

Report of the trial of Dr. Samuel Thomson, the founder of the Thomsonian practice, for an alleged libel in warning the public against the impositions of Paine D. Badger, as a Thomsonian physician sailing under false colors, before Judge Thacher, in the Municipal Court of Boston, April term, 1839.

Contributors

Thomson, Samuel, 1769-1843.
Badger, Paine D.
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Publication/Creation

Boston : Printed by Henry P. Lewis, 1839 [©1839]

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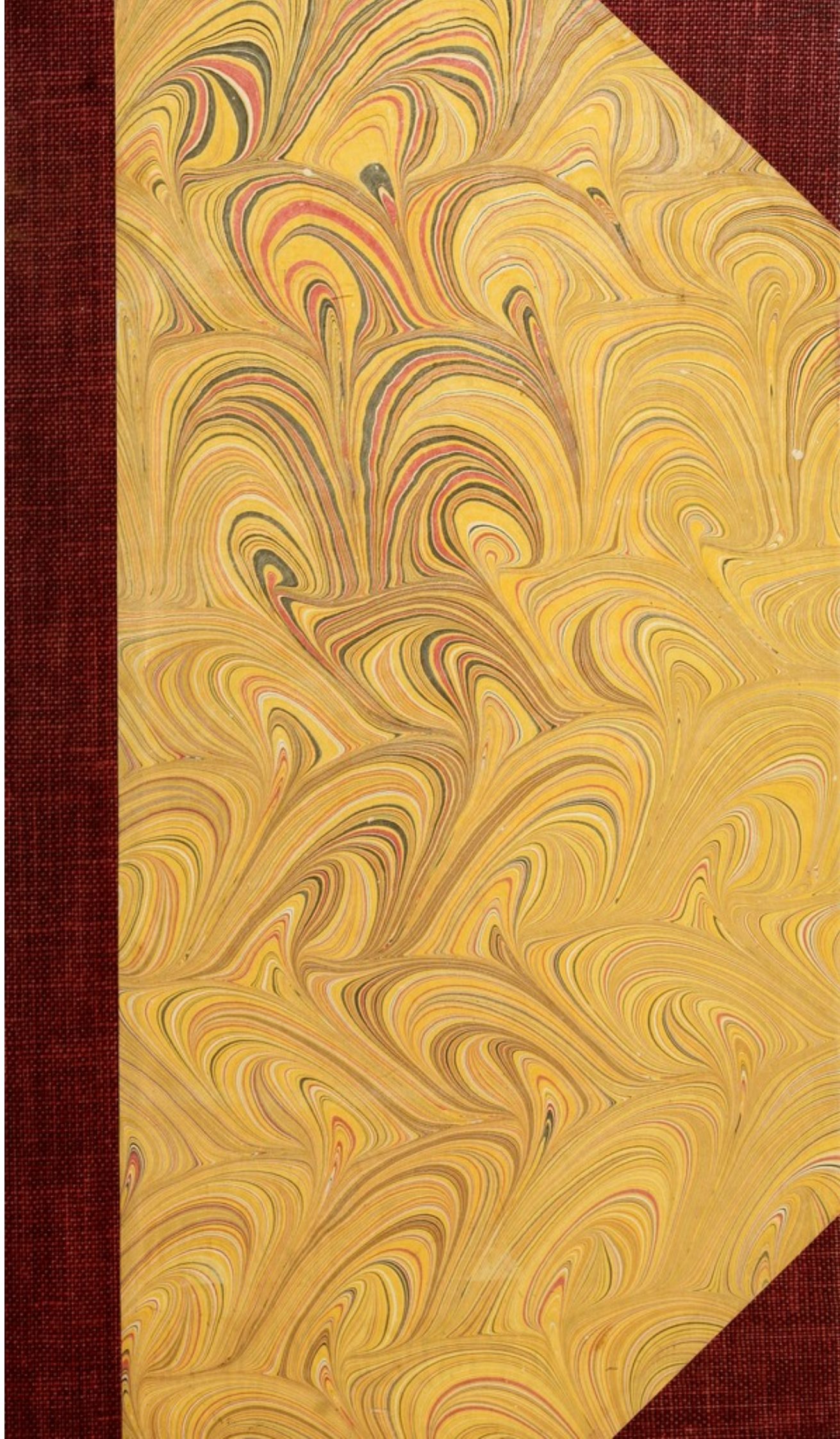
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The Law of Libel.

REPORT OF THE TRIAL

OF

DR. SAMUEL THOMSON,

THE FOUNDER OF THE THOMSONIAN PRACTICE,

FOR AN ALLEGED LIBEL IN WARNING THE PUBLIC
AGAINST THE IMPOSITIONS OF

PAINE D. BADGER,

AS A THOMSONIAN PHYSICIAN SAILING UNDER FALSE COLORS,

BEFORE

JUDGE THACHER,

IN THE MUNICIPAL COURT OF BOSTON,

APRIL TERM, 1839.

Counsel for the Prosecution, S. D. PARKER.

Counsel for the Defendant, B. F. HALLETT, J. D. HEALY.

BOSTON :

PRINTED BY HENRY P. LEWIS.

1839.

The Law of Right.

REPORT OF THE TRIAL

DR. SAMUEL THOMSON,

THE FOUNDER OF THE THOMSONIAN PRACTICE,

FOR AN ALLEGED LIBEL IN WARNING THE PUBLIC
AGAINST THE IMPOSITIONS OF

PAINE D. BADGER,

Entered according to Act of Congress, in the year 1839, by

P. B. FESSENDEN,

In the Clerk's office of the District Court of Massachusetts.

JUDGE TENCHER,

IN THE MUNICIPAL COURT OF BOSTON.

APRIL, 1839, 1839.

Counsel for the Prosecution, S. D. PARKER.

Counsel for the Defendant, R. T. HALLIST, J. D. HARR.

BOSTON:

PRINTED BY HENRY F. LEWIS.

1839.

TRIAL.

In the Boston Traveller of January 22, 1839, the following advertisement appeared:—

DOCTOR P. D. BADGER,

BOTANIC PHYSICIAN,

Gives notice to his friends and the public, that he has returned to this city and resumed his professional duties. The brilliant success which has always attended his practice in diseases of every class and of almost every degree of malignity, is the only evidence he desires to present to the public of the value of the medicines he prepares, and of his skill in administering them.

Doct. B. may be consulted at his office, 356 Washington-street, where he has every convenience for medicated vapor bathing, or he will visit those who may prefer it at their homes.

Various preparations with directions for using, constantly for sale. Also a general assortment of Botanic Medicines and Shaker Herbs.

Boston, Jan. 22, 1839.

The intimation contained in this notice, that P. D. Badger had "*resumed* his professional duties," which implied that he was about to practice, as he had done before he left the city, under the credit of Dr. Thomson's name and system, whereby the public might be deceived and the Thomsonian practice be brought into disrepute, seemed to require of Dr. Thomson a public statement that should effectually relieve him of all moral responsibility for any act of Badger as a practitioner in his name, by using which so many persons, who otherwise would never have been trusted with the medical treatment of a single patient, have acquired an extensive practice and endangered the public health. With this view, Dr. Thomson had the following notice published in the Traveller of Jan. 25, directly under that of Badger, and as this was the third time it had been necessary to put the public on their guard, it was done in rather strong language.

BEWARE OF IMPOSTORS.

Mr. Editor: Seeing in your paper a notice that P. D. Badger, Botanic Physician, has returned to this city and resumed his professional duties, (not impositions;) said Badger has strove hard to sail under my flag for several years, both in this city and Nashua, where he has been met with deserved contempt and put down. He, finding himself not able to sail under Thomsonian, has substituted Botanic Physician, (not impostor.) I would ask said Dr. Badger a few questions. Did or did you not open a letter of mine, at 554 Washington-street, and

agree to answer for medicine of fifty dollars, and have it ready for Wm. Kinsley by to morrow noon, which I discovered and answered myself? Did you not sell and clear out to escape an indictment? Depend upon it Sir, you are not yet out of danger. You had better clear again and hire some more Lectures written for you to read to your imposed audience; when questioned you could not answer a word nor show a particle of my medicine or authority from me. When you was advertised in Nashua, did you not clear out with the loss of several hundred dollars, as your patients would not pay for your deceptions, as neither law nor justice demands it? I say, beware of the man; also Clark and Wilder, who sail under a Thomsonian flag in Pleasant-street. Also, H. Winchester and William Johnson, Hanover-place, Dealers in spurious Medicines.

SAMUEL THOMSON.

Boston, Jan. 25, 1839.

The first of February, P. D. Badger published the following in the Traveller, under Dr. Thomson's notice:—

A CARD.

Dr. Badger would give notice to Dr. Thomson and the public, that his questions shall be answered in due form and proper time, and that before long.

P. D. BADGER.

February 1.

The only explanation he gave was the following libel on Dr. Thomson, which appeared in the Traveller of February 15.

NOTICE.

By the advice of friends, against my own impressions of what was due to propriety and self-respect, I was induced to promise some days since, an answer to the base insinuations against me, published in this paper by Dr. Samuel Thomson. In accordance with that advice it was my purpose to publish a series of facts well authenticated, which would place the whole matter within the reach of every person disposed to investigate it. Further reflection has but served to strengthen my first impressions into firm conviction. I cannot descend into a newspaper conflict with Dr. Thomson. The charges he has made against me by implication, are false and libellous, and are dictated by a mean and cowardly spirit, much more uncomfortable and troublesome to its possessor, than to his neighbors. The man of courage *acts*, but never threatens.

P. D. BADGER.

Feb. 12, 1839.

Soon after this an indictment was found by the Grand Jury, who hear only one side, upon the exparte evidence furnished by Badger, and is as follows:—

COMMONWEALTH OF MASSACHUSETTS.

Suffolk to wit: At the Municipal Court of the City of Boston, begun and holden at Boston, within and for the County of Suffolk, on the first Monday of March in the year of our Lord one thousand eight hundred and thirty-nine. The Jurors for the Commonwealth of Massachusetts, on their oath present, That Samuel Thomson of said Boston, Physician, on the twenty-fifth day of January in the year of our Lord eighteen hundred and thirty-eight, maliciously intending to injure, defame, vilify and disgrace one Paine D. Badger of said Boston, Botanic Physician, and to bring him into disgrace, contempt and infamy, and injure him in and deprive him of, his business and practice as a Botanic Physician, and subject him to public prosecution and indictment for fraud and dishonest conduct and practices, and as an imposter and deceiver, and for other misdemeanors, and to cause it to be believed, that said Badger was an imposter, and that he had wrongfully opened a letter of said Thomson's and agreed to answer for medicine of fifty dollars, and have it ready for one William Kingsley, and that he cleared out to escape an indictment, and was still in danger of an indictment, and that he

hired Lectures to be written for him, and imposed on audiences, and that in consequence of his deceiving his patients neither law nor justice would demand payment from them, did at said Boston on said twenty-fifth day of said January, unlawfully and maliciously compose, write, print and publish, and cause and procure to be printed and published in a certain Newspaper printed in said Boston and of extensive circulation in said Boston, and through the said Commonwealth of Massachusetts, called "American Traveller," a certain false, scandalous, and malicious libel of and concerning said Badger, which said false, scandalous and malicious libel, among other things contains the following false scandalous and malicious words, of and concerning said Badger, that is to say,

Beware of imposters, (meaning that said Badger was an imposter.) Mr. Editor, (meaning the editor of said Newspaper,) seeing (meaning said Thomson seeing) in your paper (meaning the said Newspaper) a Notice of P. D. Badger, (meaning said Paine D. Badger) Botanic Physician, has returned to this city, (meaning said Boston,) and resumes his (meaning said Badger's) professional duties, (not imposition) (meaning said Badger had resumed imposition) said Badger (meaning said Paine D. Badger) has strove hard to sail under my flag (meaning said Thomson's flag) for several years, both in this city (meaning said Boston) and Nashua, where he (meaning said Badger) has met with deserved contempt and put down: he finding himself not able to sail under the Thomsonian he has substituted Botanic Physician (not imposter) (meaning said Badger was an imposter) I (meaning said Thomson) would ask said Dr. Badger a few questions, did or did you (meaning said Badger) not open a letter of mine (meaning said Thomson's) at 554 Washington-street, and agree to answer an order for medicine of fifty dollars, and have it ready for Mr. Kingsley by to-morrow noon, (meaning that said Badger did do so) which I (meaning said Thomson) discovered and answered myself, did you (meaning said Badger) not sell and clear out to escape an indictment, (meaning an indictment for some criminal misdemeanor,) depend upon it, Sir, (meaning said Badger,) you (meaning said Badger) are not yet out of danger; (meaning that said Badger was in danger of indictment for some criminal offence) you (meaning said Badger) had better clear again and hire some more Lectures written for you to read to your (meaning said Badger's) imposed audience, (meaning said Badger had Lectures written for him and he imposed on the audience and those who heard him.) When you (meaning said Badger) was advertised in Nashua, did you not clear out with the loss of several hundred dollars, as your (meaning said Badger's) patients would not pay for your deception, as neither law nor justice demands it, (meaning said Badger had deceived his customers and patients, and law and justice would not demand payment of his claim and charges from them.) I (meaning said Thomson) say beware of the man, (meaning said Badger.)

SAMUEL THOMSON.

to the great scandal, disgrace and injury of the reputation, character, business, gains and profits of said Badger, and to the great injury of his feelings, and great anxiety of his mind, and against the peace and dignity of said Commonwealth.

A true Bill.

J. W. LEWIS, *Foreman of the Grand Jury.*

SAMUEL D. PARKER, *Attorney of Commonwealth.*

The following specifications of the grounds of defence were filed for the Defendant by his Counsel, in pursuance of a rule of the Court, which requires that when the truth is plead as a justification of a libel, the Defendant shall file specifications of all he expects to prove.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK ss.

MUNICIPAL COURT OF THE CITY OF BOSTON,
March Term, 1839.

COMMONWEALTH vs. SAMUEL THOMSON.

Specification of Defendant's Defence.

The Defendant expects to prove—That the said Thomson is the author of a System of Medical Practice, founded upon principles original with himself,

which is of great value to the public, and a source of great gain and honor to the said Thomson.

That the said System of Practice has become widely known, and has the confidence and support of great numbers of individuals, among the Medical Faculty, and every other class of individuals in the community.

That Paine D. Badger has repeatedly counterfeited the medicines, prepared and sold by the said Thomson, and sold such counterfeited preparations, falsely pretending that they were medicines prepared and authorized by the said Thomson, and that he, the said Badger, was licensed by the said Thomson to sell and administer them.

That the said Badger, by numerous fraudulent pretensions and practices, has induced a great number of persons to believe him to be an authorized Agent of the said Thomson, and to purchase of him, the said Badger, spurious and deleterious compounds for medicines prepared by the said Thomson, or by his authority; thereby bringing great odium, injury and disgrace upon the said Thomson, and his system of Medical Practice.

That the said Badger has falsely pretended to be a Practitioner of Medicine under the authority of the said Thomson, and by such false pretence has administered his own counterfeit and spurious medicines to numerous persons, whereby said persons have been greatly injured, and said Thomson's System of Medicine brought into disrepute.

That the said Badger never was authorized by the said Thomson to prepare, or sell, or administer his, the said Thomson's, medicines,—and that all the pretensions of the said Badger in this behalf are fraudulent, and an imposition upon the public.

That the said Badger has, for several years, both in this City, and in Nashua, New-Hampshire, imposed himself upon the public as a regularly authorized Thomsonian Physician; that in both places his false pretensions have been publicly exposed; that he, the said Badger, has left each place in consequence of such exposures, and having lost the confidence of the people; and that individuals, upon whom his deceptions had been practised, refused to pay his charges against them.

That the said Badger has recently, in consequence of being unable longer to practise his deceptions under the name of Thomsonian Physician, substituted that of Botanic Physician.

That the said Badger still continues to sell spurious and counterfeit medicines, falsely pretending that they are the said Thomson's medicines.

That the said Badger, at 554 Washington-street, opened a letter directed to the said Thomson, which was an order for medicines, to the amount of fifty dollars, and agreed to have the said medicines ready for the messenger, a Mr. Kingsley, by the next day at noon, which letter the said Thomson afterwards answered himself.

That the said Badger left Boston, and went to Nashua, N. H. to avoid an indictment.

That the said Badger procured some Lectures to be written for him, upon the said Thomson's System of Medicine, and afterwards delivered said Lectures as his own composition.

That the said Badger, when his deceptions were made known in said Nashua, by public advertisement, left said place, with a loss of several hundred dollars, his patients refusing to pay his bills against them.

That said Badger never had any medicine or authority whatever from the said Thomson.

Filed by

J. P. HEALY, *Attorney of said Samuel Thomson.*

MARCH 25, 1889.

In the Municipal Court April 10, the Trial commenced before a Jury—ABRAHAM T. LOWE, *Foreman*, WILLIAM JENNINGS, FREDERICK LINCOLN, MOSES MILLER, EZRA F. NEWHALL, JOHN F. PAYSON, WM. J. SLADÉ, ALVAH SKINNER, EDWARD A. VOSE, HENRY R. WILLIAMS, JOHN T. WARD, JOHN BENSON.

The Case was opened by S. D. PARKER, Esq. *Commonwealth's Attorney.* The publication, he said, was admitted by the defendant,

who set up as a justification, the truth. The Government were only bound to show that the publication was made by the defendant, and that it was libellous, and this made out the case for the prosecution, unless it was shown to be true, and to have been published with good motives and for justifiable ends. The law of libel, by which this offence was made criminal, was derived from the Common Law of England. It had often been urged as a reproach upon that law that it went upon the maxim, the greater the truth the greater the libel. This was the doctrine of the Common Law and was so held in this State until 1826, when the late Andrew Dunlap, Esq., a distinguished advocate for the liberty of the press, introduced a bill in the Legislature, that in prosecutions for libel the defendant may give the truth in justification, provided he also shows that it was published with good motives and for justifiable ends. [Chap. 133 Revised Statutes.] But instead of a reproach to the law, the old maxim "the greater the truth the greater the libel," showed the good sense of the Common Law, because the ground of the offence was that these publications provoked ill blood, and tended to a breach of the peace. A publication exposing another to ridicule and contempt, was much more likely to lead to a breach of the peace, if it were true than if it were false, because if true, there was no remedy by a civil suit. But in that respect, whether wisely or not, the Common Law of libel had been changed by Statute, and it was now a good defence to show the truth, if published with good motive, and for justifiable ends. Otherwise, though true, it would still be a libel, if the motive was not shown to be good. Thus, if a criminal act in early life, of which the person had repented, should be wantonly exposed, it would be a libel, though the publication were literally true. The burden of proof, both as to the truth and the motive, was on the Defendant, and the Government was only called on to prove the publication, and that it was libellous in its nature, which put the party on the defence.

