No. 1045.
J. E. Parker.

CORNELL UNIVERSITY
MAR 31 1921
LAW LIBRARY

REPORT

OF THE

TRIAL,

TIMOTHY UPHAM

AGAINST

HORATIO HILL & CYRUS BARTON,

FOR AN ALLEGED LIBEL.

Portsmouth Jan'y 8. 1811

Capt Nath[l] Sloan[d] Esq

Dear Sir.

In the adventure you have undertaken for us we engage you one tenth part of the net profits and engage that it shall amount to one hundred & fifty dollars— your expens paid & for every day which you shall serve say since you began the 8th of Feb'y you shall receive two dollars per day over and above the foregoing— No compensation if the adventure does not succeed No fault to be charged you for any adventure if you are

I am with esteem

Yours &c

W Gardner

LIBEL TRIAL.

REPORT OF THE TRIAL,

TIMOTHY UPHAM vs. HILL & BARTON,

FOR AN ALLEGED LIBEL,

AT THE

COURT OF COMMON PLEAS,

ROCKINGHAM COUNTY....OCTOBER TERM, 1830.

COMPILED FROM NOTES TAKEN AT THE TRIAL, AND THE ORIGINAL PAPERS IN THE CASE.

TO WHICH IS ADDED

AN APPENDIX,

CONTAINING THE EVIDENCE RULED OUT BY THE COURT, AND MANY INTERESTING ORIGINAL PAPERS NOT BEFORE PUBLISHED.

"The liberty of the press, and the liberties of the people, must stand or fall together."—HUME.

CONCORD:

PUBLISHED BY HILL AND BARTON.

1831.

E. MANSUR, PRINTER.

DISTRICT OF NEW-HAMPSHIRE, *to wit:*

DISTRICT CLERK'S OFFICE.

BE IT REMEMBERED, That on the twenty-fourth day of December, 1830, and in the fifty-fifth year of the Independence of the United States of America, HORATIO HILL and CYRUS BARTON, of the said District, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, viz.—"Libel Trial. Report of the Trial, Timothy Upham vs. Hill & Barton, for an alleged libel, at the Court of Common Pleas, Rockingham County—October Term, 1830. Compiled from notes taken at the trial, and the original papers in the case. To which is added, an Appendix, containing the evidence ruled out by the Court, and many interesting original papers not before published. 'The liberty of the press, and the liberties of the people, must stand or fall together.'—HUME."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

CHARLES W. CUTTER,

Clerk of the District Court of the United States, for the District of New-Hampshire.

A true copy of record—

Attest—C. W. CUTTER, *Clerk.*

ADVERTISEMENT.

It will readily be perceived, that the following Report has been compiled under many disadvantages. Supposing that we had a Reporter in our employ, of whose notes of the Trial, we were to avail ourselves, we made no other provision for the purpose ; and when disappointed in receiving that Report ; when that had been disposed of to our political opponents—our only recourse was to the notes of our Counsel, and to the original papers in the case, to enable us to comply with our promise to the public. Under these circumstances, it has been impossible for us to give the remarks of Counsel upon many questions which arose in the course of the trial, nor the reasons offered by the Court in justification of the several decisions, the effect of which was to exclude from the Jury a great proportion of the evidence offered in justification of the several counts in the declaration. All the testimony, however, bearing upon the main issue, is believed to be correctly noted in this report. We have, in addition, inserted in its appropriate place, the testimony excluded by the Court, so as to present a connected history of the several transactions to which it relates ; carefully noting what was admitted, and what excluded.

Having a reputation at stake, which we are no less loath to part with, than the plaintiff in this action can be with his own, justice to ourselves, and to the cause we serve, demands that the PEOPLE should be made acquainted with ALL the facts in the case, whether such facts were laid before the Jury, or whether they were excluded by the *technicalities of the law;* and having done this, we submit to be tried by the people, and hold ourselves amenable to the award of their righteous judgment.

HILL & BARTON.

THE FAC SIMILES.

The genuineness of some of the documents originally published, and which were offered in evidence at the trial, having been questioned—having in fact been pronounced *forgeries*, we have been at considerable expense to procure *fac similes* of three of them, in order that, contrasting these with other of Mr. Upham's writing about which there can be no dispute, the people may judge for themselves, in regard to them.

The letters in dispute, and which are given in the annexed sheets, are 1st, that dated "*Portsmouth, Jan.* 7, 1812," addressed "*My Dear Stoodly,*" and signed "*Timo. Upham.*"—2d. The Memorandum, dated "*Portsmouth, Jan.* 12, 1810," without signature—and 3d, the letter addressed to "*Capt. Nath'l Stoodly,*" dated "*Jan.* 8, 1811," and signed "*Timo. Upham*" and "*W. Garland.*" The letter dated "*Fort Constitution, Sept.* 2, 1812," addressed to "*Hon. Tho's H. Cushing,*" and signed "*Timo. Upham, Major,*" &c. was taken from the files of the War Office, and this fact certified by the acting Adj. General. The two orders on *Isaac Waldron*, the one dated "*June* 17, 1808," and the other for a barrel of *new rum*, dated "*June* 29, 1812," were furnished by Mr. Waldron, from his files. The last of these is the paper which one of Plaintiff's witnesses who only saw the signature, swore down with the rest of the papers.

It will readily be seen that the hand which wrote one of these papers, wrote them all. Look at the general appearance of the writing: look at the figure 8 in the date of the years—it is peculiar—and yet *in all the papers it is alike.* Examine the signatures, especially the capital letters. Examine the character which stands for "account," in the order for new rum—viz. "charge it to my account," and then compare this with the last word in the last paragraph but one in the disputed memorandum, viz. "*If either of the Mr. Burbanks of Salem are at Eastport, they will render Capt. Stoodly any service on my account*"—and a hundred other particulars which the reader will readily discover. Some of the witnesses on the stand gave as a reason of their belief that Upham did not write these letters, that his orthography was better. Look at his letter to the War Department, and it will there be seen that the words "transmit," "copy," "immediately," and "military," four words in that short communication, are misspelled. Again, the filing on the letters were denied to be Stoodly's hand writing. Now if Stoodly's hand has been forged in *one instance*, it has been in a thousand: for we have more than a thousand papers now in our possession, the same that came from the box, and all are filed in the same hand. Every person who examines the disputed papers must be convinced that Upham wrote every one of them, and that his denial only furnishes additional evidence of the depravity of his own heart.

LIBEL TRIAL.

COURT OF COMMON PLEAS,

Rockingham County....October Term, at Portsmouth, 1830.

Hon. ARTHUR LIVERMORE, *Chief Justice.*
Hon. JOSIAH BUTLER, *Associate Justice.*

Counsel for the Plaintiff,

Messrs. JEREMIAH MASON, EDWARD CUTTS, ICHABOD BARTLETT, AND W. H. Y. HACKETT.

Counsel for the Defendants,

The Attorney General Mr. SULLIVAN, and Messrs. SAMUEL CUSHMAN, and WILLIAM CLAGGETT.

JURY empanneled and sworn,

DANIEL B. CHASE,	of	Poplin, *Foreman.*
DAVID CLEMENT,	,,	Derry.
JOSIAH FOLSOM,	,,	Exeter.
JONA. MARSTEN, jr.	,,	Hampton.
JOHN B. HANSON,	,,	Kingston.
LEVI DEARBORN,	,,	New-Castle.
JACOB ROWELL,	,,	Newtown.
JOHN CHAPMAN,	,,	North-Hampton.
JOSEPH LEATHERS, jr.	,,	Nottingham.
SUPPLY HAM,	,,	Portsmouth.
ELIHU FRENCH,	,,	South-Hampton.
SHERBURNE FOGG,	,,	Epsom, *Talisman.*

Mr. CUTTS read the Writ, as follows:—

Rockingham, ss.]—THE STATE OF NEW-HAMPSHIRE.

(L.S.) *To the Sheriff of any County in this State or his Deputy,* GREETING.

We command you that you summon Horatio Hill and Cyrus Barton, both of Concord, in our county of Merrimack, Printers, if they may be found in your precinct, to appear before our Justices of our Court of Common Pleas, to be holden at Exeter, within and for our said county of Rockingham, on the third Tuesday of March next, then and there, in our said Court, to answer unto Timothy Upham, of Portsmouth, in said county of Rockingham, Esquire, in a plea of

Trespass on the case, for that whereas the said Timothy Upham, now is a good, true, honest, just and faithful citizen, and as such hath always from his nativity hitherto behaved and governed himself, and has for all the time aforesaid been held and reputed to be a man of good name, fame and credit; and whereas the said Timothy, before the time of printing and publishing of the several false, scandalous, malicious and infamous libels hereafter mentioned, to wit, at Portsmouth in said county, to wit, on the sixteenth day of May, A. D. 1816, and from thence hitherto until the fourteenth day of April, A.D. 1829, was, and during all that time hath been Collector of the Customs, within and for the district of Portsmouth, in the State of New-Hampshire, exercising the duties of said office of Collector of the Customs within and for the district of Portsmouth, and in virtue of said office of Collector of Customs as aforesaid was authorised to receive and did receive large sums of moneys, accruing to the United States, for customs collected within the said district of Portsmouth, by means whereof and by the faithful discharge of the duties of said office of Collector of the Customs as aforesaid, the said Timothy before the printing and publishing of the said several false, scandalous, infamous and malicious libels hereafter mentioned, had deservedly gained the good opinion of divers good and worthy citizens of said Portsmouth, to wit, at Exeter aforesaid, and whereas before the printing and publishing of the said several false, scandalous, infamous and malicious libels hereafter mentioned, a certain newspaper called "*Signs of the Times*," was printed and published—to wit, at said Portsmouth, to wit, on the fourth day of July, A. D. 1827—and for a long time afterwards was printed and published weekly, to wit, at Portsmouth aforesaid; yet the said Hill & Barton well knowing all and singular the premises, but contriving and maliciously intending, wrongly and unjustly to injure the said Timothy in his aforesaid good name, fame and credit—and to bring him into publick scandal, contempt, ignominy, and disgrace, and to cause it to be credited and believed, that the said Timothy had been guilty of corrupt practices in the said office of Collector of the Customs as aforesaid, and had misapplied the moneys belonging to the United States received by him in virtue thereof on the first day of February A. D. 1830, at a place called Concord, in our said county of Merrimack, to wit, at Exeter, aforesaid, did falsely and maliciously, wilfully and designedly cause to be printed and published in a certain common publick newspaper, commonly called New-Hampshire Patriot and State Gazette—a certain false, scandalous, infamous and malicious libel of and concerning the said Timothy, and of and concerning the official conduct of the said Timothy as Collector of the Customs as aforesaid,

containing therein the false, scandalous, infamous and malicious matter following, of and concerning the said Timothy, and of and concerning the official conduct of said Timothy, as Collector of the Customs, as aforesaid, that is to say—"You paid the money of the Government (meaning the money of the Government of the United States received by the said Timothy in his official capacity as Collector of the Customs as aforesaid) to support that prostituted press (meaning the aforesaid newspaper called Signs of the Times). Your pen and your hand (meaning the pen and hand of the said Timothy) were conspicuous in producing some of the vilest articles for that press (meaning communications composed by said Timothy to be printed and published in said newspaper called Signs of the Times)—And also, for that whereas the said Timothy heretofore, to wit, at said Portsmouth, to wit, on the sixteenth day of May, A.D. 1816, and from thence hitherto until the fourteenth day of April, A.D. 1829, was and during all that time hath been Collector of the customs within and for the district of Portsmouth in the State of New-Hampshire, exercising the duties of said office of Collector of the Customs within and for the district of Portsmouth, and in virtue of said office of Collector of the Customs as aforesaid, was authorised to receive, and did recieve large sums of money accruing to the United States for customs collected within the said district of Portsmouth, and whereas before the printing and publishing of the said several false, scandalous, infamous and malicious libels hereafter mentioned, a certain paper called Signs of the Times was printed and published, to wit, at said Portsmouth, to wit, on the fourth day of July, A. D. 1827—and for a long time afterwards was printed and published weekly, to wit, at Portsmouth aforesaid—

Yet the said Hill and Barton further contriving and maliciously intending wrongly and unjustly to injure the said Timothy, in his good name, fame and credit and to bring him into publick scandal, contempt, ignominy and disgrace, and to cause it to be credited and believed that the said Timothy had been guilty of corrupt practices in the said office of Collector of the Customs as aforesaid; and had misapplied the monies belonging to the United States received by him in virtue thereof, on the eighth day of February, A. D. 1830 at a place called Concord, to wit—at Exeter aforesaid, did falsely and maliciously, wilfully and designedly cause to be printed and published in a certain common publick newspaper commonly called New-Hampshire Patriot and State Gazette, a certain false, scandalous, infamous and malicious libel of and concerning the said Timothy and of and concerning the official conduct of the said Timothy as Collector of the Customs as aforesaid, that is to say: "Did he, (meaning

the said Timothy) not rather pay the money of the Government (meaning the said money belonging to the Government of the United States which the said Timothy had received for the use of the said Government in vitue of his the said Timothy's office of Collector of the Customs as aforesaid) to sustain that polluted vehicle of slander and detraction the Signs of the Times (meaning the said newspaper called the Signs of the Times) which pursued that amiable lady with the vilest calumnies even to the Grave?"——

And also, for that the said Hill and Barton at a place called Concord, to wit, at said Exeter on the fifteenth day of February, A. D. 1830, further contriving and maliciously intending wrongly and unjustly to injure the said Timothy, and bring him into publick scandal, contempt, ignominy and disgrace and to cause it to be credited and believed that the said Timothy had violated certain Laws of the United States, heretofore existing, regulating commercial intercourse between the United States and foreign Nations and the dependencies thereof, commonly called the embargo and nonintercourse Laws which said Laws were in force previous to the late War between the United States and the United Kingdoms of Great Britian and Ireland, and that the said Timothy had been guilty of introducing into the United States, goods, wares and merchandise contrary to law, did falsely and maliciously, wilfully and designedly cause to be printed and published in a certain common publick newspaper commonly called New-Hampshire Patriot and State Gazette, certain other false, scandalous, infamous and malicious libels of and concerning the said Timothy, in a certain part of which there is contained the false, scandalous infamous and malicious matter following, of and concerning the said Timothy, that is to say: "Col. Upham (meaning the said Timothy) calling himself a *republican* has always been a confidential favorite of the leading federalists at Portsmouth; the reason is, that he has always been one of them. He(meaning the said Timothy) was engaged with some of them (meaning some of the leading federalists at Portsmouth) during the Embargo and nonintercourse (meaning during the period the aforesaid Laws called the Embargo and nonintercourse Laws were in force) which preceded the late War, (meaning the late war between the United States of America and the United Kingdoms of Great Britian and Ireland) in smuggling goods to and from the British provinces," (meaning the territories belonging to the United Kingdoms in North America) and in a certain other part of which said libel there was and is contained the false, scandalous, infamous and malicious matter following, of and concerning the said Timothy, that is to say, "Here then is a picture of the Federal candi-

date (meaning the said Timothy) for the office of Governor. (meaning the office of Governor of the State of New Hampshire.) A man (meaning the said Timothy) who has been guilty of most gross and flagitious violation of the laws (meaning the laws of the United States) is brought forward by the Federal party, as a suitable person to administer the laws of New-Hampshire; that a party reckless and unprincipled as the federal party have ever shown themselves to be, should bring forward a wholesale *Smuggler* (meaning the said Timothy) as a candidate for the first office in the State (meaning the office of Governor of the State of New Hampshire) is not strange: But with a character thus assailable (meaning the character of said Timothy) what madness, what infatuation could induce Mr. Upham (meaning the said Timothy) thus to become a candidate" (meaning a candidate for the office of Governor of the State of New-Hampshire) by means of the writing and publishing of which said false, scandalous, and malicious libels by the said Hill and Barton, of and concerning the said Timothy, and of and concerning the official conduct of said Timothy in said office of Collector of Customs as aforesaid; he the said Timothy hath been and is, greatly injured in his aforesaid good name, fame, and credit, and brought into publick scandal, infamy, and disgrace, with and amongst other good and worthy inhabitants of the State of New-Hampshire, and of the United States, and otherwise at Concord aforesaid, to wit, at Exeter aforeseid—

To the damage of the said Timothy as he says the sum of Ten Thousand Dollars, which shall then and there be made to appear with other due damages; have you there this Writ with your doings therein.

Witness, ARTHUR LIVERMORE, *Esquire*, at Exeter, the sixteenth day of February, Anno Domini, one thousand eight hundred and thirty. P. CHADWICK, *Clerk*.

A true Copy, Attest, RICHARD BRADLEY, *D. Sheriff*.

TIMOTHY UPHAM, by W. H. Y. HACKETT, *his All'y*.

A true Copy, Attest,

RICHARD BRADLEY, *D. Sheriff*.

Merrimack, ss. February 18, 1830.

In pursuance of this precept, I have this day summoned the within named Horatio Hill and Cyrus Barton to appear and answer as within commanded, by leaving a true and attested copy of this precept, with a true and attested Copy of this my return, endorsed thereon, at each of their last and usual places of abode. RICHARD BRADLEY, *D. Sheriff*.

A true copy, Attest,

RICHARD BRADLEY. *D. Sheriff*.

MR. CUSHMAN *then read the Pleas as follows :*

And the Defendants come and defend the wrong and injury when, &c. and say that they are not guilty in manner and form as the Plaintiff hath above complained against them, and thus they put themselves upon the country.

By their Attorney, W. CLAGGETT.

And for further plea in this behalf as to the printing and publishing of the words in the first and second counts of the declaration mentioned above, supposed to have been printed and published by the Defendants of and concerning the Plaintiff, they the Defendants by leave of the Court here for this purpose first had and obtained, say that the Plaintiff, his action aforesaid thereof against them ought not to have and maintain because they say that before the printing and publishing of the several words in the first and second counts in the declaration mentioned, and above supposed to have been printed and published by the Defendants of and concerning the Plaintiff, at the said time and place and in the said newspaper called the New-Hampshire Patriot and State Gazette in said declaration mentioned, the said Upham, to wit ; on the 27th day of August, 1828, at said Portsmouth, did as Collector of the Customs within and for the district of Portsmouth in the State of New-Hampshire, pay to one Hampden Cutts, then being an editor of a certain newspaper printed at said Portsmouth, called the Signs of the Times, the sum of seventeen dollars and fifty cents, being money of the government of the United States for the support of and to sustain that press or newspaper called Signs of the Times. Wherefore the said Defendants at the said time, &c., did print and publish of and concerning the Plaintiff the said several words in the first and second counts of the said declaration mentioned, and thereby above supposed to have been printed and published by the Defendants of and concerning the Plaintiff, as *he* lawfully might do for the cause aforesaid, and this the defendants are ready to verify,—Wherefore the Defendants pray judgment if the Plaintiff ought to have or maintain his aforesaid action thereof against them and for their costs.

By their Attorney, W. CLAGGETT.

And for further plea as to the printing and publishing of the words in the said counts of the declaration mentioned above, supposed to have been printed and published by the Defendants of and concerning the Plaintiff, they the said Defendants, by leave of the Court here for this purpose first had and obtained, say, that the Plaintiff his action aforesaid thereof against them ought not to have and maintain because they say that before the printing and publishing of the several words in

the third count of said declaration mentioned, and above supposed to have been printed and published by the Defendants of and concerning the Plaintiff at the said time and place and in said newspaper called the New-Hampshire Patriot and State Gazette in said declaration mentioned the said Upham, to wit : on the 28th day of February, A. D. 1810, while the act entitled "an act to interdict the commercial intercourse between the United States and Great Britain and their dependencies and for other purposeses," passed on the first day of March, 1809, or certain parts of said act ; and also an act entitled "an act to amend and continue in force certain parts of the act, entitled an act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies and for other purposes," passed June 28, 1809. And also certain other acts of the Congress of the United States prohibiting all commercial intercourse between the United Kingdoms of Great Britain and Ireland and the provinces or dependencies thereof and the United States, were in force, did contrary to law and contrary to the laws, orders, rules and regulations of the United Kingdoms of Great Britain and Ireland, convey and smuggle from a certain place within the United States, to wit : from Eastport in the county of Washington and then district now State of Maine, into the aforesaid British Province, to wit : into Halifax in the Province of Nova Scotia then and ever since one of the Provinces of the Kingdoms of Great Britain and Ireland the articles, goods, and merchandize mentioned in the schedule or invoice hereto annexed. And also conveyed, smuggled and introduced on or about the first day of March, A. D. 1810, and between that time and the 18th day of June, A. D. 1812, from some of the Provinces or dependencies of said United Kingdoms of Great Britain and Ireland into some of the United States, to wit : into York, in the then district now state of Maine five pounds of Silk and one hogshead of Rum and divers other goods and merchandize, being of the growth, produce or manufacture of the said United Kingdoms of Great Britain and Ireland. Wherefore the said Defendants at the said time, &c., did print and publish of and concerning the Plaintiff, the said several words in the third count of the said declaration mentioned, and thereby above supposed to have been printed and published by the Defendants of and concerning the Plaintiff as *he* lawfully might do for the cause aforesaid, and this the Defendants are ready to verify. Wherefore the Defendants pray judgment, &c.

By their Attorney, W. CLAGGETT.

Mr. Cutts *read the Replication, as follows :*

And the said Timothy Upham as to the said plea of the said Horatio Hill and Cyrus Barton by them first above pleaded and whereof they have put themselves upon the country, doth the like. By Wm. H. Y. HACKETT, his Attorney.

And the said Timothy Upham as to the second plea of the said Horatio Hill and Cyrus Barton by them secondly above pleaded, saith that he the said Timothy Upham by reason of any thing by the said Horatio Hill and Cyrus Barton in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against them the said Horatio Hill and Cyrus Barton in respect to the grievances in that plea mentioned, because he saith that the said Horatio Hill and Cyrus Barton, at the said time when he in the said first and second counts mentioned of their own wrong and without the cause by them the said Horatio Hill and Cyrus Barton in their said second plea by them mentioned, did commit the said grievances in their said plea mentioned in name and form, as the said Timothy Upham hath above thereof complained against them the said Horatio Hill and Cyrus Barton, to wit : at said Exeter on the day and year last aforesaid, and this the said Timothy Upham prays may be enquired of by the country. By Wm. H. Y. HACKETT, his Att'y.

And the Defendants do the like.
By their Attorney, W. CLAGGETT.

And as to the third plea of the said Horatio Hill and Cyrus Barton, by them thirdly above pleaded, the said Timothy Upham saith that he by reason of any thing by the said Horatio Hill and Cyrus Barton in the said third plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said Horatio Hill and Cyrus Barton in respect to the grievances in their said plea mentioned, because he saith that the said Horatio Hill and Cyrus Barton, at the said time when he in their said third plea mentioned, of their own wrong and without the cause by them the said Horatio Hill and Cyrus Barton in their said third plea mentioned did commit the said grievances in their said third plea mentioned, in manner and form as the said Timothy Upham hath above thereof complained against them the said Horatio Hill and Cyrus Barton, to wit : at Exeter aforesaid on the day and year last aforesaid, and this the said Timothy Upham prays may be enquired of by the country.

By Wm. H. Y. HACKETT, his Attorney.

And the Defendants doth the like.
By their Attorney, W. CLAGGETT.

Mr. Cutts then opened the case for the plaintiff. He spoke of the liberty of the press—pointed out the distinction between the liberty and the licentiousness of the press—alluded to the standing of the plaintiff, the military services he had rendered, and the offices of honor and profit which he had held; and concluded by saying, that having maintained their allegations, the burthen of proof rested upon the defendants.

Mr. Cushman opened the defence in the following manner:

Gentlemen of the Jury—

We perfectly accord with the Plaintiff that this is a case of no ordinary magnitude, and that one of the charges in the publications complained of, is of a serious nature.

The Counsel for the Plaintiff, Mr. Cutts, has gone through with his character from the time he came to this town—has described his mode of doing business—his character for integrity and fair dealing—his various appointments, civil and military—and the sanguinary battles in which he has been engaged.

We did not expect to be called upon to controvert statements of this kind, although it might easily be done: but it is not necessary. The questions for you, gentlemen of the jury, to decide are, as to the truth or falsehood of the charges which the Defendants have published. You perceive, gentlemen of the jury, that the action is founded upon three supposed libels published by the Defendants in the New-Hampshire Patriot, of which they are Editors. This species of defamation is usually termed written scandal.

The Defendants have pleaded to all three counts not guilty, and also a justification to each. The plain question, therefore, for the jury to decide is, whether those charges are true or false, and whether they were published with malicious or dishonest motives, or otherwise.

In actions of this description, it is necessary, in order to come to a correct result, that the jury should be made acquainted with all the circumstances connected with the speaking the words or publishing the libel. You would naturally inquire what was the inducement which prompted the Defendants to make the charges against the Plaintiff, of which he now complains.

In reply it will be sufficient at this time to say, the supposed charges were but a fair commentary upon the Plaintiff's character at a time when the two great political parties of this State were canvassing the pretensions of the several candidates for office, just before the last annual election.

At this time the Plaintiff was brought forth, if not as a "Military Chieftain," as a candidate for the office of the Chief Magistracy, and his pretensions to that office strongly urged

upon the consideration of the freemen of this State in opposition to the ultimately successful candidate, the present virtuous Chief Magistrate ; that they were furnished with evidence in proof of the truth of their allegations, which would be sufficient to satisfy every fair, candid and impartial mind that what they stated was the "truth, the whole truth, and nothing but the truth" ; that intimations of this were given in their paper, upon which they had a public call from the federal party to come out ; if they had any thing, to come out plainly. Upon receiving this challenge they did come out, and made the declarations which form the subject of the present examination.

This was done with a fair and honest belief in the truth of the charges, and without any malevolence against the Plaintiff, but was done merely to prove his unfitness for the office to which he was then aspiring. They made them from a solid conviction that they were discharging an imperious duty to the public as the Editors of the leading Republican paper of this State : and a duty from which they had no right to shrink. A duty from which they, as *honest men*, could not shrink.

Upon the supposition that the Defendants were faithfully discharing their duty to the public and nothing more ; then have they not a right to complain of the *unusual* course which has been pursued by the Plaintiff ? We say *unusual*, because we do not believe that a case can be found in the annals of our country, where a candidate for a high and responsible trust, has, during the pendency of a contested election, upon the moment of the publication of a supposed *libel*, ever instituted a suit for high sounding damages.

The defendants ask you to cast back your thoughts to the days of the venerable John Langdon, James Sullivan and Thomas Jefferson. Whenever and wherever were three distinguished individuals more unsparingly calumniated. Yet there is not a man on earth who can come forward and declare that either of those venerable fathers of our country ever attempted to intimidate men of the type, or muzzle the press for the false and malicious attacks which were made upon their characters. No ! They were panoplied in their own conscious innocence and the hearts of a virtuous and intelligent people. They sought not the verdict of a jury assessing the Defendants in a little miserable trash called money, but asked for a righteous *award* of a grateful and discriminating public. This award was made them to their hearts content, and is now inscribed upon monuments erected to their memories and fame in characters never to be obliterated.—Yes, their God-like virtues, unyielding integrity and unextinguishable patriotism will be had in everlasting remembrance.

Come, if you please, to a period of time when facts are more fresh and vivid upon the minds of the whole community ?—

Who is there that does not remember the scenes which transpired during the last Presidential election? What accusation, in the whole catalogue of crime is there, which was not charged upon the present Chief Magistrate of the United States?

Although he, emphatically the best of men, was sinned against with a high hand, did not even deign to ask for an indictment to be filed against his libellers, and much less would he deign to ask for a suit to be instituted for damages. No, for while his vindictive persecutors were standing mid deep, at least, in the quag mire of poisoned and turbid waters, surrounded by a death-like blackness, created by their own dark imaginations, the man of the people was walking upon the "mountain path of virtue," inhaling a pure and salubrious air—nourished and invigorated by a moral atmosphere surrounding his own domestic altar. Such men as I have described need not the verdict of a jury to add lustre to their fame. No, they have acted from the belief that such momentous questions should be decided by the whole community, that "the liberty of the Press is essential to the freedom of the State," that there is more danger to be apprehended from abridging its freedom than from a prostitution of the Press. And this opinion no doubt was formed upon the ground, that in a country like ours, so highly blessed with the means of a general diffusion of knowledge—with a people so universally desirous of extending this rich blessing to all classes, that a well informed, enlightened, an intelligent and virtuous community would more effectually correct all abuses of the Press, than any other mode which could be devised. Have we not been taught by experience that they were right in this belief? Is it not true, as a general principle, that where papers have been established to answer some *selfish* or *disorganizing factious* purpose, the columns of which have been filled with little else beside detraction, that they have had their few fleeting days only, in a very limited circle, and then have passed away into forgetfulness? While others which have been established with good intentions, for the purpose of diffusing correct principles and wholesome nutriment to the people, have daily extended their circulation, carrying along with them true information as to the merits or demerits of public men and of public measures, to enlighten and instruct thousands and tens of thousands of the freemen of our country; and the proprietors and Editors constantly receiving additional patronage to reward their honest and faithful labors. And I have no doubt that if public men and candidates for public office, would leave all questions of this nature to the decision of a virtuous and intelligent public, it would be better for themselves and for the community.

The Plaintiff may, however, think otherwise. It is his right and his privilege. The Defendants intend not to complain at the haste with which the Plaintiff caused his suit to be instituted, although a long writ is somewhat terrific, especially at such a time as that in which this was issued.—But they did complain of the hue and cry of *forgery* that was raised against them: a course, however base, has been kept up almost to the very moment of the sitting of this Court. Of the design no one can mistake. But we trust this disgraceful course will prove futile, and that whatever you may have heard through the medium of the public Journals, will be banished from your minds, and that you will decide this cause upon the law and the testimony which may be laid before you.

The Plaintiff's writ contains three counts, which have been read to you by his Counsel. The substance, however, I will again repeat.

The two first are for saying that the Plaintiff paid, or had "rather pay the money of the Government to sustain that prostituted vehicle of slander and detraction, the "Signs of the Times," which pursued that amiable Lady with the vilest calumnies even to her grave." The third for charging the Plaintiff with having been concerned with some of the leading federalists of Portsmouth in smuggling goods to and from the British Provinces previous to the last war.

The words in the two first counts, we say, are not actionable. The rule is, that where the charge, if true, would subject the party charged to an indictment for a crime, then the words are actionable. 5 Johnson, 188.

The two first supposed libels do not, either of them charge upon the Plaintiff an indictable offence. There are many expressions which would at the first impression seem to be a good cause of action, but which have been declared not to be actionable. A few cases of this sort I will now mention.—Such as the following: words spoken of a man, who is a Justice of the Peace, "Esq. A. B. is a damned rogue" are not actionable, because not spoken of him in his official capacity. 1 Johnson, 129. To say a person is foresworn, charges no crime, unless it refers to a judicial case, and the innuendo does not aid." 6 Dernford and East. 691. To constitute legal slander the words must impute a precise crime.—3 Blk. Com. 125. It is not actionable to say, "the Plaintiff is a thief, and stole my corn in my field," for standing corn is intended, which cannot be stolen. 1 Comyn, 267. Or for words "you are a thief and stole my trees," for by the latter words this would only be trespass, as trees are not a subject of theft. 12 Johnson, R. 239. To say "that A. B. stole a file of unsettled documents is not actionable. 2 N. H. R. 398. So in this case, if the Plaintiff had misappropriated the

Government money, and had been so charged, it would have amounted only to a breach of duty for which he might be made to respond by a suit upon his bond.

All the defendants meant to say was, that the Plaintiff made use of money received from the public crib, where he was daily fed, to aid in the support of a prostituted press, which was slandering the Republican candidate for the Presidency, rather than patronise those papers which were advocating the election of the present Chief Magistrate of the United States. We believe the sentiment above expressed is the fair inference, and that it will be so considered when the whole is taken together.

The Plaintiff has averred that the charges affect him in his official character as Collector of the Customs. But the fact is that he had been removed from office almost a year previous to the publication of the supposed libels, and the law is "that where the publication affects the Plaintiff in a particular character, it must be proved that the character belonged to him, or that he filled the office or situation at the time of the publication complained of." 2 Starkie, 859.

As to evidence of malice, the Court are referred to 2 Starkie, 863. As to proof of malice, 867. Presumptions as to malice, 904, 906.

TESTIMONY INTRODUCED.

The first evidence offered was an affidavit of the Register of the United States' Treasury, showing that Plaintiff was allowed $ 17 50 for money paid to Hampden Cutts, editor of the *Signs of the Times*, for an advertisement for proposals to build the Light House on Whale's Back. This affidavit was *ruled out by the Court*, on the ground that the notice to take deposition was served upon plaintiff's Counsel, and not upon plaintiff personally—and that the *name* of the Register of the Treasury was not inserted in the notice.

A box of papers was produced.

Elijah S. Hall. Lived with John H. Sherburne, from October, 1828, to April, 1829. Sometime in the fall of 1828, was called upon by said Sherburne to go with him and Mrs. Stoodly to Mrs. Stoodly's house in Pitt Street, and when there, Mrs. Stoodly and myself went up stairs into a chamber, when she handed me a box about the size of a common window glass box, and told me to carry it to said Sherburne's, and I carried it there according to her directions, and placed the same in Sherburne's front room. At Sherburne's request, I then got a hammer and assisted in opening the box, which contained papers—does not know what papers were in the box.—(A box was shown him by Mr. Cushman, who inquired if that was the box? He said it was the same.)

