

MESSAGE

FROM

HIS EXCELLENCY THE GOVERNOR.

February 27, 1812.

Gentlemen of the Senate, and

Gentlemen of the House of Representatives,

IN the Office of the Secretary of this Commonwealth, are files of Newspapers printed in the Metropolis, from the first of June last to the present time; and the libellous publications in them have been officially reported at my request, by the joint efforts of the Attorney and Solicitor-General. Their Report No. 1 will show, that within the period mentioned, ninety-nine libels have been printed in the Scourge, fifty-one in the Columbian Centinel, thirty-four in the Repertory and General Advertiser, thirty-three in the Boston Gazette, eighteen in the New-England Palladium, and one in the Weekly Messenger, making *two hundred and thirty-six* libels, in what are styled the *Federal* newspapers; also, eight in the Independent Chronicle, nine in the Boston Patriot, and none in the Yankee, making *seventeen* libels in those denominated the *Republican* newspapers.

In this Commonwealth, there being no statute in regard to libels, they are subject to restraint and punishment by what is called the common law of England, as sanctioned by our Constitution. This provides;

“ That all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature ; such parts only *excepted*, as are repugnant to the rights and liberties contained in this Constitution.”

And the laws “ in full force” include the common law.

“ The first ground and chief corner stone of the laws of England (according to the celebrated Blackstone) is general immemorial custom or common law, from time to time declared in the decisions of the courts of justice ; which decisions are preserved among their public records, explained in their reports, and digested for general use, in the authoritative writings of the venerable sages of the law. And those decisions are evidence of what is common law.”

Every provision by our statutes, opposed to any rule of the common law, repeals it ; and such other rules thereof “ as are repugnant to the rights and liberties contained in the Constitution,” but not specifically revoked by such statutes, add to what is sometimes called “ the glorious uncertainty of the law.”

If the Supreme Judicial Court are, as cases may occur, by their decisions to declare, what maxims or rules of the common law “ are repugnant to the rights and liberties contained in the constitution,” it may be well to consider the result, as it will affect the lives, liberties, and property of the citizens of this Commonwealth ; and other important points.

The Constitution declares, “ That it is the duty of the people, in framing a Constitution of government, to provide for an equitable mode of *making* laws, as well as for an impartial *interpretation* and a faithful *execution* of them, that every man may at all times find his security in them.” But the powers of making, interpreting, and executing the laws, when vested in any man or body of men, forms a complete tyranny, and the two first powers thus exercised will approach

it. Our Constitution therefore has wisely provided,
 “ That in the government of this Commonwealth the
 “ legislative department shall never exercise the exe-
 “ cutive and judicial powers, or either of them; the
 “ executive shall never exercise the legislative and
 “ judicial powers, or either of them; the judicial shall
 “ never exercise the legislative and executive powers,
 “ or either of them; to the end it may be a gov-
 “ ernment of laws and not of men.”

That the Legislature has a right, by a declaratory act, to ascertain such exceptions of the common law as are repugnant to the constitution, will it is presumed not be denied, neither will it probably be contended, that, in similar cases this has been the practice, or, that it is a mode the most prompt and best adapted to render the law clear and certain. If there exists then in the Judicial Department, a concurrent, for there cannot be an exclusive authority, in regard to this point, will not the important constitutional provision, for keeping the three great departments distinct, be thus far defeated?

The learned Judge referred to, states, that “ Statutes
 “ are declaratory, where the old custom of the king-
 “ dom is almost fallen into disuse, or become *disputa-*
 “ *ble*, in which case, the parliament has thought proper,
 “ in perpetuum rei testimonium, and for avoiding all
 “ doubts and difficulties, to declare what the common
 “ law is, and ever has been.” Thus in England, the source of the common law, the Legislature when an old custom is almost in disuse; or is disputable, declares what is law. But does it appear that their Judiciary are permitted to do this? If then the Judiciary of this Commonwealth is left to declare, by its decisions, what “ disputable” parts of the common law are excepted by the constitution, will it not, under the form of a judicial, exercise a legislative authority?— But will not other serious consequences flow from such an exercise of power, by the Judiciary? Municipal law is defined, “ to be a rule of *civil conduct*, prescribed
 “ by the supreme power in a state, commanding what

“is right, and prohibiting what is wrong.” And how is a citizen to govern his “civil conduct” by the common law, if he has a thorough knowledge of it; when it may be altered by the Judge, at the moment he is to pronounce a sentence, which may affect the life, liberty or property of such a citizen? If the common law, according to the practice in England, would justify a citizen, but according to a decision of our Judicial Court, by which that law shall be materially altered on his trial, should condemn him, would not that citizen be thus in effect sentenced by an *ex post facto* or retrospective law? For how could he know what the law is, until after his sentence? And if it can be conceived, that the Judges should be thus left, to modify the law, must not the slow process of their decisions, perpetuate the uncertainty of the law, and render it impossible for good citizens to ascertain the duties to be performed by them, in society.

