AN ESSAY

ON THE

LIBERTY OF THE PRESS,

SHewing,

THAT THE REQUISITION OF SECURITY FOR GOOD BEHAVIOUR FROM LIBLERS, IS PERFECTLY COMPATIBLE WITH THE CONSTITUTION AND LAWS OF VIRGINIA.

BY GEORGE HAY.

RICHMOND:

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1803.
To the People of Virginia.

Richmond, December 26th, 1802.

A QUESTION has been recently discussed in this city in relation to the liberty of the Press; which certainly deserves, and will probably attract general attention. As this question arose in consequence of a measure suggested by myself, it is, perhaps my duty to submit to the consideration of the public, the principles by which that measure may, according to my judgment, be completely justified; by which it may, be proved to be perfectly consistent with the constitution and laws of our country, the rights of the press, the liberty of the people, the peace and happiness of society. It is not, however, my intention to perform this duty, immediately: my professional engagements do not allow me leisure for the purpose; and even if they did, the investigation would not now be proper. The question, though determined by the magistrates, must be regarded as depending before the court, and therefore ought not, at this time, and especially by a party, to be selected as a topic of newspaper discussion. At a future and not distant day, the subject shall be presented to the public, with candor, if not correct exposition of its merits.

My object in the present address, is to guard against a misrepresentation which there is reason to anticipate. The arrest of the editors of the Recorder, for the purpose of requiring security for their good behaviour, will probably be denounced as a party measure, for which the republicans generally, are responsible... This will not be just. I not only acknowledge, but I aver, that the arrest of Pace and Cailender was a step, of which the praise or the blame, whichever it may be, belongs exclusively to myself. I will not affirm, but I do believe, that there was not one of my political friends who knew, ten minutes before the application for the warrant, that an arrest was in contemplation. My consultations were confined to my professional brethren, who, though opposed in political sentiment, concurred with each other and with me, in their opinion as to the law.
For a moment more I will intrude on the attention of the public. During the discussion of the question whether security for good behaviour could be constitutionally exacted from persons charged with being notorious libellers, it was stated by one of the counsel for the defendants, that a few years ago I had come forward as the assenter of the liberty of the press; but that I was now endeavouring to establish a precedent, tending directly, not to impair, but to destroy it. In reply to this charge which, though delicately expressed, was very explicitly made, I declared to the numerous and very respectable assembly of citizens who attended the discussion, that my zeal for the liberty of the press was as ardent and sincere as it was at the most inauspicious period of our political progress; that the doctrine which I had formerly advocated and published to the world, was, according to my most impartial judgment, perfectly consistent with the principles which I was then endeavouring to carry into effective operation; that the clause in our bill of rights, which guarantees the freedom of the press was intended to protect, from the power and the vengeance of every administration, the individuals who might choose to condemn, however unjustly, their principles or their measures; to secure to the vigilant and intelligent patriots of this country, through all succeeding time, the right of discussing freely those great questions of constitutional law, or national policy on which the liberties and happiness of a free people depended; but that it ought never to be interposed in a question between man and man, because it could not have been intended to save from punishment the libeller, who, through the medium of the press, with wanton and unprovoked malignity, endeavours to wound the feelings, and blight the character of an individual, while he tramples on the peace and happiness of families... Such however, I observed, was my attachment to the sacred principles which guard the liberty of the press, that if I could be persuaded, that it was in any degree endangered by the step which I had taken, I would instantly retract. I would acknowledge my error in the face of the world, and as an expiation of my fault, would patiently submit, during the remainder of my life, to the grossest abuse that calumny could dictate... I repeat this declaration; if I should hereafter be convinced of my error, my acknowledgment shall be no less explicit than prompt. But this conviction will never come. The more I reflect, the more I see, and what have I not seen! the more I am assured, that under the state governments it is time that the "good sense of the people, aiding the authority of the magistracy, should interpose to rescue us from a tyranny, by which the weak, the wicked and the obscure, are enabled to prey upon the fame, the feelings and the fortunes of every conspicuous member of the community."... No! this conviction will never come. The principles for which I shall contend, cannot be abandoned without resorting to others, which may, at the awful moment when exasperation is at its height, place those who ought to be friends and brothers in armed array against each other, and deluge our cities with the blood of our fellow citizens.

George Hay.

* See Governor Mc-Kean's last and very eloquent address to the Legislature of Pennsylvania.
AN ESSAY

ON THE

LIBERTY OF THE PRESS.

To the People of Virginia.

Richmond, Augst, 1803.

In a publication, dated the 28th of December last, and addressed to you, I pledged myself, to vindicate, at a future day, the principle on which security for good behaviour had been required from the Editors of a Gazette, called the Recorder. The performance of this duty might have been sooner attempted; but it was postponed until this time, partly from a want of leisure, but principally with a view to satisfy myself as well as the public, that the course which I now pursue, is prescribed by my most deliberate and impartial judgment. Another consideration had some influence; in producing this delay, I wished to hear, and to understand the objections, which seemed to be relied on, in opposition to the doctrine, which it is now proposed to maintain: because I believed that I did possess, and I yet believe, that I possess firmness enough to acknowledge myself convinced by an argument, which I cannot refute. The merit of consistency, if such an expression can with propriety
be used," is but "dust in the balance," when weighed against the merit of acting in conformity to the sacred principles of candor and truth.

A subject more interesting, has seldom been submitted to the consideration of the public. It ought, if possible, to be understood by every member of the community. But this important object can be accomplished by means of fair argument alone, which should be so brief that all may have leisure to read it, and so perspicuous, that all may have power to comprehend it. The citizen, who shall in this way perform this task, will render a real service to his country. It is to me a subject of unfeigned concern, that I have neither time nor talents for the undertaking; but the peculiar situation in which I stand, renders it necessary for me, however reluctantly, to proceed.

I will not stop to vindicate myself from the charges of presumption and inconsistency, which have been exhibited against me in the newspapers. These are charges, about which the people cannot be concerned; and which, whether true or false, are the affairs of a moment only; but the question, on which they are now about to be addressed, will be interesting, through every succeeding age, when no "frail memorial" shall be left of the parties or occurrences which gave it birth.

The propositions meant to be maintained in the ensuing discussion are two. The first is, that by law, security for good behaviour may be required, by a justice of the peace from the editors of a gazette notoriously libellous.

The second is, that the clauses in our bill of rights, relating to the trial by jury, and the freedom of the press, will not in any degree be violated by this requisition of security.

Whether the truth of these propositions, or either of them, can be demonstrated or not, time will determine; but it is justifiable to remark, that in stating them thus specifically, a plan has been adopted which has, at least, the merit of candor to recommend it. The reader is distinctly apprised of the object, which the writer has in view, and will not therefore be intangled or misled by an argument, the application of which is artfully kept in reserve. But my opponents neither state their propositions, nor define their terms. They boldly represent what has been done as an invasion of principles which our constitution has pronounced to be sacred: and having infixed as they think the fears and prejudices of the people on their side, they confidently assume what they are unable to prove, and declaim in a tone in which as little respect is paid to the principles of logic, as to the rules of decorum.

It is obvious that the two foregoing propositions are, in their nature entirely different. The first exhibits a question of law, in the discussion of which, we must be governed by cases already determined, and be guided by doctrines which have been sanctioned by authority. The latter presents a great constitutional question, the solution of which depends, not on cases and precedents furnished by books, but on principles whose origin is to be traced in the law of nature, and whose validity depends on their tendency to promote the permanent interests of mankind. Plain as this distinction is, it is frequently overlooked even by intelligent men. The two questions are often confused, as if they reposed on the same ground. But if precision and method are in any case important, in the present case they must be admitted to be essential. The reader therefore if his object be the attainment of truth, will take the propositions, as they have been distinctly stated to him, and consider the arguments urged in support of each, without any reference to the other.

The first proposition is,

That by law, security for good behaviour, may be required, by a justice of the peace from the editors of a gazette, notoriously libellous.

The examination of this point, is not, perhaps absolutely necessary. There are few, very few, it is believed, who seriously controvert the truth of this proposition. The most candid and the most intelligent of those, whose opinions, or rather whose doubts, have been made known to me, admit the doctrine contained in it, to be correct, when stated without reference to the bill of rights. But as this doctrine is, probably, not generally understood, and as I stand before the public, pledged at least to attempt an explanation, I trust, that a candid exposition of the law, on this preliminary topic, will not be unacceptable or useless.