An Invoice of merchandize was next offered—*Signature admitted by Plaintiff*, and the Invoice read, as follows :

Invoice of Merchandize shipd on Board the Sloop Eliza Capt. George Huntress for Eastport by Timo. Upham and Nathl Stoodley on their Joint account consigned to Nathl Stoodly—viz

1458 lbs Chese	- -	a 11 c	160 38	
81 Kegs Containing	3293lbs a 15 c		493 95	
81 Kegs for ditto a 2|,	Inspection a 9 c each		34 29	
5 Barrells Nos from 16 to 20 Inclusive 1100 lbs 15	- - -		165 00	
5 Barrells for ditto	-	6|	5 00	698 24
50 Boxes 2337 lbs dipd Candles a 16 c			373 92	
50 Boxes for Ditto	-	1|6	12 50	
54 Boxes 2134 1-4 lbs Mould candles a 18 c			384 16	
54 Boxes for ditto	- -	1|6	13 50	784 08
24 Hhds and 10 Tierces Containing 208 Bush Corn 6|9	- - -		234 00	
Casks and Expence of packing Hhds 12| Tierces 7|6	-	-	60 00	294 00
5 Barrells No 1 Beef	-	a 10 D.	50	
Inspection 9 c ea.	-	-	45	
12 Half Barrells No 1 Beef a 5 50			66 00	
Inspection 9 c	-	-	1 08	
6 Half Barrels Toungs a 10 Drs			60	
4 Half B'lls Mess Beef a 6 50 c		-	26 00	
Inspection of 10 Barrels	-	9 c	90	204 43
15 Barrells Pork. 13 No 1. 2 No 2 a 18 Drs Numbered from 1 to 15 Inclusive			270	
Inspection	- - -	9 c. a	1 35	271 35
3 Kegs Cont 316 1-4 lbs Tobacco in lbs Rolls (Pigtail)	- -	18 c		56 92 1-2
24 Rounds Beef	-	16|6		66 00
10 Barrells American Gin Cont. 312 1-2 Glls	- - -	6|	312 50	
10 Barrells for ditto	-	a 7|6	12 50	325 00
				$2860 40

Portsmouth Jan'y. 12th 1810.

Errors Excepted for the Shippers
TIMO UPHAM.

A specific Invoice of the same cargo, offered—*Signature admitted by the Plaintiff*, and read, viz :

Portsmouth January 12th 1810.

Invoice of Merchandize ship'd on board the Sloop Eliza—Capt. George Huntress, for Eastport by Timothy Upham, & Nathl Stoodly on their Joint acct,, consigned to Nathl Stoodly viz—

20 Hhds numbered from 1 to 24 inclusive containing as follows

No. 1.	10 Kegs Butter 399 1-2 lbs at 15 c|		59 93

	10 kegs for ditto a 2| inspection 9 cts each		4 23	
	82 lbs cheese - - -	a 11 cts	9 02	
	7 1-2 Bushels corn -	at 6|9	8 44	
	Cask & expence of packing	12|	2 00	83 62
No. 2.	10 kegs Butter 402 1-4 lbs	at 15 cts	60 34	
	10 kegs for ditto a 2| inspection 9 cts each		4 23	
	75 lbs cheese - -	at 11 cts	8 25	
	7 1-2 Bushels corn - -	a 6|9	8 44	
	Cask & expence of packing	12|	2 00	83 26
No. 3.	10 kegs Butter 401 lbs at 15 cts		60 15	
	10 kegs for ditto a 2| inspection 9 cts each		4 23	
	80 lbs cheese - -	at 11 cts	8 80	
	8 Bushels corn - -	a 6|9	9 00	
	Cask & expence of packing	12|	2 00	84 18
No. 4.	10 kegs Butter 396 lbs at 15 cts		59 40	
	10 kegs for ditto a 2| inspection 9 cts each		4 25	
	76 lbs cheese - -	at 11 cts	8 36	
	7 1-2 Bushels corn - -	at 6|9	8 44	
	cask & expence of packing	12|	2 00	82 45
No. 5.	10 kegs Butter 406 1-2 lbs at 15 cts		60 97	
	10 kegs for ditto a 2| inspection 9 cts each		4 23	
	75 lbs cheese - -	at 11 cts	8 25	
	7 1-2 Bushels corn -	at 6|9	8 44	
	cask & Expence of packing	12|	2 00	83 89
No. 6.	10 kegs Butter 429 1-2 lbs at 15 cts		64 43	
	10 kegs for ditto a 2| inspection 9 cts ea		4 23	
	62 lbs cheese - -	at 11 cts	6 60	
	7 3-4 Bushels corn -	a 6|9	8 71	
	cask & expence of packing	12|	2 00	85 97
No. 7.	10 kegs Butter 427 1-2 lbs at 15 cts		64 12	
	10 kegs for ditto 2| inspection 9 cts ea		4 23	
	59 1-2 lbs cheese - -	at 11 cts	6 55	
	8 Bushels corn - -	a 6|9	9 00	
	cask & expence of packing	12|	2 00	85 90
No. 8.	10 kegs Butter 387 1-2 lbs at 15 cts		58 12	
	10 kegs for ditto a 2| inspection 9 cts each		4 23	
	182 1-2 lbs cheese - -	at 11 cts	20 08	
	7 1-2 Bushels corn - -	a 6|9	8 44	
	cask & expence of packing	12|	2 00	92 87
No. 9.	6 Boxes Dipd Candles 281 3-4 lbs at 16 cts		45 08	
	6 Boxes for Ditto -	a 1|6	1 50	
	191 lbs cheese - - -	at 11 cts	21 01	
	5 1-2 Bushels corn -	a 6|9	6 19	
	Cask & expences of packing	12|	2 00	75 78
No. 10.	6 Boxes dipd Candles 291 1-2 lbs at 16 cts		46 64	
	6 Boxes for Ditto	a 1|6	1 50	
	64 lbs cheese - - -	at 11 cts	7 04	
	7 Bushels corn - - - -	6|9	7 88	

	Cask & expenses of packing 12|		2 00		65 06
No. 11.	6 Boxes dipt candles 280 3-4 lbs at 16 cts		44 92		
	152 lbs cheese 6 Boxes for ditto a 1|6 at 11 cts		16 72		
	6 1-2 Bushels corn - at 6|9		7 27		
	expence on packing & cask - 12|		2 00		70 91
No. 12.	8 Boxes Mould candles 310 lbs at 18 cts		55 80		
	8 Boxes for ditto - - 1|6		2 00		
	23 lbs cheese - - a 11 cts		2 53		
	7 Bushels corn - - a 6|9		7 88		
	Cask and expence of packing 12|		2 00		70 21
No. 13.	8 Boxes mould candles 302 1-2 lbs at 18 cts		54 45		
	8 Boxes for ditto - - 1|6		2 00		
	7 Bushels corn - - at 6|9		7 88		
	Cask and expense of packing 12|		2 00		66 33
No. 14.	8 Boxes mould candles 307 1-4 lbs at 18 cts		55 30		
	8 Boxes for ditto - - at 1|6		2 00		
	7 1-2 Bushels corn - at 6|9		8 44		
	Cask and expence of packing 12|		2 00		67 74
No. 15.	6 Boxes dipt candles 290 1-4 lbs at 16 cts		46 48		
	6 Boxes Dipt candles - at 1|6		1 50		
	7 1-2 Bushels corn - - a 6|9		8 44		
	Cask and expense of packing 12|		2 00		58 42
No. 16.	6 Boxes dipt candles 276 1-4 bls at 16 cts		44 20		
	6 Boxes for ditto - - a 1|6		1 50		
	8 1-4 Bushels corn - - a 6|9		9 00		
	expence on packing and Cask 12|		2 00		56 70
No. 17.	6 Boxes dipt candles 274 1-4 lbs at 16 cts		43 88		
	6 Boxes for ditto - 1|6		1 50		
	7 1-2 Bushels corn - a 6|9		8 44		
	Cask and expences on packing 12|		2 00		55 82
No. 18.	6 Boxes dipt candles 273 1-4 lbs at 16 c		43 72		
	6 boxes for ditto - - - a 1|6		1 50		
	152 lbs cheese - - at 11 cts		16 72		
	5 1-2 Bushels corn - at 6|9		6 19		
	Cask and expence of packing 12|		2 00		70 13
No. 19.	6 Boxes dipt candles 281 lbs at 16 cts		44 96		
	6 boxes for ditto - a 1|6		1 50		
	118 lbs cheese - - at 11 cts		12 98		
	5 1-2 Bushels corn - a 6|9		6 19		
	Cask & expence of packing 12|		2 00		67 63
No. 20.	7 Boxes mould candles 288 3-4 lbs at 18 cts		51 77		
	7 Boxes for ditto a 1|6 - - -		1 73		
	8 Bushels corn - - - a 6|9		9 00		
	Cask & expences on packing 12|		2 00		64 52

No. 21.	7	Boxes mould candles 285 lbs at 18 cts		51	30	
	7	boxes for ditto - - -	a 1|6	1	75	
	67	1-2 lbs cheese - - -	at 11 cts	7	42	
	7	Bushels corn - -	at 6|9	7	88	
		Cask & expence of packing	12	2	00	70 35
No. 22.	8	Boxes mould candles 319 3-4 lbs	at 18 cts	57	56	
	8	Boxes for ditto - - -	a 1|6	2	00	
	7	3-4 Bushels corn - -	a 6|9	7	72	
		Cask & expence of packing	12|	2	00	69 28
No. 23.	3	Boxes mould candles 120 1-4 lbs	at 18 cts	21	65	
	3	Boxes for ditto - - -	a 1|6		75	
	3	kegs Tobacco 316 1-2 lbs	a 18 c	56	92 1-2	
	3	kegs for ditto	a 2|3	1	12 1-2	
	1	keg Butter 42 1-2 lbs	at 15 cts	6	38	
	1	keg for ditto inspection 9 cts	2|		41	
	7	3-4 Bushels corn - - -	a 6|9	8	72	
		Cask & expences of packing	12|	2	00	97 86
No. 24.	4	Boxes mould candles 172 lbs at	at 18 cts	30	96	
	4	Boxes for ditto - - -	a 1|6	1		
	2	Boxes dipt candles 90 1-4 lbs	at 16 cts	14	44	
	2	Boxes for ditto - -	at 1|6		50	
	9	1-2 Bushes corn - -	at 6|9	10	70	
		Cask & expences of packing	12|	2	00	59 60
No. 1.	1	Tierce 3 1-4 Bushels corn	a 6|9	3	66	
	31	Gallons Gin a 6| Barrel for do	7|6	32	25	
		Cask & Packing - - -	7|6	1	25	87 16
No. 2.	1	Tierce 3 1-4 Bushels corn at	6|9	3	66	
	31	Gallons Gin a 6| Barrel for do	7|6	32	25	
		Cask & Packing	7|6	1	25	87 16
No. 3.	1	Tierce 3 1-4 Bushels corn at	6|9	3	66	
	31	Gallons Gin a 6| Barrel for do	7|6	32	25	
		cask & packing - - -	7|6	1	25	87 16
No. 4.	1	Tierce 3 1-4 Bushels corn	a 6|9	3	66	
	31	gallons Gin a 6| Barrel for do	7|6	32	25	
		cask & packing - -	7|6	1	25	37 16
No. 5.	1	Tierce 2 3-4 Bushels corn at	6|9	3	09	
	31	1-2 Gals Gin a 6| barrel for do	7|6	32	75	
		Cask and packing	7|6	1	25	37 09
No. 6.	1	Tierce 3 Bushels corn -	a 6|9	3	38	
	31	Gals Gin a 6| barrel for ditto	a 7|6	32	25	
		Cask and packing	7|6	1	25	36 88
No. 7.	1	Tierce 3 Bushels corn	a 6 9	3	38	
	32	1-4 Galls Gin 6|. Cask for ditto	a 7|6	33	50	
		Cask and packing	7|6	1	25	38 13

No. 8.	1 Tierce 3 Bushels corn a 6|9			3 38	
	31 1-2 Gals Gin 6| barrel for do 7|6			32 75	
	Cask & packing		7|6	1 25	37 38
No. 9.	1 Tierce 3 Bushels corn a 6|9			3 38	
	31 1-4 Gallons Gin a 6| barrel for do 7|6			32 50	
	Cask & packing		7|6	1 25	37 13
No. 10.	1 Tierce 3 1-4 Bushels corn		a 6 9	3 66	
	31 3-4 Gallons Gin a 6|			33 00	
	Cask and packing		7|6	1 25	37 91
16 to 20.	5 B'lls marked Pork, cont. 1100 lbs Butter a 15 c			165 00	
	5 Barrells for ditto		6|	5 00	170 00
	5 B'lls No.1 Beef a 10Drs. Inspection 9c ea			50 45	
	12 Half B'll No. 1 Beef at 5,, 50 Inpection a 9 c ea - - - - -			67 08	
	24 Rounds Beef a 16|6 -			66 00	183 53
	6 Half Barrels Toungs at 10 Ds. Inspection 9 c - - - - .			60 54	
	4 Half B'lls mess Beef a 6, 50. Inspection 9 c			26 36	86 90
Nos 1 to 15	15 B'lls Pork Including 2 of No 2 and 13 No 1 a 18 Ds			270	
	Inspection 9 c ea			1 35	271 35
	Error in No. 11 Hhd 6 Candle Boxes not carried out				1 50
	,, No. 16 1-4 Bush Corn not carried out				23
	Mistake in adding 4th page,				8 81
	ditto in 5th Page - - - - - - -				10 00
					$ 2855 20

Portsmouth, January 12th, 1810.

Errors Excepted

TIMO. UPHAM.

Amt. Brought down	2855 20
18 3-4 lbs Candles Error in ac 18	3 28
Loss in measuring corn	1 82
	$2860 40

A *smuggling* Invoice of the same cargo offered—*Signature admitted by Plaintiff*, and invoice read as follows :

Invoice of Merchandize ship'd on board Sloop Eliza Capt. George Huntress for Eastport by Timo Upham & Nathl Stoodly on their Joint account consigned to Nathl Stoodly—Viz

24 Hhds Indian Corn No's from 1 to 24
Inclusive Containing as follows—-
Hhd No. 1—17 1-2 Bushells No 12 17 1-2 No. 18, 17 1-2 No 24 18 Bus
2, 18, No. 7, 18, 13, 17, 19, 17 1-2
3, 17 1-2, 8, 17 1-2, 14, 17 1-2, 20, 17 1-2
4, 17, 9, 17 1-2, 15, 17 1-2, 21. 17
5,17 1-2, 10, 18, 16,18 , 22, 17 1-2

6, 17 3-4, 11, 17, 17, 18, 23, 17 1-2
105 1-4 88 105 1-2 104 1-2 403 1-4

10 Tierces from No 1 to 10 Inclusive—

No 1	No 2	No 3	No 4	No 5	No 6	No 7	No 8	No 9	No 10
71-2	7 1-4	7 1-4	7 1-2	7.	7 1-2	7 1-2	7 1-4	7	71-4 73

Total No of Bushels	494 1-4 a 6|9	556	03
20 Barrells Pork Nos from one to 20 Inclusive	18 Ds	360	00
5 Barrells Beef No 1 a	10 Ds	50	00
6 Half Barrells Tounges	10 Ds	60	
12 Half Barrells No 1 Beef	6 Ds	72	
4 Half Bls Mess Ditto	7 Ds	28	
24 Rounds with Beef	3 Ds	72	00
24 Casks & packing 12|; 10 Tierces a 6|6—Inspection on Beef &Pork		94	00
		1262	10

Errors Excepted for the Shippers

TIMO. UPHAM.

Memorandum without signature offered—writing denied by plaintiff.

Isaac Waldron, sworn. The memorandum is Col. Upham's hand writing. No doubt about it. Has been acquainted with Plaintiff since 1805 or 1806—has frequently seen him write, and thinks he has known his hand writing ever since he first became acquainted with him. Produced bills of 1808, 1812 and 1813, signed by Upham.

Memorandum read, as follows :

"*Portsmouth, Jan.* 12, 1810.

The Teirce No. 1 must be carefully attended to—It may be possible that some of the butter is not of the first quality but it may be recommended with the exception of a small quantity.

The tobacco is of the first quality of Pigtail done up in small rolls.

There is half a Barrell of Beef marked tongues by mistake.

There is no bad cheese and some of it is remarkably good.

If either of the Mr. Burbanks of Salem are at Eastport they will render Capt. Stoodly any service on my account.

If you can procure silk either in Blk. Blue or Cloth colors of the quality of the enclosed pattern for six dollars per lb without much risque of getting it here it will answer in any quantity ; if it is not scarce at Halifax it may be had for 5 Drs."

Copy of a letter from Stoodly to Upham, dated Nov. 14, 1810, offered. Objected to as *inadmissible*, by Plaintiff's counsel, and *ruled out* by the court.

Capt. George Huntress, sworn. About the 18th of January 1810, I sailed as master of the sloop Eliza, owned by Capt. Benning Morrill, from Portsmouth to Eastport. Timothy Upham shipped on board my vessel about twenty hogsheads and eight or ten tierces of merchandize, as near as I can recollect, and a few barrels of beef, all of which was consigned

to Capt. Nathaniel Stoodly, who went in the Eliza with me. The hogsheads were packed by John Walton, some of them in my presence, and contained candles and tobacco in the middle and corn at each end. The tierces contained each a barrel of gin with corn at each end. The hogsheads and tierces were marked on the heads "corn." Col. Upham was some of the time present when the goods were packing. We proceeded to Eastport, and remained there about a fortnight, with the cargo on board, at one of the most public places.—Captain Stoodly offered me five hundred dollars if I would carry the cargo over to the English side, which I refused.—Mowry came on board with Stoodly, and said he would guarantee the vessel against seizure on the other side. I told them the best way to avoid that difficulty was not to go at all; I had express orders from Capt. Morrill to violate no laws of the United States. Stoodly went over to the English side several times to procure an English vessel to carry the property to Halifax. At the end of about a fortnight, the Eliza was taken to Prince's Cove, the most remote part of the Island, where the cargo was taken out and put into Prince's store-house.* The same night the cargo was taken from Prince's store-house and put on board an English vessel in my presence. It was after midnight when the goods were all reshipped on board the English vessel, which sailed across and anchored on the English side, at a place called Indian Island. A day or two after, Capt. Stoodly took his baggage from my vessel and went in a boat on board the English vessel.

Cross examined. I held the light whilst the goods were put on board the English vessel. From Easport to the English side about as far as from Portsmouth to the Navy Yard. Eastport was then a small place;—all smugglers down there;—a place of much business and money plenty. Have seen a hundred sail there at one time. Boston merchants and some from Portsmouth resorted there. Stoodly offered me five hundred dollars to cross the line at several different times. British vessel sailed from Prince's cove to Indian Island. Mowry purchased the flour, which had been consigned to me—did not purchase the gin. Mowry one of the most respectable merchants—considered one of the first men there. Morrill owned the Eliza. When my affidavit was taken at Upham's counting room last winter, Hackett did not put down all my story. Mr. Upham took me into the back store, and I told him the story I have told now. Mr. Upham said he only wanted an answer to questions, and asked me if I could say that I landed the goods at Eastport? I told him yes—Hackett then took it down and I swore to it.

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*See Prince's Receipt for Storage—Numbered [1] in the following documents.

[The following Documents numbered from 1 to 10, all come within the rule of those excluded by the Court. The testimony of Capt. Huntress and the Invoices show that the cargo of the Eliza was packed for a smuggling adventure. His testimony brings the transaction down to the reshipment of the cargo on board a British vessel, and the smuggling it across the line. From a perusal of the following ten papers, the reader will see where the cargo went, and what became of it ; and will also find that Stoodly accounted to Upham for the *amount of the sales at Bermuda.*]

[No. 1.]

Prince's Receipt for Storage.

Received of Nath'l Stoodly on Storage the following articles, viz.

Twenty four hhds Corn
Ten tierces do.
Twenty five blls Beef
Twenty two half blls do.
Twenty four Rounds
One box shoes

East Port, Feb'y 19th, 1810—

BENJ. D. PRINCE.

[No. 2.]

Stoodly's Bill of Disbursements.

To expences on the passage to E. P.		5 60	
,, Carrying baggage - - - - -		50	
,, Board at Chipman's	30		
,, Expences of unladeing - - -	3 50		
,, Passage to Indian Isle and Halifax	7		
,, Stores - - - - - - -	12		
,, Board at Halifax	31		
,, Passage and Stores to Campobello - -	16		
			105 60
,, Boat from Campobello to E. P.	1 40		
,, Expenses and boat hire to St Andrews to clear out	4 25		
,, Paid Andrews	20		
,, Chipman's board Bill - - - -	19		
,, Tood's board Bill	8		
,, Cooperage & Storage - - - -	25		
,, Expence of labour freight Over the line	28		
,, Expence of going to St Andrews - -	3		
,, Boat hire to Snug Cove	1 50		
			110 15
,, Provisions for the Rosella - - - -	12		
,, Bond at Custom house at Yarmouth and expence	5 12		
,, Horse hire from Hamilton to St. Georges -	7 19		
,, Paid George Seymore pilotage	7		
,, Pilotage from Hamilton to St. Georges -	5		
,, Board and Labour at Hamilton	7 50		
			43 81

,, Horse hire		3 50	
,, Ferryage - - - - - -		1 25	
,, Labourers, Rum, &c.		2 25	
,, Do - - - - - - - -		3	
,, Horse hire		4	
,, Ferryage - - - - - -		50	
,, Boat hire from St. Georges to Flatts		3	
,, Labourers - - - - - -		2 50	
,, Horse hire at Hamilton		3	
,, Custom house officer and Serchor - -		6	
			29 00
,, Horse hire		3 50	
,, Musson's Bill for Labour - - - -		5 43	
,, Paid Capt. Crosby's Charter		458	
,, Boat hire to Hamilton - - - -		5	
,, Boat hire to Ireland		2	
,, Board and liqours while on the Isle - -		238	
,, Stores and expence of Passage in the Brig Spence to Halifax		90	
,, Expence of Landing bagage - - -		1	
,, Board at Mrs. Galligers		40	
			842 93
,, Passage, Stores and expences from Halifax to Liverpool - - - - -		24	
,, Board at Liverpool		8	
,, Passage from Liverpool to Cape For Chu -		12	
,, Board at Yarmouth		9	
,, Passage to Harbour Delute & Boat from thence to E. P. - - - - -		6 50	
,, Woodward's Bill Storage		2	
,, Boat hire to join the Cutter - - -		1 50	
,, Expences in the Cutter		36	
			99
NATHL. STOODLY			1230 49

[No. 3.]

Charter party.

It is mutually agreed between Nath'l Stoodly on the one part and Theo. Crosby on the other part, for the terms herein after mentioned, viz. said Theo. Crosby, his Executors, administrators or assigns agrees to let on hire unto said Stoodly his executors, administrators or assigns, the whole of the Schooner Rosella now laying in the port of Passamaquoddy to proceed on a voyage from said Port of Passamaquoddy to the Island of Bermudas and to return to the aforesaid Port of Passamaquoddy and said Theo. Crosby further agrees to have said Sch. Rosella properly Man'd, victualed and in every way properly fitted to proceed on said voyage and to keep her so properly fitted during said voyage. And said Nath'l Stoodly, his executors, administrators or assigns promises fully and truly to pay unto said Theo. Crosby the sum of Seventy pounds per month to begin on Monday day of April, 1810, and said

Stoodly promises further to advance to said Crosby the sum of four hundred dolls at Bermudas, being a part of said Schooner's Charter and to be deducted therefrom on a final settlement, and said Stoodly further agrees to risk said schooner against seizures wherein he the said Stoodly may be in fault ; and the aforesaid Theo. Crosby considers the aforesaid sum of seventy pounds to be Halifax Currency and to be in full for the services of said Vessel and in full for every expence that may properly attend said vessel, and said Stoodly agrees that Theo. Crosby shall have the liberty of stopping at CapeForchu for the space of one day, and provided said Crosby detains said vessel a longer space of time it is agreed that it shall be at his own expence.

Campobello, April 2nd, 1810.

NATHL. STOODLY
THEO. CROSBY
NATHAN UTLEY

Witness—CHARLES CHIPMAN

Rec'd of Nathl. Stoodly the sum of four Hundred and forty Eight Dolls. in full for the above charter of the Schooner Rosella

St. Georges, May 8th, 1810.

NATHAN UTLEY
THEO. CROSBY

[No. 4.]

Endorsed by Stoodly, " Copy of a letter to T. Upham."

" I suppose by this time you will have concluded the devil must have got me. I have the pleasure to inform you however, that he has not, although the Bermudeans have. I have refrained writing to you as I did not wish to remind you frequently of that which would have a tendency to cause regret. An opportunity now offers for writing, and I think it best to inform you that I arrived here safe after a tedious passage of 13 days. I got every thing landed safe and in good order without the least suspicion. But I did not find the markets any thing like the price current which sent you from Halifax, the butter has been selling for 30 cents and upwards, but there is not much sold ; mould candles has been selling at about 30 cents, dips a 28 I believe about half the candles are sold, most all the cheese is sold at a quarter of a doll ; tobacco from 25 to 27 cents pr pound; corn 112 pr Bushel; Tar a six dolls ; Beef dull and not all sold ; there no money here and I shall be obliged to take bills. Whoever you got that gin of took you in ; it is without exception the damdest stuff I ever saw ; no strength ; put a barrel under a juniper bush in a shower of rain and you will catch as good gin. I am afraid I will never sell it at any price."

[No. 5.]

Sales of Sundries at request of James Musson, Esquire, 7th May, 1810.

1	Half Bl.	Corn'd Beef—		Sam'l Lewis		4	0	0	
1	do	do		Lieut Holt		3	15	0	
1	do	do		do		3	18	4	
									£11 13 4
1	Half Bl.	Tongues	14 No. 8|4	C. B. Hayward		5	16	8	
1	do	do	11. 9|	Saml Lewis		4	19	0	
									10 15 8
1	Barrel	Apples	5 1-4$	Will Jones		1	15	0	
1	do	do	5 1-4	Jno. J. Tucker		1	15	0	
1	do	do	6 1-4	John Till		2	1	8	
1	do	do	6 3-4	B. Ford		2	5	0	
1	do	do	6 1-2	Saml Lewis		2	3	4	
1	do	do	3 1-2	Beck Burch		1	3	4	
1	do	do	5 1-4	J. & J. Musson		1	15	0	
1	do	do	4 1-4	do		1	8	4	
1	do	do	4 1-2	do		1	10	0	
1	do	do	4 3-4	do		1	11	8	
1	do	do	3	JRichardson		1	0	0	
11	Barrels		55 1-4$						13 8 4
5	Boxes	Herrings	1 1-4	G. F. Mallory		1	16	8	
1	do	do	7|	Lewis Holt			7	0	
2	do	do	8|	James Hill			16	0	
1	do	do	,,	Wm. Tucker			8	0	
9	Boxes								3 7 8
2	Bushels	Potatoes	5|4	Will Jones					10 3
				CHARGES.					
	Bell				£0	5	0		
	Commission	3 3-4 pct			1	13	7		
									1 18 7
				No. Pds					£42 17 1

Except Errors—7th May, 1810.

P. S. HAYWARD & Co.

[No. 6.]

Account Sales of Sundries sold at auction at request of Mr. James Musson.

1810								
May 23d—	Beef ——	1 Barrel	12$	Trimingham Tucker	4	0	0	
		1 hlf Do	8 3-4	Do	2	18	4	
		1 Round	21|	Joseph Dill	1	1	0	
		1 Do	13|4	Do		13	4	
								8 12 8
	Tongues —	10 Do	8|6	Sergt Layland	4	5	0	
		12	8|9	Adam Brown	5	5	0	
								9 10 0
	Candles —	1 Box	41 3-4 a	1|10 Chas B Hayward	3	16	7	
		1 ,,	39	,, Richard Fisher	3	11	6	
		1 ,,	41 3-4	,, Thos. Outerbridge	3	16	7	

1	,,	37-1|2	,,	Thomas B Hill	3	8	9
2	,,	79	,,	William Tucker	7	4	10
1	,,	37 1-2	,,	William Corbusier	3	8	9
							25 7 0
Butter —— 1 Keg		39 1-4	2|	Adam Brown	3	18	6
1	,,	38 1-4	,,	Thomas Outerbridge	3	16	6
1	,,	41 1-2	,,	James Tynes	4	3	0
1	,,	40 1-2	,,	Saml. Lewis	4	1	0
1	,,	40	1|10	Robert Hayes	3	13	4
1	,,	40 1-2	,,	Adam Brown	3	14	3
							23 6 7
Cheese —— 1		24 1-2	1|6	William Gibbons	1	16	9
1		16 1-4	1|5	Sergt. Hamilton	1	3	0
1		25 3-4	1|4	Saml. S. Peniston	1	14	4
1		18	,,	William Gibbons	1	4	0
1		19 1-2	,,	Joseph Dill	1	6	0
3		58 1-2	1|1	Do	3	3	4
1		12 1-4	1|4	John T. Cox	0	16	4
1		12 1-2	,,	William Tucker	0	16	8
							12 0 5
Herrings — 4 Boxes		a 2	1|	Thos. Outerbridge	0	8	4
1			1|4	Adam Brown	0	2	4
90			1|4	G. & Jas. Musson	6	0	0
							6 10 8
Women's Shoes 2 pair		a 13|4		Joseph Lightborn	1	6	8
1	,,	9|4		Do	0	9	4
7	,,	9 3-4	$	Lawrence N. Hollis	3	5	0
6	,,	7 1-2		Do	2	10	0
							7 11 0
							£92 18 4

CHARGES.

Advertising & Bellman		6	8
Commission 3 3-4 pr Cent.	3	9	8
			3 16 4
			£89 2 0

E. E. St. George's, 31st May, 1810—
For B. S. Hayward & Co.
JOS. J. HINSON.

[No. 7.]

Trimmingham and Astwood's Sales.

Sales at Anction of Sundry Goods—For account Messrs. Thomas Turzo and James Musson——viz.

1	Box Candles	38 lbs	a 2|1	Henry King	-	3 19	2
1	do	41 3-4 lbs	a 2|2	Henry Robinson		4 10	6
1	do	41 3-4 lbs	a ,,	Josiah Dickinson		4 10	6
1	do	41 3-4	lbs 2|1-2	Thos. Astwood		4 8	9
1	do	37 1-4	lbs 2|2	Wm. Nusum		4 0	9
1	do	42	lbs	Jas. Burrows		4 11	
1	do	41	lbs	Jaimcey Outerbridge		4 8	10

1	do	38 1-2 lbs			Wm. W. Morris	4	3	6
1	do	38 lbs			Jos. Webb	4	2	4
1	do	43 1-4 lbs			Rich'd Darrell	4	13	9
1	do	38 3-4 lbs	2	1	Jere. Hurd	4	0	9
1	do	37 3-4 lbs	2	2	Hezekiah Frith	4	1	10
1	do	40 1-2 lbs	2	2	Thos. Astwood	4	9	5
1	do	38 1-2 lbs	2	1	Outerbridge & Tucker	4	0	3
1	do	43 1-4 lbs			Josephus Darrell	4	10	8
2	do	Herrings	a 8	4	Arch'd Washington		16	8
1	do		8		Jas. Jones		8	
2	do				Jas. & Dan'l Smith		16	
2	do				Dan'l R. Prudden		16	
1	do				Arch'd Washington		8	
1	do		7	8	Jos. Godfrey		7	8
1	do				R. P. Whitney		7	8
2	do				T. & D. Trimingham		15	4
1	do				Wm. Nusum		7	8
1	do				Watson & Astwood		7	8
1	do				Jere. Hurst		7	8
1	do				B. Williams		7	8
1	do				Jaimcey Outerbridge		7	8
1	do				Jere. Burrows		7	8
2	do				S. J. Hutchings		15	4
2	do				Rich'd Darrell		15	4
2	Boxes Herrings		a 7	8	Jas. & Dav. Smith		15	4
1	do				Flor'e Cox		7	8
1	do				Sam'l A. Smith		7	8
1	do				Jas. Darrell, sen.		7	8
1	do				Jas. Darrell, Jun.		7	8
1	do				Henry Mauley		7	8
1	do				Capt. Chalward		7	8
1	do				Tho. Astwood		7	8
1	do				Ric'd Webb		7	8
1	do				J. H. Trimingham		7	8
1	do				John E. Masters		7	8
1	do		6	8	Tho's James		6	8
3	do				John Fowle	1	0	
2	do				Arch'd Washington		13	4
2	do				John J. Masters		13	4
3	do				R. W. Chalker		13	4
1	Barrel Beef				Wadson & Astwood	5	6	8
1	do				T. & D. Trimingham	5	6	8
1	Cheese 15 1-4 lbs		a 17		Harvy Robinson	1	1	7
6	do 106 1-2		17	3-4	Capt. Child	7	17	6
1	do 13		17	3-4	Ditto		18	5
10	do 166		16	3-4	Ditto	11	11	8
1	do 25 3-4				Outerbridge & Tucker	1	15	
1	keg butter 37 lbs		2		Jas. & David Smith	3	14	
1	Cheese 24 3-4lbs		16		Jos. Godfrey	1	13	
						£120	14	9

Charges

Commissions at 2 1-2 pr. Cent	3	0 4
Net proceeds	117	14 5
	120	14 9

Bermuda, 15th May, 1810.

Errors excepted

TRIMINGHAM & ASTWOOD

[No. 8.]

Musson's account of Sales.

Sales Continued.

