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THE SEGREGATION OF JAPANESE STUDENTS BY THE SCHOOL AUTHORITIES OF SAN FRANCISCO

BY CHARLES CHENEY HYDE,
Associate Professor of Law, Northwestern University.

THE action of the Board of Education of San Francisco in passing a rule October 11th last, requiring all pupils of Mongolian descent in that city to attend the Oriental School on Clay Street, was made a ground of protest by the Japanese Ambassador at Washington, Viscount Aoki, on October 26th, as an alleged infraction of the treaty of 1894 between the United States and Japan.

The School Law of California of 1903 provides that:

"Trustees shall have the power to exclude all 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."¹

In pursuance of this rule, the School Board of San Francisco passed the order in question which affected ninety-three students who attended various schools in that city from July 1, 1906, until the following October.²

The action taken by the school authorities in view of the protest of the Japanese government raises certain important inquiries which it is the purpose of the writer to discuss: First, the method of determin-

¹ Art. 10, § 1662, School Law of Calif. 1903.

² Report of A. Althmann, President of Board of Education of San Francisco, to D. S. Richardson, Foreign Secretary to Consulate of Japan, Oct. 30, 1906, cited in *San Francisco Chronicle*, Oct. 31, 1906. It appears that twenty-five out of the ninety-three students were born in the United States, of Japanese parentage; the remaining sixty-eight were born abroad. Report of the Secretary of Commerce and Labor to the President, Nov. 26, 1906.

ing whether there has been a violation of the treaty of 1894; secondly, the interpretation of the treaty; thirdly, the validity of the treaty, or of such portions thereof as might be construed to sustain the contentions of Japan; fourthly, the liability of the United States to Japan for acts of the authorities of California which might be shown to be in violation of the treaty.

It is provided in Article VI of the Constitution of the United States that

"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."³

The reason for the presence of these provisions should be observed. With reference thereto George Ticknor Curtis says:

"It is a remarkable circumstance that this provision was originally proposed by a very earnest advocate of the rights of the States — Luther Martin. His design, however, was to supply a substitute for a power over State legislation, which had been embraced in the Virginia plan, and which was to be exercised through a negative by the national legislature upon all laws of the States contravening, in their opinion, the Articles of Union or the treaties subsisting under the authority of the Union. The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a State law supposed to be in conflict with the Constitution, laws, or treaties of the Union should be inoperative or valid. By extending the obligation to regard the requirements of the

³ Art. VI, par. 2, Constitution of U. S.

national Constitution and laws to the judges of the state tribunals, their supremacy in all the judicatures of the country was secured."⁴

Judge Story says of the same Article:

"It is notorious that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the States under the confederation. They were deemed by the States not as laws, but like requisitions of mere moral obligation, and dependent upon the good-will of the States for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice. But their voice was not heard. Power and right were separated; the argument was all on one side, but the power was on the other. It was probably to obviate this very difficulty that this clause was inserted in the Constitution.⁵ The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. . . . It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws."⁶

It is a benefit to the alien resident in the United States that whenever he may believe that his rights under a treaty are infringed by the act of a single state he may secure a judicial interpretation of the treaty by a competent tribunal. The fact that such

⁴ Constitutional History of the U. S. by George Ticknor Curtis, 2nd ed., p. 554. Cited in C. H. Butler's *Treaty-Making Power of the United States*, § 264.

⁵ Story's *Commentaries on the Constitution*, 5th ed. § 1838.

⁶ *Id.* §§ 1837, 1838.
See also C. H. Butler's *Treaty-Making Power of the United States*, § 271.

an inquiry may be made by a court which is independent of the political department of the government, and free to consider the question of infringement on its merits, is a means of protection to the foreigner. If his contention is sustained, the court, in pursuance of a constitutional provision, will pronounce null and void, and therefore inoperative, any local ordinance or state law which it finds to be in violation of the treaty. Because this means of redress is open to the alien, the United States is justified in requiring that an alleged violation of a treaty by the act of a state should be made the subject of judicial inquiry in an American court before being asserted as a ground for diplomatic intervention. Such has been our constant practice.⁷

