NATIONAL RIGHTS AND STATE RIGHTS.

A

REVIEW

OF THE CASE OF

ALEXANDER McLEOD;

RECENTLY DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW YORK.

BY A MEMBER OF THE MASSACHUSETTS BAR.

REPRINTED FROM THE LAW REPORTER.

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ADVERTISEMENT.

THE attention of the American people is at length awakened to a just sense of the magnitude of the *national* questions involved in the extraordinary case, which is the subject of the present review, but which, from its appearing in the habiliments of a judicial question and before a judicial tribunal, had not been effectually brought home to the consideration of any other than professional readers. The case is now, however, brought under the cognizance of an intelligent community; who, without looking to the technical formalities that surround purely judicial questions, begin to survey — in their practical bearings upon the peace and welfare of the Union — the merits of the case itself and the extraordinary attitude of an individual State, which is attempting to wield the authority of the *nation*, and indirectly to act upon the gravest public questions which can occur in our relations with foreign powers. The whole country now begins to perceive, that the United States present, to the eyes of all Europe, the remarkable spectacle of a confederacy of states, the people of which have by express compact, and for their "common defence and general welfare," placed the power of conducting their foreign relations in the hands of the general government of *all* the states, of which, nevertheless, one individual state, a party to the compact, now claims to exercise the very powers it had surrendered to the whole. Assuredly, if any occurrence in the history of our nation is calculated to excite the deepest solicitude in the breast of every lover of his country, this is such a case.

In making these remarks we would not be understood as arraigning the motives of the individuals, whether public or private men, who have advised or participated in this extraordinary proceeding. We are not writing a political dissertation on the eve of an election, nor attempting to mislead public opinion by ingeniously quibbling away the *common sense* construction of the federal compact, as it was understood by the people of the country at large, when they adopted that sacred charter of our *national rights*. We only state the fact, and ask the country to ponder well upon the consequences. If the noble fabric of our UNION will ever be in danger of a dissolution,

it will be from the attempt of an individual state to exercise its power over our *foreign relations.* We have had quite enough to excite apprehensions for the fate of the Union in the practical questions, that would naturally result from the doctrines held in some quarters of the country on the subjects of nullification and the protection of American industry; but those questions, vital as they are deemed, are domestic in their character, and would not be likely to disturb our relations with the other nations of the world, to whose community we acknowledge ourselves to belong. But when any one state, and especially one of great strength and resources, shall undertake to exercise powers that will be likely to involve the whole Union in a controversy with any foreign nation, there is incalculably stronger reason for alarm; and such an event must command the deepest attention of the whole country. The first attempt cannot safely be disregarded. "One precedent" says an able statesman, "creates another; they soon accumulate and constitute law. What yesterday was fact, to-day is doctrine. Examples are made to justify the most dangerous measures; and where they do not suit exactly, the defect is supplied by analogy."

Under the most solemn conviction of the importance of the case now pending before the Supreme Court of the great and powerful State of New York — and may she, for the honor and advantage of the Union long remain great and powerful — the following review was drawn up; and it has been the source of no small satisfaction to us to find, that the views we have taken of this great subject, have been sanctioned by the decided opinion of the profession in this part of our country, as well as by our first statesmen in Congress — among whom it will not be deemed invidious to distinguish that eminent and experienced diplomatist, whose authority in this case would be considered paramount — we need not say, that we mean the venerable Ex-President Adams.

The frequent calls, from different quarters of the country, for copies of this review, since the edition of the journal for which it was originally written has been exhausted, have induced the publishers to issue a second edition. The short interval that has elapsed since the original publication, has afforded opportunity to make some slight revisions of the article; a few notes and illustrations have been added, and some corrections made, where it was thought that any ambiguity of language might lead to a misconception of the views intended to be presented. The main ground of argument remains unchanged; and if that cannot be sustained, we are unable to perceive how the fundamental principles of the federal compact can be carried into effect, according to the intentions of the people who adopted it for the security of their *national* as well as state rights.

Boston, September, 1841.

CASE OF ALEXANDER McLEOD.

In our last number we alluded briefly to this great national case, and the extraordinary judgment pronounced in it by the Supreme Court of the state of New York; which, we then thought, as a legal performance, was open to criticism, and, we feared, would not be entirely creditable to the country abroad. We regret to be obliged to say, with all that respect which is due to a high judicial tribunal of a great state of the Union, that a farther examination of the opinion given by the court has not tended to change the views which we then took of it. In regard to foreign nations, we must add, that if their governments had previously any grounds for entertaining a distrust of our state courts in dealing with great questions of *international* law — which, for the most part, lie beyond the sphere of their ordinary action — those governments, we are apprehensive, will not find new inducements, in the present decision, to lead them to place any greater confidence in those local tribunals, than heretofore. Even considering our state courts as tribunals administering the comparatively insignificant regulations of common municipal law, what estimate will English lawyers be likely to form of the legal learning of our highest state courts, and what confidence will they place in that learning, when they find a court of that rank, in reviewing the catalogue of principal cases respecting admission to bail, to be apparently quite uninformed of a well known law authority, in which a case of that description is reported?

The New York court, in the case before them, after observing, that Petersdorf, in his work on Bail, refers to Chitty, and that this latter cites "*Cases K. B.* 96," gravely remark — "this book, eo nomine, *does not appear now to be extant;* and 12 Mod., the only reference I am aware of, which among the English quotations is synonymous with Chitty's, does not appear to contain the case stated by him." The book in question, however, which the court says does not appear now to be extant, is familiarly known to all criminal lawyers in this part of the United States, if not to all practisers on the civil side, as *Cunningham's Reports*, though it is not always so cited (from the circumstance of his name not being in the title page), but in the manner adopted by Chitty, or, sometimes, as *Rep. Temp. Hardwicke*, the later editions of which, however, do not contain *all* the cases to be found in Cunningham's original edition, of 1766. The volume in question may be seen in the Bar Library of Boston, (where the case cited by Chitty may be found, *Rex* v. *Parnam*, page 96), and we presume, also, in every other well furnished law library in the United States. We will only add, that the learned judge, who delivered the opinion, remarks, that the 12 Modern Reports — which is the only reference he is aware of, that is "synonymous" with Chitty's — "does not appear to contain the case stated;" and in this remark he is entirely right. Nor is it strange that he should not find in 12 Mod. (which he supposes may be a "synonymous" reference), the case in question; since that book has cases only down to the 13th of William 3d, or about A. D. 1700, while the case cited by Chitty and Petersdorf as "K. B. 96," was not decided till the 8th of George the 2d, more than *thirty years afterwards.*

In ordinary cases, we should not have deemed this matter deserving of so particular notice; but in a case involving the life of the individual accused, and — what is of immeasurably greater consequence — involving the question of peace or war to the millions of human beings in our own country and in England, such an omission can hardly be excused. But we proceed to the case before us; making an abridged history of its origin from the *Monthly Chronicle* of May, 1841, a valuable periodical, now well known to be under the charge

of the editor of the Boston Daily Advertiser, whose circumspection and accuracy are familiar to every reader.

In December, 1837, on the defeat of the party in Upper Canada, who had taken up arms against the colonial government, William Lyon Mackenzie and Dr. Rolf, two principal leaders of the insurrection, made their escape to the state of New York. They immediately proceeded to the city of Buffalo, where a strong popular feeling had been manifested in favor of the insurrection. There, after two or three preliminary meetings, a large popular assembly was held on the 12th of December, at the theatre, where were assembled two thousand people, and large numbers were unable to gain admittance to the theatre for want of room. Mackenzie was present, and made a speech, recounting his exploits, and strongly exciting the feelings of the assembly against the British authorities. The speech was received with bursts of applause; and resolutions were entered into, to aid the cause of the colonial insurrection by encouraging the enlistment of men and by contributions in money. Shortly afterwards a party was organized, consisting partly of refugee Canadians, but chiefly of Americans, for the invasion of the province. As they could not openly embody themselves in the United States, and were too feeble to maintain a position in Canada within reach of the military force embodied there, they adopted the expedient of taking possession of *Navy Island*, a small uninhabited island in Niagara river, *belonging to Canada*, and situated a few miles above Niagara Falls. It is only half a mile from the Canada shore, but is in a great measure secured from invasion, from this quarter, by the rapidity of the current; yet it is easily accessible by boats and vessels from the *American* shore. Here a provisional government was established, and Mackenzie was placed at its head. Rensselaer van Rensselaer, an American citizen from Albany, was appointed military commander. Proclamations were issued, inviting the discontented to flock to the standard of Canadian liberty, and offering rewards, for military services, in lands to be conquered in Canada. Paper money was issued, redeemable from the resources of the government when it should require any, and in this medium purchases were made of munitions of war, and provisions for the rapidly increasing army,

except so far as these were not gratuitously furnished. Batteries were erected, in which cannon, *stolen from the arsenals of New York*, were mounted for the defence of the island, and for bombarding the town of Chippewa on the opposite shore. The force on the island increased so rapidly, that they talked loudly of crossing over to the neighboring continent; and the colonial governor assembled a body of volunteer militia at Chippewa, under Colonel McNab, for the defence of the colony, with threats of making a hostile descent upon the island.

