THE LATE CUBA STATE TRIALS.

We propose to present to our readers a compact, but at the same time comprehensive, view of the late *Cuba State Trials* at New-Orleans and at New-York. And we propose to do this, not merely for the sake of the interest attaching to these important cases in themselves, in various aspects which they present, but also, and mainly, with a view to derive from them the light of illustration which they serve to shed upon the meaning and practical application of the law upon which they turned, namely, the famous act of 1818, commonly called the Neutrality Law. Certainly, if ever there was a time when it was important that the general public opinion should be enlightened respecting the true significance of this law, and when it was especially interesting to observe its application to specific facts and cases, the present moment is that time.

The New-Orleans trials, three in number, took place in the months of January and February of last year, before Judge McCaleb, the U. S. District Judge of the Southern District of Louisiana, but presiding in the *Circuit*, and not in the District Court.*

Judge McKinley, of the Supreme Court, the Circuit Judge of the Circuit embracing the New-Orleans district, was absent, and the Circuit term was of necessity held by Judge McCaleb singly. The indictments had been indeed found, in the month of June preceding, in the District Court, but Judge McCaleb had transferred them (as allowed by law) from the District to the Circuit Court, for the double reason: First, that the importance of the questions involved demanded that course at his hands; and, Secondly, because it was in no degree disguised that, after the preliminary proceedings before Judge McCaleb, connected with the finding of the indictments in June, some of the gentlemen indicted were very little satisfied with the prospect of a trial before that Judge, whom they regarded as having prejudged much of the case; and as being, moreover, under strong bias in favor of the government and prosecution. With perfect propriety as well as delicacy, Judge McCaleb therefore had remitted the cases from the District to the Circuit Court, expecting to be assisted on their trial by the presence of Judge McKinley.

The indictment, which had reference to the "Creole" or Cardenas Expedition of Gen. Lopez, in May, 1850, included not less than fifteen gentlemen, some of whom were indicted singly, while in other cases several were included in one indictment. They were: Gen. Lopez himself, (who was indicted singly,) Gov. Quitman, Judge Cotesworth Pinckney Smith, of the Mississippi Supreme Court of Errors and Appeals, Mr. Henderson, ex-Senator of the United States, and Mr. O'Sullivan, of New-York, (these four included in one indictment,) Mr. Sigur, (editor of the New-Orleans *Delta*, and a Senator

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* To the unprofessional reader it may be proper to explain, that in each one of the judicial districts into which the United States are divided, there is a District Judge, who presides singly in the District Court, and who also is associated with one of the Supreme Court Judges in holding within his district the terms of the Circuit Court, which is a court of higher grade than the District Court. It often happens that the Circuit Judge is unable to hold the required terms, in which case the District Judge holds the Circuit term by himself, precisely as he holds his District term. The two are distinct Courts, with different calendars, jury panels, &c., though it very commonly happens that the same District Judge presides singly in both, and often within five minutes is sitting, now in the one capacity and now in the other, adjourning the District and opening the Circuit Court, or *vice versa*, according to convenience. In civil cases there is appeal from the District to the Circuit Court, and thence to the Supreme Court at Washington. In criminal cases, however, there is *no appeal;* and in such cases, the only mode in which any question can ever go up to the Supreme Court is, when it arises in the Circuit Court before two judges, when they may happen to disagree; the point or points of disagreement are then sent up to the Supreme Court for decision. In the District Court, where there can never be more than one judge, of course not even this partial and wholly insufficient opportunity of appeal from judicial error can ever exist. It is high time that this absurd and often iniquitous anomaly in our federal judicial organization were corrected.

in the State Legislature,) Adjutant-General Rowley, General Gonzalez, Captain A. J. Lewis, Colonels O'Hara and Pickett, Major Hawkins, (the last three of Kentucky,) Mr. White, of New-Orleans, and three other gentlemen whose names we do not remember.

The trial of the indictments having been adjourned over the hot and sickly months of the year at New-Orleans, to the December Circuit term, the parties indicted assembled at that place for the purpose, at the appointed period; when Judge McCaleb, loyal to his pledge of affording to the accused the just benefit of the presence of an associate on the bench with him, announced that, in consequence of the absence of Judge McKinley, who could not attend to hold a Circuit term before the following April, he would adjourn the trials till that term, unless any of the parties accused preferred to go to trial at once, before himself alone on the bench. Mr. Henderson, for himself, elected to proceed at once, fighting his own battle single-handed, on the merits of his cause and the strength of his position under the law, in spite of the adverse bias which he believed to exist in the mind and disposition of the presiding judge, the powerful efforts to be expected from the government in urging a conviction, and the able extra counsel retained by the government to assist the District Attorney. The cases of General Lopez and a few of the other gentlemen indicted were adjourned according to the offer of the Judge; while the others stood aside in expectation, to observe the result of the struggle between the government and the defense in the person of Henderson, whose case thus became a test case, which would settle the construction of the law, and go far towards determining the issue in most of the others.

