

File

Secretary of State,
NOV 20 1906

November 27, 1906.

SOLICITOR'S OFFICE,
NOV 27 1906
DEPT OF STATE.

**MEMORANDUM
ON THE DISCRIMINATION AGAINST JAPANESE SUBJECTS
IN CALIFORNIA.**

The exclusion from the public schools of Japanese subjects temporarily or permanently residing in San Francisco, is regarded by the Japanese Government, not only as a manifestation of an unfriendly feeling, but as a direct violation of that favored nation treatment provided for in the Treaty of 1894 between the United States and Japan. The pertinent provisions of the treaty in question are 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. * * * In whatever relates to rights of residence and travel * * * 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 citizens or subjects of the most favored nation." (ARTICLE I.)

Article XIV of the treaty, while it concerns commerce and navigation, looks to an equality of treatment, and is not unimportant in reaching the intent of the contracting parties. While the provisions set forth or referred to are sufficient to show the nature and extent, as well as to lend support to the contention, the spirit of the treaty goes beyond the letter and breathes in all its parts equality.

The action of the State of California is not sporadic or

sudden, but may be called the settled policy of that State, and, indeed, the policy of the Pacific Coast, toward the Asiatic peoples who settle in that portion of our country. It is claimed that these settlers are alien in race, language, and institutions; that they do not easily lend themselves to assimilation, and that they are, and must always remain, strangers in the land. It is contended that their industrial methods and habits of life prevent them from meeting the natives in friendly and profitable rivalry, and that their social standing is such as to unfit them for intimate association with the native population upon a footing of equality in the public schools.

For these reasons, or others of a like nature, the State of California has, it would seem, invoked the police power, and by virtue of this police power, unsundered by the treaty and not vested in Congress, the State claims to regulate, in its own interest and according to its own lights, the relation of foreigner to native within the jurisdiction of the State.

A casual acquaintance with the Pacific Coast, and a knowledge of the events of the past thirty years would show that this feeling of opposition to the Asiatic originated in the deep-seated hostility which exists in that portion of our country against the Chinaman, and, in order to include the Chinaman and allied races, the statutes regulating the relations of the Asiatic to the Californian have invariably employed the generic term "Mongolian."

Inasmuch, however, as the Japanese are, rightly or wrongly, considered Mongolians, they necessarily fall within the wording of the statute, although it may be questioned whether the framers of the statute meant to include them in the proscription. However this may be, it is evident that the statutes at the present day are being interpreted strictly and literally so as to include the subject of Japan as well as the subject of China.

In order to understand the question in its various phases, it is advisable to set out in detail the provisions of the constitution and laws of California. These therefore follow:

The present constitution of the State of California was adopted in 1879 at a time when the anti-Chinese agitation was at its height. It contains many provisions directly aimed at Chinese or Mongolians and discriminating against them. The following are the chief provisions applicable to the question before us:

CONSTITUTION OF THE STATE OF CALIFORNIA. Article I. Declaration of Rights. § 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

§ 11. All laws of a general nature shall have a uniform operation.

§ 17. Foreigners of the white race, or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of all property, other than real estate, as native born citizens; pro-

vided, that such aliens owning real estate at the time of the adoption of this amendment may remain such owners; and provided further, that the legislature may, by statute, provide for the disposition of real estate which shall hereafter be acquired by such aliens by descent or devise. [Amendment adopted Nov. 6, 1894].

Article IX. Education. § 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

§ 5. 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, after the first year in which a school has been established.

Article XIX. Chinese. § 2. No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision.

§ 3. No Chinese shall be employed on any state, county, municipal, or other public work, except in punishment for crime.

§ 4. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power.

POLITICAL CODE OF CALIFORNIA. Article X. Schools. § 1662. Who may be admitted to. 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 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; provided, that in cities and towns in which the kindergarten has been adopted or may hereafter be adopted as part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years; and provided further, that in cities or school districts in which separate classes have been or may hereafter be established, for the instruction of the deaf, children may be admitted to such classes at the age of three years.

