Michigan Law Review

Volume 6 | Issue 1

1907

Federal Treaties and State Laws

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FEDERAL TREATIES AND STATE LAWS *

THE rights of foreigners, in case of conflict between federal treaties with their several countries and laws enacted by the states, have been recently much considered.

Such questions are undoubtedly to be solved by constitutional law under our frame of government, but they so directly affect our international obligations and relations that they are habitually treated as proper topics to be discussed in our best works on International Law.

Thus Wheaton, our first great writer on this branch, treats extensively of treaties and the power to make and enforce them, not omitting our constitutional provisions.[1] The present accomplished Solicitor for the State Department, Dr. Scott, in his "Cases on International Law" includes many on the constitutional force and effect of treaties as the law of the land.[2] And Dr. Wharton in his International Law Digest devotes nine and one-half pages to the authority of treaties in the United States.[3]

The Digest of International Law published by the United States Government in 1906, edited with great judgment and learning by the Hon. John Bassett Moore, gives to the subject of treaties two hundred and thirty-two pages[4] besides still greater space given to conventional and diplomatic relations, and discusses at length the enforcement of treaties and "Judicial Actions" therefor[5] and the implied revocation or repeal of state constitutions and statutes by treaties.[6]

This topic may perhaps be considered, like that large class of goods provisionally contraband which is of ambiguous use (*ancipitis usus*), as having its character, like that of the goods, finally determined by its destination. On that theory this discussion is here plainly one of International Law.

The Federal Constitution, by Article I, Sec. 1, provides, "All legislative powers *herein granted* shall be vested in a congress of the

*A paper read at the Annual Meeting of the American Society of International Law, Washington, D. C., April 10, 1907. The writer further supported the views herein expressed in a debate before the International Law Association at Portland, Maine, August 29, 1907, speaking three times in reply to gentlemen of the bar of Virginia and of Louisiana.

[1] Wheaton's Inter. Law, Sec. 538 *et seq.*, 4th Ed., 1904. Same edited with notes by R. H. Dana (1866), p. 714.

[2] Scott's Cases on Inter. Law, p. 412 *et seq.*

[3] 2nd Ed., Sec. 138.

[4] Vol. V, p. 158 *et seq.*

[5] Same, p. 233.

[6] Same, p. 371.

United States," and there is incorporated in the article of nine sections and many subdivisions an elaborate and somewhat minute enumeration of the powers of Congress, so confided.

The Congress therefore possesses only these enumerated powers and such as can be derived therefrom.

By subdivision 2, Sec. 2, Article 2 of the same instrument, among the powers conferred upon the president is found the following, "He shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur." By subdivision 2, Article VI, "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."

Luther Martin, of Maryland, on Tuesday, July 17, 1787, moved in the Federal Convention, "That the legislative acts of the United "States, made by virtue and in pursuance of the Articles of Union, "and all treaties made and ratified under the authority of the United "States, shall be the supreme law of the respective states, as far as "these acts or treaties shall relate to the said states. or their citizens "and inhabitants; and that the judiciaries of the several states shall "be bound thereby in their decisions, anything in the respective laws "of the individual states to the contrary notwithstanding," which was agreed to, Nem. Con.[7]

This was included in the resolutions referred to the Committee of Detail, Thursday, July 26.[8] On August 6 Mr. Rutlege delivered in the report of the committee of detail and the provision was then shaped to read as follows: "Art. VIII, The Acts of the Legislature "of the United States, made in pursuance of this constitution and "all treaties made under the authority of the United States shall be "the supreme law of the several states and of their citizens and "inhabitants; and the judges in the several states shall be bound "thereby in their decisions, anything in the constitutions or laws of "the several states to the contrary notwithstanding." Aug. 15 Colonel Mason declared that the Senate "Could already sell the whole country by means of treaties." Mr. Rutledge moved an amendment of this article on Aug. 22, which was agreed to, Nem. Con., but which did not alter the language as to treaties.[9] On Aug.

[7] The Madison Papers, 5 Elliott's Debates, p. 322.
[8] Id., p. 375.
[9] Id., p. 467.

25, on motion of Mr. Madison, seconded by Mr. Gouverneur Morris, the words, "or which shall be made" were added Nem. Con.[10] Considerable debate and difference of opinion appeared. A slight verbal amendment was offered by Mr. Rutlege Aug. 27 and carried Nem. Con.[11] The final draft received from the committee on style contained the language on this subject finally agreed to and adopted, and which has stood in the constitution ever since.

The vast extent of the treaty making power was at once observed and was one of the grounds of opposition to the ratification of the constitution in the Pennsylvania Convention.[12]

In a debate in the legislature of South Carolina as to calling a state convention to ratify the constitution, and in the state convention itself the far reaching effect of the treaty making power was also fully discerned and violently attacked, but notwithstanding this the constitution was ratified by South Carolina.[13]

In the Virginia Convention the opposition was led by Patrick Henry, and he declared of treaties, "To make them paramount to the constitution and laws of the states is unprecedented." * * * "Gentlemen are going on in a fatal career; but I hope they will stop "before they concede this power unguarded and unaltered.[14] This was on Wednesday, June 18, 1788. The constitution was ratified by Virginia by a vote of 89 to 79, but though nearly 119 years have passed, the prognostic of the great Virginian has not been verified and the "fatal career" has not yet terminated in fatality.

