182. Devlin

ST. ALBANS RAID.

SPEECH OF

B. DEVLIN, ESQUIRE,

Counsel for the United States, in support of their demand for the Extradition of

BENNETT H. YOUNG, et al,

Charged with the robbery upon the 19th October last, of

SAMUEL BRECK,

In the Town of St. Albans, in the State of Vermont, one of the United States of America.

Reported by Mr. SAMUEL J. WATSON.

MONTREAL:

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The following Speech, reported by MR. S. J. WATSON, *was delivered upon the 21st instant, by B. DEVLIN, Esq., Counsel for the United States, in the Court House in Montreal, in support of their demand for the Extradition of the St. Albans Raiders.*

MAY IT PLEASE YOUR HONOR.

It is, I have no doubt, as gratifying to you, as it certainly is to the Counsel who here represent the Governments of Canada and the United States, to find that the time and attention bestowed upon this Investigation have at last triumphed over the numerous and unexpected obstacles opposed to its termination, and brought us to that stage of the enquiry which enables us to address your Honor upon the merits of the application for the extradition of the prisoners. The case, as I view it, is one of extreme simplicity; and although it has attained to an unusual magnitude, and attracted public attention perhaps to a greater degree than any demand ever before made under the Treaty, I have certainly so far been unable to discover that it presents any feature calculated to embarrass the Court in dealing with it, or that even tends to withdraw it from the category of crimes enumerated in the Treaty under which we are now proceeding. True it is that the prisoners' Counsel have labored hard to surround the act of their clients with grave international difficulties, and to impress upon it the character of an act of war, but I flatter myself, that submitted as it will be to the test of sound sense and judicial scrutiny, the crime of robbery, of which the prisoners are accused, will still appear, despite all the false coloring under which it has been so ingeniously presented to your Honor's judgment. And here I may remark, that to me it doth seem as if my learned friends

fancied themselves endowed with some extraordinary magical influence, for certainly without their supposed possession of some such rare and wonder-working power, it would be difficult indeed to believe that they would have attempted to elevate a daring act of robbery to the dignity of a manly deed of warfare, or claimed for its guilty perpetrators the consideration due to the honest warrior who uses his arms for the legitimate objects of war, and not as the prisoners did at St. Albans, for the ignoble and savage purpose of robbing and murdering unarmed and defenceless citizens. I have said, your Honor, that this enquiry, notwithstanding the simplicity of the question involved in it, has attained an extraordinary importance, so much so indeed, thanks to the fertile genius of my learned friends, that it has become a *cause célèbre*. But let me ask what is it that has thus distinguished the St. Albans Raid and given to it a world wide notoriety? I answer unhesitatingly, its signal atrocity, the fraud and cunning by means of which it was achieved, aided, no doubt, by the extraordinary efforts subsequently made by the friends and sympathisers of the prisoners to strip their wicked deed of its criminal responsibility, and to make of them, its guilty perpetrators, heroes if not martyrs. Be this, however, as it may, I entertain the hope in which I trust I will not be disappointed, that senseless clamor will not here be permitted to drown the voice of public justice. That your Honor, ever mindful of the high and solemn trust reposed in you as one of the chosen administrators of the laws of our country, will not suffer your attention to be diverted from the consideration of the justice of our demand by the inflammatory speeches addressed by the learned Counsel ostensibly to you, but in reality to the passions, prejudices, and sympathies of the auditory which has filled this spacious Court-room from day to day. And, now, let me ask what does the duty imposed upon you require? It demands neither more nor less than that you should give effect to the provisions of a Treaty without which Canada would soon become a place of refuge for criminals of every grade, an asylum for malefactors of every dye. For be it remembered that it was with the object of

protecting the subjects of Her Majesty and the citizens of the United States from the direful consequences that inevitably followed where great criminals were allowed to escape the punishment due to their crimes, by fleeing from one foreign territory into another, that the Governments of England and the United States entered into the solemn Treaty which now gives your Honor jurisdiction to investigate the charge preferred against the prisoners. This treaty, as your Honor is aware, was assented to at Washington on the ninth of August 1842, and ratified in the month of October following. I refer to its stipulations, applicable to this case, with the view of shewing more clearly the obligations it imposes upon us. It is to be found in the Consolidated Statutes of Canada, Cap. 89, p. 943, and commences thus "Whereas, by the 10th article of a Treaty between Her Majesty and the United States of America, ratified, &c., it was agreed that Her Majesty and the said United States should upon mutual requisitions by them or their Ministers, Officers or Authorities respectively made, deliver up to justice all persons who, being charged with the crime of Murder, or Assault with intent to commit Murder, or Piracy, or Arson, or Robbery, or Forgery, or the utterance of Forged Paper within the jurisdiction of either of the high contracting parties, should seek an asylum, or be found within the territories of the other." Here we find that there can be no mistaking the class of offenders marked out for extradition, which, be it remembered, the same article of the Treaty commands shall be granted, "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and committal for trial if the crime or offense had been there committed, and also provided that the evidence of criminality should be heard and considered by the Judge or Magistrate issuing the warrant, when, if deemed sufficient to sustain the charge, it became the duty of the Justice to certify the same to the proper executive authority, in order that a warrant of extradition might issue." This, your Honor, is the only test to which the guilt of any person demanded under the treaty can be subjected until he is made

to answer for his crime before the tribunals of the country against the majesty of whose laws he has offended. Who will say that this is not a wise measure of protection, if not of prevention, against the commission in our midst of all or any of the foul crimes indicated in the Extradition Treaty? Is there a law abiding citizen in Canada who wishes for its abrogation? I believe there is not: and yet, strange as it may appear, this investigation has revealed the startling fact that there are at this moment very many among us who erroneously imagine that this national convention, so necessary for the repression of crime, and so needful for the protection of society dependent for its existence upon the good faith observed in its execution by both the contracting parties, may upon a special occasion be treated with indifference, or, in order to secure the immunity from punishment of some highly favored criminal, be ignored in such case altogether.

In refutation of this mistaken notion of our duties and obligations under the Treaty, I will now read from the published opinions of eminent Jurists and distinguished statesmen, a few extracts, to show their appreciation of the benefits derivable from its existence, and the rule to be observed whenever its execution becomes the subject of demand by either of the high contracting parties.

Upon this point I refer firstly to a debate which took place in the House of Lords, in the month of February, 1842, when this Treaty was the subject of discussion. Upon that occasion Lord Brougham said:—"He thought the interests of justice required, and the rights of good neighborhood required, that in the countries bordering upon one another, as the United States and Canada, and even that in England and in the European countries of France, Holland, and Belgium, there ought to be laws on both sides giving power, under due regulations and safeguards to each Government, to secure persons who had committed offenses in the territory of one, and taken refuge in the territory of the other. He could hardly imagine how nations could maintain the relationship which ought to exist

between one civilized country and another without some such power."

"Lord Campbell, for his own part, should like to see some general law enacted and held binding on all states, that each should surrender to the demand of the other all persons charged with serious offences, except political; this, however, he feared was a rule or law which it would be difficult to get all nations to concur in."

Upon the same subject, Sir Robert Peel, replying to Lord Palmerston's speech condemning the other provisions of the Treaty, observes:—"The next point to which I shall refer is the article of the late Treaty providing for the mutual surrender of persons charged with offences. The noble Lord admits that the general object aimed at by the article is a wise one, that when the countries have a common boundary, the escape of criminals by stepping over that boundary, is prejudicial to the cause of good order, and injurious to the interests of both countries. The reciprocal delivery of heinous criminals is clearly an object of importance to civilized Governments." *Hansard's Parliamentary Debates*, 3rd series, vol. 67, p. 1223.

President *Tyler*, in his Message communicating the Treaty to Congress, observes:—"The surrender to justice of persons, who having committed high crimes, seek an asylum in the territories of a neighbouring nation, would seem to be an act due to the cause of general justice, and properly belonging to the present state of civilization and intercourse. The British Provinces of North America are separated from the States of the Union by a line of several thousand miles, and along portions of this line the amount of population on either side is quite considerable, while the passage of the boundary is always easy, offenders against the law on the one side transfer themselves to the other. Sometimes with great difficulty they are brought to justice, but very often they wholly escape. A consciousness of immunity from the power of avoiding justice in this way instigates the unprincipled and reckless to the commission of offences, and the peace and good neighbourhood of

the borders are consequently often disturbed." (Message of President of U. S. to House of Congress, August, 1842.)

Mr. *Webster*, the American negotiator of the Treaty, in his celebrated speech, delivered, I believe, in 1846, in defence of its provisions, referring to the tenth article under which we are now proceeding, spoke of it in the following terms:—"I undertake to say that the article for the extradition of offenders contained in the Treaty of 1842, if there was nothing else in the Treaty of any importance, has of itself been of more value to this country, and is of more value to the progress of civilization, the cause of humanity, and the good understanding between nations, than can readily be computed. What was the state and condition of the country on the borders and frontiers, at the time of this Treaty? Why, it was the time when the "Patriot Societies," or "Hunters Lodges" were in full operation, when companies were formed and officers appointed by secret associations to carry on the war in Canada, and as I have already said, the disturbances were so frequent and so threatening, that the United States Government despatched General Scott to the frontier to make a draft on New York for militia, in order to preserve the peace of the border? Nothing but this agreement between the two Governments that, if those "Patriots" and "Barn burners" went from one side to the other to destroy their neighbors' property, trying all the time to bring on a war, (for that was their object,) they should be delivered up to be punished. They were heard of no more." *Webster's Works*, vol. 5, p. 139.)

Vattel, speaking of Treaties, says: "The faith of Treaties—that firm and sincere resolution—that invariable constancy in fulfilling our engagements, of which we make profession in a Treaty, is therefore to be held sacred and inviolable between the nations of the earth, whose safety and repose it secures; and if mankind be not wilfully deficient in their duty to themselves, infamy must ever be the portion of him who violates his faith.

He who violates his Treaties, violates at the same time the law of nations: for he disregards the faith of treaties—that

faith which the law of nations declares sacred: and, so far as depends on him, he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind."

On the observance and execution of Treaties, "said a respectable Sovereign," depends all the security which Princes and States have with respect to each other; and no dependence could henceforward be placed in future conventions, if the existing ones were not to be observed. The man who violates and tramples under foot Treaty engagements is a public enemy, who saps the foundation of the peace and common safety of nations.—(*Vattel*, B. 2, Cap. 25, p. 229.)

Upon the same subject, Chief Justice Jay, in his day a most eminent jurist, and, if I mistake not, the negociator of the Treaty known as the "Jay Treaty," in delivering his charge to the Grand Jury in the celebrated case of Henfield, tried in the City of Richmond, on the 22nd of May, in the year 1793, for a violation of the neutrality laws of the United States, observed:—"Treaties between independent nations are contracts or bargains which derive all their force and obligations from mutual consent and agreement: and consequently, when once fairly made and properly concluded cannot be altered or annulled by one of the parties without the consent and concurrence of the other. Wide is the difference between Treaties and Statutes—we may negotiate and make contracts with other nations, but we can neither legislate for them nor they for us to vacate or modify Treaties at discretion. Treaties, therefore, necessarily become the supreme law of the land. The peace, prosperity and reputation of the United States will always greatly depend on their fidelity to their engagements, and every virtuous citizen (for every citizen is a party to them) will concur in observing and executing them with honor and good faith, and that whether they be made with nations respectable and important, or with nations weak and inconsiderable, our obligation to keep our faith results from our having pledged it, and not from the character or description

of the state or people to whom neither impunity nor the right of retaliation can sanctify perfidy; for although perfidy may deserve chastisement, yet it can never merit imitation."

