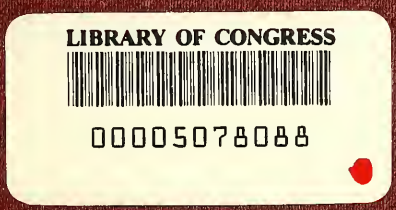

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JAY'S TREATY AND THE SLAVERY INTERESTS OF THE UNITED STATES.

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The vast importance of negro slavery as an influence in our national diplomacy after the rise of abolitionism has been very generally taken into account by the historians of the middle period. That the "peculiar institution" had not a little to do with our foreign relations in the earlier days of the Republic has perhaps not been so commonly appreciated. The subject may be said to have entered our diplomacy almost at its beginning. The provisional treaty, signed at Paris November 30, 1782, contained in its seventh article the stipulation that—

> * * * His Britannic Majesty shall, with all consistent speed and without causing any destruction or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons, and fleets from the said United States, and from every port, place, and harbor within the same. * * *

Although the incorporation of the negro clause was purely the result of the chance arrival of Henry Laurens at Paris on the closing day of the negotiation,[a] the practicability of such a provision had previously been urged by Franklin in his interviews with Oswald, and the conditions attending the British withdrawal from America so manifestly demanded some such safeguard that the matter could not have long been denied serious diplomatic consideration.

Throughout the Revolution it had been a favored line of British policy to weaken the colonists' power of resistance by depriving them of the services of their slaves. To this end proclamations had been issued from time to time, notably by General Clinton and Lord Cornwallis, offering freedom to

[a] Works of John Adams, Vol. III, p. 336.

all negroes who should take refuge within the British lines, and the inducements thus held out had been by no means lacking in their intended effect. Moreover, during the later years of the war, when the British armies were overrunning the slave-stocked South, very many negroes were carried off by force along with other personal property of the inhabitants. Thus Jefferson tells us that Virginia alone lost 30,000 during Cornwallis's invasion in 1778, and many more subsequently by reason of Arnold's predatory incursion. Ramsay, the historian of South Carolina, is responsible for the assertion that between 1775 and 1783 that State lost 25,000 negroes, valued at $12,500,000. According to contemporary estimates Georgia fared even more badly, losing in all fully seven-eighths of her slaves. Five thousand were sent from Savannah to the West Indies at a single time.

Of course the negroes thus carried away prior to the signing of the treaty of peace were irrecoverably lost to their masters. When the treaty was made, however, there were within the British camps a considerable number of negroes whom Laurens, by his suggested clause, hoped to save from deportation and ultimately restore to their owners. Sir Guy Carleton, successor to Clinton after the Yorktown surrender, when apprised of the treaty stipulation, assumed the ground that the negroes who had fled from their masters were no longer to be considered "property of the American inhabitants," and, besides, that in assenting to the Laurens clause of the treaty it could not have been the intention of the British Government "to reduce themselves to the necessity of violating their faith to the negroes who had come into the British lines under the proclamations of his predecessors in command."[a] The three commissioners appointed by Washington to be present at all embarkations of British troops for the purpose of detecting and reporting violations of the treaty were sometimes ignored, sometimes deceived, and sometimes prevented from even witnessing the lading of the ships; so that the carrying away of the negroes went steadily on until the last of the British had taken their departure.

When, in 1785, John Adams was sent as our first minister to the court of St. James, the question of the negroes, so long

[a] See Carleton's letter to General Washington, May 12, 1783, American State Papers, Vol. I, p. 190.

and ineffectually wrangled over by the military authorities in America, was transferred to the realm of actual diplomacy along with the other alleged violations of the treaty of peace. For almost a decade the subject was discussed—first by Adams with Carmarthen and Pitt, then by Gouverneur Morris with Pitt and the Duke of Leeds, and subsequently by Jefferson with George Hammond, the first British minister to the United States;[a] but the clearly determined British policy was to postpone an adjustment of the controversy pending the delayed execution of several engagements of the United States under the Paris treaty.

The declaration of war against England and Holland by the French convention, February 1, 1793, brought with it a train of consequences which seriously endangered the peace and prosperity of America. The British version of belligerent rights on the high seas struck deep at the trade, not to speak of the honor, of the young nation. The seizure of French goods on American vessels, the rigid enforcement of the rule of 1756 in the case of the West India trade, and the impressment of American seaman, made up a list of grievances which tested our qualities of forbearance to the extreme. Congress waxed warm in debate of retaliatory duties, preparations for war, and the laying of embargoes.

To stem the tide which seemed to be carrying the nation inevitably into war, the President resolved to send to London an envoy extraordinary, whose duty should be the securing of redress for injustice suffered during the war then in progress, and, if possible, a general treaty covering the wide range of matters in dispute between the two countries. On the 16th of April, 1794, Chief Justice Jay was nominated for the mission. Three days later the Senate confirmed the nomination. It may well be questioned whether a wiser choice could have been made. Jay's qualifications included an unyielding integrity, a keen sense of justice, a judgment unusually sound, if not brilliant, freedom from prejudice, and a lofty spirit of pride in his country's honor. Of qualifications fitting him specially for this particular undertaking he had not a few, and chief among them experience. To him, perhaps better than to any other man, was known the entire history of our relations with Great Britain. Not only had he been a com-

[a] American State Papers: Foreign Relations, Vol. I, p. 188 et seq.

missioner at the making of the treaty whose violations were to be subjects of the prospective negotiation, but by reason of occupying subsequently for a number of years the office of Secretary for Foreign Affairs he had been called upon to follow closely the progress of its execution.