In the New York Convention, Mr. Lansing proposed an amendment to the effect that "no treaty ought to alter the constitution of any state" but no action is recorded upon it, and New York ratified the constitution.[15]

North Carolina rejected the constitution, and quite largely on account of objection to the provision as to the making of treaties. It was urged that as they were "the supreme law of the land, the House of Representatives ought to have a vote in making them.[16]

The full and paramount treaty making power was defended in the Federalist and other contemporary Federalist publications over and over again, and attacked by opposing writers and pamphleteers as

[10] Id., p. 478.

[11] Id., p. 483.

[12] Butler's "Treaty Making Power," Vol. I, Sec. 200 and notes.

[13] Butler's "Treaty Making Power," Vol. I, Sec. 207, 8, 9 and 10. Citing Elliott's Debates, Vol. IV, p. 253 to 340.

[14] Same, Sec. 216, citing Elliott's Debates, Vol. III, p. 499.

[15] Butler's "Treaty Making Power," Vol. I, Sec. 226, citing "Elliott's Debates," Vol. II, p. 287.

[16] Butler's "Treaty Making Power," Vol. I, Sec. 228, citing "Elliott's Debates," Vol. IV, p. 119.

Richard Henry Lee and George Mason.[17] It was one of the burning questions involved in the ratification of the constitution, and the scope of the provision was fully apprehended and discussed on every side.

It will be observed that the powers of congress are those "granted" and that they are carefully specified. That there is a grant to the president and senate of the treaty making power with no specifications or limitations. That laws of the United States "made in pursuance" of such constitution and all treaties made "under the authority of the United States are" the supreme law of the land with no express provision that the latter must be "pursuant" to the Constitution.

This might seem to give countenance to the theory that the treaty making power is not restrained even by the Federal Constitution itself, but such a construction would have certainly been strained and the opposite conclusion seems to have been generally reached. Thus Chancellor Kent quoted from Story's Commentaries the following conclusion: "The treaty making power is necessarily and obviously subordinated to the fundamental laws and constitution of the state and it cannot change the form of government or annihilate its constitutional powers.[18] Mr. Butler in his very valuable work on "Treaty Making Power of the United States,"[19] quotes at length from Dr. Ernest Meier to the effect that the Constitution has confided certain matters to Congress (as naturalization, patents, copyright, control of the army, the declaration of war, borrowing money) and that these powers positively conferred on Congress cannot be usurped by the treaty making power.

It may be suggested that matters not granted by the Constitution were reserved by the states. This is beyond controversy, but the right to make treaties was granted, therefore it was surrendered by the states, and it was surrendered absolutely and utterly and in its entirety, and granted to the federal treaty making power specified. This grant was not limited by any express provision of the grant, and was in terms made paramount to state constitutions or state laws. If any limitation can be found it lies in the function and nature of a treaty.

We seem then forced to the conclusion that the power to make any engagement or regulation of a character customarily deemed within the scope of a treaty, except as the Constitution expressly

[17] Butler's "Treaty Making Power," Vol. I, Sec. 239 *et seq.*

[18] Kent in Lecture XIII, p. 286-7. Story's "Commentaries on Constitution," II. Sec. 1502. Both quoted Butler's "Treaty Making Power," Sec. 309 and notes.

[19] Butler's "Treaty Making Power of U. S.." Vol. I, p. 447.

bestows the control of certain matters on Congress, the judiciary or some other branch of the government, is granted to the federal treaty making power. That such treaty is made by the Constitution paramount to any state constitution or statute and necessarily to any ordinance or regulation of any of the subdivisions or agencies of the state.

It is believed that all the federal decisions are consistent with and support this view, and that there are many state decisions concurring.

The very first important decision as to treaties made by the United States Supreme Court in 1796 involved this very question of the conflict of a federal treaty with a statute of one of the states. In *Ware* v. *Hylton*,[20] it was held that under our treaty of peace with Great Britain, a British creditor could recover a debt previously contracted to him by one of our citizens notwithstanding payment of the debt by the creditor into the treasury of Virginia during the war pursuant to a statute of that state making such payment a discharge. The court held that Virginia had the power of confiscating the debt and that she exercised her lawful power (p. 235). It was doubted by one of the counsel (Mr. Marshall) whether Congress had a power to make a treaty that could operate to annul a legislative act of any of the states and to destroy rights acquired by or vested in "individuals in virtue of such acts." It was decided that the stipulation in the treaty that creditors "on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted" rendered the Virginia law and all defenses thereunder void and ineffectual as against a debt covered by the treaty.

It is not to be overlooked that the power of Virginia to pass the act was fully conceded in the leading opinion by CHASE, J., but it was notwithstanding held that a state statute already passed in a matter unquestionably under the control of the state was invalidated if it conflicted with a federal treaty, and action thereunder was wholly without effect. As Mr. Butler says, "The opinions in this case alone had they never been cited and approved in subsequent decisions would be sufficient to justify any commissioners concluding a treaty for the United States in making whatever absolute stipulations might in their opinion be necessary and proper in order to gain any desired result, and in regard to any matters whether exclusively within the control of the states or not; and clothe the central government with ample power to enter into and enforce all such treaty stipulations."[21]

As Mr. Justice CUSHING said in the case above, "The treaty, then,

[20] 3 Dall. (U. S. S.) 199.

