SPEECH

OF

MR. H. EVERETT, OF VERMONT,

ON

THE CASE OF ALEXANDER McLEOD.

Delivered in the House of Representatives of the United States, September 3, 1841

WASHINGTON:
PRINTED AT THE NATIONAL INTELLIGENCER OFFICE.
1841.

SPEECH.

Mr. EVERETT said that the debate had involved not only the question of McLeod, but also the merits of the original controversy on the affair of the Caroline. He proposed, on the present occasion, to confine himself to the first question. It had become his duty, as a member of the Committee on Foreign Affairs, to examine this subject; and until lately he had hoped to have been able to have presented his views in the form of a report. Being now satisfied that that opportunity would not be afforded him, he should, "*with the usual privilege*" allowed under the hour rule, proceed to present them substantially as prepared for a report, with such alterations as should be necessary to accommodate them to the forms of a speech.

He would, however, premise that he should avoid all party considerations. The subject was too grave in its character and consequences to be mingled with the party politics of the day. He could not, on a question of such magnitude, be even provoked to follow the example of those who had preceded him. He should state nothing as fact that he did not believe to be proved, or as argument that he did not believe to be well founded. He believed he should best serve the country by "*presenting things truly as they came to his knowledge.*"

The case of McLeod was referred to the Committee on Foreign Affairs at the last session of Congress, and on which the committee made a report in February. It appears from the debates on that report that a minority of the committee entertained doubts of the propriety of making any report at that time: that, considering that the whole controversy, as well concerning the destruction of the Caroline and the homicide of Durfee as the arrest and imprisonment of McLeod, was then the subject of negotiation between the two Governments; that no action of Congress was called for by the state of the negotiation or proposed by the committee; and that the case of McLeod was then pending before the judicial tribunals of the State of New York, they apprehended that a report, at that time, from a bare majority of the committee, while it might appear to give a party character to the consideration of a great national question, must necessarily tend to embarrass the progress of the negotiation then about to be committed to a new Administration, and to prejudice the trial of the party accused.

That report was published at the time, and has had its apprehended effects, both at home and abroad.

In the recent diplomatic communications with the Government of Great Britain, the present Administration has taken grounds opposed to some of the positions taken in the report; and the still more recent decision of the Supreme Court of the State of New York is directly opposed to the grounds taken by the Executive. Mr. E. said he did not concur in those positions, or in that decision. In his opinion, they were in direct conflict with the constitutional powers of the Federal Government; and, if sustained, the power of war and peace will be wrested from this Government and left to the discretion of each of the twenty-six States. In this state of conflict of jurisdiction between the Federal and a State Government, he deemed it to be his duty to submit his views of the case to the judgment of the House and of the country.

I shall, said Mr. E., confine myself to the case of McLeod. We are not called upon to pass a final judgment on the original question of the destruc-

tion of the Caroline. Nor would it be proper so to do, until the British Government shall have given their final answer to our demand for satisfaction. It is sufficient for the purposes of the present investigation to say, that that act remains to be justified; and that, until that justification shall be made, I shall consider the case, as our Executive has hitherto considered it, as "*one of open, undisguised, and unwarrantable hostility*"—as "*an open and admitted invasion of the territory and sovereignty of an independent nation*"—as an "*act of hostile and daring aggression upon its rights and sovereignty, utterly inconsistent with all the principles of national law, and wholly irreconcilable with the friendly relations of the two countries.*"

It will be necessary to refer to the condition of the Canadian provinces and of our own frontier at the date of the destruction the Caroline, for the purpose of ascertaining the *precise character* of that act, as an act of hostility.

The disaffection of the French of Lower Canada to the *English* Government has been of long standing. Constituting a great majority of the population, they had for years a decided majority in the Commons of the Provincial Parliament, and which had been in continual conflict with the Executive, and also with the home Government, to the extent that, since 1832, it had granted no supplies for charges of the administration of justice or for the support of the civil list. Actual disloyalty, however, was not supposed to extend to a majority of the French, while the English and American portion of the population, with few exceptions, were loyal.

In May, 1837, immediately after the arrival of Lord John Russell's resolutions, an insurrectionary organization was commenced. In October it had embraced the six counties, Richelieu, Verecheres, St. Hyacinth, Chambly, Rouville, and L'Acadie, and the county of the Two Mountains, and was progressing in other sections of the Province with a view to immediate action. The time was well chosen, as, from October to May, no forces or supplies could arrive from England. In Novsmber the patriots were in open rebellion. The affairs of Longueil, St. Dennis, and St. Charles occurred on the 17th, 24th, and 28th of November. The patriots, defeated in all quarters, dispersed or retreated across the lines. Martial law was proclaimed on the 5th of December. On the 6th, a party of 200 recrossed the lines from Vermont, and were defeated at Phillipsburg. The insurrection was, however, put down in the course of that month.

In the mean time an organization, principally of American citizens, had been in progress along our frontier, from Vermont to Michigan, with a view of aiding the patriots by the invasion of Canada. This organization, however, seems not to have excited much apprehension of danger in Upper Canada until after the defeat of the patriots in the Lower Province. Such was the confidence of Sir Francis Head in the loyalty of the people and the security of the Province from insurrection or invasion, that early in November he sent all the regular forces to Lower Canada, and even committed 6,000 stands of arms to the custody of the Mayor and Aldermen of Toronto without any military guard. The sudden movement of McKenzie upon that place, with 4 or 500 men, on the 4th December, excited a temporary alarm. But the alacrity with which the militia turned out and defeated him, fully justified the confidence that had been placed in their oyalty, and dispelled all apprehension of insurrection.

In this armed state of the one Province, and the disarmed state of the other, a determination was made to invade Upper Canada from our fron-

ter, with a view either of direct success, or of compelling the British to di-vide the regular forces between the two Provinces.

Early in December an active organization was set on foot at Buffalo and in its vicinity. Public meetings were held, men enlisted, munitions of war (in part taken from the State arsenals) provided, and the invasion of Canada was openly threatened as the object of these movements. On our part, this state of things was not anticipated, and, of course, not provided against. The preservation of our neutrality was left to the efforts of the United States civil officers in the vicinity—the marshal, collector, and district attorney. Without the aid of a military force, their efforts were ineffectual against the numbers brought out by the overpowering force of public feeling on that border. Though the state of things was early communicated to the Executive, there was neither time nor means to check the proceeding of our citizens.

On the 13th of December, some 2 or 300 American citizens under the command of Van Rensselaer, took hostile possession of Navy Island. By the 28th, their numbers had increased to 1,000. They had thrown up intrenchments, mounted twenty pieces of cannon, and had commenced cannonading the Canadian forces across the Niagara. On the 25th, the whole number of the Canadian militia from Niagara to Erie did not exceed 600. On the 28th, it was estimated at 2,500, but without any efficient artillery.

The military defence of the Province was committed to Col. McNab, with instructions to respect the neutral rights of the United States.

The position of Navy Island, in the rapids, above the Falls of Niagara, rendered an attack in boats too dangerous to be attempted; and, being without suitable artillery, he was obliged to await the arrival of a competent force expected from Lower Canada.

On the 28th, a party of American patriots, estimated by an eye-witness at about 1,000, were engaged in cutting out the Caroline, (then ice-bound at Buffalo,) and, in the opinion of our marshal, Mr. Garrow, "with a view to aid the patriot expedition." Of this movement Colonel McNab was informed, and on the morning of the 29th he communicated the fact to the District Attorney, Mr. Rogers.

On the 1st December the Caroline was enrolled and licensed, under a declared intention of running between Buffalo and Schlosser, for carrying passengers and freight. "Schlosser was the point from which a very con-'siderable portion of the stores, provisions, arms, and munitions of war 'were taken on to Navy Island, and many of the people who passed to and 'from Navy Island, during its invasion, departed from and landed at that 'place."

