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REBUTTAL TO MR. JUSTICE O. OTTO MOORE

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In this issue of *Dicta* there appears an article by Mr. Justice Moore of the Colorado Supreme Court reflecting a certain degree of anxiety on the part of the Justice in connection with the treaty power of the United States as possibly over-riding, abridging, or eliminating some of the civil rights of citizens of the United States under the United States Constitution.

It is with some degree of hesitancy that I undertake to make a rebuttal in connection with these matters because not only is it popular in these days to "view with alarm", but also because of the keen and analytical mind of Mr. Justice Moore.

It is to be noted, however, that the analogies and arguments which appear in the article are likely to have the effect of emotionalizing a purely legal problem, and since this writer feels that a legal problem should be discussed in a logical, cool, and scholarly way, it is thought proper to discuss the article purely on the basis of decided cases and fundamentals of American jurisprudence.

The answers to some of the problems raised by the Justice are obvious. The Supreme Court of the United States has ruled again and again on some of the more important problems raised, and the legal problems are as a matter of fact so well settled that they have become fundamental principles on constitutional law.

It might be well at this point to state the problem: *Can a treaty abridge the personal liberties of citizens of the United States?* We must first examine the provisions of the Constitution of the United States which deal with this problem:

Article VI, paragraph 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; *and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*" (Italics by writer.)

It is apparent just from reading the above provision what the answer to the problem is. One could very well stop right here without any further discussion, since the Justice in his article has placed the greatest stress on the proposition that there is a trend growing for treaties to supersede state laws and state constitutions. The answer to that very thing appears in the above italicized portion of Article VI which was written in 1787. Any treaty made under the authority of the United States is superior, in fact, to any state law or state constitutions.

Now if it were true that all personal liberty stems from state laws and state constitutions, one could reasonably have some quarrel with the propriety of Article VI but this is not the case. The Bill of Rights of the Federal Constitution and the Fourteenth Amendment thereto are the basis of almost all personal liberty within the United States, and those provisions are not changed, cannot be changed, and will stand as against any treaty made under the authority of the United States.

The basis for the alarm of some, as evidenced in the article by Mr. Justice Moore, is found in the case of *Sei Fujii v. State,* found in 217 P. 2nd, page 481, and later affirmed in 242 P. 2nd 617. It is rather singular that this case should be cited by the Justice in his article as the cause of danger of losing personal liberties when the case upholds personal liberties against a law which restricts them. This is the famous California land law case. The Court of Appeals held in substance, that the California Alien Land Law, which in effect prohibits Japanese persons from owning property in California, is contrary to the United Nations' Charter, and particularly Article 17 of the Declaration of Human Rights, made in pursuance of the Charter, and that since the said Charter is a treaty, the Alien Land Law being contrary thereto is void.

This decision has been bewailed in law circles all over the country on the theory that our national sovereignty is being impaired through the United Nations, and that before long the United States will be just a minor political subdivision of the United Nations. Nothing is farther from the facts. In the first place, the Declaration of Human Rights is a re-affirmation, perhaps in even stronger language, of the Bill of Rights already in existence in this country, and we can certainly not be harmed by a full enforcement of that Declaration of Human Rights. Secondly, Justice Wilson, who wrote the decision, could do nothing but what he did. The decision was unanimous and the basis for it is that the said Article 17 states "Everyone has the right to own property alone, as well as in association with others." The provision is so clear and so directly in conflict with the Alien Land Law that under Article VI of the United States Constitution, above cited, the conclusion of the Court is absolutely inescapable and in accordance with dozens of decisions of Courts throughout the United States. It might be well at this point to quote directly a few paragraphs from the decision:

> "(1) The Charter has become 'the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U. S. Const., Art. VI, sec. 2. The position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and

act upon the Charter according to its plain language and its unmistakable purpose and intent."

In speaking of the Declaration of Human Rights the Court says:

(Page 488) "This Declaration implements and emphasizes the purposes and aims of the United Nations and its Charter.

"Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well.

"This nation can be true to its pledge to the other signatories to the Charter only by co-operating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes."

The decision of the Supreme Court, found in 242 Pacific 2nd, page 617, affirms the Courts of Appeals but puts it on the theory that the United Nations Charter is not self-executing and thus does not control, but does hold that the land law is contrary to the Fourteenth Amendment of the Federal Constitution. It can certainly not be said that the United Nations Charter was disregarded because the land law has been upheld many times, including a decision by the United States Supreme Court, and there is no doubt but that without the United Nations Charter the California Supreme Court would not have declared the land law unconstitutional, although they state that they disregard the United Nations Charter. Certainly the California Supreme Court would not undertake to contradict the Supreme Court of the United States unless it felt an absolute need to hold the way it did, which need was caused by the passage of the United Nations Charter.