In a note to the Chinese Minister, May 27, 1890, the Secretary of State, Mr. Blaine, in reply to a protest from the Chinese government against an ordinance of San Francisco, requiring Chinese subjects there residing to remove from their existing homes and places of business to a particular part of that city, as a violation of Article III, of the treaty of 1880 said:

"Meanwhile, may I ask your attention to the sixth article of the Constitution of the United States, which places treaties on the same juridical basis as laws and makes them the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. By the second section of the third article the judicial power of the United States is made to extend to all cases arising under the treaties. Under these provisions, and the statutes of the United States passed to give them effect, it is believed that the Chinese who are said to have been arrested under the

⁷ See the reply of Mr. Jay, when Secretary of Foreign Affairs, to the complaint of Sir John Temple, Dec. 11, 1787, that an action of trespass had been instituted against a British subject in violation of the treaty of peace of 1783. 3 MS. Am. Let. 306, Moore's Dig. of Int. Law, § 760.

Mr. Bayard, Sec. of State, to Baron Fava, Italian Min., Dec. 18, 1888, MS. Notes to Italy VIII, 315 — Moore's Dig. Int. Law § 760.

order in question may, in an application to the courts for release from imprisonment or detention, speedily obtain a decision as to their rights and the legality of the order."¹

Advantageous as it may be from every point of view, both to the alien and to our own government, that an American tribunal should determine whether a foreigner residing in the United States has been prevented from enjoying the exercise of a treaty right, it cannot be said that the decision of such a question by such a tribunal can fully determine the rightfulness of the claim advanced. When the decision of the court denies the contention of the alien, his government is not bound by the judicial interpretation of the treaty. If, for example, the federal courts should decide that the action of the school authorities of San Francisco was not in contravention of the treaty of 1894 with respect to Japanese subjects there residing, the Emperor of Japan would not be under any obligation to accept the decision as decisive of the rights of his subjects. This exact situation was forcibly commented on by Mr. Blaine in writing to Mr. Comly in Hawaii, June 30, 1881:

"I am not aware whether or not a treaty, according to the Hawaiian Constitution, is, as with us, a supreme law of the land, upon the construction of which—the proper case occurring—every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated and carried into practical execution, this government would have no alternative and would be compelled to

¹ For. Rel. 1890, p. 221.

See also note of Mr. Hay, Sec. of State, to Signor Carignani, Italian chargé, Aug. 24, 1901, For. Rel. 1901, 308.

consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling."¹

It is not unreasonable for a state to feel itself free from any obligation to yield to the interpretation given to the provisions of a treaty by a local tribunal of the other contracting party. The right of a court to do justice between nations—to render, for example, a decision as to the meaning of a treaty, and which shall be legally binding on the signatories thereto, must be founded on their mutual consent. This fact is now generally appreciated by civilized states. It is one of the reasons why nations are willing to agree that disputes concerning the interpretation of treaties, and which can not be adjusted through diplomatic channels, may be referred to international courts of arbitration, such as the permanent Tribunal at The Hague.

On the other hand, by reason of the learning and integrity of the Supreme Court of the United States, and, therefore, on account of the strong probability that its interpretation of the treaty of 1894 would be the true interpretation, and such as an international court of arbitration would render under similar circumstances, it is not unlikely that the Japanese Government would yield to the decision of that tribunal and admit the correctness of its views. In the present controversy, therefore, it is not to be anticipated that a decision by the highest court of the United States adverse to the contentions of Japan would be regarded by that government as arbitrary, or unreasonable, or as not decisive of the rights of the high contracting parties.

The true interpretation of the treaty of 1894 is a complex task. In the first place the intention of the United States, as well

¹ For. Rel. U. S. 1881, pages 624, 625, Moore's Dig. Int. Law, § 760.

as of Japan, at the time of the negotiation of the treaty must be carefully considered. It seems to have been the purpose of our government at that time to recognize Japan as a member of the family of civilized states, fully possessed of the means of exercising all of the functions, and consequently entitled to enjoy all of the privileges of such a state. The present understanding of the United States as to what that purpose was is reflected in a telegram of Secretary Root to Ambassador Wright, dated October 23rd last, which according to press dispatches, contained the statement:

"You may assure the government of Japan in most positive terms that the government of the United States will not for a moment entertain the idea of any treatment toward the Japanese people other than that accorded to the people of the most friendly European nations, and that there is no reason to suppose that the people of the United States desire our government to take any different course."¹

The text of the treaty deserves careful examination. Article I contains the provision that:

"The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property. . . . In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation."

