MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING,

(Pursuant to a resolution of the House of Representatives, of 7th May,)

A Letter of Jonathan Russell,

Late one of the Plenipotentiaries of the United States, at the Negotiation of Ghent,

WITH

Remarks thereon, by the Secretary of State.

MAY 8, 1822.

Ordered to lie on the table.

WASHINGTON:

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1822.

TO THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES:

In compliance with a resolution of the House of Representatives, of the 19th of April, requesting the President "to cause to be communicated to the House, if not injurious to the public interest, any letter which may have been received from Jonathan Russell, one of the Ministers who concluded the treaty of Ghent, in conformity with the indications contained in his letter of 25th of December, 1814," I have to state, that, having referred the resolution to the Secretary of State, and it appearing, by a report from him, that no such document had been deposited among the archives of the Department, I examined and found among my private papers a letter of that description, marked "private" by himself. I transmit a copy of the report of the Secretary of State, by which it appears that Mr. Russell, on being apprized that the document referred to by the resolution had not been deposited in the Department of State, delivered there "a paper purporting to be the duplicate of a letter written by him from Paris, on the 11th of February, 1815, to the then Secretary of State, to be communicated to the House, as the letter called for by the resolution."

On the perusal of the document called for, I find that it communicates a difference of opinion between Mr. Russell and a majority of his colleagues, in certain transactions which occurred in the negotiations at Ghent, touching interests which have been since satisfactorily adjusted by treaty between the United States and Great Britain. The view which Mr. Russell presents of his own conduct, and that of his colleagues, in those transactions, will, it is presumed, call from the two surviving members of that mission, who differed from him, a reply, containing their view of those transactions, and of the conduct of the parties in them, and who, should his letter be communicated to the House of Representatives, will also claim that their reply should be communicated in like manner by the Executive—a claim which, on the principle of equal justice, could not be resisted. The Secretary of State, one of the Ministers referred to, has already expressed a desire that Mr. Russell's letter should be communicated, and that I would transmit, at the same time, a communication from him respecting it.

On full consideration of the subject, I have thought it would be improper for the Executive to communicate the letter called for, unless the House, on a knowledge of these circumstances, should desire it; in which case the document called for shall be communicated, accompanied by a report from the Secretary of State, as above suggested. I have directed a copy to be delivered to Mr. Russell, to be disposed of as he may think proper, and have caused the original to be deposited in the Department of State, with instruction to deliver a copy to any person who may be interested.

JAMES MONROE.

WASHINGTON, *May 4th*, 1822.

DEPARTMENT OF STATE,
Washington, May 3, 1822.

The Secretary of State, to whom was referred the resolution of the House of Representatives of the 19th ultimo, requesting the President "to cause to be communicated to the House, if not injurious to the public good, any letter or communication which may have been received from Jonathan Russell, Esquire, one of the Ministers of the United States who concluded the treaty of Ghent, after the signature of that treaty, and which was written in conformity to the indications contained in said Minister's letter, dated at Ghent, 25th of December, 1814," has the honor of reporting to the President, that, until after the adoption of the said resolution by the House, there was upon the files of the Department of State, no letter from Mr. Russell, of the description mentioned therein; but that Mr. Russell himself has since delivered at the Department a communication purporting to be the duplicate of a letter written by him from Paris, on the 11th of February, 1815, to the then Secretary of State, to be communicated to the House, as the letter called for by their resolution.

A copy of this paper is herewith submitted to the President.

JOHN QUINCY ADAMS.

TO THE HOUSE OF REPRESENTATIVES:

In compliance with the resolution of the House of Representatives, of the 7th of May, requesting the President of the United States "to communicate to that House the letter of Jonathan Russell, Esq. referred to in his message of the 4th instant, together with such communications as he may have received relative thereto, from any of the other ministers of the United States who negotiated the treaty of Ghent," I herewith transmit a report from the Secretary of State, with the documents called for by that resolution.

JAMES MONROE.

WASHINGTON, *May 7*, 1822.

DEPARTMENT OF STATE,
Washington, 7th May, 1822.

The Secretary of State has the honor of transmitting to the President of the United States his remarks upon the paper deposited at the Department of State on the 22d of last month, by Jonathan Russell, late one of the Plenipotentiaries of the United States, at the negotiation of Ghent, to be communicated to the House of Representatives, as the letter called for by their resolution of the 19th of that month; and the Secretary of State respectfully requests that the President would transmit to the House of Representatives these remarks, together with the above mentioned communication of Mr. Russell, on the renewal of the call therefor by the House.

JOHN QUINCY ADAMS.

Mr. Russell to the Secretary of State.

[PRIVATE.]

PARIS, 11*th February*, 1815.

SIR: In conformity with the intimation contained in my letter of the 25th of December, I now have the honor to state to you the reasons which induced me to differ from a majority of my colleagues on the expediency of offering an article confirming the British right to the navigation of the Mississippi, and the right of the American people to take and cure fish in certain places within the British jurisdiction.

The proposition of such an article appeared to be inconsistent with our reasoning to prove its absolute inutility. According to this reasoning, no new stipulation was any more necessary, on the subject of such an article, than a new stipulation for the recognition of the sovereignty and independence of the United States.

The article proposed appeared also to be inconsistent with our instructions, as interpreted by us, which forbid us to suffer our right to the fisheries to be brought into discussion; for, it could not be believed that we were left free to stipulate on a subject which we were restrained from discussing, and that an argument, and not an agreement, was to be avoided. If our construction was indeed correct, it might not, perhaps, be difficult to show that we have not, in fact, completely refrained from the interdicted discussion.

At any rate, the proposal of the article in question was objectionable, inasmuch as it was incompatible with the principles asserted by a majority of the mission, and with the construction which this majority had adopted on that part of our instructions which related to the fisheries. If the majority were correct in these principles, and in this construction, it became us to act accordingly; if they were not correct, still it was unnecessary to add inconsistency to error.

I freely confess, however, that I did not accord with the majority, either in their view of the treaty of 1783, whence they derived their principles, or of our instructions; and that my great objection to proposing the article did not arise from an anxiety to reconcile our conduct with our reasoning and declarations.

I could not believe that the independence of the United States was derived from the treaty of 1783; that the recognition of that independence, by Great Britain, gave to this treaty any peculiar character, or that such character, supposing it existed, would necessarily render this treaty absolutely inseparable in its provisions, and make it one entire and indivisible whole, equally imperishable in all its parts, by any change which might occur in the relations between the contracting parties.

The independence of the United States rests upon those fundamental principles set forth and acted on by the American Congress, in

the declaration of July, 1776, and not on any British grant in the treaty of 1783, and its era is dated accordingly.

The treaty of 1783 was merely a treaty of peace, and therefore subject to the same rules of construction as all other compacts of this nature. The recognition of the independence of the United States could not well have given to it a peculiar character, and excepted it from the operation of these rules. Such a recognition, expressed or implied, is always indispensable on the part of every nation with whom we form any treaty whatsoever. France, in the treaty of alliance, long before the year 1783, not only expressly recognized, but engaged effectually to maintain, this independence; and yet this treaty, so far from being considered as possessing any mysterious peculiarity, by which its existence was perpetuated, has, even without war, and although part of it contained words of perpetuity, and was unexecuted, long since entirely terminated.

Had the recognition of our independence by Great Britain given to the treaty of 1783 any peculiar character, which it did not, still that character could have properly extended to those provisions only which affected that independence. All those general rights, for instance, of jurisdiction, which appertained to the United States, in their quality as a nation, might, so far as that treaty was declaratory of them, have been embraced by such peculiarity, without necessarily extending its influence to mere special commercial liberties and privileges, or to provisions long since executed, not indispensably connected with national sovereignty, or necessarily resulting from it.

The liberty to take and cure fish, within the exclusive jurisdiction of Great Britain, was certainly not necessary to perfect the jurisdiction of the United States; and there is no reason to believe that such a liberty was intended to be raised to an equality with the general right of fishing within the common jurisdiction of all nations, which accrued to us as a member of the great national family. On the contrary, the distinction between the special liberty and the general right appears to have been well understood by the American ministers who negotiated the treaty of 1783, and to have been clearly marked by the very import of the terms which they employed. It would evidently have been unwise in them, however ingenious it may be in us, to exalt such a privilege to the rank of a sovereign right, and thereby to have assumed the unnecessary and inconvenient obligation of considering such a liberty to be an indispensable condition of our national existence, and thus rendering that existence as precarious as the liberty itself. They could not have considered a privilege, which they expressly made to depend, to a very considerable extent, for its continuance, on events and private interests, as partaking of the character and entitled to the duration of the inherent properties of sovereignty. The settlement of the shores might, at any time, have been effected by the policy of the British government, and would have made the assent of British subjects, under the influence of that policy, necessary to the continuance of a very considerable portion of that liberty. They could not have meant thus to place, within the con-

trol of a foreign government and its subjects, an integral part, as we now affect to consider this privilege, of our national rights.

It is from this view of the subject that I have been constrained to believe that there was nothing in the treaty of 1783 which could, essentially, distinguish it from ordinary treaties, or rescue it, on account of any peculiarity of character, from the *jura belli*, or from the operation of those events on which the continuation or termination of such treaties depends. I was, in like manner, compelled to believe, if any such peculiarity belonged to those provisions, in that treaty, which had an immediate connexion with our independence, that it did not necessarily affect the nature of the whole treaty, or attach to a privilege which had no analogy to such provisions, or any relation to that independence.

I know not, indeed, any treaty, or any article of a treaty, whatever may have been the subject to which it related, or the terms in which it was expressed, that has survived a war between the parties, without being specially renewed, by reference or recital, in the succeeding treaty of peace. I cannot, indeed, conceive of the possibility of such a treaty or such an article; for, however clear and strong the stipulations for perpetuity might be, these stipulations themselves would follow the fate of ordinary unexecuted engagements, and require, after a war, the declared assent of the parties for their revival.

We appear, in fact, not to have had an unqualified confidence in our construction of the treaty of 1783, or to have been willing to rest exclusively on its peculiar character our title to any of the rights mentioned in it, and much less our title to the fishing liberty in question. If hostilities could not affect that treaty, or abrogate its provisions, why did we permit the boundaries assigned by it to be brought into discussion, or stipulate for a restitution of all places taken from us during the present war? If such restitution was secured by the mere operation of the treaty of 1783, why did we discover any solicitude for the *status ante bellum*, and not resist the principle of *uti possidetis* on that ground?

With regard to the fishing privilege, we distinctly stated to you, in our letter of the 21st of December, that, "at the time of the treaty of 1783, it was no new grant, we having always before that time enjoyed it," and thus endeavored to derive our title to it from prescription. A title, derived from immemorial usage, antecedent to 1783, could not well owe its origin or its validity to a compact concluded at that time, and we could, therefore, in this view of the subject, correctly say that this privilege was no new grant; that is, that our right to the exercise of it was totally independent of such compact. If we were well founded, however, in the assertion of our prescriptive title, it was quite unnecessary to attempt to give a kind of charmed existence to the treaty of 1783, and to extend its undefinable influence to every article of which it was composed, merely to preserve that title which we declared to be in no way derived from it, and which had existed, and, of course, could exist, without it.

It was rather unfortunate, too, for our argument against a severance

of the provisions of that treaty, that we should have discovered, ourselves, a radical difference between them, making the fishing privilege depend on immemorial usage, and, of course, distinct in its nature and origin from the rights resulting from our independence.

We, indeed, throw some obscurity over this subject when we declare to you that this privilege was always enjoyed by us before the treaty of 1783, thence inferring that it was not granted by that treaty, and in the same sentence and from the same fact, appear also to infer, that it was not to be forfeited by war any more than any other of the rights of our independence, making it thus one of these rights, and of course, according to our doctrine, dependant on that treaty. There might have been nothing incomprehensible in this mode of reasoning had the treaty recognized this privilege to be derived from prescription, and confirmed it on that ground. The treaty has, however, not the slightest allusion to the past, in reference to this privilege, but regards it only with a view to the future. The treaty, therefore, cannot be construed as supporting a pre-existing title, but as containing a grant entirely new. If we claim, therefore, under the treaty, we must renounce prescription, and if we claim from prescription, we can derive no aid from the treaty. If the treaty be imperishable in all its parts, the fishing privilege remains unimpaired without a recurrence to immemorial usage; and if our title to it be well founded on immemorial usage, the treaty may perish without affecting it. To have endeavored to support it on both grounds implies that we had not entire confidence in either, and to have proposed a new article indicates a distrust of both.

It is not, as I conceive, difficult to show that we cannot, indeed, derive a better title to this fishing privilege from prescription than from any indestructible quality of the treaty of 1783.

Prescription appears to me to be inapplicable to the parties and to the subject, and to be defective both in fact and effect. As to the parties:—the immemorial enjoyment of a privilege within British jurisdiction, by British subjects, the inhabitants of British colonies, could not well be considered as evidence of a title to that privilege claimed by the citizens of an independent republic, residing within the exclusive jurisdiction of that republic. The people of the United States, as such, could have claimed no special privilege within the dominions of any foreign power from immemorial usage, in 1783, when the longest duration of their own existence in that quality was little more, at the utmost, than the brief period of seven years, which is surely not beyond the memory of man, *(ultra memoriam hominis.)* The people of the United States had never, in fact, during that period, enjoyed the fishing privilege a moment; being effectually prevented therefrom by the existing state of hostilities. Nor could the inhabitants of the colonies originally constituting the United States, even in their colonial condition, acquire against their sovereign any right from long usage or mere lapse of time, (nullum tempus regi occurrit.) The British sovereign was always competent to regulate and restrain his colonies in their commerce and intercourse with each other, whenever

and however he might think proper, and had he forbid his subjects in the province of Massachusetts, to fish and dry and cure fish in the bays, harbors, and creeks of Labrador, which, by the way, had not immemorially belonged to him, it is not to be imagined that they would have conceived themselves discharged from the obligation of submitting, on account of any pretended right from immemorial usage. The fishing privilege, therefore, enjoyed by British subjects within British jurisdiction, could give no permanent and independent right to those subjects themselves, and, *a fortiori*, no such right to the citizens of the United States, claiming under a different estate and in a different capacity. Great Britain might, indeed, as well prescribe for the prerogatives of her sovereignty over us, as we for any of the privileges which we enjoyed as her subjects.

I do not think it necessary to inquire how far the practice of the people of Massachusetts was the practice of the whole original thirteen United States, or of the United States, now including Louisiana, or how far the immemorial usage of the people of Boston can establish a prescriptive right in the people of New Orleans. I trust I have said enough to shew that prescription is inapplicable to the parties. It is also, I conceive, inapplicable to the subject.