CIVIL CODE OF CALIFORNIA. § 69. Marriage license. . . . Provided that the said clerk shall not issue a license authorizing the marriage of a white person with a negro, mulatto or Mongolian.

It thus appears that while the constitution of the State of California has the usual provisions declaring the freedom and equality of all men, and requires uniformity of all laws of a general nature, these general expressions were not thought incompatible with numerous special provisions discriminating against Chinese or Mongolians. Just as the Declaration of Independence must be read in the light of the fact that its framers practiced and defended human slavery, so the "general platitudes" of the constitution of the State of California must be read in the light, not merely of the practice of the State, and, indeed, of the Pacific slope, as regards the Chinese, but also in the light of the provisions definitely aimed at the Chinese and discriminating against them which are found embodied in the constitution itself.

The section of the Political Code of the State, already quoted, which permits the establishment of separate but equal schools for the White and Mongolian races is evidently in full accord, not only with the letter, but with the spirit of the constitution of California, and it would seem probable that the separate schools permitted by Section 1662 might be sustained by the courts.

It will be noticed, however, that there is nothing in this

legislation to indicate an intention on the part of the law-makers to draw a distinction between Mongolian children, native born Americans and therefore citizens of the United States, and other Mongolians who are aliens.

The decisions of the California courts already rendered in regard to separate schools seem to show that the courts would probably sustain the validity of the restrictions and discriminations in question. The following résumé of the California decisions is quoted from the report of the District Attorney for the Northern District of California to the Attorney General:

"In *Ward v. Flood*, 48 Cal.37, it was held that under the statute then existing the education of children of African descent and Indian children might be provided for in separate schools, and that such establishment was not in conflict with the constitution of the State, nor with the 13th and 14th amendments to the Constitution of the United States. The court held, however, that the legislature could not exclude children from the benefits of a system of education provided for the youth of the State merely because such child was of African descent. The court held further that the exclusion of colored children could not be upheld, except upon the condition that separate schools were maintained for the education of colored children.

"In *Tape v. Hurley*, 66 Cal.473, it was held that children between six and twenty-one years of age, of Chinese parentage, born in San Francisco, were entitled to admission into the public schools of the district in which they resided, and that teachers were not justified in excluding them, notwithstanding a resolution of the board of education which purported to command them to do so."

At the time of the decision of *Tape v. Hurley* there was no legislation justifying discrimination against Chinese or classification of Chinese in separate schools. This case cannot, there-

fore, be quoted as an authority against the validity of the present legislation.

"In the case of *Wysinger v. Crookshank*, 82 Cal.588, it was held that subsequent to the act of April 7, 1880, by which certain sections of the Political Code were repealed, and under the laws existing touching the education of children in the public schools, it was not within the power of the board of education or school trustees to establish public schools exclusively for children of African descent, and the board had no power to exclude them from public schools established for white children.

"As it will be noticed, at that time the provision of the statute providing for the education of colored children had been repealed, and the board of education had no such power."

It would therefore appear that should a case arise involving the exclusion of a Japanese child from a school set apart for white children, a separate school equally well provided having been set aside by the board of education for Japanese or Mongolian children, the Supreme Court of California could hold such exclusion proper so far as anything contained in the laws or constitution of California is concerned.

The present problem, however, is broader than California, and the statutes of some of the neighboring States include provisions of a similar, although less hostile, kind. For the present purpose it will only be necessary to consider the question of marriages.

It will be noted that the Civil Code of California, § 369, provides that "the said clerk shall not issue a license authorizing the marriage of a white person with a negro, mulatto, or Mongolian."

The following provisions of like import are found in neighboring States and Territories:

The Code of Oregon, § 5217, prohibits marriages "when either of the parties is a white person and the other a negro, or Mongolian, or a person of one-fourth or more of negro or Mongolian blood." Such a marriage is made a criminal offense by §§ 1999 and 2000.

Sec. 4851 of the Compiled Laws of Nevada, reads -

"If any white man or woman intermarry with any black person, mulatto, Indian, or Chinese, the parties to such marriage shall be deemed guilty of a misdemeanor, and, on conviction thereof, be imprisoned in the state prison for a term not less than one year nor more than two years."

