

REPORT OF A TRIAL

IN THE

4

SUPREME JUDICIAL COURT,

HOLDEN AT BOSTON, DEC. 16th AND 17th, 1828,

OF

THEODORE LYMAN, JR.,

FOR AN ALLEGED LIBEL ON DANIEL WEBSTER, A SENATOR OF
THE UNITED STATES, PUBLISHED IN THE
JACKSON REPUBLICAN,

COMPRISING ALL THE DOCUMENTS AND TESTIMONY GIVEN IN THE
CAUSE, AND FULL NOTES OF THE ARGUMENTS OF COUNSEL,
AND THE CHARGE OF THE COURT.
TAKEN IN SHORT HAND.

By JOHN W. WHITMAN.

BOSTON:

PUBLISHED BY PUTNAM AND HUNT,
41, Washington Street.

1828.

REPORT OF A TRIAL

THE JUDICIAL COURT

M/2245

12219 - Law 10

SUPREME JUDICIAL COURT,

NOVEMBER TERM, A. D. 1828.

COMMONWEALTH *vs.* THEODORE LYMAN, JR.

JURORS,—William B. Swett, *Foreman*; Francis Hall, Thomas Hunting, Charles Lane, Wyman Harrington, Benjamin Brown, John G. Valentine, Nathaniel H. Whitaker, Jonas B. Brown, Charles R. Ellis, Frederick Gould, and Albert Smith.

COUNSEL FOR THE GOVERNMENT,—Daniel Davis, *Solicitor General*.

FOR THE DEFENDANT,—Franklin Dexter, and Samuel Hubbard, Esquires.

This case was upon an indictment on the part of the Commonwealth of Massachusetts, for an alleged libel by the Defendant upon Daniel Webster; the Solicitor upon the opening of the case for Government, caused the indictment to be read, which is as follows:—

COMMONWEALTH OF MASSACHUSETTS.....SUFFOLK, ss.

At the Supreme Judicial Court, begun and holden at the City of Boston, within the said County of Suffolk, and for the Counties of Suffolk and Nantucket, on the second Tuesday of November, in the year of our Lord one thousand eight hundred and twenty-eight.

The Jurors for said Commonwealth of Massachusetts upon their oath present, that Theodore Lyman, Jr. of Boston, in the said county of Suffolk, Esquire, being a person of malicious temper and disposition, and regardless of the integrity, patriotism, and purity of character, which the citizens of this Commonwealth, and of the United States, when elected to, and intrusted with offices of honor, trust and responsibility, in the administration of the governments of this Commonwealth, and of the United States, ought to possess and sustain; and unlawfully, maliciously and deliberately, devising, contriving and intending to traduce, vilify and bring into contempt and detestation, one Daniel Webster, of said Boston, Esquire, who was on the day hereafter mentioned, and still is one of the Senators in the Congress of the United States of America, for the State of Massachusetts, duly, and constitutionally, elected and appointed to the office, and also, maliciously intending to insinuate, and cause it to be believed, that the said Daniel Webster, and divers other good and patriotic citizens, of this Commonwealth, had been engaged in an atrocious, and treasonable plot to dissolve the Union of the said United States, then, and still constituting the government of the said United States, under the present constitution thereof; and further, maliciously intending to insinuate, and cause it to be believed, that John Quincy Adams, the present President of the United States, *had denounced the said Daniel Webster, as a traitor to his country*; on the twenty-ninth day of Oc-

tober, now last past, at Boston aforesaid, in the county of Suffolk aforesaid, unlawfully, maliciously and deliberately, did compose, print and publish, and did cause and procure, to be composed, printed and published, in a certain newspaper called the Jackson Republican, of and concerning him, the said Daniel Webster, an unlawful, malicious, and infamous libel, according to the purport and effect, and in substance, as follows, that is to say, "We, (meaning the said Theodore Lyman, Junior,) publish this morning a letter of December, 1825, of Mr. Jefferson, to Mr. Giles, and Mr. Adams' (meaning John Quincy Adams, the present President of the United States,) own statement, published last week in the National Intelligencer, at Washington, concerning disclosures said many months ago, to have been made by Mr. Adams, (meaning the said John Quincy Adams,) to Mr. Jefferson, (meaning Thomas Jefferson, late of the State of Virginia,) in regard to the conduct of the leader of the Federal party, in New England, during the whole course of the commercial restrictive system. Mr. Adams (meaning the said John Quincy Adams) confirms in his statement, in a positive and authentic form and shape, the very important fact, that, in the years 1807 and 1808 he, (meaning the said John Quincy Adams,) *did make such disclosures*. The reader will observe, that Mr. Adams, (meaning the said John Quincy Adams,) distinctly asserts, that Harrison Gray Otis, Samuel Dexter, William Prescott, Daniel Webster, (meaning the aforesaid Daniel Webster,) Elijah H. Mills, Israel Thorndike, Josiah Quincy, Benjamin Russell, John Wells, and others of the Federal party, of their age, and standing, were engaged in a plot to dissolve the Union, (meaning the government of the said United States,) and to re-annex New England to Great Britain; and that he (Mr. Adams,) (meaning the aforesaid John Quincy Adams) *possessed unequivocal evidence, of that most solemn design*. The reader will, also, observe, that in the statement just published, of Mr. Adams, (meaning the said John Quincy Adams,) there is no intimation whatever, that he, (meaning the said John Quincy Adams,) *does not still believe, what he, (meaning the said John Quincy Adams,) revealed to Mr. Jefferson, (meaning the aforesaid Thomas Jefferson,) and Mr. Giles, twenty years ago*. All the gentlemen we (meaning the said Theodore Lyman, Junior,) have mentioned above, are, with one exception, still living and, with two exceptions, are *active* and *ardent* political friends of Mr. Adams, (meaning the said John Quincy Adams.) We (meaning the said Theodore Lyman, Junior,) here beg to ask, why Mr. Adams' (meaning the said John Quincy Adams,) statement, has been withheld from the public eye more than a year? why it has been published only one fortnight before the election for President all over the Country? why for three years he (meaning the said John Quincy Adams,) has held to his (meaning the said John Quincy Adams) bosom, as a political counsellor, Daniel Webster, (meaning the aforesaid Daniel Webster,) a man whom he (meaning the said John Quincy Adams,) called in his (meaning the said John Quincy Adams,) midnight denunciation, a traitor in 1808? (meaning the said John Quincy Adams, had called and denounced the said Daniel Webster, as a traitor to the government of the United States, in the year 1808?) Why in 1826, he (meaning the said John Quincy Adams,) paid a public compliment to Josiah Quincy, in Faneuil Hall, when he (meaning the said John Quincy Adams,) who he called a traitor, (meaning traitor) the same year? and as the last question, why, during the visits he (meaning the said John Quincy Adams,) has made to Boston, he (meaning the said John Quincy Adams,) always met in friendly and intimate and social terms all the gentlemen, (meaning gentlemen, and the said Daniel Webster as one of them,) whose names a few years before, he (meaning the said John Quincy Adams,) placed upon a secret record in the archives of our government as traitors to their Country? (meaning that the said John Quincy Adams had placed the name of the said Daniel Webster, with others, upon a secret record in the archives of the government of the United States, as a traitor to his Country,) why did he (meaning the said John Quincy Adams,) eat their salt, break their bread, and drink their wine?"

To the great injury, scandal, and disgrace of the said Daniel Webster, and against the peace and dignity of the Commonwealth aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Theodore Lyman, junior, being a person of a malicious temper and disposition, and regardless of the integrity, patriotism, and purity of character, which the citizens of this Commonwealth and of the United States, when elected to, and entrusted with offices of honor, trust, and responsibility in the administration of the government of this Commonwealth and of the United States ought to possess and sustain; and unlawfully, maliciously, and deliberately devising, and intending to traduce, vilify, and to bring into contempt and detestation, one Daniel Webster, of said Boston, Esquire, who was, on the day hereinafter mentioned, and still is, one of the Senators in the Congress of the United States of America, for the State of Massachusetts, duly and constitutionally elected and appointed to that office; and also maliciously intending to insinuate and cause it to be believed, that the said Daniel Webster, and divers other good and patriotic citizens of the Commonwealth, had been engaged in an atrocious and treasonable plot to dissolve the union of the United States, then and still constituting the Government of the United States under the present Constitution thereof; and further intending maliciously to insinuate and cause it to be believed that John Quincy Adams, the present President of the United States, had denounced the said Daniel Webster as a traitor to his country; on the twenty-ninth day of October now last past, at Boston aforesaid, in the county of Suffolk aforesaid, unlawfully, maliciously, and deliberately did compose, print, and publish, and did cause and procure to be composed, printed, and published, in a certain newspaper called the Jackson Republican, of and concerning him the said Daniel Webster, an unlawful, malicious, and infamous libel, according to the purport and effect, and in substance as follows, to wit, "We" (meaning the editors and publishers of the said newspaper, called the Jackson Republican) "publish this morning a letter of December, 1825, of Mr. Jefferson to Mr. Giles, and Mr. Adams" (meaning John Quincy Adams, the present President of the United States,) "own statement published last week in the National Intelligencer, at Washington, concerning disclosures said, many months ago, to have been made by Mr. Adams" (meaning the said John Quincy Adams) "to Mr. Jefferson," (meaning Thomas Jefferson, late of the State of Virginia,) "in regard to the conduct of the leaders of the federal party, in New England, during the whole course of the commercial restrictive system. Mr. Adams" (meaning the said John Quincy Adams) "confirms in his statement, in a positive and authentic form and shape, the very important fact that, in the years 1807 and 1808, he" (meaning the said John Quincy Adams) "*did make such disclosures*. The reader will observe, that Mr. Adams" (meaning the said John Quincy Adams) "distinctly asserts, that Harrison Gray Otis, Samuel Dexter, William Prescott, Daniel Webster," (meaning the aforesaid Daniel Webster) "Elijah H. Mills, Israel Thorndike, Josiah Quincy, Benjamin Russell, John Wells, and others of the federal party, of their age and standing, were engaged in a plot to dissolve the Union," (meaning the Government of the said United States) "and to re-annex New England to Great Britain; and that he Mr. Adams" (meaning the said John Quincy Adams) "*possessed 'unequivocal evidence' of that most solemn design*. The reader will also observe, that in the statement just published of Mr. Adams," (meaning the said John Quincy Adams) "there is no intimation whatever, *that he*" (meaning the said John Quincy Adams) "does not still believe *what he*" (meaning the said John Quincy Adams) "*revealed to Mr. Jefferson and Mr. Giles twenty years ago*. All the gentlemen we" (meaning the editors and publishers of the said newspaper, called the Jackson Republican) "have mentioned above, are, with one exception, still living, and, with two exceptions, are *active and ardent* political friends of Mr. Adams," (meaning the said John Quincy Adams). "We" (meaning the said editors and publishers of the said newspaper, called the Jackson Republican) "here beg to ask, why Mr. Adams" (meaning the said John Quincy Adams) "statement has been withheld from the public eye more than a

year ? why it has been published only one fortnight before the election for President all over the country ? why, for three years, he" (meaning the said John Quincy Adams) "has held to his bosom, as a political counsellor, Daniel Webster," (meaning the aforesaid Daniel Webster), "a man whom he called in his midnight denunciation, a traitor, in 1808," (meaning that the said John Quincy Adams had called and denounced the said Daniel Webster as a traitor to the Government in the year 1808.) "Why, in 1826, he" (meaning the said John Quincy Adams) "paid a public compliment to Josiah Quincy, in Faneuil Hall, when he" (meaning the said John Quincy Adams) "who he called a traitor" (meaning a traitor), "the same year ? And as the last question, why, during the visits he" (meaning the said John Quincy Adams) "has made to Boston, he" (meaning the said John Quincy Adams) "always met in friendly and intimate and social terms all the gentlemen" (meaning the said Daniel Webster as one of them) "whose names, a few years before, he" (meaning the said John Quincy Adams) "placed upon a secret record in the archives of our Government, as traitors to their country ?" (meaning that the said John Quincy Adams had placed the name of the said Daniel Webster, with others, upon a secret record in the archives of the Government of the United States.) "Why did he" (meaning the said John Quincy Adams) "eat their salt, break their bread, and drink their wine ?"

To the great injury and disgrace of him, the said Daniel Webster, and against the peace and dignity of the Commonwealth aforesaid.

DANL. DAVIS, *Solicitor General*.

A true bill, ISAAC C. PRAY, *Foreman*.

A true Copy, attested, JNO. CALLENDER, *Clerk*.

The Solicitor, in opening the case, observed that this indictment charged the defendant with a false, scandalous and malicious libel upon Daniel Webster, with an intent to defame said Webster, which libel was couched in the common, legal, and technical language. It was stated in two counts, which intended no more or less, than charging the same offence in a different manner. The character and standing of the parties, as well as the nature of the allegations against the reputation of Mr. Webster, as charged by General Lyman, gave to this trial a peculiar interest. The high character of the defendant in this prosecution was well known to the jury ; he had been before the public in offices of honor and trust ; and was deservedly esteemed, not only by his more intimate acquaintances, but by the whole public. On the other hand, the high political standing of Mr. Webster, was a fact equally known to that jury and the world. In this case particularly as well as in all others, the jury were called to act with great deliberation, fairness and impartiality. He should take the liberty to observe, previous to stating more particularly the exact nature of this case, that had this attack been one of an ordinary kind, such as is usual in the common newspapers of the day, no public prosecution would have been instituted. But the fact was otherwise—the accusation against Mr. Webster was of a high and aggravated nature—it

was not confined to the immediate neighbourhood of Mr. Webster—but through the columns of the Jackson Republican, had a circulation coextensive with *his* name, which gave a title to the paper itself—it was against a Senator of the United States, and in this accusation was implicated, indirectly, the character of the nation. It operated throughout the whole of the United States against the distinguished reputation of Mr. Webster, whose character was known as extensively as the confines of the union, and had extended even beyond it, to Europe—to the world. He was the representative of the interest and dignity of this sovereign State. His character, individually and politically speaking, was the property of the public—of the nation. Under any circumstances the character of an individual was at all times the property of the public, and as such to be protected by the public; more especially was that of a public officer discharging duties of a high and responsible nature. The gentleman libelled was a member of the Senate of the United States—a representative of the sovereignty of this State at our national councils—in his character, therefore, was this Commonwealth peculiarly interested. Mr. Webster in his situation as a Senator of the United States, by his duty, was bound to repair to the seat of government as soon as possible. He would there meet both his friends and his enemies, they holding this paper, this accusation in their hands. They there would have no means of judging of his guilt or innocence. He was accused of one of the highest of crimes—there was no degree of depravity, of a deeper nature, than that which existed in the bosom of a traitor. Under such circumstances, if there ever was a time when a public prosecution should be instituted, to protect the reputation of an individual, it was on an occasion like this. It was not the prosecution of Mr. Webster, but of the whole Commonwealth—his character, standing, reputation, and more than all, his situation as the representative of a State sovereignty in the national councils, demanded a public prosecution and investigation into the nature and authority for so high a charge, before he should take his seat at the Senate Board of the United States. He had children and friends interested in wiping away the stain created on the escutcheon of his reputation, by so foul a charge. The public good required an examination into it, and the reputation of our State at our seat of government imperiously demanded a thorough investigation of its truth or falsehood. The freedom of the press, one of the greatest blessings of a free nation, had been abused full often of late, and imperiously required of the laws to be controlled and repressed in such abuses, especially

when consequences and evils like those in this case pressed upon the public peace and quiet. The situation of the press and the latitude taken by those who have the charge of it, was different from what it had been in former times—the number of newspapers in circulation had increased the evil—and though they contributed, when confined to their legitimate purposes, to the diffusion of knowledge, science, and a spread of political information, greatly to the common good of a free people, yet when they were made the medium of communication for the foulest of calumnies, when her thousand tongues are employed in the circulation of the blackest slanders, then it becomes the duty of government to interfere. It was not the freedom of the press which was to be controlled, but the abuse of that freedom. It was admitted on all hands, that some papers were set up, not for the purpose of a diffusion of general knowledge and science, or mere circulation of political information, but for express and personal political objects. When such was the case, and when purity of character was invaded, and the rights of individuals wantonly outraged, it was the duty of the guardians of the public peace, to repress such abuse of the freedom of the press. Should this not be done by those whose duty it was to watch over the public interests, the consequences would be the breaking up of the foundations of civil society, violent and deadly contests, and one wide scene of confusion, disorganization and blood would ensue. The feelings of Americans were such that they never would submit to outrage and wrong with impunity, and the proper, and in fact only place of redress was *here*, at the laws, and before a jury of the country. The offence of libelling an individual in all ages and in every civilized country had been punished with marked severity. In Greece and Rome it was an offence of high magnitude. The libel alluded to in the present case had appeared in the Jackson Republican, and was couched in substance, in the following language:—

“ We publish this morning a letter of December 1825, of Mr. Jefferson to Mr. Giles, and Mr. Adams’ own statement, published last week in the National Intelligencer at Washington, concerning disclosures said, many months ago, to have been made by Mr. Adams to Mr. Jefferson, in regard to the conduct of the leaders of the Federal party in New-England, during the whole course of the commercial restrictive system. Mr. Adams confirms in his statement, in a positive and authentic form and shape, the very important fact, that in the years 1807 and 1808, *he did make such disclosures*. The reader will observe, that Mr. Adams distinctly asserts, that Harrison Gray Otis, Samuel Dex-

ter, William Prescott, Daniel Webster, Elijah H. Mills, Israel Thorndike, Josiah Quincy, Benjamin Russell, John Wells, and others of the Federal party of their age and standing were engaged in a plot to dissolve the Union and to re-annex New England to Great Britain; and that *he* (Mr. Adams) possessed "*unequivocal evidence*" of *that most solemn design*. The reader will also observe, that in the statement, just published, of Mr. Adams, there is no intimation whatever, *that he does not still believe, what he revealed to Mr. Jefferson and Mr. Giles twenty years ago*. All the gentlemen, we have mentioned above, are, with one exception, still living, and, with two exceptions, are *active and ardent* political friends of Mr. Adams. We here beg leave to ask, why Mr. Adams' statement has been withheld from the public eye more than a year? Why it has been published only one fortnight before the election for President all over the country? Why for three years he has held to his bosom, as a political counsellor, Daniel Webster, a man whom he called, in his midnight denunciation, a traitor in 1808? Why in 1826 he paid a public compliment to Josiah Quincy, in Faneuil Hall, whom he called a traitor the same year? And as the last question, why during the visits he has made to Boston, he always met in friendly and intimate and social terms all the gentlemen, whose names a few years before, he placed upon a secret record in the archives of our government as traitors to their country? Why did he eat their salt, break their bread and drink their wine?"

The indictment framed upon the above libel, as would be seen, contained two counts, or rather two methods of charging the same offence.—The first count stated, that the defendant had asserted that Mr. Adams had said, that "Daniel Webster and others of the Federal party, &c. were engaged in a plot to dissolve the Union and to re-annex New England to Great Britain,—and that he (Mr. Adams) possessed unequivocal evidence of that most solemn design." This count was grounded upon the alleged statement of Mr. Adams and referred probably, though the solicitor observed he would not anticipate the defence, to the statement of Mr. Adams published in the National Intelligencer, afterwards in the Jackson Republican.—The second count alleged that General Lyman, the defendant, had said "why has he (meaning John Quincy Adams) for three years held to his bosom as a political counsellor Daniel Webster, a man whom he called in his midnight denunciation a traitor in 1808," &c. as also "why during the visits he has made to Boston, he always met in friendly and social terms all the gentlemen,

whose names a few years before, he placed upon a secret record in the archives of our government as traitors to their country? Why did he eat their salt, break their bread, and drink their wine?" He, General Lyman, meaning according to the language of the indictment to say that Daniel Webster was a traitor recorded as such upon the records of our country in 1808. This was not the assertion of Mr. Adams, but of General Lyman.

