Delima Vs. Bidwell

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SooperKanoon Citation : sooperkanoon.com/89040

Court : US Supreme Court

Decided On : May-27-1901

Appeal No. : 182 U.S. 1

Appellant : Delima

Respondent : Bidwell

Judgement :

DeLima v. Bidwell - 182 U.S. 1 (1901)
U.S. Supreme Court DeLima v. Bidwell, 182 U.S. 1 (1901)

DeLima v. Bidwell

No. 966

Argued January 8-11, 1901

Decided May 27, 1901

182 U.S. 1

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

By the Customs Administrative Act of 1890, an appeal is given from the decision of the collector "as to the rate and amount of the duties chargeable upon imported merchandise," to the Board of General Appraisers, who are authorized to decide

"as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duties imposed thereon under such classification,"

but where the merchandise is alleged not to have been imported at all, but to have been brought from one domestic port to another, the Board of General Appraisers has no jurisdiction of the case, and an action for money had and received will lie against the collector to recover back duties assessed by him upon such property and paid under protest.

With the ratification of the treaty of peace between the United States and Spain, April 11, 1899, the Island of Porto Rico ceased to be a " foreign country" within the meaning of the tariff laws.

Whatever effect be given to the Act of March 24, 1900, applying for the benefit of Porto Rico the duties received on importations from that island after the evacuation by the Spanish forces, it has no application to an action brought before the act was passed.

This was an action originally instituted in the Supreme Court of the State of New York by the firm of D. A. De Lima & Co.

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against the collector of the port of New York to recover back duties alleged to have been illegally exacted and paid under protest upon certain importations of sugar from San Juan, in the Island of Porto Rico, during the autumn of 1899 and subsequent to the cession of the island to the United States.

Upon the petition of the collector, and pursuant to Rev.Stat. sec. 643, the case was removed by certiorari to the circuit court of the United States, in which the

defendant appeared and demurred to the complaint upon the ground that it did not state a cause of action and also that the court had no jurisdiction of the case. The demurrer was sustained upon both grounds, and the action dismissed. Hence this writ of error.

In this and the following cases, which may be collectively designated as the " *Insular Tariff Cases,* " the dates here given become material:

In July, 1898, Porto Rico was invaded by the military forces of the United States under General Miles.

On August 12, 1898, during the progress of the campaign, a protocol was entered into between the Secretary of State and the French Ambassador on the part of Spain providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. 30 Stat. 1742.

On October 18, Porto Rico was evacuated by the Spanish forces.

On December 10, 1898, such treaty was signed at Paris (under which Spain ceded to the United States the Island of Porto Rico), was ratified by the President and Senate February 6, 1899, and by the Queen Regent of Spain March 19, 1899. 30 Stat. 1754.

On March 2, 1899, an act was passed making an appropriation to carry out the obligations of the treaty.

On April 11, 1899, the ratifications were exchanged, and the treaty proclaimed at Washington.

On April 12, 1900, an act was passed, commonly called the Foraker Act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1, 1900.

This case was argued with No. 507, *Downes v. Bidwell,* No. 501, *Dooley v. United States,* No. 502, *Dooley v. United*

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No. 509, *Armstrong v. United States.* The briefs and the arguments were reported in length in a book entitled "The Insular Cases," compiled and published pursuant to a resolution of the House of Representatives passed in the Second Session of the 56th Congress and containing both the briefs of counsel and their oral arguments. Then amounted to 1075 pages. Of course, it is impossible to reproduce all here, even if it were desirable.

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MR. JUSTICE BROWN delivered the opinion of the Court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

1. Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the circuit court as a federal court, we should be obliged to say that the defendant was not in a position to make this claim, since the case was removed to the federal court upon his own petition. It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction to hold that where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a federal court, he is estopped to deny that such removal was lawful if the federal court could take jurisdiction of the case, or that the federal court did not have the same right to pass upon the questions at issue that the state court would have had if the cause had remained there. Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. *Cowley v. Northern Pacific Railroad Co.,* 159 U. S. 569 , 159 U. S. 583 ; *Mansfield Railway Co. v. Swan,* 111 U. S. 379 ; *Mexican Nat. Railroad v. Davidson,* 157 U. S. 201 .

This, however, is more a matter of words than of substance, as the defendant unquestionably has the right to show that the state court had no jurisdiction, or that

the complaint did not set forth facts sufficient to constitute a cause of action. This we understand to be the substance of the defense in this connection.

By Rev.Stat. sec. 2931, it was enacted that the decision of

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the collector "as to the rate and amount of duties" to be paid upon imported merchandise should be final and conclusive unless the owner or agent entered a protest and within thirty days appealed therefrom to the Secretary of the Treasury, and further that the decision of the Secretary should be final and conclusive unless suit were brought within ninety days after the decision of the Secretary. By Rev.Stat. sec. 3011, any person having made payment under such protest was given the right to bring an action at law and recover back any excess of duties so paid.

The law stood in this condition until June 10, 1890, when an act known as the Customs Administrative Act was passed, 26 Stat. 131, c. 407, by which the above sections, Rev.Stat. secs. 2931, 3011, were repealed, and new regulations established by which an appeal was given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," if such duties were paid under protest, to a board of general appraisers whose decision should be final and conclusive (sec. 14)

"as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification,"

unless, within thirty days, one of the parties applied to the circuit court of the United States for a review of the questions of law and fact involved in such decision. Sec. 15. It was further provided that the decision of such court should be final unless the court were of opinion that the question involved was of such importance as to require a review by this Court, which was given power to affirm, modify, or reverse the decision of the circuit court.

The effect of the Customs Administrative Act was considered by this Court in *In re Fassett,* 142 U. S. 479 , in which we held that the decision of the collector that a yacht was an imported article might be reviewed upon a libel for possession filed by the owner notwithstanding the Customs Administrative Act. It was held that the review of the decision of the Board of General Appraisers, provided for by section 15 of that act, was limited to decisions of the board "as to the construction of the law and the facts respecting the classification"

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of imported merchandise "and the rate of duty imposed thereon under such classification," and that it did not bring up for review the question whether an article be imported merchandise or not, nor, under section 15, is the ascertainment of that fact such a decision as is provided for. Said Mr. Justice Blatchford:

"Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector had no authority to make any determination regarding any article which is not imported merchandise, and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the district court on which the rights of the libellant depend."

"Under the Customs Administrative Act, the libellant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect."

It was held that the libel was properly filed.

The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country; in other words, whether they were imported at all as that word is defined in *Woodruff v. Parham,* 8 Wall.

123, 75 U. S. 132 . We think the decision in the *Fassett* case is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers, and that whether they were imported merchandise for the reasons given in the *Fassett* case that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case, the article is not *imported.*

Conceding, then, that section 3011 has been repealed, and that no remedy exists under the Customs Administrative Act, does it follow that no action whatever will lie? If there be an admitted

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wrong, the courts will look far to supply an adequate remedy. If an action lay at common law, the repeal of sections 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the Board of General Appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases, and the fact that, by section 25, no collector shall be liable

"for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise,"

or any other matter which the importer might have brought before the Board of General Appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the Customs Administrative Act. If the position of the government be correct, the plaintiff would be remediless, and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position. But we are not without authority

upon this point.

The case of *Elliott v. Swartwout,* 10 Pet. 137, was an action of assumpsit against the collector of the port of New York to recover certain duties upon goods alleged to have been improperly classified. It was held that, as the payment was purely voluntary, by a mutual mistake of law, no action would lie to recover them back, although it would have been different if they had been paid under protest. Said Mr. Justice Thompson:

"Here, then, is the true distinction: when the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake and required not to pay it over, he is personally liable."