This is the explanation of the reason why Mr. Henderson's case was the first, and, as it eventually resulted, the only one tried. We have no disposition to withhold his due from either Mr. Webster or any other great personage; and therefore take this opportunity of correcting a mistaken charge often made against the Administration on this head, namely, that they selected the Henderson case for trial, passing over the easier and more flagrant case of General Lopez himself, and leaving the latter free and unmolested, to pursue at pleasure his further labors, which resulted in his subsequent expedition by the "Pampero," in the August following. The truth is not so. It was no matter of selection or preference, otherwise than as above stated, namely, by Mr. Henderson himself; who, under these circumstances, impatient of further suspense and detention, and trusting to the law and a jury, though knowing that he had the Court against him before he began, insisted upon a trial at once, even before Judge McCaleb, presiding singling at the Circuit term. Henderson's case was, unquestionably, a less difficult one for the government to succeed upon, than any of the others; it certainly presented chances of a conviction much greater than existed against General Lopez. If on the facts existing, proved, and not denied, Henderson could not be convicted, it was beyond all question idle for the prosecution to dream of any better success in any of the other cases, especially that of Lopez; turning, as the whole case did, upon the law, its construction and application to such an expedition as the one in question, and not upon any question whether the one or the other was more or was less clearly and positively concerned in it. Three trials were had in prompt succession, one immediately after another; long and hard-fought forensic battles, all of them; the government being beaten by failing to obtain a verdict at each renewed attempt. The jury disagreed in each of them; in each refusing to be coerced into a verdict by any length of confinement, threatened or enforced; and standing, on the first trial, four against conviction; on the second, eight; and, finally, on the third, eleven. Thus reduced to the forlorn condition of being able to get but a single voice on the jury in favor of a conviction; having witnessed its strength, on that high and potent popular tribunal, thus growing "fine by degrees and beautifully less," till, from a majority of eight to four, it had sunk to the wretched minority of one to eleven, the government at last recognized itself beaten, and retired from the contest, by entering a *nolle prosequi* on all the indictments, which all necessarily followed in the wake of the test trial had in the Henderson case.

The leading facts in this case were as follows. The Creole steamboat had sailed from New-Orleans on the 7th of May, having on board General Lopez and a considerable number of men, and quantity of arms, ammunition, uniforms, &c.; the latter being

in unbroken bulk. She had been preceded a few days by two small sailing vessels, the barque Georgiana and the brig Susan Loud, each in like manner having a large number of men on board, unarmed, and bound as emigrants to Chagres. The one of these had rendezvoused with the Creole at a given point of latitude and longitude in the Gulf of Mexico; the other, at the island of Mugeres, off the eastern coast of Yucatan. Both of these appointments were successfully kept, with the mere exception that the vessels met at the island of Contoy, a little to the northward of that of Mugeres. *At Contoy, General Lopez made a military organization of his followers*, or such portion of them as chose to accompany him on a military expedition to Cuba, there to commence a revolution, of which his landing was expected to be the signal. Those who did not choose to take part in the enterprise were furnished with the provisions and conveyance requisite for either a return to the United States or the continued prosecution of the voyage to Chagres, the port for which all the vessels had cleared from New-Orleans. From Contoy the Creole proceeded to Cardenas, where the expedition landed, fought, and reëmbarked, with the intention of going to another point of the island, though it resulted in its return to the United States; the Creole reaching Key West under hot pursuit by the Spanish war-steamer Pizarro. Before leaving the United States, promises of commissions to be subsequently given, with pay and rewards, were made to the officers; pay and rewards being in like manner promised to the men; all of course contingent on success in the expected revolution. No commissions were actually given within the jurisdiction of the United States, nor any thing more nearly approaching to military organization made, than paper programmes and unexecuted ideas of an organization to be subsequently carried into effect. The men composing the expedition had not been engaged to go to Cuba, but to California; though it was very certain that no one embarked on board any of those vessels without a perfectly distinct idea that, if he felt disposed to go to Cuba, he would have the opportunity pretty soon afforded him.

That some of them never meant to go to Cuba, but on the contrary intended solely and *bona fide* to go to California, is also very certain; the truth of the matter being, that they supposed that the expedition for Cuba was to be formed and organized *at Chagres*, at which place they would be free to decline joining it, and to proceed on across the Isthmus, after having received the benefit of a free passage and maintenance thus far on their way to the Land of Gold. While, therefore, their leaders, in order to prevent interruption, had been attempting to mislead the Spanish and governmental agents by published plans of an expedition to California, which misled no body, some of their followers had been adroitly misleading *them*, by acting out the character of the California emigrants so naturally to the life, that on arrival at the Isthmus, they would have wholly refused to change that peaceful character or destination, and would perhaps have been vastly surprised on receiving at Chagres any proposition to a different effect. These 'Artful Dodgers,' together with some who had embarked with no definite resolution, further than that of judging at Chagres whether they would join in the enterprise or not, and a few who had no doubt changed on shipboard the purposes with which they had left New-Orleans, constituted those who, at Contoy, refused (as they had a perfect right to do) to take part in the expedition, and who were there accordingly left by Lopez, with the two sailing vessels provisioned and placed at their disposal, free to go whithersoever might seem good in their own eyes; but who, unfortunately, were seized and captured by the Pizarro, with equal contempt for the American flag over them and the Mexican waters and jurisdiction beneath and around them. And these were the famous "Contoy prisoners," about whom we shall have something more to say hereafter.

It only remains to add, that the departure of the Creole from New-Orleans took place at about ten o'clock in the evening, and that the arms and ammunition were taken on board a few miles down the river.

This being a correct outline of the leading facts in the case, all that was material in them to the question of the *legality or illegality of the enterprise at New-Orleans*, was fully brought out in evidence at the trial; and Mr. Henderson was shown (as he himself did not deny) to have been the principal director of the expeditionary affairs at that place, and to have bought and equipped the Creole for the purpose, &c.

The stress of the case was wholly, or almost wholly, on the law and its application; very little upon the facts. It was only on a few comparatively minor points of fact that there was any disagreement of statement between the prosecution and the defense, these being points tending to show the existence of a greater or less degree of *military organization* within the United States. For instance, the prosecution endeavored to make out that a colonel, as such, had exercised military command on board the Creole while in the river, during the day which intervened between her departure from the wharf at New-Orleans and her getting to sea; and that he had appointed a "commissary" to issue rations, &c. The defense, on the other hand, made out that commissary to be a mere *steward*, appointed from the necessity of the case, in the midst of a general confusion, where no sort of military authority or order reigned, or was ever pretended. These were small details of coloring or shading; the great question, arising out of the broad outlines of the undisputed facts, was, *whether such an expedition constituted a violation of the law or not;* that is to say, of the 6th section of the Act of April 20, 1818; in other words, whether it was, in a legal sense, a "*military expedition or enterprise*," "*carried on from thence*" (the United States) against Cuba. The government contended, of course, that it was; the defense, that it was not.