By the 20th of December, the adventurers were reported at seven or eight hundred men, with twelve or fifteen cannon — the state arsenal of New York was entered, and five hundred stand of arms and several pieces of ordnance stolen from it. On the other hand, a body of two hundred colonial volunteers was stationed in Chippewa, (opposite to the island) which had been evacuated by the inhabitants; and a cannonading was commenced from the island, to the great alarm of the colonists. The provincial force was augmented in Chippewa, rumors were current, that an attack upon the islanders was meditated, and that they meditated a descent upon the Canadian territory. In the mean time, very little effort had been used by the authorities of New York, to prevent this invasion of that province or the plunder of the state arsenals; the government of the United States, however, by Mr. Forsyth, secretary of state, gave instructions to their law officer in that quarter, to prosecute for any violations of law; and it was stated, that the marshal of the United States met a party of men marching towards Navy Island with a field piece, but that *he had no power to stop it.*

During this time, a constant intercourse was kept up between the Navy Islanders and the American shore; and, to facilitate this, as well as to derive a revenue from the crowds of people flocking to the island, a steamboat, called the *Caroline*, belonging to William Wells, of Buffalo, and commanded by captain Appleby, was employed as a regular passage boat between the island and the American port of *Schlosser*, nearly opposite, a few miles above Niagara Falls.[1] She was cut out

[1] The Caroline was enrolled and licensed, under a declared intention of running between Buffalo and Schlosser, for carrying passengers and freight. Schlos-

of the ice and put in a condition for this service; of which the Canadian commander, Colonel McNab, had notice, and promptly resolved to destroy her. On the 29th, this steamer proceeded down to Navy Island, and thence passed over to Schlosser, where she arrived at 3 o'clock, P. M. She afterwards made two trips to the island and back, on the same afternoon, carrying passengers, at twenty-five cents each, and, as alleged by the British officers, carrying also munitions of war and a cannon for the use of the invaders. She was moored to the wharf at night, and in addition to the crew, ten in number, who slept on board, several persons who had resorted to Schlosser from curiosity or other motives, went on board to lodge, and retired to rest in the cabin. One of the crew kept watch on deck, who at midnight gave the alarm that boats were approaching from the opposite, Canadian, shore; and, by the time that the unarmed crew and lodgers were aroused from sleep, the steamer was boarded by a party of armed men, who drove them on shore; the boat was towed out from the harbor, set on fire, and suffered to drift down the river over the cataract of the Niagara. One man, *Amos Durfee*, a citizen of Buffalo, was found dead on the wharf, shot through the head by a musket ball, and three men were wounded by blows from the assailants. It was at first currently reported, that there were several persons on board the steamer when she went over the falls; but it did not appear, from subsequent proof, that any person was missing. Colonel McNab reported the exploit to Lieutenant Governor Head, *as performed under his orders*, in the most gallant manner, by Captain Drew, of the royal navy, with a party of volunteers.

The sensation and alarm excited on this occasion are well known. The president of the United States issued a proclamation, reciting this violation of the public peace, and that "a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated

ser was the point from which a very considerable portion of the stores, provisions, arms and munitions of war were taken on to Navy Island. . . 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*." *Speech of the Hon. Horace Everett, member of Congress from Vermont, on the 3d September.*

at Navy Island, and were still in arms under the command of a citizen of the United States;" and he earnestly exhorted all citizens, who had thus violated their duties, to return to their homes; warning them, that in thus compromitting the *neutrality* of the government, they would render themselves liable to punishment, and would receive no aid or countenance from their government. General Scott, of the United States army, and Governor Marcy, of New York, repaired to Buffalo on the 10th of January; Mackenzie, the head of the island government, and General Van Rensselaer, having come over to Buffalo, were arrested by the United States marshal; the island was finally evacuated, and the British flag hoisted on it.

We have given this particular history of the affair, for the purpose of putting the reader in possession of all the material circumstances, which would be taken into view in settling this case, both as a diplomatic, or international question, and as a purely legal one; for, whatever may be the decision of a *judicial* tribunal on such questions as may be technically presented to it in cases of this nature, the great question, after all, in which the American people are interested, and on which they would be most anxious to form a sound opinion, is one of *international* law, and not cognizable, judicially, by any state tribunal.

We now proceed to consider, as briefly as possible, the questions that have arisen in this important case — questions of as great magnitude, as have ever come before any judicial tribunal in our country since the adoption of the federal constitution.

It appears that, in the attack, which was made by the party of volunteers, under orders from the British officer, Col. McNab, upon the American steamer Caroline, while lying in the American port of Schlosser, one man, *Amos Durfee*, a citizen of Buffalo, was killed; that subsequently (Nov. 12, 1840,) *Alexander McLeod*, a British subject, having come within the territory of the state of New York, was arrested under process issued by the *state* authorities, on a charge of having been one of the party that attacked the Caroline, and of having killed Durfee. An indictment, for murder, was accordingly found by the grand jury of the county against McLeod, who was held to answer to it, and was kept a prisoner in the

common jail, as in ordinary cases, for an offence under the municipal laws, considered to be not bailable. Not being able to obtain his enlargement, on bail, he made application to the court for his discharge, on a *habeas corpus*.

The question, then, which was submitted to the state court, was — whether he was entitled to his discharge on that process, under the circumstances of the case.

This general question is to be considered under different points of view; as a purely technical question under the municipal laws of New York — which it was in its origin — and as a question of international law, which it became by the accession of new elements subsequently to the first institution of the proceedings; then, again, its international character is to be considered in relation to the peculiar organization and powers of the government of the *Union*, and the *state* governments respectively. The reader will at once perceive, therefore, that this question is not to be settled upon the narrow principles and technical rules of municipal law, which are sufficient for the decision of the ordinary controversies between fellow-subjects of the same sovereign state, living under the influence of the same local institutions, usages and habits; but that it must be decided by those more large and liberal rules of *justice*, which are sufficiently generalized to be admitted as binding on all nations, however diversified their local institutions, habits, and usages, who acknowledge the same code of *international law* — as, in the present case, the international code of the European community, of which the United States are a member. We say, emphatically, the rules of *justice*, and not the rules of *policy*, in its usual application; which last we hope never to see influencing any *judicial* decision, however right it may be deemed in any cases of diplomatic strategy. Even there, however, we would say with the great British statesman — that "*justice* is itself the great standing *policy* of civil society; and any eminent departure from it, *under any circumstances*, lies under the suspicion of being no policy at all."[1] But before the ministers of the holy temple of *Justice*, both friend and foe — nations and individuals — our own country and

[1] Burke's Works, vol. iii., p. 184.

foreign ones — must bow in submission to the sternest decrees of the divinity, that there rules over the affairs of men —

> Tros, Rutulusve fuat, nullo discrimine habebo;
> Rex Jupiter omnibus idem.

We have alluded to the relation in which the state governments of our confederacy stand towards the general government; and, lest any suspicion should be harbored of our want of due regard for state rights, we say in the outset that we yield to no man in asserting them; they must be held sacred; they are the maintaining power of the union, at once the centripetal and centrifugal forces, which keep the members of the system from flying asunder, on the one hand, or, on the other, from being dashed together in one common chaos. We are not displeased, therefore, to see a state court manifest a disposition to support what it honestly believes to be the rights of its own state. But, while we would sacredly respect the rights of each state separately, we should, on the other hand, as strenuously maintain the *national* rights, which are secured to *all* the states jointly by the federal constitution. The people of the states jointly, who constitute the political body called the American *nation*, have *rights* under their solemn compact, which must be respected by every individual state; otherwise, the *nation* cannot perform its *duties* — alike sacred with its *rights* — to each member of the confederacy. If, therefore, we should, in the course of our remarks, make different limitations of state rights from those of the New York court, it will proceed from an honest conviction, that such must be the construction of the respective powers of the state and general governments, in order to carry into effect the objects, for which those powers were surrendered by the whole people of the United States.

We add one remark farther in relation to the opinions which foreign nations, by their diplomatic agents, may choose to express on the powers and duties of our judicial and other officers, whether of the states or of the Union. We maintain, that the public officers of the United States must, so far as other nations are concerned, be the sole judges of the respective powers and duties of the state and general governments. When, therefore, Mr. Fox addresses an official note to the

Secretary of the State in the tone he has adopted, and proceeds to impugn the declaration of Mr. Forsyth, who asserts "that the federal government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the state of New York" — when he assumes such a tone, we say, and goes on to impugn the construction which is put upon its own powers by the very government to which he is accredited, — whether he is right or wrong in his opinions, — he goes beyond the sphere of his official functions, and commits what, in the mildest language, would be a marked diplomatic indecorum, and, in some countries, of a less pacific disposition than ours, might have led to other consequences than have here taken place. We make this remark, not in any unfriendly spirit towards the minister himself or the nation he represents, but simply because impartiality demands it.

We will now consider, in detail, the several questions arising in this case. And first, the technical question, whether McLeod was entitled, under the *state* laws to his discharge, on the process of *habeas corpus;* which, if the court had not labored with such an array of learning, we should think might have been disposed of without great difficulty.