The common law, in regard to libels, as it exists in this Commonwealth, in the opinion of the Supreme Judicial Court, is stated in the fourth volume of Tyng’s Reports, page 168, in the case of the Commonwealth against William Clap. And the Hon. Judge Parker, has been explicit on the subject, in his charge to the Grand Jury, at the last term of the Supreme Judicial Court in Suffolk. The manuscript of the charge was, by order of the Judge, to have been delivered to me by the printer, but was accidentally lost, or destroyed by him. The Attorney General conceives that the charge is correctly printed in the Boston Patriot, numbered 2, amongst the documents to be delivered by the Secretary.

The honorable Judge Parker in his charge states, that “a more important variance,” (than had been by him mentioned) “from the strict common law principles, relating to libels, has lately been adopted here, “as resulting *from the nature of our government*, and “the express provision of our constitution, this is, that “in trials of indictment for libels, upon persons

“holding offices, which depend upon an election by
 “the people, or permitting themselves to be candidates
 “for such offices, the accused is permitted to give the
 “truth in evidence.” The Judges have not confined
 themselves, in their variance from the common law,
 “to the express provisions of our constitution, as it is
 “conceived they ought to have done,” but have taken
 an indefinite rule for their conduct, namely, “the na-
 “ture of our government.” They have also implied,
 if not expressed, that in the support of libels upon
 Judges, and executive officers not elected by the peo-
 ple, the truth is not to be given in evidence; but their
 reasons for these positions are not stated. “If a bad
 “man is at any time held up for the office of Governor,
 “Senator, or Representative,” it may be desirable, as
 Judge Parker states, “to let the people know, through
 “the medium of the press, that they cannot elect such
 “a man, without disgracing or ruining themselves.”
 And is it not equally true, that if there are in office bad
 Judges, they ought to be placed precisely on the same
 ground, that their mal-practices being publicly exposed,
 may meet prompt investigation, and produce their re-
 moval and punishment? Can it be denied, that as
 great a proportion of Judges, as of other public function-
 ries, in all countries and ages, have been bad men, al-
 though by their professional address they may have been
 more successful in escaping punishment? and if the
 conduct of a Judge is to be exempt from the press, may
 not the judicial department, by the power which they
 are now exercising, and by the doctrines which are,
 and may be promulgated by them, establish an uncon-
 stitutional and dangerous influence in the state?

The three great departments of government ought
 to be filled by men of abilities and integrity, and to be
 mutually disposed to the support of each other, and of
 the national government; but no powers ought to be
 given to good Judges, unless indispensably necessary,
 which may be abused by such as are bad. And if the
 judicial department of the state should at any time

consist of bad men, who are desirous to oppose and overthrow the national and state governments, or either of them,—to favour or frown on individuals according to their political opinions,—to punish severely one citizen, and lightly another, for the same offence,—to protect the guilty and punish the innocent, or to commit under the garb of justice any other atrocities,—ought not such *mal-practices* to be exposed by the press, in order to procure the removal of every such offender from office, as well as the misconduct of individuals, who are in or may be candidates for offices, to prevent their elections by the people? Chief Justice Parsons in the case mentioned affirms, “It would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against law.” And is it not for the interest of the people to know, and through the medium of the press constantly to receive information of the mal-practices, if any there be, of every Judge, and to unite their publick efforts, for presenting facts to the Grand Inquest of the Commonwealth, for impeaching, and to the Senate for removing such heinous offenders?

By the letter of the Attorney General No. 3, it appears, “That four bills of indictment were found by the Grand Jury of Suffolk against the printer of the Scourge for libels, who plead guilty to them all, and was sentenced to six months imprisonment in the county gaol—That four indictments were found against the vender of the same libels, who, having plead not guilty, was tried on one of them, found guilty, and fined fifty dollars, and recognised to keep the peace for twelve months—That two bills were found against the editors and publishers of the Independent Chronicle for libels, to which they plead not guilty, but were afterwards found guilty, and sentenced to two months imprisonment—That presentations were also made to the Grand Jury against the editors and publishers of the Columbian Centinel, of the New-England Palladium, of the Repertory

“ and General Advertiser, and of the Boston Gazette—
 “ that other presentments were made of the editor of
 “ the Scourge ; all for supposed libellous matter in
 “ their respective newspapers—and that to all these
 “ presentments the Grand Jury returned no bills.

It will also appear by the report of the Attorney General, and Solicitor General, that “ of the two
 “ hundred and fifty three libellous publications mentioned in it, fifteen of them bear date subsequent to
 “ the dismissal of the Grand Jury,” and that of the two hundred and thirty eight remaining libels, bills of indictment were found against ten only.

