

JEREMIAH S. BLACK.<sup>1</sup>

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Jeremiah Sullivan Black, the twenty-sixth Secretary of State of the United States, succeeded Lewis Cass, of Michigan, in that office, December 17, 1860, and served during the remainder of President Buchanan's administration, a period of two and one-half months. His brief service as Secretary of State had precedent in that Hugh S. Legare, of South Carolina, who held that office in the Cabinet of President Tyler, from the retirement of Webster, March 5, 1841, to the succession of A. P. Upshur of Virginia, July 24, two years later. Secretary Black was transferred from the attorney-generalship in which office he had served from the beginning of Buchanan's term. Ranking high among the distinguished men who have served as Attorneys-General, Judge Black also ranks high among the Secretaries of State. Passing by his services as head of the Department of Justice,<sup>2</sup> his Opinions (Volume IX, Opinions of Attorneys-General of the United States), on many subjects being of record, one opinion on the powers and duties of the Presidents of the United States especially with respect to the relations existing constitutionally between the States and the United States, given to Buchanan at the President's request, remains a classic exposition of the subject, makes clear Judge Black's understanding of the issues involved and enables us to know precisely his mind and action amidst the confusion of impending

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<sup>1</sup> Chief Justice of Pennsylvania, Nov. 17, 1851—Dec. 1, 1854; Attorney-General of the United States, March 6, 1857—Dec. 20, 1860; Secretary of State of the United States, Dec. 17, 1860—March 5, 1861.

<sup>2</sup> See Note 1.

civil war, when he held first place in the Cabinet. This Opinion and later opinions while Secretary of State identify him with the most eminent men who have served their country in any capacity.

His Opinion as Attorney-General was given November 20, 1860, just one month before the State of South Carolina, in Convention assembled, renounced its membership in the Union, proclaimed its secession and declared itself a "free, sovereign and independent nation." At the time of this action by South Carolina the causes leading to it had long been under discussion both in and out of Congress. Buchanan's administration was not taken by surprise. The immediate cause, as South Carolina asserted in its formal "Declaration of Causes," was the election of Abraham Lincoln as President of the United States (which occurred a few days before the Attorney-General gave his Opinion), an election which, in the opinion of South Carolina, meant the triumph of a political party that had sworn hostility to slavery—a sectional party, a northern party, representing interests wholly opposed to the interests of the South.

Facing possible disruption of the Union, rebellion, revolution, civil war, President Buchanan requested his Attorney-General to give him counsel as to the constitutional course he should pursue. That counsel, that Opinion, remains the exposition of the entire subject as understood by Judge Black and adhered to by him without faltering to the end of his life.

Within their respective spheres of action, so runs this Opinion, the Federal Government and the government of a State are both of them independent and supreme, but each is powerless beyond the limits assigned to it by the Court. The will of a State, whether expressed in its constitution or laws, cannot, while it remains a State in the Confederation, [nation (?)] absolve its people from the duty of obeying the just and

constitutional requirements of the Central Government. Nor can any act of the Central Government displace the jurisdiction of a State, because the laws of the United States are supreme and binding only so far as they are passed in pursuance of the Constitution. The Attorney-General did not say what might be effected by mere revolutionary force; he was speaking of legal and constitutional right.<sup>3</sup>

To support the State governments in all their rights (quoting Jefferson) Black re-asserted that the States themselves possessed the most competent administrations, both for their domestic concerns and as the surest bulwark against "anti-republican tendencies" combined with the preservation of the General Government in its whole constitutional vigor; "as the sheet-anchor of our peace at home and safety abroad." To the Chief Executive Magistrate of the Union, continued the judge, is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with power equal to its performance, he nominates his own subordinates and removes them at pleasure. For the same reason the land and naval forces are under his orders as commander-in-chief, but his powers are to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means, or break the laws himself to prevent them from being violated by others.

When the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary to accomplish the end of the legislation.

