THE

AMERICAN LAW REGISTER

AND

REVIEW.

APRIL, 1893.

THE CONSTITUTIONAL EFFECT OF HAWAIIAN ANNEXATION UPON THE TARIFF ACT OF 1890.

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THE proposed annexation of the Hawaiian Islands raises several interesting questions of constitutional law, and among them are the following: (1) After annexation, can a sugar producer in the Hawaiian Islands claim a sugar bounty under the provisions of the Act of Congress passed October 1, 1890 (R. S., § 3689, pp. 724–726), and (2) Can duties under other sections of this Act be constitutionally imposed upon the products of the Hawaiian Islands, after annexation, upon the arrival of the goods in a port of the present United States. As certain products of those islands are at present exempt from duty (Convention of January 13, 1875, 19 U. S. Stat. at Large, 200; Convention of November 9, 1887, 25 U. S. Stat. at Large, 1399; Act of Congress approved March 3, 1891, 26 U. S. Stat. at Large, 844), the second question can only arise with reference to those products or manufactured goods not exempted under the above-cited treaties and Acts of Congress.

In considering these questions, three propositions have been assumed; (*a*) that annexation is constitutional;[1] (*b*) the constitutional power of Congress to confer a bounty; (*c*) that the proposed treaty of annexation will operate *propriore vigore* and will not require an Act of Congress to carry it into effect, and that the treaty contains no provisions exempting products, not now exempt, from the operation of the Tariff Act of 1890.

1. *After annexation, can a sugar producer in the Hawaiian Islands claim a bounty under the provisions of the Tariff Act of October 1, 1890?*

The first section of the sugar schedule of that Act provides for the payment of a bounty to all producers of sugar from beets, sorghum, or sugar cane grown within the United States, or from maple sap produced within the United States.

The Act provides that a sugar producer must fulfill certain conditions before he can be entitled to a bounty. In the first place he must make application for a license, and the application must be accompanied with a full description of his plant and estimate of the probable production for the ensuing year, and a bond with approved securities that the producers shall observe all rules and regulations which may be prescribed for such manufacture and production of sugar, and after these prerequisites have been fulfilled the applicant is entitled to a license to produce such sugar for a year from the date thereof. The Act then provides that the bounty shall only be payable to licensed producers, and only upon sugar produced from sorghum, beets and sugar cane grown in the United States, and from maple sap produced within the United States, and the commissioner of internal revenue, with the approval of the secretary of the treasury, is authorized to make all needful regulations and rules concerning the manufacture of such sugar. The Act also expressly forbids the payment of a bounty to any person engaged in refining sugars which have been imported

[1] Insurance Co. *v.* Canter, 1 Peters, 511; sed cf. Article by George Ticknor Curtis, Esq., in *North American Review*, March, 1893.

into the United States or produced in the United States upon which the bounty therein provided for has already been paid or applied for.

(*A.*) It will be noticed that the Act only prescribes two requisites to entitle any one producing sugar to a bounty. First, that the producer shall have procured a license from the Commissioner of Internal Revenue, and, secondly, that the raw material from which the sugar is manufactured shall have been grown in the United States. As presumably the Hawaiian producer can comply with all the rules and regulations which have been prescribed by the Commissioner of Internal Revenue, he will be entitled to a license after he has filed his bond, accompanied with a description of his plant and the proposed production, and the only question left to be considered is, does the Act, when it refers to sugar grown in the United States, cover only sugar grown in what was the United States at the time the Act went into force, or does it cover sugar grown in territories which subsequently to the passage of the Act becomes an integral part of the United States?