Upon this branch of the case I will not dwell longer, as I believe that your Honor is as fully sensible of the importance of our executing in good faith our Treaty engagements, as have been the distinguished men whose opinions upon this subject I have briefly laid before you. But while it is our duty to give due effect to the Treaty when its execution is demanded, we must guard against its being made to become in our hands an instrument of oppression or of injustice. I will therefore with the view of shewing the justness of the present application, address myself to the consideration of the facts upon which is founded in this instance the demand of the United States for the extradition of the prisoners; premising that before we can invoke the operation of the Treaty, we must have clearly, unmistakeably, and in accordance with the rules and requirements of the law as it exists, here established three facts:—

First, that the particular offence which has caused the demand for extradition, was committed at the time and place alleged by us.

Secondly, that it is one of the offences mentioned and described in the Treaty.

Thirdly, and *lastly*, that the persons whose extradition is by reason thereof demanded, participated in the commission of the guilty deed.

This, your Honor, as I understand the object of our investigation, is the most important branch of our enquiry, and therefore the first to merit our attention. Impressed with this conviction of our duties and responsibilities, I will now proceed to discuss the evidence we have adduced in support of these three propositions.

What then are the facts proved, if any? I answer, that it is proved beyond the possibility of doubt that long previous to the 19th day of October last, the day when the crime in question was committed, a plan was organised in our Province of Can-

ada, by a party of men calling themselves Southern Refugees, who at the time were enjoying the hospitalities of our citizens and the protection of our laws, which plan had for its object the robbery of our neighbours in the peaceful town of St. Albans. It is proved that in pursuance of this illegal and treacherous organisation, and two or three days preceding the said 19th day of October, these so called refugees, to the number of about 20, secretly left this Province, and stealthily introduced themselves into the town of St Albans. It is proved that after their arrival there, and so soon as these evil disposed visitors had marked out the persons whom they intended should become the victims of their cowardly and felonious operations, they cast aside the disguise assumed for the occasion, and in the afternoon of the 19th day of October last, suddenly emerged from their hiding places, and appeared among the unsuspecting citizens of St. Albans armed with the deadliest kind of weapons; each man of the party threatening instant death to all or any of the panic stricken citizens who dared to oppose him in his work of plunder.

It is proved, that having been thus armed, some of the gang entered the St. Albans Bank, and having taken violent possession, closed its doors; that immediately after this first act in the tragedy so treacherously performed, Mr. Samuel Breck, unconscious of the danger that awaited him, knocked for admission, and was permitted to enter. It is proved that no sooner had he done so, than the door of the bank was again closed; whereupon he was violently seized by one of the robbers, who presented a revolver close to his head, threatening at the same moment (I use the words of the witness) to blow his brains out if he (Breck) did not then deliver to him a sum of money which he had brought with him to the bank for the purpose of redeeming his Promissory Note, unfortunately for him, due on that eventful day. It is proved, that Breck, seeing that resistance upon his part would but lead to his being shot dead upon the spot, yielded to the threat of his murderous assailant, and allowed him to take his money, amounting to about

$300.00, and which, as I have already stated, he carried with him to the bank for the purpose of paying his note.

It is proved, that during the continuance of this cowardly operation, (politely designated by my learned friends an act of war), others of the same gang were keeping watch on the outside of the bank, with the view of guarding their light-fingered friends in the inside from being suddenly surprised, or even rudely interfered with in their work of plunder. It is also proved, that others of the same party were at the same moment engaged in the highly honourable and of course "warlike act" of stealing horses, with which to enable the honest warriors, one and all, to seek safety in flight so soon as the work of robbery was completed. It is proved, that after their thirst for plunder was satisfied, these valiant soldiers mounted the stolen horses, and with their ill gotten booty fled to Canada, which they had left a few hours before; but mark, not before they had imbrued their hands in the blood of the unfortunate and unoffending man, Morrison, whom they then and there, without the shadow of a cause or provocation on his part, brutally murdered. But to this cruel deed I must not make further reference, as it is not at this moment the subject of investigation.

It is also established, that so soon as the report of these infamous outrages upon the lives and liberties, the honour and property of our neighbours, had reached the ears of the Government and people of this Province, they elicited from one and all a general outburst of earnest and well merited indignation, heightened by a knowledge of the fact that the murderers and robbers had sought a place of refuge in Canada, which they had evidently made the base of their nefarious operations.

It is well known that the Government of this country, animated by a lofty sense of justice, and moved as well, by a desire to mark their abhorrence of the crimes committed at St. Albans, as to maintain our friendly relations with the United States, ordered the immediate employment of every means at their disposal necessary for the apprehension of the offenders; the result of which was the arrest in this province of thirteeen of

the gang, all of whom unfortunately were subsequently allowed to escape; how or why this was permitted it is not necessary I should now stop to enquire, particularly as the circumstances under which the prisoners eluded justice, are at this moment the subject of a special Governmental investigation.

What has taken place subsequently is personally known to your Honor. It was upon your warrrant that five of the prisoners who had escaped were re-arrested; they are the persons now under examination. So far, your Honor will not fail to perceive that we have proved our two first propositions, namely, that Samuel Breck was robbed, and at the Town of St. Albans, in the State of Vermont, one of the United States of America, and within the jurisdiction of the United States, and also that this is one of the crimes mentioned and described in the Treaty.

It is therefore only necessary that we should advance one step further, and show that we have proved our third and last proposition, that is, that the crime was committed by the prisoners. And this, I think, we have abundantly established by our having identified two of them, Spurr and Teavis, as the prisoners who personally robbed Breck, and the other prisoners as having aided, assisted, and concerted with them for that purpose. Upon this point I refer to 1 Wharton, American Criminal Law, page 124, wherein the law upon this subject is stated in these words: "It is not necessary that the party should be actually present an eye or ear witness of the transaction; he is in construction of law present, aiding and abetting, if with the intention of giving assistance he be near enough to afford it, should the occasion require. Thus if he be outside the house watching to prevent surprise or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient; one who keeps guard while others act thus assisting them, is in the eyes of the law present and responsible as if actually present. In case of stealing in a shop, if several are acting in concert, some in the shop and some out, and the property is stolen by one of those in the shop, those who are on the outside are equally guilty as principals in the offence in stealing in a shop."

As to what violence is sufficient to constitute robbery, Archbold in Vol. 3, page 418, says:—The ordinary mode, formerly of presenting a pistol is sufficient, so, if the robber assault the party in any other way under such circumstances of terror, as to cause him to deliver up his money or other property, or if there be a struggle for the property before it is taken is sufficient."

If further testimony should be required, it would only be necessary to refer to the voluntary statements of the prisoners, in which they admit their commission of the crime charged against them, but, say they, we should stand excused. Why? Because we informed Breck at the time we robbed him, that we did so in the name of the Confederacy. Truly a very consoling intimation.

Such, your Honor, are the facts; and such, also, is the law upon which we rest this branch of our case. The next consideration that presents itself is: What is the duty of the Judge under these circumstances? Would your Honor, if this crime had been perpetrated in this Province, and within the jurisdiction of this Court, by any of our citizens, with such evidence of its commission as we have laid before you in support of the present charge, hesitate for a moment in committing them for trial? I feel confident you would not, and therefore I venture to say, that if the justice which under similar circumstances we would mete out to ourselves is not denied to the United States, and I hope it will not, your Honor cannot refuse to commit the prisoners now before you, to await the further action of the Government, upon the demand for their extradition. In support of this view of the case, I will now cite a few authorities, which, I believe, are worthy of your Honor's attention.

THE DUTY OF THE JUDGE.

Sir Cornwall Lewis puts it thus clearly and explicitly: In order to render a system of extradition effectual, the amount of proof, and the formalities required should be as small as is consistent with the prevention of abuse. The essence of the system

is, that confidence is reposed in the foreign Government and in its administration of criminal law. The assurance of that Government ought to be the chief guarantee against abuse. If, therefore, it claims any fugitive, through the accredited diplomatic channels, and gives a reasonable proof that there has been a proper investigation by the officers of police and the functionaries conducting the preliminary stages of Judicature, and that this investigation had led to the conclusion that the person in question is guilty of the offenee charged against him, it is desirable that the extradition should take place, upon proof of identity of the party, and without any full investigation, such as a Magistrate would make for the commitment of a prisoner in this country. (Lewis on foreign Jurisdiction, page 52.) And again at page 53, he says:—"The recognition of the criminal law of a foreign State, and the confidence in its regular and just administration which is implied in a system of extradition thus carried iuto effect, is paralleled by the established practice of this and other countries with respect to the civil law."

In fact the rule thus clearly stated has been followed in practice whenever questions under the Treaty arose.

In the Anderson case, Chief Justice Draper, with reference to the case of a party accused of murder, seeking to justify it, observed:—If there is a question of fact to be tried, I apprehend he must be surrendered, as such a question can only be tried in the country where the fact arose. (U. C. C. P. R. Nos. 1 and 2, Vol. II, page 60.)

In the *Chesapeake* case the same question was incidentally disposed of. The Counsel for the prisoners was proceeding to comment on the evidence of authority from the Confederate Government, when Mr. Justice Ritchie observed: "assuming, as you must do, at this stage of your argument, the correctness of the proceedings against the prisoners, and the Magistrate's Jurisdiction of the offence, do not these questions fall within the province of the Superior Court on the trial of the prisoners? Is it not the Magistrate's duty now merely to see if a preliminary case is made out? I think we must act in this case just as

if it was an offence committed here. The question is, would I on the evidence commit for trial in this country? If so, must I not commit the parties for extradition?"

To this the prisoner's Counsel replied:—In Anderson's case a *prima facie* case was made out, but the prisoner was discharged, and so in U. S. *vs.* Palmer, 4 Curtis, page 314, Parker is found in command of the Retribution, and Braine and Parr acting under him, (Ritchie, J.) I think these questions are proper for a Jury, and not for the Magistrate. His duty is simply to deal with this case as a Magistrate would deal with an offence to be tried in this country. (Chesapeake case, Report, page 35.) The case of Metzger reported in the 5th vol. New Legal Observer, maintains the same doctrine. The Magistrate must commit when there is just ground for suspicion.

I will now, said Mr. Devlin, call your Honor's attention to the case of Joseph Fisher to be found in (*Stuart's* Repts., p. 245,) decided in our own courts. Fisher was accused of having stolen $638 in the state of Vermont, one of the United States of America. Immediately after the robbery he fled to Canada, hoping, like the prisoners now before the court, to find a safe asylum here. Fisher was however, not permitted to enjoy his ill gotten booty in peace. An application was made for his extradition, although, be it remembered, there was at the time no Treaty as there is now for the surrender of fugitives from justice, in existence. The application was founded upon what is called the "comity of nations," and was heard before Chief Justice Reid. That eminent Judge, in disposing of the question, said:—"This right of surrender is founded on the principle, that he who has caused an injnry, is bound to repair it, and he who has infringed the laws of any country is liable to the punishment inflicted by those laws; if we screen him from that punishment, we become parties to his crime, we excite retaliation; we encourage criminals to take refuge among us. We do that as a *nation*, which as *individuals*, it would be dishonorable, nay, criminal to do. If, on the contrary, we deliver up the accused to the offended nation, we only fulfil our part of

the social compact, which directs that the rights of nations as well as individuals should be respected, and a good understanding maintained between them; *and this is the more requisite among neighbouring States, on account of the daily communications which must necessarily subsist between them.*

A modern writer, (Instit. du Droit des Gens, &c., par le Gerard de Rayneval, liv. 2, ch. 3, ss. 4, p. 134,) on the Laws of Nations, says:—"La communication journalière entre deux pais limitrophes est inévitable, et elle doit être d'autant plus favorisée par leurs gouvernemens respectifs, qu'elle est naturellement fondées sur des besoins réciproques et qu'elle donne par là, lieu à des changes, d'ailleurs elle établit entre les habitants respectifs des liaisons, et une sorte de confiance qui assurent leur tranquillité, et contribuent à leur jouissances."