Mr. Parker stated to the Jury that a libel is a criminal offence at Common Law, and is expressly recognized as such in the Statute Laws of this Commonwealth. He expressly referred to the 28th Section of the 82d Chapter, and the 10th Section of the 86th Chapter, and more especially to the 6th Section of the 133d Chapter of the Revised Statutes, and alluded to the Statute of 1826, Chapter 106.

Libels were considered criminal for two reasons; first, from their invariable tendency to breaches of the peace, assaults and batteries, duels, assassinations and blood-shed. The pavements of State-street, in our own city, had been stained with human blood, and instant death had there occurred in the case of the late lamented Charles Austin, in consequence of a rencontre caused by a Libel. The second reason is, that the Constitution says, "every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all *injuries* and *wrongs* which he may receive in his person, property, or *character*. He ought to obtain right and justice freely, and without being obliged to purchase it." Now if a pauper, or man deeply insolvent, could have the control of some printing types, and should publish, whenever he pleased, false and malicious libels against a man or woman, a civil suit against a worthless individual would be no certain remedy for a wrong done to character,

under such circumstances. The institution of Government was to prevent breaches of the peace, and to give protection to individuals against personal wrongs and injuries. Hence the law makes libelling a criminal offence, if attended *with malice*, and the truth alone constitutes no defence, but there must be good motives as well as truth. Such is the law now in every one of the United States.

This libel was published first on the 25th January 1838, and continued for two months, and there were express orders to publish it in the Traveller (newspaper) always under Badger's.

Mr. Parker said that he was unacquainted with the Thomsonian System, which formed the subject of the controversy between the Defendant and the Prosecutor. It might be a valuable system, and by many citizens it was believed to be a great discovery, and a great blessing to mankind. Dr. Thomson might be fully entitled to protection in his discoveries against impostors assuming to practice under his name, but if, in doing so, he published a libel, he must be held answerable for it. He regretted that Mr. Badger had resorted to this prosecution instead of going to the Courts for civil redress, which might have been given him, if he were injured. He had so advised him when he proposed to make his complaint to the Grand Jury, and as this was a personal matter between the two, in which the public were not directly interested, and as Dr. Thomson was fully responsible for any damages that might be recovered, he should have preferred to have seen it take that course. But the complainant saw fit to go to the Grand Jury, where he swore that the libel was not true, and the Grand Jury, to the best of their knowledge, supposing it not to be true, found a bill of indictment. The Defendant setting up the truth in justification, had in fact put the prosecutor on trial, and if he made out all the allegations in the libel to be true, and that it was published with good motives, it would amount to a justification. If the specifications were made out in the defence, it covered the whole ground, otherwise the Jury would be bound to find a verdict against the Defendant. Mr. Parker then proceeded to call the witnesses for the prosecution.

PAINE D. BADGER was put upon the stand, and questioned by Mr. Parker whether the statements contained in the alleged libel were true; to which he answered in the negative. Mr. Parker observed that he had no farther questions to ask.

Mr. Badger. I s'pose squire Parker, from the nature of the case, it would be proper to go through and give a detail, but Dr. Clark is called as an evidence, and got to go out of town; and as I expect the learned counsel will want to examine me pretty close, I should like to have him called first.

WILLIAM CLARK then took the stand. He said, Mr. Badger came to my house in Hanover-street, in order to show me a letter he had got, directed to Dr. Samuel Thomson. It was open. Badger asked me to give it to Dr. Thomson, which I afterwards did. I do not know what Dr. Thomson did with it. It was an order to Dr. Samuel Thomson for medicine. Dr. Badger wanted the medicine sent to his place, 554 Washington-street, to give it to the messenger. He said it would be more convenient to deliver it there, and he wanted me to send the medicine there. I did not do so, but gave the letter to Dr. Thomson, whose agent I then was.

Cross examined. Dr. Thomson boarded with me at that time. He and Badger were at variance, and Dr. Thomson would have nothing to do with Badger's medicines. He called him an impostor, for using his name and imitating his medicines, without authority. The letter was delivered to me by Badger, opened. It appeared to have been sealed. Badger said it was an order for medicine. There were books, and medicines and directions, sold as family rights, by Dr. Thomson. The medicines were patented, and I suppose Badger had no right to sell them. He did not have the books to my knowledge. Badger said that after the letter was broken open, he found it belonged to Dr. Thomson. He said it was opened by somebody else, by mistake, before it was given to him. I am positive the outside of the letter was directed to Dr. Thomson. Dr. Thomson was angry at the conduct of Badger, when I gave him the letter broken open. I do not know any thing of Dr. Badger's practice at his Infirmary. He was once sick himself and sent for me. I do not know why Badger could not cure himself, but he might be too sick to do it. The object of the family right is, that he who has it shall know how to administer the medicines himself.

Being asked if he cured Badger, when sent for, with his (B.'s) own medicines, he replied, I did not like to try Badger's medicines upon himself. Dr. Thomson cried out against them, and I carried some of the genuine, which I administered. I differ from Dr. Thomson now. Was his agent then, but am not now. I compound my own medicines and sell them as "Thomsonian." The Judge of the Supreme Court has decided so, and I call them Thomsonian. I am the Clark referred to in the notice published by Dr. Thomson. I sell my own Thomsonian medicines and keep a Thomsonian sign.

CARLTON COBBETT, for the prosecution. In the fall of 1835 I was employed by Badger, at the Thomsonian Infirmary, 554 Washington street. A baggage wagon stopped at the Infirmary, and the teamster brought an order for medicine. The teamster opened the letter and wanted to know if we sold Thomsonian medicine. I told him we did. He read over the articles and asked me if he could have them. I said yes. He wanted them to be ready the next day at noon, when he would call. I said he should have them. After he had gone, I happened to turn the letter over, and saw Dr. Samuel Thomson, Pleasant street. Dr. Badger was up in the steam room. I went up to him and showed it, and he said he would go and carry the letter to Dr. Clark.

Cross examined. It was about 8 or 9 o'clock in the forenoon, and sometime in *September or October*, 1835, when the letter was brought by the teamster. In regard to the prosecution Badger was threatened with, it was in September or October, when the letter was brought, and Badger sold out to Mr. Magoun in May, and left the city in July. I have heard it verbally said that he would be prosecuted. Do not think I heard it till he went away. I received a letter from Badger after he left Boston, when I had moved to Hopkinton. It related to the conduct of Badger at Boston. He spoke of a prosecution he had been threatened with before he left Boston.

I was not a partner of Badger in the Infirmary. He had so much business to do I bought him out as to his Variety Store, which I kept

at the Infirmary. I was Badger's agent and put up medicines for him in his absence.

What was the sign of the shop?

Ans. I rather think the sign was "Thomsonian Infirmary."

Have you any doubt about it?

Ans. Do not know that I have.

How long was the sign?

Ans. It might be twenty feet.

How large were the letters?

Ans. They might be eleven inches.

Was Badger an agent of Dr. Thomson?

Ans. He had no authority from Dr. Thomson. I never owned the medicines in the shop, only the groceries. I bought out Badger in the Variety Store, six weeks before the teamster brought the letter.

Were you an agent of Badger's, or did you share in the profits?

Ans. I assisted him in his absence.

Were you paid for your services, or did you receive a portion of the profits of the sales?

Ans. I boarded with Mr. Badger, and we settled the board.

Did the board pay for your services?

Ans. Not always.

Did you in settling the board pay Badger or he pay you a balance?

Ans. Sometimes one way, sometimes another.

Don't you know then whether you had so much of the profits or so much per month?

Ans. Sometimes he paid me and sometimes I paid him.

Then he did pay you sometimes over the board?

Ans. Yes.

Then did not your receipts depend on the profits and not on wages?

Ans. I suppose they did.

Counsel. I suppose so too.

MR. RICE. Keeps the books of the Traveller office. The advertisement inserted in that paper, he received from Dr. Thomson, with orders to insert it under Badger's, to be continued two months if the other was. In the manuscript it read Mr. Kinsley. It was printed Wm. by mistake. After that Mr. Badger had a card put into the Traveller promising an answer. Afterwards he came with another advertisement, declining to reply.

Cross examined. Witness did not object to insert the advertisement of Dr. Thomson on the ground that it might be libellous, and made no such intimation to him.

PAINE D. BADGER, (the prosecutor) now took the stand. Mr. Parker asked him if the article published by Dr. Thomson was true or false.

Ans. It is false and libellous.

Mr. Parker. I shall decline going any farther, the witness is yours.

Mr. Badger was then *cross examined*, and went into a very long defence of himself.

I keep an Infirmary. I have for sale every article which Dr. Thomson recommends in his book. I prepare them myself and have them labelled "Thomsonian Botanic Medicines." I purchased Dr. Thom-

son's book and a family right, in 1833. In 1835 bought out Dr. Brown's Infirmary, No. 554 Washington street. Do not know that Brown was an agent of Dr. Thomson at the time. Never saw any authority for it from Dr. Thomson, except the family right, which Brown published in a book. I never had any authority from Dr. Thomson; but my lawyers, Messrs. Fisk and Rand, gave their opinion that I could use the Thomsonian Infirmary and medicine. After I bought out Brown, I advertised in the Boston Daily Advocate, pure Thomsonian medicines, Thomsonian Infirmary. Dr. Thomson threatened to prosecute me for selling my medicines as Thomsonian. In 1836, I made a proposition to settle with Dr. Thomson. He demanded \$400 for damages, or to leave it to a rule of Court.

Witness here read a letter he wrote to Dr. Thomson or his agent, offering to make compensation to settle the future and the past. Made this proposition in Feb. 1836. The reply of Dr. Thompson's agent was to refer it, which I declined, because it would leave trouble ahead, and would not settle any thing for the future. I had several conversations with Dr. Thomson. He threatened prosecution if I did not pull down the sign.

In regard to the letter (ordering medicinae, &c. addressed to Dr. Thomson) I never opened it. The letter was handed to me, up stairs, opened, and I carried it to Mr. Clark and wanted the medicines sent up to my shop, to accommodate Dr. Thomson. I was threatened about the letter. After that I sold out to Mr. Magoun and went to Nashua, N. H. Gave four lectures there, and fell into practice and set up a Thomsonian Infirmary. I got more patients than all the medical practitioners. They had little to do, while I had as much as I could attend to. Dr. Morrill kept an Infirmary there. At first I had an understanding with him. I was doing well till Dr. Thomson sent word to advertise me, and then I lost my practice. While in Nashua, I wrote a letter to Capt. Cobbett of Hopkinton, in which it was stated they thought of prosecuting me about the letter. I had my medicines ground by Mr. Fessenden. Ordered him to give no medicine inferior to Dr. Thomson's. Did *not* tell Fessenden to *imitate* Dr. Thomson's medicines, but to grind mine as he ground Dr. Thomson's. Am positive I did not tell him to *imitate* the medicines of Dr. Thomson. Never told Fessenden to color the cayenne so as to look like that used by Dr. Thomson. Did not understand that Dr. Thomson's was colored. I had the Narrative and Guide published by Dr. Thomson. Have seen a book called Learned Quackery, published by Dr. Thomson, but never tried to get a libel against him till now. I called my medicines "THOMSONIAN," but on *all* the labels it read "prepared by P. D. Badger." Since I came from Nashua I have told patients that I was not Dr. Thomson's Agent and did not sell his medicines. Cannot recollect the name of any patient I told so before I left Boston. Dr. Thomson published a notice of me in Nashua. [One notice, which was here read to the Jury, stated that Badger never purchased or procured his medicines of Dr. Thomson: that by assuming to be a regular Thomsonian practitioner he impaired the confidence of the public in the system, but that he was welcome to pursue his own practice if he would not make Dr. Thomson responsible by using his name.] Another notice is as follows:—

NOTICE TO THE PUBLIC.

☞ As complaints almost daily reach me against the practice of *P. D. Badger*, Nashua, N. H., respecting him as using spurious and deleterious articles as "Thomsonian medicines;" ignorantly, and of course, injudiciously, applying steam, &c.—the public are therefore informed that said Badger is not and never has been an agent for, or had the least authority from me, whatever, to practice; and if he is still unsuccessful, and the cause of injury, by his practice, the bad success or injury cannot justly be attributed to Thomsonism; because he does not procure any medicines of me or of my preparing, and does not, to my knowledge, know any thing of my system of practice. SAMUEL THOMSON.
Boston, July 1837.

After this notice I lost my practice, and sold out and then came back to Boston.

Q. What conversation did you have with Mr. Fessenden about the prosecution?

A. I asked Mr. Fessenden just before I came back, if he thought Dr. Thomson would prosecute me. He said he did not think he would trouble me if I dropped the Thomsonian, and did not use his name. My sign now is Botanic Infirmary.

Q. Do people call for the Badger medicine at your shop, or what?

A. They call for the *Thomsonian* medicine. I tell them I can sell the pure Thomsonian medicines.

Q. Do you not use the Thomsonian labels on your medicines which you sell now?

A. There are labels that say Thomsonian. After he published me I did not take the labels off. I purchased the labels of Dr. Brown and put them on to my medicines. Dr. Thomson found fault with me for selling my medicines under his name. Before I left Boston, he threatened to prosecute, and he would put me down. He had got money and I had not, and he was determined to carry it out and put me down, if I used his name. He told me several times to pull the sign down of Thomsonian Infirmary. This was in the fall. I kept the sign up, and left it when I sold out to Mr. Magoun, and went to Nashua. I was in a good practice there, till Dr. Thomson published me. Large handbills were circulated, telling the people I was not a true Thomsonian, and I found it impossible to attend my patients. I swapped away my house and lost several hundred dollars. The patients refused to pay me in consequence of Dr. Thomson's advertisement. They said they would club together and stand a law suit if I sued them, and refused to take my medicine. Thomson said they were not obliged to pay me, because I had deceived them. After this notice, I published an advertisement that I had nothing to do with Dr. Thomson. Did not publish any such notice before. My patients refused to pay me several hundred dollars, because they said Thomson called me an impostor, which I was not. I was charged with gulling the people, and my Infirmary was called a *gull trap*. Most all Dr. Thomson's agents are charged with being impostors. Most all the Infirmaries in Boston have run down on that account. Dr. Thomson wants to monopolize it all to himself. There is not nigh as many Infirmaries as there used to be. It has got into a snarl by the Doctor being so harsh with us, and the people don't know who to trust.

Q. What right had you to complain of Dr. Thomson, when you never had any authority from him to make a profit out of his discoveries?

A. I bought a Family Right and the Guide to Health.

Q. What authority did that give you to use Dr. Thomson's credit in vending the medicines?

A. I will tell you, Squire. Here is the agreement—Read it. Witness reads as follows. [Page 4, New Guide to Health.]

AGREEMENT.

The subscriber who "is the discoverer and proprietor of the system of medical practice contained in this work, agrees to give, whenever applied to, any information that shall be necessary to give a complete understanding of the obtaining, preparing and using all such vegetables as are made use of in said system, to all those who purchase the right."

[Here the witness stopped, and said that was his authority. He was told to read on, which he did as follows.]—

And the purchasers in consideration of the above information, and also what is contained in this book, agree in the spirit of mutual interest and honor, not to reveal any part of said information, to any person except those who purchase the right, to the injury of the proprietor, under the penalty of forfeiting their word and honor, and all right to the use of the medicine. And every person who purchases the right is to be considered a member of the Friendly Botanic Society, and entitled to a free intercourse with the members for information and friendly assistance.

SAMUEL THOMSON.

It was here stated that sufficient time had been occupied with the witness, but he insisted upon going on—and proceeded.

As to the Lectures Dr. Thomson charges me about, I wrote the Lectures intending to deliver them, and handed them to Squire Healy to *gramatize*. Being asked in whose hand writing the Lectures were, says—the corrections were in Squire Healy's hand writing. He thought some ideas might be altered, and I pasted it over with what he wrote. I delivered the Lectures at Milbury, admission 12 1-2 cents. I had a conversation with Mr. Fessenden after I left Nashua, and thought of going to some place. Asked him whether, if I came to Boston, Dr. Thomson would prosecute me about the letter. I now sell Botanic Medicines and Shaker Herbs. I sell every Thomsonian medicine I did when here before.

Q. Do you sell a syrup, and what do you call it?

A. I make a syrup, and call it "*Thomsonian Alterative Syrup*." Do not know I have sold it to any one here. I sell no poisons.

Q. Are there not vegetable as well as mineral poisons, and do you not sell such?

A. I sell Mandrake. The Medical doctors buy it of me. I use the *Blue Flag* in the alterative syrup.

Q. Were you ever threatened with an indictment for injury to your patients in Boston?

A. I was threatened with indictment for injury to persons' health before I went to Nashua, but I should like they would have tried it, and I would have shown that my patients were cured more than the Medical doctors did theirs.

Q. In your Card published in the Traveller you promised to give a series of facts to answer Dr. Thomson's notice; why did you not do so?

A. I went to the lawyer and he advised me to go to the Grand Jury, and I wanted to save the expense, as I could not afford it as Dr. Thomson could.

Q. What lawyer gave you that advice?

A. Squire Choate.

MR. PARKER here closed the evidence for the Prosecution. He said he was not bound to prove the Libel false until the Defendant had shown that it was true, but he had put Mr. Badger on the stand to give him the opportunity he wished, to state his own case.

J. P. HEALY opened the defence as follows:—

The defendant in this prosecution is the author of the System of Medical Practice, which bears his name. His system, sneered at and ridiculed as it may be, is, as we shall prove to you, of great value to mankind. The evidence is conclusive that important, and oftentimes almost incredible, cures have been wrought by its agency. It has no affinity whatever with the thousand species of quackery, which are rife at the present day. It does not offer you, as a sovereign remedy for every disease, a single mysterious compound, the ingredients of which are known only to him, who puts them together—trusting for its patronage only to a concealment of its real nature, and the credulity of its purchasers. On the other hand, you are presented with a well digested system, based upon philosophical principles, upon a careful study of the structure of the human body, and the laws of its existence; the results of a close, practical investigation of nearly half a century, on the part of its founder. The causes of disease, and the means of its removal, are fully explained. The whole system—its philosophy, its remedial agents, every thing that appertains to it—is laid open for public inspection. It leads you not a single step in the dark. It seeks no advancement, further than it carries with it your conviction of its utility. It makes its appeal to your reason, and craves to be subjected to every test, by which truth may be discovered.