On the morning of the 29th, the Caroline, in violation of her license, went from Buffalo to Navy Island, and there landed men and munitions of war, described in the affidavit of Captain Appleby as "*a number of passengers*" and "*certain articles of freight.*" In the course of the day she made two trips from Schlosser to Navy Island for similar purposes; she returned to Schlosser about six in the evening, was moored to the wharf, and a watch set for the night. I do not stop to inquire into the terms of the employment of the Caroline: in violation of her license she was engaged in a direct intercourse between Schlosser and Navy Island, in aid of the patriots, then in open war with the province of Upper Canada.

Thus an invasion of Canada was commenced by our citizens on the 13th December, and continued until the evening of the 29th, without any indication of a termination of the accession of force on Navy Island. The

Caroline, in the employment of the invaders as part and parcel of the means of invasion, was moored for the night, prepared to renew its aid on the succeeding day. In fine, Schlosser, for the purpose of annoyance, was, equally with Navy Island, in possession of the patriots, and engaged in hostility against Canada, unrestrained by any American authority, State or Federal. Between them and Canada war existed.

Such was the state of things on both sides of the lines when Colonel McNab gave the order for the destruction of the Caroline. Whether that order was or was not justifiable, is not now the question before us. That question remains, where it has remained for the last three years, in discussion between the two Governments. The statement of facts is not made with a view to that question, but solely with a view to its bearing on the case of McLeod.

On the evening of the 29th, Col. McNab, on his responsibility *as commander-in-chief of Her Majesty's forces*, ordered Captain Drew, with a detachment of the military force, of which McLeod was one, to destroy the Caroline wherever she might be found. That order was executed on the night of the 29th by a hostile attack on the Caroline, found moored at the wharf of Schlosser, by expelling all on board, and, in the attack, killing Durfee and wounding others—then setting her on fire, towing her into the stream, and leaving her to drift in flames over the falls.

On the next day Captain Drew reported the execution of the order to Col. McNab, who, on the 1st January, communicated that report to Sir Francis B. Head, Lieutenant Governor of the Province. Sir Francis Head, in his reply of the same day, *gave his unqualified approbation to the proceeding*, and which was on the same day published in a general order.

It is obvious, from this statement of facts, that the order was given in view of the existing state of things, and intended against those, and those only, who were supposed to be engaged in actual hostilities against the Province of Upper Canada, whether found there or within the territory of the United States, between whom and Great Britain the relation of amity existed: that the execution was a military expedition of a detachment of Her Majesty's forces, acting under the immediate command of their superior officer, and approved by the supreme power of the Province; and that the destruction of the Caroline, with its incidents, was a hostile invasion of the territory, and a violation of the sovereignty of the United States. The war was between Canada and the patriots; the battle was fought on neutral ground.

It was *per se* an act of war, although the *state of war* did not, either before or after, exist between the two nations. It was, in its character, similar to the attack of the Leopard on the Chesapeake—of the British fleet on Copenhagen. It was a violation of the law of nations, for which the British nation was responsible. That nation was responsible as well for the destruction of the property and the homicide of a citizen of the United States as for the invasion of its territory, and the violation of its sovereignty. The disapproval of the order and of the act by the British Government would not release her from our claim for satisfaction for the personal injuries; while the act, if avowed as her own act, would constitute a *just cause of war*. In either case it belongs exclusively to the United States, to whom all relations with foreign nations are by the constitution entrusted, to seek or to compel redress. All, all parts of the transaction—the attack, the destruction of the Caroline, the homicide of Durfee—constitute one act of national injury, and are the subjects not of individual, but of national controversy only.

"There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. 'When the fact is established,' says Sir W. Scott, 'it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy.'—[Wheaton, International Law, 140.] Yet the property is not to be restored as for a private wrong, nor at the suit of an individual; but as for a public wrong, and at the instance of the Government.

"Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a technical rule of the prize court to restore to the individual claimant *only on the application of the neutral Government whose territory has been thus* violated. This rule is founded upon the principle, *that the neutral State* alone *has been injured by the capture*, and that the hostile *claimant has no* right to *appear for the purpose of suggesting the invalidity of the capture.*"—*Ibid*, 141.

These principles, it will be seen, have been fully recognised by the Executives of New York, of the Province of Lower Canada, of the United States, and of Great Britain.

The message of the Governor of the State of New York to the Legislature, of the 2d January, 1838, contains the following passages: "The territory of this State has been invaded, and some of our citizens murdered, *by an armed force from the Province of Upper Canada.*" "*The General Government is intrusted with the maintenance of our foreign relations, and will undoubtedly take the necessary steps to redress the wrong and sustain the honor of the country.*" Thus very properly referring the whole subject to the General Government.

The despatch of Sir F. B. Head to Mr. Fox of the 30th January, 1838, contains the following passage, having a reference to the indictment found against Captain Drew and others, for murder in the affair of the destruction of the Caroline: "I cannot but believe that the American Govern-'ment will feel it to be due, no less to their own character than to their re-'lations with Great Britain, to interest themselves in arresting any such 'proceedings. *The act was done by public authority*, in the prosecution of 'a warfare to which this Province was driven by the outrageous aggressions 'of American citizens. *The British nation is to answer for it, and not in-'dividuals* zealously acting in her service."

I will now refer to the views of our Executive of the character of the outrage, as exhibited in the correspondence with the British Government and in Executive communications to Congress.

The message of the President of the 8th January, 1838, communicates a letter from Mr. Forsyth to Mr. Fox of the 5th January, enclosing the affidavit of the commander of the Caroline, detailing the circumstances of her destruction. The affidavit states "that this deponent has no doubt *that the individuals who boarded the Caroline were a part of the British forces now stationed at Chippewa.*" Mr. Forsyth, in his letter to Mr. Fox, very properly omits to charge the act as having been done by order of the British authorities, leaving it to Mr. Fox to avow or disavow that character of the transaction. He merely characterises it as "an extraordinary outrage *committed from Her Majesty's Province of Upper Canada*, on the persons and property *of citizens of the United States* within the jurisdiction of the State of New York," adding: "*It will necessarily form the subject of a demand for redress upon her Majesty's Government.*" The message, however, gives it a more national character. It imputes it to the *troops of the Province*, and denominates it a *hostile invasion.*

"In the highly excited state of feeling on the Northern frontier, occasioned by the disturbances in Canada, it was to be apprehended that causes of complaint might arise on the line dividing the United States from Her Britannic Majesty's dominions. Every precaution was, therefore, taken on our part, authorized by the existing laws; and, as *the troops of the Provinces* were

embodied on the Canadian side, it was hoped that no serious *violation of the rights of the United States* would be permitted or occur. I regret, *however*, to inform you that an outrage of a most aggravated character has been committed, accompanied by *a hostile*, though temporary, *invasion of our territory*," &c.

He also informs Congress that the proper steps had been taken "*preparatory to a demand for reparation.*" It is evident, from the letter of Mr. Forsyth and the message, that it was not the intention of either directly to make the charge that the act was done by public authority ; but to lay the foundation for a demand for redress, the character of which should depend on the character Mr. Fox should give to the transaction.

It may be here proper to inquire on what ground was the Executive of the United States authorized to demand redress ? If the outrage be considered as the mere act of individuals, acting upon their own responsibility, it was, whether committed by foreigners or citizens, a mere violation of the laws of the State of New York ; the burning of the Caroline and the homicide of Durfee were simple felonies, committed within the jurisdiction of that State, and for which the perpetrators were amenable to its tribunals only. As the mere act of individuals, it was no infraction of the laws of nations ; no invasion of the territory ; no violation of the sovereignty of the United States ; no act that compromitted the peaceful relations between the two nations ; it formed no ground for the interposition of the Executive of the United States, other than to demand the perpetrators as fugitives from justice. It is only as the act of the public authorities of Upper Canada, for which the British nation is responsible, that it becomes a violation of the laws of nations—a hostile invasion of the territory, and an unwarrantable violation of the sovereignty of the United States—that totally merges the individual character of the transaction ; excludes the jurisdiction of the State, and transfers to the General Government the whole cognizance of the subject—that constitutes it a national concern, and devolves upon it the power and the duty to seek and to compel redress.

