GEORGE VAN SANTVOORD'S

SKETCH OF

John Jay

SKETCHES

OF THE

CHIEF JUSTICES

VOLUME 1

Sketches of the Chief Justices

Volume 1 — John Jay

George Van Santvoord's sketch of

JOHN JAY

from

Sketches of the Lives, Times &
Judicial Services of the Chief Justices of the
Supreme Court of the United States

third edition

Edited by
Ross E. Davies &
Montgomery N. Kosma

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Best wishes for a safe and joyous holiday season

& a peaceful and prosperous new year.

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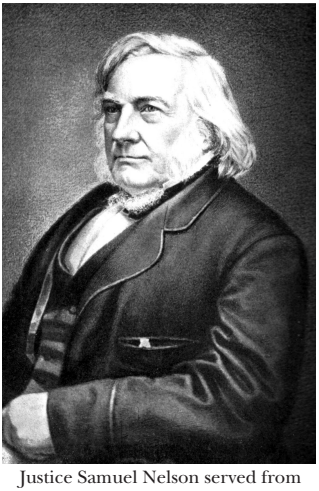
To the Hon. Samuel Nelson, one of the Associate-Justices of the Supreme Court of the United States



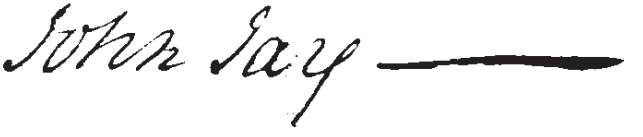
Justice Samuel Nelson served from Feb. 27, 1845 to Nov. 28, 1872.

Sir –

I do not know to whom I can more appropriately dedicate this work than to yourself. For more than twenty years, as Circuit-Judge, as Associate-Justice, and as Chief-Justice of the New York Supreme Court, your learning illustrated, and your virtues adorned, the judicial records of our State. Appointed to the elevated position you now occupy, as the successor of a Thompson, and a Livingston, you carried with you the unanimous verdict of the profession that the ermine of those illustrious judges could not have fallen on one more worthy to receive it; and a service there of nearly ten years has rendered it abundantly evident that posterity will not seek to set that verdict aside.

As the only present member of the Court from our own State, whose bench and bar you may, therefore, be said to represent in the Federal Judiciary, there seems to be such a peculiar fitness in inscribing your name on these pages, that I esteem it not only an honor, but a privilege, in being allowed to make this dedication. Permit me then to express the lively gratification I feel in having your permission to inscribe this work to you. With sincere respect, I have the honor to be your obliged and humble servant,

G. Van Santvoord
Troy, N.Y., August 1st, 1854.



Contents

Illustrations

Sources

1 The Green Bag, vols. iii, vi, vii, x, xiv, xix (1891-1907).

2 Hampton L. Carson, The Supreme Court of the United States: Its History and Centennial (1891).

3 Library of Congress, *American Memory: Historical Collections for the National Digital Library.*

4 John Fiske, The American Revolution (1891, 1919).

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PREFACE

TO THE

THIRD EDITION

In 1854, George Van Santvoord published his *Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States* in a 530-page volume – about 100 pages per Chief Justice. Twenty-eight years and two Chief Justices later, William Scott's 1882 edition of the *Sketches* totaled 740 pages – again, about 100 pages per Chief. At that rate, a 2001 edition would weigh in at 1,600 pages or so. But we could not imagine voluntarily picking up such a book, so we decided not to inflict it on you. Instead, we will publish the third edition of the *Sketches* in digestible chunks, one Chief Justice at a time. We have picked up, as William Scott did, where our predecessor left off, reproducing his work on the early Chief Justices largely as-is, but correcting indisputably typographical errors. We have added illustrations, chapter breaks, an index, and a chronology.

In this latest incarnation, the *Sketches* will remain true to Van Santvoord's original plan. They will not "pretend to the minuteness of the full and complete biography," but will instead briefly "trace the judicial history and follow the professional career of these illustrious jurists" and "present an accurate and connected view of the public life of each of them before coming to the bench." Within that form, the *Sketches* will "present a brief and succinct, but connected" institutional history of the Supreme Court, and "notice, more or less fully, most of the important Constitutional questions which have been discussed in the Supreme Court from the foundation of

the government to the present time." This ambition may sound like the proverbial attempt to force ten pounds of beans into a five-pound sack, but unencumbered by the law-scholarly compulsions to comprehensiveness and novelty, we see no reason not to select the five tastiest pounds and leave the rest on the floor.

About the Sketch of John Jay

Van Santvoord admires Jay's loyalty, integrity, and patriotism, but the sketch artist is not particularly sympathetic toward his subject. The author was a Democrat writing in 1854, and it shows. According to Van Santvoord, the greatest offense given by the British to the new American republic – greater than the impressment of American sailors, greater than the continued occupation of outposts on the western frontier – was their refusal to pay reparations for the slaves they had freed during the Revolutionary War. From this it follows that one of Jay's defects as a late-eighteenth-century diplomat was his failure to appreciate the importance of this issue, and to deliver a satisfactory resolution of it. In the same vein, Van Santvoord ignores one of Jay's finest moments: the enactment of the New York emancipation law during Jay's second term as governor, a project in which he had been engaged since 1777, when New York's first constitution was approved without an emancipation provision. (Jay was not, however, above reproach on the slavery issue. He bought and held slaves, freeing them only after "their faithful services shall have afforded a reasonable retribution" for his investment.)

More generally, Van Santvoord implies that Jay's career demonstrated the Peter Principle. After more than fifteen years of courageous and effective service to New York and the American confederation, Jay's reach exceeded his grasp between 1789 and 1795, when he accepted important posts in the new national government, first as Chief Justice of the United States and then as envoy to England. Jay, he suggests, was neither bright enough to lead the Supreme Court nor sufficiently free from partisan sympathies to hold a proper sense of what was good for the United States at home or abroad. He was

inclined to encroach excessively on the rights of States to order their own affairs (which, by the mid-nineteenth century, had come to stand for the power to perpetuate slavery), and he was too willing to sacrifice sectional interests for what he believed to be the long-term interests of the nation as a whole. Thus, Van Santvoord concludes, Jay "was not, perhaps, what may be called a great man," nor was he a "genius," or blessed with "originality of thought." xv

None of which is to say that Van Santvoord is altogether unfair. Even Jay's defenders would agree that his willingness to trade away access to the Mississippi River was a mistake – a mistake that was at least in part a product of his parochial inability or refusal to give reasonable weight to American frontier interests. Van Santvoord also alludes to, but fails to confront, Jay's vigorous anti-Catholicism, which he encoded into New York's 1777 constitution in the form of an anti-Papal naturalization oath (misidentified by Van Santvoord as an oath of office) under which new citizens were bound to reject "every foreign king, prince potentate, and state, in all matters, *ecclesiastical* as well as civil."

And Van Santvoord does give Jay credit in several places where it is due, including the Spanish mission of 1779-1782 and the Paris peace talks that followed in 1782-1783, the *Federalist* and other elements of the drive to ratify the U.S. Constitution in New York in 1787-1788, the clouded and very nearly violent dispute over the New York gubernatorial election of 1792, and Alexander Hamilton's disturbing plan in 1800 to deliver a second term for President John Adams. From the tone of this *Sketch*, it is hard to believe that Van Santvoord's praise of Jay is anything other than sincere. Even when he is objecting most strongly to Jay's judgments and actions, he is consistently respectful. Van Santvoord is, in other words, ready to concede the strength of Jay's character and the full use that Jay made of his abilities in service to his country.

Ross E. Davies
Montgomery N. Kosma
Washington, D.C., December 8th, 2001

PREFACE

TO THE

SECOND EDITION

In 1854, the first edition of the Lives of the Chief Justices of the United States appeared, and that edition has become exhausted, and is now entirely out of print. The growing demand for the work by the studious, both in and out of the profession, has induced the publishers to offer to the public a second edition. The editor acknowledges his inability adequately to supply the place of the lamented author who so admirably presented the lives, times and judicial labors of the eminent men, who, up to his time, had filled the exalted station of chief in that tribunal, which controls and holds in its hand the rights and liberties of fifty millions of people, and whose judgments are respected and honored from Massachusetts to California, and from Maine to Texas. Since Mr. Van Santvoord wrote, the eminent and venerable jurist who graced the Bench has died, and two others have occupied the high office. The editor has inadequately attempted to complete the life of Taney, and has written a sketch of the lives of Chase and Waite. Judge Robert B. Warden's admirable memoir was the basis for the facts in connection with Chase; and most of the facts stated in the sketch of the life of the present Chief-Justice, were furnished the author by himself. The lives of such men cannot be uninteresting, and even the poorest attempt to depict them, cannot fail to be instructive.

W.M.S.
Albany, N.Y., November 1st, 1882.

PREFACE

TO THE

FIRST EDITION

Of the five eminent Jurists who have successively filled the elevated station of Chief Justice of the United States, only one – the first Chief-Justice, Jay – has hitherto been the subject of anything like a complete biography. So far as I know, with this exception, and except also an occasional sketch, or an obituary notice – such as that pronounced on Marshall, by his brother Judge Story, before the Suffolk bar – no attempt has been made to preserve in a connected narrative, even the public history and career, to say nothing of the professional life and judicial services, of these distinguished men, three of whom were prominent and active leaders among the statesmen of the Revolution. I have seen it stated some years since, that a son-in-law of Judge Ellsworth was preparing an extensive and complete biography of that gentleman, containing his speeches, extracts from his writings, and many interesting facts in regard to him, but, for some cause which I have not seen explained, the promised memoir has not made its appearance. It might indeed seem a singular, and unaccountable neglect, that one so eminent and distinguished in our civil and diplomatic, as well as our judicial annals, should not hitherto have had a place assigned him in our biographical literature, were not the same unaccountable neglect manifest in the case of his immediate predecessor, as well as in that of his illustrious successor, on the bench of the Supreme Court. Surely the rich mine of American biography cannot be nearly

exhausted when such treasures as the lives of Rutledge, Ellsworth, and Marshall lie still undeveloped and comparatively neglected.

The plan of these memoirs, which are now submitted with unaffected diffidence to the public, is such, as necessarily to restrict that part of them which may

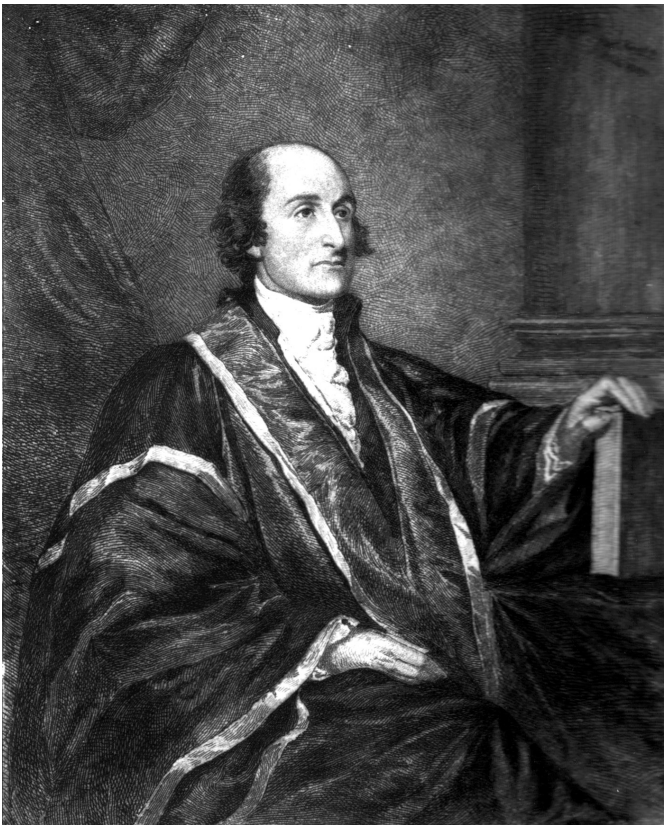
properly be called biographical, within very narrow limits. They do not pretend to the minuteness of the full and complete biography, and I have not, therefore, assumed to dignify them with a higher title than simply that of "sketches." My object has been rather to trace the judicial history and follow the professional career of these illustrious jurists, than to write what may properly be called their biographies. Still, I have endeavored not to neglect entirely the essential requisites of biography, but have attempted, so far as the limits prescribed will permit, to present an accurate and connected view of the public and official life of each of them before coming to the bench.

Without further remark I might here submit this volume to the judgment of the reader, and leave it to speak for itself. But a single additional observation seems proper and necessary. I am aware that the review of judicial decisions, which I have given somewhat at length, is a wide departure from the ordinary course of biographical writing. I have not entered upon it, however, without due reflection and design. A main object in undertaking this work has been to trace something like a history of the United States Supreme Court, and to present a brief and succinct, but connected, view of the Constitutional jurisprudence of the United States; and I knew of no more agreeable and interesting mode of doing this than by combining it with sketches of the public and professional lives of those eminent men who have from time to time presided in the Supreme Federal tribunal. I have attempted thus to unite judicial and constitutional history with biography. This has enabled me to take a wider and more general view of the entire subject; to embrace within these sketches not only those matters which are properly the subject of the memoirs of a life, but also to trace the history of the Federal judiciary from its earliest beginnings; to consider the facts and results connected

with the adoption of the Federal Constitution, and to review, or notice, more or less fully, most of the important Constitutional questions which have been discussed in the Supreme Court from the foundation of the government to the present time.

There are those, perhaps, who may consider such a work as too *professional*, to claim a place within the sphere of general literature, and to regard such an analysis of legal cases as has been incorporated into it, as incompatible with the legitimate objects of popular biography. Perhaps such a criticism may be just. It is not, however, for the author to anticipate it. If he has misjudged in this respect, he has at least the satisfaction of knowing that the general plan of his work has been considered with favor by friends in whose judgment he has confidence; and should its success not meet their expectations he can but attribute it to its imperfect manner of execution, and not to any want of public interest in that branch of the subject alluded to – a subject which can never be indifferent to the American citizen – the constitutional history and jurisprudence of his country.

John Jay



John Jay, Chief Justice of the United States,
served from October 19, 1789 to June 29, 1795.

Introduction

History is not always just in its discriminations, or correct in its estimate of individual character and of the true worth and merit of public services. There is something so attractive to the historian in tracing successful results in administration, and brilliant achievements on the field of battle, that he is apt to lose sight of the less striking but no less valuable labors of the discreet statesman in the legislature, the jurist on the bench, and the ambassador in the field of foreign diplomacy. Thus it happens in regard to our revolutionary struggle, that while the popular admiration centres round the more prominent actors on the scene, there is a class of men, standing comparatively in the background, whose characters have never been fully appreciated, and to whose memories history has not yet done entire justice. These are the men of the Continental Congress and of the Federal and State Conventions – the Livingstons, the Rutledges, the Morrises, the Ellsworths – the men who aided, not only in achieving the American Revolution, but in laying broad and deep the foundations of liberty, and in reconstructing our political institutions. Without their aid, however successful the contest, it must have ended in ultimate defeat. The battle might have been won, but the fruits of victory never obtained. The arm of the conqueror would have fallen, paralyzed, in the moment of his triumph; for the experience of history shows that the civilian and the statesman are as necessary

as the soldier to the successful issue of a revolution.

One of these men was John Jay – a man of modest virtue and unpretending merit, who quietly, faithfully and ably discharged the most important duties in the sphere he was called upon to fill. There are those who played a more imposing and brilliant part than he
2 in the revolutionary drama, and whose names posterity has been inclined to inscribe higher on the scroll of fame; but there are few who are more deserving the respect and veneration of their countrymen. His signature, it is true, is not found with those of Jefferson and Adams, affixed to the Declaration of Independence; nor with Hamilton and Madison did he assist in raising the fabric of the Federal Constitution. But no man rendered a more zealous and energetic support to the one, and none contributed more efficiently to sustain and carry out the other. And whatever in our day may be thought of the correctness of some of his political views, no American will fail to render a ready homage to that active zeal, courage, and devotion to the common cause, as well as to that honesty of purpose and moral rectitude which characterized the public, as it did the private life of one of the purest men of the Revolution.

The name of John Jay should be especially venerated by the American lawyer; – indeed it is a name that cannot soon be forgotten. The first Chief-Justice of the Supreme Court of the State of New York – the first Chief-Justice of the Supreme Court of the United States under the Federal Constitution, he occupied a position which of itself, and without the aid of that learning, and those varied accomplishments which adorned his mind, would have left a memory that could not soon have faded from the records of American jurisprudence.

I shall have occasion in attempting a sketch of the life and services of the first Chief-Justice of the United States, to consider him in the character of a lawyer and a judge, as well as in those more public capacities, legislative, diplomatic and executive, which he filled during the greater portion of his active life. It is not only as a statesman, but as a jurist, that John Jay ought to be known to his countrymen. For it is from the record of his judicial

labors, as well as from the history of his political career, that we are to draw a true estimate of his character, and of the extent and value of the services he rendered his country.

I

Youth & Law Practice

John Jay was born in the city of New York, on the 12th day of December, 1745. He was descended on the father's side from French ancestry. His mother's ancestors were from Holland. His paternal grandfather, Pierre Jay, was an opulent merchant at Rochelle. A Protestant he was obliged to leave France on the revocation of the edict of Nantz, and take refuge in England. One of his three sons, Augustus, emigrated to New York, and married a daughter of Balthazar Bayard, whose ancestors, like those of Mr. Jay, had been Protestants, and had been obliged to emigrate from France to Holland. Three daughters and one son were the fruits of this union. The son, in honor of the Rochelle merchant, was named Peter. In 1728 Mr. Peter Jay married Mary Van Cortlandt, the daughter of Jacobus Van Cortlandt, a gentleman belonging to one of the oldest families of the Dutch colonists who settled Manhattan Island. Peter Jay had ten children, of whom the subject of this sketch, John, was the eighth. The family, we are told, removed to the town of Rye, on Long Island Sound, about twenty-five miles distant from New York, and John was carried there in his nurse's arms.

At the age of six or seven years, his father remarks of him, that he is "of a very grave disposition, and takes to learning exceedingly well;" and again, "My Johnny gives me a very pleasing prospect. He seems to be endowed with a very good capacity, is very reserved, and quite of his brother James' disposition for books."

At the age of eight John was sent to a grammar-school at New Rochelle, kept by the Rev. Mr. Strope, pastor of the French church at that place. At fourteen he entered King's College, in the city of New York, over which Dr. Samuel Johnson then presided. Egbert Benson, Peter Van Schaack, Richard Harrison, Gouverneur Morris and Robert R. Livingston, all of whom, like Mr. Jay, subsequently pursued with distinction the legal profession, were among his college acquaintances. He graduated on the 15th May, 1764, with the highest collegiate honors, having been selected to speak the Latin salutatory.

The father and grandfather of Mr. Jay had been merchants. That honorable pursuit, however, did not agree with the tastes and inclinations of the young graduate. The choice of a profession being left to him, he selected that of the law, and entered the office of Mr. Benjamin Kissam, an eminent practitioner in the city of New York.

We have no very accurate account of the incidents attending the clerkship and preparatory studies of the future Chief-Justice – they were probably much the same as those which are familiar to the experience of every student. It must be recollected, that in those days, a preparation for the legal profession was not, as it often is at present, an agreeable recreation. It was a real labor, and often a drudgery. Printed blank forms were unknown, and every thing was written, even the argument of questions of law. The labors of a clerkship were consequently very arduous, and a large portion of the time of the student was occupied in attention to office duties. Nor were elementary treatises – those ready and convenient aids in acquiring the elements of the profession – so plenty then as now. Finch's Law, Wood's Institutes, or Coke upon Littleton were the books usually placed in the hands of the student at the commencement of his clerkship, each of which, to use the words of Lord Mansfield, applied to Coke, may be called "an uncouth, crabbed author, who has disappointed and disheartened many a tyro." The first volume of Blackstone's Commentaries was published in England in 1765, the second part some three years later. Up to this time the difficulty of selecting the book

which should initiate the student in the elementary principles of law, is admitted by Lord Mansfield. "Till of late," he says, "I could never with any satisfaction to myself answer that question, but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss." In entering upon his clerkship, however, Jay had not
6 the advantage of this admirable treatise, and, therefore, unlike those students who have succeeded him, could not, *ab initio*, "imbibe imperceptibly (quoting again the words of Lord Mansfield,) the first principles upon which our excellent laws are founded." To him, as to others in those times, the labor was tedious and toilsome; but at the same time it was a healthy intellectual exercise, and a vigorous mental discipline.*

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* The reader may be curious to learn the course of legal study which in Jay's time was recommended to the student. The following extracts are made from an old manuscript manual in my possession, bearing date 1768. It is in the handwriting and was the property of a cotemporary of Mr. Jay, then a student-at-law in the office of William Smith, the historian of New York.

> "But now I bring our student home to the studies of his profession of the law, and I would advise him to read these books, in the following order:
>
> "First, for the knowledge of the law in general:
>
> "1. The treatise of laws in Wood's Institutes of the Civil Law, or in Domat, which are both the same.
>
> "2. *Puffendorf de Officio Hominis et Civis*, or an English translation of it called 'The Whole Duty of Man according to the Law of Nature,' or the abridgment of Puffendorf, in two volumes, by Spavin."

And before entering further into the law of Nature and Nations and the Civil Law, the writer advises a general study of the elements of the Common Law, in the following order:

> "Hall's History of the Common Law.
>
> "Fortescue's Practice of the Laws of England.
>
> "Sir Thomas Smith's *De Republica Anglorum*.
>
> "The first book of Doctor and Student, *De Fundamentum Legum Angliae*.
>
> "The second part of Bacon's Elements.
>
> "Wood's Institutes of the Common Law."

Between Mr. Jay and the estimable gentleman in whose office he read law, the most entire confidence existed, which gradually ripened into familiarity and friendship. This is attested by several letters written by Mr. Kissam to Mr. Jay. In one of these, dated soon after Jay was admitted to the bar, Mr. Kissam, in a tone of playful and friendly familiarity, compliments his pupil upon having successfully tried several causes for him, which, he says, was done "by a kind of inspiration." Alluding to one cause in which Jay was opposed to him, Mr. Kissam remarks, "As to the cause about Captain's Island, this, tell Mr. Morris, must go off; because as you are concerned *against me*, I can't tell where to find another into whose head the cause can be infused in the miraculous way of inspiration, and without this it would be rather too intricate for any one to manage from my short hints."

Mr. Kissam and Mr. Jay were frequently opposed to each other in the trial or on the argument of a cause. On one of these occasions, being hard pressed in the argument, the former remarked, "I have brought up a bird to pick out my own eyes." "Not so," retorted Jay, "not to pick out, but to open your eyes."*

On entering upon the practice of the law, Mr. Jay associated himself with his relative, Robert R. Livingston, the future chancellor, but the connection was soon dissolved. From his *debut* as an advocate in the colonial courts, it is said he entered upon a lucrative practice, and continued it down to the period of the revolutionary war. I have not been able, however, to draw from the imperfect record of colonial jurisprudence any very sat-

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After recommending a farther and more extensive reading of the Law of Nature and Nations and the Civil Law, he remarks:

> "Then to fill up and enlarge your ideas you may read Bacon's Abridgment of the law, which it is presumed will all be soon published. In reading this Abridgment, which is contrived *so as to be read pleasantly*, I would advise that you constantly refer from the Abridgment to Wood, and from Wood to the Abridgment, because I would have *these books the basis or foundation* of all your studies."

* Life of John Jay, by his son, William Jay.

isfactory information respecting his forensic career,* or even the more important causes in which he was engaged. The race of reporters did not exist in those days, and the colonial decisions and adjudged cases with which the names of Jay, Livingston, Benson, Morris, Duane and their cotemporaries were identified must remain for us a
8 lost and comparatively forgotten record.† Suffice it then to say that the practice of Mr. Jay during these six or eight years was extensive and lucrative, that he exhibited professional ability of the highest order, and that he acquired an eminent and proud position as an advocate at the New York bar.

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* It may be mentioned as a fact interesting to the legal profession, that in 1770 the young lawyers of New York formed a club called "The Moot," at which legal questions were discussed and argued in form. Some of the records of this club are still preserved. Its decisions acquired great authority, and the questions discussed and decided were considered as professionally settled. Among the junior members of the club were Jay, R.R. Livingston, James Duane, Egbert Benson, Gouverneur Morris, and Peter Van Schaack. The older members of the bar also regularly attended and participated in these discussions and arguments, and among them are found the names of those veteran lawyers, William Smith, Samuel Jones, William Livingston, Benjamin Kissam, John M. Scott, and Richard Morris.

† The author of the Life of William Livingston thinks we have lost very little in this respect. "An examination of Mr. Livingston's registers and business letters," he says, "would much tend to diminish any regret which may be felt for the want of colonial reports. A great number of the cases are suits for the collection of debts owned by English merchants; and causes under the complex law of ejectment, now so happily exploded, form another large class." – *Sedgwick's Life of Livingston*, p. 71.

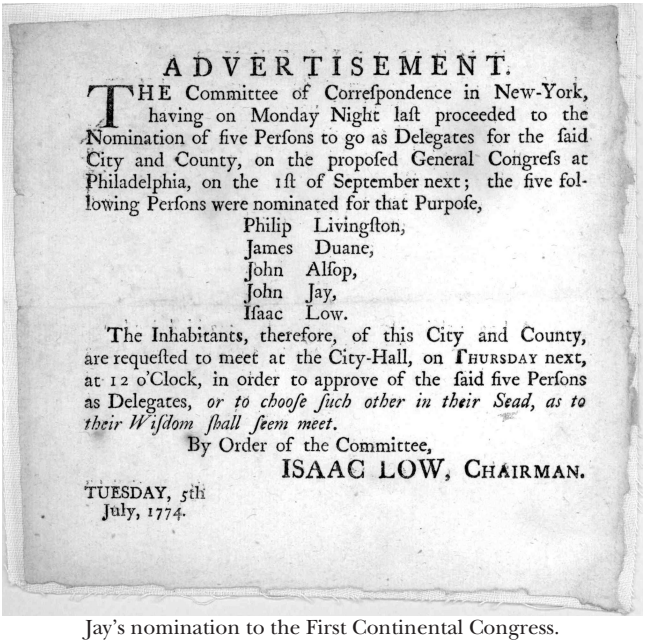
II

Revolution & the Constitution of 1777

But the quiet and peaceful course of professional life was about to be broken. The contest between the colonies and the mother country commenced. The young lawyer was summoned from his briefs and his cases, from his books and his precedents, to a nobler and more enlarged field of action. Nor did John Jay turn an unwilling ear to the summons. While others hesitated and wavered, while some of his own friends and intimate associates counselled submission or passive non-resistance, his voice was raised among the first in opposition to the arbitrary measures of Great Britain. On the 16th of May, 1774, Mr. Jay attended the first meeting of the citizens of New York called to "consult on measures proper to be pursued in consequence of the late extraordinary advices received from England." The result of that meeting was the appointment of a committee of fifty, of which Jay was one, and a subsequent report, said to be from his pen, which recommended the convocation of a *Congress of deputies* from the thirteen colonies.