In the case of Cross *v.* Harrison,[1] the facts were as follows: Early in 1847, after the United States had taken military possession of Upper California, the President of the United States authorized the military and naval commanders of the United States forces in California to form a civil and military government for the conquered territory with power to impose duties on imports and tonnage for the support of such government. This was done, and tonnage and import duties were levied under a war tariff until official notice was received by the military government of California that a treaty of peace had been made with Mexico by which Upper California had been ceded to the United States. Upon receiving this intelligence the Government directed that the import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other parts of the United States by the acts of Congress, and for such purposes the President appointed the defendant in

[1] 16 Howard, 164.

this suit collector of the port of San Francisco. The plaintiffs in the case sought to recover from the defendant certain tonnage duties and imports upon foreign merchandise paid by them to the defendant as collector between the date of the treaty of peace and the time when the Collector appointed by the President according to law entered upon the duties of his office, on the ground that they had been illegally exacted. The question then to be decided in the case was whether, after the ratification of the treaty with Mexico, the territory of California became *ipso facto* subject to the acts of Congress which were in force to regulate foreign commerce after those acts had expired which had been instituted for the regulation as a belligerent right. The Supreme Court, Mr. Justice WAYNE delivering the opinion of court, answered that question in the affirmative, and held that the Tariff Act of 1846 was in force in California, and also that the Acts of July 20, 1790, and of March 2, 1799, regulating the collection on imports and tonnage, were also *ipso facto* of force in California without other special legislation by Congress declaring them to be so. Mr. Justice WAYNE also pointed out that "after North Carolina and Rhode Island had ratified the Constitution, special Acts of Congress were passed to apply to them the previous legislation of Congress and that of the revenue Acts, as a matter of course, because, previously to the ratification, those States had not been attached to any collection district; but it was not supposed by any one that after these States had ratified the Constitution that foreign goods could have been imported into them without being subject to duty, or that it was necessary to make them collection districts to make such importations dutiable."

It, therefore, seems, under the authority of this case, that the sugar bounty act would apply *ipso facto* to producers of sugar in the Hawaiian Islands the moment the treaty of annexation is ratified by the Senate.

It is a general rule for the construction of Acts of Congress that the presumption is in favor of the constitutionality of an Act, and as between two constructions of equal weight, the Courts will favor that construction which will make the Act constitutional.

If, then, the construction of the bounty Act limits its operation to those producers of sugar grown within the boundaries of the United States at the time the Act went into effect, will the fact that it does not apply to sugar grown in a territory acquired by the United States, subsequently to the passage of the Act, render the Act unconstitutional? There is no doubt that under that clause of the Constitution which gives Congress power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States, Article 4, § 3, Clause 2, Congress can pass whatever rules or regulations they may see fit with reference to the territories, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.[1]

The only clause in the Constitution with reference to the uniformity of Acts of Congress is the first clause of Section 8, Article 1, of the Constitution, the clause giving Congress power to lay and collect taxes, duties, imposts and excises, etc., and which clause contains the express restraint that all duties, imposts and excises shall be uniform throughout the United States, and under this clause it has been held that the constitutional requirement of uniformity is satisfied when the duty, impost and excise operates with the same effect in all places where the subject of taxation is found, though that subject be not equally distributed in all parts of the United States,[2] and this restriction applies to the territories as well as the States.[3]

The question, therefore, arises, does an Act which confers a bounty upon any person producing an article impose a duty, impost or excise within the meaning of the Constitution, so that it must conform to the constitutional requirement of uniformity. An excise is an inland tax im-

[1] Murphy *v.* Ramsey, 114 U. S., 15; Mormon Church *v.* U. S., 136 U. S., 1.

[2] The Head Money Cases, 112 U. S., 580.