Mr. Fox, in his reply of the 6th of February, 1838, distinctly avows that the destruction of the Caroline was the act of the constituted authorities of Upper Canada. He communicates a despacth from Sir Francis B. Head of the 8th of January, in which he states that Colonel McNab was the commander of the forces of Her Majesty for the defence of the Province ; that—

"On the 28th of December, positive information was given to Colonel McNab, by persons from Buffalo, that a small steamboat called the Caroline, of about fifty tons burden, had been hired by the pirates, who called themselves '*patriots*,' and was to be employed in carrying down cannon and other stores, and in transporting men and any thing else that might be required between Fort Schlosser and Navy Island. He resolved, if she came down and engaged in this service, to take or destroy her. She did come down, agreeably to the information he received ; she transported a piece of artillery and other stores to the island, and made repeated passages between the island and the main shore. In the night he sent a party of militia in boats with orders to take or destroy her. They proceeded to execute the order. They found the Caroline moored to the wharf opposite to the inn at Fort Schlosser. In the inn there was a guard of armed men to protect her—part of the pirate force, or acting in their support ; on her deck was an armed party, and a sentinel, who demanded the countersign. Thus identified, as she was, with the force which, in defiance of the law of nations and every principle of national justice, had invaded Upper Canada, and made war upon its unoffending inhabitants, she was boarded ; and, after a resistance, in which some desperate wounds were inflicted upon the assailants, she was carried."

And he proceeds to state the grounds on which he approved the act :

"The officers of the Government of the United States and of the State of New York have attempted to arrest these proceedings, and to control their citizens, but they have failed. Although this piratical assemblage are thus defying the civil authorities of both countries, Upper Canada is alone the object of their hostilities. The Government of the United States has failed to enforce its authority, by any means, civil or military ; and the single question (if it be a question) is,

whether Upper Canada was bound to refrain from necessary acts of self-defence against a people whom their own Government either could not or would not control!"

Mr. Fox, in communicating this despatch, relies on the facts stated in it, as a complete justification of the act. "The piratical character of the "steamboat 'Caroline,' and the necessity of self-defence and self-preser- "vation, under which Her Majesty's subject acted in destroying that ves- "sel, would seem to be sufficiently established." These extracts are recited solely for the purpose of showing that, on the 6th February, 1838, Mr. Fox officially informed our Government that the Caroline was destroyed under the immediate order of the military authorities of Her Majesty in Upper Canada; that the Governor of the Province approved the act, and that Mr. Fox, as the representative of the British Government, adopted the act; and, though acting without immediate instructions, attempted to justify it.

By this avowal, a responsibility was cast upon the British Government to make reparation for the outrage, unless shown to be justifiable, even though the conduct of Colonel McNab should have been disapproved. It was the act of its constituted authorities, for which it was responsible. This ground was taken by the Executive in its further communications with that Government.

Mr. Forsyth, in his reply of the 13th February, denies the correctness of the facts and the conclusion stated by Mr. Fox; and again states that a demand will be made on the British Government for redress.

"The statement of the facts which these papers" (the despatches of Sir Francis Head) "pri- sent, is at variance with the information communicated to this Government respecting that transaction; but it is not intended to enter at present upon an examination of the details of the case, as steps have been taken to obtain the fullest evidence that can be had of the particulars of the outrage, upon the receipt of which *it will be made the subject of a formal complaint to the British Government for redress.* Even admitting that the documents transmitted with your note contain a correct statement of the occurrence, they furnish no justification for the aggression committed upon the territory of the United States."

Mr. Fox, in his answer of the 16th February, refers the further consideration to his Government.

"Although I cannot acquiesce in the view which the United States Government are diposed to take of the facts connected with that transaction," (the destruction of the Caroline,) "yet, as this legation is not the final authority competent to decide the question on the part of Great Britain, *and as you inform me that a representation will in due time be addressed to Her Majesty's Government in England, I consider it most consistent with my duty to avoid entering at present into any controversy upon the subject.*"

Thus the further negotiation of the subject was transferred from Washington to London.

On the 22d May, 1838, Mr. Stevenson, in obedience to instructions from his Government, presented to Lord Palmerston a formal demand for redress for the outrage, including both the destruction of the Caroline and the homicide of Durfee; an outrage which he affirms was committed by the *constituted authorities* of Upper Canada. "Indeed, at the very moment 'when the Lieutenant Governor of Upper Canada was declaring to the 'provincial Parliament his confidence in the disposition of the American 'Government to prevent its citizens in engaging in the contest that was 'then raging, and was waiting for replies from the Governor of New York 'and Her Majesty's minister at Washington, with whom he had communi- 'cated, *this outrage was, with his knowledge and approbation, planned 'and executed.*"

Referring to the outrage as thus planned and executed, he declares it to be "*a manifest act of hostile and daring aggression upon its*" (the Gov-

'ernment of the United States) "*rights and sovereignty, utterly incon-*
'*sistent with all the principles of national law, and wholly irreconci-*
'*lable with the friendly and peaceful relations of the two countries;*"
"*one of an open and admitted invasion of the territory and sovereignty*
'of an independent nation BY THE ARMED FORCES OF A FRIENDLY POWER,
'*and the destruction of the lives and property of its citizens, not less in-*
'*jurious to the character and interests of Her Majesty's Government*
'*than those of the United States,*" and "*one of open, undisguised, and*
'*unwarrantable hostility.*" And for the outrage, characterized as an act of hostility against the United States, committed by "THE FORCES OF A FRIENDLY POWER," in violation of the law of nations, planned and executed with the knowledge and approbation of its constituted authorities, he proceeds to demand reparation. "*The evidence having been obtained*
'*and transmitted to the President, he has, after full consideration, and*
'*under a deep sense of what was due as well to the Government of the*
'*United States as that of Her Majesty, deemed the proceeding a fit one*
'*for the demand of reparation.*" At the close of the communication he says: "*The undersigned has therefore been instructed to invite the*
'*early attention of Her Majesty's Government to the subject, and, in*
'*appealing to its sense of honor, justice, and magnanimity, to express the*
'*confident expectation of the President that the whole proceeding will not*
'*only be* DISAVOWED *and* DISAPPROVED, *but that such redress as the nature*
'*of the case obviously requires will be promptly made.*"

No answer has been made to this demand; nor does it seem to have been pressed upon the attention of the British Government with much earnestness. It appears by an extract of a letter from Mr. Stevenson, of the 2d July, 1839, no reply up to that date had been then given or was soon expected. "*I regret to say that no answer has yet been given to*
'*my note in the case of the 'Caroline.' I have not deemed it proper,*
'*under the circumstances, to press the subject, without further instruc-*
'*tions from your department. If it is the wish of the Government that*
'*I should do so, I pray to be informed of it, and the degree of urgency I*
'*am to adopt.*" Mr. Forsyth, under date of the 11th September, replies:
"*with reference to the closing paragraph of your communication, dated*
'*the 2d July last,* (No. 74,) *it is proper to inform you that no instructions*
'*are at present required for again bringing forward the question of the*
"*Caroline.*" *I have had frequent conversations with Mr. Fox in re-*
'*gard to this subject, one of very recent date; and from its tone the Presi-*
'*dent expects the British Government will answer your application in*
'*the case without much further delay.*"

Such was the quiescent state of the negotiation on the 12th November, 1840, when Alexander McLeod, a British subject, alleged to have been a private soldier in the detachment of Her Majesty's forces that destroyed the Caroline, was arrested on a charge of arson and murder, as having been engaged in the destruction of the Caroline and in the homicide of Durfee.

Thus, after the lapse of three years—after the Executive of the State of New York had referred the outrage to the charge and jurisdiction of the Federal authorities—after the jurisdiction had been undertaken and negotiations entered upon, and while these negotiations were pending between the two Governments, the State of New York has attempted to assume jurisdiction over the controversy, and to take the justice of the nation into her own hands.