Article II provides in detail for reciprocal freedom of commerce and navigation between the territories of the two nations; it

¹ Boston Transcript, Oct. 29, 1906.

specifies the rights of trade to be enjoyed by each, stating that the citizens and subjects of the two nations may:

"Own or hire and occupy houses, manufacturing, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects."

Finally it is provided in the same Article that:

"The stipulations contained in this and the preceding Article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Article XIX provides that the treaty shall go into operation July 17, 1899, and remain in effect for twelve years from that date and that either nation:

"Shall have the right, at any time thereafter, to give notice to the other of its intention to terminate the same, and at the expiration of twelve months after such notice is given this Treaty shall wholly cease and determine."

The treaty contains no express provision as to the education of citizens or subjects of either state. It is contended, however, that the right to reside in the United States includes the right to enjoy public educational advantages as a privilege relating to residence. It is urged that the right to enjoy public school facilities is generally regarded in this country as one incidental to that of residence; that citizens of our own land believe that they have a right to send their children to a public school because of residence in immediate proximity to it. Whether residence in a particular neighborhood or community, according to a national custom, gives to the inhabitant, irrespective of his

¹ Treaties of the United States in Force: 1904, Japan.

nationality, the privilege of enjoying the school of that particular neighborhood or community, is a matter for serious consideration. That the fact of residence does include this right is a widely popular belief. It has become fixed among our people. The efficiency of a public school or of the school system of a particular community is often the controlling influence in the choice of the family abode.¹

No attempt has been made in California to deprive residents of any race or nationality of the privilege of public education. That fact, it is urged, is decisive of the claim that California itself regards the right of enjoying public educational advantages as closely allied to and connected with that of residence. It is said that by reason of the custom there in vogue, of opening the public schools to all residents, the educational privilege must, by virtue of the most favored nation clause, be afforded to Japanese pupils on as liberal and desirable terms as it is to those of native or foreign descent; that segregation, therefore, amounts to unlawful and unjust discrimination when applied to aliens of any one race.

¹ Judge Deady, of the United States Circuit Court, in the District of Oregon, had occasion to comment on the scope of the right of residence given by a treaty to aliens, in a decision pronouncing invalid an act of the legislature of Oregon, approved Oct. 16, 1872, for the prohibiting of the employment of Chinese laborers on the improvement of streets and public works in that state. He said: "Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. . . . In *Chapman v. Toy Long*, 4 Saw. 36, this court in considering these provisions of this treaty said: 'The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.'" (5 Saw. 554, at 570).

It is contended also that segregation is a substantial, as well as technical injustice. It is claimed by the Japanese Association of America, according to a letter addressed to President Roosevelt, and made public by the Secretary of the Japanese Consulate in San Francisco, that:

'Said action will have the effect to exclude Japanese children from public schools, for the reason that it is not possible for them to go from their various homes scattered throughout the city, to the so-called 'Oriental' school, located as it is, in a place remote, and almost inaccessible, in the heart of the burned district.'¹

It is maintained also that the privilege extended to pupils of other foreign nationalities to associate with American students in the San Francisco schools is one highly useful and valuable to the resident alien who may thus be enabled the more readily to assimilate American ideals, and acquire a mastery of the English language. It is added, with greater feeling, that a rule of restriction which segregates Japanese, not with aliens of highly civilized nations, but with Chinese, who, for the most part, are excluded from the United States, and who are regarded as unfit for American citizenship, and with Indians, who are the dependent wards of the state, creates a distinction which is clearly invidious; that the enforcement of the rule is an emphatic challenge of the social status of the Japanese, wholly out of harmony with the spirit and purpose of the treaty of 1894.

¹ *New York Sun*, Dec. 10, 1906.

"The Oriental School, the school set apart for the Chinese, Japanese and Korean children, is in the burned section. . . . The conditions in San Francisco are such, owing to the great conflagration, that it would not be possible even for grown children living at remote distances to attend this school. If the action of the Board stands, then, and if no schools are provided in addition to the one mentioned, it seems that a number of Japanese children will be prevented from attending the public schools and will have to resort to private instruction." Report of the Secretary of Commerce and Labor to the President, November 26, 1906.

