

Executive order above described, dated March 14, 1907.

And so
much. 2/1/07

CONFIRMED
Copy of the order
sent copy of the
order also to
Harris

RECORD COPY.—NOT TO BE WITHHELD FROM THE FILES.

Copied by M.M.W.
Compared with *E 228*

RECORD COPY.—NOT TO BE WITHHELD FROM THE FILES.

DEPARTMENT OF STATE,
WASHINGTON. March 21, 1907.

File No. 1797/168-179 T/C
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His Excellency

The Governor of Hawaii,
Honolulu.

Sir:

I have the honor to enclose herewith, for your information, five copies of an order issued by the President, on the 14th instant, ordering that Japanese or Korean laborers skilled and unskilled, who have received passports from the Government of Japan to go to Mexico, Canada, or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.

I have the honor to be, Sir,

Your obedient servant,

ROBERT BACON

Acting Secretary.

Enclosures as above.

*Copy to page 9 of 14m.
J. J. Jenkins. Feb. 12/08*



ASSISTANT SECRETARY,

December 3, 1906. 1906

My dear Mr. Bacon:

Pursuant to your suggestion I have put in presentable form reasons why Congress should enact a law to safeguard rights acquired under treaty and to punish civilly or criminally the violation of such rights. I shall assume the existence of the necessity for such legislation and after a few remarks of a general nature shall venture to suggest the statutory forms which might perhaps cover the cases.

It is settled that a treaty of the United States is a law of the land and overrides anything in the constitution or laws of any state, whenever the inconsistency or repugnancy of a state law with a treaty of the United States is properly brought to the attention of the courts in the regular administration of justice.

[Ware v. Hylton, 3 U.S. 198; Chirac v. Chirac, 2 Wheaton 259; *See* Hauenstein v. Lynham, 100 U.S. 483; Baldwin v. Franks, 120 U.S. 678; *See* Geoffroy v. Riggs, 133 U.S. 258. See, also, Mr. Charles Henry Butler's Treaty-Making Power of the U.S., vol. 2, ch. 2, collecting the cases.]

It is unfortunately true that adequate means do not exist for the proper enforcement and vindication of treaty rights and the punishment of those who seek to violate them. The failure of our municipal law to provide means for carrying out our international

obligations in this respect is unfortunate.. Inasmuch as there is no common law of crimes known to our federal jurisdiction an indictment will not lie in the absence of a statute for the violation of international law or of a treaty of the United States, notwithstanding that such violation of law or infraction of treaty rights may subject the United States to international reclamations. See the leading case of United States v. Hudson (1812) 7 Cranch 32, overruling the earlier case of U.S.v. Ravara (1793) 2 Dallas 297.

It has been authoritatively held that no statutory provision exists which permits prosecution for a violation of a right secured by treaty, or other infraction of treaty provisions. The case in which this question was finally set at rest grew out of the Chinese troubles in California. In 1886, during the agitation against the Chinese upon the Pacific coast, an attempt was made to secure indictment and conviction of persons who had been engaged in a conspiracy to deprive Chinese residents of the privileges and immunities secured to them by the treaty between the United States and China under R.S.5519 which reads as follows:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six

months nor more than six years, or by both such fine and imprisonment.

In *United States v. Harris*, 106 U.S.629, this provision had been held to be unconstitutional and void so far as it applied to citizens of the United States within a state, inasmuch as the Fourteenth Amendment is aimed at state rather than individual action. It was now argued that although section 5519 was unconstitutional so far as it sought to protect citizens of the United States residing within a state, nevertheless the power of Congress to legislate in furtherance of treaty provisions being unquestioned, the unconstitutional features of the section could be severed from those which were within the scope of congressional action, and the section could be properly applied to conspiracies directed against Chinese subjects seeking to deprive them of rights secured to them by treaty. The judges of the lower court having differed in opinion upon the point, [in *re Baldwin* (1886) 27 F.R.187] the question was carried to the Supreme Court of the United States where it was carefully considered in the case of *Baldwin v. Franks*, 120 U.S.678. The court held it to be unquestionably within the power of Congress to provide for the punishment of all persons guilty of infringing treaty rights, but that Congress had not done so in enacting section 5519, inasmuch as the section was unconstitutional in toto so far as it applied to acts committed within the limits of any state. The Supreme Court was of the opinion that no severance of the good from the bad was

possible. As the court remarked, page 686, "the limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

