# THE FAVOURED NATION CLAUSE.

*Reprinted from the "Sugar Cane," May, 1880.*

When the sugar question comes on for debate in Parliament, the discussion will, we have no doubt, mainly turn upon our treaty obligations under the so-called favoured nation clauses. It is therefore not without interest at the present time to notice the arguments used by the Government of the United States in dealing with a difficulty arising out of the interpretation of this very clause, as far back as 1822, in connection with the treaty of 1803, for the cession by France of Louisiana to the United States.

Art. VIII. of that treaty was as follows: "A l'avenir et pour "toujours après l'expiration des douze années susdites les navires "Français seront traités sur le pied de la nation la plus favorisée "dans les ports ci-dessus mentionnés."

All conditions are absent from this article. Nevertheless, conditions were claimed as of right by the United States. What the conditions were has no bearing on the *principle of interpretation*, upon which point alone we refer to this international dispute.

The cause of the dispute was the advantage enjoyed by Great Britain in respect of her vessels being placed upon the same footing as the vessels of the United States, whilst vessels from France were subjected to heavy tonnage duties upon entering the American ports, including those of Louisiana. The question is thus referred to in the official report of Committee of Commerce, communicated to the House of Representatives, 15th March, 1822:—

"France. The extra duties imposed in 1817 by the French "Government on the produce of the United States, when imported "into France in vessels of the United States, have excluded them "from a competition with French vessels carrying American "produce to France. Feeling the injustice of such impositions on "the part of France, the merchants memorialised Congress. On

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" consideration of their complaints, an Act passed the 15th May, " 1820, subjecting French vessels entering the ports of the United " States to a tonnage duty of eighteen dollars a ton after the 1st " July, 1820."

The facts which appear to have originated the contest may be concisely summarised thus :—The United States were under obligation to treat the ships of France upon the footing of the most favoured nation in the ports of Louisiana. It is important to notice that this treaty obligation has no conditions specified. But it would appear that at that date (1820) British vessels entering the ports, say of New Orleans, were admitted on same terms as American vessels, whilst those of France were subjected to a heavy tonnage duty. Surely upon the words of the Treaty the French could plead their right to the same treatment as British vessels in the ports of the ceded territory. It was part of the consideration for the cession. And yet the claim was disallowed by the President of the United States, and why? We will let the President state his own case as it appears in his Fifth Annual Message of 3rd December, 1821.

" It is my duty to state, as a cause of very great regret, that " very serious differences have occurred in this negotiation, res- " pecting the construction of the Eighth Article of the Treaty of " 1803, by which Louisiana was ceded to the United States, and " likewise, respecting the seizure of the " Apollo " in 1820, for a " violation of our revenue laws. The claim of the Government " of France has excited not less surprise than concern, because " there does not appear to be a just foundation for it in either " instance. By the Eighth Article of the Treaty referred to, it is " stipulated that, after the expiration of 12 years, during which " time it was provided by the Seventh or preceding Article that " the vessels of France and Spain should be admitted into the " ports of the ceded territory, without paying higher duties on " merchandise, or tonnage on the vessels, than such as were paid by " citizens of the United States, the ships of France should for " ever afterwards be placed on the footing of the most favoured " nation. By the obvious construction of this Article, it is pre- " sumed that it was intended that no favour should be granted to any " Power, in those ports, to which France should not be forthwith " entitled; nor should any accommodation be allowed to another

"Power, on conditions to which she would not also be entitled on "the same conditions. Under this construction, no favour or "accommodation could be granted to any Power to the prejudice "of France. By allowing the equivalent allowed by those Powers, "she would always stand in those ports on the footing of the "most favoured nation. But if this Article should be so construed "as that France should enjoy, of right, and without paying the "equivalent, all the advantages of such conditions as might be "allowed to other Powers in return for important concessions made "by them, then the whole character of the stipulation would be "changed. She would not only be placed on the footing of the most "favoured nation, but on a footing held by no other nation. She "would enjoy all advantages allowed to them, in consideration of "like advantages allowed to us, free from any and every condition "whatsoever."

By the following quotation from the President's Sixth Annual Message of 3rd December, 1822, the dispute appears to have terminated in France concluding a treaty of commerce :—

"On the 24th June last a Convention of Navigation and Com- "merce was concluded in this city between the United States and "France, by ministers duly authorised for the purpose. The "sanction of the Executive having been given to this Conven- "tion under a conviction that, taking all its stipulations "into view, it rested essentially on a basis of reciprocal and "equal advantage, I deemed it my duty, in compliance with "the authority vested in the Executive by the second section "of the Act of the last session of the 6th May, concern- "ing navigation, to suspend by proclamation, until the end "of the next session of Congress, the operation of the Act "entitled, 'An Act to impose a new tonnage duty on French ships "and vessels, and for other purposes,' and to suspend likewise all "other duties on French vessels, or the goods imported in them, "which exceeded the duties on American vessels, and on similar "goods imported in them."