With much personal reluctance, but yet with a firm intention to spend his best energies in the prosecution of his mission, Jay set sail from New York on the 12th of May and landed at Falmouth on the 8th of June. By the President's letter of credence he was authorized to negotiate a settlement not only of the questions which had recently sprung up by reason of the war in Europe, but also of all infractions of the Paris treaty.[a] By Secretary Randolph's instructions the envoy was further directed to keep the two general subjects of negotiation entirely separate and to give attention first to the more immediate questions of the war.[b] Nothing was said specifically by the Secretary concerning the carrying away of the negroes by the British, but as appeared from subsequent transactions it is quite certain that the American envoy was expected to obtain such satisfaction as he could upon that point along with others connected with the treaty.

Most features of the Jay treaty, together with the richly suggestive events that crowded full its history, have been thoroughly investigated and are now easily intelligible to even the passing student of the period. Because, however, the subject of negro slavery is nowhere mentioned in the instrument, there has been a natural tendency to overlook the influence brought to bear upon the treaty, in both its making and ratification, by the slavery interests in the United States. A careful examination of contemporary state papers, corespondence, and Congressional debates reveals a connection of slavery and the treaty which no one who would understand in all its essential aspects this most important chapter in our diplomatic history can in any wise afford to ignore. It is in the very fact that slavery is not mentioned in the treaty that the point of interest lies. It should of course be understood that the part which the slavery interests played in the history of the Jay treaty was significant, not so much because by it the immediate event was changed, as because it may be regarded as on this occasion that slavery made its earliest formal entrance into

[a] Amer. St. Papers: Foreign Relations, I, 470–472.

[b] Ibid,, I, 472–474. Correspondence and Public Papers of John Jay, IV, 10–21.

the diplomacy of the nation. Intermittent claims on its behalf had been made before, but now for the first time the force of public sentiment was brought definitely to bear upon the subject.

Briefly, then, we may inquire three things: (1) What effort was made to cover the negro question in the provisions of the treaty? (2) Why was the subject finally omitted? and (3) What were the effects of this omission upon the reception and ratification of the treaty in the United States?

Jay's first official interview with Lord Grenville, the British secretary for foreign affairs, was held on the 20th of June, 1794. Thereafter for some time the negotiations were exclusively along the line of the recent maritime and commercial controversies, and it was only after certain conclusions had been reached regarding these that the negotiators felt free to turn their attention to the long standing questions of treaty violation. Jay suggested the employment of verbal conferences instead of the more tedious plan of formal written communication, which was readily assented to by Grenville, and which was doubtless the part of wisdom, though it was hardly calculated to enlighten the historian a hundred years later. The consequence is that we know comparatively little of the treaty in process of formation. Jay's intermittent and far from voluminous reports to Secretary Randolph constitute almost our only reliable source of information.[a] From these we gather, however, that early in the negotiation concerning the treaty violations arose the question as to which party had been first guilty—for there was no attempt on the part of either to claim a full execution of the obligations assumed at Paris a decade before. Now, when Jay was Secretary for Foreign Affairs, in 1786, he had declared emphatically in his report to Congress that there had not been a day since the treaty took effect on which it had not been violated in America, and he had roundly upbraided the States for having taken the initiative in violating the treaty through their numerous laws restrictive of the rights of British creditors.[b] It would not, of course, have been good diplomacy to make such a sweeping concession to Grenville. To do so would have meant surrender of even such ground as Jay felt he could command. He

[a] The correspondence of Jay and Randolph relative to the treaty may be found in the American State Papers: Foreign Relations, I, pp. 476-518.

[b] Secret Journals of Congress, Vol. IV, p. 183 et seq.

was too thoroughly convinced that his cause was a righteous one to sacrifice it all by making an admission which Grenville would certainly have taken for far more than it was worth. The sheer fact that the States had violated the treaty first in order of time—which, moreover, the majority of Jay's constituents would have refused to acknowledge—was no longer of great consequence in view of the general policy of recriminative violation acted upon for ten years by both nations. Jay therefore began by insisting to Grenville that the carrying away of negroes contrary to the seventh article of the treaty was the first aggression.[a] But Grenville refused to see in this any violation at all.

He held to the time-worn British contention that the treaty provision had been intended only to prevent depredation at the departure of the soldiery; that no alteration in the actual state of property was operated or intended by the article; that every slave, like every horse, which strayed or escaped from within the American lines and came into the possession of the British army became, by the laws and rights of war, British property, and, therefore ceasing to be American property, the exportation thereof was not inhibited by the stipulation in question; that to extend it to the negroes who, under the faith of proclamations, had come in to them, of whom they thereby acquired the property, and to whom, according to promise, liberty had been given, was to give to the article a wider latitude than the terms of it would warrant, and was also, unnecessarily, to give it a construction which, being odious, could not be supported by the known and established rules of construing treaties. The conclusion, then, of the whole matter, according to Grenville, was, in substance, that the British were forbidden to carry away only such negroes as had come into their possession after the signing of the treaty at Paris, and that in the disposal of those within their lines at that time they were left entirely without restriction.[b]

The detailed defense of Jay upon this point we do not have. In his report to Randolph, however, he indicated that in his argument with Grenville he had used substantially the same reasoning as in his Congressional report of 1786.[c] So that we

