AMERICAN BAR ASSOCIATION.

ADDRESS OF THE PRESIDENT

FRANK B. KELLOGG
OF MINNESOTA

(Presented at the meeting of the American Bar Association, at Montreal, Canada, September 1-3, 1913.)

TREATY MAKING POWER.

Gentlemen of the American Bar Association:

This is the first meeting of the American Bar Association outside of the United States. Though we meet in a foreign country, we do so among a people allied to us by every tie that binds nations in a common brotherhood. We are of the same race, speaking the same language, governed by the same general principles of law, inspired by the same traditions, working out as separate nations the same great destiny. I hope that the peace which has so long existed between these peoples may be further cemented, and mutual and friendly intercourse continue to increase. On behalf of the American Bar Association, I welcome this opportunity to extend to the officials and lawyers of the Dominion of Canada our sincere thanks for the great assistance they have rendered towards making this a memorable meeting of our Association.

The constitution of the American Bar Association requires the President in his annual address to review notable changes in statute law. Ordinarily this subject is rather dry and of little interest to the lawyers of other countries; yet at times these enactments of Congress or of the legislatures of the states touch upon subjects of absorbing general interest. The statute which has attracted the most attention, stimulated the widest discussion and raised questions of the most far-reaching and momentous consequences to the nation and its relations with foreign powers is the Alien Land Law of California. This statute, which became a law on May 19, 1913, permits aliens eligible to

citizenship to possess, enjoy, transmit, and inherit real property in the same manner as citizens. Aliens not eligible to citizenship may acquire, possess, enjoy, and transfer real property, or any interest therein, in the manner and to the extent permitted by any treaty existing between the Government of the United States and the nation of which such alien is a citizen, and not otherwise. In other words, such an alien, if not permitted by treaty, may not own, transmit or inherit real property in the state of California, and such property if held in violation of the act is subject to confiscation to the state. Section 7 of the act provides: "Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding, or disposal by aliens of real property in this state."

The treaty with Japan of 1911 provided that: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses, and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects submitting themselves to the laws and regulations there established."

The question raised, which has received such wide discussion by publicists and journalists, is whether a state may, in violation of a treaty between the United States and a foreign power, regulate the ownership of real estate within its borders by citizens of such foreign country.

I shall not stop to discuss the question of whether the treaty with Japan does give to her citizens within the United States the right to own real estate. It gives them the right to carry on trade, to own houses, manufactories, warehouses, and shops, and to lease land for residential and commercial purposes. If citizens of Japan have any right to own real estate in California, it is difficult to see how this law takes away such right, because it provides in substance that such aliens may acquire, possess, enjoy,

and transfer real estate in the manner and to the extent and for the purposes prescribed by any treaty.

But the question has been squarely raised by the declaration of the legislature of California which was intended and understood by the public generally to mean that California claimed such right notwithstanding any treaty provisions with the federal government.

Arizona has adopted an alien land law more drastic than that of California; but this likewise provides that it shall not be so construed as to conflict in any manner with any treaty of the United States.

In Washington a constitutional amendment has been submitted to the people providing in substance that if a resident alien becomes a non-resident for nine years his real property shall be vested in the common school fund.

The laws of these latter states have not attracted attention, but the passage of this law by the legislature of California and the public discussion which followed have raised a question which may disturb the amicable relations heretofore existing between the United States and Japan—a question of vital importance to our nation in its relation with foreign governments.

I am convinced that there can be no serious doubt that the federal government may, by treaty, define the status of a foreign citizen within the states, the places where he may travel, the business in which he may engage, the property he may own, both real and personal, and the devolution of such property upon his death; that such a treaty constitutes the supreme law of the land; and that a state law contravening such a treaty is void and will be so declared by the courts in a suitable action.

These propositions have been established by the laws and usages of all civilized nations, by the history of the times, by the opinions of the statesmen who framed our Constitution, by the provisions of the Constitution, by the universal practice of making such treaties from the days of the Confederation, and, lastly, by the repeated decisions of the Supreme Court of the United States and of many other courts during a period of more than one hundred years. And yet, notwithstanding this array of

authority, when the question arose, the Legislature of California, by an almost unanimous vote of its members and with the approval of its distinguished governor, took the position that California had the exclusive right to regulate the ownership and disposition of real estate by foreign citizens—a position which was conceded without question by a large section of the public journals, and which seems to have been held by influential members of the Washington Government. Certain it is that the government did not take the stand that any law of California or any other state, made in violation of a treaty with the United States, is void, and that the government would enforce such treaty rights notwithstanding the action of the states.

From the standpoint of history and judicial authority, I shall attempt in this address to maintain the supremacy of the treaty-making power, although the subject has been so fully treated by able writers and in judicial opinions that it seems hardly to be open to discussion.

The Federal Government is a government of the people, and not of the states. Its title springs from the primary authority of all governmental power, and its treaty-making power is subject to no limitations except those provided by the constitution.

The provisions of the Constitution of the United States relative to the treaty-making power and the limitations upon the states are as follows:

"No state shall enter into any treaty, alliance, or confederation." Article I, Section 10, Clause 1.

"No state shall, without the consent of Congress enter into any agreement or compact with any state, or with a foreign power." Article I, Section 10, Clause 2.

