

CONGRESS.

HOUSE OF REPRESENTATIVES,
Friday, March 18.

Debate on Mr. Livingston's resolution continued.

Mr. Livingston's speech continued.

The positions had been assumed, differing not materially in the power ascribed to treaties, but distinguished chiefly by the mode of applying this power.

By some it was contended, that the interference of the Legislature was necessary in some instances, but that the treaty operated by way of moral obligation, to enforce the necessary steps to give it validity; and that though there is a physical power of refusal, yet it ought in no case to operate against the superior obligation.

Others had asserted, that treaties being the supreme law, might operate directly, without the intervention of any other body. That where existing legislative acts opposed their execution, the treaty was paramount and could repeal them.

These positions were in fact the same, because if a treaty was at all events to have effect, it was perfectly immaterial whether it operated directly by its own power or indirectly by the instrumentality of another body; both he thought equally subversive of the principles of the government; but the first was most degrading to the legislative dignity. Nor could he discover from what part of the Constitution it was inferred; wherever in that instrument a duty was imposed, it was clearly and explicitly assigned, as in case of the President's compensation, that of the Judges and many other instances. It is not then to be conceived, that so important an obligation as this should have been left to implication. If it had been intended to annihilate this discretion the same language would have been used. "Congress shall pass laws to carry every treaty into effect," but nothing of this kind appears. Again, if it had been intended to make treaties paramount over laws, it would seem to have been the more simple mode to have dispensed with their interference. Why leave a phantom of discretion, an unreal mockery of power in the hands of the Legislature. In order to get rid of this difficulty some gentlemen seem willing to allow a species of violation, but it was a pittance that would be scarcely worth accepting. In cases of extreme necessity, and in others where from corruption or other good cause the compact is void, this House, they say, may refuse to carry it into effect. In the first case where it is impossible to give efficacy to a treaty, the power of refusing it was surely of little value. And when the compact is void in itself, the liberty of not being bound by it would scarcely be contended for. If the subject were less serious, Mr. L. said, one would be tempted to smile, at the efforts that are made to reconcile the constitutional predilection, contended for with the free agency of discretion. It was as difficult to be understood, as the most entangled theological controversy, and like most disputants in that science, they concluded with anathemas against all who could not comprehend or would not believe them. We have a discretion whether to act or not, say they; but we are under an obligation to act, and if we do not, we are guilty of treason and rebellion. This was the same kind of discretion a man has whether he will commit murder or let it alone; he may do it, but if he does he will be hanged—this was a worse alternative than that generally called *Hobson's choice*—that was, "this or nothing;" but here we are told, "do this, or be hanged for a traitor." So that hereafter when any one intended to express an inevitable necessity, he would call it *Congressional discretion*.

If then the treaty does not operate by way of obligation on the Legislative power, let us, said Mr. Livingston, examine, whether as it is contended, "a treaty is paramount to a law, and can repeal it, though it itself cannot be acted on by the Legislative power," this he said was the most important question, that had ever been agitated within these walls.—It evidently tended to the substitution of a foreign power, in lieu of the popular branch, it was replete with the most serious evils. He could never suppose so great and pernicious an absurdity, was contemplated by the Constitution, but if such was the true construction, great as the evil was, we must submit, until it could be legally amended.

The Constitution gave all Legislative power to the Congress of the United States, vested the power of making treaties in the President and Senate; and declared that the Constitution, the laws made in pursuance thereof; and treaties made under the authority of the United States, should be the supreme law of the land. He had always considered the order in which this enumeration was made as descriptive of the relative authority of each. 1st. The Constitution which no other act could operate on. 2d. The laws made in pursuance thereof. 3d. Treaties, when they contradicted neither; for if no weight was given to this argument, treaties would be superior, both to the Constitution and the laws, as there is no restriction with respect to them as in the case of laws, that they be made pursuant to the Constitution.—He did not believe gentlemen would contend for this absurdity, they must therefore refer to the order of the enumeration to measure the relative effect of the Constitution, laws and treaties. If the objects of legislation, and of treaty compact would be kept distinct, no question would arise, there would be no pretext for interference, but they could not; almost every object of legislation might also become that of compact with a foreign power.