Let us define as we proceed. A libel is a false and malicious defamation of an individual, made public by printing, writing,
This, it must be acknowledged, is not the definition furnished by the common law. According to the established principles of that code, it is not necessary, that the defamation, should be false. Evidence cannot be introduced, to prove the truth of the words, charged in an indictment to be libellous. It is sufficient, if the defendant was actuated by malicious motives. But in England, the liberty of the press, is not guarded by any constitutional provision. Here, our bill of rights declares it to be sacred. The definition of a libel therefore, now offered to the public, is different from that in which the English writers on criminal law, and the English courts, have uniformly concurred. If the term "liberty of the press," is to be understood, according to the exposition formerly submitted to the public, in an essay, under the signature of Hortensius, the propriety of the change will be completely evinced. It is there stated that the liberty of the press, consists in the right to publish whatever one chooses to publish, provided no individual be injured. Now an individual is not injured, if what is said of him be true. This point is settled by the law of England. For in that country, if the party defamed, brings an action for damages, and the defendant pleads that the words are true, evidence to support the plea will be admitted; and if the jury find it to be true, the court must pronounce judgment for the defendant; in other words, they will pronounce, that the plaintiff has no cause of action, because he has not been injured. If then the party, against whom the truth however degrading has been published, is not injured even according to the rigorous doctrines of the common law, the publisher of a printed libel might protect himself from an indictment, as well as from a civil action, by proving the truth of what he had said. By this proof he demonstrates that he has done no injury to an individual, and of course, that he has not transfixed the only limit that can be traced in the Constitution, to the freedom of the press.

The intelligent reader, will not fail to remark, that the propriety of the definition, furnished by the above mentioned essay, is, in some measure evinced, by the effect which the application of it to the subject immediately before us has produced. It en-
worthy of the county, with some learned in the law: and they shall have power to restrain the offenders, rioters, and all other baritors, and to pursue, arrest, take, and chastise them, according to their trespasses and offence, and to cause them to be imprisoned and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretion and good advicement: and also to inform them, and to inquire of all those that have been pillers or robbers: in the parts beyond the seas and be now come again and go wandering and will not labor as they were wont in times past and to take and arrest all those that they may find by indiscretion or by suspicion and put them in prison and to take all of them that be not of good fame, where they shall be found, sufficient security and mainprize of their good behavior towards the king and his people and the other duly to punish to the intent that the people be not by such rioters and rebels troubled nor endangered, nor the peace blemished, nor merchant nor other passing by the highway of the realm disturbed, nor put into the peril which may happen of such offenders."

In the construction of this statute, a question formerly arose, as to the meaning of the words "be not of good fame." Burn remarks that this statute seems principally to have had in view the disorders to which the country was exposed, from the great number of disbanded soldiers, who having served abroad, under their victorious king, were grown strangers to industry, and were rather inclined to live on rapine and spoil. He is therefore of opinion, that the words "be not of good fame" should be understood, to refer to such offenses only as have a relation to the peace, and to other things, which concern not the peace. (a)

To the argument founded on the opinion of Burn the following considerations may be opposed. The first is, that his opinion, however respectable, is not authority, and has not been adopted in the courts of England. He states himself that there is scarcely a statute which "hath received such a large

The second is, that the limited construction which he con-

tends, ought to have been adopted, is obviously, and as he himself substantially says, (a) founded on certain words in the statute, relating to pillors, robbers, &c. which words it will presently be seen, are not in our act of assembly, which gives the power, of requiring security, for good behavior.

Thirdly, the offense of publishing a libel does concern the peace. The opinion of Burn expressed in his own words is, that the statute should be extended to those offenses only which relate to the peace, and not to those which do not concern the peace. (b) If therefore he is himself of opinion that the offense in question does concern the peace, he must necessarily be of opinion, that it is within the operation of the statute. In Coke's reports (c) it is laid down, "that if the libel be against a private person, yet it deserveth severe punishment." For albeit the libel be against one, yet it inciteth all those of the same family, kindred or society, to revenge, and so tends by consequence to quarrels and breach of the peace, and may be the cause of effusion of blood and great inconveniences; but if it be against a magistrate or other public person it is a greater offense, for it concerneth not only the breach of the peace, but the scandal of the government." This is quoted by Hawkins (d) and repeated after him by Burn (e) without commentary or objection, both of which he was abundantly disposed to make, where he recited what he disapproved. A libellous publication then, having in the opinion of Burn a direct connection with the peace of society, is an offense clearly within the meaning of the statute, even according to his own principle of construction. And in fact, in speaking particularly of libels, he concurs with Hawkins, in the most extensive application of the statute, who says that a man may be bound to his good behavior, as a scandalous person of evil fame, although his publication is not actually a libel against an individual, but merely a book of ribaldry or obscenity. (f) In this opinion, that libels have a direct connection with the peace of society, Burn did not stand alone. In the classification of "public wrongs" they are placed with-of.

(a) Burn 564. (b) Ibid. 563 564. (c) 3 Co. 121. (d) 1 165. (e) Burn 569. (f) 1 Hawk. 199. Burn 569. It will be seen in the subsequent part of this work, that of a writing of this description no notice can be taken by the magistrates at courts in this state.
fences relating to the public peace,\(^{(a)}\) and are uniformly denounced, on account of their tendency to disturb it.\(^{(b)}\) The accuracy of this opinion is demonstrated by recent experience. The peace of the community has been repeatedly infringed, while social harmony has received a wound, which the lapse of ages only can relieve. Even then, according to Burn himself who was relied on by the counsel for the editors of the Recorder, libels constitute an offence, clearly within the purview of the statute.

Lord Coke also was relied on, by the counsel for the editors. His opinion seems to be, that the words \"be not of good fame\" should be construed to extend to those persons only, that \"be defamed, and unjustly suspected, of an intention to break the peace.\"\(^{(c)}\) But this is a mere dictum, and does not belong to the question, the decision of which he was then reporting. A single remark will be sufficient to shew the fallacy of this dictum. Before the statute under consideration was passed, security for keeping the peace, might have been required from persons, suspected of an intention to break it. If, therefore, his construction be correct, if the statute is to be restricted to those only who are unjustly suspected of an intention to break the peace, it is nugatory in itself, and the enactment of it was superfluous. Nothing can be done by virtue of the statute, which could not be done before. Surely it requires no argument or authority to prove, that a construction of a statute, which in effect repeals it, is utterly inadmissible.

But whatever may have been the opinion of Burn on this subject, or whatever respect may be due, to a saying of Lord Coke, the truth is, that the law of England is now, and for a long time has been, understood to be this, \"that a man may be bound to his good behaviour for causes of scandal contrary to good morals, as well as against the peace.\" This doctrine is expressly laid down by Blackstone, one of the latest, and indubitably the ablest expounder of the English law.\(^{(d)}\) In this representation, he is supported by Lambard, who wrote a treatise on the duties of justices of the peace, early in the reign of

\(^{(a)}\) Bla. Com. 4 143. 149
\(^{(c)}\) 4 Inst. 161.
\(^{(d)}\) 4 Bla. Com. 236.

James the 1st: by Dalton who in the same reign wrote on the same subject, and who expressly says,\(^{(a)}\) that libellers may be bound to their good behaviour as disturbers of the public peace; by Hawkins, who wrote in the time of George the 1st, and who after noticing the limited construction before mentioned, pointedly reprobates it, contends that \"in common understanding, the words \"those that be of evil fame\" cannot be restricted to peace breakers\(^{(b)}\) and expressly declares it to be law that security for good behaviour may be required from libellers;\(^{(c)}\) and by Matthew Bacon, who also quotes and condemns the opinion of Lord Coke.\(^{(d)}\)

The practice of the courts of the first dignity in England appears to have been in conformity to the principles here laid down. In the King vs. Ridpath, where the defendant was arrested for a libel, he was immediately bound to his good behaviour.\(^{(e)}\)

In the case of the \"King vs. Franklin,\" the defendant was arrested for a libel, and entered into a recognizance, inter alia, for his good behaviour. A motion was made to procure his discharge from this recognizance, not because the magistrate had no right to require security, but because the term for which he was bound, according to a fair construction of the recognizance, had actually expired.\(^{(f)}\)

Before this part of the subject is abandoned, a moment may be spared to the case of Wilkes, which also was noticed and relied on by the counsel for the Editors of the Recorder.\(^{(g)}\) In that case the question was, whether the privilege of Wilkes a member of parliament, extended to a libel. In all cases whatever except treason, felony, and breach of the peace, the person of a member of parliament is exempt from arrest.\(^{(b)}\) It was determined that a libel was not an actual breach of the peace, and that therefore Wilkes, whose only offence was the publication of a libel should be discharged. This was the only question before the court, and this question was properly determined. This determination had no relation to the present enquiry. But an observation of Pratt, the chief justice, in the conclusion of his argument was particularly noticed.

\(^{(a)}\) p. 94. \(^{(b)}\) Hawk. 132. \(^{(c)}\) Id. 195. \(^{(d)}\) Bla. Com. 236.
\(^{(e)}\) See Dig. of the law of libels, p. 34.
\(^{(f)}\) 2 Wils. report, 131.
\(^{(g)}\) 4 Inst. 25.
The words quoted are, "on the whole it is absurd to require fury of the peace, or bail, in the case of a libeller, and therefore Mr. Wilkes must be discharged from his imprisonment."

Upon this quotation the following observations occur.

This decision was pronounced by Pratt, in the presence of an innumerable crowd, who manifested the most lively sympathy in behalf of the prisoner, and who expressed their exultation at his discharge by loud huzzas in the presence of the court. Perhaps an expression dropped by a judge on a collateral point and under such circumstances, ought not, even if its import were perfectly clear, to be regarded as conclusive authority.