"He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article II, Section 2, Clause 2.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Article III, Section 2, Clause 1.

"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, auything in the constitution or laws of any state to the contrary notwithstanding." Article VI, Clause 2.

If there were no authority to the contrary, it would hardly be presumed that the people of the United States intended to confer upon the federal government a less power than had been exercised by other nations since the dawn of civilization. It has been the practice of governments, through the treaty-making power, to fix the status of foreign citizens, their right to engage in business, and to own, transfer and inherit property. It is one of the indubitable prerogatives of sovereignty.

The exercise of the treaty-making power has rarely been left to the individual states collectively constituting a nation, nor have such states usually been permitted to pass laws violating such treaties. Few individual states in confederations have retained the treaty-making power. Notable examples of these were the Greek, the Swiss, the North German and the Netherlands confederations. The Greek republics perished. The other three governments, finding the loose confederations disastrous to national unity and prosperity, changed their forms of government so that the treaty-making power is now vested in the nation.

The statesmen of the latter part of the eighteenth century who participated in framing the Articles of Confederation and the Constitution of the United States, were deep students of history, they were familiar with the examples and failures of certain of these confederacies; and the debates in the Continental Congress, in the Constitutional Convention, and in the conventions of the various states considering the adoption of the constitution, illustrate with remarkable clearness that it was the intention by the adoption of the constitution to place the treaty-making power solely in the federal government, to make that power comprehensive, including all the subjects upon which it had been the custom of nations to treat, to make the treaties the supreme law of the land, and to create a federal judiciary and an executive with powers adequate to enforce the obligations imposed upon the nation by its treaties. These men knew exactly what they were doing. They disagreed upon the wisdom of

giving such power to the federal government, but they did not disagree as to the extent of the power they were conferring. They had seen the defects of the confederation, the want of power to enforce treaties, and the evils resulting therefrom, and they undertook by the adoption of the constitution to remedy those evils.

Let me now invite your attention for a few moments to the treaty-making power conferred upon the federal government by the articles of confederation and the disastrous results flowing from the want of authority to enforce its treaties. By the articles of confederation of 1778, it was provided that "no state, without the consent of the United States in Congress assembled, shall send any embassy to or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince, or state." (Article 6.)

"The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, ... of sending and receiving ambassadors—entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts or duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." (Article 9.)

Under this Article the Congress of the confederation entered into treaties with foreign governments defining the status of foreign citizens within the several states, and their right to engage in business, and to own, dispose of and inherit property, both real and personal. Such treaties were made with France, the Netherlands, Sweden, Great Britain, Morocco, and Prussia.[1]

[1] Treaty with France, February 6, 1778, 8 U. S. Statutes at Large, 12.
Treaty with the State's General of United Netherlands, October 8, 1782, 8 U. S. Statutes at Large, 32.
Treaty of Peace with Great Britain, November 30, 1782, 8 U. S. Statutes at Large, 54.
Treaty with Sweden, April 3, 1783, 8 U. S. Statutes at Large, 60.
Treaty with Prussia, September, 1785, 8 U. S. Statutes at Large, 84.
Treaty with Morocco, January 7, 1787, 8 U. S. Statutes at Large, 100.

The right of the confederated government to enter into these treaties was apparently never questioned until after the adoption of the Constitution of the United States, when the provisions of such treaties guaranteeing the rights of foreign citizens were sustained under Article VI, Clause 2 of the Constitution making treaties then existing, or which might thereafter be made, the supreme law of the land. These subjects were not matters over which the Congress ordinarily had jurisdiction, but were matters which came within the jurisdiction of the states both under the confederation and under the Constitution; yet they were matters clearly within the treaty-making power. Can it be possible that, at the very threshold of this fabric of federal government, the men who had established it, who were familiar with its powers and with the power of governments generally to make treaties, made these treaties with the full knowledge that the Congress had no power to make a treaty over any matter which in ordinary domestic affairs was within the regulative power of the state? If it be true that the federal government may not make a treaty upon any matter which is ordinarily reserved for the governmental control of the state, a principal part of the treaty-making power, as it has been exercised for more than one hundred and twenty-five years, is swept away, for the central government has exercised this power, and it is absolutely necessary that it should do so in order to protect foreign citizens in their rights and to demand and receive for our citizens the same rights in foreign countries. We cannot expect that American citizens will be respected and receive the protection to which they are entitled under the principles of international law and the custom of nations, if we declare that our government is so impotent that it cannot give to foreign citizens within the states the same protection.

But let us consider this subject from the position of authority. When the convention which was to frame the constitution met in 1787, it was confronted with one of the most difficult tasks which has ever fallen to the lot of a deliberative body. The confederation, like all confederations which have come and gone, was inadequate for national purposes. It could not raise money,