Indeed, said the learned Chief Justice Reid, were we to take into account the opinions of modern writers on International law, we would be still more strongly fortified in the principle we here hold, and we see no reason why those opinions should be rejected. At all events, said the Judge, we may safely say, that at the present day, the world has become enlightened in the science of government as well as in all the other departments of human knowledge, far beyond what was known to those writers who have lived centuries ago, and therefore, that the maxims of government of the present day may be considered at least as well understood and better adapted to the rights and feelings of mankind, than they could have been in the days of Grotius and Puffendorf. What, said this eminent Judge, we have to determine is, whether there was legal ground for the arrest and surrender of the prisoner? and we hold there was. The prisoner, said he, comes before us in a very different character from that of a subject to whom protection is due as a matter of right; he is an alien, to whom protection is not due, if the King sees fit to withhold it. The observation of Judge Tilghman may well be applied to him: "*that he cannot force himself into the King's territories and say, you shall protect me.*" It is held, (see Chitty on Prerog., p. 49; 1 Black, Com., 259-260,) that alien friends may lawfully come into the

country without any license or protection from the Crown; though it seems that the Crown, even at common law, and by the law of nations, possesses a right to order them out of the country, or prevent them from coming into it, whenever His Majesty thinks fit: and the reason given, is see (1 Chitty Crim. Law, 131 and 143, note (a)) that it is inseparable from the governing power in any country, that it shall be able to take precautions against foreigners residing in such country, and particularly in a country where foreigners are only amenable to the ordinary laws. The prisoner, said the Judge, came into this Province under suspicious circumstances, charged with felony; as an alien his conduct did not merit protection—unless he had come with a fairer character—and he ought not to be surprised, nor to complain that His Majesty's Government should direct him to be taken back to that country whence he came.

Applying, said Mr. Devlin, this Judgment to the case in question, may we not say that the prisoners now before this Court should not complain, if you, one of Her Majesty's Judges, should hold that they should be taken back to that country whose laws they so shamefully violated. That having outraged the laws of humanity as they, the prisoners, did at St. Albans, they have not the right to say, we will force ourselves into your Canadian territory; and though our guilt should involve you in war, we will still persist in demanding that you should assume all the responsibilities of our crimes, and, cost what it may, that you should shield us from the penalty due to our offences. This, said the learned Counsel, is the ridiculous pretension unblushingly set up on behalf of the prisoners, and boldly urged upon the attention of the Court.

The next case to which he, Mr. Devlin, would call his Honor's attention, was the well known case of Muller, whose extradition was demanded by the British Government upon a charge of murder. The application for his surrender was investigated in the City of New York, before Mr. Commissioner Newton. In rendering judgment, the learned commissioner made the

following pertinent remarks, which will be found at (pp 28 and 30) of the published report of the proceedings had in that case.

"The evidence is such as would plainly require the commitment of Muller for trial if the offence had been committed here, and it results that a certificate leading to his extradition, that the case may undergo an investigation in England, should be granted." And on this the Commissoner, in the following language, applied the law clearly applicable to that and every other case arising under the Treaty: "Having heard and carefully considered the remarks made by the counsel for the defence I am at a loss to see, after having carefully considered the testimony, and weighing it in my mind, that there is not sufficient evidence for me, sitting here simply as a magistrate, and the duty for me being simply to determine, not whether the man is guilty or not, but whether there is sufficient evidence to require that he may be committed, in order to afford an opportunity at the place where the crime was committed, of proving his guilt or innocence. It is not necessary for me to say whether I would absolutely convict the man, and sentence him to be hung, were that even in my province, but the duty I have to perform is simply this: first, has there been a crime committed? If committed, is there probable cause from the evidence adduced to say that the accused is the party who has committed the crime? Now it appears to my mind clear, that looking at it in that light —in the light of probable cause,—it is very plain that there is such cause. I do not desire to sit in judgment on this man, but I wish it were in my power to discover any evidence in the case whereby I could withhold the certificate; but I am bound to say that the combined circumstances, to my mind appear so clear and so distinct, that upon the question of probable cause I cannot have any doubt."

In the still more recent case of for murder on the high seas, on board the British brig "Raymond," in which the prisoner desired to show by evidence that the act was justifiable, the same judge applied the like clear principle, as follows: "Even admitting that evidence of justification could be legally received (of which, however, under the Treaty I

have great doubt,) it is not for me to determine what effect it might or might not have upon the mind of a jury on a final hearing or trial for murder. Under the Treaty I am only to determine the question of probable cause. The simple question here to be decided is, whether there is sufficient probable cause to justify his return for trial to the country within whose jurisdiction the crime is charged to have been committed."

In the case of Ternan (Boston Monthly L. R. vol. 26, p 510) and others for piracy alleged to have been committed in seizing steamer "J. L. Gerrity," in the month of November, 1863, the judges of the Queen's Bench in England, though differing in opinion on the question whether piracy, *jure gentium*, was within the Treaty, did not controvert the same principle laid down by Lord Chief Justice Cockburn: "No doubt, *prima facie*, the act of seizing the vessel, saying at the same time that it is seized for the Confederates, may raise a presumption of such an intention; but then all the circumstances must be looked at to see if the act was really done piratically, *which would be for the jury;* and I cannot say that the magistrate was not justified in committing the prisoner for trial."

And Mr. Justice Crompton observed, "Upon the latter point I quite concur with my Lord, because it is not for us to weigh the effect of the evidence which is for the jury; and all we can consider is whether there was enough to justify a committal for trial, and I agree with my Lord that we cannot say that there was not."

It is unnecessary to multiply authorities on a point so clearly defined by the Treaty, but the following observations of Attorney-General Cushing, (opinions of Atty's General, vol 4, p. 204 and 211,) in advising the Government of the United States in a case where the prisoner arrested for extradition on a charge of murder desired to prove insanity before the committing magistrate, are so pertinent that they are quoted: "The evidence upon the exhibition of which this (*i. e.*, delivery up to justice) is to be done, is such as, according to the laws of the place where the fugitive or person charged shall be found,

would justify his apprehension and commitment for trial if the crime or offence had been there committed."

Had the Treaty conferred upon the magistrate—if it could have been made competent to such an object—the power of *trying* the person charged for an offence committed within a foreign jurisdiction, and of punishing in case of ascertained guilt, the inquiry might have presented itself in a different aspect. But the stipulations under examination aim at no such end, but are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge."—*Ibid p.* 211.

These opinions and decisions are, I think, well worthy the attention of this Court as showing that upon the establishment of a *prima facie* case of guilt, the extradition of the accused should be ordered, leaving him to plead matters of justification before the Court and Jury invested with jurisdiction to try the merits of the offence.

Believing that sufficient notice has been taken of this point, I will now proceed to show by authority, which cannot be controverted, that the surrender of fugitives from justice is a national obligation. That it is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction.

In the matter of *Washburn*, (Johnson's Chan. Repts. 4 vol.) arrested in Troy upon a charge of having stolen $350 in Montreal, the Chancellor who was applied to for his discharge, said: When a case of this kind occurs, it becomes the duty of the Magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the Government here to deliver him up, or for the foreign Government to make the requisite application to the proper Authorities here for his surrender. This doctrine is supported equally by reason and authority.

Vattel observes (B. 2, C. 6, S. 76,) that to deliver up *one's*

own subjects to the offended State, there to receive justice, is pretty generally observed, with respect to great crimes, or such as are equally contrary to the laws and safety of all nations. Assassins, incendiaries and robbers, he says are seized everywhere, at the desire of the Sovereign in the place where the crime was committed, and delivered up to his Justice. The Sovereign who refuses to deliver up the guilty, *renders himself, in some measure, an accomplice in the injury, and becomes responsible for it.* Professor *Martens*, also in his *Summary of the Law of Nations*, p. 107, says, that according to modern custom, a criminal is frequently sent back to the place where the crime was committed, on the request of a power who offers to do the like service, and that we often see instances of this.

Grotius, who is of still higher authority, declares: (B. 2, cap. 21, S. 3, 4, 5,) that the state is accountable for the crimes of its subjects committed abroad, if it affords them protection; and therefore the state where the offender resides, or has fled to, ought, upon application and examination of the case, either to punish him according to his demerit, or to deliver him up to the foreign state.

Heineccius, in his commentary on these passages (Prælec in Grot. h. t.) admits that the surrender of a citizen, who commits a crime in a foreign country, is according to the law of nations; and he says further, that it is to be deduced from the principles of natural law. We ought either to punish the offender ourselves, or deliver him up to the foreign Government for punishment. So *Burlamaqui*, (part 4, c. 3, S. 23 to 29,) follows the opinion of Grotius, and maintains that the duty of delivering up fugitives from justice is of common and indispensible obligation.

In the matter of *Washburn* previously referred to, the Chancellor said: "It has been suggested that theft is not a felony of such an atrocious and mischievous nature, as to fall within the usage of nations on this point. But the crimes which belong to the cognizance of the law of nations are not specially defined; and those which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented, and within the

necessity, as well as the equity, of the remedy. They are all equally invasions of the rights of property, and incompatible with the ends of civil society. Considering the great and constant intercourse between this State and the Provinces of Canada, and the entire facility of passing from one dominion to the other; it would be impossible for the inhabitants on the respective frontiers to live in security, or to maintain a friendly intercourse with each other, if thieves could escape with impunity, merely by crossing the territorial line. The policy of the nation and the good sense of individuals would equally condemn such a dangerous doctrine."

In *Kent's* commentaries, (Vol. 1, p. 36,) *Phillimore*, (Vols. 1 and 2,) *Zabriskies* New Jersey Reports, (Vol. 3, p. 377,) *Rutherforth*, (B. 2, c. 9, S. 12,) the same doctrines are enunciated as forming part of the law of nations.

Here I will leave this branch of the case, and here I might leave it altogether. Because, the pretended belligerency claimed for the prisoners, and boldly set up as a justification of their crimes, involves a question which the reading of the foregoing authorities, clearly shows, if it has any existence, (and I deny that it has in the present case,) can only be determined at the time of the trial of the prisoners, and not upon a preliminary investigation of this kind. But, as my learned friends have opened before us the wide field of international law, and defiantly challenged us to enter, I will not shrink from a consideration of the question even from this new and foreign point of view, much as it is in my opinion, out of place in the present enquiry. Upon this point, the arguments of the learned Counsel lead me to suppose that they view the acts of the prisoners at St. Albans in the light of belligerent acts. And in support of this pretension they have cited with a show of apparent seriousness, certain writers, to prove that as what their clients did, was from their point of view, done, by virtue of previously acquired belligerent rights, therefore the crimes committed by the prisoners at St. Albans, cannot be made the subjects of enquiry before the tribunals of a neutral Country. But the learned gentlemen must be reminded, that before they can invoke the operation of interna-

tional law to justify, excuse, or palliate the outrages of which they are accused, they must have proved the existence of a certain state of facts to which their law can be applied. As for instance,that their clients were duly commissioned by recognised Military Authority, to commit the act complained of. That the circumstances under which it was undertaken and executed, exempted them from criminal responsibility, and above all, even supposing that the prisoners were so authorised, that they have not forfeited their belligerent character, by commencing their attack from a Neutral and friendly territory.

