Volume 46
Issue 4 *Dickinson Law Review - Volume 46, 1941-1942*

5-1-1942

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D. Barlow Burke

FEDERAL TREATIES AND STATE SOVEREIGNTY

D. BARLOW BURKE*

In a governmental system such as ours, where certain powers are delegated to the federal government and others are reserved to the states, it is inevitable that there should be a borderline between the two where overlapping occurs. This is the situation when federal control of foreign affairs conflicts with the police power of the states. Interesting problems of constitutional law and of international law as judicially applied are involved in this conflict and it is with cases illustrative of this contest that this paper will deal.

Much of the official intercourse of the United States with foreign nations is embodied in treaties. It is when the provisions of these treaties clash with what a state deems to be its sovereign rights that the courts are called upon to decide which right is supreme.

By express provision of the United States Constitution, a treaty is superior to a state constitution. Article VI, Section 2 of the former instrument reads: "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 law of any state to the contrary notwithstanding." Therefore, insofar as the provisions of a state constitution and a treaty are conflicting, the latter will control.

In the course of a very extended opinion rendered in the case of *In Re Parrott*, 1 Fed. 481 (1880), Judge Sawyer of the United States Circuit Court of California said, "The states have surrendered the treaty-making power to the general government, and vested it in the president and senate, and when duly exercised by the president and senate, the treaty resulting is the supreme law of the land, to which not only state laws but state constitutions are in express terms subordinated."

An early case to the same effect is that of *Gordon v. Kerr*.[1] This was an action of ejectment to recover 299 acres of land located in Pennsylvania. In the course of his charge to the jury, Justice Washington, sitting as a Circuit Justice, said, "Even that constitution (The Constitution of Pennsylvania) may yield to the treaty of peace (between the United States and Great Britain) which is supreme. The fifth article stipulates that Congress should earnestly recommend to the states a revision of their confiscation laws, so as to render them consistent with justice and equity,

*Assistant District Attorney, Philadelphia; Assistant Professor of Law and Government, Drexel Institute of Technology; Instructor of Political Science, University of Pennsylvania; Former Chairman, Civil Rights Committee of Pennsylvania Bar Association; Former Attorney in Department of Public Welfare, Philadelphia; Lieutenant, United States Naval Reserve.

[1] 1 Wash. C. C. 322 (1806), reported in 10 Fed. Cases 5,611.

etc., and should also recommend to them the restitution of confiscated estates. . . . If the states thought proper to restore, their power to do it grew out of this treaty; and so far neutralized any article of their constitution, which prohibited, in other cases, the exercise of such right".

A treaty cannot be the supreme law of the land, that is, of all of the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislative body) must yield to a treaty, it cannot be questioned that an act of the state legislature, which is of less power, must also yield. Thus, a statute of any state, escheating lands of intestate aliens, where a treaty has been entered into between the United States and the aliens' country, is void if the terms of the statute controvert the treaty. This is so since the treaty, like the federal constitution, is the supreme law of the land.

The case of *Hauenstein v. Lynham*[2] is an illustration of this. This was an action by citizens and residents of Virginia, heirs of a person who had died leaving property which had been adjudged to have escheated to the state, to recover the proceeds of such property. The Virginia courts held that, under Virginia law, the proceeds of the property sought to be recovered belonged to the state; the United States Supreme Court reversed this judgment, holding that the Virginia law in question conflicted with a treaty between the United States and the Swiss Confederation. In its opinion, the court says, "It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the constitution of the United States."

The above case should be sharply distinguished from *In Re Anderson's Estate*,[3] which holds that a state statute imposing an inheritance tax on estates passing to non-resident aliens where none is imposed on residents does not conflict with the seventh article in the treaty between the United States and Denmark;[4] "The United States and his Danish Majesty mutually agree, that no higher or other duties, charges or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally either upon the inheritance of such property, money or effects, or otherwise, than are or shall be payable in each state, upon the same when removed by a citizen or subject of such state respectively."

