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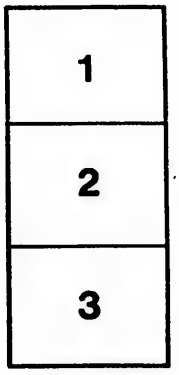

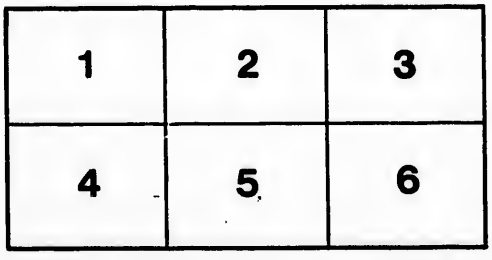

20th Congress, 1st Session. [Doc. No. 43.] Ho. of Reps. Executive.

NAVIGATION OF THE ST. LAWRENCE.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING A REPORT FROM

THE SECRETARY OF STATE,

AND THE CORRESPONDENCE WITH

THE GOVERNMENT OF GREAT BRITAIN,

RELATIVE TO THE

Free Navigation of the River St. Lawrence.

JANUARY 7, 1828.

Read, and referred to the Committee on Foreign Affairs.

WASHINGTON:

PRINTED BY GALES & SEATON.

1828.

WASHINGTON, *7th January*, 1828.

To the House of Representatives of the United States:

In compliance with a resolution of the House of Representatives, of the 17th of last month, I transmit to the House a report from the Secretary of State, and the correspondence with the Government of Great Britain, relative to the free navigation of the river St. Lawrence.

JOHN QUINCY ADAMS.

The Secretary of State, to whom has been referred a resolution of the House of Representatives, of the 17th ultimo, requesting the President of the United States to communicate to that House, "if not, in his opinion, incompatible with the public interest, the correspondence of this Government with that of Great Britain, relative to the free navigation of the river St. Lawrence," has the honor to submit to the President the accompanying papers, being extracts and copies of letters and documents, connected with that subject, and explanatory of the same.

H. CLAY.

DEPARTMENT OF STATE,
Washington, 5th January, 1828.

LIST OF PAPERS

Accompanying the report of the Secretary of State, of the 5th January, 1828.

Extract.	Mr. Adams to Mr. Rush,	dated 23d June, 1823.
	Mr. Rush to Mr. Adams,	12th August, 1824.
	Mr. Clay to Mr. Gallatin,	19th June, 1826.
	Mr. Clay to Mr. Gallatin,	8th August, 1826.
	Mr. Gallatin to Mr. Clay,	21st September, 1827.
	Mr. Gallatin to Mr. Clay,	1st October, 1827.
B. Protocol 18.		
N. Protocol 24.		

Extract of a letter from Mr. Adams to Mr. Rush, dated Department of State, Washington 23d June, 1823.

"With regard to the *right* of that portion of our people to navigate the river St. Lawrence, to and from the ocean, it has never yet been discussed between us and the British Government. I have little doubt that it may be established upon the sound and general principles of the law of nature; and if it has not been distinctly and explicitly asserted in negotiation with the British Government, hitherto, it is because the benefits of it have been, as the committee remark, *tacitly* conceded, or because the *interest*, now become so great, and daily acquiring additional moment, has, it may almost be said, originated since the acknowledgment of our independence by the treaty of 1783.

"The memorial from the committee of the inhabitants of Franklin county, New York, is perfectly correct, when it asserts this right upon the principles asserted at the period when our right to the navigation of the Mississippi was in question; and so far as the right, *by the law nature*, was maintained on the part of the United States, in that case, so far is the Government of the United States bound to maintain, for the people of the Territory of Michigan, and of the States of Illinois, Indiana, Ohio, Pennsylvania, New York, and Vermont, the natural right of communicating with the ocean, by the only outlet, provided by nature, from the waters bordering upon their shores.

"We know that the possession of both the shores of a river, at its mouth, has heretofore been held to give the right of obstructing or interdicting the navigation of it to the people of other nations, inhabiting the banks of the river, above the boundary of that in possession of its mouth. But the exclusive right of jurisdiction over a river, originates in the social compact, and is a right of sovereignty. The right of navigating the river is a right of nature, preceding it in point of time, and which the sovereign right of one nation cannot annihilate, as belonging to the people of another.

"This principle has been substantially recognized by all the parties to the European alliance, and particularly by Great Britain, at the negotiation of the Vienna Congress treaties. It is recognized by the stipulations of those treaties, which declare the navigation of the Rhine, the Necker, the Main, the Mozelle, the Maese, and the Scheldt, free to *all* nations. The object of those stipulations, undoubtedly, was, to make the navigation of those rivers effectively free to all the people dwelling upon their banks, and to abolish all those unnatural and unjust restrictions, by which the people of the interior of Germany had, before that time, been deprived of their natural outlet to the sea, by the abuse of that right of sovereignty which imputed an exclusive

jurisdiction and property over a river to the State possessing both shores, at its mauth. There is no principle of national law upon which those articles of the Vienna Congress treaties could be founded, which will not apply to sustain the right of the People of this Union to navigate the St. Lawrence river to the ocean.

"These ideas are suggested to you, to be used, first, in conference with the British Minister of Foreign Affairs, and, afterwards, if necessary, in correspondence with him. The manner and the time of presenting them, will be best judged of by your discretion. By the two acts of Parliament, of 3d Geo. 4, chs. 44 and 119, the navigation of the St. Lawrence, from our Territories to the ocean, is, in fact, conceded to us. By the first, from the ocean to Quebec; and, by the second, from any part of our territories to the same port. But a discretionary power is given to the Colonial Government in Canada, to withdraw the latter of these concessions, by excepting any of the Canadian ports from those to which our vessels are by the act made admissible; and the duties imposed by the act, upon all those of our exports which could render the trade profitable, are prohibitory."

Extract of a despatch (No. 10) *from Mr. Rush to Mr. Adams, dated*

LONDON, *August* 12, 1824.

"The act of Parliament of the fifth of August, 1822, having immediate relation to the commercial intercourse between the United States and the British continental possessions in their neighborhood, I naturally regarded it, as your instructions to me had done, in connexion with the act of June the 24th, 1822. This brought under consideration our claim to the navigation of the river St. Lawrence. Between this question, and the questions of commercial intercourse under the act of June, 1822, the British Plenipotentiaries were constantly unwilling to acknowledge any connexion. Nevertheless, looking to your instructions, and as well to the reason of them, as to their authority, I treated the two questions as belonging to one and the same general subject. They asked whether, taking the two acts of Parliament together, the United States did not already enjoy the navigation of this river? I said that they did: by the act of June the 24th, 1822, they enjoyed it from the ocean to Quebec; and by that of August the 5th, 1822, from any part of the territories of the United States to Quebec. But, from the fact of the colonial Governments, in Canada, being invested with a discretionary power to withdraw the latter of these concessions, by excepting any of the Canadian ports from those to which our vessels were made admissible, it followed that our enjoyment of the navigation of this river was rendered contingent upon British permission. This was a tenure not reconcilable in the opinion of the Government of the United States, with the growing and permanent wants of their citizens in that portion of the Union

or with the rights of the nation. It was due to both these considerations that it should stand upon a different tenure, and the time had arrived when it was desirable that the two nations should come to an understanding upon a question of so much importance.

"The British Plenipotentiaries next asked, whether any question was about to be raised on the right of Great Britain to exclude, altogether, vessels of the United States from trading with British ports situated upon the St. Lawrence, or elsewhere, in Canada? I replied that I was not prepared absolutely to deny such a right in Great Britain, to whatever considerations its exercise might be open. I remarked, also, that it seemed already to have been substantially exercised by this act of the 5th of August, 1822: for, by its provisions, only certain enumerated articles were allowed to be exported from the United States into Canadian ports, and duties were laid upon these articles, which might be said to amount a prohibition. I added, that, although the foregoing act had not laid any duty on the merchandise of the United States descending the St. Lawrence with a view to exportation by sea, yet that an act of the preceding year did, viz. upon their timber and lumber, which made it highly expedient that the relative rights of the parties to the use of the waters of this great stream, should be ascertained. I here went into a review of the footing upon which the trade between the United States and the Canadas stood, under the stipulations of the treaty of 1794. The memorial from the inhabitants of Franklin County, in the State of New York, and the report of the Committee of the House of Representatives upon that document, furnished me with the necessary lights for executing this duty, as well as for pointing out the injurious and burdensome operation of the act of the 5th of August, 1822. The latter act had superseded all the former conditions of this intercourse. With these conditions, the citizens of the United States had been, I said, content, and it was believed that they had been found, on experience, satisfactory on both sides. The treaty stipulations of 1794, were among the articles of that instrument declared, when it was made, to be permanent; and so mutually beneficial had appeared to be their operation, that both parties continued, in practice, to make them the rule of their conduct for some years after the war of 1812, until, by the acts of Parliament, just recited, Great Britain chose to consider the intervention of that war as putting an end to their validity. This state of things, by remitting each party to their anterior and original rights, rendered it manifestly incumbent upon the Government of the United States now to attempt to settle, by convention, or in some other manner, with Great Britain, the true nature of the tenure by which they held the navigation of this stream. Such was the character of the remarks by which I illustrated the propriety of adding to the two articles which I had offered for the regulation of the commercial intercourse between the United States and the British colonies, whether continental or insular, a third article relating exclusively to the navigation of the St. Lawrence. A third article will be found, accordingly, in this connexion, as part of our projet, already referred to, as annexed to

the protocol of the third conference. Its stipulations were, that the navigation of the St. Lawrence in its whole length and breadth, to and from the sea, should be at all times equally free to the citizens and subjects of both countries, and that the vessels belonging to either party should never be subject to any molestation whatever by the other, or to the payment of any duty for this right of navigation. After this unequivocal provision, it concluded with a clause that, regarding such reasonable and moderate tolls as either side might claim and appear to be entitled to, the contracting parties would treat at a future day, in order that the principles regulating such tolls might be adjusted to mutual satisfaction.

"I deemed it most advisable to ingraft upon the article this principle respecting tolls, although it was not particularly mentioned in your despatch. In pursuing into their details some of the general principles which you had laid down, I was left under the impression that our title to navigate this river, independently of the consent of Great Britain, could be made out with more complete and decisive strength, under the qualified admission of the claim to toll. The writers on public law had generally so treated the subject, and, in some of the modern treaties, of high authority in our favor, on the general question, the admission was, also, to be seen. I refer particularly to the fifth article of the treaty of peace, of the thirtieth of May, 1814, between the allied Powers and France, where, after providing for the free navigation of the Rhine to all persons, it is agreed that principles should be laid down, at a future Congress, for the collection of the duties by the States on its banks, in the manner most equal and favorable to the commerce of all nations. In adverting to the claim of toll, as a question only for future discussion, and one that might be of like interest to both parties, (the British navigation of this river being obliged, in some parts, to pass close to our bank,) and, moreover, where the claim, if advanced on either side, was to be made dependent, on sufficient cause being shown for it, I did not believe that I was losing sight of any principle of value to the United States in this controversy. The clause, I hope, will be found to have been too guarded in its terms to be open to such a risk.

"There was another point on which I felt more uncertainty. The navigation of this stream, although I believed it could be demonstrated to be the just right of the People of the United States, could not draw after it all its benefits to them, without a concurrent right of stopping at some point, or port, where both of its banks fell within the colonial territory of Great Britain. Upon what footing was I to treat this latter and subordinate question? Your instructions had not dealt with it, and I felt myself at a loss. It could scarcely be doubted but that, our right to navigate the river being established, Britain would, as matter of international comity, and as an arrangement advantageous also to herself, allow us a place of entry for our vessels, and deposite for our produce, somewhere on its shores. She has so largely, of late years, been extending the warehousing system to all other nations, for their convenience and her own, that it might well be presumed she

would not exclude the United States from a participation in it at Quebec, or elsewhere, at a suitable port in Canada. Yet I felt it to be a point of some delicacy, and therefore thought that it would be most judicious to leave it wholly untouched in my proposal. Another reason operated with me for this silence. As far as I was able to carry my investigations into the point, I found much ground for supposing that the right to the navigation of a river under the strong circumstances which marked that of the United States to the navigation of the St. Lawrence, would involve, as an incident, the right of innocent stoppage somewhere on the shores; an incident indispensable to the beneficial enjoyment of the right itself. By the seventh article of the treaty of Paris, of 1763, the free navigation of the Mississippi was granted to Great Britain, but without any clause securing to British vessels the privilege of stopping at New Orleans, then a French port, or at any other port or place on any part of the shores. Yet the historical fact appears to have been, that Britain did use New Orleans as a place for her vessels to stop at, and this without any subsequent arrangement with France upon the subject. The case becomes still stronger, if, afterwards, when New Orleans fell into the hands of Spain, the British continued to use it for the same purpose, contrary, at first, to the remonstrances of the Spanish Governor of that town, which is also believed to have been the fact. I abstained, however, from asserting, in this negotiation, the subordinate right in question.

"On the principal question of our equal right with the British to the entire and unobstructed navigation of this river, I dwelt with all the emphasis demanded by its magnitude. I spoke of it as a question intimately connected with the present interests of the United States, and which assumed an aspect yet more commanding in its bearing upon their future population and destinies. Already the immense region which bordered upon the lakes and northern rivers of the United States, were rapidly filling up with inhabitants, and soon the dense millions who would cover them, would point to the paramount and irresistible necessity for the use of this great stream, as their only natural highway to the ocean. Nor was the question one of magnitude to this part of the Union alone. The whole nation felt their stake in it; the Middle and the North more immediately; but all the rest by the multiplied ties and connexions which bound up their wants, their interests, and their sympathies, with the Middle and the North. It was under such a view of the immediate and prospective value of this navigation to us, that I first presented it to the notice of the British Plenipotentiaries as a question *of right*. I told them they must understand this to be the sense in which I had drawn up the article upon the subject, and that it was the sense in which I felt myself bound, as the Plenipotentiary of the United States, to urge its adoption.

