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Features of Mr. Jay's Treaty

Alexander James Dallas

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ROBERT ERNEST COWAN

FEATURES

OF THE

OF THE

Mr. JAY's TREATY.

TO WHICH IS ANNEXED

A View of the Commerce of the
UNITED STATES,

AS IT

STANDS AT PRESENT, AND AS IT IS FIXED BY

Mr. JAY's TREATY.

by Alexander James Dallas

PHILADELPHIA:

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[FROM THE AMERICAN DAILY ADVERTISER.]

Messrs. Dunlap & Claypoole,

THE following Sketch of "The Features of Mr. Jay's Treaty," was made, originally, with a view to ascertain, for private satisfaction, the principles and operation of an Instrument, which has excited such extensive curiosity, and is calculated to produce such important effects. It is published, however, at the instance of several persons, who think that the subject should be placed in every possible light; and that no citizen can be justified at this crisis, in suppressing his opinions, or in withholding his share of information from the common stock. But while it is committed to the press, I wish it to be considered merely as a text, which may hereafter be extended by commentary, or explained by illustration; and though it will give me pleasure (since my sole object on this occasion is the investigation of political truth) to see it become a source of candid animadversion, I trust it will not, according to the custom of contending parties, be regarded as an instrument of faction, nor be made the foundation of slander and abuse.

FEATURES

OF

Mr. Jay's Treaty.

I. *The origin and progress of the negotiation for the Treaty, are not calculated to excite confidence.*

1. **T**HE administration of our government have, seemingly at least, manifested a policy favourable to Great Britain, and adverse to France.

2. But the house of representatives of Congress, impressed with the general ill conduct of Great Britain towards America, were adopting measures, of a mild, though retaliating nature, to obtain redress and indemnification. The injuries complained of were, principally, 1st. The detention of the western posts—2dly. The delay in compensating for the negroes carried off at the close of the war—and 3dly, The spoliations committed on our commerce. The remedies proposed, were, principally, 1st. The commercial regulations of Mr. Madison—2dly. The non-intercourse proposition of Mr. Clarke—3dly. The sequestration motion of Mr. Dayton—4thly. An embargo—and 5thly, Military preparation.

3. Every plan of the legislature was, however, suspended, or rather annihilated, by the interposition of the executive authority ; and Mr. Jay, the chief Justice of the United States, was taken from his judicial seat, to negotiate with Great Britain, under the influence of

the prevailing sentiment of the people, *for the redress of our wrongs*. Query—Are not his commission and the execution of it, at variance? Is any one of our wrongs actually redressed? Is not an atonement to Great Britain, for the injuries which she *pretends* to have suffered, a preliminary stipulation?

4. The political dogma of Mr. Jay are well known; his predilection, in relation to France and Great Britain, has not been disguised; and even on the topic of American complaints, his reports, while in the office of secretary for foreign affairs, and his adjudications while in the office of chief justice, were not calculated to point him out as the single citizen of America, fitted for the service in which he was employed. Query—Do not personal feelings too often dictate and govern the public conduct of ministers? But whatever may have been his personal disqualifications, they are absorbed in the more important consideration of the apparent violence committed by Mr. Jay's appointment, on the essential principles of the constitution. That topic, however, has already been discussed, and we may pass to the manner of negotiating the treaty in England, which was at once obscure and illusory. We heard of Mr. Jay's diplomatic honours; of the royal and ministerial courtesy which was shewn to him, and of the convivial boards to which he was invited: but, no more! Mr. Jay, enveloped by a dangerous confidence in the intuitive faculties of his own mind, or the inexhaustible fund of his diplomatic information, neither possessed nor wished for external aid; while the British negotiator, besides his own acquirements, entered on the points of negotiation, fraught with all the auxiliary sagacity of his brother ministers, and with all the practical knowledge of the most enlightened merchants of a commercial nation. The result corresponds with that inauspicious state of things. Mr. Jay was driven from the ground of an injured, to the ground of an aggressing, party; he made atonement for imaginary wrongs, before he was allowed justice for real ones; he converted the *resentments* of the American citizens (under the impressions of which he was avowedly sent to England) into *amity and concord*; and seems to have been so anxious to rivet a commercial chain about the neck of America, that he even forgot, or disregarded, a principal item of her own produce, (cotton) in order to make a sweeping sacrifice to the insatiable appetite of his maritime antagonist. But the idea of the treaty, given by Mr. Pitt in answer to Mr. Fox, who, before he had seen, applauded it as an act of liberality and justice towards America, was the first authoritative alarm to our interests and our feelings. "When the treaty is laid before the parliament (said the minister) you will best judge whether any improper concession has been made to America!"

5. The treaty being sent here for ratification, the President and the Senate pursue the mysterious plan in which it was negotiated. It has been intimated, that till the meeting of the senate, the instrument was not communicated even to the most confidential officers of the government: and the first resolution taken by the senate, was to stop the lips and ears of its members against every possibility of giving

or receiving information. Every man, like Mr. Jay, was presumed to be inspired. In the course of the discussion, however, some occurrences flashed from beneath the veil of secrecy; and it is conjectured that the whole treaty was, at one time, in jeopardy. But the rhetoric of a minister (not remarkable for the *volubility of his tongue*) who was brought post-haste from the country; the danger of exposing to odium and disgrace the distinguished American characters, who would be affected by a total rejection of the treaty; and the feeble, but operative, vote of a member transported from the languor and imbecility of a sick room, to decide in the senate a great national question, whose merits he had not heard discussed; triumphed over principle, argument and decorum!

6. But still the treaty remains *unratified*; for, unless the British government shall assent to suspend the obnoxious twelfth article, (in favour of which, however, many *patriotic* members declared their readiness to vote) the whole is destroyed by the terms of the ratification: and if the British government shall agree to add an article allowing the suspension, the whole must return for the reconsideration of the senate. But the forms of mystery are still preserved by our government; and attempts to deceive the people have been made abroad, upon a vain presumption, that the treaty could remain *a secret*, till it became obligatory as *a law*.

For instance, in *Fenno's* paper of the 25th of June, it is unequivocally declared, "the treaty of amity, commerce and navigation, was ratified yesterday by the Senate of the United States; and, even while he corrects that mistake in the paper of the following day, he commits *an error* of a more extraordinary kind (particularly when we consider that he is the confidential person, who printed the treaty for the use of the senate) by asserting, that in the twelfth article, "the United States are prohibited from exporting to Europe from the said states, sugar, coffee, cotton and cocoa, *the produce of any of the West India islands.*" The fact must have been known to Mr. Fenno, that the prohibition operates universally; whether the prohibited articles are the produce of the West India islands, of the East Indies, of the United States, or of any other part of the world. The next essay to render the envelopements of the treaty still more opaque, appeared in the *American Daily Advertiser*, of the 27th of June. The writer (who is said to be a member of the Senate) likewise regards the ratification, in his introduction, as a perfect one; and after giving a gloss to the general texture of the treaty, he ascribes the obnoxious principle of the twelfth article, *to an error which, it appears, has been inadvertently introduced.* An error inadvertently introduced into an instrument, which was under the consideration of the chief justice of the United States, and the British minister, for a term of eight months! and introduced too, into a part of that very article, which is made the sole foundation of the whole commercial superstructure!! Whenever the twelfth article ceases, the treaty declares every other article, except the ten first articles, shall also cease! But the author of that sketch proceeds one step further—he says, "that

every cause of offence or collision towards the French, seems to have been studiously avoided, in the progress of the negociation ;” for, “ no article of the treaty clasbes in the smallest degree, with the obligations and engagements contracted with that gallant nation !” Let the treaty speak for itself—it is more to be hoped than expected, that the voice of France should not likewise be heard in opposition to so bold an assertion.

II. *Nothing is settled by the Treaty.*

1. The western posts are *to be given up.*
2. The northern boundary of the United States is *to be amicably settled.*
3. The river meant by St. Croix river in the treaty, is *to be settled.*
4. The payment for spoiliations is *to be adjusted and made.*
5. The ultimate regulation of the West India trade is to depend on a negotiation *to be made* in the course of two years after the termination of the existing war.
6. The question of neutral bottoms making neutral goods is *to be considered* at the same time.
7. The articles that may be deemed contraband, are *to be settled* at the same time.
8. The equalization of duties laid by the contracting parties on one another, is *to be hereafter treated of.*
9. All the commercial articles depend on the existence of the twelfth article, which may continue twelve years, if it is so agreed within two years after the expiration of the war ; but if it is not so agreed, it expires, and with it all the dependent parts of the treaty. Query—Does not the Senate’s suspension of the twelfth article bring us to the same ground ?
10. The whole business of Mr. Jay’s negociation is left open by the twenty-eighth article, for alteration, amendment and addition, by new articles, which, when agreed upon and ratified, *shall become a part of this treaty.*

Query—Does not the history of treaties prove, that whenever commissioners have been appointed by the parties, to take all the subjects of their dispute *ad referendum*, for the sake of getting rid of an immediate pressure, and patching up a peace, the matter terminates in *creating*, not in *settling* differences ?

III. *The Treaty contains a colourable, but no real, Reciprocity.*

1. The second article provides for the surrender of the western posts in June, 1796 ; but it stipulates, that in the mean time, the citizens of the United States shall not settle within the precincts and jurisdiction of those posts ; that the British settlers there shall hold and enjoy all their property of every kind, real and personal ; and that when the posts are surrendered, such settlers shall have an election

either to remain British subjects, or to become American citizens. Query—Were not the western posts, and all their precincts and jurisdiction, the absolute property of the United States by the treaty of peace? Query—What equivalent is given for this cession of the territory of the United States to a foreign power? Query—How far do the precincts and jurisdiction of the posts extend? Query—Does not the treaty give an implied assent to major Campbell's claim, by adopting its language, as far as the falls of the Miami, and to the northern claim upon the territories of New-York and Vermont?

2. The third article stipulates that the two contracting parties may frequent the ports of *either party*, on the eastern banks of the Mississippi. Query—What ports has Great Britain on the eastern banks of the Mississippi?

3. The third article likewise opens an amicable intercourse on the lakes; but excludes us from their sea-ports, and the limits of the Hudson's bay company; and excludes them from navigating our Atlantic rivers, higher than the highest port of entry in each. Query—What are the limits of the Hudson's bay company? Query—What equivalent do the United States obtain for the general freedom of navigation, portage and passage? For it must be remembered, that the British rivers penetrate the heart of the country, but of those we can take no advantage; while Great Britain is in fact admitted to all the advantages of which our Atlantic rivers are susceptible.

4. The sixth and seventh articles provide for satisfying every demand which Great Britain has been able, at any time, to make against the United States (the payment of the British debts due before the war, and the indemnification for vessels captured within our territorial jurisdiction) but the provision made for the American claims upon Great Britain, is not equally explicit or efficient in its terms, nor is it co-extensive with the object. Query—Why is the demand for the negroes, carried off by the British troops, suppressed, waved, or abandoned? The preamble to the treaty recites an intention to *terminate the differences* between the nations: was not the affair of the negroes a difference between the nations? and how has it been terminated?

5. The ninth article stipulates, that the subjects of Great Britain and the citizens of the United States, respectively, who now hold lands within the territories of either nation, shall hold the lands in the same manner as natives do. Query—What is the relative proportion of lands so held? Query—The effect to revive the claims of British subjects, who, either as traitors or aliens, have forfeited their property within the respective states? Query—The operation of such a compact on the internal policy of the union, combined with the solemn recognition of a colony of British subjects, professing and owing allegiance to the British crown, though settled within the acknowledged territory of the United States, by virtue of the second article?

6. The tenth article declares, that neither party shall sequester or confiscate the debts or property in the funds, &c. belonging to the

citizens of the other, in case of a war, or of national differences. Great Britain has fleets and armies; America has none. Query—Does not this, supported by other provisions, which forbid our changing the commercial situation of Great Britain, or imposing higher duties on her than on other nations, deprive the United States of their best means of retaliation and coercion? Query—Is it not taking from America her only weapon of defence; but from Great Britain the least of two weapons which she possesses? What is the relative proportion held by the citizens of the contracting nations, respectively, in the funds, &c. of each other.

7. The twelfth article opens to our vessels, not exceeding seventy tons, an intercourse with the British West India islands, during the present war, and for two years after: but it prohibits our exporting from the United States, melasses, sugar, cocoa, coffee, or cotton, to any part of the world, whether those articles are brought from British, French, or Spanish islands, or even raised (as cotton is) within our own territory. Query—Are vessels of seventy tons equal to maintain the most beneficial part of our trade with the West Indies, the transportation of lumber, &c.? Query—Do we not, *in the time of war* (and the continuance of the privilege, for more than two years after the war depends on the situation in which his majesty of Great Britain shall then find himself in relation to the islands) enjoy a greater privilege, under the temporary proclamations of the colonial governors, than this article admits? Query—Have not the articles which we are prohibited from exporting, formed, of late, a valuable part of our trade? Is not cocoa chiefly cultivated by the Spaniards? Is not cotton a staple of America? Is our own consumption equal to our importation or growth of the prohibited articles? Will not the want of a vent for any surplus quantity, affect the other branches of our commerce, diminish the demand for ship building, and injure our agriculture? If we are now thrown out of this branch of the carrying trade, shall we be ever able to recover it? and, in short, will not the loss be of lasting detriment to all our maritime exertions?