Date	Purchasers	Kegs Butter	Weight Butter	Boxes Candles	Weight Candles	Tobacco	Gin	Weight Cheese	Price	Amount £	s	d
	Amount brought forward,									392	8	2
	Cash							13½	1/6	1	0	3
	"					3			3/		9	
	Tom Tynes							50¼	1/6	3	15	8
	Richard Fisher			1	45¾				1/10	4	3	10
	Richard Bartlett	1	37½						2/	3	15	
	Dittto			3	131½				1/10	12	1	1
	John Harris	1	39						2/	3	18	
	John J. Tucker			1	42 1-4				1/11	4	1	
	Giles & Jas. Musson	1	46						1/10	4	4	4
	Ditto							18	1/1	1	7	
										38	15	2
	John M. Penwill	2	95						1/11	9	2	1
	John Creighton	1	45						1/11	4	6	3
	G. & J. Musson	1	56						1/10	5	2	8
	A. Mc Coy	1	56½						1/10	5	3	7
	Benja. Tucker	1	35½						1/11	3	8	1
	Sam'l Frost	1	44½						1/10	4	1	7
	Mary Haywood	1	43¼						1/11	4	2	11
	William H. Newton							11¼	1/8		18	9
	Capt. Layton							11	,,		18	4
	Nathaniel Stoodly							9	,,		15	
										37	19	3
	Tudor Hinson			20	915½				1/10	83	18	5
	Henry Tucker							31	8/4	12	18	4
	Tom Tynes							30¾	,,	12	16	3
	Anthony Atwood			1	43½				1/11	4	3	4
	Sam'l Trott	1	37¾						1/10	3	9	2
	Tudor Hinson			1	35½				,,	3	5	1
	R. W. Chalker	50	2031						1/4	135	8	
	John Harris	2	75½						2/	7	11	
	G. & J. Musson			1	46½				1/10	4	5	3
	Dan'l Gibbon	1	40½						2/	4	1	
Aug. 2	John A. Wood			1	34½				2/	3	9	
										275	4	10
	Robert Tucker			1	40½				2/	4	1	
8	Paynton Musson	1	37						1/10	3	7	10
11	Isaac Cox			1	48¼				,,	4	8	5½
15	John Harris	1	32¼						,,	2	19	1½
										14	16	5
										£759	8	10

Sales Continued.

[No. 8.—Continued.]

Dr. *Mr. Nathaniel Stoodly in Account Current with Giles & Jas. Musson* *Cr.*

1810. Aug. 16.	To amount of Sundries as pr acct No. 1.	£300	16	3	By Sundries as pr acct No. 1.	£ 7	1	8
	So much paid you by Mr. R. W. Chalker	135	8	0	By so much to be received from Mr. Burnell		6	18
	Ditto by Capt. Thomas Tirzo	31	5	6	Balance due as pr acct Sales	* 1332	3	6
	Ditto for amount of acct Sales by him	430	6	11				
	Boat hire taking Butter to Hamilton		11	8				
	Paid Messrs. John & Sam'l Musson	26	2	6				
	Ditto Benjamin S. Hayward & Co.	62	12	4				
17	Half Bushel Oats		4	2				
	Cash paid Back Burch		13	4				
	Cash this day	205	10	8				
18	Cash pd you by Capt. Thomas Tirzo	146	0	6				
		£1339	18	10		£1339	18	10

Errors Excepted.

Burmuda, Aug. 18, 1810.

GILES & JAS. MUSSON.

[* See Stoodly's account current with Upham, next page.]—*Editor.*

[No. 9.]

Stoodly's account current with Upham.

DR. Timo. Upham, Esq. in Account Current with Nathaniel Stoodly. CR.

To amount bill disbursements	410	3	3	By Nett Amount Sales at Bermuda	* 1332	3	6
,, Mowry's bill for Tar & lumber	47	10	11	,, Sales at Eastport	42	2	3
,, Commission on £100-0-0 paid Mowry	2	10		,, Sales of Corn & Potatoes not accounted for in Sales	4	2	10
,, Potatoes bot of Capt. Crosby	11	6	8				
,, Sales of apples on Freight	23	5					
,, Sales of Shoes do	21	8	8				
,, Sales of Herrin do	22	10	10				
,, Bills on London	770						
,, Balance due you	69	13	3				
	£1378	8	7		£1378	8	7

[*It will be seen by Musson's account current with Stoodly that the same amount here credited by Stoodly to Upham, is there credited by Musson to Stoodly.] *Editor.*

[No. 10.]

Letter from Stoodly to Upham.

"Nov'r 14th 1810

"Dear Sir

In my last from Halifax I enclosed you bills for five hundred and fifty stg. Enclosed you have another number of the same bills. You may expect me in the course of a few days. If you will be so good as to inform those who think me worth their enquiry that I am in health you will confer an obligation on Sir

Your Obt. Servt

NATH'L STOODLY

"One of the same date enclosing a bill of Lading and a note to Isaack Waldron against George Clark—"

CASE OF THE CLARISSA:

Or smuggling into the United States.

We now expect to prove, said Mr. Cushman, that the plaintiff was concerned in the cargo of the schooner Clarissa, which vessel sailed from Portsmouth, about the 12th of January, 1812, for Eastport,—from thence she went to St. Andrews, and took in a cargo of dry goods, came into the port of York, in the then District of Maine—where the cargo was seized, condemned, and sold.

The first evidence offered, was a letter from Upham to Stoodly, dated Jan. 7, 1812. The letter was denied by plaintiff,—when Mr. Waldron was called, who swore that the letter and the signature were in the hand writing of Upham.

The letter was then read as follows :

"*Portsmouth, Jan.* 7, 1812.

"My Dear Stoodly—

"We have a vessel all ready to sail this afternoon or as soon as you can possibly get ready. We are ready to offer you good terms at any rate we will make them *satisfactory* to you —I wish you to come down with the *bearer* prepared to go— If you can do this you may detain him until *evening*. I wish you would come directly to my house and stay there.

Your friend and

Humble Servt.

TIMO. UPHAM."

George W. Plumer, sworn. Was clerk to Upham from March, 1811, to April, 1812. Carried a letter or bill from Upham to Stoodly, at Greenland, in the fall of 1811. Thinks he did not carry any letter in Jan. 1812. Does not know

whether Stoodly came to Portsmouth about that time or not. Thinks the memorandum dated Jan. 12, 1810, is not Upham's hand writing—thinks it was written by Adams, who was a clerk to Upham. Was 15 years and 2 months old when he went to live with Upham. Had no reason to suppose that Upham was concerned in the shipment of any goods from the fall of 1811 to the spring of 1812.

The next evidence offered was a letter signed jointly by Upham and Wm. Garland, dated, Jan. 8, 1811, but written, as is supposed, Jan. 8, 1812. The writing and the signature were denied by plaintiff. Isaac Waldron was again called, and swore that the body of the letter was written by Upham, and that it was signed by him : and that Garland's signature was signed by Garland, who was his (Waldron's) former partner.

The letter was read as follows :

Portsmouth, Jan. 8, 1811.

Capt. Nathaniel Stoodly—

Dear Sir—In the *adventure* you have undertaken for us we engage you *one tenth* part of the net profits and engage that it shall amount to one hundred and fifty dollars—your expences paid and for every day which you shall save say arrive here before the 8th of Feb. you shall receive two dollars per day over and above the foregoing. No compensation if the adventure does not succeed. No freight to be charged for any *adventure* of your own.

TIMO. UPHAM.
W. GARLAND.

Mr. Sullivan said he intended to shew that this agreement related to the Clarissa, which was seized and condemned at York.

Henry Tucker, sworn. About the 12th of Jan. 1812, was employed to go in the Clarissa, then at York, to Eastport. Went to Eastport and took in lumber. After hauling off, Stoodly came on board in the night—and soon after, commenced taking on board blankets and other articles from a boat. Stoodly asked me if I was acquainted up at St. Andrews. I told him I was. He said he wished to go there.—

Here Mr. Cutts objected to the evidence. After hearing argument on both sides, the Chief Justice ruled out Tucker's testimony, on the ground that Upham had not been connected with the transaction.

Another letter was then offered purporting to be signed by Upham, dated Jan. 8, 1812. The genuineness of this letter was also denied by plaiutiff. Mr. Waldron swore it is Upham's hand writing.

The letter was then read as follows :

Portsmouth Jan. 8 1812.

Capt. Nathl. Stoodly--

Dear Sir--If in the transaction of any business at the eastward, you should have occasion to draw on me ; your bills at ninety days sight shall be duly honored and paid.

I am Dear sir Respectfully

Your Obedient Servt.

TIMO. UPHAM.

[Having, as the defendants contended, connected Upham with Garland in the voyage of the Clarissa, by the foregoing letters, they offered the following papers, numbered from 1 to 6, to show that this vessel was seized and condemned at York, for a violation of the revenue laws of the United States ; which were all *ruled out by the Court*, on the ground that a connexion of the plaintiff with the transaction had not been sufficiently shown. Of this the public can judge as well as the Court.]

[No. 1.]

Letter in Garland's hand writing, without signature and without date.

Capt. Nathl. Stoodly,

Dear Sir—We think it best for you not to go to St. Andrews with the vessel.—After going ashore yourself at Eastport, you can determine whether it is best to stop there or go up to Robinstown—our idea is in favour of the latter place. We think it most advisable also that the goods should be put in after the vessel is loaded and at a concerted place, when you find wind and weather will do for sailing. It may be important that the goods should be so placed that they may be taken out immediately on arrival. Let them, if you find it practicable, be repacked in rum or fish hhds—that is the 13 bales—the 4 boxes may go as they are. If some of the bales should be very large and unmanageable it will be necesry at all events to repack them. Be particularly cautious to keep the knowledge of your doings from spies and observers. You will have in mind the magnitude of the property at risk, about 11000 in cargo and vessel all of which is at our risk.

[No. 2.]

Garland's Invoice and instructions to Stoodly.

Portsmouth 8 *January* 1812.

Capt. Nathl. Stoodly,

D'r Sir,

There are shipped on board the schooner Clarissa 20 bbls superfine Flour and 15 bbls best Baltimore rye flour which is very white and nice ; with the above flour you will purchase a cargo of boards and shingles at Eastport, or Robinstown,

as you may find best ; you are not confined to these places if you shall think some other better—wishing you a safe voyage.

We are your friends

WILLIAM GARLAND.

[No. 3.]

Jones' Bill at Eastport.

Capt. N. Stoodly to S. Jones *Dr.*

For Board 1 week & 4 days, .at 5 Dolls.	7 88
4 Bottles Wine 24| 2 Ditto Ess. Punch 12|	6 00
Rum, &c. to carry to St. Andrews 6| Segars 50 cts.	1 50
	$15 38

Eastport, 24 Jan. 1812.

Rec'd Pay't.

STEPHEN JONES.

[No. 4.]

Plea and evidence of the Seizure.

Maine ss. District Court, March Term, 1812.

United States Libellants vs. Nine barrels Goods, etc.

And now Solomon Brooks of York, consignee of said goods and agent of James Robinson of Philadelphia, the owner of the same, comes into court and claims the said goods, and that the same may be restored to him, because he says the same are not liable to forfeiture by reason of the violation of any law of the United States, and thereof puts himself on trial by his attorney.

J. LYMAN.

And the Libellants likewise.

SILAS LEE, D. Atty.

A true copy. Attest, J. MUSSEY, Clerk.

Timothy Baker, of York, of lawful age, testifies and says, that about the 30th of January, 1812, he saw a Schooner coming up the York river, uncommonly still and silently, between nine and ten o'clock in the evening. She came to the widow Emerson wharf, and about midnight the people on board made preparation and actually removed some barrels from the hold of the vessel, upon the deck—there were two boats by the side of the vessel, and one person in one of the boats, and by the appearances the barrels I supposed were intended to be put into the boats.—Upon this discovery, Mr. Collector McIntire and myself went on board the vessel and made inquiry what they were doing, on which the persons on board put out the lights—and upon inquiry for the master, Leach, we were told he was not on board. We tarried till he morning, and then found that Leach the master was there —when he was asked for a manifest of the Cargo on board, epeatedly. When he was first asked, he said he had none

made out, but would make one out. But neglected to do it, and left the vessel—after which, we examined the barrels that was taken on deck and found them filled with Flannels and Baizes. We found about ten pair of blankets packed together and some loose ones open. We found a number of iron bound puncheons, which had the appearance of such as had been used for rum. In the hold, there were 17 in No. Upon opening their several heads, they were found to contain Goods of foreign growth and manufacture, principally woollen—some silk and worsted, and some cotton and worsted—these, after being ascertained to be of foreign goods, were taken out of the hold and taken to my store. In addition the Hds. before named, there was nine barrels, four boxes, three of which was calico and one copperplate,—eleven pieces of loose Baize. Pretty early in the morning, all the people belonging to the vessel went away. The name of the vessel was Clarisa, of York, and a schooner of about 65 tons.

TIMOTHY BAKER.

Q. by Col. McIntire. Were there a number of people on deck and actually employed in hoisting barrels before we went on board ?

A. There were, and as soon as we went on board they ceased and went below into the steerage.

Q. When McIntire, the Col., inquired of Leach what he had on board, what reply did he make ?

A. Nothing but lumber.

Q. Was there any attempt to cut the vessel adrift ?

A. I saw a man with a Jack knife open, and I supposed he would have done it, as he said he would go round to Portsmouth that night.

District of Maine.—Then Capt. Timothy Baker was duly sworn to the deposition, and interrogatories and answers, found at the request of Mr. McIntire.

Before me, DAVID SEWALL, { *Judge of the Dist. Court of Maine Dist.*

Isaac Lyman was present at the taking this deposition, on behalf of the Consignee of the Claimants.

I, Samuel Young the 3d, of York, do testify and say, that about the 30th of Jan. 1312, about the middle of the night, by Mr. Coll. McIntire's desire, I went to the Schooner Clarissa, of York, to assist in securing some goods, of foreign growth and manufacture. There were 17 Hhds all iron bound, a number of Barrels, 4 Boxes, a number of Blankets, and some loose ones—all of which were taken away from the vessel by Coll. McIntire's orders. I saw Wm. Leach, the supposed Master, there—I saw a person open a store door of Mrs. Emerson, at the wharf where the Schooner was—I saw a person with a knife in his hand, who I concluded was about to

cut the fast of the Schooner from the wharf; and some conversation was had about going to Portsmouth with her.

SAMUEL YOUNG, the 3d.

We, Edward Baker, and Rufus Baker, of York, about half after 12 o'clock at night, in Jan. 1812, were appointed a guard on board the Schooner Clarissa of York, in which were found a number of Hhds and Barrels, and packages of goods, which were seized and taken away by Mr. McIntire, the Collector. The Hhds were iron bound, and had the appearance of Rum Hhds. We saw them opened, and they contained Woollen Goods of various kinds.

RUFUS BAKER,
EDWARD BAKER.

District of Maine, Feb. 21, 1812.—Then Samuel Young the 3d, Rufus Baker and Edward Baker, after due caution and examination, made solemn oaths to the depositions by them severally subscribed, taken at the request of Alexander McIntire.

Before me, DAVID SEWALL, } *Judge of the Dist. Court of Maine District.*

Isaac Lyman was present at the Examination, on behalf of the Consignee of the Claimants.

District Court, March Term, 1812.

Handed in by the Judge—H. SEWALL, Cl'k.

A true copy—Attest—
J. MUSSEY, Clerk.

[No. 5.]

Libel and decree.

DISTRICT OF MAINE. At a District Court of the United States begun and held at Wiscasset within and for the District of Maine, on the first Tuesday of March, A. D. 1812, before David Sewall, Esq. judge of said Court.

U. States libts. vs. 9 *Barrels of Goods, &c. &c.*

For that the U. States aforesaid, by Silas Lee their attorney, in and for the District aforesaid, libel, propound and give the said judge to understand and be informed, that at York, within the district of York and within the District of Maine, on the thirty first day of January last past, sundry goods and merchandise of foreign growth and manufacture, viz. nine barrels of Bombazette, baizes and Swans' down vesting, ten pieces of Baize, ten pair of rose Blankets, eight quarters wide in a bundle, six pair of rose blankets without a wrapper, four hogsheads of flannels, two hogsheads of broadcloths, coatings and vestings, two hogsheads of forest cloths and vestings of various kinds, two hogsheads of baize and forest cloth, one hogshead of coating and cassimere, four hogsheads

of baizes, one hogshead of baize and flannel, one hogshead of forest cloth and coarse broadcloth, one box of copperplate furniture, marked T 26, one box of cotton calicos, marked T 25, one box of cotton calicos, marked T 12, and one box of cotton calicos, marked T 8, were found on board the Schooner Clarissa, of the burthen of about sixty eight tons, whereof William Leach was master,* the same schooner being then and there on waters navigable from the sea in vessels of ten or more tuns burthen, and being so found, the goods and merchandise aforesaid were then and there seized on board the vessel aforesaid, by Alexander Mc Intire, Esq. Collector of the district of York, aforesaid, and are now held for trial (for that on a day prior to the day of seizure aforesaid, viz. on the twentieth day of January aforesaid, the goods and merchandise aforesaid were brought in some vessel or vessels unknown to said attorney from a foreign port and place, so unknown und unladen and delivered from such unknown vesssl or vessels within said States, viz. within the district of Maine and within four leagues of the coasts of the same, and within one of the collection districts within said District of Maine, viz. within the district of Passamaquoddy, without a permit for such unlading and delivery from such unknown vessel or vessels, from the collector of the district within which such unlading took place, viz. of the district of Passamaquoddy aforesaid, he being the proper officer for granting the same—and there afterwards, viz. on the same day, the same goods and merchandise aforesaid, were put and received on board the Schooner aforesaid, and brought in said Schooner into the district of York aforesaid. Whereby and by force of the laws and statutes of the U. States aforesaid, the goods and merchandise aforesaid became forfeited to said States, and being so forfeited were seized as aforesaid. And the said libellants by their attorney, further give the said judge to understand and be informed that on a day prior to the day and time aforesaid, viz. on the eleventh day of January, aforesaid, at York aforesaid, the schooner Clarissa aforesaid being a vessel of the United States, duly enrolled and licensed for carrying on the coasting trade according to the statute in this behalf prescribed, and said schooner being also owned by citizens of said States did proceed from said York on a foreign voyage, unknown to said attorney, without first giving up her enrolments and license to the collector of the district of York aforesaid, which district of York comprehends the part from which the said schooner was about to proceed on such foreign voyage and without being duly registered by the collector of the district of York aforesaid, having performed her said intended foreign voyage, viz. on

[*Leach was a common hand on board, and *nominally* the master. Stoodly had the whole direction of the vessel, as would have appeared, had Tucker been allowed to testify.] Ed.

the thirtieth day of January aforesaid, returned into the district of York aforesaid, having on board sundry goods and merchandise other than those before mentioned, but like thereto in quantity, quality and value, and of like growth and manufacture, which goods and merchandise last mentioned, were then and there, viz. on the said thirtieth day of January aforesaid, at York, aforesaid, imported in said schooner into said States, viz. into the port of York aforesaid, contrary to the laws and statutes of the U. States aforesaid. Whereby and by force of said laws and statutes, the goods and merchandise last aforesaid, as well as the schooner aforesaid became forfeited to said States, and being so forfeited, the same goods and merchandise last mentioned, were also thereafterwards, viz. on the same day last aforesaid, being found on board said schooner at York aforesaid, on waters navigable from the sea in vessels of ten or more tuns burthen, were then and there seized by the collector of York aforesaid and are now held for trial and adjudication. Wherefore the said attorney moves that due process may be had, and that the several goods and merchandise aforesaid may be decreed forfeited and disposed of according to law.) And the libellants, by their attorney aforesaid, further give the said judge to understand and be informed that at York aforesaid, on the thirtieth day of January aforesaid, sundry goods and merchandise other than the goods beforementioned, but like thereto in quantity, quality and value, and of like growth and manufacture, were brought into the U. States aforesaid, viz. into the port and district of York aforesaid, in a certain vessel called the Clarissa of York, of the burthen of about sixty eight tons, whereof William Leach was master, and George Simpson and William Simpson citizens of said States the owners, from a foreign port and place unknown to said attorney, without having a manifest or manifests on board, agreeable to the directions of the laws and statutes of said States in such cases provided, including, describing and specifying or mentioning in any manner whatever, any of the goods and merchandise last mentioned, found on board, or the name of the vessel, denomination or burthen; name of the master or owners, her port of destination or place from whence she came, or where bound; the same goods and merchandise last mentioned, so found on board, being the property of and belonging to said master, and to him consigned. Whereby and by force of the laws and statutes in such cases made and provided, the goods and merchandise last mentioned became forfeited to said States, and liable to seizure; and being so liable, afterwards, viz. on the same day, the same were seized by the collector aforesaid on the waters navigable from the sea as aforesaid, and are now held for trial. Wherefore the said attorney moves that due process may be had, and that the goods and merchandise last mentioned may also

be decreed, forfeited and disposed of according to law. This libel was filed the 8th day of February last, and notice of the seizure and libelling as aforesaid duly made known as the law directs, and the first Tuesday of March instant, at Wiscasset, assigned for hearing and trial thereof.

And now Solomon Brooks of York, consignee of said goods and agent of James Robinson of Philadelphia,* owner of the same, comes into Court by Isaac Lyman his attorney, and prays that the same may be restored to him, because he says the same are not liable to forfeiture by reason of the violation of any law of the U. States, and thereof puts himself on trial. and the libellants likewise by Silas Lee their attorney.

Whereupon after a full hearing, it appears to the Court that the material facts alleged in the first and last counts of the libel are satisfactorily proved.

It is therefore considered and decreed by the said Judge, that the several goods and merchandise aforesaid are by law forfeited, that the same be sold at public auction at York, that the moneys arising from the said sale be appropriated according to law, and that a precept issue to the marshall or his deputy to carry this decree into execution. And it is further ordered and decreed that the said Solomon Brooks pay twenty five dollars, being part of the costs taxed on the prosecution.

In testimony whereof the said Judge hath hereunto set his hand and caused the seal of said Court to be affixed, the tenth day of March, A. D. eighteen hundred and twelve.

DAVID SEWALL.

A true copy—Attest, J. MUSSEY, *Clerk.*

United States of America—Maine District, ss.

In testimony that the foregoing is a true copy as of record, in the case of the United States Libellants, vs. Nine Barrels of Goods, &c. I have hereunto set (*L. S.*) my hand and affixed the Seal of the District Court of the United States, for said District, this twenty second day of September, in the year of our Lord one thousand eight hundred and thirty.

JOHN MUSSEY, DISTRICT CLERK.

[No. 6.]

PETITION OF THE SIMPSONS.

Maine, ss. To the Hon. David Sewall, Esquire, Judge of the District Court of the United States for the District of Maine.

George Simpson and William Simpson, both of York in

[*Robinson was the *nominal* owner merely—and his name was put forward because the *real owners* did not choose to appear in Court to defend the goods.] ED.

said District yeoman, humbly represent to your honor, that some months since, being the owners of the Schooner Clarissa of said York, they chartered her then sailing under a coasting license, to a certain person belonging to said York supposing and believing that he was only going on a lawful coasting voyage eastward for a load of lumber—but he employed said Schooner unlawfully and contrary to law imported in said Schooner into said York, certain English goods, which to a large amount have been seized libelled and condemned in your Honor's Court ; and the said Schooner has also been seized and libelled in said Court as being liable to forfeiture. Your Petitioners are perfectly innocent and never entertained an idea of violating the laws, nor had they any reason to suppose that the said Schooner was intended to be employed in any illicit trade ; and as your petitioners are in danger of loosing the vessel entirely without recompense from the person who chartered her in case she should be condemned, they humbly pray your honor, that after a summary examination a statement of their case may be made to the Secretary of the Treasury, than the forfeiture may be remitted as the same was not incurred on their part by any wilful negligence or intention of fraud.

(Signed) T. MELLEN Att'y to Petitioners.

I hereby certify that the foregoing is a true copy of the Petition of George and Wm. Simpson, compared with the original on file in this office.

(Signed) H. SEWALL, Clk.

I, Samuel D. Ingham, Secretary of the Treasury, do hereby certify that the anexed writing is a true copy from the Record of this department.

Given under my hand and seal of office in the City of
(L.S.) Washington this sixth day of September in the year of our Lord one thousand eight hundred and thirty and the fifty fifth of the Independance of the United States.

S. D. INGHAM, Secretary of the Treasury.

EVIDENCE RELATING TO THE BOX OF PAPERS.

John H. Sherburne.—The first I ever heard of the papers was from Stoodly himself, when I carried him out of the State away from his creditors. He said he pitied poor Upham—[*Here he was stopped by Mason.*] After Stoodly's death, his wife came to my house with her family. I supported them several months, when a house was hired for her in Pitt Street, on charity, Upham and others subscribing for the purpose. On speaking to her about the papers, she offered to let me

take them. I went with my servant to her house, when she delivered him the box which he brought to my house; and got a hammer and opened it in Mrs. Stoodly's presence. She took out a pocket-book, and also some letters which she burnt. After she had taken out what she wanted, she said the box was mine if I wanted it. The three invoices and several other papers, which I gave to Col. Decatur to carry to Washington, came from the box.

Stephen Crummit—Lived at Dea. Bailey's, in Greenland, when Stoodly died there. Soon after Stoodly's death, John H. Sherburne came there and got a box, which he said contained papers, and which he took away. He said the box exhibited in Court was the same.

Adelaide Stoodly—Is the widow of the late Capt. Nath'l Stoodly. Never delivered any papers to Sherburne, nor any body for him—never walked in the street with Sherburne, and never saw a box of papers opened at Sherburne's house. Never saw the box before. Has all the papers in her possession now, which she ever had. Had the misfortune to be sick at Sherburne's house, and went away before she was able to walk. Her husband died on the 14th of June, 1827.

Ann Stoodly—daughter of Mrs. Adelaide Stoodly. Never saw the box before. All her father's papers at home; kept any where most convenient—sometimes in a desk, sometimes on the floor—left them on the floor when she left home.

Mrs. Mary Ann Sherburne.—In October, 1828, Mr. Sherburne, and Elijah our servant, and Mrs. Stoodly, went from our house together. The boy brought the box into our parlor, and opened it in Mrs. Stoodly's presence. The papers were taken out of the box and we examined them—some were burnt as of no consequence, and others returned to the box again. Mrs. Stoodly took from the box an old pocket-book, and some papers which she burnt. The box was brought, by Mrs. Stoodly's request, from Greenland to our house, by Mr. Sherburne:—I sent it to Mrs. Stoodly's, and it was brought back by the servant boy, in her and my husband's company, and there opened. It had never been opened at our house before.

Elijah S. Hall.—For his testimony, see page 17.

John P. Decatur.—Saw Sherburne take the papers from a box containing many papers belonging to Stoodly, sometime in 1829, which papers he carried to Washington, to give the President good cause to remove Upham.

EVIDENCE RELATING TO THE GENUINENESS OF THE PAPERS.

[There were four papers admitted by the Court as evidence in the case, the genuineness of which was denied by the Plaintiff, viz.—the Memorandum in Upham's hand writing, without signature, directing the purchase of silk, "if it is not scarce at Halifax," dated "Portsmouth, Jan. 12, 1810"—the letter from Upham to Stoodly, dated "Portsmouth, Jan. 7, 1810"—the letter to Stoodly, signed jointly by Upham and Garland, dated "Portsmouth, Jan. 8, 1811," but written, Jan. 8, 1812—and Upham's letter of credit to Stoodly, dated "Portsmouth, Jan. 8, 1812." It was also contended by Plaintiff's counsel, that the filing on these letters was not in Stoodly's hand writing.]

Isaac Waldron, Esq. President of the Portsmouth Bank. Swore that the memorandum is Upham's hand writing: that the joint letter of Upham and Garland was written by Upham and signed by him, and that Garland's signature is Garland's hand writing; that the other two letters were written and signed by Upham, as they purport to be. Has been acquainted with Upham since 1805 or 1806, and has been acquainted with his hand writing about as long. Garland went to school to him, and in 1800, they were partners in trade: that there was no person's hand writing he could testify to with greater certainty.

John Rice, a Cashier. Has known Plaintiff fifteen or twenty years: intimately acquainted with his writing. Did not write any of the papers. His orthography generally better: the letter of Jan. 8, 1812, a clumsy imitation: Plaintiff's hand has altered much, but retains its peculiar character: not acquainted with Garland's hand writing.

Wm. Haven, a Cashier. Particularly acquainted with Plaintiff's *signature*. Thinks none of the writing Upham's: not examined as to Garland's hand. *Thinks the order on Waldron for a barrel of new rum* (about which there was no dispute) *was not signed by Upham:* the *signature* only being shewn him.

Samuel Lord, a Cashier. Has been acquainted with Upham twenty years. Thinks none of the four papers genuine.

Alexander Ladd. Acquainted with Plaintiff twenty years: not acquainted with Garland's writing. Thinks none of the four papers genuine, although there was some resemblance.

Robert Neal. Acquainted with Plaintiff eighteen or twenty years. Thinks none of the four papers genuine: not examined as to Garland's writing.

John N. Sherburne. Acquainted with Plaintiff's writing

since he was appointed Collector : thinks none of the four letters written or signed by him.

John F. Parrott. Has had a general knowledge of plaintiff's hand writing for eighteen years. Don't think any of the four letters genuine.

Edmund Roberts. Acquainted with Plaintiff's writing since 1806. Thinks none of the letters genuine, although there is some resemblance to Plaintiff's writing.

Andrew W. Bell. Not particularly acquainted with Plaintiff's writing: has seen him write from 1816 to 1824. None of the letters genuine, nor is the filing in Stoodly's hand.

Samuel Larkin. None of the four letters genuine.

James Ladd. Acquainted twenty-four years with Plaintiff's writing. None of the letters, in his opinion, Upham's.

Charles Cushing. Acquainted since 1805: should say that none of the letters were written by Upham.

John Ball. Acquainted since Upham was in the Custom House. Thinks none of the papers written by him, and that the filings are not Stoodly's hand writing.

Thomas G. Berry. Was formerly Garland's Clerk—thinks Garland did not sign the joint letter: not examined as to Upham's writing.

John P. Decatur. Acquainted with Stoodly in 1824. Both attached to the navy yard, and boarded together. Believes the filing on the papers were in Stoodly's hand writing.

John C. Davis. Acquainted with Stoodly since 1818—both attached to navy yard. Thinks the filing in Stoodly's hand writing, all but the third invoice.

John H. Sherburne. Acquainted with Stoodly since 1818. Thinks the filing his hand writing.

Adelaide Stoodly—[Glancing at the papers through a black veil.] None of the filing written by her husband. [Mr. Cushman showed her a paper of Stoodly's writing not in the case—and she said her husband did not write that.]

Ann Stoodly—[Giving a slight glance at the papers through a veil, condemned them all as not her father's, without examining them.]

William B. Parker. Acquainted with Upham's hand writing since 1814: was a Clerk in the Bank, and saw much of his writing. Thinks the letters were written by him. Familiar with Garland's writing since 1803 or 1804. Has not the least doubt that Garland's name to the joint letter was written by Garland.

EVIDENCE AS TO THE TWO FIRST COUNTS:

Or paying the Money of the Government to support the Signs of the Times.

Hampden Cutts, sworn. Was editor of the *Signs of the Times*: was employed by Upham to publish an advertisement for proposals to build a Light House on Whale's Back, for which he received, according to the best of his recollection, $17,50, which was the usual price. Believes Plaintiff was a subscriber to his paper from its commencement.

[The following evidence, from the Treasury Department, was not admitted.]

Certificate from Hon. S. D. Ingham.

Timothy Upham, Esq. Collector of the Customs for the District of New-Hampshire—

To Hampden Cutts Dr.

1828, June, 24. To Adv. in the Times, proposals for Light House on Whale's Back, - - $17,50

1828, Aug. 27. Received of Timothy Upham, Collector of the Customs and Superintendent of Light Houses in the State of New-Hampshire, seventeen dollars and fifty cents in full of the above account.

Signed duplicates,

HAMPDEN CUTTS.

Treasury Department:

Register's Office, 24 *February*, 1830.

I hereby certify, that the foregoing is a true copy of the original on file in this office, with the accounts of Timothy Upham, late Collector of the Customs for the District of Portsmouth in the State of New-Hampshire: and that the said Timothy Upham received credit for the same on adjustment of his accounts as Agent for Light Houses for the 2d qr. 1828.

MICH'L NOURSE, Acting Reg'r.

Be it Remembered, that Michael Nourse, Esquire, who certified the foregoing transcript, is now, and was at the time of doing so, acting Register of the Treasury of the United States, and that faith and credit are due to his official attestations.

In testimony whereof, I, Samuel D. Ingham, Secretary of the Treasury of the United States, have hereunto subscribed my name, [L.S.] and caused to be affixed the Seal of this Department, at the City of Washington, this 24th day of February, in the year of our Lord 1830.

S. D. INGHAM, Secretary of the Treasury.

MR. SULLIVAN'S ARGUMENT.

May it please your Honors, and you Gentlemen of the Jury—

This cause is highly important to the parties. Their reputation is concerned in the event. If it would be injurious to the character of the plaintiff to be considered as a smuggler, or as having misapplied the public money while in the office of Collector; it would be equally injurious to that of the defendants to be regarded as wicked and unprincipled libellers. The defendants have published nothing respecting the plaintiff which they did not, at the time of the publication, believe, and which they do not now believe to be true. They were actuated by no malicious motive. They were influenced by no consideration but that of discharging a duty which they owed to the public. Give them only a patient hearing, and they are confident they can satisfy you that this action is unfounded.

