

having been made through me. I observe that in the records of this mission there is no trace of a complaint, on the part of the United States, of his Majesty having disavowed the act of his Minister. You have not in the conferences we have hitherto held, distinctly announced any such complaint, and I have seen, with pleasure, in this forbearance, on your part, an instance of candor, which I doubt not will prevail in all our communications, in as much as you could not but have thought it unreasonable to complain of the disavowal of an act, done under such circumstances, as could only lead to the consequences that have actually followed.

It was not known when I left England, whether Mr. Erskine had, according to the liberty allowed him, communicated to you *in extenso* his original instructions. It now appears that he did not. But, in reverting to his official correspondence, and particularly to a dispatch addressed on the 20th of April to his Majesty's Secretary of State for Foreign Affairs, I find that he there states, that he had submitted to your consideration, the three conditions specified in those instructions, as the ground work of an arrangement which, according to information received from this country, it was thought in England might be made, with a prospect of great mutual advantage. Mr. Erskine then reports *verbatim & seriatim* your observations upon each of the three conditions, and the reasons which induced you to think that others might be substituted in lieu of them. It may have been concluded between you that these latter were an equivalent for the original conditions; but the very act of substitution evidently shews that those original conditions, were, in fact, very explicitly communicated to you, and by you of course laid before the President for his consideration. I need hardly add, that the difference between these conditions and those contained in the arrangement of the 18th and 19th April, is sufficiently obvious to require no elucidation; nor need I draw the conclusion, which I consider as admitted by all absence of complaint, on the part of the American Government, viz. that under such circumstances, his Majesty had an undoubted and incontrovertible right to disavow the act of his Minister. I must here allude to a supposition, which you have more than once mentioned to me, and by which, if it had any the slightest foundation, this right might perhaps have been in some degree affected. You have informed me that you understood that Mr. Erskine had two sets of instructions, by which to regulate his conduct; and that upon one of them, which had not been communicated either to you or to the public, was to be rested the justification of the terms finally agreed upon between you and him. It is my duty, Sir, solemnly to declare to you and, through you, to the President, that the dispatch from Mr. Canning to Mr. Erskine, which you have made the basis of an official correspondence with the latter Minister, and which was read by the former to the American Minister in London, is the only dispatch, by which the conditions were prescribed to Mr. Erskine for the conclusion of an arrangement with this country on the matter to which it relates.

To return to the immediate subject of your letter. If, Sir, it be your intention to state, that no explanation whatever has been given to the American Government of the reasons which induced his Majesty to disavow the act of my predecessor, I must, in that case, observe, that in the instructions conveying to him his Majesty's intention, those reasons were very fully and forcibly stated; and if he has not transmitted them to you, I can only attribute it to the peculiar delicacy and embarrassment of his situation, for which he probably trusted to the President's goodness to make some allowance; and he might the more reasonably be led to that reliance on it, as a full and ample communication was also made upon the subject by his Majesty's Secretary of State for Foreign Affairs to Mr. Pinkney, to whom the whole of Mr. Erskine's original instruction was read, and who, it was natural to suppose, would convey to his government so much information upon a very momentous occasion, as would relieve Mr. Erskine from the necessity of entering into minute details of the misunderstanding that had occurred. At all events, no complaint can be substantiated against his Majesty's Government on this score, seeing that they not only instructed the Minister who had made the disavowal arrangement as to the motives which occasioned the disavowal, but also, with frankness, promptitude, and a most scrupulous regard to national honor, gave notice to the American Minister in London of the disavowal, of the motives of it, and of the precautions spontaneously taken by his Majesty to prevent any loss or injury accruing to the citizens of the United States from a reliance on any agreement, however unauthorized, made in his Majesty's name. The mere allusion to this latter circumstance dispenses me from farther noticing the effects which you describe as being produced upon the United States by the circumstances of this agreement. How far they are irrevocable it is not for me to determine—but the word *irreparable* seems to imply that a loss had been sustained on the occasion by the public or by individuals of this country. So far as his Majesty could be by possibility supposed answerable for such an eventual loss, he has as I have before stated, taken the utmost precaution to avert it.