"I approach an interesting part of this negotiation when I come to make known in what manner the British Plenipotentiaries received this disclosure. They said that, on principles of accommodation, they were willing to treat of this claim with the United States in a spirit of entire amity; that is, as they explained, to treat of it as a *concession*

on the part of Great Britain, for which the United States must be prepared to offer a full equivalent. This was the only light in which they could entertain the question. As to the claim *of right*, they hoped that it would not even be advanced; persisted in, they were willing to persuade themselves it would never be. It was equally novel and extraordinary. They could not repress their strong feelings of surprise at its bare intimation. Great Britain possessed the absolute sovereignty over this river, in all, parts where both its banks were of her territorial dominion. Her right, hence, to exclude a foreign nation from navigating it, was not to be doubted, scarcely to be discussed. This was the manner in which it was at first received. They opposed to the claim an immediate, positive, unqualified resistance.

"I said that our claim was neither novel nor extraordinary. It was one that had been well considered by my Government, and was believed to be maintainable on the soundest principles of public law. The question had been familiar to the past discussions of the United States, as their State papers, which were before the world, would show. It had been asserted, and successfully asserted, in relation to another great river of the American continent, flowing to the South, the Mississippi, at a time when both of its lower banks were under the dominion of a foreign Power. The essential principles that had governed the one case, were now applicable to the other.

"My reply was not satisfactory to the British Plenipotentiaries. They combatted the claim with increased earnestness, declaring that it was altogether untenable, and of a nature to be totally and unequivocally rejected. Instead of having the sanction of public law, the law and the practice of nations equally disclaimed it. Could I show where was to be found, in either, the least warrant for its assertion? Was it not a claim plainly inconsistent with the paramount authority and exclusive possession of Great Britain? Could she for one moment listen to it?

"I remarked, that the claim had been put forward by the United States because of the great national interests involved in it; yet, that this consideration, high as it was, would never be looked at but in connexion with the just rights of Great Britain. For this course of proceeding, both the principles and practice of my Government might well be taken as the guarantee. The claim was, therefore, far from being put forward in any unfriendly spirit, and would be subject to a frank and full interchange of sentiments between the two Governments. I was obviously bound, I admitted, to make known, on behalf of mine, the grounds on which the claim was advanced—a duty which I would not fail to perform. I stated that we considered our right to the navigation of this river, as strictly a *natural right*. This was the firm foundation on which it would be placed. This was the light in which it was defensible on the highest authorities, no less than on the soundest principles. If, indeed, it had ever heretofore been supposed that the possession of both the shores of a river below, had conferred the right of interdicting the navigation of it to the people of other nations inhabiting its upper banks, the examination of such a

principle would at once disclose the objections to it. The exclusive right of jurisdiction over a river could only originate in the social compact, and be claimed as a right of sovereignty. The right of navigating the river was a right of nature, preceding it in point of time, and which the mere sovereign right of one nation could not annihilate as belonging to the people of another. It was a right essential to the condition and wants of human society, and conformable to the voice of mankind, in all ages and countries. The principle on which it rested, challenged such universal assent, that, wherever it had not been allowed, it might be imputed to the triumph of power or injustice over right. Its recovery and exercise had still been objects precious among nations, and it was happily acquiring fresh sanction from the highest examples of modern times. The parties to the European Alliance had, in the treaties of Vienna, declared that the navigation of the Rhine, the Necker, the Mayne, the Moselle, the Maese, and the Scheldt, should be free to all nations. The object of these stipulations was as evident as praiseworthy. It could have been no other than to render the navigation of those rivers free to all the people dwelling upon their banks; thus abolishing those unjust restrictions by which the people of the interior of Germany had been too often deprived of their natural outlet to the sea, by an abuse of that right of sovereignty, which claimed for a State, happening to possess both the shores of a river at its mouth, the exclusive property over it. There was no principal of national law upon which the stipulations of the above treaties could be founded, which did not equally apply to the case of the St. Lawrence. It was thus that I opened our general doctrine. It was from such principles that I deduced our right to navigate this river, independent of the mere favor or concession of Great Britain, and, consequently, independent of any claim, on her side, to an equivalent.

"I abstain from any further recapitulation to you of the principles which I invoked, or of the authorities to which I referred, for a reason to be now mentioned. It will be seen, by the first protocol, that our agreement had been to carry on the negotiation by conference and protocol. This, the more usual mode at all times, was conceived to be peculiarly appropriate where the subjects to be handled were so various, and their details, in some instances, so extensive. It was recommended, also, and this was of higher sway with me, by the example of the negotiation of 1818, in the course of which some of the same subjects had been discussed with this Government. Nevertheless, each party had reserved, under this agreement, the right of annexing to the protocol any written statement that might be considered necessary, as matter either of record, or of explanation. In your instructions to me respecting this claim to the navigation of the St. Lawrence, a question wholly new as between the two nations, you had adverted to my presenting it in writing, if necessary, and I determined, under all the circumstances, that I should not properly come up to my duty, unless by adopting this mode. The question was not only new, but of the greatest moment. I saw, also, from the beginning,

that it would encounter the most decided opposition from Great Britain. In proportion as her Plenipotentiaries became explicit and peremptory in denying it, did it occur to me that it would be proper, on my part, to be unequivocal in its assertion. This could be best done upon paper. This would carry the claim distinctly to the archives of this Government, rather than trust it to foundations more uncertain and fugitive. It would explain, as well as record, the sense in which it was inserted on the protocol. Another motive with me for this course, and scarcely a secondary one, was, that it would serve to draw from Great Britain, in the same form, a precise and full avowal of the grounds on which she designed to oppose the claim. On a question so large, and which, from all that I perceived to mark its first opening between the two Governments, could hardly fail to come under discussion again hereafter, it appeared to me that it would be more acceptable to my Government to be in possession of a written document, which should embody the opinions of this Government, than to take the report of them from me, under any form less exact or authentic.

"I, accordingly, drew up a paper on the subject, which, under the right reserved, I annexed (marked B) to the protocol of the eighteenth conference, and so it stands amongst the papers of the negotiation. The British Plenipotentiaries continued to urge their animated protests against this proceeding on my part; not that they could divest me of my privilege of recording my sentiments in the shape of this written statement, but that they earnestly pressed the propriety of my abandoning, altogether, any claim to the navigation of this river, as a claim of right, which shut them out from treating of it upon other bases. But, having taken my determination, under other estimates of my duty, I did not depart from it.

"The paper which I drew up, aimed at presenting a broad, but intelligible, outline of the principal reasons in support of our claim. These were such as you had set before me, and as I judged to be immediately deducible from them. Under the latter, I included the argument on the Mississippi question, used by an illustrious individual, then the organ of our Government in its intercourse with foreign States. I considered this argument as virtually comprehended in your instructions by the reference which they contained to it; the questions in both cases, so far as each drew support from the deep foundations of the law of nature, being the same. Of this luminous State paper I followed the track, adopting its own language, whenever this could be done, as the safest, the most approved, the most national. The only view of the subject not elicited on that occasion, which I ventured to take up, was one pointed out by the locality of the St. Lawrence. I will briefly explain it.

"The exclusive right possessed by Great Britain over both banks of this river, was won for her by the co-operation of the people who now form the United States. Their exertions, their treasure, their blood, were profusely embarked in every campaign of the old French war. It was under this name that the recollection of that war still lived in

the United States; a war which, but for the aid of New England, New York, and Pennsylvania, if of no more of the States, would probably not have terminated, when it did, in the conquest of Canada from France. If these States were, at that epoch, a part of the colonial empire of Great Britain, it was, nevertheless, impossible to obliterate the recollection of historical facts, or exclude the inferences that would attach to them. The predecessors of the present inhabitants of those States had borne a constant and heavy burden in that war, and had acquired, simultaneously with the then parent State, the right of descending this stream, on the hypothesis, assumed for the moment, of their not having possessed it before; a right of peculiar importance to them, from their local position and necessities. It was to this effect that I noticed a title, by *joint acquisition*, as, also, susceptible of being adduced for the United States, to the navigation of this river. There was, at least, a strong natural equity in it, which would come home to the people of the United States, impressing them with new convictions of the hardship of now refusing them the use of this stream, as an innocent pathway to the ocean. But, as I had not your elucidations of this view of the subject, I was careful to use it only in subordination to the argument of natural right. The latter I treated as sufficient, in itself, to make out our title, and repudiated the necessity of resorting to any other. I will own, however, that my disposition to confide in the argument founded upon joint acquisition, was increased by the analogy which it appeared to me to bear to the course of reasoning pursued with Great Britain, by my predecessor in this mission, in relation to the fisheries. If our title to a full participation with Britain in the fisheries, though they were within the acknowledged limits and jurisdiction of the coasts of British America, was strengthened by the fact of the early inhabitants of the United States having been among the foremost to explore and use the fishing grounds, why was the analogous fact of their having assisted to expel the French from the lower shores of the St. Lawrence to be of no avail? I had believed in the application and force of the argument in the one instance, and could not deny it all the consideration that it merited in the other.

"The necessity of my recounting to you the British argument in answer to our claim, is superseded by my being able to transmit it to you in their own words upon paper. It is sufficiently elaborate, and was drawn up with great deliberation. It is annexed (marked N.) to the protocol of the twenty-fourth conference. The intention avowed by the British Plenipotentiaries, at the nineteenth conference, of obtaining for its doctrines, before it was delivered to me, the full sanction of their highest professional authorities on matters relating to the law of nations, may serve to show the 'gravity and importance,' to repeat their own expression, which the question had assumed in their eyes. I have, otherwise, reasons for knowing that their argument was prepared under the advice and assistance of five of the most eminent publicists of England. With all the respect due to a paper matured under such auspices, I am not able to look upon it as impugn-

ing the argument which, under your direction, and following the course of others before me, I had become the organ of making known on behalf of the United States.

"In several instances the British paper has appealed to the same authorities that are to be found in mine. It is in the application of them only, that the difference is seen. In other parts, the difference is made to turn upon words rather than substance. But an error that runs throughout nearly the whole of their paper, consists in attributing to mine a meaning which does not belong to it. This applies especially to the particular description of right which we claim; how far it is one of mere innocent utility; how far a right necessary to us and not injurious to Britain; how far a right which, if not falling under the technical designation of absolute, is, nevertheless, one that cannot be withheld. These are all qualifications which were not overlooked in my exposition of the doctrine; a light, however, in which the British paper does not appear to have regarded it. But as each document is now of record, and will be judged by the terms which it has used, and the construction that justly attaches to them, I will not enlarge upon this head.

"The British paper deals with our claim as standing upon equal footing with a claim to the use of the roads, canals, or other artificial ways, of a country; forgetting that the case in dispute is that of a natural stream, forming the only natural outlet to the ocean—the stream itself being common, by nature, to both countries. Commenting upon the acquired title of the United States, which I had put forward under the restriction described, their paper argues, that the same ground would justify a correlative claim, by Great Britain, to the use of the navigable rivers, and all other public possessions, of the United States, which existed when both countries were united under a common Government! By a like misapplication of obvious principles, it argues that our claim would also justify Britain in asking a passage down the Mississippi, or the Hudson, though neither the one nor the other touch any portion of the British territories; or that it might equally justify a claim, on her side, to *ascend*, with British vessels, the principal rivers of the United States, as far as their draft of water would admit, instead of depositing their cargoes at the appointed ports of entry from the sea! On doctrines such as these, I could only say to the British Plenipotentiaries, that I was wholly unable to perceive their application to the argument, unless the United States had been advancing a claim to the navigation of the river Thames, in England.

"Their argument also assumes that the treaty stipulations of 1794, exclude all idea of a right, on our side, to the navigation of this river, forgetting, that if, under those stipulations, vessels of the United States were interdicted the navigation of British rivers between their mouths and the highest port of entry from the sea; so, on the other hand, British vessels were interdicted the navigation of the rivers of the United States, beyond the highest ports of entry from the sea; and, also, that the whole terms of the international intercourse, in that quarter, were, by this compact, such as at the time satisfied both

parties, without impairing the rights which either possessed independent of the compact, and which only remained in suspense during its existence. This observation suggests another to which their argument is open, in parts which they press as of decisive weight. It alleges that because, by the general treaty of Vienna, the powers whose States were crossed by the same navigable rivers, engaged to regulate, by common consent, all that regarded their navigation; because Russia held by treaty the navigation of the Black sea; and because of the many instances, capable of being cited, were the navigation of rivers or straits that separated, or flowed through the territories of different countries, was expressly provided for by treaty; that, because of these facts, the inference was irresistible, that the right of navigation, under such circumstances, depended upon *common consent*, and could only be claimed *by treaty*. Here, too, it seems to have been forgotten, that it is allowable in treaties, as well as oftentimes expedient, for greater safety and precision, to enter into stipulations for the *enjoyment* or *regulation* of pre-existing rights; that treaties are, in fact, expressly declared, by the writers upon the laws of nations, to be of two general kinds: those which turn on things to which we are already bound by the law of nature, and those by which we engage to do something more. In their quotation, also, of the note from the first volume of the Laws of Congress, containing an intimation that the United States could not be expected to yield the navigation of the Mississippi, without an equivalent, they seem wholly to have overlooked, besides the other points of that note, that it was made at a period when it was well known that no part of that river touched the territories of a foreign Power; and when, therefore, its exclusive navigation belonged to the United States, as much so as the Delaware, or the Potomac.

"The foregoing are some of the remarks upon the British paper, which I submitted at the conference, after receiving it. The first impressions that I had of my duty in regard to it, and, consequently, my first determination was to reply to it at large, in writing, annexing my reply to the protocol. But, on more reflection, I deem it most proper to abstain, at present, from this step. As a view of the whole subject, given out under the immediate eye and authority of this Government, and with extraordinary care, it appeared to me that the British paper ought to come under the knowledge of my own Government, before receiving a formal or full answer from any source less high. If it be thought to require such an answer, a short delay could be nothing to the advantage of its being afforded, either through me, or my successor in this mission, under the light of further instructions from home. The pause seemed the more due, not only from the newness of the discussion between the two Governments, but, because I may not, at this moment, be sufficiently apprised of all the modifications under which mine may desire it to be presented in a second and more full argument. I hope that this forbearance, on my part, will be approved, as having been, under the exigency, the most circumspect and becoming course. I gave the British Plenipotentia-

ries to understand, that the written argument, on the side of the United States, must not be considered as closed, but, on the contrary, only as opened."