At the same time the court left open the question as to whether or not the section "is separable so that it can be enforced in a territory though not in a state". Sections 5508 and 5536, under which it was also sought to sustain the indictment of Baldwin, were held to be inapplicable, inasmuch as they are aimed at offences against the rights of "citizens" and not of aliens. The following language taken from the opinion of the court, delivered by Mr. Chief Justice Waite, will show the exact scope of the decision.

The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offence as that with which Baldwin is charged, but whether it has so done.

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

* * * * *

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt. What we have to decide, under the questions certified here from the court below, is, whether this has been done by the sections of the Revised Statutes specially referred to.

Mr. Justice Harlan dissented from so much of the opinion of the court as held section 5519 unconstitutional in toto, and held

section 5536 inapplicable to the situation before the court.

Mr. Justice Field also dissented and in the closing words of his opinion he set forth the situation in which the United States is left as a result of this decision and in the absence of appropriate legislation on the part of Congress:

The result of the decision is, that there is no national law which can be invoked for the protection of the subjects of China in their right to reside and do business in this country, notwithstanding the language of the treaty with that empire. And the same result must follow with reference to similar rights and privileges of the subjects or citizens resident in this country of any other nation with which we have a treaty with like stipulations. Their only protection against any forcible resistance to the execution of these stipulations in their favor is to be found in the laws of the different states. Such a result is one to be deplored.

In the present state of our laws it is therefore impossible to vindicate treaty rights through Federal criminal proceedings.

On the civil side the situation is somewhat better. R.S. 1977 combined with section 563, clauses 12 and 16, and section 629, clause 16, appear to provide substantive and adjective law looking towards the assertion of treaty rights in the civil courts. This is of course not enough. The absence of statutory provisions looking toward the vindication of treaty rights through criminal action has often placed the Government of the United States in an embarrassing position when called upon by foreign governments to fulfill its international obligation and to punish its citizens who have been guilty of the violation of treaty provisions. Frequently, the United States has felt called upon to pay indem-

nities on account of acts which it was powerless to punish. [See Moore's Int. Law Digest, sections 1026-1027]. These unfortunate incidents have, on several occasions, led to the recommendation, on the part of the Executive, of legislation by Congress looking toward the punishment of offenders who violate treaty rights.

Perhaps the best known of these unfortunate affairs was the lynching of certain Italian subjects in New Orleans in 1890. As a result of this affair President Harrison used the following language in his annual message of December 9, 1891:

Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the 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.

Subsequently, several similar instances occurred leading to protests on the part of Italy and expressions of regret and payment of indemnity on the part of the United States.

As a result of one of these unfortunate affairs which occurred at Tallulah, Louisiana, in 1899, President McKinley recurred to the recommendation already made by President Harrison in his annual message of December 5, 1899. He said:

The recurrence of these distressing manifestations of blind mob fury directed at dependents or natives of a foreign country suggests that the contingency has arisen for action by Congress in the direction of conferring upon the Federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved. The suggestion is not new. In his Annual Message of December 9, 1891, my predecessor, President Harrison, said: [The President at this point quoted the passage from President Harrison's Message already quoted in this memorandum].

A bill to provide for the punishment of violations of treaty rights of aliens was introduced in the Senate March 1, 1892, and reported favorably March 30. Having doubtless in view the language of that part of Article III of the treaty of February 26, 1871, between the United States and Italy, which stipulates that 'The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives', the bill so introduced and reported provided that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country and constituting a crime under the laws of the State or Territory shall constitute a like crime against the United States and be cognizable in the Federal courts. No action was taken by Congress in the matter.

I earnestly recommend that the subject be taken up anew and acted upon during the present session. The necessity for some such provision abundantly appears. Precedent for constituting a Federal jurisdiction in criminal cases where aliens are sufferers is rationally deducible from the existing statute, which gives to the district and circuit courts of the United States jurisdiction of civil suit brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and rights of aliens under the settled principles of international law no less than under treaty stipulation, in cases of such transcendent wrongdoing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders.