The plaintiff has failed to prove a circumstance, which is absoltuely essential to the maintenance of his action, so far as respects the first count in his declaration. All the words in this count, which any one will assert to be libellous, were published of the plaintiff, not in his private character, but in his official character of collector of the customs for the district of Portsmouth. The plaintiff alleges that the defendants published a false, scandalous, and malicious libel of and concerning him, and of and concerning his official conduct as collector of the customs. He then recites the words and explains them. The words of the alleged libel and the explanation are as follows, viz. "You paid the money of the government (meaning the money of the government of the United States received by the plaintiff in his official capacity as collector of the customs as aforesaid) to support that prostituted press, (meaning the aforesaid newspaper called 'Signs of the Times.')—Your pen and your hand (meaning the pen and the hand of the said plaintiff) were conspicious in producing some of the vilest articles for that press, (meaning communications composed by the plaintiff to be printed and published in said newspaper, called 'Signs of the Times.')"

Whatever was published by the defendants, respecting the payment of the money of the government in support of the paper called "Signs of the Times," was published in relation to the plaintiff's official conduct, as collector of the customs, and it is so stated by the plaintiff in his declaration.

In order to maintain this action, it is necessary for the plaintiff to prove to you that he was collector of the customs at the very time when the words were published; it is not sufficient to prove that he had been collector previous to that time.

If defamatory words are published of an attorney or physi-

cian, affecting the one or the other, in his professional character ; in an action for damages, the plaintiff must prove that he was an attorney or physician at the time when the words were published.

The law declares expressly, that "if the publication affects the plaintiff in a particular character, it must be proved that the character belonged to him, or that he filled the office or situation at the time of the publication complained of." 2 Starkie, 859.

The reason on which the law is founded is apparent. If any thing libellous is published respecting a man, while in office, importing that he wants either the talents or the integrity necessary for the proper discharge of the duties of that office, his interest is deeply affected. He is liable to be removed from his office and to be disgraced without an opportunity of being heard. But this evil cannot arise, if words are published respecting the conduct of a man in a particular office which he once held, but which he had ceased to hold at the time when the words were published.

It has not been proved, nor is it pretended, that the plaintiff was collector of the customs at the time of the publication of the words. Indeed the plaintiff's declaration shews that he was not. The declaration states that the plaintiff was appointed collector on the 16th of May, 1816, and that he held the office until the 14th of April, 1829. The words complained of were not published until nearly twelve months after the plaintiff had ceased to be collector.

As the words respecting the payment of the money of the government, relate to the official conduct of the plaintiff as collector of the customs ; and as he was not collector at the time of the publication of them ; it is clear, that, so far as respects the publishing of these words, the action is not maintained. But if the plaintiff had actually sustained the office of collector when these words were published, this action could not be supported, because the words import nothing libellous. The words of the supposed libel are these—"You paid the money of the government to support that prostituted press." How much of the money of the government is the plaintiff charged with having paid for the object above mentioned?—Was it twenty dollars—or ten—or only one dollar? The publication does not state.

The plaintiff, in giving a meaning to these words, does not assert that they charged him with any fraud or corruption. He says the sense conveyed by the words "You paid the money of the government," is this, that the plaintiff paid the money of the government of the United States, received by him in his official capacity as collector of the customs, to support the paper called "Signs of the Times."

The libel, if the words can possibly be constructed to import any thing libellous, must consist in charging the plaintiff with taking and paying away the money of the government without authority, and not in designating the object to which the money, when thus taken, was applied It makes no difference whether it was applied to the support of a newspaper ; to the payment of a debt ; or to the aid of some charitable institution.

There probably never has been a collector in this state, or in any other, who has not, at times, taken some of the public money and paid it away ; and this has been done without committing , or intending to commit, the least injury or injustice to the public.

Suppose a man should call on a collector at the custom-house to pay him a debt of fifty or one hundred dollars ; the collector should not have with him any money of his own, and should take some of the public money and pay the demand—would this conduct be fraudulent or corrupt,—or would it be a breach of official duty in the collector ? The public could sustain no injnry in consequence of it, because every collector gives a bond to account for all the money he receives belonging to the government. The plaintiff gave a bond, as every collector must, to account for all the public money received by him; and without doubt, he has accounted for all the money he received while he was in office. The defendants have never denied this; they have not alleged, in the supposed libel, that the plaintiff paid away any money belonging to the government, for which he had refused or neglected to render an account. But the plaintiff did, in fact, pay money belonging to the government, to support the newspaper called the Signs of the Times.

A person may aid in the support of a newspaper in various ways. He may contribute to its support by giving money to the printer, if he has the disposition; by becoming a subscriber; or by having advertisements inserted in it. Some papers, in large commercial cities, receive their principal support from the advertisements inserted in them.

The fact that the plaintiff paid the money of the government to support the Signs of the Times, has been proved by the testimony of *Hampden Cutts*, Esquire, late editor of that paper. He testifies that the laws of the United States were not published in his paper; that the plaintiff, while he was collector, had a long advertisement respecting the building of a light-house, inserted in the Signs of the Times; and that, for the insertion of the advertisement, the plaintiff paid him about seventeen dollars. A part of the defendants' evidence, relating to the point under consideration, has been rejected by

the court; but there is still enough to shew that the money paid by the plaintiff to Mr. Cutts, belonged to the government. The very circumstance, that the advertisement for the publication of which the plaintiff paid the witness, related to the building of a light-house, proves that the money belonged to the government. Did the plaintiff pay his own money, and give it to the public? No one can believe it. The course of this business is plain; the plaintiff charged to the government the sum he paid to Mr. Cutts, and the government has allowed it to him.

As to what is said in the first count, respecting the plaintiff's writing for the newspaper called Signs of the Times, it is manifestly not libellous. The words are, "your pen and your hand were conspicuous in producing some of the vilest articles for that press."

In order to give the publication of these words even the semblance of a libel, it should be proved that vile pieces were published in that paper. If an editor should publish, respecting an individual, that he wrote some of the vilest articles in a particular paper, which paper had been uniformly employed in teaching and enforcing the purest principles of morality and religion, such a publication could never be regarded as a libel. No attempt has been made, to shew that the Signs of the Times contained pieces that were vile, or in any degree improper. If the Signs of the Times contained vile articles, why did the plaintiff give support to it by the insertion of even a single advertisement?

To write respecting a newspaper, that it is vile and scurrillous, is not libellous. 2 Espin. 101.

Much less is it libellous, to publish that an individual has written vile or scurrillous pieces for a paper.

As to the second count in the plaintiff's declaration, I would remark, that it contains substantially the same charge as the first, in relation to the payment of the public money to support the Signs of the Times. The same answer may be given to it that has been already given in considering the first count. There is, however, a circumstance, applying to the charge in the second count, which does not apply to that in the first. It is this: the defendants merely published by request, an address by a convention in the county of Merrimack to the electors, on the subject of the election that was about to take place. The words mentioned in the second count are contained in that address, and selected from it. This circumstance repels every idea of malice in the defendants; and if the words were published without malice, this action cannot be supported.

We come now to a consideration of the third and most important count in the plaintiff's declaration. In this, the plaintiff is charged with having been engaged with some of the

leading federalists in Portsmouth, during the embargo and non-intercourse laws, that preceded the late war, in smuggling goods to and from the British Provinces.

The defendants say that this charge is true ; that the plaintiff was actually engaged in the business of smuggling goods as they have asserted.

In order to prove this, I will consider, in the first place, the voyage performed by the sloop Eliza, of which George Huntress was master, in the year 1810.

Captain *Huntress* testifies that on the 18th of Janury, 1810, he sailed, as master of the sloop Eliza, owned by Captain Benning Morrill, from Portsmouth for Eastport. That the plaintiff shipped on board said vessel about 20 hogsheads and 10 or 12 tierces of merchandize,as near as he can remember, and also a few barrels of beef. This property was consigned to Captain Nathaniel Stoodly. These hogsheads were packed by John Walton ; some of them in the presence of the witness. They contained candles, cheese, and tobacco, in the middle, and corn at each end. The plaintiff was sometimes present, when Walton was thus packing the hogsheads. Each of the tierces contained a barrel of gin in the middle and corn at each end.

The witness says he proceeded to Eastport, and remained there with the cargo on board more than a fortneight.

While his vessel was at Eastport, Stoodly offered him five hundred dollars, if he would go to the British dominions ; this offer was made at several times. He refused to go, because Capt. Morrill, the owner of the Eliza, had told him not to violate the laws. After he had refused Stoodly, Capt. Mowry, a merchant living at Eastport, came to him, in company with Stoodly, and they both endeavored to persuade him to go to the British side. Mowry purchased some flour of him ; but he purchased no part of the cargo belonging to the plaintiff and Stoodly.

This witness further testifies that Stoodly went over to the British side, several times, to procure a British vessel, as he said, to carry the property to Halifax. After his vessel had been more than a fortnight at Eastport, he was directed by Stoodly to land the goods shipped by the plaintiff, in a remote place called Prince's cove. The very night after the goods were landed they were put on board an English vessel, and carried over to the British side. The witness assisted in putting the goods on board the English vessel, which took them until one or two o'clock in the morning. Stoodly put his baggage into a boat, and went on board the English vessel, that had taken the goods and was then on the British side of the river. She remained in sight two or three days.

This witness also testifies, that the hogsheads containing candles, cheese, and tobacco, in the middle, were all marked *corn*;

and that all the tierces, each one of which contained a barrel of gin in the middle, were marked *corn*.

It is apparent from the evidence that the goods, shipped on board the Eliza, were the joint property of the plaintiff and Stoodly. The invoices were made out in their joint names, and the plaintiff has admitted that they were all signed by himself. These invoices would never have been made out in the names of the plaintiff and Stoodly, if the plaintiff had not been a part owner of the property. Why should the invoices have been made out in the name of the plaintiff, rather than in the name of any other individual in the community, if he had had no interest in the property ?

It has been suggestsd during the trial, that the plaintiff purchased the property for Stoodly ; that he hired the vessel for him; and that the property was assigned by Stoodly to the plaintiff to secure him for the money which he had advanced.

If the whole, or any part of the property, was assigned by Stoodly to the plaintiff, in order to indemnify him for any advances he had made on Stoodly's account, why is not the instrument, by which the assignment was made, produced before you? Here is no proof of any sort that the plaintiff purchased this property for Stoodly ; nor is there the least evidence that Stoodly assigned the property, or any part of it, to secure the payment of any debt or any claim that the plaintiff had against him.

If it were true, that the whole, or any part of the property, was assigned by Stoodly to the plaintiff, to secure him for advances he had made, it would not evail the plaintiff in his suit; still he was jointly interested in the property with Stoodly to the amount of the sums advanced.

But mere suggestions, whether made by the one party or the other, are not to be regarded as evidence. There is no more proof that the plaintiff made advances for Stoodly, than that Stoodly made advances for him.

In deciding this cause you are to consider the evidence produced on the trial and that only ; and from the evidence your opinion of its merits must be formed. From the strong facts that the invoices were in the joint names of the plaintiff and Stoodly ; and that these invoices were signed by the plaintiff himself, you must be satisfied beyond a doubt, that the goods shipped on board the sloop Eliza, were their joint property, and that the voyage was undertaken for their joint benefit.

From the evidence it is clear, that the goods, put on board the Eliza, were designed for a foreign market—they were to be carried to Halifax : and this was well known to the plaintiff. Candles, cheese, and tobacco were put into the middle of the hogsheads, and corn at each end of them. A barrel of gin was placed in the middle of each of the tierces, and corn at each end. The hogsheads and tierceswere all marked *corn*.

Why were these hogsheads and tierces thus *falsely* marked? The reason is manifest. Corn could be legally carried into the British provinces; while gin, candles, cheese and tobacco, were excluded. In order to prosecute the voyage successfully, it became necessary to practice deception, and to induce the British officers of the customs to believe, that the hogsheads and tierces contained corn and nothing else. To effect this purpose they were all marked *corn*.

Did not the plaintiff know that the hogsheads and tierces were all packed in the manner described by Capt. Huntress? It is impossible that he should have been ignorant of it. Huntress says he sometimes saw the plaintiff with John Walton, while he was packing the hogsheads. Could Walton have had any motive for packing the hogsheads as he did, if he had not been so ordered? Would he have dared to pack them in the manner described, without the directions of the plaintiff, and that too, even in the plaintiff's presence? Would the plaintiff have seen him do this and have remained silent, if he had not directed it to be done? No reflecting man can believe it.

It may be said that Stoodly directed Walton as to the manner of packing the hogsheads and tierces, and that the plaintiff never gave any directions on the subject.

This assertion is easily made, and, as Walton and Stoodly are both dead, the defendants cannot produce their testimony to show its falsity. But it ought not to be believed without proof.

There is positive evidence that the plaintiff was present, while Walton was packing some of these hogsheads; he, therefore, knew the manner in which they were packed. If Stoodly gave orders for the packing of the hogsheads and the plaintiff disapproved of such a procedure, why did he not put an end to it? This was certainly in his power. There is not only no evidence that Stoodly gave orders to Walton as to the packing of the hogsheads, but there is none that he was present, at any time, while Walton was packing them. Yet as the plaintiff and Stoodly were the joint owners of the property, there can be no doubt, that both of them knew the manner in which the hogsheads and tierces were packed.

After the exhibition of the strong proofs that have been mentioned, do you still doubt whether the plaintiff knew the manner in which all the hogsheads and all the tierces were packed? If you do, look at the invoices signed by the plaintiff and you can doubt no longer. According to these invoices the plaintiff put on board the Eliza twenty-four hogsheads and ten tierces. With what articles were these hogsheads and tierces filled? The plaintiff himself, in one of the invoices, which he has signed, will inform you. He there states that the hogshead numbered one, contained ten kegs of butter,

eighty-two pounds of cheese, and seven and a half bushels of corn ; that the tierce numbered one contained three bushels and one fourth of corn, and thirty one gallons of gin. By the invoice referred to is proved, that the hogsheads were filled with corn, candles, cheese and tobacco ; and that the tierces were filled with corn and gin. Let it no longer be contended that the plaintiff did not know, with perfect certainty, in what manner these hogsheads and tierces were packed.

But it is said that the property shipped by the plaintiff on board the Eliza was not intended for a foreign market ; that it was to be carried to Eastport ; and there sold.

If this property was to be carried to Eastport and there disposed of, why were the hogsheads and tierces packed in the manner described and clearly proved to you ? Why were they falsely marked ? These things would never have been done if the property had been designed for an American market.— But if it was destined to a British market, the very things that were done by the plaintiff and Stoodly, were absolutely necessary to the success of their undertaking.

Again, if the property was designed for the market at Eastport and was expected to be sold there, why was it suffered to remain on board the vessel more than a fortnight ? Why was it not landed, immediately and exposed for sale ? Why was it landed, at last, in a remote and obscure part of Eastport, where it never could be sold ? Why was it not landed until the very day preceding the night,on which it was put on board an English vessel, and carried within the British dominions ? If this property was to be carried no father than Eastport, how did it happen that Stoodly offered Capt. Huntress five hundred dollars to transport it to the British side of the river ? Was he to pay this sum out of his own pocket ? Was the plaintiff to allow no part of it ? The plaintiff, without doubt, was to pay his part of the expense of the transportation ; the business was well understood between him and Stoodly.

It may be said that the offer of Stoodly to Huntress was unauthorized by the plaintiff and ought not to affect him.

It is very clear, that the plaintiff and Stoodly were so connected in this business, that the act of one is regarded by law as the act of both. The property was owned by the plaintiff and Stoodly together; the voyage was undertaken for the benefit of both; and the plaintiff had entrusted Stoodly with the management and disposal of his part of the property. The act of Stoodly is to be considered as the act of the plaintiff, and as binding upon him.

In addition to the circumstances already stated to prove that the plaintiff and Stoodly were engaged in a smuggling voyage to the British dominions, I will mention another that must be regarded as irresistible.

The plaintiff admits that he signed the three invoices that have been exhibited to you. One of them is very general; another particular, stating all the articles that composed the cargo. The third is a false invoice, formed for the purpose of deception. It represents that the hogsheads and tierces contained the quantity of corn mentioned in the invoice, and nothing but corn; when, in fact, the quantity of corn was far less than that stated in the invoice; and besides corn, they contained gin, candles, cheese, and tobacco. Why was this false invoice made, unless for the purpose of prosecuting a smuggling voyage to the British provinces? It could have been made for no other purpose. Such a paper, in a voyage from one American port to another, would have been entirely useless; but, in a smuggling voyage, to a Britiah port, it must have been absolutely indispensable.

The letter of the plaintiff to Stoodly, dated on the 12th of January, 1810, furnishes, of itself, the most perfect evidence, that he knew the goods which he had shipped on board the Eliza, were to be carried to Halifax. In this letter, he says, "If you can procure silk, either in black, blue, or cloth color, of the quality of the enclosed pattern, for six dollars per pound, without much risk of getting it here, it will answer in any quantity. If it is not scarce at *Halifax*, it may be had for five dollars."

If silk was to be procured at Eastport, or at any other place in the United States, why does the plaintiff speak of the risk of bringing it to Portsmouth? What risk could there be if nothing illegal had been undertaken?

It may be said, that the plaintiff supposed that silk would be smuggled from Halifax into Eastport, and that there would be a risk in bringing it from Eastport to Portsmouth.

It is evident that this could not have been the meaning of the plaintiff, because he must have known that the risk did not terminate on the arrival of the silk at Portsmouth.

The plaintiff knew that the goods on board the Eliza were to be carried to Halifax; that silk was to be purchased there and brought to Portsmouth. It was on this account that he spoke of the risk of getting silk to Portsmouth.

Mark the expression in the plaintiff's letter, and then say, whether the place, to which the goods on board the Eliza were destined, can be doubtful. This is the expression to which I refer—"If it (silk) is not scarce *at Halifax*, it may be had for five dollars."

If the plaintiff did not know that Stoodly was going to Halifax, with the goods, why does he say, after directing him to purchase silk, that if it was not scarce at Halifax it might be had for five dollars? Why should he speak of the scarcity of silk at Halifax, if Stoodly was going no farther than Eastport? How could Stoodly know whether it was scarce at Halifax,

if he did not go there? And if he could, what would his knowledge avail him ?

It has been said, that if silk was not scarce at Halifax, it would not be scarce at Eastport, and might be had for five dollars at the latter place ; and that this must have been the meaning of the plaintiff. Why then did he not say, if silk is not scarce *at Eastport*, it may be had for five dollars? When a man intends to purchase articles at a particular place, he will speak of their plenty or scarcity, and of their price at the place where they are to be purchased, and not another place. It is true that the plenty or scarcity of articles at one place may raise or depress the price of those articles at distant places, with which a constant intercourse is kept up. But when you consider the state in which Great Britain and her provinces were placed with respect to this country, it will be evident that the price of articles at Eastport could not depend on their plenty or scarcity at Halifax. All intercourse between Great Britain and her provinces and the United States, was prohibited under severe penalties. The plaintiff, undoubtedly, supposed that some silk would be smuggled from Halifax into Eastport; but he could not have supposed that it would be smuggled in such quantities as materially to affect the price.

The plaintiff denies that he wrote the letter of the 12th of January, 1810, containing instruction to Capt. Stoodly. He denies also that he wrote or signed the letters of the 7th and 8th of January, 1812, purporting to be written by himself to Stoodly; and the letter of the 8th January, 1811, purporting to be signed by himself and William Garland to Stoodly. As all these letters are declared to be forgeries, and as there are some general remarks that apply to all of them, it will be more convenient to consider the evidence in relation to the genuineness of the whole, at this time, than at any other.

Several witnesses, who have been called on the part of the defendants, testify that they have long been acquainted with the hand writing of the plaintiff, and that, in their opinion, he wrote the letter of the 12th of January, 1810, which has no signature; and that he wrote and signed the other letters.

Many more witnesses, called on the part of the plaintiff, testify that they have for a long time known the plaintiff's hand writing, and that they believe he did not write or sign the letters attributed to him.

But you will consider how easily our opinions are influenced by our feelings, and our wishes ; and, when the evidence of a fact rests on opinion merely, how uncertain is that evidence. The witnesses of the plaintiff are his personal and political friends. Their feelings—their wishes—their anxieties—are all enlisted in his behalf: what effect this must have on their opinion, you are to determine.

Besides, when a paper is said to be signed by a friend, and he denies the signature, this very denial goes to form our opinion. It is impossible for us to form an opinion from an examination of the signature alone, and to be wholly uninfluenced by the denial of our friend. It is not my intention to insinuate the least reflection against the witnesses of the plaintiff who have testified as to his hand writing. Their characters are fair; and their opinions, however erroneous, are undoubtedly honest.

In order to determine whether these letters are genuine, it will be necessary to consider various important circumstances which the case presents. These are far more to be relied on than the mere opinion of witnesses. Indeed, the circumstances of a case, are often as strong and satisfactory to prove the existence of particular facts, as direct and positive testimony.

The first circumstance to which I would call your attention is this: if these letters are forged, the person who committed the forgery has imitated the hand writing of the plaintiff, not as to the signatures alone, but as to the body of all the letters. Would any man have undertaken a task, at once so difficult and so hazardous? Among the almost numberless forgeries that take place, it scarcely ever happens that the guilty person forges any thing more than the signature of another. After repeated attempts, a person may so far imitate the signature of another, as to produce a strong resemblance; but to maintain that resemblance through a whole letter, or instrument, is so difficult, that it is most rarely undertaken. If these letters are forged, an attempt has been made to imitate the hand writing of the plaintiff, not through the body of one letter only, but of four.

There is another circumstance that applies to all these letters. According to their dates, they were written about twenty years ago. Examine them, and you will find they have every appearance of age. But of this I shall have occasion to speak directly.

I will now consider the circumstances and evidence that apply to some of these letters, but not to all of them. If you shall be satisfied that the plaintiff wrote or signed one of these letters, you cannot doubt that they are all his. If he would deny one letter that he wrote, he would, with equal readiness, deny the whole. Besides, the plaintiff's witnesses say, that, in their opinion, he did not write any of the letters. If the fact is proved that he wrote one of them, it will shew that their opinion, as to the plaintiff's hand writing, is not to be relied on. If they are mistaken as to one, they probably are as to all.

The letter of instructions to Stoodly, dated the 12th of January, 1810, has no signature. This is a strong circumstance

to prove the letter genuine. Who would ever commit a forgery without forging the name of some individual? Did you ever know or hear of such a case? If any one had forged this letter, and intended to impose it upon the world as the genuine letter of the plaintiff, would he not have signed the plaintiff's name? If an enemy of the plaintiff had designed to injure him, by forging this letter, would he have left it to be inferred from the hand writing that the plaintiff wrote it; or would he have signed the plaintiff's name, that no doubt might remain that the plaintiff was the writer? On this, you can have but one opinion. A forger of the letter would never have omitted the plaintiff's signature; but a man, who would make out a false invoice, in order to smuggle goods, would be very likely to write the letter and forbear to sign his name.

It is said, that the plaintiff did not write this letter, because several words in it are misspelled, as—recommend—cheese—with, &c. If these letters are forged, they resemble one another so nearly, that they must have been forged by one person. The man who is capable of writing so good a hand, and of imitating the hand writing of others so well, must know how to spell words so common as those which have been mentioned. Every man, who undertakes to commit a forgery, and who knows how to spell, will be very sure to have all his words properly spelled. But a man, who is writing upon business, is often careless; he will, in his haste, misspell a word, when he knows perfectly how to spell it. This circumstance, instead of proving the letter to be forged, shews it to be genuine.

But this letter is proved to be genuine from internal evidence. I will mention one or two circumstances to shew this; and the reading of the letter, which you will have with you, will suggest others.

A man, who should forge a letter respecting a cargo on board a vessel, would use only general expressions; he would not be particular for fear of detection. In this letter, the writer, as you will perceive, is very particular in what he says as to the cargo. Among othes things, worthy of your notice, he says, "There is half a barrel of beef marked tongues by mistake." Could such a circumstance ever have occurred to the thoughts of a forger? Nothing but the fact itself—the improper marking of the half barrel—could have put it into the mind of any one. In another part of the letter he says, "If you can procure silk, either black, blue, or cloth colours, of the quality of the enclosed pattern, for six dollars a pound, without much risk of getting it here, it will answer in any quantity." Is not this the language of the practical merchant? A man, guilty of forgery, might have represented the plaintiff as requesting Stoodly to purchase silk; but he would not have been so minute—he would not have represented him as desir-

ing Stoodly to purchase silk of particular colors, and according to an enclosed pattern.

In this letter we discover the spirit of the man of business, intent upon gain : In it we discover the fears of the smuggler suggesting the cautious policy of omitting his name.

It is said, in order to prove these letters to be forgeries, that the endorsement on the letter from William Garland to Stoodly has been altered. It stood originally, " Garland's letter instructions ;" the words, " and Upham's" have been interlined. It now stands, " Garland's and Upham's letter instructions."

It is admitted that this endorsement has been altered in the manner before mentioned. But this does not affect injuriously the letter itself. The words, " and Upham's" that have been interlined, are entirely different from the rest of the endorsement. The difference is perceived at once. If to imitate the hand writing of others was so easy to him, who had the custody of these letters, that he could imitate the hand of the plaintiff, and Garland, and Stoodly with so much exactness, how does it happen that the words interlined are so unlike the rest of the endorsement? Was this interlineation made at an unfortunate moment, when the writer was less skilful in imitation than usual? Why then was not the whole letter written over and a new endorsement made without any interlineation ?

To prove these letters to be forged, it is said, that the endorsements on them, mentioning by whom they were written, are forgeries ; that they were not made by Stoodly.

To shew that these endorsements are not in the hand writing of Stoodly, several witnesses have been called.

Adelaide Stoodly says, the endorsements on the letters were not written by Captain Stoodly, her late husband.

This witness is contradicted by another, in such a manner, that she cannot be credited. She testifies that she was married to Capt. Stoodly, in December, 1811 ; that her husband never went on any voyage after they were married, except, that in February or March, 1812, he went to the Eastward for Thomas Haven.

Andrew W. Bell, one of the plaintiff's witnesses, tells you, that Captain Stoodly sailed on a voyage for him to Europe ; that he left Portsmouth in November, 1815, and was gone about two years.

There can be no doubt, that Mrs. Stoodly meant to misrepresent. If during her marriage, her husband had gone a voyage of one or two months only, it is possible she might have forgotten it ; yet that is very improbable. But, that her husband should have gone to Europe, and been absent for the long period of two years, and she have forgotten it, it absolutely impossible. There is no room for mistake. She in-

tended to deceive you ; and to such a witness you can give no credit. Her testimony should be entirely disregarded.

Ann Stoodly, a daughter of Capt. Stoodly, says, the endorsements on the letters are not in her father's hand.

The testimony of this witness, should be received with caution. She says, she never saw the endorsments until they were shewn to her on this trial ; yet as soon as she glanced her eye upon them, she said they were not written by her father. She gave her opinion without the least examination of the writing. No one, who is a judge of hand writing, will say, that, if these endorsements are forged, the writing bears so slight a resemblance to that of Captain Stoodly, that a mere glance of the eye will detect the forgery. It seems, from the conduct of the witness, that she had determined to pronounce the endorsements forged before she saw them.

Andrew W. Bell and *John Ball*, say, that they were acquainted with Stoodly's hand writing, and they do not think that Stoodly wrote the endorsements.

Several witnesses, on the part of the defendants, say that, in their opinion, the endorsements were written by Stoodly.

John P. Decatur says he is well acquainted with Stoodly's hand writing ; that he boarded in his family, and often saw him write ; he believes the endorsements to be in Stoodly's hand.

John H. Sherburne says he knows Stoodly's hand, and believes Stoodly wrote the endorsements.

John C. Davis says, he has known the hand writing of Stoodly for many years ; ever since the year 1818. For several years he saw him write every day. The endorsements on the letters are in the hand writing of Stoodly.

I will mention a very strong circumstance to prove that these endorsements were written by Stoodly. These letters were found in a box containing the invoices that have been exhibited to you and other papers that belonged to Stoodly. They were found after his death. Can any thing be more natural than to endorse papers of this sort ? One of these letters contains an agreement for his compensation as master of the Clarissa. Would Stoodly, or would any man of business, be likely to suffer such a paper to remain without being endorsed ? If he endorsed one, he did all, because all the endorsements are in the same hand.

It is alleged that the finding of these letters among Stoodly's papers, in a box, after his death, is all pretence—that they never were among his papers. The defendants say that Mrs. Stoodly delivered to John H. Sherburne a box containing papers belonging to her late husband ; the box was opened in her presence ; and that in it were found the invoices and letters that have been exhibited. The plaintiff produces Mrs. Stoodly to disprove this. She says that she never delivered to

John H. Sherburne, nor to any one in his behalf, a box, containing any papers, that belonged to her husband that she ever has had, at any time, since his decease. I shall dwell but a moment on the testimony of this witness. After stating that all her husband's papers were kept in a desk, upon being questioned, she said that part of them were kept in a box. Considering the manner in which she has been contradicted in her testimony by Captain Bell, it is scarcely necessary to say that she is entitled to no credit whatever.

An attempt is made to confirm the testimony of Mrs. Stoodly by that of Ann Stoodly, her daughter. Her evidence is negative in its nature. Her mother may have delivered a box of papers, that belonged to her father, to Sherburne and this witness not have known it. She adds no weight to her mother's testimony. The defendants have proved most clearly that Mrs. Stoodly, notwithstanding her testimony to the contrary, did deliver to Mr. Sherburne a box containing papers that belonged to her husband; and that the invoices and letters produced before you were found in it.

John H. Sherburne testifies, that in October, 1828, he was at the house of Mr. Baily, in Greenland, where Stoodly died; that he received there a box containing papers that belonged to Stoodly, and carried them to his house, in Portsmouth.—The box and papers remained some time at his house, and were afterwards carried to Mrs. Stoodly's house, in Pitt-street. Some time after this, Mrs. Stoodly was at his house, and told him, if he would go to her house she would deliver to him the box of papers that he brought from Greenland.—He, Mrs. Stoodly, and Elijah Hall went to Mrs. Stoodly's house; she delivered the box and Hall carried it to his house and assisted in opening it. Mrs. Stoodly was present. He says he found in it the three invoices and the three letters that have been produced.

Many witnesses have testified unfavourably to the character of Mr. Sherburne, for truth; but his testimony is so confirmed by that of others, that it cannot be doubted.

Stephen Crummett, one of the plaintiff's witnesses, says that in October 1828, he lived at Deacon Bailey's in Greenland—that he delivered to John H. Sherburne, a box, that belonged to Captain Stoodly, who died at Deacon Bailey's house. Sherburne carried the box away: He says, the box produced by the defendant's in court, is the one he delivered.

Mrs. Sherburne testifies, that her husband, John H. Sherburne, brought the box of papers from Greenland, to his house, in October, 1828. The box was carried to Mrs. Stoodly's, in Pitt-street. She heard Mrs. Stoodly, sometime afterwards, tell her husband, that if he would go to her house, she would let him have the box of papers that he brought from Greenland. He went with Mrs. Stoodly and Elijah Hall to Mrs.

Stoodly's house. They all came back, and Hall brought the box. It was opened in the presence of Mrs. Stoodly, and contained papers that belonged to Captain Stoodly.

Elijah Hall says, he went to Mrs. Stoodly's with her and Mr. John H. Sherburne. She delivered a box, which he carried to Sherburne's ; he assisted in opening the box ; it contained papers ; but what they were, he did not know. Mrs. Stoodly was present when the box was opened.

The fact that Mrs. Stoodly delivered to John H. Sherburne a box of papers that belonged to Capt. Stoodly is proved beyond all controversy. This box contained the invoices and the letters. The plaintiff admits that he signed the invoices. If Sherburne did not find them in the box, how did they come into his possession ? He could have obtained them in no other way. You cannot doubt his testimony when he declares to you that he found the invoices and the letters in the box that contained Stoodly's papers.

That the plaintiff and William Garland signed the letter of the 8th of January, 1811, to Capt. Stoodly, has been proved in a manner entirely satisfactory.

Let us consider, in the first place, the evidence as to Garland's signature. The plaintiff has produced several witnesses, who declare that, in their opinion, Garland did not sign it.

Mr. *Larkin* says he has seen Garland write, but he is *not* well acquainted with his hand. He thinks Garland did not sign the letter.

Mr. *Lord* says he is not acquainted with Garland's general hand, but has often seen his signatures. He believes the signature is not his.

Thomas G. Berry testifies that he is well acquainted with Garland's hand writing ; he was a clerk in Garland's store, and thinks that Garland did not sign the letter. He was requested to point out the difference between the signature of this letter and the signature of Garland. He said it was not in his power to do it, and he did not make the attempt. If the signature of this letter bear so exact a resemblance to the real signature of Garland, that a person intimately acqurinted with his hand writing can point out no difference between them, what is the inference ? Is it not that the signature of the letter is Garland's ? If the witness has come to a different conclusion, it cannot be that he judges from the hand writing alone. Witnesses called by the defendants have no doubt that Garland signed the letter.

William B. Parker testifies, that he was acquainted with Garland's hand writing as early as 1803; he has seen him write frequently. He has no doubt that Garland signed the letter.

Isaac Waldron says he is perfectly acquainted with Garland's hand writing. Garland was his pupil; he was after-

wards his partner in trade. He says it is impossible that he should be deceived as to his hand writing. He has not the least doubt that Garland signed the letter.