Mr. Fox, in his letter to Mr. Forsyth of the 13th December, 1840, after stating the fact of the arrest and imprisonment of McLeod, demands his release on the ground that the destruction of the Caroline was the public act of persons obeying the constituted authorities of Her Majesty's province. "*I feel it my duty to call upon the Government of the United 'States to take prompt and effectual steps for the liberation of Mr. Mc-'Leod. It is well known that the destruction of the steamboat 'Caro-'line' was a public act of persons in Her Majesty's service, obeying the 'order of their superior authorities. That act, therefore, according to the 'usages of nations, can only be made the subject of discussion between 'the two national Governments. It cannot justly be made the ground 'of legal proceedings in the United States against the individuals con-'cerned, who were bound to obey the authorities appointed by their own 'Government.*"

Mr. Forsyth, in his reply of the 26th December, denies the correctness of the principle on which Mr. Fox claims the liberation of McLeod, and also the authority of the Executive to interfere.

"The jurisdiction of the several States which constitute the Union is, within its appropriate sphere, perfectly independent of the Federal Government. The offence with which Mr. McLeod is charged, was committed within the territory and against the laws and citizens of the State of New York, and is one that comes clearly within the competency of her tribunals. It does not, therefore, present an occasion where, under the constitution and laws of the Union, the interposition called for would be proper, or for which a warrant can be found in the powers with which the Federal Executive is invested. Nor would the circumstances to which you have referred, or the reasons you have urged, justify the exertion of such a power, if it existed. The transaction out of which the question arises, presents the case of a most unjustifiable invasion, in time of peace, of a portion of the territory of the United States, by a band of armed men from the adjacent territory of Canada; the forcible capture by them, within our own waters, and the subsequent destruction, of a steamboat, the property of a citizen of the United States, and the murder of one or more American citizens. If arrested at the time, the offenders might unquestionably have been brought to justice by the judicial authorities of the State within whose acknowledged territory these crimes were committed; and their subsequent voluntary entrance within that territory places them in the same situation. *The President is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the legal tribunals, when coming voluntarily within their independent and undoubted jurisdiction, because they acted in obedience to their superior authorities, or because their acts have become the subject of diplomatic discussion between the two Governments.* These methods of redress—the legal prosecution of the offenders, and the application to their Government for satisfaction—are independent of each other, and may be separately and simultaneously pursued. The avowal or justification of the outrage by the British authorities might be a ground of complaint with the Government of the United States, distinct from the violation of the territory and laws of the State of New York. The application of the Government of the Union to that of Great Britain, for the redress of an authorized outrage of the peace, dignity, and rights of the United States, cannot deprive the State of New York of her undoubted right of vindicating, through the exercise of her judicial power, the property and lives of her citizens. You have very properly regarded the alleged absence of Mr. McLeod from the scene of the offence at the time when it was committed as not material to the decision of the present question. That is a matter to be decided by legal evidence; and the sincere desire of the President is, that it may be satisfactorily established. If the destruction of the Caroline was a public act of persons in Her Majesty's service, obeying the order of their superior authorities, this fact has not been before communicated to the Government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offence with which Mr. McLeod is charged, to decide upon its validity, when legally established before it."

I do not understand in what sense the last assertion of Mr. Forsyth is to be taken, as the fact that the Caroline was destroyed by the order of Col. McNab, commanding Her Majesty's forces, approved by Sir Francis Head, was distinctly communicated to Mr. Forsyth by Mr. Fox in his letter of the 6th February, 1838, and which was one of the grounds on which the demand for redress is founded.

McLeod was indicted for the murder of Durfee, and on the 12th March,

1841, the British Government made a *second demand* for the release o McLeod. Mr. Fox, after referring to the former correspondence, proceeds:

"And the undersigned is directed, in the first place, to make known to the Government of the United States that Her Majesty's Government entirely approve of the course pursued by the undersigned in that correspondence, and of the language adopted by him in the official letter above-mentioned." "And the undersigned is now instructed again to demand from the Government of the United States, formally, in the name of the British Government, the immediate release of Mr. Alexander McLeod." "The grounds upon which the British Government make this demand upon the Government of the United States are these: That the transaction on account of which McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of Her Majesty's territories and for the protection of Her Majesty's subjects; and, that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

After referring to the views of Mr. Forsyth, he adds:

"But, be that as it may, Her Majesty's Government formally demanded, upon the grounds already stated, the immediate release of Mr. McLeod; and Her Majesty's Government entreat the President of the United States to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of this demand."

Mr. Webster, in his reply of the 24th of April, puts a construction on the demand and proposes a course to be pursued for the liberation of McLeod, which, not being objected to by Mr. Fox, are to be considered as satisfactory, viz:

"The President is not certain that he understands, precisely, the meaning intended by Her Majesty's Government to be conveyed by the foregoing instruction.

"This doubt has occasioned, with the President, some hesitation; but he inclines to take it for granted that the main purpose of the instruction was, to cause it to be signified to the Government of the United States, that the attack on the steamboat "Caroline" was an act of public force, done by the British colonial authorities, and fully recognised by the Queen's Government at home; and that, consequently, no individual concerned in that transaction can, according to the just principle of the laws of nations, be held personally answerable in the ordinary courts of law, as for a private offence; and that upon this avowal of Her Majesty's Government, Alexander McLeod, now imprisoned on an indictment for murder, alleged to have been committed in that attack, ought to be released, by such proceedings as are usual and are suitable to the case.

"The President adopts the conclusion, that nothing more than this could have been intended to be expressed, from the consideration, that Her Majesty's Government must be fully aware, that in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the undersigned supposes, can the arm of the Executive power interfere, directly or forcibly, to release or deliver the prisoner. His discharge must be sought in a manner conformable to the principles of law, and the proceedings of courts of judicature. If an indictment, like that which has been found against Alexander McLeod, and under circumstances like those which belong to his case, were pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi*, or that the prisoner might cause himself to be brought up on *habeas corpus*, and discharged, if his ground of discharge should be adjudged sufficient, or that he might prove the same facts and insist on the same defence or exemption on his trial.

"All these are legal modes of proceeding, well known to the laws and practice of both countries. But the undersigned does not suppose, that if such a case were to arise in England, the power of the Executive Government could be exerted in any more direct manner. Even in the case of ambassadors and other public ministers, whose right of exemption from arrest is personal, requiring no fact to be ascertained but the mere fact of diplomatic character, and to arrest whom is sometimes made a highly penal offence, if the arrest be actually made, it must be discharged by application to the courts of law.

"It is understood that Alexander McLeod is holden as well on civil as on criminal process, for acts alleged to have been done by him in the attack on the "Caroline;" and his defence, or ground of acquittal, must be the same in both cases. And this strongly illustrates, as the undersigned conceives, the propriety of the foregoing observations; since it is quite clear that the Executive Government cannot interfere to arrest a civil suit, between private parties, in any stage of its progress; but that such suit must go on to its regular judicial termination. If, therefore, any course, different from such as have been now mentioned, was in contemplation of Her Majesty's Government, something would seem to have been expected from the Government of the

United States, as little conformable to the laws and usages of the English Government as to those of the United States, and to which this Government cannot accede.

"The Government of the United States, therefore, acting upon the presumption, which it readily adopted, that nothing extraordinary or unusual was expected or requested of it, decided on the reception of Mr. Fox's note, to take such measures as the occasion and its own duty appeared to require."

* * * * * * * * *

"The communication of the fact that the destruction of the "Caroline" was an act of public force by the British authorities, being formally made to the Government of the United States by Mr. Fox's note, the case assumes a decided aspect.

"The Government of the United States entertains no doubt that, after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the Government itself.

"Soon after the date of Mr. Fox's note, an instruction was given to the Attorney General of the United States, from this Department, by direction of the President, which fully sets forth the opinions of this Government on the subject of McLeod's imprisonment, a copy of which instruction the undersigned has the honor herewith to enclose.

"The indictment against McLeod is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this Government.

"He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized States is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

"This Department has been regularly informed by his excellency the Governor of the State of New York, that the chief justice of that State was assigned to preside at the hearing and trial of McLeod's case, but that, owing to some error or mistake in the process of summoning the jury, the hearing was necessarily deferred. The President regrets this occurrence, as he has a desire for a speedy disposition of the subject. The counsel for McLeod have requested authentic evidence of the avowal by the British Government of the attack on and destruction of the "Caroline," as acts done under its authority, and such evidence will be furnished to them by this Department.

