WILL THE CALIFORNIA ALIEN LAND LAW STAND THE TEST OF THE FOURTEENTH AMENDMENT?

The Fourteenth Amendment has had the most intricate and the most interesting history of any part of our Constitution. Adopted through the pressure caused by a concrete social and political situation—the chaotic condition of the South at the close of the Civil War—we can see now that it was little more than a war measure for the relief of the negro race. It served this purpose only as a temporary expedient. After a long period of comparative inactivity it suddenly sprang into prominence as a measure to protect the corporations—chiefly of the public service type—from state regulation and control.[1] In this capacity it is now showing great vitality. Since the recent decision of the Supreme Court in the celebrated *Minnesota Rate Cases*[2] the railroads now have no appeal from state regulation of intrastate rates except under the Fourteenth Amendment.

The Japanese race question on the Pacific Coast presents to us the most recent as well as the most serious problem that has arisen for a long time under this provision of the Federal Constitution. To this we shall now give our attention.

In 1900 there were 10,151 Japanese in California. In 1910 there were 41,356, and in 1912 the figures are given at 58,000. In the latter year they owned 12,726 acres of land and leased 18,000 acres in addition.[3]

The Californians, seeing that the Japanese could live much more cheaply than the native population, while at the same time working just as hard and just as efficiently, have, after much agitation, passed a law the purpose of which is to prevent the Japanese from outstripping and ultimately supplanting them in the struggle for existence. The question is at bottom an economic one. Out of it, however, grow many complications—social, political and diplomatic.

The race element forms an important factor in the problem. The Japanese are a proud and sensitive people. They are capable

[1] See my vol., "The Fourteenth Amendment and the States", Little, Brown & Co., 1912.

[2] Decided June 9, 1913.

[3] Report of the State Commissioner of Labor.

of the highest physical and intellectual efficiency. We need not therefore discuss the question whether the one race be superior to the other. There remains the more important and fundamental question of race compatibility. The Californians feel very strongly that there can be no efficient coöperation between Japanese and Americans. And seeing the possibility of a greater increase of Japanese immigration, they have fears for the future. The Federal Government itself has, by denying citizenship to the Japanese, tacitly admitted the existence of race incompatibiliy.

This law was enacted for the manifest purpose of preventing the Japanese from gaining any further foothold on the soil of California. It applies also to the Chinese, but they being excluded from this country by the immigration laws, need not here be considered. The law reads as follows:

An act relating to the rights, powers, and disabilities of aliens and of certain companies, associations, and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith.

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in Section 1 of this act may acquire, possess, enjoy, and transfer real property, or any interest therein, in this state in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may, in addition thereto, lease lands in this state for agricultural purposes for a term not exceeding three years.

Sec. 3. Any company, association, or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in Section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, and convey real property, or any interest therein, in this state in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects and not otherwise, and may, in addition

thereto, lease lands in this state for agricultural purposes for a term not exceeding three years.

Sec. 4. Whenever it appears to the court in any probate proceeding that, by reason of the provisions of this act, any heir or devisee can not take real property in this state which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such real property to such heir or devisee, shall order a sale of said real property to be made in the manner provided by law for probate sales of real property, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such real property.

Sec. 5. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in Section 2 of this act, or by any company, association, or corporation mentioned in Section 3 of this act, shall escheat to and become and remain the property of the State of California. The attorney-general shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by Section 474 of the Political Code, and Title 8, Part 3, of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings the title to such real property shall pass to the State of California. The provisions of this section and of Sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien company, association, or corporation acquiring the same in such manner.

Sec. 6. Any leasehold or other interest in real property less than the fee hereafter acquired in violation of the provisions of this act by any alien mentioned in Section 2 of this act, or by any company, association, or corporation mentioned in Section 3 of this act, shall escheat to the State of California. The attorney-general shall institute proceedings to have such escheat adjudged and enforced as provided in Section 5 of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property ,and enter judgment for the state for the amount thereof, together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold or other interest in the manner provided by Section 1271 of the Code of Civil Procedure. Out of the proceeds arising from such sale the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein.

Sec. 7. 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.

Sec. 8. All acts and parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed.

Our existing treaty with Japan was made in 1911. Article I thereof reads as follows:

"The citizens 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 or 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."

We are not here considering the diplomatic question as to whether this law violates the treaty in fact or in spirit. This part of the treaty is here inserted for the purpose of showing what rights and privileges as to real property the Japanese are allowed under Section II of the law. That section is so phrased that a study of the treaty is essential to an understanding of the extent of its operation.