The following is the important 6th section referred to:

"If any person shall, within the territory and jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

It is at a glance apparent that the description of the offense in this section is at least somewhat deficient in that precision and distinctness which should characterize every penal statute; an opinion which Chief Justice Marshall has himself left on record, in a reference to the 5th section of the law of 1794, which is *verbatim* the same as this 6th section of the Act of 1818, with the exception of an immaterial addition. "There is a want of precision," says the great Chief Justice, "in the description of the offense, which might produce some difficulty in deciding what cases would come within it."

What *is* a "military expedition or enterprise," under this statute? What is a "*carrying on*" of such expedition "*from thence*," that is, from the United States, against any particular country? And when these questions are satisfactorily answered, (in a legal sense, we mean—that strict sense in which all penal statutes must be construed,) what then shall be said to constitute its "beginning" or "setting on foot?" And what "providing or preparing of means" for it is to be held as rising to the altitude of a "high misdemeanor," punishable with three thousand dollars fine and three years of imprisonment?

In the first place, what are the characteristics or conditions requisite to constitute a "military expedition?" It must be remembered that this is an expression altogether new to the law; it has no settled legal meaning and definition. It must also be remembered, that great caution and forbearance are to be exercised in giving interpretation and practical penal application to terms so unsettled and indefinite, loosely employed by careless legislation. Even in regard to a term so familiar and distinctly intelligible as that of a "*revolt*" on shipboard, a very wise judge on the bench of the Supreme Court (Judge Washington) refused once to give it a legal interpretation, to be made penally applicable, for this very reason, namely: that, however clear might be his own and the popular idea of the meaning of the expression, "making a *revolt*," yet he could find no legal authority for its construction; and loose dictionary interpretation of a not unambiguous phrase would never suffice for him, as it ought not for any judge or jury under the solemn responsibilities of a criminal case.

"But, although this is still my opinion," says Judge Washington, after a lucid statement of what he had always understood to be meant by the expression, "yet I am not able to support it by any authority to be met with, either in the common, admiralty, or civil law. If we resort to definitions given by philologists, they are so multifarious and so different, that I cannot avoid feeling a natural repugnance to selecting, from this mass of definitions, one which may fix a crime

upon these men, and that of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the Legislature. Laws which create crimes ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid. For these reasons, the Court will not recommend to the jury to find the prisoners guilty of making or endeavoring to make a revolt, however strong the evidence may be," &c.

Between extreme cases on the one side and on the other, in regard to which there could be no diversity of opinion,—between such an operation as the departure of a Scott at the head of an army with banners, to invade an empire, and the departure of a Lafayette with a few volunteer enthusiasts, for the shores of a foreign country, where they may intend to offer their services to a struggling cause of nascent liberty,—there is a vast distance and a wide range, where it would be very difficult, if any where possible, to fix a line of definition, and to say, with any approach to legal precision, where the designation of "*military expedition*" has begun to attach, and where it is not yet applicable. If Kossuth, for example, should, at the present day, undertake to return to Hungary at the head of an armed force, to take the direction of a revolution expectant and ready, and should sail from New-York to Trieste or Fiume for that purpose, with a body of men organized, armed, equipped, uniformed and drilled, under military engagement of service and obedience, and under the command of officers commissioned as such, this would undoubtedly be, in the full sense of the term, a "military expedition," and so "carried on" as to fall within the purview of the law in question. But, on the other hand, if he were to do nothing of this sort, but were simply to announce that he intended to return to Hungary, to head an insurrection about to break out, with as numerous an accompaniment of armed friends and followers as possible; that the laws of this country forbade the formation of a military expedition here, and that he would neither violate nor evade those laws; that he designed therefore to form one at some foreign point, where no law of the United States would follow him or be infringed by such a proceeding, and that for that reason he invited all who should desire to take part in it to meet him at an appointed time, at the place selected for that purpose,—Chagres, for instance; that he would furnish free passage to that place to all persons who should seem to him likely to be willing there to engage with him, and to be in themselves useful and suitable persons for the purpose, without making any sort of present engagement with them, or restricting their perfect freedom of option, when they should hear the proposals he would address to them as soon as he and they should be beyond the reach of any legal impediment to prevent him from making, and them from accepting them,—in such a case, we say, it is equally clear that the departure of any number of persons from New-York or New-Orleans to the appointed place of foreign rendezvous, whatever hopes and purposes they might carry with them, and however willing and anxious they might be there to enter into the service for which they were there to find the opportunity, would *not* constitute a "military expedition," "carried on from thence," (New-York or New-Orleans,) in any intelligible sense under this law. If afterwards, indeed, a military expedition should be formed at Chagres, in which more or less of the persons thus induced to flock to that quarter should take part; if they should there receive Kossuth's proposals, and enter into his service, accept his commissions and promises of pay, pledge themselves to military obedience and duty, and perhaps meet there a ship-load of arms, artillery, equipments, and munitions of war, dispatched to that place from the cheap and overflowing markets for such articles, whether in the Birmingham of Old, or the Springfield of New-England; and if the expedition thus formed should then proceed to Italy or Hungary to raise again the downfallen flag of Liberty and Nationality; then, indeed, it would constitute a "military expedition," carried on against the Austrian territory or dominions, but a military expedition neither formed "*within the territory and jurisdiction of the United States*," nor "*carried on from thence;*" nor would it be, in any sense, a violation of the law of 1818, or of any other law of the United States, or, to go farther, of any other law, human or divine. And whenever such an one is made, may the God of Battles and of Liberty bless and speed it on its glorious way!

