

Thomas Jefferson to George Washington, January 17, 1791, Report on the Current French Policies on Trade with the United States, from the Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

REPORT ON TONNAGE LAW¹ J. MSS.

1 The original letter of Otto's, as well as this report of Jefferson's as transmitted to Congress, are in the *State Papers* (Foreign Relations, 1, 109). Jefferson submitted this report to Hamilton, with the following letter:

“January 1st, 1791.

“ Dear Sir,—I inclose you copies of the printed papers you desired: also a letter I received last night. This paper I will thank you to return by the bearer when you shall have perused it, as it is yet to be translated & communicated to the President. It is evident that this matter will become serious, & tho' I am pointedly against admitting the French construction of the treaty; yet I think it essential to work up some favour which may ensure the continuance of the good dispositions they have towards us. A nation which takes one third of our tobacco, more than half our fish oil & two thirds of our fish, say one half of the amount of these great staples and a great deal of rice, & from whom we take nothing in return but hard money to carry directly over and pour into the coffers of their enemies, such a customer, I say, deserves some menagemens. I would thank you sincerely to suggest any thing better than I had thought of. I am dear Sir your's affectionately & respectfully.”

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See two very interesting letters of Hamilton on this report in *Hamilton's Works*, Federal edition, IV, 345, 347. The editor, Mr. Lodge, adds two foot-notes to them, stating:

“This refers undoubtedly to our treaty with France. What the precise exemption was which was sought is not clear, although indicated in this and the next letter. There is no evidence that this ‘intended’ report was ever made: at least it is not found in Jefferson's works nor in those of Washington.”

“Although the precise point involved is lost, the general purport of this and the preceding letter is clear. Jefferson was considering whether to recommend some treaty construction favorable to France. Hamilton civilly disagreed on being consulted, and the matter appears to have been dropped.”

Jefferson also consulted Madison concerning this, writing him:

[Jan. 1791.]

“I intended to have called last night & left with you the enclosed draught of a Ire to Otto but it was so cold I could not give up my hack. I received yours soon after I came home. Of the two constructions I observe you lean more to the 2d. and I more to the 1st. on account of the consequences to which the 2d may be pursued—My first idea was to write this Ire to Otto and previously communicate it to the President & he perhaps to the Senate. But I have concluded to throw it into the form of a report to the President, to be submitted to the Senate. This will permit me to speak without reserve, to admit the force of 2d construction, & to enforce the proposition I suggest in the close, by showing what valuable branches of our commerce hang on the will of the French nation. I shall see you at dinner & be glad to exchange further thought on the subject which is an important one.”

[Jan 18, 1791.]

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The Secretary of State having received from the Chargé des Affaires of France a note on the Tonnage payable by french vessels in the ports of the United States has had the same under his consideration, and thereupon makes the following Report to the President of the United States:

The Chargé des Affaires of France, by a note of the 13th. of December represents, by order of his Court, that they consider so much of the acts of Congress of July 20th. 1789 and 1790 as imposes an extraordinary Tonnage on foreign vessels, without excepting those of France, to be in contravention of the 5th. Article of the Treaty of Amity and Commerce between the two nations; that this would have authorised on their part a proportional modification in the favours granted to the American navigation: but that his sovereign had thought it more conformable to his principles of friendship and attachment to the United States to order him to

make representations thereon, and to ask, in favour of french Vessels, a modification of the acts which impose an extraordinary Tonnage on foreign vessels.

The Secretary of State in giving this paper to the President of the United States, thinks it his duty to accompany it with the following observations:

The 3d. and 4th. Articles of the Treaty of Amity and Commerce between France and the United States, subject the vessels of each nation to pay, in the ports of the other, only such duties as are paid by the most favoured nation: and give them reciprocally all the privileges and exemptions, in navigation and commerce, which are given by either to the most favoured nations. Had the contracting parties stopped here, they would have been free to raise or lower their Tonnage as they should find it expedient; only taking care to keep the other on the footing of the most favoured nation.

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The question then is whether the 5th. Article, cited in the note, is anything more than an application of the principle comprised in the 3d. and 4th. to a particular object? or whether it is an additional stipulation of something not so comprised?