The meaning of the words above quoted, which constitute only a part of a sentence, cannot be ascertained, without comparing them, with the general tenor of the whole case. The absurdity of partial quotations has been often exposed. By partial quotations it may be proved that Locke was the advocate of humane ideas or the divine right of kings, and Milton may be convicted of impiety.

The meaning then of the quoted words, when compared with the context, must be this. "Upon the whole it is absurd to require fury of the peace, or bail in the case of a libeller, who is a member of parliament, and therefore Mr. Wilkes must be discharged." For this has been "upon the whole" the real point of discussion, whether Mr. W. being a member of parliament could be held to security. But demonstration on this subject is afforded by the preceding page of the same report, in which the same judge, speaking of the libel, expressly states, "it is said to be an infamous and seditious libel; it is such a misdemeanor as we should require good bail for (observation to be observed) and such as the party may be able to procure." Now, if you take the two quotations, and compare them together, without noticing the several questions before the court, you make the Judge lay, in one instance, this libellous publication is a misdemeanor, for which good bail should be required; in another, it is absurd to require bail in the case of a libeller. But if you take the whole report together, it amounts to this, that a member of parliament being privileged from arrest, except in case of treason, felony, or breach of the peace, and a libel being neither, Mr. Wilkes, a member of parliament, must be discharged from arrest. This is the doctrine contained in that report, and in reality there is not a word in it, which has the least relation to the question, whether a libeller can be held to security for his good behaviour or not.

With respect to this case, it is worthy of remark, that in the report furnished by the "Digest of the law of libels" before quoted, the Judge is represented as confining himself strictly to the question about security for the peace.

If my notes are correct, Burn, Coke and Pratt were the only lawyers, whose opinions were quoted by the counsel for the Recorder, in opposition to the motion for security for good behaviour. Concerning the first, I have endeavoured to shew, that his opinion is in direct opposition to the doctrine, in support of which it was introduced: as to the second, that his dictum ought not to be regarded, because it renders the statute a dead letter: and as to the third, that the question, which Wilkes' plea of privilege, made it necessary for him to decide, bore no relation to the point now under consideration.

Upon the whole, it appears, that in England, at different times, three different constructions have been put upon the words "be not of good fame," used in the statute of 34, Ed. 3.

The first confines the operation of these words, to persons justly suspected of an intention to break the peace. This, from the dictum, above mentioned, seems to be the construction of Lord Coke, but in this opinion he seems to stand alone. The opposing counsel mentioned no other authority to the same effect, and I know of none.

The second extends the operation of these words and makes them comprehend not only persons suspected of an intention to break the peace, but those whose actions have a tendency to produce a breach of the peace. This is the doctrine laid down by Burn; and this doctrine is sufficient for my purpose.

The third construction, supported by Hawkins, Bacon and Blackstone, as well as more ancient writers, extends the operation of the statute to all persons suspected of an intention to commit an act denominated in law a crime, or misdemeanor; and so, the law has long been understood, and acted upon in the courts of England.

The foregoing remarks I know must be tedious; but I shall be excused for introducing them, by all those who shall think,
that in a discussion, intended for the public, both candor and decorum required, that notice should be taken, of the objections which had been already made known through the medium of the bar, and of the press.

It is presumed that the preceding authorities and remarks are sufficient to produce a general conviction, that according to the established exposition of the English statute, security for good behaviour may be required, from many, besides those, who are defamed and justly suspected of an intention to break the peace; and among others, from libellers. If however any doubts should be entertained, it will be readily perceived, that the cautions which produce them, are not to be discovered in our own law upon this subject.

The above mentioned statute, was in force in this commonwealth, until the year 1792, at which time all the acts of parliament, which had been considered, as in operation here, were repealed. But during the same session, in which this repealing law passed, the General Assembly enacted a great number of laws, many of which were copied almost word for word, from the statutes which they had repealed. Among others, they revived or rather continued in substance the act of 34. Ed. 3. leaving out those words only, which in England had given rise to controversy, but adopting the identical words, to which according to Burn, such a “largeness of interpretation” had been allowed. The phrasing is indeed remarkable. “Be it enacted” say the legislature, “that the Judges of the Court of Appeals, High Court of Chancery, and General Court, shall be conservators of the peace, throughout the common-wealth; and the justices of the peace in each county and corporation, shall be conservators of the peace within their respective counties and corporations respectively; and the said judges and justices within the limits aforesaid respectively shall have power to demand of such persons, as are not of good name, sufficient surety and mainprize for their good behaviour.”

The important words in this act are plainly copied from the statute of Edward. One of these words, mainprize is not only antiquated, but superfluous. The operation of the act would be the same without it. This procedure can be accounted for, rationally, in one way only. The legislature meant to continue the law as it was, and by thus accurately copying the words of the English statute, they had recourse to phrasing, the import of which had been long ascertained. This reasoning, I understand, has been repeatedly recognized, in our Court of Appeals.

There is no book so well known among the judges and lawyers of Virginia, as Blackstone’s Commentaries, nor is there any so much relied on, or so frequently quoted. It is in the hands of every man, and was the principal guide of the Revivers, in the selection of laws presented in 1792 to the General Assembly. Blackstone, having stated, that the words “be not of good fame” extended to persons guilty of offences against good morals, as well as against the peace, it is obvious that the revivers and the legislature meant to use those words, in the extensive sense ascribed to them by the writer with whom they were most familiar.

I will encounter the charge of temerity, by venturing to give to these words, a construction more definite and precise, than has been hitherto afforded. The expression, says Blackstone, is of great latitude, and leaves much to the discretion of the magistrate. By ascertaining, the latitude of the expression, we shall perceive the extent, of magisterial discretion.

It is obvious, at the first glance, that this expression ought not to be taken according to the common acceptation, so as to justify the requisition of security from every man of bad fame. A man may be a peron of evil fame, in consequence of acts of which no notice is taken by the law. He may have, and may deserve a bad character, from all who speak of him, and yet be completely out of the reach of municipal regulations. He may be infamous, for avarice, for cowardice, for lies, for cruelty, for ingratitude. He may have a temper which may make his wife hate him, his children fear him, his slaves tremble in his presence, and his neighbours avoid all intercourse with him. But he does no act, which the laws of society, have denounced as a crime. Such a man, however abhorred, and however justly abhorred, is not a subject for the operation of this law. If he were, then the expression under review would indeed be of great latitude, and the power of the magistrate might be dangerous, as it would be boundless.

To whom then, it will be asked, shall the words of this law be
applied? The answer is to those, and to those only, whom there is probable ground, to suspect, of an intention to commit an act, denounced by the law, a crime, or misdemeanor. The common sense of this reply must be obvious to every man: for why should the law, take security from a man, but to prevent him from doing that, which, when done, is an offence, and punishable by law. It is justice, says Blackstone, to punish crimes and misdemeanors, but it is humanity to prevent them. The requital of security is the preventive system, adopted by our laws. If the words under consideration, were understood in the limited sense here contended for, the law is rational, and consistent. It endeavors to prevent those acts which it has denounced as criminal, and which when committed, must be punished. If, on the other hand, the more extensive signification should be allowed, this enormity ensues. A man might be arrested and thrown into prison, for want of security, to prevent him from committing a crime, when there existed no just reason to suspect, that a crime was in contemplation.

Upon the same principle, it is supposed, that the words “good behaviour” do not mean, in law, as in common speech, polished manners, or gentlemanly deportment, but that system of conduct, in which no crime or misdemeanor can be discerned.

Thus we trace without difficulty the limits of the magistrate’s power. He has no direction, in selecting the persons, to whom the law shall be applied. The foregoing exposition, furnishes him, with an unerring guide, which conducts him to those only, whom there is ground to suspect, of an intention to commit, an indictable offence. In truth he seems to have no discretion. He must judge indeed of the facts which justify the apprehension, that a crime is intended; but if he is satisfied, that the apprehension is well founded, he is bound, to execute, without discrimination, the preventive power, conferred on him by the law.

The application of this reasoning to the subject before us, will leave no room of difficulty as to the law of the case. To which, and which only, the reader will permit me to remind him, the discussion has hitherto confined.

A libel, we have already seen, is an indictable offence: therefore upon the principles above stated, a man, who is the Editor of a paper notoriously libellous, may lawfully be held to security for his good behaviour.

To me it seems perfectly clear, that the construction here given to the words “be not of good fame,” is the only one, which will stand the test of an investigation. But let them be taken according to their usual acceptation, in common conversation. If a libeller is not a man of evil fame, who is? His crime is denounced in almost every code in the strongest terms, and in England has been frequently punished, by compelling the calumniator, to submit, to the most afflicting humiliations. In the justice of this denunciation all parties concur, and even those who encourage and support him, unite with the rest of mankind, in bestowing upon him the bitterest exactions. In truth, who can deserve them more? For the thief, poverty may afford some extenuation of his offence. The murderer may hope, that the “gates of mercy” are not shut against him forever, if the mortal blow was inflicted in the excess and agony of sudden desperation. But for him, who lies, who deliberately lies, for the purpose of destroying a character, or blasting the peace of a family, what apology can be offered? This wide world, filled as it is with wickedness and abominations of every possible description, with villains of every possible denomination and degree, does not contain a monster more foul, and more to be abhorred than the calumniator. But the “ways of Heaven though some times dark and intricate,” are just. If the calumniator, is among the basest, he is also among he most wretched of the sons of men. Conscious of the vileness of his motives, and the inanity of his pursuits, and haunted by terrors which he cannot overcome, he flits aloof from man kind. His own conscience has set a mark upon him, and he fears, “that every man, who finds him may flay him.” He therefore like Junius, wraps himself up in a veil impervious to mortal eye, and suffers his reputation to be blasted by the pen of the eloquent and indignant historian, or seeks for refuge, from the scorn of integrity and the hostility of renunciation, in a vice which though it produces a momentary delirium, leads its devoted victim, to melancholy, to despair, to infamy, to death, and death.