To these two counts it was essentially necessary to apply, distinctly, the principles of law. The first, was as to the assertion of Mr. Adams; the second, as to the denouncement of Mr. Webster, as a traitor, &c. The Solicitor then proceeded to read certain parts of a letter from Mr. Jefferson to Mr. Giles, which lately was printed in the Jackson Republican, which letter was dated December, 1825, wherein it was said, that the leading federalists, &c. were engaged in a plot, in 1808, to dismember the Union. But Gen. Lyman, in the libel alluded to, attempts to designate and mark out who those federalists were, by name—if the assertions of Gen. Lyman were not warranted by the letters referred to, then, and in such case, Gen. Lyman must be deemed to be the original libeller. The defendant had asserted that the name of Daniel Webster had been recorded upon the secret records or archives of our country, by Mr. Adams, as a traitor. This was evidenced by the enquiry, "Why, &c. has he met on friendly terms, &c. those whose names he has placed upon a secret record, &c. as traitors to their country?" on this head, relative to the second count, the allegation was perfectly original on the part of Gen. Lyman, and not authorized by the statement of Mr. Adams—to show this, he read so much of Mr. A.'s statement as was the groundwork of the assertion, which, he argued, was merely a statement with regard to the federalists of Massachusetts, and not relative in any shape, to the character, acts, or opinions of Mr. Webster, who then was an inhabitant of New Hampshire.

In the course of the evidence, he should first show that Mr. Webster was a Senator of the United States. In the next place, show the author of the libel to have been Gen. Lyman, and then proceed to show the circumstances attending it: after having gone thus far, he should not undertake to anticipate what might be the nature of the defence set up—he should hereafter govern himself by the circumstances developed in the course of trial. But still he would add, in the outset, that the extended character of the individual libelled would designate that the injury was co-extensive with that reputation, and in fact that the remedy or antidote should be equal to the poison disseminated.

His endeavor would be to give a full and clear view of the grounds of the prosecution, without any puerile attempts at parade; so that the points in issue before the jury, should be clear and well understood. He had one or two authorities to adduce, relative to the general law of libel, which might well apply particularly to this case—he here cited from Holt 283-4, (see notes, page 12), relative to the ingredients of libel and to its particular definition. It was the publication of a matter, either by picture, painting, printing, or otherwise, which in and of itself, tended to accuse an individual of crime, or to hold him up to public contempt or ridicule. The public were interested to prevent all such libellous matter, for it tended toward personal assaults and to a disturbance of the public peace, by provoking the party aggrieved to wrath, and to a taking of the law into their own hands. If the publication itself was of a virulent nature, the fact of this virulence appearing to the jury, was a sufficient proof of malice *ab initio*, and therefrom malice was implied. In the first count, the law, so far as it relates to a repetition of a slander would apply, provided that Gen. Lyman, in the recapitulation of the article admitted to have been written by President Adams, has repeated exactly the words originally used by Mr. Adams.

That which was alleged as to have been declared by Mr. Adams, was not borne out by the statement referred to. If it had been thus substantiated, and if the truth of the accusation which was the ground of the libel had been proved, this truth would have been by a State law of this Commonwealth a complete justification: but no such justification had been attempted, unless by an affidavit to which he might have occasion to refer in the course of the trial. He then referred to Starkie on libel, (pages 244, 5, 6, and 7,) wherein cases of reporting the proceedings of public bodies were referred to, and where the circumstances of those cases were in a degree similar to this under consideration; the supposed libellant there undertook to report the proceedings of a public body, which he had a right to do—but yet, if a person in repeating the publications or sayings of another, undertakes to color or misrepresent that statement, he is the original libeller in the eye of the law. One has the right to report the proceedings of a legislative or judicial body, but his must be a plain and unvarnished history of things as they occurred—and his quotations must be literally correct. Any departure from this, subjects him to the charge of libel, and he is considered as having an original intent to defame, especially if a coloring of the circumstances of the trial or proceedings exhibits a feeling in the Reporter, adverse to him who is said to be

defamed. The inference of an intent to defame, is drawn from the circumstances of the case. To these points he cited Pickering's Reports, vol. ii. page 117. Under the pretence of a correct recital, no one had a right to use malice. Here he cited Pickering's Reports, page 319.

That a correct account of the statement of Mr. Adams had not been given, was, as might be said, the corner stone of the present prosecution, and that even the absurd and unfounded assertions of Mr. Adams himself were not either correctly stated by the Defendant in this action, or in any way justified. The sole essence of the charge of libel was a malicious intent—two things composed especially its ingredients—first, that the charge should be false, and second, that it was done from malicious motives. In order to explain what malice meant in the view of the law, he would read from Holt 47.* There were two senses in which the term ought to be used—one a legal and the other a moral sense—for instance, one in the words of the quotation could not scatter firebrands, arrows and death, and then say, am I not in sport? The import of the words themselves, and the moral intention of the person using them, was to be considered—the effect of those words, and not the feeling of the one publishing them, was the true interpretation which the law would give to libellous matter. He then read from the third volume of Pickering's Reports, to prove that the deliberate publication of a calumny, false in its nature, was an internal evidence of malice—also, he assumed a legal ground, that a lack of proper caution in the republication of libellous matter inferred

* “Printing a libel is publishing it. The printer gives a body and activity to the poison, which is mixed up in private, and would lie in a quiescent state, if no persons could be found to put it into that form which is best suited to give it publicity. Printers and booksellers have therefore been justly deemed the instruments of the crime. Whatever be the motive of the printer or publisher, if an injury be done to the public or an individual, he must, and ought to be answerable for it. The law presumes guilt from every act of public mischief, and imputes a malicious intent to an act which is injurious to another. But facts or circumstances may enhance or mitigate that implied guilt, and vary the degrees of it.”

“A libel was a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one alive and expose him to public hatred, contempt, or ridicule.”

“Malice in legal understanding implies no more than wilfulness. The first inquiry of a civil judicature, if the fact do not speak for itself as a *malum in se*, is to find out whether it be wilfully committed; it searches not into the intention or motive any further or otherwise, than as they are marks of a voluntary act; and having found it so, it concerns itself no more with a man's design or principle of acting, but punishes, without scruple, what manifestly to the offender himself was a breach of the command of the legislature. The law collects the intention from the act itself; the act being in itself unlawful, an evil intent is inferred and needs no proof by intrinsic evidence.” [*Holt's Law of Evidence*, p. 97-8, 283-4.]

malice, especially if the author was aware that such assertions were false, or that the publication of an article which to the publisher's own knowledge was false, was a legal evidence of malice. To these several points he cited Starkie, (pages 252, 451, 274, 275, 869 and 870,) all of which citations more or less tended to strengthen the positions by him taken.

He then produced those documents necessary to show that the Hon. Daniel Webster was a Senator of the United States.

The following certificate was then read :

"Friday, June 8th, A. D. 1827.

IN SENATE.

The following certificate was received from the House of Representatives :

*Commonwealth of Massachusetts, House of Representatives,
June 7, 1827.*

Agreeably to adjournment, the House proceeded to the choice, on its part, of a Senator, to represent this Commonwealth in the Senate of the United States, for six years from the third day of March last; and on the votes being taken, it appeared that the Hon. Daniel Webster was chosen. Sent up for concurrence.

WILLIAM C. JARVIS, Speaker.

Agreeably to assignment, the Senate proceeded on its part to elect a Senator to represent this Commonwealth, in the Senate of the United States, for six years, from the third day of March last, and on the votes being taken, it appeared that the Hon. Daniel Webster was chosen."

The above is a true copy from the Records of the General Court.

Attest.

EDWARD D. BANGS,

Secretary of the Commonwealth.

He next called upon the stand Francis O. Dawes, who stated, that since the day of the publication of the alleged libel, he had called at the office of the Jackson Republican and purchased a paper, containing the alleged libel upon Mr. Webster, of a gentleman with whom he was not acquainted, but who was in the office, on which he made a memorandum of the day and place of purchase. On cross examination he was asked at whose request he made the purchase? to which he replied, at the request of Charles P. Curtis, on the 31st October last. He was then a student in the office of Mr. Curtis, and that Messrs. Curtis and Webster were together at the time of his going to

purchase the paper in question,—that he heard nothing then said about Gen. Lyman as the author of the offensive piece.

John Putnam sworn.—Who said that he was not the Editor of the Jackson Republican, but was simply one of the publishers of it,—that it had an extensive circulation, principally in New England, and particularly in New Hampshire, Maine, and Massachusetts, and more or less in every state in the United States. Some went to the South, to Tennessee, City of Washington, &c. He did not know whether to the heads of the Department of the United States or not, for he had not the direction of the several bundles. Some members of Congress, however, were among the subscribers,—Mr. Lyman was one of the proprietors of the paper. The number of subscribers he should think were about six hundred; he should think with the exchange list, which was liberal, that about seven hundred were circulated,—about one thousand printed, from the number left on the shelves.

He and his partner received a letter from Richard Fletcher and C. P. Curtis, Esquires, asking the name of the author of the article now in question.—This letter was given to Col. Orne, and he was informed, an answer was sent to it. The Solicitor General then read the answer as follows:

*Boston, Saturday morning, }
Nov. 1, 1828. }*

GENTLEMEN,

Your letter, dated October 31, and addressed to Messrs. Putnam and Hunt, the publishers of the Jackson Republican, was received by them yesterday afternoon, and a few hours after delivered to us.

In this letter you request information as to the names of the Editors of the "Jackson Republican, and the name of the author of some remarks on the subject of Mr. Jefferson's letter to Mr. Giles, and Mr. Adams' statement thereon," published in a Jackson Republican of Oct. 29.

You also observe, that you make these inquiries on behalf of a gentleman whose name is mentioned in those remarks.

In answer to the first portion of your inquiry, we beg to say, that there is no regular, permanent editor engaged for the Jackson Republican, but that the principal direction of it is in the hands of Henry Orne, whose name is written below, and in reply to the second, we take this opportunity to say that the remarks, to which, we presume, you allude, were written by Theodore Lyman, jr. whose name is, also, subscribed to this letter.

You have not mentioned the name of the gentleman, on

whose behalf you have made these inquiries, nor the object he had in view in causing them to be made. Though we should be justified in requiring his name at your hands, yet we readily answer your inquiries, presuming that you were fully authorized to take the step, you have done.

We remain, gentlemen,

Your very obedient humble servants,

(Signed) { Henry Orne,
 { Theodore Lyman, Jr.

The Solicitor then stated that he had introduced the grounds of the prosecution—the libel itself and its nature—had proved the fact of its publication, as also the author. For the present on the part of the government, he should rest his cause here.

MR. FRANKLIN DEXTER, for the defendant, stated that in the opening of the defence his duty was of a humble nature—he was precluded from the argument of it, by the regular rules of Court, for that would rest in abler hands—he should only offer a few general remarks, applicable to the nature of the case, and state the law and fact upon which the defendant would rely: in discharging this duty he should be extremely brief, as it was the wish of all concerned that this cause should occupy but one day. The course of the defendant would not be upon the *offensive* but strictly *defensive*. The Counsel for the defendant would endeavor to satisfy that jury, that he never intended to libel Mr. Webster: upon the law there could not be much disagreement between them and the Attorney for Government, for the law was unequivocally plain: if, in the course of such a defence which was purely defensive, any accusations against the complainant were to be made, it would but ill support such defence, as he now should offer. He would now, in the outset, boldly assert that the prosecution originated in a mistake: but, still, as the prosecution now had met them, they must be prepared to encounter it, upon its legal and just merits. On the part of the defendant, it was a subject of regret. The feelings of one of the parties had been injured, and now all that was to be done, was for the jury to take the subject into consideration, and to decide without regard to the consequences which were to ensue. What might have been the best course to have been pursued the prosecutor was the best judge. It was now the duty of that jury, upon their oaths, to decide upon the innocence or guilt of the defendant. There was but one course before them—they must say guilty or not guilty. No matter what were the characters and standing of the parties, political opinions and prejudices

were to be discarded, and every feeling of partiality banished from their breasts, when they came to a decision of this cause.

The question which they had to decide was rather of a grave nature, for it concerned the freedom of the press and the rights which individuals had, to discuss questions of political moment. Many of the public, whom curiosity had drawn together at this trial, might be disappointed in the course which this trial might take: they might expect strange developements relative to former political events—but no such developements would be given, if these existed, and as he believed, little probably would arise to gratify curiosity thus excited. In great political questions, such as of late have agitated this country, it was not to be expected that the controversy would be confined to the parties themselves who were candidates, but must involve the names of their distinguished supporters, when the merits of each candidate were discussed. The latitude taken and allowed was of a wide nature, under such circumstances; but still for the defendant in this case, and as it referred to Mr. Webster, as set forth in the indictment, for his client, he denied totally and unequivocally all intentions injurious to or derogating from the character of Mr. Webster. In cases of libel under the law, as it now existed, there were two modes of defence—one was simple; to deny the act and the malice, and to put the prosecutor to the proof of both—the other, to assert the truth of the matter contained in the supposed libel, and that it was published from good motives and justifiable ends. It might seem from an affidavit filed in this cause, that the defendant intended to justify himself, by proving the truth of his allegations—yet, relative to giving the truth in evidence, in former times, it was a legal maxim, “the greater truth the greater libel.” At the present day, the truth might be given in evidence, and by a statute of this Commonwealth, amount to a complete justification. Still, notwithstanding the tenor of that affidavit, it was not intended to attempt to justify on the ground of the truth of these statements, declared upon in the indictment. The fact was, that the defendant was called upon, after short notice, to reply immediately to an indictment charging him with an offence, serious in its consequences. His counsel did not have time to consult together—believing, however, that some further light might be thrown upon this subject by Mr. Adams, an affidavit was filed for the purpose of obtaining a continuance, setting forth what the defendant expected to prove, by Mr. Adams and other witnesses then absent. This motion was overruled by the Court, and the trial ordered to proceed. He did not believe that if the continuance had been

granted, that other grounds of defence would have been taken, different from those now assumed. That motion for a continuance was overruled upon the common and legal rules of the Court; it was perfectly proper so to overrule it, and his client did not complain of wrong in this particular: in truth his defence would have been on a continuance, probably the same as now offered. This defence was in substance—1st, That the matter purporting to have been published by Gen. Lyman, in the Jackson Republican, was not in and of itself libellous, so far as the defendant was concerned; and in the second place, that in the publication of Gen. Lyman there was no malicious intent, which was a principal ingredient in the charge of libel. The nature of this charge against the defendant was both serious and novel. It was usual and perhaps necessary, on the part of the Government, to charge one with a false and malicious libel—but here the Solicitor had seen fit to declare in the indictment, that Gen. Lyman was an evil-disposed person, and intending to defame, &c. Daniel Webster, did publish the following false, malicious, and *infamous* libel. These were hard words, not necessary to have been used in technical language, easy to be said but not easily to be proved—the word *scandalous* was common; but his brother and himself, in that case, had searched for a long period, among the precedents of the present and past ages, to find a parallel, and in only two cases could they discover that the word *infamous* had ever been used in an indictment of this nature.

On the part of the defendant, it was strictly denied that there were any malicious motives actuating him, in the publication complained of. And as to the truth, the repetition of the charges of Mr. Adams were so nearly true, that no one could say that it was wilfully untrue; or that the application of the assertions of John Q. Adams to a certain individual were so nearly correct, if not absolutely so, as to leave no imputation upon Gen. Lyman's mind, when he thus applied the observations of Mr. Adams. In the first place, he should deny that the publication was, of itself, a libel; and in the next, if the matter was libellous, there was no malice on the part of General Lyman.

The nature of the charge against the defendant was, as he had before observed, for an *infamous* libel. It was the obvious intent of the prosecutor, to stamp this offence as one of no ordinary nature—as one of peculiar aggravation—in the outset to give a character and coloring to the transaction, such as would arouse the feelings of a jury. But here the poison carried its own antidote with it—if it was a crime, an infamous crime, of no ordinary magnitude, so much greater must be the plenitude of proof to

convict the defendant of such an aggravated offence ; the charge was one marked with uncommon severity, and extremely, and, as he thought, unnecessarily disreputable to the defendant. The defendant was charged with having been an evil and wickedly disposed person, who wantonly and maliciously had published an *infamous* libel on the character of Daniel Webster, a Senator of the United States. With regard to implied malice, they were the judges of the law and fact, not only of the malice but the implication of it. The prosecutor and the defendant's Counsel would not disagree much relative to the law in this case. It was perfectly simple and plain, and was more allied to plain common sense than at first would be imagined. It was said by the Solicitor, that malice was to be inferred or proved, if the matter complained of was libellous in its nature—that the malice might be a thing of inference. Still, if the article was not malicious on the face of it, the jury had a right to go into all the attendant circumstances, to take the whole subject together, and then decide upon the motives and feelings actuating the supposed libeller : he, the Solicitor, had said that if there was malice apparent on the face of the supposed libel, the jury were not bound to look further, but decide upon such fact so exhibited—but still he conceived that the jury, as judges of the law and fact, had a right to take the whole case into consideration, and decide upon the result, drawn from a careful consideration of the whole facts in issue.

The point assumed by the Solicitor was not so formidable as it, at first, seemed. If it were not that the jury, being the judges of the whole law and facts, had a right to draw their conclusions from the whole of the facts in evidence, the law delegating such power to them would be absurd. In order to arrive at a correct result they must examine all the facts in the case, and on these must their verdict be founded.

Malice was the essence of the crime charged, and of this the jury were the sole judges—if they were convinced that there was no malice, there was an end of their inquiry—if there was a doubt on this subject, they would go to the whole of the sources of the testimony and from thence gather the result—on this they were not confined, but must judge for themselves, relative to the time when the supposed libel was published. No extraneous evidence was to be introduced, but the Jury were confined to the circumstances of publication. It had been said that even a publication of the truth was an aggravation of the offence of libel—that doctrine was now exploded—and though the truth of the accusation was not now to be set up in justification, yet it would in this case be necessary for this fact to be kept in mind. The

breach of the public peace, which consequently might happen, and was the groundwork for a public prosecution, was not paramount to all others, for now the truth might be published concerning any individual, if it was done from good motives and justifiable ends. In such case there was no crime—if no malice appeared upon the face of the libel, or even if there did, the jury had a right to inquire into the attendant circumstances of the case.

If there was no libel upon the face of the paper, the jury certainly had a right to inquire into the circumstances of the case. In the first place he contended there was no libel, taking the matter set forth in the sense in which the author intended. He then cited instances wherein a man was not considered as a libeller, if the intent to libel was not satisfactorily proved, but was intended in a different sense from what a part of the words would seem to imply; for instance, when a man had said that another was a murderer, because he had killed every animal but a human being; this was no libel, for no crime was stated, taking the whole sense of the words into view. Another where it was said that a man was a thief, because he had stolen a lady's heart: here the sentence must be construed together and no crime was charged. He then cited from the 1st Johnson's Cases, (New-York) page 279, for slander, wherein the allegation was, that "John Keating was a d——d black-hearted highway robber, and murderer," which related to a contest about a bass viol in a church wherein Keating and others attempted forcibly to obtain possession of a bass viol, the property of a certain church, or individual of it, in which one of the parties was seriously injured and there was a stabbing. The jury, in this case found a verdict of guilty—but the court set aside that verdict, for the expression was connected with certain known facts of a public procession, &c. which taken in connexion with such facts, marked the case with an innocent character, and the defendant finally was acquitted.