[21] "Treaty Making Power of the U. S.," Vol. 2, p. 7.

as to the point in question, is of equal force with the Constitution itself, and certainly, with any law whatsoever."[22]

This case was the only one in the Supreme Court in which John Marshall appeared as counsel, and he was unsuccessful,[23] though Patrick Henry was associated with him.[24] Patrick Henry, who had opposed the ratification of the Constitution of Virginia, as we have seen, here exerted himself to the utmost to prevent its overriding the Virginia statute. He is said to have shut himself up for three days in his office while preparing himself, without seeing even a member of his family, his food being handed in to him by a servant. His argument lasted three days and "so injured his voice that it never fully recovered its strength." The doctrine of this case has stood unquestioned ever since, for over one hundred years, and has been constantly cited, approved and followed.[25]

In 1806, in *Hopkirk* v. *Bell*,[26] it was held that a debt due a British subject prior to the war of the Revolution could not be barred by the statute of limitations of Virginia contrary to the treaty of peace of 1783.

In *Fairfax's Devisee* v. *Hunter's Lessee*[27] (1813), the question was whether Lord Fairfax at his death having the absolute property in the waste and unappropriated lands in the northern neck of Virginia could devise them to Denny Fairfax, his nephew, an alien enemy, and whether the commonwealth of Virginia could grant them so as to defeat the latter's title. It was held it could not and that the treaty of 1794 confirmed the title in the devisee. It is held that though the state had once a right by inquest of office found to divest the alien's title yet "it has not so done, and its own inchoate title "(and of course the derivative title, if any of its grantee) has by the "operation of the treaty become ineffectual and void."

The Court of Appeals of Virginia denied the jurisdiction of the Supreme Court of the United States and the constitutionality of the provisions of the federal judiciary act under which the decision of the state court was reversed and the Federal Supreme Court on writ of error reversed the judgment of the Virginia court, the

[22] 3 Dall., p. 284.

[23] "Treaty Making Power of the U. S.," Vol. II, p. 10.

[24] See Macgruder's "American Statesmen John Marshall," p. 38.

My attention has been kindly called to this by Mr. J. J. Lamb. Patrick Henry does not appear as counsel in this case in the report, but his participation is also mentioned by Mr. Carson in his "History of the Supreme Court," p. 169. See Butler's "Treaty Making Power," Sec. 330, note 1.

[25] "Treaty Making Power of the U. S.," Vol. II. p. 11.

[26] 3 Cranch 454.

[27] 7 Cranch 603.

opinion of the court being delivered with great learning and elaboration by Justice STORY.[28]

Thus a most determined and repeated attempt by perhaps the chief state of the Union (at that time) to establish the independence of its laws as to realty from the control of federal treaties met with complete defeat and the doctrine with final repudiation.

In 1817, the case of *Chirac* v. *Chirac*[29] was decided by the Federal Supreme Court, Chief Justice MARSHALL writing the opinion, and it held that where a naturalized Frenchman died intestate, leaving lands in Maryland, his heirs being French citizens, that these heirs could recover the lands notwithstanding the attempt of the state to escheat them under its anti-alien laws, since our treaty with France enabled subjects of France to hold lands in the United States.

The case of *Orr* v. *Hodgson* (1819)[30] held that the treaty of 1793 protected from forfeiture by reason of alienage lands then held by British subjects, but that lands could not be inherited or transmitted by a person once a British subject but who had become a Venetian subject and lost British citizenship, since such person suffered all the disabilities of alienage and was not within the terms of the treaty which affected British and American citizens only.

Shortly after in a group of cases the various federal courts declared that state laws providing for the confiscation of property owned by a British society were ineffectual in so far as they conflicted with our federal treaty with Great Britain, and these cases held that the rights of parties under these treaties were so vested that the war of 1812 did not divest them and that a state could not pass laws confiscating franchises contrary to treaty stipulations.[31]

The case in the 8 WHEATON was argued in support of the state confiscation by Mr. Webster and was decided in 1823, WASHINGTON, J., giving the opinion of the court, but not Mr. Webster's great powers or the deep feeling hostile to all British interests or claims, resulting from the recent war of 1812, induced the court to in the least modify its previous views, and the protection of the treaty against acts of confiscation was extended to a British corporation exactly as to a natural British subject.

It was held that this property was "protected against forfeiture "for the cause of alienage or otherwise, by the treaty of peace. This

[28] Martin Heir and Devisee of Fairfax *v.* Hunter's Lessee, 1 Wheat. 304 (1816); Smith *v.* Md., 6 Cranch 286.

[29] 2 Wheat. 259.

[30] 4 Wheat. 453.

[31] Society for the Propagation of the Gospel *v.* Hartland, 2 Paine 536; Same *v.* Wheeler, 2 Matthews 105; State of Vermont *v.* Soc. for Prop. the Gospel, Fed. Cases, 16, 919-20; Soc., etc., *v.* Town New Haven, 8 Wheat. 464; "Treaty Making Power U. S.," Vol. 2, p. 12.