The decision here involved is sound, not only on the basis of Article VI itself, but on the basis of innumerable past decisions, the leading one of which is *State of Missouri v. Holland,* 40 Supreme Court, 382. This is the famous decision of Mr. Justice Holmes of the United States Supreme Court, which has been the leading case on this question ever since it was decided in 1920. In substance the decision holds that the treaty between the United States and Great Britain of 1916 regulating the killing of migratory birds, and the Act of Congress made in pursuance to that treaty, is not an unconstitutional interference with the right of

the States and is proper and enforceable. The reasoning of Justice Holmes is, as in his other decisions, clear, concise, and logical.

The general law is well stated in 11 American Jurisprudence, sec. 43, under Constitutional Law:

> "*Supremacy of Treaties.*—It is expressly declared in the Federal Constitution that all treaties made, or which shall be made, under the authority of the United States, together with the Constitution itself and the laws made in pursuance thereof, shall be the supreme law of the land. Therefore, when anything in the Constitution or laws of a state is in conflict with a treaty, the latter must prevail.
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> "It is well stated that an act of Congress may supersede a prior treaty and that a subsequent treaty may supersede a prior act of Congress. Accordingly, while a state law may be void as inconsistent with a treaty, an act of Congress cannot be similarly declared to be invalid."

If the reader will look at that section he will find that there appear dozens of United States Supreme Court decisions on each point stated.

The law is very clear, in summary, that a treaty supersedes state laws and state constitutions. It is further well settled that an act of Congress supersedes a prior treaty and that a prior act of Congress is superseded by a later treaty.

What is the result of this basic law upon the argument that civil rights are abridged by the treaty-making power? No distinction is made in the article between civil rights under Federal as contrasted with State authority. As to state laws and state constitutions, and civil liberties derived solely from this source, naturally we have seen that treaties may supersede them. As to civil liberties derived from the United States Constitution and Federal statutes, it is quite apparent that the treaty-making power has no effect upon those rights and that they stand undiminished in spite of any treaty to the contrary. The United States Constitution and Federal laws are the supreme law of the land, as well as treaties, and any conflict between them could be resolved by passing an act of Congress after the treaty is made which would, under the cited authorities, have the effect of nullifying the treaty.

The article implies that the Declaration of Human Rights is contrary to our philosophy in the sense that it imposes certain restrictions upon our liberties. It was one of our own great Jurists who said, "You cannot shout fire in a crowded theatre." We have always had restrictions on these liberties in cases of national emergency or great public interest, and the Declaration of Human Rights does nothing more than restate those.

In connection with the possible abridgement of civil liberties by the United Nations Charter, the Charter is certainly not going to become an instrument for the abridgement of personal liberties. Its avowed purpose under the preamble is to promote and increase civil liberties. It is said in the preamble: "To re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and all nations, large and small."

The essence of our civil liberties is found in the first amendment of the Bill of Rights, which has been included by implication in the fourteenth amendment. These two great bulwarks of American government, and of the rights of American citizens will stand as against any attack by any treaty at any time. They are the basis of the rights of our citizens. The alarm of some as to the power of treaties to lessen civil liberties is entirely without foundation because the first and fourteenth amendments to our Constitution are invulnerable and will serve to protect the rights of our citizens as long as this nation exists.

It is thus clear that the tree of civil liberties derives its life from the United States Constitution and Federal Statutes and since treaties are powerless under the law to attack the Federal Acts, the great tree of liberty cannot be undermined by any treaties which may be passed in the future. There is nothing to view with alarm. The California case cited merely states the law which had already been in effect since 1787 and is not a case which can, in any way, be interpreted to mean abridgement of civil liberties stemming from the first and fourteenth Amendments.

This discussion has dealt only with the legal problems raised. Much could be said about the necessity for the United Nations and the necessity of giving up perhaps some small degree of sovereignty in return for a united world to combat Communist aggression, but these are political matters and can be much more aptly discussed by others.

It might be well to say in closing that the proposed constitutional amendment offered by the American Bar Association and other sources, would, in the opinion of the writer, have a most disasterous effect because it would constitute a breach of contract in the sense that we would be breaching the United Nations Charter which is a contract between ourselves and many other nations. There is nothing the Kremlin would like better than to see us forced to withdraw from the United Nations or in any way incur the disfavor of that great organization.

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