There was also an ironical sense in which words might be used, in which the author might be freed from the charge of libel. The word *traitor* was of rather vague signification, when used in a political sense. It was rather a popular word when politically applied. Was it intended by Mr. Lyman to call Mr. Webster a traitor? did it give a fair construction to the words used by Gen. Lyman? Treason by the laws of the United States was considered only the act of levying war against the nation, or of affording aid and comfort to her open enemies. If Mr. Webster was not a traitor in that sense, or if he was not

charged in that sense, there was no ground for an accusation of libel ; the accusation of his having been a traitor must be taken together with the corresponding circumstances ; if he was not charged with having been a traitor, in the sense given by the constitution of the United States, there was no criminal charge against him. But it was said that Mr. Adams had written a letter to Mr. Giles, which letter was copied into the same paper, in which the libel was said to have been written, accompanied by the statement of Mr. Adams ; but the alleged libel in question was a mere commentary upon those documents, which any man had a right to make. They were with the commentary, all to be construed together ; if from the whole there was no obvious intent to libel, the defendant must be acquitted, if he, Gen. Lyman, did not intend to bring Mr. Webster into disrepute and infamy, by such commentary, the matter was not libellous. He contended that all the defendant intended to say was, that Mr. Adams charged the prosecutor with having been a traitor, &c. and that he had placed upon the records of the archives of government, &c. certain New England Federal leaders of the year 1808, and that the prosecutor was one of them. He contended that the true meaning of the letter of Mr. Adams, bore out the assertions of Gen. Lyman. Mr. Adams had asserted that during the Embargo, certain New England Federal leaders had been guilty of treasonable plots to dismember the Union ; which facts he could not “ *prove in a court of law,*” and had not affixed that design to Daniel Webster. The only thing which Gen. Lyman had done, was to give an interpretation to that assertion, undoubtedly intended on the part of Mr. Adams, and for which he was now held responsible for an *infamous* libel. It was further said, that Mr. Adams had broke their bread and drank their wine, whom he had stigmatized as traitors. The question now was whether Gen. Lyman had given a fair interpretation to the words of Mr. Adams, or rather whether he had given an unwarrantable commentary upon the meaning of Mr. Adams. He had only given the names of those persons intended by Mr. Adams to have been meant, and had merely given a direction to the intended object of the calumny of another. He should now proceed to relate some of the circumstances pertinent to the case. In the first place he should state, that the paper in which the alleged libel had appeared was a paper established to support the cause of Gen. Jackson in opposition to Mr. Adams, as President of the United States. The persons said to have been libelled, were the personal friends of the defendant. Mr. Lyman in the old divisions of parties, was a

federalist, and all those named in the indictment as equally libelled with Mr. Webster, though Mr. Webster was alone selected as the one libelled, were his personal and, formerly, political friends. Was it probable, that he, the defendant, would hold up to public detestation such men, his friends, who were in daily, personal union with him? that he should be on such terms with men, whom he was willing thus *infamously* to libel? But it was said that the libel was untrue or false on the part of General Lyman, so far as Mr. Webster was concerned. Gen. Lyman asserted that Mr. Adams had said that Mr. Webster was one engaged in treasonable plots, &c. because Mr. Webster then belonged to New Hampshire, and not to Massachusetts; for Mr. Adams alluded to the federalists, and to none of any other state; that he had not mentioned any other leading federalists than those of Massachusetts. But he contended that the expressions of Mr. Adams alluded to all the leading federalists of the Eastern States, of New England, and would apply as well to New Hampshire as Massachusetts. But be this as it might—he denied that there was any wilful falsehood on the part of General Lyman, as taken in connexion with the facts of the case. Gen. Lyman never had any thing to do with politics until 1819; and then upon his return from Europe, he found Mr. Webster an active and leading federalist, in Boston. It might have escaped his recollection, that Mr. Webster in 1808, resided in New Hampshire, in hastily penning a Newspaper paragraph. But suppose this to be true or untrue, he was at that time a leading federalist in New Hampshire, and opposed to the embargo, and virtually was embraced in the denunciation of Mr. Adams. The territorial line demarking the several states, could not be of much consequence, if the spirit of Mr. Adams' letter included the leading federalists of New England, and Mr. Webster was one of them. The application of the spirit of Mr. Adams' letter under such circumstances, was not intrinsic evidence of express or implied malice, but of the contrary. The whole circumstances went to show there was no malice on the part of Gen. Lyman in giving a true interpretation to the meaning of Mr. Adams.

After the indictment, General Lyman, upon a very short notice, was called before that court; his Counsel, with little time for consulting together, were called upon for a defence; the defendant was arraigned, who, for the purpose of a continuance, upon grounds which he had every reason to believe were correct, made affidavit that John Q. Adams was a material witness, as he believed, in that case, and who would

be within this Commonwealth, as he also believed, on or before the next session of this Court. This was after his arraignment; then, true it was, that a public offer was made by the Solicitor to postpone the trial, if the defendant would swear that he expected to prove, by the before-named witness, the truth of the libel—or that, if proper explanations were made, that a *nolle prosequi* would be entered: but these propositions were such, that no honest or honorable man could possibly swear to or comply with—the affidavit only went so far as to state, that John Q. Adams was a material witness, but with regard to what he would swear, after his declaration in the National Intelligencer, it was difficult for Gen. Lyman to say, more so, to swear to. The offer of a *nolle prosequi*, under the circumstances in which it was made, did not operate against Gen. Lyman, for at that period he was arraigned, and charged with being an *evil disposed person* and guilty of an *infamous libel*. Thus situated, however, he might have been disposed previous to such accusation, thus publicly charged, it was not to be expected that he could honourably consent to explanations, until the nature of this charge against him had been fully investigated. Previous to any explanation, or even the asking for one, which he was always ready to have given, when applied for, a prosecution was openly threatened on the part of Mr. Webster; it was a subject of common conversation. A letter came from two attorneys, asking the name of the author of the piece, considered as offensive; this very letter did not name by whose authority the demand was made, but to which a prompt reply was given. No other application ensued to obtain an explanation; but soon a prosecution followed on the part of Government. He appealed to that jury, whether, under such circumstances, it would not have been degrading to the defendant to have consented to have offered any apology or explanation; he had, rather than do so, submit his cause and motives to a jury of his country. As he had spoken of letters, he would now refer to them—the first was a letter from Messrs. Curtis and Fletcher to Messrs. Putnam and Hunt, inquiring who was the author of the offensive article in the Jackson Republican. This letter was replied to, as has been before stated.

It was admitted that Gen. Lyman was one of the Proprietors of the Jackson Republican, and sometimes wrote for it—that he wrote the piece in question; but he wished it distinctly to be understood that, throughout the whole defence, it was contended, that malice was never intended, on his part, in the writing complained of. But to return to the letter which

had been read, it showed sound reasons for not arriving at an explanation, which, if no prosecution had been instituted, easily might have been had. Mr. Dexter then referred to the affidavit and the admissions contained in an accompanying paper, by the Solicitor. It was admitted that Mr. Webster was a leading federalist, in 1808, and following years, in the terms of the affidavit, and opposed to those restrictive measures then introduced by the National Government, and that he enjoyed the confidence of the leading federalists of New England. Mr. Dexter here read from the affidavit as follows:

“And the said Lyman further believes and expects to prove, that the persons so referred to, by said Adams, as aforesaid, were the eminent men of a certain political party in New England, then known as the federal party: and that the said Daniel Webster, was in and about the year 1808, and for many years after that time, an eminent and conspicuous member of said federal party, and being a person of distinguished talents and influence, and enjoying the general confidence of the said federal party, did participate in, and by means of his said talents and influence greatly urge and promote the measures of opposition to the embargo and restrictive system, then pursued by the general government, and deemed so injurious and oppressive to this section of the Union.”

He also read the admission of the Solicitor General, which was in these words: “It is admitted that Mr. Webster was an eminent and conspicuous member of the federal party, &c. &c. in the terms of the affidavit. But it is not admitted that he was one of that description of persons, referred to by Mr. Adams.”

Mr. Dexter then alluded to a certain pamphlet called “Considerations on the Embargo Laws,” and offered it or extracts from it in evidence.

The Solicitor General said, that he had known nothing of this before, and if it was to be offered in evidence, the whole or none must be read—he was utterly ignorant of its contents; he should not admit it in evidence to the jury, without its being read entire.

Mr. Dexter then called the Hon. Daniel Webster, who was asked the question, whether he wrote the pamphlet, which was shown him. He said, that he had written a pamphlet with that title, and from this and its size, he presumed it was the same. It was during the embargo, or some suspension of it—he could not fix the month,—perhaps not the year; the embargo was laid in December, 1807, and this, he thinks, was written in the summer of 1808. In reply to a question from

Mr. Dexter, concerning his authorship of the Rockingham Memorial, he said, that question related to the year 1812. He was not bound to acknowledge every paragraph he had ever written, whether anonymous or not. That Memorial, however, was written by a Committee of which he was Chairman; how far the writing or sentiments were written by himself, or how much they were modified by the various members of that Committee, he now could not tell—at all events, he assented to all contained in that Memorial, at the time, and to the proceedings of the Meeting.

Question by the Solicitor General.—Did you know when the application was made, that General Lyman was the author of the supposed libel?

Answer.—I did not, though I had some slight reason to suspect that he was, from his connexion with the paper—still he did not believe it. He held a conversation in State-street, with two individuals, who had not been named in the course of the trial, one of whom thought, from some peculiar expressions, that General Lyman was the author; the other, the contrary. He never was convinced, or fully believed that he was the author, until the letter referred to was shown him. He stated the time when he believed the letter was shown, which was on the evening of the 1st November, or morning of the following day.

After some conversation as to the propriety of reading the whole of the pamphlet, the Solicitor observed, that if a part was called for by the defendant's attorneys they must read the whole, to which he could not object.

JUDGE PARKER observed, that the time to be embraced in reading it was material; he had no doubt but what Mr. Webster wrote as strongly against the embargo as any one could. To this Mr. Webster replied, from his seat, that "he meant to"—JUDGE PARKER continued, that for himself, he thought it unconstitutional. He then asked, if the pamphlet tended to show, that Mr. Webster was one of the individuals intended by the observations of Mr. Adams?

Mr. HUBBARD. It was alleged by Mr. Adams, that an intention existed on the part of the leading Federalists in New England from the year 1808, down to the close of the war, to sever the Union and to re-annex themselves or the New England States to Great Britain. Mr. Webster was then one of the leading Federalists of New England; and, consequently, one of those charged by Mr. Adams. The Embargo pamphlet and the Rockingham Memorial, acknowledged by Mr. Webster to have

been principally written by him, went to show this fact. If this was apparent, then there was no malice on the part of General Lyman in classing Mr. Webster with other distinguished Federalists in New England.

Mr. Davis asked if they intended to prove the truth of the allegations by producing the pamphlet, and that Mr. Webster was engaged in a treasonable plot to dissolve the Union, &c. they had better read it,—if not, it was better in Scottish parlance “to keep their bread below their broth.”—If it was used for that purpose the whole, if any, must be read.

Judge Parker observed, that if the constitutionality of the Embargo was on trial, he should be glad to hear it read.—Mr. Dexter then offered the “Rockingham Memorial” in evidence, which was rejected, as inapplicable to the issue. He then put in the case the previous numbers of the Jackson Republican, for the purpose of showing that Mr. Webster had never been named in any article written by General Lyman.

Judge Orne, sworn. He had examined the articles as marked in the schedule, and recognized that Gen. Lyman had written all the articles thus marked. He was satisfied that they were correct. The piece in question was written by General Lyman. The object of the Jackson Republican was to oppose the re-election of John Quincy Adams.—In relation to general politics, the articles were examined by him. He was not able minutely to state, what was the circulation of the Republican; the exchange was rather extensive than otherwise,—it circulated more or less in most of the states of the Union;—there were about one thousand printed;—he did not think that all were distributed. With regard to the present prosecution, he first heard that Gen. Lyman was to be sued, one or two days before the letter to Putnam and Hunt. This information, he believed, was obtained at the Theatre. The publication was, he believed on the 29th October;—the letter was received on the 31st. Mr. Webster’s name was mentioned as the person libelled;—he communicated the information the next morning to Gen. Lyman, after he had received it. He had understood sometimes that Lyman, and at others, that himself or both were to be sued or prosecuted for a libel, on account of said alleged libel contained in the article in question. He could not state exactly when those facts came to his knowledge. He also heard that Major Russell was the complainant. He had no conversation with Gen. Lyman concerning the article. He learned from Mr. Austin that Mr. Webster was the complainant.—After conversing with Col. Austin he did not hear from the Grand Jury of

the Municipal Court. This was about the close of October. A settlement of an account with Mr. Austin, of a public nature fixed the date.

Benjamin Russell, sworn. Defendant's witness. Heard Mr. Webster say that he intended to prosecute soon after the publication of Oct. 29th in the Jackson Republican. He (Mr. Russell) sent for the paper, and read it. He did not then understand it. He then asked Mr. Webster if he had seen it. He said he had. He then asked if it did not contain a libel? Mr. Webster replied that he should try to make it so, or ascertain the fact, or words to that effect. Previous to this conversation he had thought that the piece alluded to, or meant him; but he found it was in better hands than his own. He felt proud to be in such company as he was ranked amongst in that libel.—He never thought General Lyman to have been the author of the piece in dispute, but had always attributed it to the Hon. Gentleman who had just left the stand. With regard to newspaper controversies he had heretofore had some experience, and some little practice. In this case he had intended to have tried the case of libel himself, but circumstances had rendered it unnecessary.

Henry Williams, for defendant, sworn. Mr. Williams informed Mr. Lyman he had heard that Mr. Webster was about to institute a suit against him. He was of opinion that this was on the evening of the 29th or 30th of October last. He obtained his information from Capt. Jones of the Liverpool Packet Company, who told him this fact at the Merchants' Hall Reading Room, and who had it from Major Russell. It was a general report at the Hall. He called and informed Mr. Lyman when on his way home that evening, which was the 29th or 30th, of the story which he had heard, in order to obtain a confirmation or denial of its truth. This was merely to satisfy his own curiosity, which was excited on the occasion,—but Gen. Lyman could give him no information on the subject, having heard nothing of it.

Col. James T. Austin, sworn. He received a letter on the 1st of November last, as prosecuting officer for the Government, which he was requested to lay before the Grand Jury as a complaint against the defendant for a libel on the Hon. Daniel Webster: the letter was brought by Mr. Curtis, who desired to know of him when it would be convenient for him to lay the subject before the Grand Jury. On the receipt of it and after he had read it, he advised Mr. Curtis to go with it directly to the Supreme, rather than to the Municipal Court. Mr. Curtis replied that he was not aware that the Supreme Judicial Court

had jurisdiction in a case of this nature: after he (Col. Austin) had satisfied him (Mr. Curtis) of the fact, that they had, he took the letter away, and afterwards followed the course he had pointed out. The complaint was on the part of the Hon. Daniel Webster against Gen. Lyman.

Mr. DEXTER then proceeded to state that the indictment related to an article published in the Jackson Republican now in the case, and the offensive paragraphs must be taken in connexion with all the other articles in the same paper. The first was an article headed, Political, and signed, A Pennsylvanian. This was extracted from a Pennsylvania pamphlet, which extract was furnished by Gen. Lyman, and related to Mr. Adams' assertions, and to the subject matter commented upon by Gen. Lyman. These facts were a part of the defence, as the Jury would afterwards understand.

Judge Orne was called again, who stated, that at the first establishment of the Jackson Republican a number of pamphlets and papers were sent on from the southward to this paper. Having a perfect confidence in Gen. Lyman's judgment, Mr. L. had taken or made such selections as he deemed fit. Whatever was written by himself, had always been under the editorial head, with few or no exceptions. He had no conference with Gen. Lyman, previous to the writing of the article, in reference to its nature; had seen it however, previous to its publication.

Mr. DEXTER then went on to state as admitted by the Government, that Gen. Lyman was graduated at Harvard college, in 1810; being then 18 years of age; that he went to Europe in 1812, and returned in 1814; that he went to Europe again, in 1817 on account of his health, and returned in 1819; and that he took no part in politics till the winter of 1819-20.

Warren Dutton, sworn. He saw the publication alluded to on Wednesday after its publication. On Friday in the Mall he met with Gen. Lyman, and from him understood that Mr. Webster complained of the publication; does not recollect that Mr. Lyman said, he was threatened with a prosecution. He could not relate the whole conversation, as it was desultory. Understood Mr. Lyman to say he did not intend to libel any one. He was intimate with the defendant. Mr. Webster, Gen. Lyman, and himself were on friendly terms, and frequently were together in a friendly association, and never knew of any difficulty between the prosecutor and defendant. Mr. Lyman was a federalist in the old divisions, and on good terms with Mr. Otis,

Thorndike, &c. named in the indictment. He was a connexion of Mr. Otis.

Mr. Webster was again called by the Solicitor. He stated, that in the years 1807 and 8, he was a resident in New Hampshire; that he came to Boston, August 1816; and in the years 1808 and 9, he had no personal or political connexion with the persons named in the alleged libel. He knew them merely as boys know men. While a student at law, in this town, he knew Messrs. Otis and Prescott by sight and reputation, and not otherwise. Here he was asked by the Solicitor General, "Did you at that, or any other period, ever enter into any plot to dissolve the Union?" To which the answer was "No Sir." He then proceeded to say that he would state the transactions relative to the alleged libel, as they transpired. That on the day of the publication, or the next, he was in an Insurance Office, he believed the Suffolk, and his attention from the conversation was drawn toward it. It was also thus in other offices; and some conversation was held by him in the street with gentlemen, to which probably the Solicitor had referred. From the conversation, and from the connexion of Gen. Lyman with the paper, he had some reason to believe, that he possibly might be the author. He distinctly stated at or about this period, that he should not prosecute the publishers of the paper for this, what he should call, atrocious libel, for he had observed that the paper was printed for the proprietors. When he should find out who those were, he should give them an opportunity to prove the truth of the assertions. On the day of the date of the letter, signed by Messrs. Curtis and Fletcher, he called upon them as his counsel, professionally speaking, to inquire of the publishers of the Jackson Republican, to know the author of the piece in question. The return was the letter in the case, from Messrs. Lyman and Orne. He then directed his Attornies to inquire as to the jurisdiction of the Municipal or Supreme Judicial Court, of the offence. It was two or three days previous to the sitting of the Municipal Court, and ten or twelve days previous to the session of the Supreme Judicial Court: it was found that the latter had jurisdiction. Nothing was then done until he was satisfied that Gen. Lyman knew, that he intended to have a legal investigation. No explanation was given by Gen. Lyman, though he (Lyman) was satisfied in the opinion of him (Webster) that he (Webster) felt injured by the publication of the alleged libel in question. He heard nothing on the subject from Gen. Lyman. For himself he sought no explanation, and none on the other hand was given. In twelve

days afterwards, he presented his case to the Grand Jury of Suffolk county.

Charles P. Curtis was then sworn for the Government. The first information he had received of the libel in question was on Friday, the 31st of October, two days after it was printed. At this time Mr. Webster applied to him professionally to ascertain who was the author of it; and also authorized him to retain Mr. Fletcher to assist him. On the same day (31st) the letter which had been mentioned, was written. Mr. Webster then did not seem to be aware who was the author. In answer, the reply which had been read was sent by Messrs. Lyman and Orne. On Saturday morning, (1st Nov.) the contents of that letter were communicated to Mr. Webster. He then had doubts whether the Supreme Judicial Court had jurisdiction in a case of this kind, and went to Col. Austin with this letter, &c. to obtain information. As a lawyer he preferred presenting the case to the Supreme Court, but was under the impression that cases of this nature were transferred from this, to the Municipal Court, and that it was indispensibly necessary to have the prosecution instituted there. Upon conversation with Col. Austin, he was convinced that the Supreme Court had a right to exercise jurisdiction in the case, and then all intentions of prosecuting it at the Municipal Court were given up. It was the expectation of Mr. Webster, that some explanation would be made by Gen. Lyman, which should supersede the necessity of a public prosecution.

Judge PARKER here observed that it was evident, there was throughout the whole, some unfortunate misapprehension between the parties.

Mr. DAVIS here read the affidavit, which had been alluded to, which was as follows, viz :

The said Theodore Lyman, jr. makes oath and says that this Indictment was found against him at the present term of this Court, and that he has had only five days' notice thereof, and was not able to procure a copy thereof until three days ago. That immediately on obtaining such copy, he advised with his Counsel respecting the answer he should make to the same. That his said Counsel have had the same under consideration, and now advise him that the several matters therein charged to have been published by said Lyman are not libellous, if the same were neither wilfully false, nor maliciously contrived and intended to defame the said Daniel Webster, both of which the said Lyman wholly denies. The said Lyman is further advised that he may lawfully give in evidence on the

trial of said indictment, the truth of the several matters contained and alleged in said supposed libel, as a justification thereof, and that he cannot safely proceed to trial on the point of his defence without evidence of a great variety of facts relating to the political history of the United States for more than twenty years last past, and to the part taken therein by the said Daniel Webster, and the other persons named in the said supposed libel. That it will be necessary for him to prove, among other things, that John Quincy Adams, the President of the United States, composed and published, or caused to be composed and published, in the newspaper called the National Intelligencer, the statement said in that paper to be authorized by him and referred to in said supposed libel, and that the said Thomas Jefferson did write to said William B. Giles the letter referred to in said supposed libel; and that the said Daniel Webster was one of the description of persons referred to by said Adams as engaged in a course of opposition to the General Government, which, in the opinion of said Adams, tended to produce a forcible resistance and civil war, in which the persons so spoken of by him would surely call in the aid of Great Britain against the Government of the United States; and also as persons whose object was to dissolve the Union of the United States and establish a separate confederacy, by the aid of Great Britain, if necessary.