The learned judge, who delivered the opinion of the court, states this part of the case thus: "The sheriff returns an indictment for murder, found by a grand jury of that county [Niagara] against the prisoner, in which he appears to have been arraigned at the court of oyer and terminer holden in the same county. It further appears, that he pleaded *not guilty*, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Durfee, by the prisoner, on a certain day and at a certain town within the county. These facts, though officially returned by the sheriff, were by a provision in the *habeas corpus* act, (2 Rev. Stat. 471, 2d edit. § 50,) open to a denial by affidavit, or the allegation of any fact to show, that the imprisonment or detention is unlawful. In such case, the same section requires this court to proceed in a summary way, to hear allegations and proofs in support of the imprisonment or detention, and dispose of the party, as the justice of the case may require. Under color of complying with this provision, which is of re-

cent introduction, the prisoner, not denying the jurisdiction of the court over the crime as charged in the indictment, or the regularity of the commitment, has interposed an affidavit, stating certain extrinsic facts. One is, that he was absent, and did not at all participate in the alleged offence; the other, that if present and acting, it was in the necessary defence or protection of his country against a treasonable insurrection, of which Durfee was acting in aid at the time." The learned judge then adds—"Taking these facts to be mere matters of evidence upon the issue of not guilty, and of themselves they are clearly nothing more, I am of opinion, that they *are not available on habeas corpus*, even as an argument for letting the prisoner to bail, much less for ordering his unqualified discharge. That this would be so on all the authorities previous to the Revised Statutes, his counsel do not deny."

Notwithstanding this admission, or non-denial on the part of the prisoner's counsel, however, the learned judge goes into an elaborate detail of English cases in support of the doctrine thus laid down by him respecting bail; including in his enumeration the book before mentioned, cited by Chitty as "Cases, K. B. 96,"—supposed to be "not now extant *eo nomine*," and two ancient cases, 2 Str. 911, and 1 Salk. 104, which the court of New York had several years ago condemned "as of little or no weight," in 5 Cow. Rep. 39. But it is unnecessary for us to contest the English rule as laid down in the cases that are properly adjudged; for, admitting the English law to be as stated from those books, still, that whole class of cases appears to us to be inapplicable, or aside of the true question in the case before the court. All those cases assume as their basis, that the party applying for bail is confessedly *liable to be tried;* and the question upon his application then is, not whether he shall take his trial at all—for it is already settled that he shall—but whether he shall, for his personal accommodation, be allowed his liberty on bail, till his day of trial arrives. The actual imprisonment is not imposed as a punishment, but merely to secure his appearance at the trial; for the same reason bail is taken; but, if it could be made judicially certain, that he would voluntarily appear and submit to that trial which the law has decided he must undergo, he would be allowed his liberty without bail.

Now the true question before the court, in the case of McLeod, as we understand it, was—not whether the prisoner, as an acknowledged subject of trial, should be allowed to go at large and await that trial, but, whether he was *liable to be tried at all.* Between the two questions, there is a wide distinction; and the copious learning of the court upon the former question is wasted when applied to the latter.[1]

The court, after considering and applying the English cases in the manner we have stated, and remarking, very justly we have no doubt, that the law of England was the law of New York, until the new *habeas corpus* act of the state took effect, proceed next to inquire, whether that new statute has worked any enlargement of those powers, beyond what they before possessed.

The section of the statute relied upon by the prisoner's counsel, is thus cited by the court: "The party brought before such court or officer, on the return of any writ of *habeas corpus*, may *deny* any of the *material* facts set forth in the return, or *allege any fact* to show, either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed, *in a summary way*, to hear such allegations and proofs, as may be produced in support of such imprisonment or detention, or against the same, and *to dispose* of such party as *the justice of the case may require.*"

Under this statute, say the court, "the prisoner's counsel claim the right of going behind the indictment, and proving that he is not guilty, by affidavit, as he may by oral testimony before the jury." But they further say — "We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English courts. And we were not disposed to admit its adoption by our legislature without clear words or necessary construction. We think its object entirely plain without a resort to the rules of construction. Its words are satisfied by being limited to the *lawfulness of the*

[1] In this view of the two questions, the argument of the court (speaking in scholastic language) is not *ad idem*, but rests upon an *ignoratio elenchi*, which has been ranked in the category of logical fallacies, from the time of Aristotle to Burgersdicius and all his successors. *Aristot. Organ. De Sophisticis Elenchis, cap.* 5.

authority under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain, by considering the evil which the statute was intended to remedy. At common law it was doubtful, whether the prisoner could question the truth of the return, or overcome it by showing extrinsic matter, upon the point of authority to imprison. The statute was passed to obviate the oppression, which might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or, if true, depending for its validity on the act of a magistrate or court, which can be shown by proofs *aliunde* to have been destitute of jurisdiction." The court add — "There are various cases in which the enactment allowing proof extrinsic to the return may have effect, without supposing it applicable here. It must, we apprehend, for the most part, apply to the cases where the original commitment was lawful, but, in consequence of the happening of *some subsequent event* the party has become entitled to his discharge; as, if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only; so, after conviction he may allege a pardon, or that the judgment under which he was imprisoned has been reversed."

Now, though there are some things here from which we should not dissent, yet we must add, with great submission, that this view of the original objects of the process of *habeas corpus*, and of the New York provisions for carrying into effect this great remedial writ — the citizen's safeguard — strikes us as too narrow and refined to answer the great practical purposes intended in a free country. We cannot bring our minds to the opinion, that this great legal, or, more justly speaking, constitutional provision against oppression under color of law or otherwise, is to be construed and applied with the subtilty and strictness, that a special pleader would use in construing an ordinary statute provision regulating eaves-droppings or pound breach. It is, in our judgment, to be construed as all *constitutional* privileges are; the citizen is to be made *absolutely sure* of protection in his personal liberty. In questions of this magnitude, there is to be no room for the application of

those narrow and artificial rules, by which — useful and necessary as they may be, in the ordinary administration of justice between party and party — the astuteness, or the corruption, or the timidity, of a judge may, under a legal form, deprive a citizen of the substance of his political privileges. We trust it is unnecessary to add, that these remarks are general, and not intended to imply any fears or suspicions of the honorable individuals who now fill the New York bench.

Without, therefore, attempting a minute analysis of the New York statute — which might be presumptuous in those who live in another state — we cannot but direct the attention of the reader to the language of the *substantial* parts of it; which really seems to be as broad and comprehensive as it can be made for the purpose of insuring the great objects in view. The party brought before the court on this process may "deny any of the *material* facts set forth in the return, or allege *any fact* to show, either that his *imprisonment or detention is unlawful*, or *that he is entitled to his discharge*." What are the "material" facts here spoken of? Does not the statute include facts that go to the *merits?* or are they to be excluded? An issue is made; and that issue is to be tried "in a summary way" by the *court;* who, after hearing the allegations and proofs produced, in support of such imprisonment or against the same, are directed "to *dispose* of such party as *the justice of the case* may require."

Can it be, that the legislature of New York intended, by these particular provisions for hearing the party, that he should only be heard upon the "lawfulness of the authority" under which he was detained? The statute appears to us to provide, in terms, for something more than this; the prisoner may not only deny the material facts in the return, but he may also allege, on his part, *any* fact to show — either that his imprisonment or detention is unlawful, or, that *he is entitled to his discharge;* and these questions are to be determined, not by a jury, but by the court, in "a summary way" — a provision as to the mode of trial, which was probably introduced into the law, to prevent the possibility of an inference, that an issue involving so much matter of fact, as would thus be open to the party, should be sent to a jury.

The restricted view above taken of the statute by the court,

had not, if we are rightly informed, been the prevailing opinion of the profession in New York, previously to this decision. One eminent jurist of that state, Chancellor Kent, states briefly the provisions of their *habeas corpus* act, thus:

Persons restrained of their liberty *are not* entitled to the process of *habeas corpus*, if they are detained (1) by process from any court or judge of the United States having exclusive jurisdiction — (2) or by *final* judgment, or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction; — or (3) for any contempt specially and plainly charged in the commitment by some court, &c., having authority to commit on such a charge, &c. On the other hand, he says, affirmatively, and all persons restrained of their liberty *are* entitled to this writ, unless detained (1) by process from any court or judge of the United States, as above, and (2) by *final* judgment or decree, or execution, &c., as before stated. This eminent writer then adds, that no inquiry is to be made into the legality of any process, judgment or decree of the United States courts (as above) nor where a party is detained under *final* process, or for contempt, as before stated. But, he adds, that the court awarding the writ "may in *other* cases examine into the *merits* of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require." [1]

On this subordinate part of this great subject we will only add one further remark. Considering the case as it was originally presen ed to the court, and abstractedly from the political circumstances connected with it, we do not mean to say, the court might not have found sufficient legal grounds for refusing at that time to discharge the prisoner under the process pending before them; unless the provisions of their revised *habeas corpus* act required, in favor of personal liberty, that liberal construction, which upon a general view, this remedial statute would seem to admit of. On this point we have already ventured to remark, as far as would be becoming, and, we hope — for such was our intention — with all that deference, which practisers under a different jurisdiction ought to entertain upon questions of this description.