Finally, it is contended that the excellence of the Oriental School as compared with other schools, and any peculiar fitness it may possess for the training of Japanese pupils, are matters unrelated to the question at issue, which concerns solely a comparison of the educational advantages afforded to Japanese and other resident aliens. This line of argument confines itself to the interpretation of the treaty, brushing aside as irrelevant any discussion of the rights, which according to the law of nations a state may have with respect to resident aliens. The justice of this must be admitted. The present inquiry does not relate to the right of a nation to exclude aliens of any race from its territory, or to regulate the education of those who are admitted to residence. It is not concerned with the economic benefits or evils resulting from the presence of large numbers of Japanese on our Pacific coast. Nor does it deal with the question as to the wisdom of a policy which resulted in the execution and ratification of the treaty of 1894. It must be obvious that between nations as between individual men the proper interpretation of a contract is not ascertained by reference to the convenience or inconvenience with which either party may perform an obligation alleged thereunder.¹

In a word, the Japanese contention is that by the treaty the right of residence is secured; that that right includes the right to enjoy the same public school facilities as are accorded residents of other nationalities; that this is admitted by the San Francisco authorities, but that in the regulation of this right, by the process of segregation of Japanese with Indians and Chinese, there is denied a vital privilege or liberty as highly appreciated as it is generally enjoyed, by students of European and other nationalities.

¹ "It is commonly said that a country observes the stipulations of a treaty no longer than it suits its interests or its convenience to observe them; but this has never been universally true in modern times, and I am happy to believe it is less true to-day than ever before. (The Practice of Diplomacy by John W. Foster, p. 291.)

Attention is called, however, to the broad provision in Article II, that the previous stipulations do not "affect the laws, ordinances and regulations with regard to . . . police and public security" which were then in force, or might thereafter be enacted by either country. This suggests the inquiry whether the segregation of Japanese students may be properly deemed a police measure, or one for the benefit of public security. It is urged that if it were shown that by reason of the difference of race, the presence of the Mongolian and Caucasian pupils in the same schools of lower grades engendered mutual ill-will, physical antagonism, violence of passion, or diversion from study to a perceptible degree, the public security and the moral welfare of students of both races would demand their separation, and that without the regard to the causes of demoralization. It is said that the legislature of the state must always be deemed to be the natural judge of what conditions menace the public security, and that to it must be imputed *prima facie*, good faith in attempting by enactment to protect the same. Hence, it is urged that the California statute and the local ordinance in pursuance thereof should be regarded, not as an arbitrary discrimination against resident subjects of a friendly state, but simply as an earnest effort on the part of a conscientious law-making body to promote the security of the public—that is, of all persons of whatever race living in the state. It is maintained, therefore, that in scrutinizing acts done in alleged violation of the treaty, a court should be slow to overrule the judgment of the legislature as to what conditions might threaten the public security; that a mere disagreement on that point between the court and the legislature should be insufficient to sustain the charge of violation of the treaty, unless the court should conclude that the legislature had been not only unwise, but also unreasonable and clearly arbitrary in its view.

The provision for the enactment and enforcing of measures for police protection and

public security indicates that the negotiators of the treaty considered it vital, that notwithstanding the generous treatment accorded the citizens and subjects of the high contracting parties, both Japan and the United States should not be precluded from exercising a broad control over their domestic institutions, whenever the public safety of either state might seem to require it. In the absence of any stipulation to the contrary, it was left to each country to determine the time and circumstances when its public security might be endangered, and what restrictions ought to be placed on the privileges afforded by the treaty.