"It is understood that the indictment has been removed into the supreme court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

"The undersigned hardly needs to assure Mr. Fox, that a tribunal so eminently distinguished for ability and learning as the supreme court of the State of New York, may be safely relied upon for the just and impartial administration of the law in this as well as in other cases; and the undersigned repeats the expression of the desire of this Government that no delay may be suffered to take place in these proceedings which can be avoided. Of this desire, Mr. Fox will see evidence in the instructions above referred to."

It is not perceived that the *position* of the question between the two Governments has been materially changed by the note of Mr. Fox to Mr. Webster. Mr. Fox, as the representative of his Government, presumed, and by Mr. Forsyth was admitted, to be authorized to make the "*admission*," (acting, however, without express instructions) communicated to Mr. Forsyth the fact that the destruction of the "Caroline" was an act of public force, &c., and on that account demanded the release of McLeod. In his note to Mr. Webster, he communicates the same *fact*, and makes the same demand, acting under express instructions from his Government. It is not, then, perceived that the position of the question is changed, though it may have assumed a more "decided aspect."

The question itself, however, has been changed, though but in a single point only. Mr. Forsyth denied the impunity claimed. Mr. Webster admits it. But both are agreed that McLeod can be liberated only by due course of law.

The case, as now settled by the correspondence between the two Governments, and in which both are agreed, is this: The destruction of the

"Caroline," with all its incidents, was an act of public force—planned and executed by her Majesty's colonial authorities of Upper Canada; as such, avowed to the Government of the United States by those authorities, and by Her Majesty's Government; and for which, as thus avowed, the Government of the United States have formally demanded redress of her Majesty's Government. That demand is yet the subject of negotiation between the two Governments. McLeod, a British subject, a private in her Majesty's forces, having been engaged in that transaction, has been arrested and indicted for the alleged murder of Durfee, killed in the attack on the "Caroline," within the limits of the State of New York, and is now imprisoned and held for trial before the judicial tribunals of that State. Her Majesty's Government has formally demanded his release. And it is agreed by the two Governments that he is not, by the laws of nations and the general usagd of civilized States, personally responsible in the judicial tribunals of the State of New York for his alleged participation in the attack on the "Caroline," and ought to be discharged from his imprisonment *by due course of law*. Such is the case made by the two Governments, and conclusively proved by the records of the Department of State.

For the purpose of effecting his discharge, McLeod was brought before the Supreme Court of the State of New York by a writ of *habeas corpus*. The case was argued in May, and in July the court decided that he ought not to be discharged, and remanded him for trial on the indictment.

This decision is in direct conflict with the law of nations as settled in the case made by the two Governments.

The acts of the constituted authorities of a State are the acts of the State. This decision is, then, the act of the State of New York. For the acts of States, as well as individuals, both being constituents of the National Government, so far forth as they are in violation of the law of nations, and affect other nations, the United States are responsible.—[14 Peters, 573.]

The case now presents a question of conflict of jurisdiction between the United States and the State of New York—a question of the gravest character in its principles and in its consequences. The United States have become responsible for the personal safety of McLeod. If the act of the State of New York is sustained, then the responsibility of the United States depends not on their own acts, but the acts of the State of New York; and that State may compromit the peace of the nation. In this view, as well as in view of the respect due to the State of New York as a member of the Union, and to the high character of its judicial tribunals, the subject demands the most attentive examination and serious consideration of this House and of the country.

The question before the court was a question of jurisdiction solely. Have the judicial tribunals of New York, after the case made by the United States and Great Britain, jurisdiction to try, condemn, and execute McLeod for the offence charged? There was no question *en pais*—no fact to be ascertained by a jury. The whole case was made and conclusively proved by the records of the Department of State. The question was to be decided on that record alone.

By several grants of powers in the Constitution, all power relating to intercourse with foreign nations is vested, and exclusively vested, in the National Government. The nomination of ambassadors and negotiations are committed to the President; the power to make treaties to the President and the Senate; and the powers to regulate commerce with foreign nations, to define and punish offences against the law of nations, and to declare

war, are committed to Congress, and to the judiciary, the jurisdiction over all cases arising under the Constitution, the laws of the United States, and treaties, &c. In relation to treaties, the power of the States is expressly excluded; and, in relation to the other powers, by necessary intendment. [14 Peters, 570.] "The framers of the Constitution manifestly believed that any intercourse between a State and a foreign nation was dangerous to the Union." [Ibid. 574.] "But if there was no prohibition to the States, yet the exercise of such a power on their part is inconsistent with the power upon the same subject on the United States;" and "where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, then the authority of the Federal Government is necessarily exclusive; and the same power cannot be constitutionally exercised by the States." [575.] "Every part of the Constitution shows that our whole foreign intercourse was intended to be committed to the hand of the General Government." [575.] And "it may be safely assumed that the *recognition and enforcement* of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the General Government." [560.] "Every thing that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the Federal Government." [570.] Over all subjects thus exclusively confided to the General Gevernment, their acts must be binding on all constituents of the Union—on States and on individuals. And of their acts their records are not only conclusive evidence, but the only evidence. These principles are applicable to the case of McLeod. The act complained of was a violation of the law of nations—the proper subject for adjustment by treaty; to that end negotiations were entered into; the relations between the two nations defined; facts and principles stated and admitted. These acts are the acts of the constituted authorities of the nation, having exclusive jurisdiction of this subject—the acts of the nation; and of these acts the records of the Government are conclusive evidence.

It is, then, a question of jurisdiction, depending solely on the evidence of the records of the General Government. If that jurisdiction be exclusively vested in the United States, McLeod cannot be amenable in the judicial tribunals of New York.

The conflict of jurisdiction becomes of vital importance in view of the due administration of the powers of the General and State Governments. The jurisdiction of the one, over all matters confided to it, is supreme and exclusive of the other. The discussion by negotiation, and the determination by treaty or by war, of all questions growing out of our relations and intercourse with foreign nations, are confided to the General Government. Touching all such questions, the jurisdiction of the judicial tribunals of the States is superseded. A State, to every purpose supreme, acts through its judiciary as well as through its Executive. The acts of each are the acts of the nation, for which it is responsible to foreign nations, so far as they may be a violation of the laws of nations or of treaties. If, then, the jurisdiction of such questions belongs exclusively to the General Government, and for which the nation is responsible, the interference of the judicial tribunals would not only be an assumption of power, but would make the United States responsible to foreign nations for the acts of every State over which they have no control.

The decision of the court rests on two grounds: *first*, that the court had no power to discharge McLeod, because he had been *indicted* by the

grand jury for murder; *second*, because, in their opinion, he was personally responsible for the homicide of Durfee—the proceedings of the two national Governments to the contrary notwithstanding.

I shall now proceed to examine the grounds of the decision of the court. The second, being the principal ground, and the only one involving principles of public law, the first will be disposed of in a few words: remarking, however, that the question did not rest on the grounds taken by the court, but on the question of jurisdiction only, which will be examined on the second branch.

First. That McLeod cannot be discharged upon *habeas corpus*, because *the grand jury have indicted him for murder.*

On this part of the case I have drawn largely on an article from the pen of an able jurist, in the New York Star of the 26th July.

