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Japanese School Incident at San Francisco from the Point of View of International and Constitutional Law

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THE JAPANESE SCHOOL INCIDENT AT SAN FRANCISCO FROM THE POINT OF VIEW OF INTERNATIONAL AND CONSTITUTIONAL LAW

I.

THE act of the Board of Education of San Francisco in assigning to Japanese pupils separate school buildings, has been the occasion of a diplomatic incident which, although insignificant in itself, may lead to far reaching consequences both in regard to the internal affairs and the external relations of the country.

It is neither the first, nor will it probably be the last sign, of the struggle for equality of the yellow with the white man, which may subsequently be emphasized in a more tangible, if not abrupt manner, resulting in a clash between the two races: the one, trying to insure the equality, the other, striving to maintain the supremacy.

Leaving to the future the evolution of that struggle, let us now examine the present incident, not from the ethical or the point of view of natural justice, but purely from the legal aspect, and see as to how far the Japanese grievances are well founded, justifying a diplomatic intervention in the internal administration of the republic.

Two principles are here involved: the one is of International, the other of Constitutional law.

The first is connected with the external affairs of the country; the second with its internal or constitutional structure. The former affects the Federal Government in its foreign; the latter in its home policy. It certainly requires not a little wisdom to harmonize both, and to avoid the conflict which might inevitably, at times, result from such a division of authority.

Leaving aside the question of the responsibility of the Federal Government toward foreign powers, in all matters connected with grievances against any State of the Union, which is not at issue in the present case, at least for the moment, let us now see as to how far the treaty rights of Japan have been violated through the action of the Board of Education of San Francisco, or rather in consequence of the statute of the Legislature of California ordaining separate schools for pupils of Mongolian descent.

According to Art. 1 of the Treaty of 1894 "the citizens or subjects of each of the Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party," * * * and "in whatever relates to rights of resi-

dence and travel; * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation."

Conceding that the clause of the most favored nation is of general character and not simply limited to the "charges and imports," and that, consequently, the subjects of Japan are entitled to enjoy in the United States the same privileges and rights as the citizens of the United States or the foreign subjects, let us now see what are the rights and privileges enjoyed by other aliens residing in this country and generally in territories of foreign nations. That these "rights and privileges" cannot include "political rights" everybody will concede; but do they include all "civil rights"? Is an alien, by virtue of the right of residence in a foreign country with all the rights and privileges appertaining thereto, entitled to the enjoyment of the right of holding real property, of that of patent and copyright and numerous others which are only inherent to the right of citizenship?

As an eminent writer well observes, "foreigners are not submitted to all the charges imposed upon citizens; therefore they cannot participate in all the advantages enjoyed by the latter; each state determines the rights which may be enjoyed by foreigners residing in her territory."[1] In fact there actually exist three principal systems in regard to the enjoyment of civil rights by aliens residing in foreign territory. That of the common law, in which aliens do not enjoy all the civil rights; that represented by France, in which the enjoyment of such rights depends upon reciprocity by treaty, except in case of those who have been permitted by the Government to establish their domicile in France and continue to reside there, in which case they enjoy all the civil rights; and that headed by Italy, which is the most progressive one, in which foreigners are placed, in principle, on the same footing as the citizens in regard to civil rights.[2]

On the American Continent, the Republics of Argentine, Chili, Uruguay and Guatamala incorporated into their laws the Italian view. But it should be admitted that the tendency in the civilized nations is at present in favor of the last system, and such is also the

[1] See Calvo, Vol. II, p. 193. Also Al. Rivier, Vol. II, p. 189.

[2] See Articles 11 and 13 of the Civil Code of France, and Article 3 of the Civil Code of Italy; see also Pr. Fodéré, Vol. III, p. 634, 635; P. Fiore, Le Droit International Privé, Vol. I, § 279.

views of some eminent authors.[3] These authorities, however, hold that in regard to the enjoyment of civil rights there are some limits beyond which a foreigner cannot go. The distinguished German writer[4] who favors the enjoyment of privileges by aliens without reciprocity, says that "Strangers must be denied all rights, which without being in truth political, i. e., implying a certain share in the government of the state, or of the community, assume in their nature a permanent attachment to it." For instance, foreigners can never claim that in school instruction any regard should be given to their language; they have no concern in such matters. The eminent Italian writer who is a champion of the most liberal concessions to foreigners admits the right of the state to curtail or regulate the exercise of the enjoyment of such rights.

