REVIEW

OF THE OPINION

OF

JUDGE COWEN,

OF

THE SUPREME COURT OF THE STATE OF NEW YORK,

IN

THE CASE OF ALEXANDER McLEOD.

BY A CITIZEN OF NEW YORK.

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TO

THE HON. DANIEL WEBSTER,

Secretary of State of the United States.

The following Review of the Opinion of Judge COWEN, of the Supreme Court of the State of New York, in the case of *Alexander McLeod*, is respectfully inscribed, by

A CITIZEN OF NEW YORK.

REVIEW, &c.

The importance of the questions involved in the opinion delivered by Judge COWEN, of the Supreme Court of the State of New York, in the case of *Alexander McLeod*, and the erroneous principles of national law put forth in that opinion, seem to require that the true doctrines involved in the case should be placed in a correct light before the country. To that end, we have ventured to embody the result of our examination of the subject in the following review of Judge COWEN's opinion.

The opinion is deficient in methodical arrangement of the several positions taken and maintained by the Judge; and this confusion is increased by a badly arranged citation of authorities, and a rambling mode of discussing the subjects. It is also much too long; being nearly double the length required to discuss the matters *really* in issue, even in Judge COWEN's mode of discussing them. Why, for example, go through with an examination of the question whether our courts have jurisdiction, and a right to try a *foreigner* for a crime committed within our State, and quote the authorities bearing upon the subject to prove the jurisdiction, when not a person, lawyer or layman, ever doubted it! and when the Judge himself finally says, "want of jurisdiction has not been put on the ground that *McLeod* was a foreigner."

The other branch of the question of jurisdiction, discussed at great length by the Judge, seems to us an equal waste of labor and learning. As we understand it, the case of *McLeod* does not involve any question of jurisdiction: for it must be conceded that our courts have jurisdiction over all cases of murder committed within the boundary of our State. *McLeod's* case presents for consideration—not a question of jurisdiction, but a question of guilt or innocence; whether the homicide with which he is charged be a crime according to the law of nations.

If a sheriff should, in pursuance of a sentence, hang a person convicted of murder, and after the execution it should be ascertained that the person executed was innocent, and a grand jury should thereupon indict the sheriff for the murder of the person executed, the sheriff could not interpose an objection to the jurisdiction of the court, but would

rely for his defence and justification upon the fact of a conviction by a court of competent jurisdiction; thereby showing that the homicide in him was not a crime.

So also if a soldier should be tried by a court-martial, and sentenced to be shot; and, after his execution, those engaged in it should be indicted for murder; their defence would not be a want of jurisdiction in the State court, but a justification before that court, under a regular court-martial, conviction and sentence, thereby showing that the homicide was not a murder.

Suppose, after the peace with Great Britain, a British soldier had come within our State, and had been arrested and indicted for murder committed in the attack on Buffalo during the war; he would not think of raising a question of jurisdiction in the court, but would rely on the law of nations to justify the homicide, and relieve him from the charge of crime. Indeed, whenever a question of the jurisdiction of a court is raised, it necessarily admits the charge or claim preferred. The plea to the jurisdiction is one of confession and avoidance; surely the counsel of *McLeod* never intended to admit, for a moment, the crime of murder, with which he was charged, and seek to escape its consequences by alleging that the court had not jurisdiction over the offence! In this part of the opinion, therefore, we think the Judge must have been fighting a shadow of his own casting.

There is, also, another part of this opinion, and no inconsiderable part of it, that appears to be a waste of learning and authorities. It is that part in which the Judge proves, beyond question, "that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful;" yet, after an elaborate discussion of this question, a citation of authorities at great length to prove the *unlawfulness* of the violation of our territory by England, the Judge says, "that the act was one of mere arbitrary usurpation; *was not denied on the argument; nor has this, that I am aware of, been denied by any one except England herself.*"

We concede that the authorities cited show that the hostile attack upon the Caroline, and the violation of our territory, was unlawful; that is, without adequate cause; but not one of all the authorities which pronounce a violation of territory unlawful, denounce upon the military of the nation, under whose authority it is done, any personal penalty.

If we examine history, we shall find that quite as many wars have been commenced without, as with adequate cause, when tested by the general reason and sense of mankind; yet no one ever thought of making that the test of the impunity belonging to the military engaged. Such a test can only be applied to controversies between individuals, where there is a common arbiter or judge to decide; never between na-

tions, who admit no judge but themselves. The argument, therefore, on the side of *McLeod*, is not at all weakened by not denying that the attack was unjustifiable on the part of his nation.

In the examination of this subject, we shall concede what has never been denied, and what has taken so much of this learned opinion to prove, to wit: that a foreigner is liable to be tried by our courts for crimes committed within the State; that the courts have jurisdiction in all cases of murder committed within the State; and, for the sake of the argument, that the hostile expedition, in which the Caroline was burned, and Durfee killed, was an unlawful violation of our territory.

We proceed, then, to the discussion of the main question involved in this case, to wit: whether *McLeod* is entitled to the impunity of a soldier in time of war.

The points sought to be established by the affidavit of *McLeod*, are thus concisely stated by Judge COWEN:

"That the Niagara frontier was in a state of war against the contiguous province of Upper Canada; that the homicide was committed by *McLeod*, if at all, as one of a military expedition, set on foot by the Canadian authorities to destroy the boat Caroline; that he was a British subject; that the expedition crossed our boundary, sought the Caroline at her moorings in Schlosser, and there set fire to and burned her, and killed Durfee, one of our citizens, as it is lawful to do in time of war."

From such a state of facts Judge COWEN takes his position in relation to the rights and liabilities of England and her military, as follows:

"I deny that she can, in time of peace, send her men into our territory, and render them impervious to our laws, by embodying them and putting arms in their hands. She may declare war; *if she claim the benefit of peace, as both nations have done in this instance, the moment any of her citizens enter our territory, they are as completely obnoxious to punishment, by our law, as if they had been born and always resided in this country.*

"I will not, therefore, dispute the construction which counsel put upon the language or the acts of England. To test the law of the transaction, I will concede that she had, by act of Parliament, conferred all the power which can be contended for in behalf of the Canadian authorities, as far as she could do so."