In addition to this strong evidence to shew that Garland signed the letter, I will mention a circumstance that will remove from your minds every doubt on the subject. If these letters were forged in order to get the plaintiff out of office, as has been suggested, or to injure him in any way, the name of William Garland would never have been introduced. What advantage could be expected from forging his name? By what motive could the perpetrator of the crime have been actuated? If these letters were forged in order to get the plaintiff out of office, they must have been forged at a recent period. But Garland, for many years, has been slumbering in his grave: the resesentment of his enemies must long since have ceased; no one could have desired to injure his fame, or cast the slightest shade upon his memory. What mortal, with a design to do an injury to the plaintiff, would think of resorting to this double forgery? Every one must perceive, that in proportion as you increase the number of names that are forged, you necessarily multiply the chances of detection. By forging Garland's name, the danger of detection was greatly increased, without the prospect of even the smallest benefit.

If Garland signed this letter, the plaintiff signed likewise. Garland knew perfectly whether the plaintiff was interested in the cargo of the Clarissa, to which the letter refers; he knew also whether the plaintiff signed this letter. If the plaintiff had not been interested in the cargo, or if any one had forged the name of the plaintiff to this letter, and it had been presented to Garland for his signature, would he have signed it? Who would forge the plaintiff's name, and then hand the letter to Garland that he might sign it? Look at these signatures; they were not written with the same pen and the same ink. Garland's name is written with a finer pen and with brighter ink than that of the plaintiff. If this letter and these names had been forged, the person who committed the forgery would have used the same pen and ink. How does it happen that the names were not written with the same pen and ink? The plaintiff wrote the letter and signed it at his house, and carried or sent it to Garland, who signed it at his house.

It has been suggested several times, during the course of this trial, that these letters were forged in order to have the plaintiff removed from the office of collector, that Col. Decatur might be appointed. Col. Decatur was asked whether he carried these letters to Washington, and if he did, at what time. He answered, that he carried them there in January or February, 1829. He was aked what his motive was; plainly intimating, that his object was to get into office.

These letters cannot have been written within two or three years past, for any purpose, proper or improper. No mortal can give to letters two or three years old all the marks of age that these letters bear. Look at the alteration on the back of Garland's letter, and you will find that the words, "and Upham's," that have been interlined, have a newness—a freshness in their appearance; while the letters, and the indorsements on them, have every appearance of age.

If any person had undertaken, by forging letters, to fix upon the plaintiff the charge of smuggling, he would have forged one expressly directing Stoodly to go to some British port; to St. Andrews or to Halifax; so as to leave no possible doubt of his guilt.

I have now considered all the evidence that relates to the genuineness of the letters. After hearing this evidence, you can entertain no doubt, I should think, of their being genuine. If they are, the charge of smuggling is fixed upon the plaintiff.

As to the voyage of the Sloop Eliza, in 1810, which we were considering, when it became necessary to examine the question relating to the genuineness of these letters, it was undoubtedly a smuggling voyage. This appeared from various circumstances. It was proved that the cargo of the Eliza was the joint property of the plaintiff and Stoodly, and that the voyage was undertaken for their joint benefit; that the cargo was designed for a foreign market, which was inferred from the manner of packing the hogsheads and tierces—from their being falsely marked—from the fact that the cargo remained more than a fortnight at Eastport without being landed or exposed for sale—from its being landed at last in a remote and obscure place, on the day preceding the night on which it was put on board an English vessel and carried into the British dominions—from the false invoice signed by the plaintiff—from the offer made by Stoodly to Huntress—and from the letter of the plaintiff to Stoodly, dated on the 12th of January, 1810. I have already made such remarks on these facts and circumstances as occurred to me.

From the evidence before you, it appears that a plan was formed by the plaintiff and Stoodly to carry the cargo of the Eliza to a British port—that Halifax was the place of destination; and that this plan was actually carried into execution. Huntress assisted in shipping the cargo on board an English vessel; he afterwards saw the vessel on the British side of the river; and no one can doubt whether she went to Halifax.

We will now consider the voyage performed by the Clarisa in 1812.

On the 7th of January, 1812, the plaintiff wrote a letter to Capt. Stoodly, in which he says—"*We* have a vessel all ready to sail this afternoon, or as soon as you can possibly get ready."

He further says—"*We* are ready to offer you good terms; at any rate, *we* will make them satisfactory to you."

From this letter, it appears that a voyage was to be made for the benefit of the plaintiff and some other person with whom he was connected. On the 8th of January, 1812, the plaintiff and William Garland made the following agreement with Stoodly. They say, that "In the adventure you have undertaken for us, we engage you one tenth part of the net profits, and engage that it shall amount to 150 dollars, your expenses paid, and for every day you shall save—say arrive here before the 8th of February—you shall receive two dollars a day over and above the foregoing—No compensation if the adventure does not succeed. No freight to be charged you for any adventure of your own."

It is said that this agreement does not apply to the voyage of the Clarissa, nor to any voyage to which the letter of the plaintiff, dated the 7th January, 1812, referred, if the plaintiff ever wrote the letter; because the letter containing the agreement is dated the 8th of January, 1811.

This letter is dated in the year 1811 by mistake, and there are many strong circumstances to prove it. It is easy to see that mistakes of this sort must frequently happen. Nothing is more natural, when a new year commences, than to date a letter or any other paper in the year that has just ended. Every man's experience will prove this to be true. The year 1812 had just commenced when this letter was written, and the plaintiff dated it, by mistake, in 1811.

The paper, on which the letter of the plaintiff to Stoodly, dated the 7th of January, 1812, and the paper on which the letter of the plaintiff and Garland is written, must have belonged to the same quire. The most critical examination discovers no difference in the appearance or quality of the paper. It is not probable that the plaintiff would have paper of a particular sort in January, 1811, and paper corresponding with it exactly twelve months afterwards. The endorsement on the letter of the plaintiff and Garland, dated January 12th, 1811; that on the plaintiff's letter, dated the 7th of January, 1812; and that on the plaintiff's letter, dated on the 8th of January, 1812, are all made by the same person at one time —with the same pen and ink. This appears clearly from inspecting the endorsements. If the letter of the plaintiff and Garland was written on the 8th of January, 1811, how can you account for the fact, that the endorsement on this letter was made by Stoodly at the same time, and with the same pen and ink, with the endorsements on the other letters, that were not written until twelve months afterwards? On the 7th of January, 1812, the plaintiff wrote to Stoodly to go to Portsmouth and undertake a voyage; the letter shews that some one was concerned with him in that voyage. On the 8th of

January, the plaintiff and Garland made with Stoodly the agreement that has been mentioned. If Garland was not the person concerned with the plaintiff, who was it? Let the plaintiff tell.

From the evidence, it is clear that the plaintiff and Garland signed the letter dated the 8th of January, 1811. If this be the real time, it would be in the power of the plaintiff to show you on what voyage Stoodly was then engaged for them. In their letter they say, "In the adventure you have undertaken for us, we engage you one tenth of the net profits," &c. What adventure—what voyage did Stoodly undertake for the plaintiff and Garland in January, 1811? I fancy, the plaintiff can certainly prove it. If Stoodly undertook no voyage for them in January, 1811, then the date of the letter is wrong; it should have been dated in January, 1812.

An attempt has been made, to shew that the plaintiff and Garland were never concerned together in any voyage whatever. Thomas G. Berry says, that for several years he was clerk in the store of William Garland; he was clerk in the year 1811 and 1812; he never knew the plaintiff to be engaged with Garland in any voyage of any kind.

If the plaintiff had been concerned with Garland in a smuggling voyage, neither the clerks of the plaintiff nor those of Garland would have been likely to know it. The fact would have been industriously concealed from them. From the letter of the plaintiff and Garland, you must be satisfied that a voyage was undertaken for their benefit; and you must also be satisfied, from the evidence, that the voyage was undertaken in January, 1812. What was the character of the voyage? Was it legal, or illegal? The evidence shows it to have been a smuggling voyage.

In the agreement made by the plaintiff and Garland with Stoodly, the place of the ship's destination is not mentioned. This would undoubtedly have been named, if the voyage had been legal. From the letter of the plaintiff to Stoodly, dated 8th of January, 1812, it appears that the voyage was to the "Eastward." The plaintiff says, "If in the transaction of any busines at the Eastward, you should have occasion to draw on me," &c.

Garland had goods at that time, in Halifax, which he was desirous of getting into this country. Thomas G. Berry says, that in the fall of 1811 he was in Boston, and purchased a quantity of goods for Garland; that the goods were then at Halifax. In January, 1812, a few months after the goods were purchased, Garland determined to bring them from Halifax into the United States. When you consider the conduct of the plaintiff with respect to the cargo of the Eliza, can you doubt whether he would be willing to unite with Garland in smuggling goods into this country?

That such a plan was formed is evident from their agreement with Stoodly. They say that if the adventure does not succeed Stoodly shall receive no compensation. If the vessel had been bound to an American port, why did they thus provide against the risk of an unsuccessful adventure ? It is apparent that they regarded the hazard as great and unusual. Although they considered that the voyage might be completed in a month, they promised to allow him, if the enterprise should succeed, one tenth part of the net profits and engage that those profits should amount to one hundred and fifty dollars. This is clear proof that the vessel was not bound to an American, but to a British port.

Henry Tucker says, that about the 12th of January, 1812, the Clarissa sailed from York for Eastport—that he sailed in her.

The Court do not permit the defendants to shew where this vessel went from Eastport ; nor what her homeward cargo was ; nor what eventually became of her. But if Stoodly engaged to perform an illegal voyage to the British dominions, and to smuggle goods for the plaintiff and Garland from Halifax into the United States ; and if he actually sailed upon that voyage, you cannot doubt, that he fully performed his engagement.

The defendants feel confident that you must be convinced, from the evidence produced on the trial, that the words, which they published respecting the plaintiff, are true. But if they are not true, this action cannot be maintained. In order to support it, the plaintiff must prove, that the publication was not only false, but malicious. Malice is the very foundation of the action. I will state one or two cases to show that the principle, which I have mentioned, is correct. If a man thinks of employing another in his service, and applies to a former master to learn his character ; if the master states in writing that the servant was guilty of a particular crime, no action lies against him, although he is not able to prove the truth of what he has stated ; because he made the publication, not from malice against the servant, but from friendship to him who requested the information.

If an attorney, in arguing a cause, uses expressions that tend to defame the party against whom he is employed, no action lies against him, because he is not actuated by malice. So if a witness testifies against a person in a court of justice, no action can be maintained against him.

It is clear that the defendants could have entertained no malice against the plaintiff. They had always lived at a distance from him ; no quarrel had ever taken place ; no bitterness had ever existed between them. They could have had no motive to do him a personal injury. It may be said that where the words published tend to defame a man's character,

the law implies malice ; that it is not necessary for the plaintiff to produce any further evidence of malice to enable him to recover, than the mere publication of the words. There are cases, I admit, in which the law implies malice from the tendency of the words to injure the character of the party ; but this is not one of those cases. The law, as to this point, is well settled. It is this. If the words have a tendency to defame the plaintiff, yet, if they were published on an occasion or under circumstances, which afford a prima facie presumption that they were not published with that view, but in the bona fide discharge of some duty to society, the plaintiff will fail in his action, unless he can prove the malicious intention by extrinsic evidence, and shew that the defendant used the occasion as a mere color and pretext for venting his malice. 2 Starkie's law of Evid. 863.

On what occasion and under what circumstances were the words published by the defendants ? The plaintiff was candidate for the office of governor of the state ; the election was about to take place ; and the publication was made to shew his unfitness for the office. This occasion affords a prima facie presumption that the words were published of the plaintiff without any malicious design, if such an occasion ever can exist. When a man is a candidate for a public office, depending on the suffrages of the people, he invites an examination into his character and qualifications ; and agrees that, if he is deficient in either, it may be made known to the electors. If the defendants had good reason to believe the plaintiff had been guilty of violating the laws of his country, it was their duty to inform the public. The occasion not only justified, but demanded it.

It may be said, that when good men are candidates for public office, their characters may be greatly injured, if they can maintain no action for damages, although the defamatory assertions published respecting them may be wholly unfounded.

A little reflection will satisfy us that the reputation of such men is protected with sufficient care, by the law, which has been mentioned. When a man is a candidate for a public office, and defamatory words are published respecting him, the presumption is, that they were published without malice ; but still he is permitted to remove that presumption by extrinsic evidence. There is no danger to be apprehended from the operation of this law. To obtain extrinsic evidence would not often be attended with difficulty. Indeed, if a man should publish of a candidate for office unfounded calumnies, and should be prosecuted for a libel ; if he could produce no evidence or very slight evidence of the plaintiff's guilt ; this circumstance alone would show his malicious intention, and that he used the occasion, on which the publication was made, to gratify his malice. But, on the other hand, if the defendant,

when thus prosecuted, should produce such evidence as to shew that he had good reason to believe the truth of what he published, it would repel the idea of malice and show that the action could not be supported. And whether a defendant has good reason to believe the truth of what he published or not, must be decided by a jury.

When the people of this State formed the Constitution, they declared, that "The liberty of the press is essential to the security of freedom in a State." Every reflecting man must assent to the truth of this declaration. Let the freedom of the press be destroyed in any country, and its inhabitants will soon be involved in the profoundest ignorance; they will sink to the lowest, the most abject state of slavery. To protect, therefore, with ceaseless vigilance, this guardian of our invaluable rights, is an object of the highest importance. The principle of law, for which I contend, preserves the liberty of the press, while it gives no countenance to its licentiousness.

The government under which we live rests on the virtue and knowledge of the people. These are the main pillars that support our political fabric. If the great body of the people possessed such a degree of virtue as to lead them to sacrifice their private interest to promote the glory and happiness of their country; this alone would be insufficient to give permanency to their government. They must possess knowledge as well as virtue. They must have sufficient knowledge to enable them to judge of the tendency of those measures that are adopted for the advancement of the public welfare. They must have a knowledge of the duties incident to those offices that are conferred by their suffrages, and of the character and qualifications of those who are proposed to fill them. When different individuals are candidates for an office, the mass of the people are ignorant of their character and qualifications.—They must, then, be informed as to both. If they are not, instead of the wise and virtuous, they may elect the incompetent and unprincipled to manage their affairs. Thus the administration may become corrupt; the interests of the people may be sacrificed to those of their rulers; and the government itself may eventually be destroyed. How is the necessray information to be given but by means of the press? It can be given in no other way. But who will undertake to inform the people, if he must suffer from the verdict of a jury, unless he can demonstrate, by legal evidence and with perfect certainty, the truth of all the information he shall communicate? Suppose a person should be candidate for the office of President of the United States; that letters should be discovered purporting to be signed by such person, in which it should appear that he and others had formed a plan to overturn the government. Suppose the letters and signatures should be written in a hand bearing a striking resemblance to that of the candi-

date, and that there were other strong circumstances to prove him to be the writer. If a person should publish, in a newspaper, that the individual, who was thus a candidate for the presidency, was an enemy to his country ; that he had formed a design to destroy the government ; and if it should turn out that the letters were forgeries and the story unfounded ; should the person, who published the information, from the best and most patriotic motives, be made to suffer ? Should his patriotism subject him to punishment ? If so, the press will no longer diffuse information among the people, and the voices of your wisest and most virtuous citizens will be silent. The liberty of the press would be as effectually destroyed if there was a law prohibiting the publication of any information respecting candididates for office.

The motives of the defendants, in making the publication complained of, were pure and patriotick. They were actuated by no feelings of personal malice ; they had no other design than that of discharging a sacred duty which they owed to their country.

MR. BARTLETT'S ARGUMENT.

May it please your Honors—and you, Gentlemen of the Jury—

The plaintiff, Timothy Upham, brings his suit against Horatio Hill and Cyrus Barton, as publishers of a paper called the New-Hampshire Patriot and State Gazette, for an alleged publication of a libel upon him, seeking reparation for the injury, and a vindication from the aspersions upon his character.

The charge and the defence, you now have to pass upon. It would be idle to attempt to shut our eyes to the fact, that the immediate cause of complaint here, has its origin in political controversy—that the subject matter of it, from its publication, has been the theme of the party strife of the day. But sick and disgusted, as I am, and as I hope every honest man is, with the *manner* in which political controversy is conducted, and with the *character* which it has assumed, I cannot but congratulate you, and I hope you rejoice with me, that there is one place, where we may flee from its turbulent spirit—one sanctuary, whose doors are barred against the admission of its maddening and pernicious influence. Whatever, heretofore, may have been our individual opinions of this controversy, or of the parties, those opinions are not now to be indulged, or felt, in the discharge of our duties, either as jurors or as counsel. If any of us have personal partialities, they belong not to this case. If any of us believe we have private grievances to complain of, in relation to the press, they come not here. The parties come to this place on equal ground, as to their rights and the mode of trying them, and all feelings inconsistent with the exercise of such rights are to be forever banished, and our minds left to the fair and unbiassed operation alone of "*the law and the evidence.*"

Gross as the libel is alleged to be, of which we complain, still grosser should be considered the libel upon *you*, that " a jury of Rockingham cannot be found to agree upon a verdict in this suit between these parties." That such slanders have been uttered, it is not to be denied: slanders, which I trust you have the independence and integrity to disprove and spurn from you. I know not what are the political sentiments of any one of you; nor do I care what they are. I will not ask, or accept a verdict from political favoritism, nor will I fear that it can be denied, for political prejudice. Such considerations are forever excluded, by that solemn oath, with which, on

taking your seats here, you invoked the blessing or the curse of Heaven, as you should, or not, discharge your duty. Sad indeed will be our condition, when the feelings which dictate the proceedings of the *caucus* room, or the ebullitions of newspaper controversy, shall be permitted to come in and pollute the temple of justice. When that time shall arrive, we may bid adieu to all pretended security of government, or of law. To this day, to this hour, I believe that calamity has never been visited upon us; and I pray God, that such evil, with its attendant train of horrors, may ever be averted from our country. Let me then again beseech you, that whatever may have been your wishes, your partialities, your prejudices, in relation to these parties or their controversy, put them off—cast them from you—"for the ground on which you stand is holy."

Before proceeding to the consideration of the principal questions, indulge me in a passing notice of some remarks, which fell from the counsel who opened this cause for the defendants. That gentleman (Mr. Cushman) expressed his surprise, that so *extraordinary* a suit should have been brought. We may grant, that there was something *extraordinary* in the bold hardihood of the accusers, which made such a suit necessary. That a man who had passed the meridian of an active and distinguished life, in a manner that slander had never breathed ought against him, should, by newspaper accusation, at once be covered with infamy and crime, may be deemed extraordinary. And when such accusations were forged into the form and shape in which we here see them, it would be no less extraordinary, had the plaintiff quietly submitted to their republication again and again, unquestioned. And what was there extraordinary in the commencement of this suit, or the manner of its prosecution? Had the plaintiff sheltered himself under the name of the State; taken the strong arm of its power to have wielded over the defendants; instituted a process by indictment, and have come forward as he might have done, a witness in the prosecution,* to help bring down the vengeance of the government upon their heads, by fine and imprisonment; then might we have heard of oppression, of cruelty, of a pursuit for revenge and not for justice.

The gentleman added that he had never known such a suit. If his memory had failed him, he could have refreshed it by turning to a file of his own writs, but a year back, where he could have found the evidence, not of a suit exactly so prosecuted, but of a suit for slander, brought by himself for one of his prominent witnesses, (Col. Decatur) against the publishers of the *Dover Enquirer;* on which suit one of the firm was arrested, and all the property of the other attached—A suit, too, which after such pompous and threatening commencement, was discontinued. In the present suit, there was no arrest—no attachment—nothing more was done, than to summon the party before a tribunal, who should enquire into the truth of the allegations, which, they affirmed, they could prove. Where was the oppression of this?

In this connexion, permit me to advert to Mr. Attorney's ardent appeal for the "Liberty of the Press." "The Liberty of the Press is essential to the security of freedom in a State," says the Constitution of New-Hampshire. "Congress shall make no law abridging the freedom of speech, or of the press," says the Constitution of the United States. And will you, then, put chains and fetters upon it? Will you "break down the press?" I answer, no! God forbid it. You shall never have my aid, or my consent, to do ought even to abridge, in one tittle, the legitimate Liberty of the Press. And what is that Liberty? There is a somewhat fashionable loose declamation upon this subject, which may, perhaps, be productive of no great evil, while indulged only in the columns of newspapers; but, when those, who minister in the temples of justice, have duties to perform in re-

[* Which he dare not do—for in that case he would have been obliged to testify that he wrote every one of the letters he has denied.] *Editor.*

lation to the rights of their fellow men, it becomes them to speak with somewhat more of precision, and to attach some *definite idea* to the term "Liberty of the Press." What is liberty of person?—liberty of speech? Are we not free? But have we a right to knock down and trample upon all whom we may dislike? Have we not liberty of speech? But may we charge any and every crime, with impunity, upon our neighbors? We have, not long since, seen some of our southern brothers toasting "the liberty of speech, the liberty of the press, and the liberty of the hand." If liberty of speech is to be understood an unrestrained license to slander; and liberty of the press, liberty to publish and perpetuate libellous falsehoods; then may the "liberty of the hand" be understood a liberty to every man's pocket, or as it has been defined, the liberty of gouging other's eyes—and such *liberties* are all equally legitimate. We have all liberty to use the element of fire. We have, too, the right of bearing arms. And if we are not permitted to throw a brand into our neighbor's dwelling, or discharge our rifle upon the passers by in the street, we could as well complain of being enslaved, as to say the press is shackled, because it may not, by falsehood, assault the character of any and every citizen, when and where its conductors may choose.

I cannot better express my own views of the legitimate meaning of "liberty of the press," than in the language of an acknowledged authority, which happens to be before me. It was read for another purpose. It could not have been brought here for this. Whatever may, for effect, have been said or published elsewhere, it could not have been anticipated, that *here*, it would be urged, that the holding publishers responsible for truth, could endanger any *liberty* which should be preserved. In Holt on Libels, Chapter 4th, the writer says: "Having already shewn, that the common law recognized the offence of libel from the earliest times, it remains to be considered whether the invention of printing, a new and enlarged means of libel, in any way altered the legal acceptance of the offence; whether it abridged the RIGHTS OF REPUTATION, and from respect to the general utility of the newly discovered instrument, absolved those who might employ it, from the responsibility attached to them in every other way. And this leads us to what is loosely termed the Liberty of the Press, a term which has become elemental in all free governments. As this liberty is opposed to the power of the licenser, the term is correct. It is loose only, when distinctively used as a new peculiar right of the press. THE LIBERTY OF THE PRESS IS ONLY THE LIBERTY OF THOSE WHO USE IT. It is only one of the personal rights of the printer. When we have termed the press a new and enlarged instrument of publication, whether of good or evil, we have, in fact, pointed out that part of its nature which defines and circumscribes the law which attaches to it. The law of libel was not altered by the discovery of printing; nor is there any reason that it should be altered. The rights of PERSONAL REPUTATION and the rights of free discussion, remained the same. Printing is but the mechanical art of extending such discussion into a wider sphere. It was a new power but no new right. It left, therefore, every thing as it found it, with the exception that the acquisition of such power, and the greater facility of mischief, demanded an increase of vigilance on the part of the law."

"With respect to the correct acceptance of the popular notion of the Liberty of the Press, it is what is necessarily included in its equivalent progressive terms—thinking, speaking, and writing."—"When these thoughts are embodied in words, they become in that shape moral substances; they produce palpable and material effects upon the personal rights of others."—"In this shape, therefore, as being naturally capable of injury, they become cognizable by law. Writing is the further publication of words, as printing is the further publication of writing. They are all, therefore, comprehended within the same term; have all the same extent of right; the same lim-

its from the rights of others; and are all contained under the same compass of law. The Liberty of the Press, therefore, properly speaking, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press."—"The Liberty of the Press, restricted as it may be by the law of libel, will be found wide enough for the exercise of every right and duty. It prohibits nothing but injury. It confines from mischief the employment of an instrument extensively pernicious in its abuse as it is beneficial in its natural use."

A learned Judge, of a neighboring State, (Judge Morton) in speaking of the Liberty of the Press, observes, "Can it be right to publish with impunity, falsehood, calumny and slanders? Obviously not. What then is it? It may be defined here, according to the law of this country, to be the right to publish TRUTH of any person, with good motives and for justifiable ends. This is the freedom of the press intended to be preserved and guarded in our Constitution." The people must be informed, says Mr. Attorney, aye, verily; and what will be their information, when truth and falsehood are alike disseminated by the press. "The qualifications of candidates must be discussed"—and who must, and who will be your only candidates for office hereafter, if an unsullied life, an unspotted reputation, are no protection from the vilest slanders, and if the law can give no redress? You were admonished by the defendant's counsel, that I should appeal to you, and dwell upon the abuses, "the licentiousness of the press." Gentlemen, I shall make no such appeal. For such purpose, I should not need the aid of fancy. Facts enough are at hand, from which to exhibit to you the pure and the upright subjected to assassin-like attacks from behind the press, and the prostration of the moral sense of the community, by such licentiousness. But you have not lived till your time of life, to need to be reminded of what is so constantly before you. On this subject, I will only repeat what is said by the Judge whose words I have just quoted. "Yet if we are at all in danger, it is from this quarter. I mean, the ABUSE of this invaluable privilege. If the time should ever come, when the conductors of the public press should become generally corrupt, and indulge in the indiscriminate dissemination of falsehood, though the freedom of the press could be preserved in form, its substance would be gone. Our citizens could no longer rely on it for safety, all confidence in its instructions would be lost, and thus its value and usefulness would be destroyed."

I have given this notice to Mr. Attorney's very eloquent, though very general remarks upon the Liberty of the Press, that it might be distinctly understood, if he claims for that *liberty* the right of disseminating falsehood, to the destruction, or injury of any citizen;—to his views I do not assent. If he claims for that *liberty* the right of publishing the truth of any and every citizen, then to say to him, that we will ask nothing of you, in this case, or any other, which shall endanger, or violate, or abridge, that freedom of the press. And while the Constitution, to which he refers, protects the press while it is directed by truth, the same Constitution guarantees to every citizen "a certain remedy, by having recourse to the laws for all injuries he may receive in his person, property, or CHARACTER." Not to violate other's rights, then, but to seek a remedy for a violation of our own, we now call upon you.

In discussing the main questions which you have to consider, I shall be as brief as circumstances will admit, and endeavor with plainness to make myself intelligible to you. I shall have accomplished all that I propose, if I succeed in presenting to you, separately and distinctly, the questions that arise, with the principles, circumstances and proofs, as they separately apply to each. In doing this, I shall necessarily depart from the method pursued by the defendant's counsel. He has chosen to make a very general application of the evidence, in a manner which tends to give it an importance that it will be found not to deserve. When the search is for truth, it

seems to me, that no mode is better to effect the object, than first to ask ourselves, what are the particular questions to be answered? then, what particular proofs apply to those questions? and we thus avoid the doubt and confusion, which are too often produced by dealing in generalities.

I. The plaintiff's first allegation, and which constitutes the first count in his declaration, is in substance, that the defendants, on the first of February, 1830, published a libel on him, in charging him with taking the money of the government of the United States and applying it to support a prostituted press, &c. called the Signs of the Times.

To this, the defendants answer by their pleas,

1st. The general issue; that they did not so publish.

2d. A justification; that the plaintiff did so take and apply the money of the government—and

3d. By the argument of counsel, that if they did so publish, and if the plaintiff did not so take the money, the defendants are not liable, because nothing is alleged which would sustain an action. In a word, that the plaintiff is accused of nothing to do him an injury, for which he could have a remedy.

First, for the proof of publication, we offer you the paper itself, containing the accusation set forth, at large, with all the aggravating epithets with which the defendants could decorate it. This fact, then, is established.

Second, as to the justification. Here the affirmative rests upon the defendants. This they must prove. Have they proved that the plaintiff took the money of the government and applied it as they alleged? The evidence offered for this, is the testimony of Hampden Cutts, Esq. who swears, that while he was proprietor of the Times, Gen. Upham paid him $17,50, for advertising in that paper proposals for erecting a light house on a ledge called the Whale's Back, in this harbor; and that that sum was the regular and proper charge for the advertisement. Where is the proof here that this was the money of the government? There is none. But suppose, if you choose, that he did, as an officer of the government, pay this sum, and that the sum was allowed to him in his accounts, and will they then have justified the charge they made? Did they, in that accusation, which was paraded in glaring characters again and again in their paper, intend to be understood as saying, that the plaintiff had done nothing wrong—he had only performed a duty which the law required of him—he had committed no other offence than every officer of government, who pays printers for the service they perform for government? Or did they intend the accusation as a dereliction—a violation of duty—a corrupt misuse of public money, for which he should be denounced and discarded by his fellow citizens, as unworthy of their trust and confidence? If to answer that question you needed further proof than is in the terms of the accusation, you have it in the context, and their own comments to that publication.

But *thirdly*, It is required, that if the publication was made as we allege, and if it was untrue, that still we have not a right to recover; because the plaintiff was not collector of the customs at the time of publication, and because the charge as published imports no crime and will not sustain an action for libel.

The law, which the defendants' counsel urges on the first position that the plaintiff was not collector at the time of the publication, may do well enough, when the charge is of such a nature, that it can do no harm to him, only in the character of collector, for then when the character of the collector ceases, there is nothing to receive an injury;—but where the charge made against him as collector is such as to affect his character in every condition of life,—then the remedy exists whenever the injury shall be perpetrated, so long as he hath a character worth protecting. Though I was somewhat astonished at the zeal with which this position of the defendants was attempted to be sustained, I cannot think it proper to detain you a mo-

ment on a point so plain, that the Court, I have no doubt, in their charge to you, will settle it with a word.

But it is urged, that the publication charged as a libel is not actionable—that it imputes no crime. We have read to you authorities of unquestioned law; unquestioned except by the argument of the defendants' counsel, which point out the distinction between *unwritten* and *written* slander: and in the language of the books cited, it was stated, that "It is chiefly in this branch of libels, that the action for words *spoken* and for words *written*, substantially differ. The common law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation."—"It confines, therefore, the action for slander, to such of the grosser kind of words as impute positive crimes," &c.—"The act of writing is in itself an act of deliberation, and the instrument of a permanent mischief. What before was mere *convitium*, and contumely, grew into a deliberate charge and accusation. The law, therefore, both with respect to the public peace, and the prevention of private injury, allowed an indictment and information, as well as an action on the case for words *written*, which it denied to words *spoken*."—"and in the same manner all such written abuse as may be fairly intended to impair him in the enjoyment of society, or to throw a contempt on him which might affect his general fortune and comfort, is a positive injury and therefore the subject of an action on the case."—"Scandalous matter is not necessary to make a libel. It is enough if the defendants induce an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." "Thus, to say of a man, he is a *dishonest man*, is not actionable; but to publish so, or put it upon posts, is actionable." If, then, the defendants' counsel could argue from off the record the charge of *positive crime*, which this publication contains, still he must argue the law off from its fixed and settled foundations, before he can find an escape for his clients.

But does the publication contain no charge of crime upon the plaintiff?—It may not have been larceny, for he had the custody of the money. It may not have been robbery, for there was no putting the owner in personal fear. But was it any thing but the most flagitous and corrupt fraud and violation of all faith and trust? And was it not so urged upon the people of this State by the defendants? And after they had given existence to the calumny, was it not so taken up by public meetings, and solemnly set forth as *evidence* of his unworthiness to be trusted? But *now*, forsooth, their counsel say they meant nothing—it was no offence. Did they *then* so mean it, and did the public *then* so understand it? And can it *now* be so understood? But there was really no harm, says the counsel, in his taking the public money and applying it to the support of a partisan press. He had given a bond, and must answer to the government. The taking was the only offence; the bond cured that. The applying it to support a press was no worse than if he had applied it to charitable uses. Upon what code of morals Mr. Attorney can advance such doctrines, I will not pretend to say. It is not that, I am sure, upon which he will act in his own character. It is not that upon which he will, in his official capacity, administer the laws of the State. It is not that code either of morals or of laws, upon which Watkins is now so justly enduring the penalty of a like *crime* in the prison at Washington.

The publication of the charge, then, is proved.

The justification of it is not proved. There is not a pretence that it is true. And I do not believe we have yet arrived at that degree of profligacy and degradation, when to do what the plaintiff was accused of, can be said to be innocent and harmless, and no imputation upon his character.

II. The plaintiff's next allegation, and which constitutes the second count in his declaration, is, that the defendants, on the 8th day of February, 1830,

published a charge in substance the same as the first. It varies in its phraseology merely—"Did he not rather pay the money of the government to sustain that polluted vehicle, the Signs of the Times," &c.

The same answer is attempted to be made by the pleas of general issue and justification. The publication is proved by the production of the paper of that date, and no other proof of the justification is offered than upon the first count. In addition to the defence urged in argument upon the first, the counsel say this is a mere interrogatory, not published as editorial, but the address of a meeting of the county. I will not for a moment suppose, that the counsel would attempt, or wish to make you believe, that in law there is any difference in the accusation, whether in the form of an interrogatory, or a direct affirmation. Such imputation would do injustice to his understanding, or his integrity. The effect of the charge is the same in the one form or the other; and the liability of the party publishing it is the same.

But they published the alleged libel as an address from a public meeting against a candidate for office. If, then, libels are put into that form, has the party injured no remedy against the publishers? So is not the law. The language of one of the highest judicial tribunals in the country has placed that point beyond controversy and beyond doubt. In the case read from the 5th of Johnson's Reports, the Chief Justice says, "It would in my judgment be a monstrous doctrine to establish, that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes with impunity." And whether "one hundred or one thousand men" make the accusation, the Court held that it could make no difference. And how is this matter of a public address? On the first of February the defendants published the libellous charge. On the eighth of the same February, in their next paper, it comes forth in the shape of a public address; and then the slander which they themselves had originated, it is contended they may with impunty repent and republish. That it so soon assumed such form, only proves how their accusation was understood by their readers, and how soon the poison took effect. They are, in fact in this count, only charged in another form, with repeating the slander of their own manufacture.