Now if we inquire into the practice of civilized nations, we find, that even in those countries where the most liberal and progressive laws exist in favor of aliens residing in their territory, such aliens are far from enjoying all the civil rights and privileges attached to citizenship. But in no country does a foreigner enjoy more rights and privileges than a citizen, and such an anomaly is not to be thought of in civilized communities.

Both theory and practice being against the grant to foreigners of all civil rights without exception, let us now see whether aliens residing in foreign territory and being entitled to enjoy all the civil rights, either by the laws of such foreign country or by special treaty, have the right to attend the public educational institutions of such foreign country. Is such a privilege included in the civil rights enjoyable by aliens? or has a state the right either to deprive them of such advantages or to make such regulation in regards to such institutions as she may deem necessary for her peace and internal tranquility or for the furtherance of the interests of her own citizens? In short is the benefit of education inherent in the enjoyment of the civil rights guaranteed by treaty or granted to a foreigner by the laws of the state?

No state seems to have gone so far as to claim such a privilege for her citizens, residing in foreign territory, by the mere right of the enjoyment of civil rights guaranteed by international compact, and contrary to the laws of such foreign nation. On the contrary if we are to be guided by the actual practice of civilized communities, we find that such privileges are always considered as being special favors conceded to aliens, and as pure acts of international

[3] See P. Fiore; Trattato di Diritto, Internazionale Publico, Vol. I, p. 456, Ed. 1904; also Bar, Private Intern. Law, p. 212.

[4] Bar, Private International Law, p. 211; also P. Fiore, *op. cit.*

courtesy and politeness. As a matter of fact states exclude aliens from their military or naval colleges and confer such privileges only on special occasions. In regard to other educational institutions, as it is more advantageous, both from the political and financial point of view, to grant rather than to withhold such a privilege, the doors of the educational institutions of a nation are generally opened to foreigners; but it should not be inferred from this, that a state does not possess, or retain, the power to exclude foreigners from such institutions or discriminate between them in regard to educational privileges.

If we examine the system of Republican France, we see that—besides her military and naval schools, to which the admission of foreigners is granted only in exceptional cases, as in all other countries, even in some of the other educational institutions of an entirely different character, such admission is granted either by a ministerial decree or special permit of the competent authority. Thus, foreigners are permitted to pursue their studies in the universities, by the ministerial decree of June 24, 1840, which is still in force. This clearly shows that the government may at its discretion grant or prohibit the admittance of foreigners to its public educational institutions. Again in some other schools of that country the entrance of foreign students can be secured only through the respective diplomatic agent of such foreigners at Paris and the authorization of the Minister of Public Instruction, or other minister under whose direction such institution comes. Such for instance is the case with the schools of engineering of the Ponts et Chaussées and that of the Mining School. The same rule applies to the Veterinary College and even the Conservatory of Music of Paris. In all these educational institutions the government has full authority to discriminate between such and such a foreigner, by granting admittance to one and refusing it to the other. The clause "of the most favored nation" in the treaties between France and foreign states cannot possibly give rise to any complaint, because the rights and privileges of residence, granted to foreigners by treaty stipulations, cannot justify a foreign intervention in such matters.

Likewise in Spain by a royal decree, aliens are admitted to the educational institutions of the country with the same rights as the Spanish subjects.[5]

It is not usual for states to bind themselves by treaty to grant educational privileges to aliens, for the simple reason that such courtesies are not only generally extended, but encouraged as furthering the interests of a country through the spread of its language and

[5] See Torres Campos, Elementos de Derecho, Internacionale Privado, p. 210, Ed. 1906.