Such are the principles and effects of the common law in regard to libels ; and whether it is best adapted to the punishment or to the encouragement of them, the Legislature can best determine. Those are the means by which the depraved and profligate part of the community, are making great efforts to reduce to a level with themselves, such as have governed their conduct by correct principles.

When it is considered that the common law of England, often inconsistent and contradictory, has its origin as early as the tenth century, that the customs on which it was then founded, had existed time immemorial ; that of that distant age and region, most of the maxims and rules are inapplicable to the present times and country ; that the citizens at large of this Commonwealth never were and never can be duly informed of that law, recorded as it is in the numerous volumes of immense law libraries ; are not statutes indispensable to prevent an increase of the uncertainty of the law, until it shall by our own code be rendered no longer necessary, and to guard against the evils which do and may result from the circumstances referred to. In stating them, I have had no intention to implicate any officer, and hope for the indulgence of the Legislature, if on any points they should entertain different opinions.

The Supreme Executive, on a petition from the printer of the Scourge, representing the danger his life

was in by his confinement, have pardoned him ; and on a petition from one of the editors of the Independent Chronicle, supported by several others from a great number of the respectable inhabitants of Boston and Charlestown, and a letter from the Hon. Chief Justice Parsons, pardoned that editor. These documents are numbered from 4 to 7.

I regret, gentlemen, that circumstances beyond my control prevented this communication at an early period of your session ; the subject is too important in my mind to pass unnoticed ; and, although it may not be the cause of immediate effects, may yet excite attention and produce them at a future period.

E. GERRY.

Council Chamber, 27th Feb. 1812.

REPORT of the Attorney and Solicitor General.

To His Excellency Elbridge Gerry.

Sir,

IN obedience to your request of the 8th instant, we have carefully examined all the Newspapers, printed in the Town of Boston since the first of June, which were submitted to us and which we found deposited in the Secretary's Office, and the result of that examination is herein submitted. We found in examining the *Centinel* that it contained matters, in our opinion libellous in the following instances.

CENTINEL.

Libels at Common Law where the truth cannot be given in evidence in justification of the party accused.

Libels in which, by the Common Law of Massachusetts, as declared by the Supreme Judicial Court, the truth may be given in evidence in justification of the party accused.

June 1,	1811,	No. 1
June 19,	"	7
July 17	"	17
Aug. 3	"	24
Aug. 31	"	32
Sept. 11	"	33
Sept. 14	"	34
Oct. 9	"	36
Oct. 12	"	37
Oct. 23	"	38
Nov. 27	"	46
Jan. 11,	1812,	49
Feb. 8	"	51

June 12,	1811,	No. 2
June 15	"	3 and 4
June 19	"	5 and 6
June 22	"	8 and 9
June 26	"	10 and 11
June 29	"	12
July 3	"	13
July 10	"	14
July 13	"	15 and 16
July 17	"	18
July 24	"	19 and 20
July 27	"	21
July 31	"	22
Aug. 3	"	23
Aug. 7	"	25
Aug. 10	"	26
Aug. 14	"	27
Aug. 17	"	28 and 29
Aug. 21	"	30
Aug. 28	"	31
Sept. 25	"	35
Oct. 26	"	39
Oct. 30	"	40
Nov. 2	"	41
Nov. 6	"	42
Nov. 9	"	43
Nov. 16	"	44

Nov. 23	„	45
Dec. 18	„	47
Jan. 4, 1812		48
Feb. 5	„	50

CHRONICLE.

Libels at Common Law, &c.		Libels at Common Law of Massachusetts.
June 6, 1811,	No. 1	
June 17, „	2	
Aug. 5, „	3	None.
Aug. 22, „	4	
Aug. 26, „	5	
Oct. 28, „	6	
Nov. 21, „	7	We had no Chronicles beyond the 5th of December.
Nov. 25, „	8	

REPERTORY.

Libels at old Common Law, &c.		Libels at Common Law of Massachusetts.	
June 14, 1811,	No. 4	June 11, 1811,	No. 1
June 18, „	5, 6, 8, and 10	June 14, „	2 and 3
June 28, „	13	June 18, „	7 and 9
Sept. 3, „	14	June 21, „	11 and 12
Sept. 6, „	17	Sept. 3, „	15
Sept. 13, „	18	Sept. 6, „	16
Sept. 20, „	19	Oct. 29, „	20
Jan. 3, 1812,	26	Nov. 5, „	21
Jan. 7, „	27	Nov. 8, „	22
Jan. 10, „	28	Nov. 12, „	23
Feb. 7, „	34	Nov. 15, „	24
		Nov. 22, „	25
		Jan. 14, 1812,	29
		Jan. 17, „	30
		Jan. 21, „	31
		Jan. 24, „	32
		Feb. 4, „	33

We had no Repertories of July, August, or December,

BOSTON PATRIOT.