These illustrations will serve to throw some light upon the nature of the main

questions presented to the jury in the Henderson trials at New-Orleans, as also, again, in the late O'Sullivan and Lewis trial at New-York. Between the extreme cases on the one hand and on the other; between what is unequivocally a "military expedition," and what unequivocally is *not* a "military expédition," it is evident that, on any given state of facts, short of either extreme, there would be little likelihood of unanimity in any jury, in the judgment they should form as to the applicability of the law in question. It is evident, too, that such a state of facts as we have seen to have been proved in the New-Orleans case, was precisely such as to afford fair ground for reasonable and honest divergence of judgment on the part of a jury. To the one class of minds, the undemocratic or anti-democratic, friendly to all authority, and unsympathizing with popular, and especially with revolutionary ideas; politically disposed to agree with the Administration, from which the prosecution proceeded, and to support it against the Opposition, by which its general course, in reference to these Cuban questions, was severely attacked in that section of the Union; and generally inclined to frown bitterly upon all agitating movements tending to disturb the serene atmosphere of commercial tranquillity,—to this class of minds it was natural that the facts of the Henderson case should wear a clear aspect of violation of the law, calling for an unhesitating verdict, and meriting condign punishment. In other words, it was to be expected that every *regular Conservative Whig merchant* on the jury should, under the operation of a bias not incompatible with entire honesty of intention and conscience, side with the prosecution, and vote for a verdict of guilty. On the other hand, it was equally natural that every "progressive Democrat" in that body should take a very different view of the subject,—every man, we mean, whose political philosophy, instincts, character, habits, and party associations made him a friend rather of popular freedom than of governmental despotism,—who could not but wish well to the oppressed people of Cuba, and regret in his heart that they had not yet been able to imitate, with success, the revolutionary examples, both of our own country and of the other Spanish colonies of the New World,—who was little predisposed to strain vague and doubtful language, found in old statutes, for the purpose of affixing crime and penalty to acts having at least some points of analogy with those for which our own national gratitude has embalmed, in immortal glory, the name of the foreign volunteer auxiliaries of our own long-doubtful revolutionary struggle. That all men of this latter stamp and complexion on the jury should, with equal honesty, feel the influence of a different bias, and rejoice to be able to find themselves justified, under clear and sound rules of legal construction, in acquitting the accused, was equally natural. Define for us what you mean by a "military expedition" in your indictment;—show us that *such an expedition* was formed within the United States, and that, as such, it was "carried on from thence;"—if some degree of military organization, some commissioned authority to command and some pledged obligation to obey, some engagement of service, some sort of military equipment, armament, and discipline are requisite to affix the character of a "military expedition" to the departure of a few hundreds of persons who leave our shores as California emigrants, as thousands are doing every month, show us that some, if not all of these features existed in the present case;—show us that this was not rather, in strict parlance, a military expedition really formed for the first time as such *within the Mexican rather than the United States territory and jurisdiction*, and "carried on" from Yucatan against the iron tyranny dominant in Cuba, rather than from the United States;—show us, too, that this law, under which you ask us to convict Mr. Henderson, is, in its own terms, so plain and unambiguous as to have served as a sufficient guide and warning to the citizen, informing him unequivocally of what acts are forbidden and what liberties left unrestricted by it;—do this, show us these things, satisfy us on these points, before you can legally, or justly, or rightfully ask us to give you our verdict of guilty against Mr. Henderson, under this law and your indictment. Such was the natural language to express what must have been the sentiments of the class of jurors last referred to; and such was clearly in our judgment the proper language for them to address to the prosecution in such a case.

The result might have been foretold, with but small hazard to the prophetic claims of the vaticinator. As already mentioned, the

juries all disagreed, four jurors being inflexible against a conviction on the first trial; on the second, eight; while on the third, but one single juror stood on the government side of the issue, which may be deemed substantially an acquittal. Owing to a mode of drawing the panel of jurors practised at New-Orleans, (to which formal exception was taken by some of the parties indicted, on the ground that it was plainly illegal, and that its practical operation was to pack the jury, in a manner most injurious to the chances of the defense,) that body consisted, on Mr. Henderson's first trial, almost exclusively of *friends of the Administration*, and merchants at that,—containing but a single individual known to be a Democrat. What may have been the case on the subsequent trials we are not informed. There is certainly a remarkable contrast between the majority of eight to four in favor of the prosecution—that is to say, in favor of the administration—on the first trial, and eleven to one the other way on the last.

There was one circumstance which told strongly against the prosecution in its efforts to make a "military expedition" under the statute, "carried on from the United States," out of the facts of this case, and which materially supported the argument of the defense upon the proper construction and application of the law in question. A few days after the departure of the Creole from New-Orleans, when the fact was notorious that she and the two sailing vessels had sailed, with as many passengers as they could carry, and with General Lopez in proper person on board, the U. S. District Attorney himself, Mr. Logan Hunton, had written an official letter to the State Department, in reply to a communication enjoining vigilance, &c., in which he gave the assurance that there was *no violation of the law* in that proceeding.

"There can be no doubt," says the legal representative, counsel, and attorney of the government itself, at New-Orleans,* "that many persons have left New-Orleans recently whose ultimate destination is the island of Cuba, and who, on arrival at the island, or at some other point out of the United States, will engage, under the command of General Lopez, to assist the dissatisfied people of that island in throwing off the dominion of Spain. The number of these emigrants has been greatly exaggerated; they are perhaps one thousand or fifteen hundred from this port. If Lopez shall be able to make a successful stand, it is said he will be joined by a distinguished gentleman, now the governor of a neighboring State, to whom the command will then be yielded. However, before this reaches, your conjectures may have ripened into certainty: and I repeat that my purpose in addressing you is to give the assurance that the leaders of the enterprise have had good *legal advisers*, and have not rendered themselves amenable to our law."