The allegation, then, in this count, is proved, and the justification entirely fails, and the plaintiff has a right to demand your verdict. Is the plaintiff guilty of the charge which the defendants have made against him? You cannot acquit them but by convicting him of a crime of the same character and degree for which Watkins is now suffering the punishment that ought every where to follow it.

III. We now come to the consideration of the charge in the third count of the declaration. It is, that in their paper of the 15th of February, 1830, they published, in substance, an allegation that the plaintiff, during the embargo and nonintercourse, was engaged in smuggling goods to and from the British provinces; that he was guilty of the most gross and flagitous violation of the laws; that he was a "*wholesale smuggler.*"

1st. To this count they plead the general issue.

2d. They put in a justification. This justification consists of two parts, to sustain their publication; and alleges, that on the 28th of February, 1810, the plaintiff did convey and *smuggle* from Eastport to Halifax certain goods, which are enumerated in the schedule: and that on or about the first of March, 1810, and between that and the 18th of June, 1812, conveyed, *smuggled* and introduced into York, in Maine, five pounds of silk and one hogshead of rum.

Your first enquiry in relation to this count, is, what is the charge made? and what is the charge attempted to be justified? It is, that he is a *smuggler*. Not that he has violated the embargo and nonintercourse laws only. Those are offences of a different character, and for which a

different and much less punishment is inflicted—but the charge is of smuggling. And what is smuggling? It is, to import, or export goods without payment of the customs. The precise definition of a smuggler, as given by the highest authority, is, "a wretch who imports or exports goods without payment of the customs." And this, you will perceive, might have nothing to do with any embargo or nonintercourse. [The defendants' counsel rose, and said he thought the plea did not allege *smuggling*.] Mr. Bartlett resumed—I am happy in being corrected, if wrong; and very happy in the opportunity of setting the Attorney General right. I read from the record. The plea says, "conveyed and *smuggled*." [The Attorney General said, no doubt when goods were exported against law, they are said, to be smuggled.] Mr. Bartlett said, I hope the record supports me. I do not mean to depart from it; and I am correct in saying, it charges the plaintiff with smuggling. [The Chief Justice said, the definition of smuggling as given by the plaintiff's counsel, was correct according to the English books, but suggested, that a different meaning might be attached to it in common acceptation and use, and that the term was to be taken in the popular sense; and that if the defendants proved that the plaintiff violated the laws of the U. S. in carrying goods to the British provinces, he should hold that the justification was made out.] Mr. Bartlett resumed, If there is any other popular acceptation of the term smuggling than the legal and technical meaning, concerning which however I have heard no evidence, I should have no doubt it could be taken in the original publication; and on the general issue, the defendants could show that they did not charge the plaintiff with the crime of smuggling. But when they have, in their justification, charged upon him the crime of smuggling, that there was then none other but its legal and technical meaning to be understood. I have little concern, however, what construction is put upon the term. Having justified a particular offence, I think they should prove *that* offence. But there has been no smuggling in any sense; no violation of *any* law by the plaintiff.

The libel complained of charges the plaintiff with having smuggled goods *to* and *from* the British provinces; and the justification alleges the smuggling *to* the British provinces of the goods mentioned in the schedule, on the 28th Feb. 1810: and the smuggling silk and rum *to* this country, from March 1, 1810, to June 18, 1812. These allegations are distinct and separate. They have no connexion in the evidence that attempts to sustain them, and we will consider them separately.

The first is attempted to be made out by the shipment of some articles on board the schooner Eliza, Capt. Huntress, from this place to Eastport, Jan. 12, 1810, and by a paper alleged to be written by the plaintiff in connexion with that voyage. I particularly request you not to suffer yourselves to be embarrassed by the multitude of papers which have been read to you, and have been commented upon as if they had connexion with this voyage; for whether the papers which are before you, any or all of them are true or false, none of them except the invoices and the memorandum of Jan. 12, 1810, without signature, have any relation to this transaction of the voyage in the Eliza, or are pretended to have any. Leave the consideration of all other papers, then, till we come to the transaction to which they apply, or are supposed to apply.

What then is proved in relation to the voyage of the Eliza Jan. 1810, and the plaintiff's connexion with and interest in it?

The defendants have called Capt. George Huntress, whose appearance here upon the stand, has indicated frankness and fairness. When you recollect the manner in which he states, that his depositions from time to time, were taken, by those who wished to find something illegal in that voyage, and to find the plaintiff implicated in the illegality; and when you learn from the witness, the situation in which he stood as to hope or expectation of favor, or what seems to be the greatest moving power—

of *office* from the agent under whose direction the deposition was, *exparte*, taken, you certainly cannot believe, if he could have stated any fact to implicate the plaintiff, that he would have withheld it. You surely have *all* he can say, that would bear in any manner upon the plaintiff. And what is that all? That in January, 1810, he sailed in the schooner Eliza, owned by Captain Benning Morrill, from this port, to Eastport, taking freight of flour and other articles for the owner, and also, the freight mentioned in the invoices except the third general invoice of corn alone, which was not shipped, which you have before you, of the date of Jan. 12, 1810. That the goods which were invoiced in the name of and or account of Timothy Upham and Nathaniel Stoodly, were consigned to Nathaniel Stoodly, at Eastport. That the goods were packed by putting gin and other articles in hogsheads and tierces, and corn around and at the ends. That he thinks he saw Upham at or about Walton's shop at the time Walton packed the goods. That Stoodly sailed with him in the Eliza, and that at Eastport he landed the goods and put them in a store on a wharf at Prince's Cove, after laying in the harbor of Eastport about a fortnight. He swears that he had direction from his owner, to violate no law. He had no direction or request from Upham to violate any law, and he did not know of any direction or authority from Upham, to do any thing with the goods, further than to deliver them at Eastport. His testimony, in relation to Stoodly's conduct, I will notice presently. The defendants also offer you three invoices of goods, purporting to have been shipped on board the schooner Eliza, on account of Timothy Upham and Nathaniel Stoodly, signed by Upham, dated January 12, 1810. The invoices are not written by Upham, but are signed by him. This, with the exception of the memorandum without signature, which we shall presently notice, is every particle of proof, written or oral, which relates to Mr. Upham's concern in this voyage, or the goods shipped.* What was there in this in violation of any law of any country? The shipment and the voyage were as legal and right as the same shipment and voyage to Boston or New-York. Whatever thereafter may have been the fate of that consignment, this plaintiff is not answerable for it. Merchants are accountable for the destination of their goods, only so far as they direct it. Desolating indeed would be the doctrine, to mercantile responsibility, if they were to be visited with the liabilities and penalties and crimes which all goods might incur, because they were once shipped by them on a lawful voyage, to a lawful port. Then might the merchant, who sold goods here in his warehouse that should afterwards find their way, illegally, into some port on the continent of Europe, twenty years after a transaction of which he even knew nothing, find himself *guilty of smuggling*.

But, in this case, it is attempted to charge the plaintiff with the crimes of Stoodly, after the delivery of the goods at Eastport. If Stoodly, on his arrival there, had committed forgery, highway robbery, or murder, the plaintiff could as well be charged with the crime, as with his smuggling, unless it were committed by his direction. With such view, Huntress is inquired of, and swears, that after his arrival at the Harbor of Eastport, by Stoodly's direction, not by Mr. Upham's, he kept the goods on board a fortnight. By Stoodly's direction, he landed and stored them at Prince's cove, an obscure place; and that Stoodly and others, on the night following, put them on board a British vessel and went into the British dominions —and that Stoodly had tried to induce him to go with them before. Now suppose Huntress, on leaving the wharf here, instead of making the voyage directed, had sailed directly to a British port, in violation of the orders of his owner and shippers, would Capt. Morrill, the owner of the vessel, and

[*And that of itself were enongh. The invoices themselves prove smuggling—*gin in the middle, with corn at each end.*]—*Ed.*

all who shipped goods, become smugglers by Huntress' acts? But you are asked to *believe*, that the plaintiff directed the goods to be smuggled. You have no right so to believe without proof*—you have no right to presume crime. But, there are suspicions about the transaction, says the defendants' counsel. Let us see of what stuff the suspicions are made, and then say if any man's character is to be affected by such suspicions.

Why—the voyage was to Eastport, close to the British lines. Eastport always was and always will be as close to the British lines, and voyages always were and always will be just as *suspicious* to that place. The witness tells you that he has found a hundred sail of vessels at a time in that harbor, and business to an immense amount was transacted there. Capt. Morrill, too, whom we do not hear impeached, sent his vessel and sent freight there at the same time.

And the goods were packed in an unusual manner, with "corn at both ends," and a most ingenious argument is fabricated upon this fact with the aid of an assumption of certain other facts, which, by the way, do not exist. The plaintiff's account of the matter is this: that as a commission merchant having made advances for Stoodly, he wished the security of the insurance upon this property, for which purpose, the invoices were made in the joint names of the plaintiff and Stoodly; but that having no actual ownership of the property, or any other interest than as collateral security, he knew nothing, and cared nothing how it was packed.† The invoices, as appears, were made out by some other person, which he neither compared, examined or read, as he had no need to do for any concern of his in relation to it. But Huntress says, he thinks that he saw the plaintiff at Walton's shop, at some time while the goods were packed. All this might be and he still have no knowledge of the particular manner. But, take the most that the defendants pretend. Take it that they were so packed by his order, and what then? Goods so packed might perhaps incur less charge for freight; or so packed, they might, if you please, command a better price at Eastport. You surely will not presume an illegal purpose, unless there was some illegal purpose for which they were so better fitted. That they were so fitted for an illegal purpose, has been most elaborately argued by the defendants' counsel. He says, that all the articles in the invoice, except corn, were prohibited by the British government from being carried into their provinces, and that the importation of corn was permitted. Therefore, the other goods were concealed in the corn, that they might be *smuggled* in under the permitted article. And then, you are to infer, that they were originally shipped for Halifax. Now it seems almost a pity to spoil so plausible a theory; but you will perceive that it all rests on the often repeated allegation, that 'corn was then permitted to be imported into the Provinces.' But unfortunately for the argument, the evidence and the British statute which was introduced by the defendants, shews that allegation not to be true. The law read to you, prohibits corn just as effectually as any of the other enumerated articles, and therefore, such could not have been the object, or motive. There was as much reason, for any illegal purpose, to conceal the corn in the gin, as to conceal the gin in the corn. Whatever Stoodly may have done after the arrival of the property at Eastport, shall this plaintiff be convicted of his crimes upon this evidence? Then, if any merchant shall commit goods to a consignee, and he shall violate any law in relation to them, not only the civil consequences, but the moral turpitude shall be visited upon the head of the merchant.

[* For proof, see the account current, where Stoodly credits Upham with the *amount of sales at Bermuda*, and the papers connected with it.]—*Ed.*

[†But he offered no shadow of proof to substantiate "the plaintiff's account of the matter."]—*Ed.*

I have chosen to consider this case, thus far, independent of the falsehood and forgery with which it is loaded, that you might come to a judgment without suffering your minds imperceptibly to be influenced by that which you cannot but reject as evidence.

The defendants however offer you a paper dated Jan. 12, 1810, which they say was written by the plaintiff. It is offered to shew, that Stoodly went into the British provinces by his direction, &c. The paper is without signature. It is the one called letter of instructions—describing the property and speaks of the price of silk, &c. and of bringing it without risk. Whenever and by whomsoever that paper was written, it does not necessarily shew an intention of visiting Halifax. Where it says—if silk is plenty at Halifax it may be had for such price—it may refer to the price at Eastport, which, every one knew, would be affected by the supply at Halifax—and the risk referred to may allude to the exposure from the fact, that the silk at Eastport, if origianlly imported illegally, as the whole country knew much of it was, it would still be subject to forfeiture in the hands of the purchaser. But our answer is—that whenever that paper was made—by whomsoever and for whatsoever purpose,—with the paper, or its purpose the plaintiff has not—and never has had any thing to do. It is not his. The attorney says, it is extraordinary, that a paper should be forged, and no signature put to it—no more extraordinary than that an original should be made without a signature. You are asked whose paper is it? As it is not ours, that question may be easier for the defendants to answer. We can say whose it is not. The counsel ask you how are you to determine but by the hand writing. No one saw it written. And if it resembles the plaintiff's hand writing it must be taken for his. It is not enough to prove a resemblance—that at least may be found in every forgery. The paper is intended to charge the plaintiff with a crime—and to make him answerable for it you must have such evidence as will remove all reasonable doubts from your mind, that he wrote it. Other papers the only material parts of which that have a tendency to touch the plaintiff are proved by the defendants' own witnesses to be forged, and when we find the hand of fraud and forgery at work to create evidence against him, the disposition and the power and destitution of principle is found to commit the offence; and what limit can you set to the extent to which it may be carried, but the occasion, convenience, or supposed necessity of the party.

The first witness called to prove the paper genuine is Mr. Isaac Waldron. He is a gentleman, who sustains a fair character. He swears that he believes the writing to be the plaintiff's—that he has not the least doubt of it in the world When you reflect upon the situation in which this witness is placed, you will not be surprised that he should feel some zeal in the matter. It is not in human nature that it should be otherwise. During the last winter, the papers were exhibited to him and he formed an opinion that this was genuine. He was then supported by the opinion of one other individual, who for some cause does not now choose to swear to it. Others examined the paper and, with the exception named, no man was found to support him. He was left by the whole country to stand alone in support of it. He could not feel indifferent to his situation. He might not fear that his integrity would be questioned, but his judgement was, and no man like him, is without some pride of opinion. His being positive,—*very* positive, give no more weight to his testimony. Some men are more positive than others in every thing. It is only saying, I am confident I am right. And some men are always right in their own judgement. Mr. Waldron is confident in his opinion in this case. As to his means of being acquainted with the plaintiff's writing I think you will be satisfied it has been much less, than that of very many other witnesses, who have been before you. He has seen him write, but he cannot tell when, or where, and in all, never many times. And after all, it is only the judgment of one man with such means

as he states—an honest and good man, but no more than other men, infallible. Another witness, who was called by the defendants and who was a clerk of the plaintiff from March, 1811, to April, 1812, was asked in relation to this same paper, and swore he thought it was not Upham's. This, too, is their own witness, and we may think from his occupation in the plaintiff's own counting house at that period, is more competent than strangers are to decide. And who is found to support Mr. Waldron's opinion? Mr. William B. Parker. In all this place—in all the surrounding country—in all the world, he is the only individual, who swears that he even thinks it may be the plaintiff's writing. And he says, that until 1814, he knew nothing of the plaintiff's writing—and after that period got his principal information from being, a while, a clerk in the Branch Bank—and he is not there now, where, as book keeper, he probably had but little to do with signatures.

Now if this were a civil suit for debt upon such a paper and it rested on this evidence of its genuineness, I doubt if you could give a verdict to support it. With less than the testimony of one witness who had means of knowing the hand writing, it could not be even read to the jury. Mr. Waldron, who does not know when he ever saw Mr. Upham write, thinks it his,—another of the defendants' witnesses, who stood by his desk and had charge of his papers for a year, thinks it is not his—and Mr. Parker, so far as relates to any knowledge of his hand writing at that period, may be set down as blank. But it is as proof of *crime*, that this paper is offered. Suppose it were a forged draft or check and the question were whether Mr. Upham had made it to defraud another, would such evidence of his writing satisfy you that you should convict him? The defendants' counsel say this must be true, or Gen. Upham has been most barbarously treated. Gentlemen, he has been most barbarously treated! That is our complaint and the reason why we come here.

If the testimony of the defendants on this point is sufficient to ground any pretence for calling that paper genuine, I believe, gentlemen, even such pretence it is in our power entierly to remove. In calling your attention to the witnesses on the part of the plaintiff, we fearlessly ask you to examine critically their *means* of knowledge and scrupulously as you will, the *characters* of the men.

Mr. John Rice* swears, that he has been acquainted with the plaintiff's hand writing 15 or 20 years—that he was military store keeper during the war, and cashier of the Union Bank since—that during and since the war he was intimately acquainted with Gen. Upham's hand writing. He swears this paper is not Upham's hand writing.—He has no doubt respecting it. Give us reasons, says Mr. Attorney for your opinion—but what reasons did his witness give? Mr. Rice gives you reasons—most conclusive reasons. I need not repeat them. Have the defendants called any witness of more integrity—of better means of judging, or more competent to form an opinion. We then offer you Mr. Wm. Haven, one of the oldest cashiers in town, who swears he is particularly acquainted with the plaintiff's writing, and that this writing is not his.† No man impeaches Mr. Haven. Mr. Samuel Lord, another cashier of a bank, is called. He swears he has been acquainted with Gen. Upham's handwriting for twenty years. He kept an insurance office previous to his being cashier—has often seen the plaintiff write—and that this writing is not his. Mr. Alexander Ladd, a merchant of extensive business and familiar with hand writing, swears that he has known Gen. Upham's hand writing twen-

[* One of the committee who called on Upham last winter to get his denial of the letters. He knew that Upham signed the ORDER FOR NEW RUM after he had unfolded the paper.]—Ed.

[† And also that the signature to the order for *new rum* is not his.]—*Ed.*

ty years, and he does not believe this to be his. Mr. Robert Neal testifies, that he has been intimately acquainted with Gen. Upham's hand writing eighteen or twenty years. He served under him in the late war, and with him in the custom house since, and he says this paper is not Gen. Upham's writing. Mr. John N. Sherburne is offered. I beg you to distinguish him from Mr. John H. Sherburne*—he is quite another man. He swears he has been acquainted with the plaintiff's hand writing since he was appointed to the custom house, and that he thinks this paper was not written by him. Mr. John F. Parrott swears, that he has been acquainted with the plaintiff's hand writing eighteen years, and that he does not think this paper was written by him. Mr. Parrott is known to you personally or by reputation. Mr. Edmund Roberts, a gentleman who has been engaged in extensive mercantile transactions, and who formerly boarded in the same house with the plaintiff while they were in business at the same time, says, he has been intimately acquainted with Gen. Upham's hand writing from 1806—has often seen him write, and that he does not think this writing is his. Mr. Andrew W. Bell says he has been acquainted with the plaintiff's hand writing from 1816 to 1824, and he does not think this writing is his. Mr. Samuel Larkin testifies, that he is acquainted with Gen. Upham's hand writing, but was better acquainted with it in 1810, 11 and 12, than since, and that he does not think this paper was written by him.† Mr. John Ball, much engaged in handling paper and in examination of signatures, swears to his knowledge of the plaintiff's hand writing since he was appointed to the custom house, and thinks this writing is not his. Mr. Charles Cushing, a merchant of extensive business, testifies, that he has been acquainted with Gen. Upham's hand writing from 1805; has often seen him write, and that this paper was not written by Upham. But another witness, whom we have offered you, from his integrity, judgment, and better means of information than any other individual, is sufficient alone to settle this question. Mr. James Ladd testifies, that twenty-four years and upwards, he has been well acquainted with Gen. Upham's hand writing; that a year or more he was a clerk in his store, about 1806; was always conversant with his writing; from 1816 to 1829 was with him as a clerk in the custom house, and part of the time a surveyor of the customs, and that in his opinion this is not Gen. Upham's hand writing.

These are the men and such is their testimony, which we offer you to prove that the paper without signature, dated Jan. 12, 1810, was not written by Gen. Upham!

But says Mr. Attorney, "they are the friends of the plaintiff." I thank the gentleman for the concession. They are such as any man may be proud to claim as friends. They are such as none but an honest man *can* claim as friends. They are such friends as were never gained by the commission of the crimes, that are charged upon the plaintiff. Have they for their life time been his nearest neighbors and not *known*, if he deserves the character these defendants attempt to give him? They must have known it. I beg you not to believe this places or this age, yet so corrupt, that our best men and most upright citizens will come forward and jeopardize their own characters in this life, and their hopes of salvation hereafter, by committing perjury to screen the guilty. If there be such witnesses they are not on our list.

The counsel for the defendants say, that you may have heard witnesses testify in courts very differently in relation to highways and their judgment of the practicability and expense of making them, and very differently from

[*And John H. Sherburne is *equally* solicitous that the distinction should be observed. He would suffer most by such mistake.]---*Ed.*

[†And who last winter testified to their genuineness.]---*Ed.*

tho fact. And from that I suppose you must infer, that all our witnesses are wrong, and Mr. William B. Parker correct. But our witnesses are not *highway* witnesses: they were not picked up there, nor is that either their usual or occasional lodging place.* With all due deference to the witnesses, let us now see how this matter is to be weighed. The defendants' two most respectable witnesses, Mr. Waldron and Mr. Plumer, disagree, and may be therefore, for this examination, laid aside, as balancing each other. Then you have left Mr. Parker in the defendants' scale; and on the other hand—but I will not pursue it. It cannot be supposed that men who come here to judge of the evidence are for a moment to doubt.

Not finding, then, this paper to be Mr. Upham's—and it is for the defendants to prove that it is,—but on the contrary, it being incontestably proved not to be his—there is nothing to shew any concern of his in the voyage of the Eliza, in any way illegal or improper. For this is all the evidence in paper or otherwise, that relates at all to that transaction. We here then dismiss this and proceed to examine the other part of the plea, and the evidence which relates to the charge of smuggling five pounds of silk and a hogshead of rum into York.

To make out this part of the case, the opening counsel for the defendants stated to you, that he expected to prove that the schooner Clarissa was chartered on the 1st of January, 1812, from this port to Eastport—that she sailed about the 8th of January—Went to Eastport—thence to a British port—took a large quantity of dry goods—came to York—Was there seized and condemned—and that Mr. Upham and a Mr. William Garland were jointly concerned. For this purpose, the defendants offer three papers. One purports to be a letter from Mr. Upham to Nathaniel Stoodly, dated Jan. 7, 1812, which speaks of having a vessel ready to sail—that the terms shall be satisfactory—and wishing him to come directly to his house. Another purporting to be a letter from Mr. Upham and W. Garland to Nathaniel Stoodly, dated Jan. 8, 1811, proposing to him in the adventure he had undertaken one tenth of profits—that they shall amount to $150—his expenses be paid—and $2 for every day he shall save by arriving here before 8th Feb. And no compensation if the adventure does not succeed—and no freight to be charged for any adventure of his own.—The third purports to be a letter from Mr. Upham to Nathaniel Stoodly, dated Jan. 8, 1812, and is a general letter of credit for any bills he may draw at ninety days.

These letters, true or false, are all the evidence that is before you, to prove this second part of their justification. Henry Tucker was called to prove that he sailed in the Clarissa, but this was ruled out, for so far as he stated, he said Upham had not to his knowledge any thing to do with it—and there was no evidence he had, whether the voyage were legal or illegal which does not appear. The only evidence then to support this pretended voyage to the British provinces, and smuggling dry goods into York, is these pretended letters.—And now if they were all proved to be genuine, what pretence is there, that they support the allegation. The charge is that he smuggled in at York, five pounds of silk and a hogshead of rum. But where is the silk and the rum, and where is the smuggling of any thing in these letters? But we dispose of these letters, not for what they may do here, but to show the world the foul conspiracy that has been got up. It is not necessary for us to shew what they are, to get rid of this defence,—but we do it to remove all suspicion, if any has been excited, against the character of the plaintiff.

These three letters, like the last, the plaintiff declares that he never wrote. The defendants, to prove them to be his, again call Mr. Waldron, and he goes for the whole. He swears they are Mr. Upham's—that he has no doubt. Mr. Plumer, who was the clerk of Mr. Upham at the time of their

[* No, they all belong to *good society*.]—*Ed.*

date, is asked if he did not carry such letter, or a letter at that time, to Stoodly—he swears he did not—that he carried a letter or bill to Stoodly in October—and he swears too, that these letters in his opinion, were not written by Mr. Upham. Here, then, again Mr. William B. Parker must take the whole burthen of carrying these forgeries through as genuine. Even a much lighter load would break him down. You will remember he knew nothing about the plaintiff's writing at these dates, and very little since.

On the part of the plaintiff, all the witnesses whose testimony I have adverted to, in relation to the paper without signature of January 12, 1810, with equal distinctness and certainty, swear that neither of these three letters were written by Gen. Upham—that they clearly are forgeries. There is, in relation to one of them, something more than the forgery of Mr. Upham's hand writing. The name, 'W. Garland,' is to one of them. Mr. Waldron is called, and says, it is a genuine signature of Garland; and Mr. W. B. Parker repeats it. While on the other hand, Mr. Samuel Lord swears, that he was acquainted with Mr. Garland's hand writing, and the signature is not his. Mr. Edmund Roberts says, he was familiar with Mr. Garland's writing, and this signature is not his. Mr. Samuel Larkin often saw Mr. Garland write—often transacted business with him; and he swears, that he believes it is not Garland's writing. If it were possible still to doubt, we further add proof that carries all the certainty, which human testimony in such a case, can give. Garland is dead, and we cannot have his evidence. But next to that, the most certain must be, that of the person, who from his youth, was familiar with Gurland's writing; who for a series of years was his clerk, having charge of all his papers and business; and who, after his death, had the settlement of his estate as attorney to the administratrix. That witness is Mr. Thomas G. Berry;* a gentleman in whose judgment and integrity no one can hesitate to repose confidence. He testifies to you, that he does not believe this is Garland's signature. He has no doubt. Has he any motive to misrepresent? is he not too honest to be influenced by any consideration, to say what he does not believe? And can he be mistaken with his means of knowledge?

We are asked by the counsel then, whence came these papers, who forged them, why not make them more direct to the purpose—why forge two names when the object is to charge but one? Gentlemen, for answers to such questions, we must refer you back to the defendants, or some of their witnesses. I believe that you must be satisfied, that they know much more of them than the plaintiff does, or ever did. Whence they came is not now material to us, and after the testimony we have given you in relation to them, whether they shall go, we may care as little. When you shall advert to the character of some of the persons, who have had most to do with them, you cannot well send them to a worse place, than that of their origin. Why the papers are in the present from, and why Garland's name is introduced would be accounted for, if some other person than Mr. Upham had been concerned with Mr. Garland in business of this or any other character, and those letters were *copied*, merely substituting Mr. Upham's name for that of some other person.†

The defendants attempt to trace these papers from the possession of Stoodly, and a witness by the name of Elijah S. Hall, is brought to swear, that on a dark night, he in front, and Mr. John H. Sherburne and Mrs. Stoodly in the rear, marched from Mr. Sherburne's house to Mrs. Stoodly's—that Mrs. Stoodly there delivered him a box, they then marched back to Mr. Sherburne's parlour, he got a hammer, opened the box, and it contained

[* The same that purchased the goods of Tappan & Searl, to be smuggled from Halifax.—*Ed.*

[† A very satisfactory conclusion.]—*Ed.*

papers. Now, why there is all the pomp of this funeral procession, in a dark night, to escort this box, to Mr. Sherburne's, does not appear. But, Mr. John H. Sherburne comes up and swears just as Hall, and that out of *that* box at *that* time, came these papers. And here Mr. Sherburne leaves you to infer, that this was his first acquaintance with the box, or its contents. But to you, Gentlemen, I shall submit it, whether the defence, or the papers, are at all purified from the suspicion, from the proof of iniquity, by any possesson, inspection, revision, or arrangement, which they may have passed in his hands, or from any account that is given of them, or of the use they were intended for, by himself and his *particular* friend, Col. Decatur, both of whom, according to his testimony, of great influence and fit for all offices. Of this witness, I shall say nothing ! He swears much, and others have sworn much concerning him. He seems long to have been in a rapid downward course, and none to have given him a quicker onward movement than his own counsel, till he is left prostrate to the earth, and no voice is heard to cry "God save him."*

Mrs. Sherburne, the wife, is then brought forward to occupy the place where he had fallen, to stand where he could not. And what testimony is to be expected from her, that she should come to contradict her husband. Surely not. They are one.

Mrs. Stoodly is called by the plaintiff and she most emphatically contradicts Mrs. Sherburne throughout. But the defendants counsel says you must discredit Mrs. Stoodly, because she is contradicted by Mrs. Sherburne. Aye—and why not discredit Mrs. Sherburne because she is contradicted by Mrs. Stoodly? They both appear very fair in their testimony, and no witness has spoken against either ; but Mrs. Stoodly has the advantage of being directly sustained in her account by Stephen Cummett, who swears, that, instead of the box finding its way to Mr. Sherburne's, as Mr. and Mrs. Sherburne state, Mr. Sherburne himself took it from Greenland, without Mrs. Stoodly's knowledge. When this fact is proved, and not before, we first hear from Mr. and Mrs. Sherburne, that the box, which was opened with a hammer in such a solemn form, when brought to the house by Hall, had been open and the papers loose in Mrs. Sherburne's kitchen for months before ! But we leave this matter to be discussed or adjusted, as best it may, by the individuals most interested in it.

To give these letters the appearance of being genuine, and of having been received by Stoodly, and of having been in his possession, there are endorsements upon the back, purporting to be in Stoodly's hand, as if received from Mr. Upham, and witnesses are called to prove these endosements to be in Stoodly's hand writing. This corps, and it is a very small one, is led on by Col. John P. Decatur. He has figured largely in this transaction. These papers first saw the light, and only became valuable in proportion as they could serve him, and although they seem to have been of but *temporary* use in his matters, he cannot be destitute of good feelings and kind wishes toward them. The Colonel knew nothing of Stoodly's writing before 1824,—and being asked if the letters are filed in Stoodly's writing, his answer is,—"I should say so."

The next in command is Mr. John C. Davis, of mahogany memory†—[Mr. Cushman here interrupted and said, you ought not to say it, for Mr. Davis is a very fair and upright man.] Mr. Bartlett begged Mr. C.'s pardon, and observed it escaped me, at the moment, that you had once before affirmed, upon your personal character, that Mr. Davis was one of the best

[* And should he continue this "downward course" for a thousand years he will get somewhere in the latitude of John N. Sherburne. "I beg you to distinguish them."]—*Editor.*

[† Not a witness for the defendants can escape, of course, without a *nailing to the pillory.*]—*Ed.*

of men. I have not stated that he is not. I have made no allusion that does not come from his own testimony. He swore that he was once employed on the navy yard ;* that while there, he *borrowed* a mahogany chip, which had been thrown away, and that he carried back a plank of mahogany in return for it ; and that after all this generosity, the officers of the government would not let him come upon the yard. Mr. Davis seems for a short time to have been in some subordinate station among the *chips* upon the yard, and Mr. Stoodly was connected with the station as sailing master ; and he says, that he learnt enough of his hand writing, to say, that these letters are filed in his hand writing. But the testimony of John P. Decatur and Mr. John C. Davis, in the estimation of the defendants' counsel, not being sufficient to establish Stoodly's hand writing on these letters, they are *supported* by Mr. John H. Sherburne, the same of whom Mr. Underwood, Mr. Gains, and twelve other good men, testified. "These three !"

To shew, that these papers were not filed in Stoodly's hand writing, the plaintiff has offered you the testimony of Mrs. Stoodly, the widow of Capt. Stoodly. She swears that she knows her late husband's writing well†—and this is not his. The defendants' counsel say, that she speaks with confidence and unhesitatingly. And why should she not? who can better know her husband's hand writing? But they say she is contradicted ; that she swears her husband sailed no voyage after she was married to him ; and that Mr. Bell proves that he sailed in his employ in 1816 and '17. Stoodly went no voyage after he was married and previous to his taking a commission in the navy ; and to that the answer of Mrs. Stoodly referred. It was to that period of time that the enquiry was directed, and to that of course her answer was made. She could have had no motive to have misstated about the voyage of 1816--17, and she had no reason to suppose it was in question. Miss Stoodly, the daughter of Capt. Stoodly, testifies, that she knows her father's hand writing, and she knows that the filing on these letters is not his—and, therefore, says Mr. Attorney, "she is as bad as her mother." And how bad is that? So bad, that she will not, for these defendants or all their agents, falsely swear writing to be Capt. Stoodly's which she knows is not.‡ Mr. Andrew W. Bell, who knew Mr. Stoodly and his hand writing long before the defendant's witnesses ever saw him, and in whose employ he sailed in 1816 and '17, swears that the endorsements are not his hand writing, Mr. John Ball, whose unsworn opinion would be worth a score of some sort of oaths, testifies, that he knew Stoodly's hand writing well, and that these endorsements, so far from being his, are but a very *clumsy* imitation of his writing. The papers then are branded with the crime of *forgery* from beginning to end—from first to last. There is no clean place on them. But had the endorsements proved to have been genuine, they would not have established the genuineness of the papers, for if Stoodly and others had chosen to have used the plaintiff's name as a cover for illegal transactions, it would not make him answerable. But proving to be false, as the endorsements do, the evidence would corroborate, if it needed corroboration, the proof of the falsehood of the papers themselves.

Gentlemen, we stop not with proving the forgery of the papers ; but we prove conclusively as ever a negative can be proved, that no such transactions ever took place ; that no business of the kind was ever done between Upham and Garland ; and that, therefore, there could not have been any such papers. For this purpose we call your attention to two witnesses, one

[* Clerk to the Naval Constructer.]

[† And she swore through a black veil, and of course could not be mistaken.]—*Ed.*

[‡ Nor would she "falsely swear" there was a single paper in the whole box written by him.]—*Ed.*

of whom was a clerk with Mr. Upham at the time the papers refer to, and the other was clerk with Mr. Garland.

Mr. George W. Plumer testifies, that at this period, he was Mr. Upham's clerk, kept his books, knew his business, and that he was concerned in no shipment with Garland, and in no shipment with any person -- that in fact he closed his business in October, 1811, and was only engaged in settling his accounts until he entered the army. And yet the counsel say, he must have been then engaged in a seven thousand dollar importation of goods. Could such business be done and he not know it? Such pretence is pre-preposterous.

