge of a juror's duties. Having discharged their duty, and acted as they thought proper; their conduct as jurors became a fair question for public discussion, and every man has a right to examine the justice, and the propriety of their conduct. Besides, we have very strong reasons to examine their conduct; as a motion for a new trial has been made upon ground which cannot be resisted. And in many instances have I known verdicts, which a jury have returned, at once set aside by the court upon their own convictions that the jury had acted improperly. But how strained is this doctrine for which the counsel for the prosecution contend; they would take from us the right to examine the proceedings of courts; but I hold it to be the duty as well as the privilege of every citizen, after the jury have returned their verdict in any case; or the court have given their decision, to call in question either their or your conduct. If the people once suffer decisions to be made by the courts, and permit them to pass without investigation, all our liberty is at once taken from us, and with it every blessing which we enjoy. The proceedings of courts of justice are altogether free subjects of discussion after a decision is made: and it is owing to this liability to be arraigned at the bar of the public, that justice is kept free from partiality, and courts free from error. The gentlemen who have made this affidavit, were at the time of this publication no longer a jury; and we have full liberty to investigate the merits of their conduct: and how they can possibly come forward, or from what motives, and make the application of this publication to themselves, I cannot discover. These remarks are not slanderous; they have no individual reference; and they have no evident, plain, direct allusion: and if sophistry could make them apply to the parties, and if they could be proved to be slanderous; this court have no jurisdiction; and it is most unconstitutional to act in this summary manner by attachment, for which the prosecutor has moved the court.

That courts have a right to issue an attachment in certain cases, which are erroneously called contempts—I have no doubt; because if this were not admitted the administration of justice would be destroyed—but this arbitrary power, for it is arbitrary at the best, must not be extended to every case—it must be restricted within the bounds of the law, and must not oppose the injunctions and provisions of the constitution. These are those cases in which, I conceive, that a court have a right to award a summary process: because there are certain causes which imperiously demand the interposition of a court—without which justice could not be obtained, and in these cases, the exercise of power is an inherent right and a concomitant circumstance which belongs to the court. They have the authority

to exercise this power of summary process over their own officers—they have jurisdiction also to compel the attendance of witneses and jury-men—and they have the power of suppressing disturbances which may be excited within the sight and hearing of the court: if any man disturb and interrupt the orderly administration of justice by any means which come immediately within the personal knowledge of the court—they must necessarily be enabled to suppress the proceeding—they must have the power of fining or imprisoning the party or parties offending. These are the only instances in which a court have the right or can exercise the power of punishing offenders by the summary process of an attachment. These contempts are all direct and abstract in their nature, and without the power in courts to punish them at once a total stop must be put to the administration of justice. Thus far then the law will justify the court—but to go beyond this is treading upon the most dangerous ground. One court may assert this to be a contempt—another will assert something else to be a contempt—and thus there will be no certainty upon the subject—until from a monstrous load of contradictory precedents—every man will be exposed to punishment at the discretion of a court—unjust in its nature—arbitrary in its application—and ruinous in its effects—a punishment contrary to the constitution—opposite to the bill of rights—and totally subversive of the liberty of the people. And that the cases which I have cited are the only ones which can come before any court; I would again draw the attention of the court to the 19th, 20th & 21st. sections of the bill of rights, which my learned colleague has already introduced.

From a fair and impartial consideration of these important passages, it is evident to a demonstration, that government meant to confine courts from the exercise of that power which the English judges have arrogated upon alleged cases of contempt. There is a still stronger ground of objection to this proceeding, if we consider it in connection with the Bill of Rights. The subsequent steps of a decision in favour of the prosecution for a contempt, are equally objectionable with the doctrine itself. The interrogatories which are to be put to the supposed offender by a prosecutor might make him criminate himself, by giving evidence which might be afterwards twisted to his injury. This is the first case which has ever occurred in this state—and no law, no precedent in our state can be shewn by which the parties can be thus called upon to answer interrogatories for constructive contempt: and as it is the first, so I hope it will be the last case, in which an attempt will be made to fix upon a man the charge and the penalty of a contempt of court, when neither the constitution nor the law of the land declare him, or can make him guilty of any crime.

By the twenty-first section of the Bill of Rights, a power is expressly given to the Legislature of the state to pass laws by which a citizen may be deprived of his liberty or property without a Trial by Jury. The words of the section are, "that no free man ought to be taken or imprisoned, or "deprived of his freehold, liberties or privileges, or outlawed or exiled, "or in any manner destroyed or deprived of his life, liberty or property "but by the judgment of his peers, *or by the law of the land.*" Thus, then, I find, that an express right is reserved by those latter words of the section to the legislature to enact any laws upon this subject, without violating any part of our Bill of Rights, and it is under and by virtue of this power that the different acts of assembly since the Revolution have been passed—And as to those which passed antecedent to that period, there was nothing to prevent it, because we then had no bill of rights which had not been in some degree infringed by the English judicial decisions; therefore by these acts of assembly the words in the Bill of Rights are qualified.

It is true that they all give magistrates certain powers, and in cases of actual contempt committed in their presence, and in other cases they are permitted to send delinquents to prison without the verdict of a jury; but

in all cases which can be, or which are decided by a magistrate, there is an appeal to the higher authority. And if the legislature, were obliged to make specific acts to punish magistrates with a sufficiency of authority to execute their duties; it is evident that neither the constitution nor the legislators of Maryland intended that the doctrine of consequential and constructive contempts should ever be introduced into the courts of justice.—Why then should my client be thus called upon to answer for a crime, in a manner unauthorised by our constitution, unknown to our laws, and unprecedented in the practice of our courts? It is to answer the purposes of a party. My client has been obliged to sit in this court to hear himself most outrageously villified, the most abusive language has been applied to him, and if he were disposed to act in the same manner as the prosecution has done, and were to admit their principles of law, he could bring one of those gentleman before this court, for a contempt committed in their presence—not for a constructive contempt. Mr. Hanson here remarked—I will give him leave to do it if he pleases. Can it be doubted, continued Mr. G. that the epithets which have been used in the present case by that gentleman, were meant to bring my client into contempt? he travelled out of the record, on purpose to overwhelm him with opprobious names. If any person insulted the jury it was that gentleman, who before them made use of such scurrilous language to blind and prejudice their minds, by holding my client up to their view as infamous, instead of adverting solely to the evidence of facts and the weight of the testimony—and how any jury can think themselves insulted by this publication in question, I am at a loss to determine: if they are so, and have been injured they have their redress; but the courts have no further power, and cannot, according to the constitution, take any cognizance of this affair Mr. Glenn here read section 17, page 60, 1st vol. of the United States Laws.