As to the expectation entertained here, that the explanation of his Majesty's share in this transaction should be made through me, I might content myself with simply observing, that I was not provided with instructions to that effect, because it was known that the explanation in question had already been given. But it accords with the sentiments of his Majesty towards this country to observe also, that he considered, that as some time must necessarily elapse between my appointment and my entrance on the duties of my Ministry, it would be a more friendly mode of proceeding to state without delay, and through the channels I have already mentioned, the motives that compelled his Majesty to disavow the agreement, than to leave the American government in uncertainty in these respects, till the unavoidably protracted period of my arrival in America. I say this in regard to the original notification of his Majesty's determination, and of the motives of it, which being already made, it could not be supposed in London that a repetition of them would be expected from me; and of course no such case has been foreseen in my instructions. But if, beyond this any incidental explanation or discussion should be wished for by this government, I came fully prepared to enter into them. I even consider them to have taken place between us. I have certainly derived great satisfaction from the several hours, which we have spent in conference upon these subjects, because they have enabled me to remove some misunderstandings and to refute many misrepresentations, which you yourself informed me of, in regard to the conduct of the British government. I consider such mutual explanations as highly beneficial to a right understanding of the views and interests of the two countries, and I should with much pleasure have renewed them, if you had not informed me that the President had been pleased to prescribe another and a different mode of conducting our negotiations.

I will nevertheless avail myself of that mode which he still permits to repeat to you that his Majesty has authorized me, notwithstanding the ungracious manner in which his former offer of satisfaction for the affair of the Chesapeake was received, to renew that which Mr. Erskine was instructed to make. You have said that you fully understood the particulars of that offer, that I deem it unnecessary to recapitulate them here: I regret that, since they were so clearly understood by you, you should not yet have been enabled to state to me either in our personal communications, or in the letter which I am now answering, whether they are considered by the President as satisfactory, or whether they are such as he ultimately means to accept. You

seem not to distinctly have understood the form of proceeding in this affair which I took the liberty of suggesting as likely to lead to a satisfactory result, without however at all precluding any other method which might appear preferable to you. My proposal was, not to communicate a note tendering satisfaction, but to agree with you before hand upon the terms of a declaration on the part of his Majesty, which should actually give the *satisfactio*, (the conditions of which I informed you that I was authorized to carry into immediate execution) and of a counter declaration to be signed by you on the part of the United States for the purpose of accepting such satisfaction. I expressly stated that this interchange of official documents was not meant by me as the means of conveying to each other our respective sentiments; that I understood to be as usual, the object of our conferences; and I imagined that the papers to be signed by us, respectively, would be the result of those sentiments so communicated, and that by being reciprocally corrected and modified, and simultaneously delivered, they would form one compact by which the two countries would be equally bound. This course of proceeding is conformable to the practice of the courts of Europe on similar occasions. You did not at the time appear to object to it; you even requested me to come the next day, prepared with a draft or projet of a paper, framed in pursuance to these ideas; and although you desired to refer the subject to the President for his approbation, I do not find in your letter either an expression of his sentiments upon it, or the substitution of any other form that might be more agreeable to him, than the one which I have proposed.

I touch with considerable and very sincere reluctance upon that part of your letter, in which you state that I had not assigned "any reason whatever why the reasonable terms of satisfaction tendered and accepted have not been carried into effect."

I believed that I had observed to you, in the words of my instructions, that if his Majesty were capable of being actuated by any desire to retract an offer of reparation which he had once made. His Majesty might be well warranted in doing so both by the form in which his accredited Minister had rendered that reparation, and by the manner in which that tender had been received. I believe that I elucidated this observation by a reference to the particular expressions, which made the terms of satisfaction appear to be unacceptable even to the American government, at the very moment when they were accepted, and which at all events put it totally out of His Majesty's power to ratify and confirm any act in which such expressions were contained.

On the subject of his Majesty's Orders in Council, I have had the honor of informing you that his Majesty having caused to be made to the government of the United States certain proposals founded upon principals, some of which were understood to originate in American authorities, and others to be acquiesced in by them, and having afterwards ascertained, in the manner mentioned in a former part of this letter, that the sentiments of the American Government were so different from what they were at first understood to be, I was not instructed to renew to you those proposals, nor to press upon your acceptance an arrangement which had been so recently declined, especially as the arrangement itself is become less important, and the terms of it less applicable to the state of things now existing.

Those considerations which were first intimated in Mr. Canning's official letter to Mr. Pinkney of the 23d September, 1803, and which, in the process of the following six months, acquired greater weight and influence, induced his Majesty, before the result of Mr. Erskine's negotiation was known, to modify the Orders in Council of November, 1807, by that of the 26th of April, 1809.