I. That it is merely an application of a principle comprised in the preceding articles, is declared by the express words of the

article, to wit, “ *Dans l'exemption cidessus est nommément compris* ” &c, “ *in the above exemption is particularly comprised* the imposition of 100. sols per Ton established in France on foreign vessels.” Here then is at once an express declaration that the exemption from the duty of 100. sols, is *comprised* in the 3d, and 4th. articles; that is to say, it was one of the exemptions, enjoyed by the most favoured nations, and, as such, extended to us by those articles. If the exemption spoken of in this 1st. member of the 5th. article was *comprised* in the 3d. and 4th. articles, as is expressly declared, then the reservation by France out of that exemption (which makes the 2d. member of the same article) *was also comprised*: that is to say, if *the whole* was comprised, *the part* was comprised. And if this reservation of France in the 2d. member was comprised in the 3d. and 4th. Articles, then the counter reservation by the United States (which constitutes the 3d. and last member of the same article) was also comprised. Because it is but a corresponding portion of a similar whole on our part, which had been comprised by the same terms with theirs.

In short the whole article relates to a particular duty of 100 sols laid by some antecedent law of France on the vessels of foreign nations, relinquished as to the most favoured,

and consequently to us. It is not a new and additional stipulation then, but a declared application of the stipulations comprised in the preceding Articles to a particular case, by way of greater caution.

The doctrine laid down generally in the 3d. and 4th. Articles, and exemplified specially in the 5th. amounts to this: “The vessels of the most favoured nations, coming from foreign

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ports, are exempted from the duty of 100. sols: therefore you are exempted from it by the 3d. and 4th. Articles. The vessels of the most favoured nations, coming coastwise, pay that duty: therefore you are to pay it by the 3d. and 4th. Articles: we shall not think it unfriendly in you to lay a like duty on coasters, because it will be no more than we have done ourselves. You are free also to lay that or any other duty on vessels coming from foreign ports: provided they apply to all other nations, even the most favoured. We are free to do the same, under the same restriction. Our exempting you from a duty which the most favoured nations do not pay, does not exempt you from one which they do pay.”

In this view it is evident that the 5th. Article neither

enlarges, nor abridges the stipulations of the 3d. and 4th. The effect of the Treaty would have been precisely the same had it been omitted altogether; consequently it may be truly said that the reservation by the United States in this Article is completely useless. And it may be added with equal truth that the equivalent reservation by France is completely useless: as well as her previous abandonment of the same duty: and in short the whole article. Each party then remains free to raise or lower its Tonnage, provided the change operates on all nations, even the most favoured.

Without undertaking to affirm, we may obviously conjecture, that this Article has been inserted on the part of the United States from an over-caution to guard, *nommément, by name*, against a particular grievance; which they thought they could never be too well secured against: and that has happened, which generally happens; doubts have been produced by the two great number of words used to prevent doubt.

II. The Court of France however understands this article as intended to introduce something to which the preceding articles had not reached; and not merely as an application of them

to a particular case. Their opinion seems to be founded on the general rule, in the construction of instruments, to leave no words merely useless, for which any rational

Library of Congress

meaning can be found. They say that the reservation by the United States of a right to lay a duty equivalent to that of the 100 sols, reserved by France, would have been completely useless, if they were not left free, by the preceding articles, to lay a Tonnage to any extent whatever. Consequently that the reservation of a part proves a relinquishment of the residue.

If some meaning, and such a one, is to be given to the last member of the Article, some meaning, and a similar one, must be given to the corresponding member. If the reservation by the United States of a right to lay an equivalent duty, implies a relinquishment of their right to lay any other, the reservation by France of a right to continue the specified duty to which it is an equivalent, must imply a relinquishment of the right on her part to lay or continue any other. Equivalent reservations by both, must imply equivalent restrictions on both. The exact reciprocity stipulated in the preceding articles, and which pervades every part of the Treaty, insures a counter-right

to each party for every right ceded to the other.

Let it be further considered that the duty called *tonnage* in the United States is in lieu of the duties for anchorage, for the support of Bouys, Beacons, and Light-houses, to guide the mariner into harbour, and along the coast, which are provided and supported at the expence of the United States, and for fees to measurers, weighers, gaugers &c. who are paid by the United States; for which articles, among many others (light excepted) duties are paid by us in the ports of France under their specific names. The government has hitherto thought these duties consistent with the Treaty; and consequently the same duties under a general, instead of specific names, with us, must be equally consistent with it; it is not the name, but the thing which is essential. If we have renounced the right to lay any port duties, they must be understood to have equally renounced that of either laying new or continuing the old. If we ought to refund the port duties received from their vessels since the date of the act of Congress, they should refund the port duties they have received from

Library of Congress

our vessels since the date of the Treaty; for nothing short of this is the reciprocity of the Treaty.