The law requires that all goods imported into the United States within certain collection districts, and the Opinion here especially referred (without saying)

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<sup>3</sup> 21 Howard, 506, cited.

to the district within which lay the city of Charleston, South Carolina, shall be entered at the proper port, and the duty thereon shall be received by the collector appointed for that port and there residing, but the functions of the collector may be exercised anywhere, at or within the port; the Opinion here referring to, the action of South Carolina, if the State had succeeded or should attempt to succeed in collecting customs itself, ejecting the federal collectors, or if such collectors, resigning from federal service, should act under the orders of the State. There is no law, continued Judge Black, which confines the collector to the custom house, or to any particular spot. Were the custom house burned, the collector might remove to another building; were he driven from shore, he might go on board a vessel in the harbor; keeping within the port he is within the law.

Speaking directly to the issue and to the President, the Attorney-General instructed him that the President's right to take such measures as might seem necessary for the protection of public property was very clear. "It results from the proprietary rights of the Government as owner of the forts, arsenals, magazines, deck-yards, navy-yards, custom-houses, public ships and other property which the United States have bought, built and paid for; besides, the Government of the United States is authorized by the Constitution" so to do.<sup>4</sup> The Government is not only the owner of such property but by virtue of the supreme and paramount law, it regulates the action and punishes the offences of all who are within the bounds of such property. "If any one of an owner's rights is plainer than another, it is that of keeping exclusive possession and repelling invasion." Here we have the very crux of the matter set out as Judge Black

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<sup>4</sup> Art. I, Sec. 8: 17.

habitually set out his opinions on whatever subject, going directly to the principle in plain words. "The right of defending public property includes also the right of recapture after it has been unlawfully taken by another," and the Attorney-General again cited Jefferson as holding and acting upon the opinion "that he could order a military force to take possession of any land to which the United States had title, though they (*i.e.*, the United States) had never occupied it before the private party claimed and held it, and though it was not then needed nor proposed to be used for any purpose connected with the operations of the Government."

The Attorney-General admitted that Jefferson's action might have been "a stretch of executive power," but he now assured Buchanan that "the right of retaking public property in which the Government has been carrying on its lawful business (again referring to the custom house and the forts in Charleston harbor) and from which its officers have been unlawfully thrust out, cannot well be doubted; and when it was exercised at Harper's Ferry, in October, 1859, everyone acknowledged the legal justice of it." The reference to Harper's Ferry and the John Brown raid touched a critical act of Buchanan's administration, an act which remains a landmark in American history. The logic here was simple—if Buchanan could protect and defend and retake the round-house at Harper's Ferry, being federal property, could he not now protect, defend and retake federal property—custom house and forts in Charleston Harbor?

Thus far the Attorney-General's counsel had been of a general nature. "I come now," he writes, "to the point in your letter which is probably of the greatest practical importance. By the Act of 1807 you may employ such parts of the land and naval forces as you may judge necessary, for the purpose of causing the

laws to be duly executed, in all cases where it is lawful to use the militia for the same purpose. By the Act of 1795, the militia may be called forth whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power of the marshals. This imposes upon the President the sole responsibility of deciding whether the exigency has arisen which requires the use of military force, and in proportion to the magnitude of that responsibility will be his care not to overstep the limits of his legal and just authority."

That the Attorney-General should take a legal view of the situation was his duty. Ours is a government of laws and not of men. First there should be exhausted all resources springing from judicial procedure. "It is only upon clear evidence (that judicial process is not and will not be effective), that a military force can be called into the field. Even then, its operations must be purely defensive. It can suppress only such combinations as are found directly opposing the laws and obstructing their operation." And again Judge Black returned to first principles, observing that "The military power must be kept in strict subordination to the civil authority."<sup>5</sup>

But the Attorney-General was a strict constructionist of the law, State or federal. "What," he now asked, "if the feeling in any State against the United States should become so universal that the federal officers themselves (including judges, district attor-

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<sup>5</sup> In *Ableman v. Booth*, the *U. S. v. Booth*, 21 Howard, 506; and in *Ex parte Milligan*, 4 Wallace, 2, in which cases Judge Black was of counsel, he elaborated this principle; see his forensic arguments in "Essays and Speeches of Jeremiah S. Black," compiled by Hon. Chauncey F. Black, pp. 417-430; 510-539. In other great cases in which he was employed (his arguments given in "Essays" &c.), the adherence to fundamentals distinguishes him among lawyers.