Extract of a letter from Mr. Clay to Mr. Gallatin, (No. 1.)

DEPARTMENT OF STATE,
Washington, 19th June, 1826.

"3. The navigation of the St. Lawrence from the Territories of the United States to the sea.

"The Government of the United States have seen, with very great surprise and regret, the manner in which the assertion of this right of navigation, through Mr. Rush, during the former negotiation, was met and resisted by the British Plenipotentiaries. The President has respectfully and deliberately examined and considered the British paper which was delivered in by them, and which is annexed to the protocol of the 24th conference, and he has been altogether unable to discern, in its reason or its authorities, any thing to impeach the right of the United States, or to justify the confidence with which the exclusive pretensions of Great Britain are brought forward and maintained. What is the right claimed by the United States? The North American lakes are among the largest inland seas known on the globe. They extend from about the 41st to the 49th degree of north latitude, stretch over sixteen degrees of longitude, and thus present a surface, altogether, of upwards of eighty-three thousand square miles. Eight States of this Union, (three of them among the largest in it) and one Territory, border on them. A population already exceeding two millions, and augmenting beyond all example, is directly and deeply interested in their navigation. They are entirely enclosed within the Territories of the United States and Great Britain, and the right to their navigation, common to both, is guarantied by the faith of treaties, and rests upon the still higher authority of the law of nature. These great lakes are united by but one natural outlet to the ocean, the navigation of which is common to all mankind. That outlet, along a considerable part of its course, forms a common boundary between the territories of the United States and Great Britain, and to that extent the right of navigating it is enjoyed by both. The United States contend that they are invested with a right to pass from those lakes, the incontested privilege of navivating which they exercise, through that natural outlet, to the ocean—the right of navigating which, by all nations, none presumes to question. The right asserted, in other words, is, that their vessels shall be allowed, without molestation, to pursue their trackless way on the bosom of those vast waters, gathered together, in no inconsiderable degree, in their own territory, through that great channel of the St. Lawrence, which nature itself has beneficently supplied, to

the ocean, in which they are finally deposited. They ask that the interests of the greater population, and the more extensive and fertile country above, shall not be sacrificed, in an arbitrary exertion of power, to the jealousy and rivalry of a smaller population, inhabiting a more limited and less productive country below. The United States do not claim a right of entry into British posts, situated on the St. Lawrence, against British will, and to force their productions into the consumption of British subjects. They claim only the right of passing those ports, and transporting their productions to foreign markets, or to their own, open and willing to receive them; and, as incident and necessary to the enjoyment of that right, they claim the privileges of stoppage and transhipment, at such places within the British jurisdiction, and under such reasonable and equitable regulations, as may be prescribed or agreed upon.

"Such is the right, the assertion of which shocked the sensibility of the British Plenipotentiaries. The impartial world will judge whether surprise most naturally belonged to the denial or to the assertion of the right.

"If the St. Lawrence is regarded a strait, as it ought to be, connecting navigable seas, there would be less controversy. The principle on which the right to navigate straits depends, is that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. Let that principle be applied to the present case. The United States and Great Britain have, between them, the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from the one to the other through the natural link. Is it reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common natural bounty, necessary to the enjoyment of the full advantages of them? But, if that vast mass of water, collected from a thousand tributary sources, in the immense reservoirs of the North American lakes, and cast by them into the Atlantic ocean, through the channel of the St. Lawrence, is to be considered, in its transit through that great channel, as a river, the name which accident has conferred, and not a strait, the right of the United States to navigate it is believed to be, nevertheless, clearly and satisfactorily maintainable. In treating this subject, there is, throughout the whole of the British paper, a want of just discrimination between the right of passage, claimed by one nation, through the territories of another, on land, and that on navigable water. The distinction, it is true, is not always clearly adverted to in the writers on the public law, but it has a manifest existence. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State or its citizens, whose territory is traversed. If the country be in a forest state, there is a destruction of timber, if not of soil. If in a cultivated, the fields are trodden down and dilapidated,

and the use of the roads more or less impairs them. In both, there is danger of collisions between the native and foreign citizens. But a passage on land, through the territories of another, whenever it is innocent, cannot be lawfully refused. It is to be granted by a neutral to a belligerent army, if no serious injury is likely to accrue to him. As the right of judging whether the passage be or be not innocent, must abide somewhere, expediency suggests that it should be exercised by the sovereign of the soil. But his judgment and decision must be regulated by reason and justice; and, of course, the passage cannot be rightfully refused upon grounds merely arbitrary. How stands the case of a passage on navigable water? In that, no injury is done to timber or soil, to cultivation or to roads; no dangerous collisions between the inhabitants and the foreigners arise; not a trace is left by the passenger behind. In the passage of the St. Lawrence, for example, the vessel is wafted, on the same water which first floats it from the territories of the United States, to the ocean. It is true, as is alleged in the British paper, that this water washes the quays of Montreal and Quebec, passes under the walls of a principal fortress, and, also, through the *finest* settlements of Canada, and extends along a space of near six hundred miles, within the dominions of his Britannic Majesty. But when the American vessel shall have arrived at the ocean, to which she is supposed to be bound, she will have inflicted no injury upon those quays; the guns of the fortress will have been silent; those fine settlements of *Canada*, and that space of six hundred miles, (not exactly, as is asserted, extending through the heart of a British colony,) will have remained unmolested. She will have left no traces of injury behind her: her voyage itself will not have made on the inhabitants the impression of a passing dream; and, like the water on which she was borne, she will have sought her trackless and innocent course to the ocean, to reach which Great Britain would be as much justified in claiming a power to prevent the one as the other.

"Nor ought the cases of rivers which rise and debouché altogether within the Territorial limits of the same nation, to be confounded with those which, having their sources and navigable portions of their bodies in States above, finally discharge themselves within the limits of other States below. In the former instance, there is no basis on which a right in common can rest. The navigation of those rivers, ordinarily, can only be desired for purposes of commerce or intercourse with the nation to whose Territories, in their whole extent, they are confined. And as every nation, strictly, has a right to interdict all foreign commerce, and to exclude all foreigners from its Territories, as is done, in a considerable degree, by China, it follows that every one has a right, generally, to prohibit an entry into such rivers, or the use of its artificial roads. This right of prohibition exists where the direct object of the visit of foreigners is social or commercial. The end being forbidden, the means necessary to its accomplishment may be rightfully withheld. But, if an innocent passage is demanded for purposes unconnected with the commerce or society of the State through which

it is required, it cannot justly be denied. In the enjoyment of this right of passage, the use of the Territories, in which it is exerted, is merely collateral. If it be for purposes of lawful war, the end carries the means; and the neutral cannot deny the passage without weighty considerations.

"But the right of the inhabitants of the upper bank of a river to the use of its navigation in its passage to the sea, through the territories of another Sovereign, stands upon other and stronger ground. If they were to bring forward the pretension to trade, or open other intercourse with the nation inhabiting the banks below, against its consent, they would find no support or countenance in reason, or in the law of nature. But it is inconceivable upon what just grounds a nation below can oppose the right of that above to pass through a great natural highway into the sea, that it may trade or hold intercourse with other nations by their consent. From the very nature of such a river, it must, in respect to its navigable uses, be considered as common to all the nations who inhabit its banks, as a free gift, flowing from the bounty of Heaven, intended for all whose lots are cast upon its borders; and, in this latter respect, it is clearly distinguishable from canals and works of art, from the use of which, being erected at the expense of one, all others may be excluded. The right to prohibit the use of natural channels, deduced in the British paper, from that of the exclusive nature of those of an artificial kind, would establish the power, if it were practicable, to forbid the enjoyment of the showers of rain which are equally dispensed by the Author of all Good, because the gardener may lawfully deny the employment of his watering vessels in the irrigation of any grounds but his own. The land may be divided through which a river passes, or which composes its bed, by artificial lines of demarcation; but the water itself is incapable of such a division. It is confluent and continuous. And that portion of the floating mass which is now in the territorial dominion of the lower nation, was yesterday under that of the nation above; and, contemning alike the authority of all, will, to-morrow, be in that ocean to which the presumptuous sway of no one has as yet been lawfully extended. The incontestible right which one nation has to trade with others, by their consent, carries along with it that of using those navigable means necessary to its enjoyment, which the bounty of nature has provided for all, in respect to seas, and, in regard to rivers, for the nations who inhabit them.

"The British paper inquires if the American Government can mean to insist on a demand, involving such consequences as it describes, without being prepared to apply, by reciprocity, the principle on which the demand rests, in favor of Great Britain? The American Government has not contended, and does not mean to contend, for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. Accordingly, with respect to that branch of the Columbia which rises north of the parallel 49, (should that parallel be mutually agreed to as the boundary between the territories of the two Powers,) a case analogous to that of the St. Lawrence will be presented.

And you have been hereinbefore instructed, in the event of that branch being navigable within the British territory, to stipulate for the right of navigating the Columbia to the ocean, in behalf of British subjects. In regard to the Mississippi, (the example put by the British Plenipotentiaries,) if further exploration of the country shall develope a connexion between that river and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American Government, always faithful to principles, would be ready to apply to the Mississippi the doctrines which it now holds in regard to its great northern rival. It is not necessary to discuss all the extreme cases which may be fancifully suggested, such as a foreign claim to pass the Isthmus of Darien, to drive a trade between Europe and distant India, through two oceans; or that of passing through England to trade with France or other portions of the European continent. Examples of that kind belong to the species of sophistry which would subvert all principles, by pushing their assumed consequences into the regions of extravagant supposition.

"The British paper denies that the engagements of Paris, in 1814, and at Vienna in the following year, between the Powers of Europe, in respect to the navigation of rivers, give any countenance to the natural right asserted by this Government. It is difficult to conceive what other principle than that of a strong sense of the injustice of withholding from nations, whose territories are washed by rivers, the privilege of their navigation, dictated those engagements. The clause, cited in the paper under consideration, is not in the nature of an original grant, but appears to be founded on a pre-existing (and which could be no other than a natural) right. 'The Powers whose States are separated or crossed by the same navigable river, *engage* to regulate, by common consent, all that regards its navigation.' The regulation is not of the right, but of the *use* of the right, of navigation. And if the consent of the local sovereign is necessary to give validity to the regulation, so is that of the sovereign, above or below, whose territories are crossed by the same river; and it is not stipulated that their use of the right of navigation was to remain in abeyance until the manner of its enjoyment was regulated by the consent of all the interested Powers. On the contrary, it cannot be doubted, that it was the understanding of the great Powers at Vienna, that all the States, concerned in the navigation of the Rhine and the other enumerated rivers, were to be forthwith let into the enjoyment of the navigation of them, whether it was previously regulated, or not, by common consent. Without such an understanding, it is manifest that any one of the States, by withholding its assent to proposed regulations, upon real or ostensible grounds of objection, might indefinitely postpone, if not altogether defeat, the exercise of the recognized right. The fact of subjecting the use of a right to treaty regulations, as was proposed at Vienna to be done with the navigation of the European rivers, and as was also done in the case of the Danube, and other instances cited, does not prove that the origin of the right is conventional, and not natural. It often happens to be highly convenient, if

not sometimes indispensable, to guard against collisions and controversies, by prescribing certain rules for the use of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail, which is called for by the complicated varieties and wants of modern navigation and commerce. And hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations—the transactions at Vienna, relative to the navigation of the European rivers, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the superior wisdom of the paramount Lawgiver of the Universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected.

"The force of the example in the definitive treaty of peace of 1783, between Great Britain and the United States, by which they stipulated that the navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to both parties, is not weakened by any observations in the British paper. A stronger case need not be presented of the admission of the principle that a State, whose territories are washed by a river, cannot be justly excluded from its navigation to the ocean by an intervening Power. Spain held the entire right bank of the Mississippi from its source to the ocean, and the left bank from the ocean up to the 31st degree of north latitude, from which point, to its source, the residue of the left bank, it was supposed, belonged to the United States and Great Britain in severalty. Spain, with respect to the mouth of the Mississippi, thus stood, in 1783, in the same relation to the United States and to Great Britain, as Great Britain now does, in regard to the mouth of the St. Lawrence, to the United States. What was the law of that position of Spain, as solemnly declared by both the present contending parties? It was, that the navigation of the river Mississippi, from its source to the ocean, *shall* forever remain free and open to them both. If Great Britain, by the success of the war terminated in the treaty of 1763, was enabled to extort from France a concession of the free navigation of the Mississippi, as is asserted in the British argument, her condition was not the same in 1783. Yet, amidst all her reverses, without consulting Spain, she did not scruple to contract with the United States for their reciprocal freedom of navigating the Mississippi, from its source to the ocean, through Spanish territory, and passing the finest settlements and the largest city of Louisiana, as well as all the Spanish fortresses of the lower Mississippi. Is Great Britain prepared to promulgate a law for Spain to which she will not herself submit, in analogous circumstances?