[a] Jay to Randolph, 13 Sept., 1794—Amer. St. Papers, I, 485.
[b] Jay to Randolph, ibid.
[c] Jay to Randolph, ibid. The report cited above.

shall certainly not go far astray in using that document to ascertain its author's personal opinion on the negro question. As to the merits of the American claims for compensation, his ideas were very pronounced. He chose to consider the matter in three aspects: (1) As to the negroes captured and disposed of during the course of the war; (2) as to negroes who remained with and belonged to Americans within the British lines; and (3) as to negroes who, confiding in promise of freedom, had fled from their masters and taken refuge with the British army. The first of these classes, declared Jay, was manifestly not comprehended in the prohibitory clause of the treaty. By the laws of war all goods and chattels captured *flagrante bello* became the property of the captors. Though some might be inclined to doubt whether negroes can ever be so degraded as to constitute mere chattels, the laws of both Great Britain and the United States clearly recognized that man might have property in man. The treaty spoke significantly of "negroes or *other property* of the American inhabitants." If captured negroes might not lawfully be carried away, no more might captured arms or provisions. In this reductio ad absurdum Jay and Grenville found themselves in perfect agreement. As to the second class of negroes—i. e., such as belonged to and remained with Americans within the British lines—Jay considered the treaty provision fully applicable, for, as he said, "As the enemy had never taken them from their masters, nor treated them as booty, the property remained unchanged." Of the validity of this proposition Grenville was not so sure.

It was Jay's third class—i. e., the negroes who, influenced by British proclamations, had fled from their masters across the lines into the British camps—that presented the greatest difficulty. Such negroes Jay believed to be clearly comprehended by the terms of the treaty. According to his logic, they remained as truly as ever the property of their masters. By mere flight they could not extinguish their slave character. Inasmuch as they had not been captured by the British, but only received as friends and refugees, they had in no sense become the property of the British, and hence must still be the property of the Americans. From this it followed that it was an infraction of the seventh article of the treaty to carry them away. Grenville, however, took the ground that when

the negroes crossed the British lines they thereby ceased to be American property. The British might or might not consider them their property, as they chose, but in any case the claims of the former owners ceased. Just because a piece of negro property had the peculiar functions of intelligence and locomotion, and so might voluntarily betake itself within the British lines, while a bag of corn or a bale of cotton must perforce be laid hold of and literally carried away, Grenville did not conceive that the former was any less a transfer of ownership than the latter.

Jay was keenly appreciative of the difficult position which Great Britain was forced to occupy by reason of having made two incompatible promises—the one to the negroes, the other to the United States; but he did at least wish to bring Grenville to acknowledge that the two promises were incompatible. He was not the man to take delight in upholding the slavery interests of his country. Personally he was vigorously opposed to the slave system, and long ago had expressed the conviction that until the States should abolish it "their prayer to Heaven for liberty would be impious." Nevertheless, he took the eminently sensible view that as long as men continued to hold property in slaves such property must be protected like any other; and on this ground he was convinced that an injury had been done his slaveholding countrymen, and in a conservative but firm manner he insisted that reparation be made.

Regarding Great Britain's conflicting engagements as to the negroes—on the one hand to give them liberty, on the other not to carry them away—Jay took ground substantially as follows: Great Britain had made solemn promises of freedom to all slaves seeking the lines of her army. These promises, held out through the proclamations of Clinton and Cornwallis, should by no means have been made, but now that they had been made and thousands of negroes had acted upon them, the United States ought not to expect Great Britain to break them. In other words, the carrying away of the negroes was justifiable in view of the pledges previously made to them. To restore the negroes now, after the elapse of a decade, would be manifestly impossible, just as Washington had urged upon Carleton that it would be; besides, such restoration would still involve the violation of Great Britain's

pledge of freedom. But, continued Jay, Great Britain ought not to expect to escape the consequences of her folly, or rather the folly of her generals in America. There was just one honorable way of escape, and that was by paying the Americans for the slaves. Thus only could faith be kept with the negroes and at the same time substantial justice be done their masters. This, then, was the thing for which Jay contended. But Grenville still denied that the slaves carried off were any longer American property.

So the negotiations dragged. Other matters, as the western posts, were taken up and conclusions concerning them reached with comparative ease. Again and again the negro question was brought forward, but always with the same result. Regarding it Jay could only record, "On this point we could not agree." At length practically everything else was settled. Projets of a treaty were interchanged and in neither was the subject of the negroes mentioned, though the evacuation of the western posts received careful attention. On the 19th of November the negotiations were closed. There was in the treaty not a word on the subject of the negroes. "Various articles," wrote Jay, "which have no place in this treaty have, from time to time, been under consideration, but did not meet with mutual approbation and consent."[a] Of these articles discussed, but not adopted, one providing compensation for the negroes carried away was by no means the least important.

In these days of ocean cables and steamships it is difficult to realize the slowness of communication a hundred years ago and the comparative isolation of our ministers abroad. There is much reason to believe that had rapid communication been then possible the Jay treaty would have been made to differ in some essential respects from the form it finally assumed—or at least the trend of the negotiation would have been considerably modified. Jay's letter of the 13th of September, in which was set forth Grenville's interpretation of the slave provision of the treaty, did not reach Secretary Randolph until the 11th of November. In his reply, the following day, the Secretary wrote: "The reasoning of Lord Grenville in relation to the negroes is so new to me * * * that its accuracy can not be assented to without the fullest reflection."[b]

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[a] Jay to Randolph, Amer. St. Papers, I, 504.
[b] Randolph to Jay, Amer. St. Papers, I, 501.