enforce its laws, prevent the violation of its treaties by the states, or protect interstate and foreign commerce. The history of the times and the constitutional debates show that one of the most vital defects in this confederation was the want of power to enforce treaties. No one doubted the power of the government to make them, for the only limitations upon the treaty making power in the articles of confederation were in respect to imposing duties, and restraining the Congress from prohibiting by treaty the exportation or importation of any species of goods or commodities. Even those limitations were removed under the Constitution subsequently adopted. But the trouble at that time was that the confederated government was a government of the states and not of the people. It acted upon and through the state governments, rather than directly upon the people. There were no federal courts or executive officers to enforce the treaties. Their enforcement was left to the states, which either obeyed them or not as their selfish interests seemed at the time to dictate. There was no provision in the articles of confederation making the treaties superior to the laws of the states. These very property rights which I have heretofore enumerated, guaranteed to foreign citizens by the treaties, had been violated by the states. Real and personal property and debts owing them had been confiscated, and the courts had refused to enforce the treaty obligations. Especially was this true of the treaty with Great Britain of September 3, 1783, which, among other things, provided that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts theretofore contracted; that all persons who had any interest in confiscated lands, either by debts, marriage settlements, or otherwise, should meet with no lawful impediment in the prosecution of their just rights, and that there should be no further confiscations made nor any prosecutions commenced against any person by reason of the part which he may have taken in the war, nor on that account should any person suffer any loss or damage either in his person or property. The violation of these guaranties by the state and the inability of the federal government to enforce them, through want of the

court machinery and executive power, had greatly disturbed the public mind and made a deep impression upon the statesmen and publicists of that day, both in our country and in foreign countries, and it was one of the controlling reasons for calling the Constitutional Convention.

Time does not permit me to cite the numerous authorities establishing beyond question the opinions of public men at this time and their determination to correct this, one of the greatest defects of the confederation. These opinions were held by substantially all of the leading men: Washington, Jefferson, Hamilton, Madison, Randolph, Pinckney, Adams, Wilson, and others.

There is no question about the determination of the great majority of the convention to place the exclusive right of making treaties in the federal government and to confer on that government the power to enforce their provisions through the machinery of the federal government, exclusive of the states. Every proposition to limit this power was voted down, and there was evidenced the greatest solicitude for the adoption of adequate means for the enforcement of treaty stipulations. It was first proposed to vest the treaty-making power in the Senate, but afterwards it was vested in the President by and with the approval of the Senate, two-thirds of its members present voting therefor.

But the most important thing was to adopt means whereby the acts of the states in violation of treaties could be annulled. Various plans were discussed. The sixth resolution offered by Governor Randolph proposed to give Congress the right "to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union."[2] This, in substance, was contained in Pinckney's first draft of the Constitution. It was, however, considered by the convention cumbersome and inadequate. It would require the Congress to affirmatively act upon and set aside each legislative or constitutional provision of the states violating our treaties, instead of declaring and making them invalid and creating a department of the government to enforce the treaty stipulations. This point

[2] Elliot's Debates, Vol. 1, p. 144.

is made very clear by the debates in the Constitutional Convention.

Speaking upon the Paterson resolutions, Mr. Madison expressed the opinion that they did not go far enough in the general surrender of power to the central government. He said[3]:

"Will it prevent the violations of the law of nations and of treaties which, if not prevented, must involve us in the calamities of foreign wars? The tendency of the states to these violations has been manifested in sundry instances. The files of Congress contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shown us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is the greatest of calamities. *It ought, therefore, to be effectually provided, that no part of a nation shall have it in its power to bring them on the whole.* The existing Confederacy does not sufficiently provide against this evil. The proposed amendment to its does not supply the omission. It leaves the will of the states as uncontrolled as ever."

Paterson had proposed a resolution creating a federal judiciary with jurisdiction in all cases "in which foreigners may be interested, in the construction of any treaty or treaties," and making such treaties the supreme law of the respective states, in the following language[4]:

"Resolved, That all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby vested in them, and by the Articles of Confederation, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states as far as those acts or treaties shall relate to the said states, or their citizens; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.

"And if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorized to call forth the

[3] Butler's Treaty-Making Power, Vol. 1, Sec. 177.
[4] Elliot's Debates, Vol. 1, p. 177.

powers of the confederated states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties."

This was the basis of Luther Martin's resolution,[5] which was finally adopted, with some modification, as Article VI of the Constitution. A federal judiciary was created, consisting of one Supreme Court and such inferior courts as Congress might from time to time ordain and establish, and the judicial power was extended to all cases arising under the Constitution and treaties made.

Thus it will be seen that under this constitutional provision any constitution or law of a state in violation of a treaty was made void and the state judges were bound so to declare, and a federal judiciary was created having jurisdiction over all questions arising under such treaty, with full power and authority to enforce its decrees. The federal convention had accomplished its purpose to correct one of the greatest weaknesses of the confederated government. It adopted these provisions in the light of the usage of nations, the history of the times, and with full knowledge of the evil, to be remedied. While men differed as to the wisdom of this central power, none differed as to its nature. It was deliberately adopted in order that we might be a nation and fulfill our obligations to foreign powers.

In the various state conventions called for the ratification of the Constitution the meaning of these provisions was not doubted; only their wisdom was questioned. It was claimed that too great a power was conferred upon the President and the Senate; if treaties were to be the supreme law of the land, the House of Representatives ought to have a voice in making them; they ought not to be made so as to alter the constitution or the laws of any state, and a resolution to this effect was proposed in the New York convention by Mr. Lansing. Patrick Henry, in the Virginia convention, was particularly strenuous in his opposition to the treaty-making power and the supremacy of the treaties over the laws and constitutions of the states. He stated[6]:

[5] Butler's Treaty-Making Power, Vol. 1, Sec. 181.
[6] Butler's Treaty-Making Power, Vol. 1, Sec. 216.