neys and marshals) should be reached by the same influences and resign their places? Of course the first step would be to appoint others in their stead, if others could be got to serve. But in such an event it is more than probable that great difficulty would be found in filling the offices. \* \* \* In that event troops would certainly be out of place and their use wholly illegal. Under such circumstances to send a military force into any State, with orders to act against the people, would be simply making war upon them. The existing laws put and keep the Federal Government strictly on the defensive. You (*i.e.*, the President) can use force only to repel an assault on the public property, and (to) aid the Courts in the performance of their duty." And now follows that passage in the Opinion which, construed by all in sympathy with the then projected "Confederate States of America," countenanced if it did not aid secession. Its advice was promptly acted upon by Buchanan in his message to Congress. Radicals and ultras holding extreme ideas of federal powers and duties, promptly condemned this portion of the Attorney's Opinion, and hostile critics of Judge Black continue to condemn it to this day. It should be remembered that he was rendering a legal, not merely an ethical opinion. The Department of Justice is not above the law.<sup>6</sup>

"If one of the States should declare her independence," continued the judge, "your action cannot depend upon the rightfulness of the course upon which such declaration is based, whether the retirement of a State from the Union be the exercise of a right reserved in the Constitution, or a revolutionary movement; it is certain that you have not in either case the authority to recognize the independence, or to absolve

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<sup>6</sup> The office of Attorney-General was created in 1789; the Department of Justice was created in 1870; the Attorney-General "head" of the Department.

her from her federal obligations. Congress, or the other States in Convention assembled must take such measures as may be necessary and proper. In such an event, I see no other course for you but to go straight onward in the path you have hitherto trodden, that is, execute the laws to the extent of the defensive measures placed in your hands, and act generally upon the assumption that the present constitutional relations between the States and the Federal Government continue to exist, until a new order of things shall be established either by law or force. Whether Congress has the constitutional right to make war against one or more States, and require the Executive of the Federal Government to carry it on by means of force to be drawn from the other States is a *question for Congress to consider.*'"<sup>7</sup> "It must be admitted that no such power is expressly given, nor are there any words in the Constitution which imply it."<sup>8</sup>

Judge Black interpreted the Constitution as meaning no more, in this connection, "than the power to commence and carry on hostilities against the foreign enemies of the nation." And citing the clause regulating the employment of the militia<sup>9</sup> he interpreted it (and relevant clauses) "as made to protect the States, not to authorize an attack by one part of the country upon another; to preserve the peace and not to plunge them (the States) in civil war." He was of opinion that there "was undoubtedly a strong and universal conviction among the men who framed and ratified the Constitution, that military force would be not only useless but pernicious, as a means of holding the States together. If it be true that war cannot be declared, nor a system of general hostilities carried on by the

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<sup>7</sup> Italics mine; see President Buchanan's message, January 8, 1861, Richardson, V. p. 656. (Quoted, *infra*.)

<sup>8</sup> The Opinion here refers to the powers of Congress, Art. I, Sec. 8.

<sup>9</sup> Art. I, Sec. 8: 16.



Central Government against a State, then it seems to follow that an attempt to do so would be *ipso facto* an expulsion of such State from the Union being treated as an alien and an enemy, she would be compelled to act accordingly.”

But there was and is another side of the shield, which the Attorney-General now displayed.

“The right of the General Government to preserve itself in its whole constitutional vigor, by repelling a direct and positive aggression upon its property or its offices<sup>10</sup> cannot be denied.” Writing further as an interpreter of the law he counselled Buchanan: “This is a totally different thing from an offensive war, to punish the people for the political misdeeds of their State government, or to prevent a threatened violation of the Constitution, or to enforce an acknowledgment that the Government of the United States is supreme. The States are colleagues of one another and if some of them shall conquer the rest and hold them as subjugated provinces, it would totally destroy the whole theory upon which they are now connected. If this view of the subject be correct, as I think it is, then the Union must utterly perish at the moment when Congress shall arm one part of the people against another for any purpose beyond that of merely protecting the General Government in the exercise of its proper constitutional functions.”<sup>11</sup>

Before his appointment as Attorney-General, and

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<sup>10</sup> The President takes the oath, “I will faithfully execute the office of President of the United States.” The latter part of the oath explaining what is meant by “office”: “and will to the best of my ability preserve, protect and defend the Constitution of the United States.” As the Constitution was ordained and established by the People of the United States “in order to form a more perfect Union,” the duty of the President relative to the Union is obvious. This duty is plainly deducible from Judge Black’s Opinion.