The recommendation was adopted. A Congress was called and convened at Philadelphia, on the 5th of September, 1774. Jay was elected a member from New York, and took his seat on the first day of the session. Though one of the youngest members of the Congress, being then only in his twenty-ninth year, he was placed

John Jay ——



ADVERTISEMENT.

THE Committee of Correſpondence in New-York, having on Monday Night laſt proceeded to the Nomination of five Perſons to go as Delegates for the ſaid City and County, on the propoſed General Congreſs at Philadelphia, on the 1ſt of September next; the five following Perſons were nominated for that Purpoſe,

Philip Livingſton,
James Duane,
John Alſop,
John Jay,
Iſaac Low.

The Inhabitants, therefore, of this City and County, are requeſted to meet at the City-Hall, on THURSDAY next, at 12 o'Clock, in order to approve of the ſaid five Perſons as Delegates, *or to chooſe ſuch other in their Stead, as to their Wiſdom ſhall ſeem meet.*

By Order of the Committee,

ISAAC LOW, CHAIRMAN.

TUESDAY, 5th July, 1774.

Jay's nomination to the First Continental Congress.

10

upon the committee to draft an address to the people of Great Britain. That celebrated address is from his pen. It had been composed and written by Jay in the room of an obscure tavern. It was reported to Congress by Mr. Livingston, and adopted as the work of the entire committee, and its paternity was not immediately known.

Jefferson attributed it to Gov. Livingston, by whom it had been reported, as chairman of the committee, and told that gentleman that he regarded it as "the production of the finest pen in America." The author of the life of Jefferson states, that this coming to the ears of Mr. Jay, he was at some pains to set Jefferson right in the matter and assert his own claims to its authorship.

Of the proceedings of this Congress it is not necessary now to speak. It was composed of fifty-five members. Among them were the distinguished orators from Virginia, Patrick Henry and Richard Henry Lee.* The

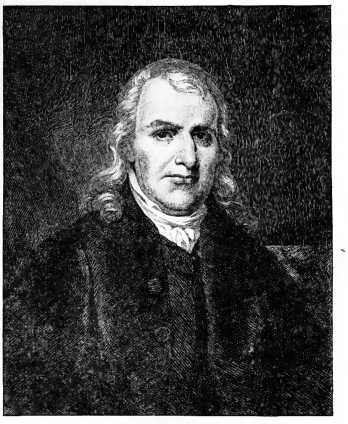
* Prof. Tucker remarks in his Life of Jefferson, that though Henry and Lee bore the palm for eloquence in debate, yet "for that of the pen, the first place must unquestionably be awarded to Mr. Jay, of New York."

The eloquence of Richard Henry Lee (and Patrick Henry) of Virginia awed delegates from other States at the First Continental Congress, but their written work was not as impressive.

debate was opened by Mr. Henry in a speech of matchless power and eloquence – a vivid and glowing description of which has been drawn by the graphic pen of Mr. Wirt. Richard Henry Lee followed, and charmed with his graceful eloquence an audience that had been spell-bound by the more potent declamation of his colleague. As he closed, Mr. Chase, a delegate from Maryland, whispered into the ear of one of his colleagues, "we may as well go home; we cannot legislate with these men." The whole assembly seemed to acknowledge their superiority. Lee was made chairman of the committee to prepare the address to the people of Great Britain; and Henry of the committee to prepare the address to the King. It soon became apparent, however, that their superiority consisted in powers of eloquence alone. The address of Lee fell far short of the high expectations that had been raised. Its reading disappointed the whole assembly. "After all," remarked Mr. Chase, with that quick perception and ready boldness which so strongly characterized his mind, "they are but men, and *very common men, too.*"* After some faint and equivocal compliments, the address was laid on the table, and Gov. Livingston and John Jay

* Wirt's Life of Patrick Henry.

John Jay



Samuel Chase of Maryland served in the Continental Congresses, and later became a leading Federalist partisan. He sat on the Supreme Court from February 4, 1796 to June 19, 1811, and gained notoriety when he was impeached and then tried before the Senate in 1804-05.

Samuel Chase

were appointed upon the committee. The result was, as we have seen, the production of an address which the Congress adopted – an address worthy of the men and of the occasion, and fully equal to the crisis which called it forth.

Mr. Jay was now actively and warmly enlisted in the cause of the Colonies. A full review of his career from the time when he first took his seat as a delegate in Congress to the period when he accepted the Spanish mission, would comprise a record of the history of the Colonial struggle. The limits of the present sketch will not permit a detail, much less a discussion of these stirring events, and all that can be admitted here, is to indicate generally and briefly, the part taken in them by the subject of this memoir.

The first Revolutionary Congress, after a brief session, adjourned to meet again on the 10th of May in the following year. Accordingly, at that time, the Congress assembled at Philadelphia. It continued its session, with the exception of a brief recess in the month of August, during the remainder of the year. The decisive action which attended the deliberations of this Congress is well-known. The crisis was now at hand – the battle of Lexington had been fought – the alternative presented

was armed resistance, or abject submission and slavery. A new set of ideas seemed to have been developed. The revolutionary mind had been ripened and matured in a day. A profound lesson of experience had been learned, and a vast stride taken in the direction of Colonial independence. It was no longer, as at the opening of the first Congress, a question of non-importation – of peaceable remonstrance. The aspect of affairs had changed, and it had become a question, which might well have made the boldest hesitate, of armed, open, determined, and manly resistance. But the men of the Continental Congress did not falter. The crisis was met, boldly and manfully; an army was organized; Washington appointed commander-in-chief; subordinate officers nominated, among whom, on motion of Mr. Jay, John Sullivan, a modest and unobtrusive delegate from New Hampshire, was commissioned a Brigadier-General in the American army.

The important part taken by Mr. Jay in the deliberations of this Congress must be passed hastily over, and I can barely allude to a few prominent public acts in which he was engaged. His active and vigorous pen was almost ceaselessly at work, and his voice was frequently heard in the deliberations of the assembly. He was a member of the committee which prepared the Declaration setting forth the causes and necessity of the Colonies taking up arms.* He was also upon the committee appointed to carry out the measure originated by himself, of presenting a petition to the sovereign to redress the grievances of the Colonies, the rejection of which left no alternative but armed resistance. By direction of Congress he prepared an address to the people of Canada. He also wrote the celebrated address to the people of Jamaica and Ireland, in which he depicted in vivid colors the injuries which the Colonies had suffered,

* Mr. Jefferson and Mr. Dickinson were subsequently added to this committee. The address of the committee was drawn by Jefferson, but being considered "too bold," it was remodelled by Mr. Dickinson. It is a remarkable fact that this address, though reported only a year before the Declaration of Independence, disclaims all design to dissolve the union between Great Britain and the Colonies.

John Sullivan, one of Washington's most controversial lieutenants, inspired the General to write, "No other officer of rank in the whole army has so often conceived himself neglected, slighted and ill-treated as you have done, and none I am sure has had less cause than yourself to entertain such ideas."

and traced the origin of their rights and the grounds of their resistance.

Though a less prominent member of this Congress than some of his distinguished compatriots – though neither a Henry, a Rutledge, nor an Adams, in the rare gifts of an impassioned eloquence – still it is not claiming too high a distinction for the zeal, patriotism, ability, and modest worth of John Jay, to place him in the very front rank of those illustrious men who laid the foundations of the Republic.

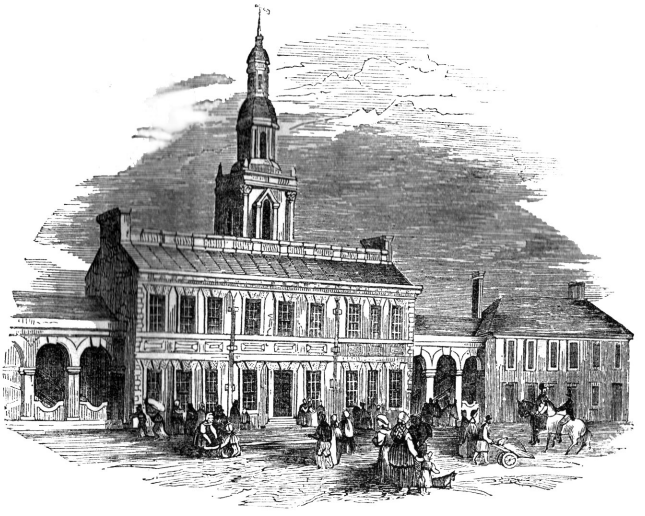
The Continental Congress, it is well known, was a mere convention of delegates, a body, organized, it is true, but without specific objects, real authority, or definite powers. The Congress was of itself neither a sovereignty nor the representative of a sovereignty. The union of the colonies was little more than a league, and even after the declaration of independence it was a league scarcely of independent States, for though social institutions remained, yet the political fabric had been swept away by revolution, and the labor of organization and reconstruction was yet to be done. This was the work of some of the best and wisest men in the respective States of the confederacy. In the State of New York it was eminently the work of John Jay.

While yet a delegate in Congress, Mr. Jay had been elected, in the month of April, 1776, to the New

York Colonial Convention. He took his seat in that body on the 25th of May, without resigning his commission as a member of Congress. It seems to have been his intention to return, but the New York Convention required his attendance, and, as he informs his colleague, Mr. Duane, "directed me not to leave them till further orders." And thus he was deprived of the honor of affixing his signature to the Declaration of Independence. But while his name is not attached to that noble instrument, the records of the New York Provincial Convention attest the warmth and ardor of his approval of the act. From the committee to which it was referred in the Convention, Mr. Jay as chairman reported immediately the following resolution, which was unanimously adopted:

> "*Resolved, unanimously*, That the reasons assigned by the Continental Congress for declaring these united Colonies free and independent States, are cogent and conclusive, and that while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will at the risk of our lives and fortunes, join with the other colonies in supporting it."

This resolution was adopted on the day of the opening of the Convention, July 9th, 1776. It is somewhat remarkable that though Chancellor Livingston was a member of the committee which drafted the Declaration of Independence, of which Jefferson was chairman, yet his name is not found attached to that instrument. The fact is, that though the declaration purports to be "the *unanimous* declaration," etc., yet the Chancellor and some other members of the Congress thought it premature. Indeed the whole New York delegation asked and obtained leave to retire, on the ground, that having been appointed when a reconciliation with Great Britain was possible, they did not regard themselves as empowered to sign this important manifesto. None of the New York members signed it until *after it was approved* by the New York Convention; and it was not until the 15th of July that their signatures were actually placed to the Declaration. To John Jay, therefore, though his name does not appear



Carpenters' Hall, Philadelphia,
home to the First Continental Congress in 1775.

attached to that celebrated instrument, is justly due the credit of having promptly and boldly taken the first official step toward the recognition by the State of New York of American Independence.

The new State Convention was called in pursuance of a resolution of the Continental Congress, recommending to the respective Colonies the adoption of independent governments. The former Assembly, to which Mr. Jay had been summoned from his seat in Congress, having been convened while the Colony was yet under the government of the Crown, had been established for the sole purpose of opposing the encroachments of the British parliament, and not with a view of declaring the Colony independent, and establishing a new form of government. To remove all doubts whether the Assembly was invested with authority to deliberate and act on these important questions, the Colonial assembly, on the 31st May, had, on motion of Mr. Jay, called a Convention to constitute and establish a new government. This body met at White Plains on the 9th of July, 1776, and, as has been noticed, immediately ratified and confirmed

unanimously the Declaration of the Independence of the Colonies. This first decisive step having been taken, nothing remained but to establish a constitution and organize the new government.

The Convention comprised a large share of the best intellect and worth of the Colony. Mr. Jay found himself associated with such men as Philip Livingston and James Duane of New York, Robert R. Livingston of Dutchess, the future Chancellor, Leonard Gansevoort and Robert Van Rensselaer of Albany, Gouverneur Morris, Pierre Van Cortlandt and Lewis Morris of Westchester. It is certainly no small compliment to the ability and character of Mr. Jay, still a young man, but little more than thirty years of age, that in a Convention numbering among its members such men as the Livingstons, the Morrises, and their illustrious associates, he should have then selected as the delegate to be charged with the responsible and arduous duty of drafting a Constitution for the new Commonwealth. Being assigned this duty and placed at the head of the committee created for that purpose during the first month of the Convention, he at once directed the whole power of his mind, and the resources of his political experience and judicial learning to attain the great end in view, namely the drafting of a Constitution fit to be established as the fundamental law of a free people.

It may here be remarked, that the idea of a *written Constitution*, emanating from and sanctioned by the people, as the basis of government and political and social rights, if not entirely a novel idea, was at least, practically, an untried experiment, prior to the formation of the State Constitutions. It had been hinted at and partially developed by some of the liberal writers and statesmen during, and subsequent to, the period of the English Revolution. Vane, Sidney, and Locke, had successively entertained the subject as an abstract political truth, and the latter had even attempted its practical development.*

* In the Carolina colonies. This curious Constitution, almost as elaborate, unique and original in its way as that remarkable instrument which more than a century afterward Sieyes presented to Bonaparte, was

But it is not too much to say that it remained a theory only, and that hitherto no successful instance of a written constitution or fundamental law had existed in Christendom. The Bill of Rights, the charters of some of the Colonies, and particularly those established in one or two of the proprietary governments, such, for example, as the
18 "Concessions of the proprietors of New Jersey with the people who might settle or plant there," approximated this idea of a written Constitution, but did not wholly realize it. The Bill of Rights was in the nature of a compact between king and people; the Colonial charters were royal grants, not resting upon, but independent of the popular sovereignty; the proprietary governments were what they claimed to be, *concessions* to the people, not original and elementary popular rights. It remained for the Colonists to put in successful operation this new political experiment, in the formation and organization of the State sovereignties – an experiment, destined, a few years later, to be crowned with complete success in the adoption of the Federal Constitution.

The first Constitution of the State of New York was mainly the work of John Jay. It was reported on the 6th of March, 1777, and adopted the 20th of April of the same year, at the village of Kingston, to which place the Convention had removed. This Constitution, which contained for nearly half a century the fundamental law of the State, is a monument to the memory of its illustrious author more lasting than a monument of brass or marble. I do not mean to assert that the Constitution was all that it *might have been* – that it was a perfect production – that it contained no imperfections and no errors. On the contrary, experience demonstrated the necessity of amendment; a trial of forty-five years proved that it was susceptible of material alterations; the progress of the age and the march of liberal ideas opened the door to improvement; but it is not too much to say that in the circumstances under which this Constitution was promulgated,

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adopted by the Proprietaries, but after a few years wasted in attempting to put it into practical operation it proved itself a miserable failure, and was abandoned.

and in view of the habits, customs, and ideas of the age, it was an original and vigorous, as well as a successful innovation, and it stamped its author as a bold and radical but judicious reformer.

All the guarantees of English liberty secured in the Bill of Rights were carefully preserved in this Constitution, – the trial by jury, the habeas corpus, and the privilege of the accused to defend by counsel. All political power was declared to be derived from the people. In addition to this, the free exercise and enjoyment of religious worship was established,* and the right of the people to bear arms in their own defence recognized and secured. Ten years afterwards, in the Federal Convention, Hamilton proposed, and sustained, in a speech of surpassing power, the project of appointing an executive and Senate, to hold for life or during good behavior. But Jay, even at this early day, comprehended the more correct idea of popular government. The New York Constitution provided for the election of an executive to hold office for three years, a Senate for four years, and an annual Assembly. The voting by ballot was not definitely established; it was left to be determined by the Legislature, a provision which may be regarded as the effect of excessive caution and prudence, if not of timidity, but one which the state of the times and the novelty of the experiment at that day might justify. So too in regard to the property qualification attached to the elective franchise, and the qualifications for office, the provisions of the Constitution fell far short of what we now regard as the correct and legitimate rule of political action, but at

* In regard to this clause, Mr. Jay, in his celebrated charge to the grand jury, at Kingston, uses these noble and dignified expressions: "Every man is permitted to consider, to adore, and to worship his Creator in the manner most agreeable to his conscience. No opinions are dictated, no rules of faith prescribed, no preference given to one sect to the prejudice of others." * * * * "In a word, the Convention by whom that Constitution was formed, were of opinion that the Gospel of Christ, like the ark of God, would not fall, though unsupported by the arm of flesh; and happy would it be for mankind if that opinion prevailed more generally."

that day, when the colonists were just emancipated from British tutelage, and aristocratic customs and notions of hereditary right still prevailed, this section of the Constitution was a sensible reform, if not a radical revolution. The provision that "a wise and discreet freeholder of this State shall be, by ballot, elected Governor, by the
20 freeholders of this State, qualified as before described, to elect Senators" – that is possessing a freehold of forty pounds, or renting a tenement of the yearly value of forty shillings, – was but a step from asserting the great principle of universal suffrage, which was established by the Constitution of 1821 as the basis of representative democracy.

As to the social institutions of the State, the Constitution left them very nearly in the position it found them. The revolution was purely political. The Convention did not undertake to meddle with the laws of property, the domestic relations, or indeed in any other respect with the judicial polity of the State. Accordingly, the Constitution re-enacted and established as the law of the State, the Common law of England, and such parts of prior statutes, both acts of Parliament, and acts of the Colonial Legislature, as were applicable and not repugnant to the Constitution, with the restriction, that all such parts thereof as might be construed "to establish or maintain any particular denomination of Christians or their ministers, or concern allegiance heretofore yielded to," etc., be abrogated and rejected.

Such were the main features of the Constitution of 1777. It may be remarked that Jay himself was not entirely satisfied with it. The vote on its final passage was taken during his temporary absence from the Convention, and some additional sections had been added which he disapproved; what these sections were, does not clearly appear. He intended also, he says, to have moved several amendments, one for the support of literature, one against the continuance of slavery in the State, and one requiring all persons taking office to swear allegiance to the government, and renounce all allegiance to foreign kings, princes and states in all matters, *ecclesiastical as well as civil.*

Approving, however, the main features of the new Constitution, Mr. Jay devoted his best efforts to the task of setting it practically in operation. In the organization of the courts under it, the Convention tendered him the place of Chief-Justice of the Supreme Court, which he at once accepted, Livingston being at the same time appointed Chancellor. The Convention then adjourned, after, appointing a "Council of Safety," of which Jay was a member, in whose hands was vested the absolute sovereignty of the State during the interim between the adjournment and the organization of the new government. This Committee was armed with plenary and unlimited power. It was indeed an arbitrary dictatorship. The crisis was such as seemed to demand it, for the darkest hour of the revolution had come. That power was exercised vigorously, but wisely and discreetly. It was wielded with tremendous effect, but not abused. It was the power which in a similar case was lodged by the French Convention in the hands of the Committee of Public Welfare, but it was used for wiser and better ends, for there were no Couthons and Robespierres upon the New York Council of Safety. The measures adopted against the royalists were such as the exigency of the times demanded. They were vigorous, stringent, severe. The jails and churches were filled with prisoners. Banishment and confiscation became the order of the day. But these measures, though harsh and rigorous were tempered with as much mildness as the nature of the case would admit. No member of that Committee, and least of all John Jay, is liable to the charge of wielding political power for the purposes of individual oppression.

One of the finest traits in the character of Jay was the warmth of his social feelings, and the constancy of his friendships. Adversity never separated him from his early associates, nor did political differences cause him to forget the attachments of other days. It was during the administration of the Council of Safety that the formidable invasion of Burgoyne threatened the safety of New York. General Philip Schuyler at that time had command of the army of the north. Jay was the friend of Schuyler; he knew and appreciated the worth, the patriotism, the

chivalric honor, of that brave officer and gallant gentleman. In a moment of weakness, Congress, yielding either to false and malicious representations, or a timid policy, recalled Schuyler at the very moment when victory was within his grasp, and placed Gates in command. Schuyler felt the indignity, but with the generous magnanimity
22 of his character, sacrificing every personal feeling to the cause of his country, cheerfully co-operated with the plan of the campaign, and aided Gen. Gates to reap the laurels which justly belonged to himself. Among the friends who adhered through good report and through evil report to Schuyler, and who never failed to vindicate his reputation, none was truer or more faithful than Jay. Sharing the same ancestral blood, the blood of the early Dutch settlers of the colony, and satisfied with the entire correctness of Schuyler's conduct, as well as the purity of his motives, Jay did not conceal his indignation at this act of injustice. In a letter to Mr. Duane, then in Congress, he expresses what he conceives to be the true reason. "General Schuyler is recalled," he say[s], "to *humor the eastern people*, who declare that their militia will not fight under his command." The warmth of his friendship, and the delicacy of his sympathy, are beautifully expressed in two or three letters to Schuyler himself about this period. In one of these, written some months after the victory of Saratoga, and while the laurels were yet fresh and green upon the brow of the commanding general, Jay, with his accustomed delicacy of expression, ventures to predict what the future has fully realized, and posterity cordially admits. "Justice will yet take place, and I do not despair of seeing the time when it will be confessed that the foundation of our success in the northern department was laid by the present commander's predecessor."

Not only to political associates, but even to political opponents, did Jay evince the kindliness of a generous nature; and he never failed to respond to the recollections of early attachments. Few among the revolutionary leaders originated, advocated, and carried out more stringent and effective measures against the royalists and the disaffected, and yet he was never deaf to the voice of private friendship, and never disregarded the appeal of

one to whom he had been kindly attached in other days. To his old classmate at King's College, Peter Van Schaack, who had from conscientious motives declined taking a part with the colonists, he writes with a feeling of the liveliest interest; and the cordial intercourse is renewed when one is the honored representative of his country, and the other an exile in a foreign land. To Col. De Lancey, who had taken arms in the royal cause, and who was a prisoner on parole, he writes during the troubles of 1778: "The friendship which subsisted between us is not forgotten; nor will the good offices formerly done by yourself and family cease to excite my gratitude. How far you may be comfortable and easy I know not. It is my wish, and shall be my endeavor, that it be as much so as may be consistent with the interest of that great cause to which I have devoted every thing I hold dear in this world."

John Jay was a revolutionist, but no terrorist. He was resolute, stern, and inflexible, but not proscriptive. His was the uncompromising action based upon principle, not prompted by personal enmity. He had not a grain of bitterness in him, not a drop of malice, not the slightest tincture of vindictiveness. Firm, resolute, and unbending, but equable, magnanimous, generous and just, a man to suffer, rather than do a wrong, like Aristides he would have calmly written his own name upon the shell, and without a regret or a sigh, have retired into banishment.

The new State government went into operation in September, 1777. Jay having refused to be a candidate for Governor, George Clinton was elected to that office, and Pierre Van Cortlandt, Lieutenant-Governor. Walter Livingston was chosen speaker of the Assembly. The Legislature promptly re-appointed Mr. Jay Chief-Justice of the Supreme Court, and Robert R. Livingston Chancellor.

It was but a few days before this re-appointment that the Chief-Justice held the first court under the State Constitution. It met at the village of Kingston, on the 9th of September, 1777. The circumstances under which it had convened were peculiar. The independence of the State had been declared, but that independence had

Philip Schuyler was Jay's choice for the first governor of independent New York, but he was defeated by George Clinton in 1777.

not been established. A powerful army under Burgoyne was approaching Albany; another army was preparing to advance up the Hudson to effect a junction with the first, and in a few weeks after, actually destroyed the very village in which the court was assembled. To administer justice under the authority of the State was a crime and a treason against the British government, still claiming jurisdiction. It required, therefore, a portion of that same unflinching resolution, and sublime moral courage, which nerved the men who declared the independence of the colonies, to carry out fully and effectually this novel undertaking. The Chief-Justice was equal to the task. He did not hesitate, he did not doubt. He had entire faith in the success of the revolution; faith in the people; faith in the new Constitution which had been adopted; faith in the ultimate issue of the contest. He presided during the session of the court with a calm dignity, an intrepid courage, a confident assurance of rectitude which did not fail to impress itself upon the people. His charge to the Grand Jury was such as it might have been if the independence of the State had been already acknowledged, and the foot of the enemy no longer desecrated American soil. The following passages are worthy of remark:

"It affords me, gentlemen, very sensible pleasure to congratulate you on the dawn of that free, mild, and equable government which now begins to rise and

break from amid those clouds of anarchy, confusion, and licentiousness which the arbitrary and violent domination of Great Britain had spread in greater or less degree throughout this and the other American States. This is one of those signal instances in which Divine Providence has made the tyranny of princes instrumental in breaking the chains of their subjects, and rendered the most inhuman designs productive of the best consequences to those against whom they were intended.

"The infatuated sovereign of Great Britain, forgetful that kings were the servants, not the proprietors, and ought to be the fathers, not the incendiaries of their people, hath, by destroying our former constitutions, enabled us to erect more eligible systems of government on their ruins; and by unwarrantable attempts to bind us in all cases whatever, has reduced us to the happy necessity of being free from his control in any.

"Whoever compares our present with our former Constitution, will find abundant reason to rejoice in the exchange, and readily admit that all the calamities incident to this war will be amply compensated by the many blessings flowing from this glorious revolution – a revolution which in the course of its rise and progress is distinguished by so many marks of the Divine favor and interposition that no doubt can remain of its being finally accomplished."