Whereupon the said Lyman further says, that to prove the truth of the matters aforesaid, numerous facts will be important, which took place before he was himself of an age to have personal knowledge of political affairs of the country or of the individuals, who had the management of the same, and which it will require much time to investigate, that the said matters involve inquiries of an ancient date to be made of various aged persons in distant parts of the United States, whose attendance it will not be possible for said Lyman to procure at the present term. But the facts of which said Lyman is already informed, and which he is advised are material to this part of his defence, are as follows, viz :

The said Lyman believes and expects to prove, that the said John Quincy Adams did in fact write and publish, or cause to be written and published in the said National Intelligencer, the said statement referred to in said supposed libel, and this, said Lyman expects to prove either by Gales and Seaton, the editors of said National Intelligencer, or one of them, or by said John Quincy Adams, all which persons are now without the Commonwealth, and cannot be procured to attend the trial at this

time, but the said Lyman further says that he has a reasonable expectation that the said John Quincy Adams will return within this Commonwealth in season to attend the trial at the next term of this Court.

And the said Lyman further believes and expects to prove, that the persons referred to by said Adams as aforesaid, were the eminent men of a certain political party in New England, then known as the federal party ; and that the said Daniel Webster was in and about the year 1808, and for many years after, an eminent and conspicuous member of said federal party ; and being a person of distinguished talents and influence, and enjoying the general confidence of said federal party, did participate in, and by his talents and influence greatly urge and promote the measures of opposition to the embargo and the restrictive system then pursued by the General Government, and deemed so injurious and oppressive by this section of the Union ; which facts said Lyman expects to prove by divers persons resident in the state of New Hampshire, but of whose names and residence said Lyman is not yet informed ; but said Lyman's reason for believing that he can prove the same is, that the same things are commonly reported and believed, but the said Lyman is not yet informed, (nor can he during the present term procure such information together with the other evidence necessary to his defence), who were the persons, who know said facts of their own knowledge.

And the said Lyman further expects to prove, and verily believes that said John Quincy Adams did in or about the year 1808, write to divers persons then high in office in the Government of the United States, and among these, to the said William B. Giles, then a member of Congress from the state of Virginia, sundry secret and confidential communications, denouncing the said federal party or the leaders thereof, as engaged in treasonable projects of resistance to the General Government, and for dissolving the Union. The said Lyman's reasons for believing and expecting to be able to prove, that said Adams did so write or communicate, are deduced from said Adams' said statement, and said Lyman expects to prove the same at the next term by the said Adams' own testimony, or that of said William B. Giles, who is an aged and infirm man, and cannot attend the trial at this term ; and by other persons to whom the said Adams wrote or communicated as aforesaid, but who are not resident in this Commonwealth, and are at present unknown to said Lyman.

And the said Lyman further says that he expects and believes

that he shall be able to obtain all the evidence aforesaid in season for a trial at the next term of this Court."

(Signed)

THEODORE LYMAN, Jr.

Suffolk, ss. Nov. 17, 1828, sworn to in the Court, Jno. Calkender.

AFTERNOON—3 o'clock.

MR. DEXTER then closed the opening of the defence, by citing from 2d Cowen, page 479, on the import of the words used, as also from *Commonwealth vs. Clapp*. 4 M. R. 163—here he rested the opening.

MR. HUBBARD closed the defence by observing, that the intention must be proved, as well as the truth or falsehood of a charge, in a case of libel. Till lately it was ruled, that the truth of a libel could not be given in evidence. The statute giving this liberty, showed the progress of public opinion, as well as of legal principle. In former times, it was thought the publication of the truth would as much tend to a breach of the peace, as a publication of a falsehood, and, therefore, even the truth was prohibited—but now, the law protected a man in telling the truth, and more especially if it was from good motives or justifiable ends. In this case, it would not be attempted to prove the truth of the supposed libel—that Daniel Webster was a traitor, or that any one named in the communication of Mr. Adams was a traitor. He asked of the jury to take the whole circumstances into view; he merely asked of them to carry into effect the principles of the law, allowing the truth to be given in evidence, and to judge of the motives of the supposed libellant, which, if they were innocent and without malice, did not make him a libeller, or, to use the words of the indictment, an infamous libeller. If his motives were pure and innocent, in the publication, he was by no means a malicious libeller—if he had no intentions of vilifying the prosecutor, he was guilty of no malice, yet malice was a principal ingredient of the crime. The motives were, therefore, to be called in question—on this subject he need not enlarge—it was a common sense view of the question. The circumstances of the case would show, beyond a reasonable doubt, that Gen. Lyman never intended to libel Mr. Webster—that purpose was never in his heart or head. The alleged libel, was merely a comment of Gen. Lyman upon Mr. Adams' letter. This was done at the close of a warm political contest. The object of the writer was, to hold up, if any body, Mr. Adams to ridicule and contempt, for that letter, and not Mr. Webster; and

to show that he never was worthy of support. He should not oppose the law as laid down by his brother, the Solicitor, in the present case. He should only contend from the nature of the piece itself, the character and views of the writer, and the circumstances of the case, that the defendant never intended, really, to libel Mr. Webster, and that of this fact the jury must be convinced beyond a reasonable doubt. It was a well known fact, that the first object of the Jackson Republican was to oppose the re-election of Mr. Adams, and to advocate the cause of General Jackson, for the Presidency of the United States. Mr. Adams at the close of a hot political contest, publishes a certain letter, bearing strongly upon the motives and conduct of certain leaders of the federal party, which letter was in the case; after the publication of this letter, Gen. Lyman undertook to publish a commentary upon it, for the purpose of holding Mr. Adams up to the contempt of the federal party, on account of the accusations contained in that letter, and to show from it that he was unworthy of their support. This letter went to show his (Mr. A.'s) real feelings toward the federalists of former times. Gen. Lyman, not in set logical terms to be sure, endeavored, in his commentary upon that letter, to show what the federal party ought to feel upon such an occasion, and that Mr. Adams was unworthy of their support.

These intentions on the part of Gen. Lyman, were to be gathered from the piece itself: if this appeared, the unavoidable inference must be, that there was no malice against Mr. Webster, on the part of Gen. Lyman, but merely an intent to hold up Mr. Adams, not Mr. Webster, to public ridicule. He had a right to do this. In judging of motives, for the motive must be malicious to constitute a libel, all the circumstances of the case, at the time of its publication, must be taken into consideration, by the Jury. Without this, innocence might be construed into guilt: a course, contrary to common sense, or the true intent and meaning of the law of libel, even under its ancient, to say nothing of its modern construction.

It was a well known fact, that once the federal party was the dominant one in the United States. It was no dishonor to any man to have belonged to it. Washington was at its head, for himself (Mr. Hubbard,) he felt it no disgrace, to have been in its ranks. It was a fact, well known, for it was a matter of history, that John Quincy Adams, was, at one time, one of its members—one of its leaders. He was associated with those very men, whom, he had lately publicly denounced, in terms of common and political friendship—he afterwards

disowned them, and apostatised from them; he had also publicly called them, to wit, the leaders of the federal party, traitors to their country, in the embargo and war. Mr. Lyman, had, in his commentary, said that Mr. Adams, on account of this strange charge, was unworthy of the federal support, that they, of all others, had the least reasons to support him—this was a fair ground for a political writer to take, and such as was perfectly justifiable, in order to promote the election of his own candidate, viz. General Jackson.

Why was it, that so much was said concerning the freedom of the press, if each member of the body politic, had not a right to canvass the characters, conduct and motives of each popular candidate? and to develop the whole mass of facts, pertinent to the issue? this especially ought to be so, when the motives are good, and the end justifiable. It is possible for a man, in such case, perhaps, to be indiscreet, but it does not follow, that he of necessity, must be guilty of malice, in spreading before the community such facts. When a person is to be chosen to the high office of Chief Magistrate, of the United States, it must be expected, that a full canvass of the merits, of each candidate, would be made; a commentary on such merits, or demerits, was not to be inferred as malicious, either towards the candidates themselves, or their supporters. The piece itself, was not an attack upon even Mr. Adams himself; but a commentary upon his own letter, giving it a construction, correct and obvious, to the eye of reason.

A letter from Mr. Jefferson, had been read in the course of the trial, of the date of December, 1825, in answer to one from Mr. Giles; this document, as well as Mr. Adams' letter, had first appeared, toward the close of the last election; this probably, was intended to operate to the advantage of Mr. Adams, in Virginia. The intentions charged upon the Federal party, were to rid themselves of the effects, or existence, of the Embargo; it was said, or to be inferred, from the letter of Mr. Adams, that the federalists, of the Eastern States, would take any measures of resistance, even unto blood, if the embargo, and its principles, were to be continued in operation; of this, Mr. Adams had the most unequivocal evidence; also, that said leaders or party, were then in negociation, with Great Britain, to re-annex, &c. New England to Great Britain, and to take no further part in the war, then going on. Mr. Adams' remarks, upon Mr. Jefferson's letter, tended to show, that he had confounded events, and that he had applied to an opposition to the war, what the Federalists did in opposition to the Embargo;

still, however, reasserting the fact, that such intentions did exist, on the part of the leading federalists. In order to show that Mr. Webster, was one of the leading federalists of New England, at the period referred to by Mr. Jefferson, Mr. Adams, or both, he would refer to a pamphlet, said to have been written by Mr. Webster, and by him acknowledged, on the Embargo Laws.

THE SOLICITOR here objected to the reading of, or reference to a part, unless the whole was read.

MR. HUBBARD said, that the pamphlet was in the case, and had been acknowledged by Mr. Webster, and he had a right to refer to it, to show that Mr. Webster's sentiments on that important topic, were the same, as those of the leading federalists. He did not wish the whole read, on account of a waste of time.

The SOLICITOR, still objecting to a reference to parts, the Judge desired Mr. Dexter to read the whole pamphlet, which is as follows:—

ARE THE EMBARGO LAWS CONSTITUTIONAL?

The government of the United States is a delegated, limited Government. Congress does not possess all the powers of Legislation. The individual States were originally complete sovereignties. They were so many distinct nations, rightfully possessing and exercising, each within its own jurisdiction, all the attributes of supreme power.

By the Constitution, they mutually agreed to form a general government, and to surrender a part of their powers, not the whole, into the hands of this government. Having, in the constitution described, the form which they intended the new government should take, they, in the next place, declare precisely what powers they give it; and having thus cautiously described and defined the powers which they give to the general government, they then, for greater security, expressly declare, that "the powers not delegated to the United States, by the constitution, are reserved to the States respectively, or to the people."

This is the plain theory of the national constitution. To determine, therefore, whether congress have a constitutional right to lay an embargo, we must look at their charter. If the constitution gives them such a right, they have it; if the constitution does not give such a right, then they do not possess it.

It is clear, that the power of laying an Embargo is not, in so many express words, given to Congress by the constitution.

If they possess such a power at all, they hold it under a clause in the 8th Sect. of the first Art. which says that Congress shall have power.

"To regulate Commerce with foreign nations."

It is admitted, on all hands, that no other article or section confers the power; and that if these words do not give it, then it is not given.

"To regulate commerce," is an expression not difficult to be understood. *To regulate*, is to direct, to adjust, to improve. The laws respecting duties, draw-

backs, ports of entry, the registry, the sale, and the survey of vessels are all so many laws "regulating commerce."

To regulate, one would think, could never mean to destroy. When we send our watches to be regulated, our intention is, not that their motion be altogether stopped, but that it be corrected. We do not request the watchmaker to prevent them from going at all, but to cause them to go better.

If one were authorized to regulate the affairs of Government, he would not think of arresting its course altogether—of abolishing all office, and abrogating all law—this would be destroying; but he might, perhaps alter, and correct; and this would be regulating.

The embargo laid in the year 1794 under Washington's administration, comports strictly with this definition of regulation.

It was limited to sixty days.

Its object was, to give the merchant notice of his dangers, and having done this, to leave him to his own discretion.

It was intended for the benefit of commerce alone. It had no extraneous object.

When the merchant was apprised of his danger; when he had availed himself of all the knowledge which the government could communicate; when he had ascertained, in what channels he might pursue his accustomed trade, and in what he might not; the embargo then expired, and our vessels once more sought their proper element.

The same motive which led government to lay the embargo, led it at the same time, unasked, unsolicited, to a full and perfect disclosure of all the information it possessed, relative to our foreign regulations.

Thus, by General Washington's embargo of sixty days, nothing was sought but the protection, the preservation, the regulation of commerce.

The present embargo is unlike that, in many material points—

It is unlimited in point of time.

An unlimited suspension of commerce approaches as near to its destruction, as the indefinite suspension of breath does to the destruction of animal life. In either case, relief may come soon enough to prevent the effect—but it may not. If it be conceded, that Congress have not a constitutional right to annihilate commerce, as one of the leading interests of the country, there seems to be an end of the argument; for no man doubts, that a law laying an Embargo for an indefinite time, must, if left to its own operation, produce the total annihilation of all the commerce of the country; because such a law never can expire. It is true, that the effect may be prevented by a second law, repealing the first; but how can the constitutionality of a law depend on a second law repealing it?

The present embargo differs from that of 1794 in object. It is not intended as a measure of precaution, to forewarn the merchant of his danger, and then leave him to his own discretion.

It is used as an instrument of war. Its avowed object is, to reduce the powers of Europe to the necessity of complying with our terms. It is advocated, as a powerful means of annoying foreign nations.

This, it would seem, is not regulating commerce by an embargo; it is making war by an embargo. It is, in effect, carrying on war, at the expense of one class of the community.

It is difficult to understand, how an Embargo, universal in extent, and unlimited in duration, imposed for the express purpose of waging war against foreign nations, and of compelling them to come to amicable terms, by a powerful assault on their interests—it is difficult to understand how such a measure is a mere regulation of commerce. It would certainly look more like its annihilation.

There is little hazard in saying, that if the commercial States had thus understood the Constitution, they never would have agreed to it. They never would have consented, that Congress should have power to force them to relin-

quish the ocean, and to cut them off from one of their great and leading pursuits.

It is impossible to believe that they understood such a power to be given to Congress, under the authority of regulating commerce.

WHAT WERE THE TRUE CAUSES OF THE EMBARGO ?

The general embargo law was passed in consequence of the President's recommendation, communicated to congress by message, December 18, 1807.

The only object which the President pretended to have in view, in recommending this measure, was "the keeping in safety our vessels, seamen and merchandize."

This was his only ostensible object.

It is easy to show that it could not have been his real one.

In the first place, the "safety of our vessels, seamen and merchandize," did not require a perpetual embargo. If the President had embargoed our commerce for thirty, or sixty days, and immediately made public the information which the government possessed relative to our affairs abroad, instead of keeping all information locked up in the cabinet, the merchants could have decided for themselves, on the expediency of sending out vessels; and they are certainly the best judges of their own risks, and their own interest.

In the next place, the "safety of our vessels, seamen and merchandize" did not require an universal embargo.

All our commerce was not endangered, either by the French decrees, or the British orders of council. It has indeed been said by Mr. Nicholas, one of the members of congress who voted for the embargo, and who is now labouring to rescue his reputation from the consequences of it, that if the embargo were off, "not a ship of ours could sail, which would not be subject to seizure and confiscation, by one or other of the Belligerents, unless she were going to the bare kingdom of Sweden."

This is either a gross mistake, or an intentional misrepresentation. We will here enumerate the places to which our vessels might sail, without being subject to seizure and confiscation, under the British orders, or French decrees, and we will add the amount of produce, foreign and domestic, annually exported from the United States to those places, according to official documents:—

[Here a table was omitted in the reading.]

It will be clearly discovered that it is owing to the British orders in council not pursuing the French decrees in their injustice to the full extent, that our trade to the Spanish, French and Dutch colonies, is left without interruption, and amounts to six millions of our domestic, and upwards of fourteen millions of foreign produce.

On the 23d of November, a committee of merchants in London having desired an explanation of the orders in council of the 11th of that month, the following is the explanation given by order in council.

"American vessels may proceed from the ports of the United States to the ports of the colonies belonging to the enemy, and direct back to the ports of the United States."

If therefore, the safety of our vessels, seamen and merchandize had been the President's real and only object in laying the Embargo, he unquestionably would have exempted from its operation, all vessels bound to the foregoing places.

But there is yet another consideration which alone is complete demonstration, that the safety of our vessels, seamen and merchandize, was not the true cause of the embargo. When the mouth speaks one language, and the conduct another, we all know which we are to believe. When a man's pretensions are utterly inconsistent with his actions, his pretensions must be false.

If the safety of our ships and merchandize was the true cause of the Embargo, why were the supplementary acts passed, prohibiting all intercourse with Canada and New Brunswick? It surely could not endanger our vessels, or seamen, or

merchandize, for a Vermont farmer to go into Canada and sell his pot-ash;—or for a British subject to come over the line and buy it.

The moment the President put his hand to the supplementary law, he directly negatived the truth of his message. He made a complete admission, that his real motive in recommending the Embargo was not such as the message represented.

A member of Congress has indeed gravely said, that trade with Canada and New Brunswick was prohibited, in order that “the sufferings of our citizens might be made equal!!”—What!—if Congress think it necessary by an embargo, to distress one portion of the community, will they also, although it is not necessary, distress the rest, in order to make “the suffering equal?”—This is as if your physician should draw one of your teeth, because it ached, and should then propose to draw another, from the other side of your face, which did not ache, in order to make the “suffering equal!”

It is worse to bear the insult of such arguments, than to endure the pressure of such measures.

On the whole, it is demonstrated,—it may be asserted in a tone that defies contradiction, that the motive assigned for laying the embargo, was never the true motive.

It is now said, that the embargo was laid, for the purpose of bringing France and England to just terms of settlement with us, by withholding our produce, and thereby starving the inhabitants of their colonies in the West-Indies.

That the embargo was intended to operate as a measure of hostility against England, there is no doubt; but that it was intended to be equally hostile to England and France; or that the government expected from it a revocation of the British orders of council and the French decrees, no man, who will consider the subject, can possibly believe.

Every body knows, that in all rich and civilized countries, the quantity of food actually consumed is at least twenty times as great as the absolute necessity of life requires; and every reader of history has observed, that a single town, covered with a thick population, situated perhaps on a barren rock, has resisted, for months, and years, every attempt to reduce it by famine—And yet the United States, by the mere operation of withholding their flour, expect to reduce the West India colonies to such a state of want and distress, that, to relieve them, England and France will be compelled to repeal their orders and decrees!

Many of the West India Islands have a fine, exuberant soil. A warm sun, rolling vertically over it, fructifies and stimulates it, to the production of two harvests in a year. They are, moreover, in the neighborhood of the rice countries, on the Spanish Main, and every where accessible by sea. Will any man believe, for a moment, that Mr. Jefferson could be so wild and credulous, as to think of starving these Islands?—That they experience inconvenience from the loss of our trade is certain, because it is an interruption of their ordinary business; but they suffer no more than we do, and probably not so much.

It would be a good deal ridiculous, if the merchants of Portsmouth should conspire to freeze the inhabitants of the county of Rockingham next winter, by refusing to sell them broadcloth and kerseymere. Every one would see, that few people would be likely to perish, in consequence of such an embargo. It might be a trifling inconvenience;—because many of them have been accustomed to purchase those articles in that town. But if the mercantile gentry should take such airs, the farmers would laugh at them—They could purchase their articles elsewhere, or do without them.

It is just as ridiculous, for the United States to think of starving the West India colonies.

We appeal to experience. What has been the fact? The embargo has now been imposed for more than seven months. Has it produced any effect?—Has it starved any body?—Not at all. Do the Islanders grow clamorous?—Do they rise in rebellion, and cut the throats of their governors for want of food?—Not at all. Flour, especially in some of the Islands, is dear. But still they have

flour. They suffer inconvenience; but they suffer it without impatience and without mortification, for it is not the consequence of their own folly. We speak of the Islanders; to them these consolations belong, while they can behold a people, who suffer severely, in a foolish attempt to inflict distress on others.

In short, the administration papers are compelled to admit, that the embargo has not produced such an effect on the West India colonies, as to induce the mother countries to any relaxation of their systems.

It is even admitted that it is not likely, by its further continuance, to produce any such consequences.

This is the language of the *National Intelligencer*. Why then is it continued? If it was laid to accomplish an object, which it has not accomplished, and which its advocates admit it never can accomplish, why is it not taken off? Why is this bondage continued, when it has not only not produced the intended effect, but when it is admitted that it never can produce it?

These considerations show us conclusively that the government did not adopt the embargo system, from an expectation that it would compel England and France to rescind their orders and decrees. If they had, they would have abandoned the system, when they abandoned all hope of producing that effect by it.