The effect of this new order is to relieve the system under which the former orders were issued, from that which has always been represented in this country, as the most objectionable and offensive part of it—the option given to neutrals to trade with enemies of Great-Britain through British ports on payment of a transit duty. This was originally devised and intended as a mitigation of what is certainly more correct but more rigid in principle—the total and unqualified interdiction of all trade with the enemy. If, however, this mitigation was felt as an aggravation, and, as has been sometimes warmly asserted, as an insult, that cause of complaint is now entirely removed. By the Order in Council of the 26th April, 1809, all trade with France and Holland, and the ports of Italy, comprehended under the denomination of the kingdom of Italy, is simply prohibited altogether. No option is afforded, and consequently no transit duty is required to be paid. In another respect the Order in Council of the 26th April must be admitted to be more restrictive than those of November 1807.

The trade with enemies' colonies which was opened to neutrals at the commencement of the present war by the Order in Council of the 24th June, 1808, was continued to be left open by those of November 1807. The order in Council of the 26th April retracts this indulgence. But it is to be observed that, since the period, when the Orders in Council of November 1807, were issued, the opening of the ports of Spain, of Portugal, of the south of Italy and of Turkey has afforded a more ample scope to neutral commerce, and that by the capture of Martinique, in addition to that of almost all the colonies of the enemies of Great-Britain, together with the blockade of Guadalupe, the extent to which the liberty of commerce with enemies' colonies applied has been so far narrowed, that there is little of practical hardship in recurring to the rule which, however occasionally mitigated in its application, Great-Britain can never cease in principle to maintain. It is further to be observed, that the Order in Council of the 26th April has this operation highly favorable to neutrals, that restricting the regulations of blockade to France, Holland and their colonies, and to the territories denominated the kingdom of Italy, it lays open to the direct trade of neutrals the ports of the north of Europe. Under the Order of the 26th April, therefore, while there are on the one hand fewer points of difference to stand in the way of a satisfactory arrangement between Great-Britain and the United States, it is possible that there may be less temptation to the latter, to enter into such an arrangement, as the extent of their commerce may be, if they please, nearly as great under the Order in Council of the 26th of April, as it would be under any arrangement which should effect the indispensable objects, to which that order applies, or as it would be even without any such order so long as France and the Powers subservient to France continue to enforce their decrees. It is, in the same proportion, matter of indifference to Great-Britain, whether the Order in Council be continued or an arrangement by mutual consent substituted in its room.

Such, Sir, are the grounds on which it has appeared to His Majesty to be unnecessary to command me to propose to the government of the United States any formal agreement to be substituted for that which His Majesty has been under the necessity of disavowing; but I am directed to receive and discuss with you any proposal which you may be authorized to make to me on this head.

As no disposition has hitherto been shewn on your part to make any such proposal, it has been impossible for me to state by anticipation (nor was I instructed so to do) what might be the answer that I should eventually think it my duty to return to you; consequently I could not have made with that view the statement contained in the 4th section of your letter, and the three subdivisions of it. Such a statement would have been obviously inconsistent with the former part of my overture, which

you very correctly record in the 3d section, viz. that I was not instructed to make to you any proposal whatever upon this subject—I must necessarily reserve, until I hear from you what proposals it may be deemed proper to make on behalf of the United States, to state in how far they do or do not accord with the instructions, which it has pleased His Majesty to give me for my guidance in this negotiation.

I will only add, Sir, in conclusion of this letter, that His Majesty is very sincerely desirous of maintaining a perfect and cordial understanding with the United States, and of bringing to a complete and satisfactory adjustment, all the points of difference that have arisen between the two governments; and that, agreeing as I do with you, most heartily, as to the interest which both nations have in fostering a mutual and solid friendship and cordiality, no zeal or exertions shall be wanting on my part to carry into effect His Majesty's commands for this most salutary purpose. I have the honor to be, with great respect, Sir, your most obedient humble servant,

F. J. JACKSON.

The Hon. Robert Smith, &c. &c. &c.

MR. SMITH TO MR. JACKSON.

Department of State, October 19, 1809.

SIR,—I had the honor of receiving your letter of the 11th instant.

Before I proceed to the more material topics, which it embraces, it is proper that I should take some notice of your construction, which has unhappily converted an intimation of the expediency of conducting in a written form our further discussions, on this particular occasion, into a general prohibition of all verbal communications whatever, and into an unprecedented violation of the most essential rights of a public minister, requiring a formal protest and a resort to the commands of your Sovereign.