In the *Anderson* case, a citizen of Denmark, domiciled in Iowa, died intestate, leaving as his only heir at law his mother, a citizen and resident of Denmark. This estate consisted entirely of personal property. The court held that the tax imposed

[2] 100 U. S. 483 (1880).
[3] 218 N. W. 140 (1928).
[4] 8 Stat. 340.

by the Iowa statute, which tax was alleged to be contrary to the treaty provision set forth above, was a tax not on property or estate, but rather upon the succession or right to take by succession. In other words, a death or excise tax is held not to be a tax on property so as to violate the express provisions of a treaty between the United States and a foreign country, when the property in question passes from a resident alien to a non-resident alien. This case illustrates that state legislation may in some instances vary or alter the clear spirit and intention of a treaty without violating its strict letter, and thus in fact make the state law superior to a federal treaty. The court points out, however, that if the intestate's mother had been a resident of Iowa, even though not a citizen of that state, the statutory provision imposing the tax would not have applied. This case has been overruled by the decision in *Neilson v. Johnston,*[5] which held that the statutory provision in question violated the treaty with Denmark. The reasoning of the court in the *Anderson* case nevertheless remains interesting. In the *Neilson* case Mr. Justice (now Chief Justice) Stone, delivering the opinion of the Supreme Court said, *inter alia*: ". . . as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments." This case involved a dispute between the administrator of the estate of a citizen of Denmark, *resident in Iowa* at the time of his death, and the taxing authorities of that state. The administrator claimed the benefit of the foregoing treaty clause while the state claimed that the estate was subject to the local inheritance tax law. The court, in the language of Justice Stone, asserted the prevalence of the treaty.

A quite recent case similar in facts and principle was that of *Engen v. State Bank of Harvard,*[6] decided in 1929. This case was decided by the Supreme Court of Nebraska, and concerned the effect of a treaty between the United States and Norway. The treaty provided, *inter alia*: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even ab intestato either in person or by their attorney."

The question is; can the terms of the Nebraska homestead law limit or restrict the operation of this treaty? The court answered this question in the negative. The Nebraska homestead statute imposed certain restraints on the alienation of land and certain conveyances executed by Christian Knudson, an alien domiciled in Nebraska, were sought to be set aside as contrary to the homestead law. The court said that the treaty rights of aliens must be enforced by the state courts without regard to statutory provisions. Therefore, though the provisions of the homestead act

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[5]279 U. S. 47.
[6]118 Neb. 105, 223 N. W. 664 (1929).

would apply to citizens of Nebraska and its limitations would be effective as to them, they cannot be effective as to domiciled aliens whose status is governed by treaty.

A case arising out of the Chinese Exclusion Act of 1888 gave Mr. Justice Field, of the United States Supreme Court, an opportunity to discuss the conflict between state and federal governments in the realm of foreign affairs. Although the case of *Chae Chan Ping v. U. S.*[7] was primarily concerned with a treaty and a subsequent and conflicting act of Congress, the opinion written by Mr. Justice Field discussed federal and state relations in an illuminating fashion. "While under our Constitution and form of government", wrote the Justice, "the great mass of local matters is controlled by local authorities, the United States in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory . . .". Quoting Chief Justice Marshall in the case of *Cohen v. Virginia,*[8] he continues: "The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." Justice Field in his opinion also quotes Mr. Justice Bradley in the case of *Knox v. Lee*[9] as follows: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is vested with powers over all the foreign relations of the country, war, peace and negotiations and intercourses with other nations; all of which are forbidden to the State governments . . .". The opinion of Justice Field continues in the following words: "The control of local matters being left to the local authorities and national matters being intrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests has been happily solved. For local interests, the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

Next, the question arises, does a treaty have superior sanctity over an act of Congress, where the latter is subsequent to the former in time? The answer to this question is in the negative, for it has been authoritatively held that where Congress passes a law, which in substance changes, modifies or repeals an earlier treaty between the United States and a foreign country, such law is valid and will govern in place of the treaty which has thus been wholly or partly superseded. In the *Head Money Cases,*[10] Mr. Justice Miller said: "So far as a treaty made by the United

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[7]130 U. S. 581 (1889).
[8]6 Wheat. 264 (1821).
[9]12 Wall. 457 (1871).
[10]112 U. S. 580 (1884).