8. The thirteenth article admits us to trade in the British settlements in the East Indies: but it excludes us from any share in the coasting trade of that country; it forbids our penetrating the interior of the country, or holding an intercourse with the natives, unless under a license from the local British government; and it compels us to land all the articles that are there shipped, in the United States. Is not China the independent territory of the emperor? Is not Canton an open port accessible to all nations? Do we not obtain there, and at independent places in the East Indies with which we have, at present, an uninterrupted communication, tea, porcelain, nankeens, silk, &c. upon the principles of a free trade? Does not a very advantageous part of the trade in that quarter of the globe, consist in the exchange of the products and manufactures of the East Indies for those of China, and *vice versa*? Do not our importations of East India goods far exceed our consumption? Is not the trade which we carry on with those goods in Europe, highly beneficial?

Are not sugar and coffee a part of our importations from India, and does not the 12th article prohibit our re-exporting them? Does our trade to Europe, founded on the previous intercourse with India, depend on the British licence; and can it be maintained, under the disadvantage of a double voyage? Are we not, every voyage, making favourable impressions on the natives of China? Do we not participate, at present, in the carrying trade of that country? Does not our interest in it increase rapidly?

9. The several articles that regulate the rights and privileges of the contracting parties within their respective territories, in case either of them is engaged in a war, may cease in two years after the present war is terminated, and cannot be protracted beyond twelve years. Query—Are not all these advantages, in effect, *exclusively favourable to Great Britain*, a principal maritime power of Europe; often engaged in wars; and interested to obtain for her ships, her colonies, and herself, the ports and supplies of this extensive continent?

Is it probable that, during the longest possible existence of this treaty (twelve years) America will be engaged in maritime wars, will want English ports as a refuge for men of war, or as a retreat for prizes? Or that it will, during that period, be of importance to her objects, to prevent her enemies from arming in English ports, or selling their prizes there?

10. The twenty-second article provides for ships of war being hospitably treated in the ports of the respective contracting parties; and that officers shall be treated with the respect that is due to the commissions which they bear. Query—Could not the principle of reciprocity, as well as humanity, suggest to Mr. Jay, that some provision should be made to protect our citizen sailors from the fangs of British press-gangs in England; and from the horrors of their prison-ships in the West Indies? Were the commissions of his Britannic majesty of more regard than the liberties of American freemen? Or, was it unknown, that thousands of our sailors have been occasionally enslaved by the impress tyranny of the British government? Or, that thousands have lost their lives in noxious prisons, while their vessels were carried into British ports for “LEGAL ADJUDICATION?”

11. The fourteenth article provides for a perfect liberty of commerce and navigation, and for the accommodation of traders; but subject always to the laws and statutes of the two countries respectively: Query—Are not the laws and statutes of England infinitely more rigid, on the subjects of this article, than the laws and statutes of America?

IV. *The Treaty is an Instrument of Party.*

1. The discussions, during the session of Congress in which Mr. Jay's mission was projected, evinced the existence of two parties, upon the question; whether it was more our interest to be allied with the republic of France, than with the monarchy of Great Britain. Query—Does

not the general complexion of the treaty decide the question in favour of the alliance with Great Britain? Query—Whether that complexion does not manifestly arise from the provisions, for admitting a British colony within our territory, in the neighbourhood of the western posts; for admitting the whole British nation, without an equivalent, into a participation of our territory on the eastern bank of the Mississippi; for naturalizing all the holders of lands; for opening a general intercourse with their traders on the lakes, in the interior of our country, rendering (as it is idly said) the local advantages of each party common to both; for regulating the external trade of the two nations with each other; for admitting citizens to be punished as pirates, who take commissions, &c. from a belligerent power, adverse to either contracting party; for fettering the operations of our treaty with France; for surrendering criminals, &c. &c. &c.

2. The measures proposed by one party to retaliate the injuries offered by Great Britain to our territorial, commercial and political rights, were opposed by the other, precisely as the treaty opposes them. For instance:—

(1.) Mr. Madison projects a regulation of our commerce with Great Britain, by which the hostile spirit of that nation, might be controuled on the footing of its interest. The treaty legitimises the opposition, which was given to the measure in Congress, by declaring in article fifteen, “that no other or higher duties shall be paid by the ships or merchandise of the one party, in the ports of the other, than such as are paid by the like vessels or merchandise of all other nations; nor shall any other or higher duty be imposed in one country on the importation of any articles of the growth, produce, or manufactures of the other, than are, or shall be, payable on the importation of the like articles of the growth, &c. of any foreign country.

(2.) Mr. Clarke proposes to manifest and enforce the public resentment, by prohibiting all intercourse between the two nations. The treaty destroys the very right to attempt that species of national denunciation, by declaring in the same article, that “no prohibition shall be imposed on the exportation or importation of any articles to or from the territories of the two parties respectively, which shall not equally extend to all other nations.”

(3.) But Mr. Dayton moves, and the house of representatives support his motion, for the sequestration of British debts, &c. to ensure a fund for paying the spoliation committed on our trade. The treaty (without regarding the respect due to the commission which is borne by our members of Congress) not only despoils the government of this important instrument to coerce a powerful, yet interested adversary into acts of justice, but enters likewise into a commentary, which, considering the conduct of one of the branches of our legislature, Lord Grenville, consistently with decorum, could not have expressed, or at least, Mr. Jay, for the sake of our national dignity, ought not to have adopted. The tenth article declares, that “neither the debts due from individuals of the one nation to individuals of the other,

nor shares nor monies which they may have in the public funds, or in the public or private banks, shall ever, in any event of war or national difference, be sequestered or confiscated, *it being unjust and impolitic*; that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents." The terms are very similar to those that gave Mr. Dayton offence in a speech pronounced by Mr. Ames; and certainly it will be deemed no mitigation, that the charge of committing "*an unjust and impolitic act*," has been wantonly engrafted upon the most solemn of all instruments, — a public treaty! Query:—Would Lord Grenville have consented to brand his Royal Master with the title of *Great Sea Robber*, if Mr. Jay's urbanity could have permitted him to borrow the epithet from another member of Congress, in order to insert it, in the article that relates to the British spoliation on our trade? But perhaps, Mr. Jay forgot, that the commentary operated as a reflection on the government of the United States, and only meant it as a reproach to Great Britain, for sequestering during the late war, and retaining at this moment, the property belonging to Maryland, lying in the bank of England. It might, likewise, be intended as a satire upon the parliamentary sequestration of French property in the famous "*Intercourse Act*:" or, perhaps, Mr. Jay anticipated the revolution in Holland, and designed his commentary as a warning against the seizing of Dutch property, public and private; which, however, has since taken place, in spite of his solemn admonition.

3. The trials that had occurred relative to the equipment of French privateers in our ports; and the enlistment of our citizens in the service of the republic, had produced some embarrassment in the course of party pursuits. These are obviated by the treaty. The British nation by which the empress of Russia has always been supplied with naval officers, and whose fleets and armies are always crowded with volunteers from other nations, consents that her subjects shall not serve against us; and stipulates that our citizens shall not serve against her. This contract is made with a power actually engaged in a war; and seldom more than seven years clear of one; by a power at peace, not liable, from her local position, and political constitution, to be involved in war, and in strict alliance with the nation against whom the stipulation will immediately operate. Captain Barney and the other Americans, who have joined the arms of France, are thus involved in the most serious dilemma. If they expatriate themselves, they may possibly escape the vengeance of the American government; but will that save them from the vengeance of Great Britain, whose concessions on the doctrine of expatriation are not quite so liberal? By the bye, it may here be seasonably repeated, that while Mr. Jay was so willing to prevent American citizens from *entering* into the service of France, he might surely have taken some pains to secure them from being *pressed* into the service of England. He would have found, on enquiry, that the im-

stances of the latter kind are infinitely more numerous than of the former. But it is enough that the measure will be introductory of a law, favourable to the view of a party which reprobates every idea of assisting the French, and cultivates every means of conciliating the British.

4. It has, likewise, been thought by some politicians, that the energies of our executive department require every aid that can be given to them, in order more effectually to resist and controul the popular branches of the government. Hence we find the treaty-making power employed in that service ; and Congress cannot exercise a legislative discretion on the prohibited points (though it did not participate in making the cession of its authority) without a declaration of war against Great Britain. George the third enjoys by the treaty a more complete negative to bind us as states, than he ever claimed over us as colonies.

V. The treaty is a violation of the general principles of neutrality, and is in collision with the positive previous engagements which subsist between America and France.

1. It is a general principle of the law of nations, that during the existence of a war, neutral powers shall not, by favour or by treaty, so alter the situation of one of the belligerent parties, as to enable him more advantageously to prosecute hostilities against his adversary. If, likewise, a neutral power shall refuse or evade treating with one of the parties, but eagerly enter into a treaty with the other, it is a partiality, that amounts to a breach of neutrality. These positions may be supported by the authority of the most esteemed writers on the subject ; but it will be sufficient in the present case, to cite the conduct of Great Britain herself. Thus, it has been adjudged by Lord *Mansfield*, "that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, liable to be taken." See *Judge Blackstone's reports*, 1 vol. p. 313, 314. According to the principle on which this judgment was given, the act of issuing the memorable orders of the 6th of November, 1793, and the consequent seizure of all our vessels, are attempted to be justified. Great Britain alledges (when it is injurious to France) that trading with the French islands, *on a footing not allowed before the war*, is a breach of neutrality, and cause of confiscation : and, therefore, Great Britain must also admit, at least America will not deny, that trading with the British islands, *on a footing not allowed before the war* ; or, in different words, altering and enlarging the commercial relations of the two countries, is equally a breach of our neutrality towards France. When the sword is found to cut both ways, the party who uses it, has no right to complain.

2. That we have, on the one hand, evaded the overtures of a treaty with France, and on the other hand, solicited a treaty from Great Britain, are facts public and notorious. Let us enquire, then,

what Great Britain has gained on the occasion, to enable her more advantageously to prosecute her hostilities against France.

(1) *Great Britain has gained time.* As nothing is settled by the treaty, she has it in her power to turn all the chances of the war in her favour; and, in the interim, being relieved from the odium and embarrassment of adding America to her enemies, the current of her operations against France is undivided, and will of course flow with greater vigour and certainty. We have been for so many years satisfied with *the promises of the treaty of peace*, that Great Britain has cause to expect, at least, an equal period of credit, for *the promises of the treaty of amity*. If, indeed, it is true, that the reasons assigned by Lord Grenville to Mr. Jay, for declining an immediate surrender of the posts, were, *first*, that the British traders might have time to arrange their out-standing business; *a privilege that is expressly granted by the treaty*, and could not therefore, furnish a real excuse for delay; and *secondly*, that the British government might be able to ascertain what would be the probable effect of the surrender, on the Indians; *a reservation that demonstrates an intention to be governed by events*; we can very well account for the late extensive shipment of artillery and ammunition to Canada; and may easily calculate the importance of *gaining time*, in order to promote the American, as well as European, objects of Great Britain.

(2.) *Great Britain gains supplies for her West India colonies*; and that for a period almost limited to the continuance of the war, under circumstances which incapacitate her from furnishing the colonial supplies herself; and, indeed, compel her to invite the aid of all nations, in furnishing provisions for her own domestic support. The supplies may be carried to the islands either in *American bottoms not exceeding seventy tons*, or in *British bottoms of any tonnage*.

(3.) *Great Britain gains an advantage over France, by prohibiting the exportation of sugar, &c.* in consequence of which the colonies of France must, in a great measure, remain unsupplied with provisions, &c. as they can only in general pay for them in those articles, *whose use is confined to the American consumption*. It will be remembered, that the produce of the French islands has of late constituted a great part of our European remittances. If, therefore, that trade is cut off, and at the same time, besides employing *our own small craft* of seventy tons, Great Britain is allowed, *to any extent of tonnage*, to be our West India factor, it is obvious that our consumption of sugar, coffee, &c. &c. will be abundantly supplied, without maintaining an intercourse with the French, or even with the East Indies, to procure any of those articles. Perhaps this method, though less bold, will be more effectual to prevent our furnishing the French islands with provision, than declaring them to be in a state of blockade, and seizing the vessels that attempt to visit them.

(4.) *It is another important gain to Great Britain* (which might, likewise, have been adverted to under the feature of reciprocity) *that, to any extent of tonnage, her vessels may carry on the West India trade for us*, either to supply our domestic consumption, or European en-

gagements, *subject to no other or higher duties than our own vessels*, while our own vessels are restricted to a pitiful size, and circumscribed to a particular voyage. But whatever may be thought of the benefit of acquiring for America even this scanty participation in the West India trade, no one (after the rejection of the twelfth article) will deny that the whole measure changes the relative situation of the two countries, avowedly in favour of Great Britain, and operatively injurious to France; and every such change is derogatory to our boasted neutral character.

(5.) *The admission of Great Britain to all the commercial advantages of the most favoured nation, and the restraints imposed upon our legislative independence*, as stated in the *party feature* of the treaty, are proofs of predilection and partiality in the American government, which cannot fail to improve the resources of Great Britain, and to impair the interests, as well as the attachments, of France.