The Chief-Justice, after commenting upon several features of the new Constitution in terms of unqualified approbation, particularly that relative to the rights of conscience and private judgment in matters of religion, and freedom of religious worship, remarks:

"But let it be remembered, that whatever marks of wisdom, experience, and patriotism there may be in your Constitution, yet like the beautiful symmetry, the just proportion, and elegant forms of our first parents before their Maker breathed into them the breath of life, it is yet to be animated, and till then may indeed excite admiration, but will be of no use. From the people it must receive its spirit, and by them be quickened. Let virtue, honor, the love of liberty and of science be and remain the soul of this Constitution, and it will become

the source of great and extensive happiness to this and future generations. Vice, ignorance, and want of vigilance will be the only enemies able to destroy it. Against these be forever jealous."

III

President & Minister to Spain

Mr. Jay retained the office of Chief-Justice of the Supreme Court two years. He did not, however, actively discharge its duties during the whole of this period. On the 10th of November, 1778, the Legislature elected him a delegate to represent the State in Congress. By the Constitution, a Judge of the Supreme Court was prohibited from holding any other office, except that of delegate in Congress, on a *special occasion*. The controversy respecting the "New Hampshire Grants" having arisen, this was voted a *special occasion*, and the Chief-Justice was delegated to Congress without vacating his seat on the bench. On the 10th of December, three days after he took his seat, he was chosen President of Congress. Conceiving his continued residence at Philadelphia inconsistent with the discharge of the duties of Chief-Justice of the Supreme Court of New York, Mr. Jay during the following year resigned his Judicial office. Governor Clinton at first refused to receive the resignation. Mr. Jay, however, persisted; and, after some delay, the resignation was accepted; thenceforth he devoted his entire services to the duties connected with his attendance in Congress.

Mr. Jay retained his place as President of Congress nearly a year, during which time he discharged its duties with a dignity, an urbanity, and an impartiality,

Independence Hall, Philadelphia,
home to the Second Continental Congress.

which commanded universal respect. The subject of the currency, and the emission of bills of credit, at that time, attracted the serious attention of Congress. The depreciation of the currency and the prostration of public credit were appalling. Congress was literally bankrupt, and the means of continuing the contest seemed no where to be found. Besides the sum of nearly forty millions of dollars borrowed abroad, Congress had put in circulation bills to the enormous amount of $160,000,000, for the payment of which the public faith was pledged. This paper currency had become absolutely worthless, so much so that it was literally true, as was remarked at the time, that a cart-load of provision could be purchased only with a cart-load of money. In this emergency, Congress, feeling the necessity of at once replenishing the public treasury and restoring the public confidence, passed a resolution that no more bills should be issued than sufficient to make the entire sum $200,000,000. A resolution was also passed calling upon the States for supplies by State loans and taxes, and the President, Mr. Jay, was directed to prepare an address to the people of the respective States of the confederacy, in regard to these objects. That celebrated and justly admired paper, the “Circular letter from

Congress to their Constituents," bears date on the 13th September, 1779, and is signed by Jay as President of the Congress. It is a clear and forcible statement of the condition of affairs, particularly with reference to the question of finance, and a most ardent and earnest appeal to the people and the States, to stand by, assist, and sustain the honor of the confederacy. Not the least noticeable feature in this admirable address is the bold and courageous spirit, the tone of calm, well-grounded confidence as to the ultimate success of the struggle, pervading it. Not for an instant does the author intimate a doubt as to the ability of the States to maintain the independence they had so boldly declared. "That the time has been," he remarks, "when honest men might, without being charged with timidity, have doubted the success of the present revolution we admit; but that period is past. The independence of America is now as fixed as fate, and the petulant efforts of Britain to break it down are as vain and fruitless as the raging of the waves which beat against her cliffs." The appeal to the people of the States to sustain the honor of the Confederacy, to provide for continuing the revolutionary army in the field, and at least to share with France the glory of achieving American independence, is eloquent, impassioned, and spirit-stirring; in short, is worthy the classic and vigorous pen of John Jay. The following are its closing sentences:

"The war, though drawing fast to a successful issue, still rages. Disdain to leave the whole business of your defence to your ally. Be mindful that the brightest prospects may be clouded, and that prudence bids us be prepared for every event. Provide, therefore, for continuing your armies in the field till victory and peace shall lead them home; and avoid the reproach of permitting the currency to depreciate in your hands, when, by yielding a part to taxes and loans, the whole might have been appreciated and preserved. Humanity, as well as justice, makes this demand on you. The complaints of ruined widows, and the cries of fatherless children, whose whole support has been placed in your hands, and melted away, have doubtless reached you; take care that you ascend no higher. Rouse, therefore; strive who shall do most

Sarah Van Brugh Livingston married John Jay in 1774. Like Abigail and John Adams, Sarah and John Jay were partners in both romance and politics. They traveled together on the Spanish mission and remained devoted to each other until Sarah's death shortly after Jay's retirement in 1801.

for his country; rekindle that flame of patriotism, which at the mention of disgrace and slavery, blazed throughout America, and animated all her citizens; determine to finish the contest as you began it, honestly and gloriously. Let it never be said that America had no sooner become independent than she became insolvent, or that her infant glories and growing fame were obscured and tarnished by broken contracts and violated faith, in the very hour when all the nations of the earth were admiring, and almost adoring the splendor of her rising."

Mr. Jay was now about to enter upon a different, and if possible, a more arduous and responsible sphere of action. Tried in the revolutionary cause, and in every branch of legislative and executive service, he had been found true, active, discreet, and courageous.

But a more difficult, and a new and untrodden field now lay before him. He was called upon to enter upon it. It was no enviable post, no tempting task; it promised few honors and less emoluments. His private interests and his feelings prompted him to shun the employment. But his country demanded the sacrifice, and it seemed to him the path of public duty. Jay did not hesitate as to the course he should pursue. He accepted the Spanish mission. His instructions were received on the 16th October, 1779, and four days after he sailed, in company with the French Minister, M. Gerard, for Europe. The object of this mission was two-fold. It was first to draw Spain into the Confederacy against Britain, pursuant to a secret clause in the treaty between France and the United States, and secondly, to raise money either by a loan or guaranty from Spain. It is highly probable that the latter was the more immediate and pressing object. It was, however, all the same to Jay. He had enlisted in the service of his country from the purest, the most elevated motives, and was ready to serve her wherever he could be most useful.

Upon the threshold of his theatre of operations in Spain, the American envoy encountered difficulties that would have discouraged and baffled a man of less moral courage and resolution. He encountered too, annoyances, humiliations and petty vexations that would have exhausted the patience of a man of a less equable temper of mind. But Jay bravely faced every difficulty, withstood all things, endured, conquered all. On his landing at Cadiz, the Spanish government invited him to Madrid, but refused to recognize him, in a formal character. "Pains were taken," he says in a letter to a friend, "to prevent any conduct towards me that might savor of an admission or knowledge of American independence." It seemed to be the policy of Spain rather to amuse than to aid the United States. She desired to injure Great Britain, and would, therefore, at the right time and on the proper occasion, render such assistance to the revolted colonies as might accomplish that result, but such aid was to be rendered only for a *consideration*. Certain concessions were required to be made, among which was the right of the United States to navigate the Mississippi. This Jay peremp-

torily declined, acting on the advice given by Franklin, then in France: – "Poor as we are, yet as I know we shall be rich, I would rather agree with them to buy at a great price the whole of their right on the Mississippi than sell a drop of its waters. A neighbor might as well ask me to sell my street door." In this Franklin manifested his accus-
32 tomed good sense. Alluding to Jay's discouragements and difficulties in Spain, he counsels him to continue "the even good temper you have hitherto manifested." "Spain," remarks the philosopher, in his usual sententious style, "*owes* us nothing; therefore, whatever friendship she shows us in lending money or furnishing clothes, etc., though not equal to our wants and wishes, is, however, *tant de gagne*."

But, in the mean time, how were the hopes, the wishes, nay the absolute expectations, prompted by inevitable necessity, of Congress to be realized? Money must be had somewhere. The supplies from the States did not come in; the continental currency continued rapidly to depreciate; the military chest was empty. Without money, without resources, without credit, absolute bankruptcy was staring them in the face. In this emergency Congress took an extraordinary step which nothing but desperation could have prompted. Without the slightest surmise of what might be Jay's reception or prospects of success in Spain, nay, without even apprising him of the step taken, it was resolved to draw upon him bills to the amount of half a million, payable in six months. The Spanish government, after authorizing the acceptance of these bills to the amount of a few thousand dollars, informed Mr. Jay that no more would be paid unless America agreed to furnish ships of war as an equivalent, or cede to Spain the sole right of navigating the Mississippi, but offered to guaranty the payment of $150,000 in three years, if Mr. Jay could effect such a loan. The conditions imposed by Spain were rejected; Jay attempted to effect the loan, but failed. In this emergency, he resolved upon a step of extraordinary boldness, it might be called rashness, a step, however, not hastily determined on, but one which his calm judgment dictated, and his reason approved. Without any present prospect of meeting these

demands as they fell due, but with unshaken confidence in himself, his country, and its cause, he resolved *to accept all bills presented to him, at his own risk.* Prudence and caution were eminently characteristics of the mind of John Jay; a wise and cool discretion marked his general conduct in life, but when the crisis occured which demanded prompt, bold, and daring action, few men were more ready to step resolutely forward and assume the responsibility. In him, that caution which usually governed his actions was not the result of timidity; it tempered but did not impair the higher qualities of a resolute and courageous mind.

The result of this bold and daring act fully justified his best expectations. The first cheering intelligence he received, was the arrival of $25,000 from Dr. Franklin, at Paris. This, however, did not nearly equal the amount of his acceptances. Still he continued to accept every bill that was presented, and still he pressed his importunities upon the Spanish Government. At length in December, 1780, the sum of $150,000 was promised him; but the money was not paid, and the American envoy was not yet relieved from his financial embarrassments.

In April of the following year we find him writing to Dr. Franklin at Paris, and inclosing him a statement of the desperately hopeless condition of affairs. Not more than $35,000 of the Spanish loan had been paid in. He had then outstanding acceptances to the amount of $231,000, the largest portion of which must be paid in two months. His situation, he says, was a cruel one. It was rendered more annoying from the fact that he had never received a dollar of salary from America, and at one of the proudest courts in Europe was obliged to contract debts and live on credit. Still, however, Jay bore manfully up, and continued zealously and faithfully his labors at the Spanish court. By dint of almost superhuman exertions, he was enabled for a long time to meet his liabilities, and sustain the credit of the country. At length, in the month of March, 1782, the inevitable crisis came. The Spanish Government, after the payment of the $150,000, agreed to guaranty to a banker the amount necessary to liquidate the remainder of the bills accepted by Mr. Jay;

but the transaction was not completed, through the want of faith, it is believed, of the Government itself; and Jay was subjected to the mortification of seeing the bills protested, and his own and his country's credit annihilated.

IV

The Treaty of Paris

The misfortune, however, was soon retrieved. During the next month Jay received from Franklin the following welcome letter:

"Passy, April 22, 1782.

"Dear Sir – I have undertaken to pay all the bills of your acceptance that have come to my knowledge, and I hope in God no more will be drawn upon us but when funds are first provided. In that case your constant residence at Madrid is no longer necessary. You may make a journey either for health or pleasure, without retarding the progress of a negotiation not yet begun. Here you are greatly wanted, for messengers begin to come and go, and there is much talk of a treaty proposed, but I can neither make nor agree to propositions of peace without the assistance of my colleagues. Mr. Adams, I am afraid, cannot just now leave Holland. Mr. Jefferson is not in Europe, and Mr. Laurens is a prisoner, though abroad upon parol. I wish, therefore, you would resolve upon the journey, and render yourself here as soon as possible. You would be of infinite service. Spain has taken four years to consider whether she would treat with us or not. *Give her forty, and let us in the mean time mind our own business.* I have much to communicate to you, but choose rather to do it *viva voce* than trust it to letters.

"I am ever, my dear friend, yours most affectionately,

"Benjamin Franklin."

Benjamin Franklin had been a great support from afar during Jay's frustrating mission to Spain. Franklin welcomed Jay to Paris for the post-Revolution peace talks, but once they were working closely together the two did not always see eye to eye.

The foregoing letter explains itself. Mr. Jay's mission to Spain was about to end. It had been fruitless in respect to the proposed treaty, although Congress, to the astonishment and mortification of Jay, had some time before passed a resolution instructing him to yield the claim to the navigation of the Mississippi. And he had drawn up and presented a treaty to that effect. A longer residence at the Spanish court was therefore unnecessary. He repaired to France to act in conjunction with Franklin, Adams, Jefferson, and Laurens, the commissioners appointed by the United States in negotiating a peace.

This commission was extremely distasteful to Mr. Jay, not on account of the difficulty and responsibility attending it, but by reason of what he conceived to be the humiliating conditions attached to it. At the instigation of the French minister, Mr. Adams, who had been appointed American plenipotentiary, had been instructed in negotiating a peace, "to make the most candid and confidential communications upon all subjects to the ministers of our generous ally the King of France; to undertake nothing in the negotiations for peace or truce without their knowledge or concurrence," etc. Subsequently, at the requisition of the French minister, the additional commissioners were appointed, and the following added to their instructions: "*And ultimately to govern yourselves by their* (the ministers of the King of France) *advice and opinion.*" It was in

reference to these instructions that Mr. Jay protested, in a dignified letter to the President of Congress, in which, while reluctantly accepting the commission, he entreated to be relieved of it as soon as practicable. The following are the concluding sentences of this letter.

"Thus circumstanced, and at such a distance from America, it would not be proper to decline this appointment. I will, therefore, do my best endeavors to fulfil the expectations of Congress on this subject; but as for my own part, I think it improbable that serious negociations for peace will soon take place, I must entreat Congress to take an early opportunity of relieving me from a station where, in character of their minister, I must necessarily receive and obey (under the name of *opinions*) the directions of those on whom I really think no American minister ought to be dependant, and to whom, in love for our country, and zeal for her service, I am sure that my colleagues and myself are at least equal."

Jay accordingly repaired to Paris, where he arrived on the 23d June, 1782. Here he met Dr. Franklin, and these two mainly conducted the negotiations on the part of the United States. Jefferson was detained in America; Adams did not arrive till the 26th of October, after the preliminary articles were agreed upon between the Americans and Mr. Oswald, the British commissioner; and Col. Laurens reached Paris the 29th November, the day before the preliminary articles were signed.

It is not my design here to sketch the progress of this negotiation, or to discuss its merits. It has become a part of the history of the country, and is familiar to every one versed in the diplomatic events of that period. We are doing but justice to Mr. Jay in claiming for him a large share in the successful results of the negotiation – results upon which Jefferson himself in the warmest language congratulated him; – "The terms obtained for us," he remarks in the confidence of a friendly letter, "are indeed great, and are so deemed by your countrymen, a few ill-designing debtors excepted." Hamilton, also, highly complimented him. "The peace," he says, "which exceeds in the goodness of its terms the expectations of the most sanguine, does the highest honor to those who

made it." These terms, however, and this successful negotiation, were not achieved without the most painful anxiety and difficult labor. England was of course prepared to grant but few concessions to her revolted colonies, and France, "our generous ally," had her own designs to subserve, and was as dangerous to America in diplomacy as

she had been formidable to England in war. At the outset, too, Mr. Jay had the misfortune to differ with his then sole colleague, Dr. Franklin. The British commissioner, Mr. Oswald, had been authorized to treat with any commissioner or commissioners appointed by the thirteen colonies or plantations in North America. Jay regarded the independence of the colonies as already a fact not to be controverted even by implication; and he refused to treat with the British commissioner except upon terms of equality. The French minister, Vergennes, urged a compliance; Franklin himself thought "it would do;" but nothing could shake the firmness and sense of propriety of Mr. Jay; he assured the British envoy that he would under no circumstances take part in any negotiation in which the United States were not treated as an independent nation; and at Mr. Oswald's request he drew the draft of such a commission as would be satisfactory. A courier was dispatched with this to London, and finally, on the 27th September, returned with a commission to Mr. Oswald, authorizing him to treat with the commissioners of the United States of America.

The draft of the preliminary articles is in the handwriting of Mr. Jay. Mr. Adams subsequently arriving in Paris, concurred in sentiment with him on all points, and assisted in completing the negotiations; – and finally, on the 30th November, 1782, they were signed by the four American commissioners, and by Mr. Oswald on behalf of the British Government. The success of the negotiation was handsomely complimented by the Spanish ambassador, the Count Aranda, whom Jay characterizes as the ablest Spaniard he had met. Meeting Mr. Jay the next day after the preliminaries were signed, he tapped him familiarly on the shoulder and remarked, " *Eh bien, mon amie, vous avez tres bien fait.*"

While these general results, however, were

highly flattering, and greatly added to the credit of the ministers who had negotiated the treaty, it is not to be denied that there was much dissatisfaction manifested, and that too in the highest quarters, in regard to the *manner* in which the business had been conducted. The conduct of the envoys in violating their instructions, as was alleged, by proceeding in a separate and secret manner with respect to our ally, France, and confidentially with respect to the British commissioner, was severely criticised in Congress, and particularly by Mr. Mercer, a member from Virginia, who in a very warm speech denounced their conduct in meanly stooping, as he remarked, "to lick the dust from the feet of a nation whose hands were still dyed with the blood of their fellow-citizens."* Other members, though without using the same severity of language, concurred in these sentiments. The separate article in the treaty with Great Britain was peculiarly obnoxious to the charge of its being made in violation of our faith with France, and it must be confessed that the complaints of the French minister of the manner in which the American commissioners had proceeded in that respect, without the advice and concurrence of the Government of France, were not entirely without foundation.

Indeed, we find Mr. Hamilton himself, in this same debate in Congress, while advising "coolness and circumspection," yet "disapproving highly of the conduct of our ministers in not showing the preliminary articles to our ally before they signed them, and still more so of their agreeing to the separate article." Mr. Hamilton also observed "particularly with respect to Mr. Jay, that although he was a man of profound sagacity and pure integrity, *yet he was of a suspicious temper*, and that this trait might explain the *extraordinary jealousies* which he professed."†

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* Madison Papers, Vol. I. p. 390.

† Madison Papers, Vol. I. pp. 395, 396. This language of Hamilton is the more remarkable, inasmuch, as, *by profession*, at least, he afterwards so warmly approved the conduct of Mr. Jay. I have already quoted his complimentary language in regard to the treaty. In a letter to Jay, a few

Jay's defence of his course of action in departing from his instructions was, in substance, that they had been given for the benefit of America, not of France, and that America alone had a right to complain. "Moreover," he remarks in a letter to the Secretary of Foreign Affairs, "as the French Minister did not consult us about his articles, nor make us any communication about them, our giving him as little trouble about ours did not violate any principle of reciprocity." John Rutledge, in the debate in Congress on this subject, placed the defence of the Ministers on higher and bolder grounds; they had done right, he maintained, in violating their instructions, because "instructions *ought to be disregarded when the public good requires it.*"*

The definitive treaty of peace, though the preliminary articles had been signed in the autumn of 1782, was not executed until the third of September, 1783. Mr. Jay thereupon went to England, where he remained a few months, and then returned to Paris. The Court of Spain had invited him to visit that country once more and resume negotiations. This was before the conclusion of the treaty, and Mr. Jay had determined to accept. But it seems the state of affairs in Paris, and ill-health, induced him to abandon this design. After the signing of the treaty he determined to resign his commission, and return to his native country. His name having been mentioned as a fit person to be appointed Minister at the Court of London, he expressly declined such an appointment in a letter to the Secretary for foreign affairs, refusing to be a competitor with Mr. Adams for the place in question. His motives in resigning his commission are best expressed in

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months subsequent, he says: "I have been witness with pleasure to every event which has had a tendency to advance you in the esteem of your country; and I may assure you, with sincerity, that it is as high as you could possibly wish. All *have united in the warmest approbation of your conduct.* I cannot forbear telling you this, because my situation has given me access to the truth, and I gratify my friendship for you in communicating what cannot fail to gratify your sensibility."

The debates in Congress, it will be recollected, were *not public.*

* See subsequent sketch, Life of Rutledge.

his own words, as found in a letter written to Gouverneur Morris from Paris, on the 10th of February, 1784.

"You suppose that ill-health induces me to resign. You are mistaken. It seldom happens that any measure is prompted by one single motive, though one among others may sometimes have a decisive weight and influence. Many motives induce me to resign; but of those many there is one which predominates, and that is: – When I embarked in the public service, I said very sincerely, that I quitted private life with regret, and should be happy to return to it when the object which called me from it should be attained. You know what those objects were, and that on the peace they ceased to operate. To be consistent, therefore, I must retire. The motive is irresistible. Superadded to this, are the education of my son, the attention I owe to the unfortunate part of my family, and the happiness I expect from rejoining my friends. Pecuniary considerations ever held a secondary place in my estimation. I know how to live within the limits of any income, however narrow; and my pride is not of a nature to be hurt by returning to the business which I formerly followed. But professions of this sort are common, and facts only can give unequivocal evidence of their sincerity."

Such were the views of Mr. Jay in returning to private life. Expressed in the unreserved confidence of an intimate friendship, their sincerity cannot be questioned. They were not, as is so often the case, *professions* merely, intended to catch the public ear and excite the popular applause; but they were actual sentiments, real, living rules of action. He had quitted private life with regret, he was about to return to it with pleasure, for the objects in view had been attained. The same elevated motive which prompted Washington to gird on his sword in the revolution, and to lay it aside when that revolution had been accomplished, had also prompted the actions of Jay. Ten years before, he had left the profession in which he had been educated; during that time he had filled the highest offices in the gift of his countrymen – Chief-Justice, President of Congress, Plenipotentiary at foreign courts – and now with the calm hope of a lofty pur-

John Jay

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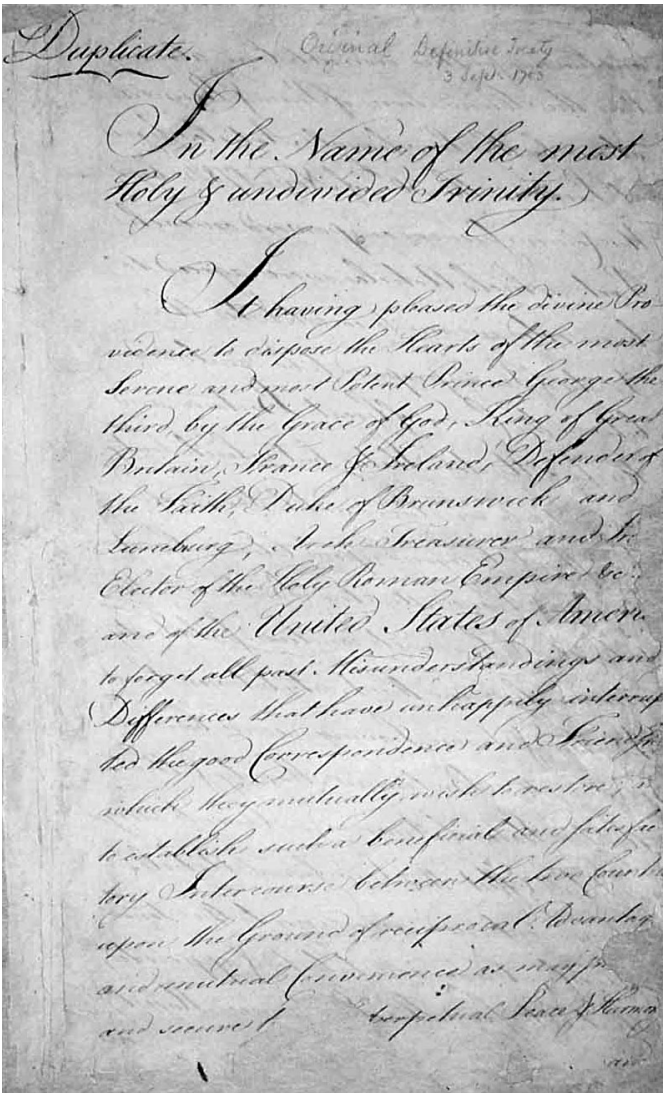
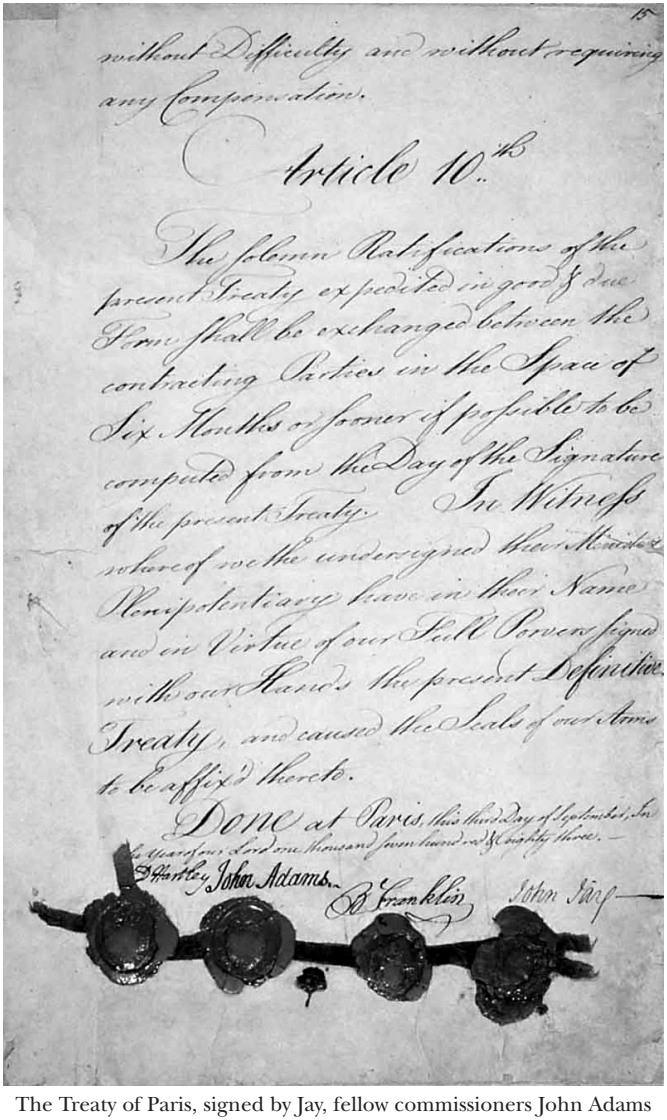


Duplicate.