literature, and the treaties that actually exist in educational matters have been concluded, either in order to facilitate the admission of students to foreign educational institutions by considering their school certificates as being equivalent to those of their own citizens,[6] or with a view of securing a mutual compulsory or gratuitous education.[7] The Treaty of July 28, 1868, between the United States and China, in which a special provision was inserted for securing mutual educational privileges for the respective citizens of both countries, is a rare exception. Some of the provisions of that instrument have still a binding force as not having been abrogated by any subsequent convention, as it is provided in Art. XVII of the Treaty of Oct. 8, 1903.[8] According to Article 7 of the Treaty of 1868 "Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the government of China, and reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation." (Ibid. p. 157-158). From the wording of this provision it is evident that these privileges are limited to the educational institutions under the control of the Federal Government and not to those of the States of the Union. Now according to Art. 6 of the same instrument "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges or immunities and exemptions in respect to travel or residence, as there may be enjoyed by the citizens or subjects of the most favored nation." Likewise Art. III of the Immigration Treaty of Nov. 17, 1880, with the same power, reiterates the enjoyment of the same privileges by the citizens of both parties. As these provisions also have not been abrogated by a subsequent treaty, they are still in force, as provided in Art. 13 of the Treaty of 1903. Therefore, if the construction given to the treaty by Japan should prevail and the San Francisco Board of Education should be enjoined to admit the Japanese pupils into the schools assigned to white people, the right of admittance of Chinese pupils could not be denied, since they also enjoy in regard to residence the same privileges as the subjects of Japan. But it should be observed that if the expression, "the enjoyment of the rights and privileges of residence," covered the educational advantages also, the insertion of a special provision to that effect in the Treaty of 1868 with China, would have been superfluous.

[6] See treaties of 1904 between Spain, Colombia, Guatamala and Mexico, and that of 1905 with Salvador, Ib. Torres Campos.

[7] See treaty of 1887 between France and Switzerland.

[8] See Senate Documents, Vol. 37, p. 155.

In Art. 11 of the Treaty of 1882 between the United States and the Kingdom of the Chosen (Korea), which is still in force, as not having been abrogated by the now suzerain power of the Flower Kingdom (Japan),—although the Chosen Kingdom has no more choice in this than in any other matter, because it has been particularly chosen by the Flower Kingdom to atone the sins of others—, we read that "students of either nationality, who may proceed to the country of the other, in order to study the language, literature, laws or arts, shall be given all possible protection and assistance in evidence of cordial good will."[9] There is nothing obligatory in this treaty for either party, but it only proves the desire at least for some kind of moral obligation in regard to educational facilities.

France and Switzerland wishing to reciprocate compulsory as well as gratuitous education for their respective citizens residing in the territories of the other, concluded a convention to that effect in Dec. 14, 1887. In Art I of that instrument it is provided that "the children of the Contracting Parties shall receive a gratuitous education in the primary schools of each state and that besides such education shall be compulsory."[10] Now assuming that the enjoyment of the rights and privileges of residence in the treaties either with China or with Japan, have as a corollary, the right of attending the public schools in California by Chinese or Japanese pupils, it is still questionable whether the segregation of such pupils of Mongolian descent, providing equally good educational advantages for them, could be considered as a real discrimination and consequently a violation of the alleged treaty rights. As we shall presently see, the supreme courts of various states, and that of the United States, held in numerous cases, that the assignment to colored pupils of separate school buildings, provided they receive the same educational advantages as the white people, is not a discrimination, but a mere classification and consequently not a violation of the enjoyment of the equal rights and privileges with white people. It is very likely that the same principle will be applied in the case of Japanese, Chinese or other alien pupils who might be entitled to the educational privileges of the country by international compact.

From the above exposition it may be seen, that there is a well established principle of the law of nations that aliens whilst residing in foreign territory cannot by right obtain admittance to the educational institutions of such country, unless there is a treaty stipulation expressly mentioning the grant of such a privilege and that, the mere right of residence with all its privileges cannot be

[9] Sen. Doc., Vol. 37, p. 494.

[10] See J. de Clerg, Recueil des Traités de France, Vol. 17, p. 506, 1887.

considered as being sufficient, to justify a claim for admittance by foreigners to such educational institutions. Therefore, the claim of Japan, that her treaty rights have been violated by the action of the Board of Education at San Francisco, does not seem to be founded either in theory or in usage; but as a sovereign power Japan is at full liberty, if she considers the action of the California authorities as an act of discourtesy, to resort to "retortion," i. e., to apply the same treatment to students from California residing in Japan or she may even extend such retaliation to all American students within her territory. But between a violation of a treaty right and an infringement of the rules of the "comity of nations," there is a great difference; the former giving the right to denunciate a treaty, the latter justifying a state in resorting only to friendly retaliation.