As proof, Gentlemen, that the Thomsonian system is valuable, and entitled to respect and the protection of the law, allow me to state, that it has spread itself over the whole length and breadth of our country; that it now numbers as its friends and patrons about three millions of people; among whom may be found many of our most distinguished citizens of every class and profession.

No adventitious circumstances have brought this system into notice, or given it a temporary popularity. On the contrary, departing, as it did, from the established order of things, and aiming at the introduction of an entirely new method of treating disease, it has necessarily been obliged, in its progress, to encounter every obstacle, which could be thrown in its way by prejudice, interest, and honest fear that it would prove to be a dangerous experiment upon human life. All these impediments it has met and surmounted; and while its author yet lives, established itself in the favor of one-sixth part of our whole population. I put it to you, Gentlemen, to say, whether a system, having no intrinsic worth, could, under these embarrassments, have made a similar progress?

These remarks are to be applied to this system, as laid down by its

venerable father, and as administered and practised upon by him, and those who have derived their instruction from him. That it would deserve this reputation, or be productive of these beneficial results, in the hands of men, wholly ignorant of its fundamental principles, is not pretended. Experience has proved that it may, in such hands, be made an instrument of evil; and it was to apprise the people of this fact, and to put them upon their guard against imposition, that the advertisement was published, upon which this indictment was founded.

It will appear to you, Gentlemen, in the progress of this trial, I think, that the complainant in this prosecution has no just cause of complaint that he has been treated with some severity. His whole career has been marked by the most flagrant outrages upon the rights of my client, and by fraud and deception upon the public. We shall show that he commenced his operations as a physician in this city, in the year 1835. He opened an Infirmary, at that time, at No. 554, Washington-street, professedly under the auspices, and with the approbation, of Dr. Thomson; but in truth without ever having consulted him upon the subject, or having obtained permission to use his name, or make sales of his medicines. He advertised his establishment in a manner calculated to carry out the deception, and placed a sign over his door, bearing in great capitals this inscription—“THOMSONIAN BOTANIC INFIRMARY.” By means of these false signals many were decoyed thither, under the supposition that they had found the head quarters of Dr. Thomson himself. Badger's mal-practice here was often made a subject of complaint to Dr. Thomson; and the reputation of the system was suffering from his unskillfulness, and prescriptions of spurious and unauthorized medicines. Dr. Thomson repeatedly remonstrated against this course of proceedings on the part of Badger, requesting and requiring him to pull down the Thomsonian colors, and to stand before the public upon his own merits; but these remonstrances were unheeded, and the imposition resolutely persevered in. Resort was then had, and with considerable effect, by Dr. Thomson, to advertisements in the newspapers, and otherwise, cautioning the public against these deceptions. About this time, a letter addressed to Dr. Thomson, being an order for Thomsonian medicines and books, was brought to Badger's place, and opened, and answered, so far as it could be answered by Badger, he not having the means of procuring the books ordered. For this daring act, he was threatened with a prosecution, and to avoid it he sold out his establishment, and went to Nashua, in the State of New-Hampshire. At that place he renewed his deceptive course of conduct; advertised as he had done in Boston; delivered Lectures upon the Thomsonian system of practice, which he had procured to be written for him; represented himself as a duly authorized agent of Dr. Thomson; and sold spurious and deleterious compounds for medicines prepared by Dr. Thomson, or under his direction. His practice was signally unfortunate, and both himself and the system he pretended to represent, were brought into disrepute. His deceptions were then exposed at that place; and he in consequence was obliged to take his leave of it. The people, who had been duped by him, indignant at the imposition which had been played off upon them,

refused, almost without exception, to pay any of his charges for medicine or advice. It was natural and proper that they should do so.

Broken up and put down at Nashua, the complainant is next found in Boston again, advertising that he has *resumed* the practice of his profession. In truth he had done so. He was again selling medicines, bearing the Thomsonian stamp, which are wholly unknown to that system. Under these circumstances, seeing the people deceived and injured, and his own system brought into disgrace and contempt by an impostor, what was the duty of my client? To expose the villany, and save the public from his depredations, is the answer of reason. He did so; and for doing it, Gentlemen, he is now brought before you as a criminal. In making this public exposure he believed he was discharging a solemn duty. He saw the health of his fellow-citizens made the sport of ignorance and deception, and he gave them a timely caution. He did right. He could not have remained silent, and preserved a quiet conscience. The well-being of the community was the object he had in view, and he is willing that community should judge of his motives and conduct.

While it is claimed for my client that he acted from higher considerations than those which relate merely to himself, and he published the alleged libel from a conviction of his moral obligations to society, he would not conceal the fact, that something of personal feeling entered into his composition. How could he be wholly unmoved?

Look, Gentlemen, upon his hoary head and care-worn face. See the infirmities of age rushing upon him, and his strength wasting away. That head has grown white, and his energies have been expended in forming, maturing and perfecting a system, which he believes will live forever, and which he expects will bear his name in honor down to future generations. Can he see that system, valuable as he holds it to be, and the product of a long life of severe labor and study, marred or disgraced, with indifference? He does not pretend it. He claims an interest in what he has produced, and asks at your hands, Gentlemen, so much protection, and so much only, as the merits of his discoveries, and the purity of his motives justly entitle him to.

TESTIMONY FOR DEFENDANT.

RUFUS B. KINSLEY—Is a carrier and drives a baggage wagon between Newport and Boston. Recollects leaving a letter directed to Dr. Samuel Thomson, at the Thomsonian Infirmary, 554 Washington-street. It was in 1836; cannot state the time, but am positive it was sleighing. I came into the city on runners. The letter I was told was an order for Dr. Thomson's Medicines. I saw the sign up "THOMSONIAN INFIRMARY," and supposed it to be Dr. Thomson's residence. I gave the letter to some one in the shop, who opened and read it, and said I could have the medicines the next day at noon. I did not open the letter. Am positive I did not open it. The letter was done up, but cannot say whether it was sealed. I left the letter, and called the next day and got some of the medicine at the same place. They never informed me at Badger's shop that I had come to the wrong place, nor told me where I could find Dr. Thomson. I supposed it was all right. Something was said about not having the

books. I went back to Newport, and the next week I ascertained I had been to the wrong place for the medicine. I then went to Dr. Thomson's Agent in Congress-street and got the medicine and the books. I never went to Badger's again. People have repeatedly sent for Thomsonian medicine by me since, and I always went to Dr. Thomson.

Cross examined by Mr. Parker. I never open an order for goods directed to other persons. I did not go up stairs when I delivered the letter. Do not recollect whether I saw Badger. Cannot say it was Cobbett (who presented himself to witness,) who took the letter, but whoever took it opened it. I did not. It was directed plain to Dr. Samuel Thomson. Don't remember Pleasant-street being on it. It was found out, after I went back, that I had not got the books, and that there was something wrong, and I brought an order, a week or two after, and got the articles wanted, of Dr. Thomson, in Congress-street. I understood that Badger had got the medicine he delivered to me, in Congress-street. Whatever I got at Badger's I paid for when I took it. I think I got a bill there when I took the medicines. I think I got them for Dr. Gardner of Newport. When orders are directed to me I get the articles myself. When directed to others, I do not examine the orders, but leave them with the persons and take what they give me to carry. I am sure I got some medicines at Badger's the day after I left the letter. I can't be mistaken. I got something there to carry back, but can't recollect what the package was. It was not in the Variety Store, but in the place where they sold medicines. When I went back (to Newport) I found I had not got the books, and some medicine was wanted. I then, about a week after, when I found the mistake, went to Dr. Thomson, and got the right articles.

SAMUEL SMITH, of Boston. I have known Dr. Thomson's system of practice for twenty-three years, and have used it in my family. I have indeed received benefit from it. I had long been under the treatment of regular practice, and much to the injury of my bodily system. I bought the information of Dr. Thomson in 1816, and have used no other remedies since. Am satisfied that I have been relieved by it from the injurious effects of bleeding, blistering and mineral poisons. I had suffered under great debility. My body was made a wreck of by the Faculty. A shrinking in my leg which entirely disabled me. Crooks in my ribs, my teeth loosened and black as my vest; owing to the mineral poisons given me. Since then I have had occasion to take a great deal of Dr. Thomson's medicine. It restored a firmness of body and general health I never could have got from other remedies. My limb was strengthened, teeth restored to their firmness, and I now enjoy substantial health. I had previously given up all application to Physicians as hopeless. I know of no injury, but an immense amount of good derived from Dr. Thomson's system when rightly administered. I cannot describe the value it has been to me, in my health. Dr. Thomson was the original discoverer, and I never knew any other claim to it. The system is becoming very extensive. Many thousand persons have adopted it in all parts of the Union. It has engaged the attention of great numbers of intelligent men. I have attended a Thomsonian Conven-

tion at Philadelphia of Delegates from many States, to consider the system. It was comprised of intelligent men of all classes.

Mr. Parker objected to going into the merits of the Thomsonian system.

Mr. Hallett replied that the object was to show that Dr. Thomson was the founder of a system of medical practice, simple and novel, of great benefit to mankind when rightly administered, but liable to be abused by unskillful and unprincipled men assuming to practice under his sanction, when in fact they were pirating on his rights and defrauding the public by their impositions. The mal-practice of these impostors was all attributed to the Thomsonian system, which was thus brought into disrepute, and Dr. Thomson, as well as the public, injured. The defendant had been arraigned here, as for a crime, in an endeavor to warn the public against these impostors, and protect his system from the reproach they were bringing upon it. It was the fashion of the day, to attribute all the mal-practice of quackery to the Thomsonian system, and it was but fair that the founder of the system should now have the opportunity of proving its merits, and pointing out the genuine from the false, to the satisfaction of the Court and Jury. This he was prepared to do, and had his witnesses at hand for that purpose. The alleged libel was made up of a charge of imposition against Badger. If the original which he counterfeited was of no value, there could be no good reason for Dr. Thomson exposing him as an impostor. But if the public really had an interest in preserving this system of healing in its original purity, then it was material to show its value in order to establish the good motive and justifiable end of the publication.

Mr. Parker replied that the testimony might be admissible, if Dr. Thomson's system had been called in question, but he had no disposition to do so, and considered Dr. Thomson entitled to all the merits of his discovery, as one held to be of great utility, by a large portion of the community. He would save the trouble of any farther examination on this point, by admitting the first statement in the specification of defence, as to the merits and value of the system.

Judge Thacher remarked that Dr. Thomson was undoubtedly entitled to the benefit and the honor of his discoveries, which seemed to be so widely disseminated, and the public ought to be guarded against imposition; but as the specification in this particular was fully admitted, it was unnecessary to adduce the evidence.

The counsel for the Defendant then waived calling further testimony on this point.

NATHANIEL S. MAGOON. Lives in Boston, and is at the Infirmary formerly used by Badger. Badger practiced in Boston about a year, before he went to Nashua. I bought medicines of him. He held himself out as a *pure Thomsonian doctor*. He wanted to sell out, and I purchased the establishment of him, 554 Washington street, the 7th of June, 1836. I was not then authorized by Dr. Thomson. There was a large sign on the building, twenty feet long, with large letters, "THOMSONIAN BOTANICAL INFIRMARY." Another sign had the several names of Dr. Thomson's compounds. I bought these signs as a part of the establishment. I considered them as holding out to the world the Thomsonian practice. It was held out that we had a right

to use the name to get practice. When I bought Badger out, I thought I ought to take down the sign, and told him it looked to me like holding out imposition. Badger and Brown said that we could get no practice without the sign, and advised me not to take it down. I did not then know that Dr. Thomson had required Badger to take it down, and I let it stand. I found it was considered as a regular Thomsonian Infirmary. In nine out of ten cases, the persons who came would inquire for Dr. Thomson.

I have examined the medicine sold by Badger and that prepared by Dr. Thomson. The former is very inferior in quality, and the difference would be seen by any one well acquainted with the medicine. After I bought Dr. Badger out, he wanted to hire a room in the building to write some lectures he was going to deliver. He told me that a young gentleman, then a law student of Hon. Daniel Webster, was going to help him write them. One day Mr. Badger was called for and I went to his room: found Mr. Healy writing at the table. Mr. Badger wished me not to mention it, and I agreed not to. I think Mr. Healy called several times about the lectures.

The labels on the medicines I had of Badger were like those of Dr. Thomson. Any one to buy, would take them for the same. The Agent has no authority to compound Thomsonian medicines. The object is to keep them pure. When Badger sold out he told me his wife was sick, but he did not say where he was going.

Cross examined. Understood that the sign was up before Badger took the house. After I bought him out, the sign remained a year before I took it down. I thought it was right at first, from what others did, but did not feel satisfied. Dr. Thomson required me several times to take it down, and I did so, and settled with him and took a regular agency, and have sold his medicines since.

W. A. GILBERT. Some time in 1836, my wife was seven weeks at Dr. Badger's establishment for cure. She was benefitted in health by it. I had heard of Dr. Badger and she wished to go there. It was considered a regular Thomsonian Infirmary. I should think she had not been there a great while before Badger admitted he was not an agent of Dr. Thomson, and he was trying to put him down. She would have gone to the head quarters of Thomsonism had she known it at first.

JAMES OSGOOD. Resides in Nashua, N. H. Knew Badger there, and purchased medicines of him, supposing them to be Dr. Thomson's. I understood him he was a regular Thomsonian physician. He labelled his medicines so. One of his phials I bought was labelled "Thomsonian Alterative Syrup." I then supposed it genuine. Have since found out there is no such medicine in Dr. Thomson's *Materia Medica*. It is not a Thomsonian medicine, nor laid down in his book. I did not then know that there were Thomsonian impostors. Previous to this I had adopted the Thomsonian practice in my family. Dr. Badger called at my house and represented himself as a Thomsonian physician. He left a bottle of the syrup as Thomsonian medicine. I understood by *Thomsonian*, the Thomsonian system of medicine secured by patent to Dr. Samuel Thomson. Have never known any other. In procuring the medicine of Badger, my design was to purchase Thomsonian medicines, such as were secured to Dr. Samuel

Thomson. I should not have bought Mr. Badger's medicines as such, had I known it.

Question by the Court. When did you find out that Dr. Badger was not a Thomsonian doctor?

Ans. I learnt it just before the notice of Dr. Thomson was published in Nashua, that Badger was not his agent. It was sometime after Badger had been practicing in Nashua. He was there about a year.

Cross examined. I supposed that Badger was an agent of Dr. Thomson. He called himself an agent of Dr. Thomson. He advertised as if in connexion with Dr. Morrill, who was known as a regular agent. I never saw him at Dr. Morrill's. There was a number of articles in the papers respecting Badger being an agent of Dr. Thomson. Witness was here referred to an advertisement in a Nashua paper by Badger, in 1837, and says he saw it at the time and supposed from it that Badger was regularly authorized by Dr. Thomson. In the advertisement Badger offers his services to the public "as a thorough Thomsonian physician, without any amalgamation;" that at his office "may be found a large assortment of *Thomsonian* medicines, prepared, with full directions, for any family's immediate use. Dr. Morrill will *also* keep Thomsonian medicines prepared by Dr. Thomson."

Nothing was said about any medicines prepared by Badger. He supposed it was all to be Thomsonian, in connexion with Dr. Morrill. Witness heard a patient of Dr. Badger, after he was published, refuse to pay more than half his bill, but nothing was said about Dr. Thomson.

GEORGE A. MORRILL. Resided in Nashua all the time Badger was there. Before Dr. Badger commenced practice there, I was an agent of Dr. Thomson. When Badger first came to Nashua he called on me and represented himself as a thorough Thomsonian, following Dr. Samuel Thomson in every particular. He said that if I used any articles except such as Dr. Thomson had prescribed in his Guide to Health, I was no Thomsonian. He came to my Infirmary to buy some medicine. He came several times to me and proposed to become a partner. He did not represent himself as an agent of Dr. Thomson, to carry on the practice, and had not signed the bond (as agent), but he wished to do all he could for the system. It was then agreed that he should go out and lecture and get patients to send to my Infirmary. This was his proposition, and I gave him leave to use my name in his advertisement. I should not have permitted him to use my name if I had not believed him to be a regular Thomsonian practitioner. He went out and lectured and then commenced practice himself and sent me no patients. He put in a notice in the paper that he had so many patients of his own, he could not attend at my Infirmary. He began practising Thomsonian, but soon got off the track, and used spurious medicine, and some never laid down in Dr. Thomson's discoveries, though he labelled them Thomsonian. He still held himself out as a Thomsonian practitioner, until he was exposed. His patients, when they found it out, refused to pay, some of them on the ground that he had run them down by improper treatment and putting them through too many courses. Others gave as a reason that he had deceived them. That they expected he was an agent of Dr. Thomson and un-

der his patronage, when it turned out that Dr. Thomson never had any thing to do with him.

When Mr. Badger proposed to deliver his lectures and get me patients, he was to have a part of the profits of the business he should send to me. He told me that he had paid, or was to pay, \$15 for the writing of the lectures he was going to deliver, and that I ought to pay half of it, because I should be benefitted by them. He told me that he was copying the lectures, which he had got written for him in Boston. He said they were fixed for him.

Being asked as to the right of an agent to compound the medicines he sells—witness says, the object of the bond is to prevent spurious medicines being compounded, and to guard the public against imposition and the system against discredit. The bond was made after so many agents had sold bad medicines of their own making and injured Dr. Thomson. A schedule of prices accompanies the bond, over which the agent is not to sell, in order to prevent exorbitant prices being asked. Witness read the bond as follows.

KNOW ALL MEN BY THESE PRESENTS,

THAT I of county of State of am held and firmly bound to SAMUEL THOMSON of Boston, in the county of Suffolk, and State of Massachusetts, in the sum of FIVE THOUSAND DOLLARS to be paid to the said Thomson, his executors, administrators or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

In witness whereof, I have hereunto set my hand and seal this day of in the year of the common era, one thousand eight hundred and thirty-

The conditions of this obligation is as follows, viz:

Whereas, the said has been duly appointed an agent of said Thomson, to administer, use and sell the patent and other medicines discovered, compounded and prepared by said Thomson, as mentioned in his Guide to Health; also to sell Family Rights to use such medicines to all suitable persons, except physicians or their students; and the said has agreed that he will not mix or compound any of said medicines, or buy or speculate on any of said medicines, or the ingredients whereof the same are compounded, nor purchase any of said medicines of any person or persons except said Thomson or his legally authorised agent, except in cases of urgent necessity; and then, more than twenty-five pounds shall not be purchased, made or compounded by said until after application to said Thomson, or his agent, for a supply has been made, and he or they have neglected or refused to furnish it. And said agrees that he will not administer or use any of said medicine, except as aforesaid, other than that which he may purchase of said Thomson, without his written consent; and that he will not sell any of said medicine or Family Rights at any other price or prices than those enumerated in the schedule annexed to said agency. Now if the said shall well and truly perform all the stipulations and agreements by him above made, then this obligation shall be null and void. Otherwise it shall be and remain in full force.