If the payment of the money be accompanied by a notice to the collector that the duties charged are too high and that the person paying intends to sue to recover back the amount erroneously paid,

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it was held that such action must lie

"unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress."

The case recognized the fact that, with respect to money paid under a mistake of law, the collector stood in the position of an ordinary agent, and could be made personally liable in case the money were paid under protest.

This decision was made in 1836. Apparently in consequence of it, an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States, and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this Court in *Cary v. Curtis,* 3 How. 236, that this act precluded an action of

assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in *Arnson v. Murphy,* 109 U. S. 238 , 109 U. S. 240 :

"Congress, being in session at the time that decision was announced, passed the Explanatory Act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839, 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney v. Watson,* 92 U. S. 449 ; until repealed by implication by the Act of June 30, 1864,"

c. 171, 13 Stat. 202, 214, carried into the Revised Statutes as sections 2931 and 3011. In the same case of *Arnson v. Murphy,* 109 U. S. 238 , it was decided that the common law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given based upon these sections which was exclusive. The decision in *Elliott v. Swartwout* was recognized, but so far as respected *customs cases* (*i.e.,* classification cases), was held to be superseded by the statutes. So, in *Schoenfeld v. Hendricks,* 152

U.S. 691, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is that they dealt only with *imported* merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these, the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff

laws. Had the sugars involved in this case been admittedly imported -- that is, brought into New York from a confessedly foreign country -- and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev.Stat., sec. 989, provides that, in case of a recovery of any money exacted by him and paid into the treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury.

We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise, but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that, in the *Fassett Case,* 142 U. S. 479 , the proceeding was

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by libel for possession of the vessel, which is analogous to an action of replevin at common law; but it would appear that Rev.Stat. sec. 934 would stand in the way of such a remedy here, since, by that section,

"all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

If the words "under authority of any revenue law" are to be construed as if they read "under color of any revenue law," it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

We are all of opinion that this action was properly brought.

2. Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a "foreign country" at the time the sugars were shipped, since the Tariff Act of July 24, 1897, 30 Stat. 151, c. 11, commonly known as the Dingley Act, declares that "there shall be levied, collected, and paid upon all articles imported from foreign countries" certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States. *The Eliza,* 2 Gall. 4; *Taber v. United States,* 1 Story 1; *The Adventure,* 1 Brock 235, 241.

The status of Porto Rico was this: the island had been for some months under military occupation by the United States as a conquered country when, by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the Island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depended solely upon these facts, and the question were broadly presented whether a country which had been ceded to us, the cession accepted, possession delivered,

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and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser who had accepted the deed, gone into possession, paid taxes, and made

improvements without let or hindrance from his vendor. But it is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws until Congress has embraced it within the general revenue system.

We shall consider this subject more at length hereafter, but for the present call attention to certain cases in this Court and certain regulations of the executive departments which are supposed to favor this contention.

In *United States v. Rice,* 4 Wheat. 246, which was an action of debt brought by the United States upon a bond for duties upon goods imported into Castine, in the District (now State) of Maine, during its temporary occupation by the British troops in the war of 1812, it was held the action would not lie, though Castine was subsequently evacuated by the enemy and restored to the United States. The Court said that, by the military occupation of Castine, the enemy acquired a possession which enabled him to exercise the fullest rights of sovereignty; that the sovereignty of the United States was suspended, and our laws could be no longer rightfully enforced there or be obligatory upon the inhabitants; that, by the surrender, the inhabitants passed under a temporary allegiance to the British government, and were only bound by the laws of that government, and that Castine was during this period to be deemed a foreign port; that goods brought there were subject to duties which the British government chose to impose, and were in no correct sense imported into the United States, and that the subsequent evacuation by the enemy did not change the character of the transaction, since the goods were not liable to American duties when imported. In that case, the character of the port as foreign or

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domestic was held to depend upon the question of actual occupation, and the right of the defendant determinable by the facts then existing, and further that the subsequent reoccupation of the port by the United States was ineffectual to

change the right of the defendant or to vest a new right in the United States.

A case somewhat to the converse of this was that of *Fleming v. Page,* 9 How. 603, which was an action against the collector at Philadelphia to recover back duties upon merchandise imported from Tampico, in Mexico, during a temporary military occupation of that place by the United States. It was held that, although Tampico was within the military occupation of the United States, it had not ceased to be a foreign country in the sense in which these words are used in the acts of Congress. In delivering the opinion of the Court, Mr. Chief Justice Taney observed:

"The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treatymaking power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. . . . While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist."

This was clearly a sufficient reason for disposing of the case adversely to the importer, but the learned Chief Justice proceeded to put the case upon another ground -- that

"there was no act of Congress establishing a custom house at Tampico, nor authorizing the appointment of a collector, and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law where the voyage is from one port of the United States to another;"

that the only

collector was one appointed by the military commander, and that a coasting manifest granted by him could not be recognized in the United States as the document required by law when the vessel is engaged in the coasting trade, nor exempt the cargo from the payment of duties. He states that this construction of the tariff laws had been uniformly given by the administrative department of the government, and cited the case of Florida, after it had been ceded to the United States and the military forces had taken possession of Pensacola:

"That is, that, although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress. And it appears that this decision was sanctioned at the time by the Attorney General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the later case, after a customhouse had been established by law (2 Stat. 418) at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department in no instance that we are aware of since the establishment of the government has ever recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by act of Congress."

While we see no reason to doubt the conclusion of the Court that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there or authorizing the appointment of a collector should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an

act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port.

It is not intended to intimate that the cases of *United States v. Rice* and *Fleming v. Page* are not harmonious. In fact, they are perfectly consistent with each other. In the first case, it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the *Rice* case to impose a duty upon goods which might already have paid a duty to the British commander. It would have been equally unjust in the *Fleming* case to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States.

The next case is that of *Cross v. Harrison,* 16 How. 164. This was an action of assumpsit to recover back moneys paid to Harrison while acting as collector at the port of San Francisco, for tonnage and duties upon merchandise imported from foreign countries into California between February 2, 1848 -- the date of the treaty of peace between the United States and Mexico -- and November 13, 1849, when the collector appointed by the President (according to an Act of Congress passed March 3, 1849) entered upon his duties. Plaintiffs insisted that, until such collector had been appointed, California was and continued to be after the date of the treaty a foreign territory, and hence that no duties were payable as upon an importation into the United States. The plaintiffs proceeded upon the theory, stated in the *dictum* in *Fleming v. Page,* that duties had never been held to accrue to the United States in her newly acquired territories until provision was made by act of Congress for their collection, and that the revenue laws had always been held to speak only as to the United States and its territories existing at the time when the several acts were passed. The collector had

been appointed by the military governor of California, and duties were assessed, after the treaty, according to the United States Tariff Act of 1846. In holding that these duties were properly assessed, Mr. Justice Wayne cited with apparent approval a dispatch written by Mr. Buchanan, then Secretary of State, and a circular letter issued by the Secretary of the Treasury, Mr. Robert J. Walker, holding that, from the necessities of the case, the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government. "The great law of necessity," says Mr. Buchanan,

"justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest."

These letters will be alluded to hereafter in treating of the action of the executive departments.

The Court further held in this case that, "after the ratification of the treaty, California became a part of the United States, or a ceded, conquered, territory;" that,

"as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage;"

that (p. 57 U. S. 193)

"the territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and

regulations respecting the territory or other property belonging to the United States. . . . That the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification, . . . and that, until Congress legislated for it, the duty upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison. "

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To the objection that no collection districts had been established in California, and in apparent dissent from the views of the Chief Justice in *Fleming v. Page,* he added (p. 57 U. S. 196):

"It was urged that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied that collection districts and ports of entry are no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere within its jurisdiction is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nation."