This, we confess, is meeting the question boldly; and we accept, for the sake of the argument, and for the present, the concession of the sufficiency of the power conferred on the Canadian authorities. Before we leave the subject, however, we will dispense with this concession, and establish the sufficiency of this power, by the most clear and conclusive authorities.

Upon the question as before stated by Judge COWEN, he applies to it the law of nations, as follows:

"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.* A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown; and this is a *presumptio juris et de jure*, until the national power of the country in which such courts sit, officially declares the contrary."

Now the entire error in the opinion of the Judge arises from the erroneous principle of international law which he here lays down.

All will agree that the war which affords impunity to those engaged in it, must be a lawful war. But by the term lawful war is not meant a "*solemn* and *formal* war" only; on the contrary, it comprehends every description of war, except hostile expeditions set on foot for purposes of plunder and pillage, without any apparent cause.

Rutherforth says: "If one nation seizes the goods of another nation by force, upon account of some damage, &c. such contentions by force are *reprisals.* There may be likewise *other acts of hostility* between two nations, which do not properly come under the name of reprisals, such as the besieging each other's towns, or the sinking of each other's fleets, whilst *the nations in other respects are at peace with one another.* These are *public wars*, because *nations* are the contending parties. But as they are confined to some particular object, they are of the *imperfect sort*," &c.—*B. ii.* 9, *s.* 10.

In opposition to this authority, it will be seen that Judge COWEN starts with the proposition that, so long as the *entire* peace of the two nations is not broken up—in other words, until Congress shall declare war against England, or the Queen of England against us, there cannot be a state of war that will warrant the destruction of property, or the taking of life in conflict, on either side. To controvert this proposition, we bring not only Rutherforth, as above cited, but Vattel, in language if possible still more explicit.—*B. iii, c.* 4, §67.

"A war lawful and in form, is carefully to be distinguished from an unlawful war entered on without any form, *or rather from those incursions which are committed either without lawful authority or apparent cause, as likewise without formalities, and only for havoc and pillage.* Grotius, b. iii, chap. 3, relates several instances of the latter. Such were the wars of the *Grandes Compagnies*, which had assembled in France during the wars with the English; armies of banditti which ranged about Europe purely for *spoil* and *plunder.* Such were the cruises of Filbustiers, without commission and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the African corsairs, though authorized by a sove-

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

Here we have Vattel, distinguishing all the hostile collisions of nations into "*two sorts of wars;*" the one sort being undertaken "*without apparent cause*," and for "*havoc* and *pillage*," and all that do not come under this head being of the other sort. Having thus divided wars into "two sorts," the one he calls *unlawful* war, the other *lawful* war.

Vattel does not, like Judge COWEN, call all wars unlawful that are not formally and *solemnly declared* by the "war-making power" of a Government, but he pronounces all hostile attacks lawful wars, if made with lawful authority, and for "*apparent cause*," and not for "*pillage and havoc.*"

Chancellor Kent, too, admits that a formal declaration of war is not essential to make the war *lawful.* All that is required to make a lawful war is, that the hostilities be authorized by the proper authorities.—1 *Kent Com.* 54.

"Since the time of Brinkershoock, it has become settled, by the practice of Europe, that war may lawfully exist by declaration which is unilateral only, or *without a declaration on either side. It may begin with mutual hostilities.* In the war between England and France, in 1778, the first public act on the part of England was recalling its Minister; and that single act was considered by France as a breach of the peace between the two countries. There was no other declaration of war, though each Government afterwards published a manifesto, in vindication of its claims and conduct. The same thing may be said of the war which broke out in 1793, and again in 1803, and indeed in the war of 1756. Though a solemn and formal declaration of war, in the ancient style, was made in June, 1756, various hostilities had been carried on for a *year preceding.*"

In the same explicit manner Rutherforth speaks, denying the necessity of a declaration of war to make the war lawful:

"The only real effect of a declaration of war is, that it makes the war a general one, or a war of one whole nation against another whole nation; whilst the *imperfect sorts of war*, such as reprisals, or acts of *hostility*, are confined to particular *persons*, or *things*, or *places.*"—*Ruth. B.* 2, *ch.* 9, *sec.* 8.

Thus, it will be perceived, a lawful war may be commenced without any formal declaration, and it may be manifested by an act of hostility, without any previous notice; and whether the war becomes a general one or an *imperfect war*, depends upon the extent to which hostilities are carried. It will always be a *lawful war*, if the hostili-

ties are authorized by the proper authority, and are not mere wanton depredations, without any apparent cause.

These questions do not depend entirely upon the opinions of elementary writers upon national law. They have been illustrated by judicial decisions, in cases of hostilities upon the ocean.—1 *Dodson's Admiralty Reports*, 247.

A declaration of war was issued by Sweden against Great Britain, on account of the encroachments of the latter upon her rights as a neutral nation. It was contended before Sir William Scott, that the two countries were not, in reality, in a state of war, because the declaration was *unilateral* only. "I am, however, perfectly clear," says Sir William Scott, "that it was not less a war on that account; for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not, as has been represented, a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities, on one side at least, and puts the other party also into a state of war; though he may, perhaps, think proper to act on the defensive only."

The same principle of *impunity* applies to hostilities upon the land or sea. When they are *wanton* and *malicious*, and for *plunder and spoils*, at sea, they are called *piracy*. Hostilities by land, from similar motives and for like objects, are called *robberies*. Decisions, therefore, in relation to hostilities at sea, and the impunity or liability of vessels and crews, furnish the rule of impunity or liability to be applied to the military, in cases of hostilities upon land.

11 *Wheaton*, 41, Story says: "A piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack, *in a time of peace*, is not necessarily *piratical*. It may be by mistake, or in necessary self-defence, or *to repel a supposed meditated attack by pirates*—it may be justifiable, and then no blame attaches to the act; or, it may be *without just excuse*, and then it carries *responsibility in damages*. If it proceed further; if it be an attack from *revenge and malignity, from gross abuse of power and settled purpose of mischief*, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer."