"It is not thought to be necessary further to extend observations on the British paper, upon which I have been commenting. If others, in the course of your negotiation, should be required, they will readily present themselves to you. It is more agreeable to turn from a protracted discussion, which, although we are entirely confident of having

the right on our side, if we are to judge from the past, may terminate by leaving each party in possession of the same opinion which he entertained at its commencement, to the consideration of some practical arrangement, which, if possible, shall reconcile the views of both. A river, it is manifest, may pass through the territories of several Powers in such manner as that, if each were to interdict the others its navigable use, within his particular jurisdiction, every one of them might be deprived of all the advantages of which it could be susceptible. And, if the United States were disposed to exert, within their jurisdiction, a power over the St. Lawrence, similar to that which is exercised by Great Britain, British subjects could be made to experience the same kind of inconvenience as that to which American citizens are now exposed. The best, and, for descending navigation, the only channel of the St. Lawrence between Barnhart's Island and the American shore is within our limits; and every British boat and raft, therefore, that descend the St. Lawrence, comes within the exclusive jurisdiction of the United States. The trade of the Upper Province is, consequently, in our power, and a report to the Legislature of New York, under date 28th March, 1825, (of which a copy is now put into your possession) concludes by recommending an application to Congress to exercise the power, thus possessed by us, in retaliation for the act of the British Parliament of 5th August, 1822, entitled 'An act to regulate the trade of the Provinces of Lower and Upper Canada.' If the recommendations of that report were not adopted by the General Assembly of New York, and if Congress has hitherto forborne to place Canadian navigation under any restrictions, in their transit through our territory, it has been because of an unwillingness to follow an unfriendly example, and from a hope that mutual and candid explanations with Great Britain might remove all existing causes of hardship and complaint. Prior to the passage of the British act of Parliament, of 1822, and from the first settlement of the territory of the United States bordering on the lakes and the St. Lawrence, their citizens had met with no difficulty in the disposal of the surplus produce of their industry, consisting chiefly of pot and pearl ashes, lumber, salted provisions, and flour, at the markets of Montreal and Quebec. It was there sold, not for domestic consumption, but for subsequent exportation, by sea, to distant markets, principally British West India Colonies. This trade was reciprocally beneficial; the American citizen finding his advantage in a ready sale of his produce, the British subject his, in the commission, storing, and other incidental transactions; and British navigation enjoying the exclusive benefit of re-transporting the produce to its final destination. This trade had increased to such an extent that the single article of lumber, transported down the St. Lawrence in the year 1821, amounted, in value, to $650,000, without bringing into the estimate the portion of that article which found its way through lake Champlain and the Sorrel to Montreal and Quebec. This beneficial and innocent trade, so far as it dealt in the principal articles of flour and lumber, was almost entirely destroyed by the duties imposed in the act of Parliament of August, 1822, which, in effect, if not in form, are prohibitory.

"Should not the mutual interests of the two countries, in respect to this trade, independent of any considerations of right in the navigation of the St. Lawrence, produce an arrangement satisfactory to both parties? It is a little remarkable that the opposition to such an arrangement proceeds from the party having the greatest interest in making it. That of the United States, as has been already stated, is simply to sell a surplus produce of labor. The place of its consumption is the West Indies. If it can be disposed of short of that place, at Montreal or Quebec, the citizens of the United States would be content. But, if they cannot sell it in those cities; if Great Britain, by the imposition of duties, which it will not bear, prevent a sale; they then desire to exercise the privilege of passing out the St. Lawrence, and seeking a market wherever they can find it. Some portion of the produce which would take that natural direction, is now transported through the great canal which unites the Hudson and Lake Erie. When the canal designed to connect the great canal with the St. Lawrence, at or near Oswego, which is in considerable progress, shall be completed, other portions of American produce will seek the market of the city of New York, instead of that of the Canadian capitals. If another canal, which is projected, shall ever be cut, that which is proposed to unite the St. Lawrence to Lake Champlain, the interest of this country in the navigation of the St. Lawrence will be still further diminished. Contrast this state of our interest in the trade in question with that of Great Britain. It will not be denied that the two British cities of Montreal and Quebec would be much benefitted by the prosecution of the trade. The British tonnage enjoys, and if the navigation of the St. Lawrence were freely thrown open to us, would probably continue to enjoy, the monopoly of the exportation of our produce, either as British or American property, to foreign possessions. That produce serves to swell the list of articles of general commerce in which Great Britain, more than other nation, is concerned, and ministers directly to the wants of British colonies. If it enters somewhat into competition with similar produce of Canadian origin, that consideration should be neutralized, by the fact, that the British West India colonist enjoys the benefit of the competition. For it cannot be supposed to be a part of British policy to shut up the American supply, that one British colonist may thereby sell to another British colonist, at a price somewhat higher than he otherwise could do, without the remotest prospect of its reduction from [for] any length of time that the exclusion and the monopoly might exist. Without extending the comparison further, it must be evident that Great Britain is more, or at least as much, interested in the trade as we are. Our loss is not that of the entire value of the articles which are prevented from reaching a market, under the operation of the British laws, but of the difference only in value, if there be any, between those articles and the substitutes on which our labor exerts itself in consequence of the existence of that impediment. With this view of the matter, I have prepared two articles, which accompany these instructions, under the designation of A and

B; and which may be successively proposed by you, during the progress of the negotiation. By the first, the navigation of the St. Lawrence, up and down, from and to the ocean, is declared to belong to the citizens of the United States; and the ports of Montreal and Quebec are open to the importation and disposal of their lumber, pot and pearl ashes, flour, and salted provisions, brought from the Lake and St. Lawrence country. The privilege is limited to these articles, because they are all produced in that quarter, which it is important should have that vent; and which, not being supposed to be wanted in those cities for the consumption of either Canada, are, subsequently, exported from those places of entrepôt to foreign countries. From that cause, it would be unreasonable that they should be liable to pay any higher or other duties than similar articles of Canadian origin. There is another reason for the limitation: we could not insist upon a general and indiscriminate admission into those ports of *all* produce and manufactures of the United States, free of duty, without being prepared to allow, as the equivalent, an admission into our northern Territories of all British produce and manufactures on the same terms. But such an admission of British produce and manufactures, if not unconstitutional, would be very unequal as it respects the Lake country and other parts of the United States. The first article also provides for a right of deposite at Montreal and Quebec, or such other place as the British Government may designate. Possibly, the British Government may require a reciprocal privilege of introducing from the Canadas into the United States, free from duty, and there disposing of Canadian lumber, pot and pearl ashes, flour, and salted provisions. Such a privilege would be of essential benefit to the upper Province, in opening to it, through the canals of the State of New York, the market of the city of New York. Should such a stipulation be required, you may agree to it, with a provision that the inhabitants of Canada shall be subject to the payment of the same tolls, ferriages, and other charges, in all respects, as citizens of the United States, from time to time, are, or shall be liable to pay. You may also agree to add furs and peltries to the list of articles which each party may introduce into the territories of the other, free from duty. This would be a stipulation very advantageous to Great Britain, in opening a shorter and better route to the ocean for those articles, than that through the St. Lawrence.

"By the second article, our rights of navigation, and to a place of deposite simply, is stipulated, without the privilege of introducing into the Canadas any articles whatever of American produce. Both articles secure to British subjects the right freely to navigate the St. Lawrence, where the channel is within our exclusive jurisdiction. The first would secure all that we can ask; the second the least that we can take.

"We could not rightfully object to a refusal to allow sales of American produce, free of duty, within British jurisdiction, however unfriendly it would be. But, in that case, there ought to be no limitation of the articles of our export or import trade. On the supposition of

such a refusal, the Canadas would be strictly entrepôts, and not places of consumption of the objects of our trade, in either of its directions; and, therefore, there should be no restriction, as to what we should, or should not, export or import.

"Between the maximum and the minimum, which those two articles present, there are several intervening modifications, of which I will now specify some that present themselves, and to which, if you cannot do better, you are authorized to agree:

"1. It may be proposed to limit the right of deposite to Quebec.

"2. The sale of our produce may be limited to the port of Quebec; and,

"3. The list may be increased of the articles which we may be allowed to sell, at either or both of those cities, free of duty, so as to include all, or other, articles of the growth, produce, or manufactures, of the United States, with the permission to import into the United States similar produce of Canadian origin, without any corresponding privilege, of introducing into them British, *European*, or other foreign manufactures.

"If you should find the British Government unwilling to agree to either of the two preceding articles, with or without the modifications, or some of them, abovementioned, you will decline entering into any arrangement upon the subject of the navigation of the St. Lawrence, and take any counter proposals, which they may offer, for reference to your Government. Neither the third article of the treaty of 1794, nor that which was proposed by either party at the negotiation of the convention of 1815, nor that which was offered by Lord Castlereagh, in March, 1817, would serve as a proper basis to regulate the right which we claim to the navigation of the St. Lawrence. Without adverting to any other, decisive objections to the third article of the treaty of 1794, are, that it comprehended the Indians on both sides of the boundary between the territories of the United States and Great Britain; and left Great Britain at full liberty to impose whatever duties her policy might dictate, upon our produce entering the Canadian ports. The act of Parliament of August, 1822, would not be contrary to the stipulations of that article. The latter objection equally applies to both the American and British projects of an article, which were proposed, but neither of which was agreed to, in the negotiation of 1815, as well as to that of Lord Castlereagh. Nor would the United States find any protection against the exercise of the power of imposing duties, by agreeing to the ordinary stipulation in commercial treaties, restricting the duties imposed to the rate at which similar articles are liable when imported from other countries. Because, in point of fact, no article, similar to those which are imported from our northern Territory into Canada, is introduced there from any foreign country. No foreign country stands in a similar relation to Canada, that the northern parts of the United States do. And Great Britain would not, therefore, be restrained from imposing duties upon our produce, which should even be prohibitory in their effect, by their operation upon similar produce of other countries.

"Whilst Great Britain may be unwilling to enter into any treaty stipulations, acknowledging our right to the navigation of the St. Lawrence, she may not be indisposed to consent, by her own voluntary act, to repeal all prohibitory and other duties imposed on American produce, so as to admit it into the ports of Montreal and Quebec on the same terms as the same kind of produce is received from Upper Canada. Such an equal admission of our produce, would, in a great measure, supersede the necessity of discussing and settling, at this time, our right to the navigation of the St. Lawrence, and of considering the regulations which the interests of both parties might require in the practical exercise of the right. Our citizens would enjoy, in those cities, a ready and certain market for their produce, to obtain which, would be the primary object of securing to them the navigation of the St. Lawrence. It is because we cannot demand such an admission and privilege of selling our produce, as a matter of right, and because Great Britain may decline the concession of it, although manifestly beneficial to herself, that we desire to have this interest placed upon some solid and permanent foundation. But, if you should be unable to obtain the British assent to either of the articles proposed, with or without any of the modifications of them, which have been suggested, it would then be satisfactory to have the assurance of the British Government that our produce, or, at least, the principle articles of it, which have been mentioned, shall be received at Montreal and Quebec on the same terms as the like kinds of Canadian produce are there received. And you may, in turn, assure the British Government that the President will recommend to Congress to reciprocate any British acts of liberality and good neighborhood, in regard to the admission and sale of American produce in the Canadas, by acts of equal liberality and good neighborhood, on our side, in respect to the admission and sale of Canadian produce in the United States. It is within the competency of the mutual legislation of the two countries to remove many of the existing causes of complaint, without either party conceding or renouncing rights which there might be an unwillingness to admit or surrender.

"By an act of the British Parliament, passed on the 5th July, 1825, entitled 'An act to regulate the trade of the British Possessions abroad,' inland importation is allowed into the Canadas, from the United States, in vessels, boats, or carriages, belonging to them, of any goods which might be lawfully imported by sea; but such goods must be brought to a port or place of entry, and are to pay the same duties as if they were imported by sea. They may be warehoused at Quebec, only, for exportation, without paying duty, under certain restrictions; but then the Collectors and Comptrollers of the port are empowered to declare, in a written notice, to be by them promulgated, 'what sorts of goods may be so warehoused.' (See 28, 29, 30, 31, 32, 33, and 34 sections, &c., of the Act.) Under this authority, it would be competent to those officers to exclude, at their pleasure, from the privilege of warehousing our most valuable productions. If, by British legislation, (on the supposition that you cannot prevail on the British Government to regulate, by compact, the navigation of the

St. Lawrence, in the manner which has been herein proposed,) the privilege of warehousing our produce was placed on a more stable footing, and we were allowed to export it in our own vessels, it would be a considerable improvement of the existing state of things.

"During the negotiation between Mr. Rush and the British Plenipotentiaries, a desire was manifested by the latter to couple together the disputed points under the fifth article of the Treaty of Ghent, and the right asserted by the United States to the free navigation of the St. Lawrence; and, on the supposition of those two subjects being so blended, the British Plenipotentiaries stated that they were even prepared to make offers of compromise and settlement, founded 'on a most liberal and comprehensive view of the wishes and interests of the United States.' (See pages from 80 to 86 of the pamphlet, and protocols of the 17th and 18th conferences.) These offers were to be made on the basis of the United States waiving their right to the navigation of the St. Lawrence, which, however, Great Britain was willing to grant to them on a full equivalent; and that equivalent, it is to be inferred, was expected, by the British Plenipotentiaries, to be furnished in the disputed territory to which the fifth article of the Treaty of Ghent relates. What those offers were, they declined to communicate to Mr. Rush, although invited to do so, in order that he might transmit them to his Government. The Government of the United States cannot consent to renounce a right which they conceive belongs to them by the highest species of title. If, as the British Government professes to believe, the right has no just foundation, why does it insist upon its renunciation? Nor can this Government agree to barter away any portion of the territorial sovereignty of Maine, or the proprietary rights of the Commonwealth of Massachusetts, for the navigation of a river in which neither of them has any direct interest. If the question of the navigation of the St. Lawrence could be accommodated in a manner satisfactory to both parties, so as to let the citizens of the United States into the practical and beneficial enjoyment of it, their Government would be willing that the arrangement should be equally silent in regard to the admission on the one side, or the abandonment on the other, of the right as claimed and denied by the parties, respectively. It is not easy to comprehend why the British Plenipotentiaries withheld the communication, to Mr. Rush, of the very liberal offers which, according to their account of them, they were charged to make. When they appeared disposed to yield to the separation of the two subjects, as urged by Mr. Rush, they still declined to make this proposal of compromise in respect to the northeastern boundary. Under a belief that no prejudice can result to either party from a full communication and a fair consideration of those offers, in respect to either or both questions, you will invite a disclosure of them, for reference home. It is obvious, that no instructions, adapted to them, can be given, until they are known; nor can we come under any preliminary obligation as the price of their communication. If they are ever intended by Great Britain to be brought forward, the sooner it is done the better for the economy of time, and the speedy settlement of the questions, should they prove

acceptable to this Government. Had they been communicated to Mr. Rush, the delay would have been avoided which must now take place from your transmitting them to the United States, and receiving from hence the necessary instructions, if the offers should be made known to you."