(6.) *The assent to the seizure of all provision-ships*, and that, in effect, upon any pretext, at a period when Great Britain is distressed for provisions, as well as France; and when the system of *subduing by famine* has been adopted by the former against the latter nation, is clearly changing our position, as an independent republic, in a manner detrimental to our original ally. That our merchants will be paid a reasonable profit for their cargoes, &c. may render the measure more palatable to us; even under the loss of the return cargo, the derangement of the voyage, and the destruction of the spirit of commercial enterprise; but that consideration cannot render it less offensive to France. It may properly be here remarked, that Sweden and Denmark have obtained, by a spirited resistance, an actual indemnification for the seizures which have heretofore taken place, and an exemption from all such outrages in future; while America has only put those which are past, *in a train of negotiation*, and has given a *legitimate effect* to those which are to come. The order, which, the English gazettes say, has recently been issued for seizing American provision-ships, on their passage to France, ought not, therefore, to be complained of, as it is merely an exercise, by anticipation, of the right granted by the treaty.

(7.) *Great Britain has gained the right of preventing our Citizens from being volunteers in the armies or ships of France!* This is not simply the grant of a new right to Great Britain, but is, at the same time, a positive deprivation of a benefit, hitherto enjoyed by France. Neither the laws of nations, nor our municipal constitution and laws, prohibited our citizens from *going to another country*, and *there*, either for the sake of honour, reward, or instruction, serving in a foreign navy, or army:—Colonel *Oswald* and many others have done it:—Captain *Barney* and many others are doing it. But a proclamation must issue to recal all such volunteers, and punishment must follow disobedience, if the twenty-first article of the treaty is to be effectuated, as the supreme law of the land.

(8.) *Great Britain has gained a right to treat and punish as pirates, any of our citizens who shall accept, even while they are in France, any*

commission to arm a privateer, or letter of marque. It is true, that a similar provision is contained in other treaties; but we are now only considering *the alterations* which are made by the treaty under discussion, in favour of Great Britain, and injurious to France. How far there exists a power to define piracy, *by treaty*, will be remarked in delineating another feature of Mr. Jay's diplomatic offspring.

(9.) *Great Britain has doubly gained, by obtaining in our ports, an asylum for her ships of war, privateers, prizes, &c. stipulating for an exclusion of those of her enemies, other (it is admitted) than France.* The twenty-fourth and twenty-fifth articles of the projected treaty, are nearly copied from the subsisting treaty with France. It would be curious, however, to reflect on the very different motives, which must justify (if the idea of justification could, in the late instance, be at all admissible) these analogous grants. The concession to France was made *when we were at war, and she was not*; it was made upon a certainty of *reciprocal advantage*; and it was made *as a price* for obtaining the aid of *that gallant nation*, in the establishment of our independence. The concession is made to Great Britain *when she is at war, and we are not*;—without any rational prospect of deriving any reciprocal advantage from it; and under such circumstances of injury and insult, as might have admonished us *to reserve it as the price for obtaining aid from other nations, in resisting her hostilities*, instead of paying it for smiles without affection, and promises without sincerity. When we were making treaties with Holland, Prussia, &c. did we not expressly exclude them from such important, and, as we have already seriously experienced, such dangerous privileges?

But it will be asked, perhaps what mighty benefit has Great Britain gained, in this case, at the expence of France, since the prior similar privileges of France are exclusive? *Answer*:—That as the privilege of Great Britain will operate against every other nation, it will immediately affect the French republic's alliance, offensive and defensive, with the United Provinces, which preceded the ratification, at least, of the treaty: and it may, eventually, have the same pernicious influence in relation to Prussia, Spain and Portugal, whose disposition to change sides, in the present war, has been unequivocally expressed. Thus, though Holland and Prussia made treaties with us, long before Great Britain would admit the idea of a negotiation, and though Spain and Portugal are the only customers, who furnish us with the ready money balance, for the very purpose of paying our annual accumulation of debt to Britain, the harbours of America are open to their vessels *as prizes*, but shut to them *as friends*: They may be brought hither and sold by their enemies: but if they have captured their enemy, all, but common necessaries, shall be denied to them! The habits, bias, and opinions of a people, ought not to be altogether disregarded in making a treaty. What honest, feeling American, could patiently see an Englishman, *our sunshine ally*, bringing into our ports, *as prizes*, the ships of Holland, *our ally in the times that tried men's souls*;—a republic, indissolubly

united with France,—that earliest, latest, best of friends? What honest, feeling American, even submitting to a scene so painful, would willingly assist in expelling from our ports the ships of Holland, *which had merely retaliated*, by the capture of their foe?

3. But it is time to advert to *the cases of collision* between the two treaties; and these are of such a nature as to produce a violation of the spirit, though not a positive violation of the words, of the previous engagements, that subsist between France and America—They are *causes of offence, and clash in the highest degree*.

(1.) *By the ninth article of the treaty of alliance with France, we guarantee the possessions of that nation in America.* It is true, that our situation is such as to incapacitate, and of course to excuse us, from a *direct* fulfilment of this guarantee; but it is equally true, that we violate our faith, whenever we do any thing that will, either directly or indirectly, endanger those possessions. Query—Whether facilitating the means of supplying the British forces in the West Indies, will not be the effect of the arrangements relative to the trade with the British islands? Query—Whether restraining our intercourse with the French islands, as a consequence of the treaty already predicated, will not expose them to want, and of course to the necessity of yielding to their enemies? Does not every such advantage given to Great Britain, *clash* with our engagements to France?

(2.) By our treaty with France, and indeed with several other nations, *it is expressly stipulated, that free vessels shall make free goods.* At the time of entering into the stipulation, and even at this moment, the maritime strength of France (always superior to that of Denmark and Sweden, which has, under similar circumstances, been successful) could command the respect of the world for her engagements. It is true, America neither was, nor is, in a situation to produce the same complaisance; and, on the ground of that weakness, France has, hitherto, candidly dispensed with a strict performance of the treaty. But though America cannot *enforce*, she ought not to *abandon* her engagements: she may submit to imperious necessity, but *she cannot voluntarily bring into question* the right of protecting, as a neutral power, the property of France; while France is not only ready and able to afford her property the stipulated protection, but, in conformity to the stipulation, *actually allows the property of Great Britain to pass free, under the sanction of the American flag.* When, therefore, the treaty with Great Britain *agrees*, that within two years after the termination of the existing war, *it shall be discussed* “whether in any, and what cases, neutral vessels shall protect enemies’ property”—*does it not clash with our previous promise to France, that free ships shall make free goods?* And when the treaty with Great Britain, in formal and explicit terms, *further agrees*, “that in all cases where vessels shall be captured or detained, on suspicion of having on board enemies’ property, &c. *the part which belongs to the enemy shall be made prize*”—Is not this *an evident collision with our previous agreement with France*, and with the security which British property enjoys in consequence of it? While France adheres to her treaty, by per-

mitting *British goods* to be protected by American bottoms, is it honest, honourable, or consistent, on our part, *to enter voluntarily into a compact with the enemies of France*, for permitting them to take *French goods* out of our vessels? We may not be able *to prevent*, but ought we to *agree* to the proceeding? Let the question be repeated—Does not such an *express agreement* clash with our *express*, as well as implied, obligations to France?

(3.) By enumerating, as contraband articles, in the treaty with Great Britain, certain articles which are declared free in the treaty with France, *we may, consistently with the latter, supply Great Britain; but, consistently with the former, we cannot supply France.*

Thus, *our treaty with France* (and, indeed, every treaty which we have) expressly declares, that, “in general, all provisions which serve for the nourishment of mankind and sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sail cloths, anchors and any part of anchors, also ships, masts, planks, boards and beams of what trees soever; and all other things proper either for building, or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument for war, by land or by sea, *shall not be reputed contraband.*”

The treaty with Great Britain expressly declares, “that timber for ship building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron, and fir planks only excepted, *shall be objects of confiscation, whenever they are attempted to be carried to an enemy.*”

Whether this stipulation can be considered as founded on a principle of *reciprocity*, since the articles declared to be contraband are *among our principal exports*, but *among the principal imports of Great Britain*, might have been adverted to, in tracing a former feature of the treaty; but let it be now candidly answered, whether it is not *in collision* with our previous engagements with France? The right to make such a stipulation, is not, at present, controverted; but only the assertion, that *exercising the right does not clash in any degree* with the terms and spirit of the French treaty. France exempts those important materials of our commerce from confiscation, in favour of all the world: Great Britain condemns them to confiscation, whenever they shall be carried to her enemies; and the compact is made, while France is one of her enemies!!

VI. *The Treaty with Great Britain is calculated to injure the United States, in the friendship and favour of other foreign nations.*

1. That the friendship and favour of France will be affected by the formation of so heterogeneous an alliance with her most implacable enemy, cannot be doubted, if we reason upon any scale applicable to the policy of nations, or the passions of man. From that republic, therefore, if not an explicit renunciation of all connection with the United States, we may at least expect an alteration of conduct: and,

finding the success which has flowed from the hostile treatment that Great Britain has shown towards us, she may be, at length, tempted to endeavour at *extorting from fear*, what she has not been able to obtain *from affection*. She will, probably, declare Great Britain in a state of blockade, for the purpose of seizing our vessels in Europe; and she may institute courts for "legal adjudication," in order to confiscate our vessels in the West Indies. *Great Britain will then chuckle at the scene*. No one can doubt that our embarrassments will gratify, not only the avowed objects, but the latent resentments, of that nation. Even if she could obliterate the memory of our revolution, she cannot, with pleasure, behold the successful experiment of a republican system of government; nor the rapid advances of a commercial competitor. The moment she has produced a quarrel between America and France, she may exclaim, "*Delenda est Carthago*." America is again a colony! How different were the interests and dispositions of our tried friend! That our government should preserve its purity and independence—that our commerce and agriculture should attain their zenith—were views *once* congenial with the policy and affections of the French nation: Heart, head, and hand, she would have joined in promoting them, against the arts and enmities of all the rest of the world! What a change, then, have we made!

"Look on *this* picture, and on *that* :

"The counterfeit presentment of two *Allies*!

"Who would on this fair mountain leave to feed,

"To batten on that moor!"

2. During the war, we, likewise, formed a seasonable and serviceable treaty with the United Netherlands; and, shortly after the war, treaties were established with Sweden, Prussia, &c. But in order to avoid *even the appearance of clashing or collision* with the French treaty, the powers, thus early in courting our alliance, were not allowed those privileges of asylum for themselves, and of excluding their enemies from our ports, which are conceded in the projected treaty to Great Britain. Have those nations no cause for jealousy and reproach? What principle of policy, or justice, can vindicate the partiality and predilection, that has been thus shown?

3. But the projected treaty (after an affected recognition of pre-existing public treaties) declares, that while Great Britain and America continue in amity, no future treaty shall be made, inconsistent with the articles, that grant the high and dangerous privileges, that have been mentioned. Every nation of the earth (except France) is thus sacrificed to the pride and interest of Great Britain. And with what motive, or upon what consideration, is the sacrifice made? It has been stated in a former, and will be more fully shewn in a future, feature of Mr. Jay's treaty, that the United States do not enjoy any equivalent for this, nor for any other, concession which is made to Great Britain: But the mischief does not end with the folly of a lop-sided bargain. By granting these exclusive privileges to Great Britain, by declaring that no commercial favour

shall be conferred on other nations, without her participating in them, we have thrown away the surest means of purchasing, on any emergency, the good will and good offices of any other power: We cannot even improve the terms of our old treaty with France. For all the advantages of trade that Spain, Portugal, Holland, &c. might, and probably would, upon a liberal footing of reciprocity, have given us,—what have we now left, to offer as the basis of negotiation and compact?

4. The alteration which the treaty makes in the relative situation of several nations with America, and the conduct, that is likely to be pursued by those nations, in order to counteract its effect, merit serious reflection. Will Spain see without some solicitude, the partition which we have made with Great Britain, of our territory on the eastern bank of the Mississippi? How would our projected treaty work, if France should recover Pondicherry, &c. in the East Indies; should subdue and retain the West India islands; should stipulate with Spain for the cession of Louisiana; and should conquer Nova Scotia? The curious *cordon* with which we have allowed Great Britain to circumvent us (and of which more will be said hereafter) being thus broken, how are we to calculate the consequences?

5. Considering the Indians as a foreign nation, is not the treaty calculated to exalt the character of Great Britain, and to depreciate the character of America, throughout the savage world? What right has Great Britain to negotiate for Indians, within the limits of our jurisdiction? Suppose the existing western posts surrendered, may not Great Britain establish other posts in a contiguous or more advantageous station? Is she not left at liberty to pursue the fur trade in our territory as well as her own? Will not her enterprize in traffic, superior capital and experience, enable her to monopolize that trade? And will she not, in future, have the same motives, and the same means, to foment Indian hostilities, that have hitherto been indulged and employed, at the expense of so much American blood and treasure?