"*And be it further enacted*, That all the said courts of the U. States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same: and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

If the courts said he, previously possessed the power which is now arrogated, and defended by the prosecution, why was this law passed? It is manifest that congress conceived that the court possessed not those attributes which have been given to them in this argument, otherwise they were legislating improperly and inconsistently, and at the time of the passage of this law, the sixth amendment had not been adopted and made part of the constitution of the United States, of course it must appear evident that the Congress of the United States did not not conceive that their courts could exercise a jurisdiction over cases similar to the present, or they would not have deemed it necessary to pass an express law upon the subject, besides congress have no jurisdiction but over their courts and consequently this law has no reference to the state courts which are not of their creation. The decisions of the courts in England on this doctrine which are not expressly sanctioned by our constitution and laws, cannot be a guide or rule to us at all; because they have always claimed and exercised with impunity from the enslaved condition of the people, a power much higher and more tyrannical, than ever has been given to our courts, or that can, in the present circumstances of the country, ever be exercised by them.—Mr. Glenn here read the passage from Blackstone, on the subject of contempt, quoted yesterday by Mr. Meredith. To shew. he proceeded, the effects of this doctrine of contempt, as stated and defended by the prose-

cution, we need turn our eyes only to the present condition of England and Ireland. It is through the tyrannical assumptions of the judiciary, that those countries experience their present disturbed and degraded situation. The latter country has long contended against it in vain—and I repeat it, *if our liberties are ever destroyed, it will be by the judiciary, upon those very principles, which in this case, are defended by the prosecution.* I will however here remark, that I respect courts of justice as much as any man in this community, and will go as far to support their dignity and honor as any man living, whilst they confine the exercise of their authority within the clear and defined limits chalked out to them by the known laws of the land. I do therefore assert, that this doctrine of constructive contempt, is contrary to the law of the land: and we can plainly discover that the framers of our constitution and laws, have a direct allusion to this imported case of contempt. It is not applicable to the publication before the court, and if applied at all, it must be applied by a forced construction. It is not slander, and if it could be proved such, it is not contempt, unless the law directly declares it, or unless a practice can be shewn to warrant this proceeding in our courts, founded upon the constitution.

The court here remarked, that if this doctrine were true, congress could not pass an act to authorise the punishment of contempts, because the constitution being paramount to any law, a law made in opposition to the constitution would be of no force.

Mr. Glenn answered, that the sixth amendment to the constitution had not been adopted at the time of the passage of this law. Mr. Glenn then read the sixth article of the amendments to the Federal Constitution.

"VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the state and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

Having shewn the precise similarity which exists between it and the Maryland Bill of Rights, he concluded—I thus now leave the case to the court, relying upon the justice of my client's cause, and convinced that by the law of the land he is guilty of no crime, and that he must be acquitted of the contempt—and I adjure the court not to sanction doctrines so odious, and a practice so iniquitous, as those which are attempted to be introduced to injure Baptis Irvine.

MR. LIVERMORE. In offering my opinions to the court upon the subject now before you, I shall consider whether this court has the power to enforce a summary process in cases of this kind? and whether the publication in question bears any reference to the contempt complained of?—It cannot be denied that a citizen should not be deprived of his liberty or property but by due course of law—and the provisions of the law should be regularly enforced. The proceedings of courts should be correct and impartial, and feee from misrepresentation: as it is necessary that the people should have confidence in their courts. Bad consequences must result from such publications as these—their object and tendency are to render the conduct of courts, suspicious, and to hinder the laws from being duly enforced. The principles advanced in defence of the respondent are worse than the publication itself: they are calculated to prostitute our courts of justice into the dust, and to render the arm of the law nerveless. To insure the impartial administration of justice, courts must be reputable and respected. They must have the power of protecting themselves from contempt, and they must have the power to prevent the publication of any matters which may prejudice the people in any case that may be before the court. When

our ancestors emigrated, they brought the laws of England with them as their birth-right, and the rule of their conduct. The wisdom of the statesmen of the revolution was such, that they did not permit their passions to transport them to the folly of making unnecessary alterations in their laws. They were aware that it would be no punishment to the people of England to alter the code of laws, and they knew that the crude and hasty composition of an hour could not equal the collective wisdom of ages—as established in laws which had arisen from the necessities of men. Mr. Livermore here read the third section of the bill of rights.

"*Section* 3. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used, and practised, by the courts of law or equity, and also to all acts of assembly, in force on the first of June, seventeen hundred and seventy-four, except such as have since expired, or may have been, or may be altered by acts of convention, or this declaration of rights—subject nevertheless to the revision of, and amendment or repeal by the legislature of this state; and the inhabitants of Maryland are also entitled to all property, derived to them from or under the charter granted by his majesty Charles I. to Cæcilius Calvert, baron of Baltimore."

Shall we, said he, cast away the legacy of our fore-fathers, which is our birthright? Our ancestors as is evident from this section—thought that liberty consisted in freedom from restraint according to those laws which had been adopted to promote the general good of the community.

Mr. Livermore here read Christian's definition of liberty in his notes to Blackstone. The idea of liberty, he continued, entertained by rational men is very different from that of the respondent--they have uniformly distinguished it from a state of savage ferocity—and as the foundation of liberty consits in the impartial administration of the laws as they are, justice must not be threatened, or seized by force. Mr. Livermore here read an extract from the journals of congress respecting common law—1774---to shew the adoration of our ancestors for the common law. The declaration of independence, he added, even makes it part of the public complaint that the colonies had been deprived of the benefits of the common law. The popular cry now is that we should be free from the common law of England. The revolutionary patriots however considered it as a great privilege—and this common law has become the law of Maryland—becuuse it is ratified and confirmed by the third section of the bill of rights.

Mr. Donaldson thinks that we are not bound by the common law of England in this case—but whether his authority, or that of the constitution, is to decide, I submit to the court. If we abandon the common law, what rights and privileges can we enjoy—how are the proceedings of the courts to be regulated?—there are no statutes to regulate them. What remedy has a man for injury but by the common law? Is there any statute declaring that an assault shall be punished?—If I beat a man I cannot be punished, unless the law of England be enforced—and is there any law which says that I shall pay my note? It is solely by the common law that we can attain our rights. Mr. Livermore here read a passage from Blackstone — Vol. 1. page 69. Mr Livermore then adverted to the cases of Sacheverell and Thomas Paine, and he contended that a libel of a similar kind would be punished in this country in the same way. There is a great difference, he proceeded, between political discussion and abusive libels.—Every citizen has an undoubted right to publish his opinions, provided he treat his subject calmly and in a proper manner; but when he abuses individuals, and leads the people astray. he is a proper object of punishment. By comparing the common law of England with the law of other

countries, we at once perceive its excellency. In England the people are not seized upon suspicion, and decapitated or shot without the form of a trial, as in most other countries of Europe.1 But I shall now shew the propriety of this proceeding by mode of attachment in cases of contempt by the common law of England. Mr. Livermore here read a passage from L. Bacon's Abridgement, 255. I shall contend, said he, that this power is an incident to every court of record, essentially, inseparably attached to it—and as this power belonged to courts by the common law before the revolution, it must be admitted to be their right, at this period, as it cannot be taken away without express words either in the constitution or in a statute. It has been said, that all powers not expressly given to any department of the government, either by the constitution or by the law, ought to be considered as tacitly withheld—but I argue, on the contrary, that all powers not expressly taken away by the constitution are to be considered as still appertaining to those officers who possessed them during the colonial administration. Mr. Livermore here read the 19th, 20th, and 21st sections of the bill of rights. By the 29th section of magna charta, the courts of England would be deprived of the power of proceeding by attachment, if those clauses in the bill of rights deprive the courts of this country of that power. This power, he said, has been exercised during seven hundred years from the very existence of that celebrated deed.2— Mr. Livermore then read Sutherland's Law Lectures, vol. 1, page 244. Mr. Livermore next adverted to the passages which were quoted by Mr. Donaldson from Tucker's Blackstone—and, he continued, it is obvious that Tucker's intention was to explain the difference between the common law and the laws of this country—Yet he no where takes from the court the power of punishining contempts by the summary mode of attachment. But, leaving the common law as practised in England, let us advert to the proceedings of courts in our own country. The same provisions are found in the constitutions of New-York, Pennsylvania, and the United States, which are laid down in our bill of rights—and yet, in the courts of the United States and of these two states, this proceeding, for which we now contend, has been declared by the judges to be lawful. If this clause in our bill of rights takes away the power of courts in Maryland to punish such contempts as this of the respondents, it would have the same effect in all the courts which I have named, as this power is as much interdicted by their constitutions as in ours, and yet we find that they have adopted this mode of proceeding. And, I would ask, if no proceeding is to be allowed but those which are expressly sanctioned by the statute law, whence do magistrates derive the power to force the payment of small debts? It is found in the bill of rights, or in any act of the assembly?