States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." Where, however, the subsequent federal statute contains no explicit or substantial repealer of the prior treaty, the treaty is not considered to be repealed, as was held in *Frank Cook v. U. S.*[11]

The case of *J. Ribas y Hijo v. U. S.*[12] illustrates the principle that a treaty supersedes an earlier conflicting act of Congress. This action was brought in the United States District Court for the District of Puerto Rico, by a Spanish corporation to recover the value of the use of a merchant vessel taken by the United States in the port of Ponce, Puerto Rico, when that city was captured by the United States Army and Navy in 1898. The plaintiffs based their claim on a United States statute of 1887, which provided for the bringing of suits against the United States government. The court points out that whatever rights the plaintiffs might have had under this act were rendered nugatory by the treaty of peace between the United States and Spain, which treaty was ratified in 1899. In the words of Mr. Justice Harlan: "We may add that even if the Act of March, 1887, standing alone, could be construed as authorizing a suit of this kind the plaintiff must fail; for it is well settled that in case of a conflict between an act of Congress and a treaty, each being equally the supreme law of the land, the one last in date must prevail in the courts." Here the treaty is last in date. If the situation is reversed and the act of Congress comes later than the treaty, the principle is equally applicable and the provisions of the treaty that conflict with the later law will fall.

It is important to observe that the courts do not favor repeals by implication and only when the two are undoubtedly incompatible will the later treaty be construed as repealing the earlier act of Congress.

Returning to the matter of federal treaty-making power and state sovereignty, we come to the extremely important case of *Missouri v. Holland.*[13] The decision in this case is founded on a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act on the ground that the law is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment to the federal constitution and that the threatened acts of the defendant invade the sovereign rights of the states. The act provided for the enforcement of the terms of a treaty between the United States and Great Britain, dealing with the subject of protection to be given by both nations to specified classes of migratory birds.

Mr. Justice Holmes in his opinion points out that an earlier act of Congress that attempted by itself and not following a treaty to regulate the killing of migratory birds within the states had been held bad by a United States District Court in

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[11]288 U. S. 100 (1933).
[12]194 U. S. 315 (1903).
[13]252 U. S. 416 (1920).

the case of *United States v. Shauver.*[14] The arguments in that case were to the effect that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and the control was such that Congress could not constitutionally displace it. In the *Holland* case, however, the court refuses to accept the *Shauver* case as a true test of the treaty power of the federal government. Justice Holmes declares that "it is obvious that there are matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could", thus distinguishing between the two cases. In the *Holland* case, the act of Congress can be sustained so long as the treaty itself is valid on the ground that it is a necessary and proper means of executing the powers of the federal government. On the question of the treaty's validity, Justice Holmes expresses the opinion that "the treaty in question does not contravene any prohibitory words to be found in the constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment". The Tenth Amendment, it will be remembered, provides that "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." Justice Holmes decides that the treaty is not forbidden either expressly or impliedly by the terms of that amendment. He says: "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. . . . Here a national interest of very nearly the first magnitude is involved.' It can be protected only by national action in concert with that of another power. . . . We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops destroyed. . . . We are of the opinion that the treaty and statute must be upheld." Of similar import is the question as to whether the power of the President to conduct foreign affairs is subject to the limitation of the states' reserved powers. Space does not permit a complete discussion of this topic but a recent case is sufficiently in point to be illustrative of the general rule. Congress in 1934 authorized the President to forbid the sale of arms to Bolivia and Paraguay, then engaged in the bloody Chaco war. Pursuant to this grant of authority, the President placed an embargo on such shipments which was violated by the Curtiss-Wright Export Corporation. The company defended its action on the ground that Congress had illegally delegated legislative power to the executive.

In the case of *United States v. Curtiss-Wright Export Corporation,*[15] the Supreme Court held that the reservation of powers to the states, as contained in the Tenth Amendment, applied only to internal or domestic affairs. The power to conduct negotiations and dealings with foreign governments was solely a federal power and was exclusively vested in the executive branch of the federal government.