Extracts of a letter from Mr. Clay to Mr. Gallatin, Envoy Extraordiry and Minister Plenipotentiary to Great Britain, dated Lexington, 8th August, 1826.

"Your letter, under date of New York, on the 29th of June last, having been duly received at the Department of State, and submitted to the President, was subsequently transmitted to me at this place, and I now have the honor to address you agreeably to his directions.

"He is very desirous of an amicable settlement of all the points of difference between Great Britain and the United States on just principles. Such a settlement, alone, would be satisfactory to the People of the United States, or would command the concurrence of their Senate. In stating, in your instructions, the terms on which the President was willing that the several questions pending between the two Governments might be arranged, he yielded as much to a spirit of concession as he thought he could, consistently with the interests of this country. He is, especially, not now prepared to authorize any stipulations involving a cession of territory belonging to any State in the Union, or the abandonment, express or implied, of the right to navigate the St. Lawrence, or the surrender of any territory south of latitude 49, on the Northwest Coast."

"III. The navigation of the St. Lawrence.—Both the articles, A and B, unquestionably assume that the United States have the right to the navigation of that river, independent of Great Britain. Nor can the President consent to any treaty by which they should renounce that right, expressly or by implication. If a sense of justice should not induce Great Britain to acknowledge our right, some hope has been indulged that she might find a motive to make the acknowledgment, in the power which we possess, on her principles, of controlling the navigation of the St. Lawrence within our limits. If she could be brought to consent to neither of those articles, your instructions did not look to any other treaty stipulations on the subject of the navigation of the St. Lawrence; and what they say with respect to practical arrangements, in other forms, was intended to refer to separate acts of the two parties. You are, indeed, authorized to take for reference any counter proposals which may be made by Great Britain, because it is possible that some other reconciliation of the interests of the two Powers, than any which has occurred here, may present itself to the British Government; and because, if that were not very likely, such a reference would be still due in courtesy to the other party. Although it is desirable, at present, for the inhabitants of the United States, on the St. Lawrence, to enjoy the liberty of trading at Montreal and

Quebec, in their lumber and other articles of produce, charged with no higher duties than similar Canadian commodities, it would be unsafe to assert that, at no time, now or hereafter, would the right of freely navigating the St. Lawrence, with a convenient place of deposite, be available, without the liberty of trading with either of those places. Such a right would open to our navigation a new theatre of enterprise, and if the British colonial markets should be shut against us in consequence of high duties, others equally advantageous might be sought and found. If the British Government should decline agreeing to either of the two articles, A and B, but be willing to receive our produce at Montreal or Quebec, either free of duty, or with such reduced duties as might enable it to sustain a competition with Canadian produce, two modes of accomplishing this object present themselves: one by treaty, and the other by acts of separate regulation. Between them, there is no very decided preference. The latter was suggested in your instructions as being that which would be most likely to be attainable, and because it would not involve any abandonment of the rights of either party. If it be liable to the objection that either party may, at pleasure, put an end to it, the mutual interest which recommends its adoption would afford a guarantee of its durability. But you are authorized to consider your instructions enlarged so as to comprehend both modes of effecting the object, taking due care that, if that by treaty should, in the progress of the negotiation, seem to you best, the treaty stipulation shall either expressly reserve the right of the United States to the navigation of the St. Lawrence, in its whole extent, or at least shall be so framed as not to be susceptible of the interpretation that they have abandoned that right. It is believed that the British Government may be made to comprehend, that the privilege of introducing the produce of Upper Canada, as proposed in your instructions, into the United States, and thereby securing the shorter and better route through the State of New York, will be an equivalent for that which we desire in the enjoyment of the markets of Montreal and Quebec. With respect to the right to the navigation of Lake Michigan, on which you suppose the British may insist, the President can see no legitimate purpose for which they should desire it. It cannot be wanted by them, either to reach their own dominions, or those of any foreign country, and stands, therefore, on other grounds than that on which we claim the right to navigate the St. Lawrence; and they are not allowed to trade with the Indians situated within our limits. The same observations are applicable to Lake Champlain."

Extract of a letter from Mr. Gallatin to Mr. Clay, dated London, 21st September, 1827.

"The British Plenipotentiaries will not entertain any proposition respecting the navigation of the St. Lawrence, founded on the right claimed by the United States to navigate that river to the sea.

"Although it may prove hereafter expedient to make a temporary agreement, without reference to the right, (which I am not authorized to do,) I am satisfied that, for the present, at least, and whilst the intercourse with the British West Indies remains interdicted, it is best to leave that by land or inland navigation with the North American British Provinces, to be regulated by the laws of each country, respectively. The British Government will not, whilst the present state of things continues, throw any impediment in the way of that intercourse, if the United States will permit it to continue."

Mr. Gallatin to Mr. Clay.

LONDON, 1*st October*, 1827.

SIR: I had, at an early stage of the negotiations, ascertained, not only that no arrangement, founded on a recognition of the right of the river St. Lawrence to the sea, was practicable, but that there was a sensibility on that subject which rendered it preferable not to approach it till all others, and particularly that of the Colonial Intercourse, had been disposed of. It was, therefore, only after it had been distinctly ascertained, at the interview of the 13th instant, [ultimo,] with Mr. Huskisson and Lord Dudley, that there was no chance left of the intercourse with the British West Indies being opened, and after the principles of the Convention respecting the Northeast boundary had been substantially agreed to, that I brought forward the question officially at our conferences. I did it without any hope of succeeding, but because this negotiation being the continuation of that of 1824, I apprehended that to omit altogether this subject, might be construed as an abandonment of the right of the United States.

To my first suggestion, the British Plenipotentiaries replied, that, however well disposed Great Britain might be to treat with the United States respecting the free navigation of the river St. Lawrence, as a question of mutual convenience, yet the views of the British Government being the same now as they were in 1824, and they being prohibited by express instructions from entering into any discussion respecting the free navigation of that river, if claimed as heretofore, by the United States, on the ground of right, they could not entertain any proposition to that effect, if now made by me.

It is sufficiently obvious, that the determination of the British Plenipotentiaries, not to enter into any discussion of the subject, was applicable to themselves, and could not prevent my offering any proposition, or annexing to the Protocol any argument in the support of it, which I might think proper. But it appeared to me altogether unnecessary, if not injurious, to commit my Government, by presenting any specific proposal, with the certainty of its being rejected; or to make this Government commit itself still further, by reiterating its positive refusal to treat on the ground of a right on the part of the

United States. I therefore made the entry which you will see in the Protocol of the 20th conference, and which is sufficient for the object I had in view. You had, by your despatch of 8th August, 1826. in conformity with my own wishes, so far enlarged my instructions as to authorize me to judge which method would be the most eligible for the purpose of obtaining, at all events, the admission of American produce at Quebec or Montreal, free of duty; whether that by treaty, or that by acts of separate legislation. The alternative was not within my reach, as any provision reserving the right of the United States to the free navigation of the St. Lawrence, either expressly, or by implication, was, in the present temper of this Government, out of the question. But, had it been in my power to select the mode, I would have resorted to that suggested in the original instructions, being fully satisfied that we may, with confidence, rely on the obvious interest of Great Britain to remove every restriction on the exportation of American produce through Canada, and need not resort to any treaty stipulation short of at least a liberty, in perpetuity, to navigate the river, through its whole extent.

Whatever motives may have induced the measures which gave rise to the first complaints of our citizens, a different policy now prevails. In consequence of the extension of the warehousing system to the ports of Quebec, Montreal, and St. John's, places of deposite are, in fact, allowed for every species of American produce, free of duty, in case of exportation, which is all, that, in that respect, we could ask, as a matter of right. The navigation between Montreal and Quebec, either to the sea, or from the sea, has not been granted; and it is precisely what cannot now be obtained by a treaty stipulation, without what would be tantamount to a disclaimer of the right.

But I do not think that, in practice, this will be much longer denied. There is certainly a disposition, not evinced on former occasions, to make the navigation free; provided it was not asked as a matter of right: and generally to encourage the intercourse between the United States and the adjacent British Provinces. This change of disposition is undoubtedly due, in part, to the wish of obtaining supplies for the West India Colonies, whilst the intercourse between these and the United States remains interdicted. But it also must be ascribed to more correct views of what is so clearly the interest, and ought to be the policy, of Great Britain, in that quarter. It is certainly an extraordinary circumstance, that the great importance of the American inland commerce to her own navigation, and to the prosperity of Canada, should not have been sooner strongly felt, and particularly attended to; that the obstacles to an intercourse, by which American produce is exported through Quebec, in preference to the ports of the United States, should have arisen on the part of Great Britain, and not of the United States.

It is, therefore, to that mode of attaining the object in view, that I have turned my attention. The considerations which recommend the policy of removing, by their own acts, the practical inconveniences which still embarrass the intercourse, have been stated, generally, to

the British Plenipotentiaries, but with more force, and more in detail, to Lord Dudley, and to other members of the cabinet. In an interview I had to-day with his Lordship, after having expressed my regret that no arrangement could, at this time, be made on that subject, and after having urged the *other* reasons which should induce Great Britain no longer to prevent the navigation of the American raft, boats, and vessels, between Montreal and Quebec; that, if she persisted in denying it, although I had no authority to say such was the intention of my Government, yet it seemed a natural consequence, and ought not to be considered as giving offence, that the United States should adopt corresponding measures in regard to the navigation of the river St. Lawrence, within their own limits. Lord Dudley, who had appeared to acquiesce in my general remarks, made no observation on the last suggestion.

But, what is somewhat remarkable is, that he, and several of the other Ministers with whom I have conversed, have expressed a doubt whether I was not mistaken in asserting that the navigation of the river was interdicted to our boats between Montreal and Quebec.

Upon the whole, I have great hopes that, setting aside the abstract question of right, and though no arrangement, by treaty, should take place, our citizens will, ere long, and through the acts of Great Britain alone, enjoy all the benefits of the navigation which they could obtain, even if the right were recognized. Should this expectation be disappointed, it is probable that a sufficient remedy will be found in the power to retaliate above St. Regis.

I have the honor to be, &c.

ALBERT GALLATIN.

HON. HENRY CLAY,
Secretary of State, Washington.

(B.)

American paper on the Navigation of the St. Lawrence, (18*th Protocol.*)

The right of the People of the United States to navigate the river St. Lawrence, to and from the sea, has never yet been discussed between the Governments of the United States and Great Britain. If it has not been distinctly asserted by the former, in negotiation, hitherto, it is because the benefits of it have been tacitly enjoyed, and because the interest, now become so great, and daily acquiring fresh magnitude, has, it may almost be said, originated since the acknowledgment of the independence of the United States, in 1783. This river is the only outlet provided by nature for the inhabitants of several among the largest and most populous States of the American Union. Their right to use it, as a medium of communication with the ocean, rests upon the same ground of natural right and obvious necessity heretofore asserted by the Government in behalf of the people of other

portions of the United States, in relation to the river Mississippi. It has sometimes been said, that the possession by one nation of both the shores of a river at its mouth, gives the right of obstructing the navigation of it to the people of other nations living on the banks above; but it remains to be shown upon what satisfactory grounds the assumption by the nation below of exclusive jurisdiction over a river, thus situated, can be placed. The common right to navigate it, is, on the other hand, a right of nature. This is a principle which, it is conceived, will be found to have the sanction of the most revered authorities of ancient and modern times; and, if there have been temporary occasions when it has been questioned, it is not known that the reasons upon which it rests, as developed in the most approved works upon public law, have ever been impugned. As a general principle, it stands unshaken. The dispute relative to the Scheldt, in 1784, is, perhaps, the occasion when the argument drawn from natural right was most attempted to be impeached. Here the circumstances were altogether peculiar. Amongst others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river, which passed within the dominions of Holland, was *entirely artificial*; that it owed its existence to the skill and labor of Dutchmen; that its banks had been reared up at immense cost, and were in like manner maintained. Hence, probably, the motive for that stipulation in the treaty of Munster, which had continued for more than a century, that the lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea bordering upon them, should be kept closed on the side belonging to the States. But the case of the St. Lawrence is totally different. Special, also, as seemed the grounds which the Dutch took as against the Emperor of Germany, in this case of the Scheldt, and, although they also stood upon a specific and positive compact, of long duration, it is, nevertheless, known that the public voice of Europe, on this part of the dispute, preponderated against them. It may well have done so, since there is no sentiment more deeply and universally felt than that the ocean is free to all men, and the waters that flow into it, to those whose home is upon their shores. In nearly every part of the world we find this natural right acknowledged, by laying navigable rivers open to all the inhabitants of their banks; and, wherever the stream, entering the limits of another society or nation, has been interdicted to the upper inhabitants, it has been an act of *force* by a stronger against a weaker party, and condemned by the judgment of mankind. The right of the upper inhabitants to the full use of the stream, rests upon the same imperious wants as that of the lower; upon the same intrinsic necessity of participating in the benefits of this flowing element. Rivers were given for the use of all persons living in the country of which they make a part, and a primary use of navigable ones is that of external commerce. The public good of nations is the object of the law of nations, as that of individuals is of municipal law. The interest of a part gives way to that of the whole; the particular to the general. The former is subordinate; the latter paramount. This is the principle pervading every code,