The violation of a treaty by a party thereto is a serious offense. It indicates oftentimes bad faith on the part of the offender, as well as national disregard of a legal duty to a friendly power. It imposes on the offender a consequent duty to make reparation to the aggrieved state or its citizen. The nature of such reparation varies according to the nature of the wrong done. If no reparation be forthcoming, in the absence of any international force capable of enforcing justice, the aggrieved state often takes it upon itself to secure by its own means what it has been denied. The ultimate result may be war. Because of the very seriousness, both of the offense itself and of the consequences which it may entail, nations are naturally reluctant to admit the violation of a treaty. If the alleged violation relate to a question of interpretation, the matter is given utmost consideration from every point of view before admission of infringement is to be expected. In our own country the decision of our courts on the question as to the infringement of a treaty, as has been already shown, is justly regarded as the guide for the political department. Lack of candor on the part of a state to admit violation of an international duty arising from undisputed facts and definitely imposed by international law is always to be keenly deplored. Nevertheless, the propriety of declining to admit the violation of

a treaty without the most careful investigation, and until after thorough judicial inquiry, cannot be questioned.

On the assumption, however, that there has been a violation of the treaty of 1894, it is worth while to consider our national duty to Japan. It has been observed by some that if California cannot, according to the true interpretation of the treaty, segregate Japanese students, the compact is not binding upon the United States or any part thereof, because the federal government lacks the power to make such an agreement with any foreign state. This argument attempts to limit the treaty-making power of the President and Senate. It questions the scope of the authority of the national agents in dealing with international affairs.

The constitutional limitation of the treaty-making power has long been a matter of conjecture. The fact that such a limitation exists has been recognized by our Secretaries of State as well as by the courts. In 1881, Mr. Blaine, when Secretary of State wrote to the Chinese Minister at Washington that a treaty:

"must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation."¹

In 1886, Secretary Bayard said:

"Were the question whether a treaty provision which gives to aliens rights to real estate in the states to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting

¹ For. Rel. U. S. 1881, p. 337.

powers, it may be municipally inoperative because it deals with matters in the states as to which the Federal government has no power to deal. That a treaty, however, can give to aliens such rights has been repeatedly affirmed by the Supreme Court of the United States."¹

In the decisions of the Supreme Court of the United States relating to the supremacy of a treaty of the United States over the statutes of a particular state there has been constant recognition of the vastness of the scope of the treaty-making power.² In the case of *Geofroy v. Riggs*,³ the court through Mr. Justice Field said:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

While the constitutional limitation has been frequently admitted, it is of great practical significance that in no case has the Supreme Court ever denied the validity of a treaty. Adverting to this fact Mr. Charles Henry Butler says:

"The Supreme Court possesses the greatest judicial powers that have ever been vested

¹ 160 MS. Dom. Let. 441, cited in Moore's Dig. Int. Law, § 738.

See also works of John C. Calhoun, edited by R. K. Cralle, N. Y., 1888, Vol. I, p. 252, cited in C. H. Butler's Treaty-Making Power, § 481.

² *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Hauenstein v. Lynham*, 100 U. S. 483.

³ 133 U. S. 258 at 267.

in any court of any nation. It is not only fully conscious of the great powers which it possesses and of its right to use them, but it is extremely jealous, as it should be, of its rights and powers. One of the few declarations that this court ever made in derogation of its own supreme judicial power was that if the Supreme Court possesses the power to declare a treaty void, it will never exercise it but in a very clear case indeed. That question has never been decided, because such a 'clear case' never has been presented to the court as would justify the exercise of the power, if it does exist."

And further,

"The question is not likely to arise, as, in the natural course of events, it is hardly possible, for two reasons, that any treaty will be made which the Supreme Court would be justified in declaring void: first, because the mere possession of power does not necessarily imply its misuse, and the executive department of this government, as a general rule, acts in accordance with American policy and American principles; secondly, because the governmental checks upon the exercise of the power, and upon the carrying out of treaty stipulations, practically prevent such misuse."¹

Lack of space forbids discussion of the broad question as to what may be the bounds of the treaty-making power. To what extent, if any, the federal government may by treaty lawfully compel affirmative action by a particular State is not here sought to be determined. It is merely submitted, that in view of the experience of our country it appears to be unlikely that our federal courts would conclude that it was beyond the scope of the powers of the President and the Senate to contract with Japan that its subjects resident in the United States might attend the same public schools as were open to our native citizens, or to aliens of any other states.

