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IMPORTATION OF GOODS IN AMERICAN VESSELS.

LETTER

FROM

THE ACTING SECRETARY OF THE TREASURY,

TRANSMITTING,

IN RESPONSE TO A SENATE RESOLUTION OF APRIL 9, 1914, THE FULL TEXT OF THE RECENT OPINION OF THE BOARD OF UNITED STATES GENERAL APPRAISERS ON THE CONSTRUCTION OF THE CLAUSE IN THE TARIFF ACT OF OCTOBER 3, 1913, ALLOWING A 5 PER CENT DISCOUNT ON GOODS IMPORTED IN AMERICAN VESSELS.

APRIL 14, 1914.—Referred to the Committee on Finance and ordered to be printed.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, April 11, 1914.

SIR: I have the honor to acknowledge the receipt of Senate resolution dated the 9th instant, directing me to communicate to the Senate the full text of the recent opinion of the Board of United States General Appraisers on the construction of the clause in the tariff act of October 3, 1913, allowing a 5 per cent discount on goods imported in American vessels.

In reply I transmit herewith the full text of the said opinion as it was received from the Board of United States General Appraisers, and as it was published in Treasury Decision 34246.

Respectfully,

CHARLES S. HAMLIN,
Acting Secretary.

The PRESIDENT OF THE UNITED STATES SENATE.

(T. D. 34246—G. A. 7540.)

DISCOUNT ON GOODS IMPORTED IN AMERICAN VESSELS.

1. DISCOUNT ON GOODS IN AMERICAN VESSELS—CONSTRUCTION OF STATUTE.

Subsection 7 of paragraph J, section 4, tariff act of 1913, reads as follows: "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." *Held* that the language is plain and unambiguous, and there is therefore no occasion for applying the rules of statutory construction to interpret its meaning.

2. SAME—ABROGATION OF TREATIES.

Under subsection 7 a discount of 5 per cent should be allowed on the duties imposed by the act of 1913 on goods imported in American vessels. The granting of such discount to goods imported in American vessels will not abrogate, impair, or affect the provisions of treaties existing between the United States and foreign nations.

3. SAME—FAVORED-NATION CLAUSES.

Favored-nation clauses in treaties between the United States and foreign nations are not brought into question by the allowance under subsection 7 of 5 per cent discount to goods imported in American vessels, for the allowance does not grant a favor to any particular nation.

4. SAME—COMMERCIAL TREATIES.

The provisions of commercial treaties existing between the United States and foreign nations, by which each of the contracting parties agrees not to levy higher duties upon importations in vessels of the other country than if the same or like merchandise had been imported in vessels of its own country, are not self-executing, and are therefore not within the jurisdiction of the courts, but address themselves to the political department of the Government.

5. SAME—TREATIES—CONSTITUTIONAL PREROGATIVES.

Treaties which modify rates of duty to be collected on imports are in contravention of the constitutional prerogative of Congress to lay and collect duties and of the House of Representatives to originate bills for raising revenue; and such treaties are not enforceable by the courts without the sanction of the House of Representatives and Congress.

6. SAME—GOODS IN WAREHOUSE.

Goods in warehouse at the time the act of 1913 became effective and subsequently withdrawn are not entitled under subsection 7 to the discount of 5 per cent on the duties imposed by the act of 1913, even though they may have been imported in American vessels. The discount applies only to such goods as "shall be imported" in American vessels after October 3, 1913.

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, etc., of J. Elliott & Co. et al., against the assessment of duty by the collector of customs at the port of New York.

Before Board 3 (WAITE, SOMERVILLE, and HAY, General Appraisers).

WAITE, *General Appraiser:* The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in

substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

> The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative.

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results

in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States *v.* Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

The primary and general rule of statutory construction is that the intent of the Lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

And in Bate Refrigerating Co. *v.* Sulzberger (157 U. S., 1, 36, 37) the following language was used:

In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden *v.* Collector (5 Wall., 107, 111), "what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." "Where the language of the act is explicit," this court has said, "there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature."

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice *v.* United States (53 Fed., 910, 911):

The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions which the court think Congress ought to have used.

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank *v.* United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional.

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling to the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. *v.* United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

ARTICLE III.

All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

ARTICLE IV.

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country. (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various coutracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future; and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. *v.* United States, *supra* (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses, which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate *ex proprio vigore*. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of sections 7 and 8 of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster *v.* Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

> 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. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court. [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force, and lack

jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor *v.* Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor *v.* Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor *v.* Morton and the *specific* provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

> We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried.

And, further:

> Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws.

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

> No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States than are or shall be payable on the like article, being the produce or manufacture of any other foreign country.

The decision in Taylor *v.* Morton continues:

> The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence

Then follows the citation of Foster *v.* Neilson (2 Pet., 314), *supra*, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

> This Constitution, and the laws 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; * * *.

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Section 8 of the same article provides:

> The Congress shall have power:
> 1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are

expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

A treaty, no less than the statute law, "must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation."

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no other writer in our own tongue. "Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power' be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives."

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor *v.* Morton, *supra*, said:

The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter.

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

> From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions.

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354 *et seq.*).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session Twenty-eighth Congress, page 445 *et seq.*). Among other things, he states the following upon this subject:

> In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress.

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter;

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the

Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We, therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which *imported* goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not *impose* a duty; it *grants a reduction* for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

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