Libels at old Common Law, &c.		Libels at Common Law of Massachusetts.	
June 19, 1811,	No. 1	Aug. 3, 1811,	No. 4
July 24, „	2	Aug. 14, „	5
July 31, „	3		
Aug. 17, „	6		
Oct. 12, „	7		
Nov. 2, „	8		
Dec. 21, „	9		

THE YANKEE.

None.

None.

BOSTON GAZETTE.

Libels under the old Common Law.		Libels under the Common Law of Massachusetts.
June 24, 1811,	No. 11	June 30, 1811, No. 1
June 27, „	13	June 3, „ No. 2, 3, 4,
July 18, „	20, & 21	5, 6, 7, & 8
Sept. 12, „	28	June 17, „ No. 9
Sept. 16, „	29	June 20, „ 10
		June 27, „ 12
		July 1, „ 14
		July 4, „ 15
		July 8, „ 16
		July 15, „ 17, 18, & 19
		July 18, „ 20, 21
		July 22, „ 23
		July 29, „ 24, & 25
		Sept. 5, „ 26
		Sept. 12, „ 27
		Oct. 7, „ 30
		Nov. 7, „ 31
		Nov. 11, „ 32
		Jan. 30, 1812, 33

We had no Gazettes for August.

NEW-ENGLAND PALLADIUM.

Libels under old Common Law.		Libels under Common Law of Massachusetts.
June 14, 1811	No. 6.	June 11, 1811, No. 1, 2, & 3
June 18, „	7, 8, and 9	June 14, „ 4 and 5
June 28, „	13	June 21, „ 10
From July to December inclusive there were no Palladiums in the Secretary's office, but we borrowed a set of those papers including those months, which were returned to the owner, and are not accompanying this report.		June 25, „ 11 and 12
		July 30, „ 14
		Aug. 13, „ 15
		Aug. 27, „ 16
		Jan. 24, 1812, 17
		Jan. 28, „ 18

WEEKLY MESSENGER.

Feb. 7, 1812, No. 1

THE SCOURGE.

Libels under Common Law.		Libels under Common Law of Massachusetts.
Aug. 10, 1811,	No. 1, 6, 8, and 9	Aug. 10, 1811, No. 2, 3, 4, & 5, and 7
Sept. 4, „	No. 11	Sept. 4, „ No. 10
Sept. 25, „	No. 13, 14, 15, 17, and 18	Sept. 25, „ No. 12
Oct. 3, „	No. 19, 21, 23, 25	Oct. 3, „ No. 20, 22, 24

Oct. 9,	„	No. 26, 27, 28, 29			
Oct. 19,	„	No. 30, 32	Oct. 19,	„	No. 31, 33
Oct. 29,	„	No. 34, 35, 36, 37			
Nov. 2,	„	No. 38	Nov. 2,	„	No. 39, 40, 41
Nov. 9,	„	No. 42, 43, 44, 45, & 46, 47, 48, 49, & 50, 51, 52, 54, & 55, 56, 58, 59, & 60, 61, 62, 64, & 65, 66, 67.	Nov. 9,	„	No. 51, 53, 57, & 63.
Nov. 16,	„	No. 69, 70, 72, & 74, 76, 77, 80, & 81, 82, 83, 85, & 86.	Nov. 16,	„	No. 68, 71, 73, & 75, 78, 79, & 84.
Nov. 27,	„	No. 87, 88, 89, 90, & 91, 92, 94, 95, & 96.	Nov. 27,	„	No. 93, 95.
Dec. 11,	„	No. 97, 98.	Dec. 26,	„	No. 99.

In the foregoing statement, we have taken no notice of any scandal, or calumnious publications against any foreign government or distinguished foreigners, although according to the strict rules of the law of libels, such publications might be considered libellous, while the United States are in a state of amity with such foreign nations.—We have also forbore to notice any aspersions from the Editors of the different papers, upon their brethren of the type.

Where we have marked any part of a publication as libellous, the whole of the paragraph or publication is to be considered a part of this report, although the grosser sentences of them only are marked.

It may be worthy your Excellency's notice, that the Grand Jury of the County of Suffolk were dismissed about the first of Jan. ult. ; and that of the *two hundred and fifty-three* libellous publications stated in this report, *only fifteen* of them bear date subsequent to that period. All which is respectfully submitted

by your Excellency's most obt. and
very humble servants,

PEREZ MORTON,
Attorney General.

DAN'L DAVIS, Solicitor Gen'l.

Boston, Feb. 20th, 1812.