On the supposition that the treaty has been violated by the California authorities, inquiry is made as to the responsibility of

¹ C. H. Butler's Treaty-Making Power of the United States, §§ 460, 461.

the United States to Japan for the acts of a state. It is a fundamental principle of the law of nations that an ultimate responsibility can be found, and must be found, in whatever land society exists, for all wrongs committed against a foreign nation or its subjects. The lodgment of that responsibility is necessarily said to exist in the government which controls the place in question, and which has charge of its foreign relations.

The control of the foreign relations of a state is essential to its very existence, and one of the conditions upon which its recognition as a member of the family of nations depends. Civilized states are unwilling to deal with communities, however perfect their local government may be, which do not clearly possess the right to enter into diplomatic relations. When the United States had the right and capacity to become a state, and, therefore, claimed recognition as such by the powers of Europe, its entrance into the family of nations was on the implied assumption that it was, from an international point of view, a political entity, having the power to deal with foreign affairs, and possessing control at home.

If it be true then that the United States government alone can deal with foreign states, and enter into treaties with them, its responsibility for treaty infractions throughout its territory is on the theory that it is in supreme control of whatever relates to the outside world. In the contemplation of foreign governments the official of any state of our Republic, in so far as his acts relate to foreign affairs, is the official of the nation, because he is supposedly subject to its control whenever he deals with any international matter. In his message of December 9, 1891, President Harrison said:

"It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the

¹ Westlake's Int. Law, Part 1, Peace, p. 22.

United States cognizable in the Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."¹

In a word, then, the right of a state to control its foreign relations is based on the power to control them, and the power to control implies a duty to take whatever steps may be necessary to actually control. Hence, a state cannot escape liability to a foreign government, arising, for example, from the act of a municipal authority, on the ground that the state has not exercised its power by legislation or otherwise to check or prevent the alleged wrong. In his recent annual message, President Roosevelt recognizes clearly the power lodged in the federal government to control whatever may relate to our treaty obligations, and the duty resulting from such a possession. Because of the existence of this admitted duty, he urges Congressional action to establish the provisions necessary to that end. He says:

"One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give to the national government sufficiently ample power, through United States courts and by the use of the army and navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I therefore earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President,

¹ For. Rel. U. S., 1891, vi.

acting for the United States government, which is responsible in our international relations, to enforce the rights of aliens under treaties."¹

On July 26, 1875, Mr. Robert Bunch, who was Minister Resident of Great Britain to Columbia, rendered an award as umpire in the arbitration of the claim of the United States against Columbia for damages arising from the occupation in the state of Panama, of the American steamer *Montijo*. In reply to the contention that the government of Columbia was not responsible for an act by the constituent state of Panama, he said:

"It cannot be denied that the treaties under which the residence of foreigners in Columbia is authorized, and their rights during such residence defined and assured, are made with the general government, and not with the separate States of which the Union is composed. The same practice obtains in the United States, in Switzerland, and in all countries in which the federal system is adopted. In the event, then, of the violation of a treaty stipulation, it is evident that a recourse must be had to the entity with which the international engagements were made. There is no one else to whom application can be directed. For treaty purposes the separate states are non-existent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government. . . . If this rule, which the undersigned believes to be beyond dispute, be correctly laid down, it follows that in every case of international wrong the general government of this republic has a very close connection with the proceedings of the separate States of the Union. As it, and it alone, is responsible to foreign nations, it is bound to show in every case that it has done its best to obtain satisfaction from the aggressor."²

In cases of mob violence where foreign governments have sought reparation from

¹ President Roosevelt, annual message, Dec. 4, 1906.

² *The Montijo*, Moore's International Arbitrations of U. S., pp. 1439, 1440.

our government for injuries to the persons and property of their subjects in the United States, the precise question as to the liability of the nation for the action or lack of action by state authorities, has been somewhat confused. Our government has constantly denied national liability, although from reasons of humanity or beneficence it has made generous compensation to indemnify the sufferers or their representatives. Denial of liability has been in the nature of a demurrer on the facts shown. It is not the purpose of the writer to discuss what may be the duty of a state according to international law, with respect to acts of mob violence committed against the persons and property of resident aliens. It is submitted, however, that neither the existence of a duty, nor the extent of the scope of a duty, which one government may owe to another, whether arising from a treaty, or from the general principles of international law, depends upon the extent of control it has seen fit to exercise over any of the agencies of government employed in its territory. If our government in sincerity wishes to do exact justice in its relations with foreign countries; if it desires their esteem and regard, it must be compelled to fling aside as untenable in law, and as unworthy of an enlightened nation, the slightest pretense that lack of necessary legislation or of proper machinery of government is a defense for not fulfilling the functions of government.