[1] 2 Kent's Com. 29, 30; fourth edit.

We forbear any further remarks upon this part of the case; and, passing by the minor question, which is next argued by the court, as to the power of entering a *nolle prosequi* under the laws of New York, we now proceed to a consideration of the remaining, and fundamental question arising in the case; that is, the want of jurisdiction in the courts of the state from the moment it appeared, that the act of McLeod was adopted, or recognised as an act done under the authority of his government; from that time, as we understand the law of nations and the rights of the whole "people of the United States," the American nation, who established their federal constitution "for the common defence" and "general welfare,"— from that time, we say, the jurisdiction of the state court ceased, and the United States, the nation, had jurisdiction of the case. We say, emphatically, the *rights of the nation;* for the nation has rights corresponding to its obligations, as well as the individual states composing the nation. We say this with all tenderness for state pride, and with the most sincere regard for state rights; which we shall be as unwilling to surrender, as we are the rights of the nation.

Regarding this question as fundamental, and considering the vital importance of a right decision of it to the peace and safety of our country, we have deeply regretted, that the court of New York should have been prevented by any other business, however "pressing," from bestowing upon this question the fullest consideration. They remark, that they "have looked into it as far as possible, during a very short vacation, consistently with other pressing judicial avocations." It is one of the misfortunes of our country, that our judicial officers, in all the states, and in none more than in our own, are so oppressed with the constantly accumulating load of business, that they are not able, though at the sacrifice of health and domestic comforts, to discharge their onerous duties, to their own satisfaction, even in the limited sphere of ordinary municipal law; that they accomplish as much as they do, ought to excite our wonder, instead of the complaints, which we sometimes hear, of the delays and impediments in the proceedings of our courts. This pressure of business must, undoubtedly, be severely felt, in the courts of a state, like New York,

where, in addition to its own vast concerns, the business of the whole union centres.

Notwithstanding this state of things may, however, in the ordinary current of affairs, be sometimes a sufficient reason for hasty or partial investigation of the cases before them, yet, when a judicial tribunal of a state considers itself called upon to go beyond the ordinary and familiar sphere of its action, and to decide the very highest questions of international law — questions involving the peace and safety of the whole nation — in such cases, we say unhesitatingly, but with all respect, the country has a right to its most deliberate and mature judgment. The local business of the state, urgent as it may be to suitors under the state laws, must give place to what vitally concerns the whole nation; and, however much the court might be entitled to indulgence under such circumstances, yet, if a hasty and unsound judgment should happen to be made in such a case and lead to fatal consequences, the nation would not feel satisfied with the apology, that the court were too much pressed for time and by their ordinary business, to allow them to mature their opinion. But we proceed to the question.

The court, in entering upon this branch of the case, observe, that "the want of jurisdiction has not been put (by the counsel) upon the ground that McLeod was a foreigner." They, however, lay down the general position, that "an alien, in whatever manner he may have entered our territory, is, if he commit a crime, while here, amenable to our law." And several authorities are cited by the court in support of the rule.

Such general positions, without stating the various qualifications with which they are to be understood, are comparatively of little importance in deciding grave practical cases. In the present instance, the authorities cited, advance us but little towards a resolution of the main question. In the first, (Cowp. 208,) one Campbell, a natural born subject of Great Britain, purchased a plantation in the island of Grenada (then recently conquered by that power), and brought an action against the collector to recover back a sum of money paid by him as duties on sugars exported on his account — on the ground, that the duty had not been imposed by lawful author-

ity; that is, the authority of the nation that made the conquest. But the question raised was, whether the king, of himself, had the power to change the existing laws of the island; and the court decided, that the king, by his proclamation, had precluded himself from the exercise of a legislative authority over the island. Surely, authorities like this, afford little aid in the case. The other authorities cited under this head, (Vattel, book ii., chap. 8, § 101, 102, and Story's Conflict of Laws, p 518, and Locke on Civ. Gov., book ii., ch. 2, § (9,) do undoubtedly sustain a general principle, which few persons would question — that foreigners are subject to the laws of the country in which they are. To this general principle, however, there are numerous qualifications; and when the court say, that an alien is amenable to our laws, in whatever manner he may have entered our territory, if he commit a crime here, and when they apply this rule to the present case, they assume, that a crime simply against the municipal laws of the state has been committed. But the very question here is, whether such a crime has been committed. That a homicide has been committed, is not disputed; and so it would have been, if a whole regiment of Queen Victoria's army, under the express orders of her majesty, had entered our territory, whether to destroy a steamboat, that was annoying them, in violation of our neutrality, or to surprise one of our forts, and had in the attempt killed an American citizen; but would such an act of hostility be a "crime" cognizable under the state laws of New York? That it would be a hostile violation of the national territory, we have no doubt; and one which the United States would have a right to consider as an act of war, or not, as they might think proper, and to demand, or waive satisfaction accordingly. But, that the state of New York would have a right to treat it as a mere violation of the state laws, without regard to the rights of the nation, we cannot believe to be the intent of the federal constitution, which is the supreme law of the land for the great and powerful state of New York as well as for its little neighbors Rhode Island or Delaware.

Abstractedly speaking, the act of McLeod might be considered as an act (in technical language), against the peace and dignity of the state of New York; but by the circumstances of the case, the offence against the state was merged in that

against the Union. It was a case arising out of war, (as will presently be considered), and involving the principles of neutrality, which belong exclusively to the authorities of the nation. When the Caroline was burned, England was at war with a part of her Canadian subjects; the parties were actually in arms against each other, and the insurgents had taken possession of a British island. England, of course, would not call it war; her natural pride would not permit her to acknowledge this; she would call it rebellion, insurrection, riot, or any other crime, rather than war. But neutral nations are not to participate in that national pride; whenever they see one part of a nation in arms against the other, they must call it war, and observe with respect to them the laws of neutrality; they are not to consider whether it is a civil, a servile, or any other kind of war; they can only judge of the fact before their eyes, and, as the great publicist, Bynkershoek, justly says, "a neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as a judge between his friends who are at war with each other." [1]

It will be recollected by all who are acquainted with our own history, that during the American revolution, the nations of Europe considered the colonies as being at war with Great Britain, though she treated us as rebels. Denmark, alone, undertook to judge of the nature of the contest, and restored to Great Britain prizes which Commodore Paul Jones had sent into Danish ports; but the United States considered the conduct of Denmark as a departure from the law of nations, and made claim upon the Danish government, who at last made reparation in damages for this violation of our belligerent rights. Other cases and authorities might be cited; we only wish, however, to call the attention of reflecting men to the true character of the present case, which, though sufficiently clear in itself under the law of nations, has been somewhat obscured by the excitement of the moment, and by a warm, and natural sensibility to the national honor.

But whether we consider the Canadian insurrection as a civil war, or as a rebellion, it was a contest in arms, in which we were *neutral.* The burning of the Caroline, effected under

[1] Bynkersh. Quæst. Jur. Publ. Book i., ch. 9.

the authority of the local government of Canada, was an act of retaliation for an alleged previous violation, by our citizens, of our neutrality. The act, now assumed by the British government, was an act of hostility. It need not be argued, that it placed us absolutely in a state of war with Great Britain, as it was not followed by any act of a similar character, either on her part, or on ours; both nations were, and are, willing to consider it as no interruption of the state of amity which, at least professedly, existed between us. But, that it was an act of hostility which we might have considered as war, if we had thought proper to do so, cannot be denied.[1]

The court of New York, however, have taken a different view of this part of the case, and have expended a vast amount of learned research, to show what constitutes war. The thesis maintained by 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. This, on the part of the United States, is congress, on the part of England, the queen."

Does this learned tribunal mean to be understood as affirming, that lawful hostilities cannot exist, until both parties commit some act of force upon each other, and thus stand (if we may so speak) before the common forum of civilized Europe, each one *rectus in curia*, as parties plaintiff and defendant would appear before the court of New York, in an action at common law for an assault and battery? If that is the doctrine intended to be laid down as the public law of Europe, we must beg leave, with much submission, to dissent from it. But if the court mean to admit, that one "war making power" may make a lawful war, then the proposition amounts to nothing more than we maintain; for one power, the queen of

[1] The Hon. Mr. Everett, in his able speech before quoted, says — "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." This able speech had not been published at the date of our first publication of this review. The Secretary of State, Mr. Forsyth, also, in his letter of Feb. 13, 1838, calls it "an aggression committed upon the territory of the *United States*."