Original Definitive Treaty
3 Sept. 1783

In the Name of the most
Holy & undivided Trinity.

It having pleased the divine Pro-
vidence to dispose the Hearts of the most
Serene and most Potent Prince George the
third by the Grace of God King of Great
Britain, France & Ireland, Defender of
the Faith, Duke of Brunswick and
Lunenburg, Arch Treasurer and Be
Elector of the Holy Roman Empire &c.
one of the United States of Ameri-
to forget all past Misunderstandings and
Differences that have unhappily interrup
ted the good Correspondence and Friend
which they mutually wish to restore, a
to establish such a Tranquility and Reci
tory Intercourse between the two Coun
upon the Ground of reciprocal Advanta
and mutual Convenience as may
and secure to perpetual Peace & Harmo



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without Difficulty and without requiring any Compensation.

Article 10.th

The solemn Ratifications of the present Treaty expedited in good & due Form shall be exchanged between the contracting Parties in the Space of Six Months or sooner if possible to be computed from the Day of the Signature of the present Treaty. In Witness whereof we the undersigned their Ministers Plenipotentiary have in their Name and in Virtue of our Full Powers signed with our Hands the present Definitive Treaty, and caused the Seals of our Arms to be affixed thereto.

Done at Paris, this third Day of September, in the Year of our Lord one thousand seven hundred and eighty three.

D.r Hartley John Adams. B. Franklin John Jay

The Treaty of Paris, signed by Jay, fellow commissioners John Adams and Benjamin Franklin, and British commissioner David Hartley, ended the war for American independence but not friction between Britain and its former colonies.

pose, and the serenity of a true philosophy, he expressed his determination to decline further public honors, and resume the labors of an arduous profession as the means of obtaining a livelihood for himself and family. His pride, he declares, will not be hurt at this, and he had learned to live "within the limits of any income." Passages like these

beautifully illustrate the simplicity and purity of Jay's character. They impress upon it the stamp of a high moral worth, nay, of a true greatness, which may suggest a comparison with the best examples of Roman virtue.

On the 24th day of July, 1784, Mr. Jay arrived in New York. He was received with the most distinguished marks of respect and public confidence. The public authorities presented to him an address accompanied by the freedom of the city in a gold box. His old friends hastened to congratulate him upon his safe arrival, and on every side he received those marks of attention which are due to eminent worth and distinguished and successful public services.

V

Foreign Affairs, the Framing & *The Federalist*

It had been his intention, on his return from Europe, to resume the practice of the law. Since his entrance in public life, ten years before, he had been almost entirely withdrawn from the active duties of his profession, yet he had never ceased to give his attention, when not diverted by public employment, to matter connected with his former practice at the bar. Even after his return from Europe his time was frequently occupied in applications of this kind. In a letter to Chancellor Livingston, after arriving at New York, he mentions this as a reason why he is prevented from making him a visit. He says he has so many applications about papers and business respecting causes in which he was formerly concerned, that he is obliged to pass a fortnight or three weeks in New York. In the same letter he alludes to his intention of again returning to the practice of his profession.

This intention, however, was frustrated. Congress, on learning Mr. Jay's design of returning to America, tendered him the appointment of Secretary for Foreign Affairs, a place formerly filled by Chancellor Livingston, but which by the resignation of the Chancellor had been vacant during the past year. Mr. Jay hesitated

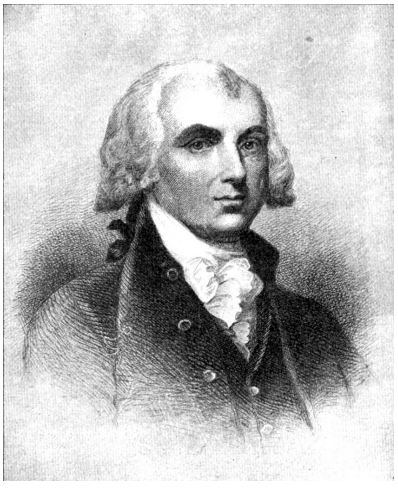
to accept this appointment. The Legislature of his native State, in the mean time, appointed him again a delegate in Congress. The session was held at Trenton. On the 23d of December Congress adjourned to New York, which it was determined should be its future seat; and having, in the mean time, granted permission to Mr. Jay to select
46 the clerks of his department, he accepted the office of Secretary for Foreign Affairs, and entered upon his duties early in the following year.

Mr. Jay remained in the discharge of the duties of this responsible position until after the meeting of the Convention which adopted the Federal Constitution. Of that body he was not a member, it being impossible for him at the same time to attend its deliberations, and to discharge the duties of his present place. It is not necessary here to detail his official services in the capacity of Foreign Secretary to the confederacy, or to dwell upon this portion of his public career. It may, however, be remarked, that he resumed the negotiations for a treaty with Spain, through the Spanish ambassador, and prescribed to that functionary the forms and etiquette to be observed in his introduction to Congress. The negotiations resulted in nothing. Mr. Jay, in a speech to Congress, recommended as the basis of a treaty, the abandonment, for a specific number of years, of the navigation of the Mississippi below the Southern boundary. The recommendation gave great, and perhaps, deserved umbrage to the Southern members of Congress; but the No[r]thern members supported the Secretary, and voted down a resolution to terminate his powers of negotiation.

During this period, Jay was again solicited to become a candidate for the office of Governor of New York, there having been some discontent expressed at the course and proceedings of Governor Clinton. He however again refused, mainly upon the ground of the obligations he was under and the services he owed Congress, and his unwillingness to exchange his present for a more honorable and lucrative position, without the consent and sanction of that body. In a letter addressed to his old friend, General Schuyler, he strongly enforces this view, adding that if *real* disgust and discontent had spread

through the country, and a change had became not only proper but *necessary*, he would have felt bound to make his personal feelings yield to public considerations.

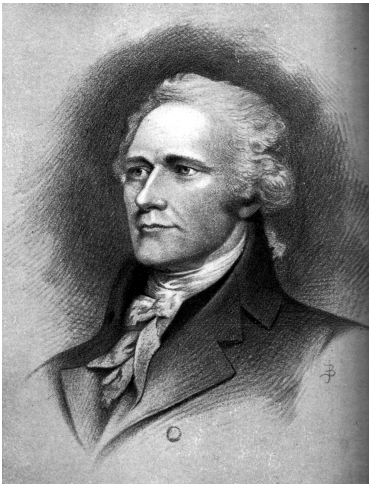
The necessity of a change in the articles of confederation, and the establishment of a general government, was very early felt. Almost all the public men of America concurred in this opinion. It is scarcely necessary to add that Mr. Jay was among the very first to express his sentiments upon the propriety and necessity of such a change. It is well known, too, that his opinions, from the start, were strongly federal. With Hamilton and Adams he inclined decidedly to centralization, and favored the establishment of an energetic national government. The federal system, as actually adopted, and especially as it was subsequently construed by Jefferson and Madison, seemed never to have harmonized entirely with his views, or to have met his ideas of a perfect government, though we find him warmly defending the new Constitution as a plan of government infinitely preferable, in all respects, to the old Confederation. It is not my purpose, however, to point out what might be regarded as the errors of Mr. Jay's theory, or to criticise his speculative opinions on government. Those opinions were shared by some of the wisest, ablest, and may we not add best, of the public men of that day. That they were erroneous is evident from the workings of the admirable system which was subsequently adopted as a sort of compromise between the extreme views of the ultra Federalists on the one hand, and on the other the doctrine of absolute State sovereignty, and the more radical and democratic element of popular government. It is, nevertheless, but doing justice to the most high-toned Federalist of that period to say, that however erroneous may have been his views, and widely as we at this day may differ from these doctrines of consolidation, and a strong central government, yet that these very doctrines, as society then stood, were a progressive step in the science of government, and even a struggle against a worse and more arbitrary system. At the present day, we are too apt to lose sight of the fact, that the opinions, customs, and habits of the monarchy had not yet lost their hold upon the people. Washington himself, in a letter to



In 1787-88, James Madison collaborated with Jay to produce *The Federalist.* By 1795, Madison was a vigorous critic of Jay, describing the treaty Jay had negotiated with England as "unworthy [of] the voluntary acceptance of an Independent people."

Jay, before the meeting of the Convention, uses the following language: "I am told that even respectable characters speak of a monarchical form of government without horror. From thinking proceeds speaking; thence to action is often but a single step. But how irrevocable and tremendous! What a triumph for the advocates of despotism, to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious! Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend." These apprehensions of Washington were shared by Jay, and, it is believed, by most of the prominent Federalists. They honestly and zealously endeavored to avert the threatened evil. The result was, that even the plan of Hamilton, of an executive and Senate for life, was repudiated, and the present Federal Constitution adopted.

Jay was neither a monarchist nor in favor of an aristocratic government. There is no evidence that his sympathies and inclinations were not from the start in favor of pure republican, though not strictly democratic institutions. It is clear, however, that he never gave in his adhesion to the Jeffersonian construction of the Constitution, or thoroughly comprehended what we have been accustomed to regard as the true theory of democratic progress. Thus he says in a letter to General



Alexander Hamilton, Jay's other *Federalist* collaborator and his ally in New York and national politics, would later be, in the words of Jefferson, "a host in himself" in defense of Jay and his 1795 treaty with England.

Washington: "The mass of men are neither wise nor good, and the virtue, like the other resources of a country, can only be drawn to a point, and exerted by *strong circumstances, ably managed*, or a *strong government, ably administered*." So too in regard to the great principle of free suffrage, he hesitated to trust the masses; it was a favorite maxim with him, says his son, in writing his memoirs, that those who *own the country* (i.e., the land-holders,) should govern it.

The views of Mr. Jay upon the great question of the formation of a national Constitution, were freely expressed in letters to his friends, and show very clearly the force of his convictions in favor of a consolidated and energetic central government. So early as the spring of 1785, he writes to a friend as follows:

"It is my first wish to see the United States assume and merit the character of one great nation, whose territory is divided into different states merely for more convenient government, and the more easy and prompt administration of justice; just as our several states are divided into counties and townships for the like purposes."

The same sentiments are repeated a year after in a letter to John Adams at London, in which he expresses as one of the first wishes of his heart, the desire "to see the people of America become one nation in every

respect; for, (he continues,) as to the separate legislatures, I would have them considered, with relation to the confederacy, in the same light in which counties stand to the State of which they are parts, viz., merely as districts to facilitate the purposes of domestic order and good government."

50 And in a long letter to General Washington, just before the Convention, he intimates the same thing: "What powers should be granted to the Government so constituted," he remarks, "is a question which deserves much thought. *I think the more the better*; the states retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national Government." In the same letter Mr. Jay, though expressing himself against a monarchy, goes so far as to suggest a Congress divided into an upper and lower house, *the former appointed for life*, and the latter annually; and a Governor-General, limited in prerogative and duration. At the same time, however, he never for a moment loses sight of the true basis of popular rights, and the cardinal doctrine of republican government; for his letter closes with the declaration, that no alteration in the government should be made "unless deducible from the only source of just authority – the people."

In like manner the general principle of the Federal union, as subsequently adopted, was already a familiar idea to the mind of Jay, for in a letter to Jefferson, at Paris, alluding to the weakness of the confederacy, and the necessity for a better and a stronger union, he thus sketches the main features of what he conceives to be the true plan which ought to be adopted: "To vest legislative, judicial, and executive powers in one and the same body of men, and that too in a body daily changing its members, can never be wise. In my opinion those three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other."

These extracts will suffice to show Mr. Jay's opinions upon the subject of the proposed Federal Constitution. It has been before remarked that he was not a member of the Convention which framed it, being

prevented from accepting a nomination by the pressing nature of the duties of the office he then held and the necessity of his attending the sittings of Congress. But no sooner was the Constitution agreed upon and submitted to the States for ratification, than Jay stepped forward, its zealous and earnest advocate. Public opinion was divided in regard to it. An active opposition was at once manifested; or if not a direct opposition, an earnest and determined effort to secure a larger concession to popular rights and state sovereignty. Perhaps in no State in the union was the opposition more strenuous and determined than in New York. The city, indeed, not then as now the metropolis of the country, but then as now, the loyal and devoted friend of the American union, was decidedly favorable to the proposed plan. But a strong feeling existed in the country in favor of a larger concession of popular rights and a less extensive delegation of power to the General Government. The people were jealous of their liberties, and hesitated to ratify an instrument which called for a surrender of some of the most important powers of State sovereignty. Some were unconditionally and unalterably opposed to the adoption of the proposed instrument; others would adopt it conditionally, and others still, merely desired its amendment in a variety of particulars. The ranks of the anti-Federalists comprised all these different shades of opinions, and certainly the power of numbers seemed to be clearly with them. But the weight of the intellect of the State was on the side of the Federalists, and prominent among them stood those distinguished advocates and champions of the proposed Constitution, Livingston, Hamilton, and John Jay.

The first decided impression made by the Federalists upon the people was through the public press. Jay united with Hamilton and Madison in writing and publishing that celebrated series of papers, which has since been known by the name of the Federalist, the first number of which appeared in the month following the adjournment of the Federal Convention. Three such minds have been rarely combined in the elucidation of any political system, or the discussion of any question, whether practical or theoretical, of politics or govern-

ment. It is not surprising then that this publication should have impressed itself deeply upon the public mind, and exercised a wide-spread and powerful influence; nor that the Federalist should have been ever since regarded by the American statesman and jurist* as the most valuable commentary ever written upon the American Constitution.
52 In this production Jay does not lay claim to an equal share with his illustrious coadjutors. He contributed, it is believed, but five papers, four of which immediately followed the opening number of the series. The remainder is the work of Hamilton and Madison.†

The Federalist was followed by a pamphlet, written by Mr. Jay, but published anonymously, addressed to the people of New York. This pamphlet discussed with great candor as well as ability, the three following questions, with reference to the proposed Constitution:

1. Is it probable a better plan can be obtained?
2. If attainable, is it likely to be in season?
3. What would be our condition, if, rejecting this, all efforts to obtain a better should prove fruitless?

In the argument of these questions, Jay starts with the admission that the proposed Constitution is imperfect. It is not such as he and the friends of a strong federal government desired.

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* Chancellor Kent speaks of the *Federalist* in the following terms: "No Constitution of government ever received a more masterly and successful vindication. I know not indeed of any work on the principles of free government that is to be compared in instruction and intrinsic value to this small and unpretending volume of the *Federalist*; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity and elegance with which its truths are uttered and recommended." – 1 *Kent. Com.*, p. 241, *note.*

† Mr. Jay would doubtless have been a larger contributor to the Federalist, but for the occurrence of a serious accident, which interrupted his labors. While endeavoring with other citizens of New York, under the lead of Col. Hamilton, to quell a riot, he was struck with a stone on the temple, and taken up for dead. He recovered only in time to write the sixty-fourth number of the series.

Their views had been clearly expressed and eloquently advocated by Col. Hamilton upon the floor of the Convention, but these views had not been adopted by that body. Unlike the opponents of the proposed Constitution, however, Mr. Jay avows himself prepared to submit, and to yield his cordial and unqualified support to the projected plan of union. The first two questions as above stated are accordingly answered in the negative. The third is discussed with an earnestness, a candor, and a power of argument, which leave no room to doubt the author's thorough conviction of the truth of the propositions he advocates, and his entire confidence in the ultimate success of the Constitution. Washington took occasion to compliment him upon the "good sense, forcible observation, temper, and moderation with which the pamphlet is written;" and Franklin deemed it advisable that Jay should give it additional weight by attaching to it his name; but the habitual modesty of the author impelled him to decline this suggestion, and prompted the characteristic reply: "If the reasoning in the pamphlet you allude to is just, it will have its effect on candid and discerning minds; – if weak and inconclusive, my name cannot render it otherwise."

The assent of New York to the new Constitution was felt by the Federalists to be an indispensable requisite to its success. The great battle of the Constitution, as has been well observed, was fought in New York. A Convention of delegates of the people was called by the Legislature. The strongest men in the State were proposed as candidates on either side. The election was held in April, 1788. In the city of New York the Federalists carried it their own way. Jay was put in nomination for that city and elected.* He had for his colleagues the Chief-Justice, Richard Morris, Chancellor Livingston, Alexander Hamilton, James Duane, Richard Harrison, Judge John Sloss Hobart, Isaac Roosevelt and Nicholas Low – an array of worth, character, and talent, that has never been surpassed, if equalled, by any delegation ever elected to represent that city.

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* Out of a poll list of nearly 3000, he received all but about 100 votes.

In the country, however, the elections were strongly against the Federalists. Most of the members returned were opposed to the ratification of the Constitution, except upon condition, or with some important amendments. Nor w[]ere the anti-Federalists, as they were called, deficient either in influence, activity, or abil-
54 ity. Prominent among the list stood the formidable name of that able and experienced leader, Governor Clinton, who was elected President of the Convention. Mr. John Lansing of Albany, afterwards for many years Chancellor, a gentleman of sound judgment and cultivated intellect, as well as a most adroit and active parliamentarian,* Mr. Melancthon Smith of Dutchess, one of the most fluent and ready debaters, perhaps under all circumstances the best, next to Hamilton, in the house, Mr. Treadwell, Mr. Williams, and Mr. G. Livingston, may be mentioned as among the most prominent of the opposition.

On the first day of the session Chancellor Livingston opened the deliberations in an elaborate speech, at the close of which he moved the consideration of the Constitution by sections, which was adopted. The motion was a wise and discreet one, had there been, as was alleged, a desire on the part of the majority to defeat the ratification entirely. It seems, however, from the cause of the debates, that this was not seriously intended, and that the design was merely to secure the adoption of some very important amendments, together with a declaration, or bill of rights, to be attached to the Constitution, a matter which had been singularly enough omitted.† Of the more important amendments desired were those in

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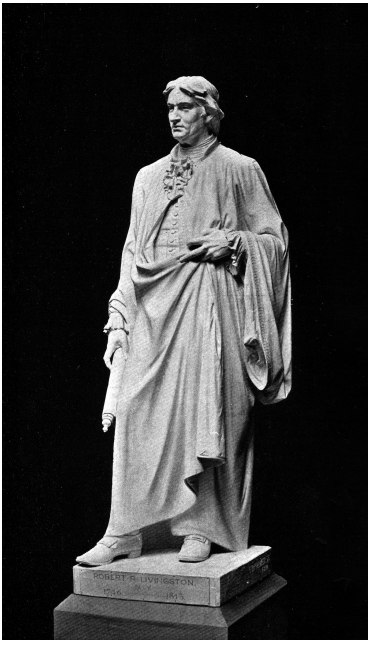
* Mr. Lansing had been a member of the Convention which framed the Constitution. He retired with his colleague, Mr. Yates, before the Constitution was agreed upon, leaving Hamilton the sole representative from New York.

† This had been Jefferson's main objection to the Constitution. In a letter to Washington, Mr. Jefferson, alluding to the charge (which he attributed to Hamilton) that he (Jefferson) had written letters from Europe to his friends to oppose the Constitution, says: "The charge is most false. I approve as much of the Constitution as most persons, and more of it was disapproved by my accuser than by me, and of its parts most



Chancellor Robert R. Livingston was Jay's first law partner and a close political ally until the contested gubernatorial election of 1792.

regard to taxation, one for increasing the number of the representatives, and one moved by Mr. G. Livingston, and sustained with great ability and force of argument by Messrs. Lansing and Smith, to authorize the *recall* of a Senator by the State Legislature, and prohibiting his re-election for the six years immediately succeeding the expiration of his term. All these amendments, as well as the important one embraced in the bill of rights subsequently moved by Mr. Lansing, and which was substantially adopted and ratified by the requisite majority of the States, and thus became a part of the Constitution, were prompted not by hostility to a plan of union among the States, or even to an energetic federal government, but by a well-grounded jealousy of the encroachments of

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vitally republican. My objection to the Constitution was the want of a bill of rights – Col. Hamilton's that it wanted a king and House of Lords. The sense of America has approved my objection, and added the bill of rights, and not the king and lords."

Mr. Jefferson was in favor also of making the presidential term six years, and not renewable.

power, and a vigilant care for the rights and liberties of the people. Much injustice has been done the *anti-Federalists* of the Convention in this respect, and their views are not at this day correctly understood. No one will question the sincerity of Governor Clinton, who is regarded as standing at their head; and Governor Clinton himself
56 stated in the Convention, "I solemnly declare that I am a friend to a strong and efficient government. But, sir, we may err in this extreme; we may erect a system that will destroy the liberties of the people. * * * * Because a strong government was wanted during the late war, does it follow that we should now be obliged to accept a dangerous one? I even lamented the feebleness of the Confederation," etc., etc.

Similar views were expressed by all the prominent members, inasmuch as Mr. Jay himself remarked in his place: "Sir, it seems to be on all sides agreed, that a strong, energetic, federal government is necessary for the United States." Mr. Melancthon Smith, the confidential friend of Clinton, and one of the most ardent and uncompromising advocates of popular rights and State sovereignty on the floor, and Mr. G. Livingston, who moved the amendment authorizing the State to recall their senators at pleasure, are both found voting in favor of an absolute, and against a conditional ratification; and if the name of Mr. Lansing is found in the negative, it is no more than happened in Virginia, where the names of Patrick Henry and James Monroe appear in opposition to that of James Madison, on the final question of ratification.

That the majority of the Convention were in favor of some sort of ratification, is apparent from the description given of the members by Jay himself, in a letter to Washington:

"The leaders in opposition seem to have more extensive views than their adherents, and until the latter perceive that circumstance, they will probably continue combined. *The greater number are, I believe, averse to a vote of rejection.* Some would be content with *recommendatory* amendments; others wish for *explanatory* ones, to settle constructions which they think doubtful; others would not be satisfied with less than *absolute* and *previous* amend-

ments, and I am mistaken if there be not a few who prefer a separation from the union to any national government whatever. They suggest hints of the importance of the State, of its capacity to command terms, of the policy of its taking its own time, and fixing its own price, etc. They intimate that an adjournment may be expedient, and that it might be best to see the operation of the new government before they receive it."

Mr. Jay, of course, was one of those who desired the *absolute* and *unconditional* ratification of the Constitution. His influence in bringing this about was no doubt great, though from the sketch of the debates it does not appear that he took any very active or prominent part in the discussions of the Convention. He was not a frequent speaker; indeed he was never a very ready and skillful debater. He was better adapted to the committee room, or perhaps the chair, than the floor of a deliberative body. His strength, like Mr. Jefferson's in that respect, lay rather in his pen than in oral speech. As a pamphleteer and political essayist, he had few equals; as a parliamentary orator he had many superiors, and some, too, upon the floor of the Convention itself. The efforts of Mr. Jay cannot compare with the clear, calm, logical, comprehensive speeches of Livingston, much less with the bold, rapid, impetuous harangues of Hamilton, alike brilliant as declamations, and convincing as arguments. These two were therefore regarded as in some sense the parliamentary leaders of the Federalists; but Mr. Jay in point of real influence was inferior to neither, and doubtless contributed as much as any man in the Convention, by his well-directed efforts, and the weight of his character and acknowledged ability, to bring these deliberations to a successful issue. Occasionally too he mingled in the debates, and expressed his opinions upon the more important questions raised with freedom and frankness. He spoke upon the question of representation in reply to Mr. M. Smith, and while avowing himself in favor of a large representation, yet was satisfied with the matter as the Convention had left it, and urged a general acquiescence. He spoke also upon the important question of revenue, and the power of Congress to levy taxes, advocating

the propriety of investing the General Government with the command of the national resources, in opposition to the amendment proposed of limiting this power by reserving to the States the right in certain cases of regulating the supplies. The speeches of Mr. Jay are characterized by great simplicity and candor, as well as force of expression
58 and cogency of argument.

On the 11th of July, Mr. Jay moved the unconditional ratification of the Constitution, and that such amendments as might be deemed expedient, ought to be *recommended*. He was ably supported by Chancellor Livingston and Chief-Justice Morris, and opposed by Mr. Smith. On the 15th of July, the latter gentleman moved, as an amendment, that the Constitution ought to be ratified, *on condition* that certain amendments specified, should be made. This was the test question, and the serious struggle in the Convention now occurred.* A proposition to adjourn, was made and voted down. A resolution, by Mr. Lansing, reserving the right to New York to withdraw from the union, in like manner passed in the negative. The absolute ratification would probably have been also rejected if the timely amendment moved by Mr.

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* Ten of the states had already adopted the Constitution before it was ratified by New York. The order in which it was ratified by the respective states and the votes thereon, are as follows:

Delaware,	December [7],	1787	unanimously.
Pennsylvania,	December [12],	1787	46 to 23.
New Jersey,	December [18],	1787	unanimously.
Georgia,	January [2],	1788	unanimously.
Connecticut,	January 9,	1788	140 to 128.
Massachusetts,	February 6,	1788	187 to 168.
Maryland,	April 28,	1788	63 to 12.
South Carolina,	May 23,	1788	149 to 73.
New Hampshire,	June 21,	1788	57 to 46.
Virginia,	June 25,	1788	89 to 79.
New York,	July [26],	1788	30 to 27.

North Carolina and Rhode Island came into the Union after the new government went into operation. The former ratified the Constitution on the 21st November, 1789; the latter not till the 29th of May, 1790.

Jones had not been adopted, changing the words *on condition*, into the words *in full confidence*. Among the affirmative votes were, Mr. Smith, Mr. G. Livingston, Mr. Williams, etc. In this shape the resolutions passed on the 25th of July, by a vote of 30 to 27, and New York assumed a place among her sister States in the federal union.

59

VI

Chief Justice

The new government was to go into operation on the 4th of March, 1789. Congress was summoned to meet on that day at the city of New York, when the votes for President and Vice-President were to be counted. On the appointed day, however, it was found that a quorum was not in attendance, and the two houses adjourned. The House of Representatives was the first to organize; the Senate continued to adjourn from day to day for want of a quorum, until the 6th of April. On that day a quorum of both houses being present, the electoral vote for President and Vice-President was counted, when it appeared that George Washington, having received the whole number of votes cast, sixty-nine,* was elected President, and John Adams having received a majority of all the votes, was elected Vice-President. Mr. Jay received the votes of Delaware and New Jersey, for the Vice-Presidency.