national or municipal, whose basis is laid in moral right, and whose aim is the universal good. All that can be required under a principle so incontestible, so wise, and, in its permanent results upon the great fabric of human society, so beneficent, is, that reasonable compensation be made whenever the general good calls for partial sacrifices, whether from individuals in a local jurisdiction, or from one nation considered as an integral part of the family of nations. This is accordingly done in the case of roads, and the right of way, in single communities; and is admitted to be just, in the form of moderate tolls, where a foreign passage takes place through a natural current, kept in repair by the nation holding its shores below. The latter predicament is not supposed to be that of the St. Lawrence at this day, since it is not known that any artificial constructions, looking simply to its navigation, have yet been employed, either upon its banks, or in keeping the channel clear. This has been the case, in connexion with other facilities and protection afforded to navigation, with the Elbe, the Maese, the Weser, the Oder, and various other rivers of Europe that might be named; and the incidental right of toll has followed. It may be mentioned, however, as a fact, under his head, that the prevailing disposition of Europe defeated an attempt, once made by Denmark, to exact a toll at the mouth of the Elbe, by means of a fort on the Holstein side, which commanded it. The Sound dues have been admitted in favor of Denmark, but not always without scrutiny, and only under well established rules. We know that, under some circumstances, and with due precautions, a right is even allowed to armies to pass through a neutral territory for the destructive purposes of war. How much stronger, and more unqualified the right to seek a passage through a natural stream, for the useful and innocent purposes of commerce and subsistence! A most authentic and unequivocal confirmation of this doctrine, has been afforded, at a recent epoch, by the parties to the European alliance, and largely, as is believed, through the enlightened instrumentality of Great Britain, at the negotiation of the treaties at the Congress of Vienna. It has been stipulated in these treaties, that the Rhine, the Necker, the Mayne, the Moselle, the Maese, and the Scheldt, are to be free to all nations. The object of these stipulations undoubtedly has been, to lay the navigation of these rivers effectively open to all the people dwelling upon their banks, or within their neighborhood, and to abolish those unnatural and unjust restrictions by which the inhabitants of the interior of Germany have been too often deprived of their outlet to the sea, by an abuse of that sovereignty, rather than its right, which would impute an exclusive dominion over a river to any one State not holding all its shores. These stipulations may be considered as an indication of the present judgment of Europe upon the point, and would seem to supersede further reference to the case of other rivers, and, from their recent, as well as high authority, further illustration of any kind. They imply a substantial recognition of the principle, that, whatever may sometimes have been the claim to an exclusive right by one nation

over a river, under the circumstances in question, the claim, if founded in an alleged right of sovereignty, could, at best, only be supposed to spring from the social compact: whereas the right of navigating the river, is a right of nature, pre-existent in point of time, not necessary to have been surrendered up for any purpose of the common good, and unsusceptible of annihilation. There is no principle of national law, and universal justice, upon which the provisions of the Vienna treaties are founded, that does not apply to sustain the right of the People of the United States to navigate the St. Lawrence. The relations between the soil and the water, and those of man to both, form the eternal basis of this right. These relations are too intimate and powerful to be separated. A nation deprived of the use of the water flowing through its soil, would see itself stripped of many of the most beneficial uses of the soil itself; so that its right to use the water, and freely to pass over it, becomes an indispensable adjunct to its territorial rights. It is a means so interwoven with the end, that to disjoin them would be to destroy the end. Why should the water impart its fertility to the earth, if the products of of the latter are to be left to perish upon the shores?

It may be proper to advert to the footing, in point of fact, upon which the navigation of this river stands, at present, between the two countries, so far as the regulations of Great Britain are concerned. The act of Parliament, of the 3d of Geo. IV, chapter 119, August 5, 1822, has permitted the importation from the United States, by land, or water, into any port of entry in either of the Canadas, at which there is a customhouse, of certain articles of the United States, enumerated in a schedule, subject to the duties which are specified in another schedule. Under the former schedule, many of the most important articles of the United States are excluded; and, under the latter, the duties are so high as to be equivalent to a prohibition of some that are nominally admitted. The foregoing act lays no impositions on the merchandise of the United States descending the St. Lawrence with a view to exportation on the ocean; but an act of Parliament of 1821 does, viz.: upon the timber and lumber of the United States. Such, in general terms, is the footing upon which the intercourse is placed by the British acts, and it may be alike proper, in connexion with this reference to it, to mention the conditions of intercourse which it has superseded. To whatever observations the duties imposed on the products of the United States, imported for sale into the ports of Canada, may otherwise be liable, as well as the exclusion of some of them altogether, it will be understood that it is only the unobstructed passage of the river, considered as a common highway, that is claimed as a right. By the treaty stipulations of November, 1794, between the two countries, the United States were allowed to import into the two Canadas *all* articles of merchandise, the importation of which was not entirely prohibited, subject to no other duties than were payable by British subjects on the importation of the same articles from Europe into the Canadas. The same latitude of importation was allowed into the United States from the

Canadas, subject to no other duties than were payable on the importation of the same articles into the Atlantic ports of the United States. Peltries were made free on both sides. All tolls and rates of ferriage were to be the same upon the inhabitants of both countries. No transit duties at portages, or carrying places, were to be levied on either side. These provisions were declared, in the treaty, to be designed to secure, to both parties, the local advantages common to both, and to promote a disposition favorable to friendship and good neighborhood. The waters on each side were made free, with the exception, reciprocally, at that time, of vessels of the United States going to the seaports of the British territories, or navigating their rivers between their mouths and the highest port of entry from the sea; and of British vessels navigating the rivers of the United States beyond the highest ports of entry from the sea. These treaty regulations are found among the articles declared, when the instrument was made, to be permanent. Both countries continued to abide by them, until Great Britain passed the acts above recited, by which it appears that she has considered the intervening war of 1812, as abrogating the whole of the treaty of November, 1794. The United States have continued to allow, up to the present time, its provisions, regulating this intercourse, to operate in favor of the Canadas. By the act of Parliament, of the 3d of George IV, chapter 44, taken in conjunction with the act of the same year, chapter 119, above mentioned, the right of the vessels of the United States to the whole navigation of the St. Lawrence appears to be taken for granted: by the first, from the ocean to Quebec; and, by the second, from any part of the territories of the United States to Quebec. But a discretionary power is given to the Colonial Governments in Canada, to do away the effect of the latter permission, by excepting any of the Canadian posts from those to which the vessels of the United States are, by the act, made admissible; whilst the duties which it imposes upon such of the exports of the United States as could alone render the trade profitable, are prohibitory. But it is the right of navigating this river upon a basis of certainty, without obstruction or hindrance of any kind, or the hazard of it in future, that the United States claim for their citizens.

The importance of this claim may be estimated when it is considered that the people of at least as many of the States as Illinois, Indiana, Ohio, Pennsylvania, New York, Vermont, Maine, and New Hampshire, and the Territory of Michigan, have an immediate interest in it, not to dwell upon the prospective, derivative interest which is attached to it in other portions of the Union. The parts of the United States connected, directly or remotely, with this river, and the inland seas through which it communicates with the ocean, form, indeed, an extent of territory, and comprise, even at this day, an aggregate of population, which bespeak the interest at stake to be of the very highest nature, and one which, after every deduction suggested by the artificial channels which may be substituted for the natural one of this great stream, make it, emphatically, an object of national con-

cernment and attention. Having seen the grounds of necessity and reason upon which the right of so great and growing a population, to seek its only natural path-way to the ocean, rests, it may be expected that they should be supported by the established principles of international law. This shall be done by the citation of passages from the writings of the most eminent publicists, always bearing in mind that the right, under discussion, becomes strong in proportion to the extent which the country of the upper inhabitants, in its connexion with the stream, bears to the country of the lower inhabitants. Vattel, in book 2, ch. 9, sec. 127, lays down the following as a general position: "Nature, who designs her gifts for the common advantage of men, "does not allow of their being kept from their use, when they can be "furnished with them, without any prejudice to the proprietor, and by "leaving still untouched all the utility and advantages he is capable "of receiving from his rights." The same author, same book, ch. 10, sec. 132, says, "Property cannot deprive nations of the general right "of travelling over the earth, in order to have a communication with "each other, for carrying on trade and other just reasons. The mas-"ter of a country may only refuse the passage on particular occasions, "where he finds it is prejudicial or dangerous." In sec. 134, he adds, "A passage ought, also, to be granted for merchandise, and as this "may, in common, be done without inconvenience, to refuse it, with-"out just reason, is injuring a nation, and endeavoring to deprive it "of the means of carrying on a trade with other States; if the pas-"sage occasion any inconvenience, any expense for the preservation "of canals and highways, it may be recompensed by the rights of "toll." Again, in book 1, ch. 22, sec. 266, we are told, that, if "nei-"ther the one nor the other of two nations, near a river, can prove "that it settled first, it is to be supposed that they both came there at "the same time, since neither can give any reason of preference; and, "in this case, the dominion of each will be extended to the middle of "the river." This is a principle too relevant to the doctrine under consideration to be passed over without remark. It relates, as will be seen, to *dominion*, and not to right of passage simply. Now, if simultaneous settlement confers coequality of dominion, by even stronger reason will simultaneous *acquisition* confer coequality of passage. Without inquiring into the state of the navigation of the St. Lawrence as between Great Britain and France, prior to the peace of 1763, it is sufficient that, in the war of 1756–63, which preceded that Peace, the people of the United States, in their capacity of English subjects, contributed, jointly with the parent State, (and largely, it may be added, with historical truth,) towards gaining the Canadas from France. The right of passage, therefore, of this river, admitting that it did not exist before, was, in point of fact, opened to the early inhabitants of New York and Pennsylvania, at an epoch at least as soon as to British subjects living, afterwards, in the newly conquered possessions. A title thus derived, is not invoked as resting upon the same ground with the title derived from natural right: but it serves to strengthen it, and is of pertinent ap-

plication, as against Great Britain, in this instance. Let it be looked at under either of the following alternatives which present themselves. If Great Britain possessed the navigation of this river prior to 1763, so did the People of the United States, as part, at that time, of her own empire. If she did not, but only first acquired it when the Canadas were acquired, the People of the United States, acting in common with her, acquired it in common, and at as early a date. It will not be said that the right which necessarily inured to the colonies, as part of the British empire, was lost by their subsequently taking the character of a distinct nation; since it is the purpose of this paper to show that the right of passage may, as a natural right, be claimed by one foreign nation against another, without any reference whatever to antecedent circumstances. But the latter, when they exist, make up part of the case, and are not to be left out of view. The peculiar and common origin of the title of both parties, as seen above, is calculated to illustrate more fully the principle of common right, applicable to both now. The antecedent circumstances show that the natural right always appertaining to the early inhabitants of the shores of this river, above the Canadian line, to navigate it, has once been fortified by joint conquest, and by subsequent joint usufruction. One other quotation is all that will be given from the same author. It relates to a strait, and not a river; but the reasoning from analogy is not the less striking and appropriate. "It must be remarked," he says, "with regard to straits, that, when they serve for a communication between two seas, the navigation of which is common to all or many nations, he who possesses the strait cannot refuse others a passage through it, provided that passage be innocent, and attended with no danger to the State. Such a refusal, without just reason, would deprive these nations of an advantage granted them by nature; and, indeed, the right of such a passage is a remainder of the primitive liberty enjoyed in common." If we consult Grotius, we shall find that he is equally, or more, explicit in sanctioning, in the largest extent, the principle contended for. He even goes so far as to say, after laying down generally the right of passage, that "the fears which any Power entertains of a multitude in arms, passing through its territories, do not form such an exception as can do away the rule; it not being proper or reasonable that the fears of one party should destroy the rights of another." Book 2, chap. 2, sec. 13. In the course of the same section he declares, that upon "this foundation of common right, a free passage through countries, *rivers*, or over any part of the sea, which belong to some particular People, ought to be allowed to those who require it, for the necessary occasions of life, whether those occasions be in quest of settlements, after being driven from their own country, *or to trade with a remote nation*." The reasons which Grotius himself gives, or which he adopts from writers more ancient, for this right of innocent passage, (and he is full of authorities and examples, as well from sacred as profane history,) are of peculiar force. He denominates it a "*a right interwoven with the very frame of human society*." "Property," he says,

"was originally introduced with a reservation of that use which might be of general benefit, and not prejudicial to the interest of the owner." He concludes the section in the following manner: "A free passage ought to be allowed, not only to persons, but to merchandise: for no Power has a right to prevent one nation trading with another at a remote distance; a permission which, for the interest of society, should be maintained; nor can it be said that any one is injured by it: for, though he may thereby be deprived of an *exclusive* gain, yet the loss of what is not his due, *as a matter of right*, can never be considered as a damage, or the violation of a claim." After authorities of such immediate bearing on the point under consideration, further quotation will be forborne. The question of right is conceived to be made out, and if its denomination will be found to be sometimes that of an imperfect, in contradistinction to an absolute right, the denial of it is, nevertheless, agreed to be an injury, of which the party deprived may justly complain. The sentiments taken from these two writers, and they are not the only ones capable of being adduced, (though deemed sufficient,) have the full support of coincident passages in Puffendorf, book 3, chap. 3, sec. 4, 5, 6, and in Wolfius, sec. 310.

Finally: the United States feel justified in claiming the navigation of this river, on the ground of paramount interest and necessity to their citizens—on that of *natural right*, founded on this necessity, and felt and acknowledged in the practice of mankind, and under the sanction of the best expounders of the laws of nations. Their claim is to its full and free navigation from its source to the sea, without impediment or obstruction of any kind. It was thus that Great Britain claimed, and had, the navigation of the Mississippi, by the seventh article of the treaty of Paris, of 1763, when the mouth and lower shores of that river were held by another Power. The claim, whilst necessary to the United States, is not injurious to Great Britain, nor can it violate any of her just rights. They confidently appeal to her justice for its enjoyment and security; to her enlightened sense of good neighborhood; to her past claims upon others for the enjoyment of a similar right; and to her presumed desire for the advantageous intercourse of trade, and all good offices, now and henceforth, between the citizens of the United States and her own subjects bordering upon each other in that portion of her dominions.

N.

British paper on the Navigation of the St. Lawrence—24th Protocol.

The claim of the United States to the free navigation of the river St. Lawrence wears a character of peculiar importance when urged as an independent right.

The American Plenipotentiary must be aware that a demand, rested upon this principle, necessarily precludes those considerations of good neighborhood and mutual accommodation, with which the Government of Great Britain would otherwise have been anxious to enter upon the adjustment of this part of the negotiation.

A right claimed without qualification on the one side, affords no room for friendly concession on the other: total admission, or total rejection, is the only alternative which it presents.