(1) But the form both in England and Ireland, if the person accused be obnoxious to the government, might be advantageously omitted, because justice should not be openly mocked and insulted. Mr. Livermore must have forgotten that by the 43d of Edward III. "*all statutes made in violation of the magna charta, are declared to be void,*" and yet the "records of the courts in England and Ireland groan" with condemnations procured by *packed juries notoriously inimical to the accused, hired, perjured witnesses, and interested partial judges.*

(2) Common law says, Ignorantia juris, quod quisque tenetur scire, neminem excusat: the ignorance of it is no excuse for transgression, tho' no man can ever say what the common law is. What excuse can a lawyer make for ignorance of history, especially of law history. Every school boy knows that magna charta is not 600 years old; it was signed by king John at Runnimede near Windsor, on the 19th day of June, 1215. And yet we are very gravely told that magna charta is more than 700, and even 800 years old. "This comes from your learning! ! !"

But we must also consider the intention of the legislators—and every act or clause is to be construed according to their intentions. Hence it does not appear that they had any design of depriving the courts of the power of enforcing an attachment, or of hindering them from punishing by other modes than the trial by jury. Mr. Livermore then read the 12th section of the constitution of Maryland This section, he added, was intended to define the privileges of the house of assembly—which not being a court could have no power but the privilege of parliament. The clause was intended to define what in England was undefined—and explicitly to state the natnre of that power with which the house of assembly should be furnished. But can there be any reason assigned, why such a power should be given to the house which does not belong to this court—for they are equally bound to preserve their proceedings from contempt—as they are of equal importance with those of the legislature. The counsel for the respondent have admitted that the court have a right to punish by attachment in certain cases—such as disobedience to process—correction of their own officers—and any outrage in the view of the court But must they not also look to all other attempts which are used to hinder the proceedings of the court, and to lessen its dignity—and must not these be restrained as well as the instances which have been admitted? I can see no difference, as they all have the same object—to stop the administration of justice. Mr. Livermore here cited the case of attorneys who act wrong in the discharge of their duties: and, by what law, he asks, can they be punished?—they can only be punished by attachment—very bad consequences may follow from improper conduct in them and yet there is no other mode of punishing them Mr. Livermore then read from 1st vol. Bacon's abridgement, page 264—and he contended, that in all the cases cited there is no power to punish but by attachment. How can a disturbance in court, or an absent witness, or absent jurors, be punished but by attachment? The interrogatories which have been so much animadverted upon after the decision of a court is given, are nothing more than the answers which are filed upon oath, and which is the mode of proceeding in chancery.

It has been said that the state has no interest in this case: but I would ask, has not the state an interest in the administration of justice, and does it not receive an injury from improper decisions of the courts, as well as from unjustifiable and improper remarks upon their proceedings. The gentlemen have paid many compliments to the court, but why should this conduct be imputed to them, which is imputed to them in this paper? Is not the jury calumniated? are not the witnesses libelled? and how can the punishment of such an offence be called an attempt to destroy the liberty of the press? The liberty of the press is the greatest security of the liberties of the country—it is this which has kept the people free from that slavery in which all the continent of Europe is immersed, but it is equally endangered by licentiousness as by arbitrary power. Mr. Livermore here read the observations of Blackstone upon the liberty of the press. But, he continued, the liberty of the press does not bear upon the present case—*the conduct of the government or legislature is the subject of animadvension, but this right of investigation does not apply to the proceedings of courts of justice* 3 Such conduct is dangerous to the liberty of the people, because the

(3) Messrs. Livermore, Meredith, Hanson, &c. wish to reduce the "good people" of this country to the state of the Israelites of old. "In hearing, they heard, but did not understand: in seeing, they saw, but did not perceive." However they will *kindly* admit that we shall see, hear, understand and think, but wo be to you, say these *very, very learned gentry*, (see the last note) if you dare to speak or to write.

udges have not the power to destroy the constitution, hence animadversions upon their proceedings are calculated to be injurious (4) *A popular judge is the most odious character, he is the most dangerous and despicable character in the community* (5) If the conduct of the judges is to be animadverted upon, and if the judge were rendered dependant upon the people, he would disregard his oath and the law, to act according to the popular opinion. Upon reviewing the whole of this subject, I must say, that libelling is the worst of all vices: but how prone is man to calumniate his neighbour—and how eagerly are calumnious stories received, propagated and spread abroad: this proceeding is therefore meant to uphold the trial by jury, which has been libelled by this respondent. To secure the impartiality and purity of it, requires that the jurymen should be free from every improper bias. They should be above the fear of popular odium, because their decision determines the conduct of the judge, whose province it is to declare the law and not to make it.

The latin quotation with which Mr. Livermore concluded, is omitted.

Mr. KELL.—I shall not trouble myself to travel through all the road which has already been examined; nor shall I indulge myself with that latitude of speech which has been allowed upon this occasion. I shall endeavour to think correctly, if not fashionably; and I shall speak plainly and clearly. I rise not to defend any man, but to defend the principles of freedom and the liberty of the press from annihilation; or from the possibility of its becoming the instrument of oppression. I am not addressing that tribunal which I have heard described since this discussion began—that this court possessed the power and the inclination to punish the gentleman who is the respondent in the present case. The court here interfered, and said they certainly should not have permitted that language if they had heard it. The court may go as far as the laws of the country order them—but no farther—therefore this offence cannot be punished, unless the law and the constitution permit them. The gentleman who has made use of the most reprehensible language in the course of this argument, is young and warmly zealous—therefore I pity and excuse him—but, Sir, of all blindness, the blindness of zeal is the most blind—I must therefore presume that the warmth of the gentleman's feelings hurried him in his arguments off his guard, and led him to form and to utter opinions which the case does not merit. The court are now called upon to require of the person before them to shew cause why an attachment should not issue against him for contempt of this court. The ground work of this proceeding originates in an affidavit made by certain persons, in which they state, &c. Here Mr Kell read the affidavit. The court is called upon to exercise the highest prerogative known to man, to swallow up in the vortex of judicial authority every security of liberty, both of the press and of speech. If the court countenance this proceeding, they will set

(4) Hear what the JUDGE OF ABL THE EARTH said. "*There was in a city a judge who feared not God, neither regarded man. And there was a widow in that city, and she came unto him saying, avenge me of mine adversary. And he would not for a while: but afterward he said within himself. Though I fear not God nor regard man, yet because this widow troubleth me I will avenge her, lest by her continual coming she weary me.*" This is the history of an old judge, who cared not for the law or the constitution; but who acted according to his prejudices, passions, interests and caprice.

