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SCHOOLING RIGHTS UNDER OUR TREATY WITH JAPAN.

The laws of California since 1885 have given local school boards power to establish separate schools for children of Mongolian or Chinese descent, and provided that, when such separate schools are established, Chinese or Mongolian children must not be admitted into any other school.

Acting under this authority, the Board of Education of San Francisco established a separate school for children of Mongolian descent, known as the Clay Street Oriental School, and in October, 1906, passed a rule that all pupils of such descent should attend it. At that time there were nearly a hundred pupils of Japanese descent in various public schools in the city, more than a quarter of whom were born in the United States, and a part were grown men.

Japan has made a formal claim that this action of the school authorities is an infraction of her treaty with us.

That instrument provides that "the citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property * * *. In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, 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, or citizens or subjects of the most favored nation;" that Japanese subjects here and American citizens in Japan may "own or hire and occupy houses, manu-

factories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects;" but that these stipulations "do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

It is settled in our law that treaties are entitled to a liberal construction, in favor of those claiming under them. Each nation owes to the other not only good faith in adhering to the spirit of its engagements, but *uberrima fides*.¹

If, therefore, that with Japan fairly admits of two constructions, one restrictive as to the rights of the Japanese to attend our public schools, and the other liberal, the latter is to be preferred.² Does then a liberal interpretation of its provisions lead to the conclusion that they grant to Japanese in the United States rights of education at public cost identical with those that may be possessed by Americans?

That they grant such rights to education to be given by the United States within the limits of any State could not be claimed. The Constitution of the United States confers no power to lay taxes for such a purpose. But this is not decisive of the controversy. The United States in concluding treaties speak for every State in the Union as well as for the people of the United States. On account of our dual system of government, benefits gained or granted by the United States according to the ordinary meaning of words in a treaty are often read as if gained or granted by the States individually. Thus, our treaty with Great Britain for the extradition of those committing offenses "made criminal by the laws of both countries," is held to include those made criminal by the laws of Great Britain, and of that one of our American States where the fugitive from justice is found.³

Conversely, a duty assumed by a treaty of the United States on the part of the United States, if calling for acts which must, from the nature of our government, proceed from the several States and not from the United States as a whole, would be construed as incumbent on the States respectively. If, therefore, the United States have the right to compel a State to educate the

¹ *Tucker v. Alexandroff* (1901) 183 U. S. 424, 437.

² *Hauenstein v. Lynham* (1879) 100 U. S. 483, 487.

³ *Wright v. Henkel* (1902) 190 U. S. 40, 59.

children of foreigners, and if they have by their treaty with Japan undertaken to confer, on certain conditions, a right to such education in a certain way, the action of the San Francisco School Board must be held ineffectual in law, if it infringes the right so conferred.

The rule that a treaty is to be construed liberally relates to its general sense and logical effect. It is not to be pushed beyond just limits. The meaning of the treaty remains fixed by its terms, as these may be explained by local circumstances and by the idioms which its framers may fairly be supposed to have had in mind. Its terms, of course, will include whatever is fairly to be implied from them.¹

If a right to schooling here is granted by the treaty now in question, it exists by implication.

Is it implied from or incidental to the right of residence in "the territories" of the United States? "Territories," as here used, undoubtedly covers States. But is there any natural relation between a man's residing in California and his having his children educated there; in a particular way, at other people's expense?

It will hardly be doubted that, had California set up no system of public education, she could not have been compelled by treaty to institute one for the benefit of foreigners. So, if she sets one up by which all not citizens of the State, or all foreigners, resident or non-resident, are excluded from receiving gratuitous instruction, the logical result would seem to be the same. It does not seem unreasonable, though it may be impolitic, for a State to limit admission to its free schools to its own citizens. It educates them in no small part as a measure of self-protection. "Educate your masters" is the maxim on which the modern public school is mainly based.

But it would seem that California has adopted the policy of educating both all her own children and those of all foreign residents. By Section 1662 of her Political Code "every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district."