On looking to the objects embraced by the American claim, we find them to be of no ordinary magnitude. The United States pretend to no less than the perpetual enjoyment of a free, uninterrupted passage, independent of the territorial sovereign, through a large and ry important part of the British possessions in North America. They demand, as their necessary inherent right, the liberty of navigating the St. Lawrence from its source to the sea, though, in the latter part of its course, which lies entirely within the British dominions, and comprises a space of nearly six hundred miles, that river traverses the finest settlements of Canada, communicates by the south with Lake Champlain, and washes the quays of Montreal and Quebec.

A pretension which thus goes to establish a perpetual thoroughfare for the inhabitants, vessels, and productions, of a foreign country, through the heart of a British colony, and under the walls of its principal fortress, has need to be substantiated on the clearest and most indisputable grounds. It requires, indeed, an enlarged view of what is owed in courtesy by one nation to another to justify the British Government in entering, at this late period, on the discussion of so novel and extensive a claim.

There will, however, be little difficulty in showing, that the claim asserted by the American Plenipotentiary rests, as to any foundation of *natural* right, on an incorrect application of the authorities which he has consulted. With respect to the claim derived from an *acquired* title which he has also alleged, that ground of claim will remain to be examined hereafter; but it may be observed, in the outset, that the natural and acquired title depend on principles essentially distinct; that the one cannot be used to make good any defect in the other; and although they may be possessed independently by the same claimant, that they can, in no degree, contribute to each others validity.

Proceeding to consider how far the claim of the United States may be established on either of these titles, it is first necessary to inquire what must be intended by the assertion that their claim is founded on *natural* right. "The right of navigating this river," says the American Plenipotentiary, "is a right of nature, pre-existent in point of time, not necessary to have been surrendered up for any purpose of common good, and unsusceptible of annihilation." The right here described, can be of no other than of that kind which is generally designated in the law of nations a *perfect* right. Now, a perfect right is that which exists independent of treaty; which necessarily arises from the law of nature; which is common, or may, under similar circum-

stance, be common to all independent nations; and can never be denied or infringed, by any State, without a breach of the law of nations. Such is the right to navigate the ocean without molestation in time of peace.

Upon these principles, now universally received, it is contended for the United States that a nation possessing both shores of a navigable river at its mouth, has no right to refuse the passage of it to another possessing a part of its upper banks, and standing in need of it as a convenient channel of commercial communication with the sea. Applying the same principles to the case of the St. Lawrence, the American Government maintain that Great Britain would be no more justified in controlling American navigation on that river, than in assuming to itself a similar right of interference on the high seas.

To this extent must the assumption of a *perfect* right be carried, or such claim is no longer to be considered in that character; but, falling under the denomination of an *imperfect* right, it becomes subject to considerations essentially and entirely different.

The first question, therefore, to be resolved, is, whether a perfect right to the free navigation of the river St. Lawrence can be maintained according to the principles and practice of the law of nations?

Referring to the most eminent writers on that subject, we find that any liberty of passage to be enjoyed by one nation through the dominions of another, is treated by them as a qualified occasional exception to the paramount rights of property. "The right of passage," says Vattel, "is also a remainder of the primitive communion in which the entire earth was common to men, and the passage was every where free according to their necessities." Grotius, in like manner, describes mankind as having, in their primitive state, enjoyed the earth and its various productions in common, until after the introduction of property, together with its laws, by a division or gradual occupation of the general domain. Among the natural rights, which he describes as having in part survived this new order of things, are those of necessity and of innocent utility; under the latter of which he classes the right of passage. Following his principle, this natural right of passage between nation and nation, may be compared to the right of highway, as it exists, in particular communities, between the public at large and the individual proprietors of the soil, but with this important difference, that, in the former case, commanding and indispensable considerations of national safety, national welfare, and national honor and interest, must be taken especially into the account.

It is clear that, on this principle, there is no distinction between the right of passage by a river flowing from the possessions of one nation, through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or of water, generally accessible to the inhabitants of the earth. "Rivers," says Grotius, "are subject to property, though neither where they rise, "nor where they discharge themselves, be within our Territory." The right to exclusive sovereignty over rivers, is also distinctly asserted by Bynkershoek, in the ninth chapter of his treatise "on the

dominion of the sea." Nor is this, by any means, the full latitude to which the principle, if applied at all, must, in fairness, be extended. "All nations," says Vattel, "have a general right to the innocent use of the things which are under any one's domain." "Property," says the same author, "cannot deprive nations of the general right of travelling over the earth, in order to have communication with each other, for carrying on trade, and other just reasons." The nature of these other *just reasons* is explained by Grotius, in the following sentence: "A passage ought to be granted to persons, whenever just "occasion shall require, over any lands or rivers, or such parts of "the sea, as belongs to any nation;" as for "instance, if, being ex- "pelled from their own country, they want to settle in some uninha- "bited land, or if they are going to traffic with some distant people, "or to recover, by a just war, what is their own right and due."

For other purposes, then, besides those of trade, for objects of war, as well as for objects of peace, for all nations, no less than for any nation in particular, does the right of passage hold good under those authorities to which the American Plenipotentiary has appealed. It has already been shewn that, with reference to this right, no distinction is drawn by them between land and water, and still less between one sort of river and another. It further appears, from Vattel, that the right in question, particularly, for the conveyance of merchandise, is attached to artificial, as well as to natural, highways. "If this passage," he observes, "occasion any inconvenience, any expense "for the preservation of *canals* and *highways*, it may be recompensed "by rights of toll."

Is it then to be imagined that the American Government can mean to insist on a demand, involving such consequences, without being prepared to apply, by reciprocity, the principle on which it rests in favor of Great Britain? Though the sources of the Mississippi are now ascertained to lie within the territory of the United States, the day cannot be distant when the inhabitants of Upper Canada will find convenience in exporting their superfluous produce by means of the channel of that river to the ocean. A few miles of transport over land are of little consequence, when leading to a navigable river of such extent. Even at the present time, a glance upon the map is sufficient to shew that the course of the Hudson, connected as it now is with the waters of the St. Lawrence, would afford a very commodious outlet for the produce of the Canadian provinces. The comparative shortness of this passage, especially with reference to the West Indies, would amply compensate for any fair expense of tolls.

It would also be, in some instances, convenient and profitable for British vessels to ascend the principal rivers of the United States, as far as their draft of water would admit, instead of depositing their merchandise, as now, at the appointed ports of entry from the sea. Nor is it probable that other nations would be more backward than the British in pressing their claim to a full participation in this advantage. The general principle which they would invoke, in pursuance of the example given by America, and a partial application of such prin-

ciples no country can have a right to expect from another, is clearly of a nature to authorize the most extraordinary and unheard of demands. As for the right of passage from sea to sea, across any intervening isthmus, such, for instance, as that of Corinth or of Suez, and, more especially, from the Atlantic to the Pacific, by the isthmus of Panama, that right of passage follows as immediately from this principle, as any such right claimed from one tract of land to another, or to the ocean, by water communication.

The exercise of a right, which thus goes the length of opening a way for foreigners into the bosom of every country, must necessarily be attended with inconvenience, and sometimes with alarm and peril, to the State whose territories are to be traversed. This consequence has not been overlooked by writers on the law of nations. They have felt the necessity of controlling the operation of so dangerous a principle, by restricting the right of transit to purposes of *innocent* utility, and by attributing to the local sovereign the exclusive power of judging under what circumstances the passage through his dominions is, or is not, to be regarded as *innocent*. In other words, the right which they have described is, at best, only an *imperfect* right.

It is under the head of *innocent utility*, that Grotius has classed the right of passage, as before laid down in his own expressions.

"Innocent utility," he adds, "is when I only seek my own advantage, *without damaging* any body else." In treating of the same right, Vattel remarks, that, "since the introduction of domain and property, we can no otherwise make use to it, than by respecting the proper right of others." "The effect," he adds, "of property, is to make the advantage of the proprietor prevail over that of all others."

The same author defines the *right of innocent use*, or innocent utility, to be "the right we have to that use which may be drawn from things belonging to another, without causing him either loss or inconvenience." He goes on to say, that "this right of *innocent use* is not a perfect right like that of *necessity*: for it belongs to the master to judge if the use we would make of a thing that belongs to him, will be attended with no damage or inconvenience."

With respect to the assertion of Grotius, as quoted by the American Plenipotentiary, "that the mere apprehension of receiving injury from the exercise of this right, is not a sufficient reason for denying it," the author, it must be observed, is addressing himself to the conscience of the Sovereign through whose territories a passage may be demanded; impressing upon his mind that he cannot fully discharge his moral obligations in giving such refusal, unless he be well convinced that his fears originate in just causes. But it would be absurd, and contrary to the general tenor of his argument, to suppose, that a well founded apprehension was not to have its due effect, or that the advantage, or even necessity, of a foreign nation could be justly recognized by him as paramount, in the one case, to the leading interests, in the other, to the safety, of his own.

It is further to be observed, that Grotius, in the argument referred to, had clearly in view an *occasional* liberty of passage, not of that *perpetual*, uninterrupted kind, which the regular activity of modern

commerce requires. But the doctrine of Grotius, applied to merchandise, and taken in the sense ascribed to it by the American Plenipotentiary, is distinctly contradicted by other eminent writers on the law of nations. Puffendorf, for instance, in his great work on that subject, expresses himself as follows: "We may have good reasons for stopping foreign merchandise, as well by land as on a river, or on an arm of the sea, within our dependence. For besides that a too great affluence of foreigners is sometimes prejudicial or suspicious to a State, why should not a Sovereign secure to his own subjects the profit made by foreigners, under favor of the passage which he allows them?" "I admit that, in allowing foreigners to carry their merchandise elsewhere, even without paying for the passage, we do not sustain any damage, and that they do us no wrong in pretending to an advantage of which we might have possessed ourselves before them. But, at the same time, as they have no right to exclude us from it, why should we not try to draw it to ourselves? Why should we not prefer our interest to theirs?"

The same author observes, in the next section of his work, that "a State may fairly lay a duty on foreign goods conveyed through "its territory, *by way of compensation for what its subjects lose by "admitting a new competitor into the market.*"

To appreciate the full force of these opinions, it must be borne in mind that Puffendorf appears to speak of a foreign nation so situated as to depend exclusively on the passage in question for the sale of its superfluous produce, and the importation of supplies from abroad. This part of the subject may be closed with the following decisive words of Barbeyrac, in his Notes on Grotius: "It necessarily follows from the right of property, that the proprietor may refuse "another the use of his goods. Humanity, indeed, requires that he "should grant that use to those who stand in need of it, when it can "be done without any considerable inconveniency to himself; and, if "he even then refuses it, though he transgresses his duty, he doth "them no wrong, properly so called, except they are in extreme ne-"cessity, which is superior to all ordinary rules."

But the American Plenipotentiary maintains that the right of passage, as understood by him in opposition to his own authorities, that is, independent of the sovereign's consent, and applied to the single predicament of the St. Lawrence, has been substantially recognized by the Powers of Europe, in the treaties of general pacification, concluded at Paris in 1814, and in the following year at Vienna.

It is true that, in the solemn engagements then contracted by them, the Sovereigns of the leading States of Europe manifested a disposition to facilitate commercial intercourse between their respective countries, by opening the navigation of such of the principal rivers as separated or traversed the territories of several Powers. This policy was applied more particularly to the Rhine, the Necker, the Maine, the Moselle, the Maese, and the Scheldt. But neither in the general, nor in the special stipulations, relating to the free navigation of rivers, is there any thing to countenance the principle of a natural, independent right, as asserted by the American Plenipotentiary.

We find, on the contrary, that, in the treaty concluded at Paris, between France and the Allied Powers, the Rhine was the only river at once thrown open to general navigation. With respect to the other rivers, it was merely stipulated that the means of extending that arrangement to them, should be determined by the Congress about to assemble at Vienna. In the instance of the Rhine, it was natural for France, in giving up possessions which she had for some time enjoyed on the banks of that river, to stipulate a reserve of the navigation. The stipulations relating to river navigation, in the general treaty of Vienna, commence in the following manner: "The Powers whose "States are separated or crossed by the same navigable river, *engage* "to regulate, by *common consent*, all that regards its navigation." They close with an agreement that the regulations, once adopted, shall not be changed, *except with the consent of all the Powers bordering on the same river.*

It is evident, therefore, that the allied Governments, in concurring to favor the circulation of trade through the great water communications of continental Europe, did not lose sight of what was due to the sovereignty of particular States; and that, when they referred the common enjoyment of certain navigable rivers to voluntary compact between the parties more immediately concerned, they virtually acknowledged the right of any one of those parties, till bound by its own engagements, to withhold the passage, through its dominions, from foreign merchant vessels. As freedom of navigation in favor of all nations, and not merely of those which border on the rivers thus opened by treaty, was the immediate object of the abovementioned stipulations, it must be presumed that the Powers assembled in Congress, if they had felt themselves borne out by the practice or general opinion of Europe, would not have hesitated to proclaim the measure which they adopted as one of natural, independent right. Their silence alone on this point might have been taken as strongly indicative of their belief that the prevailing usage of Europe would authorize no such declaration. But the principle of mutual consent is surely irreconcilable with the contrary supposition, and must, at least, be understood to give a special character to the engagements contracted under it, confining them to the rivers enumerated in the treaty; and, however laudable, as an example to other States, whose circumstances may allow of their imitating it without danger or detriment, expressive of no obligation beyond the occasion for which the treaty was framed.

It would take up too much time to demonstrate, by a detailed investigation of every case to which the American argument applies, the negative proposition, that no nation exercises the liberty of navigating a river, through the territories of another, except by permission or express concession under treaty. It is rather for the American Government to present a single instance in which the liberty claimed for the United States is exercised explicitly as a natural, independent right.

