

Treatment of Japanese in California.
 Encl. 17. October 29, 1906.
 Dep't of Commerce & Labor. (Sol'r.)
 Encloses memorandum containing
 extracts from all the decisions of
 the various federal courts bearing
 on the supremacy of treaties of the
 United States over State laws.
 (Rec'd Oct. 29, 1906.)
 P.B.D.

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To Rep. Bureau;
 The Secretary's
 independent view,
 The Secretary has
 just furnished the
 Secretary with a Memo.
 Dec. 5, 06.

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Secretary of State,
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October 27, 1906.

NOTES ON ARTICLE 6 OF THE CONSTITUTION OF
 THE UNITED STATES.

Article 6 of the Constitution of the United States provides:

"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."

With reference to this clause of the Constitution touching the supremacy of treaties of the United States over the State laws the courts have said:

"There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. 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 not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded."

"Four things are apparent, on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. That the constitution or laws of any of the states, so far as either of them shall

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be found contrary to that treaty, are, by force of the said article, prostrated before the treaty. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty (or any other), made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct." (~~In re~~ Ware v. Hylton, 3 U.S. 298, 235.) Held accordingly that the treaty of peace concluded between the United States and Great Britain in 1783, enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a State treasury under a State law of sequestration.

(3) "Thus, the states have surrendered the treaty-making power to the general government, and vested it exclusively in the president and senate; and when duly exercised by the president and senate the treaty resulting becomes the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated. As to what subjects are within the treaty-making power, see Parrott's Case, 6 Sawy. 368, 369, S.C. 1 Fed. Rep. 481, and the numerous cases there cited. It certainly, under the authorities there cited, embraces the entire subject-matter of our treaties with China. The rights, privileges, and immunities guaranteed are within the treaty-making power to grant. They are created under, and are dependent upon, the constitution of the United States. And in U.S. v. Reese the supreme court holds that 'rights and immunities created by, or dependent upon, the constitution of the United States can be protected by congress. The form and manner of protection may be such as congress, in the legitimate exercise of legislative power, shall provide. This may be varied to meet the necessity of the particular right to be protected.' 92 U.S. 217. And in Yarbrough's Case the supreme court says: 'The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of those cases it is the duty of the government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.' 110 U.S. 658, and 112 U.S. 80; 4 Sup. Ct. Rep. 152, and 5 Sup. Ct. Rep. 35." (~~In re~~ Baldwin, 27 Fed. Rep. 187, 188.) Held accordingly that section 5919 of the Revised Statutes, in so far as it embraces a conspiracy which deprives Chinese residents of a State of the privileges and immunities secured to them by existing treaties, is constitutional.

(24) "That the treaty-making power has been surrendered by the states and given to the United States, is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." (Baldwin v. Franks,

120 U.S. 678, 682.) It was held in this case that Congress had the constitutional authority to provide for the punishment of persons guilty of depriving Chinese subjects of any of the rights guaranteed to them by treaty, but that Congress had not done so in section 5519.)

"A treaty, constitutionally concluded and ratified, abrogates whatever law of any one of the States may be inconsistent therewith.

"The decision of the Supreme Court in the case of *Devisee of Fairfax v. Lessee of Hunter*, (vii Cranch, 627), giving effect to the ninth article of the treaty of 1794, between the United States and Great Britain; that of the same court in the case of *Ware v. Hylton*, (iii Dallas, 242, 244, 250, 266, 280, 284;) that of Mr. Justice Washington, in the case of the *Lessee of Gordon v. Halliday*, (i Washington's C.C.R. 291;) and that of Mr. Justice Livingston, in the case of *Doe on dem. of Fisher v. Harnden*, (i Paine's C.C.R. 59;) are examples showing the efficacy of treaties made by the United States, in their relation to the prior laws, or even the constitutions, of the several States." (6 Op. At. Gen. 293.)

"If it be suggested that such a treaty is beyond the constitutional power of the President and the Senate to effect, because it deprives the States of jurisdiction and authority now vested in them, and practically would annul their laws and destroy one subject of State sovereignty, without going into a history of that clause of the Constitution, above quoted, which declares that all treaties made or which shall be made by the authority of the United States shall be the supreme law of the land (the discussions of which in the Constitutional Convention and in the State conventions called for the adoption of the Constitution were very extensive and interesting), it is sufficient to say that it has been held by the Supreme Court of the United States that it is no objection to the validity of a treaty that it establishes within State jurisdiction a different law and standard of rights from that established by the laws of the State. That court has decided in the interest of a British subject that a treaty can annul a statute of a State confiscating the debt due to a British subject. (*Ware v. Hylton*, 3 Dallas, 199.) It was held in the case of *Hauonstein v. Lynham* (100 U.S., 483) that a State law forbidding an alien to take lands by descent must give way to a treaty which confers the right of inheritance upon a subject of a foreign power. So that it is established by judicial decision of the highest authority that the mere fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty. In the case of *Geoffroy v. Riggs* (133 U.S., 258) Mr. Justice Field declared that the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations. '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, or those arising from the nature of the Government itself and 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. But with these exceptions it is not perceived that there is any limit to it touching any matter which is properly the subject of negotiations with a foreign country.'

"My conclusion is that the United States has power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary." (22 Op. At. Gen. 217.)

"The state cannot legislate so as to interfere with the operation of this treaty or limit it or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice Field in the 'queue ordinance case,' lately decided in the circuit court for the district of California, (Ho Ah Kow v. Nunan, Case No. 6,546,) to the national government 'belong exclusively the treaty-making power and the power to regulate commerce with foreign nations. x x x That 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.'