[3] Loughborough *v.* Blake, 5 Wheaton, 317.

posed upon the manufacturer.[1] A tax is an exaction by a government in the exercise of its sovereignty of a payment of money or surrender of property by any person, natural or corporate, who or whose property was taxed as subject to the sovereign power of the government.[2]

At the first sight a bounty would not seem to be a tax; in fact, it would seem to be quite the reverse of a tax, for it is the payment of a sum of money by the government to an individual, and not by the individual to the government, as in the case of a tax. What, however, would be the effect of a bounty if it is given to A and B, manufacturers of certain goods in the United States, and not given to C, another manufacturer of that same class of goods? The effect of that would be that A and B, by reason of the receipt of the bounty, could sell their manufactured goods at a price lower by the amount of the bounty than C could sell them at, or so far as competition between A and B and C is concerned, the Act would have the same effect upon C's power of sale as if it taxed C the amount of the bounty, and neither taxed nor conferred a bounty upon A and B. It would, therefore, seem that a bounty is an indirect method of taxation, indirect in the sense that it does not confer a benefit directly upon the government, but imposes a burden upon these persons in any given class who do not come under the operation of the bounty, and that the restriction in the Constitution with reference to the uniformity of taxation applies also to any Act of Congress conferring a bounty, as the restriction is imposed for the protection of the taxpayer, and not for the United States. Of course, if a bounty is not a tax within the constitutional meaning, then this whole argument falls to the ground, as the mere fact that the effect of an Act of Congress is to confer a benefit upon a particular locality, or the products of that locality, will not render the Act unconstitutional unless it effects a preference of the ports of one State over those

[1] License cases, 5 Wallace, 462.

[2] State Freight Tax, 15 Wallace, 277; McCulloch *v.* Maryland, 4 Wheaton, 420.

of another, and this constitutional prohibition has been held not to extend to cases in which the legislation by an Act of Congress of a bridge over navigable waters has indirectly obstructed the commerce of a port in another State.[1] Yet in that very case, as in the case of a bounty, the manufacturer of the port whose commerce was indirectly obstructed, might be at a disadvantage in competing with other manufacturers of the same article.

If, however, a bounty is a tax, and the Act is unconstitutional under a construction which would not extend its scope to sugar manufactured from raw material grown in territory acquired by the United States subsequently to the passage of the Act, the Supreme Court would probably favor that construction of the Act which would extend its scope to territory acquired by the United States subsequently to the passage of the Act, thereby making it conform to the constitutional requirement of uniformity in taxation.

It would seem, therefore, under a proper construction of the Act, that a producer of sugar grown in the Hawaiian Islands, after he has conformed to the provisions of the Act, is entitled to receive a bounty on all sugar produced by him, if the raw material be grown in the Hawaiian Islands.

II. *Can duties under the provisions of this Act be constitutionally imposed upon goods manufactured in the Hawaiian Islands and shipped to a port in the present United States?*—The Act provides that certain rates of duty hereinafter prescribed shall be levied, collected and paid upon all articles imported from foreign countries. Obviously, if annexation *ipso facto* takes these islands out of the category of foreign countries, then no duties can be levied upon goods imported from them, as those goods are not within the scope of the Act. It may be argued, however, as it was in Cross *v.* Harrison, that as our commercial intercourse with the Hawaiian Islands has been the subject of legislation by Congress in several particulars it is neces-

[1] Penna. *v.* W. and B. Bridge Co., 18 Howard, 421.

sary for Congress to repeal by special legislation all prior inconsistent Acts, and until Congress so acts, duties can be collected under the Act of 1890 upon goods shipped from Hawai to a port in the present United States.

I take it that goods manufactured in Louisiana, for example, and sent to the Hawaiian Islands would not be dutiable there after the annexation of those islands (even if the duty fulfilled the constitutional requirement of uniformity), as that would be in effect a duty on exports from a State,[1] and would be in express contravention of that provision in the Constitution forbidding the United States to lay any tax or duties on articles exported from any State.[2] It might be argued, however, that this clause is only a prohibition on articles exported from a State, and would not apply to articles exported from a territory to a State.[3] It must be remembered, however, that the power to lay duties is a part of the taxing power of the United States,[4] which taxing power is subject to the restriction of uniformity, which restriction applies to the territories as well as the States.[5] Now, if duties can constitutionally be imposed upon goods exported from Hawai to a port in New York, and cannot be constitutionally imposed upon goods exported from New Orleans to the port of New York, then the duty is not a uniform one, as it does not operate with the same effect in all places where the subject of taxation is found.[6]

[1] This proposition may be controverted upon the ground that the word "export" in the Constitution refers only to goods sent to a foreign country.