Thus the intelligent reader will perceive, that the first proposition has been fully supported. He will see that I have not only demonstrated that proposition to be true, but have also proved, that by law, every citizen of this commonwealth, whom there is just reason to suspect of an intention to commit an indictable offence, by the publication of a libel, or in any other way, may be compelled to give assurance to society that he will not commit that offence or any other. Which position comprehends, what I undertook to prove, and more.

The second proposition is,

That the clauses, in our bill of rights, relating to the trial by jury and the freedom of the press, will not in any degree be violated, by this requisition of security.

This proposition, ought to have been divided into two parts: one of them relating to the trial by jury, the other to the freedom of the press. But every thing like confusion may be avoided, by making each the subject of a separate discussion.

Trial by jury is the subject of the 8th section of the bill of rights, which is in these words. "That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself: that no man be deprived of his liberty except by the law of the land, or the judgment of his peers."

The supposition, that the right to a trial by jury, can be at all affected, by requiring security for good behaviour, in other words the doctrine that the act of 1792, is incompatible with the foregoing section of the bill of rights, seems to utterly destitute of all rational support, that an apology for mentioning it, will not perhaps be deemed unnecessary. My apology is, that it furnished at the bar of Henrico court, a topic of pathetic declamation.

If there are any words in our language, whose plain and well known import excludes the possibility of two constructions, the words in the recited section are of that description. The words are "to a speedy trial by an impartial jury, &c.:" that is, the truth of the charge shall be ascertained by a jury. The question of guilty or not guilty shall not be determined by a court, whose situation in life, may deprive them of all sympathy for the prisoner, but by twelve men, selected from the neighbourhood where the party lived, who probably knew him, and who will protect him from the effects of a prosecution commenced from a spirit of party, or that disposition to oppress, which sometimes is produced by the pride of wealth or the influence of power.

If then a libeller, or any other person is held to his good behaviour, and perpetrates an act, supposed to be a forfeiture of his recognizance, this act, the objection supposes will not be tried by a jury. If this supposition were correct, it must be admitted that the bill of rights would be utterly disregarded. But the truth is that the fact charged as the violation of the condition of the recognizance, would be tried by a jury, and if disputed by the party could not be tried in any other way. A feire facias in such a case would be the proper process. The party would be summoned to show cause, why the penalty should not be exacted from him. The cause would be tried by a regular plea, stating in substance that the defendant had not violated the condition of his obligation. The replication to this plea would state precisely the fact, alleged to be a violation, with all the circumstances of time and place. On this replication, an issue would be taken, and the matter in issue, like all other matters in issue, would be decided by a jury: and if the fact alleged was not proved, by the party, that is the commonwealth, affirming it, the verdict would be for the defendant. This is a point which it is unnecessary further to illustrate. Every man in this country whose business or curiosity has led him to a county court-house, knows that in a feire facias against bail, the parties charged have a right to plead and that the truth of their defence, is to be ascertained by a jury.

It was also intimated that fines by law, are to be ascertained by a jury; and if a magistrate can exact a bond under a penalty, the verdict of the jury will only ascertain the truth of the fact alleged as the breach of the bond, and the court will give

judgment for the penalty. All this is true; but a very few words will afford a satisfactory explanation.

A law of the General Assembly enacted in 1792, says, "In every such information, or indictment, the fine or amercement, which ought to be according to the degree of the fault and the estate of the defendant, shall be assessed by twelve honest and lawful men."

To this argument the following answers immediately present themselves.

The first is that it does not bear against the proposition, which it is meant to controvert. The proposition is that the bill of rights does not oppose the requisition of security. The argument suggests an objection, resting not on the bill of rights, but on an act of Assembly, actually passed during the same session, in which the law under consideration was enacted. The supposed collision then is not between the constitution and a law, but between two laws, which being co-eval, as well as co-ordinate, ought to be considered, and are daily construed in such a way as to allow complete operation to each. The second is, that if the recited words, were in the bill of rights, instead of act of Assembly, the result would be the same, for this plain reason, that a fine facias to recover a penalty, deliberately incurred, is not a proceeding by indictment or information, in which a fine or amercement is to be assessed. The third and conclusive answer is that this argument proves too much, and therefore must be wrong; for that position must be erroneous, from which error is regularly deducible. For if security for good behaviour, cannot be exacted from a libeller because the penalty ought to be assessed by a jury, instead of being ascertained by a magistrate, it follows, that no security can in any case be taken by a bond under a penalty. The act of 1792 would be a dead letter, and security for the peace could not be required, because the magistrate could not fix the penalty. This argument, bidding defiance to the established opinions, and uniform practice of every court in the commonwealth, will not be further noticed. I halen to consider that part of the subject which relates to the liberty of the press.

The last question which remains to be considered, is whether the requisition of security, for good behaviour, from a libeller, who is a printer, is incompatible with the letter or meaning of the 14th section of our bill of rights.

"The freedom of the press," says the 14th section, "is one of the great bulwarks of liberty, and can never be restrained but by a despotic government."

If the law, and the constitution, are at variance, with each other, it is conceded, without hesitation, that the former ought not to be carried into effect. The doctrine, that the judiciary, are bound by a legislative act or declaration, repugnant to the constitution, requires, for its support, the aid of clearer and stronger arguments, than those that have hitherto appeared.

He, who will admit that a straight line is that which marks the shortest course between two given points, will concede, that the freedom of the press, as guaranteed by the above cited section of the bill of rights, authorizes a printer to publish with impunity, what he pleases on all subjects whatever, or it does not."

Or, in other words, "That the freedom of the press is without any limitation whatever, or there does exist some limitation."

That this freedom is not unlimited, is a truth which must command, and has commanded, universal assent. There is not a man in the commonwealth of Virginia, who has ever ventured even to suggest, that according to the constitution and laws of our country, damages cannot be recovered from a printer, for the publication of a libel, or that such a publication is not an indictable offence. This point being also conceded, there is an end of the question. For, if a printer can, constitutionally, be punished for the publication of a libel, it follows that he has no right to publish a libel; and if he has no right to publish a libel, it also follows, that the act of 1792 does not violate his rights, or the freedom of the press, in exacting from him..."
a security that he will not do, what he has no right to do, and what he is punishable for doing.

If a man is restrained, from doing that, which he has a right to do, he has reason to complain. He may then say, with truth, my rights are invaded. If he is prevented from publishing, what he has a right to publish, then he may say, with truth, the liberty of the press is invaded and abridged. But, that a man's rights are invaded, because he is required to give security that he will not commit a crime, which he acknowledges, or it is proved, he is about to commit: or, that the liberty of the press is averted, because can be supposed to be called upon for security that he will not make the medium of an illegal communication. These propositions, which temerity itself will hardly affirm, which credulity itself can never believe.

If this were an ordinary topic, it would be proper to stop here. The premises being admitted, the conclusion follows, with inevitable and resolute force. But the importance of the subject, justifies a departure, from the strict rules of discussion, and calls for every remark, that can afford the slightest illustration. The remainder of this discourse, therefore, must be in a great degree miscellaneous and medley.

If the last mentioned concession, be again referred to, we cannot but perceive and admit, the exact coincidence between the law, and the limitation laid down by Horaci, in the definition of the liberty of the press. This liberty, says that writer, confined, in the right of publishing, with impunity, whatever one chooses to publish, provided no injury be done to an individual. If an injury be done, to an individual, through the medium of the press, our laws prescribe a punishment, and furnish retribution for the wrong: and thus act on that part of the subject, and on that only, which the definition places within their reach.

Thus too, by means of the same doctrine, we come, without difficulty, to that line of limitation, which the laws have already clearly and distinctly drawn, around the liberty of the press. Because it has been said, and repeated, and truly repeated, that it is impossible to draw the line, between the liberty and the licentiousness of the press, it has been conceived by many, that the idea of drawing any line, in which the press is concerned, is visionary and chimerical. A few words will enable us to form a correct opinion on this subject.

The distinction, which ought to be established, and which, in reality is already established is this. A line cannot be drawn upon a subject; but a line can easily be drawn, between different subjects. The tendency of this remark will be seen at once by some; but as it has not, perhaps, been submitted to the public before, it is proper to explain it more at large.