If this construction be adopted then, each party has

forever renounced the right of laying any duties on the vessels of the other coming from any foreign port, or more than 100 sols on those coming coastwise. Could this relinquishment be confined to the two contracting parties alone, the United States would be the gainers, for it is well known that a much¹ greater number of American than of French vessels are employed in the commerce between the two countries: but the exemption once conceded by the one nation to the other, becomes immediately the property of all others, who are on the footing of the most favoured nations. It is true that those others would be obliged to yield the same

1 By an official paper from the Bureau of the balance of commerce of France, we find that of the ships which entered the ports of France from the U. S. in the year 1789. only 13. amounting to 2105. tons were French, & 163. making 24, 173 tons were American.— *T. J.* compensation, that is to say, to receive our vessels duty free. Whether we should gain or lose in the exchange of the measure with them, is not easy to say.

Another consequence of this construction will be that the vessels of the most favoured nations, paying no duties, will be on a better footing than those of nations, which pay a moderate duty, consequently either the duty on these also must be given up, or they will be supplanted by foreign vessels in our own ports.

The resource then of duty on vessels for the purposes

either of revenue or regulation, will be forever lost to both. It is hardly conceivable that either party, looking forward to all these consequences, would see their interest in them.

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III. But if France persists in claiming this exemption, what is to be done? The claim indeed is couched in mild and friendly terms; but the idea leaks out that a refusal would authorize them to modify proportionally the favours granted, by the same article, to our navigation. Perhaps they may do what we should feel much more severely; they may turn their eyes to the favours granted us by their arrets of December 29th. 1787 and December 7th. 1788. which hang on their will alone, unconnected with the Treaty. Those arrets, among other advantages, admit our whale oils to the exclusion of that of all other foreigners. And this monopoly procures a vent for seven twelfths of the produce of that Fishery, which experience has taught us could find no other market. Near two thirds of the produce of our cod fisheries too have lately found a free vent in the colonies of France.¹ This indeed has been an irregularity growing out

of the anarchy reigning in those Colonies. Yet the demands of the Colonists, even of the Government party among them, (if an auxiliary disposition can be excited by some marks of friendship and distinction on our part) may perhaps produce a Constitutional concession to them to procure their provisions at the cheapest market; that is to say, at ours.

¹ Abstract of the produce of the Fisheries exported from the United States from August 20th. 1789 to August 14th. 1790. in which is omitted one quarter's exportations from Boston, Plymouth, Dighton, Penobscot, Frenchman's Bay, Machias, and New York, of which the returns are not received.— *T. J.*

COD FISHERY WHALE FISHERY BOTH FISHERIES France and the french West Indies
586.167 dollrs. 131.906 dollrs. 718.073. dollrs. The rest of the World. 307.097 101.306
408.403 Whole produce 893.264 233.212 1,126.476

Considering the value of the interests we have at stake, and considering the smallness of difference between foreign and native Tonnage, on french vessels alone, it might perhaps be thought advisable to make the sacrifice asked; and especially if it can be so done as to give no title to other the most favoured nations to claim it. If the act should put french

Library of Congress

vessels on the footing of those of natives, and declare it to be in consideration of the favours granted us by the arrets of Decr. 29th. 1787, and December 7th. 1788, (and perhaps this would satisfy them). No nation could then demand the same favour, without offering an equivalent compensation. It might strengthen too the tenure by which those arrets are held, which must be precarious, so long as they are gratuitous.

It is desirable, in many instances, to exchange mutual advantages by Legislative Acts rather than by Treaty: because the former, though understood to be in consideration of each other, and therefore greatly respected, yet when they become too inconvenient, can be dropped at the will of either party: whereas stipulations by Treaty are forever irrevocable but by joint consent, let a change of circumstances render them ever so burthensome.

1. On the whole, if it be the opinion, that the 1st. construction is to be insisted on, as ours, in opposition to the 2d. urged by the Court of France, and that no relaxation is to be admitted, an answer shall be given to that Court defending that construction, and explaining in as friendly terms as

possible, the difficulties opposed to the exemption they claim.

2. If it be the opinion that it is advantageous for us to close with France in her interpretation of a reciprocal and perpetual exemption from Tonnage; a repeal of so much of the Tonnage law will be the answer.

3. If it be thought better to waive rigorous and nice discussions of right, and to make the modification an act of friendship and of compensation for favours received, the passage of such a bill will then be the answer.