(5) This is a most outrageous libel upon the citizens of these states, from whom the judges derive all their authority. But it is a most lamentable fact that throughout the union there should be so few popular judges. One popular judge however, but he is *not a lawyer's judge*, resides within 100 miles of Baltimore.

an example by which every man may be brought to punishment—every man who at any time shall have uttered any sentiment of disrespect either to a jury, or to a witness—and every act done to call in question the propriety of a court's decision, or a jury's verdict: and therefore they will arrogate the power to call before them all who have either thus done or acted, which would include every man in civil society. This is doctrine, to which none can submit, and it includes principles, from which every man who feels for himself must revolt with horror. When I consider all the circumstances of this case, I am sure that the court will set their faces against this proceeding—for I am certain that they must agree with me, that not a single argument has been yet delivered which proves that this court have the power to punish this offence, if it be any.

However, I mean not to defend that liberty of the press or of speech which the gentlemen have opposed; my object is to rescue the administration of the laws and of justice from the abyss into which this proceeding will drag it. We must not enlarge, we should confine the power of courts to proceed in cases of contempt—and here, a contempt of judicial authority, or a disobedience to the officers of the court is totally excluded. The court, if any offence has been committed, in viewing it will notice all the circumstances connected with the case. Some of the jurors tell the court that they *apprehend* that these strictures were intended to defame the court thro' the medium of the pannel of jurors. But do these remarks defame the administration of justice or any officer of this court? No. If any meaning can be twisted out of them, they must refer to twelve men who they say, had fairly and impartially returned the verdict of guilty, against George Tomlin. Is this publication an offence, or is it not? If it be an offence, it does not require the extraordinary assumption of judicial power. Is this publication marked with that malignity, that hell-born nature that it cannot be punished without the interposition of the omnipotent arm of the wild discretion of a court? can nothing less arrest the progress of this supposed offence? does the paper upon record require this strong departure from the common proceedings known to our law? is it necessary for the administration of justice—does not this proceeding set an example which may be followed upon every occasion, however minute and trifling, whether in speech or publication—and will any man dare to say, that the verdict of a jury, or the decision of a court may not be found fault with? But in another affidavit, the witnesses swear that it was their impression that the publication was intended to reflect upon them. But allowing for a moment that the impressions of the deponents were correct, is that any reason why the vengeance of this court should be brought to bear upon this case in the short summary way of attachment? If it is a libel, is there not a mode to punish it that frees the transaction from the judgment of this court—and does not the constitution provide the ways and the means, and the only methods by which it shall be punished? Whilst the constitution is so plain, shall we establish uncertain principles which might totally destroy our rights and property? When the law is so express, are we to make cases of this kind different from what the law declares them to be, and must they be brought into judgment as a contempt of court? this is calling upon the court to decide upon a case without authority, and to withdraw from the proper tribunal the ascertaining of facts, and to make the judge and jury both out of the court, whose offices are totally unconnected. I repeat therefore, that this measure proceeds entirely from the blindness of party zeal. Are the 12 jurors injured by this publication? are they more alive to the privileges of the state's authority than others—have their feelings been injured? Admit it for the sake of argument, but why do they expose themselves to be mistaken in the mode of punishment—and why do they conceive themselves injured and insulted when there was no such intention, why should they think that their integrity was called in question—is there any picture drawn by Baptis Irvine which reflects on their characters?—

Will not every man who reads this paper acknowledge that the expressions are those of a man who had been injured by those persons? But who does he reflect upon? Not upon the jurors who were to try his cause. Does he use language to bring him within the jurisdiction of the court upon the principles which have been already read? The principles there recognised, do not exist in this affidavit, and from the very face of the records before the court, I am sure the court will not be easily led to set a precedent by which courts may be induced on any occasion to deprive a man of his liberty or property without that trial which the constitution guarantees to every man.

It is a very wrong and a very dangerous principle to introduce into courts, that of the sovereignty of courts to decide both the law and the facts, without having law by which to regulate their conduct; and when they have nothing to guide them but their own discretion - it may run mad, it may become wild. The exercise of all power must be drawn from the law, and it must be adapted to the necessity of the case. The mode of proceeding against a citizen by attachment is in some cases necessary: and courts will in this mode punish such acts as are directly calculated to give an undue and improper impression upon any cause pending before the tribunal at the time those acts are done. It certainly is a duty in the court to punish a contempt---by which I understand such acts as must necessarily prevent a proper decision of any question before the court---but no court can go any farther. The cases already read in the different books are all within the position which I have just mentioned---all cases against which the injurious publication appears were cases then depending before a proper jurisdiction to decide upon them. Mr. Kell here adverted to the case, 2nd. Watkins. The case said he, which the parties undertook to censure, revile, and abuse was then before the tribunals of the country, which cannot therefore permit such a character of this subject as tends to prejudice the minds of those who have it in consideration and for adjudication. Mr. Kell then considered Oswald's case, Crosswell's case, and that of Hollingsworth and Duane. Upon this principle, I should certainly condemn, the agitating of any matters then absolutely within the jurisdiction of the court, and upon matters then entirely pending before them. The remarks of Duane were made upon a case sub judice - and I will admit the whole of this without endangering the present case in the least. It is upon the authorities which the gentlemen have produced that this mode of proceeding is to be brought in upon this occasion, or do they embrace this question. They present to the court a ground upon which they must proceed - but which does not here exist. In each of the cases cited, slanderous publications appeared against the parties and embracing the cause itself, and the court in which the subject was pending---this is not such a case---if this was such a case the court has the power---but this if an offence is susceptible of discussion in antother form---it then becomes a subject of question whether having it in their power and right it should be thus punished or in any other way. But leuving the character and quality of the publication complained of---can it be said that the case to which it is supposed to have relation is a case dependent in this court? One gentleman says, that Tomlin's case was depending because the fine had not been imposed by the court. But this is steering clear of the question: for this publication is not an imputation upon the court, or upon the integrity of the bench—if it contains any thing--- it is that verdicts have been obtained by perjury--- is this true and just or unjust?---then it rests with us to supply the connection, and according to our views to force it to apply to this particular case. But should the gentlemen say that these strictures apply to the proceedings of this court—I answer they apply not to the court or to any member of it, not to a jury, or to a cause lis pendens—and it does not censure the integrity of any person---unless it can be construed of twelve jurors who have passed their verdict. These jurors, it appears, seem to

think so. Here then it is evident that the pannel of jurors are not reflected upon or censured, this is expressly excluded from the affidavit upon which the court are requested to exercise their authority. Here are a few insulated aphorisms the truth of which none can deny, except as applied to particular individuals. They are insulated and distinct, the quality of which, and the criminal essence of which must exist in the application individually and specifically. The law upon the subject of this kind of constructive contempt has been culled from two or three reported cases—but the gentlemen have forgotten to shew that the principle embraces this case, or that it comes within the prohibitory law. But I argue that it is a most monstrous thing to apply a publication, as this is done by this affidavit—how could it affect the trial to which they are alledged to relate; if they do so, the trial was concluded, the verdict was passed—and shall remarks made upon a trial after its conclusion be construed into contempt? To what branch, part or principle does this publication apply? I say to none: because the court either in their character, integrity or judgment are not reflected upon, and the body of jurors are not reflected upon; no officer of the court is reflected upon; and it does appear that no part of any cause then pending is censured. But it is said that although the jury had passed their verdict, the judge had not given sentence, and a person had written an opinion which the jury believe was intended to defame them. The evil consequences of this practice are innumerable. I may express my disapprobation of the verdict of a jury, I may express my disapprobation of the decision of a court, and upon this principle I may be called upon to answer for contempt, for doing a thing which may tend to bring into disrespect and disrepute the law of our country. Is this law—is this practice to be introduced? Here the court is called upon to draw within the grasp of judicial discretion, that principle of law which gives every man the right of trial by jury.

