proclaimed July 2, 1904, the language of the act of Congress of March 2, 1901, and of Annex III, of the Cuban Constitution, appears in the exact words of the law and the Constitution in Article III of the treaty (Treaties in Force, 1904, p. 954). The lawfulness of the intervention appears from two laws of the United States, the act of Congress and the treaty, and as the President "shall take care that the laws be faithfully executed" (Constitution, Art. II, sec. 111), it follows that the President was not only permitted but by the Constitution and his oath the duty was imposed upon him to intervene in obedience to the laws with whose execution he was charged.

The act of the President in intervening and appointing a provisional governor and government was not only constitutional according to the Constitution of Cuba, but was lawful according to the laws of the United States, and the provisional government established and now existing in Cuba in pursuance of the Cuban Constitution, is the constitutional government of Cuba. It is therefore the government of Cuba; it is not the government in any sense of the United States. It follows, therefore, that Cuba is in possession of its own government and is not occupied by the United States.

Such is the theory of the intervention and such is the actual status. This republic of Cuba exists as a separate and independent international entity; its diplomatic ministers and consuls remain under the provisional government; foreign ministers and consuls remain in Cuba as under the administration of Palma, and exercise their ordinary and legitimate functions as if no change had occurred.

The American minister remains in Havana to represent the interests of the United States and to serve as the intermediary between the provisional government of Cuba and the United States.

The personnel of the government has changed; the constitutional administration of Palma has been succeeded by the no less constitutional government of Magoon and the Cuban republic is intact.

THE JAPANESE SCHOOL QUESTION

The establishment of separate schools for Japanese students and the exclusion of Japanese students from the ordinary public schools of San Francisco by local ordinance based upon a law of the state of California raises the question of the rights and privileges of Japanese subjects in the United States under the treaty of November 22, 1894, concluded between the United States and Japan.

Viewed in the light of the treaty the question is one of international law; from the standpoint of the Californian authorities the question is

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one of constitutional law involving the relation of the state of California to the United States and the rights granted to the United States on the one hand and the rights reserved to the state, and therefore the states on the other. In numbers the Japanese involved are but a handful; but the principles involved and invoked concern the law of nations and the Constitution of the United States. While the seriousness of the contention precludes a summary treatment by way of comment, a paragraph may well state the issue and the authority upon which it is sought to be supported.

The Japanese claim the right accorded to the most favored nation by virtue of Article I of the treaty of 1894, the material portion of which is as follows:

> The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their person and property. * * *
>
> In whatever relates to rights of residence and travel * * * the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than natural citizens or subjects of the most favored nation. (Treaties in Force, 1904, pp. 474–5.)

The Japanese contend that the rights and pivileges of education are necessarily incident to residence and travel, and that the rights and privileges specified in the article are the same, not equivalent privileges, liberties and rights enjoyed by native citizens or subjects or citizens or subjects of the most favored nation. British and German subjects are not segregated; and therefore the most favored nation treatment precludes other and different treatment from that of subjects of great Britain and Germany. This the local ordinance and statute of California deny them by establishing separate schools, and excluding them from the other public schools of San Francisco. Therefore, local ordinance and state statute are, it is contended, in violation of the express provision of Article I of the treaty, and as a treaty is superior to local ordinance and state statute it necessarily follows that the local ordinance and state statute are overridden by the treaty. To sustain this contention Article VI, clause 2, is pointed to, which reads as follows:

> 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 a treaty made under the authority of the United States; that is, by

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by the coöperation of the President and two-thirds of the senators present (Constitution, Article II, clause 2) is supreme and supersedes the provisions of state constitutions and statutes, inconsistent with the treaty is established doctrine. (Hamilton v. Eaton, 1796, 2 Martin's N. C. Rep. 83, per Ellsworth, C. J.; Ware v. Hylton, 1796, 3 Dall. 199; Hauenstein v. Lynham, 1879, 100 U. S. 483; People v. Gerke, 1855, 5 California, 381.)

The California authorities contend, on the other hand, that the treaty does not give expressly or by implication the right to education in public or private schools, for education is not in any just or proper sense of the word incidental to travel or residence. If, however, such right can be claimed under the treaty, California insists that the Japanese have the right in question inasmuch as they are furnished equivalent if not identical school facilities. It is also maintained that the Japanese cannot claim greater rights under the treaty than those enjoyed by native born American citizens and as segregation of colored and Indian children is not regarded as an unconstitutional discrimination against the specified classes, the Japanese cannot well claim identical as distinct from equivalent school facilities.

A less substantial argument is that Article II of the treaty of 1894 expressly subjects the Japanese to the police powers:

> It is, however, understood that the stipulations contained in this and in the preceding Article [I] do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two conventions.

The police power was not, it is said, expressly or impliedly granted; hence it resides in the states in accordance with Amendment, Article X:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people.

It should not be forgotten, however, that the treaty-making power was confided by the Constitution to the President and two-thirds of the Senators present, and that the treaty-making power, as recognized by the Constitution is the treaty-making power existing in Great Britain at the framing of the Constitution. The framers in using a technical expression used it, unless otherwise specified, in the technical sense of English jurisprudence. As the term is used without qualification or limitation of any kind, it follows that the treaty-making power is sovereign and is not subject to limitations placed upon other powers exercised by the government. In a word, the exercise of the treaty-making power which the people, not the states, possess is vested in the organ of

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the people for this purpose—the President and Senate, and it is either by its nature or in fact unlimited.

From the summary of the arguments for and against the action of the San Francisco authorities, it will be seen that the question is intricate and technical, and the decision of a test case in state or federal court will be awaited with uncommon interest.

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