PORTO RICAN DECISION.

Text of the Opinions Delivered by the Several Members of the Supreme Court of the United States.

MAJORITY OPINION.

(Delivered by Justice Brown, Justices Gray, Shiras and McKenna concurring—Justice White joined in the conclusion, but read a separate opinion.) Justice Brown, after declaring that the exception to the jurisdiction was not well taken, said:

"In the case of De Lima vs. Bidwell, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States.' (Article I., section 8.) If Porto Rico is a part of the United States, the Foraker act imposing duties upon its products is unconstitutional not only by reason of a violation of the uniformity clause, but because by section 9 'vessels bound to or from one state' cannot 'be obliged to enter, clear, or pay duties in another.'

NO ANSWER IN THE CONSTITUTION.

"The case also involves the broader question whether the revenue clauses of the constitution extend of their own force to our newly acquired territories. The constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by congress and in the decisions of this court.

"The federal government was created in 1777 by the union of thirteen colonies of Great Britain in 'certain articles of confederation and perpetual union,' the first one of which declared that 'the style of this confederacy shall be the United States of America.' Each member of the confederacy was denominated a state. Provision was made for the representation of each state by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in Article XI., which authorized the admission of Canada, upon its 'acceding to this confederation,' and of other colonies if such admission were agreed to by nine states. At this time several states made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy before it was fairly put in operation. Several of the states refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781.

WITHOUT DELEGATES FROM TERRITORIES.

"The confederacy, owing to well-known historical reasons, having proven a failure, a new constitution was formed in 1787 by the people of the United States for the United States of America,' as its preamble declares. All legislative powers were vested in a congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the union, except that congress was empowered 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' At this time all of the states had ceded their unappropriated lands except North Carolina and Georgia.

"It is sufficient to observe in relation to these fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States. The constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; and even the provision relied upon here that all duties, imposts and excises shall be uniform 'throughout the United States, is explained by subsequent provisions of the constitution, that 'no tax or duty shall be laid on articles exported from any state,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another' nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.' In short, the constitution deals with states, their people, and their representatives.

"The thirteenth amendment to the constitution, prohibiting slavery and involuntary servitude 'within the United States or in any place subject to their jurisdiction,' is also significant as showing that there may be placed within the jurisdiction of the United States that are no part of the union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the union, is to confess the very point in issue, since it involves an admission that if these states were not a part of the union, they were still subject to the jurisdiction of the United States.

LIMITATIONS ON CITIZENSHIP.

"Upon the other hand, the fourteenth amendment, upon the subject of citizenship, declares only that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place 'subject to their jurisdiction.'"

Justice Brown went exhaustively into the history of the purchase of the Louisiana territory and the subsequent legislation by congress, and drew the conclusion that congress then believed "that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the constitution (Art. I., sec. 9), that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of states within the meaning of the constitution.

"The same construction was adhered to in the treaty with Spain for the purchase of Florida," added Justice Brown, "the sixth article of which provided that the inhabitants should 'be incorporated into the union of the United States as soon as may be consistent with the principles of the federal constitution,' and the fifteenth article of which agreed that Spanish vessels sailing directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted for the term of twelve years to the ports of Pensacola and St. Augustine 'without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States,' and that 'during the said term no other nation shall enjoy the same privileges within the ceded territories.'

PROVISION REGARDING HAWAII.

"So, too, in the act annexing the republic of Hawaii there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the constitution, if such clauses were there operative.

"The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the constitution if that instrument be held to extend to these islands immediately upon their cession to the United States. By Article IV. the United States agrees 'for the term of ten years from the date of the exchange of the ratification of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine islands on the same terms as ships and merchandise of the United States'—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine islands be ports of the United States.

"So, too, by Article XIII., 'Spanish scientific, literary, and artistic works * * * shall be continued to be admitted free of duty in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.' This is also a clear discrimination in favor of Spanish literary productions into particular ports.

COURT DECISIONS AT VARIANCE.