Does this affidavit give the character and quality of a contemptuous publication as applied to this particular jury? I may believe it, but does this ascertain the fact? But this mode of proceeding destroys in every instance the power of punishing libels by a jury, and gives to a court the liberty of supplying all the inuendos. The court itself is called upon to do all this, and thus to take away the power and the rights of juries. Suppose this publication is a libel upon the witnesses, what is the mode of procedure? Why, because it is a libel, should we ask the court to interfere? But the court cannot do this, because it is within the province of the jury only. The court is called upon to say that this publication is defamatory; that it is applicable to the jurors in the affidavit. Do these jurors merit this? In order to make these remarks a contempt of court, the court must necessarily say what is embraced in the publication, what jurors, what men; they must say that we will consider this, notwithstanding its face, to be a libel, and to make it so we will supply the deficiencies for the punishing this libel. Where is the necessity of this summary jurisdiction to prohibit a jury from inquiring into the facts? But where the contempt is direct, and in the presence of the court, and where it shews its quality and purpose, there the court may interfere; but where it is in imagination only, when the constructive contempt is to be screwed out of the publication, this belongs to the province of the jury; but when language is incapable of being applied to one object only, it is not contempt, unless in the presence of the court, or a calumnious writing upon the court directly applied to them in session, then the court may interfere; but this is not the present case. I call upon the gentlemen to shew the law which authorises this proceeding. The law is perfectly silent upon the subject of speaking respecting a jury after a trial. Although any unjust remarks upon a jury constitute an offence, this is not the mode of punishing it—if it were, every man might be brought before the court, and punished in the most arbitrary and summary manner. I admit, that it is an offence

unjustifiable to revile the integrity of a jury, but this offence would not, and the court knows it does not, fall within their province; for the principles of Irvine's case, and of the cases cited from Blackstone and Viner, cannot be made to apply to a case of contempt. Mr. Kell here read from Blackstone that part of the article of summary proceedings which refers to the power of courts in cases of contempt. He continued; the language must convey reproach or defamation upon the court, or upon the parties interested in the subject matter before the court. In this case, admit for the sake of argument, that the publication is slander—it is not a contempt of court. Whether the remarks are criminal, or not, is no importance in this case. I will undertake to say that they are not punishable in this mode, even if they are criminal. To render any publication contemptuous, the case upon which the remarks are made must be made lis pendeus—it must be before the court and the subject of judicial investigation—and they must have an immediate reference to that business which is before the court. What then have the complainants to refer to? Does this publication present a system of facts, upon a case lis pendeus? No—and nothing contemptuous can be twisted from it. Is this court to be transformed into a body of judicial necromancers, and are they to say that when Baptis Irvine talks of the jury he means the court, and when he talks of jurors generally, he means this jury in particular? He has not breathed a sentence of censure, either upon their characters, or upon that of the court. Has he abused a body of jurors collected to assist in the administration of justice? No. A body of jurors have interpreted certain remarks and applied them to themselves:—but they had already decided the subject of their inquiry—and how can they call upon the court to protect them in the discharge of their duties, when they were dismissed from the court? God forbid that the court should exert such dangerous authority—it is ruinous—because it is not limited, or secured by any barrier, and nothing but the judgment of the bench can hinder it from becoming the tool of the vilest oppression. This, I repeat, is an improper mode of punishing my client, even if he is guilty of a libel:—for it is not contempt of court—and in a variety of instances, when the truth ought to be published, by this mode of proceeding, acts, in themselves highly justifiable, might become the subject of judicial investigation and punishment because they happened to be offensive to the court. Does this publication shew a want of confidence in the court, or can it bring it into disrespect? If all publications reflecting upon a judge or jury are to be prohibited, to what monstrous, iniquitous proceedings are we not exposed? I feel myself oppressed by the decision of the bench or jury—by a mistaken or a corrupt jury, and I ask of the court to relieve me from this oppression which I suffer—Upon the principle which is now contended for, I may be called into question, and brought up to bear the whole additional vengeance of those who prosecute me. If Mr. M'Kean and Blackstone say what is right, how absurd are all our proceedings! The court may decide wrong, and I go to the court of chancery and assign of the court below, to the court above, a ridiculous and contemptible decision. Is not this, although I am prosecuting in my own defence, according to the doctrine of the gentlemen, a contempt? The subject of inquiry now is, whether this publication was upon a matter pendente lite.—There was a cause in which George Tomlin had been tried, and a verdict of guilty given against him: then came the publication whilst the business was exclusively before the court alone; it reflects upon the jury, say the gentlemen—Admit it: but that jury had discharged their duty; there was no lis pendeus against which the respondent uttered a breath of censure; the whole business had passed the jury against which this accusation, if it be any, was made: there is nothing applicable to the court or to the attending jury, upon any subject before the court. They say that Tomlin's case is still before the court, because the court had not pro-

nounced their decision, and because the trial was incomplete, as four other persons were indicted with him. The first is not a good reason: the prosecution alledges, that this matter is tried down to a jury who had discharged their duty; therefore, as it is made to apply to them alone, the lis pendeus does not exist before the body against whom the publication is levelled. There is no lis pendeus in the case; and there are no facts published which can prevent the jury from doing their duty in the ascertainment of facts—therefore there is no contempt of the court, or of the power having the lis pendeus before them, That case of Tomlin's had gone through all the forms of trial, and therefore was no longer a question in court: if the jury were to affix the fine upon any case, this publication would be wrong, but not upon the present form of trial can it be so:—*the gentlemen, by their reasoning, supposed that the judge might be induced to swerve from his duty.* Baptis Irvine has not committed a contempt—there was no lis pendeus before the court—nothing for their decision—no reference to any future business or trial before these jurors, who had already discharged their duty: and if they have been wronged, there is a remedy: but not in this way—and this is not a case which calls for this uncommon exercise of judicial authority. The gentlemen have argued, that because several persons are included in the same indictment, that the matter was lis pendeus; but this does not affect the case—because Tomlin's trial was already determined—and his case was not sub judice, because his name was written upon the same piece of paper.

Mr. Meredith here interposed:—In all criminal cases, said he, when 3 or 4 are on the same indictment the court cannot award their sentence until the whole are tried.

Judge Dorsey. Tomlin's is to be considered as a single indictment.