In his annual message of December 3, 1900, President
Kinley renewed his recommendation in the following language:

I renew the urgent recommendations I made last year that the Congress appropriately confer upon the Federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved, and I invite action upon the bills to accomplish this which were introduced in the Senate and House. It is incumbent upon us to remedy the statutory omission which has led, and may again lead, to such untoward results. I have pointed out the necessity and the precedent for legislation of this character. Its enactment is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance.

While the Italian Government naturally regards such action as the primary and, indeed, the most essential element in the disposal of the Tallulah incident, I advise that, in accordance with precedent, and in view of the improbability of that particular case being reached by the bill now pending, Congress make gracious provision for indemnity to the Italian sufferers in the same form and proportion as heretofore.

See also, in this connection, Foreign Relations 1901, 283-299, containing the correspondence with the Italian Government referring to the omission of Congress to confer jurisdiction in such cases on the Federal courts and declaring that until such a measure should have been adopted the Italian Government would "not only have grounds of complaint for violation of the treaties, to its injury," but would "not cease to denounce the systematic impunity enjoyed by crime, and to hold the Federal Government responsible therefor."

It might well be thought desirable to enact a general statute providing a sliding penalty in the discretion of the court for all infractions of international law. This would arm the Executive with the same power to invoke the criminal law in vindicating rights secured by international law as is possessed by the English Executive; (see *Triquet v. Bath*, 3 Burrow 1478) and would place our criminal law on the same footing as is our law regarding civil rights and duties arising out of international law. [*The Scotia*, (1871) 14 Wall. 170; *Paquette Habana v. Lola*, 175 U.S. 677]. Doubtless there will be objection to such a statute on the ground that international law is too indefinite and unsettled to furnish a basis for a criminal prosecution.*

Be that as it may the objection cannot apply in the case of treaties. Treaty provisions are as easily ascertainable and construed as are statutes. If every man is presumed to know the compiled statutes it will be equally just and equally possible to

* See on this point *U.S. v. Smith*, 5 Wheaton 153. Congress had enacted: "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death." The jury returned a special verdict finding the facts and Mr. Justice Story decided that these facts constituted piracy by the law of nations and the defendant was punished accordingly.

to attribute to every man constructive knowledge of "treaties in force". A tentative draft of a statutory provision is therefore submitted. Naturally such a provision will require very careful wording. The following is intended as a statement of the purpose in view rather than a definitive attempt to clothe that purpose in technical language.

Sec.1. Any person who knowingly violates any provision of any subsisting treaty between the United States and any foreign nation, or knowingly interferes with or prevents the enjoyment of any right, privilege, or immunity secured by any existing treaty of the United States to any foreign nation or any citizen thereof, shall be punished in the discretion of the court by a fine of not less than fifty nor more than five thousand dollars, or by imprisonment for not less than one month nor more than one year or both.

Sec.2. Any person who violates any provision of any subsisting treaty between the United States and any foreign nation, or interferes with or prevents the enjoyment of any right, privilege, or immunity secured by any existing treaty of the United States to any foreign nation or any citizen thereof, so as to subject the United States to representations on the part of any foreign nation for the violation of treaty rights, shall be punished by a fine of not less than fifty nor more than five thousand dollars, or by imprisonment for

not less than one month nor more than one year or both, and shall be liable for whatever pecuniary damages the United States may suffer as a result of such violation of treaty provisions by such person, including any sum which may be paid as the result of any diplomatic arrangement, treaty or convention on account of such treaty violation by such person.

Sec. 3. Any act committed in any state or territory of the United States in violation of the rights of any foreign country or of a citizen or subject thereof, secured to such country, citizen or subject, by treaty between the United States and such foreign country and constituting a crime under the laws of the state or territory where committed, shall constitute a like crime against the United States and be subject to a like penalty and be cognizable in the Federal courts.

