

*Original of this report
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San Francisco, Cal., Nov. 2nd, 1906.

The President.

I have the honor to report that upon my arrival in San Francisco, through the courtesy of Mr. Justice Henshaw, I was accorded the opportunity of a special conference with the justices of the Supreme Court of the State. They expressed themselves as being wholly in sympathy with the views of the administration upon the situation. Further, they declared that, upon the assumption that the "favored nation" clause was contained in our Treaty with Japan, there was no doubt but that the action of the Board of Education of the City and County of San Francisco in segregating Japanese children and compelling them to attend a separate school, while resident foreign children of European extraction were permitted free access to all of the public schools, was a violation of our treaty obligation with Japan. The Supreme Court of California, in view of the fact that the question was momentous and involved governmental relations as distinguished from private rights, authorized me to say that they would entertain an agreed case calling for a decision of the question as to whether or not the resolution of the Board of Education violated our treaty obligations with Japan, and would decide such case upon the day of its submission.

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All of this was upon the assumption entertained by me and apparently embodied in my memorandum of instructions that our Treaty with Japan contained the "most favored nation" clause;-such clause, for example, as is found in Article 3 of our Treaty with Persia. The library of the Supreme Court having been de-

stroyed, we had at the time of this conference no access to the terms of the Treaty itself.

Subsequently, in consultation with United States District Attorney Devlin of San Francisco, upon a reading of our Treaty with Japan, he and I were convinced that it contained no such "favored nation" clause. I then wired the State Department as follows:

"On consulting United States Attorney, Treaty with Japan of 1894 does not show that Japanese subjects are entitled to same rights as citizens or subjects of most favored nations in matter of education. Will you point out clause upon which Japan founds claim?"

If it shall appear that the subjects of Japan do enjoy under treaty the privileges of the most "favored nation", then the question is one of easy solution, for the Supreme Court of California will unanimously declare that the resolution of the Board of Education segregating Japanese children into a separate school, while children of European nations are not so segregated, is violative of the treaty law, and therefore void.

If, however, the Japanese Treaty shall be found not to contain this "most favored nation" clause, the question becomes at once more delicate and complex, to the explanation of which it becomes necessary to speak at some length.

Of course, the matter of public schools is a state as distinguished from a federal matter. The Constitution of the State of California has declared simply (Article IX, section 5) that the legislature shall "provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year." The state legislature having power to legislate where such power is not expressly limited or withheld would, therefore,

be authorized to declare that the use of the free schools should be limited alone to the children of citizens, and if it had so declared no foreign nation would have a just cause of grievance. What, in fact, the legislature has declared is found in section 1662 of the Political Code of the State of California, as follows: "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, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, ^{or} of children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school." The regulation of public schools being thus (excepting so far as the supreme law of treaties may control) unquestionably a state affair, the state would have the right to admit foreign children resident within its boundaries to the privileges of such schools upon any reasonable terms that it might see fit to impose, as well as to refuse them absolutely the right to use such schools at all. The State of California does admit all foreign children of European parentage to its public schools upon identically the same terms as are admitted the children of American parents, this by virtue of section 1662 above quoted, which declares that such schools must be opened for the admission of all children. But this, it must be borne in mind, is a

matter of privilege extended by the state, and not a matter of right, to such foreign residents. So long as foreign children of European parentage are admitted upon equal terms with American children, foreign Japanese children would be entitled to admission upon the same terms, if our Treaty with Japan contained the "favored nation" clause. If our Treaty with Japan does not contain such a clause, then the Japanese government has no legal grievance, no matter what consideration may be shown to children of European parentage, or lack of consideration shown to children of Japanese descent.

If I have made myself plain, it must appear that in the absence of the "most favored nation" clause in our Treaty with Japan, it cannot be successfully contended that the action of the Board of Education is violative of the supreme treaty law. What then is left? Two arguments may be advanced in the courts with a reasonable show of success against the validity of section 1662, above quoted, the one argument being that, while under Ward v. Flood, 48 Cal. 36, and Tape v. Hurley, 66 Cal. 473, the legislature may, in its wisdom, and as matter of policy, prescribe separate schools, it cannot, as is done in section 1662, leave that matter to boards of trustees in school districts, and thus empower these inferior boards to establish a policy which is for the state legislature alone to prescribe. The second contention against section 1662 is even more narrow and rests upon the fact that the law provides for separate schools "for children of Mongolian descent." An argument may be framed upon the proposition that the Japanese are neither Mongolians nor of Mongolian descent.

Even if either or both of these contentions should be sustained by the courts, I advise strongly against the commencement of a suit based upon such narrow grounds. A victory so won would be ephemeral and valueless. The next legislature of the state meets in January and the temper of the people of California is such that unquestionably that legislature would pass a law to meet the imperfections and deficiencies found in the existing law. Sufficient evidence of this is found in the fact that the platforms of all the parties contain planks calling for restrictions against Japanese immigration.

After my conversation with the President of the Board of Education and his legal adviser, I judge it hopeless to look for any modification or repeal upon the part of that board of the obnoxious resolution. Their attitude is that they have established a separate school, that when such a separate school has been established, section 1662 steps in and makes it mandatory upon them to compel Japanese children to attend such school and no other, that if there be in this a violation of treaty obligation, it is for the courts so to declare, and they are willing to aid in presenting to the courts an agreed case upon the question, but their willingness goes no further than this.

To conclude, therefore, if our Treaty with Japan contains the "most favored nation" clause, then the question will be most expeditiously settled by the Supreme Court of the state, which will declare the resolution in question inapplicable to resident foreign Japanese children. If our Treaty with Japan does not contain such a clause, then the subjects of the Empire of Japan have not been injured in any of their

treaty rights and have no legal grievance.

Permit me finally to suggest that if our Treaty with Japan shall be found not to contain the "most favored nation" clause, an amendment or protocol could readily and expeditiously be adopted so that the vexation to the spirits of the Japanese in California would not last more than a few months.

Finally it may be said that, while the Supreme Court of the State of California and other thinking minds within the state are alive to the significance and consequence of this matter, many of the people of this State are, with a narrow provincialism, fomented and fostered by their newspapers, practically as hostile to the Japanese as to the Chinese.

I am pursuing my investigations touching alleged outrages to Japanese citizens and of the boycotting of their restaurants and other places of business, and shall, at the earliest possible moment, submit to you my report upon this matter.

Very respectfully yours,

V.H.Metcalf.