The same principle is recognized in 1 *Kent's Com.* 188: "An alien, 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*."

How perfectly does this principle cover the case in question. The

attack upon the Caroline was hostile and unlawful, and the British nation must be held responsible for it. It amounts to a lawful cause of war; but those engaged in it, acting under lawful authority, can never be regarded as *robbers* or *plunderers*, or liable to be punished criminally.

This principle has been fully recognized in the judicial decisions of the English courts. We have not the case at hand as reported, and therefore avail ourselves of it as extracted by Chancellor Kent.—1 *Kent Com.* 190:

"In the English admiralty, in 1801, it was contended that the capture and sale of an English ship, by *Algerines*, was an invalid and unlawful conversion of the property, on the ground of being a *piratical seizure*. It was, however, decided, that the African States had long acquired the character of established Governments, and that though their motives of justice differ from those entertained by the Christian Powers, their public acts could not be called in question; and a derivative title, founded on an *Algerine capture*, and matured by a confiscation, *in their way*, was good against the original owner."—Citing *The Helena*, 4 *Rob.* 3.

Shall it be said that an English court has held an Algerine capture lawful, because made under the sanction and authority of that Government; and a title thus acquired valid against the original English owner of the captured vessel; and yet the Supreme Court of New York decide that a hostile attack upon us, made (not without apparent cause) under the sanction of the British Government, shall not protect the military engaged in it from the punishment due to cold-blooded murder! We regret to say it has been so said and decided.

The decisions of the courts of England and the United States, in regard to the impunity of vessels and crews when acting under the authority of their Governments, are decisions merely carrying out principles long since adopted by the most approved elementary writers upon national law, and giving to those principles the authority of solemn adjudications by the highest judicial tribunals of the world.

These elementary writers, when speaking of war generally, and more particularly in reference to hostilities upon land, hold that whenever the hostile attack is made under the authority of Government, it becomes an affair between the two nations, and no individual responsibility rests upon the actors.

Thus, Vattel, speaking of war that is *unjust* on the part of the sovereign who waged it, but lawful, because not without apparent cause, and not for havoc and pillage, says:

"But as to the reparation of any damage—are the *military*, the general officers and soldiers, obliged, in consequence, to repair the injuries which they have done, not of their own will, but as *instruments* in the

hands of their sovereign!" "It is the duty of subjects to suppose the orders of their sovereign just and wise," &c. When, therefore, they have lent their assistance in a war which is afterwards found to be unjust, the *sovereign alone is guilty.* He *alone* is bound to repair the injuries. The subjects, and in particular the *military*, are innocent; they have acted only from a *necessary* obedience." "Government would be impracticable, if every one of its *instruments* were to weigh its commands," &c.—*Vattel, b. iii, c.* 11, *sec.* 187.

"Nothing of all this takes place in a war void of form and *unlawful, more properly called robbery, being undertaken without right—without so much as apparent cause.* It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies, is not under any obligation to observe towards them the rules of war in form. *It may treat them as robbers.*"—*Vattel, b.* 3, *c.* 4, § 68.

Thus we have "*these two sorts of wars, lawful and unlawful,*" carried through by Vattel to their consequences; and all persons engaged are entitled to have "observed towards them *the rules of war*," except those engaged in "incursions committed without apparent cause, and only for havoc and pillage."

The same position in regard to the immunity of soldiers is also maintained by Rutherforth:

"The external lawfulness of what is done in a war, in respect of the members of a civil society, extends to public wars of the *imperfect* sort, to acts of reprisals, or to *other acts of hostility, &c.—B. ii. c.* 9, *s.* 15.

And again he says:

"Neither the reason of the thing, nor the common practice of nations, will give them any other *impunity*, or allow them any otherwise to obtain *property in what is taken*, where war has been declared, than in the less solemn kinds of war, which are made without a previous declaration," &c. "In the *less solemn kinds of war*, what the members do who act under the particular direction and authority of their nation, is by the law of nations no *personal* crime in them; they cannot, therefore, be punished consistently with the law, for any act in which it considers them only as the instruments, and the nation as the agent."—*Idem, b. ii, c.* 9, *s.* 18.

We here leave this branch of the case, believing that our readers, from our citation of authorities, must be satisfied that, if the expedition in which *McLeod* is said to have been engaged, was executed under lawful authority, he was guilty of no personal crime in the violation of our territory, the destruction of the boat, or the death of Durfee.

We now proceed to show that the hostile attach took place under lawful authority.

It should be borne in mind that Canada is separated from its mother country by an ocean of three thousand miles. That a revolution was

attempted in Canada, and the disaffected of the colony had not only the sympathy of our people generally, but were, to a great extent, countenanced and succored by our citizens residing upon the borders.

Under this state of things, the British Government gave orders and authority to the chief officer in Canada for his instruction and guidance in meeting the difficulties then presented and anticipated.

Not being able to foresee what might take place, the authority was made as general as the nature of the case would admit, and the exigencies seemed to require; and was, no doubt, intended to vest in the chief officer in Canada power to do whatever the home Government would have done under like circumstances. He was, says the British Minister, "empowered to take any steps, and to do any acts, which might be necessary for the defence of her Majesty's territory, and for the protection of her Majesty's subjects."

This is a power most general and extensive in its terms. The object is, "the protection of her Majesty's territory and subjects." To insure this end, the Canadian officer is authorized to do any act necessary for this protection; and this necessity must, in the nature of things, depend upon the judgment and discretion of that officer. The authority does not limit the officer to any specified measures, or confine his acts to the Canadian territory. As England might, in defence of her Canadian subjects and territory, authorize a hostile attack upon the Caroline, under such circumstances as presented themselves to the Canadian authorities, it would seem to follow that the Canadian officers had power, under their orders, to do the same thing.

By saying that the sovereign of England might authorize such a hostile attack as was made on the Caroline, we do not intend to say it would be an attack that could be justified to the world. We only intend to say that it would be so far justifiable or excusable as to furnish impunity to the military acting under such an order.

But have *we* a right to scrutinize and limit an authority of this kind, whilst England sanctions the act done under it, and when the object and effect of such limitation is, to make murder of an act, which, under a liberal construction of the power, would render the accused innocent of the slightest crime?