Mr. Thomas G. Berry, at the same time was the clerk of Garland, the confidential clerk, had charge of all Garland's books, papers and business, and he swears, that Garland was in no manner concerned with Upham in such voyage as these papers indicate, or in any voyage, or shipment of any sort, or any character. It is suggested, that these were secret transactions. Will any man pretend that they could be secret from the clerks and book-keepers of the parties. That purchases could be made and moneys pass to the amount of $7000 and they not know it? Proving then, as we do, that the parties had no transactions together, it is impossible that these pretended papers could be genuine.

But there is something stronger in proof of the plaintiff's innocence, if possible, even than direct testimony of witnesses. It is in the life and reputation of the plaintiff, from his childhood to the time of this publication. Born at a place not distant from this, and from boyhood engaged in business in this place and vicinity—no man has sustained a fairer character; no man had more the confidence of his acquaintance. He was the intimate acquaintance and friend, and from early life was patronized by that "long tried patriot" Langdon. Did *he* not know him; and was he the man to take a smuggler to his bosom? Was it such a man that he would recommend and that the government would entrust to lead their armies to battle? Was it such crimes that secured him the confidence of Madison in the appointment of Collector of this port, and the renewal of it from Monroe and from Adams? If guilty, would his guilt have slept for twenty years, and the evidence then for the first time have been dug from the dust, when most of those, by whom it could have been disproved, had gone to the grave?—Impossible!—impossible!

Gentlemen,—a few words on one other most strange position, taken by the defendants' counsel. Which is, that if the defendant's justification is not made out, yet you may discharge them, because there is no express malice proved in their publishing the charge. In other words, if the plaintiff is not guilty as the defendants in their plea allege, yet you must find him so,—for want of malice, express malice in the defendants, and that surely, whether the charge they published is true or not, they had no personal malice against the plaintiff, they lived at a distance, and had no individual quarrel with him. To all this, I say, there is no such law, here, or elsewhere, now, or ever was, since courts existed. The law is, that when a person is injured by a false publication, and the charge is justified, all the malice necessary to sustain the action is implied. Mr. Attorney has named some exceptions to the implication of malice in spoken slander, where the charge is not justified, which instead of sustaining his position, establish the general rule, as I state it. "That mischief," says the law, "which a man does, he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. The crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at common law. He who scattered "fire-brands, arrows and death" is *ea ratione* criminal. It is not incumbent on the prosecutor to prove his intent; and, on his part he shall not be heard to say, "am I not in sport?" "If," said Lord Erskine, in the passage read to you yesterday, "if a printer's servant, without his master's consent, insert a slanderous article against me, in his newspaper, I ought not in justice to indict him; but it is no defence to an action, for he is anwerable to me *civiliter* for the damage," &c. And if any one then held such opinions as

we have heard advanced, he might well have said, that "people were resolved to distort every principle of law into nonsense." But we need not cavil about proof of malice. We have already too much. I wish there was less of it. If the accusations had been merely uttered, and but once, it might have been in the heat of passion. But proclamation is made that they were to be forth coming, and they were repeated and served up again and again in every form, as if the ravenous appetite, that fed on them, could never be gorged, or satisfied. When depositions and certificates were furnished by the plaintiff's friends,* to shew the falsehood and the forgery, instead then of retracting and making that atonement, the madness and fury of the accuser was only increased. When an opportunity was had to examine the papers, and but one person here was found to say they were true, and fifty that they were false, the confident assertions of the defendants were redoubled, as their pretended evidence vanished. Up to the very day of this court, their paper repeats the charge, and here they come and place the falsehood upon record in a plea of justification. And in such a case, where a false charge is justified, does Mr. Attorney say, that any other proof of malice is required? The court will not so say.

The questions you have to ask yourselves, are, did the plaintiff corruptly take and misuse the money of the government? Is he guilty of smuggling goods into Halifax, and silk and rum, as alleged in the plea, into York?

Gentlemen, settling in the manner, I cannot doubt you will, the questions which have been proposed, one other consideration remains for you, and that is, the amount of damages, which the plaintiff shall recover.

The opening counsel for the defendants, bestowed praises upon them with a lavish hand. I will take nothing away. I have no wish to abate from his high commendation. This matter of elevation, however, of which the gentleman spoke, is a relative term. There may be a depth so low, that to one looking up from it, the scavenger in the common sewer, may, in the poetical language of that gentleman, seem to be "enjoying the pure air of the mountain top."†

But, the more justly these defendants merit the encomiums bestowed upon them, the greater the injury they may do to the plaintiff. The higher their elevation, the more fatal the blow which falls. We stated that the plaintiff's character was fair, and that, in important stations of trust, he had been honored with the confidence of his government, and had gained the esteem of his fellow citizens. This, said the gentleman, he could easily controvert, but that it was unnecessary. What law, I would ask, does the gentleman hold, and where can he have learnt it, which makes no distinction of character, and by which that of a vagabond shall be prized as high as the reputation of the fair and honest? It was not well to say, that they could controvert our statement, and not to do it. If it was in his power, he was not faithful to his clients, to neglect it.

Some law was also read to us, as to what the party might do "in the discharge of some legal or moral duty." By what new system of ethics it becomes a moral duty to publish falshoods, I profess not to know. If a legal right by prescription be claimed, the length of time it may have been exercised perhaps, may not be disputed; but the law of such prescriptions may be. There is no prescriptive law for falsehood.

Was it not sufficient, that these false and forged papers were taken in the dark to where they were not known, to be used against this plaintiff—and that there, unheard, he should be condemned and punishment executed upon him.—That they then should be made to serve some new malignant purpose, be brought back-and announced to the world as proof of infamy and crime.

In relation to the damages, the present state of the pleadings present different considerations from what would arise upon the general issue simply. With that issue circumstances in mitigation of damages could be urged, that cannot with the justification upon record. This plea admits that the charge was intended to be made—was deliberately made, and is, on reflection, persisted in.

We ask for nothing vindictive. We ask for such a sum as shall vindicate the plaintiff's character and do justice to your own.

Every man has an estate more or less valued in his reputation. There may be those in the community, who hold in but little estimation any thing but property itself, and while that can be secure in their grasp are content. Others, in

[*Taken *secretly* in his own counting room; and the witness instructed to tell but *half the story*?]

[† Mr. Cushman alluded to the President, and not to the defendants.]—*Ed.*

comparison with reputation, would deem the wealth of worlds as valueless Blast his fair fame—take form him his character and you take that which is dearer than life—that without which life itself is not a blessing, but a curse.

Something in this case is due to the public. While accusations are, at this day, indiscriminately dealt forth through our newspapers, with no regard to truth, or character; when public justice is appealed to for a gross and high handed outrage, the community should learn, that the appeal is not made in vain.

There is something due to yourselves. By your verdict you will say, whether you hold cheaply and lightly, that, without which no man has a right in your seats,—an unimpeached reputation.

These is too, something due to the plaintiff. All the proof is, that from his infancy to the publication of these libels, he sustained a fair and unblemished reputation. His situation and employments in life have been such, as to render all his feelings sensitive to every thing affecting his honor. His stations have been such as to make him extensively known through the country and where his name has gone, before associated only with honor and honesty, it is now repeated with this slander, and the man esteemed and loved is to be associated with the charge of the meanest knavery. Instead of this had he fallen by the hand of the assassin, then the gallant spirits by whose side he fought in the most bloody conflicts of the late war, would have done justice to his memory, and have dwelt with pride upon the untarnished fame of the soldier of Fort Erie.*

Gentlemen,—He is a husband and a father. That wife, who in the darkest hour of our struggle cheerfully girded on his sword and sent him to fight his country's battles, who watched with anxious heart the varying vicissitudes of war, and gloried in his well earned honors; that wife still lives; and lives in the reputation of her husband.

His children too live—and live to be condemned to infamy by these slanders, or to be rescued by your verdict. Had his life been taken, how much less to them the affliction compared with this. Though they would have been left without wealth or means of education or support—they would have been left his fair fame at least to commend them to the cold charities of the world. Take from him his character—you take his all—his means of life, and leave him only infamy to entail upon his posterity.†

Whatever feelings, gentlemen, you may heretofore have indulged—remember, that the excitements that gave rise to them are temporary. They are passing away—will soon be passed, and we shall also have passed with them. If influenced by them in your judgment, it will ere long be the subject of most bitter regrets. All I wish is, that in all future time, and beyond the scenes of time, you shall be cheered with the consciousness that you have faithfully observed that solemn obligation which you have called God to witness—by giving "a true verdict according to the law and the evidence."

[* Where he was snug in a RAVINE during most of the contest !]

[†Oh dear ! Oh dear !]

After a brief and impartial charge by the Chief Justice, the Jury retired at six o'clock, on Friday evening. The next morning they came into court, and reported that they could not agree, being equally divided—whereupon they were discharged and the action continued to the next term of the court, to be holden at Exeter, on the third Tuesday of March next.

APPENDIX.

[Since the greater part of this report was printed, we received copies of the following depositions, taken before proper authority to be used hereafter in Court. The first, the deposition of HENRY TUCKER, relates to the Clarissa, which was condemned at York, and the second exhibits a NEW TRANSACTION. How many more instances of Upham's smuggling may be brought to light in the course of this investigation, time will disclose.—It is pretty evident, however, that he was constantly engaged in the smuggling business from 1810 up to the time of his appointment in the army, in 1812.]

CAPT. TUCKER'S DEPOSITON,

Relating to the Schooner Clarissa.

I, Henry Tucker, of Portsmouth, county of Rockingham, N. H. testify and say, that about the 17th January, 1810, I sailed in the sloop Eliza, bound for Eastport, whereof George Huntress was master, and Capt. Benning Morrill was the owner. I went as pilot. The cargo consisted of flour, and hhds. and tierces marked "corn." We arrived at Eastport the first day of February, and hauled into Burgin's wharf. We lay there about fifteen days, then we moved further South, about two miles, to Prince's wharf; there we took out all the cargo except the flour, and put it into Prince's store. Then we moved back to the same wharf, and laid there about three or four days. Then Capt. Stoodly came, and somebody with him, and took his trunk from on board the Eliza. Then Capt. Huntress sold what flour was on board to Jabez Mowry. I did not hear Capt. Stoodly say much. I was not acquainted with him at that time. Capt. Huntress and Capt. Stoodly were often talking together. After Capt. Huntress moved down to Mowry's store, and took the flour out there, that is the last of my knowing any thing about Capt. Stoodly. We then took in a load of Plaster, and came home here, and arrived at Portsmouth about the first of March.

Question by the defendants.

Did you subsequently go another voyage to the Eastward? If so, give the particulars.

Ans. I went a number of voyages, one in particular, in 1812. Sailed out of York in schooner Clarissa. I went as a pilot with Capt. Stoodly, and arrived at Eastport after about 40 hours. We hauled into a wharf, said to be Hayden and Shed's—lay there ten or twelve days—took in lumber what we thought proper. Then we hauled out to anchor. In the edge of the evening a boat came along side, and threw on

board large bundles of blankets, baizes, and flannels, and we stowed them on the half deck. From thence, we proceeded up the river St. Croix, about 14 miles, to St. Andrews ; there we took 12 puncheons, and ten flour barrels filled with English goods, on board. We then came out, and never went in any where until we arrived at Winter Harbour, about 9 o'clock, P. M. and sailed again the next morning for York, in Maine, where we arrived about 6 o'clock in the evening, about the first of February. In about an hour after we arrived, the vessel and cargo were seized by the Collector, Mc Intire. The goods were taken out and hauled up to the Custom House Store, and that was the last I knew of them.

Question by the defendants.

Who employed you to perform the above described voyage to St. Andrews ?

Ans. Mr. William Garland.

Question by the same.

Were all the orders given you by Capt. Nath'l Stoodly ?

Ans. Yes.

Question by pl'ff.

Had Gen. Timothy Upham any interest or concern in the Sloop Eliza or her cargo, or the schooner Clarissa or her cargo, during the above described voyages, according to your knowledge ?

Ans. Not to my knowledge—I never heard his name mentioned until after the goods were seized.*

Q. Who employed you to go in the schooner Eliza ?

Ans. Capt. Morrill.

Question by the defendants.

What was the cargo of the Eliza, and unto whom did the same belong ?

Ans. Flour, and hhds. and tierces, said to contain corn ; but in rolling out some of the casks, I heard something that I knew was not corn; but whether it was rum, gin or water, I cannot tell.—The goods were said to belong to Capt. Stoodly. I heard no one else named, to my recollection, as owner of the goods.

Question by pl'ff.

Do you know what became of the cargo of the Eliza after it was landed at Eastport ?

Ans. No.

Question by the defendants.

* The whole of the answer was as follows :

Not to my knowledge, I never heard his name mentioned until after the goods were seized. About two days after, I was informed, at York, by Capt. Grover, that *Timothy Upham, Joseph Sewall, and Wm. Garland,* owned that cargo of English Goods.

The latter part of this answer was erased upon motion of Mr. Cutts, upon the ground that it was hearsay evidence, and the Justice sustained the motion.

Why did you lie so long at Eastport before you landed the cargo at Prince's wharf ?

Ans. I cannot tell.

Question by the same.

Did not Capt. Huntress tell Capt. Stoodly that he could wait no longer ?

Ans. He did.

CAPT. STOCKER'S DEPOSITION,

Relating to the Ship White Oak.

I, William Stocker, of Portsmouth, in the County of Rockingham, N. H. Mariner, testify and say, that in the latter part of 1810, all of 1811, and the first part of 1812, I was in the employ of Col. Upham. I was master of the Ship White Oak, bound to Europe, in which time I made two voyages.

Question by the Defendants.

To what places did you go ?

Ans. Once to Liverpool, once to Dublin, also once to the West Indies.

Question by the same.

To what port in the West Indies did you go ?

Ans. Demarara.

Question by the same.

Of what did your cargo consist, at the time you went to Demarara ?

Ans. Lumber, Fish and Provisions.

Question by the same.

Had you any thing else on board ?

Ans. No.

Question by the same.

Did you purchase a return cargo, and of what did that consist ?

Ans. Rum and molasses.

Question by the same.

At what Port in the U. S. did you arrive, and what became of the return cargo.

Ans. I arrived at Portsmouth and landed it there.

Question by the same.

Was not said cargo or some part thereof landed without a permit from the proper authority, and without the payment of duties ?

Ans. I entered all the cargo at the Custom House, and got a permit to land the same.

Question by the same.

At what time did you land the cargo ?

Ans. In the month of June, 1812.

Queston by the same.

Was not you *prohibited by law* from bringing *rum and molasses* from *Demarara* that time.

Ans. I *did know* that it was *contrary to law*, and *cleared out for Europe*, but found no difficulty in entering at Portsmouth.

Question by the same.

Did not the above named Port, from whence you sailed, at the time above mentioned belong to the British ?

Ans. It was under the Britsh Flag at the time.

Question by the same.

Was not said vessel seized during the time you commanded her, in consequence of being concerned in illicit trade ?

Ans. *Yes* : She was seized at Demarara in a few days after my arrival, by a British brig man of war, with five other American vessels, being all that I knew of in port, except the Ship Resolution, Capt. Tibbets, from this place ; and they discharged my vessel themselves, and found enough on board to condemn her, which I did not enter.

Question by the same.

What were those articles you did not enter at the Custom House ?

Ans. Salt provisions, beef and butter ; and were not entered at the Custom House, because we were not permitted to land them.

Question by the same.

Did you not sell, at that place, that part of your cargo which you were prohibited from entering at the Custom House?

Ans. *I agreed to sell it to a British subject by the name of Finleson*, but did not receive any pay.

Question by the same.

What did Mr. Finleson agree to give you per barrel for beef ?

Ans. I cannot tell.

Question by the same.

Did not the person who made the contract with you for those prohibited articles, agree to pay you therefor ? if not, why ?

Ans. I was to have been paid in 30 or 40 days after the cargo was out and the goods delivered, but the goods were never delivered, and I received no pay for those goods under consideration.

Question by the same.

Was not said vessel and cargo seized by the Government, condemned, and the whole sold at public auction ?

Ans. *Every thing was seized and sold* excepting the long lumber. Nothing was *condemned on trial* except *beef and butter.*

Question by the same.

Who were the owners, and by whom and at what time was said vessel loaded at Portsmouth ?

Ans. *Mr. Upham, Mr. John Titcomb, and Mr. Samuel Ham*

were the owners, and loaded the same in the month of October, 1811.

Question by the same.

What papers did you produce to the Collector of Portsmouth, N. H. on your return home from the West Indies ?

Ans. The *clearance I got at Demarara.*

Question by the same.

For what place did you clear for at the above port ?

Ans. For Russia.

Question by Plaintiff.

1. For what port was the White Oak cleared when you sailed from Portsmouth, in October, 1811 ?

Ans. For Surinam, on the same coast.

2. Why did you not go to Surinam ?

Ans. I fell to the leeward, and could not fetch Surinam.

3. Have you the orders or instructions of the owners, which you received at the time of your departure from Portsmouth ; if yea, annex a copy or state the contents of the same.

Ans. I have not the written instructions—the letter of instructions were lengthy, and I cannot repeat them correctly.

4. Who were the owners of the ship White Oak at the time of her clearance at Demarara for Russia, in 1812 ?

Ans. *I purchased the vessel for the former owners*, and took a bill of sale in my own name.

5. Who were the owners of the ship White Oak, at the time of her arrival at Portsmouth, in June, 1812 ?

Ans. On my arrival in the outer harbour, I came to Portsmouth and called on Mr. Upham. He informed me that he had nothing to do with the vessel—That he had sold out to Capt. Oliver C. Blunt. I then called on Titcomb and Ham, and transacted my business with them, *Mr. Blunt taking no part at the time* of discharging, but on settlement of my accounts he did interfere with my charges.

6. At what time did Mr. Upham sell his interest in the White Oak to Capt. Blunt ?

Ans. I cannot tell.

Question by the defendants.

Was it not understood when you sailed from here, in 1811, that you should go to Demarara ?

Ans. *It was understood that if I could not find a market at Surinam, I should try at the leeward, and Demarara was the first place.*

APPENDIX.

VOYAGE OF THE JOHN LANGDON.

ARGUMENT.

By the following documents it appears that Capt. Nathaniel Stoodly, in the service of *Henry Tredick, jr.* and *Timothy Upham*, made a voyage to the West Indies, in the year 1811, during the non-intercourse which preceded the late war with Great Britain. No. 1, is their letter of instructions, enjoining upon him "to *have in view* the laws of our country, and particularly the late act relative to the importation of British produce;" "but having confidence in his experience and discretion," they do not confine him "*to any port or ports particularly*," nor do they "undertake to say *what articles*" he is "to receive in return for his outward cargo." "The islands of Hispaniola, Cuba and St. Barts," they suggest to him, "are not only open for the reception of salted provisions of which your cargo is partly composed, but are places from which you may *without hazard* import into the United States any articles they produce."

No. 2 is the Invoice of the outward cargo.

No. 3 is Upham's letter to Stoodly, saying to him that "not knowing *what business* he may find for the Brig abroad," &c. and that "it will be impossible for him to return from an *English port* with English produce," &c.

No. 4 is the agreement with James Grant, at *St. Vincent*, for the purchase of the cargo, wherein he agrees to receive in payment "rum at half a dollar per gallon, and molasses at three shillings per gallon."

No. 5 is Stoodly's letter to Upham, dated "May 6th, 11," informing him that he does not think *it would be so safe to enter at Portsmouth* on account of there being two Portsmouth

vessels [at St. Vincent,] (at which place, the next document shows this letter to have been written,) as the crews of those vessels might expose them, if his own did not. In this letter he says "the time I was to lay, May 4th, 11." agreeing with the terms in the contract, (No. 4) to have the rum and molasses delivered, in "thirty-five days from the date hereof," which is March 28—and 35 days from that time brings it down to May 4th, the time "he was to lay to receive the payment for the cargo."

No. 6 is the Bill of the cargo, consisting of molasses and rum, which the Captain, availing himself of the latitude given in his instructions, confining him to "*no particular port or ports*," purchased, not at *Hispaniola*, *Cuba or St. Barts*, places from which he could import "*without hazard*" into the United States, but at the British Island of St. VINCENT, *one of the prohibited places.*

No. 7. Stoodly to Upham again. He expresses his concern how he should get his cargo in. "It is true I shall come from a *Spanish port*, with proper documents, *if they can be obtained*, which I think very probable," (alluding no doubt, to forged or false papers.) "There is one point only I have fixed—that is, *it must not be seized*—and provided it cannot come in fairly, it must some other way." Acting upon the fears expressed in his previous letter (No. 5.) "that it would not be so safe to enter at Portsmouth," we next find him with his vessel and cargo at York.

No. 8. Upham's letter to Stoodly at York—at which place, it seems, Capt. Hart was sent, to take the vessel to Boston. He *must not stay in York one hour after it is possible for him to be away, &c.*

This may be a fair and legal voyage as Mr. Upham pretends, but it certainly carries a different aspect upon the face of it. There are some facts in this case too stubborn to be got over easily. *It is a fact* which Mr. Upham has admitted, that he was part owner of the cargo. *It is a fact*, that Stoodly, availing himself of the latitude of his instructions, *did go to a prohibited British port*, the Island of *St. Vincent.* *It is a*

fact that he did import from this prohibited Island, *contrary to law*, a cargo of rum and molasses into the United States. *It is a fact* that he entered this cargo at York,—no doubt by the aid of forged or false *Spanish papers*, and although the owners lived in Portsmouth, the vessel was got out of York as soon as possible, and the cargo carried to Boston, where she had only to show a clearance from York,and where she would not again be under the necessity of exhibiting her false Spanish papers. If however, this was an open, fair, and legal voyage, Mr. Upham and his friends can doubtless explain it to the satisfaction of the public.

[No. 1.]

Letter of Instructions, in Upham's hand wr''ng.

Portsmouth, Jany, 30. 1811

Capt Nathl Stoodly--

Dear Sir,

The Brig John Langdon of which you are Master is now ready for sea--& we confide her to your direction for a voige to the West Indies & have consigned her cargo to you. Having confidence in your experience & discretion, we do not confine you to any port or ports particularly, nor do we undertake to say what articles you are to receive in return for your outward cargo— enjoining upon you however to have in view the laws of our country and particularly the late act relative to the importation of British produce ; & if while in the West Indies you should learn that this act is rigidly enforced you will govern your self accordingly. We can only suggest to you that the Islands of Hispaniola, Cuba & St. Barts are not only open for the reception of salted provisions of which your cargo is partly composed, but are places from which you may without hazard import into the United States any articles they produce & it may be well to take your return cargo from one of those places. As the expenses of the viage beare a large proportion to the amt of your cargo dispatch is of great consequence you are beside your wages entitled to a commission of 5pr Ct outward & 2 1-2 on homeward purchases. Wishing you a prosperous voige & safe return to your friends

We are Respectfully yours——

HENRY TREDICK Jr }
TIMO UPHAM }

[No. 2.]

Invoice of Merchandise shipped jointly and equally by Henry Tredick Junr & Timothy Upham on board the Schooner John Langdon Nathaniel Stoodly Master, bound for St. Bartholomews and consigned to the said Master for sales and returns

83,614	feet boards Plank and Joist at	10$	836	14
4,680	Red Oak Staves	a 13$	60	84
30	do do Shooks	a 55c	16	50
1000	White Oak Shooks & Hhds	a 142c	1420	00
30	Barrels No. 1 Beef	a 10$	300	00
10	ditto No. 2 ditto	a 8$	80	00
30	Half Barrels No. 1 Beef	a 6.	180	00
4	Half ditto Mess Beef	a 6,50	26	00
			$2919	48
	Deduct 62 White Oak Shooks	$ 6	87	83
			2831	65
	And 50, Red Oak	55c	27	50
			2859	15

Errors Excepted—

HENRY TREDICK Jnr.
TIMO UPHAM

[No. 3.]

Letter from Upham to Stoodly.

Portsmouth, Jany. 31. 1811

Capt. Nathl Stoodly

Sir,

As it will be impossible for you to return from an Eng. Port with Eng Produce to this County—and not knowing what business you may find for the Brig abroad—I have thought best as she has no light sails to put on board 2 pieces sheeting & Two of Ravens Duck—it is not exactly the kind I should give the Brig if she was here, but better cannot be had without sending to Boston—If you should want light sails use them; if not you may return them—I shall not have the pleasure of seeing you again, as I am going in the county—& must again wish you a pleasant voige—I rec d your note this morning and your request as it respects Giles shall be complied with

Respectfully &c

TIMO UPHAM

[No. 4.]

Agreement with James Grant, at St. Vincent.

St. Vincent

It is agried between Capt. Nathl. Stoodle of the Brig Jn. Langdon of Portsmouth and James Grant of said Island Merchant that the said Nathl. Stoodle shall deliver the whole of the Cargo of said Brig consisting of Eighty thousand feet of White pine Boards plank and Scantling, One thousand White Oak Shooks with heading, thirty Red Oak Shooks and five thousand Red Oak Staves in good and Merchantable order to the said James Grant for which he agrees to pay him at the rate of twenty nine dollars pr thousand feet for the Boards plank & Scantling, two dollars for each White Oak shook with heading, one dollar for each Red Oak shook and thirty-three dollars pr thousand for Red Oak Staves in Rum at half a dollar pr Gallon and Molasses at three shillings pr Gallon and Puncheons twelve dollars each in thirty five days from the date hereof and in failure thereof the said James Grant agrees to allow him twenty five dollars pr day for demurage—— Witness our hands and Seals this twenty eighth day of March 1811——

JAS GRANT (*L.S.*)
NATHL. STOODLY (*L.S.*)

[No. 5.]

Copy of a letter in Stoodly's hand writing, endorsed in the same hand "To Col. Upham."

May 6th ——11

Mr.

The time I was to lay for to receive the payment for my cargo has expired some time and I have received nothing yet the excuse they have for nonfullfillment of the agreement is that it has blowd so hard this fortnight past that they could not ship rum to windward. I have done every thing in my power to get payment to no effect. They tell me the first good day that comes I shall get it all at once——I have written to you by every opportunity but their is one thing I forgot to mention that is I dont think it would be so safe to enter at Portsmouth on account of their being two Portsmouth vessels here and the crews of those vessels may injure us if our own crew did not——

Dear Sir

Your Obt. S——t

The time I was to lay
May 4th—11

[No. 6.]

Dr———Captain Nathaniel Stoodly in Account with James Grant———Cr

1811				1811			
May 10th	To 22 Puns molasses 2464 Gallons a 3s p Gall. & 21 Puns a 99s ea	£ 473,,	11,, 0	May 10th	By 68,602 feet W P Lumber a 239s 3d	£ 820,,	13,, 0
	To freight of 1 Puncheon	1,,	4,, 9		By 719 feet Oars a 7d p foot	20,,	19,, 5
	To 35 Puns Rum 4082 Galls: a 4s. 1 1-2 P Gallon & Puns 99s-ea	1015,,	3,, 3		By 900 White Oak Shooks a 6s 6d p	742,,	10 ,,
	To Discount on Lumber $200	82,,	10 ,		By 68 Red Oak Shooks a 8s 3d p	28,,	1 ,,
	To Cash paid Duties on Cargo	87,,	5,, 3		By 5,648 Red Oak Staves a 272s 3d p m	76,,	17,, 8
	To Ditto paid Custom House Fees	46,,	7,, 3		By 4 Boxes Fish 400lbs a 49s 6d p Cwt.	9,,	18,, 0
		£1706,,	1,, 6		Balance due James Grant	£ 7,,	2,, 5
						£ 1706,,	1,, 6
	To the opposite balance brought down	£ 7,,	2,, 5				

Saint Vincent May 13th. 1811
Errors Excepted

JAS GRANT

[No. 7.]

Copy of a letter in Stoodly's hand writing, endorsed in the same hand, "To Col. Upham," without date or signature.

It is scarcely nesesary for me to take up your time in Repeating what I have already writen as I feel confident you will receive my letters. All I have to observe is I shall be oblig'd to return with a cargo. Now how shall I get it on shore. It is true I shall come from a spanish Port with proper documents if they can be obtaind which I think very probable. And they aught to be sufficient. ▵ every vessel is oblig'd to take produce or leave their cargoes behind them as nothing else can be obtaind

▵ But I have some doubts about it Their is one point only I have fix'd that is it must not be seized and provided it can not come in fairly it must some other way–I antisipate being on my passage home in a bout 10 days

[No. 8.]

Upham to Stoodly.

Portsmo June 8th 1811

Dr Stoodly,

I understand that the collector has not *sufficent* certificates for *all* the cargo. I wish you to obtain a *general certificate* for the *whole* and let Capt Hart set off *imediately* and I will take the certificats afterwards for *each particler* cask ; I wish Hart to be in Boston even if he *should not* be *able* to open *his hatches for a Week after he gets there*–By no *means* let him stay in *York one hour* after it is possible for him to be *away*—Capt Hart comes over in a chaise which if you wish you had better take back

Your friend—T UPHAM

DOCUMENTS,

Showing extensive transactions in business between Timothy Upham and Nathaniel Stoodly, from 1809, *to* 1815.

ARGUMENT.

There is abundant proof that Capt. Stoodly was, during the years 1810, 1811 and 1812, constantly engaged in smuggling goods, to and from the British provinces, either as the *agent*, or *partner* of some of the leading federalists of Portsmouth. During all this time, we find Col. Upham in habits

of the closest intimacy with him—denominating him "*my dear Stoodly*"—advancing him cash—answering his drafts, writing him letters, and dealing with him extensively in merchandise. In 1813, we find them owning a store in Ladd-St. *in company*, which was sold June 18, 1813, and Upham accounts to Stoodly in the sum of $436,00 as his half of the amount of the sale, and $ 11,87 "half of the rents of said store," which account was settled "March 27, 1815." For what *purposes* this store in Ladd-street was used, does not appear from the documents. These facts, however, of themselves, do not prove any illegal transactions, on the part of Col. Upham. He may have been in habits of the closest intimacy with a man whose sole business was smuggling, and yet be innocent himself of any such practices. But taken in connection with other circumstances—with proved and strong presumptive cases of smuggling on his part, these documents go in some degree to corroborate the others. The proverb has it, "a man is known by the company he keeps."

Copy of an agreement between Nathl Stoodly & Timo. Upham—

The said Stoodly having recd on board the Schooner Atlantick Two Trunks & 1 Box Merchandise as pr receipt & invoice amounting to Twelve hundred & ninty one dollars & 47c. this shews that one half of the said goods included in his receip are on his own act & the other on account of Sd Upham & that the Said Upham & Stoodly are joinly concerid in all loss & proffit which may accrue on said Goods the said Upham is authorised to make insurance on the whole amount & charge the half of the premium to the said Stoodly—& in case of loss the said Upham is authorised to receive the insurance & apply it to the discharge of sd Stoodlys Note given for half the amt aforesaid
Portsmouth, July, 7, 1809

TIMO UPHAM

Capt. Nathaniel Stoodly to Timo. Upham Dr.