II.

The second point connected with the present incident is that touching Federal or State Constitutional Law.

Assuming that the treaty of 1894 guarantees to Japanese subjects the right of admittance to the public schools of San Francisco, with the same privileges as those enjoyed by the citizens of the United States, let us now see whether the statute of the Legislature of California ordaining the segregation of pupils of Mongolian descent is constitutional and whether it does not violate the privileges and immunities guaranteed by the 14th Amendment to the Federal Constitution. Can such a separation of Mongolians from white pupils in the schools be considered a discrimination in the proper sense of the word?

According to the 14th Amendment, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws." Does the law of California violate the Federal Constitution by separating white from Mongolian children in the public schools of that State? The question of the constitutionality of an act of the legislature prescribing the separation of white from colored pupils was tested at various times in the State and Federal Courts, and in all these cases it was held that such statutes were constitutional, provided no discrimination was made in the educational advantages for the pupils of either race. One of the earliest cases bearing upon this question, is that of *Roberts* v. *The City of Boston*,[11] which came up in 1849, and therefore long before the adoption of the 14th Amendment,

[11] 59 Mass. 198.

but the ruling of that decision has been followed in other cases and frequently quoted in cases even since the adoption of the 14th Amendment. The question involved in that case was whether the School Committee of Boston had power, under the constitution and laws of the State, guaranteeing equal rights to all citizens, to establish separate schools for colored children. The Supreme Court of that State in an elaborate opinion held that "the power of general superintendence vested a plenary authority in the committee (the School Committee) to arrange, classify, and distribute pupils, in such a manner as they thought best adapted to their general proficiency and welfare." * * * That "when the power was reasonably exercised without being abused or perverted by colorable pretences, the decision of the committee should be deemed conclusive." The Court proceeded to say "It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice," added the Court, "if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted."[12] Therefore the act of the committee separating the white from colored people was sustained as not being contrary to the Constitution of the State, guaranteeing equal privileges to all citizens.

Since the adoption of the 14th Amendment, cases of this nature have been very frequent in the various State and Federal Courts and in all the constitutionality of statutes directing the separation of white from colored pupils has been fully sustained. In 1874 the Supreme Court of California, in *Ward* v. *Flood*,[13] held that the school law of that State by which the education of colored and Indian children should be in separate schools, was constitutional, and that the privilege of attending the public schools of the State, was not a privilege or immunity appertaining to a citizen of the United States as such. The same principle was subsequently affirmed in the case of *Wysinger* v. *Crookshank*,[14] also in *Maddox* v. *Neal*.[15] The Constitution of North Carolina provides that "white and colored children shall be taught in separate schools but that there shall be no discrimination in favor or to the prejudice of either

[12] See also State *v.* The City of Cincinnati, 19 Ohio 178, and Van Camp *v.* Board of Education, 9 Oh. St. 407.

[13] 48 Cal. 36.

[14] 82 Cal. 588.

[15] 45 Ark. 121.