Had the United States, as an independent nation, enjoyed, from time immemorial, the fishing privilege in question, still, from the nature of this privilege, no prescriptive right could have thence been established. A right to fish, or to trade, or to do any other act or thing within the exclusive jurisdiction of a foreign state, is a simple power, a right of mere ability, (*jus meræ facultatis*,) depending on the will of such state, and is consequently imprescriptible. An independent title can be derived only from treaty.

I conceive, therefore, that our claim to the fishing privilege, from immemorial usage, is not only unsupported by the fact, but cannot, in effect, result from such usage.

I have, from this view of the subject, been led to conclude, that the treaty of 1783, in relation to the fishing liberty, is abrogated by the war; that this liberty is totally destitute of support from prescription; and that we are, consequently, left without any title to it whatsoever. For, I cannot prevail upon myself to seek for such a title in the relative situation of the parties, at the time of negotiating the treaty of 1783, and contend, according to the insinuation contained in our letter to you of the 21st of December, that the jurisdiction of Great Britain over the colonies, assigned to her in America, was a grant from the United States, and that the United States, in making this grant, reserved to themselves the privilege in question. Such a pretension, however lofty, is so inconsistent with the circumstances of the case, and with any sober construction which can be given to that treaty, that I shall, I trust, be excused from seriously examining its validity.

Having thus stated some of the reasons which induced me to differ in opinion from a majority of my colleagues, relative to the character of the treaty of 1783, as well as with regard to every other foun-

dation on which they were disposed to rest our title to the fishing privilege, I shall now proceed to explain the causes which influenced me to dissent from them in the interpretation of our instructions. These instructions forbid us to permit our rights to the trade beyond the Cape of Good Hope, to the fisheries, and to Louisiana, to be brought into discussion. I conceived that this prohibition extended to the general rights only, which affected our sovereignty, and resulted from it, and not to mere special liberties and privileges which had no relation to that sovereignty, either as to its nature or extent.

The right relating to the trade beyond the Cape of Good Hope, was the right which belonged to us as an independent nation, in common with all other independent nations, and not the permission of trading to those parts of the East Indies which were within the exclusive jurisdiction of Great Britain. In like manner, the right to the fisheries, contemplated by our instructions, was, I conceived, the right, common to all nations, to use the open sea for fishing as well as for navigation, and not to the liberty to fish and cure fish within the territorial limits of any foreign state. The right to Louisiana, which was not to be brought into discussion, was the right to the empire and domain of that region, and not to the right of excluding Great Britain from the navigation of the Mississippi.

How far we conformed to this instruction, with regard to the general right to Louisiana, it is not necessary for me here to inquire, but certainly the majority believed themselves permitted to offer a very explicit proposition with regard to the navigation of its principal river. I believed, with them, that we were so permitted, and that we were likewise permitted to offer a proposition relative to the fishing liberty, and had the occasion required it, to make proposals concerning the trade to the British East Indies. I was persuaded, that treating relative to these privileges, or discussing the obligation or expediency of granting or withholding them, respectively, violated in no way our instructions, or affected the general rights which we were forbidden to bring into discussion. Considering, therefore, the fishing liberty to be entirely at an end, without a new stipulation for its revival, and believing that we were entirely free to discuss the terms and conditions of such a stipulation, I did not object to the article proposed by us because any article on the subject was unnecessary or contrary to our instructions, but I objected specially to that article, because, by conceding in it the free navigation of the Mississippi, we offered, in my estimation, for the fishing privilege, a price much above its value.

In no view of the subject could I discover any analogy between the two objects, and the only reason for connecting them and making them mutual equivalents for each other, appeared to be because they were both found in the treaty of 1783.

If that treaty was abrogated by the war, as I consider it to have been, any connexion between its parts must have ceased, and the liberty of navigating the Mississippi by British subjects must, at least, be completely at an end; for it will not, I trust, be attempted

to continue it by a prescriptive title, or to consider it as a reservation, made by the United States, from any grant of sovereignty which, at the treaty of peace, they accorded to Great Britain. If, indeed, it was such a reservation, it must have been intended for our benefit, and, of course, could be no equivalent for the fishing privilege. If it is considered as a reservation made by Great Britain, it will reverse the facts assumed by us in relation to that privilege.

The third article of the treaty of 1783, respecting the fisheries, and the eighth article of that treaty, respecting the Mississippi, had not the slightest reference to each other, and were placed as remote, the one from the other, as the limits of that treaty could well admit. Whatever, therefore, was the cause of inserting the fishing liberty, whether it was a voluntary and gratuitous grant on the part of Great Britain, or extorted from her as a condition on which the peace depended, it could have had no relation to the free navigation of the Mississippi. Besides, the article relative to this river must, from the evident views of the parties at the time, from their supposed relations to each other, and from their known relations to a third power, as to this river, have been considered of mutual and equal advantage, and furnished no subject for compensation or adjustment in any other provision of that treaty. Both parties believed that this river touched the territories of both, and that, of course, both had a right to its navigation. As Spain possessed both banks of this river, to a considerable distance from its mouth, and one of its banks nearly throughout its whole extent, both parties had an interest in uniting to prevent that power from obstructing its navigation. Had not the article been intended to engage the parties in relation to Spain, they would, probably, have limited it to the navigation of the river as far as their own territories extended on it, and not have stipulated for this navigation to the ocean, which necessarily carried it through the exclusive territories of Spain.

If the circumstances had been, in fact, such as the parties at the time believed them to be, and with a view to which they acted; or had these circumstances subsequently experienced no radical change; Great Britain would have gained now no more than she would have granted by the revival of the article in relation to the Mississippi, and would not, any more than in 1783, have acknowledged any equivalent to be conferred by it for our liberty relative to the fisheries. The circumstances, however, assumed by the parties, at the time, in relation to Great Britain, and from which her rights were deduced, have not only, in part, been discovered not to have existed, but those which did exist have been entirely changed by subsequent events. It has been ascertained that the territories assigned to Great Britain no where, in fact, reached the Mississippi; and the acquisition of Louisiana by the United States has forever removed the Spanish jurisdiction from that river. The whole consideration, therefore, on the part of Great Britain, whether derived from her territorial rights, or from her part of the reciprocal obligations relative to Spain, having entirely failed, our engagements, entered into on account of that consideration, may be fairly construed to have terminated with it.

In this view of the subject, Great Britain could have had no title to the navigation of the Mississippi, even if a war had not taken place between the parties. To renew, therefore, the claims of Great Britain, under that article, subject to this construction, would be granting her nothing; and to renew that article, independent of this construction, and without any reference to the circumstances that attended its origin, in 1783, or to the events which have since occurred in relation to it, would be granting her advantages not only entirely unilateral, as it relates to the article itself, but, as I believe, of much greater importance than any which we could derive from the liberty relative to the fisheries.

If the article which we offered merely intended to rescue the third and eighth articles of the treaty of 1783 from the operation of the present war, and to continue them precisely as they were immediately prior to this war, the third article being then in full force, and the eighth article being no longer obligatory, we should have attempted to exchange, like General Drummond, the dead for the living.

It is not surprising, therefore, that the British government should, in suspecting such an intention, have rejected our proposition. I was opposed, however, to making the proposition, not only because I was convinced that it was offered with no such intention, but because I believed it would give to Great Britain the free navigation of the Mississippi, under circumstances, and evidently for an object, which would place it on very distinct grounds from those on which it was placed by the treaty of 1783.

The whole of the Mississippi being now exclusively within the acknowledged jurisdiction of the United States, a simple renewal of the British right to navigate it would place that right beyond the reach of the war, and of every other previous circumstance which might have impaired or terminated it; and the *power* to grant, on our part, being now complete, the right to enjoy, on hers, under our grant, must be complete also.

It would be absurd to suppose that any thing impossible was intended, and that Great Britain was to be allowed to navigate the Mississippi precisely as she could have navigated it immediately after the treaty of 1783; as if her territories extended to it, and as if Spain was in entire possession of one of its banks and of a considerable portion of the other. The revival of the British right to navigate the Mississippi would be, under existing circumstances, a new and complete grant to her, measured by these circumstances, and thence embracing not only the entire freedom of the whole extent of that river, but the unrestrained access to it across our territories. If we did not intend this, we intended nothing which Great Britain could accept; and, whatever else might have been intended, if not at once rejected by her, would hereafter have been the subject of new and endless controversy. When, however, we connected the revival of the navigation of the Mississippi with the revival of the liberty of taking and curing fish within the British jurisdiction, two things, which never before had any relation to each other, we evidently

meant, if we acted in good faith, not only to concede, as well as to obtain something, but also to be understood as conceding an equivalent for what we obtained. In thus offering the navigation of the Mississippi, and the access to it through our territories, as an equivalent for the fishing liberty, we not only placed both on ground entirely different from that in which they respectively stood in the treaty of 1783, and acted somewhat inconsistently with our own reasoning relative to the origin and immortality of the latter, but we offered to concede much more than we could hope to gain by the arrangement, with whatever view its comparative effects might be estimated.

From the year 1783 to the commencement of the present war, the actual advantages derived from the fishing privilege by the people of the United States, were, according to the best information that I can obtain on the subject, very inconsiderable, and annually experiencing a voluntary diminution.

It was discovered that the obscurity and humidity of the atmosphere, owing to almost incessant fogs, in the high northern latitudes, where this privilege was chiefly located, prevented the effectual curing of fish in those regions, and, consequently, lessened very much the value of the liberty of taking them there. By far the greatest part of the fish taken by our fishermen before the present war, was caught in the open sea or upon our own coasts, and cured on our own shores. This branch of the fisheries has been found to be inexhaustible, and has been pursued with so much more certainty and despatch than the privileged portion within the British jurisdiction, that it has not only been generally preferred by our fishermen, but would probably, on longer experience, have been almost universally used by them. It was to be believed, therefore, that a discontinuance of the privilege of taking and curing fish, within the British jurisdiction, would not, at all, diminish the aggregate quantity taken by the people of the United States, or very materially vary the details of the business. That part of the fisheries which would still have belonged to us as a nation, being exhaustless, would afford an ample field for all the capital and industry hitherto employed in the general business of fishing, or merchandise of fish, and on that field might the few fishermen, who had hitherto used the liberty of taking and curing fish within the jurisdiction of Great Britain, exert their skill and labor without any serious inconvenience. This liberty, liable in a very considerable degree by the terms in which it was granted, to be curtailed by the government and subjects of a foreign state; already growing into voluntary disuse by our own citizens, on account of the difficulties inseparable from it, and absolutely incapable of extension; was totally unnecessary to us for subsistence or occupation, and afforded, in no way, any commercial facility or political advantage. This privilege, too, while it was thus of little or no utility to us, cost Great Britain literally nothing.

The free navigation of the Mississippi, with the necessary access to it, is a grant of a very different character. If it was not heretofore used by Great Britain, it was, perhaps, because she did not con-

sider herself entitled to it, or because the circumstances of the moment suspended its practical utility. The treaty of 1783 stipulated for her the navigation of this river, under the presumption that her territories extended to it, and, of course, could not intend to give her an access to it through our territories. The British possessions to the westward of Lake Erie, being almost entirely unsettled, rendered, perhaps, the free navigation of the Mississippi, for the moment, of little advantage to her, particularly as her right to reach it was at least equivocal; and as, by another treaty, she could carry on trade with our Indians.

This navigation might, indeed, for a long time to come, be of little use to her for all the legitimate purposes of transit and intercourse; but every change that could take place in this respect must increase its importance to her; while every change in the fishing liberty would be to the disadvantage of the United States.

The freedom of the Mississippi, however, is not to be estimated by the mere legitimate uses that would be made of it. The unrestrained and undefined access which would have been inferred from the article which we proposed, would have placed in the hands of Great Britain and her subjects all the facilities of communication with our own citizens, and with the Indians inhabiting the immense regions of our western territory. It is not in the nature of things that these facilities should not have been abused for unrighteous purposes. A vast field for contraband and intrigue would have been laid open, and our western territories would have swarmed with British smugglers and British emissaries. The revenue would have been defrauded by the illicit introduction of English merchandise; and the lives of our citizens, and the security of a valuable portion of our country, exposed to Indian hostilities, excited by an uncontrolled British influence. If our instructions to guard against such an influence forbid us to renew the British liberty to trade with our Indians, we certainly violated the spirit of those instructions in offering the means of exercising that influence with still greater facility and effect than could result from that liberty.

What was there in the fishing liberty, either of gain to us, or loss to Great Britain, to warrant, in consideration of it, a grant to her of such means of fraud and annoyance? What justice or equality was there in exposing to all the horrors of savage warfare the unoffending citizens of an immense tract of territory, not at all benefitted by the fishing privilege, merely to provide for the doubtful accommodation of a few fishermen, in a remote quarter, entirely exempt from the danger?

Such have been the reasons which induced me to differ from a majority of my colleagues with regard to the article in question, and which I trust will be thought sufficient, at least, to vindicate my motives.

The unfeigned respect which I feel for the integrity, talents, and judgment of those gentlemen, would restrain me from opposing them on slight grounds, and a deference for their opinions makes me almost

fear that I have erred in dissenting from them on the present occasion. I can but rejoice, however, that the article, as proposed by us, was rejected by Great Britain; whatever were her reasons for rejecting it; whether, as above suggested, she suspected some tacit reservation, or want of faith on our part, or supposed, from the price we at once bid for the fishing privilege, that we overrated its value, and might concede for it even more than the navigation of the Mississippi, with all its accessary advantages.

We are still at liberty to negotiate for that privilege in a treaty of commerce, should it be found expedient, and to offer for it an equivalent, fair in its comparative value, and just in its relative effects. In any other way, I trust, we shall not consent to purchase its renewal.

I have the honor to be, with profound respect,

Sir, your faithful and obedient servant,

JONATHAN RUSSELL.

My argument to demonstrate the abrogation of the treaty of 1783 by the present war, and the consequent discontinuance of the fishing privilege, will, I trust, not be ascribed to any hostility to those who were interested in that privilege. I have been always ready, and am still ready, to make every sacrifice for the preservation of that privilege which its nature and utility can justify; but I have conscientiously believed that the free navigation of the Mississippi was pregnant with too much mischief to be offered indirectly under our construction of the treaty, or directly, as a new equivalent for the liberty of taking and curing fish within the British jurisdiction.

We had three other ways of proceeding:

First. To contend for the indestructibility of the treaty of 1783, thence inferring the continuance of the fishing privilege, without saying any thing about the navigation of the Mississippi, which would have reserved our right of contesting this navigation on the grounds I have mentioned, specially applicable to it.

Secondly. To have considered the treaty at an end, and offered a reasonable equivalent, wherever it might be found, for the fishing privilege.

Thirdly. To have made this liberty a sine qua non of peace, as embraced by the principle of status ante bellum.