Great Britain, has made lawful war by recognising the hostile act (which we have above briefly considered) as having been committed by McLeod and his party, under her authority. On this point, we may add a remark of Lord Stowell, in the case of the Nayade, a Portuguese vessel. That great judge says — "It was argued, that there was nothing to show, that Portugal was at war with France, &c. In cases of this kind it is by no means necessary, that both countries should declare war. Whatever might be the prostration and submissive demeanor on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it is sufficient." [1]

Will it be said, that this recognition or adoption of the hostile act of McLeod cannot relate back to the time when it was committed, and thus sanction it, as if committed originally under an express order of the British sovereign? There is a sufficient answer to this objection in the general principle of law, that a subsequent ratification is equivalent to an original authority. But we have a more precise answer, in the distinct opinions expressed upon this specific question by our own and British judges. That great jurist, who has done such lasting honor to his country, Mr. Justice Story, in the case of the *Emulous*, states the very case of a subject's committing hostilities without being originally authorized, and then uses this strong language in respect to a subsequent ratification: "Suppose he does [so commit hostilities]; I would ask, if the sovereign may not ratify his proceedings, and thus, by a retro-active operation, give validity to them? Of this there seems to me no legal doubt." The learned judge then commenting on one of the authorities cited, asks: "Is there any thing in Puffendorf [Book viii, ch. 6, § 21] to authorize the doctrine, that the subject so seizing property of the enemy, is guilty of a very enormous crime, of the odious crime of piracy? Or is there in this language any thing to show, that the sovereign may not adopt the acts of his subjects in such a case, and give them the effect of a full and perfect ratification?" [2]

In support of his own opinion, he refers to the well known case of *Thorshaven*, decided by Sir William Scott, who says, most emphatically — "Now there are instances innumerable,

[1] 4 Rob. Adm. Rep 251. [2] 1 Gallis. Rep. 568.

in which it has been held by this court, that an officer not immediately under the eye of government, may originate such expeditions, [hostile ones], subject to a responsibility; and, that the government, in the present instance, has approved of what was done, is demonstrated, &c. It is, therefore, as much an authorized capitulation, as if captain Baugh had gone out under special directions, to make the capture." [1]

But we return to the question raised by the court, as to the constituent elements of lawful war.

The learned judge, who delivered the opinion of the court, says — that "so far were the two governments of England and the United States from being in a state of war when the Caroline was destroyed, that both were struggling to avoid such a turn of the excitement on the frontier, as might furnish the least occasion for war. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while, on our side, we have inflicted legal punishment on the leaders of the expedition, of which Durfee made a part, on the ground, that England was then at peace. Whatever hostile acts she did, were aimed exclusively at private offenders; and, if there was a war in any sense, the parties were, England on one side, and her rebel subjects aided by citizens of our own, acting in their private capacities and contrary to the wishes of this government, on the other."

All this may be very true, as respects the declarations and conduct referred to; and it proves — what? That both parties did not choose to be considered in the posture which the learned judge defines as public war. But does it prove that England had not committed any hostile act, which might be a justifiable cause of war, if the United States had thought proper so to consider it? Taking the statement here made, she declared, that she did not make war or commit a warlike act; but, in point of fact, she did commit such an act; and that is sufficient for the argument.

The learned judge then defines, or describes particularly what he considers to be public war. He says — "I mean to include all national wars, whether general or partial, whether

[1] 1 Edw. Adm. Rep. 102.

publicly declared or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country and directed against the power of another; whether the directions relate to reprisals, the seizure of towns, the capture or destruction of private or public ships, or the property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object, the exercise of some influence or control over the adverse nation as such."

The whole of this definition, or description of war, rests upon the supposition, that there are but two parties, by or upon whom hostile acts can be committed. The learned judge speaks of the "adverse nation," as in a petty trial at common law we should speak of an "adverse" party in a civil suit. But here, as in other parts of this case, we must apply the rule of logic — *distinguendum est*, a distinction must be made. It is not merely the directly belligerent parties who are affected by each other's hostile acts, but the neutral nations also, who happen to be their neighbors. Innumerable acts of hostility, ordinarily of a partial, limited and local character, may be committed, by each belligerent, upon its neutral neighbor, without being intended "to control the adverse nation," that is the neutral, which would be good cause of war, if the neutral should choose so to consider it; and of these acts, one of the most common is that which really happened in the present case — a violation of the neutral territory. Now, if we understand the definition of war, which is adopted by the court, that is, that we must exclude from it "all hostility of any kind, not having for its avowed object the exercise of some influence or control over the "adverse nation, as such" — that whole class of hostile acts, of a local or partial character, which are so constantly occurring, must be struck from the catalogue of acts of war, because they fall short of a general influence or control over the whole neutral nation, as such. But the neutral, in the cases supposed, is not an "adverse nation;" it commits no hostile act at all, but happens to be in the position of an innocent bystander in a private quarrel, who receives a blow without cause from one of two contending parties. And can it be said, in that case, that the party who inflicts the

blow upon the unoffending bystander, does not commit an act of hostility, (if we may so term it,) which may be resented or not, as he thinks proper, by retaliatory measures on his part? Now a neutral nation is in a similar position in respect to belligerents; and it may patiently bear, or may boldly resent any hostile act, great or small, partial or general, as it thinks expedient. But the actual state of things between the two is, to all intents, a state of war. Every such act of force upon the territory of a neutral nation (unless fresh pursuit should be an exception,) is war.

Nor is it merely as between belligerents and neutrals, that such acts of hostility, or violence, may be committed. In time of profound peace, outrages on nations and individuals of nations, are frequently occurring, which would not be war within the definition adopted by the court of New York, but which, in the common understanding of nations, and, according to the principles laid down by publicists and statesmen, would be war. A few well known cases, we think, will set this matter in its proper light, both as respects neutrals and others.

And we take the first case that occurs to us, as it is within our own time, and in the recollection of many persons now living. In the year 1798, when the French government fitted out their well known expedition to Egypt, being in want of transport ships, they seized upon more than an hundred neutral vessels, which happened to be then in French ports, and sent them off to Egypt with the French troops on board. Can there be a doubt, that this violence was a direct act of hostility, that it was a "warlike" act, that it was war, in short, upon the various neutral nations to which those vessels belonged, and that this forcible seizure was a good cause of war on the part of those neutrals? It is true, that those nations did not elect to make war; whether from not having strength to cope with France, or from pusillanimity, or any other motive, is immaterial; it does not alter the character of the act committed against them. Yet this hostile act was not committed for the purpose (in the language of the court) of exercising any "influence or control over the adverse nation as such;" the government of France were so far from intending to commit the act as against an "adverse nation," that they

did not trouble themselves to consider to what nations the vessels belonged, whether friends or foes; and, therefore, according to the definition of war, as given by the court, here were no hostilities, no war.

In an earlier period of history, Oliver Cromwell, in the plenitude of his power, was told by one of his fanatical flatterers, that he was "a stone cut out of the mountains without hands, that would break the pride of the Spaniard;" and, accordingly, in a time of profound peace, and without any declaration or notice whatever to other nations, he equipped a squadron for the West Indies, which made an unprovoked and unsuccessful attack on Hispaniola; when, in order to atone as far as possible for this failure, his commanders in the squadron, dreading his displeasure, projected on the spot an attack upon the island of Jamaica, which, as it happened, surrendered to them without a blow — yet this could not be "war" within the definition of the court. The Spaniards, however, very justly considered it as such, and, in return, declared war against England, and made a general seizure of all English ships and goods within their reach. But, if they had been pusillanimous enough to submit to the outrage instead of declaring war, would the act committed by the English commanders have been any the less an act of war?

The case of the Spanish ships, captured by the English, in modern times, (1804,) was a similar act of war against Spain. Their attack on Copenhagen, in 1808, was of the same description.

In our own history, again, Spain, after shutting the port of New Orleans, contrary to treaty, subsequently marched armed men into our territory and seized our citizens; not for the purpose of acting upon the United States as an "adverse nation," but for local and partial objects. Yet there can be no doubt it was an act of war on her part, though we did not think fit to meet it with a declaration of war on ours.

Another class of cases, distinctly marked, is that of injuries committed by a nation upon an individual subject of another government. Need we cite an authority for this? we have a very high one from the state of New York itself. Mr. Chancellor Kent says — "An injury to an individual member of a state is a just cause of war, if redress be refused;" but, he

adds, in the humane spirit of the public law of Europe, "a nation is not bound to go to war upon so slight a foundation; for it may of itself grant indemnity to the injured party."[1] Numerous cases of this description are to be found in the history of nations; and we do not now recollect one (doubtless there may be some) in which the violence upon the individual was committed by the subjects of the offending state, with the view (as the court expresses it) to exercise "influence or control over the adverse nation, as such," whose subject was thus outraged.

But after all, is not the very broad, and diffuse definition of war, which is given by the learned judge, comprehensive enough to include the very case of the Caroline? If the Americans first aided the Canadian rebels, or were not prevented from so doing, it might be argued, that the object of attacking the vessel was to "control" the American nation, and force it to apply stronger means of prevention against the abettors of the rebels than they appeared to be doing; in that case, we became an "adverse nation," within the definition given by the court. But we need not multiply cases to this point.[2]

Can it be then, that under the well established usages of nations, the several classes of hostile acts we have mentioned (to say nothing of various others) are to be "excluded" from

[1] 1 Kent's Commentaries, 48, 4th edit.; where he cites Grotius and other authorities.