race." In *Hooker* v. *Town of Greenville*,[16] and in *McMillan* v. *School Committee*,[17] the Supreme Court of that State maintained that its constitution was not a violation of the 14th Amendment. The same view has been held by the Supreme Courts of other States.[18] In the case of *Nevada* v. *Duffy*, in 1872,[19] the Supreme Court of that State held that the statute prescribing that negroes, Mongolians and Indians shall be educated in separate schools, was constitutional. "While it may be, and probably is," said the Court, "opposed to the spirit of the Federal Constitution, still it is not obnoxious to its letter; and as no judicial action," added the Court, "is more dangerous than that most tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation; such course will be declined." The Court concluded by saying that it was perfectly within the power of the school trustees "to send all blacks to one school, and all whites to another; or to make such a classification, whether based on age, sex, race or any other existent condition, as may seem to them best." During the same year the Supreme Court of New York in the case of *The People* v. *Easton*,[20] held the same view, "It is urged," said the Court, "that this regulation of the Board (of Education) is in violation of the 14th Amendment of the Constitution of the United States. This prohibits the State," proceeded the Court "from making or enforcing any law which shall abridge the privileges and immunities of citizens of the United States." * * * "What privilege of a citizen is abridged thereby? Certainly none, unless every citizen has the privilege of choosing to which school, in a city, he will send his children." In the case of *Dallas* v. *Fosdick*,[21] the same Court said that "the right to be educated in the common schools of the State, is one derived entirely from the legislation of the State; and that "as such, it has at all times been subject to such restrictions and qualifications as the legislatures have from time to time deemed it proper to impose upon its enjoyment." "It is not one of those inherent and paramount rights, which the people by constitutional provisions have placed beyond the reach and control of legislation." The same view was re-affirmed in subsequent cases, such as in *People* v. *Gallagher*.[22] After review-

[16] 130 N. C. 472.

[17] 107 N. C. 609.

[18] In Missouri in 1890, in the case of Lehew *v.* Brummell, 103 Mo. 551, and in W. Virginia, in 1896, in Martin *v.* Board of Education, 42 W. Va. 514.

[19] 7 Nev. 342.

[20] 13 Abb. Pr. (N. Y.) 159.

[21] 40 How. Pr. (N. Y.) 249.

[22] 93 N. Y. 438.

ing the case the Court said that "the system of authorizing the education of the two races separately has been for many years the settled policy of all departments of the State government, and it is believed obtains favor very generally in the States of the Union." In the comparatively recent case of *Cisco* v. *The Board of Education* (1900),[23] the opinion of the same court was handed down by C. J. PARKER [ex-Democratic candidate] sustaining the constitutionality of the school law of the State in regard to the same matter.

In 1871 the Supreme Court of Ohio, in *State* v. *McCann*,[24] *held*, that the statute of the State separating colored from white pupils was not in violation of the 14th Amendment of the Federal Constitution guaranteeing equal privileges and immunities to all citizens. "What are these privileges or immunities," said the Court. "The language of the clause, taken in connection with other provisions of the amendment, and of the constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from or recognized by, the Constitution of the United States." "A broader interpretation," added the Court, "opens into a field of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment." The Court concluded by saying, that "the state law does not deprive colored persons of any rights but only regulates the mode and manner in which this right would be enjoyed by all classes of persons," and that "the equality of rights did not involve the necessity of educating white and colored persons in the same school, any more than it did that of educating children of both sexes in the same school." In the case of *Cory* v. *Carter*,[25] the Supreme Court of that State, in 1874, rendered a decision in which by very forcible languge it sustained the constitutionality of the statute passed by the general assembly of that State authorizing the school trustees to organize separate schools for colored pupils, with all the rights and privileges of white pupils. The Court, after reviewing the case, said that the right of a colored pupil to attend schools for white pupils in a State where such a system exists, is lost in the State in which such separation is ordained by the law of that State; "because it was not one of those fundamental rights accompanying the person, but a domestic regulation exclusively within the constitutional and legislative power of each State, necessary for the good of the whole people." * * * Then refer-

[23] 161 N. Y. 598.
[24] 21 Ohio 198.
[25] 48 Ind. 327.

ring to the 14th Amendment, the Court said "that had not delegated to the Federal Government the power to regulate and control the domestic institutions of a state." That the Federal Constitution did not "vest in Congress any power to exercise a general or special supervision over the States on the subject of education." In the school system there ought to be a classification of pupils and this classification on the basis of race or color and their education in separate schools involve questions of domestic policy; and they do not amount to an exclusion of either class." One of the best reasons for this right of separation given by the court is that, at the time of the submission of the 14th Amendment by the 39th Congress to the States of the Union, an act was passed by the same Congress (July 23, 1866) in regard to the schools of the District of Columbia, by which the City of Washington and Georgetown were required to pay over to the trustees of colored schools certain moneys for school purposes, and by a subsequent act certain lots in the City of Washington were donated for the "sole use of colored children in colored schools," and the 42d Congress by another act, directed the proportion of school money to be given to the trustees of the schools for colored children.[26] The court concluded by saying, "this legislation of Congress continued in force, as legislative construction of the 14th Amendment and a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification."