Sec. 4. Jurisdiction is hereby conferred upon Federal District Courts to take cognizance of all offences against the provisions of this act. Appeals shall be allowed in all instances on motion of the Government to the Supreme Court of the United States in order to establish the law upon the point in question; appeals shall be allowed to the defendant as in cases of other offences of like gravity, provided, that nothing in this provision shall be construed to place the individual defendant in double jeopardy.

Memorandum was written by Mr. Brainerd

L.B.

The Supremacy and Scope of the
Treaty-making Power of the United States.

It is too late in the day to question the proposition that a treaty of the United States made in the legitimate exercise of treaty-making power as defined by the constitution, annuls state laws and constitutions which are inconsistent therewith:

Article 6 of the Constitution of the United States provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

That this provision of the Constitution means what it says settled in the great case of *Ware v. Hylton*, 3 U. S. 198, where Justice Chase said:

There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not

void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded.

Four things are apparent, on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. That the constitution or laws of any of the states, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrated before the treaty. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty (or any other), made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.

It was accordingly held that the treaty of peace concluded between the United States and Great Britain in 1783, enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a State treasury or a State law of sequestration.

Although the supremacy of a treaty of the United States was held in *Ware v. Hylton*, it has been held necessary to reaffirm propositions there laid down on numerous occasions since that

The following are among the cases cited accord in Mr. Charles Butler's *Treaty-making Power of the United States*, Vol. 2, 11.:

Fairfax v. Butler, 7 Cranch, 603.

Hopkirk v. Bell, 3 Cranch, 453; 4 Cranch 163.
Chirac v. Chirac, 2 Wheaton 259.—
Orr v. Hodgson, 4 Wheaton 453.
Hughes v. Edwards, 9 Wheaton, 489.
Carneal v. Banks, 10 Wheaton, 181.
Pollard v. Hagan, 3 How. 212.
Pollard's Heirs v. Kibbe, 14 Pet. 353.
Pollard's Lessee v. Files, 2 How. 591.
United States v. Forty-three Gallons of Whiskey, 93 U.S. 188.
Hauenstein v. Lynham, 100 U.S. 483.
Geofroy v. Riggs, 133 U.S. 258.
Baldwin v. Franks, 120 U.S. 678.

Re Ah Fong, 3 Sawyer 143.
Re Ah Chong, 6 Sawyer 451.
Re Quong Woo, 13 Fed. Rep. 229.
Ho-Ah-Kow v. Nunan, 5 Sawyer 552.
Re Tiburcio Parrot, 1 Fed. Rep. 481. * ✓
Re Baldwin, 27 F.R. 187.

Gordon v. Kerr, 1 Wash. C. C. 322.

Baker v. City of Portland, 5 Sawyer 566.

Jost v. Jost, 12 Mackey 487.

6 Opinions of Atty. General, 293
22 Opinions of Atty. General, 217.

For reference to State cases upholding the treaty-making
power of the United States when in conflict with State laws or
constitutions, see Butler's Treaty-Making Power of the U.S.,
pages 349-357.

In section 358 Mr. Butler cites and discusses several California decisions as in "conflict with general rules". These cases, however, would seem to conflict with the general line of Federal and State Decisions already quoted, rather in the scope which they assign to the treaty-making power of the United States than by way of denying the supremacy of that power when exercised within admittedly constitutional limits. These cases, therefore, raise substantially the only point which may now be said to be open for argument in regard to the treaty-making power of the United States, namely, the scope within which the power may be constitutionally exercised; in other words, the extent of the limitations imposed on the treaty-making power by the Constitution of the United States and the nature of our government.

The California court, in the first case cited by Mr. Butler as questioning the validity of the treaty-making power of the United States, expressly admits the supremacy of that power when properly exercised, when it says:

A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. [The People v. Naglee, 1 Cal. 232 at 246].

On the other hand it is believed that the most extreme supporters of the authority of the central government have never ventured to maintain that the treaty-making power is absolutely unlimited. Mr. Butler himself, than whom there is no more staunch supporter

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of the most liberal interpretation of the extent of the national treaty-making power, expressly concedes in section 455 that "the fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing" and adds: "the question is not whether the power is limited or unlimited but at what point do the limitations begin."