To either of these propositions I would have assented, but I could not consent to grant or revive the British right to the navigation of the Mississippi, in order to procure or preserve the fishing liberty.

[DUPLICATE.]

PARIS, 11*th February*, 1815.

SIR: In conformity with the intimation contained in my letter of the 25th December, I have now the honor to state to you the reasons which induced me to differ from a majority of my colleagues on the expediency of offering an article confirming the British right to the navigation of the Mississippi, and the right of the American people to take and cure fish in certain places within the British jurisdiction.

The proposal of such an article appeared to be inconsistent with our reasoning to prove its absolute inutility.

According to this reasoning, no new stipulation was any more necessary, on the subject of such an article, than a new stipulation for the recognition of the sovereignty and independence of the United States.

The article proposed appeared, also, to be inconsistent with our instructions, as *interpreted* by *us*, which forbid us to suffer *our right to the fisheries* to be brought into discussion; for, it could not be believed that we were left free to *stipulate* on a subject which we were restrained from *discussing*, and that *an argument*, and not an *agreement*, was to be avoided.

If our construction was, indeed, correct, it might not, perhaps, be difficult to show that we have not, in fact, completely refrained from the interdicted discussion.

At any rate, the proposal of the article in question was objectionable, inasmuch as it was incompatible with the principles asserted by a majority of the mission, and with the construction which that majority had adopted on that part of our instructions which related to the fisheries. If the majority were correct in these principles and in this construction, it became us to act accordingly. If they were incorrect, still it was unnecessary to add inconsistency to error.

I freely confess, however, that I did not accord with the majority, either in their views of the treaty of 1783, whence they derived their principles, nor of our instructions; and that my great objection to proposing the article did not arise from an anxiety to reconcile our conduct with our reasoning and declarations.

I could not believe that the independence of the United States was derived from the treaty of 1783; that the recognition of that independence, by Great Britain, gave to this treaty any peculiar character, or that such character, supposing it existed, would necessarily render this treaty absolutely inseparable in its provisions, and make it one entire and indivisible whole, equally imperishable in all its parts, by any change which might occur in the relations between the contracting parties.

The independence of the United States rests upon those fundamental principles set forth and acted on by the American Congress,

in the declaration of July, 1776, and not on any British *grant* in the treaty of 1783; and its æra is dated accordingly.

The treaty of 1783 was merely a *treaty of peace*, and therefore subject to the same rules of construction as all other compacts of this nature. The recognition of the independence of the United States could not have well given to it a peculiar character, and excepted it from the operation of these rules. Such a recognition, expressed or implied, is always indispensable on the part of every nation with whom we form any treaty whatever. France, in the treaty of alliance, long before the year 1783, not only expressly recognized, but engaged *effectually to maintain* this independence; and yet this treaty, so far from being considered as possessing any mysterious peculiarity by which its existence was perpetuated, has, even without war, and although a part of it contained words of *perpetuity* and was *unexecuted*, long since terminated.

Had the recognition of our independence by Great Britain given to the treaty of 1783 any peculiar character, which it did not, yet that character could have properly extended to those provisions only *which affected* that independence. All those general rights, for instance, of jurisdiction, which appertained to the United States in their quality as a nation, might, so far as that treaty was declaratory of them, have been embraced by that peculiarity without *necessarily* extending its influence to mere special *liberties* and *privileges*, or to provisions *long since executed*, not indispensably connected with national sovereignty, nor necessarily resulting from it.

The liberty to take and cure fish within the exclusive *jurisdiction of Great Britain*, was certainly not necessary to perfect the *jurisdiction of the United States*. And there is no reason to believe that such a liberty was intended to be raised to an equality with the general right of fishing within the common jurisdiction of all nations, which accrued to us as a member of the great national family. On the contrary, the distinction between the special liberty and the general right, appears to have been well understood by the American ministers who negotiated the treaty of 1783, and to have been clearly marked by the very import of the terms which they employed. It would evidently have been unwise in them, however ingenious it may be in us, to exalt such a privilege to the rank of a sovereign right, and thereby to have assumed the unnecessary and inconvenient obligation of considering such a liberty to be an indispensable condition of our national existence, and thus rendering that existence as precarious as the liberty itself. They could not have considered a privilege which they expressly made to depend, to a very considerable extent, for its continuance, on mere events and private interests, as partaking of the character, and entitled to the duration, of the inherent properties of sovereignty. The settlement of the shores might, at any time, have been effected by the policy of the British government, and would have made the assent of British subjects under the influence of that policy, necessary to the continuance of a very considerable portion of that privilege. They could not have meant thus

to place within the control of a foreign power and its subjects, an *integral part*, as we now affect to consider this privilege, of our national rights.

It is from this view of the subject that I have been constrained to believe that there was nothing in the treaty of 1783 which could essentially distinguish it from ordinary treaties, or rescue it, on account of any peculiarity of character, from the *jura belli*, or from the operation of those events on which the continuance or termination of such treaties depends.

I was, in like manner, compelled to believe, if any such peculiarity belonged to those provisions in that treaty, which had an immediate connection with our independence, that it did not necessarily affect the nature of the whole treaty, nor attach to a privilege which had no analogy to such provisions, nor any relation to that independence.

I know not, indeed, any treaty, nor any article of a treaty, whatever may have been the subject to which it related, or the terms in which it was expressed, that has survived a war between the parties, without being specially renewed, by reference or recital, in the succeeding treaty of peace. I cannot, indeed, conceive the possibility of such a treaty, or of such an article; for, however clear and strong the stipulations for perpetuity might be, these stipulations themselves would follow the fate of ordinary unexecuted engagements, and require, after a war, the declared assent of the parties for their revival.

We appear, in fact, not to have an unqualified confidence in our construction of the treaty of 1783, or to have been willing to rest exclusively on its peculiar character our title to any of the rights mentioned in it; and much less our title to the fishing privilege in question.

If hostilities could not affect that treaty, nor abrogate its provisions, why did we permit the boundaries assigned by it, to be brought into discussion, or stipulate for a restoration of all places taken from us during the present war? If such a restitution was secured by the mere operation of the treaty of 1783, why did we discover any solicitude for the *status ante bellum*, and not resist the principle of *uti possidetis* on that ground.

With regard to the fishing privilege, we distinctly stated to you, in our letter of the 25th of December last, that, at the time of the treaty of 1783, it was *no new grant*, we having always before that time enjoyed it, and thus endeavored to derive our title to it from *prescription;* a title derived from immemorial usage, antecedent to 1783, could not well owe its origin, or its validity, to any compact concluded at that time; and we might, therefore, in this view of the subject, correctly say that this privilege was then no new grant; that is, that our right to the exercise of it was totally independent of such compact. If we were well founded, however, in the assertion of our prescriptive title, it was quite unnecessary for us to attempt to give a kind of charmed existence to the treaty of 1783, and to extend its indefinable influence to every article of which it was composed, merely to preserve that title which we declared to be in no way derived from it, and which had existed, and, of course, could exist without it.

It was rather unfortunate, too, for our argument against the severance of the provisions of that treaty, that we should have discovered, ourselves, such a radical difference between them, making the fishing privilege to depend on immemorial usage, and, of course, distinct, in its nature and in its origin, from the rights resulting from our independence.

We indeed throw some obscurity over this subject, when we declare to you that this privilege was always enjoyed by us before the treaty of 1783; thence inferring that it was not granted by that treaty, and, in the same sentence, and from the same fact, appear also to infer that it was not to be forfeited by war, any more than *any other of the rights of independence*; making it thus one of those rights, and, of course, according to our doctrine, dependant on that treaty. There might have been nothing incomprehensible in this mode of reasoning, had the treaty recognized this privilege to be derived from prescription, and confirmed it on that ground. The treaty, however, has not the slightest allusion to the past, in reference to this privilege, but regards it only with a view to the future. The treaty cannot, therefore, be construed as supporting a pre-existing title, but as containing a grant entirely new. If we claim, therefore, under the treaty, we must renounce prescription; and if we claim from prescription, we can derive no aid from the treaty. If the treaty be imperishable in all its parts, the fishing privilege remains unimpaired, without a recurrence to immemorial usage: and if our title to it be well founded on immemorial usage, the treaty may perish without affecting it. To have endeavored to support it on both grounds, implies that we had not entire confidence in either, and to have proposed a new article indicates a distrust of both.

It is not, as I conceive, difficult to shew that we can, indeed, derive no better title to this fishing privilege from prescription, than from any indestructible quality of the treaty of 1783.

Prescription appears to be inapplicable to the *parties*, and to the *subject*, and to be defective both in *fact* and *effect*.

As to the parties:—the immemorial enjoyment of a privilege, within British jurisdiction, by British subjects, the inhabitants of British colonies, could not well be considered as evidence of a title to that privilege, claimed by citizens of an independent republic, residing within the exclusive jurisdiction of that republic. The people of the United States, as such, could have claimed no special privilege within the dominions of any foreign power, from immemorial usage, in 1783, when the longest duration of their own existence in that quality was little more, at the utmost, than the brief period of *seven* years, which is surely not beyond the memory of man, (*ultra memoriam hominis.*) The people of the United States had never, in fact, during that period, enjoyed the fishing privilege a moment, being effectually prevented therefrom by the existing state of hostilities. Nor could the inhabitants of the colonies, originally constituting the United States, even in their colonial condition, acquire against their sovereign any right from long usage, or the mere lapse of time, (*nullum*

tempus regi occurrit.) The British sovereign was always competent to regulate or to restrain them in their commerce and intercourse with each other, whenever and however he might think proper. And had he forbid his subjects, in the province of Massachusetts Bay, to fish, and to dry and cure fish, in the bays, harbors, and creeks of Labrador, (which, by the way, had *not immemorially belonged to him,)* it is not to be imagined that they would have conceived themselves discharged from the obligation of submitting, on account of any pretended right from immemorial usage.

The fishing privilege, therefore, enjoyed by British subjects, within British jurisdiction, could give no permanent and independent right to those subjects themselves, and, *a fortiori,* no such right to the citizens of the United States, claiming, under a *different estate,* and in a different capacity. Great Britain might, indeed, as well prescribe for the prerogatives of her sovereignty over us, as we for any of the privileges which we enjoyed as her subjects.

I do not think it necessary to inquire how far the practice of the people of Massachusetts was the practice of the people of the whole original thirteen United States, or of the United States now including Louisiana; or how far the immemorial usage of the people of Boston can establish a prescriptive right in the people of New Orleans. I trust I have said enough to shew that prescription is *inapplicable to the parties.*

It is, also, I conceive, inapplicable to the subject. Had the United States, as an independent nation, enjoyed, from time immemorial, the fishing privilege in question, still, from the nature of this privilege, no prescriptive right would have thence been established. A right to fish, or to trade, or to do any other thing, within the exclusive jurisdiction of a foreign state, is a *simple power,* a right *of mere ability, (jus meræ facultatis,)* depending on the will of such state, and consequently *imperscriptible.* An independent right can be derived only from treaty.

I conceive, therefore, that a claim to the fishing privilege, from immemorial usage, is not only unsupported by the *fact,* but cannot, in *effect,* result from such usage.

I have, in this view of the subject, been led to conclude that the treaty of 1783, in relation to the fishing liberty, is abrogated by the war, and that this liberty is totally destitute of support from prescription, and, consequently, that we are left without any title to it whatsoever. For, I cannot prevail upon myself to seek for such a title in the relative situation of the parties at the time of negotiating the treaty of 1783, and contend, according to the insinuation contained in our letter to you, of the 25th of December last, that the jurisdiction of Great Britain over the colonies assigned to her, in America, was a grant of the United States, and that the United States, in making this grant, *reserved to themselves* the privilege in question. Such a pretension, however lofty, is so inconsistent with the real circumstances of the case, any with any sober construction which can

be given to that treaty, that I shall, I trust, be excused from seriously examining its validity.

Having thus stated some of the reasons which induced me to differ in opinion from a majority of my colleagues, relative to the character of the treaty of 1783, as well as with regard to every other foundation on which they were disposed inconsistently to rest our title to the fishing privilege, I shall now proceed to explain the reasons which influenced me to dissent from them in the interpretation of our instructions relative to that privilege.

These instructions forbid us to permit our *rights* to the *trade* beyond the *Cape of Good Hope*, to the *fisheries*, and to *Louisiana*, to be brought into discussion. I conceived that this prohibition extended to the general rights only, which affected our sovereignty and resulted from it, and not the special liberties and privileges which had no relation to that sovereignty, either as to its nature or extent.

The right, relative to the trade beyond the Cape of Good Hope, was the right which belonged to us as an independent nation, and not to the permission of trading to those parts of the East Indies which were within the exclusive jurisdiction of Great Britain. In like manner, the right to the fisheries, contemplated by our instructions, was, I conceive, the right to use the open sea for fishing as well as for navigation, and not the liberty to fish, and to cure fish, within the territorial limits of any foreign state. The right to Louisiana, which, by those instructions, were not to be brought into discussion, was the right to the empire and domain of that region, and not the right of excluding Great Britain from the free navigation of the Mississippi.

How far we conformed to this instruction, with regard to the general right to Louisiana, it is not necessary for me here to inquire; but, certainly, the majority believed themselves to be permitted, their own construction to the contrary notwithstanding, to offer a very explicit proposition, with regard to the navigation of its principal river; now, this offer I considered, for the reasons just suggested, not to be a violation of the instructions in question, but I considered it to be against both the letter and the spirit of our other instructions of the 15th of April, 1813. By these instructions we were explicitly and implicitly directed "to avoid any stipulation which might restrain the United States from *excluding* the British traders from the navigation of the lakes and *rivers, exclusively within our own jurisdiction.*" This instruction applied with the greater force to the Mississippi, because, as it is believed, it was the *only river* to which it could apply.

While I believed, therefore, that we were permitted to offer a proposition, relative to the fishing liberty; and that, in treating concerning this liberty, or in discussing our claim to it, we in no way violated our instructions, nor affected the general rights which we were forbidden to bring into discussion; I did believe, and do still believe, that we were expressly and unequivocally forbidden to offer or to renew a stipulation for the free navigation, by the British, of the Mississippi, a river within our exclusive jurisdiction.

Considering, therefore, the fishing liberty to be entirely at an end, without a new stipulation for its revival; and believing that we were entirely free to discuss the terms and conditions of such a stipulation, I did not object to the article proposed by us, because any article on the subject was unnecessary, or contrary to our instructions, but I objected specially to that article, because, by conceding in it, to Great Britain, the free navigation of the Mississippi, we not only directly violated our instructions, but we offered, in my estimation, a price *much above its value*, and which could not *justly* be given.