VII. *The Treaty with Great Britain is impolitic and pernicious, in respect to the domestic interests and happiness of the United States.*

1. If it is true, and incontrovertibly it is true, that the *interest* and *happiness* of America, consist (as our patriotic president, in his letter to Lord Buchan, declares) “in being little heard of in the great world of politics; in having nothing to do in the political intrigues, or the squabbles of European nations; but, on the contrary, in exchanging commodities, and living in peace and amity with all the inhabitants of the earth; and in doing justice to, and in receiving it from, every power we are connected with;” it is likewise manifest, that all the wisdom and energy of those who administer our government, should be constantly and sedulously employed to preserve, or to attain, for the United States, that enviable rank among nations. To refrain from forming *hasty and unequal alliances*; to let

commerce flow in its own natural channels ; to afford every man, whether alien or citizen, a remedy for every wrong ; and to resist, on the first appearance, every violation of our national rights and independence, are the means best adapted to the end which we contemplate. It maybe objected, that we are already involved in some alliances, that have had a tendency rather to destroy our public tranquillity, than to promote our public interest. But a difference of circumstances will require and justify a difference of conduct. For instance—it was necessary and politic, in the state of our affairs at the commencement of the revolution, to pay a premium for the friendship and alliance of France : we could not have insured success without the co-operation of that nation : and as *the price* that we paid for it was not greater than *the benefit* that we derived from it, we cannot now, with justice, cavil at our bargain. But was the inducement ~~to~~ form an alliance with Great Britain, of a nature equally momentous ? Is the advantage flowing from the sacrifices that are made, equally compensatory ? Why should we, at this auspicious season of our affairs, venture to undermine the fundamental maxim of our domestic happiness, *by wilfully obtruding on the great world of politics, or wantonly involving ourselves in the political intrigues and the squabbles of European nations ?* Suppose (as it is often alleged and sometimes proved) that our treaty with France is productive of inconveniences ; will it happen in the political, any more than in the physical or moral world, that by multiplying the sources of evil, we shall get rid of the evil itself ? If, according to the *quondam* opinion of the friends of a British alliance, our commerce has been restrained in its operations ; or if our government has been menaced in its peace and stability, by a practical developement of *the terms* of our treaty with France, shall we better our situation, because we make *another treaty upon the same terms* with Great Britain ; and furnish *two* nations, instead of *one*, with an opportunity to perplex and distress us in pursuing our natural and laudable policy—the *policy of exchanging commodities, and living in peace and amity with all the inhabitants of the earth ; doing justice to, and in receiving it from, every power we are connected with !*

2. But even if the question was at large, and we were now *under a necessity* of deciding, for the first time, whether we would be allied to the monarchy of Great Britain, or to the republic of France, how would a rational estimate of *the interests and happiness* of the United States (the true and only touch-stone for solving, *in the mind of an American*, such an enquiry) lead us to decide ? To *those members of the senate*, who could regard *the twelfth article* of the treaty as a mark of parental care and wisdom, by which Great Britain was fondly desirous of restraining the excesses of our commercial ardour ; excesses that might eventually and prematurely debilitate and destroy us ! To *those members of the senate*, who could, with filial gratitude, declare, that an alliance with Great Britain was natural ; that an alliance with France was artificial ; since, although we were partially indebted to France for our independence, we were entirely indebted to Great Britain for our being ! To all who can cherish such ideas, or utter such language,

these strictures will be ungracious and unprofitable : but they claim a candid attention from *the patriot*, who remembers, that when *the parent* sought to destroy, *the friend* interposed to save ; and from the *statesman*, who possesses too much wisdom to be influenced by prejudice, and too much fortitude to be controuled by fear.

Are the *interests and happiness* of the United States involved in the permanent establishment of a republican government ? Yes :—Then she ought rather to cultivate the friendship of a republic, actuated by a fellow feeling, than the alliance of a monarchy impressed with jealousy and apprehension. Are *the interest and happiness* of the United States connected with her territorial and political independence ? Yes :—Then she ought rather to fortify herself by an alliance with a nation, whose territorial jurisdiction, and physical characteristics, preclude the possibility of collision ; than attach herself to a nation whose language, manners and habits, facilitate the execution of every attempt to encroach ; and whose territorial possessions are in an irritating and dangerous contact with our own. Are *the interest and happiness* of America to be promoted by an active employment of the vast store of *materials of the first necessity*, which nature has bestowed on her ; by the extension of her commerce ; and by the freedom of her navigation ? Yes :—Then she ought rather to court the countenance and protection of a nation, whose occasions of envy are comparatively few ;—whose temptations are to foster, not to counteract, our schemes of commercial opulence and enterprise ;—and whose imperial glory and existence do not depend upon a claim of universal maritime superiority ;—rather than consent to bask beneath the baneful shade of an alliance with a nation, whose very existence is, probably, the tremendous stake in opposition to our prosperity : and whose embraces, like the embraces of the tyrant's image, may be rendered the most effectual instruments of torture and destruction. Are *the interest and happiness* of the United States dependant on the cordiality of their union, and the permanency of their government ? And again—Do that cordiality and that permanency, depend upon the confidence and mutual good understanding, which subsist between the people who formed the government, and the officers whom the people have appointed to administer it ? Yes :—Then it would be the part of duty, as well as policy, in those officers to follow *the unanimous sentiment of the people*, by preferring a liberal and faithful alliance with France, to a constrained and hypocritical alliance with Great Britain.

3. The first striking effect of the treaty, *to endanger the interests, and disturb the happiness* of the United States, may be detected by a geographical sketch of the *cordon, or line of circumvallation, with which it enables Great Britain to fetter and enclose us*. The proximity of Canada and the western posts, has heretofore been a cause of great uneasiness ; but that is a trifling source of vexation, compared with what we shall have in future to encounter. Suppose ten thousand *radii* were drawn diverging from the centre of the United States ; not one of them could escape the conventional circle of British territory,

jurisdiction and occupancy. Has an American occasion to travel to the east or the north? *The barriers of Nova Scotia and Canada* present themselves. Is it his wish to penetrate the great western wilderness? *A new set of British posts* will intercept his progress, even if he shall be allowed peaceably to pass *the British colony* within the precincts and jurisdiction of Detroit. Does business require him to cross, or float down, the Mississippi? He may evade the vigilance of the Spaniard, but he will find the eastern bank of the river monopolized by British traders, and probably protected by British gun-boats. He is in hopes, however, to avoid all difficulty by a passage on the ocean? Alas! our Atlantic harbours are crowded with prizes to British privateers, and our sea coast is lined with British cruisers! Yet, let us for a moment imagine, that this ill fated traveller has surmounted his *domestic* obstacles, whither can he fly, to be emancipated from the *foreign* jurisdiction of Great Britain? In the West Indies, his *cock boat* is measured and steered, according to the scale and course prescribed by the treaty. In the East Indies he can hardly exchange a commodity, or make a single acquaintance, without the British license. In Europe, if, during a British war, he carries goods belonging to an enemy of Great Britain, they will be seized as prize; if he takes ship-timber, tar, rozin, &c. they are liable to be confiscated as contraband; and if his cargo consists of provisions, the British may take it, *by treaty, at their own market price!*

One idea more about the boundary of the United States. Before the revolution, Great Britain had projected that general arrangement and division of her colonial possessions in America, which she has since, upon a smaller scale, carried into execution with respect to Canada. The territory then intended to be allotted to the government of the Canadas, was extended by a line running along the northern boundaries of the eastern colonies, along the western boundary of Pennsylvania, and along the courses of the Ohio, into the Mississippi. Since we are left at a loss for a positive definition of *the precincts and jurisdiction of the western posts, as ceded by the treaty to the settlers under British titles*, may we not conjecture, that Great Britain contemplates the territorial extent of her original project? Does not major Campbell's unexpected pretension, and the constant claim of the Indians, *at the instigation of the British*, to establish the Ohio as a boundary between them and the United States, give some countenance to such a conjecture?

4. But should an American, not stimulated by the desire of travelling into foreign countries, be content to prosecute the objects of his honest industry within the British territorial circle, bounding and constituting *his own home*, will his condition be much better than the condition of his itinerant fellow citizen? What with the establishment of British colonies and British ware-houses; the naturalization of British land-holders; and, in short, the *unqualified admission* of Englishmen, owing allegiance to the British crown, throughout our lakes, rivers and territory, while we are *excluded* from their sea-ports, company-lands, &c. &c. an American will hardly be able to find el-

bow-room for himself and family. Their pecuniary capital being larger; their means being easier; their experience being greater,—they must, inevitably, under such circumstances, become our merchants, manufacturers, farmers, &c. &c. They will import for us, *in their vessels*, all the products and fabrics of Europe, Asia and Africa —They will export for us, *in their vessels*, every article that our soil can furnish; our merchants will dwindle into clerks; our husbandmen will degenerate into the condition of the feudal villenage; and thus, in a short course of years, *America will probably exhibit the astonishing spectacle of a country possessed, cultivated, and enjoyed by aliens!* The ancient inhabitants of Great Britain, in a similar manner, invited those Saxons to their island as *friends and allies*, who soon afterwards became their *conquerors and masters*.

5. In such a state of things, *the interest and happiness* of the United States must languish and expire! At first the American mind will be corroded, by contrasting the elevation of *the guest* with the depression of *the host*. A struggle will probably ensue; but the influence of wealth, and the patronage of extensive commercial and manufactural institutions, &c. *will even divide the Americans themselves*; and, by *dividing*, capacitate the British settlers to rule them. Is this an idle phantom—a visionary suggestion? No! For, is not a great part of our trade, at this moment, monopolised by British subjects, under *the mask* of American citizenship? Has not the influence of British credits, and British politics already formed a considerable party in our government, and among our merchants? Disguise it as you will—let pride deny, and shame suppress the sentiment—still, it is too evident to every candid and discerning observer, that the only subsisting difference in the opinions and conduct of the citizens of America, arises from this fatal cause. Why, at the moment of reprobating *self-created societies for civil purposes*, do we gladly see the formation of *self-created societies for military purposes*; the city cohorts and Prætorian bands? Why are our merchants, who so anxiously called forth the voice of their fellow citizens in applauding the proclamation of neutrality, so circumspect and so torpid in giving their testimony about the treaty? How comes it, that amidst the acclamations of the 4th of July, the treaty is *toasted* in the little circle of English manufacturers, on the banks of the Passayik; and at the convivial tables of the English emigrants on the plains of the Genesee? How comes it that every man who prefers France to Great Britain—republicanism to monarchy,—is denominated *Antifederalist, Jacobin, Disorganiser, Miscreant*, &c. while men of another humour arrogantly and exclusively assume the titles of *Federalists, Friends to order*, &c. &c.? But let every honest American reflect seriously and seasonably, upon the means of promoting *the interest and happiness* of the United States, and he will disdain, as well as dread, to augment, by the adventitious force of treaties, that paramount interest, which Great Britain has already insidiously acquired in our commerce, navigation, manufactures, territory, and government.

6. Besides the injury eventually to be apprehended from these causes, the treaty is calculated to impair *the interest and happiness* of the United States, by producing an immediate and violent concussion in the federal atmosphere. For,

It ransacks the archives of our revolutionary transactions; and re-judges the solemn judgments of our courts of justice.

It condemns individuals to the payment of debts, from which they had previously been discharged by law.

It makes the government of the union responsible for the contracts of private citizens, and the defalcations of bankrupts.

It disregards the freedom of our commerce and navigation: and it restrains the use of our staple commodities.

It does *not* exact a just indemnification for the detention of the western posts.

It does *not* require the payment, stipulated by the preceding treaty, for the value of the negroes carried off at the close of the war.

It does *not* provide for the freedom and safety of our seamen, in their intercourse with the British dominions.

Let any one of these propositions be separately analysed, and sufficient cause will be found to excite and justify popular dissatisfaction; but view them combined, and the mind is shocked with an apprehension, that *the ratification of the treaty, may be the death-warrant of the union!*

VIII. *The British Treaty and the Constitution of the United States are at war with each other.*

1. Self-preservation is the first law of society, as well as of individuals: It is the radical principle of all political compacts. Nations (says *Vattel*) are bound to guard *their own preservation, and to pursue their own perfection*. We have incessant opportunities, indeed, of observing the operation of this universal rule; in animals of *instinct*, as well as in animals of *reason*; in the world of *things*, as well as in the world of *beings*.

2. Self-preservation, however, is a relative idea: it relates to the nature of the animal; to the constitution of the society. A man may lose his *human character*, without destroying his *vital existence*; and a government may be changed *in its essence*, without being subverted *in its forms*.

3. So, likewise, without open assault or positive violence, the sources of animal life may be poisoned, by the imperceptible contaminations of a luxurious habit: so, without the aid of terror or force, the legitimate foundations of government may be undermined, by the insidious encroachment of the rulers, and by the sedative acquiescence of the people. Governments, indeed, have too generally proved to be a kind of *political chrysalis*, passing, by progressive transmutations, from the grub of pure democracy, to the butterfly of absolute monarchy.

4. But it will not yet be denied in America, that as the people have the sole right to constitute their government, the rule of *self-preservation* requires that the government should be maintained, in practice as well as in theory, *such as they have constituted it*. To render it, by any construction of the written articles of our social compact, *other than a republican government*, would be as fatal a subversion, as daring usurpation, or military conquest, could achieve. For, what real difference does it make to a nation, whether its constitution is *seized upon* by an enterprizing individual, as in the Swedish revolution of 1770; or *overthrown* by a triumphant warrior, as in the recent extinction of the Polish monarchy; or *voted out of doors*, as in the disorganizing edicts of the long parliament of England? Thus, likewise, for one department of the government to assume the authority of another; or, by constructive amplifications of its own jurisdiction, so to monopolize the attributes of government, as to render the other departments useless and inefficient, must ever be deemed an effectual subversion of any constitution. The mode of distributing and organizing the powers of government, as well as the consideration of the nature and extent of the powers to be delegated, essentially belongs to the people; and in the body politic, as well as in the body natural, whenever any particular member absorbs more than its allotted portion of the aliment, that is destined to vivify and invigorate the whole, debility and disease will infallibly ensue. After the emperors had usurped the functions, privileges and powers of the senate, and of the popular magistrates of Rome, they preserved the formalities of the commonwealth, but they trampled on the liberties of the people. Though the parliaments of France had long been deprived of every deliberative faculty, as the representatives of the people, they were summoned to the last, as the ministerial officers of the monarch, for the purpose of registering his edicts.