<sup>11</sup> November 20, 1860; Opinions of Attorney-Generals of the United States, IX, 516-526. (Edition, 1869, edited by J. H. Ashton.)

his appointment was a compromise, Black had risen to first place among the lawyers of the country. He had served his native State as President Judge, as Associate-Justice of its Supreme Court, as Chief-Justice, and at the time Buchanan called him to the Cabinet, was an Associate Justice of that Court. He had never before held a federal office. Bred to the law, profoundly versed in the principles of jurisprudence, knowing no fear, accustomed to weighing all sides of an issue, possessing knowledge and vision rarely bestowed on the sons of men, he gave opinions, as Attorney-General of the United States, based on legal principles not on mere ethical speculation. There is nothing theoretical here. His son and biographer tells us "he was a Democrat of the straitest sect, a disciple of Jefferson, and a most unflinching and aggressive friend of Jackson."<sup>12</sup>

The times were out of joint all through Buchanan's administration, and Buchanan could not set them right. Whatever interpretation may be given today of the causes of the civil war, undoubtedly that interpretation will be colored by conclusions drawn from an event that happened at Appomattox. Every lawyer, every thoughtful layman knows some of the difficulties, not to say the perils, of aggressive action directed against a contingency. When Judge Black wrote his famous Opinion as to the powers and duties of the President and the relation between the States and the United States, secession and civil war were a contingency. As an "aggressive" friend of Jackson, Judge Black must have been familiar with Jackson's ideas and action in 1833 concerning nullification in South Carolina.

Turning back to the evidence as it presented itself to President Jackson and his letters to Poinsett, Collector of the port at Charleston, are primary evidence,

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<sup>12</sup> "Essays &c." p. 5.

we read: "I fully concur with you in your views of nullification. It leads directly to civil war and bloodshed and deserves the execration of every friend of our country. Should the civil power with your aid as a *posse comitatus* prove not strong enough to carry into effect the laws of the Union, you have a right to call upon the Government for aid, and the Executive will yield it as far as he has been vested with the power by the Constitution and the laws."<sup>13</sup> "The Union must be preserved and its laws duly executed by proper means." "But bear in mind the fact that this step (*i.e.*, the suppression or nullification by military force) must be consequent upon the actual, open assemblage of such a force, or upon some *overt act of its commission*."<sup>14</sup>

The issue here is "the overt act." When Judge Black wrote the Opinion as to the powers and duties of President Buchanan, confronted by possible and probable secession, the crucial "overt act" was yet a contingency, and Judge Black handled the question accordingly and precisely as Jackson handled the nullification issue. To what extent Buchanan was influenced by Judge Black, controversy and speculation may run riot. Unquestionably Buchanan pursued a national course. Few indeed are the apologists of James Buchanan. Historians quite without exception have pilloried him (to put the case mildly) as a patriot so cautious and timid as to effect treason. The substantial practical advice which his Attorney-General gave him, November 20, 1860, was "to go straight onward in

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<sup>13</sup> Jackson to Poinsett, December 2, 1832.

<sup>14</sup> Jackson to Poinsett, February 7, 1833. (*Italics mine.*) The MS of the Jackson-Poinsett letters is in the Library of The Historical Society of Pennsylvania, Philadelphia; they were printed for the first time in "The Statesmanship of Andrew Jackson" (various letters and state papers, edited, with historical notes by Francis N. Thorpe, 1909). pp. 17-29.