"Treaties rest on the laws and usages of nations. To say that they are municipal, is, to me, a doctrine totally novel. To make them paramount to the Constitution and laws of the states, is unprecedented. . . . .

"We are told that the state rights are preserved. Suppose the state right to territory be preserved; I ask and demand, How do the rights of persons stand, when they have power to make any treaty, and that treaty is paramount to constitutions, laws, and everything?"

Mr. Madison, speaking in the Virginia convention, said:

"The confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprised that our general government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states. Our violation of treaties already entered into proves this truth unequivocally."

The most remarkable discussion of the Constitution was by Hamilton, Madison and Jay, in the "Federalist," a discussion which excited the admiration of statesmen the world over and compares favorably with the writings of such great students of government as Vattel, Montesquieu, Burke, Machiavelli, and Rousseau.

In the 22d number of the "Federalist" Hamilton discusses the defects of the confederation in its want of power to enforce treaties in the several states. He said:

"A circumstance which crowns the defects of the confederation remains yet to be mentioned,—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one *supreme tribunal*. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing

from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice. . . . .

"The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?"

In discussing the subject of limitations upon the power of the federal government, he says that such power "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."

It was in the light of history and with the full knowledge of the condition of the treaty-making power, and of the violation of treaties by the states, that the Constitution was adopted by the convention of every state after the widest discussion and deliberate consideration. It was a momentous step in human government. It was to be a trial of constitutional representative democracy. While preserving the widest field consistent with liberty in the individual, it was an attempt to confer upon the central government sufficient power to stand among the nations of the earth. It attempted to remedy the evils and instabilities of pure democracies and loose confederations on the one hand, and the oppressions and tyrannies of pure monarchies on the other. While protecting the person and the property of the citizen against the abuses of government, it gave to the central government the power to make treaties with foreign nations necessary to the preservation of the Union, to the extension of its commerce, to the protection of its citizens in foreign lands, and

the right reciprocally to confer upon foreign citizens those privileges consistent with the laws and usages of nations; and, lastly, it established a tribunal—the federal judiciary—which was to preserve the constitutional guaranties of liberty, maintain the supremacy of the Union, and enforce its laws and treaties.

We come now to the last and conclusive interpretation of the treaty-making power by the Supreme Court of the United States. We shall see how citizens of foreign countries, whose rights, guaranteed by treaties with the central government, had been violated by the states, naturally sought redress in the tribunal the Constitution created for this purpose, and how that court, fully realizing its grave responsibility, established beyond peradventure the supremacy of the treaties over the laws of the states and enforced the rights of foreign citizens, in the face of popular prejudice. These decisions were rendered at a time when the reasons for the adoption of the constitutional provisions were fresh in the minds of lawyers and jurists. Many of the men who participated in these trials and in the decisions as judges had been members of the Constitutional Convention and of the Congress of the confederation. They knew the reasons which had actuated the convention in adopting these provisions and the construction which ought to be placed upon them; and by an unbroken line of decisions, evincing the most profound knowledge of the principles underlying representative government, the court sustained the supremacy of the treaty-making power in relation to the subjects under discussion.

Alexander Hamilton was the first to assert the rights of British subjects to lands in the state of New York, claiming that they were protected by the treaty, notwithstanding the confiscatory legislation of that state. He argued the case of Elizabeth Rutgers *vs.* Joshua Waddington, in the Mayor's Court of the City of New York, in 1784. The decision in that case, which sustained the treaty as against the law of the State of New York, brought forth a storm of protest and created the most bitter feeling. It was denounced in mass meetings of the people, and and an extra session of the Legislature condemned the action of the court. Hamilton was publicly abused, and his motives ques-

tioned. But with commendable courage and with masterly ability he defended the treaty-making power and denounced the violations of the treaties by the several states. He published a series of letters under the name of Phocion, in which he clearly set forth the injustice to foreign citizens, their rights under the treaties, and the danger to the government from these flagrant violations by the states. These letters created a powerful impression upon the public mind, and contributed in no small degree to the action in the constitutional convention to guard against a possibility of such abuses in the future.

The first reported case on the subject in the Supreme Court of the United States is the case of Ware *vs.* Hylton.[7] It was in substance provided by a law of the Commonwealth of Virginia that a citizen of Virginia owing money to a subject of Great Britain might pay the same to the State of Virginia, and that the receipt of the governor and council should be a discharge from such debt. The law required the governor and the council to lay before the General Assembly an accounting of these certificates of payment, and provided that they should see to the safe-keeping of the money subject to the future directions of the Legislature. A British subject sued a citizen of Virginia upon a debt. The defendant pleaded the law of Virginia and the payment to the state. The plaintiff replied setting up the 4th Article of the treaty between Great Britain and the United States. The court held that the treaty was the supreme law of the land, and repealed all provisions of the state laws and constitution to the contrary. There were opinions by Justices Chace, Paterson, Wilson, and Cushing. Justice Chace said[8]:

"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

[7] 3 Dallas 199.
[8] 3 Dallas 236-237.

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."

It will be remembered that the 4th Article of the treaty provided that creditors on either side "shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted." Speaking specially of this provision, Justice Chace said:

". . . . The *only impediment* to the recovery of the debt in question, is the *law of Virginia*, and the payment under it; and the treaty relates to *every kind of legal impediment*.