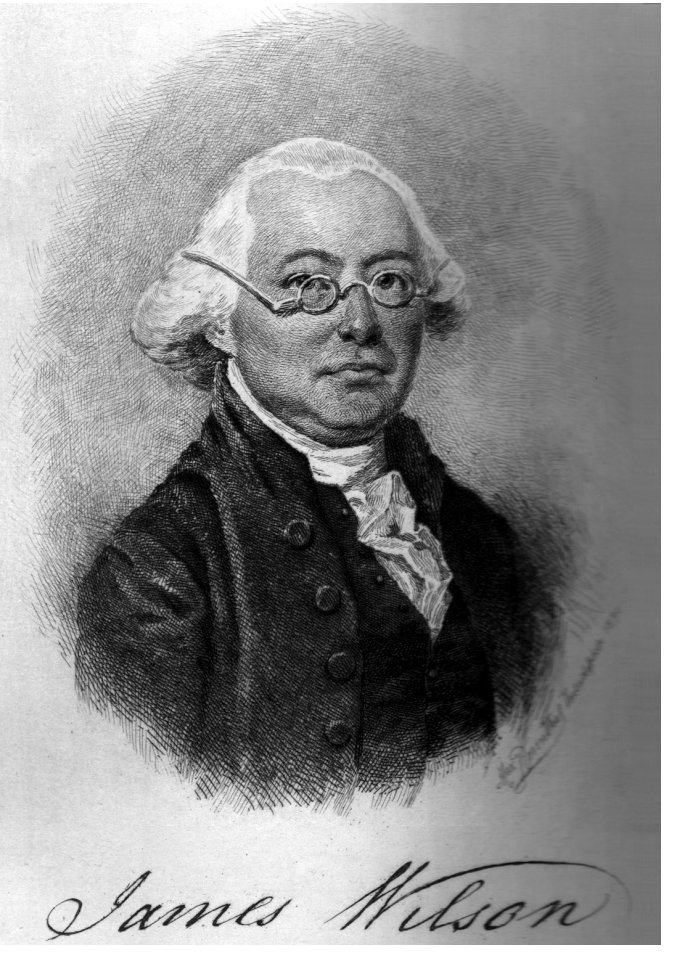
The election of General Washington having been announced, and he having signified his acceptance of the trust, it was thought proper to make the necessary arrangements for the accommodation of the President at New York. These arrangements were not

* These comprised the electoral votes of ten of the States only. Rhode Island and North Carolina had not yet adopted the Constitution, and New York did not vote. At the opening of the Congress no member from New York appeared in either house. Rufus King took his seat in the Senate on the 25th of July, and Gen. Schuyler two days after.

immediately completed, and in the mean time Jay wrote to Washington, tendering the hospitalities of his house, and with a sincerity and delicacy that could not fail to be appreciated. "As the measures that were in contemplation on this subject," he says, "would have given an earlier invitation the appearance of a mere compliment, it was omitted. Considering all circumstances, I really think you would experience at least as few inconveniences with me as in any other situation here. Your reluctance to give trouble will doubtless suggest objections. Apprised of this, we shall be particularly careful to preserve such a degree of simplicity in our domestic arrangements as will render you easy on that. In a word you shall be received and entertained exactly in the way which, if in your place, I should prefer, viz., with plain and friendly hospitality." The completion of the public arrangements for the reception of General Washington prevented his acceptance of this invitation. He arrived in New York soon after, and delivered his inaugural address on the 30th of April. At his request Mr. Jay continued to act as Foreign Secretary until the arrival of Mr. Jefferson from Europe.

The Constitution provided that the judicial power of the United States should be vested in a Supreme Court and in such inferior courts as Congress might from time to time establish. At the first session of Congress the organization of the federal judiciary engaged the early and constant attention of that body. The judiciary bill, organizing the new courts, approved the 24th of September 1789, will be more particularly noticed in the succeeding sketch of Chief-Justice Ellsworth, then a senator in Congress, from the State of Connecticut. By its provisions a Chief-Justice and five Associate-Justices, were to constitute the Supreme Court of the United States.

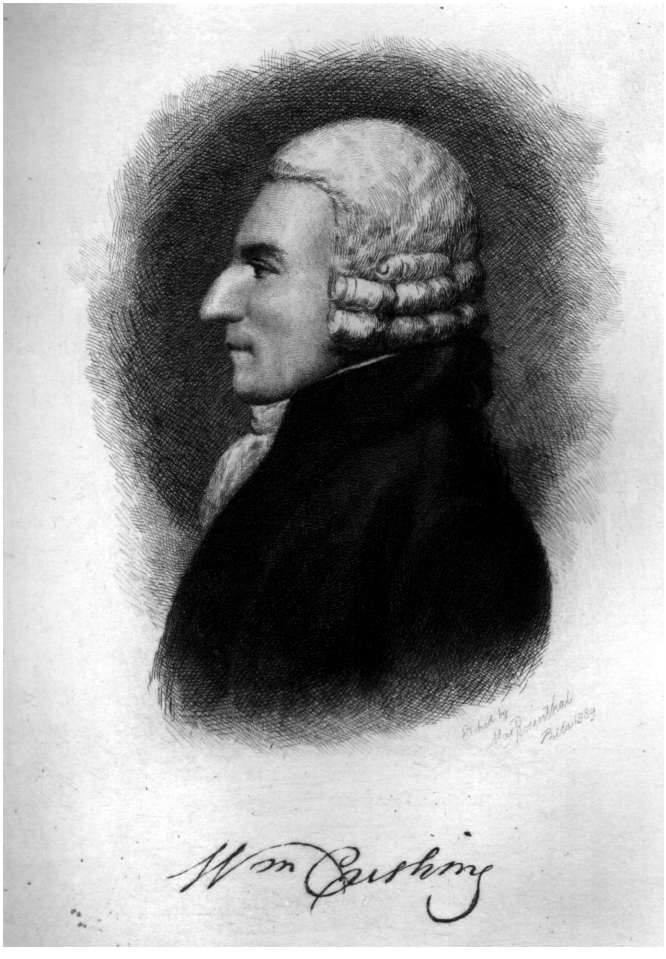
On the very day of the approval of the Judiciary bill, the President sent in to the Senate the name of John Jay for the office of Chief-Justice, and the names of the following gentlemen for the offices of Associate-Justices of the Supreme Court: – John Rutledge, of South Carolina; William Cushing, of Massachusetts; [Robert] H.



Justice James Wilson, from Pennsylvania,
served from October 5, 1789 to August 21, 1798.

Harrison, of Maryland; James Wilson, of Pennsylvania; and John Blair, of Virginia; who were immediately confirmed. Edmund Randolph was at the same time appointed Attorney-General. Mr. Harrison resigned, and James Iredell, of North Carolina, was subsequently appointed in his place.

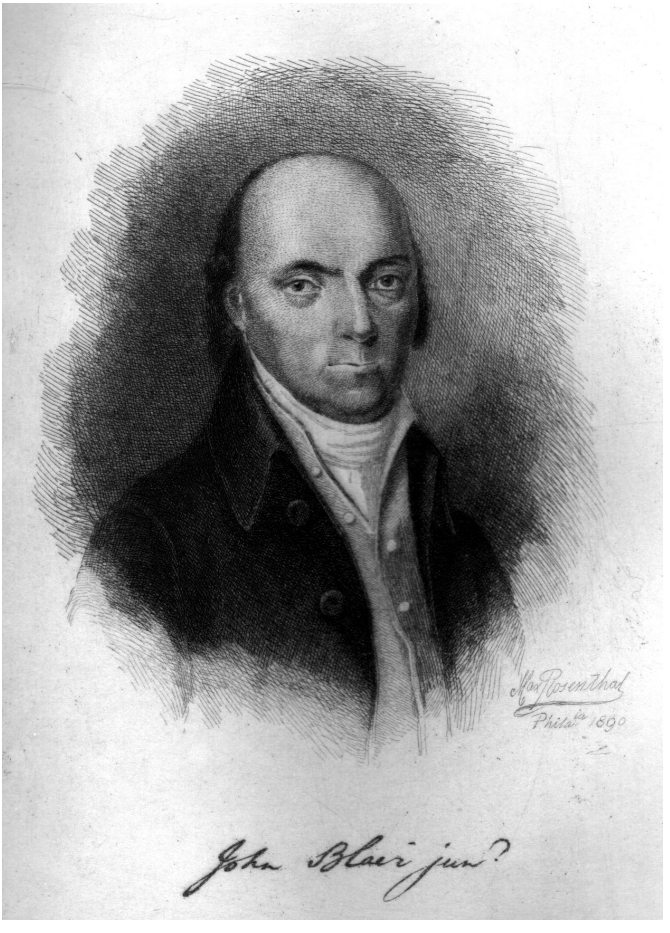
General Washington had been earnestly desirous of securing the services and well-known ability of Mr. Jay in support of the new government; and the position in



Justice William Cushing, from Massachusetts,
served from February 2, 1790 to September 13, 1810.

which he was now placed was the one which Jay himself had preferred, as most in accordance with his tastes, his previous studies, and habits of life.*

* Jay's appointment as Chief-Justice, in preference to Chancellor Livingston, it has been intimated, was the real cause of the Chancellor's abandonment of the Federal party, and his subsequent opposition to Jay's election. The authority for this assertion, however, seems somewhat questionable. See *Hammond's Political History of New York*, p. 107.



Justice John Blair, from Virginia,
served from February 2, 1790 to October 25, 1795.

The first term of the Supreme Court was held in New York, in February, 1790. The Chief-Justice, and Justices Cushing, Wilson, and Blair, appeared,* constituting a quorum. Very little seems to have been done except the adoption of three or four rules of court, one relative

* Judge Rutledge did not take his seat. He resigned the next year, and the commission of Thomas Johnson, bearing date 7th November, 1791, was read at the August term, 1792, when that gentleman took his seat. See following sketch of Rutledge.

Justice John Rutledge, from South Carolina,
served from February 15, 1790 to March 5, 1791.

to the seal of the Supreme and Circuit Courts; another in regard to the admission of attorneys and counsellors, and another directing that all process of the court should be in the name of "the President of the United States." At the next term, in August of the same year, the commission of Judge Iredell was read, who was sworn in, and took his seat, soon after which the Court adjourned. No case of special importance seems to have been argued before the Court until the August term, 1792, when the first motion was made in the case of the State of

Justice James Iredell, from North Carolina,
served from May 12, 1790 to October 20, 1799.

Georgia *vs.* Braislford and others; and the important case of Chisholm *vs.* Georgia, which will be presently noticed, was also brought on for argument.

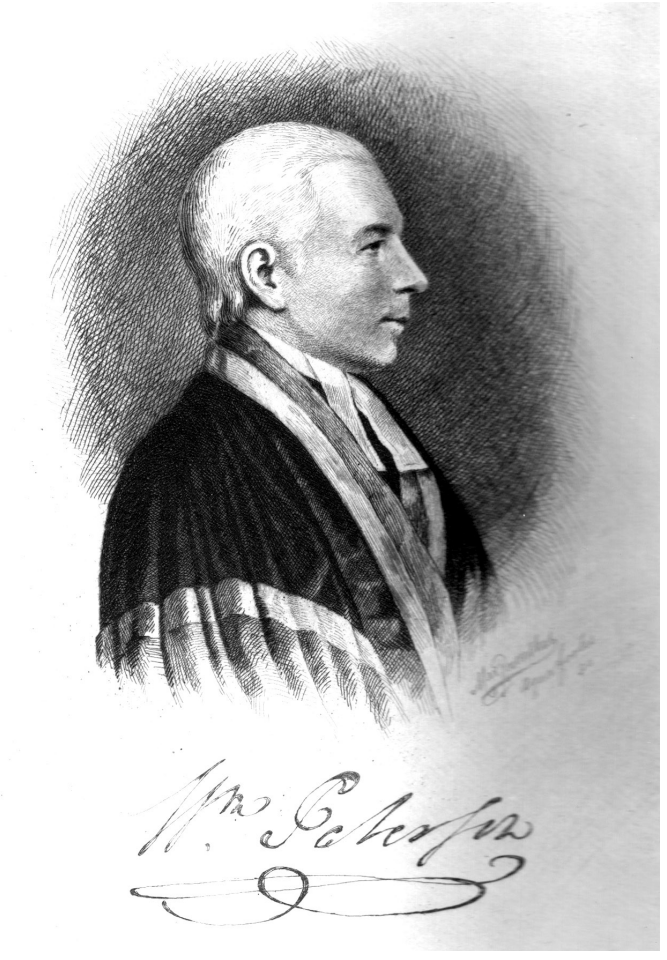
The Chief-Justice, in the mean time, regularly rode the circuit twice a year, in company with one of his associates. The Eastern circuit, to which he was assigned, comprised the New England States and New York. The Judiciary bill provided that two Circuit Courts a year should be held in each district, by two Justices of the

Justice Thomas Johnson, from Maryland,
served from August 6, 1792 to January 16, 1793.

Supreme Court and the District Judge.

The Chief-Justice held his first circuit in New York on the 4th of April, 1790, assisted by one of his associates and the District Judge, James Duane, Esq., an eminent and able lawyer of that time.* His charge to the grand jury was carefully prepared, temperate, and dis-

* See Sketch of Duane, by Hon. Samuel Jones, in 4th Vol. *Documentary History of New York.*



Justice William Paterson, from New Jersey,
served from March 11, 1793 to September 8, 1806.

creet, and withal thoroughly conservative. "It cannot be too strongly impressed on the minds of all," he remarked, "how greatly our individual prosperity depends on our national prosperity, and how greatly our national prosperity depends on a *well-organized, vigorous government*, ruling by wise and equal laws faithfully executed. Nor is such a government unfriendly to liberty – to that liberty which is really estimable. On the contrary, nothing but a strong government of laws, irresistibly bearing down arbitrary

Justice Robert Harrison, from Maryland, was confirmed September 26, 1789 but resigned before serving.

power and licentiousness, can defend it against these two formidable enemies."

Immediately after the close of this Court the Chief-Justice commenced his first circuit through New England, and was everywhere received with the most flattering marks of respect. In those primitive days it was deemed no improper civility, or extraordinary occurrence, to lavish upon the head of the federal judiciary the somewhat tumultuous demonstrations of popular

applause. Thus the citizens of New Haven and the citizens of Portsmouth honored him with "a public entry" into these towns; and even the staid people of Boston were moved from their propriety in a similar manner. A year or two later we find him feted and toasted at public dinners – crossing the Hudson at Albany under the roar
70 of artillery – "attended for twelve miles on his journey by a body of cavalry" – entering the village of Hudson on "Independence Day," amid the ringing of bells and roar of cannon; and, finally, received by a deputation of citizens eight miles from New York, who carried him in triumph into the bosom of his native city. But these latter demonstrations, it must be confessed, were political, and not in compliment to his judicial character.

In April, 1791, the Chief-Justice, with Justice Cushing and the District Judge, Duane, held the circuit at New York, and made a very important decision, involving the jurisdiction and powers of the Justices of the Supreme Court. Congress had passed an act to regulate, among other things, the claims to invalid pensions. Under this act certain duties were assigned to the Circuit Courts; but the decisions of the Courts thereon were made subject, first to the consideration and suspension of the Secretary of War, and then to the revision of Congress. It speaks well for the independence and firmness of the Supreme Court, even at that early day, to observe the Judges standing up boldly to resist a constitutional encroachment. The Chief-Justice and his associates refused to perform judicially the duties imposed by the act. They declared that, by the Constitution, neither the Secretary of War, nor any other executive officer, nor the Legislature itself, was authorized to sit as a court of errors on the judicial acts or opinions of the Court. They regarded the act therefore as appointing the judges commissioners merely, which appointment they might accept or decline at their option. In this case, as they desired to manifest in every proper manner their respect for the national Legislature, they would execute the act, not as a court, but in the capacity of commissioners. Similar views were taken of the act in the Circuit Court of Pennsylvania by Justices Wilson and Blair, and Peters, District Judge, who united

in representing their opinions in a joint letter addressed to the President.

At the August term of the Supreme Court, 1792, a motion was made by the Attorney-General for a *mandamus*, directed to the Circuit Court of Pennsylvania, commanding it to proceed on the petition of William Heyburn, as an invalid pensioner. The Attorney-General made an elaborate argument upon the merits of the case and the refusal of the Judges to carry the law into effect. The Court held the case under advisement until the next term; but no decision was ever pronounced, as Congress, in the mean time, provided for the relief of pensioners by another law.

At this same term was brought on for argument the first motion in the important case of the State of Georgia *vs.* Braislford et al. The case presented several novel questions connected with the Constitutional jurisprudence of the country, and is remarkable as being the only case in which a special trial by jury has ever been had before the Supreme Court. The State of Georgia had passed an act of confiscation, whereby it was claimed that the debt in controversy – a bond made by Kelsey and Spalding to Braislford and others, whom it was alleged were aliens – had been sequestrated to the State. Notwithstanding their alienage and the act of confiscation, Braislford and his co-partners had brought an action on the bond against Kelsey and Spalding in the Circuit Court of Georgia. The State of Georgia applied to be admitted to assert her claim, but was refused, and judgment passed for the plaintiffs. The State now filed a bill in equity and moved that an injunction might issue to stay further proceedings in the Circuit Court, and also to the Marshal of the Georgia district to stay money levied on any execution that might have come to his hands. This motion was made and argued by Alexander J. Dallas, of Pennsylvania,* one of the most eminent, as he was decidedly one of the most accomplished and able lawyers of

* Alexander J. Dallas was a native of the Island of Jamaica, and born on the 1st day of June, 1759. He was educated in Europe, and emigrated to Philadelphia in 1783. Two years after his arrival he was admitted to the

that day, and was opposed by the Attorney-General, Mr. Randolph. The Court, after argument, delivered their opinions *seriatim*.

Justice Johnson was of the opinion that if the State had a right to the debt in question, it might be enforced at common law, and that an injunction should
72 not issue. Justice Cushing was of a similar opinion. On the other hand, Justices Blair, Iredell, and Wilson, thought that a temporary injunction should issue till the Court should be enabled by a full inquiry to decide upon the whole merits of the case; though the latter was inclined to think that the more proper course would have been for Georgia to have sued out a writ of error, rather than have asked for an injunction. In these views the Chief-Justice concurred, and accordingly an injunction issued.

At the following term, February, 1793, the case was again brought before the Court on a motion by the Attorney-General to dissolve the injunction and dismiss the bill. Justices Iredell and Blair were still of opinion that the injunction ought to be sustained, but the rest of the Court coincided in the opinion delivered by the Chief-Justice that if Georgia had a right to the debt, it was a right to be pursued at common law, and it was ordered

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bar. In a few years he acquired a distinguished reputation as a lawyer; and on the organization of the Federal judiciary we find him engaged in nearly all the important causes in the Supreme Court, and the criminal trials of these days. Mr. Dallas was several years Secretary of the Commonwealth of Pennsylvania. He published the four volumes of the Reports which bear his name, containing the earlier decisions of the Pennsylvania and the Federal Courts. He also published an edition of the laws of Pennsylvania, which he illustrated with notes and references.

In 1801 Mr. Dallas was appointed by Mr. Jefferson District Attorney for the Eastern District of Pennsylvania, and in 1808 he was invited to a place in the Cabinet as Secretary of the Treasury. He continued in the Cabinet until 1816, a part of which time he performed the duties of Secretary of War. Returning again to the bar, on his resignation of this office, he resumed an extensive and brilliant practice, which was, however, interrupted the next year by an untimely death. He died on the 16th of January, 1817, in the 58th year of his age.

that the injunction should stand until the next term, when it would be dissolved, unless Georgia instituted her action at common law. An amicable action was accordingly entered, in which an issue was made up whether the debt and the right of action belonged to the State of Georgia, or to the original creditors. This issue was brought to trial before a jury at the February term, 1794. The question was argued with great ability, and learning, by Dallas and Ingersoll for the State, and by William Bradford, who had been appointed Attorney-General in place of Randolph, for the defendants. The cause went to the jury under the charge of the Chief-Justice, who declared it as the unanimous opinion of the Judges, that the act of Georgia did not vest the debt in the State at the time of passing it; that it was subjected not to *confiscation*, but only to *sequestration*, and the owner's right to recover it revived at the peace. The jury, under this charge, of course, returned a verdict against the State, and the injunction was accordingly dissolved.*

At the February term of the Court, 1793, held at Philadelphia, the celebrated case of Chisholm Executors *vs.* Georgia, was brought on for argument.† This great case excited an unusual degree of attention, both on account of the novelty of the questions raised, and the important political consequences that were supposed to be involved in the decision. The doctrine of State sovereignty, and State rights, was for the first time brought before the Court, for discussion. The question was, whether a State was amenable to the jurisdiction of the Supreme Court, at the suit of a citizen of another State, a question which might, in the language of Judge Wilson, ultimately resolve itself into another no less radical than this, "Do the United States constitute a Nation?" Chisholm, a citizen of South Carolina, had brought an action against the State of Georgia by service of process upon the Governor and Attorney-General of that State. Georgia refused to appear, and now the Attorney-General of the United States moved that unless Georgia caused

* See this case reported, 2 Dallas, 403, 415. 3 Dallas, 1.

† 2 Dallas, 419.

her appearance to be entered by the next term, judgment should be rendered against her by default, and a writ of inquiry issue. No case of a similar kind had yet been regularly brought before the Court for adjudication. In a case against Maryland, the Attorney-General of the State had voluntarily appeared. In a case against the State of
74 New York a motion had been made to compel an appearance on the part of the State, but while the Court held the motion under advisement the suit had been discontinued.* The question was now brought up on the motion of Mr. Randolph, the Attorney-General, who delivered a lucid and most masterly argument, the analysis of which, gives us the highest opinion of the forensic talents, and profound legal attainments of that gentleman. The State of Georgia refused to recognize the jurisdiction even so far as to appear upon the argument, but presented by Mr. Dallas and Mr. Ingersoll, an eminent lawyer of the Philadelphia bar,† a written remonstrance and protestation on behalf of the State. Under these circumstances this important question was considered by the Judges, who, after advisement and careful deliberation,

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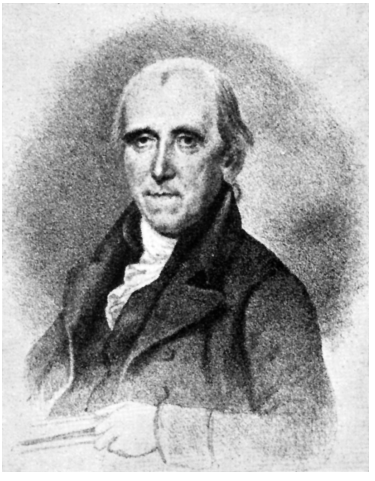
* Oswald *vs.* State of New York, 2 Dall. 401. But see same case, 2 Dall. 415, where default against the State was ordered to be taken at the next term, unless appearance was entered.

† Jared Ingersoll was at that time Attorney-General of Pennsylvania, a post which he held from 1791 to 1800, and again from 1811 to 1816. He was born in New Haven in 1750, was educated to the bar, and in 1773 was sent to London to complete his education at the Temple. Mr. Ingersoll left England after the Declaration of Independence, and went to France, where he remained for some time, after which he returned to Philadelphia to the practice of the law. His success was immediate, and he was soon at the head of his profession, "in the midst," says a judicious writer, "of the well-known formidable competition of a day when the bar of Philadelphia by concession led the Union, and gave birth to a proverb which has been handed down to present times." Mr. Ingersoll declined the place offered him of Judge, on the organization of the Circuit Court, for New Jersey, Pennsylvania and Delaware, in 1801. He presided, however, for a short time preceding his death, in the District Court at Philadelphia. In 1812 Mr. Ingersoll was a candidate for Vice-President. He died in 1822, at the age of seventy.



Jared Ingersoll, attorney general of Pennsylvania, represented Georgia in the *Chisholm* case.

pronounced their opinions *seriatim*.

The opinion of the Chief-Justice in this case, is by far the most elaborate, perhaps the most able, delivered by him while on the bench. It occupies over ten pages of the printed report of the case. He makes no reference to cases, for the reason given by him that he knows of none which are not distinguishable from this case. Unlike the learned, and somewhat scholastic opinion of his associate, Justice Wilson, in the same case, he does not attempt an analysis and comparison of other forms of government and social institutions, nor does he undertake to discuss the opinions of writers on government and the rights of man, or show the harmony of their views with the principles which governed his own judgment. He discusses the question purely as a practical, constitutional question; he examines it in three separate propositions. 1st, In what sense Georgia is a sovereign State? 2d, Whether suability is compatible with such sovereignty? 3d, Whether the Constitution authorizes such an action against her? To the first proposition he applies those strong federal views and ideas of nationality, which he was always known to entertain, going to the very opposite extreme of the doctrine of State rights and State sovereignty. A corporation was an aggregate of individuals, and so was a State. The citizens of Philadelphia, numbering forty thousand, in their corporate capacity, were

suable by a single citizen, and there was no reason why the fifty thousand citizens of Delaware should not be. He distinguishes, it is true, between the case of a suit against the United States, and a suit against a State, because the national Courts being supported by the arm of the Executive power of the United States, that power could
76 not be exercised against itself. The sovereignty of Georgia was therefore not absolute, but subordinate to the nationality of the United States. There was nothing incompatible with such sovereignty, in a public arraignment in a court of law at the suit of a citizen of another State, in an action of assumpsit for the breach of a contract; and moreover, the Constitution, to which Georgia had acceded, authorized such a suit.*

These views were not concurred in by Judge Iredell, who delivered a dissenting opinion. That able jurist considered the question also in a Constitutional point of view, and as a question of strict construction. With great force of reasoning, and admirable precision and clearness of illustration, he analyzed the argument of the Attorney-General, and arrived at exactly the opposite conclusion. His opinion was, that no part of the existing law applied to this case; and even if the Constitution would admit of the exercise of such a power, a new law was necessary to carry the power into effect, and that assumpsit at the suit of a citizen would not lie against a State. One can scarcely arise from a careful perusal of this able opinion without being sensibly impressed with the force of the reasoning of the learned Judge, and the accuracy of his deductions; – lucid, logical, compact, comprehensive, it certainly compares very favorably with that of the Chief-Justice, in every respect, and as a mere legal argument must be admitted to be far superior.† The majority of the Court, however, concurred with the Chief-

* In reference to this decision Chancellor Kent observes in his commentaries: "It is a little *remarkable* that the Court, in one of its earliest decisions, should have assumed a jurisdiction which the authors of the Federalist had a few years before declared to be without *a color of foundation.*

† Judge Iredell may be regarded as one of the ablest of the many distinguished jurists who have graced the bench of the Supreme Court. He

Justice and granted the motion.