The opinion of the court correctly adopts the principle that in a case where a person cannot be admitted to bail he cannot be discharged *on habeas corpus;* but incorrectly assumes the principle that a person indicted for murder cannot, *under any circumstances,* be admitted to bail or be discharged on *habeas corpus.* Though the court were not aware that this principle had been ever departed from in practice under the English *habeas corpus* act, yet there are cases of such departure, and from which principles may be deduced in accordance with the first principles of justice and humanity and the common sense of all mankind—principles which would not only authorize as a matter of discretion, but require as a matter of right, the discharge of McLeod. The article mentioned refers to the following authorities:

3 Bacon Abr. 436, title, Habeas Corpus.—"Also the court will sometimes examine by affidavit the circumstances on which a prisoner brought before them by an *habeas corpus* hath been *indicted,* in order to inform themselves, on an examination of the whole matter, *whether it be reasonable to bail him or not.* And agreeably hereto, one Jackson, (4 Geo. iii.) who had been *indicted* for *piracy,* brought his habeas corpus in the said court in order to be *discharged* or *bailed. The court examined the whole circumstances of the fact by affidavit;* upon which it appeared the prosecutor himself, if any one, was guilty, and carried on the present prosecution to screen himself; and thereupon the court, in consideration of the unreasonableness of the prosecution and the uncertainty of the time when another of admiralty might be held, *admitted the said Jackson to bail.*"

Bac. Abr. 35, title, Bail in Civil Cases. "So if a man be *convicted* of felony, upon evidence by which it plainly appears to the court he *is not guilty of it,*" he will be let to bail.

5. Mod. In Kirk's case the principle was admitted, though bail was refused.

1. Sal. 104. J. S. being committed on an *indictment for murder,* moved to be bailed; Rokeby and Tuston were for bailing him, *because* the evidence upon the affidavits read did not seem to them *sufficient to prove him guilty.* Holt, C. J. and Gould contra. The evidence does affect him, and that is enough, &c.

2. Str. 911. Rex *vs.* Dalton. In this case, the case of Lord Mohun, cited in the opinion of the court, is referred to. The Chief Justice said "that Lord Mohun's case was at Lord Holt's chambers, and not in court, as the books report it, *and that the lords* bailed him after indictment for murder was found."

"In Rex *vs.* Acton. 2 Str. 851, (as cited by the court.) The prisoner

had been tried for murder and acquitted; afterwards a single justice of the peace issued a warrant charging him with *the same murder*, upon which he was again committed. On an offer to show the former acquittal in the clearest manner, the court refused the proof. On this case the court, says Mr. Chitty, laid down the rule that the court will not look into extrinsic evidence at all. This case is misstated. It was not a committal for *the same* offence, but for *another offence.*"

The sensible rule on the subject of bail or discharge, after indictment for murder, is for the court to refuse bail or discharge upon proof *that is susceptible of being contravened.* When, however, the evidence is of that certain and positive character that it cannot be *gainsaid*—whether it show the innocence of the prisoner, or that the court have no jurisdiction of the offence, as a former acquittal—producing the person alleged to have been murdered, alive—showing that the homicide was committed in battle in time of war, or on the high seas, or in a foreign country; in each case proved by evidence that could not be *gainsaid.*

In the present case, the evidence is the records of the Department of State—conclusive to every intent and purpose.

It is not necessary to pursue this branch of the subject further, as, on the second ground, the court decided against the immunity claimed by McLeod, in whatever manner or form it might be presented—whether on habeas corpus—by plea—or as evidence on the trial by jury.

The question now presented is, between the United States and the State of New York, whether, on the case stated, McLeod is amenable to the judicial tribunal of that State, or exempted from all personal responsibility whatever?

The question depends on the laws of nations—laws arising from the relations of nations—founded on principles best calculated to secure justice, to promote humanity, and to preserve peace among nations. In other words, these laws of nations are the principles of natural justice applied to nations. The evidence of those laws is to be found in the usages of nations, treatises of public jurists, and, in new cases, in the general principles of justice and humanity.

The first and obvious reflection is, the gross and manifest inhumanity, and even barbarity, of punishing a private soldier for an act done under the immedate command of his superior officer, whom, at the peril of life, he is bound to obey. The soldier has no will of his own:—he cannot question or even know the source from which the authority of his officer proceeds, much less its validity; his only duty is implicit obedience; while he obeys, his will has no free agency. He is, in the hands of his officer, as passive as is his musket in his own hands: he kills without malice and without crime. The guilt, if any, rests on those above him. You protect the wife who acts in obedience to the command of the husband, and execute the soldier who acts in obedience to a command which he is bound to obey. The place where the act is done can make no difference. The soldier cannot judge of the relations of nations; he cannot know whether war be legal or illegal when it exists—whether his act is a violation of the laws of nations—he cannot judge of the rights of neutral nations; he is bound to go wheresoever, and to do whatsoever, he is commanded *in the line of military duty to do;* and in whatever he so shall do, he is, by the usage of civilized nations, protected from personal responsibility. Savage nations may make slaves of the captive or burn him at the stake; but it is believed that, among civilized nations, no instance can be found of

taking personal vengeance on a soldier for any act done by the command of his superior officer—especially when the command was authorized by the constituted authority, however much that command may have been in itself a violation of the law of nations. What, it may be repeated, can the soldier know of the law of nations? His only law is the law of obedience. The decision of the court, then, is contrary to the first principles of humanity and justice.

When, to the act of McLeod, done in obedience to the command of his superior officer, is added that the command emanated from the commander-in-chief, and has been avowed as such by the sovereign of his nation, every principle not only of humanity and justice, but of honor, of national dignity, demands that we pass by the *mere instrument* and place the responsibility *on the nation itself*: that we should look to the nation which assumes the responsibility. The very attempt to seek redress of a private soldier—of Alexander McLeod—is degrading the controversy from a question of the violation of national sovereignty, to a question of personal satisfaction for a felony—utterly inconsistent with the honor and character of a great nation. And we may add, "that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the Government itself."

The attempt to hold McLeod personally responsible, is then opposed to the principles of humanity and justice, to the honor of the nation, and to the feelings of the American People. It is opposed to the laws of nations, as deduced from the admitted duties of all nations. What is the duty of a nation—of every nation—towards its officers and soldiers ordered on a military expedition? The answer is, *protection—protection, at all hazards*. If, then, it be the duty of every nation to protect its military forces, for the execution of its orders, it follows as a consequence that every nation must respect that principle of protection, at all times and at all places. Whatever every nation is bound to do and to respect, is the law of nations. The alternative is war. In this case, the act of McLeod was done in the execution of a military expedition, ordered by the constituted authorities of Upper Canada, and so avowed by the British Government. That Government has assumed it to be its duty to protect McLeod: the State of New York has assumed to punish him as a felon; and, should that State attempt to punish him as a felon, what will be the measure of protection attempted by Great Britain? Any step towards it will either lead to war or be war itself. What should we have done if Spain, after the execution of Ambrister and Arbuthnot, had seized the soldiers who hung them and executed them as felons? The consequences that may flow from this attempt of the State of New York to interfere on a subject belonging to the intercourse between this nation and Great Britain, in violation of the law of nations, strongly illustrates the propriety and necessity of the constitutional submission of all questions relating "*to the recognition and enforcement of the principles of public law to the General Government.*"

It is opposed to the usage of civilized nations. As a general principle, adopted by the usage of nations, *soldiers* and *sailors* are not to be made personally responsible for any act done under the *commission or flag* of the military or naval force of the nation; but for all acts done under either, the nation is responsible. It is believed that no case can be found with-

in the last century in which it has been attempted to depart from this rule—to charge upon an individual the responsibility that rests on his sovereign. The following extract, illustrative of this principle, is taken from Courtenay's Review of Wheaton's Elements of International Law:

"The case of piracy illustrates the customary law of nations, which in this case has been transfused into the municipal law of civilized nations in general. By this, without doubt, the offence technically called piracy is not committed when the Commander of a vessel regularly commissioned by his sovereign, commits a violence on the seas, though *not* commissioned to do that particular act. It is not the personal offence of piracy that is committed, but a public injury is done by one state against another, authorizing remonstrance; and if punishment be not inflicted, or redress obtained, reprisals or war; and this arrangement is probably conducive to peace. If a State extended its protection to its lawless subjects, committing violence out of its local jurisdiction, there would be endless disputes with other States, and probably a great delay of justice: on the other hand, if an officer duly commissioned in war by one State were to be punished by another for exceeding or deviating from the purport of his commission, *the commissioning power could not be expected to rest satisfied with the judgment of the foreign court on the construction or execution of its own commission*, and the dispute which must necessarily occur between the two Powers would be embarrassed by a questionable punishment, in addition to the original cause of complaint.—*British and Foreign Review*, *vol.* 11, *p.* 158.