The Japanese claim, among other things, that the law is violative of the Fourteenth Amendment to the Constitution of the United States in that it is discriminatory legislation. The exact clause involved reads as follows; "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." It must be clearly borne in mind that this protection is not limited to citizens, but applies to all persons whatsoever. All aliens are of course persons within the meaning of this clause as well as all foreign corporations and domestic corporations owned by aliens.[4] Now it is contended that the classification of aliens into aliens entitled to citizenship and into aliens not entitled to citizenship is an artificial and arbitrary selection, the only purpose of which is to prevent the Japanese from acquiring title to real property in California.

The question of discriminatory legislation by the states of course presents now no new principle to the Supreme Court of the United States. The only problem involved is the interpretation of the facts of this particular controversy in relation to the

[4] Cf. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S., 394, and *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 121, declaring a corporation to be a person under this clause.

judicial history of this clause of the Constitution. What attitude the court will take nobody can presume to say, but we may, by looking back at some of the decisions involving similar problems, attempt some forecast of the probabilities.

From the adoption of the amendment to the close of the fall term of 1910 of the Supreme Court, Federal intervention thereunder has been sought under the "equal protection" clause two hundred and seventy-three times. Sixty-eight of these cases arose in the period between 1868 and 1895 and two hundred and five from 1896 to 1910. During the entire period the Supreme Court of the United States annulled state action twenty-five times. In eleven of these cases the "equal protection" clause was the only question involved, while in the fourteen others this clause was considered along with the "due process of law" clause. This does not include thirty instances of intervention under the "due process" clause alone, as the questions involved in the latter cases related to confiscatory state action rather than to action complained of as discriminatory.

We shall now consider briefly the subject matter of all of those cases in which state action was annulled as discriminatory,[5] Under the "equal protection" clause alone:

1. The right of negroes to sit on juries. There have been six cases before the Supreme Court on this point, four arising during the period of reconstruction in the South; one in 1899; and one in 1903.[6] The net result of these decisions is that negroes cannot be excluded from jury service solely because of their race or color. They may be excluded on other grounds, such as lack of education, for instance, but race or color itself cannot be made the basis of a classification.[7]

2. Discrimination against the Chinese engaged in the laundry business in San Francisco.[8] We shall give this case further consideration.

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[5] Cf. my paper, "Federal Intervention Under the Fourteenth Amendment," *Yale Law Journal,* April, 1912.

[6] *Strauder v. West Virginia,* 100 U. S., 303; *Ex parte Virginia,* 100 U. S., 339; *Neal v. Delaware,* 103 U. S., 370; *Bush v. Kentucky,* 107 U. S., 110; *Carter v. Texas,* 177 U. S., 442; *Rogers v. Alabama,* 192 U. S., 226.

[7] See my paper, "The Fourteenth Amendment and the Nego Race Question," *American Law Review,* December, 1911.

[8] *Yick Wo v. Hopkins,* 118 U. S., 356.

3. Regulation of stock yards in Kansas. Discrimination against the Kansas City Stock Yards Company.[9]

4. An anti-trust law of Illinois which exempted agricultural products and live stock in the hands of the producer from the operation of its provisions.[10]

5. Assessment for taxation by the Cook County Board of Equalization under the laws of Illinois. Discrimination against certain corporations.[11]

6. Classification of corporations under the laws of Alabama into foreign corporations and domestic corporations and making certain provisions as to taxation of the former while exempting the latter.[12] We shall have occasion to speak further of the principles involved in this case.

The following cases involved the interpretation of both the "equal protection" and the "due process" clauses of the Fourteenth Amendment. That is to say, the question of discrimination and the question of confiscation were considered together. It is quite probable that this situation may arise as a secondary consideration out of the present problem. An individual Japanese who purchases a piece of realty would lose it under the present law by escheat. He could claim that as a result of this discriminatory legislation his property was confiscated by the state. Although often thus impleaded it is logically unnecessary to use one of these clauses to buttress the other. However, it sometimes happens that the question of discrimination and the question of confiscation arise independently in the same controversy.

1. A Los Angeles ordinance prescribing territory for the location of gas works.[13]

2. A New Orleans ordinance imposing a license tax upon a foreign corporation.[14]

3. Taxation of railroad cars in Kentucky.[15]

4. Franchise taxes on corporations in California.[16]

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[9] *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79.

[10] *Connoly v. Union Sewer Pipe Co.*, 184 U. S., 540.

[11] *Raymond, Treas. v. Chicago Traction Co.*, 207 U. S., 20.