Does this justify the Japanese in claiming entrance to the ordinary public school? If so, it is by reason of the provision in the treaty that in whatever relates to rights of residence or of acquiring personal property, or disposing of property of any sort

¹ Wharton, *Int. Law Dig.*, II, § 133; Moore, *Dig. of Int. Law*, V, 252.

which they may lawfully acquire, they shall enjoy the same privileges, liberties, and rights, as citizens of the State in which they may reside, and be subject to no higher imposts and charges in these respects than such citizen, or the citizens of the most favored nation. It is plain that these stipulations would invalidate any State law by which Japanese and not Americans were subjected to an impost or charge for the privilege of residence, or upon any privilege that by that law is appurtenant to residence. The terms "impost" and "charge," however, relate to burdens of payment or service. It is the preceding words, guaranteeing "the same privileges, liberties and rights" in "whatever relates to rights of residence," that make the strength of the Japanese contention. As the privilege of free schooling under the laws of California exists in favor of all residents, if it has a recognizable relation to the right of residence, it is a claim not to be lightly considered that this privilege, under the treaty, must be extended to Japanese on identically the same terms as to Americans.

The main argument in opposition to such a contention would seem to be that by Article II the treaty is not in any way to "affect the laws, ordinances and regulations with regard to police and public security" of the United States or any of them.

The term "police" is one broad enough to cover all powers of local government.¹ Its collocation would, however, seem here to limit it to matters affecting public health, education, morals, and order. To put foreign men and American children in the same classes might obviously throw them in undesirable relations of familiarity. To put children of a race, whose language is so absolutely dissimilar to our own as is that of Japan, with our own children, might naturally tend to delay the progress of the latter in mastering English. To educate them at the same school houses might give occasion for outbreaks of racial prejudice. All these considerations bear on the proper police and security of the State, and certainly indicate lines of action which the two powers might have intended to reserve to their discretion, by the phraseology which this article contains.

The underlying question, it will be observed, is not, as things stand, whether the United States can by treaty virtually compel a State to educate resident foreigners. It is whether, if a State confers the privilege of full education on all residents, and allows every American child to go to such one of the public schools as is at the most convenient distance from his place of residence, it

¹ *McKeon v. N. Y., N. H. & H. R. R. Co.* (1902) 75 Conn. 343, 347.

can deny the same identical privilege to a Japanese child. The treaty is aimed against discrimination, and discrimination exists if any right "whatever" relating to residence is, either by the United States or by any State, given to an American and denied to a Japanese.

It has been suggested by an eminent publicist that California can provide separate schools for children who are her own citizens, if of African descent, and that therefore it may be that she can treat Japanese children in the same way.

It may be conceded that a State can exclude colored children - from her ordinary schools, provided she opens other schools for them, of an equal grade. She will do it by reason of a deep-rooted prejudice which, in the language of Chief Justice Shaw, is not created by law and probably cannot be changed by law, though it might perhaps be effectually fostered by law, if the public authorities should compel colored and white children to associate together in the same school rooms.¹ But this is simply to recognize a social fact, resting on reasons, good or bad, which have some definite, historical, physiological, and economic basis. It does not deny privileges of citizenship; but classifies citizens for the purpose of participation in such privileges. A treaty of the United States guaranteeing to subjects of a foreign power the same privileges in each of our States as those possessed by its citizens means, under the rule of liberal construction already mentioned, the same privileges as those possessed by the general body of its citizens; and would not be fulfilled by restricting them to those conceded to any small class of them, set apart by themselves for reasons which, at bottom, proceed from a general popular dislike to coming in close personal association with them on terms of social companionship and familiar intercourse.

It is no doubt true that there is in California a widespread dislike to close personal association with the Japanese, though it may be questioned whether it can be termed a general feeling among her people at large. But be that as it may, it is not a feeling shared by the people of the whole American union. In most of the States the Japanese are recognized as an intelligent and courteous people. Such of them as have settled here have been found to be active, ambitious, sober, thrifty. As servants, they are civil and capable; as workmen, industrious and efficient; as students in our schools and universities, faithful and successful scholars. They have good ground to claim that

¹ *Roberts v. Boston* (1849) 5 Cush., 209.

the United States, in guarding their rights by treaty, did not intend that they should be treated in one way and all other foreigners in another.

There are limits to the treaty-making power of the United States, but they are few. As a sovereign power, invested with the sole management of foreign relations, they must have the right to make treaties of every nature and on every subject which the Constitution does not expressly or impliedly exclude. "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 of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S., 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."¹

An express treaty stipulation that Japanese children living in any State should be admitted to all its public schools on the same footing as the children of other residents would unquestionably be regarded by Japan as an important and desirable provision. It might also be one desirable for the United States. The schools are the furnace-fire in which habits of thought and traditional characteristics that are hopelessly inconsistent with the spirit of our institutions are burned out of the foreign-born child and we make an American of him.