In no view of the subject, could I discover any analogy or relation between the two objects; and the only reason for connecting them, and making them mutual equivalents for each other, appeared to be, because they were both found in the treaty of 1783. If that treaty was abrogated by the war, as I consider it to have been, any connection between its parts must have ceased, and the liberty of navigating the Mississippi, by British subjects, must, at least, be completely at an end; for it will not, I trust, be attempted to continue it by a *prescriptive* title, or to consider it as a *reservation* made by the United States from any grant of sovereignty, which, at the treaty of peace, they accorded to Great Britain. If, indeed, it were such a reservation, it must have been intended for *our benefit*, and of course, no equivalent for the fishing privilege, likewise for our benefit. If it is considered as a reservation made by Great Britain, it will reverse all the facts assumed by us in relation to that privilege.

The *third* article of the treaty of 1783, respecting the fisheries, and the *eighth* of that treaty, respecting the Mississippi, had not the slightest reference to each other, and were placed as remote, the one from the other, as the limits of that treaty could well admit; whatever, therefore, might have been the cause of inserting the fishing liberty, whether it was a voluntary and gratuitous grant on the part of Great Britain, or extorted from her as a condition, on which the peace depended, it could have had no relation with the free navigation of the Mississippi; besides, the article relative to this river, must, from the evident views of the parties at the time, from their relations to each other, and from their known relations to a third power, have been considered of mutual and equal advantage, and furnished no subject for compensation or adjustment in any other provision of that treaty.

Both parties believed that this river touched the territories of both, and that of course both had a right to its navigation. As Spain possessed both banks of this river to a considerable distance from its mouth, and one of its banks nearly throughout its whole extent, both parties had an interest in uniting to prevent that power from obstructing its navigation. Had not the article been intended to engage the parties in relation to Spain, they probably would have limited it to the navigation of the river, so far as their own territories extended on it, and not have stipulated for its navigation to the ocean, which necessarily carried it through the exclusive territories of Spain. If the circumstances had been, in fact, such as the parties at the time believed them to be, and with a view to which they acted,

or had these circumstances subsequently experienced no radical change, Great Britain would have gained now, no more than she would have granted by the renewal of the article in relation to the navigation of the Mississippi; and would not, any more than in 1783, have acknowledged any equivalent to be conferred by it, for our liberty relative to the fisheries. The circumstances, however, assumed by the parties at the time, in relation to Great Britain, and from which her rights were deduced, have not only, in part, been since discovered not to have existed, but those which did exist have been entirely changed by subsequent events.

It has been clearly ascertained, that the territories, assigned to Great Britain, no where, in fact, reached the Mississippi; and, the acquisition of Louisiana, by the United States, had forever removed the Spanish jurisdiction from that river. The whole consideration, therefore, on the part of Great Britain, whether derived from her territorial rights, or from her part of the reciprocal obligations, relative to Spain, having entirely failed, our engagements, entered into on account of that consideration, may be fairly construed to have terminated with it.

In this view of the subject, Great Britain could have had no title to the navigation of the Mississippi, even if a war had not taken place between the parties. To renew, therefore, the claims of Great Britain, under that article, subject to this construction, would be granting her nothing; and, to renew that article, independent of this construction, and without any reference to the circumstances that attended its origin in 1783, or to the events which have since occurred in relation to it, would be granting her advantages not only entirely *unilateral*, as relates to the article itself, but, as I believed, of much greater importance than any which we could derive from the liberty relative to the fisheries.

If the article which we offered was merely intended to rescue the third and eighth articles of the treaty of 1783, from the operation of the present war, and to continue them precisely as they were immediately prior to this war, the third article being then in full force, and the eighth article being no longer operative, we should have attempted to exchange, like General Drummond, the dead for the living. It is not surprising, therefore, that the British government, in suspecting such an intention, should have rejected our proposition.

I was opposed, however, to making the proposition, not only because I was convinced that it was made with no such intention, but because I believed it would give to Great Britain the free navigation of the Mississippi, under circumstances, and evidently for an object, which would place it on very distinct grounds from those on which it was placed by the treaty of 1783.

The whole of the Mississippi being now exclusively within the acknowledged jurisdiction of the United States, a simple renewal of the British right to navigate it would place that right beyond the reach of the war; and every other previous circumstance which

might have impaired or terminated it, and the right to grant, on our part, being now complete, the right to enjoy, on the part of Great Britain, must be complete also. It would be absurd to suppose that any thing impossible was intended, and that Great Britain was to be allowed to navigate the Mississippi only as she would have navigated it immediately after the treaty of 1783, as if her territories extended to it, and as if Spain was in the entire possession of one of its banks, and of a considerable portion of the other.

The recognition of the British right to navigate the Mississippi, would be, *under existing circumstances*, a new and complete grant to her, measured by these circumstances, and, thence, embracing not only the entire freedom of the whole extent of the river and its tributary waters, but unrestrained access to it across our territories. If we did not intend to offer this, we intended to offer nothing which Great Britain could accept; and whatever else we might have intended to offer, if not at once rejected by her, would at least have been, hereafter, the subject of new and endless controversy.

When, however, we connected the revival of the navigation of the Mississippi with the revival of the privilege of taking and curing fish within the British jurisdiction, two things which never before had any relation to each other, we evidently meant, if we acted with good faith, not only to concede, as well as to obtain something, but also to be understood as conceding an equivalent for what we obtained.

In thus offering the navigation of the Mississippi, and the access to it through our territories, as an equivalent for the fishing liberty, we not only placed both on ground entirely different from that on which they respectively stood in the treaty of 1783, and acted somewhat inconsistently with our own reasoning, relative to the origin and immortality of the latter, but we offered to concede *much more* than we could hope to gain by the arrangement.

From the year 1783 to the commencement of the present war, the actual advantages derived from the fishing privilege by the people of the United States, were, according to the best information that we could obtain on the subject, very inconsiderable, and annually experiencing a voluntary diminution.

It was discovered that the obscurity and humidity of the atmosphere, owing to almost incessant fogs in the high northern latitudes, where this privilege was chiefly located, prevented the effectual curing of fish in those regions, and, consequently, lessened very much the value of the privilege of taking them there. By far the greatest part of the fish taken by our fishermen before the present war, was taken in the open sea, or on our own coasts, and cured on our shores. This branch of the fisheries has been found to be inexhaustible, and has been pursued with so much more certainty and despatch than the privileged portion within British jurisdiction, that it has not only been generally preferred by our fishermen, but would, probably, on longer experience, have been almost universally used by them. It was to be believed, therefore, that a discontinuance of the privilege of taking and curing fish within the British jurisdiction, would not,

at all, diminish the aggregate quantity taken by the people of the United States, or vary materially the details of the business.

That part of the fisheries which would still belong to us as a nation, being exhaustless, would afford an ample field for all the capital and industry hitherto employed in the general business of fishing, or merchandise of fish; and on that field might the few fishermen, who had, hitherto, used the liberty of taking and curing fish within the jurisdiction of Great Britain, exert their skill and labor without any serious inconvenience.

That liberty, liable, to a very considerable degree, by the terms in which it was granted, to be curtailed by the government and subjects of a foreign state, already growing into voluntary disuse by our own citizens, on account of the difficulties inseparable from it, and absolutely incapable of extension, was totally unnecessary to us for subsistence or occupation, and afforded, in no honest way, either commercial facility, or political advantage. This privilege, too, while it was thus of little and precarious utility to us, cost Great Britain literally *nothing*.

The free navigation of the Mississippi, with the necessary access to it, is a grant of a very different character. If it was not, heretofore, used by Great Britain, it was, perhaps, because she did not consider herself entitled to it; or because the circumstances of the moment suspended its practical utility. The treaty of 1783 stipulated, for her, the navigation of this river, under the presumption that her territories extended to it, and, of course, could not intend to give her access to it through our territories. The British possessions to the westward of Lake Erie being almost entirely unsettled, rendered, perhaps, the free navigation of the Mississippi, for the moment, of little advantage to her; particularly, as her right to reach it was, at least, equivocal; and as, by another treaty, she could carry on trade with our Indians. This navigation might, indeed, for a long time to come, be of little use to her for all the *legitimate* purposes of transit and intercourse; but every change that could take place in this respect must increase its importance to her, while every change in the fishing liberty must be to the disadvantage of the United States.

The freedom of navigating the Mississippi, however, is not to be estimated by the mere legitimate uses that would be made of it. The unrestrained and undefined access, which would have been inferred from the article which we proposed, must have placed in the hands of Great Britain and her subjects, all the facilities of communication with our own citizens, and with the Indians inhabiting the immense regions of our western territory. It is not in the nature of things that these facilities should not have been abused for unrighteous purposes. A vast field for contraband and for intrigue would have been laid open, and our western territories would have swarmed with British smugglers and British emissaries. The revenue would have been defrauded by the illicit introduction of English merchandise, and the lives of our citizens, and the security of a valuable portion of our country, would have been exposed to Indian hostility, excited by an uncontrolled British influence.

If our instructions of the 15th of April, 1813, already cited, forbid us, in order to guard against such an influence, to renew the treaty of 1794, "allowing the North West Company and British traders to carry on trade with the Indian tribes within our limits, a privilege, the *pernicious* effects of which have been *most sensibly felt* in the present war," we certainly violated the spirit of those instructions in offering the means of exercising that influence with still greater facility and effect than could result from that *privilege*.

What was there in the fishing liberty, either of gain to us or loss to Great Britain, to warrant, in consideration of it, a grant to her of such means of fraud and annoyance? What justice or equality was there, in exposing to all the horrors of savage warfare, the unoffending citizens of an immense tract of territory, not at all, or but faintly, benefitted by the fishing privilege, merely to provide for the doubtful accommodation of a few fishermen, annually decreasing in number, in a remote quarter, and entirely exempt from the danger? Such have been the reasons which induced me to differ from a majority of my colleagues with regard to the article in question, and which, I trust, will be deemed sufficient, at least, to vindicate my motives.

The unfeigned respect which I feel for the integrity, talents, and judgment, of those gentlemen, would restrain me from opposing them on slight grounds, and a deference for their opinions makes me almost fear that I have erred in dissenting from them on the present occasion. I can but rejoice, however, that the article, as proposed by us, was rejected by Great Britain, whatever were her reasons for rejecting it; whether, as above suggested, she might have suspected some tacit reservation, or want of faith, on our part; or supposed, from the price we at once bid for the fishing privilege, that we overrated its value, and might concede for it even more than the free navigation of the Mississippi, with all its accessary advantages.

Let me not, in any thing which I have said, be misunderstood. In judging on the interests of the great whole, I am not disposed to undervalue the interests on any of the constituent parts. No one can more highly appreciate than I do, a branch of industry which not only adds to national wealth, but seems to create it. Nor can any one more warmly admire the usefulness and patriotism of those citizens who are engaged in it, and who have never ceased to deserve well of the Republic. In times of peace they bring home, amidst conflicting elements, the treasures of the deep to enrich their country; and in times of war they contribute, by their skill and intrepidity, to her defence and glory. But, in our country, where all are equal, the essential security and prosperity of the many must be preferred to the convenience and minor interests of the few. In giving this preference, I will frankly confess I had to silence early prepossions and local predilections, and to listen to the councils of a more enlarged patriotism; and to this patriotism I dare appeal for my vindication, not only with those to whom I am officially responsible, but with those with whom I am more immediately connected in society, and whose interests may be considered to have been unfavorably affected by the

views which I have deemed it to be my duty to adopt. I have always been willing to make any sacrifice for the fishing privilege, which its nature, or comparative importance could justify, but I conscientiously believe that the free navigation of the Mississippi, and the access to it which we *expressly offered*, were pregnant with too much mischief to be offered, indirectly, under our construction of the treaty; or, directly, as they were in fact offered, as a new equivalent for the liberty of taking and drying fish within the British jurisdiction.

I will frankly avow, however, that my impressions were, and still are, that Great Britain, calculating on the success of the powerful expedition which she has sent against New Orleans, confidently expected that she would have become the mistress of Louisiana and all its waters; and that she did not, in this event, intend to abandon her conquest under the terms of the treaty of Ghent.

Her ministers had, almost from the commencement of the negotiation, not only affected to consider our acquisition of Louisiana as evidence of a spirit of aggrandizement, but insinuated a *defect* in our title to it. Expecting, therefore, to obtain the free navigation of the Mississippi for nothing, she would not consent to part even with the fishing liberty as an equivalent. If she be disappointed in her views on Louisiana, and I trust in God and the valor of the West that she will be, I shall not be surprized if, hereafter, she grants us the fishing privilege, which costs her absolutely nothing, without any extravagant equivalent whatever.

At any rate, we are still at liberty to negotiate for that privilege in a treaty of commerce, and to offer for it an equivalent, fair in its comparative value, and just in its relative effects; and to negotiate for it in this way is evidently more wise than to demand it as a *condition* of peace, or to offer for it a price beyond its worth, and which, however excessive, runs the hazard of being refused, merely by the operation of those unaccommodating passions which are inevitably engendered by a state of war.

I have the honor to be, with the most profound respect,

Sir, your faithful and obedient servant,

JONATHAN RUSSELL.

Hon. JAMES MONROE,
Secretary of State of the United States.

A true copy of a paper left by Jonathan Russell, Esq. at the Department of State, 22d April, 1822, to be communicated to the House of Representatives of the United States.

J. Q. ADAMS,
Secretary of State.

REMARKS

ON

A Paper delivered by Mr. Jonathan Russell,

AT

THE DEPARTMENT OF STATE,

ON THE 22D OF APRIL, 1822;

To be communicated to the House of Representatives, as the duplicate of a Letter written by him at Paris, the 11th of February, 1815, to the then Secretary of State, and as the Letter called for by the Resolution of the House, of 19th April, 1822.

The first remark that presents itself upon this *duplicate*, is, that it is not a copy of the letter really written by Mr. Russell, at Paris, on the 11th of February, 1815, to the Secretary of State, and received by him. The latter was marked "*private*," and, as such, was not upon the files of the Department of State; and, although of the same general purport and tenor with the so called duplicate, differed from it in several highly significant passages, of which the following parallel, extracted from the two papers, presents one example:

ORIGINAL.	DUPLICATE.
"How far we conformed to this instruction, with regard to the general right to Louisiana, it is not necessary for me here to inquire; but certainly the majority believed themselves permitted to offer a very explicit proposition with regard to the navigation of its principal river. *I believed, with them, that we were so permitted*, and that we were, likewise, permitted to offer a proposition relative to the fishing liberty, and, had the occasion required it, to make proposals concerning the trade to the British East Indies. I was persuaded, that treating relative to these privileges, or discussing the obligation or	"How far we conformed to this instruction, with regard to the general right to Louisiana, it is not necessary for me here to inquire; but certainly the majority believed themselves to be permitted, their own construction to the contrary notwithstanding, to offer a very explicit proposition with regard to the navigation of its principal river. Now, this offer, I considered, for the reasons just suggested, not to be a violation of the instructions in question, but I considered it to be against both the letter and the spirit of our other instructions of the 15th of April, 1813. By these instructions, we were explicitly and

ORIGINAL.

expediency of granting or withholding them, respectively, violated, in no way, our instructions, or affected the general rights which we were forbidden to bring into discussion."