He then read the enumeration of powers vested in congress, and said, that many of these had already become the objects of treaty—many more probably would be, and the whole directly or indirectly, were liable to be embraced by it. If then all, or even any one of these objects may be regulated by treaty, without any interference of law, the constitution, said Mr. L. has contained the evident absurdity of submitting the same object at the same time to the controul of two distinct powers. An absurdity that could not be destroyed but by sup-

posing that—It was intended these different powers should operate under this constitution as they do in that of England. So that every treaty operating on objects submitted to the legislative power should receive its sanction before it took effect.—This construction would reconcile all the parts of the instrument to each other; whereas the other would set them at variance, and by degrees deprive the House of representatives of all the share in Legislation. This was not reasoning, he said from an abuse of power: If it was properly vested in the President and Senate, it was not only permitted but it was their duty to use it, and no one could call the exercise of a constitutional right, an abuse of power. He admitted, that if the text were explicit, reasoning from consequence was a bad mode, but as that was not pretended in the present case, it would be well to weigh the serious evils that attended the construction gentlemen contended for.—And to enquire whether there is more danger in trusting the representatives of the people with a check on all treaties relating to those objects, which are specially vested in them by the constitution, than in making those representatives subservient to the will of twenty-one men, who may be leagued with a foreign power?

In looking for the true construction of this instrument we should consider the state of things at the time it was proposed and adopted. The opposition it met was well known, and the power given to the Senate and President, was considered as one great cause of opposition. It cannot be supposed as the sentiments of the people were known by the framers of the constitution, that they would have proposed any plan more energetic than the government of Great Britain.

But it was probable, Mr. Livingston said, that the treaty power was intended to be placed in the President and Senate to the same extent only in which it existed in the executive of Great Britain. The words of our constitution on this point were the same made use of by the British writers in defining the corresponding power in their government.—And it seemed evident that some of its features (and this was none of the least prominent) were drawn from that original. He was happy that the parallel was not perfect in other instances.—He thought it completely so in this, and that the practice, therefore, of that government would in some measure lead to the true construction of this. A ware of the weight of precedents drawn from English history, gentlemen endeavored to weaken them by a very ingenious argument:—"The British constitution, say they, is not written, it is formed of usages; if you prove, therefore, that it is the usage for British Parliaments to sanction treaties, you prove it to be their constitution, but you do not prove it to be ours." It was true, Mr. Livingston observed, that the English constitution was formed partly of immemorial usages; but it was also true, that those usages were collected in books of authority, and that the different powers of government were generally designated, so that the leading points in their constitution were as well known and defined as they were in that of America. It had been shewn, by a reference to writers of the best authority, that by the Constitution of England the power of making all treaties was in the King; but as the power of making all laws was in the Parliament, this latter, as the greater power, controuled the former, whenever it affected objects of legislation. Thus, in the constitution of the United States, (he contended) the power of making treaties, that is all treaties, is vested in the President and Senate—but as all legislative power is vested in Congress, no treaty operating upon any objects of legislation can take effect until it receives the sanction of Congress. The practice, too, was the same. The King asserted his right of making and completing treaties, by not only concluding but ratifying them, before they were submitted to Parliament, but he believed no commercial treaty was proclaimed as the law of the land before it had received the sanction of Parliament. Indeed it was impossible in any country, and under any constitution, where the legislative and treaty-making powers are lodged in different hands, that any other construction can be given, without running into the absurdity he had before hinted at, of making two different powers supreme over the same object at the same time. Our ideas had been confounded by referring to the practice of governments where the two powers were united, and where a ratification gave the consent of both.

If, then, there was a perfect analogy between the powers vested in the crown in England, and that delegated to the President and Senate in America, on the subject of treaties; and if the Parliament, by virtue of its general Legislative authority, was in the practice of giving or withholding its sanction to treaties concluded by the King, it was but a fair inference to say, that the same discretion existed in Congress.

