THE CONSTITUTION IN PORTO RICO.

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We are reaping the aftermath of the Spanish war. Already numerous and perplexing questions have engaged the attention of the courts of the country, growing out of our new relations with the territory which came under the sovereignty of the United States Government through the victory of our arms and the agreements contained in the Treaty of Paris.

The settlement of these questions has led to a flood of diverse judicial opinions, given by most learned judges, in which the rights and wrongs of the people of the late Spanish possessions, in their relations to our government and our people, have been analyzed, weighed, and determined,—some in accordance with one theory of constitutional interpretation and others according to a different construction. Greater even than the flow of judicial decisions is the deluge of lay opinion, from some of the most earnest thinkers of the day, with which our periodical literature overflows, and which has already added numerous volumes to our political book-shelves.

This is not wholly to be deplored and has much of justification, for rarely, if ever before in our history, have just such circumstances arisen, or situations, so momentous as to their possible effects on our national character, developed, as those which are the outgrowth of the recent war. The feeling has heretofore been strong in this country that within the boundaries of the Union, from ocean to ocean, and from the Lakes to the Gulf, lay the potency of all possible growth in population, trade, and national advantage that we could hope to attain.

One of the objections to the adoption of the Constitution in 1787, was that the territory of the proposed United States was too large for a national government. It was and is believed that we are large enough already as a nation, and that within our borders we can develop in all ways that are advantageous to us, and that stepping beyond is fraught with gravest dangers to our Republic and its institutions.

It is urged with great force that our position in the western hemisphere, practically isolated from the other great nations of the world, has been the means of insuring to us a tranquillity of existence which has in the highest degree given opportunity for a most marvellous growth without provoking the jealousies of other nations or exciting their opposition. It is argued that our long-continued peace with the world is due to the fact that, following Washington's farewell injunction, we have avoided entangling alliances with other powers and have kept ourselves free from world politics.

The fear is expressed, nay, prophetic voices warn us, that, with our accessions of foreign territory, we shall place ourselves in a new and undesirable position before the world and one at variance with our professions; and that, having abandoned our policy of domesticity, we shall come into contact with hostile influences which will be destructive of our exalted national character and bring disaster to the Republic. History is invoked to show that by grasping more and more territory and expanding over vast reaches of the world, such weight of responsibility is imposed and such heavy burdens are laid upon the home government as ultimately to weaken its power and finally to break it down altogether. The example of Spain itself is cited, and it is predicted that, through the irony of fate, we may find in our acquisition of Spain's lost possessions the grave of our national strength.

If the acquisition of Louisiana, the Floridas and the vast regions washed by the Pacific Ocean and the Gulf, and their marvellous addition to the strength of the Republic is instanced as proof that our primitive ideas of expansion were too limited, it is urged that these possessions, by reason of their contiguity, were the natural adjuncts of the young Republic, but that to go beyond seas and acquire lands in another hemisphere is unnatural and foreign to the spirit of our government.

The preamble of the Constitution is quoted to show that it was ordained and established by the people of the United States for the United States of *America*, and not for any part of Europe, Asia, or Africa; and it is gravely argued from this use of the word "America," that it was never intended to be extended beyond the American Continent and therefore cannot be.

On the other hand it is insisted that, however it may have been in the past, the development of the material interests of our country and the proper extension of its beneficent influ-

ences now require territory in other parts of the world than on the American Continent; that as our commerce extends to all parts of the globe, we should have home ports in every quarter of the globe, under the flag of our Union and all which that implies. That these ports should be in the midst of tributary territory, controlled and governed by us, which shall furnish a market for our enterprises, and products of its own with which our home-returning vessels may be laden. That since the result of the war has brought the Philippines, Porto Rico, Guam, and the other islands under our control, without our seeking dominion over them, we must now hold them as territorial possessions of the United States, to be regulated and governed as the Constitution directs.

A wider and more ambitious policy favors the acquisition of territory by all legitimate means, for the mere purpose of widening our borders, in order that we, having outgrown our own colonial existence, may have colonies of our own and a colonial system, and so enter the race with the powers of Europe for the possession of the world.

From these diverse views it would seem that the question of the acquisition of foreign territory was a mixed question of law and policy.