"question as to real estates belonging to British subjects, was finally "settled in this court in the case of *Orr* v. *Hodgson,* 4 Wheat. 453, "in which it was decided, that the sixth article of the treaty protected "the titles of such persons to lands in the United States which would "have been liable to forfeiture, by escheat, for the cause of alienage "or to confiscation '*jure belli*' and the court declared 'we can discover "no sound reason why a corporation existing in England may not as "well hold real property in the United States, as ordinary trustees "for charitable or other purposes, or as natural persons for their "own use.' "

In 1824, in *Hughes* v. *Edwards,*[32] the court held that a British subject being an alien could foreclose a mortgage on land in Kentucky since it did not involve any recovery of the possession of the land, but WASHINGTON, J., intimated that British subjects under the protection of the treaty could bring suit even for the recovery of the land itself.

In 1840, in *Pollard's Lessee* v. *Kebbe,*[33] Mr. Justice BALDWIN declared "all treaties, compacts and articles of agreement in the "nature of treaties to which the United States are parties have ever "been held to be the supreme law of the land, executing themselves "by their own fiat, having the same effect as an act of Congress and "of equal force with the Constitution."

In 1866, the Supreme Court of the United States held in the case of *The Kansas Indians,*[34] that the state could not tax their lands held in severalty contrary to a provision of the treaty made by the United States with the Indian tribes exempting their lands "from levy, sale and forfeiture," that being construed to extend to forfeiture for non-payment of taxes.

This was fully adopted and approved in case of an attempt to tax lands of the Seneca Indians by the State of New York. They were held fully protected by a treaty with the United States assuring them of such lands "without disturbance by the United States."[35]

In 1879, the Federal Supreme Court in *Hauenstein* v. *Lynham,*[36] considered the power of Virginia under her statutes to cause lands within her borders acquired by a citizen of Switzerland to escheat on his death, his heirs being aliens. It holds that under our treaty with Switzerland of 1850 a Swiss citizen was given the right, if successor to any real estate within the United States which as an alien he could not hold, to sell the same and withdraw the proceeds without other

[32] 9 Wheat. 489.
[33] 14 Pet. 353.
[34] 5 Wall. 737.
[35] The New York Indians (1866), 5 Wall. 761.
[36] 100 U. S. 483.

charge than that exacted from natives, that "a treaty cannot be *the* "*supreme law* of the land, that is, of all the United States, if any act "of a state legislature can stand in its way. If the constitution of a "state (which is the fundamental law of the state and paramount to "its legislature) must give way to a treaty and fall before it, can it "be questioned whether the less power, an act of the state legislature, "must be prostrate." That the treaty is within the treaty making power conferred by the Constitution. The judgment of the Court of Appeals of Virginia was reversed and it was held the escheator could have no claim as such.

In 1889, the Supreme Court of the United States again considered the treaty making power in its relation to state laws, in *Geoffroy* v. *Riggs*,[37] where Mr. Justice FIELD spoke for the court. It was held that the treaty of 1800 with France suspended the common law and statutes of Maryland so far as they prevented French citizens from taking real or personal property by inheritance or succession from persons in the United States.

The opinion declares "that the treaty power of the United States "extends to all proper subjects of negotiation between our govern- "ment and the government of other nations, is clear. It is also clear "that the protection which should be afforded to the citizens of one "country owning property in another and the manner in which that "property may be transferred, devised or inherited are fitting sub- "jects for such negotiation, and of regulation by mutual stipulations "between the two countries," and again "The treaty power, as "expressed in the Constitution, is in terms unlimited except by those "restraints which are found in that instrument against the action of "the government or its departments, and those arising from the "nature of the government itself and of that of the states."

When Chinese immigration was thought by the inhabitants to have become a menace to the Pacific States they by a series of acts tried to discourage it.

Our treaty with China contained reciprocal provisions for rights of immigration, travel and daily pursuit of business and labor of Americans in China and Chinese citizens in our country,[38] and in the later seventies the controversy shifts largely to the Pacific Coast. and involves the rights of Mongolians.

Oregon by statute forbade the employment of Chinese laborers on public works, and under the statute there was an attempt to enjoin a contractor from employing Chinese labor.

Judge DEADY, of the United States District Court, held that if the

[37] 133 U. S. 258.

[38] Butler's "Treaty Making Power," Sec. 336.

state could exclude from this form of labor it could exclude from all, that the treaty furnished the law and was supreme and necessarily implied "the right to live and labor for a living." A demurrer to the bill on other grounds was sustained, and this was affirmed on rehearing by Mr. Justice FIELD and DEADY, District Judge, Aug. 21, 1879[39]

In 1879, California by her Constitution prohibited corporations from employing Chinese labor and authorized appropriate statutes which were passed making such employment a crime. One Parrott was arrested for violation of the statute but was released by the United States Court on habeas corpus in 1880 on the ground that the provision of the state Constitution and statutes thereunder conflicted with our treaty of 1868 with China and were therefore void.[40]

In the same year a state statute prohibiting aliens incapable of naturalization from fishing was held void as contravening the terms of our treaty with China in that it discriminated against the Chinese and was favorable to other aliens.[41]

In 1879, the validity of an ordinance of the city of San Francisco providing for the clipping of the hair, to a uniform length of one inch, of all persons imprisoned in the county jail under a criminal judgment was considered by the United States Circuit Court, Justice FIELD presiding, in what is known as the famous queue case. The ordinance was held invalid under the Fourteenth Amendment as aimed at a particular class and denying them equal protection under the law. Justice FIELD held that the federal "government alone "can determine what aliens shall be permitted to land within the "United States and upon what conditions they shall be permitted to "remain." He points out that any restrictions needed must be imposed by the federal government and that nothing can be accomplished by "hostile and spiteful legislation on the part of the state, or its municipal bodies, like the ordinance in question. Legislation which is unworthy of a brave and manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation."[42]

This was not a case involving a treaty, but does involve the conflict of a San Francisco ordinance with paramount federal law.