A recurrence to that intimation cannot fail to shew that its sole object was to avoid, in the further discussions of a case of unusual delicacy and importance, the misconceptions well known to be incident to oral proceedings, and of which the diplomatic intercourse between the two governments had furnished so many and such serious proofs,—nay, of which your letter itself is an additional illustration.—That a change in diplomatic discussions from an oral to a written form is not without precedent. I cannot refer to one which will be more satisfactory to you than the intimation recently given by Mr. Canning, in the case of the proposal by Mr. Pinkney on the subject of the Orders in Council and the Embargo, that the discussions which had been previously verbal must thenceforth take a written form. And with this view I take the liberty of recalling your attention to the subjoined extracts (See A. and B.) letters that passed on that occasion.

On the present, as on that occasion, the change from verbal to written communications was requested after two conferences, and when the subject appeared to one of the parties to have, by those verbal discussions, been brought to a point, which required a precise understanding of the views and propositions of the other.

You will, Sir, hence perceive, that in maintaining the right, which every government has as to the rules of intercourse with foreign functionaries near it, no encroachment has been made or intended on any right or customary privilege belonging to you in that character, nor any thing done to impede the proper and usual course of negotiation.

You have been sufficiently apprised, by my letter of the 9th, of the light in which the President views the arrangement lately made by your predecessor with this government, and of the grounds on which he has expected a formal and satisfactory explanation of the reasons for the refusal of his Britannic Majesty to carry it into effect. He persists in that expectation, and in the opinion, that there has been given no explanation that is adequate, either as to the matter, or as to the mode.

When one government has been solemnly pledged to another in a mutual engagement by its acknowledged and competent agent and refuses to fulfil the pledge, it is perfectly clear, that it owes it, both to itself and to the other party, to accompany its refusal with a formal and frank disclosure of sufficient reasons for a step, which, without such reasons, must deeply injure its own character, as well as the rights of the party confiding in its good faith.

"To refuse with honor (says a high authority on public law) to ratify what has been concluded on by virtue of a full power, it is necessary that the government should have strong and solid reasons, and that he shew in particular that his Minister has violated his instructions."

Although it is particularly incumbent on the Sovereign in such case to shew that his instructions have been violated, yet it is not a mere violation of them on immaterial points that will be sufficient. It is indispensably requisite, moreover, that the reasons be strong and solid, that they manifestly outweigh not only the general obligation to abide by what has been so done, but also the disappointment and injury accruing to the other party. And it is worthy of notice that the case under discussion is of a higher character, and appeals with greater solemnity to the honor and justice of the refusing party, than the case stated in Vattel, inasmuch as the transaction, now disavowed, was not a treaty or convention to be ratified by both parties, previous to an execution by either. It had, according to the terms of it (and this peculiarity appears to have been contemplated by your government) been actually and immediately carried into execution on the part of the U. States. The refusal of his Britannic Majesty is, therefore, not simply to ratify what had been ratified by the other party, but to carry into effect on his part an arrangement which had been carried into full effect with good faith on the part of the United States rendered it unsusceptible of a full equivalent for the refusal to execute it on the other side.

It has not escaped observation, that the obligation of your government to tender explanations on this occasion is admitted by your attempt to shew that it has been sufficiently done in what passed in conversation between Mr. Canning and Mr. Pinkney, and by the instructions given to Mr. Erskine to communicate such explanations.

With every disposition to view in the most favorable light whatever may affect the relations between the two countries, it is impossible to mistake the conversations of those ministers for a discharge of such a debt to the good faith and reasonable expectations of the United States. Besides that they were mere conversations in a case requiring the precision and respect of a formal communication, it is certain, that it was neither understood by Mr. Pinkney, nor intended by Mr. Canning, that those conversations were so to be regarded. Mr. Pinkney is explicit on this point. And Mr. Canning himself, after declining to recapitulate in writing what he had verbally remarked, signified to Mr. Pinkney in a letter dated May 27th, that his observations on the subject would be more properly made through the successor of Mr. Erskine, who was about to proceed to the United States.

With respect to the instructions on this point, given to Mr. Erskine, it might be sufficient to remark that they were never carried into execution; but it may be asked, whether it was a mark of friendly respect to the United States to employ for such a purpose, a minister from whom his government had thought proper publicly to withdraw its confidence, and to the peculiar delicacy and embarrassment of whose situation you have yourself referred, as accounting for his not having executed the task imposed upon him.