

The Intelligencer, & Weekly Advertiser.

Published by WILLIAM & ROBERT DICKSON, at their Printingoffice and Bookstore, north Queenstreet, LANCASTER.

PRICE, six Cents.]

WEDNESDAY, August 28, 1799.

[NUMBER 5.]

CONDITIONS, OF THE Intelligencer, & Weekly Advertiser.

- I. Subscribers in the Borough shall be regularly served with this Paper on the Day of each Publication; and those in the County, shall have it left at each Town in Town as they may direct.
- II. The Price to Subscribers will be two Dollars per Annum; one half to be paid at the time of subscribing, and the Remainder, in six Months.
- III. Advertisements, not exceeding a Square will be inserted three Times for one Dollar; and those of greater Length, in Proportion.

(Continued from last.)

FEDERAL DISTRICT COURT, For the District of South-Carolina, 15th July, 1799.

Present, His Honor Judge BEE.

CAN it be supposed, that it was the intention of the contracting parties to deprive the Citizens of America of the trial by jury, or which are guaranteed the both principles of American freedom? Certainly not: it is an unfair and unjust inference. Hence it follows, that a Citizen ought not to be delivered up to a foreign tribunal for any offence, which is within the jurisdiction and competence of his country. The strategy of the crime with which the prisoner is charged, has nothing to do with the principle contended for; the requisition could be made with equal propriety, were it of a civil nature. Piracy and murder is an high offence against all nations; all nations have an interest in bringing offenders to justice; and all are equally competent to try them. A requisition is made, under the 27th Article of the Treaty, to deliver up a Citizen of the United States, on a vague allegation contained in two affidavits, which afford a mere suspicion of the prisoner having been on board the *Hermes* frigate, at the time of the murder. If a Citizen can be delivered up on grounds so flimsy, in the present general political conflict among mankind, when the violence of party spirit knows no bounds; when vindictive passions are allowed in heat of reason, justice, and humanity; to men, however prominent and respectable among his fellow-citizens, can be feasted upon the operation of this law. The prisoner is an officer character; and, although in the bosom of his native country, from the nature of his profession, being constantly moving from one place to another, is in doubt of friends, as if he were on the opposite side of the globe.

Mr. Key next directed to the words of the 27th Article of the Treaty, under which the requisition is made. He contended, that the words "murder or piracy, committed within the jurisdiction of either," manifestly implied the exclusive jurisdiction of one or the other power; and not the jurisdiction of the high seas, where the United States have a concurrent, one in common with all nations; that the laws of nations provide against officers committed on the high seas, and therefore a particular jurisdiction was unnecessary; that the apparent object of the Article was to bring offenders to justice, and therefore provided against the crimes of murder and piracy being committed within the exclusive jurisdiction of either; but that the law did not apply in the present case, as the United States possessed competent power to try the offender and bring him to justice; that, if the offence had been committed within the Kingdom of Great Britain, under the municipal laws of that country, the Article affords a remedy, as our laws could not reach the offence; and further, that a requisition should not be given to the Treaty, which abridged the jurisdiction of the United States; and that we ought not to perform, that the government of the United States had abandoned any of its jurisdictional rights to any nation; and that under the letter or spirit of this Article warranted the conclusion.

Col. MONTGOMERY, also counsel for the prisoner, arose. After premising the importance of this case, and fixing it as one in which the dearest interests of the union were involved, in support thereof, he advanced, in a plain and manly style, the following grounds for consideration, though much more enlarged on, than is here given.

1st. On the Constitutional Ground.

That the Constitution of the United States contained the constituent principles of our federal union as a nation; that it is the compact by which our government was formed, and under which alone it exists; and that from this compact all civil power and authority, and every constituted branch of our federal government, was derived and is exercised. That, in making, in quitting a state of nature for that of society, gave up part of their natural rights, which they all possessed in common, to possess the good of the whole, and to secure the remainder which were not surrendered; that the natural rights given up, were either totally relinquished, or were modified only under certain restrictions, and became political rights; and that not given up, formed a sacred refuge in the hands of the people, and which is unalienable by any act of legislation.

That this was no visionary theory of ancient writers, but is the true and modern ground of all civil union; and it is fully recognized in our free Constitution: for, by Article 12th of the amendments to our Constitution, it is declared, "That all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." And the 10th Article declares, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the People."

2dly. On Treaty.

That treaties and laws made by legislators, were only acts of the constituted agents and subordinate ministers of the constitution; that they were of derivative authority only, and derived from the primary authority of the constitution, and therefore must be subordinate to, and could not contravene or cancel it; and that the treaty-making power was derived only from the constitution, a sequel from the 10th Article of the 2d Article, which creates and gives it.