The action was by a Chinese citizen to recover damages from the sheriff who enforced the unlawful ordinance, and judgment for the plaintiff was ordered on demurrer to pleas of justification under the ordinance.

[39] Baker v. City of Portland, 5 Sawy. 566; Fed. Cas. 777.
[40] In re Tiburcio Parrott, 6 Sawy. 349.
[41] In re Ah Chong, 6 Sawy. 451.
[42] Ho Ah Kow v. Nunan, 5 Sawy. 552.

In *re Quong Woo*[43] (1882), the United States Circuit Court for California, FIELD, J.. giving the opinion, held that "under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges and immunities of subjects of the most favored nations with which this country has treaty relations; and where he was a resident here before the passage of the act of Congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do can not be restrained by invalid legislation," and the petitioner held for breach of such ordinance was discharged apparently on habeas corpus. The legislation referred to was an ordinance of San Francisco as to the laundry business, which ordinance was held void on other grounds.

In 1894, the United States Circuit Court for Wyoming was called on to decide whether the right of a Bannack Indian named Race Horse to hunt on unoccupied lands, given by a treaty between his tribe and the United States, could be affected by the game laws of Wyoming. It was held the passage of such laws was a "matter entirely within the powers of the state," but that these powers are subject to the right of the general "government to exercise the powers conferred upon it by the Constitution is perfectly clear."[44]

Race Horse was accordingly ordered discharged on habeas corpus from the custody of the sheriff who held him on default of his bail under a charge of unlawfully killing seven elk in the state of Wyoming. The court holds that the preservation of game and fish has always been treated as within the proper domain of the police power of the state, and that the Supreme Court so held (*Lawton* v. *Steele*, 152 U. S. 133) that the state had the undoubted right to pass the law in question, but that "these powers are subject to the right of the general government to exercise the power conferred upon it by the Constitution is perfectly clear."

The decision was reversed by the Supreme Court on other grounds but without discrediting the decision as to the points above considered.[45]

Yet the supremacy of the state in legislation in general as to crime has been repeatedly affirmed by the Federal Supreme Court, as in *Spies* v. *Illinois*,[46] the Chicago Anarchists case, and in *Brooks* v. *Missouri*,[47] and as was also held in affirming the validity of electrocution as a punishment, in *re Kemmler*.[48]

[43] 13 Fed. R. 229.

[44] In re Race Horse, 70 Fed. R. 598.

[45] Ward *v.* Race Horse, 163 U. S. 504; and see dissent by Mr. Justice BROWN.

[46] 123 U. S. 131.

[47] 124 U. S. 394; and see In re Shibuya Jugiro, 140 U. S. 291.

[48] 136 U. S. 436.

In *People ex rel. Cutler* v. *Dibble*,[49] an act for the summary removal of white intruders from Indian lands was held valid as a police regulation merely, the right of the one removed to litigate his title not being affected, but though the case is often cited as if it held that courts were loth to allow a treaty to deprive the state of its police power,[50] it is submitted that it does not so hold or intimate, but on the contrary deals with the rights of white men who were not Indians and not aliens claiming any right under a treaty.

The case was carried to the Supreme Court of the United States and affirmed,[51] but J. GREER for the court pointed out (p. 370-1) that the relators could not claim the protection of the treaty, and had no right of entry under the treaty, and therefore that this statute is "not in conflict with the treaty in question."

The right of a state to maintain a quarantine under its reserve police powers was upheld by the Supreme Court of Louisiana in 1899, when it was claimed to contravene a treaty with France.[52]

The same question was raised in 1902 in the United States Supreme Court in *Companie Francaise* v. *State Board of Health*.[53] The majority of the court construed the treaty in question so that it was decided there was no conflict, but Justice BROWN, dissenting, construed the treaty as conflicting with the state law, and concludes: "Necessary as efficient quarantine laws are I know of no authority in the states to enact such as are in conflict with our treaties with foreign nations." Justice HARLAN joined in this dissent.

The California cases on the subject are by no means in agreement. *People* v. *Naglee*[54] upholds a requirement of a license fee of $20 a month from foreign miners working gold mines, and decides that it does not conflict with any treaty, holding that the states have retained all power of taxation not surrendered to the federal government. No treaty or nationality was set out as giving any rights violated (see page 245), but it holds if a treaty conflicts with the reserved powers of the state it fails. But in *People* v. *Gerke*,[55] the same court five years later upheld a treaty right to inherit, notwithstanding the California laws, though the State's Attorney-General

[49] 16 N. Y. 203.

[50] Butler's "Treaty Making Power," Sec. 356.

[51] 21 How. 366.

[52] Compagnie Francaise v. State Board of Health, 51 La. Ann. 645.

[53] 186 U. S. 380; 22 Sup. Ct. R. 811.

[54] 1 Cal. 232 (1850).