Thursday morning, April 11.

At the opening of the Court the examination of *Dr. Morrill* was continued. He was asked if applications were made by persons in Nashua, to Dr. Thomson, to publish Badger as an impostor? Mr. Parker objected, but the Court admitted the evidence.

Witness answers—There was considerable excitement at Nashua as to Badger's practice and character; whether he was a true and authorized Thomsonian or an impostor. I stated myself these particulars to Dr. Thomson, and told him he ought to publish Badger.

This was before any notice had appeared in Nashua from Dr. Thomson respecting Badger. In consequence of what I knew and heard, I represented to Dr. Thomson that the effect of Badger's practice on the Thomsonian system was bad. People said if this was Thomsonian they wanted nothing to do with it. Several patients, to my knowledge, refused to pay on the ground of ill treatment, before it was generally known that Badger was an impostor. They refused to pay after he was exposed, on that account, and also because he had imposed himself on them as a Thomsonian physician. I was called to attend some of Badger's patients who had not been relieved.

I was present at some of Badger's lectures in Nashua. He was questioned by some of the hearers, as to the subject matter of his lectures, and could not answer at all. I never consulted Mr. Abbott with Badger as to any agreement or advertisement.

Cross examined. Who were the patients that complained of Badger?

Ans. Mr. Ward, Mr. Holt, Mr. Palmer, and three or four others. I advised Dr. Thomson to publish Badger, and saw the publication before it was made. My motive was to preserve the reputation of the system and the rights of Dr. Thomson, and to guard the public against false Thomsonian practice. I never did any thing to check genuine Thomsonism, only the false in bad hands. I believed the public good required the exposure of Badger.

PHILIP B. FESSENDEN. Is a grinder of drugs. Grinds for Dr. Thomson and has for Dr. Badger. He has given me orders to *imitate* Dr. Thomson's medicine. He said as the doctor was advertising him for spurious medicine, he wanted none inferior. Said he could sell them better under Dr. Thomson's name, and he told me to have the medicines exactly like Dr. Thomson's. I did not compound the medicines, only ground the drugs.

Badger told me several times before he left Boston to go to Nashua, that he expected Dr. Thomson would prosecute him for selling his medicines and using his name. When he was coming back from Nashua, before he set up in Boston the second time, he asked me if I thought the doctor would prosecute him. I told him I thought not, if he did not use Dr. Thomson's name for his medicines. Not long before he left Boston he came to me and said he expected Dr. Thomson would prosecute him, and asked me what he should do. I advised him to pull down the Thomsonian sign and move out of the city. He replied that he could not do business without he had the sign *Thomsonian*. He first spoke to me about this say a month before he left Boston for Nashua. He spoke to me several times about the prosecution. At times he seemed to be agitated and fear a prosecution. At other times he seemed not to care about it. It troubled his mind a good deal.

He never mentioned the letter to me till since he came back. He said he was afraid the doctor would prosecute him about the letter; he said he did not break open the letter, but a letter belonging to Dr. Thomson was brought to him for medicines. I gave him the advice several times to pull down his sign and move out. He was sick, and his wife told me he was worried for fear of a prosecution.

Witness was asked as to the adulteration of drugs sent to him to be ground for medicine. *Mr. Parker* objected.

Mr. Hallett said the testimony would go to the motive. He wished to show that there was great adulteration in the grinding of drugs. That this was the reason Dr. Thomson took so great precaution in the compounding of his medicines and in warning the public against imposition. He was prepared to show by this witness that the cayenne pepper, for instance, of which whole cargoes were used in the Thomsonian practice, was of very different medicinal qualities and price—that the best quality has a marked color, and that the inferior was made to imitate it by deleterious colorings, even such as sugar of lead and red arsenic. That Dr. Thomson, to prevent imposition, gave a peculiar color to the genuine pepper, so as to avoid imitation, and this was the imitation which Badger wanted Mr. Fessenden to give to his medicines.

The Court said it was competent to show that Badger had prepared spurious medicines, but not to go into the comparative quality or genuineness of other medicines generally. He then asked witness if Badger had ever told him to put deleterious articles into the drugs he ground for him. He said not.

E. G. DARLING. Has been out of health. Came to Boston in pursuit of his health, and wished for a Thomsonian physician. Went to Badger, supposing him to be such. Inquired for Thomsonian medicines, and he sold them to me as Thomsonian. They were labelled Thomsonian, and I supposed were prepared under Dr. Samuel Thomson. [Witness here produced several bottles, all labelled Thomsonian, in large letters. On some of the bottles the word Thomsonian was colored over with thin red ink, which did not erase the letters but made them rather more conspicuous.] Witness said he bought these medicines the 24th of March last.

Mr. Parker objected to the introduction of the medicine as it was purchased since the publication of the libel. Counsel for defendant replied that they should show the labels on these medicines to be the same as those Badger had before he went to Nashua and while there, and that in continuing to sell his medicines with these labels since he came back to Boston, he had resumed the imposition, as alleged in Dr. Thomson's notice to beware of imposters.

The Court said, if this was shown, it would be relevant.

Mr. Parker said that it would be no justification of a libel charging a man with larceny, to prove that after the publication he stole a horse.

Mr. Hallett replied that it would be a very good justification for charging a man with stealing a horse, if it could be shown that after the publication he had the stolen horse in his possession or tried to sell it as his own.

DR. MORRILL was then called and stated that these labels were the same Badger used at Nashua, and he believed the medicine was the same. The labels were Thomsonian.

MR. FESSENDEN also testified, that when Badger came from Nashua, he told witness he had a quantity of medicine on hand he wished to dispose of, and since then he had had none ground.

In answer to a question from Mr. Badger to Mr. Darling, whether he applied to him as a Thomsonian doctor, Mr. Darling said, I came into the city in pursuit of my health, and you was the first one I applied to, and I purchased your medicine for the genuine Thomsonian.

DR. MORRILL then examined and tasted the medicine. The article labelled *Thomsonian Rheumatic Drops*, he said was spurious. It was made of an inferior myrrh, and was not good; very inferior in pungency, strength and color.

Question by Foreman of the Jury. How do you know the myrrh is of inferior quality?

A. It is musty. Such myrrh I should think might cost 50 cents. That Dr. Thomson uses costs from 70 to 80 cents. I should not be willing to sell such medicine to my customers.

MR. SAMUEL SMITH called again. Has been well acquainted with Dr. Thomson's medicines for over twenty years. Has examined the Botanic Drops of Dr. Badger produced in Court. It is vile stuff. I would not use it, but should throw it away if I had a shop full. Witness produced some of the genuine drops, and said that no person who examined the two could mistake the difference in quality. Badger's compound was made of very inferior drugs. Witness had been so long accustomed to testing the medicine, he was sure he could not be mistaken in its quality.

The Defendant also put into the case the advertisement of P. D. Badger, when he first opened his establishment, 554 Washington-street, in order to show that he held himself out as an Agent of Dr. Thomson, and as selling the medicines prepared by him, and to contradict Badger's testimony that he never published an advertisement to sell Thomsonian medicines without stating that they were prepared by himself, and not by Dr. Thomson. The advertisement was first published, in the Boston Daily Advocate, October 28, 1835, and was continued by Badger's order, without alteration, till he left the city, in 1837. The advertisement is as follows:—

THOMSONIAN BOTANIC INFIRMARY:

No. 554 Washington-street, Boston.

(Opposite the Worcester Rail-road Ticket Office.)

The subscriber having purchased the interest of Dr. Brown, his late partner, in that large and spacious Infirmary above named, and lately occupied by them as partners, and has fitted it up in a style not surpassed by any other in the State for convenience and comfort; and would now inform his friends and the public that he is not only ready to accommodate them when sick with the most assiduous attention and medical treatment, after the Botanic System of Practice, but also with large and airy rooms commanding a fine prospect of the Worcester and Providence Rail-roads, and the surrounding country, on the west; Boston Harbor, its islands, shipping, light-houses, &c. on the east; and so situated as to enjoy as good air as the city affords.

The subscriber is also determined that nothing shall be wanting through every department of this Infirmary as to neatness and regularity; good order, the best of nursing and attention, to make every one who favors him with their patronage, happy and contented. He has also a valuable library of the best selected books for the instruction and amusement of his patients. He has also in readiness clean changes of linen for all patients who come to take single courses of medicine, and India Rubber coverings for the mattresses and beds, he always uses to prevent contagion—his steam-boxes have windows with curtains, so that patients who are feeble can at any time put out their heads and breathe the fresh air—boilers are so constructed that he can at any moment graduate the steam to suit

their wish or ability to bear—so that there is not the least danger to the most feeble constitution, nor even for an infant of a month old. The shower of two quarts of cold water is delicious, though we never insist on it, as it is always a matter of choice with the patients, and a person who has once taken it, will never after be denied, but will frequently call for more.

The subscriber has owned Dr. Samuel Thomson's Family Right nearly three years—has given strict attention to its precept, and for the five last months has administered *pure Thomsonian Medicine* to over two hundred persons, many of whom suffered under the most desperate complaints, and had been given over to die by the regular physician; and such has been his success, that out of the whole number, every individual except two persons, have been relieved, and more than three-fourths cured who have left his Infirmary. He will still continue to administer *Thomsonian Medicines in their purity*, at his Infirmary, assisted by Dr. Darling, of No. 52 Salem-street, in all difficult cases, who has been a regular practitioner of the Thomsonian System, for more than fourteen years in this city. Mrs. BADGER will attend to the ladies department at all times—she having been an experienced nurse over eighteen years—a part of which time she was nurse in the Massachusetts General Hospital;—since in private families, and for the last two years a strict Thomsonian nurse. The subscriber would respectfully invite the afflicted of all descriptions to call and examine for themselves, and if they should see fit to put themselves under his care, let their disease be what it may, if timely application be made, he will ensure a speedy relief.

P. D. BADGER, *Botanic Physician*.

N. B. For sale at the above establishment, a general assortment of *pure THOMSONIAN MEDICINES*, done up with directions for use, at wholesale or retail.
October 28, 1835.

The testimony was here closed for the Defence.

P. D. BADGER then put himself on the stand, and desired to make some explanation. He said he purchased the myrrh of Mr. Fessenden and supposed it was good. Being asked if the labels on the medicine he now sold were the same he had before he went to Nashua, he admitted they were. He bought them of Dr. Brown when he sold out to him. The witness was proceeding to further remarks; when Mr. Hallett suggested to the Court that he had been disposed to indulge the Prosecutor in arguing his case pretty fully to the Jury, but if he was to go on any longer he (Mr. Hallett) did not wish to be held responsible for the time he might occupy.

Mr. BADGER. There was some little ideas yesterday, and I should like to —

Mr. PARKER. I do not wish to go any farther with the witness. I have had enough of it. Mr. Parker then called Mr. Healy, as to the Lectures.

J. P. HEALY, Esq. Said that some time ago he corrected some Lectures for Mr. Badger, as had been stated. The precise amount of service he performed he did not recollect. He did not furnish the medical ideas, but the language in making corrections and suggestions.

Cross examined. The original, without corrections, was not adapted to a public delivery. He had entertained a favorable opinion of the Thomsonian system, and took some interest in it at the time he aided Mr. Badger in his Lectures.

CLOSING ARGUMENT FOR DEFENDANT.

B. F. HALLETT addressed the Jury in the close of the defence. They must have perceived already that this was one of the last cases in which the criminal Law of Libel, even if there could be no possible

doubt of the existence of such a law in this Commonwealth, should be resorted to. The complainant has himself admitted that he has come here to enlist the Commonwealth as the Prosecutor in his private concerns, in order to save the expense of an appeal to a jury for civil redress which was open to him if he could show any wrong done to his rights of person, property or reputation. If he failed in such a suit, the costs must fall upon himself. If he fail in this, the Commonwealth pays the expense. The criminal law of libel is thus used, by way of experiment and speculation, to enable needy men without character to try the adventure at the public expense, of prosecuting in the hope of gaining a character; and in the certainty that they can lose nothing in reputation or cost, should they fail.

Against such proceedings, to enlist the power and dignity of the Commonwealth, as a party, in a mere war of words, whether spoken or written between two individuals, it is the duty of every honest juror to set his face, with a determination to leave such matters to be settled in the ordinary course of civil remedies, without the parade of grand juries, indictments, arraignments, trials and convictions as for high crimes and misdemeanors, affecting the public good.

The prosecuting officer (Mr. Parker) who has only discharged his official duty on this occasion, and with an ability and candor, gentlemen, which command my entire respect; has frankly told you that this was not a proper case to call in the interposition of the Commonwealth. He regrets that it is here. But the complainant would not be denied. Provided he could throw the cost upon the State, and avail himself gratuitously of the talents of the learned Attorney for the Commonwealth, he could at all events lose nothing, and might possibly gain something from the publicity of a trial with the defendant; especially when he could be admitted to tell his own story on the stand, while the mouth of his opponent was closed; for such is the justice and equality of this criminal law of libel. The party prosecuting, with every possible inducement to conceal and misstate truth, in his own case, is allowed to swear up his own character and swear down that of the defendant, while the latter is held dumb before the jury and can only answer *not guilty*.

And what are the real merits of the case before you; for it is between these two men you are to decide. The Commonwealth, even by the *fiction* of the law of libel, (which is all founded on fiction and judicial usurpation,) can have no possible interest in the issue. There is nothing that looks like shedding of blood or breaches of the peace on the part of the prosecutor. He does not hold his own reputation high enough to risk even a bill of costs to defend it, much less a personal encounter. You need not apprehend the shedding of blood in State-street, which the learned Attorney so prominently placed among the reasons why you should enforce the criminal law of libel.*

* The case of Selfridge and Austin is a standing precedent with the supporters of the law of libel. Selfridge had a controversy with Austin's father, in the newspapers. Young Austin struck him with a cane in State-street, to disgrace him, and Selfridge shot him down, and was tried and acquitted, on the ground of self-defence. Suppose Selfridge had been indicted for a libel. If acquitted, would young Austin have been less inclined to punish the insult to his father. If convicted, would Selfridge have had no ill will to Austin? The absurdity of the

Who and what are the parties in this case ; and by estimating their relations to the public and each other, you will best get at the motive of this publication. On the one side is the venerable founder of a system of medical practice, the value and extent of which was well described in the opening of the defence. I do not speak as a disciple of the system, but he is himself an empiric in the practice of common sense, who does not perceive that a change like that which has been effected in so short a time and with so little aid, in some of the leading principles of medical practice, must be met by some other answer than to call it quackery. That it has not sprung from the learning of the schools is rather a proof that it is a discovery of value than otherwise, for the whole history of the healing art will show that to *empiricism* it owes its most valuable improvements. Learned men are trained to think and act in a circle which they rarely expand, while those they exclude from it, often range wider and strike deeper and produce an entire revolution in science and art. Such a man is Samuel Thomson, the defendant ; and with whatever prejudices, gentlemen of the Jury, you may have come into this case, or with whatever contempt you may have supposed you would regard a controversy between two quacks, it is not in your power to withhold respect from my venerable client there, who has devoted half a century to a great pursuit. There is something ennobling in the perseverance of unaided genius, which lifts man above himself ; and even if the effort be aimless we can but admire. If successful, it commands respect. The very fact that the defendant has been so much assailed, is sufficient proof that he has learnt something not taught in the schools. When you reflect that there are so many who have been subjected to his system of treatment for disease, and that all the failures which could be ascribed to it have been loudly proclaimed, the small number of these (even including the mal-practice of such pretenders as Badger and his associates,) is a sufficient proof that the discoveries of Dr. Thomson have their foundation in the application of some law of nature, some common sense principle to the science of medicine, that has not been cultivated as it should have been in the medical schools. The time has gone by when the medical faculty or any other profession can put down every theory but their own established rules of practice, by sneering at it as irregular and empirical. They may put it down by showing that it is destitute of sense or reason, but never by denouncing it merely because it lacks a diploma.

Nor is it merely the unlearned, who have held the investigations of Samuel Thomson worthy of a high rank in medical science. Among

breach of peace argument, is still more apparent when applied to words spoken. Suppose Selfridge had gone on Change and openly villified the elder Austin ? Would it have stirred the blood of the son less than a printed libel ? And yet the wisdom of the Common Law says that for a libel *spoken*, you shall have only a civil suit, but for the same libel printed or written, you shall also have a public prosecution, *because* it tends to a breach of the peace. Look at the common sense of the argument. A man meets another in a public place, and pronounces him a *knave*, a *scoundrel* and a *liar*. That is no libel says the sage Common Law. Nay, it is not even slander, for which you can have a civil action, without proving consequential damages. But write these same words and post them in ever so obscure a place, or print them in an unread newspaper, and then the Commonwealth must step in to prevent a breach of the peace ! Magnificent logic !

others, the venerable and scientific Waterhouse, the classmate of Jenner, to whom we owe the practical introduction of vaccination into this country; a remedy which has triumphed over the doubts and the theories of the learned, and the prejudices and fears of the world; has pronounced the Thomsonian system a discovery worthy the study of the scientific and the encouragement of the philanthropist. He said so in 1825, when in the full vigor of his intellect, and the study and reflection of fourteen years have strengthened that opinion. I have before me a letter written within the present month by that eminent man, in which he thus speaks of the Thomsonian system of practice and of its founder, both of which so many diplomatic gentlemen of vastly less learning and experience than Dr. Waterhouse, affect to hold in contempt. He says—

“Thomsonism cannot be discussed in a minute. Thomson has a theory, and a glorious one too—nothing short of the mundane system whereof the sun is the soul. Hippocrates adored it, and so did Plato. Thomson has not words to explain himself. His fire and warm water were the chief helps he had, and he used them to great advantage. The *stomach*, bowels and skin, are the organs he watches and has learnt to manage better than any of us.

He travels on foot to Canada, and to the extreme parts of the United States for his herbs, which is undoubted evidence of his full belief in the efficacy of the articles he uses.

Samuel Thomson is, in my opinion, the *Prince of Empirics* in this country; which, let me tell you, is conceding to him a great deal; for I avow my own belief that the most valuable part of my too slender knowledge is the *empirical*.