If the State of California could enter into treaty relations with a foreign power, she could certainly make such a stipulation with it. The people of the United States, in the same instrument in which they gave the treaty-making power to the President and Senate, expressly took it away from the States. It may be that the United States cannot by treaty surrender every right of a State which the State could have itself surrendered, had she the treaty-making power; but Japan has strong ground for asserting that rights of States to discriminate against subjects of a particular foreign power may be surrendered by the United States, as the price of a similar concession in return.

¹ *Geofroy v. Riggs* (1889) 133 U. S. 258, 267.

More than fifty years ago the courts of California considered this subject quite fully. The State filed an information claiming an escheat of land owned by a subject of Prussia. Our treaty with that power gave his natural heirs a right of sale, and it was held to prevail over the State statute disabling aliens from inheritance. "Upon some subjects" it was said in the opinion, "the policy of a State Government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the General Government, and when effected, the State policy must give way to that adopted by the governmental agent of her foreign relations."¹ The antique State Rights phraseology thus employed to express the views of the court makes them doubly significant. In the present day, with the theory fully established that the people of the United States gave to the general government whatever powers that government possesses, it is much more plain that the burden rests on those who contend that a treaty provision is invalid to prove it from the Constitution itself.

If, however, it be assumed that the treaty would be valid, if it goes as far as the Japanese government claims, it remains still debatable whether the reservation of police power (which seems naturally to include the police power of each of the States within her jurisdiction) does not authorize California to do precisely what she has done.

It is one of the wise sayings of Prince Hohenlohe, found in his memoirs recently published, that all emigration is in the last resort nothing but a convenient kind of traffic in souls, unless comprehensive treaties are concluded between the nation from which it comes and the nation to which it is directed. The United States, in entering into reciprocal arrangements with Japan for free emigration in either direction, certainly did not intend to leave the citizens of either ineffectually guarded, either in soul or body, when within the territory of the other. But while the treaty ought fairly to be construed as "comprehensive" in its grants of rights, so it ought equally to be construed as comprehensive as to rights of police reserved, so far as they may fairly be claimed to be important for "public security."

On the other hand, in the words of the Supreme Court of

¹ *People v. Gerke* (1855) 5 Cal. 381, 385.

the United States, in *Plessy v. Ferguson*,¹ "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." This observation, it may be noted, followed an intimation that for a State to require separate railroad cars to be provided for aliens, or for aliens of particular nationalities, in which only they could be received as passengers, would be unreasonable, even in the absence of any treaty stipulation.

The point to which the discussion is thus practically narrowed down relates to the proper meaning of two written documents—the Constitution of the United States, and a treaty. It is in its nature a suitable one for courts to settle, and for the government of the United States to aid, so far as it can, in putting before them for that purpose.

Various modes for effecting this might be suggested, such as a bill in equity asking for a mandatory injunction, or an application for a writ of mandamus. It would be in accordance with international precedent for the United States to take, should it see fit, the place of the moving party. It would also be in accordance with it, should they countenance and support a suit by a private individual personally interested. Whether such a proceeding were brought in a court of the State or of the United States, it could find its way in due course, should the trial court deny the claim made under the treaty, to the Supreme Court of the United States.²

There can be no reason to suppose that Japan would be adverse to such a mode of proceeding. If, however, she should prefer the decision of a tribunal less subject to impressions from local prejudice or national feeling, she is one of the powers adhering to the Hague Convention of 1899, and can call upon us to join her in bringing the questions involved before the Hague Tribunal. That she could pass over that form of remedy, and, in the twentieth century, make so petty a controversy, and one so local in its character, an occasion of war, is unthinkable; and her announced purpose of sending a naval squadron on a friendly visit to one of our possessions, not far from Californian ports, is sufficient proof that she is prepared to accept whatever may be the judicial determination of this unfortunate incident.

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¹(1896) 163 U. S. 537, 550.

²Since this article was written, it is reported in the newspapers that suits of the nature indicated have been brought; that for a mandamus in a State Court, and that for an injunction in the Circuit Court of the United States.