SPEECH

OF

HON. JOHN C. CALHOUN,

OF SOUTH CAROLINA,

ON THE

CASE OF M'LEOD:

DELIVERED IN THE

SENATE OF THE UNITED STATES,

FRIDAY, JUNE 11, 1841.

WASHINGTON:

PRINTED AT THE GLOBE OFFICE.

1841.

SPEECH.

In Senate, Friday, June 11, 1841—The business before the Senate being the motion of Mr. RIVES to refer so much of the President's Message as relates to our foreign affairs to the Committee on Foreign Affairs—

Mr. CALHOUN said: I rise with the intention of stating very briefly the conclusion to which my reflections have brought me on the question before us.

Permit me, at the outset, to premise that I heartily approve of the principle so often repeated in this discussion, that our true policy, in connection with our foreign relations, is neither to do nor to suffer wrong, not only because the principle is right of itself, but because it is, in its application to us, wise and politic, as well as right. Peace is pre-eminently our policy. Our road to greatness lies not over the ruins of others, but in the quiet and peaceful development of our immeasurably great internal resources—in subduing our vast forests, perfecting the means in internal intercourse throughout our widely extended country, and in drawing forth its unbounded agricultural, manufacturing, mineral, and commercial resources. In this ample field, all the industry, ingenuity, enterprise, and energy of our people may find full employment for centuries to come; and, through its successful cultivation, we may hope to rise, not only to a state of prosperity, but to that of greatness and influence over the destiny of the human race, higher than has ever been attained by arms by the most renowned nations of ancient or modern times. War, so far from accelerating, can but retard our march to greatness. It is, then, not only our duty, but our policy, to avoid it, as long as it can be, with honor and a just regard to our right; and, as one of the most certain means of avoiding war, we ought to observe strict justice in our intercourse with others. But that is not of itself sufficient. We must exact justice as well as render justice, and be prepared to do so; for where is there an example to be found of either individual or nation, that has preserved peace by yielding to unjust demands?

It is in the spirit of these remarks that I have investigated the subject before us, without the slightest party feelings, but with an anxious desire not to embarrass existing negotiations between the two Governments, or influence in any degree pending judicial proceedings. My sole object is to ascertain whether the principle already stated, and which all acknowledge to be fundamental in our foreign policy, has in fact been respected in the present case. I regret to state that the result of my investigation is a conviction that it has not. I have been forced to the conclusion that the Secretary of State has not met the peremptory demand of the British Government for the immediate release of McLeod as he ought; the reasons for which, without further remark, I will now proceed to state.

That demand, as stated in the letter, rests on the alleged facts, that the transaction for which McLeod was arrested, is a public one; that it was undertaken by the order of the colonial authorities, who were invested with unlimited power to defend the colony, and that the Government at home has sanctioned both the order and its execution. On this allegation, the British Minister, acting directly under the orders of his Government, demanded his immediate release, on the broad ground that he, as well as others engaged with him, was "performing an act of public duty, for which he cannot be made personally and individually responsible to the laws and tribunals of any foreign country;" thus assuming as a universal principle of international law, that where a Government authorizes or approves of an act of an individual, it makes it the act of the Government, and thereby exempts the individual from all responsibility to the injured country. To this demand, resting on this broad and universal principle, our Secretary of State assented; and, in conformity, gave the instruction to the Attorney General, which is attached to the correspondence, and we have thus presented for our consideration the grave question, do the laws of nations recognise any such principle?

I feel that I hazard nothing in saying they do not. No authority has been cited to sanction it, nor do I believe that any can be. It would be no less vain to look to reason than to authority for a sanction. The laws of nations are but the laws and morals, as applicable to individuals, so far modified, and no further, as reason may make necessary in their application to nations. Now, there can be no doubt that the analogous rule, when applied to individuals, is, that both principal and agents, or, if you will, instruments, are responsible in criminal cases; directly the reverse of the rule on which the demand for the release of McLeod is made. Why, I ask, should the rule in this case be reversed, when applied to nations, which is uni-

versally admitted to be true in the case of individuals? Can any good reason be assigned? To reverse it when applied to individuals, all must see, would lead to the worst of consequences, and, if I do not greatly mistake, must in like manner, if reversed, when applied to nations. Let us see how it would act when brought to the test of particular cases.