the path you have hitherto trodden;" "whether Congress has the constitutional right to make war against one or more States, and require the Executive of the Federal Government to carry it on by means of force to be drawn from the other States is a question for Congress to consider." That Buchanan strictly followed this counsel his later action fully proves. In his message to Congress of January 8, 1861, may be heard the echo of Judge Black's Opinion: "My province is to execute and not to make the laws. This is still my purpose. It belongs to Congress exclusively to repeal, to modify, or to enlarge their provisions to meet exigencies as they may occur. I possess no dispensing power. I certainly had no right to make aggressive war upon any State, and I am perfectly satisfied that the Constitution has wisely withheld that power even from Congress. But the right and the duty to use military force defensively against those who resist the federal officers in the execution of their legal functions and against those who assail the property of the Federal Government is clear and undeniable. But the dangerous and hostile attitude of the States toward each other has already far transcended and cast in the shade the ordinary executive duties already provided by law, and has assumed such vast and alarming proportions as to place the subject entirely above and beyond Executive control. The fact cannot be disguised that we are in the midst of a great revolution. In all its various bearings, therefore, I commend the question to Congress as the only human tribunal under Providence possessing the power to meet the existing emergency. To them exclusively belongs the power to declare war, or to authorize the employment of military force in all cases contemplated by the Constitution, and they alone possess the power to remove grievances which might lead to war and to secure peace and union to this distracted country. On them, and them alone,

rests the responsibility.’”<sup>15</sup> Thus Buchanan registered his “non possumus.”

The Cabinet was divided; its southern members sympathizing both openly and secretly with the projected “Confederate States of America;” its northern members, of whom Black, the Secretary of State, was chief, supporting the Union, and cooperating to hold Buchanan to a national course. Differing with the President as to executive action affecting the Union, Lewis Cass, Secretary of State, had resigned. Neither Cass nor his successor, Judge Black, sympathized with the Abolitionists of the day, and undoubtedly held the opinion vigorously set forth by Buchanan in his fourth and last annual message, that anti-slavery agitation was the primary cause of impending destruction of the Union; that “all that is necessary to accomplish (‘peace and harmony’) \* \* \* all for which the slave States have ever contended, is to be let alone and (be) permitted to manage their domestic institutions in their own way. As sovereign States, they and they alone, are responsible before God and the world for the slavery existing among them. For this the people of the North are not more responsible and have no more right to interfere than with similar institutions in Russia or in Brazil.”<sup>16</sup> But slavery in States or in Territories was not the issue in Judge Black’s Opinion. He as legal adviser to the President had set forth the President’s powers and duties, not neglecting, however, to comment on federal relations and State sovereignty. Emancipation as an issue did not arise until three years had passed; until Lincoln and a political system fundamentally differing from that personified in Buchanan and his administration were in control of national affairs.

The issue confronting Buchanan and his Cabinet

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<sup>15</sup> Richardson, V., p. 656.

<sup>16</sup> Message, December 3, 1860. Richardson, V., p. 627.

was Union or disunion. President Buchanan, an able lawyer, cautious to timidity, a timidity partly due to his age, was a man of convictions which he usually held quite to the point of stubbornness. One man in America might influence Buchanan to modify his conclusion, and that man was his chief of the Cabinet, his political supporter, his friend of many years, Judge Black. To what extent the Secretary influenced the President is not accurately known. Few Presidents have so dominated their Cabinets as did Buchanan his Cabinet. All the evidence supports this assertion. In that Cabinet, as reconstructed, Judge Black was Secretary of State and Edwin M. Stanton Attorney-General. It is known that the appointment of Stanton was due to Black. The two men had been associated, as senior and junior in law cases; they agreed in their political opinions; they were both Union men. One needs but read Black's defense, later, of Stanton in controversy with Henry Wilson who had written a eulogistic article on Stanton. Judge Black's comments on Wilson's paper and Wilson's rejoinder are of the sort which editors of magazines in our day are wont "to decline with thanks."<sup>17</sup>

Yet it is in his comment on Wilson's article that Black reveals the ideas and principles which dominated him while both Attorney-General and Secretary of State of the United States. The meaning of his language is unmistakable and will not bear paraphrasing. He characteristically calls his statements "elementary principles":

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<sup>17</sup> The "American," Volume X. p. 248, tells us that "the vehemence of Judge Black's partisanship colored all his expressions except those strictly professional; \* \* \* harshness disfigures his political writings." See Wilson's article on Stanton, *Atlantic Monthly*, February, 1870; also Judge Black's comments on this article in "Letters to Henry Wilson," in "Essays, &c" pp. 245-292. No hint of "vehemence" is found in Black's state papers.