The Revised Statutes of Utah, § 1184, prohibits marriage "between a negro and a white person," and "between a Mongolian and a white person."

The Arizona Civil Code, § 3092, reads -

"All marriages of persons of Caucasian blood, or their descendants with negroes, Mongolians, or Indians, and their descendants, shall be null and void."

Nor does the matter rest here. The Mongol cannot become a citizen of the United States. The act relating to naturalization declares: "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." Under the provisions of this statute it has been held that a Japanese may not be naturalized (In re Saito, 1884, 62 Fed.Rep.126) on the ground that a Japanese is not

a white man. It has been argued that the statute was only intended to exclude Chinese because a special provision has prohibited the naturalization of Chinese (22 Stats.58-61, Act of May 6, 1882), but it has been held even before this declaratory statute that a Chinaman could not be naturalized. (See In re Ah Yup, 5 Sawyer 155). It would seem, therefore, to be properly held of a Japanese of today.

Nor can he follow a profession in Washington which suggests citizenship. The Supreme Court of Washington held that a Japanese could not be admitted to the bar because he could not become a citizen of the United States. (In re Yamashita, 30 Wash.234; 70 Pa.482; 59 L.R.A.771.)

It will be noticed that the Japanese are denied citizenship, not expressly, but by implication. The result, however, is equally humiliating. The question necessarily involved is ethnological, for, if the Japanese are Mongolians, they fall within the statute. If they are not Mongolians, then they are not included by its terms. The Aztec, although neither white nor black, the two favored races in our statutory citizenship, is capable of becoming a citizen. (In re Rodriguez, 1897, 81 Fed.Rep. 337.) The decision in this case bears with peculiar severity upon the Mongolian, because the particular Aztec whose eligibility to citizenship was judicially determined, could neither read nor write.

It may be said, however, that the Japanese are not Mongolians. Indeed, the Japanese Foreign Office, in a communication to this Department, has stated that they are a mixed race, in which, doubtless, the Mongolian element is present; but that they object to being called Mongolians. However this may be, the Japanese are judicially held to be Mongolians. This would seem to be in large part due to the influence of Judge Sawyer's opinion in In re Ah Yup (5 Sawyer 155) in which he gives the results of his investigation into the racial status of prospective candidates for naturalization, and his statement is almost uniformly copied in the cases in which the question is discussed and seems to have largely settled the matter in the jurisprudence of this country. The material portion is therefore set out:

"In speaking of the various classifications of races, Webster in his dictionary says: 'The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or negro [black] race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and 5. the Malay, or brown race, occupying the islands of the Indian Archipelago', etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and 4. African, black.' Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race.' (See New American Encyclopedia, title 'Ethnology.')

It would therefore seem that the Japanese are considered Mongolians in the jurisprudence of this country, and in In re Saito (1884, 62 Fed.Rep.126) it was held that "the Japanese, like the Chinese, belong to the Mongolian race."

In these various provisions the Mongolians, including therein the Japanese, are coupled with the negro, mulatto, and Indian. It may be argued that it is to the advantage of the Mongolian to have him associate with his fellows in order to escape the faults and vices of the Caucasian, for it is well known that a foreigner in our midst assimilates the vices more easily and readily than he does the virtues. The fact, however, is patent, that the white man does not wish to associate with him, and that he is not treated as an equal. He may not study in the same school, although foreigners of the preferred race are freely admitted; he may not intermarry with the white race; he may not become a citizen of the United States; and in at least one instance he may not practice a profession which involves a knowledge of our laws.

It is impossible to consider this as a discrimination merely against a race as such. It is a discrimination, consciously or unconsciously, based upon the fact that such race is inferior, and that it is unworthy of equality of treatment.