[55] 5 Cal. 381 (1855). Some extracts from this case are printed on p. 7 of the brief of William G. Burke, Esq., City Atty., and Atty. for the respondents in the case of Keikichi Aoki, by Michitusgu Aoki, his guardian ad litem v. M. A. Deane, Principal of Redding Primary School, in the city and county of San Francisco, involving the school rights of Japanese children lately pending in the Supreme Court of California, which the writer has had the privilege of examining.

denied the authority of the government to make such a provision by treaty.

The court says (p. 385), "one of the arguments at the bar against the extent of this power of treaty is, that it permits the federal government to control the internal policy of the state, and in the present case, to alter materially the statute of distribution." "If this was so to the full extent claimed, it might be sufficient answer to say, that it is one of the results of the compact, and if the grant be considered too improvident for the state, the evil can be remedied by the Constitution making power."

Finally in 1900 the same court overruled all earlier aberrations and held in *Blythe* v. *Hinckley*,[56] in harmony with the universal rule. that (syllabus) "The question as to the rights of aliens to possess, enjoy and inherit property in the United States is a proper subject matter of treaty, and a treaty regulating those rights must control all state legislation contrary thereto as the supreme law," and this though the court recognizes that a state has the primary right to regulate the tenure of all real property within its limits.

Innumerable other state decisions hold like doctrine.[57]

Mr. Butler, in closing his chapter on "Treaties and State Laws," says: "In none of the cases reviewed in this chapter has the treaty making power of the United States in any way been attacked or affected; the power exists, the treaties have always been declared valid." (Sec. 359), and he points out that "the supremacy of treaties over state statutes conflicting therewith has not only been upheld by the federal courts but has been universally recognized by the state courts." Mr. Butler's work was published in 1902.

A careful examination of the American Digest, beginning with 1901 and coming down to the last advance sheets, shows no modification of the law as reported by Mr. Butler, but that the supremacy of treaties over state laws has been continuously and consistently maintained. It has been held in at least two cases within those years that federal treaties could remove the disability of aliens to inherit imposed by state laws,[58] and in three cases that treaties regulating the administration of estates of aliens contrary to state law must prevail[59]

[56] 127 Cal. 431.

[57] Jackson *v.* Wright, 4 Johnson Cases 75 (1809) Kull *v.* Kull, 37 Hun. 476; Adams *v.* Akerland, 168 Ill. 632; Schultze *v.* Schultze, 144 Ill. 290; Opel *v.* Shoup, 100 Ia. 407; Doeherd *v.* Hilmer, 102 Ia. 189; Meier *v.* Lee, 106 Ia. 303; Cornet *v.* Winton's Lessee, 2 Yerger 143; Maiden *v.* Ingersoll, 6 Mich. 373.

[58] Bahuaud *v.* Bize, 105 Fed. 485 (1901); Doe *v.* Roe, 4 Pennewill 398, 55 Atl. 341.

[59] In re Fattosini's Est., 67 N. Y. S. 1119; In re Lobrasciana's Est., 77 N. Y. S. 1040; In re Wyman, 191 Mass. 276, 77 N. E. 379.

The prevailing doctrine is believed to be in full accord with *Railroad Co.* v. *Husen*,[60] where the rule was laid down broadly that "whatever may be the nature and reach of the police power of a "state, it cannot be exercised over a subject confided exclusively to "Congress by the federal Constitution. It cannot invade the domain "of the national government," and accordingly a statute of Missouri forbidding the passing of certain cattle through the state was held void.

As MARSHALL declared in *Owings* v. *Norwood's Lessee*,[61] "whenever a right grows out of or is protected by a treaty, it is sanctioned against all the law and judicial decisions of the states; and whoever may have this right it is to be protected."

The suggestion that a matter never confided to the federal government by the Constitution is reserved to the state, and so beyond the control of a federal treaty would, if followed, reverse the decision of almost every case cited. The descent or devise of lands is a matter never surrendered and exclusively for state cognizance (except as to taxation) as was held by the United States Supreme Court in *Clarke* v. *Clarke*[62] and *Blythe* v. *Hinckley*.[63] But, as has been seen, treaties may to any extent modify this control. The same is true of distribution or bequest of personalty, enforcement of contracts, and of regulations as to game, yet treaties have been held paramount as to all of these.

We seem to have negotiated some twenty-two treaties for the arrest of deserters from ships, and a statute authorizing proceedings in a federal court for the arrest and return of deserters under such a treaty is considered and upheld in *Tucker* v. *Alexandroff*.[64]

Some fifteen treaties as to estates of deceased persons and some thirty as to property rights,[65] and as we have seen these have been repeatedly held valid, and superior to state laws enacted within the admitted competence of the state.

The argument that legislative or executive or judicial powers in general not delegated to the federal government are fully reserved to the states is perfectly cogent, and logical. It is beyond dispute or discussion. Every state has its departments of government appropriate to the exercise of these reserved powers.

No state has any department or can have any which can possibly exercise any treaty making power, and the exercise of any such

[60] 95 U. S. 465 (1877).
[61] 5 Cranch 344 (1809).
[62] 178 U. S. 186, 20 Sup. Ct. R. 873.
[63] 180 U. S. 333, 21 Sup. Ct. R. 390.
[64] 183 U. S. 424, 22 Sup. Ct. R. 195 (1902).
[65] See index Treaties in Force, 1904.

power is expressly forbidden to every state by Sec. 10, Article I, Constitution of the United States. "No state shall enter into any treaty alliance or confederation."