Suppose, then, that the British, or any other Government in contemplation of war, should send out emissaries to blow up the fortifications erected at such vast expense, for the defence of our great commercial marts—New York and others—and that the band employed to blow up Fort Hamilton, or any other of the fortresses for the defence of New York, should be detected in the very act of firing the train: would the production of the most authentic papers, signed by all the authorities of the British Government, makes it a public transaction, and exempt the villains from all responsibility to our laws and tribunals? Or would that Government dare make a demand for their immediate release? Or, if made, would ours dare yield to it, and release them? The supposition, I know, is altogether improbable; but it is not the less, on that account, calculated to test the principle.

But I shall next select one that may possibly occur. Suppose, then, in contemplation of the same event, black emissaries should be sent from Jamaica, to tamper with our slaves in the South, and that they should be detected at midnight, in an assembly of slaves, where they were urging them to rise in rebellion against their masters; and that they should produce the authority of the home Government, in the most solemn form, authorizing them in what they did: ought that to exempt the cut-throats from all the responsibility to our laws and tribunals? Or, if arrested, ought our Government to release them on a peremptory demand to do so? And if that could not be done forthwith, from the embarrassment of State laws and State authorities, ought this Government to employ counsel and to use its authority and influence to effect it? And, if that could not accomplish its object, would it be justified in taking the case into their own tribunals, with the view of entering a *nolle prosequi*?

But, setting aside all supposititious cases, I shall take one that actually occurred—that of the notorious Henry, employed by the colonial authority of Canada to tamper with a portion of our people, prior to the late war, with the intention of alienating them from their Government, and effecting a disunion in the event of hostilities. Suppose he had been detected and arrested for his treasonable conduct, and that the British Government had made the like demand for his release, on the ground that he was executing the orders of his Government, and was not, therefore, liable, personally or individually, to our laws and tribunals: I ask, would our Government be bound to comply with the demand?

To all these questions, and thousands of others that might be asked, no right minded man can hesitate for a moment to answer in the negative. The rule, then, if it does exist, must be far from universal. But does it exist at all? Does it even in a state of war, when, if ever, if we may judge from the remarks of gentlemen on the opposite side, it must? They seemed to consider nothing more was necessary to establish the principle for which they contend but to show that this and all other cases of armed violence on the part of one nation or its citizens against another, is in fact war; informal war, as they call it, in contradistinction from one preceded by a declaration in due form.

Well, then, let us inquire if the principle for which they contend, that the authority, or the sanction of his Government, exempts an individual from all responsibility to the injured Government, exists even in case of war.

Turning, then, from a state of peace to that of war, we find at the very threshold, a very important exception to the rule, if it exists at all, in the case of spies. None can doubt that, if a spy is detected and arrested, he is individually and personally responsible, though his pockets should be filled with all the authority the country which employed him could give.

But is the case of spies the only exception? Are they alone personally and individualy responsible? Far otherwise. The war may be declared in the most solemn manner; the invaders may carry with them the highest authority of their Government, and yet, so far from exempting them individually, officers, men, and all, may be slaughtered and destroyed in almost every possible manner, not only without the violation of international laws, but with rich honor and glory to their destroyers. Talk of the responsibility of the Government exempting their instruments from responsibility? How, let me ask, can the Government be made responsible, but through its agents or instruments? Separate the Government from them, and what is it but an ideal, intangible thing? True it is, when an invading enemy is captured or surrenders, his life is protected by the laws of nations, as they now stand; but not because the aothority of his Government protects it, or that he is not responsible to the invaded country. It is to be traced to a different and higher source—the progress of civiliazation, which has mitigated the laws of war. Originally it was different. The life of an invader might be taken, whether armed or disarmed. He who captured an enemy had a right to take his life. The older writers on the laws of nations traced the lawfulness of making a slave of a prisoner to the fact that he who captured him had a right to take his life; and, if he spared it, a right to his service. To commute death unto servitude was the first step in mitigating the horrors of war. That has been followed by a further mitigation, which spares the life of a prisoner, excepting the case of spies, to whom the laws of war, as they stood originally, are still in force. But, because their lives are spared, prisoners do not cease to be individually responsible to the invaded country. Their liberty for the time is forfeited to it. Should they attempt to escape, or if there be danger of their being released by superior force, their lives may be still taken, without regard to the fact that they acted under the authority of their country. A demand on the part of their Government for an immediate release, on the ground assumed in this case, would be regarded as an act of insanity.