It therefore seems self-evident to one of an unprejudiced mind that the restrictions and discriminations against Mongolians, including therein the Japanese, are based upon the supposed inferiority of the Mongolian race much in the same way as the restrictions against the negroes and Indians are based upon the supposed inferiority of the negro and Indian to the white race. As these restrictions, however unjustified they may be morally, have stood the test in courts of law if not of justice, and must therefore be regarded as legal, the question arises whether or not the restrictions against the Mongolians would not, or might not, be sustained by a parity of reasoning. The crux of the question is, admitting that these restrictions are based solely upon inferiority, can a foreign nation under the favored nation clause claim a right for its subjects or citizens residing, temporarily or permanently, in the United States greater than that accorded to native born citizens of the United States. For if the negro, mulatto, or any person with negro blood in his veins however remote, is treated as inferior, although he is by the express language of the constitution declared to be a citizen, and entitled to equal protection of the laws, it may well be argued that a member of an alien race, ordinarily coupled with the negro

in statutes, can claim no greater right than that accorded to his fellow sufferer. In other words, it may well be that our courts would find themselves obliged to hold that a discrimination against the Mongolian, however unfortunate it might be in policy, is still not so repugnant to the constitution and laws as to set it aside.

The argument would necessarily be technical but the argument unfortunately has a technical foundation. In order to see the force of this argument and to apply it to a concrete case it is necessary to consider in some detail the decisions of our courts respecting the legal status of the negro, especially as far as separate schools and separate railroad accommodations are concerned. Inasmuch as there are no decisions of this kind concerning the Japanese and inasmuch as the Japanese and negroes stand upon the same statutory plane, an examination of the legal rights of the negro in such matters will by analogy outline the legal status of the Japanese in not unsimilar conditions.

The statement that the restrictions against the negro are based upon alleged inferiority receives additional support from the fact that the doctrine of separate schools was formulated while the negro was still in servitude, and that separate compartments on railwaytrains were set aside for negroes and sustained by the courts before the adoption of the Fourteenth Amendment. An examination of the subject also shows somewhat curiously that the inferiority was not a local and geographical question but that

it was judicially determined in Northern states of each restriction in turn.

Perhaps the most frequently cited and certainly one of the best considered of the State cases bearing upon this subject arose in Massachusetts before the adoption of the Fourteenth Amendment. This is the case of *Roberts v. The City of Boston*, (1849) 5 Cushing 198. Although this case was decided before the adoption of the Fourteenth Amendment certain provisions of the Massachusetts Constitution, as construed by the Massachusetts courts, had practically put the negro in Massachusetts upon the same basis of equality and citizenship which was secured for him in the country at large before the adoption of the Fourteenth Amendment. Article 1 of the Declaration of Rights of the Constitution of Massachusetts provided as follows:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possession, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Article 6 of the same Declaration contains the following significant words:

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

Under these provisions it has been held that slavery was illegal in Massachusetts, and the great Chief Justice Shaw, in

rendering the opinion of the court stated "in the fullest manner that colored persons, the descendants of Africans, are entitled by the law of this commonwealth to equal rights, constitutional and political, civil and social." The statutes of Massachusetts conferred general power to the school committee of Boston to "have the general charge and superintendence of all the public schools in the town" and to "determine the number and qualifications of the scholars to be admitted into the schools kept for the use of the whole town." No express statutory authority was placed upon the school committee to segregate the scholars along racial lines. Nevertheless the committee adopted the following resolution:

Resolved, that in the opinion of this board the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the education of that class of our population.

Acting under this resolution the Board established separate schools for colored people in Belknap Street and Sun Court. The juxtaposition of these schools and the plaintiff's residence is thus described by the reporter:

The school established in Belknap street is twenty-one hundred feet distant from the residence of the plaintiff, measuring through the streets; and in passing from the plaintiff's residence to the Belknap street school, the direct route passes to the end of two streets in which

rendering the opinion of the court stated "in the fullest manner that colored persons, the descendants of Africans, are entitled by the law of this commonwealth to equal rights, constitutional and political, civil and social." The statutes of Massachusetts conferred general power to the school committee of Boston to "have the general charge and superintendence of all the public schools in the town" and to "determine the number and qualifications of the scholars to be admitted into the schools kept for the use of the whole town." No express statutory authority was placed upon the school committee to segregate the scholars along racial lines. Nevertheless the committee adopted the following resolution:

Resolved, that in the opinion of this board the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the education of that class of our population.