We think the construction which we give to this power receives confirmation from *Burlimaqui*, *pt.* 4, *ch.* 1, *sec.* 4. Speaking of the power of magistrates or generals, this author says: "They cannot lawfully undertake any act of hostility of their own head, and without a formal order of the sovereign, *at least reasonably presumed, in consequence of particular circumstances.*"

But England approved this act, by not immediately disclaiming it,

by knighting Mac Nab, the chief projector of it,* and has since officially recognized the attack as one embraced within the powers conferred upon the Canadian authorities. Mr. Fox, the British Minister, in a communication to our Government, says:

"The transaction on account of which *McLeod* has been arrested, and is to be put upon his trial was, a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authority to take any steps and do any acts which might be necessary for the defence of her Majesty's territories and for the protection of her Majesty's subjects; and that, consequently, those subjects of her Majesty who engaged in that transaction, were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

But Judge COWEN denies that an approval by the British Government can, in any way, operate to screen *McLeod* from the punishment due to the crime of murder, for the part he is supposed to have taken in the attack. To maintain this position, the learned Judge goes into an elaborate citation of authorities, which, to avoid the appearance of injustice towards him, we here transcribe:

"An order emanating from one of the hostile sovereigns, will not justify to the other every kind of perfidy. The case of spies has been already mentioned. An emissary sent into a camp with orders to corrupt the adverse general, or bribe the soldiery, would stand justified to his immediate sovereign.—*Vattel, b.* 3, *ch.* 10, *sec.* 180; though even he could not legally punish a refusal. In respect to the enemy, orders would be an obvious excess of jurisdiction.

"The emissaries sent by Sir Henry Clinton, in 1781, to seduce the soldiers of the Pennsylvania line falling into the hands of the Americans, were condemned and immediately executed. 4 *Marsh. Life of Wash.* 366, 1*st edt.* Entering the adverse camp to receive the treacherous proposition of the general is an offence much more venial. It is even called lawful in every sense as between the sovereign and employee. *Vattel, b.* 3, *ch.* 10, §181. Yet in the case of Major André, an order to do so was, as between the two hostile countries, held to be an excess of jurisdiction.

"These cases are much stronger than any which can be supposed between nations at peace. In time of war, such perfidy is expected. In time of peace, every citizen, while within his own territory, has a double right to suppose himself secure; the legal inviolability of that territory, and the solemn pledge of the foreign sovereignty.

"The distinction that an act valid as to one may be void as to another is entirely familiar. A man who orders another to commit a trespass, or approves of a tresspass already committed for his benefit, may be bound to protect his servant, while it would take nothing from the liability of the servant to the party injured. As to him, it could merely

* Burlimaqui seems to consider such an act of the subordinate officer *approved*, unless the sovereign officially *disclaims* it.—*Burl. pt.* 4, *ch.* 3, *sec.* 19, quoted at length hereafter.

have the effect of adding another defendant, who might be made jointly or severally liable with the actual wrong-doer. A case in point is mentioned by *Vattel. b.* 3, *ch.* 2, § 15. If one sovereign order his recruiting officer to make enlistments in the dominion of another in time of peace between them, the officer shall be hanged notwithstanding the order, and war may also be declared against the offending sovereign.— *Vid. a like instance id. b.* 1, *ch.* 6, § 75.

"What is the utmost legal effect of a foreign sovereign, approving of the crime his subject committed in a neighboring territory? The approval, as we have already in part seen, can take nothing from the criminality of the principal offender. Whatever obligation his nation may be under to save him harmless, this can be absolutely done only on the condition that he confine himself within her territory.— *Vattel, b.* 2, *ch.* 6, § 74. Then, by refusing to make satisfaction, to furnish, or to deliver him up, on demand from the injured country, or by approving the offence, the nation, says Vattel, becomes an accomplice.— *Id.* § 76.

"Blackstone says, an accomplice or abettor; (4 Com. 68;) and Rutherforth, still more nearly in the language of the English law, an accessory after the fact.—*B.* 2, *ch.* 2, § 12. No book supposes that such an act merges the original offence, or renders it imputable to the nation alone."

The rights and duties of nations are not, in general, happily illustrated by reference to the rights, duties, and liabilities of individuals. In relation to the case of trespass, put by the Judge, we agree that the effect of another person's approving it might make him a trespasser also, and would not discharge the liability of him who actually committed it; and the reason is, that the approver had no more right to make the entry than the actual trespasser.

We think it cannot fail to strike every one, that the examples given by Judge COWEN, in which the authorization or approval by the sovereign cannot protect the criminal, are all cases where the act done is unlawful in itself, whether committed by sovereign or subject. The enlistment of soldiers in the dominions of another nation, without its consent, is, by the law of nations, a crime, whether the enlistment be made by the sovereign in person or by a recruiting officer.— *Vattel, b.* 1, *ch.* 6, *sec.* 75.

Spies also are not the less criminal because they are authorized by their sovereign, since the sovereign could not himself lawfully act the spy.

We cannot better answer Judge COWAN on this head than by transcribing one other of his examples, and annexing to it a quotation of his from Locke:

"Suppose a prince should command a soldier to commit *adultery, incest, or perjury; the prince goes beyond his constitutional power.*"

So Says Mr. Locke [on Gov. B. 2, ch. 19, sect. 239,] of a king even in his own dominions: "In whatsoever he has *no authority*, there he is *no king*, and may be resisted; for wheresoever the *authority ceases*, the *king ceases* too, and becomes like other men who have no authority."

Examples to show that a subject may not do an act, with or without his sovereign's authority, fall far short of showing that what he may do by the direction of his Government, may not receive equal validity from a subsequent approval of the act by that Government, as if it had directed it originally.

We have already, as we think, established the position, that the hostile violation of our territory, resulting in the destruction of the Caroline and the killing of Durfee, had the same been ordered by the British Government, would have protected the military engaged in it from any personal liability. We now maintain that the subsequent approval of the attack, especially under the circumstances of the original order and the situation of the mother country in relation to her colony, and of Canada in relation to our border, furnishes equal impunity and protection to all concerned in it.