DUPLICATE.

implicitly directed 'to avoid any 'stipulation which might restrain 'the United States from *exclud-* 'ing the British traders from the 'navigation of the lakes and *ri-* 'vers exclusively within our own 'jurisdiction.' This instruction applied with the greater force to the Mississippi, because, as it is believed, it was the *only river* to which it could apply.

"While I believed, therefore, that we were permitted to offer a proposition relative to the fishing liberty, and that in treating concerning this liberty, or in discussing our claim to it, we in no way violated our instructions, nor affected the general rights which we were forbidden to bring into discussion, I did believe, and do still believe, that we were expressly and unequivocally forbidden to offer, or to renew, a stipulation for the free navigation, by the British, of the Mississippi, a river within our exclusive jurisdiction."

It is here seen that, while in the original letter Mr. Russell did, with the majority of his colleagues, believe that we were permitted by our instructions to make the proposition with regard to the navigation of the Mississippi, as well as a proposition relative to the fishing liberty, he had, when writing the duplicate, brought himself to the belief, not only that we were not so permitted, but that he had, even at Ghent, considered it as a direct violation both of the letter and spirit of our explicit and implicit instructions of 15th April, 1813. The solution of this difference in the mind of Mr. Russell, between the writing of the original and the duplicate of his letter, may be found in this circumstance. The proposition relating to the navigation of the Mississippi, and the fishery, was made to the British Plenipotentiaries on the 1st of December, 1814. It had been discussed at the meetings of the American Mission, on the preceding 28th and 29th of November. On the 24th of that month, the American Plenipotentiaries had received a letter of instructions from the Secretary of State, dated 19th October, 1814, and containing the following passages:

"It has been judged proper to communicate to Congress so much "of the instructions given to you by this Department, as would show

"the terms on which you were authorized to make peace. These, "as well as your communications, have been printed, and several "copies are now forwarded to you, as it is believed they may be use- "fully disposed of in Europe. Should any circumstance have unex- "pectedly prolonged the negotiation, and you find the British com- "missioners disposed to agree to the *status ante bellum*, you will "understand that you are authorized to make it the basis of a treaty."

Now, the *status ante bellum*, upon which we were thus expressly and unequivocally permitted to conclude a treaty, included not only the recognition of the entire treaty of peace of 1783, but the revival of the first ten articles of the treaty of 1794; not only the freedom to the British to navigate the Mississippi, but free ingress into our territories, and free trade with our Indians. And so entirely was that part of the instructions of 15th April, 1813, now cited by Mr. Russell, considered by the President as cancelled, that it was omitted from that copy, which had been communicated to Congress, of "so much of the instructions as would show the terms on which we were authorized to make peace," and of which several printed copies were thus forwarded to us. (*See Wait's State Papers, vol. 9, p. 339–358.*)

It was scarcely possible that, within the compass of one week, Mr. Russell should have forgotten the receipt of the instruction of 19th October, 1814, fresh from Washington; nor at all possible that he should have considered us as then bound by the instruction of 15th April, 1813, to which, in his duplicate, he now so emphatically refers. The 11th of February, 1815, was yet so recent to the date of the conclusion of the treaty, that, in writing the original of his letter, the recollection of the new instructions of October, 1814, had doubtless not escaped him. But when the duplicate was written, other views had arisen; and their aspects are discovered in the aggravation of charges against the memory of a dead, and the character of living colleagues.

But whether the real sentiments of Mr. Russell at Paris, on the 11th of February, 1815, with regard to the transactions to which this passage relates, are to be taken as indicated in the original, or in the duplicate, certain it is that the vehement objections to the proposed article, which, in the *duplicate*, appear to have made so deep an impression on his mind, had as little been made known to his colleagues at the time of the discussions at Ghent, as they appear to have been to himself, when writing the *original* of the same letter.

The proposal, to which the whole of Mr. Russell's letter, in both its various readings, relates, was made to the British Plenipotentiaries, not by a majority, but by the whole of the American mission, including Mr. Russell, as may be seen by the protocol of the conference of the 1st December, 1814, and by the letter from the American to the British Plenipotentiaries, of 14th December, 1814. In that letter, already communicated to the House, the American Plenipotentiaries, referring to the article in question, expressly say: "To such an article, which they viewed as merely declaratory, the under-

signed had no objection, and have offered to accede:" and to that letter the name of Mr. Russell is subscribed.

At the time when the letter from Paris was written, or within a few days thereafter, all the colleagues, whose conduct it so severely censures, in relation to measures, to which Mr. Russell's sanction and signature stood equally pledged with their own, were at Paris, and in habits of almost daily intercourse with him. They little suspected the coloring which he was privately giving, without communication of it to them, of their conduct and opinions, to the heads of the government, by whom he and they had been jointly employed in a public trust of transcendent importance; or the uses to which this denunciation of them was afterwards to be turned.

Had the existence of this letter from Paris been, at the time when it was written, known to the majority of the mission, at whose proposal this offer had been made; to that majority, who believed that the article was perfectly compatible with their instructions, consistent with the argument maintained by the mission, important for securing a very essential portion of the right to the fisheries, and in no wise affecting unfavorably the interest of any section of the Union, they would doubtless have felt that its contents called much more forcibly upon them, to justify to their own government themselves and their motives for making that proposal, than Mr. Russell could be called upon to justify himself for merely having been in the minority upon the question whether an article should be proposed, which he did actually concur in proposing, and which the adverse party had not thought worth accepting.

The writer of these remarks is not authorized to speak for his colleagues of the majority; one of whom is now alike beyond the reach of censure and panegyric; and the other, well able, when he shall meet this disclosure, to defend himself. But he believes of them what he affirms of himself, that had they entertained of the projected article, and of the argument maintained by the mission, the sentiments avowed in either of the variations of Mr. Russell's letter from Paris, no consideration would have induced them to concur in proposing it, or to subscribe their names to a paper declaring that they had no objection to it.

Still less, if possible, would they have thought it reconcileable with their duty to their country, had they entertained those sentiments, to have subscribed, on the 25th of December, 1814, the joint letter of the Mission to the Secretary of State, already communicated to Congress, and on the same day to have written the separate and secret letter, fore-announcing that of 11th of February, 1815, from Paris.

Besides the memorable variation between the original and duplicate of the letter of 11th February, 1815, which has been exhibited in parallel passages extracted from them, there are others not less remarkable. In the course of the *duplicate*, the total and unqualified abandonment of the *rights* of the poor fishermen, is compensated by an eloquent panegyric upon their usefulness to the country, their

hardy industry, their magnanimous enterprize, and their patriotic self-devotion. Little of this appears in the original; and that little, in the after-thought of a postscript. Towards the close of the *duplicate*, the spirit of prophecy takes possession of the writer. By his "trust in God, and in the valor of the West," he foresees the victory of General Jackson at New Orleans. He foresees the convention between the United States and Great Britain, of October 1818. In the *original* there is no prophecy—no "trust in God, and in the valor of the West."

With all these varieties the two copies of the letter form an elaborate and deeply meditated dissertation to prove:

1. That the treaty between the United States and Great Britain, of 1783, the treaty which upon its face is a treaty of independence, a treaty of boundaries, a treaty of partition, as well as a treaty of peace—was, in his estimation, all his signatures at Ghent to the contrary notwithstanding, a mere treaty of peace, totally abrogated by the war of 1812.
2. That the same treaty, was a treaty *sui generis*, consisting of two parts; one, of rights appertaining to sovereignty and independence; and the other, of special grants and privileges; of which the former were permanent, and the latter abrogated by the war.
3. That the principles assumed, and the argument maintained, by the majority of the Ghent Mission, and to which he had subscribed his name in all the joint communications of the Mission, as well to the British plenipotentiaries as to his own government, were a mass of errors, inconsistencies, and absurdities.
4. That the offer to the British plenipotentiaries of a right to the British to navigate the Mississippi, was, in the opinion of the majority, and also in his own opinion, permitted by our instructions, and in no ways violated them.
5. That the same offer was directly contrary to the construction given by the majority to their instructions, and, as he had always thought, and still thought, contrary to explicit and implicit, express and unqualified prohibitions, in those instructions.
6. That the offer of the right to navigate the Mississippi, as an equivalent for the fisheries, was the offer of an excessive price, for a privilege worth little or nothing.
7. That, extravagant as that offer (to which he signed a letter declaring that he had no objection) was, it was rejected by the adverse party; because they thought it an offer of the dead for the living; or because, they hoped to get still more for the worthless privilege; or, because, they expected to take and keep Louisiana, and thus get the navigation of the Mississippi for nothing; or, because, they were blinded by the unhappy passions incident to war; but that he *foresaw*, that they would HEREAFTER grant all the valuable part of the same worthless privilege, for nothing.
8. That there was no sort of relation whatsoever between a privilege for the British to navigate in waters within our jurisdiction,

and a privilege for us to fish in waters within British jurisdiction; because one of these privileges had been stipulated in the *third*, and the other in the *eighth* article, of the treaty of 1783; and therefore, that it was absurd to offer one as an equivalent for the other.

9. Lastly, that the offer to the British of the right to navigate the Mississippi was pregnant with mischief to the western country —to "*the unoffending citizens* of an immense tract of territory, "not at all, or but faintly benefitted by the fishing privilege, "merely to provide for the doubtful accommodation of a few "fishermen, annually decreasing in number, in a remote quar- "ter, and entirely exempt from the danger."

Upon most of these points, so far as argument is concerned, it might, upon the mere statement of Mr. Russell's positions, be left to his ingenuity to refute itself. His first and second points, with regard to the character of the treaty of 1783, considered as doctrines, are evidently inconsistent with each other. The variation between the original and duplicate of his letter upon the fourth and fifth points, is something more than inconsistency; something more even than self-contradiction. The whole letter is a laborious tissue of misrepresentation of every part of its subject; of the conduct and sentiments of his colleagues who constituted the majority of the mission; and of his own conduct and sentiments in opposition to them. It substantially charges them with deliberate and wanton violation, in the face of his solemn warning, of the positive and unequivocal instructions of their government, for the sake of sacrificing the interest, the peace, the comfortable existence of the whole western country, to the doubtful accommodation of a few eastern fishermen, and in support of a claim to which they had not the shadow of a right.

I say it is a tissue of misrepresentations—of the subject, of the conduct and sentiments of his colleagues, and of his own conduct in opposition to them.

1. Of the subject. Mr. Russell represents the offer of an article, granting to the British the right of navigating the Mississippi, as an equivalent for the grant of a fishing privilege in British jurisdiction, as if it had been a separate and insulated proposal of new grants, in a distinct article, without reference to the state of the negotiation at the time when it was made, to the occasion upon which it was made, and to the considerations by which it was induced.

Mr. Russell represents the article as if offered under circumstances, when it was by both parties acknowledged that the British had no claim to territory, *to the Mississippi*. This is a direct and positive perversion of the whole statement of the subject.

Mr. Russell represents the offer of a right to navigate the Mississippi, and of access to it from the British territories as general and unqualified; as giving access to British traders and British emissaries to every part of the western country, and to intercourse with all our Indians. The proposal was, of a limited access from a single

spot of the British territory, to the river, for the purpose of navigating the river with merchandise, upon which the duties of import should have been first paid.

In consequence of these misrepresentations, Mr. Russell brings in British smugglers, British emissaries, and all the horrors of Indian warfare, upon the western country, as necessary inferences from a proposal, not that which was made, but that into which it is distorted by his misrepresentations.

2. Of the conduct and sentiments of his colleagues.

Mr. Russell represents his colleagues as having deliberately, and against his declared opinion, violated both the letter and the spirit of their most explicit and implicit, express and unequivocal, instructions from their own government. He charges them, also, with having violated their own construction of their instructions.

It is true that, in another reading of the same letter, purporting to have been written on the same day, he acquits them entirely of all violation of their instructions, and declares he had always been of that opinion.

Mr. Russell ascribes to his colleagues opinions which they never entertained, arguments which they never advanced, and doctrines which they not only would disclaim with indignation, but diametrically opposite to those which they did maintain. He imputes to them the opinion that the independence of the United States was derived only from the treaty of peace of 1783, and that all the rights stipulated by it, in favor of the people of the United States, were mere *grants* from the crown of England. This was the British doctrine, which Mr. Russell well knew his colleagues rejected with disdain, but which he himself countenances by maintaining the British side of the argument, that the fishing liberty, stipulated in the treaty of 1783, was abrogated *ipso facto* by the war of 1812.

He imputes to them, as an inconsistency with their other imputed opinion, that they rested their claim to the fishing privilege upon *prescription;* and this notwithstanding all the light of learning with which he had irradiated them, from the lucid sources of "*jus meræ facultatis;*" of "*ultra memoriam hominis;*" of "*nullum tempus occurrit regi;*" and of the imprescriptible character of fisheries. Of all this not one word was said at Ghent. The majority never asserted the right of the fishing privilege, as resting upon the right of prescription; nor had they ever the benefit of Mr. Russell's learned labors to prove that it was not applicable to the subject.

3. Of his own conduct and sentiments, in opposition to those of the majorityof his colleagues.

The parallel passages from the original and duplicate of his letter remove all necessity for further proof of this. But that is not all. Throughout the letter, Mr. Russell holds himself forth as having been the intrepid and inflexible asserter and supporter of the rights of the West, against the majority of his colleagues; as having, by a painful struggle, obtained a conquest over his early prejudices and local partialities, and enlarged his intellectual faculties and patriot-

ism, to become the champion and vindicator of the interests of the West. Of all this, nothing was made known to his colleagues of the majority at Ghent. The article to which his letter conjures up such formidable objections was drawn up and proposed to the mission by a distinguished citizen of the western country. It was opposed by another citizen from the same section of the Union. Of the five members of the mission Mr. Russell was the person who took the least part in the discussion. He neither objected that it was contrary to our instructions, nor depreciated the value of the fisheries; nor painted the dangers of British smugglers and emissaries, or the horrors of Indian warfare, as impending over the *unoffending* inhabitants of the western country from the measure. He gave, it may be, a silent vote against proposing the article; and, when it was determined by the majority to propose it, concurred in proposing it; was present at the conferences with the British plenipotentiaries when it was proposed to and discussed with them, and heard from them the reasons which induced them to reject it, which reasons did not embrace one of those which he has so severely tasked his sagacity to devise for them; but, plainly and simply, because they said it was clogged with conditions which made it of no value to them, or, at least, not of value to induce them to concede that our fishing liberties, within British jurisdiction, should continue, in return: and he afterwards signed a letter to the British plenipotentiaries, together with all the other members of the mission, declaring that they had *no objection* to the article, considering it as merely declaratory.