The Court also cited the cases of Louisiana and Florida, and seemed to take an entirely different view of the facts connected with the admission of those territories from what had been taken in *Fleming v. Page.* The opinion, which is quite a long one, establishes the three following propositions: (1) that, under the war power, the military governor of California was authorized to prescribe a scale of duties

upon importations from foreign counties to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace; (2) that after such ratification, duties were legally exacted under the tariff laws of the United States, which took effect immediately; (3) that the civil government established in California continued, from the necessities of the case, until Congress provided a territorial government.

It will be seen that the three propositions involve a recognition of the fact that California became domestic territory immediately

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upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California. The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted and a collector is appointed was distinctly repudiated with the apparent acquiescence of Chief Justice Taney, who wrote the opinion in *Fleming v. Page* and still remained the Chief Justice of the Court. T he opinion does not involve directly the question at issue in this case: whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in *Cross v. Harrison* were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty would not be considered as imported from a foreign country.

The practice and rulings of the executive departments with respect to the status of newly acquired territories, prior to such status being settled by acts of Congress, is, with a single exception, strictly in line with the decision of this Court in *Cross v. Harrison,* 16 How. 164. The only possessions in connection with which the question has arisen are Louisiana, Florida, Texas, California, and Alaska. We take these up in their order.

Louisiana: By treaty between France and Spain, October 1, 1800, 8 Stat. 202, His Catholic Majesty promised to cede to the French Republic the colony or province

of Louisiana, and by treaty between the United States and the French Republic of April 30, 1803, France ceded to the United States, "forever and in full sovereignty, the said territory with all its rights and appurtenances," with a provision (Art. 3)

"that the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution."

This treaty was ratified October 21, 1803. Possession of the territory was not delivered by Spain to France until November 30, 1803, and by France to the United States, December 20, 1803. In the meantime, and on October 31, 1803, Congress authorized the President to take possession of the territory, and to administer it

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until Congress had further acted upon the subject. 2 Stat. 245. On February 24, 1804, Congress passed another act, 2 Stat. 251, taking Louisiana within the customs union and repealing certain special laws laying duties upon goods imported from that territory into the United States. This act was to take effect March 25, 1804. We are, then, concerned only with the interval between December 20, 1803, when possession was delivered to the United States, and March 25, 1804, when the act of February 24 took effect.

In a letter to President Jefferson of July 9, 1803, Mr. Gallatin, then Secretary of the Treasury, expressed the opinion that all the duties on exports now payable at New Orleans by Spanish laws should cease, and all articles, the growth of Louisiana, which, when imported into the United States, now pay duty, should continue to pay the same, or at least such rates as would on the whole not affect the revenue. Writings of Gallatin, vol. 1, page 127.

The instructions of the Treasury Department with respect to this interval are contained in a letter by Mr. Gallatin to Governor Claiborne, who was about to start for his post as governor of the new province, under date of October 3, 1803, in which he says:

"It is understood that the existing duties on imports and exports, which by the Spanish law are now levied within the province, will continue until Congress shall have otherwise provided."

On November 14, 1803, Mr. Gallatin issued an order directed to Mr. Trist, who had been designated as collector of the port of New Orleans, as follows:

"You will also be pleased to observe, first, that the taxes and the duties to be collected under your direction are precisely the same which by the existing laws and regulations Louisiana were demandable under the Spanish government at the time of taking possession. . . ."

"10. That, until otherwise provided for, the same duties are to be collected on the importation of goods in the Mississippi District, from New Orleans, and *vice versa,* as heretofore."

On February 28, 1804, Mr. Gallatin issued a circular letter notifying the collectors of the passage of the Act of February 24, and that the same would go into effect March 25, and

"that, by the third section of said act so much of any law or laws imposing

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duties on the importations into the United States of goods, wares, and merchandise from New Orleans, which is the only port of entry in said territories, has been repealed."

These instructions undoubtedly show that Mr. Gallatin treated New Orleans as a foreign port until Congress, by the Act of February 24, 1804, admitted it within the customs union, and, so far, is an authority in favor of the position taken by the collector in this case. But it should be borne in mind in this connection that his instructions to collect duties levied by the Spanish law upon foreign importations into New Orleans are manifestly inconsistent with the position subsequently taken by this Court in *Cross v. Harrison,* 16 How. 164, wherein it is said (p. 57 U. S. 189) of the action of Mr. Harrison in California:

"That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States."

After saying that this action had been recognized by the President, Mr. Justice Wayne adds:

"We think it was a rightful and correct recognition under all the circumstances, and when we say rightful we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California."

Indeed, it is quite evident from this case that the Court took an entirely different view of the relations of California to the Union from that which had been taken by Mr. Gallatin as to Louisiana in his instructions to the collector of New Orleans.

Florida: Florida was ceded by Spain to the United States by treaty signed February 22, 1819, but not ratified until October 29, 1820. 8 Stat. 252. By Act of March 3, 1821, 3 Stat. 637, Congress authorized the President to take possession of the Floridas and extend thereto the revenue laws of the United States. Possession of East Florida was not delivered until July 10, 1821, nor of West Florida until July 17. It is true that certain ports of Florida were in the military occupation of the United States prior to the actual delivery of possession by

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Spain, but the cession did not take effect until there had been a voluntary and complete delivery under the treaty. As the act extending the revenue laws to the Floridas was passed before the surrender of the province to the United States, there was no interval of time upon which the Treasury Department could act, the provinces, immediately upon the surrender, becoming subject to the Act of March 3, 1821.

An opinion of Mr. Wirt, then Attorney General, of August 20, 1821, in the case of *The Olive Branch,* 1 Ops.Atty.Gen. 483, is instructive in this connection as illustrating the views of the administration. After stating that possession of East Florida was not delivered until July 17 (a mistake for July 10), he held that the cargo of *The Olive Branch,* which had cleared from the port of St. Augustine, July 14, was imported into Philadelphia from a foreign port or place, and consequently subject to duty, because possession had not been delivered, citing the case of *The Fama,* 5 Ch.Rob. 106, and adding:

"On the other hand, I apprehend that goods carried into a port of Florida before the delivery, remaining in port on shipboard until after the delivery, and then brought into the United States in the same vessel, or by transhipment into others, having been never entered in the Spanish customhouses, nor landed, nor the duties thereon paid or secured, but having continued all the while water-borne, would be subject to our revenue laws. . . . Our laws impose duties only on goods imported into the United States from some foreign port or place. If, therefore, in the case put, the importation be, in contemplation of law, an importation from the Floridas, the case is not within our laws because, at the time of the importation, the Floridas were not foreign ports or places."

The learned Attorney General evidently took the view that the Floridas ceased to be a foreign country upon a delivery of possession under the treaty. In a subsequent letter of January 24, 1823, 5 Ops.Atty.Gen. 748, Mr. Wirt admits that he had been misled by the newspapers in the belief that East Florida had been surrendered prior to July 14, on which day *The Olive Branch* left St. Augustine, and recommended that the case be sent to the President, as it seemed to involve a dispute with Great Britain.

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Texas: On March 1, 1845, Congress adopted a joint resolution consenting to the annexation of Texas upon certain conditions, 5 Stat. 797, but it was not until December 29, 1845, that it was formally admitted as a state. 9 Stat. 108. In this

interval, and on July 29, 1845, the Secretary of the Treasury issued a circular letter directing the collectors to collect duties upon all imports from Texas into the United States until Congress had further acted. Of course there could be no question that Texas remained a foreign state until December 29, when she was formally admitted. The circular, therefore, is of no pertinence to the question here involved.