The authorities quoted by Judge COWEN on this head, as we have already shown, do not in the slightest degree impugn the correctness of this position; whilst the authorities we shall now produce will fortify and fully sustain it.

Burlimaqui, pt. 4, *ch.* 3, *sec.* 18.—"A *mere presumption* of the will of the sovereign would not be sufficient to excuse a Governor or any other officer who should undertake a war, except in case of necessity, without either a *general* or particular order. For it is not sufficient to know what part the sovereign would probably act if he were consulted in such a particular posture of affairs; but it should rather be considered in general what it is probable a prince would desire should be done, without consulting him, when the matter will bear no delay and the affair is dubious."

Now certainly sovereigns will never consent that their ministers should, whenever they think proper, undertake without their order a thing of such importance as an offensive war, which is the proper subject of the present inquiry.

Sec. 19.—"In these circumstances, whatever part the sovereign would have thought proper to act if he had been consulted; and whatever success the war undertaken without his order may have had; it is left to the sovereign, *whether he will ratify or condemn the act of his ministers. If he ratify it, this approbation renders the war solemn, by reflecting back, as it were, an authority upon it;* so that it obliges the whole commonwealth. But if the sovereign should *condemn* the act of the Governor, *the hostilities committed by the latter ought to pass*

for a sort of robbery, the fault of which by no means affects the State, provided the Governor is delivered up and punished according to the law of the country, and proper satisfaction be made for the damages sustained."

8 *Peters*, 522.—Story, speaking of the seizure of an American vessel and cargo by a Spanish vessel, says:

"If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If she had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; *whose act, if adopted and acknowledged by the crown, or its competent authorities, become equally binding*. Nothing is better settled, both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the Government; and if his acts are adopted by the Government, the property, when condemned, becomes a droit of the Government."

Upon these authorities, and for the reasons before stated, we have come to the conclusion, that the approbation of the attack by the British Government has removed all doubt about the sufficiency of the original authority of the Canadian officers.

We have thus far discussed this matter, as if the question, as to the relation in which the United States Government stands to the British Government, in the matter of this attack, was an open one—one in which the judiciary of the country is at liberty to decide by a direct application of the principles of the law of nations to the facts as they might be established by proof; and in this view of the matter, we feel confident of having established, by the *facts* and the *law*, that the attack upon the *Caroline* was made upon sufficient authority from the British Government; or, if the authority was in any respect equivocal, that it has been ratified by the British Government, so as to require of the judiciary of the country, upon the *facts* and the *law*, a judgment establishing the perfect impunity of the military engaged in the expedition.

We now propose to show that the character of the expedition against the *Caroline*, and the relation in which the two countries stand in reference to it, has been settled and *decided* by our Government to be that of "*lawful war*" *of the* "*imperfect sort*;" and that courts of justice are not at liberty to pronounce a different judgment from that pronounced by the Government of the country.

Has our Government determined the relation in which the two countries stand to each other in reference to the impunity to which *McLeod* is entitled, as being one of this military expedition?

In May, 1838, shortly after the destruction of the Caroline, in a communication to the British Government, our Minister, Mr. Stevenson, characterized the attack as "an invasion of the territory and sovereignty

of an independent nation by an armed force of a friendly Power;" and Mr. Webster, Secretary of State, in his letter to Mr. Fox of the 24th April, 1841, says: "the Government of the United States has not changed the opinion which it has heretofore expressed to her Majesty's Government, of the *character* of the act of destroying the Caroline."

Can language be better adapted to define the first act of war by one nation upon another, where there has been no previous declaration of war, than that employed by Mr. Stevenson to characterize this attack by Great Britain?

So long ago, then, as May, 1838, the Executive Department of our Government determined that the attack upon the Caroline was an act of war, and so far as that act of hostility was concerned, placed the British Government in that relation to our own.

In the letter of Mr. Webster, before referred to, he recites the ground upon which the British Government place the hostile attack, so far as the military engaged in it are concerned, *and the assent of our Government to this same view of the matter.*

Mr. Webster in his letter, says:

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

After this recital of the position in which the British Government places the matter, Mr. Webster, speaking in behalf of our Government, says:

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

"The Government of the United States entertain no doubt that, after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized States, to be holden personally responsible, in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American People, not distrustful

of their ability to redress public wrongs by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the Government itself."

In a letter of instructions to the Attorney General, which was also communicated to Mr. Fox, Mr. Webster says:

"That an individual forming part of a public force and acting under the authority of his Government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute."

Judge COWEN makes a criticism upon the communication of the British Minister, which, perhaps, requires a passing remark. He says:

"Even the British Minister is too just to call it *war;* the British Government do not pretend it was *war.*"

As words in a promise, indicative of an undertaking to warrant, amount, in law, according to "*Cowen's Treatise,*" to a *warranty*, without the use of the term *warrant*, so, in the letter of the British Minister, a description of hostilities that by the law of nations constitutes "imperfect war," is equivalent to the assertion in terms that it was *war of the imperfect sort.*

But the Judge, evidently not feeling much confidence in his criticism upon the British Minister's communication, afterwards seems to admit that our Government, so far as it could, had decided the question in regard to the character of the hostile attack, and, consequently, in regard to the individual liability of those concerned in it.

The language of the Judge is this:

"But it is said of the case at bar, here is more than a mere approval by the adverse Government; that an explanation has been demanded by the Secretary of State; and the British Ambassador has insisted on McLeod's release, and his counsel claim for the *joint* diplomacy of the United States and England some such effect upon the powers of this court as a *certiorari* from us would have upon the county court of general sessions. It was spoken of as incompatible with the judicial proceedings against McLeod in this State; as a suit actually pending between the two nations, wherein the action of the General Government comes in collision with, and supersedes our own.