What then was the real cause of the embargo? Until some new light is thrown on this subject, we shall be compelled to believe, that the embargo originated in a wish in our Government to favour France, and to take side with her in the war against Great Britain. Great Britain is a commercial country. She feels the embargo more than France. She does not, indeed, by any means, feel it as severely, as it was expected she would; but still she feels it, in her trade, to a considerable degree, and Bonaparte, whose undivided object is to destroy her, and root her out from among the nations, willingly bears his portion of the inconvenience, for the sake of seeing a greater portion borne by his enemy.

It is not material to consider, whether this partiality for France arises from the fear or the love of her. That it exists is certain. The administration-party are perpetually singing the praises of the French Emperor. They rejoice in his successes, and justify and applaud his most enormous acts of injustice and oppression. Even when he marched his army to Spain, overturned its government, traitorously dethroned its sovereign, and murdered one of its Princes, subjugated its provinces, and placed a plundering and blood-thirsty creature of his own on the throne of the last branch of the ill-fated house of Bourbon, they burst forth in exclamations of rapturous and unhallowed joy, at the progress of successful guilt and violence. They even blasphemed Heaven, and mocked it with diabolical gratitude, when they thanked God that the world was blessed with this detestable tyrant, and that society was like to regain its ancient peace and dignity under his iron sway!*

That Mr. Jefferson, or Mr. Madison runs to this excess of adulation we do not assert. But we do assert, that the newspapers under their most immediate patronage and inspection, clearly intimate that we are to have an English war. Nay some of them openly avow it to be both their wish and their expectation. Even the *Intelligencer* is wound up to a high war note, and is obviously labouring to prepare the minds of the people for a British war. When we have a British war we of course have a French Alliance, and surrender our liberties and independence to the protection of Bonaparte!

The embargo was laid for the same reason that, at the instance of the French minister, we prohibited all intercourse with the Independent Government of St. Domingo;—

For the same reason, that we prohibit, by law, the importation of British commodities, while we do not prohibit the importation of French commodities;

For the same reason that we forbid British vessels of war to approach our

* See the *Boston Chronicle* and other democratic papers.

shores, while we freely admit the French to the use of our waters, ports and harbors—

When a calculation is made on the effects of the embargo, it is on its effects upon Great Britain.

Nobody inquires what effect it has produced on France. Every democratic Newspaper on the continent, treats the subject as if it respected Britain alone. “Do her colonies revolt? are her manufacturers seditious? Is her government terrified? Does it relent, and relax its orders?”—These are the standing inquiries, while no one is at the trouble of asking, how it effects the Emperor of France. All this proves to us, if proof we wanted, that the embargo is exclusively an Anti-British measure;—tending to irritate that nation; to increase and aggravate the difficulties between its Government and our own; and finally, to provide for this devoted land the blessings of a British war, and a French Alliance.

WHAT ARE ITS EFFECTS?

Abroad, it has produced, as was natural it should, still further irritation. It has widened the breach, and is bringing us every day nearer to open war. At home, it has produced effects, which every man beholds

“In a commercial point of view,

It has annihilated our trade.

In an agricultural point of view,

It has paralysed industry. I have heard that the touch of Midas converted every thing into gold; but the embargo law, like the head of Medusa, turns every thing to stone. Our most fertile lands are reduced to sterility, so far as it respects our surplus produce.

As a measure of political economics,

It will drive (if continued) our seamen into foreign employ—and our fishermen to foreign Sand Banks.

In a financial point of view,

It has dried up our revenue, and if continued will close the sales of Western lands, and the payment of instalments of past sales—for unless produce can be sold, payments cannot be made.”

To this we add an extract from the letter of Mr. Lyon, one of the Democratic members of Congress, to his constituents.

[Letter omitted in the reading.]

This numeration of losses does not comprise the very great and severe one experienced by the ship owners, in the decay and destruction of their vessels; a loss which must have already amounted to more than twenty millions. The bounty of Providence hath, this season, loaded our fields with a most extraordinary harvest, the surplus of which, beyond what the necessities of each family require, is to be added to the already enormous list of losses in consequence of the embargo.

Such is the embargo; such the doubts of its constitutionality; such its obvious causes; such its serious consequences.

After reading the above, Mr. Hubbard proceeded to state, that he wished he could entertain the Jury, as well by his argument, as they had been by the pamphlet, they had just heard. Speaking of Mr. Jefferson's letter to Mr. Giles, it contained, in substance, what was said to be the disclosures made by Mr. Adams. It was said, that there was a confederacy among the Federalists, of the Eastern States, in relation to the Embargo—that there was a negociation on foot between them and the British go-

vernment, to withdraw from the Union, and afterwards to take no participation in the war, which followed, but to remain neutral—that the country was in imminent danger from a convention proposed at New Haven, not Hartford, and that the designs of such convention, were of the nature before named. The pressure of the embargo was so great, upon the community, that the Federalists had contemplated a civil war, or a dissolution of the Union: for this reason, Mr. Jefferson was obliged to abandon the embargo, and substitute the act of non-intercourse. This was a part of the substance of Mr. Jefferson's letter, as repeated and quoted by Mr. Adams, and backed by his, Mr. Adams' own letter. Mr. Adams, to correct some indistinctness, which had occurred in the statement of Mr. Jefferson, arising from his great age, and the natural decay of memory, had published in the *National Intelligencer*, quotations from his, Mr. Jefferson's letter, with remarks of his own.

It was charged upon the Federalists, of that period, that they intended to resist the embargo, at all hazards, or to reannex New England to Great Britain; against the democratic party, it was charged, that they intended to declare war, and make an alliance with France. Mr. Adams had also stated, that from a letter received from the Governor of Nova Scotia, by some leading Federalist in Massachusetts, at the time alluded to, the design was apparent, on the part of the New England Federalists, to make New England, a part of the Colonies of Great Britain. This was said to be a confidential communication, on the part of the Governor of Nova Scotia, and from this communication, Mr. Adams and Mr. Jefferson, drew inferences "which subsequent events had confirmed." The pamphlet which had been read, was written in the summer of 1808, when public excitement was extreme, and the nature of it, showed that the author was a distinguished writer and leader, among the federalists of New England. It was said by Mr. Adams, that the people were openly instigated to oppose the administration of Mr. Jefferson, and to violate the law of the embargo. How violate a law, if it was unconstitutional? and Jury after Jury had decided that it was so. No unconstitutional law could be violated, for the law itself, was a violation of the constitution. The only way to test the constitutionality of a law, was to break it, and then try the fact of its soundness: if it was unauthorized, it was binding on no one. The gentleman prosecuting, was one of those very persons, that reasoned upon the principles advocated in the pamphlet read.

The accusation of Mr. Adams tended to show, that the

federal party, or its leaders, advocated measures, which led to an open resistance to the law of the embargo. Mr. Webster was one among those intended to be included in the assertion, as was apparent from the pamphlet, known to have been written by him, and within the legitimate meaning of the statement of Mr. Adams. His opprobrious language extended still further; he said, that not only those who were leaders of the federal party, but the judiciary, and those who had the management of the legislature, were also, partners in the conspiracy to dissolve the Union, &c. and that a forcible resistance to the law of the embargo was contemplated; these were the inferences, and conclusions of Mr. Adams; and beyond all, that the judiciary were to bear them out in it! What further? If force was resorted to, to carry into effect the law, a civil war would be the result; and that this might be considered as a *certain* event. These leaders too, in co-operation with Great Britain! The whole of the federal party of New England were in this plot; in the same cause. If this statement applied wholly to Massachusetts, why hold a convention at New Haven, (not Hartford,) close upon the borders of the great State of New York.

If the federalists of Massachusetts, alone, were intended by the letters in the case, why should they have a meeting at New Haven; this fact alone was sufficient to show, that the federalists of New England, were referred to generally, and not those of Massachusetts only; they were all said to be in the same plot, and equally referred to, by Mr. Adams; and of this, he had "*the most unequivocal evidence*," though not "*proveable in a court of law*." This was a pretty round assertion, and round assertions frequently left their makers a loop-hole for retreat. For instance, Mr. Adams had not stated the names of all these traitors, and their offences were not *proveable*, &c. There was a chain of events referred to by Messrs. Adams and Jefferson, from the embargo down to the close of the war, which went to confirm, (confirm what, forsooth?) why to confirm in their opinions, or in Mr. Adams' the important fact, that the Eastern federalists were traitors, and had resisted an unconstitutional embargo! It would be seen from the letters,* that the period embraced the whole period before named, and the whole of the federal party; he here read from the letters, quoted extracts, tending to show the soundness of this position. In the expression made use of by Mr. Adams, the words "subsequent events doubtless confirmed," an intention existed in his mind to assert, and

* Vide Appendix.

which appeared in the letter quoted, that the federal leaders of New England meant to reannex that portion of the country to Great Britain, and "subsequent events" to wit, the Hartford convention, "doubtless confirmed it." He did not stand there to vindicate the Hartford convention, the members of that body, or most of them, were now alive, and could vindicate themselves and their motives, if they needed vindication; neither did he wish to attack Mr. Adams. Mr. Adams had a right to his opinions, and when he came before the public with them, each individual had equally a right to comment on them. He undertook to say that the letter justified the comment, which was perfectly fair. It was the whole federal party, of which Mr. Webster was a part, that were aspersed, and the defendant had a right, by way of comment, to make the application. He did do it, and barely explained the meaning of Mr. Adams: if in using the name of Daniel Webster, or if Mr. Adams meant to confine these treasonable plots to Massachusetts alone, then his, the defendant's mention of Daniel Webster, as a leader among the federalists of that period, in New England, was a mistake, and not a malicious and *infamous* libel. He did not (the defendant) in his comments mean to libel any gentleman; much less his personal and former political friends.

In the same paper in which the libel was complained of, there was a pamphlet republished, signed by a writer calling himself a Pennsylvanian: the comments by that writer related to the same facts in controversy; in the alleged libel there was only a coincidence of opinion, drawn from the same letter of Mr. Adams. Mr. Adams, in his statement, as connected with the other letters in the case, had made a direct charge of treason against certain individuals, or a body of individuals, in the United States, and at the same time had stated, that "he had no favors to ask from Mr. Jefferson," and that he did not wish any office. The Pennsylvanian and Gen. Lyman had entertained and expressed similar views upon this state of facts, and there was a coincidence of views on the question. Now Mr. Adams, from whatever motives, it was of little consequence then to consider, had seen fit to make this attack upon the leading New England federalists of 1808, and from thence down to the close of the war: those motives were his own, be they what they might have been—it was not for him (Mr. Hubbard) to state them. Mr. Adams had connected all these events and the intentions of the federal party together, down to 1815; and in broad, bold, and unequivocal language, asserts that they had a treasonable purpose in view. On this bold accusation, Gen. Lyman, as well as the "Pennsylv-

vanian," make their comments. Upon the assertions of the President, relating to the state of parties twenty years since, which were made to aid his own re-election, were not that party, thus accused, to make their comments? When the leaders of the federal party, accused of having been actors in this tragedy, or he might rather say farce, were in question upon such grave accusation, could they not comment? or could not an individual of another party comment upon such accusation? Such comments as were made, went to show to the federalists of the Jackson or even Adams party, that they, of all others, should not support Mr. Adams, their accuser, for the Presidency. It was especially correct, that these accusations should be noticed *here*—the very spot at which some of the principal actors lived—here it was that an effect was to be produced—the inferences were drawn from the reading of public documents, and if, in the designation of the names obviously intended, Mr. Webster was not included in the intention of Mr. Adams, still, upon the worst construction, it was no more than a mistake, without malice, to say that Mr. Webster was a leading federalist in *Massachusetts*, rather than in *New England*.

He then called the attention of the jury to the intention of the writer of the paragraph. It bore evident marks of haste—it was literally scratched off in a hurry—written on the spur of the occasion—it said that on account of these accusations of Mr. Adams, he was unworthy of federal support—it contained no libel upon Mr. Webster—there was no intent to lessen him in the estimation of the public—it merely intended to give a direction to the true meaning of Mr. Adams, and from this to show, that Mr. Adams was not worthy of the support of that party, whose leaders he had denounced in such an unequivocal manner. Here was no intention to degrade any gentleman, least of all Mr. Webster. If Mr. Adams made broad assertions, he must calculate that their consequences would be followed out by others. In pursuing these consequences, Mr. Webster's name had been used. From those remarks, one of two things must be true; either that Mr. Adams had disregarded the rights and opinions of a certain portion of the public, in order to further his own interests, on which account he was unfit for a re-election, or that, if he believed his own statements, in consequence of having received traitors, as he called them, of the federal party to his counsels, why then he was unworthy of support—in either case he was wrong. It was not for him (Mr. Hubbard) to decide upon the alternatives, or whether the writer of the article was not justifiable in taking advantage of Mr. Adams'

dilemma; still, however, he did think, that if the writer believed that Mr. Adams intended what the plain import of his words meant, he had a right to follow out Mr. Adams' reasoning into its legitimate consequences, and draw his own fair conclusions from its effects.

His client was well known, and it was equally known that, previous to the election of Mr. Adams to the office of President, he was opposed to his election, and in favor of Mr. Crawford; the motives inducing him to take such opposition were perfectly honorable to himself; after the election of Mr. Adams, and when federalists supported Mr. Adams, he seceded from their party and became the advocate of the cause of Gen. Jackson. The federalists, generally, were in favor of Mr. Adams. Gen. Lyman saw fit to advocate the cause of Jackson; whether he was wise or not remained to be proved, it was of no consequence in this trial. The gentlemen named in the supposed libel, were formerly his political friends—they were at the time when the indictment alleged the libel, his personal friends—they belonged to the same club—met week after week together. In the Presidential contest, there might be an honest difference of opinion among federalists, which would not naturally lead to dissension. Was it possible to conceive that he intended to libel his former political, and then personal friends? The idea was a monstrous one—the piece itself, he contended, bore a compliment on its very face; no man in his senses could believe that such were his intentions, and yet from the intention of the writer, must the malice be inferred. It was possible that an inadvertence, as to names, might have been committed, but there was no malice. No one, with a fair mind, could doubt of Gen. Lyman's intention, in classing Mr. Webster with those eminent gentlemen with whom he was thus associated.

But, with regard to the piece itself: Jefferson and Adams had written certain letters, concerning the restrictive system and the measures adopted by the New England federalists, during the embargo and war. These letters related to the whole of the restrictive system, and to all the leaders of the New England federal party. These views, thus expressed, were confirmed by "subsequent events." These letters being before him, the defendant, he called the attention of his readers to them, and especially to the meaning of Mr. Adams in his letter, and says that A. B. and C. were the persons intended or named in the letter. If the question had been asked, "Who were the leaders of the federal party?" the answer would have been, as Gen. Lyman had given—the leaders were well known—they were emi-

ment, distinguished men. Could not any one who was living at that period, point them out? Were they not as well known before they were named by Gen. Lyman as now, since their names were written at full length? Was it offensive to either of those individuals to call them leaders of that party? What was the language used by Gen. Lyman? That Mr. Adams had said, that Harrison G. Otis and others, were guilty of a plot to dismember the union, during the embargo and war. What does Mr. Adams say? Why, that the leaders of the federal party in New England, were engaged in the plot, &c. Who were those leaders? Any one could reply in the words of Gen. Lyman, that the individuals by him named were leaders. He had only called the attention of the reader to those who were intended by Mr. Adams.

He was merely commenting upon the absurd and ridiculous charge of Mr. Adams. It might be said, that there was an delicacy in using names; but that idea had long since passed away. In a country like this, where there were thousands of presses, with their thousand tongues, it was idle to talk about delicacy in relation to public men. Every one that sets himself up for office, or whom the public set up for office; he who courts the public, or who is courted by them, must calculate, not only to have his name but his character handled. It was well that it should be so—the more the character of a public candidate is sifted, the better for the community, and the better would be our rulers. If in this case there was any libel, it was in the indictment itself, and upon Gen. Lyman, for it called him an “infamous libeller.” If Mr. Adams said, that the leading federalists of New England were traitors, had not any member of the community a right to say who were leaders or traitors? When the most eminent men and greatest characters among us were thus traduced, had not the community a right to know the fact, and also to be informed who these men were? Had not an individual a right to ask of that community, whether the public would support this traducer for the first office in the gift of the people? Again, who would not say that Mr. Webster was not a leader at the period mentioned? Who would not say that he was a federalist at that period? He, himself, would be the last one to deny it. Was he not a federalist only, but a leader? Yes, and a powerful one. Who were the other leaders? Such men as Otis, Prescott, Dexter, and others named by the alleged libel: men of the highest order of talents and integrity: they stood upon the records of our country as such; most of them high in office. Mr. Adams undertakes to say further, that the judiciary of this

State were concerned in the same *plot*. That such men as Judge Parsons, whose name will exist as long as law itself exists—that the present Chief Justice—that the late and revered Sewall, all and each were among the rebels. And was it now to be said, that when the Judiciary were referred to, the names of the Judges were not to be given? But did any of these consider themselves to be libelled by what Gen. Lyman had written—did Messrs. Otis and others feel themselves aggrieved by the alleged libel? When individuals had thus been libelled, as they were indirectly by the letter of Mr. Adams, Gen. Lyman or any other man, has a right to say what men were intended in the letter in question. He has a right to ask of the federal public, whether they will support a man who has so foully calumniated their leaders.

Mr. Adams meant somebody.—It has been said that corporations have no souls; perhaps the federal party as such, or as a body, were in the same predicament,—yet its leaders had souls, among whom was to be included Mr. Webster. If he was no leader at the period spoken of, then Gen. Lyman was guilty of a mistake, not of malice, in including him with the others mentioned. Was he or was he not a leader? Any man who could write, and did write such a pamphlet as that in the case, must have been a leader: the fact of the pamphlet itself, its intrinsic energy and merit shows him to have been a leader.—One, who under any and all circumstances, would have been a leader. But it has been said, that Mr. Adams had confined his views to Massachusetts, and he was speaking of the leading federalists of Massachusetts;—be it so, still that Mr. Webster was on the other side of the line, in New Hampshire, the author of the pamphlet in question, does not make the enumeration of him among the rest, by Gen. Lyman, a malicious and infamous libel. It was but a mistake, with no design of malice against Mr. Webster or any body else. Mr. Adams in stating that he had the most “unequivocal evidence of a design on the part of the leaders of the federal party, to dissolve the Union,” was the only one guilty of a libel. The pointing out of the individuals alluded to by Mr. Adams, which was accomplished by General Lyman was only descriptive of the meaning of Mr. Adams, done without any malicious intent towards Mr. Webster and the others. On the part of Mr. Adams, and not Gen. Lyman, it was said, that he, Mr. Adams, still believed in the existence of that terrible plot. This was fairly to be inferred from the letter of Mr. Adams. The republication of Mr. Adams’ letter, with the comments, was but a repetition of the charge of Mr. Adams,

which was perfectly warranted by the piece. That stated, that a letter had been received from the Governor of Nova Scotia, concerning the plot;—that all the federal measures coincided with the existence of such a plot; and that “subsequent events” confirmed the truth of Mr. Adams’ statement. To show this to have been the opinion of Mr. Adams at the time of his writing the letter, no musty archives of the records of our country need be ransacked. He had *himself* published it to the world. The writer of the alleged libel had a right to feel indignant on the occasion, and to comment with severity upon such a charge. Another party thought perhaps with Mr. Adams. But there was no question before that Jury concerning the merit of parties; whether Monroe, Madison, Jefferson, or Adams, were right,—but whether one, thinking as the writer did, at the time of his commentary, was justifiable in his course. For himself, he thought he was. Was it right for Gen. Lyman to declare the true meaning of what had been said by Mr. Adams? Did it make the article in question any more or less of a libel, that Mr. Webster’s name had been used? Was Mr. Adams right in point of fact, that the leading federalists of New England intended to resist the embargo, and re-annex themselves to Britain? On this point, Mr. Adams’ opinion was one thing,—what the federalists actually did, another. The general accusations on the one part of joining the British, and on the other, of suberviency to France were mere accusations, and both equally incapable of proof. It was, however, admitted on the part of Government, that Mr. Webster was one of the leaders of the party at that time, viz. in 1808. Was he not one of the leaders of the New England federal party? If talents, personal influence, and an opposition to the restrictive system of that period, constituted a leader, Mr. Webster was not only a leader but a powerful one. He was of the same class as Messrs. Otis, Parsons, Cabot, Dexter, Ames, and others; some of whom had left this sublunary scene of things for a higher and a better.—He was engaged in the same cause and principles. If the names of the federal leaders of that period were to be called, who would think of omitting the name of Webster? It was a fair matter of inference from Mr. Adams’ letter; and there could be no question that Mr. Adams did mean Mr. Webster as much as any of the others, he (Mr. Hubbard) had named. But then it was said, that Mr. Adams intended to confine his remarks to Massachusetts only. He should doubt whether such was his intention,—even if it was, however, the including of one gentleman not strictly an inhabitant of Massachusetts, was but a

mere mistake. Still Mr. Adams had included the measures and time when Mr. Webster was a distinguished leader.