He next pointed out the infirmity of the treaty-making power being allowed to control or control the constitution; as by that means, by that treaty, our constitution, the very foundation of our government, and protection of our liberty, might be effectually destroyed, and every sacred right of the people forced thereby profligated; and this too, in our time, and by constitution with a foreign power: That no legislation or forced compact of the people, for the preservation of their happiness, could be formed, but what was, by the creators of the constitution and of the people's powers, might become; that, though the government and nation might be called independent, the people might be slaves, and be in fact without any protection to their liberties.

3d. That what the nature or determination of the offences specified in the treaty were, was totally immaterial; for, if the treaty-maker could infer one offence, he may infer as many more as he pleases; but the principle was, whether he had a right, for any offence, to oblige a citizen to be given up as a victim to any foreign power; a citizen, whose very theory conflict in his being guarded by the federal trial by jury.

4th. That the 6th Article of the constitution affords them that no law or treaty can be the law of the land, that is contrary to the constitution; in as much it says, expressly, that the laws only "made in pursuance thereof;" and "all treaties made under the authority of the United States;" see the law of the land. The question was then put by Mr. M., what was the "authority of the United States;" whence was it derived, and the United States itself created but only by and from the constitution itself.

That the constitution, and laws, and treaties of the United States, being the supreme code of the law of the land, was evidently intended by the 6th Article (as explicated) to be only a *supreme* to the local constitutions and laws of each State; but such laws and treaties stand on equal footing; and both must be made in pursuance of, and under the authority of the constitution.

The two supreme are of equal authority, and both must be equal; that two equal opposite forces or powers, acting in opposition, destroy each other; and if not equal, one or the other must be superior, (unless the constitution or treaty) and that all laws and treaties can only be legal when made in pursuance of, in subordination to, and under the authority of the constitution; but that the treaty was superior and repugnant to the constitution.

5th. That in the 27th and 31st Articles of the amendments to the constitution, the citizens are secured, in all cases, the trial by jury; except for naval and military offences by sea

and land, in time of actual war, "as Congress shall direct;" during the rage of war; and that no treaty could contravene these articles of the constitution; that the trial by jury is a sacred and unalienable right; as all the powers given by the constitution, for the protection of the original natural rights of life and liberty, are only a conditional cession of these rights to the people; and that the exception of courts of militia was in the navy, during the rage of war, was an exception by the constitution itself, on the necessity of the case, for the people's safety; and that such exception proves its full extent and operation.

6th. That, even if the treaty was legal, the perfect officers, which the prisoner is in custody for, is not within the meaning and confederation of the treaty; for the 27th Article of the treaty relates to murder and piracy, committed within the jurisdiction of either Great Britain or the United States; that is, within the peculiar exclusive jurisdiction of either, where the offence is committed, and to which the jurisdiction of the one or the other to which the party flies for refuge, or as a victim, could not extend; that relates therefore only to the respective territories of the contracting powers; but that the offence now before the court was done *extra aliam* more (upon the high seas) where all nations have equal jurisdiction, and no date of justice could arise, from a want of jurisdiction here to extend to the offence; that it was against the law of nations, which (by a private *bonis humanis generis* (the treaty of mankind) and where all nations claim a common jurisdiction equally, and over whom the United States have a concurrent jurisdiction.

That Vattel says, on this construction of treaties, nothing shall be construed as to make the treaty infirmity; and it never can be forgotten the learned Vattel and others, who framed this treaty, would have been so foolish as to make our nation of the United States, give up her dignity, independence, and concurrent maritime jurisdiction, which she holds equally in the great history of nations, with the rest of the world, or that they were ignorant of her having such jurisdiction; and that Great Britain and the United States, by their own complicity, could hold such jurisdiction exclusively; that the ocean is a common, where all nations hold a common interest and authority, as remains in common.

7th. That the prisoner is a native citizen of America, and was actually perfected in his birth, into the British service; and an attestation of his birth is Conclusive, under the faith of the city of New York, and the prisoner's own affidavit of his birth, and of his being perfected, were produced.