California: California was ceded by Mexico to the United States by treaty signed February 2, 1848, ratifications of which were exchanged May 30, 1848, and proclamation made July 4. 9 Stat. 922. On March 3, 1849, an act was passed, 9 Stat. 400, including San Francisco within one of the collection districts, and on November 13, the collector appointed by the President entered upon his duties. California had been in our military possession since August, 1847. There was therefore an interval of one year and nine months between the date of the treaty, February 3, 1848, and November 13, 1849, when the collector entered upon his duties.

On October 7, 1848, Mr. Buchanan, then Secretary of State, addressed a letter to Mr. Voorhees, already referred to, in which he states that, although the military government ceased to exist with the conclusion of the treaty of peace, it would continue with the presumed consent of the people until Congress should provide for them a territorial government, and then adds:

"This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason, no import duties can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the Territory of the United

States. I shall not enlarge upon this subject, however, as the Secretary of the Treasury will perform that duty."

Ex.Docs., 2d Sess.. 30th Cong. vol. 1, p. 47.

Mr. Walker, then Secretary of the Treasury, did perform that duty in a circular letter of the same date to the collectors, in which he instructed the collectors as follows:

"First, all articles of the growth, produce, or manufacture of California, shipped therefrom at any time since the 30th day of May last [the date when the ratifications were exchanged] are entitled to admission free of duty into all the ports of the United States and second, all articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California."

Ibid. p. 45. He adds that foreign goods imported into California, not paying duties there, will be subject to duty if shipped thence to any port or place in the United States. In a letter from Mr. Marcy, Secretary of War, to Colonel Mason, the military commander, of October 9, 1848, he uses the same language.

These letters are cited with approval by this Court in *Cross v. Harrison,* 16 How. 184, and although the question there related only to duties on goods imported from foreign countries, the tenor of the opinion, as already stated, is a virtual endorsement of the position taken by the executive departments. It is evident that the administration took an entirely different view of the law from what had been taken by Mr. Gallatin in his instructions regarding Louisiana, and established a practice, which has never since been departed from, of treating territory ceded to the United States and occupied by its troops as being domestic, and not foreign, territory.

This correspondence with reference to California took place in 1848. The decision in *Fleming v. Page,* 9 How. 603, was pronounced in 1850; yet, as appears from the list of documents submitted by Mr. Johnson upon the argument of that case (p.

611 [argument of counsel -- omitted]) the attention of the Court was not called to these instructions, though other letters and circulars were introduced

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bearing date of 1846 and 1847, as well as the treaty of peace of February 2, 1848. Had the correspondence above cited been laid before the Court, it is incredible that the Chief Justice should have said

"that the department in no instance that we are aware of since the establishment of the government has ever recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on unless it had been previously made so by act of Congress."

Alaska: This territory was ceded to us by Russia by treaty ratified June 20, 1867, 15 Stat. 539, and possession was delivered to us at the same time. No act of Congress extending the revenue laws to Alaska and erecting a collection district was passed until July 27, 1868, 15 Stat. 240, c. 273. A period of thirteen months then elapsed before Alaska, was formally recognized by Congress as within the customs union, yet during that period, goods from Alaska were, under a decision of the Secretary of the Treasury, admitted free of duty. By letter of Mr. McCullough, then Secretary of the Treasury, to the collector of the port of New York dated April 6, 1868, he acknowledges receipt of a request from the Russian minister for the free entry of certain oil shipped from Sitka to San Francisco and reshipped to New York. He states:

"The request for the free entry of said oil was made on the ground that the oil was shipped from Sitka after the ratification of the treaty by which the Territory of Alaska became the property of the United States. The treaty in question was ratified on the 20th of June, 1867, and the collector at San Francisco has reported that the manifest of the vessel shows the oil to have been shipped from Alaska on the 6th day of July, 1867, and that the shipment consisted of fifty-two packages. Under these circumstances, you are hereby authorized to admit the said fifty-two packages of oil free of duty."

This position was endorsed by the Secretary of State, Mr. Seward, in a letter dated January 30, 1869, in which he said:

"I understand the decision of the Supreme Court in the case of *Cross v. Harrison,* 16 How. 164, to declare its opinion that, upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach

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to and take effect within such territory *ipso facto,* and without any fresh act of legislation expressly giving such extension to the preexisting laws. I can see no reason for a discrimination in this effect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes."

As showing the construction put upon this question by the legislative department, we need only to add that section 2 of the Foraker Act makes a distinction between foreign countries and Porto Rico by enacting that the same duties shall be paid upon

"all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries."

From this resume of the decisions of this Court, the instructions of the executive departments, and the above act of Congress it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present the there is not a shred of authority, except the *dictum* in *Fleming v. Page* (practically overruled in *Cross v. Harrison*) for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient, as was held in *Fleming v. Page,* nor is a treaty ceding such territory sufficient without a surrender of possession. *Keene v. McDonough,* 8 Pet. 308; *Pollard v. Kibbe,* 14 Pet. 353, 39 U. S. 406 ; *Hallett v. Hunt,* 7 Ala. 899; *The Fama,* 5 C.Rob. 106. The practice of the executive departments, thus continued for more

than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *United States v. Johnston,* 124 U. S. 236 , and other cases cited.

But, were this presented as an original question, we should be impelled irresistibly to the same conclusion.

By Article II, Section 2 of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur;" and by Article VI,

"this Constitution and the laws

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of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land."

It will be observed that no distinction is made as to the question of supremacy between laws and treaties except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in *United States v. The Peggy,* 1 Cranch 103, 5 U. S. 110 :

"Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress."

And in *Foster v. Neilson,* 2 Pet. 253, 27 U. S. 314 , he repeated this in substance:

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision."

So, in *Whitney v. Robertson,* 124 U. S. 190 :

"By the Constitution, a treaty is placed on the same footing, and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either, but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing."

To the same effect are the *Cherokee Tobacco,* 11 Wall. 616, and the *Head Money Cases,* 112 U. S. 580 .

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in *American Ins. Co. v. Canter,* 1 Pet. 511, 26 U. S. 542 :

"The Constitution confers absolutely upon the government

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of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."

The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that, by the ratification of the Treaty of Paris, the island became territory of the United States, although not an organized territory in the technical sense of the word.

It is true Mr. Chief Justice Taney held, in *Scott v. Sanford,* 19 How. 393, that the territorial clause of the Constitution was confined, and intended to be confined, to the territory which at that time belonged to or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain, and was not intended to apply to territory subsequently acquired. He seemed to differ in this construction from Chief Justice Marshall in *American Ins. Co. v. Canter,* 1 Pet. 511, 26 U. S. 542 , who in speaking of Florida before it became a state, remarked that it continued to be a territory of the United States, governed by the territorial clause of the Constitution.

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this Court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the *Dred Scott* case. In the more recent case of *National Bank v. County of Yankton,* 101 U. S. 129 , it was said by Mr. Chief Justice Waite that Congress

"has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states."

Indeed, it is scarcely too much to say that there has not been a session of Congress since the Territory of Louisiana was purchased that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the

subject. Under this power, Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.

Territory thus acquired can remain a foreign country under the tariff laws only upon one or two theories: either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the states. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born, and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, Section 10, that the state shall not do certain things, this declaration operates not only upon the thirteen original states, but upon all who subsequently become such, and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a state. By parity of reasoning, a country ceases to be foreign the instant it becomes domestic. So too, if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power, there could be no doubt that from the day of such cession and the delivery of possession such territory would become a foreign country, and be reinstated as such under the tariff law. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary, for the adequate administration of a domestic territory, to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that, until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this Court. It is true the nonaction of Congress may occasion a temporary inconvenience, but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will

acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient if the contention of the government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.