The alleged libel then goes on to inquire, "why Mr. Adams' statement has been withheld from the public eye more than a year? Why it has been published only one fortnight before the election for President all over the country? Why for three years he has held to his bosom, as a political counsellor, Daniel Webster, a man whom he called, in his midnight denunciation, a traitor, in 1808? Why in 1826 he paid a public compliment to Josiah Quincy, in Faneuil Hall, whom he called a traitor the same year? And as the last question, why, during the visits he has made to Boston, he always met in friendly and intimate and social terms all the gentlemen, whose names a few years before, he placed upon a secret record in the archives of our government as traitors to their country? Why did he eat their salt, break their bread and drink their wine." The true meaning of "midnight denunciation" was merely a figurative expression intending to say no more than that Mr. Adams had made a secret communication to Jefferson. It was a figure of rhetoric. It did not mean to say, that there was a secret book, a black book kept at Washington, in which the names of Otis, Webster, &c. were inscribed by Mr. Adams. Such expressions were mere intensitives, and in common cases were added to give strength to an idea. And the whole was intended only as a comment upon Mr. Adams' letter. The whole shows it to be but a comment, and the reasons why these names were used, were because they were leaders at that time. Was it a libel to call a man a leader? or to accuse him of living in Massachusetts? If it was an offence, Mr. Webster has committed both the acts of which he is accused, by removing into Massachusetts and becoming a leader.

It was said that the libel was false. If they were not leaders, then the charge was false. If, on the contrary, they were, there was no falsity about it. Was he not a leader in 1808, in Massachusetts? He certainly was in New England. But here were other gentlemen, who also equally were libelled, if Mr. Webster was libelled. If it was a libel on one, it was also upon all. Messrs. Otis, Dexter, Prescott, &c. all were included. Who among them thought themselves libelled by the publication? Do they deny the fact that they opposed the embargo? that they were influential men? or do they avow it and justify their motives. In political contests, the parties must frequently resort to a publication of names, however indelicate it may seem to those, whose names are used. It was a thing to be expected by those who took a part in the contest of the day. It was every day's practice. If Gen. Lyman had not a mali-

cious intent to libel the whole, then he did not intend to libel Mr. Webster. The whole are equally included.

He had as high an opinion of the character of Mr. Webster as had the Solicitor, but it was not for him (Mr. Hubbard) to stand there at that time to sound Mr. Webster's praise. He should leave that to the Solicitor, who had said that this was emphatically the prosecution of the Commonwealth, whose duty it was to protect the character of its citizens. He would ask of him where was the kind care of government, when her best citizens, her mighty living and mighty dead were traduced and vilified by Mr. Adams? When such men as Otis, Ames, Dexter, and a long list of living and departed patriots were branded with the name of traitors, and they and their children left without a remedy. Did Gen. Lyman intend that paragraph on which this suit was founded, as a malicious libel on these men? Did the Solicitor think so when he first read it? If it was so apparently a malicious and infamous libel, how could his friend, associated with him in this defence (Mr. Dexter) sit there to protect Gen. Lyman who had infamously libelled his deceased, lamented and respected father, and his honored father in law? No one in his senses could say, that it would be possible for him to do it. Did Mr. Otis, or any of the other gentlemen, complain of this charge of Mr. Adams, or feel aggrieved at the comments of Gen. Lyman? Certainly not. The prosecution originated in a mistake, an undoubted mistake. No explanation was made by Gen. Lyman or called for by Mr. Webster; no opportunity given to explain. The slightest explanation would have stopped any intended prosecution. The piece itself was no libel; and he produced the affidavit of Gen. Lyman to show that he had no intention of libelling the parties mentioned. There was no malicious intent on the part of Gen. Lyman. He might deny that there was an intention on the part of Mr. Adams to impute to any one a crime. Then if the original was innocent, the comment was so. In this point he had great confidence. The comment must be taken with the original, and must be limited and restrained by the circumstances attending it: for instance, if one should say of another he was a murderer because he stole a horse—this was no libel, for it was to be construed together and its absurdity would make it innocent. A resistance to the embargo was not treasonable, if the embargo was unconstitutional. It is not treasonable to oppose an unconstitutional law. Mr. Adams then in saying that the federal leaders were traitors for opposing the embargo, did not say any thing libellous, or call any one a traitor. What is treason? It was defined by the constitution to be levying war against the United States, or adhering to, or comforting the

enemy. These were the only two methods of committing treason. Mr. Adams accuses no one of either. An intention to commit treason was not a commission of treason. An intention of this kind was not punishable by law; therefore it was no libel to accuse one of such an intention. A confederation of the New England states to confer with each other on the subject of dissolving the Union, was no treason. The several states were independent and not dependent. Every state has a right to secede from the Union without committing treason. It has been openly talked of by a number of the states at different times, and of late by the legislature of South Carolina. The wisdom or policy of the thing was one thing; the right another. Here it was stated, that certain gentlemen were traitors for threatening to dissolve the Union. The bane and antidote both went together. The time would undoubtedly arrive, when this subject of a dissolution of the Union will be openly discussed in all parts of the United States. If there should ever be danger of a separation by violence, the wisest and most patriotic course would be to deliberate calmly on this subject. A very honest and conscientious citizen might think he was discharging one of the most important duties to his country by presenting his views on such a subject. No one would call this treason. To prevent civil war and bloodshed is not treason. Still, if such discussion took place at an improper time, the wisdom and policy of the course might well be doubted.

On the whole matter, it was to be said that Mr. Adams on the eve of an election saw fit to publish a letter bearing on that election, he being one of the candidates before the people: in this he accused the leaders of the federal party, &c. as before stated. Gen. Lyman publishes that letter and another referred to, and hastily makes some comments upon it, and states who those leaders were by name. Now if it was not a libel before the names were given was it any more of a libel now? certainly not: the picture is only filled up. The whole of General Lyman's remarks were but an expression of his own opinions upon the letter of Mr. Adams.

The files of the Jackson Republican were before the Jury, with his pieces marked—they were open to their inspection and to the world. There was nothing in them derogatory to any gentleman—they were gentlemanly and respectful, as they ought to be, toward all, and reflected a high credit upon the editor and proprietors. In cases of this kind, it was always ruleable to take into consideration the character and standing of the party accused of a libel—was he a common, scurrilous, infamous libeller? or was he an honorable and an upright man. An honorable man, in one moment, could not change his whole cha-

racter, and become disgraceful in the eyes of the community; nor, on the contrary, an infamous libeller at once become an honorable man. He had seen a newspaper, he would not call it by name, but it was one of the oldest of our papers, and needed not his praise, and whose veteran editor had been but little accustomed to entertain malice. Still that paper had been found to have contained fifty-two libels in a short space of time. The discovery was made by a very ingenious hunter after libels. The investigation was conducted by an order of the State Government, and applied to all the papers—the discovery was made by the State's Attorney. Yet no one would accuse that editor of malice, but he might have been indiscreet. So with Gen. Lyman in the present case,—he intended no disrespect to the gentlemen named in the alleged libel then—he intended none now; neither did his counsel.

It was rather a compliment to these gentlemen, than otherwise, to call them distinguished leaders in those times. Gen. Lyman was entirely misrepresented, if it was said, that he intended to traduce them. It seems that the feelings of Mr. Webster were hurt, and there was a question of etiquette, who should make the first advance. One waited for an explanation to be asked, the other for a reparation to be made. It was immediately understood by Gen. Lyman, that a prosecution was to be commenced by Mr. Webster; then followed a Lawyer's letter, to the publishers of the Jackson Republican, to which the reply was made in the case; a long indictment aggravating the nature of the offence ensued, and the first suit, which ever had been instituted against the defendant, was made; his feelings were hurt. On the part of Mr. Webster, he was surprised that General Lyman, should have written the alleged libel; he expected an explanation, which not having been tendered, he became angry; even the greatest men, were not always free from this passion; it had often happened before with human nature, and often would again. General Lyman, was not informed of the name of the author of the inquiry; the breach became widened; no explanation could be expected under a threat of prosecution; much less after an indictment.

After the indictment was found, no honorable man could consent to make the explanation required in this manner. Mirabeau had said that words were things; it was no small accusation against a man, to say of him, that he had been guilty of an infamous libel; while such a charge and prosecution was hanging over him, the defendant could not honorably seek out an explanation, but preferred to meet the charge here; at the hands of a Jury of his country; he here says, that he is not guilty of an infamous libel, and that in the paragraph complain-

ed of, he was not guilty of a malicious intent, and claims your acquittal.

The Solicitor General has observed, that if this had been a calumny of an ordinary kind, no notice would have been taken of it. On account of its aggravated nature, the attention of the government had been attracted to it. We have, also, heard it intimated in another quarter, that the business was pursued because it was found to attach to a responsible person. Mr. Hubbard said, that the situation of the defendant, might have had an effect, have exercised an influence on the mind of the individual at whose instance the indictment was procured. Of this, he did not pretend to complain. He did not now examine into the motives of the prosecution, neither could the jury do it. The defendant, from his situation, has been enabled to devote his leisure to study; he has looked into the science of government; he has written much on political subjects. In free countries, such inquiries and pursuits cannot be considered without value. A man, who gives his time and leisure to them, should not be discouraged. On the contrary, he should be sustained. If he falls into errors, if he is guilty of inadvertencies, he should not be treated with a greater degree of severity. If the taste of a person disposed him, or his situation in life enabled him, to devote himself to politics, and to those matters in which the public were especially concerned, it was not wise nor judicious, in the public, to frown upon him. On the contrary, it was both wise and judicious to give him their countenance, and take him by the hand. But the circumstances of the individual were not to be considered in this case. The jury had only to look at the alleged offence, at the law, and the fact. The situation of the defendant might have had an influence on the prosecuting officer, but it could have none on the minds of the jury.

It was averred in the indictment, that Mr. Webster, a senator of the United States, was libelled. General Lyman did not, however, say any thing of him, as a Senator of the United States, but merely as a leader of the federal party in 1808, when he was not a Senator; that he is now a Senator was not a subject of their consideration at the present trial.—All alike were to be protected, and the defendant's reputation was in their hands; there was but little disagreement about the law; the only fact in issue was the intention of General Lyman, at the time he wrote the alleged libel; that fact of the innocence or guilt of those intentions, was for their decision, and he confidently expected an acquittal. Here Mr. Hubbard closed the defence.

An intimation was then given by the Solicitor, that from the lateness of the hour, and from the fatigues of the day, it would scarcely be in his power to do justice at that time, to the government, by attempting to close on the part of the prosecution.

The defendant's counsel deprecated the course of postponement, as the arguments used by the defendant, would not be likely to be so distinctly remembered by the Jury in the morning, as now : they might lose their force.

JUDGE PARKER observed, that it was an unfortunate point to break the cause off here ; but the defendant's counsel, could recapitulate their chief points in this case, if they pleased in the morning. The court then adjourned until the morrow.

WEDNESDAY.

In the morning, MR. DAVIS the Solicitor, observed, that the object before the jury was one perfectly plain ; it was a hill in view, and the plain free from underbrush or bushes. It could not create much difficulty when the vista was seen, to judge of the character of the whole prosecution, and the motives of the prosecutor. On this head it had been insinuated, that he was influenced by party views ; no such thought had ever entered into his head.

If there was any place under the canopy of heaven, in which Jurors should be impartial, when they should be aware, to use a well known expression from an equally well known book, that "they should put off their shoes, for the ground on which they stood was holy," it was on this occasion. He should endeavor in this case, to give what was commonly called a *bird's eye* view of the case before them : the facts were few and simple ; he should therefore be brief in his exposition of, and comment upon them. In the first place he should conceive it necessary to answer some few remarks on the part of the closing counsel. The accusation against Mr. Webster was, for the commission of one of the highest crimes, known in our laws. The general answer was no more or less than an admission of the fact of such accusation. This was against a man of no less consideration than a Senator of the United States. The first point taken by the defendant's counsel was that there was "no intent on his part to injure Mr. Webster ;" and the second was, that the "writing was scratched off in the hurry of the occasion ;" that there were no malicious motives ; and in the third place, this was only a fair comment upon the statement of Mr. Adams ; that what he, the defendant, had said, was but a fair inference from the letter of Mr. Adams : still further, that he could not have intended to libel Mr. Webster, for he had placed him upon the list of his (General Lyman's) friends. From a careful re-

view of the whole subject, it would be found that this was a fair digest of the whole defence, and every thing of the least importance in that defence, was contained in it. It was his duty carefully to comment upon this state of facts, and he now felt most peculiarly his present official responsibility. He had a high respect for both parties, in both their public and private situations.

Previous to going into the ground of the present prosecution, he could not refrain from replying also to some remarks, which had fallen from the lips of the counsel of the defendant, which seemed particularly to have been aimed at himself, in his official capacity. It was said, that the language of the libel was unusually unnecessary ; that the use of the word *infamous*, exhibited an excited feeling, on the part of himself, as the prosecutor for the government. To this, he could only reply, that it was the language of the law, and not his own: it was not fabricated by him for the occasion, but as the language of those precedents, which were the rule and guide of officers of government in such cases ; it was drawn in technical language without which, it could not be sustained, and the omission of such language would have been fatal. He should be the last to use unnecessary terms of hostility toward the defendant in this case. The indictment sets forth, that the language used by the defendant, was false, scandalous, malicious and infamous. Malice was an essential ingredient in libel, without which, it could not exist ; it must be false also ; and the present indictment was framed from a precedent of one, in a case where Lord Mansfield was libelled, and he thought the Defendant in this case, should not complain of a lack of delicacy, on the part of the prosecuting officer, for copying that precedent in this instance of Mr. Webster's case, in every way Lord Mansfield's equal.

In reply to a remark of the senior Counsel, that political libels should be viewed with more leniency than other libels, because political information was necessary to be circulated for the public benefit, and such knowledge was a right of the people, and that the people would look with jealousy upon any infringement of that right, he could answer, that political information was one thing—political libels another. A libel charged a defendant with *falsely* and maliciously accusing a man of crime, and dragging him before the public by name, thus falsely, and holding him up to public contempt. In discussing the characters of public men, he knew of no course more to be reprobated than that of false accusations, whereby, by calumny, the public were to be deceived. If such calumnies were not to be repressed, what security for his fair reputation could a good

man obtain, when he was presented as a candidate for the offices of the people? What just and honorable man would consent to allow himself to be held up for such offices? The idea should not be sustained for a moment, that political libels were to be treated with greater leniency than other libels—the mischief caused by them was greater, and the guards against them should be stronger: he knew of no kind of libel more strongly to be reprobated than those against public men, or candidates for public office.

He should now proceed to state his views of the case, and thus far his only object which was important, was to clear the grounds from obstruction, so that a clear view might be given of the question at issue. Of that issue he had no doubt. It was in evidence that the foundation of the libellous matter was contained in the National Intelligencer, and that the alleged libel was only a comment on the letter referred to in that paper. However this letter might apply to others, he contended that it had no reference to Daniel Webster. It related to the leading federalists of Massachusetts, and not to Mr. Webster, who then resided in New Hampshire; he could say, with the most perfect distinctness, that the libel, so far as it related to Mr. Webster, originated entirely with Gen. Lyman, and not with Mr. Adams. In the original letter there was not the slightest allusion to Mr. Webster. If in describing this libel he could legally have done it in the indictment, he would have called this libel by a softer name—he would have said, that the observations of Gen. Lyman relative to Mr. Webster, were unfair, unfriendly, unhappy, unchristian, and he might have also said, ungentlemanly; in fact he was puzzled for a name to give to the nature of these observations—it was not *his* wish, but the *law itself*, that designated the terms to be used. He was himself satisfied that Mr. Adams intended to have extended his observations to the leading federalists of Massachusetts, and not to Mr. Webster. Mr. Webster was then placed upon a different ground from any other leading federalist then in the New England States. He was then a young lawyer in New Hampshire, struggling for his bread.

He was by no means a leader of the federal party in Massachusetts, at that period, for he was not an inhabitant of it. It was particularly said by the counsel for the defendant, that the letter of Mr. Adams applied to *all* of the federalists of New England, and that Mr. Jefferson's letter applied to the whole of the federalists of the Eastern States. Yet, still it would be remembered, that Mr. Jefferson himself had stated, that "he" (Jefferson) "understood, that he" (Adams) "named Massachusetts." There was no ambiguity in the statements of Mr. Adams or Mr. Jefferson—they in no case, directly or indirectly,

referred to Mr. Webster. The whole intended on their part was, that there was "a negociation, susceptible of unequivocal proof," that the federalists of Massachusetts intended to dissolve the Union, and re-annex it to Great Britain." This at that, and at no other time, could have reference to Mr. Webster. It was, on the part of both Adams and Jefferson, directed at the *federal rebels* of Massachusetts, and by no means, at Mr. Webster. To prove these facts, he cited from the letters of Mr. A. and J. in the case. The letter from Nova Scotia, referred to by Mr. Adams, as received by some person in Massachusetts, went to show, that he intended, by his sweeping denunciation, the federalists of Massachusetts only. There was the same difference between charging the leading federalists of Massachusetts, at that period, with treason, and charging Daniel Webster with treason, as there was between black and white.

At the session of Congress, Nov. 1808, Mr. Adams was a private citizen resident in Boston, while the embargo was in force. It pressed severely upon the private property of many individuals, and upon the commerce of the New England states. There was a severe opposition to the restrictive system. Mr. Adams in speaking of the opposition to the measures of the embargo, intended to apply these to the federalists of Massachusetts, of the state in which he lived. He speaks of the men and measures of the leading federalists of that state, in which he lived. In that, Jury after Jury had said, that the measure of the embargo, was unconstitutional. It was also asserted in the calumny of Mr. Adams, that the Judiciary of Massachusetts were in league with the opposition to the embargo, and *in this treasonable* plot. The whole related to the Legislature, the Judiciary, and to the leading federalists of Massachusetts; and not to that of any other state. It was of this state it was said, that their resistance to the embargo would produce a civil war. In all cases Mr. Webster was excluded from the charges contained in the libel of Mr. Adams. From these facts, it could not be otherwise but that Mr. Webster stood upon his own solitary ground of integrity, and apart from the foul slanders attempted to be affixed upon him by Mr. Adams, or anybody else. Mr. Adams must be the judge of his own intentions and conclusions, of their correctness or untruth as to the federal party. They touched not Mr. Webster.

Another remark of the defendant's counsel was, that the statement of Mr. Adams contained nothing very important. One would imagine that from this, there was nothing very atrocious in it; and that the present alleged libel was but a very innocent comment upon it. And that an union of Massachusetts and Great Britain, under such circumstances of the

nature referred to, might be perfectly harmless, and therefore there was no malice to be presumed or implied in the statement complained of. But it was important to glance at the statement of Mr. Adams, in order to understand the nature of the comment by Gen. Lyman. The statement of Mr. Adams was, that the embargo would be met with a forcible resistance on the part of the federalists of Massachusetts and New England. What was the meaning of this? Why, that a law of the United States would be forcibly resisted, and that there would be another "Whiskey Insurrection!" or a rebellion in which every individual concerned could be convicted of treason. In the whiskey rebellion, some concerned had been convicted of treason. That resistance was considered to have been treasonable;—it was a treasonable combination against the sovereignty of the nation. The federalists of the period alluded to by Mr. Adams, were willing to meet this charge on the ground of its truth. It was also said by him, that the Legislature, and Judiciary of this state, were subservient to this policy or plot; that they were preparing to produce a civil war, and if they were involved in the plot, they were also in the treason. And yet it was said that a charge of this nature, possessed but little of atrocity! When such charges were made, it exhibited every abandonment of principle,—of unutterable depravity; it was an infamous falsehood. The highest and most venerated characters were traduced. The most high minded of this, or any other country, were vilified. The counsellors and bosom friends of the immortal Washington were foully calumniated; those whom he trusted and loved, were thus disgraced. He should not under these circumstances be *mealy* mouthed. And what were these New England or Massachusetts rebels to have done? to have thrown themselves into the arms of a foreign government: and what government? Why of Great Britain,—of that country from which they had, but scarcely for a day, been emancipated! that country which had shed the best blood of the fathers and brothers of the accused! it had been charged that it was intended by them, to call in the aid of foreign mercenaries, of foreign cannon, to accomplish this wicked design. This was the greatest act of human depravity, of which any man could be accused. This was made against, not only the living, but those who had gone to their long account; against the good and the patriotic and the pious; against such men as Ames, Cabot, and Dexter. This being the true character and import of Mr. Adams' statement on which the alleged libel was founded, was there any reason for the allegation that Mr. Adams' charge was trifling in its nature, and that the defendant had a right to come out with the names intended as

large as life? The character of the State was implicated in the attack thus made; and if any men ever existed, whose characters were above reproach, they were those thus accused by Mr. Adams, and afterwards by General Lyman, in the libel complained of: the accusations against the leaders of the federal party of 1808, and especially against Mr. Webster, were false—yes ludicrously false. The federalists of New England, were to be sure, not much injured by the accusation, as was stated by the defendant's counsel; perhaps some of them did not think that the charge was worthy of notice.—But, that they did not see fit to notice it was immaterial in the present case; had he been one of the persons named, he should not have hesitated in his course. General Lyman in his communication most explicitly states, that Mr. Webster was recorded on the archives of the Government as a traitor. No construction which had been given by the defendant's counsel, had changed that allegation of General Lyman, or its nature.