Acting under this resolution the Board established separate schools for colored people in Belknap Street and Sun Court. The juxtaposition of these schools and the plaintiff's residence is thus described by the reporter:

The school established in Belknap street is twenty-one hundred feet distant from the residence of the plaintiff, measuring through the streets; and in passing from the plaintiff's residence to the Belknap street school, the direct route passes to the end of two streets in which

there are five primary schools. The distance to the school in Sun Court is much greater. The distance from the plaintiff's residence to the nearest primary school is nine hundred feet.

The plaintiff, a colored child of five years of age, was accordingly excluded from the schools established for white people, although she might at any time have attended either one of the schools provided for colored people referred to above. The plaintiff sued the City of Boston under a statute which provided that any child unlawfully excluded from public school instruction might recover damages against any city or town by which such instruction is supported, and the legality of the action of the school committee was therefore squarely presented to the court. Charles Sumner represented the plaintiff and Chief Justice Shaw delivered the opinion of the court. He held, as above stated, that colored persons were entitled in Massachusetts to equal rights, constitutional and political, civil and social "equal to those enjoyed by white men", and stated that the question before the court was "whether the regulation in question which provides for separate schools for colored children is a violation of any of these rights." He pointed out that the principle of equality before the law when it comes to be applied "to the actual and various conditions of persons in society, will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as

they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security."

The court held that it was within the discretion of the school committee to classify, so long as the classification was reasonable, and that the court could see no reason to believe that the classification along racial lines was not honest and within the reasonable discretion of the committee and intended for the benefit of all concerned. As to whether such classification was desirable as a matter of policy the court expressed no opinion, but contented itself with pointing out that "it was a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence" and that the court could not say "it was not founded on just grounds of reason and experience." As to the point that the classification adopted by the Board compelled the plaintiff to go farther in order to reach a school provided for her than white children were compelled to go, the court evidently regarded this result as a probable incident of any classification and therefore unobjectionable so long as the discrimination was not intentional or outrageous. To quote the exact language of the Court:

But in Boston, where more than one hundred thousand inhabitants live within a space so small, that it would be scarcely an inconvenience to require a boy of good health to traverse daily the whole extent of it, a system of distribution and classification may be adopted and carried into effect, which

may be useful and beneficial in its influence on the character of the schools, and in its adaptation to the improvement and advancement of the great purpose of education, and at the same time practicable and reasonable in its operation.

This case has been examined in detail, because it was decided under a constitution and in a latitude where all the principles of the Fourteenth Amendment prevailed, and for the further reason that it is the great authority relied upon in all subsequent cases. It may be said that it meets almost every argument advanced upon this subject. There is finally a personal but not unimportant reason why the case is and should be one of great authority, for the plaintiff was represented by Sumner and the judgment for the defendant was rendered by Shaw.

The leading case under a constitution or statute expressly prescribing separate schools for the white and colored races is *State v. McCann* (1871) 21 Ohio St.198. The constitution of Ohio directs that "the General Assembly shall make such provision by taxation or otherwise as, with the income arising from the school trust fund, will secure a thorough and sufficient system of common schools throughout the State." In 1853 the legislature passed an act, in pursuance of the constitutional authority above quoted, for the purpose as expressed in the sixty-third section of the act "of affording the advantages of a free education to all the youth of this State".

As amended in 1864 the act provides that the township boards of education "shall be and they are hereby authorized and required

to establish within their respective jurisdiction one or more separate schools for colored children, etc."

The court held that this law was constitutional, not only under the provisions of the State constitution above quoted, but also under the Fourteenth Amendment to the Constitution of the United States which, according to the court, "only affords to colored citizens an additional guarantee of equality of rights to that already secured by the Constitution of the State." The plaintiff, according to the court, cannot "dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same schools, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

Another leading case upon this branch of the question is that of *Corey v. Carter* (1874) 48 Ind. 327. The state constitution of Indiana declares that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." It also makes it the duty of the General Assembly "to provide by law

for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all."