"But it is asked, did the fourth article intend to *annul a law* of the states? and destroy rights acquired under it?

"I answer, that the fourth article did intend to destroy *all lawful impediments*, past and future; and that the *law of Virginia*, and the payment under it, is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty.

". . . . Our Federal Constitution establishes the power of a treaty over the constitution and laws of any of the states; and I have shown that the words of the fourth article were intended, and are sufficient to nullify the *law of Virginia* and the payment under it."

Justice Paterson said:

"The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of Virginia, which has been pleaded in bar, and with regard to the creditor annuls everything done under it."

Justice Wilson said:

"Even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case; it is not confined to debts existing at the time of making the treaty; but is extended to *debts heretofore contracted*. It is impossible by any glossary or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the Constitution of the United States, which authoritatively inculcates the obligation of contracts the treaty is sufficient to remove every impediment founded on the law of Virginia."

Justice Cushing said:

"A state may make what rules it pleases, and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes; and that makes the difference.

". . . . To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the Constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the constitution itself; and certainly, with any law whatsoever."

Both Justices Paterson and Wilson had been members of the Constitutional Convention. Justice Wilson had been a member of the Congress and a signer of the Declaration of Independence, and was one of the most distinguished lawyers of the United States. The Chief Justice was one of the authors of the "Federalist." They were all men deeply learned as lawyers and statesmen. This opinion was delivered in the February term 1796. It was the leading case which for the first time laid down the principles of the supremacy of the federal treaties over state laws. It was argued by distinguished counsel, Marshall, subsequently Chief Justice, appearing for the defendants in opposition to the treaty power. It received the most careful and painstaking consideration by the court. It was followed by many decisions all along the same line, some of them particularly applying to the ownership or the devolution of real estate within the states.

In the case of Chirac *vs.* Chirac,[9] decided at the February term in 1817, Chief Justice Marshall wrote the opinion. The question involved was whether the heirs of Chirac, being aliens, might inherit property in Maryland according to the terms of the treaty with France, although in violation of the anti-alien law of that state. Chief Justice Marshall said[10]:

"It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declared that 'the subjects and inhabitants of the United States, or any one of them, shall not be reputed Aubains (that is aliens) in France.' 'They may, by testament, donation, or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat,* without being obliged to obtain letters of naturalization. The subjects of the most Christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article."

"Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.

"It is unnecessary to inquire into the effect of this treaty under the confederation, because, before John Baptiste Chirac emigrated to the United States, the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land."

In Orr *vs.* Hodgson[11] it was held that the treaty with Great Britain of 1783 protected the estates of citizens of that country from forfeiture by way of escheat for the defect of alienage.

In the case of Fairfax's Devisee *vs.* Hunter's Lessee,[12] Justice Story writing the opinion, held that the heir of Lord Fairfax, although being an alien, was protected by the treaty of 1794 from any forfeiture for alienage, under the laws of Virginia.

[9] 2 Wheat 259.
[10] 2 Wheat 271.
[11] 4 Wheat 453.
[12] 7 Cranch. 603.

In Hughes *vs.* Edwards [13] the Supreme Court held, Justice Washington writing the opinion, that although under the laws of Kentucky aliens could not hold lands therein or maintain a bill to foreclose a mortgage thereon, yet, under the treaty of Great Britain of 1794, British subjects who then held lands in the territories of the United States were guaranteed the right to continue to hold them according to the nature and tenure of their respective estates; that this was the supreme law of the land, and superior to and rendered void the law of Kentucky to the contrary.

There were several other decisions to the same effect by the Supreme Court during the first quarter century of the existence of the government. Coming down to a later period we find that those decisions have been reaffirmed and approved.

In 1879 the Supreme Court decided the case of Hauenstein *vs.* Lynham,[14] Justice Swayne delivering the opinion. Solomon Hauenstein died in the city of Richmond in 1861 or 1862, without any children, leaving real estate therein. An inquisition of escheat was brought by the escheator for that district, and when he was about to sell the property the plaintiff in error, being an alien and the only heir of Hauenstein, intervened and claimed the real estate. It was clear that under the laws of Virginia aliens were incapable of taking property by inheritance. The court held that ordinarily the law of nations recognizes the liberty of every government to give to foreigners only such rights touching immovable property within its territory as it may see fit to concede, and that in this country this authority is primarily in the state where the property is situated, but that where the federal government has contracted otherwise, such treaty is the supreme law of the land and will be enforced by the courts. The court reviewed Ware *vs.* Hylton, Chirac *vs.* Chirac, Hughes *vs.* Edwards, Orr *vs.* Hodgson, the case of the heirs of Lord Fairfax, and other cases. In conclusion, Justice Swayne said:

"We have no doubt that this treaty is within the treaty-making power conferred by the Constitution, and it is our duty to give it full effect."

[13] 9 Wheat 489.
[14] 100 U. S. 483-487.

These cases were again reviewed and reaffirmed by the Supreme Court in 1889, in the case of Geofroy *vs.* Riggs,[15] Justice Field writing the opinion. The court in that case held that under the treaty with France a citizen of that country was entitled to take real estate by descent in the District of Columbia, notwithstanding the law of Maryland, which had been adopted by Congress as the law of the District. The court held that the treaty power of the United States under the Constitution extended to the subject of the ownership of land by foreign citizens within the states. Justice Field said[16]:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement.