A single further point remains to be considered: it is insisted that an Act of Congress passed March 24, 1900, 31 Stat. 51, applying for the benefit of Porto Rico the amount of the customs revenue received on importations by the United States from Porto Rico since the evacuation of Porto Rico by the Spanish forces, October 18, 1898, to January 1, 1900, together with any further customs revenues collected on importations from Porto Rico since January 1, 1900, or that shall hereafter be collected under existing law, is a recognition by Congress of the right to collect such duties as upon importations from a foreign country, and a recognition of the fact that Porto Rico continued to be a foreign country until Congress embraced it within the customs union. It may be seriously questioned whether this is anything more than a recognition of the fact that there were moneys in the Treasury not subject to existing appropriation laws. Perhaps we may go further and say that, so far as these duties were paid voluntarily and without protest, the legality of the payment was intended to be recognized, but it can clearly have no retroactive effect, as to moneys theretofore paid under protest for which an action to recover back had already been brought. As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands justly and equitably belonging to them. To say that Congress could, by a subsequent

act, deprive them of the right to prosecute this action would be beyond its power. In any event, it should not be interpreted so as to make it retroactive. *Kennett's Petition,* 24 N.H. 139; *Alter's Appeal,* 67 Pa. 341; *Norman v. Heist,* 5 W. & S. 171; *Donovan v. Pitcher,* 53 Ala. 411; *Palairet's Appeal,* 67 Pa. 479; *State v. Warren,* 28 Md. 338.

We are therefore of opinion that, at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back.

The judgment of the Circuit Court for the Southern District of New York is therefore reversed, and the case remanded to that court for further proceedings in consonance with this opinion.

MR. JUSTICE Mc KENNA, with whom concurred MR. JUSTICE SHIRAS and MR. JUSTICE WHITE, dissenting:

MR. JUSTICE SHIRAS, MR. JUSTICE WHITE, and myself are unable to concur in the conclusion of the Court, and the importance of the case justifies an expression of the grounds of our dissent.

Settle whether Porto Rico is "foreign country" or "domestic territory," to use the antithesis of the opinion of the Court, and, it is said, you settle the controversy in this litigation. But in what sense, foreign or domestic? Abstractly and unqualifiedly -- to the full extent that those words imply -- or limitedly, in the sense that the word "foreign" is used in the customs laws of the United States? If abstractly, the case turns upon a definition, and the issue becomes single and simple, presenting no difficulty, and yet the arguments at bar have ranged over all the powers of government, and this Court divides in opinion. If, at the time the duties which are complained of were levied, Porto Rico was as much a foreign country as it was before the war with Spain, if it was as much domestic territory as New York now is, there would be no serious controversy in the case. If the former, the terms and the intention of the Dingley Act would apply. If the latter, whatever its words or

intention, it could not be applied. Between these extremes, there are other relations, and that Porto Rico occupied one of them and its products hence were subject to duties under the Dingley Tariff Act can be demonstrated. Indeed we have the authority of a member of the majority of the Court, and the organ of the Court's opinion in this case, that, even if Porto Rico were domestic territory, its products could be legally subjected to tariff duties. This principle is expressed by him in *Downes v. Bidwell.* The other members of the Court, though agreeing with him in the case at bar, do not agree with him in *Downes v. Bidwell.* They assert that, Porto Rico being a territory of the United States, tariff duties on its products are inhibited by the Constitution of the United States. Their judgment and his only unite in the case at bar, and we may assume that the reasoning of the opinion just announced is the road which has brought them together, and, assuming further that such reasoning is the best judicial support of the conclusion it is presented to establish, we address ourselves to the consideration of that reasoning.

(1) The statement of the opinion is that whether the cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a foreign country at the time they were shipped, and a foreign country is defined to be, following Chief Justice Marshall, " *one exclusively within the sovereignty of a foreign nation' and without the sovereignty of the United States." This makes sovereignty the test, and gives a rule as sure and exact in its application as it is clear and simple in its expression. There is no difficulty in applying it. Difficulty comes with attempts to limit it. The difference between our country and one not ours would seem to be of substance, not needing words to explain the difference, but defying words to confound it, and having the consequence of carrying not only one law, but all laws. The Court does not go so far, and why? Is there weakness in the logic, or do its consequences repel? The argument of the Court certainly proceeds as if the test is universal -- illustrations are used to make it unmistakable.*

Under the effect of the treaty of cession and our government of Porto Rico, it is said, if the question was broadly presented

whether it was "a foreign country or domestic territory," there would be as little hesitation in answering the question as there would be in determining the ownership of a house deeded in fee simple to a purchaser, after he had gone into possession, paid taxes, and made improvements, without let or hindrance from his vendor. And we would have as little hesitation in applying all of the consequences and concomitants of ownership. But we do not care to join issue on an illustration, although it may suggest wrong principles. We submit that the administration of a government has more complexity -- must consider more things -- than the management of a piece of real estate. But even the conveyance of real estate may be conditional, all of the incidents of ownership not immediately applying. However, we need not dwell on insufficient analogies. There are better ones. The history of our country has examples of the acquisition of foreign territory -- examples of what relation such territory bears to the United States -- authorities, executive, legislative, and judicial, as to what was wise in statesmanship, as well as what was legal and constitutional, in withholding or extending our laws to such territory, and finding these examples and authorities in the way the opinion of the court attempts to answer or distinguish or overrule them.

United States v. Rice, 4 Wheat. 246, 4 L. 562, is reviewed. In that case, Castine, port of the United States, was in temporary occupation by the British during the war of 1812, and it was declared to be a foreign country within the meaning of our customs laws, as much, the Court said by Mr. Justice Story, as if "Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there." In other words, not a cession to another country, but the accidental occupation by the armed forces of another country, made a port in the State of Maine foreign territory. The conclusion had the sanction of great names and the authority of this Court. Temporary sovereignty, not permanent dominion, was seemingly made the test.

Fleming v. Page, 9 How. 603, is also reviewed. The case involved the legality of duties levied in Philadelphia upon goods imported from Tampico. Tampico was a port of Mexico temporarily

occupied by the United States forces, the exact condition which, in the *Rice* case, made a port in one of the states of our Union English territory. Tampico was nevertheless held to be a foreign country within the meaning of our revenue laws. In other words, the military occupation and the sovereignty which attended it, which determined in the *Rice* case, was rejected in the *Fleming* case. There is apparent antagonism between the cases, and the Court in the case at bar observe it. And, strangely enough, that which is "somewhat of the converse" (to quote the Court in the case at bar) of the *Rice* case is held sufficient for the judgment in the *Fleming* case, and other grounds of decision are declared to be *dicta.*

An attempt is made, however, to reconcile the cases, and we think they can be reconciled, but not upon the grounds stated by the Court in the opinion in the case at bar. Harmony cannot be established between them by that which in the *Fleming* case is the converse of the *Rice* case, and by rejecting as *dicta* all other grounds as unnecessary to the judgment in the *Fleming* case. However, we will proceed to the consideration of the latter case.