Aside from the legal questions involved in our new relations, a political issue has been made of the action of the Administration in its adjustment of our relations to the ceded territory and its peoples under the treaty of peace. The late presidential campaign was largely fought on the right and good policy of our Government to acquire and hold foreign territory as the result of our winning in the contest with Spain. The Executive was charged with an ambition to expand our territorial limits as far as our arms had reached, and with a determination to hold and rule the captured people according to the will of the conqueror and not in deference to the consent of the governed. Much feeling was aroused and deep apprehension was felt by a large body of our citizens, because of the attitude of the Administration on these questions.

This feeling manifested itself in strong opposition to the action of the Government in acquiring such new territory and in respect to its dealings with it; and in the campaign, which was regarded as the battle of the contending ideas, the policy of the Administration was bitterly opposed. It must be conceded, however, that the result of the election was not favorable to the theory of the opposition, while the political significance of the event can hardly be over-estimated.

If the question of our control and government of the ceded territory is a political rather than a legal one, it must be admitted that the judgment of the highest tribunal under our form of government—the people—has been expressed in no uncertain way, in favor of holding the ceded territory as our own, to be regulated and governed as the Congress shall decide.

If the question is a legal one, where do we stand before the law? The diversity of opinion respecting the legal status of the ceded territory is fully as great as that respecting the policy of our Government in relation thereto. It will not be attempted here to review the various decisions of the Supreme Court of the United States upon this point, for that has already been done most fully and ably in this and other journals. The question had come before that Court in various forms before the war with Spain was waged, upon facts arising out of the cession of Louisiana, Florida, and California, and was passed upon, but "its response had a somewhat uncertain sound." [1]

Since the war was closed by the Treaty of Paris, several cases have come before the United States Courts for adjudication, in which the status of the people of the ceded territory has been passed upon. A brief review of two of them which represent opposing views of that status may be of interest.

The first is *ex-parte Ortiz*, 100 Fed. Rep. 955. On February 24, 1899, Raphael Ortiz, a native resident of Porto Rico, as was charged, murdered John Burke, a private soldier of the United States army. He was arrested, tried, and convicted March 27, 1899, by a military commission appointed by the general commanding the military department of Porto Rico, which department had been established by order of the President of the United States, October 1, 1898, after our army had invaded and taken military possession of that island. Ortiz was sentenced to death, which sentence was afterward commuted by the President to imprisonment for life in the Minnesota State Prison. The prisoner petitioned the United States Circuit Court for the District of Minnesota for his discharge on a writ of *habeas corpus*, claiming that at the time of his trial in March, 1899, there was no war in Porto Rico, which had then been ceded to the United States by the Treaty of Paris, signed December 10, 1898, and therefore belonged to and was part of the United States. And as the petitioner had never belonged to

[1] See article by Simeon E. Baldwin in Vol. 12 *Harvard Law Review*, p. 399.

the army or navy of the United States, but was a civilian and resident of Porto Rico, the military commission had no jurisdiction to try him for the alleged murder; and, under the Constitution of the United States, he could only be tried by a jury, after indictment or presentment by a grand jury. The petition was opposed by the United States District Attorney, first, on the ground that by the cession, Porto Rico did not become an integral part of the United States, nor subject to the Constitution; and second, that the war with Spain was not ended, so as to displace the jurisdiction of the military commission until the exchange of ratifications of the treaty in April, 1899; and that then, because the Constitution had no force in that island, such jurisdiction continued until displaced by the provisions of some Act of Congress.

District Judge Lochren, before whom the proceeding was brought, dissented from the first position taken by the Government, but agreed as to the second, and refused the application of the petitioner on the ground that when he was tried by the military commission, the state of war still in fact existed in Porto Rico, and that tribunal had jurisdiction to try, convict, and sentence him for such alleged offense.

The learned judge might properly have rested his decision upon this second contention of the Government, with which he agreed, without discussing the first, from which he differed,—as he admits he might have done "had that claim not been urged with such confidence and amplitude of argument, as the basis on which the decision of the case must rest, that acquiescence might be inferred from silence."

As controlling authority, then, that part of his opinion devoted to dissent from the claim of the Government that the prisoner was not entitled to a trial by jury, because the constitutional guaranty of trial by jury was not extended *ex proprio vigore*, to him, must be treated as mere *dictum*, since the decision was put upon another ground. But aside from this, was the view taken by Judge Lochren a correct one? His statement of this view is as follows:

"It must be held that, upon the cession by Spain to the United States of the island of Porto Rico, that island became a part of the dominion of the United States,—as much so as is Arizona or Minnesota,—and that the Constitution of the United States, *ex proprio vigore*, at once extended over that island, and that this extension of the Constitution gave to Congress, whose every power must come from that instrument, the authority to legislate in respect to that island as a part of the

United States territory. It follows that all the provisions of the Constitution in respect to personal and property rights, including the right to trial by jury in criminal prosecutions, became at once, when the cession was completed, a part of the supreme law of the land."