In the absence of such proof, it is perfectly manifest that their International law can have no application; and for this very good reason, that without it there is nothing of record to which the ingenuity of the most skilful pleader can possibly make the application. I will, therefore, as next in order, examine the evidence, such as it is, submitted by the prisoners upon these points, all of which I undertake to demonstrate they have signally failed to prove.

The defence of the prisoners rests upon the pretended commission produced by Bennett H. Young, which it has been strenuously urged entitles him to the recognition of an officer in the service of the so-called Confederate States. And further, that under this commission, and certain mysterious instructions communicated to him by one C. C. Clay, Young, and his accomplices were fully licensed to commit all kinds of depredations at St. Albans, or elsewhere in the United States.

This being the *modest* pretension of the prisoners' Counsel, we will now see how far it is borne out by reference to the commission itself, which is in these words:—

Lieutenant Young's Commission.

CONFEDERATE STATES OF AMERICA,
WAR DEPARTMENT,
Richmond, June 16th, 1864.

SIR,—You are hereby informed that the President has appointed you First Lieutenant, under the Act 121, approved February 17th, 1864, in the Provisional Army, in the service of

the Confederate States, to rank as such from the 16th day of June, 1864. Should the Senate, *at their next session*, ADVISE and CONSENT THERETO, you will be commissioned accordingly.

Immediately on receipt thereof, please to communicate to this Department, through the Adjutant and Inspector General's Office, your acceptance or non-acceptance of said appointment, and, with your letter of acceptance, return to the Adjutant and Inspector General the oath herewith enclosed, properly filled up, subscribed, and attested, reporting at the same time your age, residence, when appointed, and the State in which you were born.

Should you accept, you will report for duty to

(Signed) JAS. A. SEDDON, Secretary of War.

Lieut. Bennet H. Young, &c., &c., P.A.C.S.

This, your Honor, is the document which you are asked to regard as a commission, and to accept as an authority for the perpetration of the crimes committed by the prisoners at St. Albans. A modest request surely, considering that upon the face of this same piece of paper, it appears that a commission will only be given, provided *the Senate at their next session advise and consent thereto.* But there has been no attempt to prove that the Senate ever did advise or consent thereto, nor is there a particle of evidence to show that Young ever communicated his willingness, verbally or in writing, to accept of such appointment, or that he ever took the required oath. To get rid of these difficulties, witnesses have been examined with the view of proving that it was the custom of the Confederacy to issue commissions in this conditional form, to be ratified afterwards when the Senate met. Well, if such a practice had prevailed, it might, perhaps, have answered the purpose intended. But surely the matter assumes an entirely different aspect when the holder of such a document leaves the limits of the so-called Confederacy, and goes abroad to rob and murder by virtue of such authority. The pretence that this piece of paper is sufficient to justify the crimes committed by the prisoners at St.

Albans, is so monstrous as to excite astonishment at its having been urged upon the attention of the Court. Indeed, it is well calculated to induce the belief that we are trifling with our Treaty obligations.

It has, however, been said on behalf of the accused, that Young received instructions subsequent to his pretended commission which supply the authority of the Senate and establish his military *status*. These instructions I will now read word for word as I find them in the evidence.

Confederate States of America,
War Department,
Richmond, Va., June 16th, 1864.

To Lieut. Bennet H. Young;

Lieut.,—

You have been appointed temporarily first Lieut. in the Provisional Army for special service. You will proceed without delay by the route already indicated to you, and report to C. C. Clay, jun., for orders. You will collect together such Confederate soldiers who have escaped from the enemy, not exceeding twenty in number, that you may deem suitable for that purpose, and execute such enterprises as may be indicated to you. You will take care to organize within the territory of the enemy, to violate none of the neutrality laws, and obey implicitly his instructions. You and your men will receive transportation and customary rations, and clothing or commutation therefor.

JAMES A. SEDDON,
Sec. of War.

CONFEDERATE STATES OF AMERICA,
War Department.
Richmond, Va., June 16th, 1864.

TO LIEUT. BENNET H. YOUNG,

LIEUT.—You have been appointed temporarily 1st Lieut. in the Provisional Army for special service.

You will proceed without delay to the British Provinces, where you will report to *Messrs. Thompson and Clay for instructions.*

You will, under their direction, collect together such Confederate soldiers who have escaped from the enemy, not exceeding twenty in number, as you may deem suitable for the purpose, and will execute such enterprises as may be entrusted to you. You will take care to commit no violation of the local law, and to obey implicitly their instructions. You and your men will receive from these gentlemen, transportation, and the customary rations and clothing, or commutation therefor.

JAMES A. SEDDON,
Sec. of War.

Va., June 16th.

CONFEDERATE STATES OF AMERICA,
WAR DEPARTMENT,
Richmond, Va., June 16th, 1864.

Lieut. B. H. Young is hereby authorized to organize for special service, a company not to exceed twenty in number from those who belong to the service and are at the time beyond the Confederate States.

They will be entitled to their pay, rations, clothing, and transportation, but no other compensation for any service which they may be called upon to render.

The organisation will be under the control of this Department, and liable to be disbanded at its pleasure, and the members returned to their respective companies.

JAMES A. SEDDON, *Secretary of War.*

Here, your Honor, we have no less than three different sets of instructions, emanating, we are told, from the Confederate Secretary of War, and each of them upon the 16th of June. In the first instructions given, Young is ordered to proceed without delay by the route already indicated to him, and to report to C. C. Clay, Jur., for orders. In the second, the same

Bennett H. Young is ordered to proceed without delay to the British Provinces, and there report himself to Messrs. Thompson and Clay for instruction. While in the third set of instructions he is informed, that the organization will be made under the control of the War Department. Now, how are we for the purposes of this enquiry, to reconcile these conflicting orders? Can we seriously believe that Jas. A. Seddon, supposing him to have been a sane man upon the 16th of June last, ever subscribed his name to orders so ridiculously contradictory to each other? For my part, I incline to the belief, that he did not, and for this reason, that I am strongly impressed with the conviction that the pretended commission and instructions have been fabricated to meet the exigency of the prisoners' position. But whether I am right in this conjecture or not, matters little, as neither the so-called commission nor its accompanying instructions, convey any authority to the prisoners to engage in acts of murder or robbery. Indeed, so true is this, that we find their Counsel relying for a justification of their crimes, not upon the alleged authority of James A. Seddon, but upon the order of the mysterious C. C. Clay, whom, nobody in Canada, except the prisoners and their Counsel, seems to have seen, known, or cared about. Remembering, however, that C. C. Clay, Junr., has figured conspicuously in this investigation; that it is he, whom we are told, planned, authorised, and directed the execution of the St. Albans' Raid, that it was his command the prisoners obeyed, and stated they were bound to obey, I feel myself called upon to examine his authority to sanction the crimes committed at St. Albans, and to issue military orders from Canada.

Here is his letter to Young:—

PAPER P.

Mem. for Lieut. Bennet Young, C. S. A.

Your report of your doings, under your instructions of 16th June last from the Secretary of War, covering the list of twenty Confederate soldiers who are escaped prisoners, collected and enrolled by you under those instructions, is received.

Your suggestions for a raid upon accessible towns in Vermont, commencing with St. Albans, is approved, and you are authorised and required to act *in comformity with that suggestion.*

October 6, 1864.

C. C. CLAY, JUN.
Commissioner, C. S. A.

Now, I think it may be fairly asked, who is this C. C. Clay, who has arrogated to himself such extraordinary powers in a neutral Territory. George N. Sanders, in his evidence, says: I know Mr. C. C. Clay, whose name is subscribed to document P. He was then exercising the authority of a Confederate agent, claiming *full ambassadorial powers, as well civil as military.* I had several conversations with Mr. Clay about the St. Albans raid. He informed me that he directed the raid, and gave the order for it—the St. Albans raid—and Bennet H. Young was instructed by him to carry it out. Mr. Clay told me about the eighth day of December last, a few days before he left, that he would leave such a letter as the paper writing marked P, and which I infer had not been written up to that time. The letter which he said he would write on that occasion was a letter assuming all the responsibility of the St. Albans raid, for which he was responsible.

Now, if we are to believe Sanders, and I know of no reason why we should disbelieve his testimony upon this point; the prisoners had only the verbal authority of C. C. Clay, for their doings at St. Albans, upon the 19th of October. The letter, or memorandum, as it is called, bearing date 6th October last, was undoubtedly written after the prisoners' visit to St. Albans, and in the month of December, a day or two before C. C. Clay withdrew himself from Canada. But this again, is of little consequence, for it is to be hoped that the assumed authority in Canada of a *soi-disant* Southern rebel agent, will not be permitted to over-ride our own laws, to nullify our treaties, and to imperil our friendly relations with the United States. Besides, Clay, of all others is least entitled at our hands to friendly recognition. It is in evidence, that from the moment he set foot in this

Province, he disregarded our neutrality laws, which so long as he claimed an asylum in Canada were as binding upon him as upon us. And Clay knew this, as appears by the evidence of Wm. M. Cleary, who says: "The reason why at an earlier stage of this enquiry I did not produce this paper, ordering Young to proceed to the British Provinces, to report himself to Messrs. Thompson and Clay for instructions, was, that after a consultation I had with the Counsel for the defence, it was decided not to produce it, because it might involve Clay in a breach of the neutrality laws."

Another paper, omitting the words *proceed to the British Provinces*, was, therefore, substituted; a proceeding, which shows the dexterity of the prisoners' friends in manufacturing evidence to meet the requirements of their case. Is it not however strange, that Clay, who, (according to Mr. Sanders,) claims to exercise in Canada, full Ambassadorial powers, civil as well as military, has not made his appearance at any time during this investigation? Assuredly, if he is clothed, as Sanders tells us, with such high power and authority, his evidence might have been of some importance to the prisoners. At any rate, it would have been interesting to very many, no doubt, to be afforded an opportunity of seeing the first Ambassador Canada could ever boast of having within her borders. But the fact is, your Honor, Clay, dared not appear. And as a proof of this, we find, that in order to screen his own guilt, and to save himself from punishment, he has fled from Canada, taking with him, if report be true, and I doubt it not, much more than his share of the monies stolen by the prisoners from the people of St. Albans. And yet, it is the authority of this conspirator against the laws of the United States, against the peace, dignity and welfare of Canada; he, who had not even the courage to stand by his friends and accomplices in their hour of trial, that is set up as a justification of the St. Albans outrages, and for which judicial recognition is demanded from this Court. I believe, however, that your Honor will not sanction such a monstrous proposition for a moment—one utterly abhorrent to every idea of justice, and one which, I

hesitate not to say, if entertained by the people of this Province, will, I verily believe, be regarded, and justly so, by the United States as tantamount to a declaration of war against them. I say justly so, Sir, because, if you discharge the prisoners, it must be that you regard them as belligerents, and the crimes imputed to them at St. Albans, as so many acts of legitimate warfare. Now, considering the circumstances under which this robbing expedition was planned and executed—that it was concocted in Canada, and started from Canada, and that it has no higher authority to rest upon than the memorandum of C. C. Clay, can we be surprised that our recognition and judicial sanction of such an atrocious outrage should excite the indignation of the people of the United States, and induce them to look upon us as their enemies?