If Mr. Russell had entertained at Ghent the sentiments relating to this measure, disclosed in the duplicate, or even those avowed in the original of his letter, he is to account for it to his conscience and his country, that he ever assented to it at all. He was not under the slightest obligation to assent to it. As an act of the majority, it would have been equally valid without his concurrence or signature as with it. More than one member of the Mission, and on more than one occasion, signified his determination to decline signing the treaty, if particular measures, proposed by the British plenipotentiaries, should be acceded to by the majority. A refusal by any one member to concur in any measure upon which a majority were agreed, would at least have induced the majority to re-consider their vote, and in all probability to have cancelled it. In a case of such transcendent importance as this, of high interests, generous policy, humane and tender sympathies, wantonly to be sacrificed, in defiance of the most express and unqualified instructions, to the paltry purpose of accommodating a few fishermen, destitute of all claim of right, how could Mr. Russell sit patiently in conference with the British plenipotentiaries, and join in the offer of it to them? How could he subscribe his name to a letter declaring he had no objection to it? Had Mr. Russell dissented from this measure of the majority, and they had still persisted in it, he would doubtless have reported to his own government the reasons of his dissent; his colleagues of the majority would in like manner have reported theirs; and the responsibility of

each party would have rested, as it ought, upon their respective acts. To concur individually in the measure; to sign all the papers approving it; and then secretly to write to the government a letter of censure, reproach, and misrepresentation, against it and those who proposed it—was indeed a shorter and easier process.

Mr. Russell, therefore, did not entertain or express at Ghent, the opinions disclosed in his letter from Paris, and has been as unfortunate in the representation of his own conduct and sentiments, as in that of the subject of his letter, and in that of the sentiments and conduct of his colleagues.

But there is a point of view more important than any regard to his conduct and sentiments, in which his letter is yet to be considered. If there were any force in his argument against the measures, or any correctness in his statements against his colleagues, it is proper they should be sifted and examined.

Let us, therefore, examine the proposed article in both its parts:—first, as relates to the fishing liberty for us; and secondly, to the navigation of the Mississippi by the British. And, in order to ascertain the propriety of the principles assumed, and of the measures adopted by the American commissioners, as now in question, let us premise the state of things as they existed, and the circumstances under which this proposal was offered.

By the third article of the treaty of 1783, it was agreed, that the people of the United States should *continue* to enjoy the fisheries of Newfoundland and the Bay of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries *used at any time theretofore to fish;* and, also, that they should have certain fishing liberties, on all the fishing coast within the British jurisdiction of Nova Scotia, Magdalen Islands, and Labrador. The title by which the United States held those fishing rights and liberties was the same. It was the possessory use of the right, or, in Mr. Russell's more learned phrase, of the "*jus meræ facultatis,*" at any time theretofore as British subjects, and the acknowledgment by Great Britain of its *continuance* in the people of the United States after the treaty of separation. It was a national right; and, therefore, as much a *right,* though not so immediate an interest, to the people of Ohio and Kentucky, aye and to the people of Louisiana, after they became a part of the people of the United States, as it was to the people of Massachusetts and Maine. The latter had always used it, since they had been British colonists, and the coasts had been in British dominions. But, as the settlement of the colonies themselves had not been of time immemorial, it was not, and never was pretended to be, a title by prescription.

Such was the title of the United States to the fisheries—prior possession, and acknowledgment by the treaty of 1783.

The commissioners at Ghent had received from the Secretary of State a letter of instruction, dated 25th of June, 1814, containing the following passage:

"Information has been received from a quarter deserving of atten-

"tion, that the late events in France have produced such an effect on "the British government, as to make it probable that a demand will "be made at Gothenburg, to *surrender our right to the fisheries*, to "abandon all trade beyond the Cape of Good Hope, and to cede Lou-"isiana to Spain. We cannot believe that such a demand will be "made; should it be, you will of course, treat it as it deserves. These "rights must not be brought into discussion. If insisted on, your "negotiations will cease."

Now, it is very true that a majority of the commissioners did construe these instructions to mean, that the right to the fisheries was *not to be surrendered*. They did not subtilize, and refine, and inquire, whether they could not surrender a part, and yet not bring the right into discussion; whether we might not give up a liberty, and yet retain a right; or whether it was an *argument*, or an *agreement*, that was forbidden. They understood, that the fisheries *were not to be surrendered*.

The demand made by the British government was first advanced in an artful and ensnaring form. It was by assuming the principle that the right had been forfeited by the war, and by notifying the American Commissioners, as they did at the first conference, "that "the British government did not intend to *grant* to the United "States, gratuitously, the privileges formerly granted by treaty to "them, of fishing within the limits of the British sovereignty, and of "using the shores of the British territories for purposes connected "with the fisheries." Now to obtain the *surrender* of thus much of the fisheries, all that the British plenipotentiaries could possibly desire, was, that the American commissioners should acquiesce in the principle, that the treaty of 1783 was abrogated by the war. Assent to this principle would have been surrender of the right. Mr. Russell, if we can make any thing of his argument, would have *assented*, and surrendered, and comforted himself with the reflection, that, as the right had not been brought into discussion, the instructions would not have been violated.

But, however clearly he expresses this opinion in his letter, and however painfully he endeavors to fortify it by argument, he never did disclose it to the same extent at Ghent. The only way in which it was possible to meet the notification of the British plenipotentiaries, without *surrendering* the rights which it jeopardized, was by denying the principle upon which it was founded. This was done by asserting the principle, that the treaty of independence of 1783 was of that class of treaties, and the right in question of the character, which are not abrogated by a subsequent war; that the notification of the intention of the British government not to *renew the grant*, could not affect the right of the United States, which had not been forfeited by the war; and that, considering it as still in force, the United States needed no new grant from Great Britain to revive, nor any new article to confirm it.

This principle I willingly admit was assumed and advanced by the American commissioners at my suggestion. I believed it not only

indispensably necessary to meet the insidious form in which the British demand of surrender had been put forth; but sound in itself, and maintainable on the most enlarged, humane, and generous principles of international law. It was asserted and maintained by the American plenipotentiaries at Ghent; and if, in the judgment of Mr. Russell, it suffered the fishing liberty to be brought into discussion, at least it did not *surrender the right.*

It was not acceded to by the British plenipotentiaries. Each party adhered to its asserted principle; and the treaty was concluded without settling the interest involved in it. Since that time, and after the original of Mr. Russell's letter of the 11th February, 1815, was written, the principle asserted by the American plenipotentiaries at Ghent, has been still asserted and maintained through two long and arduous negotiations with Great Britain, and has passed the ordeal of minds of no inferior ability. It has terminated in a new and satisfactory arrangement of the great interest connected with it, and in a substantial admission of the principle asserted by the American plenipotentiaries at Ghent; by that convention of 20th October, 1818, which, according to the *duplicate* of Mr. Russell's letter, he foresaw in February, 1815, even while writing his learned dissertation against the right which he had been instructed not to surrender, and the only principle by which it could be defended.

At this time, and after all the controversy through which the American principle was destined to pass, and has passed, I, without hesitation, reassert, in the face of my country, the principle, which, in defence of the fishing liberties of this nation, was, at my suggestion, asserted by the American plenipotentiaries at Ghent.

I deem this reassertion of it the more important, because, by the publication at this time of Mr. Russell's letter, that plenipotentiary has not only disclaimed all his share in the first assertion of it, but has brought to bear all the faculties of his mind against it, while the American side of the argument, and the reasons by which it has been supported against arguments coinciding much with those of his letter, but advanced by British reasoners, are not before the public. The principle is yet important to great interests, and to the future welfare of this country.

When first suggested, it obtained the unanimous assent of the American Mission. In their note of 10th November, 1814, to the British plenipotentiaries, which accompanied their first projet of a treaty, they said, "in answer to the declaration made by the British "plenipotentiaries respecting the fisheries, the undersigned, referring "to what passed in the conference of the 9th August, can only state, "that they are not authorized to bring into discussion any of the "rights or liberties which the United States have heretofore enjoyed in relation thereto. From their nature, and from the peculiar "character of the treaty of 1783, by which they were recognized, no "further stipulation has been deemed necessary by the government "of the United States, to entitle them to the full enjoyment of all of "them." This paragraph was drawn up, and proposed to the mission

by the member with whom Mr. Russell concurred in objecting to the proposal of an article confirmative of the fishing liberties and navigation of the Mississippi, and as a substitute for it. The Mission unanimously accepted it: and the fishing liberties being thus secured from *surrender*, no article relating to them or to the Mississippi was inserted in the projet sent to the British Mission.

But one of the objects of the negotiation was to settle the boundary between the United States and the British dominions, from the northwest corner of the Lake of the Woods westward. That boundary, by the treaty of 1783, had been stipulated to be, "from the most northwestern point of the Lake of the Woods on a *due west* course *to the river* Mississippi; and thence, down the middle of the Mississippi, to the thirty-first degree of north latitude;" while, by the eighth article of the same treaty, it had been stipulated, that "the navigation of the river Mississippi, from its source to the ocean, should forever remain free and open to the subjects of Great Britain and the citizens of the United States."

The right of Great Britain and of the United States, at the time of the treaty of 1783, to make this stipulation with regard to the navigation of the Mississippi, might be, and afterwards was, questioned by Spain, then a possessor also of territories upon the same river, and indeed of both its banks from its mouth, to a higher latitude than that thus stipulated as the boundary of the United States. But, as, between Great Britain and the United States, there could, at the time of the conclusion of the treaty of 1783, be no possible question of the right of both to make the stipulation, the boundary line itself being in substance a concession of territory to the river, and down its middle to latitude 31, which Great Britain was undoubtedly competent to make, and the United States to receive. Now, the United States having received the cession and the boundary, with the right to navigate the river, with the express condition that the navigation of the river should forever remain free and open to British subjects, and having expressly assented to that condition, without considering it as infringing upon any right of Spain; they could not, consistently with good faith, by acquiring afterwards the right of Spain, allege that this acquisition absolved them from the obligation of the prior engagement with Great Britain. There is, indeed, in Mr. Russell's letter, a hesitating argument to that effect; the odious character of which is but flimsily veiled by its subtlety. The United States had always insisted upon their right of navigating the Mississippi, by force of the article of the treaty of 1783, and had obtained the acknowledgment of that right from Spain herself, many years before they acquired her territorial right by the purchase of Louisiana. With what front then could an American negotiator have said, after the latter period, to a British minister:—You have no right to the navigation of the Mississippi, for although, on receiving from you a part of the river, we expressly stipulated that you should forever enjoy a right to its navigation, yet that engagement was a fraud upon the rights of Spain; and although, long before we had acquired these rights of Spain, she had acknow-

ledged *our* right to navigate the river, founded upon this very stipulation of which you now claim the benefit, yet I will now not acknowledge your right founded on the same stipulation. Spain, no party to the compact between you and me, after controverting it as infringing upon her rights, finally acceded to its beneficial application to us, as compatible with those rights. But we, who made the compact with you, having now acquired the adverse rights of Spain, will not allow you the beneficial use of our own compact. We first swindled and then bullied Spain out of her rights, by this eighth article of the treaty of 1783; and now, having acquired ourselves those rights, we plead them for holding our engagement with you for a dead letter.

This, and nothing more or less than this, is the substance of Mr. Russell's argument to show, that *perhaps* the United States were, by the acquisition of Louisiana, absolved from the obligation of the 8th article of the treaty of 1783, even before the war of 1812.

But, says Mr. Russell, the treaty of 1783 was made, under a belief of both parties, that it would leave Great Britain with a portion of territory upon the Mississippi, and *therefore* entitled to claim the right of navigating the river. But the boundary line of the treaty of 1783, was a line from the northwesternmost point of the Lake of the Woods, due west *to the Mississippi.* And after the treaty of 1783, but before the war of 1812, it had been found that a line due west, from the northwest corner of the Lake of the Woods, did not strike the Mississippi. Therefore, continues Mr. Russell, Great Britain could claim no *territorial* right to the navigation of the river; and therefore had no longer any claim to the benefit of the eighth article of the treaty of 1783.

To this it may be replied: First, that the British claim of right to navigate the Mississippi, was not founded solely on the territory which it was believed they would retain upon that river, by the boundary west from the Lake of the Woods. The eighth article of the treaty of 1783, was a separate and distinct article, stipulating the right of both nations to navigate the river, without any reference to boundary or to territory. But the boundary, the territory, and the right to navigate the river, were all, in that treaty, cessions from Great Britain to the United States. And, had it even been the intention of both parties, that Britain should cede the *whole* of her territories on the Mississippi, it was yet competent to her to reserve the right of navigating the river for her subjects, in common with the people of the United States, and competent for the United States to accept the cession, subject to that reservation. They did so, by the eighth article of the treaty. And in this point of view, the British right of navigating the river, within the American territory, was precisely similar to the American liberty of fishing within the British territorial jurisdiction, reserved by the third article of the same treaty.

But, secondly, the discovery that a line due west, from the northwesternmost corner of the Lake of the Woods, would not strike the

Mississippi, had *not* deprived Great Britain of all claim to territory upon that river, at the time of the negotiation at Ghent. The line described in the treaty was, from the northwesternmost point of the Lake of the Woods, "on a *due west* course to the river *Mississippi.*" When it was found that the line *due west* did not touch the Mississippi, this boundary was annulled by the fact. It remained an unsettled boundary, to be adjusted by a new agreement. For this adjustment, the moral obligation of the parties was to adopt such a line as should approximate as near as possible to the intentions of both parties in agreeing upon the line for which it was to be substituted. For ascertaining this line, if the United States were entitled to the benefit of the words "on a due west course," Britain was equally entitled to the benefit of the words "to the river Mississippi." Both the demands stood on the same grounds. Before the war of 1812, three abortive attempts had been made by the parties to adjust this boundary. The first was by the treaty of 1794, when it was already conjectured, but not ascertained, that the line due west from the lake would not intersect the Mississippi. By the fourth article of the treaty of 1794, it was agreed that a joint survey should be made to ascertain the fact; and that, if, on the result of that survey, it should appear, that the west line would not intersect the river, the parties would proceed, "by amicable negotiation, to regulate the "boundary line in that quarter, according to justice and mutual "convenience, and in conformity to the intent of the treaty of 1783." This survey was never made. The second attempt to adjust the line was by the convention signed on the 12th of May, 1803, by Mr. King and Lord Hawkesbury; the fifth article of which, after reciting the same uncertainty, whether a line drawn due west from the Lake of the Woods would intersect the Mississippi, provided that, instead of the said line, the boundary of the United States, in that quarter, should, and was declared to be, *the shortest line which could be drawn between the northwest point of the Lake of the Woods, and the nearest source of the river Mississippi.* This convention not having been ratified, the third attempt at adjustment had been made in the negotiation of Mr. Monroe and Mr. Pinkney, of 1806 and 1807; at which an article had been proposed and agreed to, that the line should be from the most northwestern point of the Lake of the Woods, to the 49th parallel of latitude, and from that point, due west, along and with the said parallel, *as far as the respective territories extend in that quarter.* And with that article was coupled another, as follows:

"It is agreed by the United States, that his Majesty's subjects "shall have, at all times, free access from his Majesty's aforesaid "territories, by land or inland navigation, into the aforesaid territo-"ries of the United States, to the river Mississippi, with the goods "and effects of his Majesty's said subjects, in order to enjoy the bene-"fit of the navigation of that river, as secured to them by the treaty "of peace, between his Majesty and the United States, and also by "the third article of the treaty of amity, commerce, and navigation, "of 1794. And it is further agreed, that his Majesty's subjects

"shall, in like manner, and at all times, have free access to all the "waters and rivers falling into the western side of the river Missis- "sippi, and to the navigation of the said river."