The case of the Scheldt, though referred to by the American Pleni-

potentiary, is certainly not one of this kind. The leading circumstances relating to that river were, first, that its mouths, including the canals of Sas and Swin, lay within the Dutch Territory, while parts of its upper channel were situate within the Flemish provinces. Secondly, That the treaty of Westphalia had confirmed the right of the Dutch to close the mouths of the river. Thirdly, That the exercise of this right was disputed, after a lapse of more than a hundred years, by the Emperor of Germany: and, fourthly, that the dispute between that monarch and the Dutch Republic terminated, in 1785, by leaving the Dutch in possession of the right which had been disputed. It is true that, at the latter period, the Dutch founded their claim, in part, on the expense and labor which they had undergone in improving the river; but, it is true, at the same time, that they also grounded it on the general law of nations. Above all, they rested it on the treaty of Westphalia. But if the right of the Dutch Republic had been countenanced by the law and practice of nations, why, it may asked, should it have been thought necessary to confirm that right by the treaty of Westphalia? The reply is obvious, that confirmation was the resort of the weak against the strong: of the former dependents of Spain against the encroachments of a haughty power, still sovereign of Antwerp, and the neighboring provinces, and not having yet renounced its claim of sovereignty over Holland itself. It was natural for the Dutch, under such circumstances, to fortify their right by the general sanction of Europe; but it was not natural for the principal parties in the pacification of Munster, to lend their sanction to a measure in direct contradiction to acknowledged principles; or, if their scruples, as to the admission of such a measure, had been removed by special motives, it is strange that they should not have taken the obvious precaution of recording those motives. During the discussions about the Scheldt, in 1785, the Empress of Russia was the only Sovereign who officially declared an opinion in favor of the House of Austria. But the United States can derive no great advantage from a declaration couched in such terms as these: "Nature herself hath granted to the Austrian Low Countries the use and advantage of the river in dispute; Austria alone, "by virtue of the law of nature and nations, is entitled to an *exclusive* "right to the river in question. So that the equity and disinterestedness of Joseph II. can only impart this right to other people— "it belonging *exclusively* to his States."

The opinions proclaimed on this subject by the Russian Government are the more remarkable, as there is no country which has a greater interest than Russia in the disputed question. It is well known, that the only approach to the Russian ports on the Black Sea, from the Mediterranean and Atlantic, is by the passages of the Dardanelles and Bosphorus. These canals are, in fact, salt-water straits, communicating from sea to sea; passing, it is true, between the Turkish territories in Europe and Asia, but with no great length of course, and leading to a vast expanse of inland water, the shores of which are occupied by no less than three independent Powers.

There is manifestly a wide difference between such a case and that of the St. Lawrence, nor can the marked difference in principle between rivers and straits be overlooked; and yet, as matter of fact, the navigation of the Black Sea, and the adjacent canals, is enjoyed by Russia—by that Power which has so often dictated its own conditions to the Porte—in virtue of a treaty, founded, like other treatries, on the mutual convenience and mutual advantage of the parties. Even the navigation of the Danube, downwards to the ocean, was first accorded to Austria by the Turkish Government, as a specific concession made at a juncture when the Porte, involved in a quarrel with the most formidable of its neighbors, was compelled to propitiate the good will of other Christian Powers.

The case of the Mississippi is far from presenting an exception to this view of the subject. The treaty of 1763, which opened the navigation of that river to British subjects, was concluded after a war in which Great Britain had been eminently successful. The same motives that prevailed with France to cede Canada, must have restrained her from hazarding a continuance of hostilities for such an object as the exclusive navigation of the Mississippi. The agreement respecting that river, makes part of the general provisions as to the western boundary of the British possessions in America, by which the whole left side of the Mississippi was ceded to Great Britain, with the exception of the town and island of New Orleans. This reservation was admitted on the express condition, that the navigation of the whole channel should be open to British subjects. The very fact of its having been thought necessary to insert this stipulation in the treaty, in consequence of France having retained possession of both banks of the river, at a single spot, leads, irresistibly, to an inference the very reverse of what is maintained by the American Plenipotentiary.

At a later period, the navigation of the Mississippi became a subject of arrangement between Spain and the United States. By the fourth article of their treaty of boundary and navigation, concluded in 1795, a similar agreement to that which had before subsisted between France and Great Britain, was effected between those Powers, with this remarkable difference, that the liberty of navigating the river was expressly confined to the "parties themselves, unless the "King of Spain," to use the words of the treaty, "should extend "the *privilege* to the subjects of other Powers by *special convention*."

It must not be overlooked, that, when the clause which is here quoted, and the exclusive stipulation immediately preceding it, were drawn up, the sources of the Mississippi were still supposed to be within the British territory; and, at the same time, there was in force a treaty between Great Britain and the United States, declaring 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."

Some additional light may, perhaps, be thrown on the object of the present discussion, by the quotation of a note on the fourth article

of the Spanish treaty, which is printed in the collection of the United States' laws, *arranged and published under the authority of an act of Congress.* It is as follows:

"Whatsoever right his Catholic Majesty had to interdict the free "navigation of the Mississippi, to any nation, at the date of the trea- "ty of San Lorenzo el Real, (the 27th of October, 1795,) that "right was wholly transferred to the United States, in virtue of the "cession of Louisiana from France, by the treaty of April 30th, "1803. And, as the definitive treaty of peace was concluded pre- "viously to the transfer to the United States of the right of Spain "to the dominion of the river Mississippi, and, of course, prior to the "United States' possessing the Spanish right, it would seem that the "stipulation contaied in the 8th article of the definitive treaty with "Great Britain, could not have included any greater latitude of na- "vigation on the Mississippi, than that which the United States "were authorized to grant on the 3d of September, 1783."

"The additional right of sovereignty which was acquired over the "river by the cession of Louisiana, was *paid for* by the American Go- "vernment; and therefore any extension of it to a Foreign power "could scarcely be expected *without an equivalent.*"

The natural right asserted by the American Plenipotentiary being thus examined in respect both to the principles which it involves, and to the general practice of nations, the *acquired* title, as distinct from the *natural*, stands next for consideration.

This title is described in the American argument, as originating in circumstances which either preceded or attended the acquisition of the Canadas by Great Britain. It is said, "that, if Great Britain pos- sessed the navigation of the St. Lawrence before the conclusion of peace in 1763, so did the People of the United States, as forming, at that time, a part of the British empire; but if Great Britain only first acquired it together with the Canadas, then did the People of the United States acquire it common with her at the same period." In both the supposed cases, it is taken for granted, that whatever liberty to navigate the St. Lawrence, in the whole length of its course, the inhabitants of the United States enjoyed when those States were part of the British Empire, continued to belong to them after their separa- tion from the mother country. Now, if this were so, it would also be true, and in a far stronger degree, that the subjects of Great Britain have an equal right to enjoy, in common with American citizens, the use of the navigable rivers and other public possessions of the United States, which existed when both countries were united under the same Government. For the acquired title, be it remembered, does not affect the St. Lawrence, as a river flowing from the territories of one Power, through those of another, to the sea, but is manifestly grounded on the supposition that an object which had been possessed in common by the People of both countries, up to the time of their separation, con- tinues to belong, in point of use, to both, after they have ceased to be parts of the same community. If it be true, that the inhabitants of the United States contributed, as British subjects, to effect the conquest

of Canada, it cannot, at the same time, be denied, that the United States, before their separation from Great Britain, were frequently indebted to the councils and exertions of the parent country for protection against their unquiet and encroaching neighbors.

Specifically did they owe to Great Britain their first enjoyment of the waters of the Mississippi, conquered in part from France by the very same efforts, which transformed Canada from a French settlement into a British Colony. The pretension of the American Government as grounded on the simultaneous acquisition of the St. Lawrence, as well by the inhabitants of the adjacent, and, at that time, British Provinces, as by those of the countries originally composing the British monarchy, must, therefore, if admitted, even for the sake of argument, be applied reciprocally in favor of Great Britain.

The fact, however, is, that no such pretension can be allowed to have survived the treaty by which the independence of the United States was first acknowledged by Great Britain.

By that treaty a perpetual line of demarcation was drawn between the two Powers, no longer connected by any other ties than those of amity and conventional agreement.

No portion of the sovereignty of the British empire, exclusive to the actual territory of the United States, as acknowledged by that treaty, could possibly devolve upon the People of the United States, separated from Great Britain.

By the same instrument, the territorial boundary of the States, as recognized by their former sovereign, were carefully defined, for the express purpose of avoiding disputes in future; and the articles stipulating for a concurrent enjoyment of the North American fisheries, and of the navigation of the river Mississippi, prove that equal care was taken to determine, in the general act of pacification and acknowledgment, those objects, of which the usufruct in common was either retained or conceded by Great Britain.

Is it conceivable, under these circumstances, that the treaty of 1783, should have made no mention of the concurrent navigation of the St. Lawrence, if the claim, now raised by the United States, had rested on any tenable grounds?

But the commercial treaty of 1794, would afford additional proof, if it were wanted, that the channel of the St. Lawrence, from the sea to the 45th parallel of latitude, was never for a moment considered as forming any exception to the territorial possessions of Great Britain.

The third article of the commercial treaty shows, most clearly, that the power of excluding foreign vessels from those parts of the river which flow entirely within the British dominions, was deemed to belong of right to the British Government. The leading purpose of that article is, to establish a free commercial intercourse between the two parties throughout their respective territories in North America.

The same article contains a limitation of this privilege with respect to a considerable portion of the St. Lawrence, to which it was declared that American vessels were not to have access; and the

corresponding restriction against Great Britain, was an exclusion of British vessels from such parts of the rivers of the United States as lie above the highest ports of entry for foreign shipping from the sea.

It necessarily results, from the nature of the two clauses thus viewed with reference to each other, that the authority of Great Britain over the part of the St. Lawrence interdicted to American vessels, was no less completely exclusive, than that of the United States over such parts of their interior waters as were, in like manner, interdicted to the shipping of Great Britain.

The former limitation is, besides, of itself inconsistent with the notion of a right to a free, uninterrupted passage for American vessels, by the St. Lawrence, to the ocean.

Nor is it less conclusive as to the merits of the case, when coupled with the declaration, contained in the very same article, that the navigation of the Mississippi was to be enjoyed in common by both parties, notwithstanding that a subsequent article of the same treaty expresses the uncertainty which already prevailed with respect to the sources of that river being actually situated within the British frontiers.

With these facts in view, it is difficult to conceive how a tacit enjoyment of the navigation now claimed, can be stated by the American Plenipotentiary to account for the silence maintained on this subject by his Government, from the establishment of its independence to the present negotiation.

In the course of forty years, during which no mention whatever has been made of this claim, there has been no want of opportunities fit for its assertion and discussion. To say nothing of periods anterior to the rupture of 1812, it is strange that an interest of such vast importance should have been wholly neglected, as well on the renewal of peace, in 1815, as during the negotiation of the commercial treaty which took place in the close of that year. This long continued silence is the more remarkable, as the mere apprehension of an eventual change in the regulations, under which a part of the St. Lawrence is actually navigated by foreign vessels, has been alleged by the American Government as their reason for now raising the discussion.

The regions contiguous to the upper waters of the St. Lawrence are doubtless more extensively settled than they were before the late war, and the inhabitants of those regions might at times find it advantageous to export their lumber and flour by the channel of that river. But mere convenience, and the profits of trade, cannot be deemed to constitute that case of extreme necessity under the law of nations, to which the rights of property may perhaps be occasionally required to give way. It has already been shown, that such interests can, at most, amount to an imperfect right of innocent utility, the exercise of which is entirely dependent on the will and discretion of the local sovereign. Of this description are the rights and accompanying duties of nations to trade with each other, and to permit the access of foreigners to their respective waters in time of peace; but will any one, at the same time, call in question the co-existing right of every

State, not only to regulate and to limit its commercial intercourse with others, but even, as occasion may require, to suspend or to withhold it altogether?

If ever there was a case, which particularly imposed on a sovereign the indispensable duty of maintaining this right unimpaired, even with every disposition to consult the convenience and fair advantage of friendly nations, it is the present unqualified demand of the United States.

It cannot be necessary to enumerate the various circumstances which make this claim peculiarly objectionable; but there is no concealing, that, besides the ordinary considerations of territorial protection, those of commercial interest and colonial policy are alike involved in the demand of a free, gratuitous, unlimited right of passage for American citizens, with their vessels and merchandise, from one end of Canada to the other.

Interests of such high national importance are not to be put in competition with the claims of justice; but when justice is clearly on their side, they have a right to be heard, and cannot be denied their full weight. That the right is, in this instance, undoubtedly on the side of Great Britain, a moment's reflection on the preceding argument will suffice to establish.

It has been shewn that the independent right asserted by the United States, is inconsistent with the dominion, paramount sovereignty, and exclusive possession, of Great Britain.

It has been proved, by reference to the most esteemed authorities on the law of nations, with respect as well to the general principle as to the opinions distinctly given on this point. that the right of sovereignty and exclusive possession extends over rivers, in common with the territory through which they flow.

The same principles and the same opinions have been cited to prove that those parts of the river St Lawrence which flow exclusively through the British dominions, form no exception to the general doctrine so applied to rivers.

The existence of any necessity calculated to give the United States, in this case, a special right, in contradiction to the general rule, has been distinctly denied, and the denial conclusively supported by a reference to known facts.

With no disposition to contest such imperfect claims and moral obligations, as are consistent with the paramount rights of sovereignty and exclusive possession, it has been proved, from the authorities already quoted, that of those imperfect claims and moral obligations, the territorial sovereign is the judge.

The title of the United States, as derived from previous enjoyment at the time when they formed part of the British empire, has been shewn to have ceased with the conclusion of that treaty by which Great Britain recognized them in the new character of an independent nation.

It has also been shown, that, while the American Government acknowledge that their claim is now brought forward for the first time,

not only have they had, since their independence, no enjoyment, under treaty, of the navigation now claimed, but that the provisions of the commercial treaty, concluded in 1794, and described as having been till lately in force, are in direct contradiction with their present demand.

It has finally been made to appear, that the treaties concluded by European Powers, as to the navigation of rivers, far from invalidating the rights of sovereignty in that particular, tend, on the contrary, to establish those rights; and that the general principle of protection, essential to sovereignty, dominion, and property, applies with peculiar force to the present case of the river St. Lawrence.

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