". . . . In adopting it (the law of Maryland) as it *then existed,* it adopted the law with its provisions suspended during the continuance of the treaty so far as they conflicted with it—in other words, the treaty, being part of the supreme law of the land, controlled the statute and common law of Maryland whenever it differed from them."

I shall not attempt to review the decisions of the various federal circuit courts, except to say that Judge Deady,[17] of the United States Circuit Court in Oregon, held that a statute of that state prohibiting the employment of Chinese labor on public works was in violation of the treaty between the United States and China; that Judges Sawyer and Hoffman,[18] in the United

[15] 133 U. S. 263.

[16] 133 U. S. 266-267.

[17] Baker *vs.* City of Portland, 5 Sawyer 566.

[18] In re Tiburcio Parrott, 6 Sawyer 349.

States Circuit Court in California, held that the constitutional provision of that state prohibiting corporations within the state from employing Chinese labor was in violation of the provisions of the treaty of 1868 with China; that Judge Munger,[19] in a late decision in Nebraska held that the treaty of 1853 between the United States and France permitted resident aliens of that country to own real estate in Nebraska, and that the statute of Nebraska to the contrary was void. Nor shall I attempt to review the decisions of the state courts. Many of them have held, following the early decisions of the Supreme Court of the United States, that the provisions of the treaties guaranteeing rights to hold and inherit real estate, giving consular agents the right to administer upon the estates of deceased, and other like provisions, were binding upon the states, notwithstanding the laws thereof. California, I believe, is the only state holding to the contrary.[20]

There are certain expressions in some decisions of the Supreme Court of the United States, notably in opinions of Chief Justice Taney, delivered in 1840,[21] of Justice Daniel, shortly after, in the License Cases,[22] and of Chief Justice Taney and Justice Grier in the Passenger Cases,[23] tending to support the

[19] Bahuaud *vs.* Bize, 105 Fed. Rep. 485.

[20] Tellefesen *vs.* Fee, 168 Mass. 188.
Louisiana Succession of Ravasse, 47 La. Ann. 1452.
Stixrud *vs.* Washington, 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632.
Dufour's Succession, 10 La. Ann. 391.
Amat's Succession, 18 La. Ann. 403.
Crusius's Succession, 19 La. Ann. 369.
Rixner's Succession, 48 La. Ann. 552, 32 L. R. A. 177, 19 So. 597.
Prevost *vs.* Greneaux, 19 How. 1.
Wunderle *vs.* Wunderle, 33 N. E. 195.
Lehman *vs.* Miller (Ind.), 88 N. E. 365.
Dockstader *vs.* Roe (Del.), 55 Atl. 341.
Yeaker *vs.* Yeaker, 4 Met. (Ky.), 33.
Opel *vs.* Shoup, 100 Iowa 407, 37 L. R. A. 583, 69 N. W. 560.

[21] Holmes *vs.* Jennison, 14 Peters 540.

[22] 5 How. 504.

[23] 7 How. 283.

theory that the treaty-making power does not extend to the subjects which by the Constitution are ordinarily committed to the regulative jurisdiction of the states. In all of these cases there were opinions by several of the justices of the court, and it does not appear that the language used was approved by the majority. In fact, in the Passenger Cases, the language of Chief Justice Taney was used in a dissenting opinion. These decisions, however, do not purport to overrule the earlier decisions of the court to the contrary and have never been followed by the court since that time. They were rendered at a time, now happily past, when the country was divided by an overwhelming issue which darkened the political sky and clouded the judgments of men. This undoubtedly had its effect upon the decisions of that great court, but the later decisions have placed at rest whatever doubt may have existed.

The Constitution confers upon the federal government, in unqualified terms, the power to make treaties and prohibits the states from making any treaty with foreign states. What reason is there for saying that the treaty-making power is confined to matters which under the Constitution Congress may legislate upon, or that such treaties may not touch upon any subject which, as between Congress and the state governments, in ordinary matters is reserved to the latter? Take, for instance, the question of commerce. There is an interstate and international commerce, the exclusive regulation of which is in Congress. There is an intrastate commerce which is exclusively within the jurisdiction of the states. And yet, even as to the regulation of interstate commerce, the Supreme Court has held that there are no limits except those imposed by the Constitution of the United States; and if the regulations of Congress made pursuant to this plenary power conflict with those of the states, the law of Congress is supreme and the state laws must give way. In regard to the matter of treaties, there is no divison of power. None of it is reserved to the states. Unless, therefore, the federal government may make a treaty regulating the activities of foreign citizens in the states, no regulation can take place, for the states may not make such a treaty and Congress may not

legislate upon the subject. Congress does not obtain its right to legislate upon the subject through any other provision of the Constitution than under the treaty-making power. As well might it be said that because the states have power to regulate domestic commerce, the general government could not make a treaty giving foreign citizens the right to travel on the intrastate railways or make use of any of the other conveniences of modern civilization necessary to the comfort and sustenance of such citizens when traveling in this country. Of course in the absence of action by the federal government by treaty, the states may regulate the ownership of real estate within their borders, by citizens of foreign countries. In the control of international and interstate commerce, the regulation of the federal government is necessarily exclusive. The intention was to permit the free flow of such commerce unrestrained by the states. But the question of the status of foreign citizens within the United States, their right to engage in business and own property, may or may not be regulated by treaty. It may well be the policy of the federal government to leave this to the states. There are many other subjects likewise which it might be found inexpedient for the government to control by treaties with foreign nations. But the power exists, and whenever in the judgment of the President and the Senate it becomes necessary for the federal government to exercise this prerogative, it is undoubtedly conferred by the Constitution.