In the case of *Berea College* v. *Commonwealth*,[27] which was tried this year (1906), the Court of Appeals of Kentucky upheld also the constitutionality of a statute separating white from colored pupils.

The decisions of the various State courts upon this question have been sustained by the Supreme Court of the U. S., judging from the special references made to it in different cases though the points at issue there were of a different nature. In *Hall* v. *De Cuir*,[28] which came up before the court in 1877, Mr. JUSTICE CLIFFORD, after concurring in the decision of the court on the main issue, said, "school privileges are usually conferred by statute, and, as such, are subject to such regulations as the legislature may prescribe." That "it is settled law there that a board of education may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the 14th Amendment." In *Plessy* v. *Ferguson*,[29] the same

[26] See Congressional Globe, Vol. 70, p. 1753.
[27] 94 S. W. Rep. 623.
[28] 95 U. S. 485.
[29] 163 U. S. 537.

court, in 1895, sustained the constitutionality of the laws of the various state legislatures separating white from colored children in schools. The question in that case was as to whether the act of the Legislature of Louisiana providing separate railway carriages for the white and colored races, was constitutional and not in violation of the 14th Amendment. The court said, "The object of the 14th Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." "Laws permitting and even requiring," proceeded the court, "their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced." The court concluded by saying that, "The argument assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." "Legislation," said the court, "is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

In numerous cases the various state courts and, in some, the Supreme Court of the U. S. held that the statutes of the State Legislatures prescribing separate coaches or vehicles of transportation for white and colored people, were not in violation of the Federal Constitution and that the States were at liberty to legislate upon such matters. Furthermore, state laws prohibiting intermarriage between white and colored persons were not declared unconstitutional.

Therefore, if the Japanese, during their residence here, are placed on the same footing with the citizens of the United States by the clause of the most favored nation in the treaty of 1894, it is evident from the above exposition of the settled law of the country, that their exclusion from the schools assigned to white pupils, cannot be considered as a discrimination and consequently there is no violation of a treaty right.

III.

The last question to be examined is as to whether a treaty concluded by the United States Government and ratified by the Senate, can supersede all State rights. Art. VI of the Federal Constitution declares that * * * "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." As the Supreme Court of the United States well observed in the case of *Chew Heong* v. *United States.*[30] "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected." Therefore, the utmost care should always be taken in the conclusion of an international compact, in which not only the interests, but also the honor of the country is at stake. Considering the complexity of the constitutional structure of the United States and the difficulty of enforcing treaty obligations in the States of the Union, it is evident that no ordinary wisdom, combined with knowledge and tact, is required to coordinate the rights of States in regard to their domestic government, with the international engagements affecting the interests or rights of foreigners residing in the United States. Generally speaking and as a question of principle, the concensus of opinion both of State and Federal Courts and the views of eminent writers on the subject, is that a treaty being in the United States the law of the land, it can supersede both State laws and State constitutions. The question is so well settled that it would be superfluous to quote any decisions or opinions in support of that view.

It has been held in some cases that the treaty making power can confer by treaty upon aliens certain rights, the enjoyment of which is prohibited by State law to such aliens, such as the right of holding realty by purchase or by descent or inheritance, and that in such a

[30] 112 U. S. 536.

conflict between a State law and a treaty right, the latter shall prevail. The only doubt that exists is, whether the treaty making power can assume international obligations which may encroach upon the fundamental rights of States, i. e., upon those rights which have not been delegated to the Federal Government, and were intended to be retained by the States exclusively. Some distinguished writers on Constitutional Law, discussing the question, seem to favor the view that the treaty making power possesses an unlimited authority in the conclusion of treaties and that the stipulations of such an instrument, once concluded, are obligatory upon the States of the Union; but others equally distinguished, are of the opinion that a treaty, contrary to the Federal Constitution and encroaching upon the fundamental rights of States which have not been delegated to the Federal Government, cannot be valid.[31].