[2] The truth is, the text writers do not help us to a precise definition of war, as applicable to the present case. A learned correspondent, who has read this review, has favored us with the following remarks: "*Hostilities* are partial war. The *quasi* war, as it has been called, in 1798, against France, was not acknowledged to be war by the *governments*, on either side; but when it came *judicially* before the Supreme (or Circuit) Court of the United States, the judges, as lawyers, pronounced it to be war." The name of this case is not recollected; our correspondent says it was not published by Dallas in the series of reported cases, but appeared in a separate pamphlet at the time.

We subjoin the following description from Hobbes, whose opinions on war, as the natural state of man, are familiar to readers: "War consisteth not in battle only, or the act of fighting, but is a tract of time wherein the will to contend by battle is sufficiently known; and therefore the notion of *time* is to be considered in the nature of war, as it is in the nature of weather For, as the nature of good weather lieth not in a shower of rain, but in an inclination thereto of many days together, so the nature of war consisteth not in actual fighting, but in the known disposition thereto, during all the time there is no assurance to the contrary."

the idea of "war," as now practically understood by all statesmen and publicists, and that we must narrow it down to the conceptions of a subtle special pleader, in an action of assault and battery at *nisi prius?* We cannot bring our minds to this view of the subject, after reviewing it deliberately and sincerely; but, after all our care, and with all possible deference for the official opinion, and all personal respect for the learned judge who delivered it, we feel ourselves compelled, in the brief but expressive formula of the great Ottoman law officer, to say to Mr. Justice Cowen, "Olmaz, it cannot be!"[1]

After the consideration we have given to this portion of the subject, it is needless to follow the court through their minute and somewhat prolix discussion of the various kinds of war — solemn, unsolemn, and mixed — distinctions to be found in all the earlier text writers, but which have long been of little utility in the resolution of practical questions. When, therefore, the court intimate that the hostile violation of the American territory, in the case of the Caroline, cannot be "tortured into a *war*," it is evidently a dispute about words. Whatever England may now choose to assert, after having adopted the act of McLeod as a national act, and however pacific the United States may choose to be in return, the original character of the hostile act, so far as relates to the liability of McLeod, is not changed. The learned judge proceeds to illustrate the case, by likening it (among others) to the acts of force committed by individuals upon their fellow subjects in violation of the municipal laws under which both parties live, and under which the military power is sometimes called out as a *posse comitatus* to aid the civil authorities; but the cases are not parallel. Here was an invasion, by one party, of the jurisdiction of the other — a neutral jurisdiction; and we have no disposition to dissent from the authorities cited by the court on the inviolability of a neutral territory; it lies, in fact, at the foundation of this case.

We acknowledge, however, that we were surprised at the remark of the learned judge, when he says, "there is nothing in this case, except a body of men, without color of authority, bearing muskets and doing the deed of arson and death; and

[1] Jones on Bailments.

that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or that it can plausibly claim to come within any law of war, public, private, or mixed." But we have already stated our views on this point, and forbear repeating them.

Nor are we less surprised at the strong statement of the "result" at which the court next arrive — that the provincial government of Canada attempted to exercise jurisdiction over our citizens — that, being convinced of the "delinquency" of the Caroline, they "sentenced her to be burned; an act, which all concerned knew would seriously endanger the lives of our citizens. The sentence was therefore equivalent to a judgment of death, and a body of soldiers were sent to do the office of executioners;" and again — that "the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man should be killed, it would be murder."

Dismissing the rhetorical tone of this statement, as lying beyond the hallowed precincts of the seat of justice (though too often admitted there), let us look merely at its legal and logical soundness.

It is asserted, that the Canadian authorities knew that the burning of the steamer Caroline would seriously endanger the lives of our citizens. It might be argued (but we are not informed of the evidence before the court on this point) that, judicially speaking, the Canadian authorities ought to presume that no American citizen would, in violation of the neutrality of his country, be found on board of a vessel that was employed in thus annoying the neighboring possessions of a friendly nation; and, consequently, they might reasonably, in law, presume, that they would not endanger any American lives, by attempting to destroy a vessel thus employed, and which was the sole object of their expedition? But we need not settle this matter for the purposes of the present question; we repeat once more — they did commit an offence, and a very high one — the violation of our territory in a time of peace, by entering upon it without our consent, and there adding the further aggravation of committing the violence and homicide in question. Assuming that they knew that Americans were aiding their enemies, they then *retaliated*, and their act thus be-

came more distinctly an *act of hostility* against the *United States*, but not against the *state of New York*. What had they to do with the fact, whether those Americans were from New York or any other state; it was enough that they were from the United States. This, however, having been done under the authority of their government, the individuals thus acting under a commission of their nation, cannot be condemned under the municipal laws as private offenders guilty of "arson" and "murder" on the land, any more than the subjects of a foreign nation, acting under a national commission at sea, can be held guilty of piracy. The rule of international law on this point is well laid down by that able and enlightened jurist, a New York jurist too, whom we have before cited: "An alien," says Mr. Chancellor Kent, "under the sanction of a national commission, cannot commit *piracy* while he pursues his authority. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy."[1]

Again; it is said that the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. We must here once more remark, that, on logical principles, this argument is vicious, because, in the terms stated, it proves too much; if well-founded, then a foreign army entering a neutral territory under a commission from their sovereign, would be liable as private robbers and murderers. But the law of nations places such violations of right upon the ground of hostile acts — acts of war.

We are now brought to a consideration of the fact, that the British government have ratified the act, committed by McLeod, as a national act; or, as stated in the very marked language of the opinion, we are to inquire "whether England has placed the offenders above the law and beyond our jurisdiction, by ratifying and approving such a crime."

The court remark, that it is due to England, in the first place, to deny that it has been so ratified and approved; she has approved a public act of legitimate defence only.

Now it seems to us, that however necessary it might be for

[1] 1 Kent's Comm. 188, 4th edit.

McLeod, if on a trial in the courts of his own government, to prove that he had not exceeded his authority, in order to justify himself to his employers, yet, in respect to ourselves, it is not necessary for us to inquire, whether it was an act of legitimate defence or not; what have we to do, as neutrals, with the character of the controversy between the government of England and her Canadian subjects? England has now ratified the act, whatever it was, and the government of the United States (not of the individual state of New York,) must judge of its character. Besides, the Secretary of State, in his able letter to Mr. Fox, takes no such distinction as his ground of argument; but explicitly says: "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." Whatever, therefore, might have been the true character of the act in question, the American government, without any refined distinctions on that point, has received the British statement of the transaction as given by the minister, and has acknowledged that the individuals concerned in that same transaction ought not to be held personally responsible.

We have not room to follow the court through the great mass of historical and other learning which is brought into this case from all parts of history, ancient and modern, as well from law books, to establish various well-known principles; as, the inoperative character of laws beyond the territory of the nation making them; the general rule, that soldiers are not to be treated as criminals, when only obeying the lawful commands of their superiors; the limits of political and civil power; the law relating to spies, (which, by the way, is by common consent an excepted case); the relation of principal and agents, or accessories in acts of force, &c. All this, in our view, is unnecessary, as we think the case rests upon principles of public law, that are well settled, and need not be fortified by authorities like those which are arrayed in support of this part of the opinion.

The court ask, with much emphasis, and in a marked tone

and phraseology, "Was it ever suggested by any one, before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offence; nay, that the coalition of great power with great crime does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrators can be reached?"

The whole effect of this broad and indefinite question, and the answer to it, will depend upon the sense in which certain terms are to be taken; the criminal offence is not defined — nor the jurisdiction — nor the character and powers of the tribunal whose jurisdiction is to be ousted — nor whether the approval is to be that of a "monarch" whose own laws are violated by his own subjects, or that of one, who authorizes his subjects to violate the laws of another nation by committing hostile acts, or making war upon it. It is obvious, therefore, that this question is not stated in a form susceptible of a definite answer, that would be of any utility in solving the main question before us. And when a question of this indefinite character is attempted to be illustrated by equivocal cases from general history — as that much vexed one of Mary, Queen of Scots; and an intimation is made, (in guarded terms, however,) that the pope had, over Mary, as his civil subject, that species of jurisdiction which would have authorized him to exonerate her by his formal approval of her alleged criminal act — we are unwilling to attempt to dispose of the question and its illustrations in a plain argument upon a question of law, lest we should not do it in such a mode, as would be deemed suitable to the occasion and the high tribunal whose decision we are considering.

The case of our border difficulties on the frontier of Maine, to which the court refer in a tone of animation somewhat beyond the usual even tenor of the judicial tribunals in our own quarter, is one of a more tangible character than some others cited; and the conduct of Great Britain in that quarter might, in a diplomatic negotiation, be very properly urged as an *argumentum ad hominem* to obtain our just rights. But if (as we assume) Great Britain was there in the wrong in point of law, and unjustly punished our citizens for exercising acts of civil authority in what the court consider as a "disputed" ter-

ritory, still, in an American court of law, this injustice on her part would be no reason for our doing injustice to one of her subjects in another case. The fact of the territory being a "disputed" one, as stated by the court, would be a justification for many things on that frontier, for which Great Britain would have no apology on the well-defined and undisputed territory where the Caroline was destroyed; and, so far, even this practical case will not give us any essential aid in the present inquiry.