Delivering the opinion of the court, Chief Justice Taney substantially said that the boundaries of our country could not be enlarged or diminished by the advance or retreat of armies, and based his opinion besides and the judgment of the case on the absence of an act of Congress establishing a customhouse at Tampico and authorizing the appointment of a collector,

"and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another,"

and the necessity of a legal permit and coasting manifest was expressly asserted. He further said:

"This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before

it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces

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of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is that, although Florida had by cession actually become a part of the United States and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress, and it appears that this decision was sanctioned at the time by the Attorney General of the United States, the law officer of the government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a customhouse had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department in no instance that we are aware of since the establishment of the government has ever recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on unless it had been previously made so by act of Congress."

The opinion in the case at bar disregards this reasoning and the conclusion from it, and says:

"While we see no reason to doubt the conclusion of the Court (in *Fleming v. Page*) that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required

to be issued to a vessel engaged in the coasting trade."

Such power, it was said, "a military commander may be presumed to have," but, "of course, he would have no power to make a domestic port of what was in reality a foreign port." But why did it remain a foreign port? Castine did not remain a domestic port. We, however, need not dwell any longer on this point,

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for, under the latest utterances of this Court, the test of dominion breaks down. Cuba is under the dominion of the United States. We held in the *Neely Case,* 180 U. S. 109 , that it is a foreign country.

We think that *Fleming v. Page* is disposed of too summarily by the majority in the case at bar, and we have shown that it is not antagonistic to the *Castine* case. Both cases recognized inevitable conditions. At Castine, the instrumentalities of the custom laws had been divested; at Tampico, they had not been invested, and hence the language of the Court:

"The department in no instance that we are aware of since the establishment of the government has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on unless it had been previously made so by act of Congress."

We submit that the principle upon which *Fleming v. Page* was based is still a proper principle for judicial application. Does it not make government provident, not haphazard, ignoring circumstances and producing good or ill accidentally? Does it not leave to the executive and the legislative departments that which pertains to them? Did it not stand as a guide to the executive -- a warrant of action so far as action might affect private rights? Indeed, what is of greater concern, so far as action might affect great public interests? It should, we submit, be accepted as a precedent. It is wise in practice; considerate of what government must regard, and of the different functions of the executive, legislative, and judicial departments and of their independence. Why should it, then, be discarded as *dictum?* If constancy of judicial decision is necessary to regulate the relations and property

rights of individuals, is not constancy of decision the more necessary when it may influence or has influenced the action of a nation? If the other departments of the government must look to the judicial for light, that light should burn steadily. It should not, like the exhalations of a marsh, shine to mislead.

The case of *Cross v. Harrison,* 16 How. 164, is relied on especially. The curiosity of that case is that all parties cite it, and this Court even finds it as convenient and as variously adaptive.

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It therefore challenges the application of the wise maxim expressed by Chief Justice Marshall, "[t]hat general expressions in every opinion are to be taken in connection with the case in which those expressions are used." And certainly to ascertain the meaning of the court, we must see what was before the court, and interpret its opinion by that, and, if there is confusion in its language, it may resolve itself into satisfactory meaning.

It is cited to sustain the proposition that immediately upon the cession of territory it becomes a part of the United States, "instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage." This is the strongest expression of the case. It is attempted to be made its controlling one -- the point decided. It was neither the point decided nor was it the controlling expression. It was immediately accompanied by the qualification, "as there is nothing differently stipulated in the treaty in respect to commerce." The effect of the qualification the opinion in the present case does not explicitly notice, and we shall attempt to show with what meaning the expression was used, and what was decided.

The case involved the legality of duties on imports into California between the 3d of February, 1848, and the 13th of November, 1849. The time was divided by the plaintiffs in the case "into two portions," the Court said, "to each of which they supposed that different rules of law attached," and further that "the claim covered various amounts of money which were paid at intervals between the 3d day of

February, 1848, and the 13th of November, 1849." The first of those dates was that of the treaty of peace between the United States and Mexico, and the latter when Mr. Collier, a person who had been regularly appointed collector at that port, entered upon the performance of the duties of his office.

"During the whole of this period, it was alleged by the plaintiffs that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries."

Meeting the contention and replying to it fully, the Court held that the duties were legally levied and collected during the whole of the period -- from the 3d of February, 1848, until sometime

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in the following fall -- under the war tariff instituted by Governor Mason; after that, under the Walker tariff. In other words, before and after cession, under the war tariff. Speaking of that tariff, the Court said:

"They [duties] were paid until some time in the fall of 1848 at the rate of the war tariff, which had been established early in the year before by the direction of the President of the United States."

And, speaking of the action of Governor Mason and the law which sanctioned it, it was further said:

"He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new states into this Union, with only such limitations as are expressed in the

section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in

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convention to form a state government, which was subsequently recognized by Congress under its power to admit new states into the Union."

And further replying to the contention that there was neither treaty not law permitting the collection of duties,

"it having been shown that the ratification of the treaty made California a part of the United States, and that as soon as it became so the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right."

An important inquiry is when did the laws cease "which had been instituted for the regulation of the territory as a belligerent right," and how did they cease? The answer is instant -- they ceased when the President withdrew them and because he withdrew them. The laws of Congress did not instantly apply upon the cession. There was an interval of time during which they did not apply, and if there can be such interval, who is to judge of what duration it shall be? Who can but the political

department of the government? and how impracticable any other ruling would be. It is not for the judiciary to question it. It involves circumstances which the judiciary can take no account of or estimate. It is essentially a political function.

We have quoted largely from *Cross v. Harrison* because it is made the pivot of the opinion of the court in the present case, and we will recur to it again. But it should be said now that some of the expressions may be accounted for and understood by the state of precedent opinion.

It is a matter of some surprise that the only explicit provision of the Constitution of the United States in regard to the territory not embraced within the jurisdiction of a state is expressed in the following provision:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."

What was meant by it, what its relation was to other provisions of the Constitution, was the subject of discussion. Gouveneur Morris, who wrote the provision, subsequently declared

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that it was intended to confer power to govern acquisitions of territory as "provinces and allow them no voice in our councils." He admitted, however, that it was not expressed more pointedly in order to avert opposition. In his mind it certainly contemplated the government of after-acquired territory. In *Scott v. Sandford,* 19 How. 393, however, the provision was declared to be confined, and was intended to be confined, to the territory which at that time belonged to the United States. "It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more." This conclusion was claimed to be established by the history of the times, "as well as the careful terms in which the article is framed." We will not stop to reconcile this conflict between him who wrote the provision and the court who interpreted it. The conflict was but an incident in the evolution of opinion. And there were other conflicts, or rather diversities of view, caused or encouraged by the silences of the Constitution. That

instrument contained no provision for acquiring new territory. The power was derived from the powers of making war and of making peace, and might be accomplished by conquest or by treaty. There was a question, however, of the effect of an acquisition. It is certain that Mr. Jefferson doubted the power of incorporating new territory into the Union without an amendment to the Constitution, and the debates in Congress exhibit the diverse views held by public men on the relation which such territory would bear to the United States, the application of the laws to and the power of Congress over the acquired territory under the Constitution. We shall not stop to quote the debates. That will be done in a subsequent case, and the conclusion which they demonstrate expressed. It is only necessary for us to observe that distinctions always existed between territory which might be acquired (whether by purchase or by conquest) and that which was within the acknowledged limits of the United States, and also that which might be acquired by the establishment of a disputed line. These distinctions were conspicuous in the opinion of Mr. Justice Johnson at circuit, in the case of *American Insurance Company v. Canter,* 1 Pet. 511. In that case, the relation of Florida to the United States

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was necessary to be considered, and of that relation, the learned Justice said:

"It is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest) within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these, there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of*

cession. "

The italics are ours.

All the history and utterances of the past declare the same way.