As far as judicial decisions, bearing upon this point are concerned, there does not seem to exist at present, any final and clear opinion of the highest judicial authority of the country. It would not, however, be amiss here to mention a decision on that point, given by the Supreme Court of California in the case of *People* v. *Negbee*,[32] in which that court held that the general government did not possess unlimited powers in treaty matters. "In determining," said the Court, "the boundaries of apparently conflicting powers between the States and general government the proper question is not so much what has been in terms, reserved to the States, as what has been, expressly or by necessary implication granted by the people to the National Government." * * * Then, referring to the crucial point as to whether in case of conflict between State laws and a treaty, the latter is binding or not upon the State, the Court said, "But even if the provisions of the Statute did clash with the stipulations of that or of any other treaty, the conclusion is not deducible that the treaty must therefore stand, and the State law give way. The question in such a case would not be solely what is provided by the treaty, but whether the State retained the power to enact the contested law, or had given up that power to the general government. If the State retains the power, then the President and the Senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department and in relation to those subjects the jurisdiction over which has been exclusively entrusted

[31] See Treaty Making Power of the United States, by Charles H. Butler, Vol. I, p. 395, where the views of various authorities are given. See also Wharton Dig. of Int. Law, Vol. 2, § 138 Seq.

[32] 1 Cal. 232.

to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a State law which enforces or exercises any power of the State not granted away by the constitution. "To hold any other doctrine," said the Court, "would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the States to a foreign nation.[33]

In the first and most important treaty case of *Ware* v. *Hylton*,[34] which was decided in 1795, JUSTICE CHASE handing down the opinion of the court, declared that every treaty made by the authority of the United States would be superior to the constitution and laws of any individual State, and then referring to the question, as to whether the court possessed any power to decide that Congress could by treaty annul the laws of the States, and destroy vested rights, said that "if the court possesses a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

In the license cases,[35] the same court said, "Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of a citizen of a State." In the Cherokee Tobacco case,[36] the court expressed its opinion as follows: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." Again in *Holmes* v. *Jennison*,[37] CHIEF JUSTICE TANEY, speaking for the court, said, "I am ready to admit that the President and Senate can make treaties, which are not themselves repugnant to the Constitution." And lastly, in *Hauenstein* v. *Lynham*,[38] the court, after upholding the efficacy of a treaty, said, "There were doubtless limitations of the treaty making power as there were of all others arising under such instruments."

But if a divergence of opinion as to the limits of the treaty mak-

[33] See also United States *v.* Rhodes, 1 Abb. 28.
[34] 3 Dall. 199.
[35] 5 How. 504, 613.
[36] 11 Wall. 617.
[37] 14 Peters 540.
[38] 100 U. S. 483.

ing power exists, there is hardly any regarding the power of Congress to nullify the provisions of a treaty by a subsequent act. It has been held in various cases, that if the provisions of an Act are in conflict with the stipulations of a treaty, the former shall prevail; and that the Constitution does not give to a treaty superiority over an Act of Congress. This assumption by Congress of the right to abrogate a treaty by a subsequent act, cannot be considered as a novelty, because every sovereign State has the right to denounce a treaty, independently of the consequences which might result from an ex-parte action, giving rise to a diplomatic conflict.

But can the general government with the Senate, by a treaty, grant to aliens more rights and privileges than those enjoyed by the citizens of the United States? In the treaties in which the clause of the most favored nation is inserted, the subjects or citizens of the contracting parties are entitled to enjoy the same rights and privileges as the subjects or citizens of the other contracting party or as those enjoyed by other aliens. In the treaty cases which have been adjudicated by the Supreme Court of the United States, the object was to place aliens on the same footing with citizens in regard to the enjoyment of certain civil rights, and not to grant them more rights and privileges than those enjoyed by citizens. If, by the treaty of 1894, the Japanese subjects should have been entitled to enjoy the right to be educated in the public schools of the States of the Union or of those under the control of the Federal Government, with the white people, contrary to the laws of such States and the Acts of Congress assigning particular schools for colored, Mongolians or Indians, this paradox would follow: the Mongolian citizens of the United States by birth, such as Chinese and Japanese citizens or the people of African descent and Indian citizens, would be excluded from such schools for white people by virtue of a State law or an act of Congress, as in the District of Columbia, and aliens, such as Japanese, Chinese, or colored subjects of Great Britain, France, and other States, or Mexican Indians, would have free access to all the public educational institutions of the country.