In this state, every man has a right to examine, and to censure, the proceedings of our general assembly. These proceedings afford a subject, for free discussion. Upon this subject, the citizens are assured, by the sincere feeling of our bill of rights that they may exercise, and shall enjoy freedom of discussion. Upon this subject, then, a citizen enters. He disapproves the proceeding, which he examines, and of course expresses his disapproval. The terms in which this disapprobation is expressed, will appear to some, to be the language of intelligent and indignant patriots; to others, the coarse and rancorous invective of an ignorant and bileling partisan, who writes, not only without any knowledge of our affairs, but without solicitude for the reputation or welfare of our country. How is this difficulty to be surmounted? How is this difference to be reconciled? The solution of these questions has in vain been sought. It has hitherto eluded the researches of the most sagacious; it has bid defiance to the labours of the most industrious. It seems at length to be a political axiom, established by the concurrence of all parties, that the point at which freedom of enquiry ends and licentiousness begins, must remain forever unknown. It is indeed, obvious, at the first view, that to this citizen thus engaged, in an investigation which he considers, or affects to consider, as important, a course cannot be prescribed by law. He must mark it out for himself. He must be at liberty to state the facts which he believes or pretends to believe, in the mode which he deems most eligible, and to speak the language which his taste, his judgment, and his feelings dictate. A line by which he is to be directed in his way, on that subject, cannot be drawn, without subjecting to the control of law, a right, which the constitution intended to place, beyond its reach. In this opinion all agree. It was communicated by our envoy to the directory of France, in language of unusual en-
ergy and elegance, and was repeated, word for word, by the leg

gislature of Virginia in their address to the people.

But though a line cannot be drawn, upon any given subject, it may be drawn, and by our law as now understood and practised, has been drawn, between different subjects. Surely it is easy to throw matters of public concern into one class, and questions of private character into another. It is, in fact, so easy, that it has been done, without any legislative interposition whatever. The people and the magistrates concur in opinion, and all agree, that as to the first, matters of a public nature, every man may say what he pleases, but that as to the latter, questions of private character, he must speak truth.

Such is the doctrine, for which I have been denounced as the invader of the liberty of the press! The doctrine which requires that truth shall be spoken of individuals, but which on every other subject allows unbounded latitude, is detestable, alarming, awful! "Of every tree in the garden, thou mayest freely eat; but of the tree of knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof, thou shalt surely die." If this solemn exception of one tree in the garden of Eden, "planted with every fruit that spreadeth its colours to the sun, and every flour that scattereth fragrance in the air," was disregarded by the parents of mankind, we cannot wonder, that their descendants are, sometimes, like them, unreasonable and pernicious.

This being, according to my present views, the last time, that I shall address the public, on any political topic, I will not take leave, before I quit this subject, to state, in detail, what I conceive to be the legitimate deductions, that are to be made, from the doctrine, concerning the liberty of the press, which I have uniformly endeavoured to support.

1. That a citizen of this commonwealth, cannot be punished, for publishing his opinions, however absurd in principle, or immoral in their tendency, on any subject whatever of a general nature, whether religious, philosophical, moral, political, or legal.

2. Nor for enforcing and illustrating these opinions, by flattering as a fact, what is not true.

* See the Journals of January, 1799.

3. But for a libel on private character, that is, for a false and malicious statement tending to the discrediting of an individual, he is amenable to that individual, by an action, and to the public, by indictment.

The reader, is requested, to attend seriously to the three propositions just stated, and after mature deliberation, to answer the following interrogatories: Is it possible, that the liberty of a nation, can be endangered by the establishment of a doctrine, which tolerates, not only error, but falsehood, on every subject except one, and that on the private character of a citizen? And if any danger doth exist, may it not be traced to the latitude, which this doctrine allows, rather than to the restriction which it creates?

Upon these principles, a citizen stands safe within the sanctuary of the press, if he should endeavour to prove that there is no God, or affirm, that there are twenty Gods: If he condemns the principle of republican institutions, and contends that liberty and property can never be secure, but under the protection of aristocracy or monarchy: If he censures the measures of our government, and of every department and officer thereof, and ascribes the measures of those, however arbitrary, and the conduct of the latter, however upright, to the base motives; even if he ascribes to them measures and acts, which never had existence; thus violating at once, every principle of decency and truth. If these are matters of public concern, deeply affecting the rights and interests of the people, and therefore they are placed by the constitution, in the open field of discussion, accessible to all, on every side. Those who framed that constitution knew, that this field would be often occupied by folly, malignity, treachery and ambition; but they knew too, that intelligence and patriotism would always be on the spot in the hour of danger, and to make their entrance at all times easy and secure, it was left open to all.

But the constitution extends its protection to subjects of a general nature only. In them, the great body of the people have an interest, and therefore they are given up to free discussion. But the welfare of the nation, and the liberty of the people, for the protection of which the press was made free, do not in any degree depend on the discussion of questions relating to private character. This species of discussion therefore is left to the
control of the law: and the law has wisely provided, that
though vice may be exposed, integrity shall be protected, and
its calumniator punished.

It cannot have escaped the notice of the reader, that the doc-
trine here inculcated, concerning the liberty of the press, is
based on the definition so often quoted. In this definition, it
is possible, there may be some latent error, which has hitherto
eluded my most patient and vigilant research. If this error
shall be detected, the deductions before stated must be abandon-
ed, and the investigation commenced again, and conducted,
upon the amended definition. But as nearly five years have
elapsed since the publication of the former essay, and during that period, its fundamental position never has been
publicly controverted, it is presumed, that an amendment has
not yet been discovered.

But a discovery, of a different nature, has been made. "The
liberty of the press," it is said, "ought not to be defined,
the tendency of the measure, in question, should be examin-
ed, and if it be dangerous to the liberty of the press, it is
prohibited by the constitution."

To this doctrine, the following considerations may effectu-
ally be opposed. The first is, that it is obviously impossible to
determine whether a measure, if carried into operation, will or
will not have a tendency injurious to the liberty of the press,
unless it has been first ascertained, what the liberty of the press
is. The second, is equally obvious and equally conclusive. If
no definition is to be pronounced, if measures are to be tested
by their tendency, or in other words, by expediency, and not
by the constitution, the result, inevitably is, that the whole
subject is placed under the control of the government. A
law highly arbitrary and dangerous, may be propounded, under
plausible pretences, and if a majority can be persuaded that it is
expedient, they may constitutionally adopt it. By this doctrine, the
bill of rights, instead of securing the freedom of the press, from the
encroachments of the legislature, submits it entirely to their dispo-
sition. This is almost a contradiction in terms. A bill of rights is a
specification of principles and subjects, which are to be regarded
as placed beyond the reach of legislation. That construction
therefore of the 13th section of our bill of rights, which fur-

instead of protecting it from their power, is palpably erroneous,
it is in fact a contradiction, which renders the sentence which is
the subject of it, entirely useless.

The difference under a corrupt government between the situa-
tion of the press, where its rights are defined, and that in which
it must stand, where all definition is rejected, must be seen at
once by the most careless observer. In the first case the lib-
erty of the press is safe. A line is drawn around it which every
man fears, and which, therefore, cannot be transgressed, with-
out instantaneously exciting the suspicion, the fears, the resent-
ment of the people. But in the latter case, there is no point to
which their attention can be directed. There is nothing to
guide them through the endless mazes of political speculation,
and they are left exposed, to all the arts of seduction, which elo-
quence, talents, and confident experience, knows so well how
to employ. Other considerations, worthy of notice, might be
suggested; but what has been said is sufficient. It is not proba-
ble that an error leading to consequences so fatal, will be sup-
ported by many advocates.

The counsel for the editors of the Recorder, pursued the
course marked out in the former as well as in the present en-
quiry, and concurred with their opponents, as to the mode of
reasoning, that ought to be adopted. They sometimes ex-
changed the pleasures of declamation for the labour of argu-
ment, and in the progress of the discussion, they gave a defini-
tion, which served as the basis of the syllogism, now about to
be examined.

The freedom of the press, said they, consists in an exempt-
ion from every species of previous restraint: the exacton from
a printer, of security for his good behaviour, is a restraint, on
his rights, or, what is the same thing, the liberty of the press,
and therefore unconstitutional and void.

The first and second members of this proposition merit,
and will receive a few moments attention. If they are lopped
off, further distinction will be needless.

This definition, it was said, was taken from the English law,
and it was contended ought to be adopted here, because it was
to be premised that the framers of our bill of rights, used the
words freedom of the press, in the sense allowed to them by
that code, which we had thought proper expressly to adopt. But
this opinion is not correct. The legal and political writers of England give no such definition. Blackstone,* Delome,† and Mansfield,‡ curcur in saying that in England the freedom of the press consists not in an exemption from every species of previous restraint, but in an exemption from a particular species of restraint, that is from the control of a licensor. Thus it appears that this definition has not even the function of authority for its support. Whether it has any foundation in reason, and sound policy, is a question, which on a former occasion, was the subject of enquiry.

It was on that occasion, urged, that if this definition be correct, if the freedom of the press really consisted in an exemption from previous restraint, the legislature might, at their discretion, declare every publication of a political nature to be criminal, and terrify the press into silence, by severity of punishment. A law, prescribing the penalty of death, for an unjust cenure of public measures, would according to this doctrine, be no invasion of the freedom of the press, because the printer was no restrained, by any species of legal coercion, from the act of printing what he chose to print. According to this doctrine, the most arbitrary control over the fortunes, liberty and lives of printers might be constitutionally exercised, provided no notice is taken of the printer, until after his criminal or offensive publication. To call a press, in this situation, a free press, is a puerile perversion of the plainest words.