Of course the treaty had been signed long before even this mild expression of dissent reached Jay. In the meantime there was a growing uneasiness in the Department of State lest Jay should not secure an adjustment of the negro claims and lest failure to do so might materially increase the anticipated popular opposition to the treaty.

Never in the history of the country has a treaty been negotiated under circumstances of such division of sentiment. From the moment Jay was dispatched on his mission the party which sympathized with France ridiculed and denounced both the enterprise and the man who had been chosen to undertake it. When Jay wrote home that he had been well received in England, the Republicans assumed that he had betrayed the interests of his country as the price of royal favor. There was little hope on the part of the Federalists that the treaty, however liberal its terms, would not arouse a storm of opposition. The Administration recognized this hostile state of public opinion and naturally desired that the treaty be such as to give just as small legitimate ground for attack as possible. Secretary Randolph, himself a Southerner, and knowing full well the anti-British sentiment in the Southern States, due largely to Great Britain's confiscation of slave property, grew especially anxious that the negro question be not passed unmentioned in the treaty. In a letter to Jay, December 3 (about two weeks after the treaty had been concluded), Randolph declared that he was "extremely afraid" that the reasoning of Grenville about the negroes would not be satisfactory. "Indeed, I own," he confessed, "that I can not myself yield to its force. But if you omit mentioning them at all will not some quarters of the Union suppose themselves neglected?"[a] About two weeks later, but yet before the news of the treaty had reached America, Randolph sent to Jay a detailed consideration of the whole question.[b] Although this belated message had no part in the making of the treaty, yet its ingenuous reasoning merits some attention, particularly when its official character is taken into account.

The main point in Grenville's contention had been that when the negroes came within the British lines they thereby ceased to be American property. To this Randolph made

[a] Randolph to Jay, Amer. St. Papers, I, 509.
[b] Randolph to Jay, Dec. 15, 1794, Amer. St. Papers, I, 509.

reply that while property is acquired in movables as soon as they come within the power of the enemy, yet property rights thus acquired in war may, by treaty of peace, be renounced. Thus Randolph freely admitted, as Jay had not done, that the negroes in question had become the property of the British through the regular processes of war, but added that by the treaty of peace Great Britain had bound herself to release all such negroes then in her possession. He understood that this stipulation had been in the nature of a compromise, since it had been agreed that the British debts should be paid, and the States in which were a majority of the debtors depended for their ability to pay chiefly on the culture of the soil, for which, in turn, they were dependent upon slave labor. He regarded the treaty stipulation as superfluous if it signified only an engagement against further depredations. The mere cessation of the war meant that much.

It will be recalled that Grenville had declared the treaty stipulation "odious," if it meant that the negroes who had sought the British lines under promises of freedom were to be returned to their American masters. It is a rather vague principle of international law that a nation is not bound to the execution of a treaty provision which is clearly of such a nature as to violate its own conscience as well as the sense of justice and right of the world at large. Under cover of this principle Grenville had taken the ground that, even if it had been the intention of the British commissioner at Paris that the negroes should be remitted to bondage—a thing which, however, was far from being conceded—still, on the basis of common morality, England was not to be expected to execute such a stipulation. This argument aroused nothing but ridicule on the part of Randolph. He declared that the principle of "odious" agreements was entirely too vague to be made use of in the present matter. He dwelt at length upon the facts that Great Britain had fostered the institution of slavery in the American colonies, and hence was largely responsible for its existence there; that in the British colonies elsewhere slavery was maintained under the protection of the Government, and declared that it was mere cant and hypocrisy for England to repudiate treaty obligations recognizing slavery on the ground that they were "odious."

"You must be too sensible," concluded Randolph, in his letter to Jay, "of the anxiety of many parts of the United States upon this subject to pass it over unnoticed. Permit me, therefore, to beg your attention to the foregoing ideas, since I have it greatly at heart that your negotiation may not be encumbered by any obligation which may be anticipated." This well-meant but really quite unnecessary admonition reached Jay on the 5th of February, 1795. To it he could only reply that the authorities at Washington and the people at large must remember that in the negotiation of a treaty it takes two to make a bargain. "We could not agree about the negroes. Was that a good reason for breaking up the negotiations?"[a] Jay's plan of action had been to secure every possible concession from Great Britain, but never to endanger the whole treaty by stubbornly refusing to yield on comparatively minor points. That the treaty would be received with ill favor in many quarters none knew better than himself; but he felt secure in the consciousness that he had negotiated as successfully as anyone could have done under the circumstances. After returning to America, May 28, he refrained from attempting to influence the President and Senate to sanction and ratify the treaty, and did not even so much as write a defense for the consideration of the people.