It is true that Mr. Hunton at a later date wrote a second letter to the Department, recalling the opinion thus expressed, that there had been no violation of law in the proceedings connected with the Creole expedition. But this subsequent opinion was founded upon further information, impressing his mind with the belief that a degree of *military organization* had taken place within the United States which he did not before understand to have existed. And, indeed, on the trial, without abandoning the position of his first letter, he reconciled it with the subsequent prosecution, by endeavoring to make out a case of the requisite military organization within the jurisdiction of the United States. On this point the parties were at issue on the facts. Nevertheless, his first letter—awkward for his prosecution, fortunate for Mr. Henderson's defense—remained to exert a material and just influence on the minds of the jurors. It recorded the government's own official declaration, that the mere departure of "one thousand or fifteen hundred" men, though Cuba were undoubtedly their "ultimate destination," did not constitute the "military expedition" of the law; and though that opinion was unquestionably sound, yet its admission by the official prosecutor himself was certainly an important point in favor of the accused. No reproof from the government to its legal agent and representative, for this pregnant concession, has ever been made public, so that it still stands on record with undiminished force, as an eminently authoritative official exposition of the legal sense and effect of the statute in question.

But enough of the New-Orleans trials. On the lamentable result of the last attempt, the District Attorney then did all that remained for him to do, and abandoned the other cases in despair, entering a *nolle prosequi* in the whole of them in mass. If Henderson could not be convicted, it was plainly idle to run the government into ridicule by further absurd attempts upon other indict-

* Letter of Mr. Hunton to Mr. Clayton, Secretary of State, May 1, 1850. Senate Doc. 1st Sess. 31st Cong. 57, page 25.

ments, founded on precisely the same facts and same law.

This defeat of the Administration before three successive juries at New-Orleans,—the more signal from the manifest bias exhibited by the presiding Judge in favor of the prosecution,—was generally ascribed by its organs of the press to the fact that they were *Southern* juries. It soon found or made an opportunity of testing at the North likewise its power of giving to this law the construction and application so vehemently desired by it. The steamboat Cleopatra was seized at New-York on the 24th April, when about to go to sea with two or three hundred Hungarian and German passengers, supposed to be designed to take part in a Cuban expedition under General Lopez; some half a dozen persons were arrested, and the proceedings resulted in an indictment against Mr. J. L. O'Sullivan, Capt. A. J. Lewis, and Major L. Schlesinger; the last of whom had engaged the passengers, Mr. O'Sullivan having furnished and equipped the vessel, &c., and Captain Lewis being, as was alleged, her intended commander. This was the case which recently came to trial at the March term of the United States District Court at New-York, before Judge Judson, of the Connecticut District, supplying the place of Judge Betts, who was indisposed. The trial was confined to the first two of the above defendants; Major Schlesinger having joined General Lopez's subsequent expedition in August at New-Orleans, and being, at the time of the trial, a prisoner, languishing in heavy chains in a dungeon, at the Spanish penal station of Ceuta in Africa.

The fierce eagerness of the prosecution for victory in this case, attested well the mortification of the government at its late defeat at New-Orleans, and its anxiety to find a compensation for it at New-York. To what extent the responsibility of the acts to which this spirit led may be justly divisible between the District Attorney at New-York and his superiors at Washington, there is no evidence, as yet, before the public to show. As the case now stands, both are responsible; the District Attorney for those scandalous and corrupt proceedings of his, which have stamped this prosecution with infamy; and the Administration, for having carried on such a case, and for having kept such an officer in such an office for twenty-four hours after the proofs were made public of the manner in which he had disgraced not only himself and it, but, indeed, the government under which, and the country in which, such things could have been dared, by the insolent profligacy of conservative tyranny in power.

The main facts of the case, as proved, were in substance as follows. That Mr. O'Sullivan had prepared the Cleopatra for sea, with a considerable quantity of provisions and stores on board, including an unusual stock of medicines, a box of brass wind musical instruments, a printing-press, and twenty-four small kegs of powder; that he directed and controlled her, and shortly after her seizure became her legal owner. That he and Major Schlesinger were in correspondence and association; that Major Schlesinger's men were to be put on board of her at night in the lower bay, near Sandy Hook, part of them being collected on board of a sloop at South Amboy for that purpose, and part being carried down in the evening from the city in a steam tow-boat, with certain other precautions of secrecy in their departure, such as tickets for emigrant passage to Baltimore being furnished to them by Schlesinger. That the Hungarians, Germans, &c., collected by Schlesinger, had been, for the most part, military men in Europe, and that he had their names enrolled with their old military designations, classifying them into the different branches of military service. That they were engaged to go as colonists to Texas, but with the expectation held out to them that at a future period they would there receive proposals to engage in some military service, to aid some oppressed people in a struggle for liberty. That some of them understood or were promised that they would be officers; and that some of the latter united with Schlesinger in subscribing an oath of secrecy, binding themselves to speak of nothing but a Texas colonization, and pledging to each other their lives for their fidelity to the oath.