The sole and only treaty making power is in the President with the advice and consent of the Senate.

It is as complete as that of any sovereign government, and is bestowed without reservation or limitation.

If the United States, having suffered a disastrous defeat (which has never happened, and it is our ardent hope may never occur), should be compelled to accede to a treaty which bound the State of New York to pay ten millions of dollars to the conqueror or to cede a canal zone to Great Britain from the lakes to the seaboard, or which made His Imperial Majesty, the Emperor of Japan, ex-officio governor of California, or His Majesty, the King of Great Britain, ex-officio mayor of Boston, it is impossible to say that any express Federal Constitutional provision would be violated, and as the treaty prevails, any state statute or constitution to the contrary notwithstanding, it seems difficult to impeach the full force and validity even of such extreme concessions. If there could be a full and absolute cession of the territory and dominion of a state there certainly might be a partial cession of territory or a special servitude imposed. If I can convey the fee, I can grant an easement. Butler's Treaty Making Power,[66] dealing with the question of rights of cession, shows many cases of such cession in boundary settlements with Spain and Great Britain.

Since the treaty making power of the states is absolutely and wholly eradicated by the Constitution, since the treaty making power is wholly, absolutely and without any express limitation delegated to the appointed federal authority which is given express power to override any state law or constitution, since treaties made pursuant to such power were expressly made paramount to any state constitution or statute, it seems impossible to find any limit to the dominion of treaties over state laws, except the discretion of the constitutional treaty making power. Our highest federal court has so far found no other limitation, although there are various expressions intimating that one exists in the nature of a treaty and the form of our government.

The control of their own boundaries has often been claimed for the states of this union, and that such boundaries could not be affected by the treaty making power.

We have negotiated some six treaties with Great Britain concerning boundaries beside three as to the Alaskan boundaries. Some

[66] Vol. 2, p. 192-3.

fourteen treaties or extensions thereof as to boundaries with Mexico. One with Russia, and at least one with Spain, and made an arrangement with Texas.[67]

However, though there are some dicta and some departmental actions favoring the right of any state to be consulted before its boundaries are dealt with, and that may be the wise and considerate course, yet it is believed the only direct decision by our court of last resort is favorable to the absolute control of the boundaries of a state by our treaty making power, and that any grant of the state in disregard of such treaty is void. This decision was given in the case of *Lessee of Latimer* v. *Poteet*,[68] where the court considered the settlement of the boundary between North Carolina and the Cherokees by a treaty made by the United States with the latter, and decided that such treaty settled the boundary and that grants by the state of land in the territory accorded to the Indians by the treaty were void.

Justice McLEAN for the court (p. 13) says: "It is a sound principle of national law and applies to the treaty making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of the state, nor those of an individual, can be interposed.[69]

As to the method by which an alien's right under a treaty is protected or redress is got for its breach, of course he may, as in case of any failure of duty owed him by this government, complain to his own government and it may make diplomatic representations and often get for him or his representatives relief or compensation. As an example, that was the ultimate procedure between this country and Italy as to citizens of Italy who were put to death by a mob at New Orleans in 1891.[70] The federal government made compensation for the negligence of the local authorities.

The right of the alien under the treaty may be set up in any suit or proceeding by him or against him, and the court, state or federal, is bound to give it full force and effect as paramount law. If this is refused, he may carry the case if in the state courts to the highest state court, and then on writ of error, if his right is denied, carry it as involving a federal question, to the Supreme Court of the

[67] See title "Boundaries" in index to "Treaties in Force in 1904."

[68] 14 Pet. 4 (1840).

[69] Cited by Mr. A. K. Kuhn, Columbia Law Review, Mar. 1907, p. 179.

[70] Scott's Cases International Law, p. 328, note; Moore's International Law Dig., Vol. 6, p. 837. And see the same volume, pp. 605 to 1037, title "Claims," for full review of many like cases.

United States. This was the practice in the early case of *Fairfax's Devisee* v. *Hunter's Lessee,* decided in 1813, and in the same case in 1816, *Martin, Heir and Devisee of Fairfax* v. *Hunter's Lessee,*[71] the judgment of the Court of Appeals of Virginia was reversed a second time and the judgment of the district court held at Winchester affirmed.

That practice has been, it is believed, constantly followed, up to this time, and it seems adequate in civil matters.[72]

It is not, however, the sole means of relief or redress for an alien denied his treaty rights.

If he is arrested under a state statute conflicting with a treaty, he may sue out a writ of habeas corpus in a federal court, and if such conflict appear, the federal court will declare the state statute to that extent void, the restraint unlawful and discharge the alien from custody.

That such relief by habeas corpus will be granted in case of imprisonment under a state law contrary to treaty provisions has been repeatedly decided, especially upon the Pacific Coast.

As in *re Tiburcio Parrott,*[73] where an anti-Chinese employment provision in the Constitution of California was held void.

In *re Quong Woo.*[74]

And in 1904, in *Petitt* v. *Walshe,*[75] the Supreme Court of the United States held that a direct review by it was allowed where the construction of an extradition treaty was drawn in question on habeas corpus in the United States Circuit Court.