Now, sir, if the Senators from Virginia and Massachusetts [Mr. RIVES and Mr. CHOATE] could

succeed in making the case of the attack on the Caroline to be an act of war, it would avail them nothing in their attempt to defend the demand of Mr. Fox or the concession of Mr. Webster. McLeod, if it be war, would be a prisoner of war, which, if it protected his life, forfeited his liberty. In that character, so far from his Government having a right to demand his immediate release, under a threat of war, our Government would have the unquestionable right to detain him till there was a satisfactory termination of the war by the adjustment of the question.

To place this result in a stronger view, suppose, after the destruction of the Caroline, the armed band which perpetrated the act had been captured on their retreat by an armed force of our citizens; would they not, if the transaction is to be regarded as war, justly have been considered as poisoners of war, to be held as such, in actual confinement, if our Government thought proper, till the question was amicably settled? And would not the demand for their immediate release in such a case be regarded as one of the most insolent ever made by one independent country on another? And can the fact that one of the band has come into our possession as McLeod has, if it is to be considered as war, vary the case in the least? Viewed in this light, the authority or sanction of the British Government would be a good defence against the charge of murder or arson, but it would be no less so against his release.

But, this is not a case of war, formal or informal, taking the latter in the broadest sense. It has not been thought so nor so treated by either Government, and Mr. Webster himself, in his reply to Mr. Fox, which has been so lauded by the two Senators, speaks of it as "a hostile intrusion into the territory of a power *at peace*." The transaction comes under a class of cases fully recognised by writers on international law as distinct from war—that of belligerants entering with force the territories of neutrals; and it only remains to determine whether, when viewed in this, its true light, our Secretary has taken the grounds which our rights and honor required, against the demand of the British Minister.

Thus regarded, the first point presented for consideration is, whether Great Britain, as a belligerant, was justified in entering our territory under the circumstances she did. And here let me remark, that it is a fundamental principle in the laws of nations, that every State or nation has full and complete jurisdiction over its own territory to the exclusion of all others—a principle essential to independence, and therefore held most sacred. It is accordingly laid down by all writers on those laws who treat of the subject, that nothing short of *extreme necessity* can justify a belligerant in entering, with an armed force, on the territory of a neutral power, and, when entered, in doing any act which is not forced on them by the like necessity which justified the entering. In both of the positions I am held out by the Secretary himself. The next point to be considered is, did Great Britain enter our territory in this case under any such necessity, and, if she did, were her acts limited by such necessity? Here again I may rely on the authority of the Secretary, and, if it had not already been quoted by both of the Senators on the other side who preceded me, I would read the eloquent passage towards the close of his letter to Mr. Fox, which they did with so much applause. With this high authority, I may then assume that the Government of Great Britain, in this case, had no authority under the laws of nations either to enter our territory or to do what was done in the destruction of the Caroline after it was entered.