But, before I leave this point, let me remind your Honor, that Mr. Davis, the President of the so-called Confederate States, has not to this hour, acknowledged the acts of the prisoners, or in any way assumed the responsibility of what they did at St. Albans. In support of this statement, I refer to the evidence of the Revd. Stephen F. Cameron, the messenger dispatched to Richmond, to obtain from there a ratification of the prisoners' acts, or such other evidence as would prove that their raid was directed, sanctioned, and authorised by the Confederate Government, and that they, the prisoners, were duly commissioned officers and soldiers of the Confederacy. Your Honor will remember how often and how earnestly my learned friends protested against being called upon for the defence of their clients, until they had an opportunity of communicating with Richmond. But why this necessity for communication with Richmond if the pretended commission and written memorandum of C. C. Clay were at the time of their production by the prisoners, as we are told they were, sufficient to prove their military *status*? The fact is, Sir, my learned friends knew then, as they know now, if they would but make the admission, that the prisoners had no authority whatever to justify their crimes, or to stay the demand for their extradition. And hence their frequent appeals for delay, to communicate with the magistracy

at Richmond. Well, that delay was accorded to them, and now that the messenger has returned, let us see what he has brought to aid the cause of the prisoners. I find, Sir, that he has laid before this Court as the result of his perilous journey, three copies of three muster rolls of three Companies, in which the names of the prisoners have been very badly written indeed; and so far back it would seem as two years ago. Now, your Honor, this is not the kind of evidence which the prisoners in their affidavits fyled in support of their application for delay, stated they needed for their defence, and could procure upon communication with Richmond. The truth is, they had hoped that the Confederate President, if appealed to, might be induced to avow their acts. But, although I would not attach the least importance to his avowal, even if it had been made, it is still worthy of remark, that he has withheld it. And the reason, said Mr. Cameron in his evidence, is, "That his General Order in the Burley case, had been disregarded by the Judges of Upper Canada. President Davis, observed the witness, seemed *piqued and indignant of the facts.*" This, your Honor, is the excuse offered for the reticence of Mr. Davis; for his unwillingness to hold himself or his Government, such as it is, responsible for the outrages committed at St. Albans. Will you then, seeing that the Confederate authorities have pointedly refused to acknowledge the Military *status* claimed for the prisoners, supply the want by the substitution of your sanction for their authority? I earnestly hope you will not place yourself in such an unenviable position; a position which I take the liberty of saying would be dishonoring to the high character of the judiciary, and extremely prejudicial to the best interests of the people of Canada. With these remarks upon this branch of the question at issue, I will now in reply to my learned friends, proceed to consider our neutral obligations to the United States, and with the further object of showing that it is not only our duty, but our interest, if we wish to secure to ourselves a continuance of the blessings of peace, to observe a strict impartiality in the

pending conflict, and not to favor one of the contending parties to the injury of the other.

Duty of Neutrals.

Chief Justice Jay, in his charge to the Grand Jury, in the case of Wenfield, (*Reported in Wharton's Rept. of State trials in U. S.*) accused of a violation of the neutrality laws of the United States, made the following sensible remarks, which I quote, as being in my opinion precisely applicable to our state at this moment. That eminent Judge said:—"By the laws of nations, the United States, as a neutral power, are bound to observe the line of conduct indicated by the proclamation of the President towards all the belligerent powers, and that although we may have no treaties with them. Surely (said he) no engagements can be more wise and virtuous than those whose direct object is to maintain peace and to preserve large portions of the human race from the complicated evils incident to war. While the people of other nations do no violence or injustice to our citizens, it would certainly be criminal and wicked in our citizens, for the sake of plunder, to do violence and injustice to any of them.

If you let loose the reins of your subjects, against foreign nations, these will behave in the same manner to you, and instead of that friendly intercourse which nature has established between all men, we should see nothing but one nation robbing another. The respect which every nation owes to itself imposes a duty on its Government, to cause all its laws to be respected and obeyed, and that not only by its proper citizens but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established than that all strangers admitted into a country are during their residence subject to the laws of it, hence it follows that the subjects of belligerent powers are bound, while in the country, to respect the neutrality of it."

Did Clay do this? Did the prisoners do it? St. Albans answers no, and well it may so answer.

"While" said the learned Judge, "we contemplate with anxi-

ety and regret the desolation and distress which a war so general (war was then being carried on between Austria, Prussia, Sardinia, Great Britain and the United Netherlands of the one part, and France of the other,) and so inflamed will probably spread over more than one country, let us with becoming gratitude wisely estimate and cherish the peace, liberty, and safety with which the Divine Providence has been pleased so liberally to bless us. Self preservation is a primary duty of a state as well as of an individual. To love and to deserve an honest fame, is another duty of a state as well as of a man. To a state as well as to a man, reputation is a valuable and an agreeable possession. But with war and rumours of war, our ears in this imperfect state of things, are still assailed.

Into this unnatural state ought a nation to suffer herself to be drawn without her own act, or the act of him, or them, to whom for the purpose she has delegated her power?

Into this unnatural state should a nation suffer herself to be drawn by the unauthorized, nay, by the unlicensed conduct of her citizens?

Humanity and reason, says *Vattel*, say no."

In the case of Talbot *vs* Janson, for a breach of neutrality law, (1 *Curtis' Repts.* of Decision in the Sup. C. of the U. S., p. 134,) Judge Patterson said:—" The United States are neutral in the present war; they take no part in it; remain common friends to all the belligerent powers, not favoring the arms of one to the detriment of the others. An exact impartiality must mark their conduct towards the parties at war, for if they favor, they favor one to the injury of the other. It would be a departure from pacific principles, and indicative of a hostile disposition. It would be a fraudulent neutrality." At (p. 136) he says:—" The principle deducible from the law of nations is plain; *you shall not make use of our neutral arm to capture vessels of* YOUR *enemies, but of* OUR *friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded.* Both the powers in the present instance, though enemies to each other, are friends of the United States, whose

citizens ought to preserve a neutral attitude, and should not assist either party in their hostile operation."

Phillimore (V. 1, 2, p. 189) says: "A Rebellion or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the Coterminous State, and from thence, with restored strength and fresh appliances, renew their invasions from the State in which they have escaped. The invaded States remonstrate. The remonstrance, whether from favour to the rebels, or feebleness of the executive, is unheeded, or at least, the evil complained of, remains unredressed.

In this state of things, the invaded State is warranted by international *law in crossing the frontier*, and in taking *the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require.*

In (3rd *Phillimore*, p. 89,) it is laid down, that the conduct of a State which allowed, through indifference or gross remissness, its subjects to invade the rights of another State, would fall under what is classed as *culpable imprudence.* If indeed the State permitted, or connived at the offence, and sheltered the offender, it would be just as much an aggressor, as if the invasion had been made by the Regular forces of the kingdom. But when the individuals of any State violate this general law, it is then the interest, as well as the duty of the Government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations, in their collective capacity, observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two States in war. It is, therefore, incumbent upon the nation injured, first, to demand satisfaction and justice to be done on the offender by the State to which he belongs; and, if that is refused or neglected, the Sovereign then avows himself an accomplice or abettor of his subjects' crimes, and draws upon his community the calamities of foreign war.

Wheaton, (p. 716,) says: The respect due to neutral territorial seas is not confined to a total abstinence, from every act of hostility; it equally extends to the proceedings immediately preparatory to those acts. Thus a fleet or vessel of war, or privateer, cannot without committing a violation of territory, establish itself upon any point of this sea, in order to watch the passage of vessels, whether of war or merchantmen of the enemy or neutral ships, even if it leaves its retreat, in order to attack them outside of the limits of the neutral jurisdiction. Without doubt, hostilities, the employment of force, the exercise of the right of war, have no place within the Jurisdictional limits of pacific Sovereigns friendly to the two parties, *but the law of war does not admit that the territory of a neutral people should serve as an ambuscade for one of the belligerents to favor his operations of the war to the detriment of the other.* All the prizes made under such circumstances are then unlawful, and give to the neutral the right of claiming from the belligerent, who does these acts, a reparation, as if they had been committed on his own proper territory, and within the limits of his Jurisdiction.

In consequence of the laying in wait at Southampton, by an American steamer of war, watching for the departure of a Confederate armed steamer, and sending men on shore for that purpose, Earl Russell wrote, January the 10th, 1862, to Mr. Adams, "I think it necessary to state to you, that, except in case of stress of weather forcing them to land, Her Majesty's Government *cannot permit armed men in the service of a foreign Government, to land upon British Territory.* (*Ibid*, page 721.) There is then no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. "When the fact is established," says *Sir W. Scott*, it overrules every other consideration. A capture made under such circumstances, is done away; the property must be restored, notwithstanding that it may actually belong to the enemy. (*Ibid* page 727.) It is a settled principle of the law of nations, that no belligerent can rightfully make use of the territory of a neutral State for belligerent purposes, without the consent of the neutral Government."

Vattel, (B, 3, c. 7, p. 344,) says: It is certain that if my neighbour affords a retreat to my enemies, when defeated and too much weakered to escape me, and allows them to recover, and watch a favorable opportunity of making a second attack on my territories, this conduct so prejudicial to my safety and interests, would be incompatible with neutrality. If therefore, my enemies, on suffering a discomfiture, retreat into his country, although charity will not allow him to refuse them permission to pass in security, he is bound to make them continue their march beyond his frontiers as soon as possible, and not suffer them to remain in his territories to watch for a convenient opportunity to attack me anew; otherwise he gives me a right to enter his country in pursuit of them. Such treatment is often experienced by nations that are unable to command respect. Their territories soon become the theatre of war; armies march, encamp and fight in it, as in a country open to all comers.

Vattel, (B, 2, c. 6, p. 161,) says: 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*.

If the offended State has in her power the individual who has done the injury, she may without scruple bring him to justice and punish him. If he has escaped and returned to his own country, she ought to apply to his sovereign to have justice done in the case. And since the latter ought not to suffer his subjects to molest the subjects of other States, or to do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment, *or finally, according to the nature and the circumstances of the case, to deliver him up to the offended State, to be there brought to justice.*

Assassins, incendiaries and robbers, are seized everywhere, at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice.

The Sovereign who refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it. But if he delivers up either the property of the offender, as an indemnification, in cases that will admit of pecuniary compensation, *or his person, in order that he* may suffer the punishment due to his crime, the offended party has no further demand on him."

In support of the doctrines and opinions thus enunciated, many other eminent writers and authors could be quoted. But I conceive that I have gone far enough in this direction, and have adduced sufficient authority to refute the mistaken opinions entertained by our opponents of the obligations imposed upon us by the laws of neutrality.