"It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany." (Baker v. Portland, 2 Fed. Cases, 777.) Held accordingly that a State statute restricting the right of Chinese to labor within that State could not be enforced in view of the rights guaranteed to Chinese persons by the treaty of July 28, 1868.

"But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control, or interference. To that government the treaty-making power is confided; also, the power to regulate commerce with foreign nations, which includes intercourse with them as well as traffic; also the power to prescribe the conditions of migration or importation of persons, and rules of naturalization; whilst the states are forbidden to enter into any treaty, alliance, or confederation with other nations." (In re Ah Fong, 1 Fed. Cases, 102.) Accordingly

held that a State statute was ineffective to deprive a Chinese person of rights guaranteed by the treaty of 1868.

"The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country has treaty relations. Being a resident here before the passage of the recent act of congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind; certainly not by a municipal ordinance that has no stronger ground for its enactment than the miserable pretense that the business of a laundry--that is, of washing clothes for hire--is against good morals or dangerous to the public safety. Rev. St. sec. 753; Ex parte Bridges, 2 Woods, 429; In re Quy, 6 Sawy. 237." (In re Quong Woo, 13 Fed. Rep. 233.) X

X "The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation." (In re Ah Chong, 2 Fed. Rep. 737.)

"There can be no mistaking the significance or effect of these plain, concise, emphatic provisions. The states have surrendered the treaty-making power to the general government, and vested in the president and senate; and, when duly exercised by the president and senate, the treaty resulting is the supreme law of the land, to which not only state laws but state constitutions are in express terms subordinated. x x x."

"If, therefore, the constitutional provision, and the statute in question made in pursuance of its mandate, are in conflict with a valid treaty with China, they are void. x x x." (In re Tiburcio Parrott, 1 Fed. Rep. 481, 501, 503.) Held accordingly that provisions of the constitution and statutes of California prohibiting the employment of Chinese by corporations were void.

"But the principle (that treaties of the United States are a part of the supreme law of the land and must be observed by the individual citizens of the United States) governing the case is, in my opinion, equally applicable here, where it is sought to enforce

an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its constitution. Such a contract is absolutely void, and should not be enforced in any court,--certainly not in a court of equity of the United States." (~~Isaac~~ Gandolfo v. Hartman, 49 Fed. Rep. 181, 183.) Held that a covenant in a deed not to convey or lease land to a Chinaman is void, as being in contravention of the treaty with China of 1880.

"The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." (~~Isaac~~ Gibbons v. Ogden, 22 Fed. 209, 211.)

"In *Chirac v. Chirac* (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks* (10 id. 181), and with respect to the British treaty of 1794, in *Hughes v. Edwards* (9 id. 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr v. Hodgeson*, 4 id. 453. By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devisees v. Hunter's Lessee*, 7 Cranch, 627; see *Ware v. Hylton*, 3 Dall. 242.' 8 Op. Atty's-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' *Treat. on Const. and Gov. of the U.S.* 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., art. 1, sect. 10.

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also *Shanks v. Dupont*, 3 Pet. 242; *Foster & Elam v. Neilson*, 2 id. 253; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 Elliott's Constitutional Debates, 231; *The People &c. v. Gerke & Clark*, 5 Cal. 381." (In *re Hauenstein v. Lynham*, 100 U.S. 483, 489-490.)

"It is true, Congress has not done this: but the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam v. Neilson*, 2 Pet. 314, has said: 'That a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.'

"Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. x x x." (In *re U.S. v. 43 Gallons of Whiskey, etc.*, 93 U.S. 188, 196-197.)

"Article 7 of the convention of 1800 was in force when the act of Congress adopting the laws of Maryland, February 27, 1801, was passed. That law adopted and continued in force the law of Maryland as it then existed. It did not adopt the law of Maryland as it existed previous to the treaty; for that would have been in effect to repeal the treaty so far as the District of Columbia was affected. In adopting it as it then existed, it adopted the law with its provisions suspended during the continuance of the treaty so far as they conflicted with it--in other words, the treaty, being part of the supreme law of the land, controlled the statute and common law of Maryland whenever it differed from them. x x x." (In *re Geofroy v. Riggs*, 133 U.S. 258, 267.)

"As was said in *Martin v. Hunter* (1 Wheat. 363), 'the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, these officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power is arrested.

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." (*In re Tennessee v. Davis*, 100 U.S. 257, 262-263.)

"There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, 'anything in

the constitution or laws of any State to the contrary notwithstanding.' Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States." (In re Tarble's Case, 80 U.S. 397, 406-407.)

"The National Constitution was, as its preamble recites, ordained and established by the people of the United States. It created not a confederacy of States, but a government of individuals. It assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so. The government of the Nation and the government of the States are each alike absolute and independent of each other in their respective spheres of action; but the former is as much a part of the government of the people of each State, and as much entitled to their allegiance and obedience as their own local State governments--'the Constitution of the United States and the laws made in pursuance thereof,' being in all cases where they apply, the supreme law of the land. For all the purposes of the National government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by State lines for the purposes of State government and local administration. Considered in this connection, the States are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work." (In re White v. Hart, 80 U.S. 647, 650.)

"The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives

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of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories or a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation." (In re Kennett et al v. Chambers, 55 U.S. 38,49-50.)

Respectfully submitted,

Charles Earl.

Solicitor.

C.