THE COMPROMISE IN THE JAPANESE CONTROVERSY.

But a few weeks ago there were those in Congress and out of Congress who saw in the Japanese protest against the exclusion of Japanese children from the public schools of San Francisco a sure indication that Japan was desirous of provoking war with the United States. Men like Senator Perkins and Richmond P. Hobson saw in the protest an ultimatum and that our only choice was surrender or fight. To their minds the school question was merely a pretext for bringing on a war in order that they might seize the Philippines and Hawaii.

If their conclusion, that what Japan really wanted was a war with the United States, was correct, the situation was indeed a serious one, for Japan could seize those possessions and fortify them before the United States could offer any very serious resistance. Once in possession and fortified, Japan could act upon the defensive and the United States could take its choice between assuming the very difficult and expensive task of dislodging them or abandoning to them its possessions in the Pacific. It would no doubt choose the former, and, because of its stronger financial condition and vastly greater resources, would be reasonably sure to win in an endurance contest. But the cost would be tremendous.

It is therefore fortunate for the United States, for Japan and for civilization that those prophets of evil were incorrect in their hasty conclusion that Japan wanted war with the United States. The fact is that war with the United States is just what Japan does not want. The friendship of the United States has been and is to Japan a much more valuable asset than the Philippines and Hawaii. It is therefore unreasonable to suppose that she would sacrifice the former for a mere prospect of possessing the latter, with the likelihood of financial ruin which an attempt to possess them in this way would entail, even if successful. When, therefore, we consider that, even when viewed from the most favorable standpoint, the prospect is decidedly unpromising, it would be little short of madness for Japan to assume the risks of war. Hitherto Japan has pursued a wise and conser-

vative foreign policy and there is little basis for the conclusion that she has now made up her mind to run amuck.

Now that Japan has in Korea and Manchuria an outlet for her surplus population and energy, there is every reason to believe that she will devote her energies to development in that direction rather than provoke a war which would lose to her the fruits of her victory over Russia. A few years ago her necessity for an outlet was such as to justify the taking of great chances in order to secure it, but this outlet she now has. The need of a field in which to expand has been satisfied for the present and it will be several years before it will again become pressing.

But can the Japanese protest be explained upon any other ground than that of a desire to provoke war with the United States? Had she any real grievance? Article I of the treaty of 1894 between Japan and the United States reads as follows:

"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 of 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."

It is true that this does not in express terms grant to Japanese children the right to attend the same public schools as white children. In fact it does not in express terms grant to them the right to attend any public schools. But the rule of interpretation applied to treaties is different from that applied to criminal statutes. For while the latter are interpreted according to the rule of strict construction, treaties are interpreted liberally. By conceding to them the right to attend the public schools for Orientals we admit that we do not intend to apply the rule of strict construction.

Nor, indeed, would it be consistent or lawful to apply one rule in interpreting treaties with Japan and a more liberal rule in construing treaties with other nations. The very purpose of the most favored nation clause is to prevent discrimination of this sort as well as of any other sort. As we would not while this treaty is in force have a lawful right to grant by express terms a right to bet treat-

ment than is accorded to Japan with reference to matters covered in the treaty, so we cannot lawfully accord them better treatment by applying a different rule of construction to treaties with them containing the same terms. In other words we cannot do by indirection what we cannot do directly. If we could, the most favored nation clause amounts to nothing.

In our treatment of European nations we have in our treaties with them construed rights of residence to mean the right to send their children to the same public schools as the children of American citizens attend. Whether this is wise or not may be open to question. But there can be no question that we have considered the right to send their children to the public schools as incident to the right of residence. Such being the construction adopted and acted upon during more than a century, we are not now at liberty to adopt a different rule of construction with reference to Japan, particularly while we adhere to the old rule with reference to other nations.