Now in Wheaton's Elements of International Law this dispute is referred to in connection with the principle laid down by this Jurist on the "Interpretation of Treaties." The reference appears as a foot-note to the following passage in the text. "Public "treaties are to be interpreted like other laws and contracts.

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"Such is the inevitable imperfection and ambiguity of all human "language that the mere words alone of any writing, literally "expounded, will go a very little way towards explaining its "meaning. Certain technical rules of interpretation have, there- "fore, been adopted by writers on ethics and public law to explain "the meaning of international compacts in cases of doubt."

The note in Wheaton, by the Editor, Mr. Lawrence, does not give the views taken by the President which we have quoted, but contains the following passage from Mr. Adams' note to the French Minister, meeting his demand that orders might be issued to such effect that in future the 8th article of the Treaty of Cession should receive its entire execution, and that the advantages granted to Great Britain in all the ports of the United States might be secured to France in those of Louisiana. To that demand Mr. Adams replied that he was instructed to say "that "the vessels of France are treated in the ports of Louisiana upon "the footing of '*the most favoured nation*,' and that neither the "English nor any other foreign nation enjoys gratuitous advantage "which is not equally enjoyed by France. But English vessels, "by virtue of a conditional compact, are admitted into the ports of "the United States, including those of Louisiana, upon payment "of the same duties as the vessels of the United States."

The sum and substance then of this historic episode, which we have detailed from official documents, amount to this: viz., that notwithstanding the absence of all conditions from the words of the Louisiana Treaty, yet conditions were imported into its interpretation by the United States.

But only as recently as 1878, in a debate in the House of Commons upon the favoured nation clause, we find some valuable authority upon its proper interpretation.

To make the debate intelligible, as bearing upon the point we are now discussing, we must explain that the Contagious Diseases (Animals) Bill, as introduced by the Government, subjected cattle from foreign countries to compulsory slaughter, with power to the Privy Council to release the Channel Islands and the Isle of Man from restriction; and as regards Canada and America, excepted these countries from restriction until an order was made by the Privy Council with respect to these excepted countries.

American cattle would, therefore, have been free until subjected

to provisions for compulsory slaughter by Order in Council. Consequently, as between foreign countries generally and America, inequality of condition would have been specifically created had the Bill become law. The inequality would have arisen from the fact that America would have been free until the Privy Council issued an order; whilst as regards other foreign countries, immunity from disease would not have freed them from restriction until an Act of Parliament was passed. The Government introduced an amendment, enabling the Privy Council to exempt Denmark, Sweden, Norway, Spain, or Portugal. Still, inequality of conditions would have remained. This inequality raised a debate on the "favoured nation clause." In the course of the debate, which we only propose to follow so far as it contains direct opinion on the favoured nation clause, Sir Henry James, who raised the question, pointed out the inequality in the provisions we have referred to, and consequent violation of the "favoured nation clause."

Sir Charles W. Dilke observed "that it would not be in the "power of the Privy Council, under this Bill, to admit French "cattle, even although France was entirely free from disease, while "it would be in the power of the Privy Council to admit the cattle "of countries that competed with France; and, therefore, with "like freedom from disease, there could not be a like principle of "treatment applicable to all cases." Upon this inequality Sir Charles W. Dilke rested his arguments against the Bill as violating the favoured nation clauses.

The Attorney-General (Sir John Holker) said, "Now, what was "the meaning of the 'favoured nation clause'? He took it that "in whatever language that clause might be expressed—and the "language of the different treaties was not always the same—but "whatever language might be used, the real meaning was this— "'You, Great Britain, shall treat us in the same way as you treat "'the most favoured nation with whom you have a treaty—that "'is to say, you shall treat us as well as you treat them under the "'like circumstances.' . . Really and truly, then, the favoured "nation clause meant that which was expressed in the case of "Austria—namely, that neither of the high contracting Powers or "parties should establish a prohibition of importation, exportation, "or transit against the other which should not 'under like cir-

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"'cumstances' be applicable to the third country most favoured "in this respect."

Sir William Harcourt said the Attorney-General's "whole "argument was founded on the very points for which those who "opposed the Bill had contended. . . The Attorney-General had "laid down the principle that in the most favoured nation clause "they must, under similar circumstances, deal with all countries "alike. He (Sir William Harcourt) was not going to quarrel "with that proposition, though, if strictly interpreted, it would "be found not to be quite correct."