A pamphlet had been written by Mr. Webster in New Hampshire during the embargo, which was produced by the counsel, for General Lyman, as evidence in the case. To this he (the Solicitor) had objected, because he had never seen or heard of the pamphlet; he did not know what Mr. Webster might have written in the ardour of youth, as he had not seen it. He presumed that it was introduced for the purpose of proving the truth of the allegation stated by Messrs. Adams and General Lyman.

[Here Mr. Hubbard made a remark, denying the application.]

Mr. Davis continued, that actions alone could exhibit the intentions of men, and that this must have been introduced for this purpose, for there could be no other. What other view could the defendant's counsel have? if this pamphlet showed, that Mr. Webster had been guilty of any flagitious treason, they were welcome to such proof as it afforded. If here was treason, it was one of a novel nature. [Here Judge Parker observed, that the pamphlet was probably introduced, not to show that there was treason in it, but that Mr. Webster was a distinguished leader in the federal party at that period.] Mr. Davis then continued, if it was not introduced for that purpose, it was not pertinent to the issue, and could not be of any import in the consideration of the Jury.

In the first place the government had given satisfactory evidence, that the libel was published by General Lyman, and the only remaining question was as to the motives of Gen. Lyman; whether they were malicious. The government also, had proved that the libel was false; that it was an unfounded assertion, that Daniel Webster was engaged in a treasonable plot to dis-

member the union ; or that Harrison Gray Otis, or Mr. Webster, or any other federalist was engaged in any treasonable plot, &c. Such charge would equally apply to the father of Gen. Lyman himself. But did Mr. Adams contend that the persons named by Gen. Lyman, were in this terrible plot ? He contended that he did not. If it was not actionable or libellous to call a man a traitor, and to circulate the charge through the whole country, he should in future be at a loss to judge what was, or was not a libel ; this had been done. In what situation were these persons thus falsely accused placed ? They could not call upon Mr. Adams for redress, for he had never marked them out as the persons intended in his letter ; who was answerable for the charge ? Had he accused them by name, there would have been no difficulty in the way. When they are accused by name, it places the matter upon a different ground from where it before stood ; when any one was called out by name as a traitor, it was enough to stir any man's blood. If Mr. Adams had done this, General Lyman would have been perfectly justified in repeating the slander ; the persons implicated would then have known where to have called for redress. The federalists of Massachusetts could in all instances, take care of themselves, when they were called traitors for opposing the embargo ; but the uncertainty of this charge of Mr. Adams, protected him from its legal consequences. Perhaps if Mr. Webster had resided in Boston, at the time alluded to, it would have been easy to have known, who was intended by Mr. Adams, in his letter ; it perhaps was easy still to conjecture who were the judiciary of that period, and who were traduced in the sentence concerning those who had the "management of the Legislature : " but if he had called no names, and left the whole affair in doubt, and another had undertaken to call out the names of those who were considered traitors, all that those so injured could do was (to use a homely phrase) to "mark the collar." Was the character of the accusation harmless ? It was one of the first principles of law, that any addition or coloring to a piece written or printed by another, which went to make it still more libellous, was an original libel in him who had made such addition or coloring. Mr. Adams had stated that the leading federalists of Massachusetts, were guilty, &c. but the defendant had given the names of those leading federalists, and had included Mr. Webster of New Hampshire. Was there any aggravation to this libel of a *harmless* nature ? Why, the Chief Magistrate of this nation, the President of the United States, was quoted as the author of the charge made : this high sanction was given to this unfounded charge, and went to aggravate its nature. He could not conceive how this could be extenuated.

Another reason why this emphatically was a libel was, that it was said that Mr. Adams had taken to his bosom, Daniel Webster as a political friend and counsellor, who was a traitor &c. Is it so said by Mr. Adams, that Daniel Webster was a traitor in 1808? If it is so proved to the satisfaction of the Jury, well. It was a matter capable of proof; Mr. Adams' or Mr. Giles' testimony could have been adduced by the defendant, to have established this fact; had it been? no—and the reason why it had not been, was because it could not have been adduced—no such fact ever existed: in furtherance of this assertion, it was offered on the part of him (the Solicitor) in writing, that if the defendant would make an affidavit, that he expected to prove such facts, he would consent to the continuance asked. This was refused, and went to show that it was not even expected to prove that any such assertion had been made by Mr. Adams; then it was evidently false when it was stated that Mr. Adams had made such assertions. It had been said that a late law had altered the law of libel; that now the truth could be given in evidence, whereas formerly it could not have been: but he contended that the common law always allowed that privilege; that the truth could always have been given in evidence, to rebut the presumption of malice, but now to say that falsehood could be given in evidence to rebut the presumption of malice was a perfectly legal absurdity. If the truth was spoken from good motives and justifiable ends, it always was a justification against a supposition of malice; but falsehood thus used, and for these purposes, never. It was the highest of absurdities to say in the case of libel, that the falsehood of the charge went to show the innocence of the defendant on the score of malice. This point of law was recognized in the case of the Commonwealth *vs.* Clapp, in respect to candidates for public office. If there was no malice, there was no libel; if the charge was true there was no malice and therefore no libel. If any one was guilty of murder or treason, and another saw fit to tell the public of the fact, still there was no libel.

In England it was true that the court had been paramount as to the intentions of the libeller, and of his malicious purposes; the Jury had only to find the fact of a publication. Whether the law was thus now there, was a fact of no consequence before that Jury: here the *truth* might be given in evidence according to the laws, to rebut the presumption of malice, but he was astonished to learn from his brethren on the opposite side, that the falsehood of the charge could be made to answer the same purposes; the doctrine was repugnant even to common sense.

Again it was said that the paragraph "was scratched in a

hurry," and therefore the defendant was not answerable. It could not be the law of the land that such an excuse could justify him; that he could scatter "firebrands, arrows and death" and then say "am I not in sport?" It was not the least painful part of his duty to comment on such a defence, for it argued a most criminal inattention to consequences which of itself was a strong evidence of malice. It seemed to be not only a legal but moral turpitude.

In the first place, there was no question as to the language used; it was plain and unequivocal, there was no ambiguity about it; the question of intention most frequently arose when there was a doubt as to the meaning of the words used; here there could be none. Had he not intended to say that Mr. Webster had conspired to dissolve the union? Was not this true and did he not intend that the public should believe this? did he not say that Mr. Adams had said, that Mr. Webster was recorded upon the archives of the government as a traitor? In excuse, it was said that Mr. Adams alone was intended to have been degraded; but what was that to Mr. Webster, if in an attempt to degrade Mr. Adams, Mr. Webster was injured. To degrade Mr. Adams, he had no right to traduce the character of any citizen, and if Gen. Lyman had done it, he was liable. It was impossible that such an excuse could avail the defence; Mr. Webster was disconnected in this transaction with Mr. Adams, and every body else. In this case Mr. Webster had been singled out by Gen. Lyman, and made to hold a conspicuous place in the gallery of portraits presented. The excuse of its having been "*stratched off* in haste" would not avail in this case; the defendant had in this and on all other occasions, when brought before the public, exhibited great self-possession and readiness of mind. He had twice repeated Mr. Webster's name, which he had not done of any other.

[Mr. Hubbard here pointed out another name twice used, to wit, Mr. Josiah Quincy's, after which some explanations on that point followed.] But it was said that there was no intention to injure the character of Mr. Webster. Why the eyes of his (General Lyman's) mind might almost be said to have been put out, if he did not think that these charges would operate to the injury of Mr. Webster; if it were thus, how could he be exonerated from the charge of a malicious intent: the charge originally made by Mr. Adams was left without application, it was a blow in the dark; General Lyman was the avowed author of giving a name and circulation to the poison. In proportion to the respectability of the Defendant, was the extent of the mischief created. Instead of at once pronouncing the assertions of Mr. Adams to be false and calumnious, he adds to their

venom and effects. In the face of the whole country and of Europe, for Mr. Webster was as well known there as he was here, the defendant had sigmatized him as a traitor, and asserted that he had been so stigmatized by the President of the United States. How could Mr. Webster return to his seat in the Senate under this imputation? might they not say to him, "with what face can you come here, how dare you show yourself among gentlemen. Go home and hide yourself in the kennel, or the cave of the bandit, where you hatched those plots of treason."

He would ask whether the comments were not calculated to enforce the belief that Mr. Webster was guilty of treasonable plots. The accusation was made, on the highest authority as a sanction for it: for whatever might be the opinions respecting Mr. Adams as a man or a politician, he had the highest character for truth. No man thought more sincerely of its obligations. This gave to the accusation a character peculiarly unpleasant. It was asserted that Mr. Adams had unequivocal evidence of Mr. Webster's treason. And when (another tremendous assertion) it was said that Mr. Adams had placed his name on a secret record in the archives of the Government as a traitor to his country, it was of no sort of consequence whether it was a letter in the bureau of Mr. Giles, or a slip of paper given to the winds.

But the defendant "had placed Mr. Webster on the list of his friends." This was not true, and he found the refutation of it in the publication itself, where he calls them all "ardent friends of Mr. Adams." They might be his personal friends, but it had been acknowledged and was well known, that since the nomination of Mr. Adams for the Presidency, General Lyman had been politically opposed to these gentlemen. Besides, when this paper went to Washington, what would it avail that these gentlemen were the friends of Mr. Lyman. How would it be known there that Mr. Otis, Mr. Prescott, &c. were the friends of the author of an anonymous libel.

But if only one millionth part of the injury, which he had supposed, had been done and suffered, what was the proper course? To make a fair and frank avowal of the mistake, if it was one, and a confession of the injury. This was the course which a just man, and a gentleman should pursue in a moral and religious community. But suppose this offence had been given in a different section of the country;—it would not have been an hour before one or the other would have been a dead man. Suppose that in this libel the name of McDuffie had been inserted instead of Mr. Webster, the gallant gentleman,

instead of being brought before a civil tribunal, would have occasion to exclaim, like Macbeth,

——“Lay on McDuff,—

And damn'd be he, who first cries hold, enough!”

It surely could not be required for him who was libelled to go cap in hand to the libeller, to ask for explanation. But the reason assigned for not making an acknowledgment was a point of etiquette! He the defendant had time enough to make it, and he knew that it was expected. And whose duty was it to move first? Was it his who had been libelled? No, it was his duty to remain in dignified silence until the proper time came for an appeal to a tribunal of his country. It was the duty of Gen. Lyman to offer reparation.

Still Mr. Webster had waited twelve or fourteen days, before the complaint was presented to the Grand Jury, in which time, no offer of reparation had been made, from which it was to be inferred that no explanation was ever intended on the part of Mr. Lyman.

From the tenor and spirit of his affidavit, it was manifest that General Lyman never intended to make satisfaction except upon the verdict of a jury and the judgment of Court. The Solicitor General here referred to a case in the county of Bristol reported in the 3d of Pickering, 379, in which an affidavit had been filed, and great parade made of proving the truth of a libel, but afterwards on trial no attempt was made to give evidence of the truth. It was held that the affidavit was evidence of malice. In the present case every indication was given that the defendant expected to prove the truth of the libel. He, (the Solicitor General,) had offered to enter a *nolle prosequi*, if he would make a frank acknowledgment. His declining to do this was inconsistent with his declarations of innocent intentions with relation to Mr. Webster.

Here Mr. DEXTER stated, that the affidavit was so mixed up with opinions, matters of construction as well as of facts, that no man could conscientiously swear to the truth of the whole, and this, and this only, was the reason why he could not. The offer on the part of the Solicitor was, that if Gen. Lyman would swear that he expected to prove that Mr. Webster was concerned in a treasonable plot, then the continuance would be granted. But the affidavit only stated, that he believed Mr. Adams and Mr. Giles to be material witnesses in the case, who might throw further light upon the subject if present. This was the true meaning of the affidavit referred to. The construction of Mr. Adams' and Mr. Jefferson's letters were such, as to induce a belief that some facts important to the issue might be obtained from the former. The refusal to swear point blank, that the defendant

believed Mr. Webster was guilty of treason, therefore ought not to operate against General Lyman : no man in the circumstances of the case could be expected to take such an oath.

Mr. DAVIS continued, that there seemed to be an insincerity in the affidavit, pretending that the truth was to be given in evidence, although it never was intended to have been done, which exhibited malice from the very affidavit itself—the authorities quoted, bore him out in his position.

Mr. DAVIS then concluded by saying, that from the great fatigue, which the jury as well as all concerned had experienced in this long trial, he should, without further remark, now submit the cause to them ; trusting that they would discharge their duty with that impartiality which the trial of jury contemplated, and which might be expected from men so intelligent and enlightened.

His Honor, the CHIEF JUSTICE, then gave the case to the Jury. The following is the substance of his charge :

It was unfortunate, he said, that there ever was occasion for this prosecution. It was unfortunate, too, that, after it commenced, there had not been some amicable disposition of it, upon explanations not derogatory to the honor of the accused, and yet satisfactory to the feelings of the party aggrieved. It was very apparent, from some of the evidence in the case, that, but for the interposition of some point of etiquette to which importance had been attached, such a disposition of it would have taken place. It is one of those prosecutions, which, though public in its character, yet, as it is instigated by an individual as much to protect his own character as for the public interest, an accommodation would be permitted by the court. But the honor of the gentlemen was in their own hands; and if that is thought to create an insuperable barrier between them, we can only regret that the controversy must be terminated by the *ultima ratio* of peaceable citizens—a verdict of the jury of their country. In other parts of the country this *ultima ratio* might have been of a different kind. No case could be presented to a jury with less reason to apprehend that their final opinion would be founded upon any thing but what ought always to be its basis—the *law* and the *evidence*.

The *accuser* and the *accused* stand before you, gentlemen, with high claims upon your consideration and respect. The former has brought much reputation and dignity to this his adopted State, by his eminent talents in every department where he has been called to act. His name has pervaded every part of the Union, and the fame of his talents has gone far beyond its limits. The latter is a native of your own city, has been

deservedly a favorite of the citizens, and has been highly useful to the Commonwealth in civil and military departments, and in support of those institutions which are the pride and ornament of the city. Between such men it must be unpleasant to be called on to decide; but the law has summoned you to this duty, and you will discharge it faithfully; nor is there any reason to apprehend that any political feeling or circumstances will influence or pervert your judgments.

Though a great political struggle has existed, it is now over, and, I believe, has, in this part of the country, left much less of bitterness behind it, than any preceding conflict of the kind. We know too well the value of independent opinion, and estimate too justly the free right of suffrage, to call in question the honor and integrity of those who take a side different from our own. An administration man and a Jackson man can sit, side by side—receive the evidence and arguments of a cause—and agree or disagree in their results, without any reference to their past political differences. Such ought to be the case in a country like ours—such, he believed was the case; and with respect to those political events of past times, which the President has seen fit, after a burial of twenty years, to spread before the nation, of which disclosure the present prosecution is one of the first fruits, the young, who know nothing except from the President's communication, when they see the names of those, who are branded as traitors, will smile with incredulity; and those, who are old enough to have been partakers in the plot, will withhold the expression of their opinion, until a fit occasion arises to divulge it.

The case before you, gentlemen, is a prosecution by indictment for a libel, and a libel of a political bearing and character. Prosecutions of this nature have, both in England and in this country, been the source of more trouble and disquiet than any other. They excite the passions and feelings of the friends and partizans of those, who are immediately interested, and the contagion is apt to spread through the community.

The liberty of the press is always a subject of discussion in such cases, and this is a subject, which, more than any other, engages the public attention and interests the popular feeling. And very justly—because the press is the chief engine to create and sustain civil, political and religious liberty.

It has been truly said, that no country, where there is a free press and an educated people, can remain long under a despotic government; and I believe that no country, without such a press, however popular may be its forms and institutions, can long remain free. It is the sustaining, vital principle of freedom—it proclaims the vices and abuses of government—the rights of the

citizen—the merits and demerits of rulers—and these are its proper and legitimate offices. He who would restrain it in the exercise of these functions, commits treason against the fundamental principles of civil liberty.

But the press is not invested with the power or right of invading private character, or of circulating falsehood against public or private men. It may promulgate truth, however harsh and severe, with good purpose, and with an honest view to expose or reform; but it cannot, with impunity, under the garb of good motives, and justifiable ends, traduce and calumniate. Powerful as the press is, it has a master; that master is the LAW, which, when it transgresses its legitimate bounds, will punish the transgression. It may be difficult accurately to define these bounds; they contract or extend with the subject, about which it treats.—Each case stands almost independently of every other, depending upon the facts or circumstances which belong to it, and hence the principle now universally acknowledged in this country, and in England, that the jury, who are a selection from the people, shall determine the whole case, both as to law and fact, by a general verdict of guilty, or not guilty, unless they choose to refer the matter of law to the court, in the form of a *special verdict*.

There have been great controversies upon this subject, and the highest order of talents exercised upon it. Until quite a recent period in English history, the Judges arrogated to themselves the right to determine the criminality of an alleged libel, leaving to the jury the power only of finding the fact of publishing, and the truth of the inuendoes. But in the late reign of George III. by an act of parliament, the whole power of determining the facts and law has been vested in the jury.

I believe that was always the law with us; it certainly is now. It never could have been otherwise in practice, whatever might be the theory—for the jury have always had the right to return a general verdict, which involves both law and fact, and when there was an acquittal, there was no power in the Court to suspend or defeat their verdict. With this popular guard over the rights of the press, and the rights of the citizen, the system is safe from any thing but occasional errors, which though to be regretted, will scarcely be able to produce general mischief. But the jury have a right to the advice and opinion of the Court upon all matters of law arising in the course of the trial; and indeed it is the duty of the Court to give such advice and opinion, clearly and distinctly, in order that the jury with whom is the final responsibility, shall not excuse themselves from an erroneous verdict, on the score of ignorance.

The decision of this cause, then, gentlemen, rests entirely

with you, and you must act with the intelligence and discretion which the occasion demands.

It is my duty to state to you the leading principles which ought to guide your deliberations, and, where I perceive any question of law, to endeavor to solve it in such manner, that you may clearly comprehend it. If I should be mistaken to the prejudice of the defendant, he is not without remedy—if in his favor, and the opinion should be sanctioned by your verdict, he is discharged.

The publication complained of as a libel, is contained in a newspaper called the Jackson Republican, bearing the date of the 29th October last. The paper you will have in evidence, was purchased at the office of the proprietors of that paper, and the defendant has acknowledged in a letter to Messrs. Curtis and Fletcher, in answer to one written by them, that he is the author of the piece complained of.

The *fact* of the publication being thus proved, the paragraph is submitted to your consideration; and the question, to be settled by you, is whether it is criminal or libellous. And the general question comprehends all the various points, which have arisen in the case—such as the sense and meaning of the words made use of—the explanation attempted to be given by reference to other communications in the same paper, and whether it is false and malicious in the sense in which these terms are used in the law. These are all matters clearly within your province to determine. And first, I think you will read the piece itself to ascertain, as well as you can, its true import and meaning; and if you find it has reference to any other communication, you will examine that, in order to come at the true sense and meaning of the piece set forth in the indictment.