Some instances of the exercise of this power by Parliament had been before quoted by others. The inexecution of the treaty of Utrecht in consequence of Parliamentary opposition, and the difficulties with which the commercial treaty with France was carried through the House of Commons, in 1787, had been already noticed. He would mention two other precedents, drawn from the same source, equally striking, or perhaps more so, as the course of proceeding there followed, was precisely that which was proposed by the resolution in debate.—The first was the proceeding on the barrier treaty, taken from the 5th Vol. Parl. Debates, p. 43—where the House of Commons began by a resolution to address the Queen, "that all instructions and orders given to the Plenipotentiaries that transacted the barrier treaty, and also all treaties mentioned and referred to in the said treaty, might be laid before the house, except such treaties as they already had." We are told in the subsequent page, that on the 13th, (that is) only two days after the request, "Mr. Secretary St. John presented to the House, by her Majesty's command, a copy of the instructions to the Duke of Marlborough and Lord Townshend, about the barrier treaty, extracts of letters from Mr. Boyle to Lord Townshend concerning the said treaty; also a copy of the preliminary articles signed at the Hague; the titles of which copies and extracts of letters were referred to the committee of the whole house. After this it was

resolved to present an address to her Majesty; that the letters written by Lord Townshend to Mr. Boyle, the Secretary of State, dated the 31st and 26th November, 1709, might be laid before the House, which Mr. Secretary St. John accordingly did on the 14th February." After having obtained the papers, Mr. L. said, the House of Commons proceeded to the consideration of the treaty in committee of the whole, and voted, 1st, that the treaty contained articles destructive to the trade and interest of Great-Britain; 2d, that the negotiator had acted without authority; 3d, that the advisers and negotiators were enemies to the Queen and kingdom.

The treaty being thus obstructed, the States General controuled to the Queen on the subject, but conscious that the Parliament were only exercising a constitutional power, they make no complaints in their memorial of any breach of faith, though the treaty had been ratified.—They enter into the merits of the treaty, offer to negotiate on the obnoxious articles, and conclude with "intreating the continuance of her Majesty's friendship."

This instance, then, said Mr. L. is complete to shew the propriety of a call for papers by the House of Commons; a ready compliance on the part of the crown, a deliberation on a ratified treaty, a rejection of it, and an acquiescence on the part of the foreign nation, without remonstrance.

The other instance was an address in the year 1714, requesting that "the treaties of peace and commerce between her Majesty and the King of Spain, and the instructions given to her Majesty's ambassadors thereupon, together with the copies of the King of Spain's ratifications of the said treaties, and the preliminaries signed by the Lord Lexington and the Marquis of Bedmar at Madrid, and all other agreements and stipulations which had been made concerning the commerce between Great-Britain and Spain. 2dly, An account of what engagements of guaranty her Majesty has entered into by virtue of any treaty with any foreign prince or state from the year 1710. And, 3dly, an account of what instances had been used by her Majesty for the restoring the Catalans their ancient privileges, and all letters relating thereunto. And then it was resolved, to take into further consideration the message that day sent from the Lords upon Thursday next following."

Objections had been raised to this construction, drawn from three different sources.

1. From the prevalent construction at the time of establishing the constitution.
2. From the practice of the government since that period.
3. From the present ideas entertained by the people of the United States.

As to the construction generally received when the constitution was adopted, Mr. Livingston did not conceive it to be conclusive, even if admitted to be contrary to that now contended for; because he believed we were now as capable at least of determining the true meaning of that instrument as the conventions were—they were called in haste, they were heated by party, and many adopted it from expediency, without having fully debated the different articles. But he did not believe the general construction at that time differed from the one he had adopted. A member from Virginia, (Mr. Brent) had shewn, by recurring to the debates in the Convention of that state, and to other contemporaneous productions, that the framers and friends to the constitution construed it in the manner that we do; whilst its enemies endeavored to render it odious and unpopular by endeavouring to fix on it the contrary construction. And as the friends to the constitution were the most numerous, we ought rather to take the explanation under which a majority accepted the constitution, as the true one, than to look for it in the bug-bears by which anti-federalism endeavored to prevent its adoption.