By the Civil Code of California, § 60, all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void. Similar laws exist in many States of the Union, especially in regard to intermarriage of white with colored people. Now, can the foreign nations, such as Japan, China, and others having Mongolian or colored subjects, by virtue of the clause of the most favored nation, inserted in treaties with the United States, in regard to the rights of residence with all its rights and privileges, claim, that their respective subjects are entitled to intermarry with white people in the States in which such mixed marriages are prohibited by law?

As a matter of fact such laws prohibiting intermarriage of the white and other races have been upheld as being constitutional. Thus in *Plessy* v. *Ferguson*,[39] the Supreme Court of the United States said, that "the laws forbidding the intermarriage of colored with white people though technically interfering with the freedom of contract, were universally recognized as within the police power of the State." But that "the exercise of the police power should be reasonable and in regard to the reasonableness of a statute, the legislature of a State is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order."

Therefore, can the treaty making power by special international compact override such a law by granting to aliens, who are forbidden by law to intermarry with white people, the right of such marriage, whilst the citizens of the United States of the same category are precluded from doing so? It is superfluous to multiply the examples in order to show the anomaly and incongruity which would result from the unlimited power of granting rights and privileges by treaty to foreign subjects, in excess of those enjoyed by the citizens of the United States.

To revert to the treaty of 1894 with Japan and those with China, which guarantee to Japanese and Chinese subjects certain rights and privileges, could it be supposed that the two-thirds majority necessary for the ratification of these treaties would have been secured in the Senate, had it been understood at the time that by granting such rights and privileges it would have set at naught the fundamental rights of States of the Union to enact a law ordaining the separation in the schools of Japanese or Chinese from white pupils?

It cannot be denied that the admission of the Japanese view, would create a most strange situation, to wit, that colored citizens of the United States—not to say anything of the aboriginal Indians—for whose sake so much blood has been shed in the country and whose rights have been so solemnly guaranteed by the Constitutional Amendments, should not be able to enjoy the same rights and privileges as the subjects and citizens of foreign states.

We may therefore conclude by saying that neither in the letter nor in the spirit of the treaty of 1894 with Japan, is there anything which substantiates the claim of the Japanese government to the right of education for her subjects in the public schools of the States of the Union, or in those under the control of the Federal Government; that such a right cannot be deduced from the wording of the

[39] 163 U. S. 537.

treaty and it can only be acquired by a special stipulation, and such is not the present case. That in the absence of such a privilege secured by treaty, the State of California has the right to exclude aliens from her schools or assign to them separate buildings for education; that in such cases a State shall have in view her own interests and conveniences and not those of aliens residing in her territory; that if the State of California has the right to exclude foreigners from her schools, she has also the corollary privilege of granting such a right to some and refusing it to others; that it is the undisputed prerogative of a State to grant certain privileges to the subjects of one State and refuse them to those of another, unless she is precluded from doing so by a treaty stipulation containing the clause of the most favored nation, with a special specification of the object in view; that otherwise it would have been useless to insert such clauses in international compacts. Further conceding, for the sake of argument, that the clause of the most favored nation in that treaty, entitles Japanese subjects to the educational privileges of the State of California, still the action of the authorities at San Francisco in assigning to Japanese pupils separate schools, cannot be considered as a discrimination, in the proper sense of the word, at least as long as the educational advantages granted to them are not inferior to those of other schools of the State.

As above explained, such is the construction given by State and Federal Courts in regard to the segregation of colored and Indian pupils, who, as citizens of the United States are entitled to all the privileges and rights secured by the Federal Constitution. There is no reason why a different view should be held for and a different interpretation should be given to rights and privileges guaranteed by treaty to aliens. Would not such a situation look in the eyes of the world as a travesty of justice? Still, such is the dilemma with which administration might be possibly confronted, if it persists in favoring the construction given to the treaty by Japan, or if the treaty making power concludes international compacts by which aliens are granted more rights than the citizens of the United States.

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