In addition to these facts, proved by respectable or documentary evidence, the prosecution brought forward a number of other witnesses, to swear to declarations received by them from one or other of the parties indicted, (especially from Schlesinger,) going to show, not merely an uncertain ulterior destination, but even a direct military engagement and organization for Cuba. These were chiefly Germans who had been en-

gaged in the affair, some of whom stood revealed before the jury on their own showing in the most villanous aspects, so as to forfeit all claim to credit. Some of them were evidently swearing up to a case which they were anxious to establish for the prosecution, and parts of the testimony bore perjury plainly stamped on their face. Viewed in connection with the proof conclusively established by the defense, that the prosecution had been actually *buying and bribing witnesses* in the most scandalous manner, and with disgraceful, circumstantial features of official profligacy and corruption, further aggravating the sufficient abomination of that proceeding in itself,—and contradicted, as it was on some points, by some of the government witnesses themselves, whose swearing fell far short of what was expected from them by the District Attorney, all this testimony may be said to have added but little to the strength of the case made out by the prosecution. Still, the case fairly made out, and not contested in the brilliant and powerful summing up of John Van Buren for the defense, was that of an attempted secret departure of a large number of men, of military antecedents, bound for Texas, with an expectation of there, at a future time, receiving proposals to engage in military service in aid of an expected revolution; which no one doubted to refer to Cuba. This proceeding the government strove to bring within the designation of a "military expedition or enterprise," prepared in New-York, "to be carried on from thence;" and it had all the authority of the bench to support it, by charging the jury strongly that the mere intention of going to Cuba for purposes to be there effected by military means, was enough to fix the character of "military expedition" upon the departure of a body of men, however deficient in the other attributes of military organization. Nevertheless, the jury could not be brought so to construe the law, and so to apply it to the above facts; and after an absence of over nine hours, they were discharged, five of the jury being inflexible against a conviction, and a sixth having sided with them during a portion of their discussions in the jury-room.

It should be remarked that, alike in New-York and in New-Orleans, both judges and prosecuting officers insisted strenuously upon the absolute prerogative of the Court to lay down the law to the jury, and the duty of the latter to be governed by the exposition of it administered to them from the serene and impartial wisdom of the bench. In both cases, too, the defense contended (and with success, as was proved by the result) for the great right of the jury, in criminal cases, to judge for themselves of the application of the law, as well as of the facts. We have here neither space nor time for a discussion of this important question of judicial usurpation, by which some judges would fritter away all that is most valuable in the institution of the jury. On some future occasion, it will well justify a separate and careful elucidation. We content ourselves now, in the first place, with referring the two learned judges in these cases to the better example set them by Judge Tallmadge in the very similar cases of Smith and Ogden, in 1807,* when that Judge fully conceded to the jury their rightful privilege in criminal trials to be the judges of law as well as of fact; and, in the second place, with asking them one single pregnant question: If a penal law is not plain enough for a jury, with all the aid of the arguments at the bar and the advice from the bench, to interpret and apply for themselves, without being bound to submit their intelligence and conscience to an overruling authority of construction from the presiding judge, how can it be pretended that such a law was plain enough to serve as a guide to the citizen destitute of those advantages and aids? If the citizen juror is unfit to understand it, how can the citizen defendant be required to have done so?

If the District Attorney failed to convict Mr. O'Sullivan, in the desperate four weeks'

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* Colonel Smith (Surveyor of the port of New-York, and who had been a highly esteemed member of Washington's military family) and Mr. Samuel G. Ogden, a leading merchant of New-York, were indicted for fitting out General Miranda's expedition, in 1806, for the Spanish main, (Miranda having been the Lopez of that day,) which sailed from New-York to St. Domingo, where it was strengthened and organized as a military expedition, before proceeding to its ulterior destination. The facts were clear and conclusive, and showed that the ship Leander had sailed from New-York, herself strongly armed, and with a large stock of arms, ammunition, artillery, uniforms, &c., and General Miranda in person; and yet on both trials the jury felt justified, under a proper construction of this same language in the Neutrality Law of 1794, in rendering verdicts acquittal.

struggle which was witnessed in this remarkable trial, he at least, however, succeeded far beyond any expectation with which he probably began it, in convicting himself, to the pretty unanimous satisfaction of all close observers of the case. On the testimony of his own witnesses, and of his own handwriting, confirming fully what was proved by the witnesses for the defense, he went out of that court convicted and self-convicted of having, in the name of the government, kept an open shop for the purchase of witnesses and evidence; and of paying them with fraudulent certificates, founded upon sham, ante-dated subpœnas and fictitious recognizances. Our government and laws know no such practice as the purchasing of testimony at all. No appropriation of public money provides for it, no usage authorizes, no principle tolerates it. There is a small annual secret service fund at Washington, but there has never been so slanderous a whisper breathed against any President or Secretary of State, as a hint that they had ever applied a dollar of that fund to such a purpose as this. And this bribery of witnesses in this trial had no connection with this fund; it was not from that fund that the means to effect it were derived. It was done by fraudulent and disgraceful contrivances, which no man can dare rise in the face of the world, and pretend to justify or to excuse, and which neither the District Attorney nor his able counsel ventured to face in court, and to defend. It was done under cover of the law which allows to witnesses a fee of a dollar and a quarter daily during detention and attendance in court as such; and it was done by putting them under this pay for *long back periods*, in some cases over six months before their actual subpœna and engagement as witnesses. In the one instance which afforded to the defense a providential ability to detect and expose this system, which was then in full operation on the part of this disgraceful prosecution, a subpœna, dated the 24th April, was served on the witness, by the District Attorney, on the 31st October, the witness being on the latter day, for the first time, introduced to the District Attorney by one of the active runners or procurers of his prosecution; and a certificate (worth nearly two hundred and fifty dollars) was at the same time handed to him, certifying him to be entitled to the witness fees from the 25th April; the further fraudulent farce being enacted (if farce can be called an official proceeding so sadly shameful) of causing him to execute a recognizance, dated 24th April, binding him, under a penalty of five hundred dollars, to appear as a witness at the ensuing May term, and then five successive extensions of the same, from term to term, from May to June, June to July, July to August, August to September, and September to October; all done at one sitting, with one penful of ink, on the same 31st of October, before a too compliant United States Commissioner! No wonder that the guilty and blushing author of this unprecedented official transaction shrank from producing these documentary records when called upon and challenged to do so, withholding them from their proper place of deposit and custody, where they would have been accessible to investigation! No wonder that he did not dare to sit in court under the righteous and indignant denunciation of the counsel for the defense, unanswered because unanswerable! And no wonder that when the Judge (erroneously) supposed himself to have been charged with having ever sanctioned such practices, he repelled the charge from the bench, as a "gross imputation" upon himself, declaring that he was "entitled to better treatment," and that he felt bound thus to notice it, because, whenever he should meet the members of the jury again, he desired "to meet them as an honest man," and "to be able to look at them in the face!"