It is a principle of practical construction,—the force of which all courts and lawyers recognize in the interpretation of constitutional and statutory provisions,—that where a people, without question, have exercised such a power, and especially where it is in harmony with the laws and usages of nations, such practice is of great weight in arriving at the true construction of the constitutional provision.

The fact that our government has from the beginning made treaties regulating matters which, as between the federal government and the states, are ordinarily within the jurisdiction of the latter, is very significant. We have seen that during the early days of the republic, at the time these constitutional pro-

visions were being formed, the government exercised the right to make such treaties. It is equally true that it has continued to do so to the present time. In 1870 a treaty was negotiated with the Republic of Salvador,[24] which was in existence until 1893, by which the citizens of each country resident in the other were guaranteed the right to purchase and hold lands and to engage in trade, manufacture and mining.

Thomas F. Bayard, when Secretary of State during President Cleveland's first administration, in discussing the subject said:

"That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court of the United States (citing cases); and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this department to deny that the treaties now in existence giving rights of this class to aliens may in its municipal relations be regarded as operative in the States."

During the very next year he negotiated a treaty with Peru,[25] the 11th Article of which guaranteed to the citizens of each country the liberty to dispose of their real estate within the jurisdiction of the other, by donation, testament or otherwise, and providing that the heirs should succeed to such real estate whether by testament or *ab intestato*.

Nearly every one of our treaties contain provisions, varying in form, regulating some one or other matter which is ordinarily within the jurisdiction of the state, and which, by the Constitution, is not committed to the Congress other than by the treaty-making clause. These provisions regulate the ownership and descent of land by inheritance or testament, the latter being a subject which has always been exclusively within the jurisdiction of the states, the right of foreign consuls to administer the estates of their deceased countrymen or to intervene in such administration,[26] the right to engage in business, to own and

[24] Treaties and Conventions, 1537.
[25] Treaties and Conventions, 1431.
[26] Rocca *vs.* Thompson, 223 U. S. 317.
In re Lombardi, 138 N. Y. S. 1007.
Consul *vs.* Westphal (Minn.), 139 N. W. 300.

dispose of personal property situated within the states, to travel and enjoy the same privileges as citizens of this country, and granting to foreign citizens free and open access to the courts of justice of the various states. It is true that at the present time a large number of our treaties contain provisions that should the property consist of real estate, and the heirs, on account of their character as aliens, be prevented from entering into possession of the inheritance, they shall be allowed a certain time in which to sell and dispose of the property and withdraw the proceeds; but the very right to inherit real estate within the states and to sell and dispose of it and withdraw the proceeds, in violation of state laws, when granted by treaty, is as much an interference with domestic concerns as any other and cannot in principle be distinguished from the right to own real estate.

The student of government, thoughtfully considering the circumstances under which this treaty-making power was conferred, the practice of nations, and especially of our own country, the decisions of our courts, the expressions of statesmen and publicists, can have little difficulty in arriving at the conclusion that the power of the federal government to protect citizens of foreign countries in our midst is plenary. And yet we have been shamefully negligent in many instances in giving this protection. I am persuaded that the humiliating subterfuge resorted to by some of the secretaries of state to escape this responsibility is owing to the fact that Congress has neglected to provide legislation to punish violations of treaty rights. The subject has been brought painfully to the public mind many times during the last thirty years. In 1880 Chinamen were mobbed at Denver, and at Rock Springs, Wyoming, in 1885. Italians were lynched in New Orleans in 1891, and again at Rouse, Colorado, in 1895. Mexicans were lynched in California in 1895, Italians at Tallulah, Louisiana, in 1899, and again at Erwin, Mississippi, in 1901. Demands of foreign governments in many of these cases were met by the claim of the Secretary of State that the punishment for such offenses was exclusively within the power of states, over which the federal government had no control. Notably was this the case in the Mafia riots, in Louisiana, in 1899, when Secretary Blaine said:

"If it shall result that the case can be prosecuted only in the state courts of Louisiana, and the usual judicial investigation and procedure under the criminal law is not resorted to, it will then be the duty of the United States to consider whether some other form of redress may be asked."