If he is subjected to any injury whatever under a state law or local ordinance conflicting with his treaty rights, he may sue the person who inflicts the injury and the state law or ordinance will be no justification. So held in *Ho Ah Kow* v. *Nunan.*[76] Justice FIELD there held a Chinese alien deprived of his queue under an ordinance of San Francisco void, as in conflict with paramount federal law, could recover damages, against the officer executing the void ordinance, by action in the federal court.

The alien plaintiff claiming under a treaty may assert his rights by a proper action in the courts, and they will be maintained by them in disregard of any inconsistent rights created by a state statute. So he may maintain ejectment for lands wrongfully taken

[71] 1 Wheat. 304.

[72] Clerke *v.* Harwood, 3 Dall. 342; Shanks *v.* Dupont, 3 Pet. 242 (1830); Chy Lung *v.* Freeman, 92 U. S. 275 (1875); Hauenstein *v.* Lynham, 100 U. S. 483 (1879).

[73] 6 Sawy. 349.

[74] 13 Fed. 229.

[75] 194 U. S. 205, 24 Sup. Ct. R. 657.

[76] 5 Sawy. 552; 12 Fed. Cases, Case No. 6546.

under such state law.[77] Or in an action to foreclose a mortgage or enforce a debt may defeat any state statute of confiscation or limitations.[78]

The holder of lands under a state law may be decreed in equity to convey them to one whose prior claim to them is protected by treaty.[79] Or equity may decree the sale of an interest in lands at the suit of aliens' heirs entitled by treaty to inherit the same, any local law to the contrary notwithstanding, and may further decree the payment of the proceeds to such aliens.[80]

Any one injured, it seems, might in equity enjoin the enforcement of a state law conflicting with a treaty if he could show such facts as otherwise entitle equity to take jurisdiction.[81]

If an arrest is made by an officer in breach of treaty rights the alien so arrested may maintain tort for false imprisonment, as was held in *Tellefsen* v. *Fee*.[82]

This case holds that our treaty with Sweden and Norway deprives the courts of this country of jurisdiction of an action by a seaman for wages against the master of a Norwegian vessel, and that an arrest on the deck of the vessel as she lay at a Boston wharf under certificate from a master in chancery, was an unlawful assault after the defendant had informed the constable that the ship was a Norwegian one, that he was her captain, and that the claim would be adjusted at the Consulate of Sweden and Norway. It is held that plaintiff was entitled to an instruction that the process did not justify the arrest and that plaintiff was exempt from arrest thereunder, and the court collects decisions to the point that such treaties have almost uniformly been held to take away all right of action in the courts of this country whether action is in rem or in personam, citing six prior decisions to like effect.[83]

Our laws seem defective only in failing to provide by federal statute that the violation of treaty rights shall be a crime to be prosecuted by the United States government in the United States courts.[84] Our federal courts have no common law jurisdiction in criminal matters but exactly as a federal statute provides a procedure which

[77] Society for Prop. Gosp. *v.* New Haven, 8 Wheat. 464; Carver *v.* Jackson, 4 Pet. 1 (1830); Chirac *v.* Chirac, 2 Wheat. 259 (1817).

[78] Hopkirk *v.* Bell, 3 Cranch 454; Higginson *v.* Mein, 4 Cranch 415; Hughes *v.* Edwards, 9 Wheat. 489 (1824).

[79] Craig *v.* Bradford, 3 Wheat. 594 (1818).

[80] Geoffroy *v.* Riggs, 133 U. S. 258 (1889).

[81] Baker *v.* Portland, 5 Sawy. 566; 2 Fed. Cas., No. 777.

[82] 168 Mass. 188 (1897).

[83] Norberg *v.* Hillgren, 5 N. Y. Legal Obs. 177; The Elwine Kreplin, 9 Blatch. C. C. 438; The Salomoni, 29 Fed. R. 534; The Burchard, 42 Fed. R. 608; The Marie, 49 Fed. R. 286; The Welhaven, 55 Fed. R. 80.

[84] See note Scott's Cases International Law, p. 328.

is upheld for enforcing treaty rights as to runaway foreign sailors,[85] so it might provide for direct enforcement of other treaty rights or for punishment in case of their breach.

Since the treaty is a part of the federal law it becomes the duty of the chief executive to enforce it, and no reason is apparent why, by the law officers of the government, it may not be enforced through the courts.

Judge SIMEON BALDWIN, of the Supreme Court of Connecticut, has lately expressed in print his belief that the government might move for a mandatory injunction in its own name for this purpose or countenance and support the suit of an individual, or if the construction of a treaty is involved, might take steps to refer it to the Hague Tribunal.[86]

The Supreme Court in *Re Debs*,[87] intimated that while it might be competent for the federal government to remove obstructions to the operations of its laws as to the mail and interstate commerce by direct force, yet the jurisdiction of the courts to intervene by injunction at the suit of the government was ancient and fully recognized. It would require but a small extension, if any, to apply a like remedy to the obstruction under state authority of the treaty rights of aliens. If that were so the proceeding by contempt, not against the state, but against any persons claiming to act under state laws in derogation of treaty rights, which so called state laws are not state laws, but as to such treaty rights merely void enactments, would seem to be efficient and adequate for most purposes to enforce obedience to paramount law.

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[85] Tucker *v.* Alexandroff, 183 U. S. 424, 22 Sup. Ct. R. 195.
[86] *Columbia Law Review*, Feb. 1907, p. 92.
[87] 158 U. S. 564; 15 Sup. Ct. R., 900 and 1039.