In regard to this proposition there seem to have been two general views, the one favoring the exercise of the power on the part of the national government and indulging every ^{presumption} ~~injunction~~ in favor of its validity, the other restricting the treaty-making power and limiting it whenever it impinges upon the reserved powers of the states. The one view, while it admits that all powers attributed to the United States Government must be expressly or impliedly granted and that if not so granted the power does not exist, yet contends that the treaty-making power has been granted and that the treaty-making power as granted is the treaty-making power as it exists in the hands of other civilized governments, except in so far as it is restricted by the express or implied prohibitions of the constitution.

The other view would deny to the treaty-making power of the United States functions possessed by all other civilized governments merely on the ground that the subject involved, although a proper subject of a treaty between nations, is also one properly within the cognizance of the reserved powers of the states. That is,

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supposing any subject is within the scope of the treaty-making power as ordinarily understood among nations, the liberal constructionists would assert that the subject in question may be regulated by the treaty-making power of the United States unless some express or implied inhibition be found in the constitution. The strict constructionists would add to this that if the subject be one ordinarily within the scope of the reserved powers of the states, even although a proper subject for the treaty-making power as between nations, the power to regulate such matters is denied to the United States government.

The adherents of this latter view have been wont to rely more or less upon the views of Mr. Calhoun who placed the following limitations upon the treaty-making power of the United States:

First, It is limited strictly to questions inter alios—"all such clearly appertain to it." Second, "By all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments." Third, "By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary." Fourth, "It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed."

Having stated these as the only limitations, the author adds, "within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it."

But it is submitted that it is at least doubtful whether or not Mr. Calhoun's limitations properly construed give comfort to these views. It all depends upon the meaning of the words inter alios.

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Mr. Tucker, another distinguished exponent of the views of states' rights remarks as follows:

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: a treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will."

The Supreme Court of California, however, in the case of *The People v. Naglee*, supra, makes the strict constructionist view definite and tangible when it says that a treaty "cannot supersede a State law which enforces or exercises any power of the State not granted away by the constitution", and it renders its meaning perfectly clear by going on to say that inasmuch as the power of taxation is admittedly not granted away by the State a treaty provision exempting certain foreigners from taxation is therefore unconstitutional. This statement, however, is admittedly dictum because the court states farther on that under a fair interpretation of the legislative intent all persons exempt from taxation according to the treaty were intended to be exempted by the legislature.

In the *People v. Gerke*, 5 Cal. 381, the court upholds the validity of a treaty of the United States removing the disability of aliens to inherit, notwithstanding the fact that the descent of real property is certainly a matter under ordinary circumstances reserved to the State and not handed over to the general government, and the court apparently takes the liberal view above

indicated when it says:

The only questions, then, which can arise in the consideration of the validity of a treaty, are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?

Again, in *Bodley v. Ferguson*, 30 Cal. 511, the court says

in syllabus on page 512:

Right of Married Women to Convey Separate Property.— The treaty by which California was ceded to the United States preserved to married women then living in this State and owning separate property therein the right to contract to convey, or to convey, separate property, and neither the Constitution nor laws of this State can deprive them of that right or unreasonably interfere with its exercise.

and on page 517 the court uses the following language:

The Act adopting the common law, passed April 13th, 1850, did not take away the capacity of Mrs. Gilroy to contract concerning her property, for that would be to make the Act paramount to the treaty and the Constitution.

In *The People v. Washington*, 36 Cal. 658, however, the opinion and decision of the court would seem to render it doubtful whether or not the court had not returned to the heresies expressed in *The People v. Naglee*, supra, although the entire case is so confused that little reliance has been placed upon it as actually giving the views of the court, much less as stating the law correctly.