But it is urged that the Japanese are of a different race and that therefore it is unwise to allow their children to attend the same school as white children. Whether or not it is advisable to allow children of different races to attend the same schools is, perhaps, an open question. Arguments against it could therefore have been legitimately urged when the treaty was being negotiated or before the Senate when the treaty was awaiting ratification. But it certainly does not have the appearance of candor or fairness to urge them as a sufficient excuse for breaking our faith with a nation with whom we have contracted in the most solemn form. Contracts are not something to be thus lightly set aside simply because someone sees what he conceives to be a new light.

It may be that the ethnic argument furnishes a sufficient reason for modifying the existing contract. But the proper body to judge of this is not the legislature of California, but a joint conference of the representatives of Japan and the United States. If to such a body the facts appear to warrant a modification, there is then no legal objection to making such a modification or modifications as in their judgment seem necessary. But, clearly, one party and *a fortiori* one not a party to a contract, is not the sole judge of what modifications shall be made in that contract.

But it is insisted by some that so far as concerns the rights of Japanese to attend the public schools of California no contract exists, because the United States has no power to make a contract affecting this subject. This raises the question of the extent of the treaty-making power of the Federal government.

The Constitution of the United States vests in the President and Senate the treaty-making power, without limitation. As it nowhere defines what is meant by the term "power to make treaties" it is fair to suppose that the framers of the Constitution had in mind the treaty-making power as it then existed in England. If this supposition is correct, there can be no doubt as to the power of the Federal Government to make the treaty in question. If legal, it is "the supreme law of the land," and the act of the legislature of California interfering with its fulfillment is unconstitutional.

But even if this supposition is incorrect, and the framers of the Constitution did not intend to confer upon the Federal Government the power to make treaties to the same extent as was possessed by the British Government, certain it is that it has from the beginning of its existence been exercising the right to make treaties containing the most favored nation clause, nor has its right been questioned. It was, therefore, entirely natural that Japan should conclude that the Federal Government was not exceeding its powers by inserting the most favored nation clause in this treaty. While each nation is supposed to know the constitutional powers of the branch of the Government with which it is dealing, was not Japan amply warranted in concluding from this long acquiescence in the exercise of the power that we would not seek to escape our obligations to her by denying the power of the Federal Government to make treaties containing so common a provision as the most favored nation clause?

The question of the power of the Federal Government to make treaties containing the most favored nation clause will have to be answered by the Supreme Court of the United States. The existence of the power is too vital to the conduct of our foreign relations to remain unanswered. It is therefore unfortunate that the compromise will probably result in the present case being dropped instead of being carried to the Supreme Court for decision.

If the Federal Government has the power to make such treaties, it follows that it has the power to enforce them, even though certain of their provisions may be objectionable to some section of the country. Any other view would be tantamount to holding that unanimous consent of all sections of the country to the provisions of a treaty is necessary in order that a treaty may be enforceable. This could never have been the intention of the framers of the Constitution. The weakness of the government under the Articles of Confederation in the conduct of foreign relations was one of the strong incentives toward the formation of a new Constitution, and it is unreasonable to suppose that the framers of that instrument did

not intend to confer such power upon the new government as would remedy what was admittedly a defect in the old government.

In order to avoid forcing the issue, California has agreed to admit the Japanese children into the public schools on condition that Japanese coolies not already here shall be excluded from this country. This satisfies the labor organizations, and it was they who were responsible for the act excluding Japanese children from the public schools. It also satisfies Japan, as the amendment to our immigration laws will be general in terms and hence will not wound the pride of the Japanese and will have the effect of turning the Japanese laborers toward Korea and Manchuria where their labor will contribute far more to the progress of Japan than if they emigrated to the United States.

While, therefore, the settlement reached accords very well with the economic interests of Japan and with the political exigencies of both countries, it leaves the main question raised in the controversy precisely where it found it. It leaves room for the suspicion that the school question was raised by the labor leaders in order to furnish a *quid pro quo* in negotiations looking to another end, viz., the reduction of competition by Japanese laborers in the California labor market. It merely postpones the settlement of the legal question of the extent of the treaty-making power of the Federal Government—a question of far more importance than the presence or absence of a few Japanese laborers in any section of our country.

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