Nor, though this was perhaps the most flagrant and salient of the unworthy practices resorted to by the prosecution in this case, was it the only disgraceful evidence of an undue anxiety to effect a conviction, in a State trial, and of an absence of all scruple as to the means of attaining the object. Other modes besides bribery were employed to obtain from witnesses the desired testimony going to establish a military engagement for Cuba. In one case, after the other means tried by the chief hunter or procurer of witnesses, Rakow, (namely, that of putting the witness on six months back pay, together with the continued *per diem* forward,) had been fruitlessly tried in regard to an honorable man, Becsey, he was arrested and taken to the District Attorney's office, where, after being for some time plied with questions to elicit answers tending to criminate

Mr. O'Sullivan, he was threatened with imprisonment, the District Attorney kindly offering him his choice between two jails equally eligible and equally attractive. A vast quantity of papers were used as evidence, which had been obtained either by false pretences or by other wholly illegitimate and dishonorable means. By the former expression, we refer to the fact that the District Attorney's acting substitute (Mr. Evarts) obtained from both Major Schlesinger and from Mr. O'Sullivan the papers in their pockets at the time of their arrest, by untruly pretending to have authority to compel their surrender; and by the latter expression we refer to the fact that Major Schlesinger's locked valise, found on board of the Cleopatra, was opened and rifled of the papers it contained. It is not easy to say which part of this joint proceeding was the less worthy of a gentleman and man of honor, the original procuring of all these papers in these modes by the subordinate, or the subsequent adoption of the act, by keeping and employing them on the part of the principal.

Another disgraceful feature of the case was the intimate association existing in its prosecution between the U. S. District Attorney and the Spanish spy and agent, Burtnete, whose antecedent general infamy of character and life fitly culminated in the part played by him in this affair. When the chief hunter of witnesses, Rakow, himself a scoundrel informer of the vilest character, on the showing of his own cross-examination, offers his pecuniary temptations for testimony, it is with the remark that it will be paid by the "District Attorney, or Burtnete." The same Rakow, though refusing to remember how he came to get it, acknowledges a mysterious paper signed by this Burtnete, "*guarantying*" to him the payment of the witness-money; a paper which he had "burned" shortly before the trial, after showing it to the District Attorney. Burtnete is a familiar haunter of the District Attorney's office, and Burtnete gives Rakow a letter of introduction to the Spanish Minisister, while the District Attorney pays the expenses of his visit to Washington. For a week before the arrest of the Cleopatra, Burtnete is seen to have been giving daily information to the Marshal of all the proceedings which he was taking an active part in promoting; and instead of stopping the whole by a word at an earlier stage, these worthy representatives of an administration by whose spirit they were actively animated, thus, with cool and heartless deliberation, connive at and indirectly participate in them, with a view to maturing the presumed criminality and liability of the gentlemen concerned; to nursing forward, to a satisfactory degree of completeness, alike the act and the proof of it; and to making up a fine case for a brilliant and victorious prosecution, which should enable them to offer up to their employers at Washington a sweet-smelling sacrifice, of betrayed victims whom they thus themselves had criminally intrigued to ruin.

Another shocking feature of this whole proceeding, is one which was not brought out in proof on the trial, though alluded to in the opening remarks of the counsel for the defense. We speak of it, however, on full and certain knowledge of what we have to state, and are ready to prove it if required. It is that in the midst of all these not only extraordinary, but profligate and criminal exertions to please the administration and the Spanish Minister by victory in the case, the District Attorney himself so well understood the true meaning and effect of the law, that, when consulted officially, in July, by two Cuban gentlemen, who avowed their wish to go to take part in the insurrection just broken out near Puerto Principe, he actually gave them an exposition of the law fully authorizing acts going far beyond those for which he was thus prosecuting and persecuting his own fellow-citizens! In answer to their inquiries, he told them that they could go in any number, ten thousand if they pleased; themselves, Cubans, and as many other friends as might choose to accompany them; in a steamer direct for Cuba; each man with his musket or rifle, pistols, bowie-knife, &c., and each man with an extra supply of these articles for the use of a friend in the island; that in regard to a cargo of arms and munitions of war, they could easily contract with merchants to deliver them to them at points A. or B., to which places, after leaving the United States, they could go and get them; and when he told them that they should do all publicly, as there was no violation of the law in all this, and received from them the reply that this would expose them to interception by the Spanish cruisers, it was the District Attorney who himself suggested to them the simple mode of evading the latter, by

clearing at the Custom House for one part of the island, and then, when at sea, being free to direct their course to any other they might select!

It is true that all this very "*filibustiering*" advice was given after the arrival of those first accounts from Cuba, in July last, which afforded to all the friends of Cuban liberty so much reason to hope and believe in a prompt and splendid triumph to the revolution. Fortunately for the District Attorney, before these gentlemen carried his kind counsels into execution, the course of events arrested their patriotic purpose. Failure having crushed in Cuba what victory was expected to have crowned, a violent prosecution of the truly "military expedition" thus authorized by the official legal representative of the government, would of course have become necessary; and that high functionary might have had to procure his own indictment from a secret *ex parte* grand jury, and to have followed it up perhaps by pouring out the public money like water, in the purchase of testimony and bribery of witnesses; to say nothing of the other modes and means, fair and foul, which, in order to be just and consistent, he might have had to ply for his own conviction.