The Act of May 30, 1869, 3 Ind.472, provided for equal but separate educational facilities for white and colored children. The court held that although the constitution required that the common school system should be "general", "uniform", and "equally open to all", it was not violated by the terms of this statute.

Said the Court:

In our opinion, there would be as much lawful reason for complaint, by one scholar in the same school, that he could not occupy the seat of another scholar therein at the same time the latter occupied it, or by scholars in the different classes in the same school, that they were not all put in the same class, or by the scholars in different schools, that they were not all placed in one school, as there is that white and black children are placed in distinct classes and taught separately, or in separate schools.

The Court rendered a long and elaborate opinion dealing not only with the state constitution but with the Fourteenth Amendment of the United States Constitution. After *Roberts v. Boston* and *McCann v. the State*, this case has been perhaps relied on as much as any other case upon the subject as an authority. The southern view is clearly and strongly presented in *Lehew v. Brummell* (1890) 103 Mo.546.

The following are the principal authorities on the subject:

People v. Gallagher (1883) 93 N.Y. 438

State v. McCann (1871) 21 Ohio St. 198.

- People v. Easton (1872) 13 Abbott's Pr. U.S. 159
- Corey v. Carter (1874) 48 Ind. 327.
- Ward v. Flood (1874) 48 Cal. 36; 17 Am.Rep.505.
- Puitt v. Commissioners, (1886) 94 N.C. 709.
- McMillan v. School Committee of Croatan, (1890) 107 N.C.609;
10 L.R.A. 823 (upholding the constitutionality of
separate schools for Indians.)
- Martin v. Board of Education, (1896) 42 W.Va. 514 (State
constitution requires separate schools.)
- County Court v. Robinson, (1871) 21 Ark. 116 (Obiter).
- Chrisman v. Brookhaven, (1892) 70 Miss. 477.
- Dallas v. Fosdick, (1869) 40 Howard Pr. 249.
- State v. Duffy, 7 Nevada 342; 8 American Rep.713 (Obiter).
- Van Camp v. Board of Education, 9 Ohio 407.
- Bertonneau v. Directors, (1878) 3 Woods, Fed.177.
- U. S. v. Bunton, (1882) 10 F.R. 730.

Passing now to the question of separate accommodations in railway trains for white and colored races, it appears that the arguments advanced are one and the same, and result from a settled belief that the black man is an undesirable associate for his white brother. The leading case on this subject was decided north of Mason & Dixon's Line before the adoption of the 14th Amendment. It is *Westchester Railway Co. v. Miles*, 1867, 55 Pa.St.209, in which the Supreme Court of Pennsylvania squarely held that the discrimination was a reasonable regulation and within the power of a common carrier. The material portion of the opinion, delivered by Agnew, J., follows:

"If a negro take his seat beside a white man, or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. * * To assert separateness is not to declare inferiority in either. It is not to declare one a slave, and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely-separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.

Unlike the school question, this discrimination has been tested by the Supreme Court of the United States, and its

validity sustained, in *Plessy v. Ferguson*, 1896, 163 U.S.537. It should be noted, however, that in the course of the judgment the court specifically cited and relied upon the decisions of the State courts upholding the classification on racial lines as evidenced in the separate schools for white and black.

It will be observed in all these cases that these discriminations apply to the negro's right to share with the white race identical privileges in public institutions, namely, in public schools and in railroads. A recent case in Kentucky has gone a step farther and has discriminated against the negro, upholding a statute forbidding the co-education of the races in private institutions. (*Berea College v. Commonwealth*, 1906, 94 S.W.623.)

It is unnecessary to comment upon the statutes forbidding the intermarriage of the negro and white, or to set forth at length the reasons by which they are supported, for the intermixture of the blood is sought to be prevented solely upon the ground of inferiority, even although it be stated from the bench that inferiority is not necessarily involved and that the sole purpose of the restriction is to preserve the purity of each race.

The segregation of the negro in restaurants and theaters is likewise omitted, because such segregation must rise or fall for the reasons above given.