Mr. Kell. I hold that this is not the law; because the state may pray for the punishment of the criminal immediately after the verdict. Baptis Irvine it is true, was indicted for another offence—and there is a motion for a new trial; is this a lis pendeus? I consider it such; but how is this publication to be brought into operation upon the case thus predicated: this is a point of law submitted to the consideration of the court. But may not a new trial be applied for? It may—how then can this apply to the publication in question?—In the case to which the publication refers, if it refer to any trial at all, which is denied—no motion for a new trial was made—therefore there is no lis pendeus. How can it apply to the case of Irvine? Is there any thought or word in this publication calculated to bias the determination of the court; or to manifest any disrespect to the jury who were not discharged from their duty? In assuming the power which the prosecution call upon the court to exercise,—they are treading upon no ground which authorises the exercise of this authority. The Court is called upon to do more than they ought to do, they are called upon not to decide points of law only, but to perform the duties of a jury, by deciding the matter of fact and to declare this paper a contempt of this court, and its authority, and intended to impede the administration of justice in a case before them. And this paper must be made a libel by inuendoes and by an application of it to persons who do not appear on its face: and I contend that unless the jurors could not discharge their duty, or that the administration of justice could not make progress, the court cannot take notice of this publication. Will any person believe that the court are herein insulted; or that this was a case of such extreme necessity, that the court cannot perform its necessary functions, without arrogating this alarming power? Have the court been disturbed by my client? I call upon the gentlemen to shew it. If this be an offence it is susceptible of proof; and would receive punishment if declared so by a jury, but to them belongs the determination of the fact, and the power of ascertaining cannot be withdrawn from them without great public injury. But admit that these remarks were intended to bring into disrepute the two witnesses; the administration of justice proceeds notwithstanding:

they contain nothing of a defamatory nature against the court, or against any part of the judicial establishment. And shall any witness if he is vilified, or shall any court bring the speaker or writer before them by the mode of attachment? No. If the witness were in court, the court would protect him; but when he is not, and when he has delivered his testimony, if such language be used, and he takes it for a libel, let him establish the fact by an appeal to the correct court, to that court which the law and the constitution recommend and advise. But the gentlemen say, that if such publications are permitted, no persons will become witnesses or jurors unless they cannot avoid it. This is pretty in theory, but no general hypothesis can be brought to bear upon the question, unless they shew it to be of a similar kind to that before the court. This case is very naked of facts, but not so in the circumstances which have led to its being brought forward; and unless the gentlemen shew more than what has already appeared, they cannot prove that there has been that disrespect to the court manifested, which is necessary to warrant this exercise of power.

Upon what wire drawn system of common law can this prosecution be supported? Compare the depositions and the publication, and how, upon what principle of law can it be shewn that this mere discretionary power, this tyrannical arm of judicial authority should be exerted to stop that most correct principle—the right of examining the conduct of all public characters. I assert that this mode of proceeding in the present case, is contrary to all law, human and divine. This is departing from their duty: the court are called upon to exercise an authority which belongs to the jury: it is an assumption of power never warranted but in cases of the most absolute necessity—when the first administration of law is immediately endangered, then the court will reprehend such conduct: but I argue that nothing can be brought out of this publication, even by this sophistical engine, construction, which has any tendency to this effect, and therefore this court cannot take from another court any matter which is exclusively allotted to its jurisdiction. In all cases of contempt, the only law is discretionary; and this authority cannot be exercised but in cases of absolute necessity.—Is this such a case? The administration of law goes on in spite of what is here written; and hence I argue, that this authority ought not to be exercised but in those cases which have been heretofore mentioned. But how can this be contempt of court, seeing the fact is beyond its limits or observation? contempt must be in a case before the court—how then can this publication be supported, since they cannot shew that it has any reference to the lis pendens—which at all events, must be the characteristic of the publication to subject it to the notice of any court:—if they confine it to the affidavits before the court, they cannot make their point good. The jury were not in any way concerned in any thing connected with this publication, and this keeps the whole affair clear of the contempt. The affidavits confine the alledged calumny to the 12 men who had discharged their legal duty. There is no publication within the rules or principles which have been produced upon this subject, and yet the court are called upon to exercise a power limited by no law, and guided by no rule but their own fallible discretion. Unless a contempt of the court can be shewn by disobedience to its process, or disorder in its presence, no power can be exercised in this way—and I hope that this court will never sanction this mode of prosecution.

Judge Dorsey asked the counsel if he understood them to admit—that publications clearly, explicitly, and pointedly, tending to obstruct the administration of justice may be punished as contempt of court. Mr. Kell replied in the affirmative; whilst Messrs. Glenn and Donaldson denied the doctrine in toto.

Mr. WRAY now rose to defend the prosecution, but withdrew upon the advice of his colleagues.

Mr. JENNINGS. May it please your honors; after so much time has been exhausted upon this subject—I am sure that I shall be obliged to go through some of the authoriries which have been already cited. But as the twinkling of a star is of service to us, when the great luminary of heaven is absent—so I hope that I may still shed a little additional lustre upon the subject before the court. Mr. Jennings here complimented in a very extravagant manner the abilities and zeal of his colleagues.* This is a question, proceeded he, of great public magnitude and importance Improper motives have been imputed to us, but nothing like party spirit or animosity should be attributed to us. Every lawyer has a right to say any thing to a judge or jury which his evidence may warrant. If he says any thing defamatory, the party vilified has a right to receive the same advantages as any other man. Denying therefore, all motives of the kind which have been imputed to us—let us investigate the matter upon its own merits; and the law upon the case. There are some men who wish to make the law bend to their purpose rather than not to have their wishes gratified: but from whatever cause our motion proceeds—I for my part can find an excuse upon the records, and through the jury do I come forward.

Mr. Jennings began his comment upon the publication His remarks were all pointed to shew that the "Occasional Hints," were levelled at the jury and the witnesses in Tomlin's case. Having made some severe strictures upon the respondent—he remarked, that he had no excuse—the character of the jury and witnesses being unexceptionable. Mr. Hanson here interrupted him to remind him that one witness had been called upon to prove Elderkin's bad character: upon which Mr. Jennings said—that a witness had been summoned to state Elderkin's bad character, *for what purpose he could not divine*, when they had sufficient testimony to the contrary.† Having at length concluded his comment upon the *Hints*, he added, any man who will not believe in this interpretation of these hints, and in this application of them would disbelieve the authority of Holy Writ.‡ It has been said, he continued, that your honors have no right to understand that which all others do in this construction; but I shall contend that it is your duty to strip it of any mask, it may wear, as you are both judge and jury. If you do not permit this offence, however numerous may be the scandals which a man may pass upon the court—it will not amount to a contempt—but he will not do it openly, that would be dangerous—but he can publish under hints, insinuations, &c. Can the court be ignorant of the purpose of this publication? I assert not. To shew the power of the court to punish upon cases of contempt—Mr. Jennings read Lambert's

* Never were any poor mortals more severely *lampooned* than Messrs. Meredith, Hanson, and Livermore on that occasion, by the attorney of the state.

† Although the object of this remark is too plain to be mistaken—and the intended insult too gross to be explained away, the only punishment which Mr. Hanson shall receive is, that pity and contempt which he is conscious he has deserved.

‡ It is not very common to see Holy Writ polluted by mixing it with the profanity of the common law, but as the "*students of morals*," study every other morality except that of Holy Writ—the following passages are quoted for the serious perusal of the public: They are extracted from one of our Lord's addresses to the Jews "And he said, Wo unto you, ye lawyers, hypocrites, for ye lade men with burdens too grievous to be borne; and ye yourselves touch not the burdens with one of your fingers. Wo unto you, lawyers: for ye have taken away the key of knowledge, ye entered not in yourselves, and they that were entering in ye hindered. Ye blind guides who strain at a gnat and swallow a cammel."

ease from The Law of Libels, page 11, &c. This publication, he added, is a contempt—and as a contempt, your honors are bound to punish the offence, in the manner in for which we have prayed. In speaking of the jury and witnesses—Mr. Jennings contended that they were component parts of a court, and therefore ought to be protected: and it ought to bind Baptis Irvine, to use his own words, that I now call upon this court to punish him. These Hints constitute a contempt, and as the court have the power they ought to exercise it.