The opinion of the court is equally opposed to the laws of nations as held by public jurists. The case, as stated by the court, is, "that the Niagara frontier was in a state of war against the contiguous Province of Upper Canada; that the homicide was committed by McLeod, (a British subject) if at all, as one of a military invading expedition to destroy the boat Caroline; that the expedition crossed our boundary, sought the Caroline at her moorings at Schlosser, and there set fire to her and burned her, and killed Durfee, one of our citizens." It is to be understood that Schlosser was on the frontier mentioned, and that Durfee was killed in the attack on the Caroline.

In this statement it is admitted that war in fact then existed between the frontier at Schlosser and Upper Canada; and it follows, as a necessary consequence, that the attack on the Caroline was an act in that war, and in itself an act of war. Yet it is said it must be a public war between Great Britain and the United States. And in support of this is cited 1 Wood's Law of Nations, 294: "Although I am aware there is great *authority to the contrary*, yet it is, on the whole, settled that no *private* hostilities, however general or however just, will constitute what is called a legitimate and public *state* of war." But how can an act of hostility, done by the command of the sovereign, be deemed *private* hostility? And why is it necessary that there should be a public *state* of war? And why, to constitute war, should the agreement of both nations be necessary? And, lastly, if there be public war in fact, why should inquiry be made into its legitimacy, for the purpose of determining *the responsibility of a soldier* acting under the order of his sovereign?

The next case cited by the court (1 Bl. Com., 267) shows clearly what is meant by acts of *private* hostility, viz: acts done without the authority of the sovereign. "So far, indeed, has my Lord Coke carried the point, that he holds if *all* the subjects of the King were to make war upon another country in league with it, it would be no breach of the league between the two countries." But how would the case stand if the King should order but a single regiment to attack that other country—to burn a city? The act would be an act of public war; though, if it were but a single act, it might not constitute a public *state* of war: it would not be the less an act of war because it was not preceded by a declaration of war, or because the war was not at the time mutually recognised by both Governments.

The next position is, that to constitute a public war, the act of hostility must be against *the nation* and not against a portion, a part only, though that part only were at war. But the United States complain of the act as an act of hostility against the nation. And this is the ground and gravamen of the complaint. If it be admitted, as stated by the court, that the frontier at Schlosser was then at war with Upper Canada, and so being at war that the attack on the Caroline was only an attack on the enemy, and not a hostile invasion of the territory and sovereignty of the United States, what is this but a full justification of the act, and of all concerned? And, in any view, what has this to do with the personal responsibilities of a *private soldier?* Against whomsoever the act of hostility was directed, it was still an act done by the commands of the sovereign. In the first instance, it was done by the constituted authorities of Upper Canada, and that order has since been acknowledged by the Crown. The effect is the same as if it had been done under a Royal order. Either, however, would be a sufficient authority for the protection of McLeod.

The next position of the court is, that "to warrant the destruction of 'property or the taking of life on the ground of public war, it must be 'what is called '*lawful war*,' by the law of nations a thing which can 'never exist without the *actual concurrence of the war-making power*, 'which on the part of the United States is *Congress*, and on the part of 'England the *Queen*;" which, as is admitted, "may be publicly declared or carried on by *commission*, such as letters of marque, *military orders*, or any *other authority emanating from the Executive.*" But what is *lawful* war? It does not relate to the *cause* of war, but to the object and to the authority by which it is undertaken. By the term lawful war is not meant a *solemn* and *formal* war only, but comprehends every description of war, except hostile expeditions set on foot for the purpose of *plunder and pillage without any apparent just cause.* And the reason why these, when carried on by the authority of the sovereign, are said to be *unlawful* wars, is, that such nations are considered *as barbarian* and not within the pale of the law of nations applicable to the civilized world. Such are the Corsair wars of Africa nor do any of the examples cited apply to civilized nations.

Rutherford, B. ii, 9, § 10. "If one nation seize the goods of another nation by force upon account of some damage, &c., such contentions by force are *reprisals.* There may be likewise other *acts of hostility* between two nations which do not properly come under the name of *reprisals*: such as besieging each other's towns, or the sinking each other's fleets, *whilst the nations are, in other respects, at peace with one another. These are public wars;* because *nations* are the contending parties. But, as they are confined to some *particular object*, they are of the imperfect sort," &c. Vattel, B. iii, c. 4, §67. "A war lawful and in form, is carefully to be distinguished from an unlawful war entered into without any form, or rather, *from* those incursions which are committed either *without lawful authority*, or *apparent cause*, as likewise without formalities, *and only for havoc and pillage.* Grotius, B. iii, c. 3, relates several instances of the latter: such were wars of the *Grandes campagnies* which had assembled in France during the wars with the English; armies of banditti which ranged about Europe *purely* for *spoil and plunder:* such were the cruises of the Filbustiers, without commissions, in time of peace; and such, in general, are the depredations of pirates: to the same class belong almost all the expeditions of the African corsairs, though au-

thorized by a sovereign, they being founded on *no apparent just cause*, and whose *sole motive is the avidity of capture.* I say these *two sorts* of wars, *lawful* and *unlawful*, are to be carefully distinguished; *their effects, and the rights arising from them*, being very different."

Thus Vattel divides all the hostile collisions of nations into "*two sorts of wars;*" the one *without apparent just cause* and for *havoc* and pillage; and all that do not come under this head being of the other sort. The first he calls *unlawful* war, the second *lawful* war. Admitting, for the sake of the argument, that this authority, in its fullest extent, applies to the hostile acts of civilized nations, what, it is asked, is the impunity which belongs to soldiers engaged in *lawful* war, by the command of the sovereign? Vattel, B. iii, ch. 5, § 187, speaking of a war, which is *unjust* on the part of the sovereign who makes it, but *lawful* because not undertaken without *apparent just cause* and for *havoc* and pillage, says:

"But as to the reparation of any damage, are the *military*, the *general* 'officers and soldiers, obliged in consequence to repair the injuries which 'they have done, not of their *own will*, but as *instruments* in the hands of 'their sovereign?" "It is the duty of subjects to suppose the orders of the 'sovereign just and wise, &c. When, therefore, they have lent their assistance 'if a war which is afterwards found to be unjust, the *sovereign alone* is 'guilty. He alone is bound to repair the injuries. The subjects, and particularly *the military*, are innocent; they have acted only from a *necessary obedience.*" "Government would be impracticable if any one of *its* '*instruments* were to weigh its commands and thoroughly canvass their 'justice before he obeyed them." And B. iii, ch. 4, § 68. "Nothing of all 'this takes place in a war void of form *and unlawful*, more properly called '*robbery*, being undertaken without right—without so much as apparent 'cause. It can be productive of no lawful effect, nor give any right to the 'author of it. A nation attacked by *such sort of enemies*, is not under any 'obligation to observe towards them the rules of war in form, and may treat 'them as robbers."

Thus, we have two sorts of wars, "*lawful*" and "*unlawful*," carried by Vattel to ther consequences.