That is, of course, the supreme law of Porto Rico. Accordingly, if the cession had been completed by the exchange of ratifications of the treaty at the time of the trial, Ortiz would have been entitled to a jury trial by virtue of the constitutional guaranty. Then, by analogy, every right or privilege secured to citizens of the United States would belong to natives of the ceded territory.

But it was provided by Article IX of the Treaty of Paris that the civil rights and political status of the territories ceded to the United States shall be determined by the Congress; and by Article XI it was provided that the Spaniards residing in ceded territory shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country in which they reside; and as the treaty is, by Article VI of the Constitution, co-equal with the Constitution as the supreme law of the land, is it not the treaty provisions which determine the status of the native residents rather than the constitutional guaranties to citizens of the United States? Congress has full power to legislate for the territories acquired, both by force of the power given in sub-division 3, of Article IV, of the Constitution "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and also by virtue of the treaty itself.

It is a well-established principle, and is virtually conceded in Judge Lochren's opinion, that the United States Government has the power to acquire new territory as a result of conquest, but nowhere is there to be found a constitutional requirement that its provisions are to extend over such conquered territory. The territory when acquired as the property of the United States, comes with the former civil and political status of its people unchanged, or possibly suspended, unless some provision is made by the treaty of cession changing that status. It then becomes the duty of Congress to make the needful rules and regulations for its government. The inhabitants of the territory are doubtless entitled to such legislation as is needful for them, and to such only as Congress has power to enact.

Judge Lochren further says that the power to Congress to govern territory ceded to the United States cannot be conferred

by a foreign sovereign by a treaty of cession. But the power is not conferred by the foreign sovereign,—it is by force of the compact made by ourselves with Spain that Congress has the power. It was the treaty-making power of the United States, not Spain, which declared that the status of the inhabitants of the ceded territory should be determined by the Congress. To say that the Treaty of Paris did not confer power upon the United States to govern the ceded territory, because made on the one part by Spain, would be to deny all force and effect to any treaty with a foreign power.

The other case is that of *Goetze, et al,* v. *United States,* 103 Fed. Rep. 72. This was an appeal to the Circuit Court of the United States, for the Southern District of New York, from a decision of the Board of General Appraisers which sustained an assessment of duty upon tobacco imported from Porto Rico, on June 6, 1899, by the appellants, Goetze & Co., into the port of New York. The duty assessed was at the same rate as is provided by the "Dingley Tariff Act" on similar goods imported from foreign countries. The importers protested against the payment of the duty assessed, on the ground that the tobacco was not subject to duty, because Porto Rico was not a foreign country but a part of the United States, and the Constitution provides that all duties shall be uniform throughout the United States, and because, therefore, the "imposition of duties on goods brought from a place within the territory of the United States into a port of the United States, is not lawful and valid under the Constitution." This contention raised, substantially, the same question that was involved in *in re Ortiz,*—do the special guaranties and provisions of the Constitution extend to the territory ceded to the United States by Spain, by virtue of the cession, and before Congress has established rules and regulations for their government? This question was squarely met by United States District Judge Townsend, who delivered an opinion in which, after a most careful examination of the grounds of appellant's contention and a profound discussion of the decisions of the Supreme Court bearing on the points involved, and of the constitutional principles applicable thereto, he arrived at a conclusion diametrically different from that of Judge Lochren in the *Ortiz* case.

Briefly summarized, he holds that Porto Rico did not cease to be a foreign country when it was occupied by the military forces of the United States. The conquest of the island under the authority of the Executive made it ours by military title,

but the conquest did not incorporate the island within the United States. Did the treaty accomplish that result? Before cession, under conquest, Porto Rico was a part of the United States as to foreign nations. The *de facto* title to the soil was in the United States, but its inhabitants were foreigners to the Constitution, and the provision for uniformity of duties had no application there. By cession, the title became *de jure*, but in the status of the islanders as foreigners, and so in the status of Porto Rico as a foreign country, no change was to be made until Congress shall determine its character. The treaty vests the sovereignty over the island in the United States but postpones changes in the relations of its people, and in its relation to the body politic, until Congress shall determine what relations shall be best suited to the conditions of its inhabitants and to the welfare of the United States.