Now, sir, I ask, under this statement of the case, what ought to have been our reply, when the peremptory demand was made for the immediate release of McLeod? Ought not our Secretary of State to have told Mr. Fox that we regarded the hostile entry into our territory, and what was perpetrated after the entry, as without warrant under the laws of nations? That the fact had been made known to his Government long since, immediately after the transaction? That we had received no explanation or answer? That we had no reason for believing that his Government had sanctioned the act? That McLeod had been arrested and indicted under the local authority of New York, without possibility of knowing that the transaction had been sanctioned by it? That we still regarded the transaction in the light we originally did, and could not even consider the demand till the conduct of which we had complained was explained? But, in the mean time, that McLeod might have the benefit of the fact on his trial that the transaction was sanctioned by his Government, it would be transmitted in due form to those who had charge of his defence?

Here let me say that I entirely concur with Mr. Forsyth, that the approval of the British Government of the transaction in question was an important fact in the trial of McLeod, without, however, pretending to offer an opinion whether it would be a valid reason against a charge of murder, of which the essence of killing with malice prepense. It is a point for the court and jury, and not for us to decide. Nor do I intend to venture an opinion whether, if found guilty, with the knowledge of the fact that his Government approved of his conduct, it ought not to be good cause for his pardon, on high considerations of humanity and policy. I leave both questions, without remark, to those to whom the decision properly belongs, except to express my conviction that there is not and has not been the least danger that any step would be taken towards him not fully sustained by justice, humanity, and sound policy. Any step which did not strictly comport with these would shock the whole community.

Having taken the ground, I have indicated that we ought to have received explanation before we we responded to a peremptory demand; there we ought to have rested till we had first received explanation. It is a maxim, that he who seeks equity must do equity; and, on the same principle, a Government that seeks to enforce the laws of nations in a particular case against another, ought to show that it has first observed them on its own part in the same transaction; or at least show plausible reasons for thinking that it had. None, but a proud and haughty nation like England, would think of making the demand she has without even deigning to notice our complaints against her conduct in

connection with the same transaction; and I cannot but think that, in yielding to her demand, under such circumstances, the Secretary has not only ailed to exact what is due to our rights and honor, as an independent people, but has, as far as the influence of the example may effect it, made a dangerous innovation on the code of international laws. I cannot but think the principle in which the demand to which he yielded was made, is highly adverse to the weaker power, which we must admit ourselves yet to be, when compared to Great Britain. Aggressions are rarely by the weak against the stronger power, but the reverse; and the practical effect of the principle, if admitted, would be to change the responsibility of declaring war from the aggressor —the stronger power—to the aggrieved, the weaker; a disadvantage so great, that the alternative of abandoning the demand of redress for the aggression would almost invariably be forced on the weaker, rather than to appeal to arms. This case itself will furnish an illustration. We have been told again and again, in this discussion, that in yielding to the demand to release McLeod we do not surrender our right to hold Great Britain responsible; that we have the power and will to exact justice by arms. This may be so; but is it not felt on all sides that this is, I will not say empty boasting, but that it is all talk? After yielding to the peremptory demand for his immediate release; after sending the Attorney General to look after his safety, and employing able counsel to defend him against the laws of the State, the public feeling must be too much let down to think of taking so bold and responsible a measure as that of declaring war. The only hope we could ever have had for a redress for the aggression would have been to demand justice of the British Government before we answered her demand on us; and I accordingly regard the acquiescence in the demand for release, without making a demand of redress on our part, as settling all questions connected with the transaction. Thus regarding it, I must say that, though I am ready to concede to Mr. Webster's letter in reply to Mr. Fox all the excellencies which his friends claim for it, the feeling that it was out of place destroyed all its beauties in my eyes. Its lofty sentiments and strong condemnation of the act would have shown to advantage in a letter claiming redress on our part, before yielding to a peremptory demand; but, afterwards, it looked too much like putting on airs when it was too late, after having made an apology, and virtually conceded the point at issue. In truth, the letter indicates that Mr. Webster was not entirely satisfied with his ready compliance with Mr. Fox's demand, of which the part where he says he is not certain that he correctly understood him in demanding an *immediate* release furnishes a striking instance.

There could be but little doubt as to what was meant; but the assumption of one afforded a convenient opportunity of modifying the ground he first took.