5. The government of the United States, being then theoretically a *republican government*, and with great propriety denominated a *government of departments*, let us proceed to examine how far *the principles of self-preservation*, and the duty of *pursuing the perfection* of our political system, are involved in the ratification of the projected treaty with Great Britain.

The second section of the second article of the constitution says, that, "The President shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur."

To the exercise of this power no immediate qualification, or restriction, is attached: but must we therefore suppose that the jurisdiction of the President and senate, like the jurisdiction ascribed to the British parliament, is omnipotent? To place the authority of our President and senate on the same footing with the prerogative of the king of Great Britain, will not be commensurate with the objects to which the treaty extends. It must be remembered, that the treaty of peace, by which the rights of sovereignty and soil were ceded by the king of Great Britain to the United States, was negotiated

and ratified under the positive sanction of an act of parliament: And it is expressly stated in *Vattel*, that the king of Great Britain cannot, by *treaty*, confer the rights of citizenship on an alien. B. 1. c. 19. §. 214. Now, Mr. Jay's treaty does both these things (as will be hereafter demonstrated) without the intervention of the legislative authority of the union.

6. The consequence of admitting this unqualified claim to omnipotence, in transacting the business of the nation, would be so hostile to the principle and preservation of our government, that it is an indispensable duty (*obsta principiis*) to controvert and resist it. Whenever the President and two-thirds of the Senate shall be desirous to counteract the conduct of the house of representatives; whenever they may wish to enforce a particular point of legislation; or whenever they shall be disposed to circumscribe the power of a succeeding Congress; a treaty with a foreign nation, nay, a talk with a savage tribe, affords the ready and effectual instrument for accomplishing their views; since the treaty or the talk will constitute the supreme law of the land. That *such things may happen*, let the history of Mr. Jay's mission and negotiation testify.

7. If the extraordinary *treaty-making power* is paramount to the ordinary *legislative power*—supercedes its exercise—and embraces all its objects; let us endeavour to trace whither the proposition will carry us.

The fifth article of the constitution vests a power in two-thirds of both houses of Congress, to *propose amendments to the constitution*.

Let us suppose that a defect in our judiciary, or in any other department, operated injuriously to a foreign nation,—could the Senate, and President, uniting with that foreign nation, and excluding the house of representatives *propose an amendment upon the subject*? If they could by these means *originate*, might they not by other means *effectuate*, alterations in the fundamental points of our government; and make, in fact, a new constitution for us?

By the eighth section of the first article, *Congress is* empowered to *borrow money* on the credit of the United States.

Suppose it was deemed expedient to subsidize Portugal, instead of building frigates, to keep the Algerines within the streights of the Mediterranean:—Could two-thirds of the Senate and the President, either borrow, or guarantee a loan for that purpose *by treaty*?

The same section empowers *Congress* to establish uniform laws on the subject of *bankruptcies*.

Suppose Great Britain had remarked, that, as her subjects were constantly the creditors of the citizens of the United States, she was deeply interested in our system of bankrupt laws:—Had the President and two-thirds of the Senate, a right to incorporate such a system with the projected treaty?

The same section empowers *Congress* to *coin money*, to regulate the value thereof, and of *foreign coin*, and fix the *standards of weights and measures*.

Suppose the Birmingham manufacturers offered, on a cheap plan, to supply us with coin? Suppose Great Britain were pleased to insist upon our receiving her guineas at their English value, and upon our promising not to sweat, deface, or clip them, according to the current practice of the union? Suppose France were desirous that we should adopt the fanciful project of that republic, respecting weights and measures?—Could all, or any, of these propositions be acceded to and established *by treaty*?

The ninth section of the same article declares “that the migration or importation of such persons as the states now existing shall think proper to admit, shall not be prohibited by the Congress *prior* to the year eighteen hundred and eight.”

Suppose Mr. Wilberforce had negotiated on the part of Great Britain, instead of Lord Grenville, and had made the prohibition of the importation of slaves into the United States, in the year eighteen hundred and eight, *sine qua non*:—Could the President and two-thirds of the Senate admit and legitimise the stipulation *by treaty*?

By the constitution, *Congress* has the power to constitute tribunals inferior to the supreme court.

Suppose Great Britain desired, for the future, as well as for the past, to establish a tribunal of her own judges in America, for deciding controversies between British subjects and American citizens:—Could this be accomplished through the medium of a treaty?

By the constitution, *Congress* is endowed with the power of declaring war.

Suppose Lord Grenville had insisted, and Mr. Jay had approved, that the treaty should be an offensive and defensive alliance; and, that we should forthwith join Great Britain in her hostilities against France:—Could the President and Senate thus *negociate* us into a war?

By the constitution it is declared, “that no person holding any office, &c. under the United States, shall, without the consent of Congress, accept of any present, emolument, office or title, of any kind whatsoever, from any king, prince, or foreign state.”

Suppose our envoy had been offered a present or a title by the British monarch—would the consent of the treaty be tantamount to the consent of Congress, for the purpose of approving and justifying his acceptance?

By the constitution it is provided, that all bills for raising revenues, shall originate in the house of representatives; and, that no money shall be drawn from the treasury, but in consequence of appropriations made by law.

Suppose Great Britain had stipulated, that as soon as the commissioners had fixed the sum due to her subjects for old debts, the President should draw a warrant for the amount, and that the same should be paid out of all public monies, in the treasury of the United States, prior to the payment of any antecedent appropriation by law:—Would this be the proper subject for a treaty, or for an impeachment?

8. But fatigued and disgusted with displaying, thus hypothetically the monstrous consequences, which will inevitably flow from *the jurisdiction claimed on behalf of the President and Senate, to bind the United States by any treaty, and in all cases whatsoever*; let us particularly examine *the numerous and extravagant infractions of the constitution, which the projected treaty actually commits*. Recent as is the establishment of the federal constitution, it is, indeed, to be lamented, that the possibility of violating it, is not a matter of floating and fluctuating popular opinion; but a matter susceptible of fixed and positive proof. For, who does not recollect, that a bill touching the fundamental principle of the government (its representative quality) *after having passed both houses of Congress, was declared by the President to be unconstitutional; and, therefore, undeserving of his official approbation and signature?* Who can forget, that a law touching the essential properties of the judicial department of our government, *after being ratified by every organ of legislative authority (the president, senate, and house of representatives) was declared by chief justice Jay, and his associate judges, to be unconstitutional; and, therefore, incapable of being executed and enforced?* With such authoritative precedents (and there are many others that might be adduced from the transactions of individual states) of the possibility of deviating from the rule and meaning of our constitution, are we to be damned for political heresy, merely because we doubt, or deny *the infallibility of Mr. Jay's negotiating talents?* And must every man be *accursed* (to use, for a moment, the intolerant language of the late secretary of the treasury, in his character of *the New York Camillus*) who thinks, that *the American envoy and the British minister were at least as likely to mistake, or misconstrue, the constitutional boundaries of the American government, as the president, senate, and house of representatives of the United States?* It is certainly, upon the whole, more candid, and more convincing, to put "the defence" of the treaty upon the *true trading ground*, taken by the New York, chamber of commerce;—to wit,—"*that we have made as good a market as such pedlars had a right to expect on the royal exchange; and that we cannot afford to fight, though we must submit to be plundered.*"

9. Let us proceed, however, in examining the points on which *the British treaty is at war with the American constitution*.

(1.) *By the constitution of the United States, the JUDICIAL POWER* is vested in one supreme court, and in such inferior courts as *the Congress* may from time to time establish; and its jurisdiction embraces, among other things, "*controversies between a state, or citizens thereof, and foreign states, citizens or subjects.*"

By the treaty, a tribunal other than the supreme court, or any inferior court established by Congress, is erected, with a jurisdiction to ascertain the amount of any losses or damages sustained "*by divers British merchants and others, his majesty's subjects, on account of debts, &c. that still remain owing to them by citizens or inhabitants of the United States:*" And it is agreed, "*that in all such cases, where full compensation for such losses and damages cannot, for*

whatever reason, be actually had and received by the said creditors, in the ordinary course of justice, the United States will make full and complete compensation, for the same, to the creditors," &c.

Remarks. 1. It is the right of every independent nation to establish and maintain a judicial authority, co-extensive with its territorial possessions. The principle is indisputable, and it is incidentally recognized by Lord Mansfield and other great lawyers, in the celebrated controversy between the king of Prussia and Great Britain, relative to the Silesia Loan. 2. The constitutional tribunals of the United States were adequate to the administration of complete justice, in the very cases for which the treaty provides a special tribunal. 3. If it is possible in any case, with any nation, and at any time, to stipulate, *by treaty*, for the erection of a tribunal, in order to ascertain and liquidate debts due from citizens to foreigners, may it not be done in every case, with every nation, and at every time? 4. Is not the Court of Commissioners, in effect, an High Court of Errors and Appeals for the United States with power to revise and reverse every judgment, that has been given since the year 1783, *either in a federal or state court*, in every cause between a British subject and an American citizen? 5. Wherever the recovery of the principal debt has been protracted by *the forms of law*—wherever there has been *an abatement of interest*, by the compromise of the parties, or the verdict of a jury—wherever *the debtor has become insolvent*; this high court of Commissioners may sustain an appeal, and can award damages for the detention or loss of the debt. It is true, the treaty adds, that this “provision is to extend to such losses only as have been occasioned by *lawful impediments* ;” but the *extent* of the discretion of the commissioners, in adjudging what constitutes a *lawful* impediment, is without limitation or controul; and the nature of the evidence, by which their minds are to be informed, is without rule or definition; since (in the language of the treaty) it may be “either according to the legal forms now respectively existing in the two countries, or in such other manner as the said commissioners shall see cause to require or allow.” Thus, not only erecting a court unknown to our constitution, but admitting a species of proof, not recognized by the legal forms of our country. 6. Let us appeal to Mr. Jay himself, upon the constitutionality of such proceedings. By an act of Congress, the judges of the circuit courts were required to take, and report to the secretary at war, certain proofs in the case of invalids and pensioners. The judges refused (as we have already noticed) to execute the act, declaring it to be *unconstitutional*, as well on account of the nature of the duty imposed upon them, as on account of the revisionary power, which was vested in the secretary at war. *By the treaty*, the President and Senate will appoint commissioners, in conjunction with the king of Great Britain, to hold a court of appeals from every court in the union; and to determine judicial questions, upon private controversies, between British subjects and American citizens. Now, let us ask, whether it is more unconstitutional *for the legislature* to impose new and extraordinary duties upon a

court, *existing according to the constitution*, than for the executive to create a new and extraordinary tribunal, *incompatible with the constitution*; inasmuch as it can only act upon the alienation of the jurisdiction, *previously and exclusively* vested in our domestic courts;—the jurisdiction of hearing and deciding judicial questions, upon private controversies, between British subjects and American citizens? 7. But this is not the only infraction of the constitution, involved in the arrangement alluded to—*the obligation of private contracts is transferred from individuals to the public*. The framers of the constitution, in declaring that “all debts contracted, and engagements entered into, before its adoption, shall be as valid against the United States under the constitution, as under the confederation,” could hardly anticipate, that they charged the treasury of the union with the payment of all the outstanding debts of the individual citizens of America! And when Congress was vested with a power “to lay and collect taxes, to pay the debts, and provide for the common defence and general welfare of the United States;” it certainly was never contemplated, that the government of America became the insurer of every British merchant, against litigious delays, and fraudulent or accidental bankruptcies! It cannot be suggested that Great Britain acts in a similar manner upon our complaints of the spoliation on our trade. For, the injury that we have sustained, originated in *an act of government*—the injured individuals are, in the *first* instance, bound to apply to the *British courts of justice*—and the public are only responsible in the *last* resort, for the individual aggressors.

(2.) By the constitution of the United States, Congress is empowered to establish “an uniform rule of naturalization;” and that power has accordingly been exercised in an act that provides, among other things, that “no person heretofore proscribed by any state, shall be admitted a citizen, except by an act of the legislature of the state in which such person was proscribed.”

By the Treaty, all the British settlers and traders, within the precincts or jurisdiction of the western posts, are allowed an election either to remain British subjects, or to become citizens of the United States: And it is agreed, “that *British subjects* who now hold lands in the territories of the United States, may hold, grant, sell or devise the same, to *whom they please*, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as *aliens*.”