Compare Thomson with that celebrated “*Quack*” *Parecelsus*, and, as an American, rejoice with exceeding great joy in the difference, not only in natural science, but in morals.—Thomson compared with *Parecelsus* who was an odious drunkard, and otherwise profane, even to what we moderns have denominated *blasphemy*. Samuel Thomson knows enough to speak with verbal reverence of the *great I Am*, but not enough to cast his head on the ground, and his mouth in the dust. Yet is he honest, and even generous to those who need his aid. He is in fact the best example that I have met of the ancient Greek physician, with the additional advantage of modern chemistry. For he knows the *magnificent apparatus of the chemistry of Nature* as well as any of us—and he knows the stomach, intestines, lungs, diaphragm and urinary organs of man as well as any of us, and better than most of our M. D.’s. He is as well acquainted with the vegetable articles of our *materia medica* as Dr. — himself, or I am mistaken.”

Dr. Waterhouse further says, with the sagacity of a philosopher—

“It is not beneath the dignity of any physician, divine, or philosopher, to inquire into the truth of a series of experiments published with so much confidence, and purporting to be for the benefit of mankind. I have no doubt that Samuel Thomson has added a very valuable article to the *Materia Medica*, and that he has again and again relieved the sick where others have failed. If this man has devoted the greater part of his life to the relief of his fellow men, his labors claim respect, and his errors our indulgence.”

If this were the only instance in which learning and science had paid a tribute of respect to the discoveries of Samuel Thomson, it would ill become the rest of the profession who have not, like Dr. Waterhouse, retired from the personal and professional struggles of the day, to assume to sneer at what, after fourteen years of observation, he deliberately pronounces deserving the profound attention of the student of nature and knowledge.

But we are spared the necessity of producing further evidence that here is a valuable discovery, and one held in high estimation with a

great portion of the community, by the candid admission of the prosecuting officer, and the just regard for the rights of the defendant evinced by the Court. For the first time gentlemen, in an eventful struggle of half a century, to establish his system, Samuel Thomson has been treated with respect and a fair regard to his rights as a man and a citizen, in a court of law.*

I conceive, therefore, that you will not hesitate to consider the point as fully established, that here is a valuable discovery, of sufficient importance to mankind to demand the protection of those general laws that protect all our rights; and that, in an especial manner is it important to the public health that it should be preserved in its purity, and not perverted by the selfish, ignorant and designing, into a mere medical speculation upon the credulity of the afflicted and unfortunate.

What then is Dr. Thomson's duty when he sees the public health endangered and the system he has labored his whole life to protect, falling into contempt and mischief by the reckless and ignorant practice of false pretenders,—the piratical depredators on his name who sail under false colors? Are you prepared to condemn him for seeking to put the public on their guard against such impostors?

When a man, single handed against the world, has devoted a whole life to perfecting a system wrought by himself from the elements of nature, he has a right to be jealous of its success. Though assailed by the learned on one side, Dr. Thomson has in reality much more to fear from the ignorant pretenders who have, on the other hand, sought to build themselves up upon his discoveries and to speculate on his reputation. He has felt it his duty to warn the public against this numerous class of depredators and impostors, and for doing this he is to-day arraigned by one of them.

And who is the prosecutor, gentlemen, who claims from you a verdict on the pretence that he has suffered, from the exposure of his impositions, "injury to his character, reputation, business, gain and profits?"

By what process of study, thought, investigation, industry or skill, did *he* acquire a right to make "gains and profits," by using the discoveries and success and *name* of Samuel Thomson to bring himself

* The despotism of an irresponsible Judiciary, and the force of prejudice to pervert justice and judgment in a great intellect, are strikingly shown in the treatment by the late Chief Justice Parsons toward Dr. Thomson, in the indictment against him for administering lobelia to Ezra Lovett, tried before Judge Parsons in 1809. Upon that trial the Government so entirely failed to make out any case, that Judge Parsons expressed his surprise that a Grand Jury could find a bill on such evidence, and wondered what sort of a Grand Jury they had. Neither did the failure of evidence permit the defendant to bring forward his witnesses to support his system of practice and prove its benefits, and here the case should have stopped. But instead of this, Judge Parsons pronounced to the Jury, in the form of a charge, a deliberate libel upon Dr. Thomson and his system, and regretting that he could find no common law to justify hanging the defendant, actually recommended getting a law through the Legislature, to make it penal to practice medicine without a diploma, and to bar the collection of all debts by such practitioners. The latter suggestion was adopted and remained the law until the liberal efforts of Frederick Robinson and others broke down this sort of exclusive legislation for doctors as well as lawyers in the revised statutes. Such, however, was the zeal of Judge Parsons that he drew up a report of Thomson's trial, and took the extraordinary course to have it published in the sixth volume Massachusetts Reports, though it was not a case reserved for the whole Court, in any form.

into notoriety? You find him, gentlemen, such as you see him, for I cannot describe his character so well as he has himself exhibited it in his testimony before you. He began with imposition by buying out a discarded agent of Dr. Thomson, who had proved unworthy of his confidence. Without a name himself that would not have deterred instead of inviting custom, he purloins the name of Dr. Thomson, and places it in large capitals over what he well said on the stand was denominated by many, "*Badger's Gull Trap*." He decoys to his shop the unwary patient, who having heard of the fame of SAMUEL THOMSON, seeks for the application of his remedies to restore his health. His nostrums, compounded in ignorance and vended in deception, are labelled with the name of Dr. Thomson, and advertised to the world as "*pure Thomsonian medicines*." For more than a year he continues this course of imposition in Boston, making great gains and profits by depredating on the rights, and building upon the foundation another has laid. Is such a man entitled to sympathy or redress at your hands because the "gains and profits" of this dishonest speculation have been stopped by the exposure of his false pretensions?

He persists in keeping up the false sign, and in sailing under false colors, though repeatedly required to take down the sign and appear in his own character. He shows the consciousness that he was doing wrong by his attempts to settle with Dr. Thomson, and you at length find him conscience stricken it would seem, reduced to sickness, apprehensive of an indictment, "worried for fear of a prosecution," and selling out his establishment and leaving the city without a definite object; giving out, as he himself admits, that he was going to farming!

But even in his fleeing from Boston, he left behind him a continuation of the deception, the practice of which had obliged him to clear out for fear of a prosecution. He sold out his false sign and false colors and fraudulent labels to Mr. Magoon; and when the latter expressed an honest reluctance to use another man's name to make "gains and profits," and told Badger "it looked like holding out imposition," the conscientious Mr. Badger tells him that he can do nothing and get no customers unless he keeps up the imposition; and both he and his preceptor in the deception, Brown, advised Mr. Magoon not to take down the sign.

You next find Badger, not on a farm, where he gave out he was going, but in Nashua, insinuating himself into the confidence of Osgood and Morrill, as a genuine Thomsonian agent, and so zealous of the reputation of the founder of the system that he tells Dr. Morrill he is no true Thomsonian if he uses a single article not laid down in the Guide to Health; and this, too, at the very time Badger was concocting his vegetable poisonous compound of *blue flag*, and calling it "*Thomsonian Alterative Syrup*."

After, by his pretended zeal for the honor of Dr. Thomson, gaining the countenance of Dr. Morrill, he goes out to lecture and publishes his advertisement referring to Dr. Morrill, and distinctly giving out that the medicines he (Badger) uses, were those prepared by Dr. Samuel Thomson. Not an allusion is made in that advertisement in Nashua to Thomsonian medicines prepared by Paine D. Badger; and yet this man states to you, gentlemen of the jury, that there was no advertisement of his that did not say he sold Thomsonian medicines as

prepared by *himself*. Here are two of them, one in the Boston Daily Advocate from Oct. 1835, to May, 1837, and another published in Nashua, both giving the public to understand that he used the medicines prepared by Dr. Thomson and no other.

Having thus opened the way, he resumed in Nashua the same deceptive practice that had driven him from Boston. Almost his first act was to sell to Mr. Osgood a spurious compound, not found or named in Dr. Thomson's *Materia Medica*. His patients, who supposed they were under the genuine treatment, became alarmed; they began to doubt; the system was falling into disrepute, and the friends of Dr. Thomson call upon him to publish the impostor to the world. He did so, but in mild and wholly unexceptionable language. Notwithstanding the gross misconduct of this man in Boston, and his further attempt to depredate upon the reputation of Dr. Thomson in Nashua, the defendant did not use a harsh word. He told the people of Nashua that Badger was not and never had been his agent, and that if he was unsuccessful in practice, as was alleged, it could not be justly attributed to Thomsonism. He was welcome to pursue his own practice if he would not make Dr. Thomson responsible for it by using his name.

This was in July, 1837, about two months after Badger opened shop in Nashua. But he still continued his deceptive practice, and Dr. Thomson was again urged to expose him and protect the public and the system from his depredations. This time it was done with more emphasis, and it was effectual. Badger's patients, who supposed they had been taking the medicines prepared by Dr. Thomson, refused to touch his drugs or pay his charges. They told him he had imposed on them, and instead of holding up his head like an honest man and enforcing his legal rights in collecting his dues, he sold out at a loss, abandoned his patients and his bills, and cleared out from Nashua.

Do you believe that any man, who was not conscious that he was a plunderer and an impostor, would have acted thus? Why did he not stand upon his character then, if he had any, and repel the charges of Dr. Thomson? Why not go to a Grand Jury then, if he wanted to prosecute for a libel? He does no such thing. He leaves Nashua and turns his course to Boston again, and in about a year after he had ceased his impositions in that city, and just after Dr. Thomson had settled with Badger's successor, to whom he had transferred his false colors, but who had had the honesty to pull them down; an advertisement appears in the newspapers, signed P. D. BADGER, informing the public that he had returned to the city and "*resumed* his professional pursuits!"

Can you wonder, gentlemen, that the forbearance of Dr. Thomson was exhausted? The avowal, that Badger had *resumed* his pursuits here, connected his present with his former practice. It plainly said that he meant to pirate on Dr. Thomson's name and medicines just as he had done before he was forced by the consciousness of having exposed himself to a prosecution, to leave Boston and go to Nashua. In fact, he immediately offered his own medicines for sale here, blue flag and all, with the regular Thomsonian label attached to them, and thus literally *resumed* his former imposition upon the public he had so often deceived by holding himself out as a genuine Thomsonian

doctor. To complete the assurance with which he again appeared on the stage, he coolly referred in proof of his own merits, to "the brilliant *success* which has always attended his practice in diseases of every class, and of almost every degree of malignity!!"

Standing as he did, responsible for giving to a new system of medical treatment all the reputation it had acquired, could Dr. Thomson have discharged his duty to the public without warning them against the impositions about to be practised on them for the third time? Could you, Mr. Foreman, as the vender of a medicine, which you had entire confidence in, when prepared under your own direction, silently see your name taken possession of by an ignorant pretender, who was availing himself of your skill and discovery, to give credit to a compound which you believed to be deleterious, and calculated to injure you and endanger the health of those, who should be induced to purchase it, in the belief that it was the genuine article? Were you to stand by and permit this, would you not be morally responsible for the injury that might follow to the community?

These are the circumstances under which Dr. Thomson published the warning against impostors and pirates upon his discoveries, for which he is now held to answer. The language of that warning is strong and emphatic, but the provocation had been great, and the inveteracy of the case seemed to call for a harsh remedy. It is not required of a jury in such a case, to sit in judgment as critics on style or grammar. The whole issue is, is the substance of the statement true, and was it published with good motives and for justifiable ends?

If the truth is substantially made out to your satisfaction, the good motive and the justifiable end must, in this case, follow as a matter of course. If Badger was an impostor and was bringing into disrepute a system as valuable as the discoveries of my client have been shown to be to the public, that public have a vital interest in the preservation of the system in its purity, and in being put upon their guard against impostors who should attempt to make "great gains and profit," by falsely using it, under color of the sanction of its original founder.

The next inquiry then is, are the allegations in the alleged libel substantially true? I say substantially, gentlemen, for you are not to be holden to find a *literal* proof of every item, as you would in a bill of indictment were the party on trial for the charges in the alleged libel. It is a sufficient justification for the defendant to make out to your satisfaction that the conduct and character of the prosecutor were such as to warrant his being held up to the public, through the the press, as an impostor, sailing under false colors and holding out

* Dr. Lowe, the foreman, was a regular physician and an extensive druggist, and had vended patent medicines. In a civil suit brought by Dr. Thomson against Winchester, for selling false Thomsonian medicines, Dr. Lowe was a witness on the part of Winchester. The Myrrh used by Badger was bought of Dr. Lowe by Fessenden. Still, in justice to the foreman, it should be stated that, under these circumstances, though they could not fail to have an unfavorable effect upon a fair trial for the defendant, Dr. Lowe was the last to consent to a general verdict of guilty, and that only on the matter of the *letter*, fully believing that the rest of the publication had been clearly justified by the truth given in evidence. It was on the mistaken point of law, that every fact must be *literally* proved, that the jury gave their verdict against the defendant, as to the failure of his justification.

false pretences to deceive the public as to his genuine character and pretensions.*

Mr. Hallett then gave a rapid view of the allegations in the alleged libel and the proofs to sustain them. They were resolved into three charges; first, imposition; second, opening a letter; third, clearing out to escape an indictment.

Under the head of imposition were several specifications. The article began with warning the public against impostors—meaning all who falsely sold Thomsonian medicines; and if the jury were satisfied that Badger had played the part of an impostor, it would cover the whole ground of that portion of the publication. That he had done so, was already shown by the history given of his proceedings; but the Defendant had gone further, and literally proved every specification under this head.

1st, Badger is proved to have *resumed* imposition in this city; by continuing to sell his own medicines with the same Thomsonian labels which were attached to them when he was here before; and by holding out to the public "the brilliant success that had *always* attended his practice:" thus referring directly to his former practice, when he imposed himself upon the public as an agent of Dr. Thomson and vender of the medicines prepared by him. Mark, Gentlemen of the Jury, the word "*resumed*;" and if you believe that he practiced imposition when in Boston the first time, you must believe that he advertised his intention to practice the same imposition again. He now swears to you that people call at his shop for the Thomsonian medicines, and he tells them he sells the pure Thomsonian medicine! What is this but resuming imposition?

2d, He is proved to have strove hard to sail under the Thomsonian flag. He not only sailed under that flag, both here and at Nashua, until his piracy was exposed, but after making "gain and profit," as the indictment says, by speculating on Dr. Thomson's fame, he made the most of his stolen flag by selling it out here and hoisting another of the same sort for himself in Nashua. He held himself out as a pure Thomsonian doctor, says Mr. Magoon. He gave me to understand he was an Agent of Dr. Thomson, says Mr. Osgood; and so on, through his whole career. Why, Gentlemen, what honest flag of his *own* has he ever had to sail under, that would have kept him afloat a moment? And yet he complains that he is exposed in his true colors, so that he can no longer make "gains and profit" by living on the credit of Dr. Thomson's discoveries!

* The rule laid down by Judge Quincy (now President of Harvard University,) in the case of the Commonwealth *vs.* Buckingham for a libel on J. N. Maffitt, is the most sensible and the best sustained of any judicial construction of the law of libel. He says, "I apprehend the Defendant has a right to acquittal if he substantiate to a jury the truth of such of the charges, either in nature or number, as shall satisfy them that the facts proved justified such an attack, on grave and weighty grounds of public interest; and if he also satisfy the Jury, with respect to those allegations which he shall fail to prove, that he had reasonable ground for them, and that they were not made from base and malignant motives. The great ground of defence is the right, growing out of the nature of the facts proved, to drag that individual to the bar of public opinion and destroy his influence."

3d, Was he not met with contempt in Nashua and put down? His own evidence fully admits this, but if you cannot credit that, the testimony of Mr. Osgood and Dr. Morrill is conclusive.

4th, Did he not sell and clear out from Boston to escape an indictment? It is immaterial for what cause he feared that indictment. The sense of the passage does not necessarily connect it with the opening of the letter. Cobbett, (Badger's partner,) testifies that he had heard it said that Badger was to be prosecuted; and so constantly did the consciousness of guilt haunt Badger, that he wrote to Cobbett, from Nashua, upon the *prosecution* he had been threatened with before he left Boston.

Badger himself testified, on cross examination "while in Nashua I wrote a letter to Capt. Cobbett, in which it was stated they thought of prosecuting me *about the letter.*" This could have related only to a *criminal* prosecution, and brings the matter home to the point.

Mr. Fessenden declares that Badger told him several times, he expected a prosecution for using Dr. Thomson's name and medicines, and on account of the letter. When he was obliged to leave Nashua, the first thing he asked of Fessenden was, if Dr. Thomson would prosecute him. He spoke to me about the prosecution, says this witness, a month before he left Boston, and frequently until he left. At times he seemed to be agitated and fear a prosecution. He was sick, and his wife told me he was worried for fear of a prosecution. Fessenden, as his friend, advised him to sell out and leave Boston, and he did so.

Can proof be stronger than this? If required you have it, for Badger himself admits he was threatened with an indictment for malpractice before he left Boston. It was then the fear of some indictment which influenced his selling out and leaving Boston.

5th, The Lectures he procured to be written. This charge is not necessarily libellous, but if it were it is proved. That Badger was conscious he was acting a deceptive part in availing himself of the talents of Mr. Healy, is proved by his exacting a promise from Magoon not to tell that he saw Mr. Healy helping him write the Lectures. Would an open, honest man have resorted to such a trick? By reading these Lectures, as his own, after they had been *gramatized*, as he calls it,—that is, polished, pruned and enlarged, by a student and a good scholar, he palmed himself off as an able and correct writer, and thus imposed upon the audience, on whom he levied an admission fee. You are distinctly told by Dr. Morrill, that when questioned as to his Lectures, he could give no explanation, thus proving that the Lectures Mr. Healy had prepared for him were beyond his depth. You find him, too, calling on Dr. Morrill to pay one half of the price he (Badger) admitted he had paid to get these Lectures written for him in Boston. Can proof be stronger?

6th, The clearing out from Nashua with the loss of several hundred dollars, and the refusal of his patients to pay for his deception, is literally proved. Badger himself is forced to admit it. He sold his house at a sacrifice, and he left hundreds of dollars uncollected, and the reason the patients gave for not paying, was *imposition*. On all these points, touching the imposition and the motives for removal, I feel assured you cannot entertain a doubt.