Although the treaty had been signed at London on the 19th of November, 1794, it was not until the 17th of March, 1795, that a copy of it was transmitted by Secretary Randolph to the President. Congress had adjourned just two weeks before. Hence it became necessary to call a special session of the Senate to consider the question of ratification. By the 8th of June a quorum was present and the debate upon the treaty was begun. Neither the treaty nor the Senate discussion of it was at the time made public—a fact which aroused much suspicion and not a little vituperation on part of the Republicans. During the course of the deliberations considerable dissatisfaction was manifested in the Senate regarding several features of the treaty. It was proposed by some members to reject it altogether, by others to accept it only in part. As had been anticipated by Randolph, the failure of the treaty to provide compensation for the negroes was seized upon by the Southerners. Motion was made to recommend

[a] Jay to Randolph, Feb. 6, 1795, Amer. St. Papers, I, 518.

the President to renew the negro claims and attempt to secure a satisfactory adjustment of the matter. Mr. Gunn, of Georgia, presented resolutions providing that Jay be instructed to press the subject of compensation on the ground that the settlement of the question would "tend to produce the desired friendship between the two Governments." The motion, however, was lost, as were also the resolutions. After a fortnight's discussion the Senate voted, 20 to 10—a bare constitutional majority—to uphold the President in the ratification of the treaty. Washington had written of the treaty: "Although it does not rise to all our wishes, yet it appears to me calculated to procure to the United States such advantages as entitle it to our acceptance." In this opinion all the Cabinet concurred except Randolph, who was uncertain as to the wisdom of ratification.

It is much to be regretted that we have no record of the Senate debates on the treaty. These debates, however, were but the beginning of a two years' controversy, during which every phase of the subject was rehearsed to the point of exhaustion among the people and finally in the House. Popular attack upon the treaty was delayed somewhat by the fact that the Senate had ordered the terms of the agreement kept secret. About the 1st of July, however, the treaty was made public through the misconduct of Senator Mason, of Virginia, who gave a copy of the document to a Philadelphia editor. Jefferson spoke Republican sentiment when he referred to Mason's deed as "a bold act of duty in one of our Senators." He further characterized the treaty as "execrable," "an infamous act," "stamped with avarice and corruption," and, finally, "nothing more than a treaty of alliance between England and the Anglo-men of this country against the legislature and people of the United States." The publication of the treaty precipitated a storm of opposition throughout the country. Public meetings denounced it. A copy was burned before the residence of the British minister in Philadelphia. Jay was dragged in effigy through the streets. The personal character of the President and other leading Federalists was bitterly attacked. The sheets of Cobbett, Freneau, Fermo, and Bache reveled in abuse and malignancy. On no occasion since the founding of the nation had public opinion been so decided and demonstrative. Throughout the summer and

fall of 1795 the country was flooded with pamphlets, anonymous letters, and circulars.

The most ardent defender of the treaty was Alexander Hamilton, who at the close of January had resigned his Cabinet position in order to return to his law practice in New York, but who nevertheless continued to interest himself in public affairs and to exert great influence in the disposal of them.[a] Hamilton had never cherished much regard for Randolph and had upon numerous occasions interposed his own ideas to the end of modifying those of Randolph, and of Jay and Washington as well. When the treaty was finally made known, however, he entered enthusiastically into the work of securing its speedy ratification and its complete execution. Through two channels Hamilton sought to reconcile the country to the work of Jay—first, in his state paper submitted to President Washington July 9, 1795,[b] and second, in his "Camillus" essays,[c] published at intervals during the closing months of the same year.

In brief, Hamilton's position on the question of compensation for the negroes was as follows: That the conduct of the British soldiery in "seducing away" the negroes was "to the last degree infamous," but to have surrendered them to their masters after promise of liberty would have been even more infamous; that it had not been the intention of the British commissioners at Paris to stipulate any such surrender (substantially the same argument used by Grenville); that if the treaty provided for any such surrender the provision was, as Grenville said, "odious;" that under the laws of the United States negroes were property, and therefore, when they fell into the possession of the British, by whatsoever means, they became British property by virtue of the ordinary rules of warfare; that in any event the United States had been the first party to violate the Paris treaty; and, finally, that the whole subject was involved in so much honest doubt that "the acting of the other party on a construction different from ours could not be deemed such a clear manifest breach of treaty as to justify retaliation."

Popular disapproval of such sentiment, as well as of the treaty in whose defense it was uttered, increased rather than

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[a] See Jefferson's letter to Madison, Sept. 21, 1795, Jefferson's Writings, VII, 31.

[b] Works of Alexander Hamilton, IV, 322 et seq.

[c] Ibid., IV, 371 et seq.

diminished as the summer of 1795 went by. Hamilton did all within his power to stem the tide. Jefferson spoke of him as "really a colossus to the antirepublican party" and as "without numbers a host within himself." The very unsettled state of the public mind gave rise to some of the most remarkable of our early controversial literature. Under the pseudonym of "Camillus," Hamilton began the publication of a series of essays which had for their sole purpose the reconciling of the people to the action of the Administration in ratifying the treaty. In the third essay the subject of the negroes received the most careful attention. The argument advanced was virtually repeated from the paper submitted previously to the President. In the Camillus essay, however, Hamilton expressed with much more vigor the conviction that in demanding compensation for the negroes the United States was exceeding her rights under the treaty of Paris. Of course, in estimating Hamilton's attitude on this question the circumstances under which he wrote must be kept in mind. He was attempting to defend the work of Jay and to secure popular support for the treaty, and was, therefore, inclined to set forth the various issues from the British rather than from the American point of view. He naturally dwelt longest upon those things wherein the contention of Great Britain was most securely grounded. The bounds of truth and propriety, however, seem never to have been seriously transgressed. In behalf of the British contention that the treaty provision meant merely that there was to be no further depredation, a vast array of arguments was brought forward. These arguments need not be stated here, inasmuch as they were all based upon facts and theories which we have already had occasion to notice.