"To such an objection the answer is quite obvious. Diplomacy is not a judicial but executive function: but the objection would come with the same force, whether it were urged against proceedings *in a court of this State, or the United States.*"

But the Judge insists that "the Executive power has charge of the question in its national aspect *only;*" by which, from the context, we must understand, that the two Governments may agree that the hostile attack was of that character which furnishes impunity to the military concerned, yet that the courts, *Federal* and *State*, may determine

otherwise, and inflict criminal punishment upon the offenders! How "the Executive power has charge of the question in its national aspect," and yet its decisions be void of all efficiency and effect upon the subject *decided upon*, is, we confess, beyond our comprehension. The General Government cannot, it is true, after deciding the question, issue any mandate to a court to carry its determination into effect, or remove a cause, or withdraw a suitor or criminal from the custody of the courts. But its decision becomes binding upon all courts or tribunals where the question arises; and thus the Executive department of the Government "has charge of the question in its national aspect," and the law makes its *decision* all-powerful and efficient.

It can hardly be necessary to resort to any course of reasoning, or to the citation of authorities, to show that the Executive of the United States possesses all the power in regard to the matter in question that usually belongs to the Executive department of every Government.

"The command and application of the public force to execute the law, maintain peace, and resist foreign invasion, are powers obviously of an Executive character, and require the exercise of qualities so characteristical of this department, that they have always been exclusively appropriated to it, in every well-regulated Government upon earth."—1 *Kent's Com.* 286.

The memorable attack of the British ship of war Leopard, Capt. Humphreys, upon the frigate Chesapeake, Capt. Barron, in which several American sailors were killed, became the subject of discussion between the two Governments, and resulted in an adjustment, in which, amongst other things, England offered "the American Government a suitable pecuniary provision for the sufferers in consequence of the attack on the Chesapeake, including the families of those seamen who unfortunately fell in the action, and of the wounded survivors." Could Captain Humphreys afterwards have been proceeded against in a court of our country, and held personally responsible, notwithstanding the Executive department of our Government had settled the whole matter with the British Government? There cannot be a doubt, as we think, that this adjustment of the matter, "in its national aspect," was an adjustment of the matter in *every* aspect, and binding upon all courts and tribunals of the country.

This principle has been judicially recognized in England. There where the Executive department of the Government has determined the relation in which the British Government stands towards any other country, in regard to hostilities, such decision is conclusive, and in all the courts precludes any further examination or agitation of the question.

15 *East.* 81.—This was a case of insurance, and the cause turned upon the question whether the trade to St. Domingo was, at that time, with a country at peace with England.

Lord Ellenborough says, "this is a grave question, and depends in a great measure upon the consideration of the Orders in Council which have been referred to. I agree with the Master of the Rolls in the case of the *Pelican, that it belongs to the Government of the country to determine in what relation of peace or war any other country stands towards it*, and that it would be *unsafe* for courts of justice to take upon them, without that authority, to decide upon those relations.

"But when the Crown has decided upon the relation of peace or war in which another country stands to this, *there is an end of the question;* and in the *absence* of any express promulgation of the will of the sovereign in that respect, it may be collected from other acts of the State. The Master of the Rolls, in the case of the Pelican, lays down the rule generally 'that it belongs to the *Government of the country to determine in* what relation any other country stands towards it, *and that the courts of justice cannot decide upon the point;*' by which I must understand him to have said that they cannot decide *adversely* to the declaration of the sovereign upon that point.

"For want of a declaration by the Crown at one period, different verdicts were given in different causes, in respect to commercial adventures of the same description to *Hamburgh.* But courts and juries cannot do otherwise than decide *secundum allegata et probata* in such particular cases without regard to other proof in other causes."

This, let it be remembered, was a private litigation between individuals; and the court held that the determination of the *Government*, as to the relation in which another Government stands towards it, controlled the rights of the parties litigant, and put an "*end to the question.*" How much stronger is the reason for the application of the rule to our country and Government.

Without such a rule, conflict and collision arise between the Executive and judicial branches of the General Government, and between the General and State Governments.

Mr. Buchanan, of the Senate, has well described the conflict which such adverse decisions, between the Executive and judicial departments of the Government, will produce:

"The judicial authority will be on one side of the question, and the Executive Government on the other. Whilst the judiciary decide that McLeod is responsible in the criminal courts of New York, *the Secretary decides that he is not.* By prejudging this pending judicial question, the Secretary has placed himself in an awkward dilemma, should the Supreme Court of New York determine that the recognition and justification by the British Government of the capture of the Caroline, does not release McLeod from personal responsibility."

The mode of remedying this difficulty, and preventing such conflicts in the two departments of Government, suggested by Mr. Buchanan, is, we confess, most extraordinary. It is that the Secretary of State, representing the Executive Department of Government, shall suspend the decision of a question pending with a foreign Government until the question shall have been judicially decided; and this course is suggested even in a proceeding where the Government is not a party, and where a decision may be delayed until those interested in the question see fit to bring the matter to a close!

One remedy for what Mr. Buchanan calls this "awkward dilemma," is, the rule which prevails in England: when the Executive Department has decided a question between our own and a foreign Government, which properly belongs to the Executive Department to decide, "courts of justice cannot decide adversely." Such a rule produces consistency and harmony in every department of the General Government, and prevents all collision with the Judicial Departments of the State Governments. Without such a rule, the intercourse of our Government with other nations becomes empty diplomacy; when national matters, discussed, agreed on, and settled by the proper Executive Department, are not only disregarded by the Judicial Department of the Government, but are perfectly annulled by adverse decisions and judgments, and executions carrying into effect those judgments.

If, in England, the determination of the Government as to the relation in which another Government stands to it, shall control the rights of individuals, in a litigation with which the Government is not the most remotely connected, and in which the public has no interest, how much stronger is the reason for applying the rule to criminal courts; especially when the guilt or innocence of the accused is made to depend upon the decision, as to the relation in which another Government stands to our own, in a hostile collision, where the accused was an actor, unconscious at the time of the possibility that the part he took could subject him to the imputation of crime?

We have now concluded our examination of the great principles of national law involved in the case of *McLeod*, and we feel great confidence in saying we have, by the most ample authority, maintained, 1st. That a hostile attack and violation of our territory, in time of general peace, by the authority of the British Government, with apparent cause, is so far a "*lawful war*," of the "*imperfect sort*," as to furnish impunity to the military engaged in it.