[12] *Southern Railway Co. v. Greene*, 216 U. S., 418.

[13] *Dobbins v. Los Angeles*, 195 U. S., 223.

[14] *American Sugar Refining Co. v. New Orleans*, 187 U. S., 277.

[15] *Union Transit Co. v. Kentucky*, 199 U. S., 194.

[16] *Southern Pacific Railroad Co. v. California*, 118 U. S., 109.

5. Charter fees for foreign corporations in Kansas.[17]
6. The same legislation in Arkansas.[18]
7. The collection of claims against railroads in Texas.[19]
8. The regulation of railroad rates in Texas,[20] Minnesota,[21] Kentucky,[22] Nebraska,[23] and Michigan.[24]

The general doctrine evolved from these cases is that the state law must by its terms and by the manner of its enforcement operate equally upon all persons of the same class. The class of persons intended to be affected by a particular law must actually exist as a real distinct class. Classification must exist in fact as well as in name and the final distinction between classification and selection must in each concrete case be left to the operation of the rule of reason in the Supreme Court of the United States.

In the well-known case of *Yick Wo v. Hopkins*,[25] the Federal Supreme Court declared an ordinance of the city of San Francisco void in that it provided for a manner of enforcement which allowed a discrimination against the Chinese. In that case the court went beyond the letter of the law and considered its real purpose. That purpose was, as everyone knew, to take the laundry business out of the hands of the Chinese. In the opinion, at page 369, the Court said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, wthout regard to any difference of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws."

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[17] *Western Union Telegraph Co. v. Kansas*, 216 U. S., 1; *Pullman Co. v. Kansas*, 216 U. S., 156.

[18] *Ludwig v. Western Union Telegraph Co.*, 216 U. S., 146.

[19] *Gulf Colorado & Santa Fe Ry. v. Ellis*, 165 U. S., 150.

[20] *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362.

[21] *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U. S., 418.

[22] *Covington Turnpike Co. v. Sanford*, 164 U. S., 578, and *Silver v. L. & N. R. R. Co.*, 213 U. S., 175.

[23] *Smyth v. Ames*, 169 U. S., 466, and *Prout v. Starr*, 188 U. S., 537.

[24] *Lake Shore & Michigan Railway v. Smith*, 173 U. S., 684.

[25] 118 U. S., 356.

The question immediately arises as to whether this law under consideration, which is manifestly discriminatory as to the Japanese, is, in the last analysis, based on considerations of race, color, or nationality. Is not the dividing of aliens into two classes, the one eligible to citizenship and the other ineligible, a mere subterfuge to evade the operaton of the Fourteenth Amendment? It is doubtful if this classification will stand the test even as it is expressed in the letter of the law. It is certain to fail if the court goes beyond the letter to the real purpose of this legislation.

In *Southern Railway Co. v. Greene,*[26] the Court said: "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation." This was a case in which the State of Alabama attempted to classify corporations doing business in the state into foreign corporations and domestic corporations, imposing certain burdens on the former from which the latter were left free. At page 417, the Court said: "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." In this case the Alabama law was declared void in that the discrimination was unreasonable.

If then there can be no classification of corporations engaged in the same business within the boundaries of the state into those foreign and those domestic, can there be a classification, as is attempted under the present law, of corporations engaged in the same business within the state into those whose members are citizens or aliens eligible to citizenship, and into those the majority of whose members are aliens not entitled to citizenship?[27]

[26] 216 U. S., 412.

[27] See Section 4 of the law.

Does eligibility to citizenship form a sufficient basis for classification in view of these decisions? And does it strengthen the case of the state that this classification is based proximately on the treaty rights of the aliens affected? The problem finally resolves itself into this question: Can persons within the jurisdiction of the state be put into a class by themselves because, for any reason whatever, they cannot become citizens and thus subjected to special legislation imposing burdens not imposed upon other persons? In the opinion of the writer they cannot. The California law will in all probability be declared void, because to uphold it would limit the protection of the Fourteenth Amendment to citizens and to those eligible to citizenship. To hold otherwise would mean a new departure for the Supreme Court and the way would then be opened up for making classifications based upon the possession, or lack of possession, of other political privileges.

In this discussion we have considered the law as it actually is rather than as it ought to be. From the standpoint of political science there is much to be said as to the philosophical background of the Fourteenth Amendment and as to the political philosophy which has grown up around it in the courts. We have not here concerned ourselves with the wisdom and the expediency of this part of the Federal Constitution for these questions cannot enter into the strictly legal phase of the problem before us.

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