But whatever the views of the California court may be it would seem that the correctness of the liberal interpretation,

or rather the incorrectness of the view which would limit the treaty-making power over subjects ordinarily within the reserved powers of the State, has been established by the numerous cases of which the California case of *The People v. Gerke*, supra, is a sample, and the case of *Hauenstein v. Lynham* in the Supreme Court of the United States is perhaps the best example, where the treaty-making power of the United States has been held to extend to the regulation of descent of property so far as it affects aliens, notwithstanding the fact that the general subject of descent and inheritance is unquestionably within the jurisdiction of the States. As Mr. Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheaton 211 "The act of Congress or the treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

So far as the Supreme Court of the United States has committed itself upon the subject it would seem that the liberal view above suggested has been upheld, the view expressed in the often quoted language of Mr. Justice Field in *Geofroy v. Riggs*, 133 U.S. 68, which is as follows:*

The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, or those arising from the nature of the Government itself and that of the States. It would not be contended that extends so far as to authorize what the Constitution forbids

to the suggestion of the learned Justice that the Constitution forbids a cession of any portion of the territory of one of the States without its consent, query. See the conflicting opinions of Jefferson and Hamilton upon this question quoted in *Downes v. Bidwell*, 122 U.S. 244. See also, Butler's treaty-making Power, v.2, sec.474, quoting the opposing views of Kent and Webster.

In *Ware v. Hylton*, supra, Mr. Justice Chase said: "If the
possesses a power to declare treaties void, I shall never
use it but in a very clear case indeed." No case has ever
been so clear as to justify the Supreme Court of the United
States in holding any treaty of the United States unconstitution-
al in view of the strenuous efforts to do so in the case of
the provisions of the treaty with Spain providing for the
cession of the Philippine Islands, it would seem that the views
of Justice Chase still obtain in the court.

The constitutionality of the provisions of our treaty with
Japan securing to Japanese residing in the United States the
treatment accorded to citizens of the United States or
of the most favored nation, would seem to be unquestion-

Similar provisions in our treaty with China have repeatedly
been before the courts. Article 6 of the treaty between the
United States and China, reads as follows:

Article 6. Citizens of the United States visiting or re-
siding in China shall enjoy the same privileges, immunities,
exemptions, in respect to travel or residence, as may
be enjoyed by the citizens or subjects of the most
favored nation. And, reciprocally, Chinese subjects visiting

suggestion on page as to whether or not in view of
the foregoing considerations the treaty would be constitutional
should be held to give to citizens of Japan greater rights
than those enjoyed by citizens of the United States.

In *Ware v. Hylton*, supra, Mr. Justice Chase said: "If the court possesses a power to declare treaties void, I shall never exercise it but in a very clear case indeed." No case has ever appeared so clear as to justify the Supreme Court of the United States in holding any treaty of the United States unconstitutional, and in view of the strenuous efforts to do so in the case of some of the provisions of the treaty with Spain providing for the cession of the Philippine Islands, it would seem that the views of Mr. Justice Chase still obtain in the court.

The constitutionality of the provisions of our treaty with Japan, securing to Japanese residing in the United States the same treatment accorded to citizens of the United States or citizens of the most favored nation, would seem to be unquestionable. *

Similar provisions in our treaty with China have repeatedly been before the courts. Article 6 of the treaty between the United States and China, reads as follows:

Article 6. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting

* See suggestion on page as to whether or not in view of the foregoing considerations the treaty would be constitutional if it should be held to give to citizens of Japan greater rights than those enjoyed by citizens of the United States.

11

or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.

Said Mr. Justice Sawyer in *In Re Tiburcio Parrott*, in commenting upon this provision:

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain.

In *In Re Baldwin*, 27 F.R. 187 at 188, the court said:

As to what subjects are within the treaty-making power, see *Parrott's case*, 6 Sawyer, 368, 369, S.C. 1 Fed. Rep. 481, and the numerous cases there cited. It certainly, under the authorities there cited, embraces the entire subject matter of our treaties with China.

While the Supreme Court cases remark in regard to the same case on writ of error, in *Baldwin v. Franks*, 120 U.S. 679: "That the United States have power under the constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exceptions guaranteed to them by this treaty."

Therefore, whatever may be the extent of the treaty-making

(12)

power of the United States, it would seem to be settled beyond question that the pertinent provisions of our treaty with Japan are clearly within the scope of the treaty-making power as confided to the national government by the Constitution.

J.B.L.

Mr. Dennis prepared this
memorandum. *me*