Remarks. Is not the treaty at war with the constitution in this great and delicate point of *naturalization*? A British colony is, *ipso facto*, by the magic of Mr. Jay’s pen, converted into an American settlement! Every *British subject*, who now holds lands (and when we recollect the recent speculations for the sale of lands, how can we calculate the extent of the adoption?) is, without ordeal or restraint, endowed with all the rights of a *native American*! If it is possible, by treaty, to give the rights of property to aliens, may not the *civil rights* of the community be disposed of by the same potent instru-

ment? If it is possible, by treaty, to confer citizenship on the British garrison at Detroit, and its contiguous settlers, why may we not, by treaty, also confer an instantaneous citizenship on *every flight of emigrants*, that shall hasten to our shores from Germany or Ireland? It may not be amiss here to intimate a doubt of *the power* of the federal government to regulate the tenure of real estates: it is no where expressly given, and, therefore, cannot be constitutionally implied; and it seems to be among the necessary and natural objects of state legislation. But let us presume (what is highly probable) that there are amongst the settlers within the precincts or jurisdiction of the western posts, certain *proscribed persons*—can the treaty, in spite of *the law*, restore them to the rights of citizenship, without the authoritative assent of the state that proscribed them? Again—Is every man whose estate was liable to confiscation as a traitor, or as an alien, in consequence of the revolution, entitled *now to hold lands as a native*? The Fairfax claim in Virginia; the claim of the Penns in Pennsylvania; and the claims of Galloway, Allen, &c. &c. may hence derive a dangerous principle of resuscitation. *Look to it well.*

(3.) By the constitution, Congress is empowered to regulate commerce with foreign nations.

By the treaty, the commerce of the United States, not only directly with Great Britain, but incidentally with *every* foreign nation, is regulated.

Remarks. There is not a source of *legislative jurisdiction*, upon the subject of commerce, which is not absorbed by this *executive compact*. The power of regulating commerce with foreign nations, is expressly and specifically given to *Congress*: Can a power so given to one department, be divested by implication, in order to amplify and invigorate another power, given in general terms to another department? But more of that hereafter.

(4.) By the constitution, Congress is empowered to regulate commerce with the Indian tribes.

By the treaty, it is agreed, that “it shall at all times be free to British subjects, &c. and also to the Indians dwelling on either side of the boundary line of the United States, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties on the continent of America, &c. and freely to carry on trade and commerce with each other.” The treaty, likewise, provides, that “no duty of entry shall ever be levied by either party on *pelties* brought by land, or inland navigation into the said territories respectively; nor shall the Indians passing or repassing with their own proper goods and effects, of whatever nature, pay for the same any impost or duty whatever.”

Remarks. It is easy to perceive that the stipulations, in favour of the Indians, were introduced at the instance of Great Britain; and her motives are not even attempted to be disguised. Her traders will boast of the favour and security, which she has compelled America to grant to the Indians; and so engage their confidence and attachment; while the privilege of free passage and the exemption from duties,

will inevitably throw the whole fur-trade into the hands of the British. The surrender of the western posts, under such circumstances, can produce no loss to Great Britain, and will certainly be of no advantage to America: It will not add a shilling to the profits of our Indian traffic; nor insure us a moment's suspension of Indian hostilities! But, to prosecute our *constitutional* enquiry—what right is there, by *treaty*, to regulate our commerce with the Indian tribes? Whenever a treaty of peace and amity has *heretofore* been concluded with the Indians, it has been the constitutional practice of the President, to call on Congress to regulate the commerce with them. Such calls were totally unnecessary, if the same thing might as well and as lawfully be done *by treaty*; and if it could not be done by treaty in the case of the *Indians*, neither could it be done by treaty in the case of a *foreign nation*: For, both are expressed in the *same terms*, and included in the *same member* of the section. “Congress shall have power (says the constitution) to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” What right is there by *treaty* to declare that *no duty* of entry shall ever be levied by either party *on peltries, &c.* (and a similar promise is made in cases that more immediately affect Great Britain) since *Congress* has the sole power to lay and collect taxes, *duties, &c.* to pay the debts, and provide for the common defence, and general welfare of the United States? If we may, *negatively*, say, *by treaty*, that certain duties shall not be laid, may we not *affirmatively* say, *by treaty*, that certain other duties shall be laid? And then what becomes of that part of our constitution, which declares, “that all bills for raising revenue shall originate in the house of representatives?” But let us imagine for a moment, that it is in the power of the President and Senate to regulate our commerce with the Indian tribes; *ought not the regulation to be made with the Indians themselves?* Why suffer Great Britain to negotiate and stipulate for Indians actually residing within the territory of the United States? Is such a concession consistent with the dignity and independence of our government—with the peace and interest of the nation? Let Mr. Randolph's letter to Mr. Hammond, on the conduct of general Simcoe and major Campbell be referred to, as an answer to this question. It is not, at present, within reach to be quoted; but its contents were too important to have already escaped the memory of any reflecting American.

(5.) By the constitution, Congress is empowered “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”

By the treaty, the definition and punishment of certain offences, not known by any law of the union, is declared and permitted; to wit—1st. For accepting commissions or instructions from any foreign prince or state, to act against Great Britain. 2d. For accepting any foreign commission or letter of marque for arming any privateer, &c. Great Britain may punish an American citizen *as a pirate*. 3d. For not treating British officers *with that respect which is due to the commissions they bear*, and for offering any insult to such officers, the of-

enders shall be punished as *disturbers of the peace and amity between America and Great Britain*. 4th. For making a prize upon the subjects of Great Britain, the people of every other belligerent nation (except France) shall be punished by a *denial of shelter or refuge, in our ports*.

Remarks. To define crimes, and apportion punishments, is the peculiar province of the *legislative authority* of every free government: but it is obvious, from the foregoing recapitulation, that the *executive authority* has likewise encroached upon that province, by the instrumentality of its *treaty-making power*. Can a citizen be surrendered by *treaty* to all the pains and penalties of *piracy*? Then by *treaty*, he might be subjected to all the pains and penalties of *treason*. It is true, that the constitution reserves to itself the *exclusive right* of declaring what shall constitute *treason*; but it is equally true, that it bestows on Congress the *exclusive right* to define and punish *piracy*: and the invasion of the right to define in one case, is as unconstitutional as the invasion of an *actual definition* in the other. But what legitimate authority can a *treaty* suggest, in order to justify the restraint upon that right of expatriation, which Congress itself has not ventured to restrain, while legislating on subjects of a similar class? It is not intended to convey the slightest doubt of the power and propriety of controuling our citizens in their conduct towards *foreign nations*, while they are within the reach of *domestic coercion*: but to prohibit an American freeman from going whither he pleases, in quest of fortune and happiness—to restrict him from exercising, in a *foreign country, and in a foreign service*, his genius, talents and industry; to denounce him for seeking honour, emolument or instruction, by enlisting *within the territory, and under the banners* of another nation—to do such things, is to condemn the principle of our own policy, by which we invite all the world to fill up the population of our country: To do such things is, in fact, to prostrate the boasted rights of man. It is hardly worth a pause to ask, What proportion of respect is due to the commission of a British officer? and what degree of punishment the refusal or neglect to pay it, may deserve?

(6.) By the constitution it is declared, that “no tax or duty shall be laid on articles exported from any state.”

By the treaty, “it is expressly agreed and declared that the United States will prohibit and restrain the carrying any molasses, sugar, coffee, cocoa, or cotton, in American vessels, either from his majesty’s islands, or from the United States, to any part of the world.”

Remarks. This is an extract, it is true, from the twelfth article of the treaty; but it equally serves to show the probability of attempts to violate the constitution. Besides, the advocates for the treaty are hasty and premature, when they desire to throw the twelfth article entirely out of consideration: for, by that proposition, *though they should save the treaty, they effectually destroy its author*. They are hasty and premature for another reason: the twelfth article is to be *suspended for the declared purpose of negotiating something as a substitute*; and, therefore we must consider its principle, in order to ascer-

tain how far *any modification* of it could be rendered palatable. But, *on constitutional ground*, when it is declared, that *no duty shall by law* be laid on articles exported from any state, is it not absurd, or wicked to suppose, that *by treaty* the exportation of *the articles themselves* can be prohibited? The obvious intention of *the constitution* is to encourage *our export trade*;—the immediate effect of *the treaty* is to obstruct and annihilate it.

(7.) There are many other points in which *a collision occurs between the constitution and the treaty*, but to which the scope and nature of these strictures will not admit a full attention. It may be cursorily remarked, however, that a *cession of territory*, which will, probably, be the consequence of *settling anew the boundaries* of the United States, and even the actual cession of the precincts of the western posts, *though in favour of individuals*, are subjects for serious reflection. If a part of the United States may be ceded—if a whole state may be ceded, what becomes of the guarantee of a republican form of government to every state? The propriety of presenting this consideration to the public mind, will be allowed by those who know, that, *in the course of the senatorial debate*, the right of ceding by treaty a whole state, nay, any number of the states, *short of a majority*, was boldly asserted, and strenuously argued!!!

(8.) It may not be amiss, likewise, to add, that our government has no more right to *alienate powers that are given*, than it has to *usurp powers that are not given*. For instance, an *act of Congress* could not (and can a treaty?) surrender the right of sequestering the property of a hostile nation—the right of giving commercial preferences to a friendly nation—and the right of suspending a ruinous intercourse with any nation? Great clamours have been raised against *the exercise* of these rights; and, undoubtedly, they should only be used *in the last resort*; but they are rights *recognised by the law of nations*; and they are rights often essential to the duties of *self-preservation*, and sometimes necessary to the accomplishment of *reciprocal justice*.

10. Having taken this review of the *actual warfare between the constitution and Mr. Jay's diplomatic work*, and of the destructive consequences of the claim of *the executive, to bind the United States, in all cases whatsoever, by treaty*; let us recur to the position with which the present feature was introduced, namely, *the duty of preserving the constitution, such as it was made and intended by the people*, and we shall find, by a faithful comparison of theory with practice, that *the government of the United States may be transformed through the medium of the treaty-making power, from a republic to an oligarchy—from a free government of several departments, legislative, judicial and executive—to the simple aristocratical government of a President and Senate*.

11. This fatal effect, however, of converting our government from the system which the people *love*, to a system which they *abhor*,—from what it was made in theory, to what it was never intended to be made by practice—can only proceed from *error or corruption*. It

would ill become the writer of these strictures, who so freely, but it is hoped, so fairly, expresses an opinion, to impute to any man or set of men, a sinister and traitorous design against the constitution of our common country. The denunciations fulminated by *the New-York Camillus*, and his small circle of coadjutors, harmlessly expand themselves in the violence of their explosion; like the denunciations of *the Tiara*, they spring from *an arrogant claim of infallibility*; and like them too, will only excite *the derision or the disgust of an enlightened nation*. Is it credible, that every citizen of the United States, from Georgia to New-Hampshire, who reprobates Mr. Jay's treaty, must either be *an enemy to our government*, or *a rancorous incendiary*? Is it to be presumed that no man can utter a sentence of disapprobation respecting *the principles* of the treaty, without feeling a sentiment of animosity, respecting *the person* of the negociator? Are we really such slaves to faction;—so trammelled with party;—so insensible to virtue, truth and patriotism;—that every thought which we conceive, every expression which we use, on this momentous occasion, must be connected with the possible (but it is ardently hoped the distant) event of *electing a successor to the present chief magistrate of the union*? Yet, such are the base and sordid motives, passionately and wantonly ascribed by *Camillus* and the scanty troop of advocates, who follow him in supporting the treaty, to the great host of the American people, rising (as it were) *in mass to condemn it*.

If it could be thought a convenient, a reputable, or a necessary task, how successfully might *the argument of recrimination* be employed! Who, it could be asked, are *the persons* that support the treaty? What are *the motives* that actuate them? Is it surprising that *the men who advised* the treaty, or that the THE MAN *who composed it*, should endeavour, by the force of ingenuity, art, or defamation, to rescue it from general malediction and impending ruin? Was it not to be expected, that a *faction, uniformly eager to establish an alliance with Great Britain, at the expence of France*, would strenuously attempt to procure the ratification of *any instrument*, calculated to accomplish that object? Does not consistency require from *him, who openly projected in the Federal Convention*, and from those, *who secretly desire in the execution of public offices*, the establishment of an aristocracy, under the insidious title of *an energetic scheme of government*, that they should approve and countenance every practical application of *any medium*, by which the barriers that separate our constitutional departments, may be overthrown, and the occasions for interposing the popular sanction of the legislature, may be superceded or avoided? Is it not *natural*, that British merchants and British agents—is it not *necessary*, that British debtors and British factors,—should clamorously unite, or tacitly acquiesce, in the applause bestowed upon a compact, which, however detrimental to America, is beneficial to Great Britain—the nation of chief importance to the allegiance and affections of some of those characters, and to the opulence and subsistence of all? Or, if the paltry idea of an *electioneering plan* must be forced upon our consideration, is it not, at least, as likely, that *the party, which aims at*

making a President of Mr. Jay, will, on that ground alone, exert itself in "The Defence" of the treaty, as that the party, which is desirous of conferring the same elevated office on Mr. Jefferson, will, for no other reason, attempt to blast the fruits of his competitor's negociation? Considering, indeed, that Camillus himself, by confining his "Defence" to the treaty as advised to be ratified by the senate, virtually abandons the treaty as negociated and concluded by Mr. Jay:—and also, considering that a part of Camillus's defence of the present treaty arises from the ambiguity that Mr. Jay had left in the former treaty with Great Britain (upon which, however, his character as a negociator was founded) we might be led to suppose, that Mr. Jay's pretensions to the wisdom of a statesman, and to the station of a President, were not deemed, even by his own party, to be any longer tenable; but that Camillus still condescends, on the obvious presumption of a subsisting rivalry, to impeach the ministerial character, and to depreciate the official performances, of Mr. Jefferson.