The second term of the proposition, under consideration, is equally incorrect. It has been already shewn, that the action of security from a printer, to prevent him from doing what he has no right to do, is not and cannot be, an invasion of his rights, or a restraint on the liberty of the press. But the doctrine is susceptible of farther illustration.

It has been before proved, that a man, whom there is good reason, to suspect of an intention, to commit an indictable offence, may be held to security for his good behaviour. Now let it be supposed, that some man, prompted to mischief by the malignity of his own heart, or corrupted, by others instead of printing his libels, should content himself with fixing them up, in the most public places of a city. Integrity is accused in the grossest terms, and even beauty itself is not permitted to escape. The whole city is in commotion, and the flanderer is at length discovered. He is dragged from the hiding place of his infamy, and instead of being trampled under foot, by an infuriated mob, he is carried, before a magistrate. His guilt is proved; and under the terror of a confession suddenly awakened, he acknowledges, that he depends, for his subsistence, on a party, who will cease to support him, when he ceases to defame. If the objection to the action of security, for good behaviour, is to be found in the bill of rights, alone, it is manifest, that the wretched being, whom we have here introduced, could not claim its protection. His offences were not committed thro' the medium of the press, and therefore as to him, the law might take its course, without a breach of any constitutional regulation. What then is the result, if the requisition of security be really a restraint, from which for the sake of the freedom of the press a printer is exempted? It is this: that the law would be different from itself in cases precisely similar! That, every citizen of the commonwealth, who is about to commit an indictable offence, may be restrained, except a printer!! That a libeller, in writing, might be compelled to give security, but that a libeller, in print, would be entitled to his discharge!!! That a man, who commits his offences, to the limits of a single city, may be checked in his career, but that he whole malignity extends its depredations by means of a gazette, over the state, or the continent, shall be permitted to continue them, without any effort on the part of the law to restrain him!!! That in this land of republicanism, by which last word is meant, "an equality of rights under a government of laws," there shall be one description of citizens, who may proudly, say, that as to them, a law affecting every other citizen, is to have no operation!!! Even in England, such doctrine would be deemed heretical. Even there, the haughty peer, who was born a counsellor of his king, and a licensor of his country, whose honor is his oath, and whose pride of family has been cherished by the successive homage of forty generations, stands on the same ground with the humblest commoner, before the courts of justice and the ministers of the law.

To pursue this idea, farther, let us suppose that the libeller in writing, and the libeller in print, being convicted, are bro't.
before the court to hear the sentence, prescribed by law, for their defeatable offences. A dilemma presents itself from which it is impossible fairly to escape. It has been before laid down, that security for good behaviour, may be, and generally is exacted by the court, after a conviction, for a misdemeanour. If it is required from the former, he cannot find a word in the law, or the constitution, which shields him from the claim. He therefore gives the security, or remains in jail, until charity or party spirit shall relieve him. But when the same requisition is addressed to the latter, he denounces it is an unconstitutional restriction of the liberty of the press. The court, alarmed by a denunciation so bold, or seduced by the sound of words so interesting, confines their sentence, to what is past. As soon as the term of his imprisonment is at an end, he walks abroad among mankind, leaving a culprit, perhaps less odious than himself, in confinement, for the want of that very security, which he had not required to procure. Every man of law, of common humanity, of common understanding, must join in the condemnation of a doctrine which produces this horrible injustice. The counsel for the editors of the Recorder, law, and felt, this injustice, and they therefore conceded, that in both cases, the sentence must be the same: that in both cases, this security, might be lawfully and constitutionally, required. But in avoiding one rock, they split upon another. In making this concession, they necessarily admitted, that this requisition of security was not a restraint upon the freedom of the press; for if it be a restraint it cannot be imposed at any time. The recognition for good behaviour, whether taken before or after conviction, has no retroactive. The penalty could not be incurred in either case, except by the commission of an offence subsequent to its date. How arbitrary, how monstrous then is it to say, that security for good behaviour cannot be required before conviction, because it is a restraint, but, that after conviction, it may be required, because it is not a restraint, on the freedom of the press.

It was before intimated, that in strictness, this discussion, might have been sooner brought to a conclusion. The second part of the second proposition was proved to be true; in a short time after it was stated. The reason then assigned for farther remarks, will be my apology for the observation now about to be introduced.

It has been uniformly contended that the word "freedom," is to be understood, with this limitation, that an individual, is not to be injured with impunity. This idea is susceptible of a farther illustration.

The last section of our bill of rights, proclaims a truth, too long with-held from the knowledge of mankind. This section declares, "that all men are entitled to the free exercise of their religion." This religious freedom, it will be immediately perceived, is subject to the same limitation, and no other. In the sixteenth century, when Europe was overrun by religious fanatics, there arose a sect in Germany, called Anna-Baptists, who among other wild, and extravagant opinions, held that all things were in common." Let us suppose, for a moment, that a sect like this should arise in Virginia, and that one of its members, acting in conformity to precepts which he conscientiously believed to be true, should take his neighbour’s horse secretly or by force. Could a man be found, without the pale of that sect, who would seriously contend, that because this enthusiast was secured in the free exercise of his religion, which authorised him to supply his wants wherever he could find the means, he ought not to be compelled to make reparation for the injury, nor deterred by punishment from a repetition of his offence?

From these considerations, it follows, that the freedom of the press, as now and formerly defined, is not infringed by the exaction of security for good behaviour. This freedom, extensive as it ought to be, and actually is, does not suffer an injury to private character to be perpetrated with impunity: When this is done, the delinquent quits the sanctuary of the constitution, and places himself under the control of the law: and of course, may be sued, indicted, or bound to his good behaviour, as the law may direct.

Thus I have endeavoured to prove, and I trust have proved, that the requisition of security for good behaviour, from a libeller, is in perfect conformity with the laws and constitution of our country. If this has been done, enough has been effected. Surely it is sufficient to show, that the application to Hennico court in December last, was warranted by the letter and

* Russell’s History of Modern Europe, 2. 155.
meaning of one of our own laws, recently selected by our own legislature from a code which they had repealed in mass, and that it is not in any degree incompatible with any one principle declared by our bill of rights or constitution to be sacred.

But in the affirmation of some, all this is not sufficient. It is true, say they, that the law is, as you have stated it to be, and it must be admitted, that an injury to private character may be punished or prevented at the discretion of the legislature without a violation of the freedom of the press. But the precedent is dangerous; the power of requiring security may be abused, and magistrates under the influence of party spirit may bring irreparable mischief on society, by incessant attacks on printers, the centinels who keep watch over our national happiness and liberty. A few words in reply to this declamation, for it is nothing more, will as to myself close this discussion, forever.

Conclusion.

That the power of requiring, from printers, security for good behaviour, may be abused, is admitted. In this respect, it is like all other power. Man is a frail, and corruptible being, and too often does wrong, not only from ignorance, but design. Yet, the possibility, that power may be abused, does not afford a reason, why it should not be granted. If it did afford such reason, government itself ought not to have been created; because the history of the world, is nothing more, than a recital of calamities, brought upon mankind by the misconduct, the ambition, the crimes of those, to whom power has been entrusted.

It may be farther admitted, that magistrates will be, more strongly tempted, to abuse this power, than any other power, confided to them by the law. Under the influence of party spirit, they may be inclined, to harass, and pervert a printer, of obnoxious politics, by requisitions, with which he may be unable to comply. While it is admitted, that this temptation may exist, it is obvious, that it will be opposed, if not overpowered, by a consideration of peculiar force. It has been already stated, that official conduct is, constitutionally, a subject of free enquiry. The requisition of security is an official act, which may be exhibited to the public, in any colours which the person injured, his friends or his party, may choose to bestow upon it. They may state it in their own way; they may speak truth or falsehood at discretion, and ascribe what has been done to ignorance which they may hold up to public ridicule, or to tyranny which they may expose to general abhorrence. All this may be done; and it may be done with impunity. If the private character of the magistrate is not falsely traduced, his assailants are safe. Is it not then an obvious presumption, that a magistrate knowing the situation in which he stands, that his public conduct may be exposed to the grossest misrepresentations, that every act of immorality or indiscretion, which he may have committed in the course of a long life, may become the subject of newspaper animadversion and of general notice, and that nothing, but the integrity and legality of his conduct can save him from the cenure of the people, or the reproaches of his own heart, will be extremely guarded in every movement in which the press can be considered as interested? Is it not manifest, that he will be particularly cautious in making an attack upon a printer, whose daily occupation, puts into his hands, not only weapons of defence, but instruments of revenge? This consideration, it is conceived, will have an influence to decide, that the apprehension, which ought to be entertained, is, not that this power will be abused, but that few men can be found, who will have firmness enough, to carry it into operation.