This negotiation was suspended, by a change of the British Ministry, and was not afterwards resumed. But the following observations upon the two articles, contained in a letter from Mr. Madison to Messrs. Monroe and Pinkney, of 30th July, 1807, show how far Mr. Jefferson, then President of the United States, had authorized those commissioners to accede to them.

"Access by land or inland navigation from the British territories, "through the territory of the United States to the river Mississippi, "is not to be allowed to British subjects, with their goods or ef- "fects, unless such articles shall have paid all the duties, and be "within all the custom-house regulations, applicable to goods and "effects of citizens of the United States. An access through the "territory of the United States to the waters running into the *west- "ern side* of the Mississippi, is under no modification whatever to "be stipulated to British subjects."

Such then was the state of things in relation to this interest in question, at the time when the war of 1812 broke out; and at the negotiation of Ghent, the same question of boundary again occurred for adjustment. The right of the British to a line from the Lake of the Woods *to the Mississippi*, had never been renounced: and, at the last negotiation between the parties, four years after the United States had acquired Louisiana, and with it all the Spanish rights upon the Mississippi, the British government, in assenting to take the 49th parallel of latitude, as a substitute for the line *to the Mississippi*, had expressly re-stipulated for the free navigation of the river, and free access to it from our territories; to both of which Messrs. Monroe and Pinkney had been explicitly authorized to accede.

Under this state of things, it had never been admitted by the British, nor could we maintain against them by argument, even that the Mississippi river was within our *exclusive* jurisdiction: for so long as they had a right by treaty to a line of boundary to that river, and consequently to territory upon it, they also had jurisdiction upon it; nor, consequently, could the instructions of 15th April, 1813, had they even been still in full force, have restricted the American commissioners from making or receiving a proposition, for continuing to the British the right of navigating the river, which they had enjoyed, without ever using it, from the time of the treaty of 1783, when the United States had received, by cession from them, the right of enjoying it jointly with them.

Bearing in mind this state of things, we are also to remember, that, in the conference of 19th August, 1814, and in the letter of that date, from the British to the American plenipotentiaries, (see Wait's State Papers, vol. 9, pp. 334 and 338,) they had claimed a new northwestern boundary line from *Lake Superior* to the Mississippi, and the free navigation of that river. To this the American commissioners had answered on the 24th of August, 1814: The undersigned

perceive that the British government "propose, without purpose spe-"cifically alleged, to draw the boundary line westward, not from the "Lake of the Woods, *as it now is*, but from Lake Superior:" and they objected to it, as demanding a cession of territory.

The British plenipotentiaries, on the 4th September, 1814, replied:

"As the necessity for fixing some boundary for the northwestern frontier has been mutually acknowledged, a proposal for a discussion on that subject cannot be considered as a demand for a cession of territory, unless the United States are prepared to assert that there is no limit to their territories in that direction, and that, availing themselves of the geographical error upon which that part of the treaty of 1783 was founded, they will acknowledge no boundary whatever, then, unquestionably, any proposition to fix one, be it what it may, must be considered as demanding a large cession of territory from the United States.

"Is the American government prepared to assert such an unlimited right, so contrary to the evident intention of the treaty itself? Or, is his Majesty's government to understand that the American plenipotentiaries are willing to acknowledge the boundary from the Lake of the Woods *to the Mississippi*, (the arrangement made by a convention in 1803, but not ratified,) as that by which their government is ready to abide?

"The British plenipotentiaries are instructed to accept favorably such a proposition, or to discuss any other line of boundary which may be submitted for consideration."

I stop here for a moment to observe how instinctively, if the expression may be allowed, both the parties in this correspondence recur to the treaty of 1783, with a consciousness that it was yet in full force, as an appeal for either in support of its claims. The expression in the above American note, applied to the boundary, "as it now is;" the reference of the British note to the geographical error in the treaty of 1783, and their willingness to discuss the arrangement of 1803, (the shortest line from the Lake of the Woods to the Mississippi,) both acknowledge the treaty of 1783 as the basis of all proposition and all argument, and as being yet in force for every thing which should not be otherwise provided for in the new treaty.

In their note of 21st October, 1814, the British commissioners said:

"On the subject of the fisheries, the undersigned expressed with so much frankness, at the conference already referred to, the views of their government, that they consider any further observations on that topic as unnecessary at the present time.

"On the question of the boundary between the dominions of his Majesty and those of the United States, the undersigned are led to expect, from the discussion which this subject has already undergone, that the northwestern boundary, from the Lake of the Woods to the Mississippi, (the intended arrangement of 1803,) will be admitted without objection."

Thus stood the parties and the subject, when, on the 10th of November, 1814, the American plenipotentiaries sent the first projet of

a treaty to the British commissioners. It contained no article relating either to the fisheries or to the Mississippi; but, in the note which accompanied it, to meet the notification twice given on the part of the British government, that they did not intend to grant, without equivalent, the liberty of fishing within the British jurisdiction, the counter-notification, already noticed, was introduced, informing them that the American government did not consider the fishing liberties as forfeited by the war, and that they would remain in full force without needing any new grant to confirm them. At this stage of the negotiation, therefore, the American plenipotentiaries did actually pursue the first of those three *other* ways of proceeding, which Mr. Russell, in the postscript to the *original* of his letter of 11th February, 1815, says they might have taken, and to which he adds that he would have assented, namely, to contend for the continuance of the fishing privilege, notwithstanding the war, without saying any thing about the navigation of the Mississippi. It cannot but be surprising to find Mr. Russell, within three months after these events, writing privately to the Secretary of State, stating this as a course *other* than that which we had pursued, and that he would have assented to it if we had; when it was the very course that we did pursue, and he had assented to it. We did contend, not for the *indestructibility*, as Mr. Russell terms it, of the treaty of 1783, but that, from its peculiar character, it was not abrogated by the mere occurrence of war. We never maintained that the treaty of 1783 was indestructible, or imperishable, but that the rights, liberties, and boundaries, acknowledged by it as belonging to us, were not abrogated by mere war. We never doubted, for example, that we might be compelled to stipulate a new boundary; but that would have been, not as a consequence of mere war, but the effect of conquest, resulting from war. The difference between our principle and that of the British, was, that they, considering the rights acknowledged as belonging to us by the treaty, as mere *grants*, held them as annulled by war alone; while we, viewing them as rights existing before the treaty, and only acknowledged by it, could not admit them to be forfeited without our own assent. Britain might have recovered them by conquest; but that could not be consummated without our acquiescence, tacit or expressed. Mr. Russell, who assented to our principle, and asserted it with us, now says he always thought the British principle was the true one. If the American mission, at that trying time, had acted upon it, he never would have prophesied the convention of October, 1818.

The eighth article of the projet of a treaty, sent by the American commissioners on the 10th of November, offered the boundary which had been proposed in 1807, a line north or south to latitude 49, and westward, on that parallel, as far as the territories of the two countries extended; and said nothing about the Mississippi. But when, on the 26th of November, the British plenipotentiaries returned the projet, with their proposed amendments, they accepted the 49th parallel, westward, from the Lake of the Woods, for the boundary, but

with the following addition to the article: "And it is further agreed, "the subjects of his Britannic Majesty shall at all times have access, "from his Britannic Majesty's territories, by land or inland navi- "gation, into the aforesaid territories of the United States to the "river Mississippi, with their goods, effects, and merchandise, and "that his Britannic Majesty's subjects shall have and enjoy the free "navigation of the said river."

It was to meet this demand that, at the conference of 1st December, the American plenipotentiaries proposed to strike out all those words, and to substitute the amendment contained in the protocol of that conference, already communicated to Congress. It was thus that the relation which Mr. Russell, within three months afterwards, so singularly professes not to perceive between the fishing liberties and the Mississippi navigation, not only naturally arose, but forced itself upon the American plenipotentiaries. They had saved the fishing liberties from *surrender*, as they had been specially instructed to do, by asserting that the treaty of 1783 had not been abrogated *ipso facto* by the war. Two days before receiving this counter projet, they had received from Washington a fresh instruction, expressly authorizing them to conclude a treaty on the basis of the *status ante bellum*, including, of course, the fishing liberty on one side, and the navigation of the Mississippi on the other. They could not, therefore, consistently with those instructions, either reject this British demand, or abandon to surrender the fisheries. They offered, therefore, the amendment containing the renewed acknowledgment of both; and they said to the British plenipotentiaries—We have told you that we consider all the rights, secured to us by the treaty of 1783, as still in force. What we demand, if you assent to it, we must yield in return. If, as we say, the treaty of 1783 is yet in force, you have the right of navigating the Mississippi, and we have the fishing rights and liberties unimpaired. If, as you say, the treaty is abrogated, how can you claim the right of navigating the Mississippi? You must admit the one, or not demand the other. We offer you the alternative of a new stipulated admission of both, or a total omission of both. We offer you in application the choice of our principle or of your own.

The British commissioners took the proposal for reference to their government, by whom it was immediately rejected. But, to show how anxious they were to obtain from us the surrender of our fishing liberties, and how cheaply they valued the right of navigating the Mississippi, as one of the last expedients of negotiation, they offered us an article agreeing that, after the peace, the parties would further negotiate "respecting the terms, conditions, and regulations, "under which the inhabitants of the United States" should again enjoy the fishing liberties, "*in consideration of a fair equivalent*, to be "agreed upon between his Majesty and the said United States, and "granted by the said United States for such liberty aforesaid;" and a reciprocal stipulation with regard to the British right of navigating the Mississippi. As the parties after the peace would have been

just as competent further to negotiate on these points, if so disposed, without this article as with it, its only effect would have been a mutual *surrender*, on the American side, of the fishing liberties, and on the British side, of the right to navigate the Mississippi; with this difference, that we should have surrendered, in direct violation of our instructions, a real, existing, practical liberty, which, even in the war of our independence, had been deemed of the highest importance, and at its close had been, with infinite difficulty, secured; a liberty, of which that portion of the Union, whom it immediately concerns, had been, from the time of the treaty of 1783, in the constant, real, and useful possession; while the British would have surrendered absolutely nothing—a right which, by inference from their own principle, was abrogated by the war; a right which, under the treaty of 1783, they had enjoyed for thirty years, without ever using it, and which, in all human probability, never would have been of more beneficial use to the British nation, than would be to the people of the United States the right of navigating the Bridgewater canal, or the Danube.

There was certainly an inconsistency on the part of the British Government, in claiming a right to navigate the Mississippi, while asserting that the treaty of 1783 was abrogated by the war: and when pressed by us to say on what principle they claimed it without offering for it an equivalent, they said the equivalent was, their acceptance of the 49th parallel of latitude for the northwestern boundary, instead of the line, to which they were entitled by the treaty of 1783, *to the Mississippi.* As they gave up the line to the river, they said they had a right to reserve its navigation, and access to it for that purpose. They had said the same thing to Messrs. Monroe and Pinkney in 1807; and the principle had been assented to by them, with the subsequent sanction of President Jefferson. Still the whole argument leaned upon the continuing validity of the treaty of 1783; for the boundary line, as well as the Mississippi navigation, was null and void, if that treaty was abrogated. We replied to them, that, although we were willing to agree to the 49th parallel of latitude for the boundary, and thought it of mutual interest that the line should be fixed, we were yet not tenacious of it: we could not agree to their article of mutual surrender, with a pledge of future negotiation; but we would consent to omit the boundary article itself, and leave the whole subject for future adjustment. And to this they finally agreed.

The advantage of this to us was, that we came out of the war, without having *surrendered* the fishing liberties, as they had been enjoyed before, and stipulated at the treaty of 1783. We were still free to maintain, and we did, after the conclusion of the peace, effectively maintain, the existence of the right, notwithstanding the intervening war. The British government still insisted that the treaty of 1783 was abrogated by the war: but when called upon to show, why then they treated the United States as an independent nation, and why in the treaty of Ghent they had agreed to four several commissions to ascertain boundaries, "according to the true intent and

meaning of that same treaty of 1783," they finally answered, that they considered our independence, and the boundaries, as existing facts, like those of other nations, without reference to their origin. This left nothing but a dispute about words; for we applied the same principle to the fishing liberties of the third article, which they conceded with regard to the acknowledgement of independence and to the boundaries. They considered the whole treaty of 1783 as a British grant. We considered it as a British acknowledgment. They never drew the nice distinction, attempted by Mr. Russell, between a perishable and imperishable part of the treaty, or admitted that it consisted of rights which they could not, and of privileges which they could resume without our consent. By their principle, they might have resumed the whole: and when they notified to us at Ghent, that they did not intend to *grant* us again the fishing liberties within their exclusive jurisdiction, but that they meant to leave us the right of fishing in the open sea, they gave us distinctly enough to understand that they were treating us with magnanimity, in not resuming the whole. There was in truth no difference in the principle. And Mr. Russell, in consulting his Vattel, to find that fishing rights were *jura meræ facultatis*, and therefore imprescriptible, ought to have seen what that writer very explicitly says, not that they were rights which could not be *acquired* by long usage, but rights which could not be *lost* by non user. He ought also to have seen, what Vattel no less clearly lays down, that, although a nation may appropriate to itself a fishery upon its own coasts and within its own jurisdiction, yet, "if it has once acknowledged the common right of "other nations to come and fish there, it can no longer exclude them "from it; it has left that fishery in its primitive freedom, at least "with respect to those who have been in possession of it." And he cites the herring fishery on the coast of England, as being common to them with other nations, because they had not appropriated it to themselves, *from the beginning*.