The treaty of cession only confirmed on the part of Spain a title already good against all the world. We have the authority of *Fleming* v. *Page*, 9 How., U. S. 603, that acquiring the title to soil, making it a part of the United States as regards foreign relations, does not bring it within the sphere of the Constitution. The sphere of application of the Constitution is determined, not by considerations of titles to lands, but by recognition of the status of its inhabitants. This is done either by an incorporation of the inhabitants into the Union, or by an extension of our laws and institutions throughout the territory. This cannot be done by conquest, but only by legislation or treaty. (*Fleming* v. *Page*.) Here the treaty recognizes and makes complete the *de facto* title gained by the conquest. The island is not thus brought under the Constitution unless the treaty supplements the confirmation of title by an incorporation of the inhabitants into the Union under the Constitution, or by the extension of our institutions. This the treaty fails to do.

The people of Porto Rico, instead of being incorporated into the Union by the treaty, are left in *statu quo*. Nor has there been any extension of our laws or institutions to the island. But at least one of these acts, brought about either by treaty or legislation, is necessary before there can be any change of status or any application of the Constitution in Porto Rico. Until then the island remains, to use the language of the Supreme Court, "part of the United States but still a foreign country."

To the objection to effectuating the language and real in-

tent of the treaty, that the United States has no constitutional authority to hold sovereignty over subject territory which it does not make part of itself under the Constitution, Judge Townsend answers, that the United States possess the same right of full sovereignty, common to other nations, over lands which they in no way annex to themselves as an integral part under their organic law; that this power is an ordinary attribute of sovereignty. The independent States possessed it before the formation of the Union. This attribute of sovereignty they delegated to the Federal Government in the treaty and war-making powers, and expressly denied to themselves. The treaty is constitutional. No treaty has ever been declared invalid on this ground.

It was claimed by the appellants that the United States could not, in acquiring territory, provide for free trade with its former sovereign for a time,—that such a provision would be unconstitutional. But the treaties which ceded Louisiana and Florida admitted to their ports Spanish and French ships at lower tonnage rates than to other ports of the United States. By the Treaty of Paris the Philippines are to have free trade with Spain for ten years, but the older treaties were never assailed on the ground that they were unconstitutional.

The conclusions arrived at by Judge Townsend are fully sustained by the authorities which he cites, and are not weakened by those cited by counsel for the appellants in support of their contention.

These conclusions are not only in accord with precedent, but are in accord with the practice and spirit of our country and its law-givers. They furnish the only rational ground upon which we may stand in carrying out the purposes and intentions of the treaty of cession; and the Government of the United States, in dealing with the newly-acquired territory upon these lines, will doubtless accomplish far more for the general welfare of the people of such territory than if restricted by the narrow construction of constitutional rights to be found in the decision of the *Ortiz* case.

It has been well said by Judge Story, in his great work on the Constitution, Sec. 1287, in commenting on this same proposition of law:

"The more recent acquisition of Florida, which has been universally approved, or acquiesced in, by all the States, can be maintained only on the same principles, and furnishes a striking illustration of the truth, that constitutions of govern-

ment require a liberal construction to effect their objects, and that a narrow interpretation of their powers, however it may suit the views of speculative philosophers or the accidental interests of political parties, is incompatible with the permanent interests of the State, and subversive of the great ends of all government, the safety and independence of the people."

Under its power to make rules and regulations for the territory of the United States, Congress has already enacted mild tariff legislation for Porto Rico, which is not in conformity with the uniformity clause of the Constitution, but which is most beneficial to the people of that island, relieving them from the burden of the high duties imposed in the United States and expending the revenues derived from the lower rate wholly within the island itself.

Our Congress will be false to all its past record in dealing with peoples of other races, if, under the power to make rules and regulations for these dependencies, it violates any personal or property rights or privileges secured to the citizens of the United States by the Constitution.

While not recognizing the doctrine that the Constitution extends, *ex proprio vigore*, over the people of the ceded territory, it may safely be assumed that no legislation for them will ever be enacted by Congress or approved by the Executive, which will not be in accordance with the beneficent spirit of that Constitution, and that as many of its provisions will be enacted into law for their government as are suited to their well-being.