On the point of the recognition of the act of McLeod by his government, we apprehend there can be no room for a question under the law of nations, and as far as it is a matter for judicial consideration. We may, out of court, or in a diplomatic negotiation, suspect that this recognition on the part of the British government is an afterthought, and treat it accordingly; but not so in the actual posture of the case before the court.

The general principle applicable to such cases is perfectly well settled, and is laid down by Vattel in these terms, — after stating that individual citizens shall not be allowed to commit offences against other nations with impunity, — "But, if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, 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." [1]

Such is the general principle of public law; and when the author speaks of the right of the injured nation to hang spies and emissaries and kidnappers or man-stealers, if caught within its jurisdiction, he speaks of classes of offences, which are by common consent treated either as exceptions or qualified cases under the general rule, or as not having the character of *national* offences or injuries.

If we are right in the views we have thus far taken of this case, the remaining question will be, what effect the existing state of facts should have had upon the proceedings in the New York court. We have already said, that the moment the government of Great Britain adopted the hostile act as a national act, the jurisdiction of the *state* court ceased, and the

[1] Vattel, book ii ch. 6, sect. 74.

case belonged to the authorities of the United States, which have the jurisdiction of all cases arising under the constitution, the laws of the United States, treaties, &c. The present case is one of peace and war, subjects exclusively belonging to the general government. Unless questions of this nature are to be settled by the authority of the United States exclusively, it is manifest, that a single state may involve the nation in a war directly in contravention of the rights and interests of the other five-and-twenty states; if this should be conceded to each state, then we must also, on the other hand, concede the like power to make peace, which would lead to inextricable confusion. The *state* courts, manifestly, cannot take notice of, or act upon, the complaints of foreign governments. If the territory of a state has been invaded, or their rights violated by persons acting under a foreign authority, they cannot (except in the specific cases provided for by the constitution) undertake to do justice to themselves; but they must apply to their natural protector, the government of the United States. It would not be just to the individual states, to throw upon their judicial, legislative, or executive departments, the responsibility of cases that threaten to involve the nation in war; this responsibility should be entirely borne, and with firmness, by the power to which it belongs, — the general government.[1]

If, then, the state court has not jurisdiction, a question arises, whether that fact should not have been shown, by a plea or suggestion, at an earlier stage of the cause. By no means; it may be shown at any time in cases of this description. In Pennsylvania, in the case of a foreign consul (*Hanhart* v. *Soderstrom*,) the point was expressly decided, that whenever the defect of jurisdiction is suggested, the court will

[1] "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. Everett's Speech.* "For the acts of states," he adds, "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's Reports of the Supreme Court of the United States, 573."

quash the proceedings; it is not necessary that it should be by plea before general imparlance.[1]

Following out the mere matter of legal procedure, we should say, the Supreme Court of New York ought, according to their own practice, to have turned over the prisoner to the officers of the United States. In that court, the practice is thus stated by Woodworth, J., in the case of *Exparte Smith* — "Detaining a prisoner by state authority, in order that he may be delivered over for prosecution to the United States, is by no means an unusual exercise of power. This court has repeatedly sanctioned such a proceeding, and in one case, very lately."[2] This was also a proceeding on *habeas corpus*.

In reviewing our remarks upon this case, so vital to the safety of our country and to its reputation for justice with other nations, we perceive that we have unintentionally omitted some views which ought not to be wholly overlooked.

On the last point which we have considered, the point of jurisdiction, the learned judge observes, "In no view can the evidence for the prosecution or the defence be here examined independently of the question of the jurisdiction; and I entertain no doubt, that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction."

Do the court mean to say, that if a foreign ambassador, or a foreign consul, should be indicted for murder in the state of New York, that the courts of that state would have "complete jurisdiction" of the case, notwithstanding the constitution of the United States expressly gives jurisdiction to the federal courts in all cases affecting those public functionaries? We put one other case, which in principle would stand before the court precisely as that of McLeod does. Suppose a foreigner was indicted for any offence under the state laws, and while the indictment was pending he should be appointed ambassador from his government to the United States; can there be any doubt, that this new state of the facts would forthwith take the case from the jurisdiction of the state court, and make it a matter exclusively for the national government? Can there be any doubt, too, that evidence of this new state

[1] 1 Binney's Reports, 138. [2] 5 Cow Rep. 273.

of facts might be heard by the court "in a summary manner," instead of sending the ambassador to be tried by a state jury? The new state of facts in McLeod's case would, we apprehend, have the same effect.

In this connection we may add a remark upon the subject of submitting the evidence in the present case to a jury, as the court seem to consider the proper mode of procedure. What is the great fact in controversy, and by which the question of jurisdiction would be determined? It is, whether the act for which the prisoner stands indicted, was a private act committed by him without or beyond his authority, or was a public act of hostility — an act of war — done under the orders of his own government. Now, in what mode is this to be proved? Is it a common matter *in pais*, to be proved by witnesses, or is it an act of the government, to be proved by official evidence, by records, of which the court would feel bound to take notice? Must the fact of the existence of war or peace, be proved before a jury by witnesses, or by the acts of the government? An astute special pleader, before a petty court of sessions, in such a case, would perhaps say, the existence of *war* is indeed provable by the act of Congress declaring it, of which, as a public law, the court would be bound to take notice. If this technical notion should suffice, then, on the other hand, we would ask, how is the termination of a war and the existence of *peace*, to be proved? Here the President of the United States (with the senate) is authorized to make peace, by treaty, which he announces by proclamation. But, says the pleader, how do you prove the treaty and proclamation of the President? We answer, just as we should prove that a foreign ambassador was accredited to our government, or a foreign consul acknowledged, and a thousand other official acts; that is, by official certificates from the proper departments of government, with or without the great seal of state, as the particular case may require. The court, in our judgment, would feel as much bound to take notice of these public acts of the government, and recieve this evidence of them, as they would of public statutes, in a summary hearing.[1]

[1] See 4 Wash. Cir. C. Rep. 531; The United States v. Ortega, and 2 Wash. C. C. Rep. 205, Liddel's case; in both of which, the court held, that the certificate

Now, in the present case, what is the evidence that would have been produced to the court, to prove the existence of a state of hostilities, or "a transaction of a public character," planned and executed under the authority of McLeod's own government, and which, on principles of international law, would exempt him from personal liability as a criminal? That evidence would be, the declaration of our own government, attested by the proper certifying officer to a fact of that kind; in this case, we presume, it would be the secretary of state, Mr. Webster; who, in his official instructions to Mr. Crittenden, the attorney-general of the United States, informs that law officer, that he will be furnished with "authentic evidence of the recognition, by the British government, of the destruction of the Caroline as an act of public force done by national authority."

Of such evidence as this, we apprehend, the court would feel bound to take notice. Indeed, some of the authorities cited by the learned judge indicate this to be the proper and conclusive species of evidence in such cases. In the case of *The Pelican*, before the Court of Appeals, Sir William Grant lays down the rule, that "it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide." [1]

The same doctrine was held by Lord Ellenborough in the case of *Blackburn et al.* v. *Thompson;* where he says: "If the state recognises any place as not being in the relation of hostility to this country, *that is obligatory* on courts of justice." [2] He also cites a previous case from 1 Campb. 429, decided on the same principle. The same learned judge, on a hearing of *Blackstone et al.* v. *Thompson*, before the whole court of king's bench, expressly agreed with Sir William Grant in the case of *The Pelican*, and added in emphatic language — "when the crown has decided upon the relation of peace or war, in which another country stands to this, *there is an end of the question.*" He observes further, very justly,

of the Secretary of State was the best evidence that the individuals in question were the Chargé d' Affaires, &c., of foreign nations.

[1] 1 Edw. Adm. Rep., Appendix D, p. 4.

[2] 3 Campb. Rep. 61.

that "it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations."[1]

Now we would respectfully ask, what fact in the case of McLeod required the intervention of a jury before the state court? His defence, in truth, was more matter of law than of fact; that is, whether the act of McLeod was authorized. Suppose the case had been submitted to a jury before a court of competent jurisdiction, and the fact made to appear, that the act complained of on the part of the prisoner was, as our own government acknowledge, a hostile act performed under the authority of the British government. The court would, as we understand the public law of all christendom, be obliged to instruct the jury, that the crime charged had not been committed, and that they must acquit the prisoner. And if bound so to instruct a jury on the trial, why should they not discharge upon the like evidence, in a summary hearing, under their *habeas corpus* act?[2]

[1] 15 East's Rep. 81.

[2] Mr. Everett, in his speech above cited, with much force thus puts the actual posture of the case:

"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 the 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 usage 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*."

Mr. Everett then, after stating that the Supreme Court of New York had decided that McLeod ought not to be discharged on the habeas corpus, adds — "This decision is in direct conflict with the law of nations, *as settled in the case made by the two governments*. . . . . The question before the court was a question of

Now, as to the mere technical mode of discharge, whether on habeas corpus, or otherwise, even in *England*, we may here cite the language of the Secretary of State, Mr. Webster, in his masterly letter to the British minister, which we had intended to notice in another part of our remarks: "If," says that great lawyer and statesman, "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." [1] Of these three modes of discharging the prisoner, the first would be at the election of the government, and the two last at the election of the prisoner; and Mr. Webster suggests no difficulty in the way of discharging him on habeas corpus even before an English court.