This decision created much excitement in the public mind at the time. The subject was at once brought before several of the State Legislatures, and an amendment of the Constitution proposed. The advocates of State rights viewed the decision as a direct attack upon the sovereignty of the States. Georgia openly defied the federal authority, and refused to enter her appearance. The Supreme Court, however, stood firm. At the February term, 1794, judgment was rendered against the State by default, and a writ of inquiry awarded. Where the controversy would have ended, it is impossible to conjecture, had not the question been put at rest by a speedy amendment of the Constitution, which declared that the jurisdiction of the Supreme Court should not extend to suits against a State by citizens of another State, or subjects of a foreign State. This amendment having been adopted, it was unanimously determined by the Court, at the February term, 1798, that no further jurisdiction could be exercised, in any case, past or future, wherein a State should be sued by citizens of another State.

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had been a delegate to the Constitutional Convention of the State of North Carolina, and was appointed to the Bench of the Supreme Court, in place of Mr. Harrison of Maryland, one of the originally commissioned judges, who declined. As a constitutional lawyer, Judge Iredell had no superior upon the bench. His judicial opinions are marked by great vigor of thought, clearness of argument, and force of expression. He did not always concur with the majority of his brethren in their constitutional constructions, and on such occasions rarely failed to sustain his positions by the strictest legal, as well as logical deductions. In the interesting case of Ware *vs.* Hylton, 3 Dallas, 199 – (referred to in sketch of Ch. J. Marshall) – his dissenting opinion exhibits uncommon research, learning and ability. As a legal argument it may be regarded as one of the best specimens that have been preserved of the old Supreme Court. In the case of Wilson *vs.* Daniel[], 3 Dallas, 401, (referred to in the subsequent sketch of Chief-Justice Ellsworth,) he also dissented, and his views relative to jurisdiction on a writ of error were subsequently adopted by the Court overruling the prevailing opinion in that case. Judge Iredell died in 1799, and was succeeded by Hon. Alfred Moore of North Carolina.

This is not a proper place, perhaps, to enter upon a review of that series of exciting political trials which grew out of the foreign relations of the United States, and commenced during the latter period of Mr. Jay's service on the bench. I may allude, however, to one of the earliest and most celebrated of these trials, – that
78 of Henfield, an American citizen, tried on an indictment for enlisting in a French privateer – as well on account of the extraordinary interest and novelty of the case itself, as for the purpose of bringing to view a most important principle advanced by the Chief-Justice, with the direct or tacit concurrence of nearly all his associates. The principle alluded to is, that by the common law, independent of any statute, the federal courts have power to punish offences against the federal sovereignty – a doctrine which seems to have grown out of the political emergencies of the times, but which has been shaken by subsequent decisions, and it is believed, is now finally abandoned. This doctrine is found laid down in a charge delivered by the Chief-Justice to the first federal grand jury ever impannelled, at Richmond, in the State of Virginia. He had been summoned, it appears, to hold this Court for this express purpose, and his charge, though not delivered to the particular grand jury by which Henfield was indicted, had been prepared with great deliberation and care, for the purpose of settling the law generally as applicable to this class of offenders. This charge (which was deemed of so much consequence as to be printed by order of the government, for the purpose of explaining abroad the position of the United States,) very clearly and explicitly enunciated the principle that any American citizen who should violate the neutrality recently proclaimed by the President, was to be deemed guilty of a violation of the laws of the United States, and liable to a prosecution in the federal courts, under an indictment at common law, for disturbing the peace; or, to quote the very language of the Chief-Justice, "That the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition, to maintain it; that, therefore, they who commit, aid, or abet hostilities against these powers,

or either of them, offend against the laws of the United States, and ought to be punished; and consequently, that it is your duty, gentlemen, to inquire into, and prevent all such of these offences, as you shall find to have been committed within this district."*

Under the rule of law thus laid down, and as subsequently applied and amplified by Judge Wilson, in one of his learned and scholastic discourses to the grand jury, two months after at Philadelphia, Gideon Henfield, a citizen of the United States, was indicted for enlisting on the "Citizen Genet," an armed vessel, commissioned by the French Revolutionary Government, then at war with England and other European states.

We may read in our day with a feeling of astonishment the proceedings on an indictment, deliberately found, gravely argued, and even sustained by the Court, on common-law principles, against a single individual, for an alleged offence against the law of nations, defined by no statute of the United States, and which, if a crime, under the law of nations, was precisely such an one as had been committed by Lafayette, Kosciusko, and Dekalb, in defence of American Independence. The case, of course, at once aroused party spirit, and political feeling. The fiercest invectives from both sides were launched by the respective partisans and opponents of the French republic at their adversaries. The English minister had demanded the arrest of Henfield; the French minister, after his arrest, demanded his release. The government was determined to sustain, in its full force, the proclamation of neutrality, and for that purpose, as we have seen, the aid of the Supreme Court had been invoked. It was not to be disguised that the contest would be formidable. There was among the American people a deep, and widespread sympathy with the young republic of France, struggling in what appeared to be its death agony, in a contest with that unhallowed coalition which Europe, under the lead of England, had raised to crush democracy in its cradle. The generous instincts of the American people were all for freedom. The great mass of the people did

* See the whole of this charge published in Wharton's State Trials, p. 49.

not reason upon, perhaps did not comprehend, the question of *policy* involved in the declaration of neutrality, and they could not, therefore, be made to understand the *crime* of Henfield in enlisting on a French cruiser, under the tri-color flag of liberty. Popular sympathy was strong in his favor. Brought to trial, all the formidable power of
80 the Court, consistent with a fair and impartial hearing of the case, was arrayed against him, but all to no effect. The well known ability of the Attorney-General, united with the legal acumen and forensic skill of the District-Attorney of Pennsylvania, Mr. Rawle,* was exerted in vain. In vain did the Court lay down with the most scrupulous and minute exactness, the doctrines of law, as settled

* William Rawle was born in Philadelphia in 1759, and was descended from an old and respectable family of the early settlers. Having commenced his legal studies in New York, he crossed the Atlantic, and was entered a student in the Middle Temple. Returning to America he entered upon his profession, but found his progress slow, so much so, that at one time he resolved to abandon it. Ten years passed before he could be assured of success. As to that success, it is enough to say, that for more than twenty years his business was very large, and he occupied, deservedly, a front rank at the Philadelphia bar. Mr. Rawle was much engaged in the political trials of that period. He never held but one public office, that of District-Attorney of Pennsylvania, which he received at the hands of Washington. His thoughts, habits, and feelings were all professional, and to his profession he devoted the best and most valuable part of a long life. In 1794, Mr. Rawle, together with Hamilton, accompanied George Washington into the western part of the State of Pennsylvania, for the purpose of quelling the insurrection which there broke out. In this expedition he formed one of the family, and shared the tent of Washington. Subsequently he was engaged in his official capacity, as the representative of the government in the prosecution of these offenders. Mr. Rawle was the author of a "treatise on the Constitution of the United States." He was also a member of the commission appointed in 1830, to revise and digest the civil code of Pennsylvania. He died in April, 1836. "His mind," says a writer, "was eminently clear and discriminating, and his arguments and speeches simple, strong, earnest and impressive." His amiability of temper, and kind and courteous deportment at the bar, are mentioned as among the most pleasing traits of his character and manners.

by the charge of Chief-Justice Jay. The jury rendered a verdict of "not guilty," and "citizen Henfield" retired in triumph amid the plaudits and acclamations of the crowd.* The verdict was regarded by the popular party as a substantial triumph over the government, as well as the Court. In some sense it was so, for it undoubtedly impeded the vigorous execution of the proclamation of neutrality, so far as the acts of individuals were concerned, though it did not of itself impair the doctrines laid down by the Chief-Justice, and the federal courts. Henfield was not acquitted on the ground of any misdirection as to the law of the case, but on the ground that the crime was not knowingly and willfully committed, and therefore, as Mr. Jefferson observed in a letter to Mr. Morris, then in England, the jury did no more than the Constitutional authority might have done.

The doctrine of a common law jurisdiction, in criminal cases, seemed to be thus an established principle in the federal courts. Chief-Justice Jay held the April session of the Circuit Court, in 1794, for the Pennsylvania district, and had occasion again to apply the same principle. Joseph Ravara, a Consul of Genoa, was brought to trial before him on an indictment for sending threatening letters to the British minister, and others, with a view of extorting money. Ravara's counsel, Messrs. Dallas, Lewis,† and Heatley, seem to have placed his defence mainly upon the ground, that the act complained of was not a crime at common law, nor was it made such by any

* So elated was the French minister, Genet, at this triumph over the Court, that he immediately issued cards to a grand dinner party to meet "citizen Henfield," and that patriotic personage was formally taken under the protection of the French republic. It may be interesting to the reader to know that sallying out soon after on a new excursion, he was captured by a British cruiser, and thus "citizen Henfield" passes from the stage.

† William Lewis was born in Chester County, Pennsylvania, in 1751, on a small farm, in a family whose stringent Quakerism, it is said, held a liberal, and especially a professional education to be inconsistent both with common sense and religious duty. His early education was therefore deficient, nor did he in after life reach any considerable degree

positive law of the United States. Judge Jay, in his charge to the jury, ruled otherwise, and sustained the indictment on common law principles. The prisoner was convicted, but was afterwards pardoned on surrendering his commission and *exequatur*.

It only remains to be added, on this subject,
82 that this doctrine, so positively asserted, and rigorously applied by the Chief-Justice and most of his associates in the Supreme Court, was a few years after unsettled, and may now be considered as entirely overthrown. The keen, bold, and penetrating mind of Judge Chase, gave it the first blow on the trial of Worrall, at Philadelphia, in 1798, when in the face of the known opinions of all his associates, and as a very judicious writer remarks, "with that quick perception of the spirit of the Constitution, for which his clear intellect was so conspicuous" – he

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of literary attainment. His learning was almost exclusively confined to his profession, and though several times elected to Legislative bodies, and for a brief period, under Washington's administration, holding the office of District Judge of Pennsylvania, yet it is as a lawyer, and mainly as an advocate at the bar, that he is best and most favorably known. Lewis commenced his practice in 1773, and though his business was interrupted during the Revolution, yet it again revived at the close of the war, and owing in some degree to his supposed partiality for the royal cause during the Revolution, he at once succeeded in obtaining a most extensive and lucrative practice among the Quaker loyalists of Pennsylvania. Mr. Lewis was engaged in some of those celebrated criminal trials which began to occupy the attention of the community, soon after Mr. Jay left the bench. He was the leading counsel in the trial of the western insurgents, and it is said, that his pride of conscious superiority at the bar was so much wounded by the request of the defendants' friends to admit Mr. Dallas as his associate, that he expressed himself with such asperity and superciliousness in regard to Mr. Dallas, as called out from the latter gentleman a challenge. This Lewis accepted, but the difficulty was amicably arranged, and both gentlemen afterwards appeared as counsel for Fries, the first of the insurgents who was brought to trial.

Mr. Lewis continued at the bar, in the practice of his profession, with increasing reputation and unabated ability, until the time of his death, which occurred on the 15th of August, 1819.

abruptly and boldly denied that the federal courts possessed any such common law Jurisdiction.* Soon after, Judge Washington, at the circuit, coincided in the opinion of Judge Chase. He was followed by that eminent jurist, Chief-Justice Marshall, who in more than one case, advances the same opinion; and the question was finally put to rest by the decision of the Supreme Court, in United States *vs.* Hudson,† in which there appears to be no dissent from the opinion delivered by the Court, that a common law offence, not specified by statute, is not indictable in the Federal Courts.‡

It was while the Chief-Justice and Judge Iredell, with the District Judge of Virginia, were holding the Circuit Court at Richmond, in 1793, that the great case of Ware, Administrator, *vs.* Hylton and others, relative to the right of British creditors to collect debts of American citizens, contracted before the war, came on for trial. This case called out a display of forensic talent, eloquence and learning, that hitherto had been without a parallel in the courts of Virginia, and placed the bar of that State, in the opinion of the federal judges, according to Mr.

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* The District-Attorney, Mr. Rawle, was in the midst of his argument in reply to Mr. Dallas, discussing the question of jurisdiction in another point of view, when to his utter dismay, and the astonishment of the whole bar, Judge Chase interrupted him with the question: "Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject; the indictment cannot be maintained!" The question, it was supposed, had been long since put at rest, and beyond all hopes of a resurrection at the hands of the "metaphysical Virginia lawyers," as they were called by an eminent Federalist of that day.

† 7 Cranch Rep., 32. See also U.S. *vs.* Coolidge, 1 Wheaton, 415.

‡ The principle is considered too well settled to be again shaken. Justice McLean in his late opinion in the Wheeling Bridge case, says: "It is admitted that the federal courts have no jurisdiction of common law offences." And Chief-Justice Taney, in his dissenting opinion says: "It has been settled since the beginning of this government, that the courts of the United States, as such have no common law jurisdiction, civil or criminal, unless conferred upon them by act of Congress." – State of Pennsylvania *vs.* Wheeling Bridge Co., 13 Howard, 519.

In *Ware v. Hylton*, Patrick Henry's eloquence, combined with co-counsel John Marshall's reasoning, transported Justice Iredell.

Wirt's account, ahead of all others in the Union. The cause was originally tried in 1791, and was now brought on a second time before the Chief-Justice and his associates. Among the array of counsel for the defendants, the American debtors, were Patrick Henry and John Marshall. Mr. Wirt, in his life of Henry, gives a very graphic and animated description of this celebrated trial, and a copious sketch of the speech of the great Virginian orator, which is said to have required three days for its delivery. He was followed by Marshall, who brought the heavy batteries of his logic to bear upon the breach made by the powerful eloquence of his associate. Alexander Campbell and Col. Innis, two of the most distinguished orators at the bar of Virginia, took the floor on the same side, and the counsel for the plaintiff followed in reply.* Some idea of the effect of this magnificent exhibition of forensic skill, this grand and imposing display of eloquence, may be obtained from the impression left upon the mind of Judge Iredell, who in his written opinion, after the argument, declares with more warmth and enthusiasm than usually belongs to the unimpassioned judicial mind, that the arguments in the case displayed an ingenuity, a depth of investigation, and a power of reasoning, equal to anything he ever witnessed, and that some of them had been

* See notice of this trial in the following sketch of Chief-Justice Marshall.

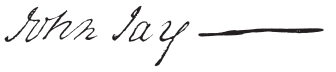
"adorned with a splendor of eloquence surpassing what I have ever felt before."*

Chief-Justice Jay presided for the last time at the term of the Supreme Court, in February, 1794. It was at this term that the issue in the case of Georgia *vs.* Braislford, which I have already alluded to, was tried. At the same term the case of Glass *vs.* The Sloop Betsey,† presenting one of the earliest questions raised in the Supreme Court on the subject of admiralty jurisdiction, was argued and decided. The Betsey was a Swedish vessel, the cargo of which was owned jointly by Americans and Swedes. She had been captured by the "Citizen Genet," a French privateer, and sent into Baltimore. The owners of the Betsey filed a libel in the District Court of Maryland, claiming restitution, and the captors (who had undertaken to proceed before the French Consul for a condemnation of the vessel) pleaded to the jurisdiction, that the Federal Courts had no power to take cognizance in the case of a captured vessel, belonging to a foreign and neutral power. After an elaborate and exhausting argument, Chief-Justice Jay delivered the unanimous decision of the Court, wherein, without assigning any reasons, he overruled the plea as insufficient, and reversed the decision of the District Court. In respect to the admiralty jurisdiction claimed to be exercised within the limits of the United States by the Consuls of France, it was determined by the court that no such power could be exercised, inasmuch as none was reserved or conferred upon these functionaries by the treaty. This important case established the admiralty jurisdiction of the Federal Courts, in cases of prize and captures on the high seas.

At the expiration of this term of the court, Judge Jay, as has been mentioned, presided at the April session of the Circuit Court at Philadelphia, and it was during this session that Ravara was tried. About the same time he was commissioned as Minister to England, and although he accepted this appointment without vacating his seat on the bench, yet he never afterwards acted in

* See opinion of Judge Iredell in the Report, 3 Dallas, 275.

† 3 Dallas Rep. 6.



a judicial capacity. On his return to America, in 1795, having in the mean time been elected Governor of New York, he resigned the office of Chief-Justice of the United States.

VII

The Jay Treaty

No portion of the public career of Mr. Jay has been the subject of more unsparing criticism, than that upon which he was now about to enter. A full history of it involves the discussion of political questions, happily long since laid at rest, and revives the memories of party controversies, which for animosity and bitterness of feeling, have never been surpassed in this country or Europe. Such a review would be fruitless and unprofitable. Without entering upon it in detail, therefore, I shall allude to these events only so far as may be necessary, in order to trace the history of the mission to England, and to sketch, briefly, the part sustained in it by Judge Jay.

On the execution of Louis XVI., England joined the European coalition, and commenced hostilities against the French republic. Up to this period, and even long afterwards, and as late as the overthrow of the republic by Bonaparte, the popular feeling in America was warmly enlisted on the side of France, and the prominent republican leaders did not hesitate to express their sympathy with the progress of popular principles in Europe.* A class of public men in America, however, like Mr. Pitt, Mr. Burke, and their adherents in England, never

* At a public dinner in New York, in 1796, Chancellor Livingston gave the following toast:

> "May the present coolness between France and America produce, like the quarrels of lovers, a renewal of love."

could be brought to regard with satisfaction the rapid progress of the democratic principle in Europe, as developed in the startling drama of the French Revolution. At the head of these stood the acknowledged chiefs of the Federal party, Hamilton, Adams, and Gouverneur Morris,* and with these, doubtless, Jay concurred in sentiment on
88 this subject. So strong was this bias against the French Revolution on the mind of Hamilton, that with all his clear, far-seeing sagacity, and practical statesmanship, he doubted whether it would be proper for the United States to receive a minister from the French republic, or whether, if a *regent*, pretending to represent the monarchy beyond the boundaries of France, should send a rival ambassador, the United States ought not to receive *both*! This grave doubt Hamilton proposes in a letter to Jay, but the question did not for a moment perplex the latter. The Chief-Justice entertained a too clear and just conception of international law, and of the principles which should regulate the intercourse of nations, to hesitate for a moment, and he accordingly advises against receiving "any minister from a regent, until he was regent *de facto*."†

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* The journal of Gouverneur Morris – an acute observer, as well as an accomplished gentleman – during his stay in Paris, exhibits his strong conservative, perhaps we may say, monarchical, sentiments. Mr. Morris had no faith in the revolution from the outset. He sided with the King, on all occasions, against the liberals. He sneered at Sieyes, disputed constantly, and always warmly, with that "strong-minded woman," Madame De Stael, in her own drawing-rooms, and almost quarrelled with Lafayette at his own dinner table. Mr. Morris denounced the Constitution of 1791 as "a wretched piece of paper" – the same Constitution which Lafayette regarded as the perfection of wisdom, and that liberal and enlightened British statesman, Mr. Fox, pronounced "the most stupendous and glorious edifice of liberty which has been erected on the foundation of human integrity, in any age or country."

† When this question was submitted by Washington to his Cabinet, Hamilton and General Knox thought that the French minister ought to be received *with qualifications*. The sound judgment of the President, however, acceded to the reasoning of Mr. Jefferson, with whom the Attorney-General, Randolph, agreed that the French Minister should be received without any qualifications.

George Washington commanded Jay's loyalty as he did so many others', and thus while Jay may have protested the difficulties and risks involved in his mission to England, his correspondence makes clear that he was honored by Washington's trust.

The arrival of Genet in America, as minister from the French republic, and the imprudent and exceptionable conduct of that personage, contributed to fan the flames of party spirit, and to open wider the breaches between the Republicans and the Federalists. Washington held with a firm and steady hand the reins between the two factions, turning neither to the right hand nor to the left, but rigidly and impartially adhering to the principles of neutrality which he had proclaimed, with the unanimous advice and assent of his Cabinet, including Jefferson himself. It was a position of no ordinary embarrassment and difficulty. The Republicans were loud and earnest in expressing their sympathy for republican principles in Europe, and their desire for a closer union with France against the natural enemies of liberty; the Federalists were no less earnest, nay were bitter and vindictive, in their denunciations of jacobinism and "French principles." On the one hand the British minister, Mr. Hammond, uttered the complaints of his Government against the United States for discriminating against British subjects and British interests, in violation of treaty stipulations; on the other, the republican envoy, Genet, reproached the public authorities for the ingratitude of America, and threatened to appeal from the Government to the people.

The conduct of England was such, indeed, as to cause deep and wide-spread indignation among all classes of our citizens. England had never yet carried

out, either according to its spirit or its letter, the treaty of peace. British troops still garrisoned several posts on our frontiers, and within the jurisdiction of the United States. American citizens were excluded from navigating the great lakes; and Great Britain had neglected to make compensation for negroes carried away by the British
90 fleet, after the war.* These violations of the treaty of peace were admitted by Great Britain, but justified on the ground that the United States had not fulfilled her engagements under the same treaty – a charge specifically made and urged at length by Mr. Hammond, the British minister, but triumphantly answered and conclusively refuted, in a very elaborate and most able communication from Mr. Jefferson, the American Secretary of State.†

Other causes of differences, and grievances growing out of the belligerent attitude of England towards France, served, soon after, to widen the breach between her and this country. Under the British Orders in Council, the last of which authorized the capture by British cruisers of all vessels carrying supplies to any French colony, or laden with its produce, numerous American vessels were seized and sent to England for "legal adjudication." The right of search was claimed, and American sailors were torn from the decks of American vessels, under pretence of their being British subjects. These and other outrages committed upon our commerce and maritime rights, for some time previous to the spring of 1794, justly excited the indignation of the popular party, who loudly demanded of Congress the adoption of vigorous and energetic war measures. It required all the firmness and prudence of Washington, barely sustained in the Senate, and with a small majority against the Federal policy in the lower house, to stem the current of popular passion, and avert the threatened storm. The excitement of party gradually reached such a point as to overstep the bounds of propriety, and even decency; and the clamors of mob

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* Letter of Mr. Jefferson, Secretary of State, to Mr. Hammond, the British minister, Dec. 15th, 1791, American State Papers, Vol. I., p. 179.

† See this correspondence in Vol. I., American State Papers.

violence invaded the habitation of the President himself. According to the statements, perhaps too highly colored, of Mr. Adams, "innumerable multitudes" surrounded the President's house from day to day, "hurrahing, demanding war with England, cursing Washington, and crying success to the French patriots and virtuous republicans."*

The Democratic party in Congress were in favor of prompt and immediate action against England, looking mainly toward commercial restriction. Steps were taken to increase the military force; an embargo was laid for thirty days on all vessels bound to foreign ports; and a resolution was introduced to suspend commercial intercourse with Great Britain till indemnity should be made for the losses sustained under her orders in council, and until she surrendered the military posts agreeably to the treaty of peace.

It was at this moment, when the public mind was in the highest state of ferment, and a speedy rupture seemed inevitable, that Washington determined to make another effort to reconcile the differences between the two countries, and preserve peace. He resolved upon sending a special envoy to England, and he selected for that purpose the Chief-Justice of the United States. As in the case of the Spanish mission, the appointment was one in no way to be coveted or desired, and indeed was repugnant to all Mr. Jay's ideas of personal convenience. But in this as in almost every act of his public life, he demonstrated that his conduct was governed by a high and exalted sense of duty, and not by mere personal considerations; and the rule of action which he had marked out for himself did not suffer him to shun the responsibility or decline the appointment. "There is here," he remarks in a letter to Mrs. Jay, on the 15th of April, 1794, "a serious determination to send me to England, if possible to avert a war. The object is so interesting to our country, and the combination of circumstances such, that I find myself in a dilemma between personal considerations

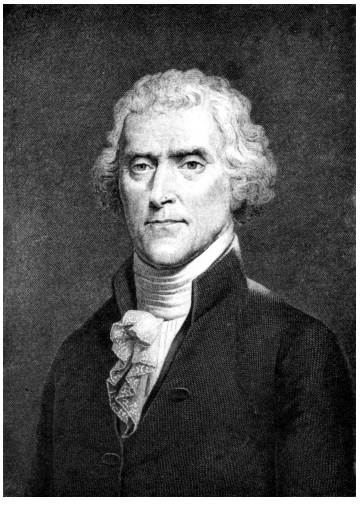
* The "innumerable multitudes" of Mr. Adams have been discredited, on good authority. Perhaps the rest of the statement is also to be taken with considerable abatement.

and public ones." And again, a few days after, "So far as I am personally concerned, my feelings are very far from exciting wishes for its taking place. No appointment ever operated more unpleasantly upon me; but the public considerations which were urged, and the manner in which it was pressed, strongly impressed me with a conviction that
92 to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comfort."

The Chief-Justice was at this time holding the Circuit Court at Philadelphia. The nomination was sent in, and acted upon by the Senate, on the 19th of April, 1794. It appears that the object of the mission was distasteful to the party in opposition in the Senate. Some of the members, among whom was Mr. Burr, refused to sanction it, on personal grounds, alleging the impropriety of the nomination itself. It was, however, confirmed by a decisive vote, 18 to 8. Two days afterwards the House passed a bill, prohibiting, at the end of a limited period, the importation of articles of British growth or manufacture into the United States – a bill that of course would have rendered Mr. Jay's mission nugatory. Its passage in the Senate was only prevented by the casting vote of the Vice-President.