And how important those utterances and decisive of the present controversy! They were not the utterances of inattention and ignorance, and therefore to be discarded. They were the utterances of men whose actions illustrated them. They were the utterances of men (to borrow the thought of Benton) whose sacrifices made the Constitution possible, whose genius conceived and wrote it. Shall it be said that the farther time separates us from them the better we understand them -- better than they understood themselves?

American Insurance Co. v. Canter came to this Court and was argued by Mr. Webster. We may quote what he said. His views were more than those of an advocate. He expressed them elsewhere when a different, if not higher, duty demanded reflection, consideration, and sincerity. "What is Florida?" he asked.

"It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions."

And, responding to the argument, the Court decided, through Chief Justice

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Marshall that the judicial power of the United States, as declared by the Constitution, did not extend to Florida, and the title to one hundred and fifty-six bales of cotton was held to pass by a sale under the order of a court, which consisted of a notary and five jurors, established by an act of the Governor and council of Florida.

From the light of previous opinions, the language of Mr. Justice Wayne in *Cross v. Harrison* receives explanation. The treaty with Mexico, following the war, defined the "boundaries of the United States," and made the reclaimed territory, which included California, a part of the United States. In other words, the acquisition (if it

can be called such) of California was in recognition of boundaries, and hence the learned Justice called it a part of the United States. But not uniformly. Mark this sentence: "But after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory." That his language marked a distinction there can be no doubt, but it was of no consequence to observe. The principle enforced did not need it. In either case, the action of the President was the potent thing.

2. The line of judicial precedents relied upon in the opinion of the Court in the case at bar ends with *Cross v. Harrison,* and the practice and rulings of the executive departments of the government are considered. They are said to be in accordance with the ruling ascribed to *Cross v. Harrison,* with but a single exception. If there is one legal exception, the rule is gone. It is not a case where an exception can prove the rule; it is one where the exception destroys the rule. The exception was Louisiana. Between December 20, 1803, when possession was delivered to the United States, and March 25, 1804, when the Act of February 24 became effective, Louisiana was treated as a foreign country under the customs laws, but this, the Court in the opinion just announced says,

"is manifestly inconsistent with the position subsequently taken by this Court in *Cross v. Harrison,* wherein it is said of the action of Mr. Harrison in California:"

"That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico,

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and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the Executive of the United States, or without any interference to prevent it. Indeed, from the letter from the then Secretary of the Treasury, we cannot doubt that the action of the military governor of California was

recognized as allowable and lawful by Mr. Polk and his cabinet."

"After saying that, and this action having been recognized by the President, Mr. Justice Wayne adds:"

"We think it was a rightful and correct recognition under all the circumstances, and when we say rightful we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California."

If the laws of Congress instantly applied, why was the recognition of the President necessary? They could gain no legal efficacy from such recognition which they did not have without it, under the supposition that they applied on cession by their own force. Surely so obvious a consequence would have occurred to the Court in *Cross v. Harrison,* and we cannot believe that the court used its language carelessly or uselessly. If the assent and recognition of the President were not necessary, why dwell upon them? Why so confuse the statement of a simple principle -- simple in application and expression -- and cast doubt upon it by unnecessary qualifications? The case therefore is not inconsistent with the ruling in regard to Louisiana. For a period of time after the cession of Louisiana, President Jefferson treated it as foreign territory under the custom laws, and duties were levied upon its products, and no one disputed the legality of it. If the instance was not the same as in *Cross v. Harrison,* the principle was the same. There was not an immediate change upon the cession of either California or Louisiana. In California, duties were levied for a time under the war tariff, and afterwards under the act of Congress, and of the latter it was said: "This last was done with the assent of the Executive of the United States, or without any interference to prevent it." And this, it was further said, was "recognized as

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allowable and lawful by Mr. Polk and his cabinet." We are disposed to ask again, was the language inadvertent? Did not the Court use it with full consciousness of its meaning and its necessity? Was the Court in confusion as to the principles

which applied, and jumbled them together without seeing or making a distinction between the force of the act of Congress of itself and the action of the President in giving it efficacy, the necessity of its being recognized as "allowable and lawful by Mr. Polk and his cabinet?" Surely not. Rights were involved which depended upon the legality of the war tariff both before and after cession, and that legality was intended to be and was passed upon and sustained. An automatic effect was not given to the act of Congress as it is given in the case at bar. The act was applied by the President not in simple execution of it, but as giving it legal effect. And it was this that the Court said "was a rightful and correct recognition under all the circumstances." "Rightful," because "it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California." In other words, an act of Congress was not necessary to extend the collection of duties; the power of the President was sufficient, and of that power the Court left no doubt. Speaking of the duties which were collected under the war tariff after the cession, it was observed,

"but after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory. Our inquiry here is to be whether or not the cession gave any right to the plaintiffs to have the duties restored to them which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our government to the military governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government which had been instituted during the war was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington. "

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Comment would seem to be unnecessary to make this passage clear. If the act of Congress applied by cession, it applied immediately. It could not be delayed by taking time for notice. Besides, it would by its own force displace all other provisions, and would not need for operation upon rights or the creation of rights,

that the President give instructions or intimations, near or remote, "that the civil and military government which had been instituted during the war was discontinued." But we need not comment further. We may use the language of the Court in summarizing its conclusion:

"Our conclusion from what has been said is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that, until Congress legislated for it the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

This explicit statement, as well as the analysis and review which have first been made, leaves no ground to sustain the conclusion that *Cross v. Harrison* held that the tariff laws of the United States were immediately operative in California without regard to the exercise of the President's discretion putting them in force. But, purely for argument's sake, we may concede the contrary. The decision must have been, in any conception, based on the provisions of the treaty with Mexico. The Court said so. But the treaty with Spain, instead of providing for incorporating the ceded territory into the United States, as did the treaty with Mexico, expressly declares that the status of the ceded territory is to be determined by Congress. This difference in the treaties removes *Cross v. Harrison* as a factor in the judgment of the case at bar, supposing its interpretation, in the opinion we are reviewing, be correct.

3. The opinion of the Court says:

"On March 1, 1845, Congress adopted a joint resolution consenting to the annexation

of Texas upon certain conditions, 5 Stat. 797, but it was not until December 29, 1845, that it was formally admitted as a state. 9 Stat. 108. In this interval, and on July 29, 1845, the Secretary of the Treasury issued a circular letter directing the collectors to collect duties upon all imports from Texas into the United States until Congress had further acted. Of course, there could be no question that Texas remained a foreign state until December 29, when she was formally admitted. The circular therefore is of no pertinence to the question here involved."

We think otherwise. Even after her admission as a state, it was deemed necessary to extend the laws of the United States to her. 9 Stat. 1. She was an example, as Florida was, as to what Congress believed to be necessary, and Oregon and Alaska are like examples. The simple rule of the automatic action of the custom and revenue laws seemingly did not occur to anybody; not even as to incorporated territory nor to a new state formed from foreign territory. Nor, as we have seen, did such theory seem to be sustainable when Chief Justice Taney announced in *Fleming v. Page* a contrary conclusion.

4. But, independent of precedent, the Court says it is "irresistibly impelled to the same conclusion." The argument is mainly based upon the treatymaking power invested in the President and Senate. A treaty made by that power is said to be the supreme law of the land -- as efficacious as an act of Congress and, if subsequent and inconsistent with an act of Congress, repeals it. This must be granted, and also that "one of the ordinary incidents of a treaty is the cession of territory," and that "the territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress." But to tell us of the sources of the treatymaking power and to define the extent of that power helps us very little to the solution of the present problem.