It therefore appears that millions of our fellow-citizens

are deprived of the full rights and privileges accorded to the white inhabitants of this country, and the question squarely arises, can a foreign nation claim, under the most favored nation clause, rights and privileges judicially denied to native-born American citizens?

Technically it may be admitted that the same reasoning which sustains the restrictions against the negro would apply and therefore support the restrictions against the Mongolian, provided the cases were strictly analogous. As far as the statutes are concerned, they are analogous, because the restrictions are embraced in one and the same statutory form. But there are statutes in several States which forbid, in express terms, segregation, and the courts in construing such statutes have given full scope to the legislative intent by holding that segregation is, in such cases, unlawful. While, therefore, statutes permitting or requiring segregation are not illegal, statutes forbidding such segregation are sustained.

It may well follow that Japan may admit the validity of such statutes as applied to native-born American citizens, but may insist that the Treaty of 1894 containing the favored nation clause is an express relinquishment of the right to pass such statutes as regards Japanese subjects residing in the United States. In other words, the language and policy of the treaty, as evidenced in the favored nation clause, are equivalent to a

statute providing against discrimination. Should it appear that the treaty is susceptible of such a construction, it would necessarily follow that such a provision is not opposed to the 14th Amendment any more than State statutes forbidding discrimination are opposed to the 14th Amendment, and that a treaty, being the supreme law of the land, expressly or impliedly overrules a State statute to the contrary.

It therefore becomes necessary to consider whether or not the treaty of 1894 confers the rights in question. The so-called favored nation clause of the treaty with Japan is found in Article XIV and reads as follows:

"The High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor of immunity which either High Contracting Party has actually granted, or may hereafter grant, to the Government, ships, citizens or subjects of any other State, shall be extended to the Government, ships, citizens, or subjects of the other High Contracting Party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

It will be noted that the favored nation clause as expressed in this treaty related only to matters that concern "commerce and navigation", and is not expressed in the general language often found in corresponding clauses in our other treaties. For instance, the favored nation clause in our treaty with Persia of 1856 reads as follows:

"ART.III. The citizens and subjects of the two high contracting parties, travelers, merchants, manufacturers and others, who may reside in the Territory of either Country, shall be respected and efficiently protected by the authorities of the Country and their agents, and treated in all respects as the subjects and citizens of the most favored nation are treated."

The favored nation clause in our Treaty with China regarding immigration, of 1880, reads as follows:

"ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exceptions which are accorded to the citizens and subjects of the most favored nation."

If, therefore, reliance were placed upon the favored nation clause of the Treaty of 1894, it would perhaps be difficult, in view of the restrictive scope of the clause as expressed in Art. XIV of the Treaty with Japan, to find that a right to education had been conferred by the treaty. Article XIV, however, must be read in connection with Article I, which 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.

"They shall have free access to the Courts of Justice in pursuit and defence of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such Courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"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 dis-

possession 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. The citizens or subjects of each of the Contracting Parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances, and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"The citizens or subjects of either of the Contracting Parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions."

It therefore appears that according to Article I the citizens or subjects of each nation shall enjoy in whatever relates to "rights of residence and travel * * * the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in those respects than native citizens or subjects, or citizens or subjects of the most favored nation." That is, our Treaty with Japan contains two favored nation clauses: first, as regards residence and travel; second, as regards commerce and navigation, for the words "residence and travel;" "commerce and navigation", may well be considered the equivalent of the words "in all respects" found in the treaty with Persia above quoted.

This view finds additional support from the fact that in

"Whatever relates to rights of residence or travel. . . . the citizens or subjects of each high 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."

If the word "same" be construed technically it might be urged that segregation is excluded, because same means identical, not equal or equivalent. If such were the technical meaning it would of necessity follow that the Japanese subject could not be excluded from the school and that because by the treaty the same right or privilege was guaranteed, not an educational right of equal value or opportunity. But such construction would be as technical and forced as would be the construction which would deny to Japan the favored nation clause. Equal, equivalent, and same, appear indiscriminately in state constitution and state statute, and the courts have uniformly construed them to be synonymous.