The liberty of the press has been brought into this question, and we are charged with attempting to destroy it. I hold it to be the greatest blessings which a free people can enjoy. But by this we are not to understand, the power to calumniate and bring into disrespect our constituted authorities—neither should the press be the engine to insult and injure others.—The liberty of the press is an unreserved discretionary power in any man to publish his sentiments in any manner not forbidden by the law of the land: if he offend against the laws of society, he must take the consequence. The subjects of government and religion, are the two subjects on which we may write, they are the most important of all, and indeed the only point on which a tyrant would restrain us. Injurious remarks are no proof of the liberty of the press. We may write upon those subjects which affect our consciences, our liberties, our estates: and this liberty admits us to examine the principles of faith upon the grounds of scripture and reason, and of animadverting upon the affairs of government. In all free countries, every man has a right to express his sentiments with freedom, but he must do it with decency, and with a regard to the laws. But he who undertakes to send forth such productions as this before the coutt, deserves not the thanks of society—he tries to weaken their respect to the law, and to render them worse members of it. The law and the trial by jury are the stable principles of our liberty. This respondent has eclumniated the trial by jury. Every man should publish his thoughts with freedom and if he be under an error he will be convinced of it; but if he publish the truth he does great good to his country. Whilst I would defend the liberty of the press, I cannot but consider licentiousness as the greatest scourge with which a nation can be afflicted.

Mr. Jenning's here read a passage from Tucker's Blackstone, to prove the right of the court to punish this crime in a summary way. At this period it is the fashion for some men to cry down the power of the judges, and to lessen the common law, by calling it the discretion of the court. I may be thought to encroach upon the privileges of the people; but I shall shew that this proceeding is in defence of the majesty of the people:—Your honours are the state's court, therefore the people's, court; whoever stops the proceedings, or villifies the judge of a court of justice, offends the judge and the people whom he represents. Mr. Jennings here read from the trial of the Pennsylvania judges, 410. *The common law* he continued, *is the most important part of our government*, it is authortsed by our constitution as in the 3d section of the bill of rights. *The trial by jury no man can have unless by the common law.* Mr. Jennings here read the 12th section of the constitution. In reconciling these seeming contradictions, said he, it is the duty of the court to put such a construction upon every instrument which are analagous to each other. The courts have always exercised this power of punishing by attachment in certain cases *from the time of king John, more than 700 years ago.* In the magna charta this doctrine of contempt must be allowed, or it is strange that nothing should ever have been said upon the subject, no authority can be produced against it.*

* Mr. Jennings will be able to correct this mistake at some future period, if he reads the essay subjoined to this report.

I will place this subject upon the principles of common sense and reason, whether the court have not the right to punish for contempt in cases where it has been committed? This is necessary to the existence of the court. The gentlemen admit that it may be exercised in other instances; we say the court is entitled to the power in this case. By the constitution of our country, and the common law by which you administer that constitution, you are bound to punish this offence. Mr. Jennings here referred to the case of a man's dying possessed of large property—all of which, by the common law, devolved to the eldest son, if he died intestate. He also noticed the power of magistrates to punish contempts, which had been expressly granted to them by several acts of assembly: and he argued, that where the common law was not set aside by specific statutes, it was still in force—and that if magistrates have the right to punish contempts, hereby judges must have the same power.* In a case of contempt, if it be not punished in the summary mode of attachment, the judges of one court must go to a different court for protection in the performance of their duty—[in case they were vilified] The difference betwixt a libel and an attachment is this—the attachment must go immediately, because a man may so prejudice juries that they, from different publications, might entirely set aside the correct verdict. If the witnesses are traduced, the contempt is clear; and an attachment will issue to bring the man before the court, that he might at once retract before the jury what he had asserted. Whenever there is a defamation, the party accused may purge himself of the contempt which he has committed. It has been said that this case was not sub judice; but a cause cannot be at an end until the judgment of the court is pronounced; in this case it remains to pass sentence, and to levy the fine; and might not such publications be calculated to intimidate, or to influence the court? Until the judgment is passed, the case is not at an end. Mr. Jennings here read from 2d Atkins, 469; from which he argued, that the case is pending as long as the verdict of the jury may be set aside. He then concluded by reading the long opinion of judge Tilghman on the case of Hollingsworth and Duane.†

Mr. Meredith rose and stated, that although Mr. Glenn had so strenuously opposed this proceeding, he had not long before himself applied for an attachment against a person in the admiralty court. Mr. Glenn then related the circumstance. It appeared that he was employed in some cause, and while he was returning from the court, in the house where the court sat during the continuance of the trial, the opposite party assaulted him—upon which he prayed for the protection of the court—but the attachment was never served.

Monday, February 22.

JUDGE DORSEY. Although the facts in Tomlin's case are within the knowledge of the court; in order to shew the connection between those facts and the publication—is there any objection to these facts being admitted, or must they be moved—they must be admitted or proved not to satisfy the court---but to preserve the memory and record of them.‡

* The punishment of contempt by magistrates can extend to acts only which are done in their immediate presence.

† The difference of the length of the gentlemens' speeches is very obvious. The counsel for the prosecution consumed the greater part of their time in *reading* from the "musty record of British precedents"—whilst Mr. Irvine's counsel were almost exclusively engaged in *arguing* upon the constitution and laws of Maryland, and the United States.

‡ This was a most excellent manœuvre, its object was well understood; but it was too naked—and therefore the plan was so strongly resisted that it could not be carried into execution.

Mr. Glenn denied the whole as improper.

Mr. Jennings offered to read a statement of the testimony given upon the trial. Mr. Kell asked whence this statement was procured? Mr. Jennings replied, from an examination of the witnesses since the trial. Mr. Kell said, that he would rather rely upon the recollection of the court, than upon a statement made since the trial, from the evidence of the witnesses, because there was a very strong objection to it upon this very ground.—Mr. Hanson said, that the opposite counsel refused their assent—upon which the judge remarked, they are not called upon to consent to any thing. Mr. Jennings offered to make an affidavit to the truth of the statement. Mr. Glenn—We cannot admit the introduction of new affidavits in this case. The judge said, that in arguing the case, it had been contended that the constitution and bill of rights prevented the court from punishing in a summary way. All the counsel concluded that the contempt was not committed, because the proceedings in Tomlin's case, to which the *publication refers*, were not sub judice. The facts, as they appeared upon that trial, were admitted, whether this statement be admitted or not.