7th. The charge of opening the letter only remains, and on this you may entertain doubts. If my client fails in literal proof, it will be here, and here only. The indictment lays this as alleging a fraudulent act. Such is not its fair import. It states as facts "the opening of a letter of Dr. Thomson's (not breaking the seal) and agreeing to answer for medicine and have it ready for Mr. Kinsley by to-morrow noon, which I (Dr. Thomson) discovered and answered myself." Is not all this substantially proved? As to the opening of the letter, we do not bring it home upon Badger himself, but upon some one in his employ, and for which he is answerable. Kinsley cannot identify Badger or Cobbett as the man, but if you believe Kinsley, who testifies fairly and has no possible motive to do otherwise, the letter was opened in Badger's shop. Whoever did it imposed upon Mr. Kinsley and made him believe that he had gone to the right place to get an order addressed to Dr. Thomson answered. The carrying of the letter to Dr. Thomson's agent, by Badger, (if this is the same transaction) looks like an after thought, when it was discovered that the books could not be got to answer the order. Even if you can believe that the direction of the letter was not discovered until after it was promised to answer an order for books which Cobbett *knew* Badger had not got, how can you reconcile the subsequent proceedings? Badger and Clark are now fellow-trespassers on Dr. Thomson. Clark was then his agent, and Badger tells you he carried the letter to him and wanted the medicines and books sent to his (Badger's) shop, to *accommodate* Dr. Thomson. Recollect that at this time Badger knew that Dr. Thomson held him to be an impostor, and yet he pretends he went to get the doctor sanction his proceeding in promising to deliver at his shop the genuine medicines ordered from Dr. Thomson himself! Do you believe it? If this proposal was made, was it not a tampering with Clark in order that Badger might carry out the deception he had begun with Kinsley, and thus make it appear that he was an accredited agent of Dr. Thomson? The subsequent collision of these men against Dr. Thomson justifies this inference.

But mark the conduct of Badger. If he called on Clark with the letter, it must have been within twenty-four hours of the time Kinsley was to call for the medicine and books. Badger did not get either, and yet, when Kinsley called the next day, Badger or his agent delivered him the *Badger medicine* as the genuine Thomsonian. Not a word was said about having come to the wrong shop. Money was received for the spurious medicine,—something was said about not having the books, and Mr. Kinsley is suffered to depart in the full belief that he had got his order answered by Dr. Thomson himself! Do not forget, Gentlemen, that Mr. Kinsley is *positive* that medicine was delivered to him as the answer to his order on Dr. Thomson; and you cannot doubt that this charge is substantiated. Mr. Kinsley carried the medicine to his employer. About a week after the mistake was discovered, Kinsley returned to Boston, went to the right place, Dr. Thomson discovered how he had been deceived, and then answered the order himself, while Badger pockets the money he had received for the medicine he had sold to Kinsley, under false pretences!

How can you reconcile with an honest intent, this gross deception on the part of Badger in delivering his own medicine to Mr. Kinsley,

receiving the pay and never hinting to him that he had brought his order to Dr. Thomson to the wrong shop?

Kinsley and Cobbett differ irreconcilably as to the time the order was delivered. Cobbett says he is sure it was September or October. Kinsley is positive it was sleighing. The only way to reconcile Cobbett's statement with truth is to infer that there were two instances of orders wrongly delivered. Some other teamster, deceived as Mr. Kinsley was by the sign, may have delivered the open order Cobbett received in September, and he and Badger may connect together two distinct transactions. At all events a man who would hold out false signs to decoy customers as Badger did, would not be scrupulous in catching all that came to his net.

So much, Gentlemen, for the facts in this case; and if ever a publication of severe truth against an impostor was justifiable, I do not perceive how, as fair and impartial men, you can avoid the conclusion that Paine D. Badger deserved at the hands of the man he had so long plundered of his name, all the castigation and exposure he has received.

THE LAW OF LIBEL CONSIDERED.

But should you, after considering the facts, come to a different conclusion, you then have another duty to discharge, and that is to satisfy yourselves beyond all doubt, of the existence of any law in this Commonwealth by which you can find the Defendant guilty. When I say to you, gentlemen of the Jury, that after using all the research and all the reasoning faculties within my power to apply to a question, I conscientiously believe that there is not, never was, and never ought to be, a law in this Commonwealth to punish a citizen as a *criminal* for printing his thoughts, I may be charged with standing alone in this belief at the Bar; and that may be reason enough to satisfy you in taking the mere opinions of others in preference to my proofs. Nevertheless, long established error, sanctioned by the greatest names, has often been broken up by the slight impulse from a single hand, given to the ball that others will impel to crush it. I as firmly believe that the doctrine of the criminal law of libel, as now held by our learned Judges who have unconsciously fallen into the error of mistaking their own opinions for legislation, will be one day exploded, as that the original dogma of that doctrine, "the greater the truth the greater the libel," has already been scouted from every Court of Justice in the Union.

The learned Judge who presides in this trial will inform you that in his opinion the law does exist in this Commonwealth. Were it a matter of *opinion* merely upon the construction and meaning of a known law, I should most freely defer my opinion to his; but in a matter of evidence, of historical truth, in the simple fact whether a law declaring a certain act a crime, does exist or not,—you and I or any man of common sense, are as competent to form an opinion as the most learned in the land.

I put it to you, not as a matter of *construction*, but as a matter of *fact*; and here, Gentlemen, you are bound by your oaths to find in the first step, the fact that the law by which you are called on to deprive a citizen of his liberty as a criminal *does exist*. Without the

evidence of the existence of the law is brought home to your understandings, past all doubt, how can you discharge your oath "to well and truly try the issue between the Commonwealth and the Defendant according to your evidence?"

Your first demand upon the Commonwealth is, "show me the law to punish this citizen!" "In my opinion the law exists," says the learned Judge. "Where is the *evidence* of it?" demands the juror; and of the weight of that evidence as well as the application of the law to the facts, he must judge for himself and not the Court for him. He cannot put his oath or his conscience in the keeping of the Judge. If the juror falsifies that oath, it is *he* and not the Judge, who will be held accountable by the Judge of all Judges. Suppose the Judge should say to you, "in my opinion this man is guilty," dare you convict him on that opinion, under your oath, without investigating the evidence? If, then, the Judge's opinion as to the existence of the facts in the case is not binding on you, how can you delegate to him the power of deciding for you whether the most important fact of all, the *law* to punish, exists?

Look at it then, in this relation, as a simple question of evidence, and be not alarmed out of the exercise of reason and judgment by the notion, that there is some great mystery attached to the simple fact, whether a certain act is or not an offence by law. If you are told that you have never studied law and can know nothing about it, while the Court knows every thing; let your answer be that you are not put here as servants to the Court, to nod assent to its opinions, but as an independant, coordinate branch of the administration of justice; and every man of you, in a criminal trial, a judge, with higher powers than he who presides on the bench,—for he can only give you his opinion of the law and the facts. You are sworn by your oath and required by your office, to *judge* of both the law and the facts.*

I contend that there is no criminal Law of Libel in force in this State, on which this indictment is founded.

1st, Because the indictment is not founded on any Statute, but on the Common Law of England.

2d, Because the Common Law of England, punishing libelling as a crime, was not adopted and approved and usually practiced on in the Courts of Law before the Constitution.

3d, And if ever adopted before the Constitution, it was abrogated and repealed. 1st, By the Colonial Acts which established a distinct law for the Colony upon Lying and Libelling,—2d, by the Constitution itself, to which the English Law of Libel is utterly repugnant.

When a citizen is arraigned for a crime which is to touch his liberty, the first inquiry for a Jury to make of the Government is—"show us the law?" for the Bill of Rights says "no person shall be held to

* "Juries are Judges, and if a Jury have no right to enter into a question of law, their decision is in itself a mere nullity. Jurymen are too often ignorant of their own rights, and too apt to be awed by the authority of a Judge. Your Barristers are too apt to be civil to my Lord Chief Justice, at the expense of their clients." [Junius to Lord Mansfield.] The Judge is always to be respected so long as he respects the rights of others; but should never be allowed to dictate to a jury, or to enforce their consciences.

answer for any crime or offence until the same is fully and *plainly*, substantially and formally, described to him."

Show us the law, then, not by inference or guessing or the suppositions and notions of learned Judges, but "*fully and plainly.*" At the outset, gentlemen of the Jury, you must stop in this case, if there is a shadow of doubt resting on the existence of this law. We are not to prove that it does *not* exist, but the Government is to prove that it does, "*fully, plainly, substantially and formally.*" If the prosecution fail to do that, you peril your own consciences as well as the liberties of the citizen, should you venture to pin your faith upon the sleeve of the Court, and substitute another man's opinion for your own honest conviction.

The prosecuting officer has undertaken to show you the law, and he refers to the Statute Book as indirectly admitting the existence of such a law. The word *libel* occurs five times in the Statute Laws of this Commonwealth. Sect. 28, chap. 82, provides for appeals from the Municipal Court upon indictments, and libel, nuisance and conspiracy are mentioned among others. Sect. 10 of chap. 86, makes the same provision for appeals.* Sect. 19 of chap. 100, refers expressly to a civil suit for publishing a libel. Sect. 1 of chap. 120, limits the time in which civil suits for slander and libel may be commenced.

The 6th sect. of the 133d chap. which is the same as the Statute of 1826, chap. 107, provides that in every prosecution for writing or publishing a libel, the defendant may give in evidence, in his defence, upon the trial, the truth of the matter charged as libellous.

The history of this last act will show why it was introduced. In 1808, Chief Justice Parsons *enacted* the law of libel on the Bench, in the case of Clap. He declared it a *crime* to publish *truth*. In 1822, Judge Quincy *repealed* Judge Parsons's law, in the case of Commonwealth vs. Buckingham, and admitted the truth. In 1825, Chief Justice Parker re-enacted the law that truth was a libel, in the case of Blanding.†

This was so manifestly an outrage upon the Constitutional liberty of the press, that the next year the Legislature passed an act to restrict the judges in their arbitrary proceedings to restrain the liberty of the press. But so long had the judicial enactment of the law of

* This provision for appeals was abolished by the last Legislature, so that this reference to the law of libel which was *artfully inserted* by some sticklers for the doctrine, upon the revision of the Statutes, *after* the criminal law of libel had been called in question, is taken out of the way.

† In that case Chief Justice Parker would not admit the truth to be given to show that a tavern keeper held a drunken carousal at his house while there was a corpse in it. If the doctrine had been carried out, what would have become of the free discussions on the subject of temperance? And yet, so infatuated was Judge Parker with the English law of libel, that he solemnly said that a "relaxation of the law of libel, so as to admit the truth in justification, could not take place without involving the community, families and individuals, in those contentions and acrimonious conflicts, which will render the social state little, if any at all, better than the *savage.*"

How mistaken this learned judge was! The truth has been allowed in evidence for thirteen years, and yet society has not gone back to the savage state. The morbid fears of the Common Law lawyers of the present day, are as unfounded, touching the danger of abolishing all indictments for libel, as were Judge Parker's absurd notions in 1825.

libel been unquestioned, and it was so generally supposed that the Judges would not have introduced it, had not the proof of its usage in the Courts before been clear, that no question as to the fact of its legal existence was then raised.

But these enactments of the Legislature create no offence; and if the Attorney relied on them, his indictment would be quashed at once, for it concludes against no form of law, or statute, but against the peace and dignity of the Commonwealth; that is, the Common Law of England.

We must then look beyond the Statute Book to find this assumed law of libel.

Now there are but two modes in which laws can be made in this Commonwealth, and that is either by the Legislature, or by force of the Constitution. The Legislature has not made libel a crime by any law since the Constitution. The adoption of the Constitution abrogated all previous laws not recognized by it.

The 6th section of the 6th chapter is the only recognition of any unwritten law. It provides that "all the laws which have heretofore been adopted, used and approved of in the Province, Colony, or State of Massachusetts Bay, AND *usually practiced* on in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature."

This brings us to the distinct fact whether, before the adoption of the Constitution in 1780, the English Criminal Law of Libel had been adopted and approved of in the Colony, and (*also*) *usually practiced on* in the Courts.

Mark the two requisitions,—the adoption and approval by the Colony, and in addition to this a *usual* practice in the Courts! Even a single case, or two or three, would not do; there must be enough to establish a *usage*. The Bill of Rights tells you that the object of a Constitution is "to provide that all shall be governed by *certain* laws." The law must be *certain* then before you can convict under it. In the absence of all Statute law you require the next best certainty, viz. a fixed, settled, positive *certain* usage in the Courts before the adoption of the Constitution. Let Jurors do their duty and hold the Government to this proof, and there will never be another indictment for libel sustained in this Commonwealth, and Constitutional law will be placed once more above the mere law of the Judges.

Usage, before the Constitution, can alone make Common Law. The usage, therefore, must be uniform and past doubt. We can prove the *negative* of this use. When Judge Parsons made the law of libel in 1808, in Clap's case, (4 Mass. Rep.) he did not pretend it had ever been practiced on in the Courts. On the contrary, the Attorney General (Perez Morton) said, "no particular decision of the Courts here, adopting the Common Law upon this point *before the forming of the Constitution, is recollected.*" Judge Parsons assented to this, and yet went on to try a man for an offence against a law, of the existence of which neither he nor his Attorney General had any *recollection!*

In 1791, when Freeman was acquitted for a libel, (which is the first instance of indictment for libel after the Constitution,) Attorney General Sullivan said "he was the common medium of all prosecu-

tions in behalf of the Government, and the present *was the first cause of the kind* which had happened in this country."

Harrison Gray Otis, who appeared for the Defendant, said "trials of this kind are *unprecedented* in this Commonwealth;" and he added, (in strong rebuke of Sullivan, who professed to be a republican,)—

"How strange and extraordinary it appears, that during the irritable period which preceded the late revolution, and throughout the course of our civil contest with Great Britain, amid the animosities of contending factions, and under the influence of arbitrary Governors and Judges, a *prosecution of this kind was never heard of*, and, *in the first instance*, is brought forward by a gentleman (Sullivan) who has professed himself an advocate for the liberty of the press and the rights of man."

All this was said in the hearing of Robert Treat Paine, one of the Judges, who had been Attorney General from 1780, when the Constitution was adopted, until Sullivan succeeded him in 1790. How could a law have been adopted, and "*usually practiced on* in the Courts" before 1780, and these men all ignorant of such a fact or such usage?*

Why, Gentlemen, had the Criminal Law of Libel been in force preceding and during the Revolution, it would have been more effectual to put down Liberty than the whole army and navy of Great Britain. Would Otis and Adams and the rest have been kept out of prison a day, could the law of libel have been applied to their bold attacks upon Government and its agents? Against this weight of evidence, to which much more might be added, a Jury should require something more than one or two witch cases, a Quaker prosecution and a single indictment for scandalizing religion, (Chickley's case,) which is all the untiring research of the learned Attorney for the Commonwealth has been able to find, in an investigation of three years.

Taking then, the fact, that no *usage* can be shown before the Revolution, establishing the British Law of Libel, you must throw out of the case every subsequent decision of the Judges, as a manifestly extra-judicial act; for the Constitution declares that "*the judicial shall never exercise the legislative powers*, to the end we may have a government of *laws* and not of *men*." Who, then, made the libel law, if Chief Justice Parsons did not?

On the other points I will be brief.

The British Law of Libel was abrogated by the Colonial Acts. It is a plain rule, that if the subject matter of a provision in the Common Law has been passed upon by the Legislature, the Common Law, though previously in force, is thereby abrogated.†

Now the Province of Massachusetts Bay, in 1649 made a criminal Code, entitled "An act for the punishment of criminal offenders, and

* The most direct evidence that the law of libel was not practiced on in the Courts of Massachusetts in 1721, is found in the 1st vol. Hutchinson's History of Massachusetts, page 225. Governor Shute, in his message to the House of Representatives, complains thus—"I am very much surprized you should *refuse* two other bills which came down from the Council, the one to prevent riots, the other to *prohibit the making and publishing libels and scandalous pamphlets*, the passing of which would, in my opinion, have tended both to the honor of the Government and the public peace."

† 12th Mass. Rep. 537. 10th Pickering, 37.

among a long list of offences is *lying and libelling*.* In 1692 this Act was revised, and lying and libelling made offences punishable in the form there prescribed. This covered the whole subject, and even went farther than the English law, which did not make lying an offence. It follows, that as no other law was passed down to 1780, on this subject, this was the only law under which libelling could be made a crime, and must now be in force if any law on the subject is in force.

3d, But the Constitution abrogated even this Colonial law, as well as all British criminal law on the subject of libel. It abrogated all laws or parts of laws "repugnant to the rights and liberties contained in this Constitution."

One of these rights is, "the liberty of the press shall not be restrained in this Commonwealth."

The Legislature, therefore, has no power to enact a criminal law of libel. To say that a law to punish *after* the publication, is no *restraint* on the press, is the same as saying that the law which punishes theft is no restraint upon one man taking another man's property. What liberty is that which allows you to do an act for which you are to be punished? The law punishes no action which it does not mean to restrain; and what greater restraint can there be than that under which a citizen publishes his thoughts, subject to the construction, power or caprice of a Judge, whether he thinks them libellous or not?

The argument that it would lead to licentiousness of the press not to punish libels as crimes, is practically answered by the fact that thousands of libels are published annually, nay hundreds a day, in the city of Boston; scarcely a newspaper appearing without one or more of them, and yet the criminal prosecutions do not average one a year.

Besides, the civil remedy is ample. There is no sense in saying that written slander is more a crime than spoken slander. The old fiction as to breach of the peace is exploded, for the truth is admitted in evidence, and truth in a libel provokes to breaches of peace more than falsehood. When the reason of the law ceases the law should also cease.

The other reason for punishing libel, given by the learned Attorney in the opening, is that the Constitution provides that "every subject ought to find a certain remedy by having recourse to the laws, for all injuries and wrongs which he may receive in his person, property or *character*."

It is most manifest that this refers to redress for injuries by damages in *civil suits*, and on this is founded the civil action for injury to character by slander written or printed. To say that the citizen finds a *remedy* for his wrongs by an indictment, is absurd. The argument drawn from the supposition, that a pauper may get possession of a press and publish libels, and therefore you must indict him to get redress, has no more force than that the same pauper may get possession of a tongue and slander you.

The intent of the Constitution to negative prosecutions for freedom of speech or discussion, is, I think, manifest in the 10th Article, which declares that "each individual of society has a right to be pro-

* See Ancient Charters and Colony Laws, pp. 149, 240.

ted by it in the enjoyment of his *life, liberty and property* according to standing laws."

Reputation is not included in this enumeration, which relates to criminal laws, while it is included in the 11th Article relating to civil remedies.

In conclusion, Mr. Hallett here left it to the candor of the Jury to determine if there were such proof of the existence of the criminal law of libel as to warrant them in taking away the liberty of a citizen. If there was a doubt of the law, that doubt must go to acquit. But so confident was he that the defence had been fully made out, by a justification showing the truth in every particular relating to the impositions of Paine D. Badger, and the upright motives of Dr. Thomson in exposing them, that he had gone into a consideration of the law, rather from a sense of duty than of necessity in this particular case.

CLOSING ARGUMENT FOR THE PROSECUTION.