1. The Government of the United States is the Constitution and laws.
2. The preservation of the Government consists in maintaining the supremacy of the Constitution and laws.
3. For this purpose certain coercive powers are delegated to the Executive, which he may use to defend the laws when they are resisted.
4. But in this country, as in every other except where the government is an absolute despotism, the authority of the Chief Magistrate is limited and his hands are tied up by legal restriction to prevent him from using physical force against the life, liberty and property of his fellow citizens unless in certain prescribed ways or on proper occasions.
5. He is bound by his inaugural oath to keep within those limits, if he breaks the laws, he destroys the Government; he cannot stab the Constitution in the back because he is afraid that somebody else will strike it in the face.
6. The Government of the United States, within its proper sphere, is a sovereign, as much as the States are sovereign within their several boundaries.
7. The so-called ordinances of secession in 1860-'61 were the declarations of certain persons who made them that they intended to disobey the laws of the United States. It was the duty of Congress and the President to see that forcible resistance to the laws, when actually made, should be met by a counter-force sufficient to put it down; but neither Congress nor President had authority to declare war and begin hostilities, by anticipation, against all the people at once, and put them all in the attitude of public enemies without regard to their personal guilt or innocence. "The Opinion of the Attorney-General, and the messages of President Buchanan, assert these principles in plain English words. We held that the whole coercive power of the United States, delegated by the Constitution to every branch of the Government, judicial, legislative and executive, including its military and naval force, might and ought, in the appointed way, to be used to maintain the supremacy of the laws against all opposers, to hold or retake the public property and to collect the revenue. But we asserted also that powers not given ought not to be usurped, and that war upon a State, in the then circumstances of the country, would be not only usurpation, but destruction of the Union."<sup>18</sup>

This iteration in 1870 of opinions officially expressed in 1860 makes clear the attitude of Judge Black both as Attorney-General and as Secretary of the State of the United States. As the *Catholic World* remarked reviewing Judge Black's life, sixteen years later, "Judge Black was unstable in nothing."<sup>19</sup> When we consider

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<sup>18</sup> "Essays, &c," pp. 246-247.

<sup>19</sup> Volume 43 (1886), p. 757.

his stand in defense of the Union, we may the more readily agree with its further remark that he was "a colossal figure in the moving drama of American politics."

The scene in this "moving drama," while Black was Secretary of State shows the happenings in and near Charleston harbor. The Secretary vigorously approved Major Anderson's movements in defense of the property of the United States, and also all that estate expressed or implied by the word "offices." Thus Anderson's removal to Ft Sumter had Black's support in the Cabinet. Black insisted that Anderson should not be ordered back to Ft. Moultrie; that the federal troops should not be withdrawn from Charleston harbor; and in this approval the Secretary was in full accord with that act of Congress which voted Anderson's movement "a bold and patriotic act." Andrew Jackson had declared, "I met nullification at its threshold," and declared it to James Buchanan, then in Russia, to which country Jackson had appointed Buchanan minister.<sup>20</sup>

Secretary Black would meet secession "at its threshold," but Buchanan was now President. Commenting on the President's failure to follow the precedent Jackson had set, Judge Black observed (writing to Buchanan), "The fatal error which the administration has committed (is) in not sending down troops enough to hold *all* the forts in Charleston Harbor."<sup>21</sup>

Meanwhile, South Carolina had sent Commissioners to treat with the United States, that is with the President, as to all the issues involved in Charleston harbor. President Buchanan received the Commissioners and conversed with them respecting the matters they presented. The immediate question for discussion was

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<sup>20</sup> Curtis, "Life of Buchanan," I., p. 185.

<sup>21</sup> "Essays, &c." p. 16.



the division of debt and property between South Carolina and the United States. While these "sundry questions" were before the President public opinion, at the North, the expression of the will of the majority by the election of Lincoln, was sharply criticizing Buchanan. His Cabinet had changed somewhat, responsive, as many believe, to the pressure of public opinion. Howell Cobb, of Georgia, Secretary of the Treasury, had resigned because he disapproved of the general tone, and many special passages in Buchanan's annual message the evidence supporting the assertion that Cobb objected to expressed or implied restrictions on the "rights of the South." Lewis Cass, Secretary of State, had resigned because he himself and his constituency in Michigan disapproved the message "because the force in Charleston harbor had not been increased."<sup>22</sup>

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<sup>22</sup> "Essays &c." p. 11.

(To be continued.)