2nd. That the instructions given to the Governor or chief officer of Canada, under the circumstances and situation of that colony, contained sufficient authority to legalize the attack; or, if that be doubtful, then,

3d. That the sanction by the British Government of the attack, supplied any possible deficiency in the instructions.

4th. That the Executive Department of our Government has decided, that the relation in which Great Britain stands towards our Government, as to the affair of the *Caroline*, is that of "*imperfect war;*" and that "individuals concerned in that transaction ought not, by the principles of public law, and the general usage of civilized States, to be holden personally responsible," and,

5th. That such decision, by the Executive Department of our Government, is final and conclusive upon all the courts in the United States.

It remains for us now to inquire whether the mode of relief, by *habeas corpus*, sought by *McLeod*, ought, under the circumstances, to have availed him.

Upon this branch of the case Judge COWEN, for the sake of argument, concedes to *McLeod* the impunity which he claimed, as being one of the military force who made the attack upon the Caroline, yet decides that he cannot be discharged upon habeas corpus, *because the grand jury have indicted him for murder.*

The principle advanced by the Judge is, that a man charged with murder *by the finding of an indictment by a grand jury, cannot, under any circumstances*, be admitted to bail, or be discharged on habeas corpus. We readily concede that in a case where a person cannot be admitted to bail, he cannot be entitled to a discharge on habeas corpus.

The Judge has cited several cases were applications where made to admit to bail persons charged with murder. The cases cited, however, are all cases where the application was made *before* indictment; and what is said by the judges about the effect of an indictment, as precluding the possibility of letting to bail, is mere *dicta;* that question not having arisen in a single case cited. But although Judge COWEN admits that his cases "were all *before indictment found*," he says the principle of refusing bail *after indictment*, for murder, "has never, that we are aware of, been departed from in practice under the English habeas corpus act." Had the Judge searched as diligently for cases in favor of this application, as he seems to have done for cases against it, he certainly would have come to a different conclusion as to the existence of authorities for letting to bail after indictment, whatever might have been his conclusion as to the true principle of law. Whilst the Judge has not been able to cite a *single* case where, *after indictment*, the question of bail has actually arisen, we have been able to find several, where the question has not only arisen, but where the prisoner has been let to bail after indictment for murder and other high crimes.

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

3 *East.* 165, *King* vs. *Marks.* *Le Blank* says: "This court have clearly a right to bail the parties accused in all cases of felony, if they see occasion, *whenever there is any doubt either on the law or the facts* of the case.

Woodworth, J. in the case of *Tayloe*, 5 *Cow.* 55, cites with approbation this rule of Le Blank. He says: 'The court will bail whenever there is any doubt on the *law* or the *facts* of the case.'"

It is true these were cases before indictment. But the rule is laid down without limitation; and we can see no reason for limiting it to cases before indictment, especially where the prisoner shows "there is doubt on the *law* of the case," and more especially when he shows that "by the law of the case" he is innocent of the crime imputed to him.

Bacon Ab. 35, title, *Bail in criminal cases:* "So if a man be *convicted* of felony upon evidence by which *it plainly appears to the court he is not guilty of it*," he will be let to bail. Why, then, not let him to bail before conviction, "if it *plainly* appears to the court that he is not guilty of it."

5. Mod. Capt. Kirk's case: Mr. Montague moved that Mr. Kirk might be admitted to bail, "for that he was very dangerously ill by reason of the badness of the air and the inconveniences of the prison." There had been an inquest by the coroner for murder, and also an *indictment by the grand jury.*

The counsel who opposed the motion for bail, said, "It is true your lordship has *power* to bail in *treason* or *murder;* but you will not exert that power unless it be in extraordinary circumstances, as in some cases that have been quoted, and especially in such *where the prosecution is thought not to be well grounded.* [Holt, Chief Justice.] In

this case I do not think the affidavits are full enough. It does not appear that by this imprisonment they are in danger of their lives." Here is no intimation that the indictment precludes all inquiry; on the contrary, the refusal to bail is upon a full inquiry into the merits of the facts upon which the application is founded.

In *Coke's Entries*, 354 to 356, are three cases, copied from the rolls of the court, where there had been *indictments for murder*, and the prisoners *afterwards* let to bail.

1 *Salk*, 104.—J. S. being committed upon an *indictment* for murder, moved to be bailed. "☞ *Rokesby* and *Turton* were for bailing him, because *the evidence upon the affidavits read did not seem to them sufficient to prove him guilty.* Holt, Chief Justice, and *Gould, contra.* The evidence does affect him, and that is enough. The allowing the freedom of bail may discourage the prosecution; therefore it is not fit the court should declare their opinion of the evidence beforehand; for it must prejudice the prisoner on the one side, or the prosecution on the other." Here, too, the merits of the application were looked into; and although bail was refused, it was not because there was an *indictment*, but because the court were equally divided upon the merits of the application.

Judge COWEN cites a case on the *same page* as the above, to show that a person cannot be let to bail *under any circumstances after indictment!* and yet overlooked the one cited above!

The case cited by Judge COWEN is the case of *Lord Mohuns*, and even in that, it does not appear from the report in Sakl. *whether he had or had not been indicted!* The case is referred to in 2 Strange, 911, Rex *vs.* Dalton. The Chief Justice there said, "that *the Lord Mohun's case* was at Lord Holt's chambers, and not in court, as the book reports it; *and that the lords bailed him after indictment for murder was found.*"

Another case may be added, of a person indicted for murder being let to bail. We refer to the late case of the young student, who was indicted for the murder of Professor Davis, at the University of Virginia.

As to the right of courts to bail, there is no difference between cases of murder or the highest grades of manslaughter.—*See Sutherland's opinion in Taloe's case*, 5 *Cow.* 55.

Selfridge, indicted in Massachusetts for manslaughter, was let to bail *after indictment. Goodwin*, indicted in New York for manslaughter, was, after one trial, and the jury not agreeing, let to bail by Chief Justice *Spencer.*—*Wheeler's Crim. Cas.* 434.