1809										
July	6	To Merchandise	-	-	-			1	00	
do	8	ditto	ditto	-	-	-		2	00	
do	15	ditto	ditto	-	-	-		5	55	
do	17	ditto	ditto	-	-	-		9	44	
do	24	ditto	ditto	-	-	-		5	12	
Aug.	14	ditto	ditto	-	-	-		25	00	
Sept.	22	ditto	ditto	-	-			19	72	
Dec.	11	ditto	ditto	-	-			24	75	
do	12	ditto	ditto	-	-			9	44	
do	13	ditto	ditto	-	-	1	86			
do	do	ditto	ditto	-	-	7	50	9	36	
do	14	ditto	ditto	-	-			0	12 1-2	
do	do	ditto	ditto	-	-			1	00	
do	18	ditto	ditto	-	-			10	00	
do	19	ditto	ditto	-	-			14	21 1-2	
do	20	ditto	ditto	-	-			8	25	
do	21	ditto	ditto	-	-			0	84 1-2	
do	22	ditto	ditto	-	-			18	00	
do	do	ditto	ditto	-	-			12	50	
do	25	ditto	ditto	-	-			4	00	
do	26	ditto	ditto	-	-			0	25	
do	28	ditto	ditto	-	-			10	51	
do	30	ditto	ditto	-	-			8	00	
Jany	2	ditto	ditto	-	-			1	37 1-2	
do	4	ditto	ditto	-	-			5	00	
do	8	ditto	ditto	-	-			0	50	
do	10	ditto	ditto	-	-			0	12 1-2	
do	12	paid Mrs Pray		-	-			100	00	
do	13	Cash		-	-			40	00	
					-					
		Amt. carried to Page 2d			-			$346	07 1-2	
					-					

1810		Amt. brought from sheet 1st	- -	346	07	1-2
Jan	13	To Cash	- - -	12	00	
do	14	,, ditto Gold & Bills	- - -	45	50	
do	15	,, Heartwell & Walker	- -	2	88	
do	16	,, paid Benja Floyd	- - -	6	25	
do	17	,, paid Nath T. Moulton	- -	4	19	
do	20	,, paid Peter Wilson	- - -	43	48	
do	22	,, do Truckage	- - -	0	12	1-2
do	24	,, do Charles C. Hart	- -	1	50	
do	25	,, Merchandise	- - -	2	50	
do	do	,, paid Jos: Shepherd	- - -	1	89	
do	26	,, do Jona. Payson	- - -	57	43	
Feby	3	,, do Peleons a|c to Philadelphia	-	0	40	
do	5	,, Cash	- - - -	7	00	
do	8	,, do Stacy Halls Bill	- -	30	50	
July	28	,, paid Letter postages	- - -	0	25	
Augt	20	,, paid do do	- - -	0	20	
1811						
Jan	15	,, Merchandise	- - - -	13	65	
do	16	,, do do	- - - -	3	37	1-2
do	17	,, do do	- - - -	13	57	
do	23	,, do do	- - - -		030	

do	31	,, do do - - - -	0	75	
Feby	2	,, do do J Payson cash	23	00	
do	9	,, do do - - - -	1	56	
do	11	,, 2 Boxes Cegars - - -	14	00	
do	13	,, paid J. Payson - - - -	12	00	
June	6	,, Cash - - - - -	3	00	
do	12	,, Cash - - - - -	6	00	
do	14	,, Merchandise - - - -	34	38	
			$688	75 1-2	

Amount caried to account current

Dr Capt. Nath'l Stoodly in account current with Timo. Upham Cr

1811		Amount of merchandise a/c brought over	688	75 1-2	1809				
June	18	To cash paid in Boston	16	00	Decr	12	By John & Elizabeth Gookins Note	90	00
do	24	Balance on ac & adventure	8	01	1810 Jan	13	,, Smith & Havens Note	170	15
do	do	,, duties on Rum & molasses	285	70	do	14	,, freight on Gum	154	06
do	do	,, Thos: S Bossley	3	75	1811 July	18	By Balance due to New account	706	75 1-2
do	28	,, Cash	21	00					
July	1	,, Merchandise	52	26					
		,, 25 yardsLinnen 7 s	29	17					
do	10	,, 3 doz Shirt Buttons 10c	0	30					
do	15	,, Merchandise	4	12					
do	5	,, ditto ditto	12	90					
			$1120	,,96 1-2				$1120	,,96 1-2
July 18		Balance a contra due	706	,,75 1-2					

Dr Capt Nathaniel Stoodly in Acct with Timothy Upham Cr

1811				
July	18	To Balance of old ac rendered this date -	706	75
Aug.	19	,, paid postage 8. 8. & 17c - -	0	33
do	28	,, Cash Lent - - - - -	21	00
do	29	,, 3 Yards Broad Cloth - - 18s	9	00
Sept	3	,, my acceptance. in favour of Edward Cutts Junr for	150	—
do	do	,, 8 3-4 Bushels Corn - - - - 6s	8	75
do	do	,, 5 Bags - - - - - 3 9	3	12
do	do	,, Remnant Linnen - - - - 2 6	0	42
do	4	,, paid Truckage on Corn - - - 1 6	0	25
do	5	,, paid Charles Hardy, Bill	23	30
do	6	,, do Jona Payson - - - -	26	54
Nov.	8	,, proportional expenses on Rum & molasses as per a/c sales - - - -	123	64
Jany	2	,, Balance due Capt, S. carried to new a/c	394	25
			$1469	,,35

1811					
Nov.	8	By Sales of Rum & Molasses	$	1128	10
Dec.	19	By 3 Hhds Rum 325 Gallons a 105c,		341	25.
				$1469	,,35

1812. Jany 2

By By Balance of old a/c a Contra to New a/c $394,,25

Dr: Mr Henry. T. Emery To Timothy Upham, on account of Notes signed by, H. T. & C. Emery——

1810.	To Balance due on Notes, as pr account rendered pr Letter, dated, September 8th 1810 -	}	395. 11
	To Interest on $395. 11. from Augt 8. 1810. to Sept. 8th 1811. - - -	}	25. 68.
			$ 420 79

Portsmo. Sepln. 8th 1811

Of the foregoing account nothing has been paid but the whole remains due at this date.—

TIMO UPHAM.

Attest,
MARTIN P. KENRICK.

KNOW ALL MEN, by these presents that I Timothy Upham, of Portsmouth N. H. have empowered Capt Nathl Stoodly, to demand of Henry T. Emery. the balance due me according to the above statement ;, & on his paying the same, to give him a discharge in full ; and he is fully authoris'd to act as my lawful attorney in all things relative to the settlement of said demand.

Witness TIMO UPHAM
MARTIN P. KENRICK
RICHARD LANGDON

[From tho following account the heading has been cut, so that it is difficult to determine whether it is an account against Stoodly, or a bill of credits to him—or whether it is an invoice. It is endorsed in Stoodly's hand writing "*Upham's Bill.*"]

No. 1	1	piece	7 1-2	Yds.	Thread Lace	a 9s		11 21
No. 2	1	piece	114 1-4	yds	ditto	ditto a 2s		38 08
,, 3	5	ps	129 1-2	Yds	do	do a 2|6		53 86
,, 4	1	,,	24	,,	do	do 3|6		14 00
,, 5	1	,,	10 1-4	,,	do	do 3|9		6 40
,,670	1	pie.	4 -34	,,	footing	do 13|6		10 68
,, 60	1	,,	6 1-2		do	do 9|		9 75
,, 69	1	,,	5 1-2		do	do 15|		13 75
,, 71	1	,,	6 1-2		do	do 13|6		14 62
,, 62	1	,,	10 1-2		do	do 6|9		11 81
,, 65	1	,,	10	,,	do	do 12|6		20 83
,, 67	1	,,	6 1-2	,,	do	do 12|		13 00
,, 64	1	pe	7 yds-		do	do 12|.		14 00
	2	Pieces Ravens Duck					13,,50	27 00
	2	Pieces Russia Sheeting					23 Dols	46 00
	4	Pair Knit Pantaloons					18|6	9 00
	3	Pair Gingham Trowsers					10|6	5 25
	2	Waistcoats					9|	3
	2	Cloth coats					13 Dols	26 00
								$348 23

Portsmouth, Jany. 31. 1811
Errors Excepted

TIMO UPHAM.

Received of Nathl Stoodly the sum of two Hundred Doll's as follows viz one hundred Dolls in cash in March 1809 and one Hundred Dolls by Order on Timo. Upham January 12th 1810 being the full amount of a note Given to Capt Eastwick Pray in Gibralter Sometime in the year 1808

Portsmouth Jany 12th 1810

TEMPERANCE PRAY

Portsmouth Aug. 15 1811

Dr Stoodly,

John Gookin has been taken by the English an carried into St Thomas' letters have been recd. from him. I have letters from the White Oak & expect her home daily she was to leave Dublin in Ballast the 1st of July for this place--If I should not be able to sell her she will probably go to W Indies

In haste your friend

T. UPHAM.

Dr Nathl Stoodly Esq To T. Upham

Note dated August 13 1812		725 42
Interest to June 18t 1813—being 10 mo and 5 days		36 67
		762 09
Sale of the Store in Ladd Street 872 sold June 16. 1813 one half of which belongs to Capt Stoodly—viz. 436.-00		
half of the rents of sd Store	11-87	447 87
	Balance	314 22
Interest on balance 21 mo 6 days		33 49
	Balance March 27. 1815	$347 71

Recd by note on demand

T UPHAM

CAPTAIN NATHANIEL STOODLY.

This personage, who figures somewhat conspicuously as the hero of the transactions detailed in this pamphlet,—the exposure and investigation of which have created no ordinary sensation among the good people of New-Hampshire, deserves a passing notice ; and as the papers (*from the Box*) now in our possession furnish almost a connected history of the man, from the year 1805, to the time of his death, we should be inexcusable, were we to omit a brief compilation.

Captain Stoodly appears to have been a good natured, frank, and generous hearted sailor—fond of sporting, of frolick and fun ; and like most sailors, careless of thrift, and, (as his bills show,) spending his money, and squandering his resources with a prodigal hand ; who could buffet the winds and the waves and crack his joke and his bottle with the best of them.—He seems to have possessed a mind of more than ordinary sagacity and shrewdness, and these, joined to a gentlemanly demeanor and a robust and athletic constitution, admirably fitted him for the scenes in which we find him engaged.

Previous to Oct. 28, 1806, he had made two European voyages, as chief mate of a vessel under command of Captain Turner, (1) and this is about as far back as we have any account of him : during these two voyages his conduct appears to have given entire satisfaction to his commander.

In December, 1806, he was appointed to the command of the brig Joseph, fitted out by his uncle, John M'Clintock, and James Shapley of Portsmouth, with a cargo of fish and staves, for the port of Nantz, in France, and the cargo as well as the vessel was consigned to his charge. This was the first

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(1) This certifies that the Bearer Nathaniel Stoodly has been chief mate with me two voyages, that he has always done his duty to my satisfaction and my only reason for parting with him is want of employ for the Ship, as she will in all probability be laid up for the winter—given under my hand this 28th October 1806

PETER TURNER

voyage he made as master of a vessel, and it appears to have been attended with all the vicissitudes incident to a seaman's life. (2] From Nantz he proceeded to Liverpool, and for nearly two years he was engaged in carrying goods on freight between that place and the ports of Spain and Portugal, and the Mediterranean. On the 10th of June, 1807, the Joseph sailed from Almeira with a cargo of wine, with clearances for Copenhagen. During the first part of the voyage she met with heavy gales, which much strained the brig, and caused some damage to the cargo. They were boarded by the British Frigate Niobe, who took from them a butt of wine, for which they paid a fair compensation. On the 13th, in the evening, she was brought to and boarded by the British Privateer Snap Dragon, Ed. Dunsterville commander, who put a prize master on board, and sent her into Plymouth. She was, however, soon after released, and we find Capt. Stoodly instituting proceedings against the owners of the privateer to recover damages for the detention. Some transactions connected with this voyage, seem to have given dissatisfaction to the owners. (3) Although they express a wish to have

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(2) Nantes, Jan 27th, 1807.

Sir—I arrived at Quiberon bay after a rough passage of thirty five day's, without meeting with any misfortune, except loosing some of my sails, and being two men short, one by being sick the other by breaking his ribs. I took a pilot at Bellisle and was obliged to give him six gunies and one crown. Owing to heavy gales I did not arrive at St. Nazair untill the 21st inst. and was then laid under a quarentine of three days; from thence I arrived at Pellerain without discharging any thing, but shall have to lighten before I can come to Nantes. I think it probable I shall take a freight for Lisbon, freights are low now, but are on the rise, therefore I am advised to wait a few day's before I bargain for one. I entered the vessel yesterday, but not without some difficulty, on account of those five blls. of sugar belonging to the mate; because they were not in the certificate.—I cannot inform you of the price of staves; fish is from 8 to 10 dolls. per quintal*

[*This letter is without signature, as is the case with most of Capt. Stoodly's copies of letters sent. It appears to have been his practice when writing a letter, to make his corrections on the first draught, and to send the corrected copy, keeping his first draught in his hands as the copy to retain.]

(3) Portsmouth, N. H. 12th May 1806

Capt. Nathl. Stoodly

Sir—

We have received your several favours, last date Jany. 19th, at Bristol informing us of your Chartering the Brig Joseph for Almeira, which we have ever deemed a hazardous voyage, you will in future communicate to Messrs Mann & Barnard any voyage you may undertake, & consult them, as we have of this date wrote them to make Insurance on the Brig while in Europe & until she arrives in America—by which you will be better able to Judge whether the freight is adequate to the risque—It is our wish you would

him remain in Europe, their censures doubtless had no small influence in determining him to recommend a termination of his business, and a return home. (4) This voyage was finished in October, 1808, by the arrival of the Joseph at Boston, and the officers and crew were discharged. Moses Canney, whose name appears in another place, was first mate of this brig under Captain Stoodly.

We next find Capt. Stoodly, about the 21st of April, 1809, in the service of Smith and Haven; and as master of the schooner Good Intent he sailed from Portsmouth with a cargo of tobacco, which he disposed of to Messrs. Forsyth, Smith, & co. of Halifax, on the 3d of May, 1809.

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still continue in Europe & *pursue such voyages as in your judgement will best promote our Interests*—when you cannot find advantageous employ for your vessel in Europe you will proceed to the Isle May, Bonwest, or Isle Sall, either of which that you can obtain the best Salt from & on the best terms & take a cargo of that article & proceed direct to this port—We wish you to make all your accounts up to the last port—(as it will be a great guide to us in the business) & forward us a copy with all your disbursements—you will continue to make all possible dispatch, & have a close eye to economy.

We much approve your paying your own bills on the vessel, as there is always a clear saving, & remitting only your nett freights you will observe to do all your own business as far as praeticable, *avoiding breakers as much as possible*—your friends are all well. Wishing you health happiness & every blessing of heaven

I am your Friend & Obt.

JAMES SHAPLEY.

(4) *Letter from Stoodly to Capt. M'Clintock.*

Bristol, July 20th.

Capt. M——— Sir, In my last by way of Liverpool, I informed you of the accident sustained by the Joseph in King Roads, and enclosed you have a protest. I received your favor of 12th May, wherein you much disapprove of the voyage to Almeira, after advising me to go to the Straights to seek a freight. I never, nor did any one else that knows any thing about the Straights, think it more hazardous to go to Almeira than any other Port; and I thought it more advisable to go on a certainty and with proper documents, than to go without proper documents and upon an uncertainty; which would have been the case provided I had gone to look for a freight, as the documents and E. licence and passports from the Admiralty, cannot be obtained without the influence of some of the principal merchants in London, and these merchants will not use their influence unless they are interested: so that it must appear to you that I done what was best. But I suspect I am indebted to Mann & Barnard for your disapprobation, and I shall certainly call them to an account. I am well aware if I would go cap in hand to them, they would write you different letters from what they have done. What they have written I cannot tell, yet will know; and when I cant get a livelihood without bending the knee to Baal I dont want one.—The Owners of the Dragon privateer are inclined to do every justice the case may require. The underwriters are inclined to pay the damages sustained in King Road without the assistance of Mann & Barnard. If you cannot place confidence enough in me to transact your business, which it appears you did last winter, it is my sincere opinion that it will be better for your interest and mine to end the voyage as soon as possible.

His next voyage was to the coast of Africa, which was begun about the 5th of July, 1809, in the schooner Atlantick.(5) Smith and Haven, and *Timothy Upham*, were principally interested in this voyage. We find few papers relating to his proceedings on the coast of Africa, but learn from Mr. Upham's publication, last winter, that the vessel arrived at Portsmouth, with a cargo of Gum Arabic. She must have arrived previous to the first of January, 1810, as we then find Stoodly in the employ of Mr. Upham, "down east:" and this brings us to a more interesting period of our hero's life.

VOYAGE OF THE ELIZA.

About the 1st, of January, 1810, during the embargo or non-intercourse with Great Britain, Captain Stoodly engaged in an *adventure* with Timothy Upham, to smuggle a cargo of Butter, cheese, pigtail tobacco and gin, &c. into the British provinces. The sloop Eliza, owned by Capt. Benning Morrill, and commanded by Capt. George Huntress, was chartered to carry the cargo to Eastport, and on the 19th of January she sailed with Capt. Stoodly on board, as supercargo, and arrived at Eastport, where she lay three weeks, and where all the circumstances relative to the proceedings of

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(5) *Portsmo. July* 5, 1809

Capt Nathaniel Stoodly

Sir—You having the charge of the Scho Atlantic & Cargo—will embrace the first wind and proceed direct for Goree on the coast of Africa, and there dispose of the Cargo, if you can obtain a reasonable advance on the goods (say 50 per cent)—provided you cannot find such a market you will proceed to some other port on the coast and Should the price for your articles there be low you will go to the river Gambia and sell the Cargo for the most it will fetch, unless you have every reason to believe that a better voyage will be made by going further—from your return cargo you will take the produce of the coast unless it is very high in preference to money, and we should recommend your purchasing Gum Ivory and Some verdegrise,- however we will leave it to you to take such articles as you may think will pay the most profitable freight home. Annexed we have quoted the prices of African produce here for your government.

You will endeavour to make all possible dispatch on the Coast and return direct to this port, and write us by every opportunity and Should none offer to this Country, you will send your letters by the way of England directed to the care of Thomas Wilson Esqr London.

You will be allowed as a Compensation for the voyage twenty dolls pr month wages five pr cent Coms on the Sales two tons priviledge and the Cabin Wishing you a prosperous voyage

We are your obedt Servants.

SMITH & HAVEN.

Stoodly and Huntress are too well known to require a recapitulation.—These proceedings would take up the time to about the middle of Febuary, when the property was smuggled across the line. On the the 2d of April, Capt. Stoodly contracted with Capt. Theo. Crosby, of the schooner Rosela, then lying at Passammaquoddy, (and which was probably the same vessel on board which the goods were put, when taken out of Prince's storehouse at Eastport,) to carry the cargo to Bermuda, paying him seventy pounds per month ; which amounted, as appears by the settlement, to four hundred and and forty eight dollars.(6) In due time the cargo arrived at Bermuda, and by the agency of J. & J. Musson, was sold,

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(6) *Letter from Moses Canney—(orthography corrected)*

Saco, January 16th, 1811.

Capt Nathl. Stoodly—

Dear Sir—I have the pleasure of hearing that you are at Portsmouth. Sir, I am in good health, but have been unfortunate ever since I left you. I hope you have been in good health and been prosperous. I have been at Bermuda about three months since, and heard of your leaving there just before I arrived by Mr. Musson the person that you say had no faith. Soon after I received your favour twelve months ago I sailed for *Cianna* with a cargo of horses, having bad weather, and lost my water and part of deck load, I fell to the leeward and was obliged to go into *Dimerrow**, and sold well, was making a great voyage. To prevent any trouble on account of the non-intercourse, I went to St. Barts, entered and cleared, and sailed for Boston, and arrived, and entered from St. Barts, and got all my cargo on, which contained 37 hoghseads of rum and 74 hogsheads molasses. One of my people got *mift* went and informed it had been to *Dimerrow*, when the vessel and cargo was seized. There has been two trials on it but not cleared yet : which if there is any justice they cant condemn it. It injured me very much. I owned one quarter of the vessel cargo for I want my money to keep me agoing. I have made only one short voyage to Bermuda since. My brother and myself fitted her out with about two thousand dollars worth cargo. On my passage out in September lost my deck load, which consisted of masts and spars, which would have fetched a great price at Bermuda, and to complete the whole, on my passage home the vessel sprang aleak and sunk with six of us—took to the boat, by the help of Providence we were all saved, but lost every thing else.—Sir, I have the pleasure to inform you that I have got a wife since I have been at Saco. Perhaps you think it is no pleasure to have a wife. I shall be very happy to have the pleasure of introducing you to her. I have not a friend in the world that I want to see so much as I do you. I am very sorry that I ever came to Saco to sail out of. I thought that Portsmouth was the worst, but this is worse. There is no navigation here, and it is a bad harbor : there is never more than 11 feet water on the bar. Sir, I shall be very happy to receive a letter from you. I would excuse my learning, but you know what it is.

Sir, I am your obedient humble servant,

MOSES CANNEY.

[* Probably Demerarra.]

Musson accounting to Stoodly for the sales in the sum of £1332-3-6, and this sum Stoodly accounts for to Upham in his account current with him.(7) Musson's account current bears date, "Bermuda, Aug. 18, 1810," closing up the concern at Bermuda, which seems to have resulted in a loss to the owners. (8) It was during this voyage that Capt. Stoodly carried his *smuggling* transactions beyond those descriptions of merchandise which were usually denominated *contraband*. He brought home from Bermuda, a young girl, whom he sent a while to the academy at Atkinson, and afterwards married. This woman was present at the trial as a witness for the plaintiff, and her *appearance* was certainly such as to do justice to the good taste of a wild and reckless sailor. She is yet a handsome woman, who at the bewitching age of fifteen, must have been *irresistible* ; and no wonder Capt. Stoodly was for appropriating her to himself, whether *contraband* or not.

From this time to the first of January, he appears to have spent his time in the society of his friends at Portsmouth, in "fond dalliance" with his bewitching *inamorato*, and in the necessary preparations incident to commencing a state of

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(7) *Chesapeake-Bay, July 11th* 1810.
Dr Stoodly *On board Schr. Sally—Barker.*

I arrived at Balt'ye. 2d inst. from Halifax, after an absence of more than 7 months---upon settling up my business, I found that considering all things, I had made a very good voyage both for myself and Friends—I stepped on board again, and am thus far on my way to Kingston Jamaica, with a load of Flour and Corn meal—part of which I own, and am in hopes of making something handsome—Prior to my leaving H. I heard of Captn. Crosby's return to Cape Forchu—likewise of your selling part of your cargo to a good advantage. I hope you have likewise succeeded with the *Corn Hhds*—upon my return (which I hope will be in about 6 weeks) I anticipate the pleasure of a letter from you—with wishes for your welfare

I am &c GEO. B. KEE

P S. You will recollect that my address is at Chas Guinn & Co's Merct st Balte.

(8) [We find the following memorandum in Stoodly's hand writing, endorsed "Bermuda Adventure."]

There is a loss on the adventure of	$446 82
Their is a deficiency in cash of	724 40
Your loss on adventure is	223 41
Mine is	500 99
	$724 40

matrimony, which he entered into the latter part of this year. The next commercial enterprize we find him engaged in, is the

VOYAGE OF THE JOHN LANGDON, IN 1811. The particulars of this voyage are given under their appropriate head, and need not be repeated here. It was a profitable speculation to the owners, and no sooner was it concluded, than Capt. Stoodly undertook another voyage to the same place, in

THE OLIVE BRANCH, fitted out by Messrs. John Langdon, Jun. and Thos. Haven.(8) The vessel arrived at Kingston previous to the 7th October, and the cargo was disposed of to Dan MacDowall, amounting to £1199 13 10, and in payment for which he received a cargo of rum. [9] It does not ap-

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(8) *Portsmouth, Sept.* 3, 1811.

Nathl Stoodly, Master & Supercargo of the Schooner Olive Branch,

Sir—— The schooner Olive Branch of which you have the command, being now in readiness for sea, our orders are that you proceed with all dispatch to the *Island of St Vincent*: on your arrival there, (if the markets offer any inducement) sell your cargo to the best advantage and return to this port with the proceeds; If your cargo will not pay a moderate freight at St. Vincent, you are at liberty to proceed to any other port in the west Indies, (the Island of St. Domingo excepted) that offers a better prospect of a market; but it is expressly enjoined on you under any circumstances that may occur, *not to leave any part of your cargo unpaid for*, or any part of the proceeds behind. Reposing a full confidence in your judgment, integrity and discretion, we leave the interest of the voyage in your hands, particularly recommending prudence, economy and dispatch in all your doings, of which you will advise us by every opportunity. As a compensation for you services we agree to allow you five per cent commissions on the sales of the cargo, five per cent priviledge in the cargo, and ten dollars per month, wages—wishing you health and prosperity

We are your friends

JNO LANGDON Jr.
THO HAVEN

(9) *St. Vincent*, 7th *October* 1811.

It is mutually agreed between Nathl. Stoodly Master of the Schooner Olive Branch of Portsmouth N. H. on the one part (his executors administrators or assigns) and Daniel McDowall junr. of the same Island (his executors administrators or assigns) on the other part for the terms herein after mentioned. The aforesaid Nathl Stoodly agrees fully and truly to deliver unto the aforesaid Daniel McDowell junr. his executors, administrators or assigns forty five thousand feet of plank joist & boards in merchantable order three hundred W. O. Shooks and three hundred red ditto 6000 R. O. staves a forty Dolls pr M more or less at high water mark in the bay of Kingston and the aforesaid Daniel M'Dowell junr. agrees fully and truly to pay unto the aforesaid Nathl. Stoodly, his executors administrators or assigns the sum of twenty five current dollars per thousand for each thousand of long lumber and two Dolls for each W. O. shook and one Doll for

pear at what port in the United States the Olive Branch arrived with this cargo, nor at what time the voyage was concluded. It was finished, however, during the year 1811, as the next adventure of Capt. Stoodly is the

VOYAGE OF THE CLARISSA, which proved a most unfortunate speculation to all concerned, as is apparent from the proceedings in the case, detailed in their appropriate place.

Nowise disheartened by the failure of the last enterprise, he immediately embarked in another, equally hazardous, and no less unfortunate in its results. This voyage was undertaken for the benefit of Messrs. William Garland and Thomas Haven, in the schooner PATTY, (10) which proceeded to Halifax,

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each R. O. shook, payable in Rum at half a round doll per gall and puncheons at twelve Dolls each in twenty one Days from the date hereof and in case of the vessel being detained a longer time the aforesaid Daniel McDowel junr. agrees to pay unto the afforesaid Nathl Stoodly the sum of twenty five Dolls per Day for every day the aforesaid vessel shall be detained and in case of a non fullfillment of this agreement each party binds himself in the penal sum two thousand pounds of currency of the Isle of St. Vincent.

DAN MACDOWALS Jr.
NATHL STOODLY.

Portsmouth 8*t April* 1812

(10)
Capt Nathl Stoodly

Dr Sir,—You will proceed with the Patty direct to Halifax—You can profess to be bound to St. Barts but willing to sell at good prices provided you can land your beef.

If however you can not be allowed to land it you will bring it back—You will be particular in the agents you employ to do your business, making your bargain in the first place for the commission to be given. Employ the best merchants if you are oblig'd to give the more commission. As to the mode of sale, whether at auction or private sale, you must use your judgment. In case cash is to be paid, you are to sell for cash Dollars, and bring them home with you—if not get undoubted bills on Boston or New-York—if not those bills—then Government bills on England. The above is on the ground you receive no information you can rely on that the non importation act is repealed. You will also in that case return in ballast direct touching at the Shoals, and calling on Caswell for a letter of instructions, but in case you do not find a letter you will come in a boat to Portsmouth for orders.

But if the nonimportation is removed you will purchase Rum & Sugar either with your cargo, or with the money you receive for your cargo as you may find most to your advantage—Jamaica Rum will be worth say 130 cents here—duty on it is 32 cents per gallon—Good windward Island rum 105 to 110. Grenada is the best of Windward Rum—St. Croix the best of Leward and worth 3 or 4 cents a gallon more than Grenada. But if the nonimportation is off rum will not sustain these prices unless the prospect of war is very strong.

First quality W. India sugar is worth say 13 Dollars that is the nice Jamaica & St. Croix—the middling 10 to 11 Dollars and the common 8 to 9

where she was seized and condemned. (11) This is the last transaction of Capt. Stoodly, which bears upon its face the stamp of illegality. In the mean time the United States had

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dollars. Sugar requires a very particular examination to see that it answers the description. Duty is 2 1-2 cents on a pound—add this and the gross weight to the cost and you can see what the profit may promise. It is said there is a debenture on goods exported at Halifax. You will attend to that.

If you bring a cargo of Rum or part rum and other articles, you may return to York—otherwise to this port. We think sugar will probably afford the most profit—but if you make correct calculations on the above scale, you can form an opinion which it will be best to purchase whether sugar or rum. If you can obtain *first quality* sugars at 6 Dollars, it will do well. At that cost the duty and gross weight would make it about 9 1-2 Dollars here. Sugar is a safer article than rum and it will be well for you to divide your purchases between sugar and rum, unless the prices should give a very decided preference to one of them.

You will see to the weight of the sugar and make your bargain as to the tare—look to the guage of the rum likewise.

P. S. The *Dam*bargo is come—Do not hurry your sales at Halifax—Tell them you will go away unless they will give good prices. The embargo is for 90 days and no doubt it will be continued at the end of that time unless there is a war. Get your pay and return in Ballast as soon as you ean. Your friends

W. GARLAND.
THO HAVEN.

(11) Mr. Garland

Sir, This will serve to inform you that the Patty has had a tryal in the vice court of ad. and has been condemned with the whole of her cargo on the grounds that she might possibly have got into an American port and that which has rendered it necessary to draw on you and Mr. Haven for four hundred Dolls in favor of John Osborn which as I was under the necessity of giving bonds before I could possibly defend the suit. You doubtless before this time have a full account of the voyage as I have written you and forwarded you a protest. It will be therefore scarcely necessary for me to forward you more papers as I believe I shall see you in a few days after you receive this. If the Sloop should be sold very low I think I will buy her Yours &c

The American Sloop, Capt Nathaniel Stoodly

To C. R. Fairbanks Dr.

1812—April 24,	To drawing, Engrossing and recording Protest } Sloop Patty. Natl Stdl &c }	£2. 6. 8
	Drawing and preparing Claim and affdt. for Sloop Patty and other Papers in the Admiralty relating to the defence of the vessel and cargo	7. 0. 0
May 15	Counsel fee, to Mr. Robie & C. R. F. in the defence of the Vessel & Cargo in the Admiralty	14. 0. 0
		£23. 6. 8.
		$93 33 1-3

Received the above sum of Twenty three pounds six shillings and eight pence in full. By the hand of Nathaniel Stoodly. Halifax 26 May 1812.

CHARLES R. FAIRBANKS

declared war against Great Britain, and the government was in want of officers and men, both for the army and navy; to which situations *Col. Upham* and *Capt. Stoodly* turned their attention, and both were successful in obtaining commissions—the first as Major in the army, and the latter as Sailing Master in the Navy. *Both appointments took place about the same time.* We find Capt. Stoodly at Halifax on the 26th May, looking after the concerns of the Patty, and on the 28th of June, his pay commenced as Sailing Master in the Navy (12) He commanded one of the gun Boats stationed on the coast between Portsmouth and Portland, and was employed a considerable part of the year 1812, after he obtained his appointment, in recruiting seamen for the U. S. Navy.(13) In October he was ordered to Portland to draft all the able seamen from the gun boats, and send them to join the Constitution.(14) In March, 1813, the gun boats were all or-

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Captain Stoodly Halifax

1812 Bot at the Custom House Sale

May 21, the Sloop Patty, and Appurtenances £22.

1 Barrel Beef 4. 9

£26. 9

Rec Payment

W. NEWTON Pro Coll

(12) Lieut Jos. N—— Sir—

When I left Portland, you were pleased to inform me that if I wanted money, by writing to you I could obtain it. If you will now be so good as to send me what you can, (my pay commenced 28th of June) you will do me a very great favour—and the receipt for the money, shall be forwarded by return of mail if there is any particular form for the receipt, you oblige me by sending a form

August 11th--,12 Yours &c.

(13) *Letter to Capt. Evans.*

Novr. 19th, 1812.

Sir—Yesterday I inform'd you of my success in Shipping men. I have four more since. There is a young man of 18 or 19 years of age that I know to be a smart fellow who wishes to go—he has been at sea six years but not knowing if you would like such young men I shall have declin'd shiping him untill I have your permission. The boatswain I mentioned has declined going. I can get two boatswains mates if you wish them and all the quarter gunners you mentioned I believe.

(14) *Frigate Constitution, Boston 5th Oct.*

Sir—On the receipt of this you will proceed to Portland and draft all the able seamen from the Gunboats there, and send them up to join the Constitution; you will do the same from the Gunboats at Saco, Kennebunk, and

dered to Portsmouth, to be laid up, and Capt. Stoodly was appointed to take charge of the whole.(15) He had allowed him one man to each boat, and one cook for the whole. He continued in the naval service, commanding a gun boat, and recruiting men for the Navy, to the close of the war, and perhaps a little later. In the spring of 1816 we again find him in the mercantile service, in the employ of Messrs. Bainbridge and Brown, making a voyage to Liverpool. It would be easy to trace him step by step, from the documents, had we time to wade through them. He continued in the European and coasting trade for some years, but as there is nothing remark-

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Portsmouth. Direct the commanding officers of the respective boats to open a rendezvous and recruit for the boats under their command, an equal number to replace those you may take.

Respectfully,

WM. BAINBRIDGE.

(15) *Letter from Lt. Nicholson to Stoodly.*

Dr Sir

My Ink being frozen, obliges me to write with my pencil—Yesterday I wrote you an official letter respecting your boat &c—this is to inform you the plan to be adopted—all the Gun Boats East of this are ordered to Portsmouth, there to be laid up and the Commanders to be permitted to retire from the service, except one, who is to take charge of the whole—this person I have recommended to Capt. Hull to be yourself—and he has concluded it shall be you—and will doubtless give you your orders shortly—keep this to yourself or some some evil minded devil may undermine you—there is no other information I can give you at present——adieu

I hope your family are well.

Faithfully Yours NICHOLSON

Boston, March 6, 1813

N Stoodly Esq

Letter from Stoodly to Lt. Nicholson.

Dear Sir

Owing to my being down the river, and the extreme cold weather, I received both your official and friendly letter together. I am allmost as much surpris'd at the first as I am oblig'd to you for the last,—I feel very gratefull to you for your recommendation. You have ever been friendly to me without being acquainted with me, and I hope I shall never do any thing to make you regret the assistance you have rendered me, which is great in reality. But had it been ever so trifling it would assume a magnitude now, which perhaps it could not have done at any other time nor scarcely on any other person in existence—I am peculiarly situated ; to tell you why, would be too lengthy and would not be interesting.

I should be glad to be kept in the service, and the assistance that you can render me I think will be sufficient. I shall be gratefull, and all I regret is, that I can not at present make you any returns for all these favors and can only console myself with hopeing for an opportunity to make you some return. My Family is well.

able in his history, from the time he left the navy, we pass over the space of time from 1816 to the time of his death, which happened at Greenland in 1828. Towards the latter part of his life, he became intemperate, and consequently lost the confidence of his friends and employers, was without business and died poor; leaving his family entirely destitute. Whilst in the navy, he appears to have possessed the confidence and friendship of many of his superior officers, and among his papers are several friendly letters from some of them. We have no means of ascertaining his age nor the precise date of his death. We have resorted to no other sources of information in writing this brief memoir, than the *box of papers* from which those were taken, which have given notoriety to transactions that would soon have slept in forgetfulness, had not Col. Upham been brought before the people of New-Hampshire as a candidate for a high and important office.

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