S. D. PARKER, Esq. closed for the Prosecution, in an able and pointed argument, for a very brief outline of which we are indebted to his notes.

In the closing argument, Mr. Parker began by congratulating the Jury upon their approximation to the close of the case, and said that he did not intend to occupy as much time as the learned and eloquent counsel did who had spoken to them for two hours and a half in the defence. He would begin first with that part of the argument with which the preceding counsel had closed, that is, the law of libel; and he considered the case resolved itself into three questions,—the answers to which would exhaust the subject.

1st. Is libelling a criminal offence in this Commonwealth? If it is not, the case may at once be dismissed, for we are here in a criminal Court trying an *indictment*, not a civil action.

2d. Is the Defendant the author and publisher of the libel set out in the Indictment? Upon this point, there is indeed no controversy. It is proved, and unequivocally admitted and acknowledged.

3d. The most material question is, has the Defendant made out in proof his justification, namely, that the charges are true, and published with good motives and for justifiable ends?

Mr. Parker said he should take up these questions in their order.

1st. As to the law of libel, Mr. Parker said, that in the opening of the case he had referred to several parts of the *Statute* law expressly recognizing *prosecutions* and *indictments* for libel. These, therefore, were several and distinct and periodical legislative declarations, that libelling is a crime in Massachusetts: and the principles of the Common Law are *affirmed* and *confirmed* by these several acts of the Representatives of the People. The Constitution itself provides that all laws heretofore adopted and acted upon shall continue to be laws, UNTIL altered, or repealed, by the Legislature. It was therefore something of a *historical* question, whether the Common Law of Libel had been adopted and practiced upon before the Revolution. He was prepared to show by citing cases from the Records of the Courts of this State, beginning in the *Colony* within thirty years from the landing of the Pilgrims at Plymouth, and continuing through the time of

the *Province* of Massachusetts Bay, up to the troublous and exciting times preceding the revolutionary war; and in the *Commonwealth*, by the judgments of all the Courts of the State since the Constitution was adopted, and up to the last March term of the Supreme Court, in *Whitmarsh's* case, that libelling was a crime in Massachusetts. He had indeed supposed every lawyer in the Commonwealth, with the single exception of the learned gentleman who argued this defence, was of opinion, that the Common Law of libel, as modified by the Act of 1826, and the Revised Statutes, was the law of the land in this State; and even that gentleman, who raised and argued this question both before Judge Morton, and also Judge Wilde, and saved the question for the consideration of the whole Court in *Whitmarsh's* case, abandoned the law-question, and permitted *Whitmarsh* to be sentenced. Mr. P. said he had, on his table, records and cases, which he could read at length, conclusive on this point; but he would only refer to some of them by their dates, showing they cover almost the whole of the two centuries which have elapsed since the settlement of this State by civilized men.

The first case was in Essex county, in 1651—Joseph Rolinson's case. Then in Hampshire county, in 1664—Benjamin Waite's case. Then in Suffolk county, (where there was a special verdict) in 1724—*Checkley's* case. Then in the House of Representatives, March 3d, in 1768—the case of the Boston Gazette. That paper published scurrilous reflections on Governor Barnard: he complained, by Message, to the House of Representatives. They replied, "Provision is already made for the *punishment* of offenders in the *common course* of the law."

The Constitution was adopted in 1780, and revised by the people in 1820; and in the revision, no alteration was made in the law of libel, though several prosecutions had taken place. For instance, before the Supreme Court in Boston, in 1791, eleven years after the adoption of the Constitution, came *Freeman's* case, before Judges, who were members of the Convention which framed the Constitution. The precise question now discussed was raised and argued by the eminent counsel of that day. The defendant in that case was acquitted. Then *Abijah Adams's* case, in 1799, for a libel on the Senate. Since then have been *Mr. Lillie's* case, *William Clapp's* case, — *Blanding's* case, *D. L. Child's* case, *Mr. Snelling's* case, *Mr. Cheever's* case at Salem, *Moore & Sevey's* case, (wherein the gentleman, who now questions the criminal nature of libels, argued six hours for a conviction, he then aiding the Commonwealth's Attorney,) and lastly, *Whitmarsh's* case, argued by Mr. Hallett before Judge Morton, and also before Judge Wilde, upon this identical point; and both those Judges overruled the objection against the law. The persevering counsel of the defendant saved the question for the whole Court, but did not press it, and he was sentenced.

With this series of decisions in all Courts of the State, Mr. P. said he should not argue the question anew, but consider it settled, as much as the law of assault and battery, forgery, or other common law crimes.

But, it is said, that in criminal cases the Jury are judges of the law and fact. Their oath is, to give a verdict according to evidence. The Judge is put here by the Constitution and laws to testify to you, under

his oath, what the law is. He is a witness, and gives evidence of the law. The witnesses on the stand give evidence of the facts. Every honest juror will take the law from the Court, unless he can place his hand on his heart and say, I do conscientiously and sincerely believe the Judge does not deliver the law rightly, and I do know the law better than he does. Any juror who can truly say so, may perhaps disregard the Charge of the Court.

2dly. Mr. P. then proceeded to the second point, and said, Dr. Thomson being the acknowledged author of the libel, he must be found guilty, the Government's case being made out, and the publication being exceedingly injurious on its face to Dr. Badger, unless he sustained the burthen of proof now cast on him, and entitled himself to an acquittal by proving,

First, That the charges in his specifications are true, and

Secondly, That he published them from good motives and for justifiable ends.

In fact, these two points are but one, for if the charges be true, the motive probably will not be doubted. If Dr. Badger is a dangerous impostor, selling *deleterious drugs*, as alleged in the libel, it is a laudable motive which exposes him. This part of the case, then, as to the authorship of the libel, being proved and admitted, nothing remains but the

Third and last point,—to wit. are the specifications true?

Upon this head, Mr. Parker said he should consider them in their order, one by one, and was prepared to argue to the Jury that Dr. Thomson had failed to establish any one of them. If any one was not proved, the justification failed. If a reasonable doubt existed as to the truth of any one of them, the defence failed, because the burthen was on Dr. Thomson to prove every one beyond a reasonable doubt.

Mr. Parker then took up the specifications of defence, and commented on the testimony for and against each one of the charges at large, and defended Dr. Badger by a rapid notice of the evidence on each point, urging upon the Jury that Dr. Thomson had totally failed in sustaining the truth of his allegations against Dr. Badger. He occupied an hour in arguing that Dr. Thomson had failed in his proof. In conclusion, he said, if the charges had not been proved, their falsity was *prima facie* evidence of the malice required to be proved. But in addition, he would remark, that Dr. Badger's publication in the Traveller was inoffensive—he did not advertise as a *Thomsonian* Physician, nor to sell *Thomsonian* medicines. There was no need of Dr. Thomson's severe and irritating piece to be published under it. Dr. Thomson, if he wished so to do, might have cautioned the public, and informed them, that Dr. Badger was no *Thomsonian* Physician, in decent and proper and inoffensive language. His doing it in so libellous a way was a proof that the public good was not at the bottom, but probably a private resentment because Dr. Badger would not sign a bond to give him *a dollar* a pound for slippery-elm which cost *three cents* a pound, and so for other medicines; and Mr. Parker left the whole to the Jury on the truth or falsity of Dr. Thomson's charges against Dr. Badger.

COMMENTS.

Mr. Hallett did not have the opportunity to reply to Mr. Parker, and he wishes to say in reference to the allusions to the case of Whitmarsh, that the Defendant insisted upon being sentenced, and, therefore, his Counsel did not take the question to the whole Court. He was fined \$20 and no costs.

The cases referred to by the learned prosecuting officer, as having occurred before the revolution, require a brief notice. In a period of one hundred and thirty-nine years, previous to the adoption of the Constitution, *five* precedents are all that the researches of the Bar and the Bench can find, to show that the law of libel was "usually practiced on in the Courts;" that is, *once* in thirty-five years, to establish *usage*. But the cases cited are not in point.

In 1651, *Joseph Rolinson* wrote a piece of poetry ridiculing the ministers, and was sentenced to be whipped or pay a fine of five pounds, for setting up a scandalous libel. This was under the Colonial act of 1646, against heresy. Section 7, "Every person whatsoever that shall revile the office or person of magistrates or ministers, shall be whipped or pay five pounds." See Colony Laws.

In 1663. Benjamin Waite's case, "*suspected* of being the author of a libellous writing found about Goodwife Hawkes, her doore in Hadley," Hampshire county. Sentence of the County Court to be whipped five stripes on the naked back, and pay the widow Hawkes five pounds, and also costs of Court. This was Lynch Law so far as regarded the punishment. The offence came within the Statute of 1645, "as to lying and spreading false news," and proves that the English Common Law of libel was not in force. (Ancient Charters, p. 149.)

In 1696, Thomas Maule, a Quaker, was indicted for publishing a Quaker book without license, and acquitted. Before this trial, they had burnt sixteen pounds of his books and whipped him five times. This vile persecution was under the Act against Heresy of 1646.

In 1724, John Checkley was indicted for selling a book on Episcopacy, entitled "a short and easy method with the Deists," in which he denied the right of ministers not ordained by the Bishops to administer the sacraments. The indictment concluded "contrary to the laws in such case made and provided." It therefore did not go upon the Common Law, but upon some statute. It was a religious persecution. He was sentenced by the County Court, and appealed to the High Court. As good law could be found against him (and no better) as was found against Ann Hutchinson, when the bigots of her day banished her in 1637 for saying that the ministers preached a covenant of works and not of grace. The 8th sect. of the Act of 1646 against Heresy covered this case. "Every person that shall publish and maintain any heterodox or erroneous doctrine, shall be liable to be questioned and censured by the County Court, according to the merit of his offence." Under this Act, the despotic judges of that day punished as they saw fit. The jury found specially that Checkley had published a Discourse on Episcopacy, and the Court fined him 50*l*.

In 1768, that Gesler of New-England, Governor Barnard, called upon the House of Representatives to punish the Editor of the Boston Gazette for a libel on the Government. The House refused, and said in their reply, "THE LIBERTY OF THE PRESS IS THE GREAT BULWARK OF THE PEOPLE." They also said, "It is our opinion at present, that provision is already made for the punishment of offenders in the *common course of the law*." Not common law. This plainly referred either to a civil action, or to the Act of 1692, punishing lying and libelling. After this rebuke, Governor Barnard's Chief Justice in Boston, mentioned this libel to the Grand Jury, and required them to notice it. The Attorney General, a creature of Barnard, laid a bill before them, and they returned on it "*Ignoramus*"—we are ignorant of any such law; and thus, says Hutchinson, "gave a sanction to libels, which multiplied more than ever." Of course, it was not *usual* for the Courts to punish libels. The next year, 1769, the Grand Jury of Suffolk found bills of indictment against Governor Barnard, General Gage, and others, for letters written to England, abusing the people of Boston. The Attorney General *refused* to draw the bills, and the Grand Jury drew them. The Chief Justice said he would take no notice of this *wanton proceeding*, and ordered the Clerk to issue no summons. Thus did the Grand Jury, the Attorney General, the Chief Justice, and the House of Representatives, severally refuse to recognize the law of libel, which completely negatives its being "usually practised on in the Courts" at that period.

This summary disposes of every precedent that can be found previous to the Constitution.

In 1805, three years before Judge Parsons enacted the Judge law of libel, the House of Representatives passed a resolve on the subject of a piece in the New-England Palladium, reflecting on the House, in which they say that the law of England on the subject of libel, is *not* the law of this land.

The Attorney for the Commonwealth also alluded to the fact that Mr. Hallett was associated with him in the trial of Moore & Sevey for a libel on Samuel D. Greene. Mr. H. appeared in that case as counsel for Mr. Greene, whose character was called in question. He did not advise the prosecution, and did not argue, the law. In 1822, Mr. Hallett was associated with the lamented Stephen Hooper in the trial of Mr. Buckingham for a libel on J. N. Maffitt. Both he and Mr. Hooper took the ground that a civil action and not a criminal prosecution was the only proper remedy for printed slander under the Constitution of Massachusetts.

The doctrine urged by the Attorney, that the Jury are not judges of the whole, matter, law and fact, is contrary to both English and American law and precedents. To deny to the Jury this right, is to deny to them the right to give any thing but a special verdict. A general verdict must embrace law and fact. Lord Camden well said "that if twelve or twenty-four Judges declared that Juries had not a right to decide upon the *law* and the fact, *they were wrong.*"

The attempt of Lord Mansfield to wrest this power from the Jury in 1771, was resisted; and, in 1792, Parliament, "to remove doubts respecting the functions of Juries," declared "that on every trial of an individual for libel, the Jury may give a general verdict of guilty or not guilty, on the *whole matter* put in issue." If this new doctrine is true, American Juries are not as free as English Juries. Judge Story is the only Judge who has yet attempted to follow Lord Mansfield's usurpation over Juries.

This right of a Jury was never questioned in this State, until they disagreed and refused to find a verdict on the law of libel. In the trial of Whitmarsh, in 1836, Judge Morton well said—

"Sometimes cases are combined of law and fact, particularly in criminal prosecutions. The Jury, therefore, can decide on the law and the fact, and the Court has no right to revise their verdict, whether made on the law or the fact. If the Jury are not convinced as to the existence or application of a law, they must go by their consciences."

It is indeed alarming, if, after having established the law of libel by an extra-judicial act, the prosecuting officers and Judges are resolved to sustain it, right or wrong, by taking from the Jury the inherent right of deciding whether the law exists or not. This would make the Judges legislators at their pleasure, beyond all control from the Legislature or the people. Let the people never surrender this right, till prepared to surrender the palladium of their liberties,—the trial by Jury itself.

THE JUDGE'S CHARGE.

JUDGE THACHER charged the Jury, briefly. He said that the case had been so fully argued on both sides, but little remained for the Court to do. Dr. Thomson, the Defendant, admits the publication, but alleges that it is true and was published from good motives and for justifiable ends, to put the public on their guard against an impostor, who was using his name, and sailing under false colors. It is not denied that the article contains libellous matter, and it can only be justified by showing the truth and the good motive. As to the law, we must take it as we find it, and as derived from the practice and decisions of the Courts: He instructed the Jury, that, in the opinion of the Court, to publish a false and scandalous libel, is an offence at Common Law, in this Commonwealth. If he was wrong in this opinion it was subject to revision by a higher tribunal, the Supreme Court, and if they were wrong the Legislature had the power to prescribe what the law should be. He did not regard the Common Law of Libel as now administered in this State, as a restraint upon the freedom of the press. The press was left free, but from regard to humanity and the public peace, the law would step in when a libel was published, and punish the wrong doer. But in this State, contrary to the maxim of the Common Law, the truth is admitted as a justification of the libel, if published with good motives, and this throws upon the Jury the responsibility of the whole matter.

The Government is not bound to show that the libel is false, but the party has the right of showing that it is true, and if he fails in this, the Government is entitled to a verdict upon the mere showing of the publication and that the matter is libellous. The burden of proof is on him, and as in this case the truth is alleged, Mr. Badger, the complainant, is in fact the party on trial.

Dr. Thomson claims to be the discoverer and author of a system of medical practice, said to be of great value. This, the Attorney for the Commonwealth admits, and you will doubtless so regard it. He has fortified his discoveries, the result of great perseverance and labor for many years, with a patent, and superintends the preparation of his medicines, in order to prevent their becoming deteriorated, and bringing the system into disrepute in unskilful hands. To remunerate himself for his labors, he sells rights to families to use the medicine for themselves only, and he also appoints agents who agree not to sell spurious medicines, or other than that his system has prescribed. So that in this way Dr. Thomson endeavors to preserve the purity of the medicines sold under his name, and to secure to himself the profits of his labor and research. If a person has made a valuable discovery in arts or science, our laws will protect him in the enjoyment of its honors and profits; and this is an honorable incentive to improvement. I am not prepared to say that the case of Dr. Thomson furnishes any exception to this rule. If his system is a help to nature, it will sustain itself on its own merits, and it must be left to time, the revealer of all things, to test its benefits to mankind.

It is to guard this system from injury by false pretenders, that Dr. Thomson claims the right to warn the public against the impositions practiced in his name by those who assume it without authority; and such right he unquestionably has, to protect himself and the community, being responsible for any abuse of that right.

If such was the intent of the publication charged as libellous, it makes out a good motive and justifiable end, and leaves the truth only to be established to constitute an entire justification.

The publication begins and ends with putting the public on their guard against impostors, an odious race of men, who, without merit or honesty themselves, thrive on the labors and the reputation of others. He charges Dr. Badger, in substance, with being one of these impostors in selling medicines as the Thomsonian which are not so, and in making use of the Defendant's name in a manner calculated to mislead the public. He further charges him with fraudulently breaking open a letter and then selling out to escape an indictment for the offence—of again clearing out from Nashua, in consequence of the exposure of his impositions there, and with having delivered as his own, lectures he procured another to write.

It is not denied, that whatever may be the law, this is a libel if it be not true, and was not published with good motives.

But the defence is that this publication was made with good motives, and if such be your opinion, and that the matter is true, you are bound to acquit. The specifications set forth the particulars the Defendant expected to prove, and the question is, have they been made out to your satisfaction? Otherwise, the Government having shown the publication and that it is a libel, you will be bound to convict.

Dr. Thomson complains, that Badger was never authorized by him to sell or prepare his medicines, and yet he has for several years, imposed himself upon the public as a Thomsonian practitioner, obtaining confidence and customers solely on the credit of Dr. Thomson's name, and not his own. In regard to the evidence to establish this, it seems that Dr. Badger was not educated for the medical profession, but became associated with a Dr. Brown, who subsequently sold out to Badger, and he continued to sell under the Thomsonian sign, which all agree means Dr. Samuel Thomson, and was so understood by the public.

But Badger says, that though he used the name he did not claim to be an agent of Dr. Thomson, but used it as a generic term, meaning the Botanic practice. The Defendant relies on the fact, that in using the Thomsonian sign, Badger did hold out to the world that he was not only a disciple of Dr. Thomson but an agent, and you will judge, Gentlemen, whether from the manner in which he represented himself and his business to the public, he did not really intend to have it considered that he was one of Dr. Thomson's agents, and enjoying his confidence.

After being repeatedly threatened by Dr. Thomson, on the charge of imposition, and required to take down the sign, he sold out and went to Nashua, and there commenced business as a "thorough Thomsonian Physician, without amalgamation," and advertised Thomsonian Medicines in capitals, prepared for use, referring also to Dr. Morrill in a manner to make it appear there was some connexion with Dr. Thomson himself.