In the fifth Camillus essay Hamilton made another vigorous plea of justification for Jay's treaty from the standpoint of the negro question. Of the three great objects aimed at by the United States in negotiating the treaty of 1794—compensation for the negroes, surrender of the western posts, and compensation for spoliation during the war then in progress—two had been satisfactorily achieved. One—compensation for the negroes—had been abandoned. But this claim, declared Hamilton, was not only the least important of the

three, but was very doubtful in its justice. In abandoning it the United States had suffered no dishonor. "It is a fact," said Hamilton, "which I assert on the best authority, that our envoy made every construction of the article relating to this subject, and to obtain compensation; and that he did not relinquish it till he became convinced that to insist upon it would defeat the purpose of his mission and leave the controversy between the two countries unsettled." Hamilton asserted that, in view of these things, none except "certain hot-heads" who would have opposed the treaty on some ground anyway could fail to see that it was far better for the United States to secure what had been gained by the work of Jay than to forfeit all by stubbornly holding out for a claim which could not be well substantiated. "There was no general principle of national right or policy to be renounced. No consideration of honor forbade the renunciation; every calculation of interest invited to it."

Our loss in not having a record of the Senate debates on the Jay treaty is largely compensated by the fact that the House, stepping beyond its accustomed limitation into a field which many regarded as forbidden to it, during the spring of 1796 took into consideration the Jay treaty and gave it more extended and deliberate attention than had the Senate in its brief session during the previous summer. Three weeks were consumed by the House in discussing its disputed constitutional right to engage in the consideration of treaties.[a] By some it was maintained that the House was vested with discretionary power to carry a treaty into effect or to refuse to do so by failure to vote the necessary financial supplies. By others it was contended that the Constitution vests the treaty-making power exclusively in the President and Senate, and that the House must acquiesce in all treaties made under the sanction of these powers. Edward Livingston, of New York, moved that the President be requested to lay before the House the papers relating to the Jay treaty. The motion was carried, the Republicans being in the majority; but Washington refused to comply with the request on the ground that to do so would set a dangerous precedent, since, in his belief, the House had no share in the treaty-making power. The right to demand the papers was reaffirmed by the House, and the debate drifted

[a] The debate began on the 7th of March. It is reported in full in the Annals of Congress, Fourth Congress, first session.

into a general consideration of the merits and faults of the Jay treaty. Of this debate Chief Justice Marshall afterwards declared that "never had a greater display been made of argument, of eloquence, of passion;" and Washington declared that it "suspended in a manner all other business" of the House and "agitated the public mind in a higher degree than it has been at any period since the Revolution."

The debate was opened by the notable speech of James Madison, April 15. Madison spoke for the Republican element of the House and of the country, and, as might be expected, manifested extreme dissatisfaction with the treaty.[a] Among its faults he deemed by no means the least its failure to provide for the execution of the slavery clause of the Paris treaty of 1783. He could discover no adequate excuse for "the very extraordinary abandonment of the compensation due for negroes." In his estimation the attempt of Hamilton to discredit the American claim was little less than treasonable. Until recently, Madison contended, Great Britain had repeatedly recognized the essential justice of the American demands, and had postponed compliance with them merely until the Americans in turn should have fulfilled certain obligations. The truth of this proposition was beyond question. Not only had Carleton recognized at the time of the deportation of the negroes that it might be subsequently necessary for England to pay for them, but Carmarthen and Pitt, in their discussions with Adams and Morris, had generally acquiesced in the justice of the American claims. These admissions on the part of the British ministers furnished the most clinching argument at the disposal of the American claimants. It was not until Grenville's negotiation with Jay that all obligations with regard to the negroes were disclaimed by the British. Madison, therefore, charged Jay with having yielded to a mere makeshift, an afterthought, which Grenville had been shrewd enough to beguile him into recognizing. The United States, continued Madison, ought never to have acceded to the British interpretation of the peace treaty. One nation had as much right to construe the terms of the agreement as the other. If no conclusion could be reached through the regular channels of diplomacy, the matter should have been settled by a board of arbitration. To abandon the claim, as

[a] Annals of Congress, Fourth Congress, first session, I, 975.

Jay had done, was to admit either that the United States had been in the wrong or that her right to interpret the treaty was not so good as Great Britain's. However desirable the obtaining of commercial concessions for the merchant class, the securing of these could not, as Jay had urged, be regarded as compensation for the losses of the slaveholders. The Government of the United States was under just as much obligation to secure justice for the agricultural as for the merchant classes.

On the day following Madison's speech the House listened to a very able argument along the same line by Mr. Nicholas, of Virginia.[a] He, too, maintained that the right of the former owners to compensation for the negroes was well founded. He realized, as he said, that in the practical work of treaty making it often becomes necessary to forego certain rights and to abandon certain just claims, but he did not think that, in consideration of what the United States had received, Jay had been justified in abandoning the claim for compensation. He lamented the recent inclination of Great Britain (and the acquiescence of certain prominent Americans) to interpret the treaty of peace as applying only to the negroes who remained in possession of the inhabitants when peace was declared. He thought it too late to extort such an unwarranted meaning from a contract after it had existed ten years. In support of his contention that Great Britain never denied that the clause applied to *all* the negroes in both British and American possessions, he referred to three well-known and very pertinent facts: (1) That Mr. Adams, who had been one of the commissioners, informed the Senate in the course of its deliberations on the Jay treaty that it was the unquestionable meaning of the article to save all negroes and other property then in the hands of the British, and that during his stay at the British court as the first American minister this construction of the treaty had never been denied, and that it seemed to be understood by the ministry that, on a settlement with the United States, compensation must be made; (2) that Mr. Jay himself, while Secretary of Foreign Affairs, had had ample occasion to investigate this whole matter on both sides of the question and had arrived at the conclusion that we were entitled to compensation; (3) the reputed author of the best

[a] Ibid., 1, 1003.

defense of the treaty (Mr. Hamilton) in the year 1783 had himself introduced a resolution into Congress declaring that the negroes, etc., had been carried away by the British armies, contrary to the true intent and meaning of the treaty.