But why should we arbitrarily *abuse*, instead of endeavouring rationally to *convince* each other? We all have the same right, from natural and from social law, *to think and to speak*: it is true, that we do not all possess the same powers of reason, nor the same charms of eloquence; but when men are on *an equality in the possession*, as well as in *the right of exercising*, those endowments, there can be no amicable way of adjusting a difference of opinion, but that which is adopted for adjusting all the other differences of a free people—*an appeal to the voice of the majority!* Now, let it be allowed (and so far ought it to be allowed, but no farther) that Mr. Jay; who negociated the treaty; the twenty members of the senate, who assented to a conditional ratification; and Mr. Hamilton, and the New-York chamber of commerce, who have appeared in support of it (an enumeration that comprises, it is believed, all that have hitherto *avowed a perfect approbation*) are in the possession of as great a proportion of information, integrity and talents, as *a like number* of citizens, selected for their approved wisdom, virtue and patriotism, from the aggregate of those who have publicly condemned the treaty; and then let it be candidly answered, which scale in the balance must, of right, preponderate? After such a selection, there will still remain the great body of the community in opposition to a ratification; and, as members of that community, thousands of individuals, who honourably served during the late war, in the field and the cabinet, and many of whom at this moment serve with zeal, fidelity and wisdom in the various departments of government. Is it not then the symptom of an arrogant vanity—of a tyrannical disposition—to stigmatise such an opposition to *a projected measure*, with the name of '*Faction*'? The violence offered to Mr. Hamilton's person in New-York, and to Mr. Bingham's house in Philadelphia, have justly excited the indignation of every sincere republican; but even that reprehensible and odious conduct is not to be compared to the enormous guilt of endeavouring to *force* the opinion of a *few* individuals upon the people,

as the ultimate test of political truth; and to cast an *odium* upon the late conventions, in which (according to the language of the constitution) "the people were peaceably assembled, to petition the government for the redress (or rather the prevention) of a grievance."

But let the pardon of the reader be granted for *this digression*; and we will return to a delineation of the feature that lies before us.

12. Declining, then, either to create, or to follow, a bad example, let us ascribe the deviation from the principles of our constitution to an *erroneous construction*, rather than to a *wilful perversion*; and let us exert our skill in averting the evil that threatens, rather than indulge our resentment in convicting those who labour to produce it.

Our government, therefore, being a *government of departments*, it is (as we have already observed) inconsistent with the *duty of self-preservation*; or, in other words, it must proceed from an error in *construction*; that *one* department shall assume and exercise all, or any, of the powers, of all, or any, of the other departments.— "The departments of government (to adopt the elegant figure used by an excellent judge, in a late admirable charge to a Philadelphia jury) are planets that revolve, each in its appropriate orbit, round the constitution, as the sun of our political system." Thus, if the legislative, executive, or judicial departments shall encroach, one upon the orbit of the other, the destruction of the order, use, and beauty of the political system, must as inevitably ensue, as the destruction of the order, use, and beauty of the planetary system would follow, from a subversion of the essential principles of attraction, repulsion and gravity.

13. It was necessary, however, that the power of making treaties⁷ with foreign nations, should be vested in one of the departments of the government: but the power of making treaties is not, in its nature, paramount to every other power; nor does the exercise of that power naturally demand an exclusive jurisdiction. A nation may carry on its *external commerce* without the aid of the *treaty-making power*; but it cannot manage its *domestic concerns* without the aid of the *legislative power*: the legislative power is, consequently, of superior importance and rank to the treaty-making power. Again: *The legislative power exercised conformably to the constitution*, must be direct, universal, and conclusive in its operation and force upon the people; but the *treaty-making power* is scarcely in any instance independent of legislative aid to effectuate its efforts, and to render its compacts obligatory on the nation. A memorable occurrence in the English history will serve to illustrate both of these positions: It is the fate of the *commercial part of the famous treaty of Utrecht*, concluded between France and England in the year 1712. "The peace (says Russel in his History of Modern Europe, vol. 4. p. 457) was generally disliked by the people, and all impartial men reprobated the treaty of commerce with France, as soon as the terms were known. Exception was particularly taken against the 8th and 9th articles, importing "That Great Britain and France should mutually

enjoy all the privileges in trading with each other, which either granted to the most favoured nation; that all prohibitions should be removed, and no higher duties imposed on the French commodities, than on those of any other people." The ruinous tendency of these articles was perceived by the whole trading part of the kingdom. It was accordingly urged, when a bill was brought into the house of commons for confirming them, that the trade with Portugal, the most beneficial of any, would be lost, should the duties on French and Portuguese wines be made equal, &c. &c. These and similar arguments induced the more moderate tories to join the whigs, *and the bill was rejected by a majority of nine votes.* In relating the same transaction, Smollet's history of England, vol. 2. p. 242, 246, contains some passages too remarkable to be omitted on the present occasion. "Against the 8th and 9th articles, (says the historian) the Portuguese minister presented a memorial, declaring, that should the duties on French wines be lowered to the same level with those that were laid on the wines of Portugal, his master would renew the prohibition of the woolen manufactures, and other products of Great Britain. Indeed, all the trading part of the nation exclaimed against the treaty of commerce, which seems to have been concluded in a hurry, before the ministers fully understood the nature of the subject. This precipitation was owing to the fears that their endeavours after peace would miscarry, from the intrigues of the whig faction, and the obstinate opposition of the confederates." "Another bill (continues the same writer, in a subsequent page) being brought into the house of commons, for rendering the treaty of commerce effectual, *such a number of petitions were delivered against it,* and so many solid arguments advanced by the merchants, who were examined on the subject, that even a great number of tory members were convinced of the bad consequence it would produce to trade, and voted against the minister on this occasion."

Perhaps there cannot, in the annals of all the nations of the earth, be found two cases more parallel than the one which is thus recorded in the English history, and the one which at present agitates the American nation.—1. All impartial men reprobated both treaties, as soon as the terms were known. 2. The admission of the opposite contracting party to an unqualified participation in trade, with the most favoured nation, is, in both cases, a principal source of complaint. 3. The removal of all prohibitions, and the surrender of the right to impose higher duties on the commodities of the opposite contracting party, than on those of any other people, are, in both cases, condemned. 4. The good and the intelligent, of all parties, have united their influence, in both cases, to prevent a confirmation of articles of so ruinous a tendency. 5. The whole nation, in both cases, have exclaimed against the treaty. 6. Both treaties were concluded in a hurry, before the ministers fully understood the nature of the subject. 7. Innumerable petitions (and who will NOW deny the propriety of exercising the American right to petition?) were delivered against both treaties. 8. And the Portuguese minister

declared, in effect, of the treaty of Utrecht (*mutatis mutandis*) what the minister of France will, probably declare of the treaty of London (but what America surrenders the right of saying at any time to Great Britain) "If you ratify your alliance with the British, you must surrender your alliance with France." If such a wonderful similarity of circumstances concur in the negotiation, terms, and reception of these memorable instruments, let us hope that the guardian angel of American liberty and prosperity, has, also, doomed them finally to experience a *merited similarity of fate!*

14. But having thus shown, that, even in Great Britain, the treaty-making prerogative is *neither paramount nor exclusive* (though the generality of judge Blackstone's expressions on the subject, would, perhaps, lead to that preposterous conclusion) we might be satisfied to presume, on general principles, that so high a claim of jurisdiction could not be maintained, at least, on the part of our president and senate. Yet, let us endeavour, by the infallible test of the constitution, to put the matter, if possible, beyond doubt and controversy; and, having established that each department of the government should be confined to its proper orbit, let us endeavour to ascertain, what that orbit is, in relation to the *treaty-making power*.

(1.) The power of the president and senate to make treaties, is given, (as we have already stated) in *general and unrestricted terms*.

But the powers given to Congress (except in an instance to be hereafter noticed) are *definite in their terms, and appropriated in their objects*.

Let us ask, then, by what rule of construction a power *primarily and specifically* given to one body, can be assumed and exercised by another, to which, in a *subsequent clause*, a mere *general* authority is given?

Upon the common law principles of construction, the *specific powers* would clearly, in such a case, be deemed a reservation and exception out of the *general grant*. But even according to a rule furnished by the constitution itself, the same result will be produced. Thus, the twelfth ratified amendment declares, "that the powers not delegated to the United States by the constitution, are reserved to the states respectively, or to the people." Now, if the general power granted for the purpose of making treaties, can set at nought the jurisdiction specifically given to Congress for the purpose of making laws, may it not, with equal propriety and effect, overleap the boundary thus interposed between popular rights and constituted powers? In the one case, the reservation is expressly declared—in the other, it is necessarily implied.

(2. But if the delegation of a *general power* does, *ipso facto*, convey a right to embrace, in the exercise of that power, every authority not incompatible with its objects, the consequence will be, that Congress may enter into treaties as well as the president and senate.

For, Congress is vested with a jurisdiction "to make all laws, which shall be necessary and proper for carrying into execution their

own powers:" and what laws are, in that respect, necessary and proper, they must, from the nature of the thing, be the judge.

Suppose, therefore, that Congress was desirous of forming *an alliance, offensive and defensive, with France*, but could not obtain the constitutional number of two-thirds of the senate for accomplishing the measure *by treaty*,—*an act of Congress, in order to regulate commerce with that nation*, would afford as effectual a mode (according to the new doctrine) since the act, on the pretext of an equivalent for commercial advantages, might *legislate* us into the coveted alliance. The temptation and facility of proceeding in this way is obvious;—the passing of a law requiring but a majority of the senate; whereas the ratification of a treaty requires the concurrence of two-thirds of the members of that body.

(3.) It is not, however, necessary to mingle and confuse the departments of our government, contrary to the first principles of a free republic; nor to make *a part* of our political system *equal to the whole*, contrary to the soundest axioms of demonstrative philosophy, in order to give a just, efficient and salutary effect to the treaty-making power of the president and senate. For although,

In the *first* place, the *treaty-making* power cannot bind the nation *by a decision* upon any of the subjects, which the constitution expressly devolves upon the *legislative power*:

Yet, in the *second* place, the treaty-making power may *negotiate conditionally*, respecting the subjects that constitutionally belong to the *decision of the legislative power*;

And, in the *third* place, *every other subject*, proper for the national compact of a republic, may be *negotiated and absolutely concluded by the treaty-making power*.

(4.) That such a distinction was intended by the framers of our present excellent constitution, the reasons that have been glanced at, must, it is thought, sufficiently prove to every ingenuous mind: But let one argument more be adduced.

By the ninth article of the old confederation, it was declared, "That the United States, in Congress assembled, shall have *the sole and exclusive right and power of determining on peace and war*."

By the existing constitution of the United States, it is provided, "That Congress shall have *power to declare war*, grant letters of marque and reprisal," &c.

Now, it is evident, that by omitting to deposit *with Congress* the power of *making peace*, in addition to the power of *declaring war*, the framers of our present government, had in full view the division of its department, and the corresponding distribution of its powers.

Congress, *under the confederation* was a *single body*, and therefore, necessarily possessed of all the little legislative, executive, and judicial authority, which *the states* had been pleased to delegate *to the union*.

The government of the United States, on the contrary, is a compound system, of which the Congress is only *the legislative department*: and, therefore, the executive and judicial functions are elsewhere to be sought for and exercised.

Hence it is, that although the power of *declaring war* is (as it ought to be) *left with Congress*; the power of *making peace* is (as it ought to be) *transferred to the executive*; being a natural appendage of the general power of *making treaties*.

This deduction serves likewise to demonstrate, that the framers of the constitution, did not intend to leave the powers that are *specifically* given to Congress, at the mercy of the power that is *generally* given to the president and senate. By expressing a positive jurisdiction in favour of the former, it excludes a claim of jurisdiction in favour of the latter.

(5.) Nor is it in *the power of making treaties only*, that the constitution has abridged *the executive department* of its customary attributes, in order to augment the sources of *legislative jurisdiction*.

In *Great Britain* (for instance) *the executive* possesses the power of making peace; of granting letters of marque and reprisal; of regulating weights and measures; of coining money, regulating the value thereof, and of foreign coins; of erecting courts of judicature; of conferring the rights of denizenship on aliens, &c. &c.

In *the United States* the power for all those purposes is absolutely vested in *the legislature*.

15. On reviewing the various positions that have been taken in the course of these strictures, a desire is felt to exhibit the corroborative opinions of men who have been justly valued by the public: It will be useful to the reader, as well as pleasing to the writer, to indulge the disposition in a few instances, and in a brief manner.

(1.) It has been said, that *the power of regulating commerce belonged to Congress*.

The report of Mr. Mason (a member of the federal convention) on that subject, was delivered in the convention of Virginia as follows: "With respect to commerce and navigation, I will give you, to the best of my information, the history of that affair. This business was discussed [in the convention] at Philadelphia for four months; during which time the subject of commerce and navigation was often under consideration; and, I assert, that eight out of twelve, for more than three months, voted for requiring two-thirds of the members present in each house to pass commercial and navigation laws. True it is, that afterwards it was carried by a majority as it stands. If I am right, there was a great majority for two-thirds of the states in this business, till a compromise took place between the northern and southern states; the northern states agreeing to the temporary importation of slaves; and the southern states conceding, in return, that navigation and commercial laws should be on the footing in which they now stand."

(2.) It has been said, that *the treaty-making power could not cede a part of the union, nor surrender a citizen to be punished as a pirate*.

The opinion of Mr. Randolph (a member of the federal convention, and now secretary of state) delivered in the same convention, contains the following passage: "I conceive, that neither the life,

nor the property of any citizen, nor the particular right of any state, can be effected by a treaty."