There is another consideration, which cannot fail to operate with great effect, in confining a will to destroy a printer, to the bosom in which it arose. Every magistrate knows the sensibility of the people, in relation to the liberty of the press, and may therefore duly apprehend, if his conduct should be investigated in an action for damages, that a wilful abuse of power, might be attended not only with loss of character, but the ruin of his fortune.

Under a government like ours, these considerations will have great weight, enough perhaps to counterbalance, sometimes, even the fear of duty, and a regard for the public welfare. In a monarchy, there is a wide interval between the magistrate, and the subject. Wealth and rank, place the rulers, at such a
distance from the people, that the cries of the oppressed are not heard, and if heard, are not regarded. But here the magistrate, stands on the same ground, with the rest of his fellow citizens, and must be at all times accessible. He must listen to every honest man, however poor, who chooses to demand his attention, or be insulted for his pride. He must answer the complaint of the most obscure individual, or submit to general censure. In fact, a magistrate, acting illegally, for the purpose of oppression, would sink under universal execration. Our own observation declares this reasoning to be correct. Instances of magisterial oppression, seldom, if ever, occur, within the commonwealth of Virginia. The experience of other countries confirms the same doctrine: and it has been accordingly stated, by a profound observer, as a sort of political axiom, that in a republican government the magistrates may be safely intrusted with large discretionary powers.* Their responsibility to the people, precludes the possibility of abuse. The apprehension therefore of serious mischief to the public, from the arbitrary requisition by magistrates, of security from printers, cannot be justified by any rational calculation. This apprehension will be entirely dissipated, when we enquire into the mode in which the business is to be conducted.

Let us suppose, that some magistrate, a bankrupt in both fame, and fortune, should be anxious to signalize his zeal, in favor of a ruling party, hostile to the liberty of the press, by the persecution and ruin of a printer. How will he accomplish his purpose? It seems to be supposed, by many, that he will have nothing else to do, but to issue his warrant, to cause the printer to be brought, immediately, like a culprit before him, to demand security for his good behaviour, and to commit him to jail on his failure to procure it. This is indeed a wild supposition, and were it not, for the importance of the subject, to which it relates, would not be entitled, to the notice of a moment.

It is proper here to remark, that the situation of the magistrate in England, when required to act in a cafe, in which a libeller is concerned. In England it is sufficient to satisfy the magistrate, that the person charged, is the author or printer of the defamatory writing. Whether the writing be true, or false, is not a subject of enquiry with him; because, whether one or the other, if defamatory, it is libel. But in Virginia, the magistrate must be convinced, not only as to the fact of authorship or publication, but he must also be satisfied that the writing charged to be libellous, is false. How are these facts to be established before him? The answer is by evidence, submitted to him on the oath of the person defamed, or of a credible witness. Even this will not be sufficient. The requisition of security for good behaviour is not a punishment for a past offence: it is intended to prevent the commission of offences in future only. The magistrate therefore will not act legally in issuing his warrant unless, from circumstances, proved before him, there is good reason to suspect that the misdemeanour will be repeated... In short, the course of proceeding in this case will be similar to that observed, where security is demanded from one, charged with an intention to break the peace.

Both cafes, in the estimation of the law, stand on the same ground, and as to both, it is expressly declared, that security may be required, "if the magistrate shall see cause, before himself, or on the complaint of others." The first circumstance here noticed, cannot occur as to libels. The cause for requiring security, cannot appear, it is presumed, in the presence of the magistrate himself, and therefore a warrant, against a libeller, can be issued only on the complaint of others.

Under this view of the subject, it is difficult, if not impossible, to perceive how magistrates can do mischief, in the exercise of the power to require security from a libeller, which power, the law has given, and the constitution has not taken away. The fact of authorship, or publication, the falsehood of the defamation, and the probability of a repetition of the offence, must be stated on oath. A false oath in this, as in every other case, may sometimes be taken, but the magistrate is not responsible, for the perjury of the accuser. The printer indeed might suffer, but the inconvenience, would be momentary only. When taken by the warrant, he would have a right to defend himself, by interrogating his adversary, and by evidence on his part;
and if he could shew the prosecution to be groundless or malicious, he would be entitled to his discharge.

But let it be supposed, that the magistrate blinded by zeal, or under the influence of corrupt motives, disregarding the defence made by the accused; requires security in a case in which it ought not to be exacted; what would be the result? Let it be supposed, that party spirit, which was never known to slumber, might be then asleep; that sympathy, which the sight of oppression never fails to produce would instantaneously surround the prisoner, with friends. Men, whom he never saw before, would become bound for him; and thus the scheme of persecution would terminate, as it ought to do, in the defeat and infamy, of its unprincipled projectors.

It is not then, from the magistrates of this country, that danger is to be apprehended, to the freedom of the press. It is not in their power, nor in the power of any individuals to do it injury. If ever danger does come, it must proceed from a corrupt government, whose folly or wickedness is exposed through the medium of the press. This, therefore, is a truth, which may be easily illustrated. If the government is disposed to protect the rights of the press, the efforts of magistrates or individuals to restrain them, may be rendered in a moment abortive. But if the government be hostile, if those intrusted with the administration of our affairs, are alarmed at the denunciation of the press, and wish to subvert it, their views, whatever their professions may be, will never be exclusively directed to the protection of private character. They will aim at the suppression of free enquiry into the measures of the government and its officers, and for that purpose will introduce some new code of laws, or give some new definition to the term freedom of the press, which will render that freedom but a name.

A serious mischief, resulting it is said, from the measure here vindicated, is, that the merits of a candidate for public employment, cannot be freely examined. If by this objection is meant, that the author or printer of a libel on the character of such a candidate, may be punished; the objection is admitted to be correct; but it is totally inapplicable to the subject before us: for if it should be conceded that this measure is illegal or unconstitutional, the author or printer in the case that has been supposed, would still be responsible to the party and to the public.

This is one of the vague objections, which have been urged to the doctrine advocated in this essay. It is calculated to shew, how little attention, even intelligent men have bestowed on this subject: for it is obvious, that the objection goes not to the requisition of sedition, against which it is urged; for this requisition, leaves the right of investigation precisely where it was before: but against the definition here given of the liberty of the press, which the objection, when properly applied, supposes, is not sufficiently comprehensive.

The ground taken by this objection can never be surrendered. It never can be admitted, that the private character of the officers of government, or of candidates for places in the government, shall be left entirely to the mercy of every malignant, who writes for a new paper. If such were the case, the press itself, while it protected the liberties of the nation, would exercise the most afflicting and tremendous despotism over individuals.

But although the merits of a candidate, for office, cannot be in the language of the objection freely examined, yet, they may be fairly examined, although his competitor, or the friends of his competitor, cannot without danger of the law, publish untruths derogatory to his character: yet whatever is true, however degrading, may be stated with impunity. Is not this sufficient? Can any private man, can any printer, who has one particle of honor or humanity, require more, than the privilege of speaking truth, of a person who has real merits he wishes to make known? And let it not be forgotten, that there are cases in which even an untruth would be overlooked. A libel must be malicious, as well as false: and if from the style, the temper, the arguments, or the situation of the writer, it appeared, that though mistaken in point of fact, he had no object in view, but justice, and the good of his fellow-citizens, he would be safe, from every species of prosecution. But if in reality the freedom of the press, as herein defined, be not sufficiently extensive, if it be true, that the press should be allowed the same power over the private characters of candidates, which it has a right to exercise over the official conduct of public men, the evil may be remedied by the interposition of the legislature. The government is not permitted to abridge, but it may certainly enlarge the freedom of the press. A law may be introduced, at the next session of the General Assembly, extending
that freedom to the officers of government and the candidates for public employment, or in plain terms, authorizing the citizens of this commonwealth, to speak, write, and print, with impunity whatever they please, whether true or false, concerning those who are, or wish to be in office. Would not the stigma of eternal ridicule, be fastened upon the man, who should have the temerity, even to hint, at a proposition to this effect.

In addition to this it may be remarked, that those, who are held up as the candidates for the great offices of the state and federal governments, are generally men who are advanced in age, who have been long in public service, and whole characters, whatever they may be, are well understood. An anonymous attack on a man of this class, may excite the indignation of one party, and gratify the malignity of the other; but the expectation of public good, or of any great political effect, from discussions of this kind, is childish and absurd.

With respect to candidates for a seat in the legislature, the objection is equally strong. The constant communications which are carried on among the people of a district, or of a county, at all times, and particularly during an electioneering contest, enable them to form their opinions with considerable accuracy of the merits of the candidates. Their minds might be inflamed, but not enlightened, by printed hand bills in which the writer, might state what he pleased, with impunity. In fact during controversies of this kind, there is generally calumny enough, without the aid which impunity would afford. This new plan would give a wider range to the passions, which an election seldom fails to excite, and would only serve to provide in every county of the commonwealth, the materials of eternal rancour and dissension....In truth, the temptation to abuse this privilege, would be too great to be resisted. A well directed charge, made immediately before the election, against a candidate supported by five fifths of the electors, might turn a majority against him. The retort of the calumniator might be afterwards effected, to the satisfaction of every freethinker; but the unjust accuser would remain, in undisturbed possession of a post, gained by the very crime which rendered him unworthy of it.