In reply to the argument of Mr. Nicholas, Mr. Swift, of Connecticut, denied the validity of the American claims in a tone so decisive that not even Grenville himself could have done it better.[a] It was enough, Mr. Swift asserted, simply to look at the article itself in the treaty of peace. He was surprised that any person could ever have entertained an opinion that the slaveholders were entitled to compensation. If the treaty stipulation be studied, he thought, it will be evident that it was intended only to prevent the British from carrying away negroes and other property that should be taken in the future, and could have no reference to those captured during the war and before the treaty, the property of which had vested in the captors. That point was so clear, said he, as not to admit of any doubt. On any other construction they might claim all the property plundered during the war, which no one wished to do. Swift therefore asserted that the only respects in which the treaty of peace had been violated were the nonpayment of British debts and the retention of the western posts. This was a radical position assumed with rare self-assurance. It called out a strong counter argument from Mr. Giles, of Virginia, to the effect that unless by the provision of the treaty of peace had been intended the restoration of negroes captured during the war, the entire clause was superfluous; for when the treaty was made the British were in New York and the negroes in the Southern States, and it was not to be supposed that the commissioners feared that after peace should be declared the British army would start southward on a slave-hunting expedition.[b]

On the whole, the best defense of the Jay treaty brought forth during this debate was that by Mr. Hillhouse, of Connecticut.[c] In his speech of the 19th of April he undertook to prove that the assertions of foregoing speakers (Madison, Nicholas, Giles, and others) were without foundation of fact, and that the American claims could be maintained on neither a legal nor a moral basis; that negroes, at least in the estima-

[a] Annals of Congress, 4 Cong., 1 sess., i, 1015.
[b] Ibid., i, 1026.
[c] Ibid., i, 1078.

tion of the commissioners, were property admitted of no doubt; "negroes or other property," said the treaty. By reason of this fact, as well as by the acknowledged laws of war, the negroes who during the course of the war had by any means come into possession of the British thereby became British property, to be disposed of at will. The treaty provision was clearly not retrospective. It applied only to negroes who at the time of the declaration of peace were still in the possession of the American inhabitants. If any of this class had been carried off by the British, the treaty would have been thereby violated; but no accusation of this sort had been brought. In all such cases of doubt, where the freedom of a human being is involved, the benefit of the doubt should be given to the side of freedom. Upon this proposition Mr. Hillhouse based a clear and forcible plea for the liberty of the black man worthy of the abolition orator of Garrisonian times.

It is significant that the five speakers whose opinions we have just noted represented but two States. Madison, Nicholas, and Giles were from Virginia; Swift and Hillhouse from Connecticut. The three Virginians were agreed that compensation for the negroes should be demanded. The two Connecticut speakers contended that it was both illegal and immoral to make such a demand. Already the inevitable divergence of opinion between North and South as to the nation's attitude on the slavery question had begun to appear in the councils of state. During the years immediately following the treaty of peace the people of the United States had been practically unanimous in defending the American claims for restoration of the negroes or compensation for losses incurred. But after a decade of discussion and apparently futile efforts along this line there came to be an appreciable number of the people, particularly, of course, in the Northern States where the loss was not felt and where there was a feeble but rising tide of sentiment against the slave system, who were more than willing to see the claims abandoned. And not only had many of them come to believe that it was highly inexpedient to press the claims, but many also were contending, after the fashion of Swift and Hillhouse, that it had never been the intent of the treaty that compensation be made for negroes captured by the British during the war. So that while it was being urged by the slaveholders of the South that

even Great Britain had never declared for this loose construction of the treaty until she came to negotiate with Jay, it was beginning to be asserted by men of the North that even if Great Britain had really been so late in advocating this interpretation of the agreement, she nevertheless would have been in the right had she done so a decade before. As one of the participants in the House debate pointed out, men's interpretations of treaties are subject to change just as are their constructions of constitutions. Economic considerations and moral feelings have much to do with both.

It would be easy to exaggerate the antislavery sentiment thus manifested during the agitation over the Jay treaty. Despite the arguments and pleas of such men as Hamilton, the treaty never became popular; and a leading source of dissatisfaction continued to be its failure to secure compensation for the negroes. Whatever else may have been deemed settled by it, certainly the negro question was not. The slaveholders of the South, knowing well the abolitionist propensities of Jay, were not slow to conclude that he had willingly betrayed their interests by trading off their claims in return for commercial privileges for New England. Hamilton's testimony that Jay had abandoned the negro claims only when compelled to do so by fear of breaking off the entire negotiation, did not satisfy the claimants. And, moreover, since the people in the North could not find in the treaty any very substantial commercial advantages the acquisition of which could be attributed to the abandonment of the slave owners' demands, there remained little ground for hope that the question might not again disturb our diplomatic relations.