I now call your Honor's attention to the case of Bennett G. Burley, lately extradited upon the demand of the United States. This person was arrested upon a charge of robbing one Ashley, on board the Philo Parsons, a steamer sailing at the time on Lake Erie. The prisoner when ordered to render an account of his conduct before the Recorder of the City of Toronto, set up as a justification of the act, that he, Burley, was a commissioned officer in the service of the so called Confederate States, that he was entitled to be regarded as a belligerent, and that his object in taking forcible possession of the Philo Parsons, which he and others did, in addition to the robbery of Ashley, was to use her as a means to enable his party to effect the release of Southern prisoners detained in Camp Douglas, on Johnson's Island. The Recorder held that the act of robbery was not justified, and ordered extradition. A writ of *Habeas Corpus* was next applied for by the prisoner's counsel. The application was made to Chief Justice Draper, who had sitting with him three other Judges. It was very ably argued and very ably opposed by the counsel engaged on both sides, and after a patient and careful consideration of the facts and the law applicable to them, the writ of *Habeas Corpus* was by these learned Judges refused. Be it remembered too, that in this case the prisoner produced

an order or proclamation from the Confederate President avowing the act of Burley, and assuming all the responsibility. But the Judges held, and held rightly, that no such order or proclamation could justify the circumstances under which the crime was committed, commencing with the violation of our neutrality laws, and that if the authority upon which the prisoner relied, was of any value, the proper time and place to urge it as matter of justification, was at his trial, and before the Court having jurisdiction to hear and determine upon the merits of the offence charged. There is then this difference between the case of Burley and that of the prisoners now before this Court, that Mr. Davis avowed Burley's deed and refused to give a like recognition to the acts of Bennett H. Young and his accomplices. But then the soundness, the legality of this judgment have been questioned by my learned friends on the other side. Indeed one of them has carried his criticism to the extreme length of saying, that the judgment is a disgrace to the Judiciary of Upper Canada, and is a proof of the unfitness of the Judges in that section of the country, to deal with questions of international law!! Perhaps this is the opinion of the gentleman who has denounced in such strong vituperative terms the Chief Justice and his brother Judges. But certainly it is not the opinion of the eminent writers upon international law, from whose pages I have read, nor will it I trust be the opinion of your Honor. I admit, however, that the learned Judges whose judgment has provoked so much wrath, committed an unpardonable error in adjudging Burley's case, without consulting my learned friends, whom I am sure would have felt great pleasure in indoctrinating their Honors with ideas of international law as understood by Jeff. Davis, and practised by Raiders generally. Believing, however, that the Bench of Upper Canada will not be deterred from pursuing the path of rectitude, by the belligerent observations of my learned friend, and that it is quite possible he might be induced to look upon them with more favor, if he heard the reasons of their judgment once more, I will now read a few extracts from the published report of their decision, which, notwithstanding all that has

been said to the contrary, I still persist in commending to the careful attention of the prisoners' counsel.

"But," said *Chief Justice Draper*, "conceding that there is evidence that the prisoner was an officer in the Confederate service, and that he had the sanction of those who employed him to endeavour to capture the *Michigan*, and to release the prisoners on Johnson's Island, the manifesto put forward as a shield to protect the prisoner from personal responsibility does not extend to what he has actually done—nay more, it absolutely prohibits a violation of neutral territory or of any rights of neutrals. The prisoner, however, according to the testimony, was a leader in an expedition, embarked surreptitiously from a neutral territory. His followers, with their weapons, found him within that territory, and proceeded thence to prosecute their enterprise, whatever it was, into the territory of the United States. Thus, assuming their intentions to have been what was professed, they deprived the expedition of the character of lawful hositility, and the very commencement and embarkation of their enterprise was a violation of neutral territory, and contrary to the letter and the spirit of the manifesto produced. This gives a greater reason for carefully enquiring whether, looking at the whole case, the alleged beligerent enterprise was not put forward as a pretext to cloak very different designs. Taken by themselves, the acts of the prisoner himself clearly establish a *prima facie* case of robbery with violence—at least according to our law. The matters alleged to deprive the prisoner's acts of this criminal character are necessarily to be set up by way of defence to the charge, and involve the admission that the prisoner committed the acts, but denying their criminality. Assuming some act done within our jurisdiction, which, unexplained, would amount to robbery; if explanations were offered, and evidence to support them were given at a preliminary investigation, the accused could not be discharged—the case must be submitted to a jury. This case cannot, from its very nature, be investigated before our tribunals, for the act was committed within the jurisdiction of the United States. Whether those facts are

necessary to rebut the *prima facie* case can be proved, can only be determined by the courts of that country. We are bound to assume that they will try and decide it justly.

I do not, on the whole, think the prisoner is entitled to be discharged.

I should add, that, considering the nature of the questions to be determined, I requested the learned Chief Justice of the Common Pleas, and my brothers Hagarty and John Wilson who were all, at the moment, within reach, to sit with me and aid me with their opinion. I am sustained by their concurrence in the conclusion at which I have arrived."

Chief Justice *Richards*--"Taking the evidence adduced against the prisoner, there seems to have been sufficient to warrant his committal. Then, has he shown sufficient to relieve him of the charge?

If, on a similar matter occurring in this country, I was called upon to decide whether I would discharge the prisoner or commit him for trial, I should feel bound to commit him. I should say, that looking at all the facts as they are presented on either side, the conduct of those parties, and what they said and did during the time the vessel was in their possession, was of that equivocal character, that it would, in the most favorable view suggested for the prisoner, be a matter for the consideration of a jury, whether they were acting in good faith in carrying out a belligerent enterprise, or whether they were not making an expedition for the purpose of plunder, under pretence of a belligerent enterprise, thinking in that way more readily to escape detection.

Entertaining the opinion I have expressed, it is my duty to declare that the learned Recorder was warranted in deciding to commit the prisoner for the purpose of being surrendered. As long as the Extradition Treaty between this country and the United States is in force, it ought to be honestly carried out, and in all cases where the evidence shows that an offence had been committed, though there may be conflicting evidence as to the facts, or different conclusions drawn from the facts,

yet in those cases where we would commit for trial, in similar cases in this country, we are equally bound to commit to be surrendered for trial under the Treaty and our Statute passed to carry it out. We must assume that parties will have a fair trial after their surrender, or we ought not to deliver them up at all, or to have agreed to do so."

Justice *Hagarty*:—"I think the only just course open to a Canadian Court is to decline accepting either the prisoner's statement or his alleged employer's avowal of his acts, as conclusive evidence of the proposition that his conduct was war and not robbery. It should accept the evidence offered as establishing a *prima facie* case of guilt sufficient to place the prisoner on his trial and all for his defence. The whole burden of proving that the transferring of the money from Ashley's pocket to that of the prisoner and his friend, does not bear the complexion that men of plain understanding, must under the circumstances, attribute to it, must be thrown upon the prisoner.

I think I am bound to a treaty so made between my Sovereign and her ally in a liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect.

We are to regard its avowed object,—the allowing of each country to bring to trial all prisoners charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender. If the position of the case were reversed, and the prisoner had done the acts complained of in this country, and claimed to be a belligerent against our Sovereign, I think any Canadian judge or magistrate would commit him for trial for robbery, leaving him to plead his belligerent position at his trial for what it was worth. I have neither the desire nor the right to assume that he will not be fairly tried in the United States. The Treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction. I think the prisoner should be remanded on the Recorder's warrant, which I think is not open to any valid objec-

tion. Had I differed from the result arrived at by the Recorder, I should then have to consider a doubt more than once expressed, whether any judge can review his decision."

(After reciting the facts, Mr. Justice *Wilson* proceeds:)

"These proceedings, so mean in their inception and so ignoble in their development and termination, we are asked to consider as acts of war, and to accord to the prisoner belligerent rights. What is there in all this which constitutes the act of war? If the object were to release the prisoners, from all that appears they never were nearer than fourteen miles to Johnson's Island. Was the seizure of this unarmed boat *per se* an act of war?—for it has been argued that the robbery was merged in the higher act. The seizure of the boat, for whatever purpose, was one thing, the robbery of Ashley quite another; and in no way that we see, in furtherance of the design now insisted upon necessary for its accomplishment. But is not the *bona fide* of the enterprise matters of defence which a jury ought to try? Such a trial can only be had where the offence was committed, and we cannot doubt but that justice will be fairly administered. Then we are told that although the prisoner has no orders to show, authorizing what he did, he has the manifesto of the President of the Confederate States avowing the act and assuming it, and therefore he is not subject to this charge at all. We accord to that Confederacy the rights of a belligerent, as the United States has done from the day it treated the soldiers of the revolted States as prisoners of war; but there is an obvious distinction between an order to do a belligerent act, and the recognition and avowal of such an act after it has been done. The one is an act of war, the other an act of established government. The one is consistent with what Great Britain acknowledges, the other is not. For us judicially to give effect to the avowal and adoption of this act, would be to recognize the existence of the nationality of the Confederate States, which at present our Government refuses to acknowledge.

Giving for the moment this manifesto its full force, it distinctly disclaims all breaches of neutrality; but it is clear that this expedition took its departure and shipped its arms from

our port. But does it assume the responsibility of this seizure, and all that was done upon it throughout? If not, it is neither justification nor excuse. I see no authority for the doing of the act, and as an assumption of what was done, therefore the whole justification fails. Lastly, the attitude of the United States towards us is no concern of ours. Sitting here, whatever they do, while peace exists, and this Treaty is in force, we are bound to give it effect. We can look with no favor on treachery and fraud, we cannot countenance warfare to be carried on except on the principles of modern civilization. We must not permit, with the sanction of law, our neutral rights to be invaded, our territory made the base of warlike operations or the refuge from flagrant crimes. Peace is the rule, war the exception of modern times; equivocal acts must be taken most strongly against those who, under pretence of war, commit them. For these reasons, I think the prisoner must be remanded on the warrant of the learned Recorder."

And for the same reasons so also should the prisoners here be remanded, unless it can be made to appear that we have one set of neutrality laws for Upper Canada, and another and a totally distinct set for Lower Canada. But as this is not pretended, the judgment in the Burley case disposes of the question at issue here, unless indeed your Honor, like the prisoners' counsel, should be of opinion that your brother Judges, distinguished as they undoubtedly are for judicial attainments of the highest character, have in the Burley matter misunderstood the law, misapplied the facts, and evidenced gross ignorance of our international relations, a conclusion which assuredly does not flow from the premises.

With these remarks on the Burley case, I will now address myself to another point raised by the prisoners' counsel, which I undertake to refute by incontrovertible authority, namely, that the prisoners being citizens of the Southern States, had by the laws of war, a right to regard the citizens of the Northern States, with whom they are at war, as their enemies, and as such to put them to death, wherever or whenever they could, and that for this purpose they have a right to employ all sorts

of means. "A strange maxim!" (*Vattel*, B, 3, c. 8, p. 357,) "but happily exploded by the bare ideas of honor, confused and indefinite as they are. In civil society, I have a right to punish a slanderer—to cause my property to be restored by him who unjustly detains it; but shall the means be indifferent? Nations may do themselves justice, sword in hand, when otherwise refused to them; shall it be indifferent to human society that they employ odious means, (*Ibid*, B, 3, c. 8, p. 351,) women, children, feeble old men, sick persons, come under the description of enemies, and we have certain rights over them, inasmuch as they belong to the nation with whom we are at war. But these are enemies who make no resistance and consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least degree civilized acquiesces in it. The like may be said of the public ministers of religion, of men of letters, and other persons who live remote from military affairs, (Was not St. Albans remote from military affairs?) At present war is carried on by regular troops; the people, the peasants, the citizens, take no part in it, and generally have nothing to fear from the sword of the enemy, (*Ibid*, p. 359,) I give then, the name of *assassination* to a treacherous murder, whether the perpetrators of the deed be subjects of the party whom we cause to be assassinated—or of our own Sovereign. Assassination and poisoning are therefore, contrary to the laws of war, and equally condemned by the law of nature and the consent of all civilized nations. (*Ibid*, pp. 361, 362.) I cannot conclude this subject of what we have a right to do against the person of the enemy, without speaking a few words concerning the dispositions we ought to preserve towards him. Let us never forget that our enemies are men; though reduced to the disagreeable necessity of prosecuting our rights by force of arms, let us not divest ourselves of that charity which connects us with all mankind. Thus shall we defend our country's rights without violating those of human nature. Let our valor preserve itself from every stain of cruelty, and the lustre of victory

will not be tarnished by inhuman and brutal actions. (*Ibid*, p. 368.) What we have advanced is sufficient to give an idea of the moderation which we ought to observe, even in the most just war, in exerting our right to pillage and ravage the enemy's country."