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[14] 214 Fed. Rep. 154 (1914).
[15] 229 U. S. 304 (1936).

Coming now to the question of the effect of a municipal ordinance upon a treaty, we find that the conclusion is in conformity with the above decisions regarding state statutes. This is the logical result, since municipal corporations are but agents of the state which created them. In the case of *Asakura v. Seattle*[16] it was held that an ordinance of the city of Seattle, Washington, contravening a treaty between the United States and Japan was unconstitutional. Mr. Justice Butler said: "The treaty is binding within the State of Washington. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws."

A study of the cases, however, convinces the student that despite the positive declarations made in the opinions cited, all judges are not agreed as to the absolute supremacy of a treaty over conflicting state laws. There have been eminent judges who seriously question the right of the federal government to do by treaty what it may not do by statute, that is, to regulate matters reserved to the states by the federal constitution. In the *License Cases*,[17] Mr. Justice Daniel, delivering a dissenting opinion, expresses his thought on the subject as follows: "Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation. . . . Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers. . . . A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."

Two years later, in a dissenting opinion delivered in the *Passenger Cases*,[18] Mr. Chief Justice Taney declared that the States have the absolute right to decide who shall or shall not have the right to reside within their respective boundaries. He wrote: "For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the states, then the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses and traffic and trade throughout the Southern States, in spite of any state law to the contrary. . . . It will hardly be said that such a power was granted to the general government in the confidence that it would not be abused. . . . And I cannot imagine any power more unnecessary to the general government and at the same time more dangerous and full of peril to the States."

Thus the eminent Chief Justice questions the absolute supremacy of a federal treaty over state law, and though his opinion is in the nature of *obiter dicta*, it is weighty and entitled to mature consideration.

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[16] 265 U. S. 332 (1924).
[17] 5 How. 504 (1847).
[18] 7 How. 283 (1849).

Matters of policy sometimes determine whether the federal government will insist upon the absolute supremacy of a treaty. For many years there was ill feeling in the state of California toward the Japanese immigrants who settled there. In 1907 and 1908, numerous Japanese school children were barred from the public schools and were required to attend separate schools, in distinct violation of the rights which had been secured to Japanese residents of the United States by treaty between the two nations. The United States government held that it was empowered to compel the state of California to observe the provisions of the treaty and refrain from the discrimination against the Japanese, but did not press this claim due to the hostile sentiment not only in California but also in other states. In the case of *Baldwin v. Franks*,[19] the attitude of the federal government was somewhat similar in dealing with a situation that involved discrimination against the Chinese. The Supreme Court of the United States held in that case that Congress has the power, under the federal constitution, to provide for the punishment of persons guilty of depriving the Chinese subjects residing in the United States of any of the rights, privileges, immunities or exemptions guaranteed to them by the Treaty of November 17, 1880, but that Congress had not made such provision in the laws sought to be enforced. Thus the federal government sidestepped the responsibility of enforcing treaty provisions which were binding on the federal and state governments as the supreme law of the land.

Too frequently the United States government has found itself in the embarrassing position of being unable to afford adequate protection to domiciled aliens who were the victims of mob violence within some state where racial prejudice and animosity was pitted against them. Here the clash between the theory of the supremacy of federal treaties and the police power of the state became most marked. Foreign governments have been unable to understand why the Federal government has refrained from giving the protection to their nationals which it has guaranteed to them by treaty solemnly entered into and duly ratified.

In 1922, the United States government declined to be a party to international agreements looking to a suppression of the white slave traffic on the ground that to enter into such treaties would be an infringement upon the rights reserved to the states. This is but one of the anomalous situations that our federal form of government has created in the field of foreign affairs. Dual sovereignty serves many an admirable purpose, and is the keystone of our constitutional system. Nevertheless, in the important area of external relations, it is sometimes the source of vexatious misunderstanding.

PHILADELPHIA, PA. D. BARLOW BURKE

[19] 120 U. S. 678 (1886).