Again, assuming that there may have been a violation of the treaty of 1894, as well as that the United States is responsible for the acts of the authorities of California of such a kind, the means which the United States might find it necessary to employ to insure in future the observance of the treaty is not in theory of international importance. That is entirely a local affair. Practically, however, Japan might keenly regret to find our government put to vast expense, or forced to adopt extraordinary means in order to give to the subjects of the

Mikado full enjoyment of school privileges identical with those shared by pupils of other races. By reason of its traditional regard for our country, Japan might have little desire to create serious difficulties for the United States in order to secure what might prove to be merely a technical, rather than a substantially beneficial observance of the compact. More cogent still might be the appreciation by Japan of the unwisdom of insisting on the enjoyment by its subjects in California of rights the very exercise of which might arouse deep popular prejudice and open hostility towards the Japanese throughout our Pacific coast. Once assured, however, that its claim was recognized by our federal courts as a proper interpretation of the treaty of 1894, and that the rule of segregation was unlawful, Japan might consent to enter into a new treaty and forego the exercise of the particular educational right. It is unprofitable to speculate as to what might be the policy of the Mikado's Empire. Certain it is, however, that the Japanese government would be entitled to insist as a matter of justice, that for the sacrifice of rights acquired by the present treaty there should be substituted some other privilege of equal value, or that there should be surrendered by the United States an equivalent benefit. Our government could not expect Japan to give up something of value for nothing. Without attempting to measure by any system of nice balances the value of what our country might wish Japan to abandon, it must be apparent to anyone who examines carefully the treaty of 1894, that vast and important privileges are therein provided for the citizens and subjects of the high contracting parties. It is needless to consider for which nation they may afford the greater benefit. They do, however, open the way for close social and commercial intercourse befitting the relations of two civilized powers bordering on the same seas. The question, therefore, suggests itself whether a new treaty between the United States and Japan mutually restricting to

any substantial degree the privileges afforded by the convention of 1894 might not, in so far as it checked the commercial and social activities of the two countries, retard proportionately their good relations in a political sense. For what price the United States, already an Asiatic power, with yearnings for an increasing Oriental trade, ought to forfeit, or even weaken the warm friendship of Japan is an inquiry for the consideration of the diplomat rather than of the lawyer.

In conclusion it may be said:

First: the contention of Japan as to the meaning of the treaty and alleging violation thereof by the authorities of San Francisco, is one peculiarly adapted for the consideration of a judicial tribunal. An interpretation by the Supreme Court of the United States not only would be impartial and just on the merits of the question, but also might meet with the acquiescence of Japan.

Secondly: it is extremely improbable that the United States courts would regard the treaty as invalid even in part; nor would the question as to the validity of the treaty be regarded as related to that concerning the interpretation of the articles which are supposed to sustain the Japanese contention.

Thirdly: if the treaty should be found to be violated, the liability of the United States would be manifest, irrespective of the fact that the acts of infringement were committed by the authorities of a state.

Fourthly: if the treaty should be found to be violated, Japan would technically have a right to insist upon the enjoyment of the privileges denied, irrespective of the difficulty which such enjoyment might cause the United States. If Japan were called upon to forego existing rights in the negotiation of a new treaty, that country could rightfully insist either upon the sacrifice by the United States of rights of like value, or upon the receipt from the United States of compensating benefits.

Finally: the chief practical inquiry is one

of interpretation. That is made difficult by the absence from the treaty of any reference to the education of the citizens or subjects of the two nations. The right to enjoy public educational advantages may be related to the right of residence, or it may have been so regarded by the authorities of California. In any event, the treatment of Japanese pupils differs from that accorded subjects of other nationalities.

On the other hand, the scope of the reserved right to enact laws for police and public security needs careful consideration. Whatever be the true interpretation of the compact of 1894, it is confidently believed that both throughout the United States and Japan the conviction will be deepened that a treaty is the supreme law of this land.

CHICAGO, ILL., December, 1906.