Referring to the bounty on loaf sugar, Sir William Harcourt said:—"They were bound to admit this sugar, under similar "circumstances, from different countries; but they had great "difficulty with France when a bonus was given by France itself "upon this sugar. They might have said the circumstances were "not similar in a country which gave a bonus on their sugar, and "therefore they would not admit it. But it would not be politic "to maintain a proposition to that extent. . . . What a nation "could claim under the 'favoured nation clause' was that there "should be an immediate power under similar circumstances to "admit it to equal rights with others."

The Solicitor-General (Sir Hardinge Giffard) observed "that "the 'favoured nation clause' assured equality of rights to all the "parties concerned, but the mistake was to say that that involved "identity of treatment."

Mr. Herschell "quite agreed with the hon. and learned Soli- "citor-General that equality of right did not necessarily mean "identity of treatment. But he did say that equality of right did "mean identity of treatment under similar circumstances."

Mr. Gorst said: "Now, what we had promised to do [under our "treaties] was, not to establish any prohibition of importation or "transit against the produce of any country with which we had "entered into treaties containing the 'most favoured nation clause' "which would not under like circumstances be applicable to all "other countries."

The Chancellor of the Exchequer said "That this country was "bound to treat all foreign nations alike—but that was, alike "under similar circumstances."

Mr. Gladstone observed that "He would say one word upon the

"doctrine of similar circumstances. He did not deny that it was "a doctrine that could not utterly be excluded from discussion of "that kind. . . Similar circumstances were very large words; "they admitted of infinite discretion in interpretation." Referring to a most favoured nation treaty, Mr. Gladstone said: "Did not "the treaty mean that there should be immediate equality? What "he concluded was that it did mean that there should be imme- "diate equality."

It is not necessary to add to this valuable body of opinion. Sir William Harcourt and Mr. Gladstone properly qualified the doctrine of "like circumstances" from too great an extension.

The upshot of the debate was the withdrawal by the Government of all distinction between foreign countries, by subjecting all alike to provisions of compulsory slaughter, with power to the Privy Council to exempt any countries upon being satisfied as to freedom from disease.

We quite agree with Sir William Harcourt that to prohibit sugar, because it had a bounty, would not be politic. The golden mean is to prohibit from our markets, not the sugar, but the bounty. This is effected by a countervailing duty.

The principle of the Contagious Diseases (Animals) Act of 1878, was to exclude, not cattle but, disease. To exclude the disease of protection from our markets is all that our sugar industry need contend for. It is impossible to suppose we are precluded from excluding protection by any favoured nation clause, otherwise this clause in the last Austrian treaty would render nugatory all the efforts of our Government for the abolition of bounties.

Upon the wording of the favoured nation clause, foreign countries are not prohibited from favouring their own citizens. They may give bounties. But the nation, the recipient of the bounty, is not precluded by Treaty engagement from accepting the bounty for its tax-payers instead of for its consumers, and thus "favouring" its producers by releasing them from having to compete with "bounties." Commercial treaties have regard to the ports, only as leading to the markets. It is on the markets that the provisions of commercial treaties are meant to have, and must have, their effect. Our national policy is to secure free trade competition. As regards foreign markets, we admit our inability to do more than obtain, when we can, the "most favoured nation treat-

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ment." Against protection for the national industries of foreigners on their home markets we are powerless. But we venture to say that the true spirit of our commercial treaties will be violated if, on our own home market, our national production may be harassed by foreign states claiming, under those treaties, unrestricted right of entry for their products when heavily subsidised by export bounties. Such a claim has never yet been advanced by any foreign State in the discussion of this question. Moreover, such foreign States as give bounties harass not only our own home and colonial production, but the production of other foreign States in treaty with us, who give no bounties. Indeed, in Mr. C. M. Kennedy's letter to Lord Derby, of the 21st April, 1874, we find that M. Deseilligny—the French Minister of Commerce—had stated "that "bounties avowed or disguised, granted by foreign Powers, might "be checked by a general provision of English law to impose a duty "on refined sugar imported from foreign countries which are held "to give bounties on exportation." But Lord Derby, in replying to Mr. Kennedy's letter, stated that "Her Majesty's Government "were under treaty engagements from which they had no wish to "depart, to treat France and French produce on the most favoured "nation footing." Thus Mr. Kennedy's hands were tied, as Mr. Walpole's were subsequently, from discussing the only efficacious measure for a solution and settlement of the bounty question.

But last year, on the appointment of the Select Committee on the Sugar Industries, this view of Lord Derby's, as applicable to countervailing duties, was abandoned by the late Government, and not assented to by the House of Commons, seeing that Mr. Forster's amendment to exclude compensatory duties from the consideration of the Committee was rejected by a considerable majority, which included votes of members of the late administration. The conclusion to be drawn from the argument and authority we have adduced is obvious. Parliament is restrained by, and need await, no treaty engagements in rendering justice to the British sugar industry.

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