"The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the constitution; nor upon the other hand, to general statements that the constitution covers the territories as well as the states, since in such cases it will be found that acts of congress had already extended the constitution to such territories, and that thereby it subordinated not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land."

Justice Brown cited the cases of Hepburn vs. Ellzey, Loughborough vs. Blake, and others to show the power of congress over territory not included in the states. Loughborough vs. Blake tested the right to impose direct taxes in the District of Columbia. It was held that such taxes could be imposed here, and Justice Brown's comment, which follows, is interesting, as comparing the local status with that of Porto Ricans.:

"There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This district had been a part of the states of Maryland and Virginia. It had been subject to the constitution, and was a part of the United States. The constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the constitution could not be dissolved, without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States to from under the aegis of the constitution. Neither party had ever consented to that construction of the cession. If, before the district was set off, congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the district was created, it would have been equally void; in other words, congress could not do indirectly by carving out the district what it could not do directly. The district still remained a part of the United States, protected by the constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government.

REPUBLIC OF STATES AND TERRITORIES.

"In delivering the opinion, however, the chief justice made certain observations which have occasioned some embarrassment in other cases. 'The power,' he said, 'to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland and Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.' So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

"This case of Loughborough vs. Blake may be considered as establishing the principle that in dealing with foreign sovereignties the term 'United States' has a broader meaning than when used in the constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so not because the territories comprised a part of the government established by the people of the states in their constitution, but because the federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations.

CONSTITUTION IN THIS DISTRICT.

"It may be added in this connection that, to put at rest all doubts regarding the applicability of the constitution to the District of Columbia, congress by the act of February 21, 1871, specifically extended the constitution and laws of the United States to this district."

After citing many other similar cases Justice Brown says:

"Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

"1. That the District of Columbia and the territories are not states, within the judicial clause of the constitution giving jurisdiction in cases between citizens of different states.

"2. That territories are not states, within the meaning of revised statutes, section 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question.

"3. That the District of Columbia and the territories are states, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property.

"4. That the territories are not within the clause of the constitution providing for the creation of a supreme court and such inferior courts as congress may see fit to establish.

"5. That the constitution does not apply to foreign countries or to trials therein conducted, and that congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury.

"6. That where the constitution has been once formally extended by congress to territories, neither congress nor the territorial legislature can enact laws inconsistent therewith.

Minority Opinion.

(Delivered by Chief Justice Fuller, Justices Peckham and Brewer concurring—Justice Harlan concurred in the conclusions reached by the minority but read a separate opinion). Chief Justice Fuller said:

"The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the federal constitution.

"The act creates a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers appointed by the president, by and with the advice and consent of the senate, who, together with five other persons, likewise so appointed and confirmed, are constituted an executive council; local legislative powers are vested in a legislative assembly, consisting of the executive council and a house of delegates to be elected; courts are provided for, and, among other things, Porto Rico is constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the president for the term of four years. All officials authorized by the act are required to 'before entering upon the duties of their respective offices take an oath to support the constitution of the United States and the laws of Porto Rico.'

GEOGRAPHICAL UNIFORMITY REQUIRED.

"The uniformity of taxation required by the constitution is a geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found. But it is said that congress in attempting to levy these duties, was not exercising power derived from the first clause of section 8, or restricted by it, because in dealing with the territories, congress exercises unlimited powers of government, and, moreover, that these duties are merely local taxes."

The chief justice referred at this point to the case of Loughborough vs. Blake and to Chief Justice Marshall's opinion, delivered thereon in 1820, and added:

"It is said in one of the opinions of the majority that the chief justice 'made certain observations which have occasioned some embarrassment in other cases.' I agree that the opinion of the court delivered by him must be embarrassing in this case, for it is necessary to overrule that decision in order to reach the result herein announced.