But this is too sad a subject for jest. We have no gratification—far, very far from it, nothing but shame and deep regret—in the exposure elicited by this late trial of the profligate and utterly abominable practices by which the agents of the Administration (an Administration responsible for their unrebuked proceedings) have vainly labored for the triumph which the intelligence and justice of a *Northern* jury refused to it; as a similar triumph (though *not* pursued by similar means!) had been, a year before, refused to it by three successive *Southern* ones. That same triumph, though in another form, a form which would have been more humiliating to the defense and more completely satisfactory to the government, had been vainly sought before the trial, by efforts proceeding from the District Attorney to induce Mr. O'Sullivan to permit the intervention of friends, ready and sure, by a word, to obtain the consent of the Spanish Minister at Washington to a discontinuance of the trial as a measure of grace and pardon,—a proposition which was rejected by both the defendants with an inflexible steadiness which was but poorly sneered at in return by the District Attorney on the trial, as proceeding from an over-*proud stomach*. The whole case strikingly exemplifies the evils incident to any interference of the executive in the regular action of the judicial department of our triune system of government; the oppression to the citizen accused, the unscrupulousness in regard to means on the part of the prosecuting officers, the general contamination of the purity of the public justice, all of which spring naturally and copiously out of any such interference. It is plain that this was rather a diplomatic and political proceeding, than a regular trial, fairly and faithfully conducted. What may have been all the instructions, or the unwritten inspirations, proceeding from the State Department to the law officers acting under its authority, can only be known to those who may be far more deeply in the confidence of the high Whig politicians and placemen in question, than we either can claim or would wish to be. But it is evident that extraordinary motives and interests could alone have given rise to proceedings so extraordinary; and when a subordinate is first found guilty of the acts proved in this case to have been committed by the District Attorney, and when the superior is afterwards found spreading over such criminal acts and agents his broad mantle of governmental sanction and approval, the responsibility of the whole, without being lightened to either party by the division, weighs fully and equally upon both. And there we leave it.

We have given this full exposition of these singular and important state trials, the only political prosecutions that have occurred in this country for many years, in part because they are but little understood by the public at large, and in part as a duty to the cause of public morality, vitally interested in the purity of the administration of justice, and in the official integrity of the high public authorities conected therewith; but chiefly that it may serve as a basis for a more general exposition of this famous "Neutrality Law," of which so much has lately been written and said. This we reserve for our next number, in which we promise to satisfy our readers that the true *spirit* of that law affords no more justification to these, or to similar prosecutions upon similar facts, than was afforded by its form of language; which, as we have seen, has made, and must ever make it, wholly impossible for the prosecu-

tion to obtain convictions under it from any jury of clear-headed and independent American citizens, whether at the South or at the North, at the East or at the West. We could not, without inconveniently lengthening the present article, embrace within it that larger view of the general policy and objects of the law, as illustrated by its origin and history, which is necessary to its full and proper comprehension. If, in the narrative we have given of the cases in which its practical application has thus of late been tested, we have had to dwell rather upon what may seem its narrower than its broader aspects, and have had to show the impossibility of convictions, on such cases of fact, being founded upon any sort of strict or legal interpretation of the language of the statute, we hope in our next to make it equally clear that no such convictions *ought* to have been had, whether in reference to the policy and morality of the law, or to the meaning of its authors. And we hope to defend the books of our American political law, and the men of 1794, who, with hands fresh from wielding the sacred sword of liberty, in the war of our own Revolution, first wrote this enactment on their pages, from the disgrace of such applications of it as we have thus seen urged, one short half century later, by degenerate sons of such sires.

JAPAN.

In the foreign policy of a nation is involved the most difficult portion of its governmental action. *Domestic* problems are of comparatively easy solution; since, when susceptible of proper representation, they may be worked out by experimental legislation, without any serious penalties being incurred through "errors or omissions" in the result submitted. With a political calculation based on *foreign* figures, the case is different and hazardous; in general, of momentous consequences; for the quotient must satisfy or displease, an independent party having the power to accept or reject. It is this consideration which has begotten the endless shams and subterfuges of diplomacy, which is the fruitful parent of political chicanery, and which entails upon every government the support of an immense secret machinery, more or less entangled with the machinery of all other governments. The laws of precedent and expediency are the only rules of modern diplomatic action; and these, like well-bred gamblers, continually defer to one another, keeping, however, the ulterior purpose for ever in view; the first deciding a doubtful line of operations, the second palliating an unjust one.

In a despotic or aristocratic government, diplomacy finds work enough, and is hardly objectionable. The man or the class which wields the national power, and upon which all other men and classes depend, will, doubtless, in its executive course, pursue that policy which promises most to its individual profit, and, like a skilful convoy, manœuvre for itself by every tactic it can command, arbitrary or otherwise; for, being itself the state, it has a right, and is, moreover, necessitated to adopt every means to conserve itself alone. Nicholas, the Tzar of Muscovy, the head of her Church, and the absolute owner of three fourths of her inhabitants, is, in fact, Russia; and he is amenable, politically, to none but himself, and bound to pursue no policy but one which will insure his personal benefit. His measures, therefore, need be taken but with one advisement, that they entail no evil which a prudent individual would avert; and herein diplomacy, more or less tortuous, according to his political education or fears, becomes the instrument of his operations.

Again, aristocracy being the dominant element of British political life, from which radiate power and patronage, and on whose conservation depends royalty itself, the very genius of British political action constrains a line of diplomacy having for its end the sustenance of the aristocratic element continually and principally. Commons and Council recognize and obey this constraint