[Mr. Livingston's speech to be continued.]

Friday, May 6.

Mr. Richard Sprigg, jun. from Maryland, yesterday took his seat in the house, in the place of Mr. Duval, some time ago resigned.

Petitions praying the British treaty to be carried into effect, were presented by Messrs. Bradbury, Bourne, D. Foster, S. Lyman, Brent, Wadsworth, Read, Williams, Van Alen, Sprigg, jun. Rutherford, Gilbert, and Hartley.

A bill for the relief of Sylvanus Bourne, was twice read, and ordered to be engrossed for a third reading.

The bill making provision for certain debts of the United States, was read a third time and passed. The blank for the sum which the President was entitled to borrow on loan redeemable for a number of years, was filled up with five millions.

The bill for repealing that part of the act relative to the District Court of Pennsylvania being held alternately at Philadelphia and York-Town, was read the third time and passed.

Messrs. Sedgwick, Dearborn and Varnum obtained leave of absence for the remainder of the session.

Mr. S. Smith laid a resolution to the following effect upon the table:

"Resolved that there be allowed and paid for the year 1796 to the secretaries of the treasury and war department, the treasurer, comptroller, auditor, register, purveyor and attorney general, per cent on their respective salaries, in addition thereto."

The house took up the order of the day, and resolved itself into a committee of the whole, Mr. Bourne in the chair, on the report of the committee to whom was referred the message of the President relative to the territory of the United States south of the river Ohio. The resolution recommended to the consideration of the house by that committee (and the propriety of adopting or rejecting which was the subject of debate yesterday and to day,) was in the following words:

"Resolved, That by the authenticated documents accompanying the message from the President of the United States to this house, on the 18th day of the present month, and by the ordinance of Congress bearing date the 13th of July 1787, and by a law of the United States passed on the 26th of May 1790, it appears that the citizens of that part

of the United States which has been called the territory of the United States south of the river Ohio, and which is now formed into a state, under a republican form of government, by the name of Tennessee are entitled to all the rights and privileges to which the citizens of other states in the Union, are entitled under the constitution of the United States, and that the state of Tennessee is hereby declared to be one of the sixteen United States of America."

It appears by the ordinance of Congress passed in July, 1787, and by a law passed on the 26th of May, 1790, that the people of this territory were entitled to become one of the states of the union when they should amount to 60,000 free male inhabitants; and the temporary Government conceiving that number were there at present, had passed an act for taking a census, by which it appears, there are upwards of 67,000, besides about 15,000 negroes; they have, therefore, proceeded to form themselves into a state, under the name of the state of Tennessee, and request to become a member of the Union, and to send representatives to Congress according to their population. The President, some time ago, sent the documents which he had received from thence, to congress, giving it as his opinion that the state of Tennessee should be admitted into the union. That message was referred to a select committee, who reported the above resolution.

It was objected by members opposed to the resolution, that, before that state could be admitted into the union, it should first be declared a state by Congress, and the number of its inhabitants ascertained under the direction of Congress; and that it was not sufficient for the state to declare itself entitled. Some objections were also made to their constitution, and to the manner of taking the census.

It was asserted on the other hand, that the fact of there being 60,000 free male inhabitants was sufficient to entitle them to become a state of the Union: that the census having been taken by the legislature of the state (the governor and council of which were appointed by the President of the United States) was as good authority as they could wish, and that they ought not to be too strict with respect to forms, but admit the citizens of that country to all the rights of freemen.

After several propositions being offered in place of the resolution reported by the committee, which were not received,

The resolution of the select committee passed, by yeas and nays, as follows:

YEAS.

Messrs. Bailey, Baird, Baldwin, Benton, Blount, Brent, Bryan, Burges, Claiborne, Clopton, Crabb, Findley, Franklin, Gallatin, Gillepie, Giles, Gregg, Hampton, Harrison, Harper, Havens, Heister, Hollard, Jackson, Locke, W. Lyman, Maclay, Macon, Madison, Moore, New, Nicholas, Orr, Page, Preston, Read, Rutherford, I. Smith, Sprigg, Tatem, Van Cortlandt, Venable—42.