Mr. Madison, also, justifying and recommending the adoption of the constitution to his fellow citizens, says, with respect to *the treaty-making power*—"I am persuaded, that when this power comes to be thoroughly and candidly viewed, it will be found right and proper. Does it follow, because this power is given to Congress, that it is absolute and unlimited?—I do not conceive that power is given to the president and senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation."

(3.) It has been said, *the right of suspending a commercial intercourse with any nation, and the right of sequestering an enemy's property, &c.* were rights *essential to an independent government, and recognised by the law of nations.*

Vattel contains the following, among many other passages on those subjects :

"Every state has a right to prohibit the entrance of foreign merchandise, and the people who are interested have no right to complain of it, as if they had been refused an office of humanity." B. 1. c. 8. f. 90.

"It depends on the will of any nation to carry on commerce with another, or to let it alone." Ibid. f. 92.

"The goods even of the individuals in their totality ought to be considered as the goods of the nation, in regard to other states. From an immediate consequence of this principle, if one nation has a right to any part of the goods of another, it has a right indifferently to the goods of the citizens of that part, till the discharge of the obligation." Ibid. f. 81, 82.

"It is not always necessary to have recourse to arms, in order to punish a nation : the offended may take from it, by way of punishment, the privileges it enjoys in his dominions ; seize, if he has an opportunity, on some of the things that belong to it, and detain them till it has given him a just satisfaction." B. 2. c. 18. f. 340.

"When a sovereign is not satisfied with the manner in which his subjects are treated by the laws and customs of another nation, he is at liberty to declare, that he will treat the subjects of that nation in the same manner that his are treated." Ibid. f. 341.

(4.) It has been said that the constitution ought to be preserved *such as the people have made it* ; that, of course, the departments of government ought to be kept separate and distinct, *each revolving in its proper orbit*, and that *no other judicial tribunal* could be erected by a law of the legislative power, much less by a treaty of the executive power, *than what the constitution prescribes, or expressly permits.*

On this interesting subject we fortunately possess the opinions of the judges of the supreme court, and of the judges of some of the district courts, in the case of the act of Congress (already more than

once alluded to) *which they have unanimously adjudged to be unconstitutional and void.*

Extract from the opinion of *judges IREDELL and SITGREAVES.*

“ *First* : That the legislative, executive and judicial departments are each formed in a separate and independent manner ; and that the ultimate basis of each is the constitution only ; within the limits of which each department can alone justify any act of authority.

“ *Secondly* : That the legislature, among other important powers, unquestionably possesses that of establishing courts, in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only ; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

“ *Thirdly* : That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the constitution delegating *judicial power*, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another act) any power not in its nature judicial, or if judicial, *not provided for upon the terms the constitution requires.*

“ *Fourthly* : That whatever doubts may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be, at least, suspended in its operation by the secretary at war, if he shall have cause to suspect imposition or mistake, this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution : For, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction ; yet, such courts must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behaviour ; by which tenure the office of secretary at war is not held. And, we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeably to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.”

Extract from the opinion of *judges WILSON, BLAIR, and PETERS.*

“ The people of the United States have vested in Congress all *legislative powers*, granted in the constitution.

“ They have vested in one supreme court, and in such inferior courts as the Congress shall establish, the *judicial power* of the United States.

“ It is worthy of remark, that, in Congress, the *whole* legislative power of the United States is not vested : an important part of that power was exercised by the people themselves, when they ‘ ordained and established the constitution.’

“ This constitution is the ‘supreme law of the land:’ This supreme law, ‘all judicial officers of the United States are bound, by oath or affirmation to support.’

“ It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard.

“ They have placed their *judicial* power, not in Congress, but in ‘courts.’ They have ordained, that ‘the judges’ of those courts shall hold their offices during good behaviour;’ and that, ‘during their continuance in office, their salaries shall not be diminished.’

“ Congress have lately passed an act ‘to regulate (among other things) the claims to invalid pensions.’

“ Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court, held for the Pennsylvania district, could not proceed :

“ *First*, Because the business directed by this act, is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States ; the circuit court must, consequently, have proceeded without constitutional authority.

“ *Secondly*, Because, if, upon that business, the court had proceeded ; *its judgments* (for its opinions are its judgments) *might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department.* Such revision and controul, we deemed radically inconsistent with the independence of that judicial power, which is vested in the courts ; and, consequently, with that important principle, which is so strictly observed by the constitution of the United States.”

Extract from the opinion of *chief justice JAY*, and *judges CUSHING* and *DUANE*.

“ The court were unanimously of opinion,

“ *First*, That by the constitution of the United States, the government thereof is divided into *three* distinct and independent branches ; and, *that it is the duty of each to abstain from, and oppose, encroachments on either.*

“ *Secondly*, That neither the *legislative* nor the *executive* branches, can constitutionally assign to the *judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.

“ *Thirdly*, That the duties assigned to the circuit court by the act in question, are not of that description ; and that the act itself does not appear to contemplate them as such ; inasmuch as it subjects the decision of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature ; *whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorised to sit as a court of errors on the judicial acts or opinions of this court.*

SUCH, upon the whole, are "*THE FEATURES OF MR. JAY'S TREATY.*" It was not intended to protract this sketch of them to so great a length; and yet, more circumstances are recollected, that might have been inserted, than could, upon a fair reconsideration, be retrenched. If it shall, in any degree serve the purposes of truth, by leading, through the medium of a candid investigation, to a fair, honourable, and patriotic decision, the design with which it was written will be completely accomplished, *whether RATIFICATION or REJECTION is the result.*

But, before the subject is closed, let the citizens of the union be warned from too credulous an indulgence of *their prejudices and their fears.* The discordant cry of party is loud; and the phantoms of war assail the imagination: yet, let us not be deluded by stratagem, nor vanquished by terror. The question is not a question between party and party, but between nation and nation:—it is not a question of war or peace, between military powers; but a question of policy and interest between commercial rivals. The subject is too momentous, to be treated as the foot-ball of contending factions;—it appeals from the passions to the judgment; from the selfishness to the patriotism of every citizen!

That *the British treaty, or a British war, is a necessary alternative,* will be more fully controverted, if the writer's present intention of delineating "*FEATURES OF THE DEFENCE,*" shall be carried into effect. But, in the mean time, let a few self-evident propositions contribute to relieve the public mind, from the weight of that apprehension.

1. The *disposition of Great Britain,* manifested by the order of the 6th of November, 1793, by the speech of Lord Dorchester to the Indians, and by the repeated invasions made, under General Simcoe's authority, upon our territory, *is naturally hostile to the United States.*

2. Even if the United States could, by any means, soothe and convert that disposition into amity and peace, *the projected treaty is too high a price to pay for such a change.*

3. The refusal to enter into the projected treaty with Great Britain, *is not a just cause of war;* and if a *pretence,* only, is wanting, it may be found in the toasts at our festivals, as well as in the acts of our government.

4. But the ratification of the treaty will assuredly give umbrage to *another nation*—to an ancient ally.

5. If war is inevitable *either with Great Britain, or with France,* it would be more politic for the state, more congenial to the sentiments of the people, to engage the former, than the latter, power.

6. In case of a war with Great Britain, we have assurance, *that France will aid us with all the energy of her triumphant arms.*

7. In case of a war with France, we ought not to count upon *the affections,* and we cannot rely upon the power, of Great Britain, to befriend us.

[FROM THE PHILADELPHIA GAZETTE.]

=

*View of the Commerce of the United States,
as it stands at present, and as it is fixed
by Mr. Jay's Treaty.*

=

1. *Actual State.*

AMERICAN ships from Europe enjoy a protecting duty of 10 per cent. on the amount of duties on goods, wares, and merchandises, imported into the United States in foreign bottoms from Europe, and of 30 to 50 per cent. on teas imported in foreign bottoms from Asia or Europe, paid by foreign bottoms, more than is paid on such goods imported in our own vessels. Foreign bottoms pay also 44 cents a ton on every voyage, more than is paid by American shipping; all which had been allowed by the federal government, to encourage American ship-builders, mariners, mechanics, merchants, and farmers.

1. *State by Treaty.*

By treaty, America cedes to Great Britain, the right of laying duties on our ships in Europe, the West Indies, and Asia, to countervail these, and engages not to encrease her duties on tonnage on this side, so as to check the exercise of this right: in consequence British ships may be put, at the discretion of the British government, on exactly the same footing, as American ships in the carrying trade of Europe and Asia.

2. *Actual State.*

American ships, of any size, now go freely to all the British West Indies, sell their cargoes, and bring returns as it suits them.

2. *State by Treaty.*

By treaty American ships are to be reduced to *seventy tons*, in order to be admitted in the British West Indies.

3. *Actual State.*

American ships may now freely load melassies, sugar, coffee, cocoa, or cotton, to any part of the world from the United States.

3. *State by Treaty.*

By treaty American ships are to be totally prohibited this commerce, which is to be carried on under any flag but theirs.

4. *Actual State.*

American citizens can now go supercargoes to India, settle and reside, and do their business there.

4. *State by Treaty.*

By treaty no American citizen can settle or reside in these ports, or go into the interior country, without special licence from the local government, who may, under colour of this, impose what obstacles they please to the commerce.

5. *Actual State.*

America now enjoys the right of regulating commerce, so as to encourage one nation and discourage another, in proportion to benefits received, or injuries felt respectively.

5. *State by Treaty.*

All this abandoned by the treaty so far as respects Great Britain; no duties can be laid on British goods but what must apply to all other nations from whom we import goods—no embargoes on exports to British ports, but what must apply to all nations alike.

6. *Actual State.*

American ships now freely navigate to the British dominions in India, and from thence proceed with cargoes to any part of the world.

6. *State by Treaty.*

By treaty American ships are admitted as usual into the British ports of India, but prohibited carrying any return cargoes except to the United States; prohibited also from the coasting trade in the British ports of India, from which they were not, that I know of, before excluded.

7. *Actual State.*

Timber for ship-building, tar, or rozin, copper in sheets, sails, hemp, cordage, and generally whatever may serve directly to the equipment of vessels, not contraband by former treaties of the United States.

7. *State by Treaty.*

All these articles made contraband by this treaty.

8. *Actual State.*

American ships carrying provisions, by America claimed as having a free right of passage to the ports of their destination.

8. *State by Treaty.*

This claim now apparently waved; such American ships, when taken, to be allowed indemnity of freight, demurrage, and a reasonable mercantile profit, the amount whereof not ascertained.

9. *Actual State.*

American ports open to prizes made on Britain by France; and America possessed of the liberty to grant similar douceurs to other nations, as she sees fit in future compacts with them.

9. *State by Treaty.*

American ports now opened to prizes taken by Britain from any nation except France, but shut to prizes taken from Britain by Spain, or any other power not favoured in this way, by treaties already made; of course discouraging to our future negotiations with all powers, France and Britain excepted.

10. *Actual State.*

American ships allowed at present freely to enter British ports in Europe, the West Indies and Asia, but shut out from the sea-ports of Nova-Scotia and Canada.

10. *State by Treaty.*

American ships allowed to go into these ports, but under new restrictions of size, in the West Indies, and of latitude of trade in the East Indies; the ports of Halifax, Quebec, &c. still shut to America.

11. *Actual State.*

American ships thus partially allowed entrance into British ports.

11. *State by Treaty.*

British ships allowed universal entrance into all our ports.

12. *Actual State.*

American ships now sail, though not under naval protection, under guarantee of all the British effects possessed here, which might be made answerable for our floating property, if unjustly seized on by Great Britain in case of a war, so much apprehended by the chamber of commerce of New-York.

12. *State by Treaty.*

By treaty, American ships deprived of this guarantee; sequestrations or confiscations being declared impolitic and unjust, when applied to stocks, or banks, or debts; though nothing said about them when applied to ships or cargoes.

13. *Actual State.*

British debts now recoverable in the federal courts of the United States, but reposing on the solvency of the debtors only.

13. *State by Treaty.*

By treaty a new court of commissioners opened on this subject, with immense power and guarantee of the United States, who must meet, indeed, at Philadelphia, but may adjourn where they please. Nothing said of debts due to Americans in England, if, by legal impediments, prevented from recovery there.

14. *Actual State.*

America sends Mr. Jay to recover redress for spoliations on our commerce actually sustained.

14. *State by Treaty.*

By treaty a court of commissioners opened, who are to sit in London without power of adjournment, as in the case of the commission for debts. Americans must, therefore, transport themselves and claims to London, and employ counsel there, to recover what the commissioners shall think fit to allow them: admirable compensation indeed!

15. *Actual State.*

American ships much plagued by British privateers.

15. *State by Treaty.*

By treaty the privateersmen are to give 15,000l. to 30000l. sterling security for their good behaviour.

16. *Actual State.*

American citizens may now expatriate and serve in foreign countries.

16. *State by Treaty.*

By treaty they are declared pirates, if serving against Great Britain ; but no provision made to guard American seaman from being forced to serve in British ships.

17. *Actual State.*

America possesses claims to a large amount on account of negroes carried off, and the Western Posts detained, in violation of the treaty of 1783.

17. *State by Treaty.*

These claims all waved by the treaty, without reference to the merits of these pretensions.

The casting up of the above, is submitted to the Chamber of Commerce of New-York.

Errors, outstandings, and omissions excepted.

Philadelphia, July 27, 1795.

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