"Except the single case in which there is question of punishing an enemy, the whole is reducible to this general rule. *All damage done to the enemy unnecessarily, every act of hostility which does not tend to procure victory and bring war to a conclusion, is a licentiousness condemned by the law of nature.* (*Ibid*, p. 369.) The pillage and destruction of towns, &c., are measures odious and detestable on every occasion when they are put in practice without absolute necessity, or at least very cogent reasons. But as the perpetrators of such outrageous deeds might attempt to palliate them under pretext of deservedly punishing the enemy, be it here observed, that the natural and voluntary law of nations does not allow us to inflict such punishments, except for enormous offences against the laws of nations."

"Soldiers," says *Vattel* (B. 3, c. 15, p. 400), "can undertake nothing without the express or tacit command of their officers. They are not to act at their own discretion. Wherefore, with respect to things which are not entrusted to their charge, they (soldiers and officers) may both be considered as private individuals, who are not to undertake anything without orders. The obligation of the military is even more strict, as the martial law expressly forbids acting without orders; and this discipline is so necessary that it scarcely leaves any room for doubt."

These citations, I think it will be admitted, do not bear out my learned friend's ideas of carrying on war. We will now see what Wheaton says upon this subject (*Wheaton*, p. 7). "Thus, for instance, on mere general principles, it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which that is to be effected; but the conventional laws of mankind, which is evidenced

in their practice, does make a distinction, and allows some, and prohibits other modes of destruction ; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes (*Ibid*, p. 588). No use of force is *lawful*, except so far as it is necessary. A belligerent has therefore no right to take away the lives of those subjects of the enemy whom he can subdue by other means. Those who are actually in arms, and who continue to resist, may be lawfully killed ; but the inhabitants of the enemy's country who are not in arms may not be slain, because their destruction is not necessary for obtaining the just ends of the war. [Was the assassination of Morison at St. Albans by the prisoners necessary for this purpose?] (Wheaton, pp. 591 to 604). All the members of the enemy's State may lawfully be treated as enemies in a public war ; but it does not therefore follow that all these enemies may be lawfully treated alike. No use of force against an enemy is lawful unless it is necessary to accomplish the purposes of the war. The persons of the Sovereign and his family, the members of the Civil Government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally all other public or private individuals engaged in the ordinary civil pursuits of life, are by the custom of civilized nations, founded upon the foregoing principle, exempted from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field (*Ibid*, p. 626). The effect of a state of war lawfully declared to exist is to place all the subjects of each belligerent power in a state of mutual hostility. But the usage of nations has modified this maxim, *by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the*

State. Such are the regularly commissioned naval and military forces of the nation. The horrors of war would indeed be greatly aggravated if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that in land wars irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations."

"War (3 Phillimore, p. 100,) is not to be considered as an indulgence of blind passions, but as an act of deliberate reason; and as Lord Bacon says, '*no massacre* or confusion, but the highest trial of right.' Wanton cruelty exercised towards the enemy's subjects is therefore, according to the principles and practice of Christian nations, unjustifiable and illegal.—(*Ibid.*, p. 103.) Reason, morality and religion alike commend to the understanding and the conscience of nations, that cardinal principle of the law of war, to which reference has already been made, and by which it is decided, 'that everything is *not* lawful against an enemy,' but only those things which are essential to the vigorous prosecution and speedy termination of the war. The conqueror, (*Ib.* p. 145,) is obliged by the laws of just war, to spare those who lay down their arms, or who are helpless. To put such to death is to commit murder. *And those who commit it, ought to die by the hand of the hangman, and not of the soldier.* Bands of marauders acting without the authority of the Sovereign or the order of the Military commander, have no claim to the treatment of pris oners of war."

The same doctrine is maintained by every modern writer upon the laws of civilized warfare. In the case of *Talbot vs. Janson*, decided in the Supreme Court of the United States, and reported in (1 *Curtis*, p. 139,) the principle supported by the authorities I have just quoted is well and clearly laid down in a judgment rendered by that high tribunal, from which I take the following extract.—"That by a due consideration of the law of nations, whatever opinions might have

prevailed formerly to the contrary, no hostilities of any kind except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War is instituted for national purposes, and directed to National objects ; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill will. *He is not to fly like a tiger upon his prey, the moment he sees an individual of his enemy before him.* Such savage notions I believe obtained formerly—thank God more rational ones have succeeded. Even in the case of one enemy against another enemy, therefore, there is no color of justification for any offensive hostile act, unless it be authorized by some act of the Government giving the public constitutional sanction to it."

In the case of Little *vs.* Barreme, also decided in the Supreme, Court of the United States (1, *Curtis*, p. 465), Chief Justice *Marshall*, admitted by my learned friends to be a high authority, held that instructions from the President to the commander of a public armed vessel of the United States, to do an illegal act, do not justify the officer in doing it, nor so far excuse him as to exempt him from paying damages. In rendering judgment, Chief Justice Marshall said : " I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the Executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers ; and between proceedings in the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to do a *prohibited act*, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think, that where, in

consequence of orders from the legitimate authority, a vessel is seized with the pure intention, the claim of the injured party for damages would be against that Government from which the orders proceeded, and would be a proper subject for negociation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that *the instructions cannot change the nature of the transaction, or legalize an act, which without those instructions, would have been a plain trespass.*"

These authorities I confidently submit to your Honor's judgment, and in refutation of the absurd and happily exploded maxim, that every injury inflicted by one enemy against the person of another enemy in time of war, and under pretence of war, is justifiable.

The next case to which I shall refer is that of McLeod, so much relied on by my learned friends, and with it I intend to close my observations upon this branch of the case.

McLeod, it is well known, was arrested in the State of New York, in the month of November, in the year 1840, because of his supposed participation in the destruction of the steamer *Caroline*, and the killing of one Durfee. Now, the circumstances under which these acts were committed were very different indeed from those which we are investigating. Between the burning of the *Caroline*, the killing of Durfee, and the robbery of Breck, and of the Banks, the murder of Morrison, and the wounding of several other persons at St. Albans by the prisoners, upon the 19th day of October last, there is not the least analogy, absolutely none whatever, The destruction of the *Caroline* was an act of public force, done by the command of the British Government, and all that McLeod did in it, if anything, he did by the express command of his superior officer, and in compliance with the order of his own Government.

The *Caroline* was destroyed in December, 1837, and from the published accounts of the transaction, we gather, that after the rebellion which, during that year had broken out, had been suppressed, a small band of Canadian refugees, who had

taken shelter in the State of New York, formed a league with a number of other evil-disposed persons, for the purpose of invading the British territory, not to join a party engaged in civil war, because civil war at that time in Canada there was none, but in order to commit within British territory the crimes of robbery, arson, and murder. After some days' preparation, these people proceeded to invade and occupy Navy Island, and part of the British territory; and having engaged the steamboat *Caroline*, which, for their special service was cut out of the ice in which she had been enclosed in the port of Buffalo, they had used her for the purpose of bringing over to Navy Island, from the United States territory, men, arms, ammunition, stores and provisions. In consequence of these preparations, the British authorities stationed a military force at Chippewa, to repel the threatened invasion, and to defend Her Majesty's territory. The commander of that fort, seeing that the *Caroline* was used as a means *of supply and reinforcement* for the invaders, who had occupied Navy Island, judged that the capture and destruction of that vessel would prevent supplies and reinforcements from passing over to the Island, and would, moreover, deprive the force on the Island of the means of passing over to the British territory on the mainland. Accordingly, on the 29th of December. 1837, an expedition of seven small boats, and sixty-three armed men, was fitted out at Chippewa, by the direction of Col. McNab, (who was lawfully in command of Her Majesty's forces at the last named place, and vested with full authority to do so,) and commanded to take the said steamboat by force, wherever found, and to bring her in or destroy her. By this expedition, in which McLeod was engaged, the *Caroline* was captured and destroyed, and in that capture Durfee lost his life. Hence the subsequent arrest of McLeod. No sooner, however, was this arrest made known, than his immediate liberation was demanded by the British Government. The grounds, said Mr. Fox, (the then British Minister,) addressing himself to Mr. Webster, "upon which the British Government make this demand, are these: that the transaction, on account of which

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

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

After this correspondence, an application was made for the the release of McLeod, supported by the law officers of the Government of the United States; but, Judge Cowen, to whom it was made, refused it, upon the ground, that the avowal of McLeod's act by the British Government, did not, and could not, legalize that which according to his views was a crime, before its avowal. He held moreover, that an indictment for murder having been returned against McLeod, the Court could not by the recognition of the British Government of his (McLeod's) deeds, be ousted of its jurisdiction to try the offence. McLeod was therefore brought to trial, and after a full hearing of the case, acquitted. Subsequently the opinion of Judge Cowen was reviewed by Judge Tallmadge, (26, *Wendell*, p. 663,) who held that as the British Government had not only approved, but ordered the destruction of the Caroline, during

which Durfee was killed, McLeod, was not individually answerable for the consequences resulting therefrom. From the moment that it was sanctioned and avowed by England, it became a national question, and one to be determined, not, in the ordinary Municipal tribunals of the States; but in the high political Courts of Washington and St. James.

Where then is the analogy between this case and that of Young and his accomplices? McLeod, in obedience to the command of his superior officer, performed a soldierly act, one which was deemed necessary for the defence of his country, and which was approved by his Sovereign; whereas Young and his associates, without any authority, performed the very contrary of a military act—one, which no man with any regard for truth can pretend was justified by the laws of self-defence or self-preservation. McLeod aided in the destruction of a steamer, employed in carrying aid to the invaders of his country, Young and his party devoted themselves to the robbery and murder of private citizens. And yet we are told, that there is great analogy between both acts—the capture of the *Caroline*, and the raid at St. Albans. If there is, I am compelled to say. I do not see the resemblance.