NAYS.

Messrs. Bourne, Bradbury, Christie, Coit, Dent, A. Foster, D. Foster, Gilbert, Glenn, Goodrich, Griswold, Hartley, Henderson, Hillhouse, Hindman, Kitchell, Leonard, S. Lyman, Malbone, Sedgwick, Sigreaves, Jer. Smith, N. Smith, Isaac Smith, Wm. Smith, Thatcher, Tracy, Van Alen, Wadsworth, Williams—30.

A message was received from the President, informing the house that he had approved and signed the following acts, viz. an act authorizing a loan for the city of Washington; an act for making further provision relative to Revenue Cutters; an act declaring consent to an act of the state of Maryland, appointing a Health Officer at Baltimore; and to the several acts for carrying the treaties with Spain, Great Britain, Algieres, and the Indian Tribes into effect.

Adjourned.

MRS. MARSHALL'S NIGHT.

NEW THEATRE.

On Monday Evening, May 9, will be presented a celebrated Tragedy, never performed here, called

Alexander the Great.

Or, THE RIVAL QUEENS.

Alexander,	Mr. Moreton.
Hephestion,	Mr. Warrell, jun.
Lymachus,	Mr. Marshall.
Cassander,	Mr. Green.
Polyperchon,	Mr. Darley, jun.
Philip,	Mr. Morgan.
Clitus,	Mr. Whiglock.
Thestus,	Mr. Warrell.
Perdiccas,	Mr. Beete.
Eumenes,	Mr. Francis.
Slave,	Mr. Mitchell.
Roxana,	Mrs. Shaw.
Syngambis,	Mrs. Rowfon.
Parastis,	Mrs. Willems.
Statira,	Mrs. Marshall.

In act II the grand Triumphant Entry of Alexander into Babylon, attended by his Generals, Captains, &c. with banners, trophies, &c.

The Vocal Parts by

Messrs. Marshall, Darley jun. Warrell, T. Warrell, Mitchell, Solomon—Mrs. Oldmixon, Mrs. Warrell, Mrs. Bates, Miss Willems, Mrs. Solomon, Mrs. Harvey, Mrs. Gillingham, Mrs. Doctor, Miss Milbourne, Mrs. De Marquis.

To which will be added a grand serious Fantomime, never performed here, called

The Deserter of Naples.

As performed at the Theatres Covent Garden, Drury Lane, and the Royalty, upwards of 200 nights.

General,	Sig. Doctor.
Ruffett,	Mr. Warrell.
Henry,	Mr. Marshall.
Skirmish,	Mr. Bates.
Simkin,	Mr. Francis.
Jailor,	Mr. Bliffett.
Officers, Messrs. Darley, jun. Warrell, jun. Mitchell, Beete.	
Margaret,	Mrs. Rowfon.
Jenny,	Miss Milbourne.
Louisa,	Mrs. Marshall.

Villagers, Messrs. Morgan, Solomon, T. Watrell—Miss Willems, Mrs. Bates, Mrs. Harvey, Mrs. Solomon, Mrs. Gillingham, Mrs. Doctor, &c.

In act II. a solemn military procession to the execution of Henry. The Fantomime under the direction of Mr. Francis. Tickets to be had at the usual places, and of Mrs. Marshall No. 23 north Ninth street.

On Wednesday, a COMEDY, never performed here, called

SUCH THINGS ARE, written by the authors of Every one has his Fault, With A MOGUL TALE, or, The Descent of the Balloon—For the Benefit of Mr. Darley.

MR. WHITLOCK'S Night will be on Friday.

BOX, One Dollar—PIT, Three-Fourths of a Dollar—end GALLERY, Half a Dollar.

Places for the Boxes to be taken of Mr. WELLS, at the Front of the Theatre.

No money or tickets to be returned; nor any person, on any account whatsoever, admitted behind the scenes.