There is another remark on this subject, which has already, perhaps, presented itself to the mind of the reader. Political discussion is almost invariably conducted, under the influence of party spirit; and there is no species of political writing, in which that spirit subsists itself, in a less "questionable shape," than in the delineation of character. It would be scarcely going too far to affirm, that there is not a single instance from the year 1789, to the present day, in which the private or political character, of a man of distinguished talents, has been fairly exhibited by a political adversary, to the consideration of the public. The best and wiliest patriots of America, men whose virtues and talents have been, and now are, uniformly employed in promoting the good of their fellow-citizens, have been, notwithstanding the restraint of the law, incessantly purged by malignity and falsehood. If such is the case now, what would be the language of calumny, what would be the condition of society, if the constitution or the law, gave sanction to every barbarous excess, to every indecent outrage, which the venal writers for a desperate party, might be disposed to offer, to every man distinguished for his patriotism, his services, his virtues, or his talents?

If this reasoning be correct, no mischief can arise, from the exercise of the power, to require even from printers, security for good behaviour. The first proposition stated in this essay, may be carried into operation, not only without a violation of any constitutional principle, but without subjecting the society, or any honest member of it, to the slightest inconvenience. Here then the discussion regularly ends. The motion addressed to Henrico court has been proved to be legal, and the objections, which have been urged, whether deduced from the theory or language of our constitution, or the practical operation of the doctrine, on which that motion was founded, have been, it is believed, completely removed. But I cannot rest satisfied, even if the negative position, here laid down shall be admitted to be true. The principles vindicated in these pages, will not only do no harm, but if rightly understood, and applied with no more than ordinary integrity, will produce a real benefit, to the community.

The first consideration, which presents itself, in taking this further view of the subject, cannot fail to be interesting to every man, cordially attached, to the pure and sacred principles of republicanism. If the reasoning, which has been submitted, to
the public, be correct, the law will operate alike on all, and the
confinement, will be fared from the imputation, of establishing
a distinction not only vicious in itself, but utterly incompatible
with that equal right, which is the basis, of every republic
inflation. According to this reasoning, the law,道 "with equal eye" every citizen of the commonwealth; and re
quires, without discrimination, from every man about to com
mit an indictable offence, satisfactory assurance, that the appreh
ended mischief shall not be perpetrated. On the other hand, a distin
ction in favor of printers will be established, fearlessly less
detestable, than that, which, in the darkness of the middle ages,
when all Europe bowed beneath the yoke, of ecclesiastical do
mination, separated the priest from the layman, and confounded
the latter, to torture or to death; while the former was obedi
ently surrenderd, by the civil authority, that he might be re
formed, by the mild discipline, and gentle admonitions of the
church. Such a distinction, cannot be tolerated, in this free
country, and in this enlightened period. It cannot be believ
ed, to be just, or necessary, that while a libeller is allowed the
protection of the law, against an honest man, because that
man is about to commit on his person an indictable offence,
that same man shall be excluded from the similar protection, al
though the same libeller has committed, and is about again to
commit, on his reputation, an offence not only indictable, but
atrociously immoral.

A general recognition of the doctrine, contained in this essay,
will not only protect the bill of rights from the charge of incon
fidence and injustice, but it will save the press itself, in some
degree, from those "soul abominations," by which it has been too often disgraced, and by which alone its value can be im
paired. If the evil spirit, of defamation, by which it has been so long possessed, shall, "when it sees the law advancing to
wards it, rush into the sea and be drowned in the waters," then
the press, will resume the honorable station, assigned to it by
the constitution. Then will it be indeed, the guardian of pub
lic liberty, and perform the functions of its high office and de
scription. Then its weekly addresses to the public may be read
by patriots, without indignation, and by delicacy, without a
blush. There was a time, when this could not be done!

Another benefit, which by some minds will not be thought
uninteresting, will result from the adoption of this doctrine.
The wounds inflicted by calumny, might be more easily endur
ed, if its poisoned darts reached those only, against whom they
were directed. The perfons finked out from their party, as ob
jects of hostility, are frequently selected, because they possess
some virtue or talent, which makes them of value with that
party. It is fortunately, this very virtue or talent, which gen
erally enables them, to "walk unhurt, in the fiery furnace of
persecution." But when it is recollected that the mischief,
even when not felt by them, extends to others, whom every
man, would wish to see shielded from every pang...to those in
whose bosoms, "love and peace, delight to dwell," who would
not rejoice, if the demon of slander was fast bound forever in
those fetters, which law and justice have long ago prepared for
him.

In point of national morality, the subject before us, is enti
tled to our attention. Whatever tends to impair the just con
fidence of man, in human integrity, is injurious to morality.
If accusations are brought forward perpetually, against those
who stand foremost in the estimation of the people, men who
believe these accusations to be even partly true, will allow them
selves a greater latitude, than they would be disposed to take, if
they knew, or thought they knew, nothing, but examples of vir
tue and purity before them.*

But the most important effect resulting from the suppression,
or diminution of libels, will be perceived, in the temper of the
people, or rather of that portion of them, who from sentiment
or situation, take the most active part in the politics of their
country.

The spirit of party, is, perhaps, the cause of the greatest
evils, which is it is the destiny of republican government to en
counter. By the spirit of party is meant, that spirit, which
perverting the understanding, and corrupting the heart, indu
ces men to prefer the aggrandizement of their party, or the de

* This subject deserves to be contemplated from this point of view. The
injury sustained by the morals of a nation from party spirit, which though
not produced, is greatly augmented by the licentiousness of the press ought
to be seriously examined. It is to be hoped that some writer competent to
the task, will soon undertake it.
true intentions of their political opponents, to the real welfare of the people. This definition if correct shew at once, that it must often be incompatible with that justice which we owe to individuals, and that duty which we owe to our country. It results from the frailty and corruption incident to man, in all ages, and never fails to sway itself, unless suppressed by the despoticism of the government. The experience of the world has proved, that it assumes its worst form, and produces the most injurious effects, in those countries, in which the greatest freedom is enjoyed. It is needless to refer to history ancient or modern, for an illustration of this truth. Our own country affords abundant and very recent evidence. During the last session of Congress, we saw men, respectable, it is believed, in private life, for their integrity, actually exerting all their talents and influence, to bring upon their country, the calamities of war. Was the proposition which was brought forward, on this subject justified by necessity, or any principle of humanity or policy. On this question the voice of the people has pronounced a loud and decided negative. But this is not all. That same voice has pronounced a sentence still more humiliating to the advocates for war: “that their real object was to bring into difficulties, and if possible into discredit, an administration which they abhorred.”

If such be the character, if such be the operation of party spirit, the causes which produce, or augment it, well deserve to be examined. The first must remain forever untouched. The supreme power of a state or the administration of the affairs, and distribution of the honors and emoluments of office, will always be sought for, where there is a chance of obtaining them. In a free country, where the people change their rulers at short periods, this chance always exists, and party spirit will of course invariably attend it. It is in vain then to expect the extirpation of party spirit, injurious as it may sometimes be, because it cannot be rooted out, without destroying the soil in which it grows.

But that the causes, which produce party spirit, must forever remain, yet the circumstances which tend to augment its heat, or to let it in a flame, may be sometimes controlled at the discretion of the government. When we take a view of these circumstances, the most prominent and the most powerful is the licentiousness with which the characters of one party are abused by the pretexts of the other. Such is the pride and impatience of man, that he cannot subdue or conceal his indignation, when opinions to which he is known to be attached, are treated with ridicule, or contempt. But when our political adversaries, already obnoxious by their holliety to our principles, represent the ablest and best men of our party, as fools or traitors, every member of it feels himself insulted. The injury is refeved: accusations are retorted: the poisoned arrow is shot, and is returned: and in the course of a short time, a spirit of rancorous animosity prevails, which degrades the national character abroad, disturbs the peace of society at home, impairs the moral sense of the people, turns their attention from subjects of real moment, to disquisitions which they ought not to hear, and renders us too often unjust to our fellow men, and unmindful of the duty which we owe to our country. Surely then, a doctrine, which while it leaves every question of a public or general nature, free for discussion, checks and diminishes the violence of party zeal, so far from being an injury, is a blessing to society.

Thus, my fellow citizens, I have endeavored to perform the task, in which the occurrences of December last, rendered it proper for me to engage. The precipitation with which I have often been obliged to write, and the long and frequent interruptions to which I have been exposed, will, I trust, afford an apology, for the inaccuracy of some sentences, and the obscurity of others.

In support of the doctrine contained in the foregoing pages, I have stated to you, the arguments which have impressed on my mind, a deep conviction of its truth. If I had ever entertained, even a doubt, on this subject, I would cheerfully have acknowledged, that doubt, because thereby I should have obtained a release from an engagement, the performance of which has exposed me to privations and difficulties, which few would have been willing to encounter. But on this question I never doubted, and from the moment at which it engaged my attention, to the present day, it has always appeared to me to be the law of the land, that a libeller,
Whether a printer or not, may be bound to security for his good behaviour: that there is nothing in the constitution or bill of rights, which impairs the force of this law: and that its operation instead of being injurious, will be beneficial to society.

The End.