In connexion with this you will also recollect the testimony of Dr. Morrill. He states that Badger represented himself as a thorough Thomsonian, and proposed a connexion in business as such. That he did not represent himself directly as an agent of Dr. Thomson,—that is, he had not signed the bond, but witness considered him as authorized by Dr. Thomson. He began to practice, however, disregarding the terms with Dr. Morrill, but soon got off the track and vended medicine not Thomsonian. This and much other evidence is relied on for proof that Badger was an impostor, because he never was authorized by Dr. Thomson, and it is also shown that he used as Thomsonian, medicines that were never prescribed as such, and when he returned to Boston gave notice that he had resumed his former practice, and continued to use the Thomsonian labels.

For these reasons Dr. Thomson justifies the publication to put the public on their guard against an impostor.

The complainant denies this, so far as to say that he only used the labels to designate the botanic mode of practice, and not to use the credit of Dr. Thomson's name to vend his own compounds. You are to judge whether this explanation satisfies you that he was not an impostor.

In reference to the other principal charge, the fraudulently opening a letter, it appears that Mr. Kinsley, seeing this large sign, and being in pursuit of Thomsonian medicines, called at the shop and they agreed to put up the medicines, and the next day he called and received them. Cobbett testifies that Kinsley opened the letter. This Kinsley denies, and is positive he did not open it. You have the testimony of Clark also, on this point, that Badger brought the letter to him and accounted for the mistake, and in this way the letter was delivered to Dr. Thomson, who had the opportunity to answer the order. If these are the facts, there would appear no breach of honor or violation of law on the part of Dr. Badger, in the matter of the letter. If the witnesses state correctly, there would appear no ground for charge on this score, and that Dr. Thomson suspected wrong where there was none.

Another charge is, procuring lectures to be written. The evidence was that Badger furnished the medical facts and Mr. Healy the literary matter, and you will judge if this does not justify a charge of procuring lectures to be written.

The circumstances under which he left Boston and Nashua, should be considered, and whether he left the former place for fear of an indictment for breaking open the letter, or from any other cause. He came back to Boston and resumed his practice, and you must judge under all the circumstances of the prosecution, whether the publication made by Dr. Thomson was not done to put the public on their guard against an ignorant impostor, or whether it was done from malicious motives to hold him up to odium, and destroy his reputation in the community. And as you shall find, so shall you return your verdict, between the Defendant and the Commonwealth.

The Jury retired at half-past 5 P. M., and were out all night without agreeing.

Friday morning at 9 o'clock they came into Court, and informed the Judge they had not agreed on the law. The Judge instructed them that they were bound to take the law from the Court. They again retired, and in a short time returned a verdict of *guilty*.

Saturday Morning, April 14, 1839.

In the case of the Commonwealth vs. Dr. Samuel Thomson, for libel, Judge Thacher gave sentence of a fine of fifty dollars, from which the Defendant appealed to the Supreme Court. Before sentence, *Mr. Hallett* stated to the Court that, had the Defendant had a fair trial, he would not have appealed; but he was prepared to prove that the verdict had been forced by improper treatment toward one of the jurors, who had been annoyed all night the jury were out, and even threatened with indictment for a contempt of Court, if he did not consent to agree to a verdict against his own conscientious convictions of right. *Mr. Parker* intimated that no juror ought to be allowed to sit in a case, who had made up his

mind against the criminal law of libel. *Mr. Hallett* replied that, by the same rule no juror ought to sit who had made up his mind that there was such a law. It was a question of evidence as to the existence of the law.

Some conversation was had as to the operation of the new Statute which takes away appeals from the Municipal Court as to any matter of fact,—but it was found not to apply to this case. It was then suggested to the Court that the sentence ought to be merely nominal;—that the substance of the alleged libel was the charge that P. D. Badger, in assuming to be a Thomsonian practitioner, was an imposter, and had deceived the public by holding himself out as such, and vending spurious and inferior medicines, as Thomsonian medicines, to the danger of the public, and therefore the Defendant was justified in exposing him; and that every item in the alleged libel had been proved except the implied charge of breaking open a letter, which it turned out had been done by another person in Badger's establishment. The Court had considered this as a case of fraud, but such was not the intent or construction.

Judge Thacher, in delivering sentence, said, that in the trial of the cause full justice had been done to the system of medical treatment of which Dr. Thomson was the discoverer, and that it was shown and admitted, that this system was widely diffused, but dangerous in the hands of unskillful persons who assumed to practice it and deceive the public under the sanction of his name. It was proved that the prosecutor (Badger) had assumed the Thomsonian name to give credit to his own practice, and that the manner in which he had availed himself of the reputation and discoveries of Dr. T. were circumstances of strong provocation, he being the inventor of the system now celebrated in various parts of the country, and being fairly entitled to its honors and benefits. It was also obvious that it was only by the use the prosecutor (Badger) had made of the name of Dr. Thomson, that he had acquired any celebrity. The whole course of his proceeding was holding out to the public that he (Badger) practiced under the name and sanction of Dr. Thomson; and in his hands it might be not only dangerous to the public, but injurious to the reputation of Dr. T. The Court was free to state this in justice to the Defendant, but though he might have been seriously injured, yet the remedy he had pursued was not the right one, and the verdict must be taken as correct. As to the charge of breaking open a letter directed to Dr. Thomson, the impression likely to be produced from the language was, that Mr. B. opened the letter fraudulently and cleared out to avoid an indictment, that would grow out of it. With regard to the provocation for the publication, the Court would take it into consideration and impose a light sentence on the ground that it was a private matter of difference which might have been settled in another mode, and in which the public justice did not require an exemplary punishment. The trial had occupied two days, and a portion of the expense must fall on the Commonwealth. The Court had also taken into consideration that Dr. Thomson would not be likely to be distressed by any fine it should impose, but under all the circumstances, the Court would impose a fine of fifty dollars, and leave the Defendant the right to appeal or apply for a new trial, as the remedy may be open to him.

It is stated that the jury stood 8 to 4 on the facts as to the only charge not proved, the letter; and 11 to 1 on the law. The means said to have been resorted to by some of the jurors to *morally* coerce the one who had the independence to maintain his own convictions as to the law, and especially the intimation of a proceeding for contempt of Court, were unfortunate and improper. A single juror has as much right to his honest opinion as all the rest have to theirs. The juror who dissented on the law, would not have yielded his conviction, had he not understood the Court to say that it was his imperative duty to do so.

ADVERTISEMENT.

[TO THE PUBLIC.]

I have devoted most of a long life to reducing to a safe and simple practice a system of medical treatment, that should remedy the evils with which mankind has been afflicted to an incalculable amount, ever since the introduction of mineral poisons in the fifteenth century, which have ever since formed the materia medica of the regular doctors, as they are called, and which are given to cure sick men, though sure to kill well ones if administered to them.

So far from concealing my discoveries, or seeking to make a mystery of them, I have labored to make them known for the benefit of the whole human race. This, every body knows, is not quackery, which is always mysterious and works in the dark.

But I wish, while living, to see my system promulgated, if at all, in its *purity*, and when dead, handed down through others who will preserve it, and not let it fall back again into the pernicious practices that have so long plagued the world under high-sounding names of learned quackery. If I am to be remembered at all, for I am past the age of ambition, I want it to be as a benefactor and not as a curse to mankind; and this depends upon the fact, whether the learned Faculty on one side, from design and malice, and the ignorant Impostors on the other, from love of gain, shall abuse my system, and turn a great good into a great evil, till the people lose all confidence in the genuine by being poisoned by the counterfeit.

I trust my life will be long enough to enable me to warn the people against these two rocks, upon which the Thomsonian practice will be in the greatest danger of shipwreck. This has been the sole object of all my warnings, published to guard against impostors. It is no longer a question that this system will be used, but *how* it will be used, is what most concerns the public.

For more than twenty years the Faculty tried to destroy the Thomsonian system, by holding it up as quackery. In Massachusetts, they began in 1808 to get the Legislature to help them put me down, and in that State and many others, laws have been passed since that time to prevent my collecting my debts, and to make

medical practice, without a college diploma, a crime. But in nearly every State where these unjust laws were passed, the people have caused them to be repealed.

Thus, notwithstanding all the labors of the Faculty and the Bench to keep the Thomsonian system in obscurity and make the people shun it, it has worked its way, because it has merits of its own to stand on, and has got the confidence of the people, until upwards of one hundred thousand family rights have been taken, and it is estimated that about three millions of inhabitants of the United States have approved and adopted it.

But when it was established in spite of the M. D.'s, the avarice of designing and dishonest men stepped in to do what the whole learned Faculty of mineral doctors could not do, viz. put it down by making the people lose confidence in it. These men pretended to be my agents, stole my name, and under it put forth spurious medicines, to speculate upon the public health. Some that were regular agents at first, violated their contracts, and set up for themselves, under my name, and manufactured inferior medicines, or compounded new ones, which they called Thomsonian, and said were improvements, without any test of long experience to prove it, as I had done, in every thing I have recommended, devoting half a century nearly, to be sure that it would stand the test.

Whenever injury or death has happened by these pretenders in my name and medicine, it has all been laid to Samuel Thomson. Thus am I defrauded of my name to make a capital for pretenders to it, to trade upon; made to bear the blame of all their failures, and the people deceived and the system in danger of being run down in bad hands.

Conventions have been held to preserve the system in its purity, and separate the true from the false, but still the false increase; and the enemies of the system will always favor the false against the true practice, as the best means to put down my discoveries.

It is against this evil I wish to guard the people. Let these men leave my name alone and take their own for their Infirmeries and medicines, and I will not trouble them, but they must not make me or my system responsible for their mal-practice.

Almost every newspaper from abroad brings the name of some person setting up as a Thomsonian Doctor and passing as my agent, of whom I know nothing and who knows nothing of my system or medicines from me. A man calling himself Benjamin Thomson, has just opened in Alexandria, District of Columbia, and advertises in the National Intelligencer. I know nothing of what he may do, under color of my name, and I wish the people there to understand it, and not lay any blame to the Thomsonian system for any thing he may do.

Among those who have been or are using my name and medicines without any authority from me, are Charles Holman, Portsmouth, N. H.; John A. Brown, Providence, R. I.; G. Larabee at Baltimore; Clark & Wilder at Randolph, Mass.

In Boston, H. Winchester and William Johnson, Hanover-place; E. Darling, and Paine D. Badger, who says he has resumed his former practice at No. 554, at 356 Washington-street.

There are many others of less note, who are not mentioned here, but may be hereafter, if necessary. Among them some persons on Kennebeck and Penobscot Rivers in Maine, claim to sell my medicines, which they have not got. A good agent is wanted for that section, who will sell the right medicines.

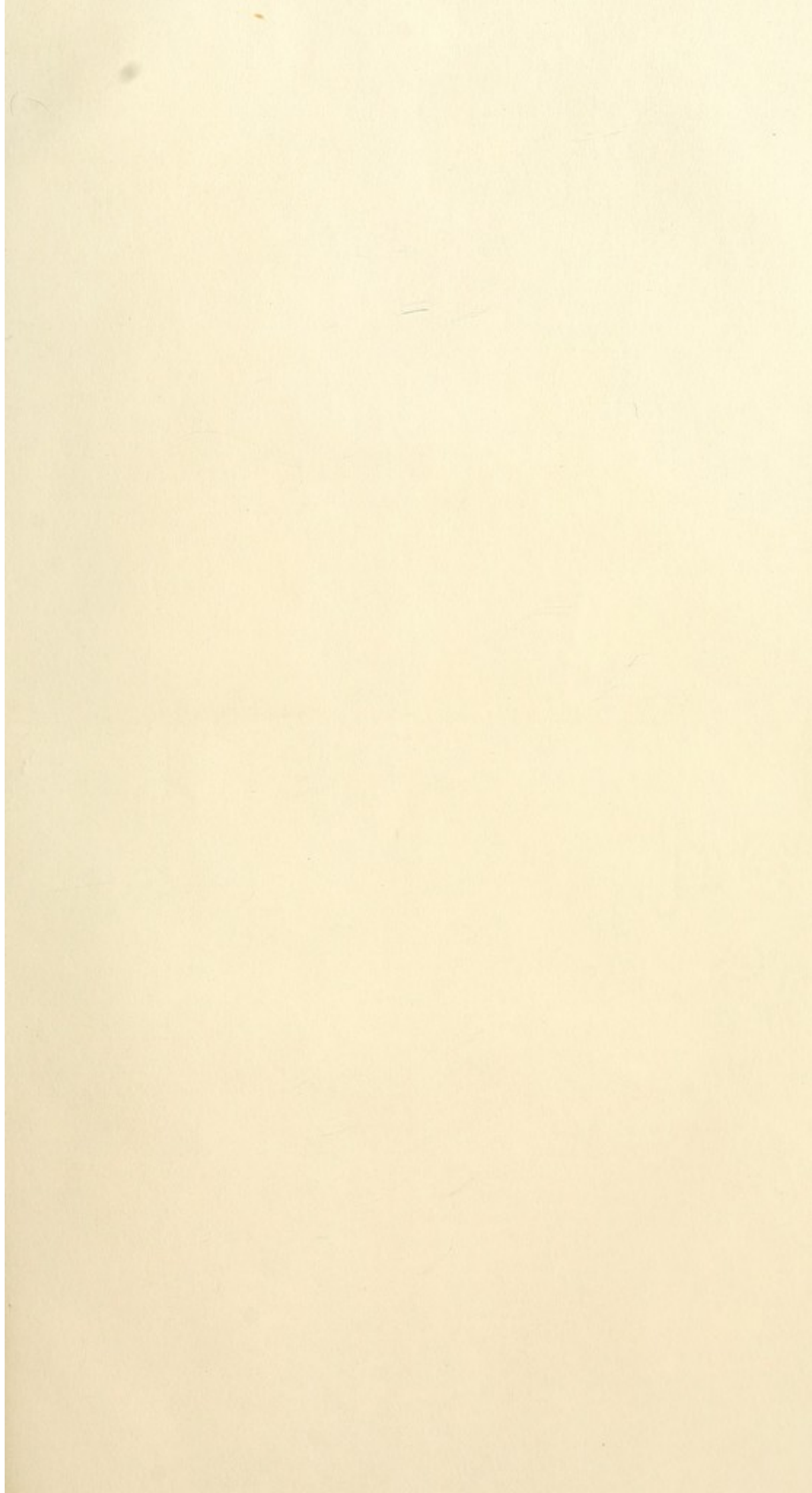
If the public choose to confide in any of these men or their medicines, as genuine Thomsonian practice, I wish them to do it with their eyes open, that none of the consequences, good or bad, may be laid to me or my system.

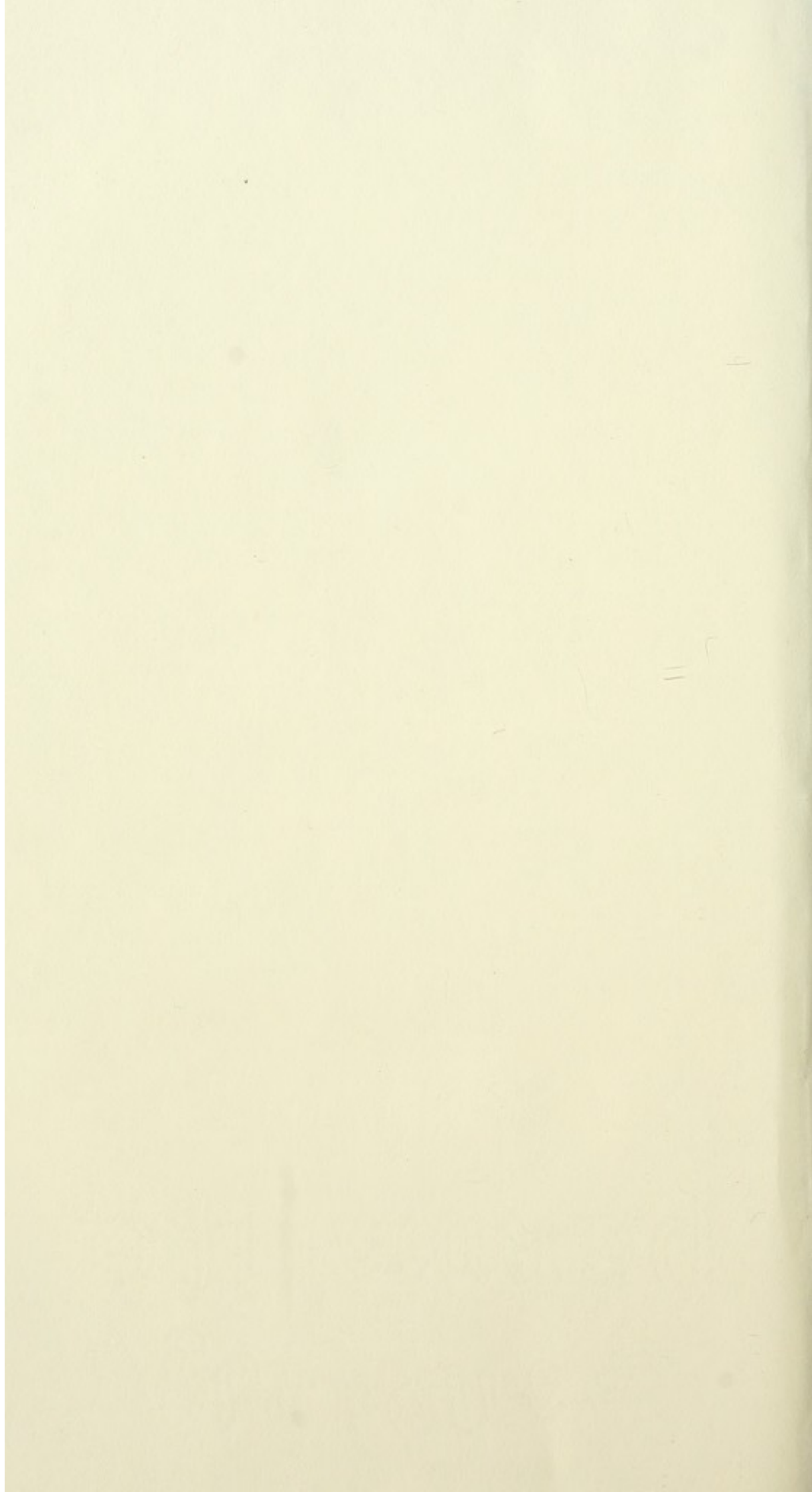
All persons desirous of correct information of me, or my agents to be relied on, are invited to apply to me personally or by letter at my General Depot and Infirmary, No. 40, Salem-street, Boston, where a supply of superior Medicines, carefully prepared under my immediate direction, can always be had, with Family Rights and the Guide to Health, at a liberal and satisfactory discount.

SAMUEL THOMSON.

BOSTON, May 1, 1839.

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