In respect to the question of jurisdiction, we ought not to omit remarking, that the government of the United States, through their Secretary of State, have — doubtless from motives of delicacy towards an important member of the Union, or for other reasons of weight — avoided denying that the state court had jurisdiction of the case, and have been equally reserved as to claiming jurisdiction of it for the federal courts. The secretary merely observes, in his letter to Mr. Fox, that the rights of McLeod, "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;" and he assures Mr. Fox, that the New York court "may be safely relied upon for the just and impartial administration of the law in this as well as in other cases." Notwithstanding this cautious language

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 *in 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."

[1] Mr. Webster's Letter to Mr. Fox, of April 24, 1841.

here used to a foreign minister, however, the secretary in his instructions to Mr. Crittenden, Attorney General of the United States, has, with some emphasis, positively directed, that, in case the prisoner's defence should be overruled by the state court, "the proper steps be taken, immediately, for removing the cause by writ of error to the Supreme Court of the United States."[1]

[1] Upon recurring to the diplomatic correspondence between the American government and the British minister, it will be perceived, that Mr. Webster was embarrassed by the ground which had been taken in regard to the state of New York, by his predecessor in office. The government had been in some measure committed on this point by Mr. Secretary Forsyth, who, in his letter to Mr. Fox, of December 26th, 1840, says: "The offence with which 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." In the embarrassing position in which the government was thus placed, what could the present administration do? A government cannot well acknowledge to a foreign nation, that it has been in the wrong in regard to the construction of its own powers and duties, upon any change of political parties in its administration. Every reader will recollect, in our diplomatic history, the sensation which was produced in the country on a memorable occasion, while Ex-President Van Buren was minister in England.

Mr. Webster, then, was obliged to use all possible skill in avoiding a direct clashing of opinion between the late and present administrations upon this point. When Mr. Fox, therefore, on the 12th of March, 1841, communicated the fact, that the destruction of the Caroline was *an act of public force by the British authorities*, Mr. Webster replied, that "this communication being *formally* made to the government of the United States, by Mr. Fox's note, the case assumes *a decided aspect*." He does not and could not say, that the *posture of the case* had been so essentially and substantially changed, that the American government could now change the ground taken by Mr. Forsyth only two or three months before, and directly deny the jurisdiction of the state of New York, which that gentleman had expressly admitted.

Now, in point of fact, Mr. Fox, so long ago as the 6th February, 1838, (just after the Caroline was destroyed) had avowed to our government, though not by the express authority of his own, that the act complained of by us *was authorized* by the provincial government of Canada; and he, as the representative of the British government, sanctioned it. The subject was accordingly then transferred to Mr. Stevenson, the American minister in London; who, on the 22d of May, 1838, on the part of the *United States*, demanded redress for the outrage committed on the nation by *the constituted authorities* of Upper Canada. The negotiation remained unfinished from that time till the 12th of November 1840, when McLeod was arrested; the State of New York then claimed jurisdiction of this affair — an affair, which that state herself had originally treated as a *national* one; and on which her governor (Seward) had, in his message to

Now, however expedient it might be, under the existing embarrassments, and in a case involving "state rights" (which has too often been but another name for state pride), that the officers of the general government should exercise the greatest delicacy towards a powerful and influential state, commanding forty or more votes in the political questions of the country, yet we — as private citizens, unfettered by the responsibilities of public office, and not so circumstanced as to feel the influence of the "*civium ardor prava jubentium*," or the "*vultus instantis tyranni*" — may be allowed to treat this subject as disconnected from all those political or other considerations, which might affect the decision of great public questions at certain junctures; we may treat it, on strict principle, as a pure question of *right*, between an individual state, on the one side, and the whole nation on the other.

the state legislature, of January 2, 1838, emphatically, and justly, remarked — "The *general* government is entrusted with the maintenance of our *foreign relations*, and will undoubtedly take the necessary steps and redress the wrong and sustain the honor of the country."

Such was the character of the act in question, according to the original views of the state of New York itself. The same views were then entertained also by President Van Buren (himself a citizen of that state) as expressed in his message to Congress, of January 8, 1838; and he accordingly informs Congress, that measures have been taken by the *general* government "preparatory to a demand for reparation."

Yet under these circumstances, the state of New York has changed her ground, and claims jurisdiction of this case, as a violation of her municipal laws! And why? From the mere accidental circumstance, as it would seem, that she has taken within her territory an humble, private individual, who, as one of a military corps, was *ordered* by his own government to capture and destroy the Caroline.

If this were not to be discussed as a pure question of international law, we might appeal to the dignity and magnanimity and consistency of a great state, when thus about to exercise its highest power upon the humble and insignificant instrument of a foreign government, whose act that government itself has adopted. If the state of New York is resolved to avenge its own wrongs, instead of appealing to its constitutional protector, the United States government, would it not be more worthy of a sovereign state to avenge itself upon the *nation* that has violated its rights, than upon one humble instrument of that nation? What has this *single* individual done to call down the vengeance of three millions of people? As a soldier, he has obeyed the call of his country; he has taken up arms in her defence, and refused to desert his colors! Who is the man among the brave citizens of the Empire State, that would consent to doom a soldier to an ignominious death for this conduct? What American is there, that would not condemn him, if he had basely deserted the cause of his country?

Considering it, then, in this point of view, we do not see that the public officers, who administer the government, could properly relinquish to any individual state, which should be unreasonable enough to require it, the exercise of those rights which belong to the states jointly, in their collective capacity — in other words, to the *nation*. And it seems to be as much the duty of the Executive of the Union, to assure the nation, that he will neither make nor permit any arrangement or proceedings, "the effect of which might be to compromit, in the least degree, the rights, dignity or honor" of the *United States*, as it was of the governor of New York, to give such assurances to his constituents in respect to the rights, dignity and honor of his state.[1] The six-and-twenty states, as a nation, have their *rights*, as well as each particular state of the confederacy.[2]

The eminent men, who are called to fill the high offices of the nation, are placed there in order to guard our *national rights*, as well as to discharge national *duties;* and the deliberate abandonment of the one would be no less a violation of their trust, than the culpable neglect of the other. If the nation, by its general government, cannot be permitted to exercise its legitimate rights in all cases, but especially in respect to its foreign relations, we shall be once more enveloped in the mists of "nullification," which, we had hoped, were long ago dispelled by the light of that giant intellect of the north, whose piercing rays shot through that Egyptian darkness to the utmost verge of our horizon. The more powerful the state, too, the greater should be its forbearance and magnanimity; as, in proportion to its power, is the danger of its causing a dissolution of the Union.

Notwithstanding, therefore, the acquiescence of the general government, that the trial of McLeod should go on in a state

[1] Message of Governor Seward to the New York Assembly.

[2] Mr. Everett, in his speech, quotes from the official message of Governor Seward, of January 2, 1838, as follows: — "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 entrusted 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." The President of the United States also, in his message imputes it to the *troops of the province*, and denominates it a "*hostile invasion*"

court, we feel constrained to adhere to our original opinion, (expressed long before the government had intimated its own views to the public,) that the New York court had no longer jurisdiction of the case, after the hostile act of the prisoner was adopted by his government. Upon strict technical grounds, then, it might have been argued, that they ought to dismiss the cause for defect of jurisdiction. If, however, they felt any reluctance at assuming that responsibility, then, we think, they ought (as we have seen they have practised) to have acted no farther than to turn it over to the competent United States' authorities, where the whole matter would be under the control of the general government, on whom the responsibility ought to rest, and who, we doubt not, would firmly have discharged the high duty thus incumbent on them.

But our limits admonish us to bring these remarks to a close. The incalculable importance of this great case, as it regards the vital question of peace or war — to say nothing of our juridical reputation abroad — has drawn us into a longer discussion than we had anticipated. But the subject swells under our contemplation, the more time we have to mark its bearings upon the present prosperity and the future fate of our beloved country. In truth, no single question has arisen since the establishment of the federal government, which has appeared to us to be fraught with more dangers, if it should, in the final resort, be erroneously decided upon a misapplication of the principles of international law, and in a forum, which, in our opinion, is not recognised by that law, nor by our own constitution, as competent.

In discussing this subject, we have endeavored to divest the case of all considerations purely political or temporary, and to treat it, strictly, as a judicial question, to be decided by a judicial tribunal — not upon flexible principles of time-serving expediency, nor the fleeting emotions of a fervid and high-toned patriotism, whose very ardor and purity expose it only the more to be misdirected by the arts of designing men — but as a question to be settled by those eternal principles of *justice*, by which alone our happy republic can hope to sustain itself; that rigorous justice, of which one of the wisest men and purest patriots of another great republic — long since extin-

guished from among the free nations of the earth — says with equal truth and force — "*non modo falsum illud esse, sine injuria non posse, sed hoc verissimum esse, sine* SUMMA JUSTITIA *rempublicam geri nullo modo posse.*" [1]

[1] Cic. de Republica, lib. ii. 44. Edit. Maii.

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