On this it was remarked by Mr. M., that the natural attraction appeared in its own face to be genuine, and of the age equal to its date; that, by reference to New York, its authenticity can be fixed; and, by reference to the *Columbian* there, the clearance and list of the crew of the vessel and name of the prisoner may be found, as fixed in his affidavit; that all this would show his defence is a false one; and that the signature, *Jameson*, *Dollin*, now made in open court to his affidavit, and the one made to the paper signed several years since, before the magistrate in New York, are the exact and indelible signatures of one and the same hand. Alas, that no man was to be perfected guilty of any transgression of the laws of his country, could he be legally charged and convicted thereof; that the law and prohibitions made to prevent our citizens going into foreign service, were very severe; that the indictment and charge against the prisoner, in the present case, was an attack on the sovereignty of our nation, and necessary; and the principle from their laws, and the fact established, was, that the prisoner was perfected contrary to his will, and the *non prosequi* (wonder of proof) to the contrary by the law of the prosecution; that, if he was in perfected, it was *servitium*, by the laws of God and man, to give his liberty even by the death of his officers, and to avenge the insult dignity of a free people; that hence the right of killing in war is founded—*Tam*, *De*, p. 1, c. 1, v. 13—*and* that the prisoner, instead of being punished, "deserved *med* of his country."

8th. *Non prosequi* libere?

9th. *Non prosequi* cum armis?

(What more valuable than liberty?)

What more important than liberty?

And here Mr. M. asked, that he knew this motto was inscribed on the banners of his countrymen; that their liberties, birthrights, and their country's honor and dignity were

most sacred to them; that they would only part with them but with their lives; that ignominy and slavery were to them death; and that they would ever hold an American unworthy the name of such, who would not sacrifice any one, who, under the impious authority of any nation, would dare attempt to enslave him, and rob him of his natural privileges.

8th. Mr. M. commented on the laws suffered by Great Britain, in the beginning of her war with us, for carrying off American soldiers over to England to be tried, and at one of the oppressive evils we fought against, and drew a striking analogy.

Further, he observed, that the office of President was an executive and ministerial office, and had no right to control this court, as appeared by the Secretary's letter in this case, advising the prisoner to be given up; that the constitution and laws only formed the true sovereignty of the nation, and the judicial was the proper guardian of it; and that the executive, in fact, is but subordinate to the judicial, as he is bound to enforce its decrees.

9th. That finding a citizen from the bosom of his country and friends, and for immolation, like a lamb to the altar, to gratify the ambition or policy of any foreign power or king, was a capital punishment; what could be greater? And Mr. M. then asked, by what law of mankind such a punishment, or any other, could be inflicted here, in time of peace, without a jury, or a trial: a punishment by which a citizen was to be tried, instead of by a jury, by a court-martial.

10th. *Of the Jurisdiction.*

A great number and variety of other striking and forcible remarks were made; but enough has been said to shew, that by the law of the Federal judiciary, the district court, before whom this was brought, had no jurisdiction for crimes on the high seas, where the punishment exceeded 30 stripes, six months imprisonment, or one hundred dollars fine; that, in this case, this court, the inferior court, or Magistrate, was only competent to commit and retain in custody for trial, by the Circuit Court, and had no jurisdiction, as to the merits; that the Circuit Court; had the jurisdiction, and that this court understanding, after commitment, to liberate or give up the prisoner, was to introduce on and affirm the *judicium* of the superior court; at which to determine and decide on it, and, if it had any jurisdiction, to shew it, and only if it; that in doing so, it would be precipitous and illegal.

A further remark was also made by Mr. Montgomerie, on the affidavits brought against the prisoner, showing that, even in a common case, they were not sufficient to persuade a prisoner from bail; and much less sufficient were they, where a man was to be punished by death, by so capital a punishment, in the first instance, without any trial, that they were vague, uncertain, and ascertained no specific charge against the prisoner; and, in fact, amounted to nothing more than mere suspicion, and even that but weakly supported; and thus, under such circumstances, no man's life or liberty can be left under this construction of the treaty. That as to removing a person from one State to another, to be tried where he commits an offence, all this is but the moving from our country to another; for the colour is still within the jurisdiction and punishment of his country; but far different it is to remove him to a distant nation, out of the protection of his country, there to meet a summary trial by a court-martial, and in the end, perhaps, to hang from motives of policy, more than from the principles of justice.

Mr. WATSON, counsel for the British claim, was shown on this file. The counsel for the prisoner, he said, had addressed the jurors of the inferior court, which was quite unnecessary in this place, where the citizens were always entitled for immunity not subjected to the accident. It was necessary, at this time of day, to divide the question of continuance, that had been long since tried, in the ratification of the treaty by the proper authorities. It should be remembered, he said, that the offences committed in the 27th Article, now objected to, were mutual to the two nations; the treaty cedes a portion of the rights of British subjects to the American government.

In answer to the arguments, that a citizen could not legally suffer under an article of a treaty which contained the rights reserved to him by the constitution, Mr. W. said, that a treaty made by the powers pointed out for the purpose in the constitution, is conformable with the constitution itself, and even paramount to it; and that the court could then to the last Page.