The question occurs what has the treatymaking power done? Is the treaty with Spain inconsistent with the Dingley Act, and was it intended to work the repeal of that act? That act when passed was undoubtedly intended to apply to products from Porto Rico, and, we suppose, it will not be contended, in determining whether the treaty has rendered the act inoperative, the

terms of the treaty are not to be looked at? Assuredly the treaty cannot have an automatic force contrary to its terms. That is, it cannot be contended that the automatic force of the treaty is greater than the force of the treaty itself.

This Court said, speaking by MR. JUSTICE BROWN, in *Holden v. Hardy,* 169 U. S. 366 :

"In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."

The statement being accepted, may not a fiscal system be as important as other matters of administration? May not a change of taxation, new burdens of taxation suddenly imposed, be worthy of consideration?

"The opinion of the case at bar has not discussed the treaty. It takes it for granted that the cession of Porto Rico was absolute, and the conclusion that it is not a foreign country within the meaning of the revenue laws is deduced from that. But necessarily that depends upon the treaty, and interpretation is called for. The power of Congress over ceded territory is asserted in the opinion in somewhat absolute terms -- it 'involves the right to govern and dispose of it.' This being so, it would seem to be certain that the treatymaking power would not forestall Congress, or accept with the cession of territory the destruction of the fiscal and industrial policies of the country. We should hesitate to so pronounce for reasons which must occur to everyone, except upon the compulsion of the clearest expression."

The opinion of the Court further says:

"Territory thus acquired [by treaty] can remain a foreign country under the tariff laws only upon one of two theories: either that the word 'foreign' applies to such countries as were foreign at the time the statute

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was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the states."

Both theories are rejected as untenable. The first because, "while a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope." But what constitutes the scope of a statute -- its letter inevitably, or may its spirit be regarded as interpreting and applying its letter? In other words, shall the purpose of its enactment be executed or defeated? There can be but one answer to these questions, nor can confidence in the answer be lessened by the analogies used by the Court.

The law against selling liquors to minors, it is said, contemplates all minors -- those existing and those which may come into being afterwards. Very true, but the purpose of the law is that. The same with territories (to use another illustration of the opinion) being bound as states when they come into the Union. But these illustrations assume that the territory referred to was incorporated by the treaty into the United States, an ever-recurring and misleading fallacy, in our judgment.

Let us, however, look at the argument under the wrong assumption of incorporation. The provisions of the Constitution for the admission of new states contemplate the consequences of statehood -- contemplate territories ceasing to be bound as such and becoming bound as states. In other words, those provisions regard the future, and have their purpose fulfilled, not defeated, by territories becoming states. But a tariff law does not contemplate additions to or subtractions from itself. It may be said to be occasional. It regards certain conditions, and may be dependent upon them, whether it be enacted for revenue only or for protection and revenue. Its entire plan may be impaired or be destroyed by change in any

part. The revenues of the government may be lessened, even taken away by change; the industrial policy of the country may be destroyed by change. We are repelled by the argument which leads to such consequences, whether regarding our own country or the foreign country made "domestic." If "domestic" as to what comes from it, it is "domestic" as to what goes to it, and its customs laws, as well

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as our customs laws, may be cast into confusion, and its business and affairs deranged before there is possibility of action.

As we have already said, to set the word "foreign" in antithesis to the word "domestic" proves nothing. Their opposition does not express the controversy. The controversy is narrower. It is whether a particular tariff law applies. That, indeed, may be the consequence of the principle that all laws apply, or that customs laws apply by reason of the provision of the Constitution which requires duties, imposts, and excises to be uniform throughout the United States, and the treatymaking power cannot prevent the application of that provision. That principle is asserted by counsel, and is very simple, but, applied as counsel apply it, is fraught with grave consequences. It takes this great country out of the world and shuts it up within itself. It binds and cripples the power to make war and peace. It may take away the fruits of victory, and, if we may contemplate the possibility of disaster, it may take away the means of mitigating that. All those great and necessary powers, are, as a consequence of the argument, limited by the necessity to make some impost or excise "uniform throughout the United States."

The treatymaking power is as much a constitutional power as the legislative or judicial powers. It is a supreme attribute of sovereignty, but often less determined in its exercise than others -- more dependent on contingency, and may be less optional. It may precede war or follow war -- command or be commanded by war. The kind or direction of its exercise cannot always be predicted or marked. There can be no verbal limitations upon it, and, wisely, none were attempted. Whatever restraints should be put upon it might have to yield to the greater restraints of life or death -- not only material prosperity, but national existence. These, of course,

are extreme contingencies, but they are not impossible, and are necessary to be regarded when limitations are urged which take no account of them. We do not mean to say that there are no limitations. They are certainly not those which counsel urge. Besides, the contention of counsel is answered by the *Canter* case. The difference between military occupation of a territory and its cession at the treaty of peace was noted. "If it be ceded by the treaty,"

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the Court said,

"the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

What is the significance of this? It would seem like useless language, its purpose often defeated if the Constitution and laws of the conqueror, and, to drop from the abstract and supposing this country the conqueror, if our Constitution and laws, immediately apply on cession of territory. The terms which may be granted or received would be, to a certain and important extent, predetermined. Neither we nor the conquered nation would have any choice in the new situation, could make no accommodation to exigency, would stand bound in a helpless fatality. Whatever might be the interests, temporary or permanent, whatever might be the condition or fitness of the ceded territory, the effect on it or on us, the territory would become a part of the United States with all that implies. It is only true to say that counsel shrink somewhat from the consequences of their contention, or, if "shrink" be too strong an expression, deny that it can be carried to the nationalization of uncivilized tribes. Whether that limitation can be logically justified we are not called upon to say. There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary or which could be applied or enforced by the judiciary. Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial. Nor can those difficulties be put out of

contemplation, under the assumption that the principles which we may declare will have no other consequence than to affect duties upon a cargo of sugar. We need not, however, dwell on this part of the discussion. From our construction of the powers of the government and of the treaty with Spain the danger of the nationalization of savage tribes cannot arise.

These views answer, in our judgment, the chief arguments of the opinion, but to make a complete reply and to justify a different conclusion, we should consider and interpret the treaty

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with Spain. We will, however, not do so now. It has been done in the concurring opinion in *Downes v. Bidwell,* and it is not necessary to anticipate the statements and reasoning of that opinion.

We said at the outset that it could be demonstrated that Porto Rico occupied a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely, and because of that relation, its products were subject to the duties imposed by the Dingley Act. And, concluding, we say we believe that, in this opinion and the one referred to, we have made that demonstration, made it from the Constitution itself, the immediate and continued practice under the Constitution, judicial authority, and the treaty with Spain. And that demonstration does more than declare the legality of the duties which were levied upon the sugars of the plaintiff in error. It vindicates the government from national and international weakness. It exhibits the Constitution as a charter of great and vital authorities, with limitations indeed, but with such limitations as serve and assist government, not destroy it; which, though fully enforced, yet enable the United States to have -- what it was intended to have -- "an equal station among the Powers of the earth," and to do all "Acts and Things which Independent states may of right do," and confidently do, able to secure the fullest fruits of their performance. All powers of government, placed in harmony under the Constitution; the rights and liberties of every citizen secured, put to no hazard of loss or impairment; the power of the nation also secured in its great station,

enabled to move with strength and dignity and effect among the other nations of the earth to such purpose as it may undertake or to such destiny as it may be called.

The judgment of the circuit court should be affirmed.

MR. JUSTICE GRAY dissenting:

I am compelled to dissent from the judgment in this case. It appears to me irreconcilable with the unanimous opinion of this Court in *Fleming v. Page,* 9 How. 603, and with the opinions of the majority of the Justices in the case, this day decided, of *Downes v. Bidwell.*