It is unnecessary to add that the Secretary came to the conclusion that the punishment for this offense was exclusively within the jurisdiction of Louisiana, but only because the Congress had neglected to pass legislation making such violations of our treaties criminal offenses remedial in the federal courts. Is it any wonder that the Italian government expressed surprise at this remarkable doctrine, and that in the note of Marquis Rudini to the Italian Minister in Washington he said:

"Let the Federal Government reflect on its side if it is expedient to leave to the mercy of each state of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

As the distinguished Senator, Honorable Elihu Root, said in 1910, our government is practically defenceless against claims for indemnity because of our failure to extend over these aliens the same protection that we extended to our own citizens, and the final result of the correspondence in each case has been the payment of indemnity for the real reason that we have not performed our international duty. Presidents Harrison, McKinley, Roosevelt and Taft each urged upon Congress the passage of a statute conferring on the federal courts jurisdiction to punish such violations of federal treaties by citizens of the various states, but to the present time Congress has not acted. Undoubtedly under decisions of the Supreme Court had such treaties, in addition to general guaranties to foreign citizens, contained explicit provisions for the punishment of offenses thereunder by the federal courts, such treaties would have had the effect of laws and the federal courts would have had jurisdiction, but the trouble is that these treaties have only contained provisions pledging the faith of the government in general terms, and have not contained explicit provisions for the punishment of such offenses. But the faith and honor of the nation are

pledged to their enforcement, and it is as much the duty of Congress to enact legislation to carry into effect these provisions of our treaties as it is to appropriate money and enact other legislation which Congress has always done to carry out the provisions of our international agreements. The result has been that the only recourse foreign nations have had, has been to demand indemnity for such injuries, which this government has always recognized and paid. No nation claiming the high prerogative of the treaty-making power has a right to shield itself behind the claim that one of the constituent states of the Union has violated the treaty, and that the central government has no authority to redress the grievance. It is a position that we resented when Brazil, in 1875, denied its accountability for the injury of an American citizen because it had been inflicted by one of the provinces. Secretary Fish said:

"You represent that the facts as set forth in the memorial of the claimant are admitted by that government, which, however, denies its accountability and says that the province where the injury to Mr. Smyth took place is alone answerable. Supposing, however, the case to be a proper one for the interposition of this government, the reference of the claimant to the authorities of the province for redress will not be acquiesced in. Those authorities can not be officially known to this government. It is the imperial government at Rio de Janiero only which is accountable to this government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a state."

I do not mean from anything I have said that our country should admit indiscriminately alien races to engage in industry and own property. But what I do mean is that this is a national question; that the federal government alone has the power to exclude them from the states; and if admitted, to decide on what terms and conditions this should be done.

It may, however, be said that if there are no implied limits to the treaty-making power, the President, by and with the consent of the Senate, might dismember the Union, abolish the

structure of government guaranteed by the Constitution, or convey away the territory of the states.

These arguments were advanced time and time again in the Constitutional Convention, and in the conventions of the various states called to consider the adoption of the Constitution, and there are expressions of the courts to the effect that the treaty making power is limited by these guaranties of the federal Constitution. This, however, is an academic question, because it is not within human probability that there can ever come before the Federal Court the question of the validity of a treaty made by this country by which it surrenders or changes its form of government, or by which any of the prerogatives of the federal government are taken away, or republican form of government destroyed in the states. When the time comes, if ever it shall, that such a demand is made, it will be backed by a military power to enforce it rather than by the untrammeled exercise of the treaty-making power.

Considering the subject, however, from the academic view, certain principles are easily deduced. That the granting or purchase of territory is clearly within the treaty-making power is demonstrated by the law and usage of nations, and by the practice of our own country.[27] Undoubtedly it is not within the treaty-making power for the President and Senate to change the form of government, or to stipulate away any of the fundamental prerogatives of the federal government. These are guaranteed by provisions of the federal Constitution co-ordinate with the treaty clause. A treaty abdicating the functions of the Supreme Court of the United States, if the making of such a treaty can be imagined, would undoubtedly be declared unconstitutional because the provisions of the constitution creating the departments of government are of equal force and effect with that conferring the treaty-making power. These questions can only be settled by the arbitrament of war, but the other questions are those pertaining to the administration of the law in the courts of the country. They are likely to arise at any time and disturb the

[27] Am. Ins. Co. *vs.* Canter, 1 Peters 542.

peace of nations unless speedily settled on well recognized principles in the courts of the contracting governments. It is of the highest importance that our country, one of the great English-speaking peoples, claiming an advanced position among the nations of the earth in the science of enlightened government, in the principles of international law, in education and in Christianity, should be ever scrupulous in keeping its treaty obligations. They are as sacred as the private obligations which arise between man and man, in the manifold duties and relations of life in organized society. They are of higher importance in the development of world civilization because they lie at the very foundation of peace and good order and maintenance of those lasting principles of international law which in the science of modern governments are taking the place of war in the settlement of disputes. We can have little influence in the great movement for world peace if we are neglectful in keeping our own treaty obligations, for the stability of international law and the fulfillment of national obligations is as necessary to the peace of the world as the stability and maintenance of law and order is necessary to the peace and prosperity of society. Law is the embodiment of the highest ideals of civilization. It has governed the relations of men in the most primitive and savage state, and in the modern and highest developed society. Before history recorded and left to succeeding generations the doings of men, law was the governing power and controlling influence of communities and nations. With the growth of government, the uplifting of physical and social conditions, law has been keeping pace with the march of progress. Its invisible forces dominate and control nations, man in all his relations in society, the tremendous transactions of modern economic life, and the minutest details of our social and industrial fabric. It is all-pervading and ever-present. Without it there is no government, no social order, no home. Its administration is the highest and noblest duty of man to his fellows. Its purity and stability are necessary to the peace, happiness and prosperity of peoples. Its corruption is the destruction of the state and of the nation.