Mr. Glenn said that the court could take notice of nothing but the affidavits and the paper itself. The judge replied, that the prosecutor had a right to demand witnesses to appear in open court to swear, and the respondent has a right to add any further affidavits. Mr. Glenn asked, if in an action of slander additional affidavits could be brought into court.—Judge Dorsey.—But this is not the case—because these were facts which took place before the publication in question, and the circumstances were not denied. He then told the prosecutor that he might file any thing in court in addition, and the counsel should have the privilege of replying. Mr. Irvine, upon being shewn the paper, denied the truth of the affidavit in toto, and therefore resisted its being recorded. Mr. Jenning said that one of the counsel had allowed Elderkin to be designated as a thief Mr. Donaldson replied, that if such were the case, it was not contempt of court. Mr. Jennings said, that admitting Elderkin was meant—the publication must therefore have a direct application to the jury who heard his evidence and decided by it. Mr. Kell strenuously opposed the admission of this paper—he insisted that as the facts were already before the court, as having passed within their own cognizance there was no necessity of filing additional papers, and that the one now offered by the prosecutor could not go upon the record, on the ground of the objection to the validity of the witnesses testimony. Judge. To shew the nature of the dispute, as we must decide upon the papers, the most correct mode will be for the prosecutor to bring all the facts upon this paper. Suppose that an action of slander were brought must it not be proved by circumstances—the analogy betwixt the case tried and the allegorical publication? The court think it correct that the indictment should be stated Mr. Kell. Are not the indictment and the testimony both in court: for what purpose then is it to be supplied? If it is to have any effect it must be to shew the truth of this publication—against which there is a complaint. Judge Dorsey. *It is unnecessary upon the doctrine of contempt in England because a true publication may as well interrupt the course of justice as a false one.* Mr Kell. Where then is the necessity of spreading the evidence upon the record? Mr. Meredith. The gentlemen may answer the statement or give in further proof. Mr. Kell. Is this statement presented to the court with the view that they shall form their opinion upon it?

Judge Dorsey—

In order to make this a contempt, you must connect the publication with the case depending---and is not this done by discovering the analogy? Mr. Donaldson. Is it not for the court to say that there is such an analogy as shall render this publication a contempt? Nobody else can see it---and besides to judge of inuendoes is the province of the jury altogether. Judge

Dorsey. I do not know, the court must act, there must be a standard, and that standard is circumstances. Mr. Meredith. The affidavits filed prove that the publication alluded to the trial. Mr. Glenn. If this paper be necessary, it should have been filed at the commencement of this proceeding. Judge Dorsey. The court do not wish to rely upon their own recollection, they wish a statement of the facts upon the record. Mr. Kell remarked, that the prosecutor must confine himself to that which is pertinent to the case. The judge here read 3 of the questions from the paper. He said that the application was direct, because it had been given in evidence that one of the three men was thrust out of the office which was the matter alluded to in one of the questions. Mr. Kell. If a person was indicted for a libel---would it be sufficient for a man to produce this publication or a similar one, and swear to his belief of its application to himself. You must shew the connection between the libel and its application, by impartial testimony. Judge Dorsey. Suppose *a publication appears in a newspaper respecting a case in court, charging a man with theft --if am attachment was moved for, the truths of that fact will not excuse the publication. The doctrine of contempt under the common law of England does not rest upon the truths or falsehood of the facts: for the law of England does not consider whether the publication be true or fale.* Messrs. Kell and Donaldson, both remarked *that it was folly to offer evidence in behalf of Baptis Irvine when truth could not benefit him.* Judge Dorsey. *All publications upon the court are improper* Mr. Kell. *We can give the truth in evidence in this country.* Judge. Then it is the plea of justification. Mr. M. Ought not this to be done after the rule is made absolute We wish the punishment of the respondent—the delay has been dangerous---the press has since teemed with publications worse even than the one in question. Judge. But the nature of the affidavits and their effects are to be decided upon---after we shall consider what step shall be taken with these affidavits. Mr. Meredith then proposed to withdraw the statement altogether---upon which Mr. Kell said they had nothing additional to offer

Judge DORSEY then read the opinion of the court.*

Upon the application of the prosecutor founded upon affidavits, the court granted a rule to shew cause why an attachment should not issue against Baptis Irvine for contempt of this court. A copy of the rule was served, and the case has been argued.

Two of the respondent's counsel contended that the court had no right to issue an attachment; & all three of them that no contempt had been committed The power of punishing contempts has been considered as the first right of common law; it has been uniformly practised for *more than* 800 *years*, since the establishment of magna charta, & of one of its provisions, our 21st section of the bill of rights is a copy. It has never been considered in England by any of the patriot lawyers that country has produced, that the exercise of this power is hostile to the subject, or any violation of this charter: because it has been enforced upon the principles of justice. The power of punishing contempts is an attribute of courts, without which, there could be no administration of justice. Upon this principle the courts of justice are likely to be affected by consequential contempts The counsel have said that if the publication be criminal or incorrect, the respondent is entitled to a trial by jury: but this would altogether destroy the

* *Presuming that Mr. Dorsey would not refuse; I asked him to give me the opinion of the court for publication, but to my utter astonishment he peremptorily denied my request. The most prominent features and the substance of that remarkable paper are here exhibited, and the identical words of the judge are recorded as they dropped from his mouth.*

power of punishing contempts. The judge here noticed the case of assaulting a judge on the bench, which the counsel admitted to be a contempt.—And why one species of contempt and not another should be punishable the court cannot discover. This mode of reasoning will not serve the counsel. In the case even of an assault upon a juryman when retiring to the jury chamber, if the counsel's reasoning be just, that would not be a contempt, because it might not so injure him as to interfere with the administration of justice—and why contempts should arise from one case and not from another the court cannot discover. The section of the bill of rights does not abridge the court of this power; because if the bill of rights altogether interdicted this summary process, contempts could not be punishable.

There is a wide difference between the liberty of the press, and its licentiousness: the liberty of the press consists in laying no previous restraint upon publications *that are legal*—but if the publication is wrong, the writer renders himself subject to punishment. The constitution of Pennsylvania has been quoted:—the words of the clause in their declaration of rights is perfectly similar to our 21st section: yet what has been the commentary upon that clause? The supreme court punished Oswald for contempt in 1802: The supreme court punished Passmore for consequential contempt. This last case has been excepted to, because the law of the United States gives their courts that power—but the amendment to the constitution says the same as our bill of rights: hence it cannot interfere with punishing contempts in a summary manner. The supreme court of New-York has exercised the power of punishing contempt in the mode of attachment; The Congress of the United States have declared that this power belongs to courts: and *this court are of opinion that they have a right to punish contempts in the manner contended for.*

The counsel argued that the proceedings were not sub judice—and that the publication cannot be connected with any proceedings in any case before the court. No fine or judgment had been pronounced, although the verdict was given—hence a contempt may be committed by a publication. *made during the continuance of the proceedings, after the verdict is found.* This publication, it was contended, did not relate to that case, in which the judgment of the court had not been delivered. The jury and the witnesses say, that the publication related to them.* The facts are within the recollection of the court, and when they come to recollect the circumstances, they think that the publication was intended to reflect upon the jury and the witnesses. —The court are of opinion that this publication is a contempt, and therefore order an attachment to issue against Baptis Irvine, and after the attachment is returned, he may answer the interrogatories of the prosecutor, and purge himself of the contempt. In deciding upon this case and in forming their opinion, the court have not been swayed by prejudice or awed by menace. Mr. Irvine was here called upon to give security to answer those interrogatories which the prosecutor might prepare against a certain time: this he refused:—he also refused to answer to any interrogatories, and desired that his protest against the whole proceeding as unconstitutional and illegal might be entered upon the record; which was done: but upon the motion of the counsel for the prosecution, Mr. Irvine's protest was erased. The court immediately passed their sentence. "Baptis Irvine, you have been declared guilty of a contempt of this court; and you have refused to answer the interrogatories of the prosecutor: the court do therefore award that you be imprisoned thirty days, that you pay the cost of this proceeding, and that you stand committed until it is paid."

* They said "*it was their impression and belief.*"