Roberts v. Boston, 5 Cush. 198.

Corey v. Carter (1874) 48 Ind. 327.

Chrisman v. Brookhaven (1892) 70 Miss. 477.

People v. Gallagher (1883) 93 N.Y. 138.

Indeed an examination of the treaty as a whole rather sustains the contention that same means equal, not necessarily identical.

Particular reference is made to articles 2, 4, 6, 7, 8, 9, 14, and 16a of the Treaty, in which these expressions seem to be used indiscriminately if not synonymously.

While the treaty operates as a statute it is familiar doctrine that a treaty is construed liberally to carry out the intent of its negotiators, but the construction to be unobjectionable must be equally favorable to each contracting party. While it is unnecessary to cite an authority for this doctrine still a quotation may well be made from one leading case. In *Geofroy v. Riggs* (1889) 133 U.S. 258, Mr. Justice Field, delivering the opinion of the court, said:

It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

But it must also be borne in mind, as pointed out by the late W. E. Hall, that—

When terms used in a treaty have a different legal sense within the two contracting states, they are to be understood in the sense which is proper to them within the state to which the provision containing them applies; if the provision applies to both states the terms of double meaning are to be understood in the sense proper within them respectively. [Hall, 4th Ed. p. 353].

If we consider then the purpose of the high contracting parties it will appear that the treaty of 1894 was intended to secure the entry of Japan into the family of nations, to recognize its legal and moral right to equality of treatment, and to set aside the last vestige of extraterritoriality which always is and must be an ear-mark and badge of inferiority.

The spirit which inspired the treaty and animates every paragraph is expressed no less forcibly than felicitously by the Japanese Ambassador in the memorandum handed to the Secretary on Thursday, November 8, 1906.

The most conspicuous feature of the treaty of 1894 is the principle of equality between nationals and citizens of the other contracting party. Equality before law, equality in submission to taxation, equality in all matters connected with residence, no exclusiveness, no segregation, but free intermingling of the subjects and citizens of the two countries, equal opportunity, equal treatment, these are the features of the existing Treaty. That Treaty is reciprocal as that whatever rights that can be claimed for U.S. citizens in Japan can also be claimed for Japanese subjects in U. S. The preamble, article 1 and article 17 bear eloquent testimony to the enlightened policy of the new treaty which has expressly abrogated the last remaining vestige of a regime that was based on exclusion and segregation.

Viewed therefore in the light of its origin and interpreted liberally as becomes a treaty, it is evident that the contention of the Japanese Government is not without persuasive force. But it must not be overlooked that a treaty is after all but a statute and as such subject to interpretation by our courts of law.

The Fourteenth Amendment is supposed to have written large upon the statute book, freedom and equality. Such at least seems to have been the dream of its framers. The courts instead of interpreting it in the light of universal freedom and equality have consistently interpreted it in the light of local surroundings, and have refused to set aside a statute seemingly violating the amendment, if such statute seem to be reasonable in the light of local sentiment. It would be an injustice, however, to the courts to suggest that they disregarded the intent of the amendment, but it is a fact that they have found in technical equality a justification for sustaining the validity of statutes which were in fact subversive of real equality, although not unreasonable in view of the local sentiment and prejudice.

What has happened to the Fourteenth Amendment may well happen to the Treaty of 1894, for the treaty however liberally construed, is still a statute and it may well be that the courts, following the example of the Supreme Court of the United States in the matter of separate accommodations in railroads and the various state courts in segregated schools, may support the technical contention that the treaty is satisfied by providing equal though not identical educational opportunity.

It is therefore with great regret and much misgiving that the Solicitor for the Department comes to the conclusion that however much a technical and narrow construction of the treaty may

do violence to the intent of the high contracting parties, it is possible, indeed probable, that courts of law may sustain the validity and application of restrictions against the Mongolian, which courts of law, including the Supreme Court of the United States, have sustained and applied to the negro, basing such judgment upon the broad principle that foreigners temporarily or permanently residing in the United States cannot have greater rights, greater privileges, or greater protection than native born citizens of our country.

J. B. S.