It purports to be a commentary on certain communications agreed to have been made by the President of the U. States, in the National Intelligencer, at Washington, which are printed in the same number of the Jackson Republican. Without doubt the defendant had a right to publish any fair commentary upon that communication made by the President. If that high officer will commit his thoughts and opinions, or what he considers facts, to a public newspaper, they become public property, and any citizen has a lawful right to criticise, or speculate upon the opinions, and to deny the facts or comment upon them, observing only the rules of decorum in his treatment of the subject. But he has not a right to misrepresent them, or to draw unreasonable inferences from them, to the prejudice of the reputations of other persons. If he does this, wilfully, in such manner as so expose a third party to public indignation, hatred, or contempt, he cannot shelter himself under cover of the communication upon which he made his commentary.

The first sentence of the commentary is unexceptionable. The writer then proceeds to say—"The reader will observe that Mr. Adams *distinctly asserts* that H. G. Otis, S. Dexter, W. Prescott, Daniel Webster, and others of the federal party of their age and standing, were engaged in a plot to dissolve the union, and to re-annex New England to Great Britain, and that Mr. Adams possessed unequivocal evidence of that most solemn design. The reader will also observe, that in the statement just published of Mr. Adams, there is no intimation whatever that he does not still believe what he revealed to Mr. Jefferson and Mr. Giles twenty years ago."

This, by the Government, is believed to be libellous; not as a direct charge by the defendant that the gentlemen whose names are mentioned were engaged in the plot therein mentioned—but because it states that Mr. Adams *distinctly asserts that they were*. On turning to the communication of Mr. Adams, I suppose you will not find that he has mentioned any person by name as engaged in such a plot; nor does he *distinctly assert* that such a plot existed; he speaks of the purpose and views of certain leaders of the federal party, who had the management of the State Legislature. That the *embargo would* be met with forcible resistance, supported by the Legislature, and probably by the Judiciary of the State. That if force should be resorted to by the Government, it would produce a civil war, and in that event he had no doubt the leaders of the party would procure the co-operation of Great Britain. That their object was, and had been for several years, a *dissolution* of the Union, and the establishment of a *separate confederation*, he knew from unequivocal evidence although not proveable in a Court of Law, &c.

There is then no *distinct assertion* of Mr. Adams in the communication, that the several gentlemen whose names are mentioned in the commentary, were those who were engaged in these proceedings. There is, however, a distinct assertion, *that the leaders* of the federal party were so engaged; and the Counsel for the defendant argue, that the gentlemen whom he has named, being at the time such leaders, the insertion of their names did not add any thing in substance to Mr. Adams' communication: and I am of opinion that, if you should be satisfied that the gentlemen named were the persons whom Mr. Adams intended to designate as leaders of the federal party at that time—that the insertion of those names would not be an unfair or unjustifiable commentary upon the communication—it would be only filling up a picture, the figures of which were as distinct and discernible to the mind, before as after filling up. And though this might be a libel by Mr. Adams, yet if the commentary introdu-

ced no new matter, and was only a fair exposition of the communication, it would not be a libel.

But the case of Mr. Webster may be considered by you different from that of the other gentlemen named. It is insisted by the government, that Mr. Adams, in his communication, confines his remarks to the leading federalists in the state of Massachusetts; and that, as Mr. Webster was not then an inhabitant of this state, he could not have been intended by Mr. Adams as one of the leading federalists to whom he imputed the objects, acts, and purposes mentioned in the communication; so that the insertion of his name was altogether gratuitous and unjustifiable.

The answer given to this is, that Mr. Adams spoke of, or had in view, the federal party of New England and their leaders; and that, as Mr. Webster is admitted to have been an eminent and conspicuous federalist in New Hampshire, he fell within the class described by Mr. Adams.

You will look over the communication of Mr. Adams, and see whether he has reference to any as chargeable with high political offences, except those of his own native state. I do not think it will do to refer to Mr. Jefferson's letter on this point, because the defendant says that Mr. Adams *distinctly asserts*, undoubtedly referring to Mr. Adams' own communication. The insertion of Mr. Webster's name, if not justified by the communication of Mr. Adams, was not warranted; and if done wilfully, and the effect is to expose him to scorn or hatred, it is libellous; if by mere inadvertence or mistake, as has been suggested, it is not so.

The other part of the paper objected to as libellous, is in these words: "Why for three years he has held to his bosom, as a political counsellor, Daniel Webster, a man whom he called, in his midnight denunciation, a traitor in 1808."

This, again, does not charge Mr. Webster with being a traitor, but alleges that Mr. Adams had called him one. To say, in print, that a person of high standing has called one a traitor, is libellous, unless it appear from the context, that it was intended to show that such a denunciation was unjust; for the imputation of crime is not necessary to constitute a libel. Any opprobrious terms, calculated to expose the party of whom they are used to contumely, may be libellous. It is not so in mere verbal slander, unless some special damage be proved.

The last section of the paper described in the indictment, is in these words: "And as the last question why, during the visits he has made to Boston, he always met on friendly, intimate, and social terms, all the gentlemen whose names, a few years before, he placed upon a secret record, in the archives of the government, as traitors to their country."

It is argued by the counsel, that this does not intend, necessarily, that Mr. Webster was one of those whose names are thus recorded. Of this you must judge; if by looking at the whole piece you are satisfied the writer, in this sentence, had reference to all those whose names are mentioned below, then of course Mr. Webster is included. It is also said that this is a mere rhetorical flourish, and means nothing more than was contained in the preceding parts of the comment; and if you are satisfied that the writer, by records and archives meant nothing more than the letters of Mr. Adams, referred to in his communication, the remark is fair, and this should not be considered as distinct libellous matter, but a mere amplification of the former charge. But if you believe the writer intended by this to assert that this charge of his being a traitor, was actually recorded, it is certainly the most serious part of the subject.

But there is another ground of defence taken, distinct from this detailed view, and which covers the whole matter of the supposed libel.

It is argued that from the political purpose with which this paper was set up—it being for the lawful object of advocating the election of the successful candidate—and from the obvious tenor of the piece itself, having due reference to the communication it was intended to criticise—that it necessarily follows that the use of the names was not with a view to prejudice those persons, but merely to put in a strong point of view what was thought by the writer to be an improper and dishonorable conduct on the part of Mr. Adams—that these names were holden up to the community as illustrative of the extreme injustice of Mr. Adams' accusation against the leaders of the federal party. If this be the true purport and effect of the publication, and it would be so understood by intelligent readers—then certainly it is not libellous; for if the words of a supposed libel are not calculated to injure the party of whom they are used, in the opinion of the community, they have no noxious meaning or tendency, and such tendency is an essential ingredient of offence.

This is a matter about which you will exercise your best discretion. If you are satisfied that the object of the writer was to disparage Mr. Adams in the minds of the citizens, and that these names were held up in contrast with his communication, and that such is the natural meaning, then the defendant will be acquitted. You will not, however, strain the words to give them such a meaning, but judge of them as well as you can from the effect they produced on you when you first read them, comparing the opinion you then formed with the arguments and evidence you have now heard, and form your opinion cautiously and deliberately on the real tendency and effect of the publication.

In regard to a malicious intent, which it is said must be made to appear, the law does not require proof of particular malice. If the publication was unjustifiable, and its natural tendency was to create hostile feelings, aversion, and hatred towards Mr. Webster, malice is inferred by law.

The inference which the law makes, may be rebutted by direct proof of an honest purpose and an innocent design; without such proof the act itself is evidence of malice. You have had all the evidence on this part of the subject and will judge of it.

With regard to the form of the indictment, in which it is supposed there is an unnecessary accumulation of harsh epithets I suppose it is in the usual form. The prefatory words of general accusation, are wholly immaterial. If the defendant is convicted, it is only of this libel; his character in other respects will stand as fair as before. This is the antiquated dress of indictments, which might usefully be exchanged for a more modern costume.

In regard to the circumstances, relied upon to prove particular malice, as they have happened since the publication, much reliance cannot be placed upon them; as subsequent circumstances have produced them, and they will not go far to show the intent at the time of publication.

After the charge of the Judge, the Jury retired when the Court after waiting some time for their return, adjourned until 3 o'clock, P. M.

AFTERNOON.—The Jury were called in, when they were asked by the Court *if they had agreed*, to which the Foreman replied, *they had not*.

JUDGE PARKER. Is there any question concerning the nature of the law in this case, if so, I will explain it further, or is your disagreement solely upon the facts?

MR. FOREMAN. It is entirely upon the fact—we do not disagree upon the law.

JUDGE PARKER. Is there any prospect of an agreement?

MR. FOREMAN. In my opinion there is none whatever.

The papers were then taken from the Jury, and they discharged from any further consideration of the case.

APPENDIX.

MR. ADAMS' DISCLOSURES.

CORRESPONDENCE BETWEEN THE HON. A. STEWART, OF STAUNTON, AND THOMAS JEFFERSON RANDOLPH, EXECUTOR OF THOMAS JEFFERSON, DECEASED.

Charlottesville, Oct. 11, 1828.

Dear Sir—I am advised that among the papers in your possession, there is a letter written by your grandfather, vindicating Mr. Adams' political course in the support which he gave to his administration, and the reasons which entitled him to so large a share of his confidence. It is important that their connexion should be explained; and that the history of this interesting period should be known to the people. It is important that it should now be known. Your grandfather if living, would not withhold his testimony in favour of any meritorious public servant, particularly one who has been so distinguished an aid, and so bright an ornament to his administration. Candid men of all parties will be gratified to receive testimony from so pure a source. May I then ask the favor of you to furnish me with a copy of the letter referred to, that it may be laid before the people.

I am, dear sir, very affectionately, your's, &c.

ARCHIBALD STEWART.

Th. J. Randolph.

Edgehill, Oct. 11, 1823.

Dear Sir—In compliance with your request, I send you a copy of the letter, I presume, alluded to in your note of this morning. Conscious that to suffer any writings of my grandfather, in my possession to be made subservient to the use of any personal or political purpose would be an unworthy and improper abuse of the trust reposed in me; I have nevertheless deemed it entirely consistent with its faithful discharge, to allow them to be used as vindictory testimony of the character or conduct of any individual, where they would fairly admit of that construction. This I believe to be one of those cases. The facts contained in this letter have long been familiar to me, having often heard them with great interest from my grandfather in conversation with others on different occasions from the date of their occurrence to his death. I am aware that this piecemeal publication of his correspondence, many of his letters too, seeing the light mutilated and detached from their contexts, would bear the appearance of inconsistent and contradictory opinions; yet the evil has no corrective but in the full publication of his manuscripts which will ere long appear, when the public being in possession of the whole, will be enabled to form a just judgment.

Very affectionately, your's

TH. JEFFERSON RANDOLPH.

Judge A. Stewart.

Monticello, Dec. 25, 1815.

MR. GILES:

Dear Sir—Your favor of the 15th was received four days ago. It found me engaged in what I could not lay aside till this day.

Far advanced in my 83d year, worn down with infirmities which have confined

me almost entirely to the house for seven or eight months past, it afflicts me much to receive appeals to my memory for transactions so far back as that which is the subject of your letter. My memory is indeed become almost a blank, of which no better proof can probably be given you than by my solemn protestation that I have not the least recollection of your intervention between Mr. John Q. Adams and myself, in what passed on the subject of the embargo. Not the slightest trace of it remains in my mind. Yet I have no doubt of the exactitude of the statement in your letter. And the less as I recollect the interview with Mr. Adams, to which the previous communications which had passed between him and yourself, were probably and naturally the preliminary. That interview I remember well; not indeed, in the very words which passed between us, but in their substance, which was of a character too awful, too deeply engraved in my mind, and influencing too materially the course I had to pursue, ever to be forgotten. Mr. Adams called on me pending the embargo, and while endeavors were making to obtain its repeal. He made some apologies for the call, on the ground of our not being then in the habit of confidential communications, but that which he had then to make involved too seriously the interest of our country not to overrule all other considerations with him, and make it his duty to reveal it to myself particularly. I assured him there was no occasion for an apology for his visit, that on the contrary his communications would be thankfully received and would add a confirmation the more to my entire confidence in the rectitude and patriotism of his conduct and principles. He spoke then of the dissatisfaction of the Eastern portion of our confederacy with the restraints of the embargo then existing, and their restlessness under it. That there was nothing which might not be attempted to rid themselves of it. That he had information of the most unquestionable certainty that certain citizens of the Eastern States, (I think he named Massachusetts particularly) were in negociation with the agents of the British Government, the object of which was an agreement that the New England States should take no further part in the war then going on; that, without formally declaring their separation from the Union of the States, they should withdraw from all aid and obedience to them; that their navigation and commerce should be free from restraint or interruption by the British; that they should be considered and treated by them as neutrals, and as such might conduct themselves towards both parties; and at the close of the war be at liberty to rejoin this confederacy.

He assured me that there was imminent danger that the Convention would take place, that the temptations were such as might debauch many from their fidelity to the Union, and that to enable its friends to make head against it, the repeal of the embargo was absolutely necessary. I expressed a just sense of the merit of the information, and of the importance of the disclosure to the safety and even salvation of our country; and however reluctant I was to abandon the measure (a measure which persevered in a little longer, we had subsequent and satisfactory assurance would have effected its object completely) from that moment, and influenced by that information, I saw the necessity of abandoning it, and instead of effecting our purpose by this peaceful weapon we must fight it out, or break the Union. I then recommended to my friends to yield to the necessity of a repeal of the embargo, and to endeavor to supply its place by the substitute in which they could procure a general concurrence.

I cannot too often repeat that this statement is not pretended to be in the very words which passed—that it only gives faithfully the impression remaining on my mind. The very words of a conversation are too transient and fugitive to be so long retained in remembrance. But the substance was too important to be forgotten; not only from the revolution of measures it obliged me to adopt, but also from the renewals of it in my memory on the frequent occasions I have had of doing justice to Mr. Adams, by repeating this proof of his fidelity to his country, and of his superiority over all ordinary considerations when the safety of that was brought into question.

With this best exertion of a waning memory which I can command, accept assurances of my constant friendship and respect.

THOMAS JEFFERSON.

NOTE.—Extracts from a confidential letter of Mr. Jefferson to William B. Giles, dated 25th of December, 1825, will be found in the Richmond Enquirer of the 7th September, 1827.

The publication of a letter from Mr. Jefferson to Mr. Giles, dated the 25th of December, 1825, concerning a communication made by Mr. Adams to Mr. Jefferson, in relation to the embargo of 1807, renders necessary the following statement, which we are authorized by Mr. Adams to make.

The indistinctness of the recollections of Mr. Jefferson, of which his letter itself feelingly complains has blended together three distinct periods of time, and the information, which he did receive from Mr. Adams, with events which afterwards occurred, and of which Mr. Adams could not have informed him. It fortunately happens that this error is apparent on the face of the letter itself. It says, "Mr. Adams called on me *pending the embargo*, and while endeavors were making to obtain its repeal." He afterwards says, that, at this interview, Mr. Adams, among other things, told him that "he had information of the most unquestionable certainty, that certain citizens of the Eastern States, (I think he named Massachusetts particularly) were in negociation with agents of the British Government, the object of which was an agreement, that the New England States should *take no further part in the war then going on*," &c.

The embargo was enacted on the 22d of December, 1807, and repealed by the non-intercourse act on the 1st of March, 1809. The war was declared in June, 1812.

In August, 1809, Mr. Adams embarked for Russia, nearly three years before the Declaration of War, and did not return to the United States till August, 1817, nearly three years after the conclusion of the peace.

Mr. Madison was inaugurated President of the United States on the 4th of March, 1809.

It was impossible, therefore, that Mr. Adams could have given any information to Mr. Jefferson, of negociations by citizens of Massachusetts with British agents, *during the war*, or having relation to it. Mr. Adams never had knowledge of any such negociations.

The interview, to which Mr. Jefferson alludes, took place on the 15th of March, 1808, pending the embargo; but, at the session of Congress before the substitution for it of the non-intercourse act. The information given by Mr. Adams to Mr. Jefferson, had only an indirect reference even to the embargo, and none to any endeavors for obtaining its repeal. It was the substance of a letter from the Governor of Nova Scotia to a person in the State of Massachusetts, written in the summer of 1807, and before the existence of the embargo; which letter Mr. Adams had seen. It had been shown to him without any injunctions to secrecy, and he betrayed no confidence in communicating its purport to Mr. Jefferson. Its object was to countenance and accredit a calumny then extensively prevailing among the enemies of Mr. J. and the opponents of his Administration, that he and his measures were subservient to France; and it alleged that the British Government were informed of a plan, determined upon by France to effect the conquest of the British Provinces on this continent, and a Revolution in the Government of the United States, as means to which, they were first to produce war between the United States and England. From the fact that the Governor of Nova Scotia had written such a letter to an individual in Massachusetts, connected with other facts, and with the movements of the party then predominant in that State, Mr. Adams and Mr. Jefferson drew their inferences, which subsequent events doubtless confirmed; but which inferences neither Mr. Jefferson nor Mr. Adams then communicated to each other. This was the only confidential interview which, during the Administration of Mr. Jefferson, took place between him and Mr. Adams. It took place first at the request of Mr. Wilson Carey Nicholas, then a member of the House of Representatives of the United States, a confidential friend of Mr. Jefferson; next, of Mr. Robin-

son, then a Senator from Vermont ; and lastly, of Mr. Giles, then a Senator from Virginia—which request is the only intervention of Mr. Giles, ever known to Mr. Adams, between him and Mr. Jefferson. It is therefore not surprising, that no such intervention occurred to the recollection of Mr. Jefferson, in December, 1825.

This interview was in March, 1808. In May of the same year, Mr. Adams resigned his seat in the Senate of the United States.

At the next session of Congress, which commenced in November, 1808, Mr. Adams was a private citizen, residing at Boston. The embargo was still in force, operating with extreme pressure upon the interests of the people, and was wielded as a most effective instrument, by the party prevailing in the State, against the Administration of Mr. Jefferson. The people were constantly instigated to forcible resistance against it ; and juries after juries acquitted the violators of it, upon the ground that it was unconstitutional, assumed in the face of a solemn decision of the District Court of the United States. A separation of the Union was openly stimulated in the public prints, and a Convention of Delegates of the New England States, to meet at New Haven, was intended and proposed.

Mr. Giles and several other members of Congress, during this session, wrote to Mr. Adams confidential letters, informing him of the various measures proposed as reinforcements or substitutes for the embargo, and soliciting his opinions upon the subject. He answered those letters with frankness, and in confidence. He earnestly recommended the substitution of the non-intercourse for the embargo ; and, in giving his reasons for this preference, was necessarily led to enlarge upon the views and purposes of certain leaders of the party, which had the management of the State Legislature in their hands. He urged that a continuance of the embargo much longer would certainly be met by forcible resistance, supported by the Legislature, and probably by the Judiciary of the State. That to quell that resistance, if force should be resorted to by the Government, it would produce a civil war ; and that in that event, he had no doubt the leaders of the party *would* secure the co-operation with them of Great Britain. That their object was and had been for several years, a dissolution of the Union, and the establishment of a separate Confederation, he knew from unequivocal evidence, although not proveable in a Court of Law, and that, in the case of a civil war, the aid of Great Britain to effect that purpose would be as surely resorted to, as it would be indispensably necessary to the design.

That these letters of Mr. Adams to Mr. Giles, and to other members of Congress, were read or shown to Mr. Jefferson, he never was informed. They were written, not for communication to him, but as answers to the letters of his correspondents, members of Congress, soliciting his opinions upon measures in deliberation before them, and upon which they were to act. He wrote them as the solicited advice of friend to friend, both ardent friends to the administration and to their country. He wrote them to give to the supporters of the administration of Mr. Jefferson, in Congress, at that crisis, the best assistance, by his information and opinions, in his power. He had certainly no objection that they should be communicated to Mr. Jefferson ; but this was neither his intention nor desire. In one of the letters to Mr. Giles, he repeated an assurance which he had verbally given him during the preceding session of Congress, that he had for his support of Mr. Jefferson's administration no personal or interested motive, and no favor to ask of him whatever.

That these letters to Mr. Giles were by him communicated to Mr. Jefferson, Mr. Adams believes, from the import of this letter from Mr. Jefferson, now first published, and which has elicited this statement. He believes, likewise, that other letters from him to other members of Congress, written during the same session, and upon the same subject, were also communicated to him ; and that their contents, after a lapse of seventeen years, were blended confusedly in his memory, first, with the information given by Mr. Adams to him at their interview in March, 1808, nine months before ; and next, with events which occurred during the subsequent war, and of which, however natural as a sequel to the information and opinions of Mr. Adams, communicated to him at those two preceding periods, he could not have received the information from him.—*Nat. Intel.*