After surveying at such length the various constructions put upon the provision of the treaty of peace relating to negroes and the various arguments pro and con upon that subject used in attack or defense of the Jay treaty, it seems hardly necessary in closing to do more than merely offer a few suggestions upon the merits of the controversy. Diplomacy has been said to abhor certainty as nature abhors a vacuum. While it is to be hoped and believed that this principle is falling into disrepute along with many other relics of Machiavelism, yet so long as language remains flexible will diverse interests of men dictate conflicting interpretations of identical forms of expression. Certain it is that the negotiations at Paris concerning

the negroes were incidental rather than fundamental. The British agent claimed restitution of confiscated Tory estates. In rebuttal the American commissioners claimed compensation for the negroes and other property which had been taken as plunder by the British soldiery during the war. It being found that no agreement could be reached on these contested points, they were relinquished for the time and other matters taken up. Finally, at the last moment, and without discussion, Mr. Laurens's provision against the carrying away of negroes was inserted. In due time the execution of the treaty was called for by each nation. Upon three matters, the posts, the debts, and the negroes, there was hesitation. As to the simple meaning of the provision regarding the posts and the debts there could be no division of opinion. The question on that score was merely as to whether or not the plain stipulations should be carried out.

But as to the negroes there was uncertainty. Did the clause enjoin the restoration of all negroes held by the British at the close of the war, or did it apply only to such as might be taken after the treaty of peace? As time went on the British became more and more firm in the latter conviction. And the same view began to be advanced in America, much to the chagrin and disgust of the Southerners who had been called upon to suffer the heaviest losses. If an attempt at an impartial interpretation of the treaty on this point were to be made, it would seem that so far as the question was of strict legal construction the right was largely on the side of Great Britain, but so far as it was a matter of the intent of the negotiators the right was even more certainly on the side of the United States. From a moral standpoint there was not much distinction between the claims of the two parties. A study of the earlier negotiations, the letters and conversations of the commissioners, as well as the expressions of opinion of British ministers and agents during the years immediately following the negotiations of the treaty, convinces the present writer that it was understood by the commissioners on both sides that the negro clause was to be retrospective in its operation. The testimony of John Adams that such was the case has already been cited. If it be wondered that the British agent did not object to the incorporation of such provision in the treaty, it should be remembered that there had

already been placed in the instrument a stipulation concerning the restoration of Tory property, which had previously been regarded as balancing the negro claims.

But that the words of the treaty actually and clearly expressed this intention admits of serious doubt. It was declared that the evacuation should be made "without carrying away any negroes or other property belonging to the American inhabitants." The crucial point was whether the negroes whom the British carried away could any longer be considered property of the American inhabitants. Clearly if by their changed conditions the negroes ceased to be property of the American inhabitants the claims set up by the United States were without foundation, for the treaty applied only to such property. Secretary Randolph's idea that, though the slaves had become property of the British, they were engaged to be restored to their former American owners by reason of the treaty stipulation was certainly erroneous. For whatever that stipulation may really have meant, it manifestly did not enjoin the handing over of British property to the people of the United States. The whole matter then resolves itself to the one question, Was the American claim of retention of property rights in the negroes justifiable under the recognized principles of international law? It is a well-established rule that slaves escaping in time of war from one belligerent to another, even though the latter be a slaveholding power, are legally free from their former masters. Halleck asserts that under the shield of the law of nations such slaves can not be regained by their former masters even through the operation of the law of postliminy.[a] Dana, in his edition of Wheaton's International Law, says the same thing.[b] It matters not whether the refugee slaves actually gain their freedom or merely effect a change of masters, if the operation takes place in the course of a recognized state of war the authorities of the army sought are under no obligation and usually have little disposition to return them. It would seem, then, that so far as those slaves were concerned who voluntarily sought the British lines the ownership of their masters had been destroyed beyond the point of revival.

The case of the other class of negroes—i. e., those carried

[a] Halleck, Elements of International Law, p. 358.
[b] Wheaton, International Law, ed. by Dana, p. 441.

off by force—presents a somewhat different problem. So far as a slave is to be considered as a mere article of private property—"a movable corporeal chattel"—he is not subject to capture and appropriation any more than other private property. In his character as a human being, however, the slave differs widely from such other property. Since he can be used by the will of his master or State in active service against the enemy, it is generally regarded as legitimate for that enemy to take possession of the slave by force and turn his services against his former master. In other words, the condition of the slave follows the fortunes of war in the sense that he is subject to capture and service. There can be no doubt that if the British had been successful in the war the slaves would rightfully have remained in their possession, or, at least, at their disposal. The property rights of the American inhabitants would have been considered extinguished. It is doubtful, however, whether a different outcome of the war could give a different status to the captured negroes. By the laws of war they had become British property, and had thereby ceased to be American property. The ethics of the day among both combatants did not elevate the negro above the condition of ordinary property. His status was closely approximated to that of horses and cattle. The case set up by the United States was founded, not on moral principles, but on the alleged rights of property. If it could not be maintained that the negroes taken by the British continued to be American property, the claims of the slaveholders fell of their own weight. But the authority of modern international law (although not so clearly defined at the time of which we are speaking as it is at the present day) must be conceded as giving its support on this point to the side of the British. And since the treaty provided only against the carrying away of American property, it would seem that the negroes taken during the course of the war were not included in the literal meaning of the treaty stipulation. This does not mean that the British conduct with regard to the negroes was in all respects justifiable. It simply means that, given the process by which the slaves had come into the possession of the British armies and given the generally accepted rules of international law on the subject, the legal defense set up by Grenville and his colleagues must be judged well-nigh impregnable.