In perusing the letter of Mr. Russell, whether original or duplicate, I cannot but reflect with gratitude to Providence upon the slender thread by which the rights of this nation to the fisheries were in fact suspended at the negotiation of Ghent. Positive and precise as our instructions were, not to *surrender* them, if Mr. Russell had disclosed at Ghent the opinions avowed in either version of his letter, if he had so broadly asserted and so pertinaciously maintained his conviction of the utter worthlessness of the fisheries, in comparison with the exclusion of the British from a mere phantom of right to navigate the Mississippi, which they had always enjoyed without use; without benefit to themselves or injury to us; if he had so learnedly disserted to prove that the Treaty of 1783 was totally and absolutely abrogated by the war; if he had so thoroughly inverted the real state of the question, and painted it in such glowing colors as a sacrifice of deep, real interests of the West to a shallow, imaginary interest of the East; if, with that perseverance which is the test of sincerity, he had refused to sign the proposal determined up-

on by the majority of his colleagues, and given them notice that he should transmit to his government the vindication of himself and his motives for differing from them; and, above all, if another mind could have been found in the mission, capable of concurring with him in those views, it would at least have required of the majority an inflexibility of fortitude, beyond that of any trial by which they were visited to have persevered in their proposal. Had they concurred with him in his opinion of the total abrogation of the Treaty of 1783, by the mere fact of the war, the fisheries in the Gulf of St. Lawrence, on the coast of Labrador, and to an indefinite extent from the Island of Newfoundland, were lost to the United States forever, or at least till the indignant energy of the nation should have recovered, by conquest, the rights thus surrendered to usurpation. In notifying to us that the British Government intended not to renew the grant of the fisheries within British jurisdiction, they had not said what extent they meant to give to these terms. They had said they did not mean to extend it to the right of the fisheries, generally, or *in the open seas*, enjoyed by all other nations. (*See Letter of the American Commissioners to the Secretary of State of* 12*th August*, 1814. *Wait's State Papers, vol.* 9. *p.* 321.) But there was not wanting historical exposition of what Great Britain understood by her exclusive jurisdiction as applied to these fisheries. In the 12th article of the Treaty of Utrecht, by which Nova Scotia or Acadia had been ceded by France to Great Britain, the cession had been made "in such ample manner and form, that the subjects of the "most Christian King shall hereafter be excluded from all kind of "fishing in the said seas, bays, and other places on the coasts of No-"va Scotia; that is to say, on those which lie towards the east, with-"in THIRTY LEAGUES, beginning from the Island commonly called "Sable, inclusively, and thence along towards the southwest."

By the thirteenth article of the same treaty, French subjects were excluded from fishing on any other part of the coast of the Island of Newfoundland, than from Cape Bonavista northward, and then westward to Point Riche. By the fifteenth article of the treaty of Utrecht, between Great Britain and Spain, certain rights of fishing *at* the Island of Newfoundland, had been reserved to the Guipuscoans, and other subjects of Spain; but in the eighteenth article of the treaty of peace between Great Britain and Spain, of 1763, his Catholic Majesty had desisted, "as well for himself as for his successors, from all pretension which he might have formed in favor of the Guipuscoans and other his subjects, to the right of fishing IN THE NEIGHBORHOOD of the island of Newfoundland." In these several cases, it is apparent that Great Britain had asserted and maintained an exclusive and proprietary jurisdiction over the whole fishing grounds of the Grand Bank, as well as on the coast of North America, and in the Gulf of St. Lawrence. Nor are we without subsequent indications of what she would have considered as her exclusive jurisdiction, if a majority of the American commission at Ghent had been as ready as Mr. Russell declares himself to have been, to subscribe to her

doctrine, that all our fishing liberties had lost, by the war, every vestige of right. For, in the summer of 1815, the year after the conclusion of the peace, her armed vessels on the American coast warned all American fishing vessels not to approach within SIXTY MILES of the shores.

It was this incident which led to the negotiations which terminated in the convention of 20th October, 1818. In that instrument the United States have *renounced forever* that part of the fishing liberties which they had enjoyed or claimed in certain parts of the exclusive jurisdiction of British provinces, and within *three marine miles* of the shores. This privilege, without being of much use to our fishermen, had been found very inconvenient to the British: and, in return, we have acquired an enlarged liberty, both of fishing and drying fish, within the other parts of the British jurisdiction, *forever.* The first article of this convention affords a signal testimonial of the correctness of the principle assumed by the American plenipotentiaries at Ghent; for, by accepting the express renunciation of the United States, of a small portion of the privilege in question, and by confirming and enlarging all the remainder of the privilege *forever*, the British government have implicitly acknowledged that the liberties of the third article of the treaty of 1783 had *not* been abrogated by the war, and have given the final stroke to the opposite doctrine of Mr. Russell. That words of perpetuity in a treaty cannot give that character to the engagements it contains, is not indeed a new discovery in diplomatic history; but that truism has as little concern with this question, as the annulment of our treaty of 1778 with France, so aptly applied to it in his letter. It is not, therefore, the word *forever*, in this convention, which will secure to our fishermen, for all time, the liberties stipulated and recognized in it; but it was introduced by our negotiators, and admitted by those of Great Britain, as a warning that we shall never consider the liberties secured to us by it, as abrogated by mere war. They may, if they please, in case of a war, consider the convention as abrogated, but the privileges as existing, without reference to their origin. But they and we, I trust, are forever admonished against the stratagem of demanding a surrender, in the form of notifying a forfeiture. They and we are aware, forever, that nothing but *our own renunciation* can deprive us of the right.

The second article of this same convention affords a demonstration equally decisive, how utterly insignificant and worthless, in the estimation of the British government, was this direfully dreaded navigation of the Mississippi. The article gives us the 49th parallel of latitude for the boundary, and neither the navigation of the river, nor access to it, was even asked in return.

These are conclusive facts—facts appealing not to the prejudices or the jealousies, but to the sound sense and sober judgment of men. Without yielding at all to Mr. Russell, in my "trust in God and the valor of the West," I have an equal trust in the same divine being, as connected with the *justice* of the West. I have the most perfect

and undoubting reliance, that to the clear-sighted intelligence of the western country, the gorgons, and hydras, and chimeras dire, of Mr. Russell's imagination, raised by incantation from the waters of the Mississippi, will sink as they rose, and be seen no more. Without professing to sacrifice any of those ties of duty and allegiance, which bind me to the interests of my native state, I cannot allow Mr. Russell's claim to a special ardor for the welfare of the West, to be superior to my own, or to that of the deceased, or of the living colleague, with whom I concurred, without mental reservation, in the measure subscribed to, and denounced by Mr. Russell. We were all the Ministers of the whole Union; and sure I am, that every member of the majority would have spurned with equal disdain the idea of sacrificing the interest of any one part of the Union to that of any other, and the uncandid purpose of awakening suspicions at the source of their common authority here, against the patriotism and integrity of any one of his colleagues.

I shall conclude with a passing notice of the three alternatives, which, in the postscript to the original of his letter of 11th February, 1815, he says, we might have taken, instead of that which, as he alleges, we, against his will, did do. We had, says he, three other ways of proceeding:

"First. To contend for the indestructibility of the treaty of 1783, "thence inferring the continuance of the fishing privilege, without "saying any thing about the navigation of the Mississippi, which "would have reserved our right of contesting this navigation, on "the grounds I have mentioned, specially applicable to it. Se-"condly, To have considered the treaty at an end, and offered a "reasonable equivalent, *wherever it might be found*, for the fishing "privilege." Thirdly, To have made this liberty a sine qua non "of peace, as embraced by the principle of status ante bellum.

"To either of these propositions" (he adds,) "I would have as-"sented. But I could not consent to grant or revive the British "right to the navigation of the Mississippi."

He could not consent! He did consent: see his name subscribed to the letter from the American to the British Plenipotentiaries of 12th December, 1814—p. 44 of the message of 25th February last.

It is, indeed, painful to remark here, and throughout this letter of Mr. Russell, how little solicitude there is discoverable, to preserve even the appearance of any coincidence between his real sentiments and his professions: half his letter is an argument in form to prove, that the treaty of 1783 was abrogated by the war; yet, he says he would have assented to contend for its *indestructibility*, so long as it applied only to the defence of the fisheries, reserving his special grounds of objection to its being applied to the navigation of the Mississippi. I have shewn, that the indestructibility of the treaty of 1783 never was asserted by any of the American commissioners; but, that the principle that it had not been abrogated by the war, and that none of the rights stipulated and recognized in it, as belonging to the people of the United States, could be abrogated, but by their

own renunciation, was at first assumed in defence of the fisheries only, and without saying any thing of the Mississippi. When, therefore, the demand for the navigation of the Mississippi came from the British Plenipotentiaries, Mr. Russell's special objections to the application of our principle, in favor of our demand, might have been urged. But what were these special objections? I have shewn, that they were our own wrong—fraud and extortion upon Spain, to justify perfidy to Great Britain. Mr. Russell never did allege these objections at Ghent, and, if he had, a majority of the American mission would, assuredly, have been ashamed to allege them to the British government.

The second way of proceeding, to which Mr. Russell says he would have assented, was to consider the treaty of 1783 at an end, and offer for the fishing privilege, a reasonable equivalent, *wherever it might be found*—and where would he have found it? He will not affirm that we had authority to offer any equivalent whatever—we had been specially instructed *not to surrender them.* He says he would have surrendered, and purchased them at a reasonable price again.

The third substitute, to which he says he would have assented, is the strangest of all. He says he would have made it a sine qua non of peace, as embraced by the principle of status ante bellum.

A sine qua non for the status ante bellum! And yet he *could not consent* to grant or revive the British right to the navigation of the Mississippi in order to procure or preserve the fishing liberty; when the status ante bellum would have given them not only the whole treaty of 1783, but the permanent articles of the treaty of 1794; not only the navigation of the Mississippi, but unrestrained access to our territories and intercourse with our Indians.

I have shown that the most aggravated portion of Mr. Russell's charge against his colleagues of the majority, that of wilful violation of positive and unequivocal instructions, by a senseless offer to the British plenipotentiaries, sacrificing an important Western to a trifling Eastern interest, is not only utterly destitute of foundation, but that it was not even made, nay, more, that it was distinctly contradicted by the letter really written by Mr. Russell at Paris, on the 11th of February, 1815. Into Mr. Russell's motive for introducing it into the duplicate of that letter, delivered by himself at the Department of State, to be communicated to the House as the letter called for by their resolution, I shall not attempt to penetrate; having, as I trust, equally shown that the charges implied in the real letter are as groundless as their aggravations in the duplicate. The professions of unfeigned respect for the integrity, talents, and judgment, of those colleagues whose conduct is, in the same letter, represented as so weak, absurd, and treacherous, I can, for my own part, neither accept nor reciprocate. To have been compelled to speak, as in these remarks I have done, of a person distinguished by the favor of his country, and with whom I had been associated in a service of high interest to this Union, has been among the most painful

incidents of my life. In the defence of myself and my colleagues, against imputations so groundless in themselves, at first so secretly set forth, and now so wantonly promulgated before the legislative assembly of the nation, it has been impossible entirely to separate the language of self vindication from that of reproach. With Mr. Russell I can also rejoice that the proposal offered on the 1st of December, 1814, was rejected by the British government, not because I believe it now, more than I did then, liable to any of the dangers and mischiefs so glaring in the vaticinations of Mr. Russell, but because both the interests to which it relates have since been adjusted in a manner still more satisfactory to the United States. I rejoice, too, that this adjustment has taken place before the publication of Mr. Russell's letter could have any possible influence in defeating or retarding it. The convention of 20th October, 1818, is the refutation of all the doctrines of Mr. Russell's letter, to which there can be no reply. It has adjusted the fishing interest upon the principle asserted by the American mission at Ghent, but disclaimed by Mr. Russell. It has given us the boundary of latitude 49, from the Lake of the Woods westward, and it has proved the total indifference of the British government to the right of navigating the Mississippi, by their abandonment of their last claim to it, without asking an equivalent for its renunciation.

With regard to the magnitude of the fishing interest which was at stake during the negotiation at Ghent, I believe the views disclosed in Mr. Russell's letter as incorrect as the principles upon which he would have surrendered it. The notification of exclusion was from all fisheries within exclusive British jurisdiction. I have shown that, historically, Great Britain had asserted and maintained exclusive proprietary jurisdiction over the whole. Had we tamely acquiesced in her principle of forfeiture without renunciation, we should soon have found that her principle of exclusion embraced the whole. That a citizen of Massachusetts, acquainted with its colonial history, with the share that his countrymen had had in the *conquest* of a great part of these fisheries, with the deep and anxious interest in them taken by France, by Spain, by Great Britain, for centuries before the American Revolution; acquainted with the negotiations of which they had been the knot, and the wars of which they had been the prize, between the three most powerful maritime nations of modern Europe; acquainted with the profound sensibility of the whole American union, during the Revolutionary war, to this interest, and with the inflexible energies by which it had been secured at its close; acquainted with the indissoluble links of attachment between it and the navigation, the navy, the maritime defence, the national spirit and hardy enterprise of this great republic; that such a citizen, stimulated to the discharge of duty by a fresh instruction from his government, given at the most trying period of the war upon the very first rumor of an intention, on the part of Great Britain, to demand its surrender, *not to surrender it*, sooner to break off the negotiation than surrender it; that such a citizen, with the dying words

of Lawrence, "don't give up the ship," still vibrating on his ear, should describe this interest "as totally unnecessary for us for sub-"sistence or occupation," and affording, "in no honest way, either "commercial facility or political advantage," as "the doubtful ac-"commodation of a few fishermen annually decreasing in number," is as strange and unaccountable to me as that he should deliberately sit down, two months after the treaty was concluded, and write to his government a cold-blooded dissertation to prove that there was nothing, absolutely nothing, in the principle upon which he and his colleagues had rested its future defence, and that he considered the fishing liberty "to be entirely at an end, without a new stipulation for its "revival."

Such were not the sentiments of a majority of the American commissioners at Ghent; such were, particularly, not the sentiments of the writer of these remarks. He reflects, with extreme satisfaction, upon that deep and earnest regard for this interest manifested, at that time, by the executive government of the United States, in the positive and unqualified instruction of 25th June, 1814, to the commissioners, on no consideration whatever *to surrender the fisheries.* He rejoices that this instruction was implicitly obeyed; that the nation issued from the war with all its rights and liberties unimpaired, preserved as well from the artifices of diplomacy, as from the force of preponderating power upon their element, the seas; and he trusts that the history of this transaction, in all its details, from the instruction *not to surrender the fisheries*, to the conclusion of the convention of 20th October, 1818, will give solemn warning to the statesmen of this Union, in their conflicts with foreign powers, through all future time, never to consider any of the liberties of this nation as abrogated by a war, or capable of being extinguished by any other agency than our own express renunciation.

JOHN QUINCY ADAMS.

May 3, 1822.