and the American shore About midnight of the night of December 29-30, a party of British troops, under command of Colonel Allan McNabb, proceeded in small boats in search of the Caroline, found her fastened to the dock at Schlosser, in the State of New York, made a hostile attack upon her, expelled her crew, set fire to her, and she floated in full blaze over the great falls. In the skirmish, one Amos Durfee, a person employed on the Caroline, was killed, and for his murder, nearly two years afterward, one Alexander McLeod, a British subject, was indicted by a grand jury in Niagara county, New York. McLeod having been arrested and confined in jail, the British minister, Mr. Fox, in a note to Mr. Webster, the American Secretary of State, (March 12, 1841), demanded his immediate release on the ground that the act in which he was engaged was one of a public character, "planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps or to do any acts which might be deemed 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 tribunals of any foreign country."

In the meantime McLeod was brought before the Supreme Court of New York, under a writ of *habeas corpus*. Here the prisoner brought to the notice of the court, by affidavits and exhibits, the character of the Caroline, and of the expedition which destroyed her, as well as the demand of the British Government for his release.

The case was argued with great ability by counsel, and many precedents and authorities were cited. The judgment of the court was finally pronounced by Mr. Justice Cowen, who argued the question involved at great length, displaying throughout his opinion the clearness of intellect for which he was distinguished, and the exhaustive research which was his habit. Referring to the demand of the British Government for the surrender of the prisoner, he said:

"She puts herself, as we have seen, on the law of *defence* and *necessity*, and nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which alone can tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The right of self-defence and the defence of others, standing in certain relations to the defender, depend upon the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to enquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, (3 Black. Com. 4), that to warrant its exertion at all, the defendant must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the *defender* would himself become the *aggressor*." The condition upon which this right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition or those limits. The Caroline was not in the act of making an assult upon the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever he could find her, and were, in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat They were the assailants and their attack might have been legally repelled by Durfee, even to the destruction of their lives."

Further on Mr. Justice Cowen quotes from Puffendorf the rule applicable to cases of private or mixed war, as follows: "If the adversary be a foreigner, we may resist him and repel him any way, at the instant he comes violently upon us; but we cannot, without the sovereign's command, either assult him while his mischief is only *in machination*, or revenge ourselves upon him after he hath performed the injury against us." Puff. b. 2, chap. 5, § 7. "The sovereign's command must," adds the learned Justice, "in order to warrant such conduct, be a *denunciation* of war."

McLeod was accordingly remanded to take his trial in the ordinary course of law, and was tried and acquitted, having proved an *alibi*.

Notwithstanding the deference which is to be paid to the opinion of so eminent a judge, it is believed that the grounds taken by him in the language above quoted, are to a great extent fallacious.