[2] Almy *v.* California, 24 How., 169; CLIFFORD, J., in Crandall *v.* Nevada, 6 Wall., 35, 49; MILLER, J., in Woodruff *v.* Parham, 8 Wall., 123, 132; NELSON, J., in Woodruff *v.* Parham, 8 Wall., 123, 141.

[3] So far as the writer knows, it has never been maintained that Congress could lay a duty upon goods exported from a territory of the United States to a foreign country upon the ground that the constitutional prohibition as to taxing exports is confined to goods exported from a State.

[4] Gibbons *v.* Ogden, 9 Wheaton, 1.

[5] Loughborough *v.* Blake, 5 Wheaton, 317.

[6] The Head Money Cases, 112 U. S., 580.

In Loughborough *v.* Blake,[1] Chief Justice MARSHALL said, with reference to the clause in the Constitution providing that all duties, imposts, and excises shall be uniform throughout the United States: "It will not be contended that the modification of the power extends to places to which the power does not extend. The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the Americam empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories; the District of Columbia, or the territory west of the Missouri, is no less within the United States than Maryland or Pennsylvania, and it is not less necessary on the principles of our Constitution that uniformity in the imposition of imposts, duties, and excises should be observed in one than in the other." Certainly, if goods sent from New York to Hawai are not dutiable, while goods sent from Hawai to New York are dutiable, and goods sent from New Orleans to New York are not dutiable, there is no uniformity within the meaning of the constitutional requirement.

In Cross *v.* Harrison,[2] in speaking of the purchase of Louisiana, Mr. Justice WAYNE said: "The surrender from Spain to France was formally made on November 30, 1803, and that to the United States was done on December 20, 1803. It was known in Washington, by a letter from the commissioner appointed to receive it, early in January. It is said that from that time until the Act of February, or as was provided for in the Act, until thirty days after, Louisiana was not considered in a fiscal sense as a part of the United States, and that duties were not only not collected by the United States on importations into Louisiana, but that duties were charged on imports brought from Louisiana into the United States. It seems to have been forgotten that our commercial intercourse with Louisiana

[1] 5 Wheaton, 317.
[2] 16 Howard, 164.

has been the subject of legislation by Congress in several particulars from the year 1800, and that before the revenue system could be applied it was necessary to repeal by special legislation. Congress, however, did not do so until the Act of February 24, 1805, was passed, by the third section of which that repeal was effected. The postponement of the operation of the Act for thirty days longer was with a view to prevent any conflict of rights or interests between what would be the regulation of Congress under the Act, and those which had preceded them."

The answer to this would seem to be that a treaty *ipso facto* supersedes a prior conflicting Act of Congress,[1] and if the effect of the treaty be to render the statute unconstitutional with reference to certain subjects which, prior to the ratification of the treaty, were within the constitutional scope of the statute, then no longer can the statute affect those subjects. Applying these principles to the case in question, it would seem that duties could not constitutionally be levied upon goods manufactured in the Hawaiian Islands and shipped to any port in the United States.

What is the theory of annexation as contradistinguished from a protectorate? If annexed, under whose sovereignty are the islands and their inhabitants? As Mr. Justice MATTHEWS said, in Murphy *v.* Ramsey,[2] "The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms." And as Mr. Justice BRADLEY added in Mormon Church *v.* U. S.:[3] "Doubtless Congress in legislating for the territories would be subject to those fundamental limita-

[1] The Head Money Cases, 18 Fed. Rep., 135.

[2] 114 U.S. 15, 44.

[3] 136 U. S., 1, 44.