Within a month after his appointment Mr. Jay sailed from New York, accompanied by his son, and Col. Trumbell, as Secretary of the Legation. Coming as the envoy of the peace party in the United States, and charged directly to negotiate a treaty between the two countries, he was of course received with every proper mark of respect and attention. His negotiations and intercourse with Lord Grenville, the Secretary of Foreign Affairs, were of the most friendly and agreeable character; and so far as appears, tended to create in each a mutual respect for the other. With this gentleman, mostly in friendly and unreserved intercourse, and by oral communication, Mr. Jay negotiated and finally settled upon the terms of that celebrated treaty, the promulgation of which in the United States brought down upon the head of its author such a tempest of popular indignation.

The terms of this treaty, and the policy or impolicy of its ratification, were fully discussed at that day,



Thomas Jefferson admired Jay's 1774 Address to the People of Great Britain as "the production of the finest pen in America," but by 1795 the two were on opposite sides of the new American politics, and Jay was a "rogue of a pilot" who had run the vessel of state "into an enemy's port."

and with great vigor of argument. Indeed it became for a time the dividing line of political sentiment, upon which those two distinguished leaders, Jefferson and Hamilton, representing the rival political parties of the country, irrevocably separated. Hamilton, with his accustomed ardor, ably defended the treaty in some papers under the signature of "Curtius" and "Camillus." Jefferson, in a letter to Governor Rutledge of South Carolina, pronounced it an "execrable thing," and nothing more than "a treaty of alliance between England and the Anglo-men of this country, against the Legislature and the people." In a letter to Madison, he says, alluding to Hamilton's pamphlet: "Hamilton is really a Colossus to the anti-republican party; – without numbers, he is a host in himself." * * * * "In truth when he comes forward there is nobody but yourself who can meet him." * * * * "For God's sake take up your pen and give a fundamental reply to 'Curtius' and 'Camillus.'" This Mr. Madison did, and very ably replied to the argument of Hamilton.

As to the merits of the treaty itself, very few, I believe, at this day, will undertake to defend it on *principle*, whatever may be said of it on the score of *policy*. Mr. Jay declares, and doubtless with truth, that it was based upon the very best terms that could have been obtained; yet Washington himself hesitated to give it his approval, and

it was only by a close vote that it escaped the ordeal of the Senate. As a commercial treaty the advantages were altogether on the side of Great Britain. There was no reciprocity in it.* It was a treaty between a strong and a weak power, where the former insisted upon much and yielded little, and where the latter agreed to receive that little in order to purchase the boon of future peace and security.

Great Britain, it is true, agreed to surrender the military posts, but this she was already bound to do by the treaty of peace twelve years before; she also agreed to pay for property which her subjects had illegally captured, after a failure to recover of the captors in due course of law. But with the exception of these two points, she yielded little or nothing that it was an object to her to retain. The treaty did not even settle existing disputes, for while providing for the more easy and certain collection of British debts in the United States, it gave no indemnification for the negroes carried away by the British troops at the close of the war; nor did it contain any concessions in regard to the right of search and privateering claimed and exercised by British armed vessels on the high seas.

Mr. Jay had been instructed by his government to procure a direct trade with the West Indies in our own vessels, "of certain defined burdens." The part of the treaty which was negotiated under these instructions, is perhaps the most objectionable, and indeed was most warmly attacked at the time. The manner in which they were carried out seems scarcely reconcilable with their *spirit*, even if it actually came up to the *letter*. True, the treaty did provide that England should open these ports, but only to vessels, or, as a member of the House of Representatives† expressed it, "canoes" of the burthen

* In this respect it compares very unfavorably with the treaty with France subsequently negotiated by Ellsworth and his associates, which Hamilton and some of the Federalists severely censured. See subsequent sketch of Ellsworth.

† Mr. Lyman. In the debate on the treaty in the House of Representatives, alluding to its want of reciprocity, he remarks: "In Europe we are told we may freely enter her (Great Britain's) ports. In the West Indies we are *to sail in canoes of seventy tons burthen*. In the East Indies we are not to

of seventy tons; – and as a restriction upon this slight relaxation of the British colonial system, and perhaps as an *equivalent* for it, the American minister consented to insert the stipulation that all cargoes taken in such vessels should be landed in the United States; and further that the United States should ship no molasses, sugar, coffee, cocoa, or cotton to any other part of the world! It may seem surprising at this day that so shrewd and able a negotiator as Chief-Justice Jay should have consented, under any circumstances, and in view of any possible consequences, to accede to such humiliating restrictions. The explanation is to be found in two facts: First, that a weak power always treats under disadvantageous terms with a strong one. Second, the disadvantage in the present case was increased because the negotiator was known to the British minister to be ardently desirous of procuring peace, and the friendship and good will of Great Britain. On the latter point the remarks of Prof. Tucker, in his Life of Jefferson,* are so discriminating and just, that no apology is necessary in presenting the reader with the following passage. While awarding to the distinguished negotiator of the treaty, in the execution of his trust, the highest talents as well as zeal and patriotism, Prof. Tucker remarks: "But the misfortune was, that Mr. Jay left the United States under the firm belief, generally entertained by his party, that peace with England, the prevention of a closer fraternity with the French, and the continued

settle or reside without leave of the local government. In the sea ports of Canada and Nova Scotia we are not to be admitted at all, while all our rivers and countries are opened without the least reserve. Yet surely our all was as dear to us as the all of any other nation, and ought not to have been parted with but on equivalent terms."

Mr. Madison spoke in opposition to the treaty in the same debate. He took particular exceptions to that portion of it which permitted aliens to hold lands in perpetuity. Other portions of the treaty he found equally objectionable. "With respect to the great points in the law of nations comprehended in the stipulations of the treaty," he remarks, "the same want of real reciprocity, and the same sacrifice of the interests of the United States are conspicuous."

* Life of Jefferson, vol. I. page 507.

ascendancy of the Federalists, all depended on his making a treaty. Every thing then which could interest either his patriotic or party feelings, (and neither were lukewarm,) was hazarded on this single step. The moral necessity under which he acted was as well known to the British ministry, as it was felt by himself; and they naturally
96 profited by it to insist on every thing which he could venture to give, and to concede nothing which they could decently refuse."

Without entering upon a further review or criticism of this celebrated treaty, I dismiss the subject with the single remark, that containing such a provision as that in regard to the West India trade, and securing peace and friendship with England without corresponding reciprocal commercial advantages, it is not at all remarkable that the treaty should have been exceedingly distasteful to the republican party. Nor is it a matter of surprise that such men at the south as Pinckney and Rutledge should have denounced it in unmeasured terms; that Madison should have censured it in the strongest language on the floor of the House of Representatives; and that Jefferson himself, should for the moment have been ruffled in the serenity of his philosophic temper, and even have forgotten the ordinary courtesies of language, in giving expression to his dissatisfaction.*

A few days after Jay's arrival in America, the Senate assembled, and the treaty was submitted by the President. On the 24th of June the Senate advised the ratification of the treaty, except the article relating to the West India trade. Soon after, and while its consideration was still before the Senate, it was made public by a senator from Virginia.† At once the public was in a blaze of excitement, or, to use the language of the biographer of Mr. Jay, the torch was applied to that mass of combustibles which had long been collecting, and the intended explosion instantly followed. In a free country no one has a right to object to the free and unrestrained expres-

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* In one of his letters Jefferson calls the negociator of the treaty *a rogue of a pilot*, who had run the vessel of state into an enemy's port.

† [Stevens] T. Mason.

sion of public opinion; – but at the same time, while the people have a right to make known their sentiments without reserve in regard to public men and public measures, this liberty ought not to be abused, or be suffered to degenerate into licentiousness. On this occasion, though unquestionably much might be excused to the intensity of public feeling, yet no one will undertake to justify the violence of language and action employed by some of those who denounced the treaty. It was doubtless unpopular. It was such as a large portion of the people of the country did not and could not approve. But to look beyond the treaty itself, and attack the character and motives of the negotiator, was both illiberal and unjust. Some few even of the Democratic societies, transcended the bounds of decency as well as propriety, and talked of the guillotine, and of bringing John Jay to trial and justice; – while the mob did not hesitate, in following the example, to parade the effigy of Jay through the streets, labelled, "Come up to my price, and I will sell you my country;" and publicly to burn the obnoxious treaty in front of his own house.* These details, however, are not necessary to be dwelt upon, and it is gratifying to know that such proceedings were neither shared in, nor approved, by temperate and intelligent political opponents, nor by the great mass of the Republican party.

Washington deliberated carefully and hesitated a long time before he signed the treaty. His habitual prudence, and his earnest desire to preserve the peace of the

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* It is but simple justice to say that the commission of outrages like these was not confined to the Republicans. Similar acts were perpetrated by the other party. Jefferson was subsequently treated in the same manner in New England; and during the absence of Mr. Gerry in France, his unoffending wife and family were subjected to unheard of insults. "On several occasions," says Mr. Austin, in his life of Gerry, "the morning sun shone upon a model of a guillotine erected in the field before her windows, smeared with blood, and having the effigy of a headless man. Savage yells were uttered in the night time to disturb the sleep of this family of females, and the glare of blazing faggots suddenly broke upon its darkness to terrify them with the apprehensions of immediate conflagration." – 2 *Austin's Life of Gerry,* 267.

country, finally overcame his scruples and determined his conduct; and on the 15th of August, 1795, he gave it his official sanction, and it thus became the law of the land. The treaty, however, had still a narrow escape in the House of Representatives the following spring, on the question of passing the laws necessary to carry it into
98 effect. The sum of $90,000 was to be appropriated for this purpose, and a determined opposition was manifested. On a question taken in the House, it was found that the vote was equally divided, and the chairman, though opposed to the treaty, gave his casting vote in favor of its execution. Soon after the necessary laws were passed, and the treaty went into full effect.

VIII

GOVERNOR

It has already been mentioned that Chief-Justice Jay had been elected Governor of the State of New York during his absence, and had been put in nomination without even his knowledge or consent. Three years before, while still holding his seat on the bench of the Supreme Court, he had consented to be put in nomination for this office against Governor Clinton. The election had been unusually close and animated. Mr. Jay received the greatest number of votes, but owing to an informality in the vote of the counties of Otsego, Tioga, and Clinton, these ballots had been rejected, and Mr. Clinton was declared by the canvassers duly elected Governor by a majority of 108. It was in this election that Mr. Jay's old friend, Chancellor Livingston, left the ranks of the Federal party, and allied himself to the Republicans, assuming an attitude of decided hostility to Mr. Jay's election. The decision of the canvassers was the subject of much dissatisfaction to the party which had supported Mr. Jay, and an investigation was had thereon at the ensuing session of the Legislature, but the house of Assembly, by a majority of only four votes, resolved that the canvassers had not conducted themselves with impropriety in the execution of their trust, and Mr. Clinton accordingly continued to discharge the duties of the office. These considerations doubtless influenced the party which had supported Mr. Jay, to present his name again for the same office, and that too without his knowledge, and before his arrival from Europe. Mr. Clinton declined a re-election,

and the Chief-Justice, Mr. Yates, was selected as the opposing candidate. Jay was elected by a large majority, and he was welcomed by his friends with this flattering announcement on his arrival at New York, only two days after the result had been officially ascertained.

The author of the Political History of New
100 York thinks, and perhaps very correctly, that if the British treaty had been published on the 1st of April instead of the 1st of July, Jay could not have been elected Governor. In proof of this assertion he alludes to the fact, that although up to that time the city of New York had been almost unanimously Federal, and even De Witt Clinton, then a young man just entering public life, had failed of an election to the Legislature at the time of Jay's election, yet the very next year Edward Livingston, a decided Republican, was elected to Congress from that city. Be this as it may, it is certain that Mr. Jay came into office with a very flattering popular vote. The elections had generally been in favor of the Federalists, and the Governor found himself supported by a decided majority in both branches of the Legislature. The late venerable Chief-Justice Ambrose Spencer, *Clarum et venerabile nomen,*[*] was the same year elected to the State Senate. Though then comparatively a young man, but thirty years of age, his great talents were known and appreciated, and he at once assumed a position of commanding influence in support of the administration. Besides Mr. Spencer, the Governor found himself sustained in the Senate by many other gentlemen of great ability and influence, among whom may be mentioned Gen. Schuyler, Mr. Cruger, and Mr. Ph. Livingston.

The Legislature convened in the city of New York on the 6th of January, 1796. The new Governor, as was usual at that period, met the two houses, and delivered a speech at the opening of the session, which though neat and appropriate, contained nothing very striking or remarkable. He declared his determination "to regard all his fellow-citizens with an equal eye, and to cherish and advance merit, *wherever found.*" If this declaration referred

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* "A distinguished and venerable name."

to the dispensing of executive patronage, it was a declaration which, however honestly intended, was not, and probably could not, have been consistently carried out. Jay had been elected as a Federalist, and opposed by the Republicans, and his fidelity to his political friends, it is believed, has never been questioned. And although, in those primitive days, offices were not yet regarded as the "spoils of victory," and removals for opinion sake were comparatively unknown, yet when an office had become vacant by resignation or otherwise, it was generally filled by the appointment of a political friend, rather than of a political opponent. The course of Mr. Jay was no exception to this rule. Indeed, it had heretofore been made a cause of perhaps just complaint against him and Generals Hamilton and Schuyler, that, through their controlling influence with the President, most of the appointments under the Federal Government had been made from the ranks of the political opponents of Gov. Clinton and the Republicans. Nor does it appear that Gov. Jay ever urged upon the council of appointment the nomination of an anti-Federalist to office on the ground of superior merit alone.

The answer of the two houses to the Governor's speech was highly laudatory, going even beyond the bounds of ordinary compliment. "The evidence of ability, integrity and patriotism," it says, "which have been *invariably* afforded by your conduct in the discharge of the variety of arduous and important trusts, authorize us to anticipate an administration conducive to the welfare of your constituents." The word "*invariably*" was not contained in the original draft. It was inserted by the Senate, on motion of Mr. Spencer, by a vote of 11 to 6, "thus repelling in unequivocal terms" – remarks the son and biographer of Mr. Jay – "the calumnies with which the opposers of the British treaty had found it convenient to assail the minister who negociated it." Such, no doubt, was the object of Mr. Spencer's motion, and so far as a party vote in a legislative body may be said to reflect public sentiment, it was successful. It may be thought surprising that Mr. Spencer himself did not always continue to yield the same unqualified approbation to Mr. Jay's political

actions. Before the close of the next gubernatorial term, we find him enrolled with the Republicans, and in connection with De Witt Clinton and another opposition member of the Council, sending in to the Assembly a paper, in which the character and conduct of the Governor are criticised with much asperity. This disagree-

ment grew out of the contest between the Governor and Messrs. Clinton and Spencer, then in opposition, and members of the council of appointment, relative to the right of nominations to office – the Governor claiming an exclusive right of nomination, and the council, which consisted of four Senators, three of whom were in opposition, claiming a concurrent right.*

It was during this year that the purpose of Washington to decline a re-election and to retire to private life, became known. Jay had been one of his warmest personal and political friends. No man in the State of New York, not even Hamilton, enjoyed in a higher degree the esteem and confidence of the first President. In his annual speech to the Legislature, at their meeting in November, 1796, the Governor, alluding to the fact

* From this it appears that notwithstanding Gov. Jay's declaration in his opening speech, his practice was uniformly to dispense official patronage among his political friends. Mr. William Jay, in his memoirs of his father, does not, indeed, claim that the Governor ever appointed anti-Federalists to office, but regards the fact that he made no removals, as evidence of the sincerity of his intention " to dispense his patronage for the good of the whole, and not of his friends." The explanation, it must be confessed, is not entirely satisfactory. It ought not, certainly, to be claimed as a peculiar merit in Governor Jay, that he declined to make removals, at a day when – as Mr. Barnard remarks in his able discourse on Chief-Justice Spencer – removal from office on account of political opinions, was unknown. Nor, can it be regarded as a fulfillment of the declaration made by the Governor, of his intention to "advance merit *wherever found*." In declining to make removals, Gov. Jay is entitled to no more, and no less, credit than his distinguished opponent, Gov. Clinton, who, on being again reinstated in office, says Mr. Barnard, utterly refused to give the practice the sanction of his name, and even caused his solemn protest to be entered on the journals of the Council, against some of the removals.

of Washington's purpose to retire from public life, delivered a very beautiful eulogium upon the character of that great and good man. It may here be mentioned as an instance of the friendship and unreserved confidence existing between them, that General Washington submitted to Jay and Hamilton the draft of his celebrated farewell address, for revision and approval. The subject has excited some attention, from the fact of a copy of this address having been found in the hand-writing of General Hamilton, from which circumstance its authorship was attributed to him. Many years after, Governor Jay, in a letter to a friend, explained the circumstance as follows: Washington sent the draft to Hamilton with a request that he would confer with Jay on the subject, and suggest any alterations that might occur. The conference took place at the house of Jay. Several additions and modifications were proposed, and, at the suggestion of Jay, instead of interlining and mutilating the original draft, Hamilton copied it entire, incorporating into it the proposed alterations. This was sent to General Washington, Hamilton probably retaining the copy, which was subsequently found among his papers.

The vote of the State of New York, at this Presidential election, as is well known, was cast for Adams and Pinckney, for President and Vice-President of the United States. That remarkable man, whose name has become a sinister omen in the political history of the country, Aaron Burr, was sustained by the Republicans for Vice-President, with Mr. Jefferson for President. Burr was then a member of the Senate of the United States. His term of service expired in the spring of 1797, and the Legislature being strongly Federal, General Schuyler was elected to succeed him. Burr returned to New York and immediately offered himself as a candidate for member of Assembly. The Republican ticket was elected in the city by about a thousand majority, and at the ensuing session Colonel Burr appeared in the Legislature with De Witt Clinton,* as one of his colleagues from New York, to orga-

* This was the first appearance of De Witt Clinton in public life. He was then about 28 years of age.

nize a vigorous and active opposition to the administration of Governor Jay.

This session of the Legislature commenced at the city of Albany, on the 2d of January, 1798. The speech of the Governor was mild and judicious, avoiding any allusion to political matters, and being confined mainly to the
104 domestic affairs of the State. It was well received by both houses, and a respectful answer returned. Nevertheless, a vigorous opposition was manifested in the Legislature, under the lead of Burr and other prominent Republicans, although no measure of any great political importance was discussed, except the bill to abolish slavery in the State, which passed the Assembly, but was lost in the Senate – a bill, it must be added, which Governor Jay warmly approved.

The first term of the Governor was drawing to a close. The election was to take place in April, of this year, and the campaign was carried on with great vigor during the winter session, outside as well as in the Legislature. The Republican party had been gradually gaining strength, and was directed by able and resolute leaders. It had life, activity, energy, character, talent, and withal the popular sympathy to invigorate and sustain it. It marshalled itself under the lead of those experienced and veteran statesmen, Chancellor Livingston and George Clinton. It availed itself of the indefatigable exertions of that able, adroit, clear-headed, and not over-scrupulous politician, Aaron Burr. It numbered among its younger members, such men as Edward Livingston, whose name and reputation have since become national, De Witt Clinton, whom General Hamilton, it is said, at one time thought would become a Federalist, and Ambrose Spencer, who had just enrolled himself in the Republican ranks. With such an array of influence, energy, and talent on its side, the Republicans might well hope for success; but the Federal party stood firm, and indeed seemed invincible so long as it was sustained by the exalted character and wide-spread personal popularity of John Jay, and guided by the colossal intellect of Alexander Hamilton.

The election was held in April. Each party selected, perhaps, under all the circumstances, its stron-

Aaron Burr, a longtime political opponent of John Jay and Alexander Hamilton, killed Hamilton in a duel in 1804. Three years later, John Marshall presided over Burr's trial for treason in connection with Burr's still-mysterious military expedition on the American frontier.

gest candidate. The Republicans supported Chancellor Livingston; the Federalists again rallied around Gov. Jay. We are told by his son that he would gladly have retired from the contest. It was peculiarly disagreeable to him to have for a rival and opponent, his old friend and relative, the Chancellor; but, remarks Mr. William Jay, "his fellow-citizens still claimed his services, and he resolved not to abandon the helm when the lowering clouds portended a storm."

The result is well known. Gov. Jay was elected, and by a large majority.* The Federalists were every where successful, and carried the Legislature. But, from the smoke of the contest, some of the opposition leaders emerged triumphantly, and among these Spencer and De Witt Clinton were elected to the Senate, and to the Assembly, that name of evil omen to the Federal party, Aaron Burr!

The Governor called the Legislature together in an extra session in August, of this year, for the purpose of making preparations for the immediate defence of the State, in prospect of a war with France, resulting from the unsuccessful mission of Messrs. Pinckney, Gerry,

* His majority was 2,380. Two years before, the whole number of legal voters in the State was returned at 66,000.

and Marshall. For the moment, says the biographer of Governor Jay, the voice of faction was drowned in a loud and vehement burst of indignation against the insulting cupidity of the French Directory, and the Legislature unanimously voted a patriotic address to the President, pledging the support of the State of New York in his

endeavors to maintain the rights and honor of the nation. An act was passed appropriating money for the erection of fortifications and the purchase of arms, at the discretion of the Governor. Little of a party nature, however, transpired, except the election of a United States Senator, James Watson, a Federalist, in place of Gen. North, who had been temporarily appointed to fill a vacancy.

At the regular session, commencing on the 2d of January, 1799, the strife of parties again commenced. Under the vigorous and skillful opposition of Burr, and others in the Legislature, the Republicans were fast organizing that powerful party which two years later carried the State, and placed Jefferson in the presidential chair. This seemed now to be the main object entertained by the opposition in New York, at least of all save one – for who shall undertake to fathom the mysterious and inscrutable mind of Aaron Burr? – and every effort was directed to this end. Burr himself co-operated with the other Republican leaders, and brought to the common cause all the craft of his singularly subtle intellect, and the tact of a wily and experienced politician.

Matters, however, did not appear very auspicious for the Republicans. The elections in April, 1799, were decidedly against them. Burr, himself, at the head of the Republican ticket for the Assembly in New York, was defeated, and the Legislature in both its branches, still remained with the administration. It was at this session, in January, 1800, that the Governor, in his opening speech to the Legislature, had occasion to allude to the recent national affliction which had occurred in the death of Washington. His language, as usual, was chaste, beautiful, and strictly appropriate. "You will, I am persuaded," he said, "join with me in regretting that the topic which naturally rises first into view on this occasion, is the afflicting and unexpected death of that virtuous and great man

who, both in the field and in the cabinet, in public and private life, attracted such an uncommon degree of merited esteem, confidence, and admiration. His memory will be cherished by the wise and good of every nation; and truth triumphing over her adversaries, will transmit his character to posterity in all its genuine lustre." How fully and accurately has the prediction been fulfilled! 107

The Legislature cordially responded to these sentiments and adopted resolutions suitable to the occasion.

Both the present house of Assembly and the Senate, as has been observed, were strongly Federal. The next Legislature were to choose electors of President and Vice-President of the United States. It was supposed by the Federalists that they would carry a majority of the members of Assembly at the election in April, 1800, and thus secure all the presidential electors. Accordingly on a bill introduced at this session to divide the State into election Districts, and provide for *the choice of presidential electors by the people in the respective districts*, the Assembly divided upon this important question, the Federalists opposing and the Republicans sustaining the measure. This bill was finally lost by a party vote, 55 to 47. The fact it is necessary to state in order properly to appreciate a circumstance which will be presently alluded to, and which may be regarded as one of the finest and most characteristic passages in the life of Governor Jay.

The Federalists, however, were sadly disappointed in their hope of carrying the election in this memorable spring of 1800. The great tac[t] and superior management of Colonel Burr, were peculiarly manifested in the selection of the Republican candidates in the city of New York, where the year before there was nearly a thousand Federal majority. Somewhat unpopular himself, from his connection with a local question,* he was not a candidate for the city, but was nominated and elected in the county of Orange. The New York nominees, thirteen in number, were men who, says Mr. Hammond, "in

* The charter of the Manhattan Company, which, after it had passed the Legislature, was found to contain banking powers.

wealth and talents, and weight of character, were probably greater than any other equal number of Republicans then to be found in the city, or perhaps, any other equal number of citizens." Among them may be mentioned Governor Clinton, Brockholst Livingston, (afterwards Judge of the Supreme Court,) Gen. Horatio Gates, Henry
108 Rutgers, and Col. Burr's particular friend and adherent, John Swartwout. The result was a decisive Republican triumph. A large and controlling majority in the Assembly, and the reduction of the Federal majority in the Senate to seven, gave the choice of the twelve presidential electors to the Republicans, and it was supposed insuring the election of Mr. Jefferson by a majority of three in the electoral college.

The Federalists now saw their mistake in defeating the bill to divide the State into electoral districts; for, the choice of Federal electors from only a few of the districts, would, it was thought, entirely change the aspect of the presidential election. The bill, however, had been opposed and defeated, not strictly as a political measure, but on *constitutional* grounds, as stated at the time by that able and distinguished lawyer, John V. Henry, the Federal leader in the Assembly, and there appeared, therefore, no remedy.

In this emergency, as soon as the result was known, the bold and impetuous mind of Hamilton conceived a project to defeat the election of Mr. Jefferson, which may be properly characterized as a mean between a daring *coup d'etat*, and a questionable political finesse. It was nothing less than the immediate convening of the *existing Legislature*, in an extra session, for the purpose of passing the very bill to divide the State into electoral districts, which his own friends in the Legislature had defeated on constitutional grounds! This proposition he actually made, and urged with much earnestness in a letter to Governor Jay, dated May 7th, 1800.* "In times like these," remarks the writer, "it will not do to be *over scrupulous*. It is easy to sacrifice the substantial interests

* This letter is published at length in the life of Jay, by his son, but without the signature of Hamilton, vol. I. page 412.

of society, by a strict adherence to ordinary rules." And again, "I shall not be supposed to mean that anything ought to be done which integrity will forbid; but merely that the *scruples of delicacy and propriety*, as relative to a common course of things, ought to yield to the extraordinary nature of the crisis."

