picion or that of others, Blackstone adds, "but in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant was prayed."

But although the existence of a fact as the foundation of the charge must be proved before a magistrate can legally imprison a citizen, it is not believed to be true that the same necessity exists for ascertaining with equal clearness the full legal character of the fact, or the degree of guilt which the law attaches to it. On a charge of murder, for example, the homicide must be proved; but the inquiry whether it be justifiable or otherwise, is seldom made by an examining magistrate. He could not refuse to commit, unless it was perfectly clear that the act was innocent. An opinion that a jury ought to acquit, would not warrant a refusal on his part to take the steps which might bring the accused before a jury.

In cases where the legal effect of the act alledged to be criminal, is in any degree doubtful, it would greatly derange the regular course of justice, and enable many offenders to escape, should a magistrate refuse to arrest until he had received full proof of guilt. If the fact be of such a character as perhaps to be construed into a high and dangerous crime with the aid of other testimony which the nature of the case admits, it would seem to be a duty to secure the person to abide the judgment of the law.

Among the many reasons which may be enumerated for committing in a doubtful case, are:

1st. That upon a considerable portion of a criminal charge, it is the peculiar province of a jury to decide.

2d. That additional testimony is to be expected: and

3dly. That the person most commonly making the commitment is a justice of the peace, not authorised finally to try the offender, and who consequently, whatever may be the fact, is not presumed to be so competent a judge of the law of the case, as he is, to whom the power of deciding it is confided.

Had these proceedings commenced with the present motion, founded on testimony such as is now adduced, I certainly should have felt no difficulty in deciding on it. But the proceedings are not now commencing. The persons against whom this motion is made, have been siezed, one in the Mississippi territory, one in Kentucky, and one in the western parts of Pennsylvania or New-York, and brought to this place for trial. An immense number of witnesses have been assembled, and a very extensive investigation of the transactions alleged to be criminal, has taken place. The result has been the acquittal of one of the accused, upon the principle that the offence, if committed any where, was committed out of the jurisdiction of this court; and a *nolle prosequi* has been entered with respect to the others. The witnesses intended to establish the charge before a jury, have been examined, and the probability of obtaining testimony which can materially vary the case, is admitted to be very remote.—The great personal and pecuniary suffering already sustained, must be allowed also to furnish some motives for requiring rather stronger testimony to transmit the accused to a distant state for trial, than would be required in the first instance. It may likewise be added, as a consideration of some weight, that the judge who hears the motion, though sitting as an examining magistrate, is one of those who are by law entrusted with the power of deciding finally on the case; and there seems to be on that account the less reason for referring the party to a distinct tribunal, on a point on which a slight doubt may exist.

I do not believe that in England, whence our legal system is derived, a justice of *assise* and *nisi prius*, after hearing the whole testimony, would commit, for trial in another county, a man who had been tried in an improper county, unless the probable cause was much stronger than would be required on ordinary occasions.

These conflicting considerations certainly render the questions to be decided more intricate than they would be in a different state of things. After weighing them, I have conceived it to be my duty not to commit on slight ground, but at the same time I cannot permit myself to be governed by the same rules which would regulate my conduct on a trial in chief.

There are certain principles attached to the different characters of a judge sitting as an examining magistrate and on a trial in chief, which must essentially influence his conduct even under circumstances like those which attend the present case. It is a maxim universal in theory, though sometimes neglected in practice, that if in criminal prosecutions there be doubts either as to fact or law, the decision ought to be in favour of the accused. This principle must be reversed on a question of commitment. In a case like the present, if the judge has formed a clear opinion on the law or fact, which there is not much reason to suppose additional testimony might be obtained to change, it would be injustice to the public, to the accused, and to that host of witnesses who must be drawn from their private avocations to the trial, should he take a step which in his judgment could produce only vexation and expense; but if he entertains serious doubts as to the law or fact, it is, I think, his duty even in a case like this, not to discharge, but to commit.

The charges against the accused are:

1st. That they have levied war against the United States at the mouth of Cumberland river, in Kentucky; and

2dly. That they have begun and provided the means of a military expedition against a nation with which the United States were at peace.

With respect to one of the accused, a preliminary defence is made in the nature of a plea of *autrefoit acquit*.

If the question raised by this defence was one on which my judgment was completely formed in favour of the person by whom it is made, it would certainly be improper for me to commit him. But if my judgment is not absolutely and decidedly formed upon it, there would be a manifest impropriety in undertaking now to determine it.—This does not arise from my fear to meet a great question whenever my situation shall require me to meet it; but from a belief that I ought as well to avoid the intrusion of my opinions on my brethren in cases where duty does not enjoin it on me to give them, as the withholding of those opinions where my situation may demand them. The question whether *autrefoit acquit* will be a good plea in this case, is of great magnitude, and ought to be settled by the united wisdom of all the judges. Were it brought before me on a trial in chief, I would, if in my power, carry it before the supreme court: when brought before me merely as an examining magistrate, I should deem myself inexcusable, were I to decide while a single doubt remained respecting the correctness of that decision.