So far, your Honor will have perceived, that I have argued the case with no more than a passing reference to the speeches made by my learned opponents—and the reason is, that in my opinion, they have little or no application to the statement of facts before us. Mr. Laflamme, it is true, stated in his address of yesterday, that two new and important facts were brought to light since your Honor's illness—the first was the despatch of Earl Russell, in answer to Mr. Adams, touching the discharge of the persons who rose upon the officers and crew of the Roanoke, and destroyed that vessel. Well my answer to this new discovery is this:—that in the case of the *Roanoke*, there was, to commence with, no judicial investigation. Secondly:—That Earl Russell stated in reply to Mr. Adams, that there was not sufficient evidence to detain the persons complained of, and lastly, that the Commander of the party was duly commissioned and entitled to the recognition

of a belligerent. Besides, his act was not one having for its object, private pillage. In addition to which, I must remind the gentleman that there is a wide distinction made between maritime warfare and war upon land—between the taking of private property at sea, and the taking of it on land. The sea being the common highway of the world; belligerents when they there engage each other, have equal rights and privileges. (*Wheaton*, p. 626,) speaking of maritime warfare, says:—"The progress of civilization has slowly, but constantly tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port, is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm as booty. Whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power, which object can only be attained by the capture and confiscation of private property.

The second new fact, brought to light by the learned counsel (Mr. Laflamme), amounts simply to this:—That the prisoners had no criminal intent in all that they did at St. Albans. Now, of all the absurd and preposterous propositions set up by the prisoners' advocates, none, surely, for reckless assertion, approaches to this last one. No *animus furandi!* Pray, what object had the prisoners in going to St. Albans? Was it not to steal? Shall it be said, or can it be believed, that when they robbed Breck they did not intend doing so? Can it be reasonably pretended, that when they stole from the Banks $220,000, that they did not mean to do that either? Shall it be said, that when they set to work to steal horses, as they actually did, to enable them the more readily to escape with their plunder, that they did not know what they were about? Can it be believed, that when Young and his party murdered Morrison, shot Huntingdon, and wounded several other citizens of St. Albans, they had no criminal intent? Truly, it is painful

to be obliged to listen to, and to answer such unfounded arguments; but the real fact is, (and it is not a new one), that it would seem as if we met here to waste time, and, as I have before stated, to trifle with, instead of honestly to fulfill, our Treaty engagements. Young and his accomplices had no criminal intent in their St. Albans operations! If this be true, why is it that up to this hour they have not made restitution? What have they done with the stolen money? If they are the honest, upright men their Counsel represent them to be, they ought not to forget the favors which our indulgent citizens daily lavish upon them. They should not oblige us to pay their debts. Fifty thousand dollars—the sum voted by Parliament to be refunded to the St. Albans' Banks, in lieu of the amount, a part of the proceeds of their robbery, taken from Bennet H. Young & Co., in this Province, and subsequently, by an act of fraud, restored to them—is rather too much to pay for the honor of their acquaintance. No writer, says Mr. Laflamme, has yet ventured to say that the prisoners should be extradited, by reason of the crimes charged against them. Again, I say, he is mistaken. With very few exceptions, every newspaper published upon this and the other side of the Atlantic, has denounced the savage deeds of his clients. For instance, the *London Post* (Government organ, Dec. 29), in a lengthy article upon the subject, says :—"That these "raiders" really *come within the terms of the Extradition Treaty, there can, we conceive, be no manner of doubt;* although an attempt was made to release them from custody, before the pretext of the badness of the warrants had been set up, on the ground that they were recognized belligerents, whereas the articles of the Treaty spoke only of ordinary depredations. Such a pretence will not hold for a moment. The Federals, indeed, quite as much as ourselves, have recognized the Confederates to be belligerents, and they have invariably acknowledged them to be entitled to the rights of war as against the Federals themselves; *but war is only war when it is waged either from the open sea, or from territory belonging to the attacking belligerents.* If, in the course of the recent Danish war,

Prussians had secreted themselves on the shores of Norfolk with the view of making an attack upon Jutland, or *vice versa*, Danes had proposed an attack upon Prussian seaports from Yarmouth or Hull, we should certainly have arrested them without any special treaty of extradition."

The *London News* (29th Dec.), referring to the St. Albans raid, says:—"We are bound to show the example of doing as we would be done by, and as we have in former times uttered keen remonstrances, and even resorted to actual force, when an enemy used neutral soil to prepare machinations against us, it is imperative that we should now vindicate our fair dealing and maintain our friendly character, by prohibiting absolutely the abuse of our protection for the purpose of directing treacherous violence against the inhabitants of a bordering and allied State. We should expect France to do thus much for us if we were unhappily at war with America, and Americans plotted and directed from Calais expeditions to sack Brighton or burn Hastings. And it is clear that what we should regard as the duty of France in such a case would be still more her duty if the war were made upon our seaboard, not by a foreign nation, but by our own subjects in revolt. This is the American case at present, and there must be no hesitation in our doing to them the justice which we should look for from every friendly power if the case were our own."

The *London Morning Star*, we also find is not less explicit. His opinion of the Raiders' conduct has been expressed in these words:—"We are quite satisfied that the Canadian Executive, equally with the Home Government, desire to make our neutrality as perfect as possible, and as the uncertainty of law is proverbial, the Colonial authorities ought to adopt executive measures to maintain the tranquility of the borders, by their own police and by the military, in place of relying upon their ability to arrest and punish offenders after a raid has been committed. They may be sure that a repetition of these raids will cause serious complications, involving an enormous expenditure in warlike preparations, if they do not create such a feeling of irritation as to render the maintenance of peace

impossible. The boundary which affords an easy protection to the Confederate spoilers returning with the contents of bank safes or traders' bills, opposes as little difficulty to a pursuing party; and it would be vain to expect exasperated people who had been robbed by banditti from Canada, to stop short at the visionary line, and commence a meditation upon international law. If effective measures are not adopted to compel our neutrality to be respected by the Confederate refugees, that neutrality will not be respected by the other belligerent; mutual irritation will beget exasperation, and exasperation will beget war. Such a result will be rather too high a price to pay for the honor of being selected by the Confederate skedaddlers from their own country, as the base from which to sally forth upon little robbing expeditions, which they are more inclined to adopt than to enter into the regular military service. Canada, governed as it is by the wise maxims of English policy, will ever give a free and safe shelter to political exiles, whatever may be their principles or their country, but the first duty of these exiles is to respect the laws and neutrality of the land in which they seek an asylum, and not to attempt to drag that country into war for a cause in which it has no interest, and with which the bulk of the population have no sympathy. It is accordingly the duty of the Canadian Executive to compel the Confederates to cease these exasperating raids, and for this purpose to place the necessary force at the frontier, and to take such other measures as may be requisite to maintain the neutrality which the nation has unanimously adopted. It will be better to do this, even at considerable expense, than to run the risk of the calamities with which a repetition of such raids must necessarily threaten the prosperity of the colony.

These extracts from leading English papers indicate that the people of England have not much sympathy with the St. Albans raiders. At any rate, as this case is not, I hope, to be determined by in-door or out-door pressure, I will not further trespass upon the time of the Court, by referring to what has been said or written upon the subject in Canada or elsewhere.

Before, however, closing my argument, I desire to bring under your Honor's notice the fact, that during last November an attempt was made by a few Southern men to burn down the City of New York. As we all know, this attempt failed. But had it succeeded, it would certainly have entailed irreparable loss upon the people of that City. In fact, it would have proved a great misfortune—a severe blow to every State in the Union. We also know that some of the persons engaged and pledged to the commission of this diabolical deed, were arrested, tried, and found guilty for their participation in it. But, notwithstanding that the destruction of New York would, if carried out according to the plans of the Southern incendiaries, have materially affected the prestige, if not to a certain extent the resources of the North, I have yet to learn that any of these prisoners followed the example of the St. Albans raiders, and set up as a justification of their crime, that it was an act of military hostility, and one which by the laws of war they were permitted to commit against their enemy. No, the truth is, it was denounced everywhere, and in no place more indignantly than in the Capital of the Rebellious States. But, from what is transpiring around us here in Canada, it would really seem, that if the New York incendiaries had been so fortunate as to have reached Montreal, and be here arrested, there would not have been found wanting those who would proclaim them belligerents, entitled, by the very greatness of their guilt, to be ranked among the heroes of the war. Why any number of our citizens should take a view so hostile to the interests of the United States, I know not. We are, and must continue to be their next door neighbors. Socially and commercially we are intimately connected. And surely it is not wise, it is not prudent in us, who have so much to gain by maintaining unbroken the friendly ties that unite us to the great Republic, rudely, nay violently, to tear to pieces the bond of friendship that has for so many years secured to us the blessings of peace and the enjoyment of an uninterrupted reign of prosperity. I beseech your Honor to reflect well and seriously upon what you

must know will be the inevitable consequence of the prisoners, discharge. Remember, if you set them at liberty, you justify, so far as you have it in your power, the atrocious crimes committed at St. Albans; and again open the door to a repetition of similar offences. Discharge those prisoners, and others will be found wicked enough to imitate their example. And what will be the result? Can you suppose for a moment that the United States will tamely submit to see their citizens on the frontier, robbed and murdered by Southern desperadoes, issuing from, and protected under the laws of Canada, without striking a blow. Would we quietly submit to such outrage under like circumstances? Suppose, for example, that Ireland was in a state of rebellion against England, that twenty Irishmen during its continuance had crossed the Atlantic, had found their way to St. Albans, and from there had secretly introduced themselves into the city of Montreal, had robbed our banks, shot down our citizens, and then fled with their plunder to St. Albans. What, I ask, would the law abiding people of Canada say, if, to a demand for their extradition as robbers and murderers, the United States replied: That the perpetrators of these crimes committed them without criminal inteent—that the state of war existing at the time between England and Ireland, sanctified their proceedings, and that as the accused claimed to be belligerents and asserted that they murdered and robbed the good people of Montreal, in the name of rebellious Ireland, all further enquiry must cease, the Treaty never having contemplated the prevention of such gallant and patriotic achievments. Would we, I ask, rest content with such answer to our demand. Or would we not, on the contrary, regard with abhorrence, nay, with the most profound contempt, the people and the judiciary of the country who entertained such perverted views of national obligations—who sanctioned such infamous outrages? I would also beg to remind your Honor that although you have supreme control over this application for extradition, and may dispose of it in any manner you please, nevertheless, the expressed will of the Government ought not, in a matter of this great national and

political importance, to be entirely ignored. It may be said, and it is undoubtedly true, that the Judges of Canada are removed far above and beyond all Government influence, where it is to be devoutly hoped they will ever and always remain. But as I have before stated, it is, and I say it in all humility, the duty of the Judge, particularly in matters affecting our political relations with foreign States, not to embarrass the Government by an unwise or injudicious application of the laws made and intended to preserve the national honor and the good faith of the citizens. I know that for the means adopted by the Legislature of this Province to guard against a repetition from within our lines, of St. Albans raids, the Government has been unsparingly abused. But do not the authorities which I have had the honor to cite—authorities recognized as laws binding upon all civilized nations, fully sustained the precautionary measures so taken? Nay, I venture to go a step further, and say that our Government is entitled to the everlasting gratitude of the country, for the prompt and efficient means they have taken to ensure the maintenance of our neutrality laws, and the inviolability of Canadian territory.

With these remarks I must bring my argument to a close, and leave to my learned associates the completion of the task, my part of which, I greatly fear, I have but very imperfectly performed. To your Honor's sense of justice I commit the case so far as I am concerned, expecting from you whose Judicial attainments are of so high a character, a judgment that will reflect honor upon the Judiciary of the country, and redeem us from the imputation of having so far, failed to fulfil our Treaty engagements. In the words of the eminent Judge Jay, let us be faithful to all—kind to all—but let us be just to ourselves.