"It is wholly inadmissible to reject the process of reasoning by which the chief justice reached and tested the soundness of his conclusion as merely obiter. Nor is there any intimation that the ruling turned on the singular theory that the constitution irrevocably adhered to the soil of Maryland and Virginia, and, therefore, accompanied the parts which were ceded to form the District, or that 'the tie' between those states and the constitution 'could not be dissolved without at least the consent of the federal and state governments to a formal separation; and that this was not given by the cession and its acceptance in accordance with the constitutional provision itself, and hence that congress was restricted in the exercise of its powers in the District, while not so in the territories.

PURPOSES OF NATIONAL TAXATION.

"On the contrary, the chief justice held the territories as well as the District to be part of the United States for the purposes of national taxation, and repeated in effect what he had already said in McCulloch vs. Maryland: 'Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported.'

"Conceding that the power to tax for the purpose of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the states and their people as well as this territory and its people. The power of congress to act directly on the rights and interests of the people of the states can only exist if and as granted by the constitution. And by the constitution congress is vested with power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' The territories are, indeed, not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

REGULATION OF COMMERCE.

"It is evident that congress cannot regulate commerce between a territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the states, the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication.

"Accordingly, the act of congress of August 8, 1890, entitled 'An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases,' applied in terms to the territories as well as to the states. In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity.

"The fact that the proceeds of these duties are devoted by the act to the use of the territory does not make national taxes local. Nobody disputes the power of congress to lay and collect duties, geographically uniform, and apply the proceeds by a proper appropriation act to the relief of a particular territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion certainly is not strengthened when based on the diversion of duties collected from all parts of the United States to a territorial treasury before reaching the treasury of the United States. Clause 7 of section 9 of Article I. provides that 'no money shall be drawn from the treasury but in consequence of appropriations made by law, and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

APPLIES TO TERRITORIES AND STATES.

"Other parts of the constitution furnish illustrations of the correctness of this view. Thus the constitution vests congress with the power 'to establish an uniform rule of naturalizations, and uniform laws on the subject of bankruptcies throughout the United States.' This applies to the territories as well as the states, and has always been recognized in legislation as binding.

"Aliens in the territories are made citizens of the United States, and bankrupts residing in the territories are discharged from debts owing citizens of the states pursuant to uniform rules and laws enacted by congress in the exercise of this power.

"The fourteenth amendment provides that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside.'

"No person is eligible to the office of president unless he has 'attained to the age of thirty-five years and been fourteen years a resident within the United States.' (Clause 5, sect. 1, Art. II.)

"Would a native-born citizen of Massachusetts be ineligible if he had taken up his residence and resided in one of the territories for so many years that he had not resided altogether fourteen years in the states? When voted for he must be a citizen of one of the states (clause 3, sect. 1, Art. II.; Art. XII.), but as to length of time must residence in the territories be counted against him?

"The fifteenth amendment declares that 'the right of citizens of the United States to vote shall

Mr. Justice Brown

The most interesting figure connected with the Porto Rico decision, according to the Washington Times, is undoubtedly Mr. Justice Brown, the profound and incorruptible jurist who, have argued himself to a standstill in defense of the Constitution in the De Lima case, immediately backed water and argued himself to another standstill in the Downes case. Or as the old song has it:

There was a man in our town,
And he was wondrous wise;
He jumped into a bramble bush
And scratched out both his eyes.
And when he found his eyes were out,
With all his might and main
He jumped into another bush
And scratched them in again.

The Same Breed

Republicanism in Vermont seems to have been bred from the same stock that has furnished the office-holders for that party in Nebraska. A dispatch of May 27th says:

"Lieutenant-Governor M. F. Allen and State Representative J. W. Ketcham were arrested by federal officers today under indictments charging them with complicity with Cashier D. Q. Lewis in wrecking the Farmers' National bank of this city, which recently suspended. The lieutenant-governor was vice president and a director of the bank and Mr. Ketcham was teller. The latter was taken to Burlington, where he pleaded not guilty, and bail was fixed at $5,000. Mr. Allen will be given a hearing at Lewisburg, his home.

"The indictments were returned last week by the United States grand jury and are in two counts—charging complicity in embezzling the bank funds and falsifying the accounts."