The same impunity is also maintained by Rutherford—book 2, chap. 9, § 15. "The members of a civil society are obliged in general, and 'those members who have engaged themselves in *the military service* of 'it, are obliged *in particular*, to take up arms to fight for it *at the com*-'*mand* of the *constitutional governors*, in defence and support of its rights 'against its enemies from without." "In consequence of the general con-'sent of mankind to consider nations as collective persons, whatsoever is 'done by the members of a nation at the *command of the public*, or of the 'constitutional governors who speak the sense of the public, is *the act of the* '*nation:* and if the act is unjust, the guilt, in view *of the law of nations*, 'is chargeable on the nation, *and not upon the individual* members." "Grotius confines the external lawfulness of what is done in war, which is 'internally unjust, *to solemn wars only*, where this external *lawfulness* in 'respect to the members of civil society, extends to public wars of the *im*-'*perfect sort*, to acts of reprisals, *and to other acts of hostility.* By giv-'ing the name of public war to reprisals or *other acts* of hostility which fall 'short of solemn wars, I suppose the reprisals to be made, or the ACTS OF 'HOSTILITY to be committed by *the authority* of a nation, though it has not 'solemnly declared war. For if the members of the nation make reprisals 'or commit acts of hostility *without being thus authorized*, they are not

'under the law of nations: as they act separately *by their own will*, so 'they are separately accountable to the nation against which they act." § 18. "The only effect of a declaration of war is, that it makes the war a '*general one*, or a war of one whole nation against another whole na- 'tion: while the *imperfect sorts* of war, such as reprisals or *acts of hos- 'tility*, are *partial*, or are confined to *particular persons or places*." Speaking of public war—"But if, by the parties concerned in the war, we 'mean nations, neither the reason of the thing nor *the common* practice 'of nations, will give them any other *impunity*," "where war has been 'declared, than in the *less solemn* kinds of public war, which are made with- 'out a previous declaration." "For in the less solemn kinds of war, what 'the members do who act under the *particular direction and authority* 'of their nation, is, by *the law of nations*, no personal crime in them: they 'cannot, therefore, be punished, consistently *with this law*, for any act in 'which it considers them only as the *instruments*, and the nation as the 'agent."

These principles apply to the case of McLeod, and entitle him to impunity. The attack on the Caroline was an *act of hostility* against the United States, committed by the *military forces* of Great Britain, acting under the *particular direction* and authority of that nation. The apparent cause of the act of hostility was the apparent hostile attitude of the Caroline. It was undertaken to prevent apprehended danger of further acts of hostility, and not for the purpose of *havoc* and *plunder*. McLeod acted under the immediate *command* of his superior officer, and who acted under the *order* of the constituted authorities. The nation was the *agent*, McLeod the *instrument*.

The passage so often cited from Vattel (b. ii, ch. vi, § 74—76) is applicable only to the acts of individuals, as "assassins, incendiaries, and robbers," and not to acts of hostility of the *public force* by order of the constituted authorities, and avowed by the sovereign. § 73. "However, as it is 'impossible for the best regulated State, or for the most vigilant or absolute 'sovereign, to model at his pleasure the actions of his subjects, and to con- 'fine them, on every occasion, to the most exact obedience, it would be 'unjust to impute to the nation or the sovereign every fault committed by 'the citizens. We ought not, then, to say, in general, that we have re- 'ceived an injury from a nation because we have received it from one of its 'members." § 74. "But if a nation or its chief approves and ratifies the act 'of the individual, it then becomes a *public* concern, (*son propre affaire*,) 'and the injured party is to consider the nation as the *real author* of the 'injury, of which the citizen was perhaps only the *instrument*." § 75. "*If 'the offended State has in her power the individual who has done the in- 'jury, she may without scruple bring him to justice and punish him.* If 'he has escaped and returned to his own country, she ought to apply to 'his sovereign to have *justice done* in the case." *And what justice?* '§ 76. "*To compel the transgressor to make reparation for the damage 'or injury, if possible, or to inflict on him an exemplary punishment; 'or, finally, to deliver him up to the offended State, to be there brought 'to justice.* This is pretty generally observed with respect to great crimes, 'which are equally contrary to the laws and safety of all nations. *Assas- 'sins, incendiaries, and robbers* are seized everywhere, and are delivered 'up to justice."

The British Government made to this Government the avowal that the hostile act was done in obedience to the orders of its constituted authorities

Had the case stopped here McLeod was entitled to the impunity claimed. That avowal was conclusive evidence of the fact to our Government. If contested, it can only be settled by war. That avowal was received by our Government without question of its truth; and, not being questioned, its truth was admitted. The fact avowed is then incontestably established, and the records of the State Department are conclusive evidence; and it is the only evidence admissible in a court of law.

Blackburn *vs.* Thompson, 15 East., 81—90, cited by the court. "That 'it belongs to the Government of the country to determine in what relation, 'of peace or war, any other country stands towards it; and that it would 'be unsafe for courts of justice to take upon them, without that authority, 'to decide upon those relations. But when the Crown has decided upon 'the relations of peace or war, in which another country stands to it, *there* '*is an end of the question.*"

This principle applies to all our relations with foreign nations. For all purpose of negotiation, short of declaring war and making a treaty, the intercourse with foreign nations is committed to the Executive. Its acts are the acts of the nation. The Executives of both nations have agreed that the act of hostility was committed by order of the constituted authorities of Great Britain; and for which that nation alone is responsible. Thus the character of the act is so far settled as to constitute it a subject of controversy between the two nations alone; and of that the record of the Department of State is conclusive evidence.

These principles seem not to have entered into the consideration of the court. Instead of regarding the records of the Department of State as conclusive evidence of the state of our relations with Great Britain on the subject, they seem to have considered the whole as resting *en pais.*

If, by the acts of the two Governments, it was settled that McLeod was not by the law of nations responsible, and under that law that it was the duty of *the nation* to liberate him from his imprisonment, it was the duty of the Executive to endeavor, by all proper means, to obtain his release.

Had the question been pending in the courts of the United States, it would have been within the immediate control of the Executive. He might at once have been liberated by a *nolle prosequi*, or by a pardon. But, being imprisoned under the authority of a State, over which the Executive had no control, all that it could do was, by all proper means, to seek his release in due course of law.

And this it was bound to do. The duty rests on the nation. The detention of McLeod was a violation of the law of nations, and for which, though the act of a State, the nation was responsible. No relations exist between foreign nations and the States for redress of national wrongs, whether from States or individuals. Foreign nations look to the United States alone. Under this responsibility, the Executive was bound to take upon itself the charge of procuring the release of McLeod by recourse to the laws. Being responsible for that release, they were bound to take this case into their own hands.

The proceeding the most expeditious as well as proper, was a writ of habeas corpus before the Supreme Court of New York; and, in case of a refusal to discharge, to carry the case, by a writ of error, to the Supreme Court of Errors of that State, and if necessary, by a writ of error from the judgment of that court, to the Supreme Court of the United States. This was the course proposed.

The defence might also have been made by a plea to the jurisdiction of

the court before which he was to be tried, or given in evidence on the trial before the jury, and carried in like manner to the Supreme Court of the United States.

In either of the three modes, the records of the State Department, as matter of law, would entitle him to a discharge or acquittal.

In attempting his discharge, the Executive was but performing its duty to the nation. In doing which, however, it had no right to proceed against the will of McLeod. If he should choose to submit himself to the jurisdiction of the court, he had a perfect right so to do; and, from the moment he should choose so to do, it is questionable whether this Government would not be discharged from the duty of further proceeding on his behalf, and of all responsibility to the British Government for his personal safety—whether, whatever of harm should thereafter befall him, be not the result of his own voluntary act. It is understood that he has submitted to take his trial, under the confident expectation of an acquittal. Whatever may be the result of the trial, must he not abide it?

I will close these remarks by giving a summary of the principles upon which the case of McLeod and the course pursued by the Administration depend.

The jurisdiction of all questions appertaining to our relations and intercourse with foreign nations, belongs exclusively to the General Government: to the President belongs all negotiation, including the "recognition and enforcement of the law of nations:" to the President, with the advice and consent of the Senate, the final adjustment of all national controversy; and to Congress, the ultimate remedy when negotiations fail, of declaring war. The acts of each branch of the Government are the acts of the nation; and, as the supreme law of the land, binding on the judicial tribunals of the States and of the nation. And of those acts the records of each branch of the Government are conclusive evidence.

That every act of hostility, committed by the public force of a nation, by the command of its constituted authorities, and so avowed by the nation, upon the territory of another nation, whether that act be in itself public and lawful war, or imperfect war, or an act of war of any sort, or a mere act of hostility, it is the act of the nation only; and for which, by the law and usage of nations, the nation alone is responsible That *soldiers*, who are part of that public force, are not personally responsible in any judicial tribunal. And the making them so responsible is a violation of the law of nations, for which the nation itself is responsible. And on the grounds of that responsibility, it was the duty of the Executive to endeavor to procure his release in due course of law; and they have thus far performed their duty.