But John Jay did not so understand the code of political ethics. Not only was he guided by "scruples of delicacy and propriety," but by a sense of justice and of right, that never suffered him to sacrifice a principle to a temporary expediency, or swerve a hair's breadth from the line of what he regarded as his duty. He kept his official robes as Governor of the State, pure and unsullied, as he had preserved the judicial ermine. The Chief-Magistrate of New York was no less upright and single-minded in his official actions, than the Chief-Justice of the United States had been. His errors, if he committed any, were errors of position, not of design – errors resulting from opinion, which every liberal mind can understand and tolerate, and not errors knowingly committed. In the present case, it appears that even the highest political considerations could not induce him to adopt a course of questionable propriety. He shunned the very appearance and suspicion of evil, and avoided even a constructive wrong. The letter of Hamilton was found among his papers endorsed "*Proposing a measure for party purposes which I do not think it becomes me to adopt.*"

Governor Jay, as has been remarked, was no lukewarm politician; he believed, and no doubt with all the sincerity of a thorough conviction, that the ascendancy of the Republican party in the State and nation was dangerous to the political institutions he had assisted in establishing. Yet with him, political success was never regarded as the sole measure of right and wrong. He was governed by higher and nobler, and more controlling considerations. Thus, when Jefferson was elected President, and some of the political friends with whom Gov. Jay acted, were counselling indiscreet, if not intemperate action, the same hand which had endorsed the above words upon the letter of Gen. Hamilton, penned a letter to the freeholders of New York, containing this

SUPPLEMENT to the *ALBANY CENTINEL*, March 31, 1801.

On Saturday last, **His Excellency the Governor** ſent the following Meſſage to the Legiſlature.

GENTLEMEN,

FOR the reaſons mentioned in it, I wrote the following letter to the Chancellor, and to the Chief Juſtice and other Judges of the Supreme Court, viz.

'ALBANY, 18th March, 1801.

'GENTLEMEN,

'TO ſecure the liberties of the People, and the legitimate rights of their Government, againſt 'encroachment and uſurpation, it has from experience been found neceſſary to divide the powers 'of Government into three diſtinct and independent departments. Aggregately conſidered, they 'poſſeſs the whole power of Government, and are always in capacity to defend their reſpective 'authorities againſt improper aſſumptions of power. As this mutual ſecurity is not leſs important 110 'to the welfare of the State, than to the orderly and proper diſcharge of the truſts repoſed in 'them, there reſults in my opinion a natural and mutual reliance on each other, to ſupport their 'reſpective conſtitutional rights; and to do it by ſuch interpoſitions as the nature of the caſe, 'and the circumſtances of the occaſion, may render adviſeable.

'THESE conſiderations induce me to call your attention to a controverſy which now exiſts 'between the Executive and the Council of Appointment. The former inſiſts on the excluſive 'right of naming and propoſing to them, for their advice and conſent, ſuch perſons as he may ſe- 'lect for office; while the latter claim a right in each individual member, to ſelect for office, 'and to nominate to themſelves, and for their own advice and conſent, ſuch perſons as they ſeve- 'rally may think proper. Whether the claim of the Executive, or the claim of the Council, is 'the moſt conſonant with the 23d article of the conſtitution, is the queſtion between them.

'MY meſſage of the 26th ult. on this ſubject to the Legiſlature, and the proceedings of the 'two Houſes relative to it, are known to you. There appears to be little reaſon to expect that 'they will at preſent cauſe the queſtion to be decided, either by a declaratory ſtatute or by judg- 'ment of law.

'ANXIOUS to diſcover whether the claim of the Executive to the excluſive right of ſelec- 'tion and nomination, is as well founded as I think it is, and being ſtrongly impreſſed with a ſenſe 'of the reſpect due to the ſentiments of the Judicial department, on queſtions ariſing from the 'conſtitution or laws of our country, I requeſt them on the one I have ſtated, *unleſs* a mode of 'having it judicially determined ſhould occur to you, and in *that caſe*, that you will be pleaſed to 'indicate it.

I have the honor to be, with great reſpect,
Gentlemen,
Your moſt obedient ſervant,
JOHN JAY.

'To the Hon. the Chancellor, and to the Hon. the Chief Juſtice and other Judges of the Supreme Court of the State of New-York.'

IN anſwer to this letter I have received the three following, viz.

'ALBANY, March 26, 1801.

'SIR,

"SOON after the receipt of your Excellency's letter of the 18th inſtant, addreſſed to the 'Chancellor, Chief Juſtice and other Judges of the Supreme Court, Judge Lewis left this city, 'in expectation of returning on Friday or Saturday next.

'PREVIOUS to his departure, all the Judges of the Supreme Court had a conſultation on 'the ſubject matter of that letter, and it was then concluded upon by them, that a final determi- 'nation reſpecting it ſhould be ſuſpended, until the Chancellor could have an opportunity to at- 'tend and conſult with them on the occaſion. A letter communicating this circumſtance, and a 'copy of your letter, was diſpatched to the Chancellor—his anſwer to which, he requeſted might 'be tranſmitted to you, Sir, with their opinion, which I have now the honor to enclose.

'AFTER the departure of Judge Lewis, I received a note from him, deſiring me, in caſe he 'did not return in time to unite in an anſwer to your Excellency's letter, to ſignify it as his opin- 'ion, that the Chancellor and Judges ought not to anſwer the queſtion propoſed; as it might poſ- 'ſibly come before them in the ſhape of an impeachment.

'IT is highly probable that he may upon his return be diſpoſed to expreſs his opinion on 'this intereſting ſubject more at large: but I did not think myſelf at liberty, merely on that ac- 'count, to delay this communication.

'I have the honor to be, very reſpectfully,
'Your Excellency's moſt obedient ſervant,
JOHN LANSING, Jun.

'His Excellency John Jay, Eſquire, Governor of the State of New-York.'

'CLERMONT, 21ſt March, 1801.

'SIR,

'THE Chief Juſtice having tranſmitted to me a copy of your letter of the 18th inſtant, ad- 'dreſſed to the Chancellor, Chief Juſtice and Judges of the Supreme Court, on the ſubject of a 'difference of ſentiments that prevails between your Excellency and the other members of the 'Council of Appointment, I regret that my diſtance and the ſtate of my health does not permit me 'to conſult the Judges of the Supreme Court on ſo intereſting a ſubject as that propoſed by your 'Excellency to our conſideration. Theſe circumſtances compel me to ſtate my own opinion, 'without knowing how far it may coincide with that of the Judges.

'The conſtitution not having formed from the Judiciary an adviſory Council for the other 'branches of government, it muſt have intended that they ſhould lend their ſupport to, or diſ- 'courage the uſurpation of either, only in their judiciary capacity. In any other their opinions 'would have no more weight, or be more binding upon the party aſking, or oppoſed to it, than 'that of any other gentlemen of equal ſtanding in the profeſſion of the law.

Jay makes his case for the separation of governmental powers and against the council of appointment he had designed 24 years earlier.

wise, dignified, and temperate advice: "I take the liberty, therefore, of suggesting whether the patriotic principles on which we profess to act, do not call upon us to give (as far as may depend upon us) fair and full effect to the known sense and intention of a majority of the people in every constitutional exercise of their will, and to support every administration of the government of our country, which may prove to be intelligent and upright, of whatever party the persons comprising it may be."

These simple and unobtrusive passages in the history of a life, however unimportant they may at first sight appear, are noticeable facts, and should never be lost sight of when we come to measure the moral worth of the individual. They are strongly characteristic. They lay open to us the mind, the heart, the inner life of the man. They indicate the salient features of his character; they serve to measure his sincerity and truth; they point out the secret springs which prompt his action – the motives which regulate his conduct – and by them we can estimate the moral worth, and just value of the man. The passages I have alluded to, beautifully illustrate the character of John Jay – his uprightness of conduct – his sincerity of purpose – his purity of mind. They show him, down to the close of his political career, the John Jay of the Revolution, of the Continental Congress, and of the New York Provincial Assemblies.

The close of his official career was rendered less dignified perhaps, certainly less agreeable, by that political contest between the Governor and his council of appointment, which has been alluded to on a former page. Not that it detracted from the personal dignity of Gov. Jay, but, that it placed him in an unenviable and awkward position; – he, a veteran statesman, just about to retire forever from public life, drawn thus by the force of circumstances, and an honest regard for the preservation of his constitutional rights and official dignity, into a contest with two of the ablest, most energetic and ambitious of those young Republican politicians, who were yet children at school, at a period when Jay had earned for himself a reputation as a statesman.

It may well be imagined that there must have

In December 1800, John Adams attempted to lure Jay back to the Supreme Court, but to no avail.

been something ludicrous, notwithstanding the gravity and earnestness of their deliberation, in these two or three meetings of the council, in the winter of 1800 and 1801. On the one side sat Spencer, De Witt Clinton, and Roseboom; on the other the Governor, (for the first time during his official career, in a minority), with his solitary adherent. Eight different nominations for a Sheriff of the county Dutchess were made by the Governor at the first meeting – and each time was the nominee rejected by the council. A few other nominations were then suffered to pass the ordeal, and the council adjourned. At the next meeting the Governor yielded the sheriff of Dutchess and nominated a Republican, who was approved. A third and final meeting was held on the 24th of February. The Republican members of the Council determined to approve no Federal nominee for the office of sheriff, in either the counties of Orange or Schoharie. Gov. Jay proceeded as usual, to nominate for the Sheriff of the county of Orange. A single affirmative responded to the nomination, and three resolute and determined voices were heard in the negative. Again and again were different individuals named for the office, but with the same result. It was evident that nothing could be done unless his excellency should yield, which did not seem to be at all probable. At this juncture the Governor was startled by a very bold and novel procedure. "*I* nominate John Blake, Jr.,"

said Clinton, in the firm tone of a man assured of his position. The meeting had in a moment been transformed from a Council into a deliberative assembly! Jay hesitated an instant, but refused to entertain the motion or put the question. "I nominate John Nicholson," he then said; Clinton, Spencer, and Roseboom refused to vote; matters had come to a stand still, and the business of the Council was at an end. Gov. Jay, thereupon stating that he desired time for deliberation, adjourned the Council, and never convened it again, leaving the vacant offices unfilled. Thereupon he sent in a communication to the Assembly, asking its direction, which that body refused to give, on the ground that it was a constitutional question, not to be decided by them. He also addressed the Chancellor and Judges of the Supreme Court, but they, too, declined giving an opinion, on the ground that it was not within the scope of their official duties.

The term of office of Governor Jay expired on the 1st of July, 1801. It seems that he had for some time contemplated a final withdrawal from public life. The determination had been formed with deliberation, and it was adhered to with rigid firmness. To the committee who waited upon him soliciting him to accept a nomination for a third term, he replied: "The period has now nearly arrived, at which I have for many years intended to retire from the cares of public life, and for which I have been for more than ten years preparing." Mr. Jay had become weary of the toils and cares of public life; perhaps, too, the example of Washington in declining to serve a third term, may not have been without its influence upon his mind; at all events he seems to have adopted the resolution as a matter of choice, and not from any anticipation of a possible adverse result at the election. No public inducements were able to tempt him to resign the retirement he had voluntarily chosen. A short time after he thus declined a third nomination for Governor, the President, Mr. Adams, unexpectedly informed him, that he had been appointed, and confirmed to his old office of Chief-Justice of the United States. "It appeared to me," remarks Mr. Adams, in explaining to Jay the cause of his nomination, "that Providence had thrown in my way

an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against the increasing dissolution of morals." Jay, however, declined the appointment, and six weeks before the close of his term of office, removed to his family estate, at Bedford, a quiet and retired part of Westchester county, about fifty miles from the city of New York, where he continued to reside to the day of his death.

IX

RETIREMENT

The public career of this eminent man was now closed – closed at a period of life (for he was but 56 years of age), when many of our public men have not reached midway their course of usefulness. And yet what an active, and busy, and eventful life had been his; and what a startling chapter in the history of America, and of the world, had been written during the quarter of a century which had elapsed since he first entered the service of his country! With the events of that period, whose results have been so grand and stupendous, his name, as we have seen, is intimately associated, and without it the history of the times cannot be written. He now finally passed from the stage, and during the next quarter of a century lived in the unbroken seclusion of a quiet and contemplative retirement, a silent, but not an indifferent spectator to the course of public events, and to the development of those institutions which his hands had helped to raise.

Little remains to be added to this imperfect sketch of Gov. Jay's career. The remainder of his life, as his son remarks, being entirely passed in the bosom of his family, and in the peaceful and unostentatious discharge of the duties of religion and benevolence, affords but few instances for the biographer. It was the life of the upright and just man – the faithful public servant, who has discharged his whole duty – whose conscience is void of offence, and who feels the pleasing satisfaction that his work is done. His time was principally passed in those

agreeable employments, which were so much in accordance with his natural tastes, the pursuits of agriculture. His amusements and recreations were few and simple. He found the most of them within the bosom of his family, or in the resources of his own mind. A work of benevolence or charity would sometimes occupy his attention – the
116 building of a church, or the interests of an educational or religious society. At rare intervals, a journey to New York or Albany, on a visit to some member of his family – often on horseback, exercising in open air – frequently conversing, as he says, with the "mighty dead," of whom Cicero was his favorite, or reading the Scriptures – now and then a letter to an old friend – these and kindred employments went to make up the routine of his daily life. To the question how it was possible for him to occupy his mind in the seclusion of his retirement, he replied with a smile, "I have a long life to look back upon, and an eternity to look forward to." If the character of this eminent man is beautiful in its simplicity and its moral purity, it becomes still more interesting when regarded as a bright example of Christian virtue. The tone of his mind was always serious. He regarded religious meditation and worship as no unimportant part of the duties of life. He, himself, in his own family, regularly led the family devotions both morning and evening; and though courtesy to guests might sometimes postpone the customary early hour for retiring, yet the presence of company never postponed nor suspended the family worship.* Death invaded his quiet retreat within a twelvemonth after he entered it, and snatched away the wife of his bosom, who for so many years had been his companion and counsellor. Jay endured the afflicting dispensation, not merely with the calmness of a philosopher, but with that better resignation and nobler fortitude which Christianity inspires.

The retirement of Mr. Jay was seldom broken in upon, and he regarded the political dissensions of the day, with the philosophic gaze of a mere spectator. It is not true, however, as has been stated, that he took no interest in politics, and would not even peruse political

* Life by Wm. Jay, vol. I. p. 444.

newspapers. On the contrary, he constantly read the news of the day, and at times took papers of opposite politics, that he might obtain more full information of passing events. He also made it a point of duty to vote at every election.*

The manner of his life, we are told, was simple and regular. He rose with, or before, the sun, read prayers, breakfasted, and then spent the greater portion of the day in the open air, often on horseback. He conscientiously devoted himself to the duties of a private life; he improved his paternal acres; he rebuilt the mansion of his fathers; he was kind to his dependents, useful to his equals. He busied himself with all the interesting occupations of a country life; was a promoter of, and a member of societies for the diffusion of knowledge and religion, and instructed his relations and servants in those Christian principles which had always been the guide of his own course.†

Such were the occupations and manner of life of this venerable patriot and statesman, for the period of more than a quarter of a century. The evening of his life was serene and quiet, and he went down to the tomb full of years and honors. On the 14th of May, 1829, having retired to his bed in the enjoyment of his customary health, he was seized with palsy, from which he never recovered. He died on the 17th of the same month in the 84th year of his age.

Mr. Jay was married in April, 1774, to Sarah Van Brugh Livingston, daughter of William Livingston, who had recently removed from New York to New Jersey, and was subsequently for many years Governor of the latter State. He was also a member with Mr. Jay of the Continental Congress of 1775. By this marriage, Mr. Jay had several children, among whom were the late Peter A. Jay, an eminent lawyer of New York, and Judge William Jay, of Westchester county, who still continues to occupy the family mansion in the town of Bedford.

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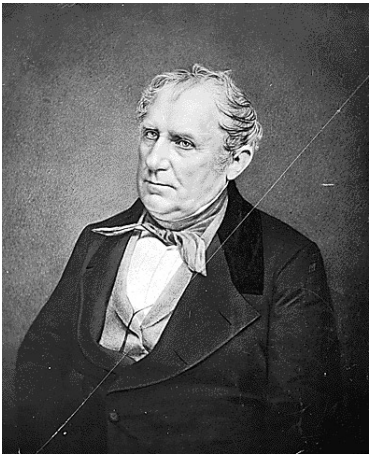
* Letter of Judge William Jay to Mr. Hammond, note D, Political History of New York.

† Prof. Renwick's Sketch of Jay, page 134.

The prominent features of Gov. Jay's character are plainly indicated in his various official and public actions, as well as in his quiet and unostentatious discharge of the duties of private life. He was not, perhaps, what may be called a great man. He was not gifted with those shining qualities of genius, which at once astonish

and dazzle mankind; nor was he endowed with those creative faculties, that originality of thought, that vigorous grasp of intellect which stamp their possessor with the impress of greatness. And yet, though laying claim to none of these, his was far from a mediocrity, much less an inferiority, of intellect. Jay was decidedly an able man – a man of extensive attainments and erudition – a vigorous writer, and a sound thinker. He was more – he had a healthy, temperate, and well-balanced mind – a clear, sound, and comprehensive judgment – an admirable prudence and caution. And withal he was a conscientious and a just man – just to his neighbors, as well as to his family, just to his political opponents, as well as to his friends. The caution of Jay was a quality not resulting from timidity or irresolution. Few men were capable of acting a bolder or more determined part, when occasion demanded. Thus we have seen that when Livingston and the New York members hesitated to sign the Declaration, Jay stepped boldly forward in the Convention, and assumed the responsibility of recommending its approval; and thus, too, while on his mission in Spain, without any present prospect of meeting the payment of the heavy amounts drawn upon him, he accepted all bills at his own risk – an act which some might call temerity and rashness. But the prudent conduct of Jay was rather the result of that innate love of justice, that desire on all occasions of standing publicly upon the clearest and most defensible issues, that effort to avoid every controversy, unless under the most obvious claim of right. Thus it was, that even after the humble petition of the first Congress to the King had been treated with the most insulting neglect, Jay originated and carried through, in the next Congress, against the most determined opposition, the proposition to send another "petition" to the King, which in like manner was "spurned from the foot of the throne." He desired to



James Fenimore Cooper's *The Spy*, published in 1821, was inspired by Jay's recollections of his work in espionage during the Revolutionary War.

place the action of the Congress upon the highest, the clearest and most indisputable basis of right, and to leave no cause for cavil, even on the part of the friends of the British cause. It was the suggestion, not of prudence merely, but of wisdom, for it placed in the hands of Congress, a moral power which nothing else could give. The same calm, deliberate, but firm judgment, tempered always with prudence and caution, is observable in all his actions. And yet he was deficient neither in quickness of determination, vigor and boldness of design, nor tenacity of purpose. Indeed, in some respects he might be called an obstinate man – tenacious of what he believed to be the right – never conceding a point of conscience, and never yielding a principle.

The virtues of such a man might still be remembered and sung in lyric strains by the Roman bard –

Justum et tenacem propositi virum,[*]

though the republic no longer existed, and the last bright exemplar of those virtues had passed away. The same virtues lived and were exemplified in the early ages of our republic, and in the character of John Jay. Just and firm of purpose, neither the idle clamor of the populace, nor

* "A just and tenacious man of purpose."

the countenance of the tyrant could avail to shake his solid temper; and these virtues, though perchance they may not be breathed in the numbers of some future lyric song, will be remembered in history, even though America should follow the example of the proud republic of antiquity.

Chronology

Dec. 12, 1745	Born, New York City
1746	Family relocates to Rye, Westchester County, New York
1753 to 1756	Attends Latin grammar school, New Rochelle, New York
1756 to 1760	Tutored by George Murray, Rye
Aug. 29, 1760	Enters King's College (Columbia University), New York City
May 22, 1764	Awarded B.A., King's College
Jun. 1, 1764	Begins reading law with Benjamin Kissam, New York City
May 19, 1767	Awarded M.A., King's College
Oct. 26, 1768	Admitted to New York bar
1768 to 1771	Law partnership with Robert R. Livingston, Jr.
Jul. 1769 to Jul. 1770	Clerk to New York – New Jersey boundary commission (certifies record, Feb. 6, 1776)
Autumn 1770	Organizes "The Moot" debating club with 17 other lawyers
Apr. 28, 1774	Marries Sarah Van Brugh Livingston
Jul. 28, 1774	Elected to First Continental Congress
Sep. 5, 1774	Takes seat in First Continental Congress in Philadelphia
Oct. 21, 1774	Congress adopts "Address to the People of Great Britain"

Mar. 15, 1775	Elected to New York Provincial Congress
Apr. 21, 1775	Elected to Second Continental Congress
May 10, 1775	Second Continental Congress meets in Philadelphia
Nov. 3, 1775	Commissioned a colonel in New York militia
Apr. 1776	Elected to New York Provincial Congress
May 15, 1776	Continental Congress recommends colonies form governments independent of England
May 24, 1776	Appointed to committee to draft New York's first constitution
May 25, 1776	Takes seat in New York Provincial Congress
Jul. 9, 1776	Proposes New York Provincial Congress endorse Declaration of Independence
Apr. 20, 1777	New York convention adopts constitution drafted in large part by Jay
May 3, 1777	Named chief justice of New York supreme court
Sep. 9, 1777	First sitting as a judge
Nov. 4, 1778	Selected delegate to Continental Congress to represent New York in dispute over Vermont
Dec. 10, 1778	Elected president of Continental Congress
Aug. 28, 1779	Resigns New York chief justiceship
Sep. 13, 1779	Continental Congress approves Jay's circular letter to the States
Sep. 27, 1779	Named minister to Spain (resigns presidency the next day)
Oct. 20, 1779 to Jan. 22, 1780	Travels from Philadelphia to Cadiz, Spain (travels later to Madrid)
1780 to 1782	Unsuccessful treaty negotiations with Spain

Jun. 15, 1781	Appointed one of five commissioners to negotiate peace with England
May 21 to Jun. 23, 1782	Moves from Madrid to Paris
Nov. 30, 1782	Signs preliminary articles of peace in Paris
Sep. 3, 1783	Signs peace treaty in Paris
Oct. 9, 1783 to Jan. 22, 1784	Visits England
Jan. 14, 1784	Peace treaty ratified (Britain follows suit April 9)
May 16 to Jul. 24, 1784	Travels from Paris to New York City
Oct. 26, 1784	Elected to Second Continental Congress
Dec. 21, 1784	Takes office as secretary for foreign affairs
Feb. 10, 1785	Organizes New York Society for Promoting the Manumission of Slaves; elected first president
Jun. 1786	Delegate to general convention of Episcopal Church, New York City
Oct. 31, 1787	*The Federalist* No. 2 published in New York *Independent Journal*; Numbers 3–5 follow
Mar. 7, 1788	Last contribution to *The Federalist* (No. 64) published
Apr. 1788	"Address to the People of the State of New York" published
Apr. 30, 1788	Elected to constitutional ratifying convention, New York
Jun. 17 to Jul. 26, 1788	Ratifying convention meets in Poughkeepsie, New York; ratifies July 26
Apr. 6, 1789	Receives presidential electoral votes from Delaware (3), New Jersey (5), and Virginia (1)

John Jay

Sep. 24, 1789	Nominated to be chief justice of the United States (confirmed two days later)
Oct. 19, 1789	Takes oath of office (second, after James Wilson, Oct. 5)
Mar. 22, 1790	Resigns as acting secretary of state on Jefferson's return from France

Feb. 1, 1790	Meets with two associate justices but lacks quorum, New York
Feb. 2, 1790	First sitting of Supreme Court of the United States, New York
Feb. 9, 1792	Nominated to be governor of New York
Jun. 12, 1792	Ballots in Federalist-dominated counties thrown out; George Clinton declared governor of New York
Aug. Term 1792	*Hayburn's Case*, 2 U.S. 409
Feb. Term 1793	*Chisholm v. Georgia*, 2 U.S. 419
Aug. 8, 1793	Supreme Court refuses Washington's request for advisory opinions
Aug. 1793 to Feb. 1794	Genet affair
Apr. 19, 1794	Nominated to be special envoy to England (confirmed three days later)
May 12 to Jun. 15, 1794	Travels from New York City to London
Nov. 19, 1794	Signs treaty with England (the "Jay Treaty")
Feb. 7, 1795	Eleventh Amendment ratified
Jun. 5, 1795	Elected governor of New York
Apr. 10 to May 28, 1795	Travels from London to New York City
Jun. 24, 1795	Jay Treaty ratified, except for article on West Indian trade (Washington signs Aug. 15)
Jun. 29, 1795	Resigns from Supreme Court

Jul. 1, 1795	Takes office as governor of New York
Jun. 1798	Reelected governor of New York
Apr. 1799	Gradual slave emancipation bill enacted, New York
May 7, 1800	Ignores Hamilton's proposal to district New York to help John Adams win a second term as president
Dec. 19, 1800	Nominated and confirmed as chief justice of the United States, but declines to serve again
Jul. 1, 1801	Completes second term as governor of New York; retires from politics
Summer 1812	Meets with Gouverneur Morris to organize opposition to the War of 1812
1815	Named president of Westchester Bible Society
1821	Named president of American Bible Society
May 17, 1829	Dies at Jay family estate, Bedford, Westchester County, New York

C A S E S

INDEX

About the Author

George Van Santvoord (1819-1863) was a lawyer with offices in Troy, New York, outside Albany. He appeared twice in reported cases decided by the Supreme Court of the United States. *Newton v. Stebbins*, 51 U.S. 586 (1850); *Den ex dem. v. Association of Jersey Co.*, 56 U.S. 426 (1854). By the mid-1850s he also was a successful author of popular and technical legal works, including *Life of Algernon Sidney, with Sketches of some of his Contemporaries, and Extracts from his Correspondence and Political Writings* (1851), *A Treatise on the Principles of Pleading in Civil Actions under the New York Code of Procedure* (1853), and *Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States* (1854). In 1860, the year in which he published his *Treatise on the Practice in the Supreme Court of the State of New York*, he dissolved his law partnership with David Lowrey Seymour in order to devote more time to his literary projects. He died suddenly just three years later – in circumstances reminiscent of Brainerd Currie's *Casey Jones Redivivus*, 1 Green Bag 2d 113 (1997) – while traveling to Albany. *Van Schaick v. Hudson River R.R. Co.*, 43 N.Y. 527 (1871).

About the Editors

Ross E. Davies is an attorney at Shea & Gardner, and Montgomery N. Kosma is an attorney at Gibson, Dunn & Crutcher LLP. Both practice law in Washington, D.C., and are founders and editors of the *Green Bag*.

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