Thus it will be perceived, that whilst Judge COWEN is not able to

cite a single case, where, upon application to bail *after indictment* for murder, the court has said the fact of an *indictment was conclusive against it*, we have been able to cite several cases in which the application was made *after indictment;* in some of which the indicted person was *let to bail*, and in others refused. Yet in none of these cases is the idea advanced that the *indictment precludes all inquiry.* In all of them the *power* is conceded, but not to be exercised, "unless in extraordinary circumstances." All the cases to be found in which the idea is advanced that an *indictment precludes all inquiry*, are cases where *no indictment had been found;* and the remarks of the judges upon that point are mere *dicta*, and unworthy the character of grave authority. That the court have the power to look beyond the indictment, may be proved to the common sense of every one, by a few examples:

Suppose, upon circumstantial evidence before a grand jury, a person is indicted for the murder of another, and is arrested and imprisoned to take his trial; suppose such prisoner should afterwards sue out a *habeas corpus*, and upon being brought before Judge COWEN, should make a *profert* of the supposed murdered man, in full life and vigor, his identity placed beyond all question; would Judge COWEN say, *there being an indictment by a grand jury precludes all inquiry*, and you must continue in prison until a court shall be held for your trial? Such are the doctrines of his opinion!

Suppose *Robinson*, the murderer of *Ellen Jewett*, should be again indicted by a grand jury, and arrested, and finally brought before Judge Edwards on *habeas corpus*, for a discharge, on the ground that he had been once tried for the same offence and acquitted. He produces the record of acquittal; yet, by the decision of Judge COWEN, the *Judge who tried him* would refuse to look behind the indictment, would refuse a discharge, and remand him to prison to wait the sitting of a court, there to go through the form of producing before a jury the record of his former trial and acquittal!

Judge COWEN fancies that he has cited a case even stronger than the one we have supposed, of a second indictment of Robinson. He says:

"In Rex *vs.* Acton 2, Str. 851, the prisoner had been tried for the murder, and acquitted. Afterward, a single justice of the peace issued a warrant, charging him with the *same murder*, upon which he was again committed. On an offer to show the former acquittal in the clearest manner, the court refused to hear the proof. On the authority of this case, Mr. Chitty, at the page just cited, lays down the rule that the court will not look into extrinsic evidence at all."

Now this case is stated by the Judge entirely wrong. The person was not arrested for the *same offence*. The defendant was the keeper of a prison, and was indicted by *four* several indictments for four several murders, and the question on the trial was, whether a place called the *strong room* was a proper place to confine disorderly prisoners in, the four prisoners having died whilst so confined. The jury acquitted the defendant. A single justice afterwards, upon a *new information* of a *fifth* person having been put into that room, and dying, thought fit to commit the defendant again for a *fifth murder*.

The court refused to bail the defendant, and he remained until the Assizes; when no bill being found, he was discharged.

Thus, instead of being, as Judge COWEN supposed, a commitment a *second* time, after acquittal for the *same offence*, it was for an entire *new offence*. We cannot but express our surprise that the Judge should, even if he had found such a monstrous case, cite it with approbation.

Suppose a person in 1816 had been arrested and *indicted* for murder and arson, committed in the attack on Buffalo, by the British, during the war. Suppose such person brought up by habeas corpus before the Supreme Court, claiming the impunity of a soldier in time of war. Could the court say, we are satisfied that you cannot be guilty of murder, but as the grand jury have found an *indictment*, we are precluded from looking into the matter, and you can neither be discharged or let to bail, but must remain in prison until the proper court sits for your trial?

Such are clearly the doctrines of Judge COWEN. He says:

"It is proper to add that if the matters urged in argument could have any legal effect in favor of the prisoner, I should feel entirely clear that they would be of a nature available before the jury *only*. And that according to the settled rules of proceeding on *habeas corpus*, we should have no power *ever* to consider them as a ground for discharging the prisoner."

Now, instead of such a rule prevailing, we have seen that in numerous cases, both in this country and in England, prisoners have been let to bail after indictment for murder and other crimes of the highest grade. We have also seen "that after a man has been *convicted* of felony, upon evidence by which it plainly appears to the court he is not guilty, he will be let to bail."

In the famous conspiracy cases in the city of New York, after the Lamberts had, by writs of error, reversed the judgments against them, Hyatt and Mowet, who were under *sentence* and suffering punishment, by *separate* indictments and convictions, applied to the Supreme Court, and were *discharged on habeas corpus*, without being put to their writs of error to reverse the judgments.

The true rule upon the subject of bail or discharge, after indictment for murder, undoubtedly is, for the judge to refuse to bail or discharge upon any affidavits or proof that is *susceptible of being controverted on the other side.* When, however, the prisoner's evidence is of that positive and certain character that it cannot be "*gainsaid*," then the prisoner is entitled to be bailed or discharged, as in the case where the man supposed to be murdered is living; where the prisoner has been tried and acquitted of the same offence; or where the supposed murder was a homicide committed in a war between two nations.

As applicable to the case under consideration, if the attack on the Caroline was authorized and sanctioned by the Canadian authorities and the British Government, the evidence of such authorization furnished by the British Government and the United States is of that conclusive and record character that it cannot be controverted at the trial. If produced at a trial of the indictment, it would show a state of war between the two countries of the "*imperfect sort*" stated by Rutherforth, but nevertheless a "*lawful war*," which furnishes, under the law of nations, an impunity to McLeod, a soldier engaged in it. If such would be the effect of that evidence on a trial of the indictment, then, on *habeas corpus*, the same incontrovertible evidence authorizes a discharge by the court.

Another ground upon which the application for a discharge ought to have prevailed is, that our own *Government* has settled the character of this hostile attack. It has *decided* it to be an "*imperfect sort of war*," and that "individuals concerned in it ought not to be holden personally responsible." That decision being, as we have shown, binding and conclusive upon courts, the prisoner ought to have been discharged on his *habeas corpus.*

We here dismiss this subject, hoping, for the character of our country, that the judgment of the Supreme Court may be reviewed, and an opinion so unsound in all its parts, as we conceive Judge COWEN'S to be, rendered nugatory as an authority for the future.