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The appointment of committees was referred to the Executive Committee, and at a meeting held on May 13th, the Committee appointed the following:

Standing Committee on Selection of Honorary Members: George G. Wilson, Chairman; Charles Cheney Hyde, Ellery C. Stowell.

Standing Committee on Increase of Membership: Oscar S. Straus, Chairman; Philip Marshall Brown, Arthur K. Kuhn, John H. Latané, Cephas D. Allin.

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Committee for the Extension of International Law: Jesse S. Reeves, Chairman; Edwin M. Borchard, Charles G. Fenwick, Charles Cheney Hyde, Manley O. Hudson, Fred K. Neilsen, Quincy Wright.

The full text of all addresses, a verbatim report of the oral discussions, as well as the minutes of the meetings of the Executive Council and Executive Committee and the financial reports, are printed in the volume of *Proceedings*, which is ready for distribution to all members and others who have sent in the subscription price ($1.50).

GEORGE A. FINCH.

THE NEW IMMIGRATION LAW AND THE EXCLUSION OF JAPANESE

The Act approved May 26, 1924, to be cited as the "Immigration Act of 1924," is the first formal exclusion act adopted by the United States in respect to Japanese immigrants. A practical, as distinct from statutory, method of exclusion has been in effect since 1908 through the voluntary policy adopted by Japan in pursuance of the "gentlemen's agreement"; but after sixteen years of operation this method has now been superseded.

The terms by which the new policy of exclusion is made effective are concise. Section 13 (c) of the law of 1924 provides that "no alien ineligible to citizenship shall be admitted to the United States." Exceptions are made in favor of government officials, tourists, seamen, and persons coming for purposes of trade, who are not technically "immigrants," and in favor of immigrants previously admitted and returning after temporary absence abroad, ministers of the gospel and college professors who come to carry on their vocation, and students who enter for purposes of study, the latter groups being technically described as "non-quota immigrants." The group of ministers of the gospel and college professors may bring with them their wives and children under eighteen years of age.

As is well known, the naturalization laws of the United States were from the beginning limited to "free white persons," the only subsequent modification being made in 1875 in favor of aliens of African nativity and persons of African descent. After a series of decisions in the lower courts,[1] in which the term "white persons" was interpreted to mean persons of what is popularly known as the "Caucasian race," the Supreme Court of the United States finally decided, on November 30, 1922, in the case of Ozawa *v.* United States,[2] that one who is "of the Japanese race and born in Japan" was not eligible to citizenship. The exclusion from the United States, therefore, of aliens ineligible to citizenship is as specific in meaning as the exclusion of the Japanese nominatim.

A preliminary question of current interest, although only incidental to the legal issues involved in the new law, is raised by the conduct of Ambassador Hanihara in writing a note of protest to Secretary Hughes on April 11, 1924, while the bill was under discussion by Congress. The ambassador pointed out the existence of the gentlemen's agreement of 1907 and, while not questioning the sovereign right of the United States to regulate immigration, asked of the government "simply that proper consideration ordinarily given by one nation to the self-respect of another." In conclusion the ambassador expressed his realization, shared, as he believed, by Mr. Hughes, of the "grave consequences" which the enactment of the measure retaining the particular provision would bring upon the otherwise happy and mutually advantageous relations between the two countries.

The ambassador's letter was made public by the Secretary of State in an effort to avert legislation which Mr. Hughes had opposed from the start. Instead, however, of accomplishing that object, the letter was interpreted by both houses of Congress as a "veiled threat," with the result that the bill was promptly enacted into law, in the case of the Senate by a vote without roll call.

There is no doubt that as a matter of technical procedure it was in viola-

[1] In re Saito, 62 Fed. 126, appears to be the first case in which a Japanese was involved.

[2] For the text of the decision, see this JOURNAL, January, 1923, p. 151.

tion of diplomatic custom for an ambassador to express his views upon pending legislation, and the suggestion of the "grave consequences" which might result from the passage of the bill added to the breach of good form. On the other hand, apart from the merits of the case made out by Mr. Hanihara, it would seem desirable that the old rule of diplomatic non-interference should be modified to the extent of permitting a friendly expression of views by a foreign government pending the passage of legislation which, it is foreseen, will have unfortunate, even if legally justifiable, consequences. Especially would this seem to be true in the case of a government such as that of the United States, in which the initiative in legislation is in the hands of one department of the government and the general conduct of foreign relations in the hands of another department.

Coming to the technical legal aspects of the exclusion provision, the general principle is accepted that, in the language of Justice Gray, "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[3] The general principle would appear to cover not merely a uniform rule applied to all states, but even a discriminatory rule where the grounds for the discrimination are well founded. The equality of states as a principle of law would appear to come into the question only when the conduct of the nation taking such action was purely arbitrary. No issue has been raised as to the discrimination shown in the denial of citizenship to the Japanese under the existing naturalization laws.

Following the passage of the law, the Japanese Ambassador presented to the Secretary of State on May 31st a formal protest against its provisions. The protest called attention to the treaty of commerce and navigation of February 21, 1911,[4] and, while reserving for a later occasion the technical legal question whether the provisions of the Immigration Act were inconsistent with the terms of the treaty, pointed out that the new legislation was "in entire disregard of the spirit and circumstances that underlie the conclusion of the treaty."

The treaty in question superseded the treaty of November 22, 1894. Article I provides in part:

> 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 ships, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

[3] Nashimura Ekiu *v.* United States, 142 U. S. 651 (1892).

[4] For the text, see Charles, *Treaties*, etc., 77, and Supplement to this JOURNAL, Vol. 5 (1911), p. 100.

Article IV of the treaty provides for reciprocal freedom of commerce and navigation, and contains the usual most-favored-nation clause. It should be noted that Section 3 of the new immigration law expressly excepts, as not being technically "immigrants," persons coming within the scope of Article I of the treaty of 1911.

It is difficult to see how even the strictest interpretation of the terms of Article I can be made to include a liberty of Japanese citizens to enter for purposes of permanent settlement and incorporation into the economic and social life of the community as distinct from entry for mere purposes of trade. Considering how vital a matter the regulation of immigration by the United States might become at a later date, it is not to be believed that the government would barter away the right except by the most explicit terms. Any doubt must be resolved in favor of the party alleged to have so bound itself.

Annexed to the signature of the treaty of 1911 was a "Declaration" by which the Japanese plenipotentiary announced that his government was "fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States." The presence of this declaration might, on the part of Japan, be argued to imply a grant by the foregoing treaty of privileges which it was thereby announced Japan would not avail itself of. The argument, however, is seen to be of no weight when consideration is taken of the fact that the negotiation of a treaty of commerce and navigation would have been normally an occasion for reducing the terms of the agreement of 1907 to the form of a convention, and that it was the desire of the United States to spare Japan the humiliation of such a procedure that led to the alternative adoption of the appended declaration. Thus far the United States Department of State has not published the minutes of the "conversations" which attended the negotiation of the treaty.

Apart from the treaty of 1911, what was the force of the "gentlemen's agreement" upon its own merits? The agreement, embodied in a series of diplomatic exchanges between the two governments but not reduced to a formal draft, consisted in a voluntary undertaking on the part of Japan to take administrative measures designed to check the emigration to the United States of Japanese laborers. In return the United States Government was to undertake to recommend to Congress to refrain from resorting to formal exclusion legislation. While for obvious reasons the agreement was not reduced to writing, it would seem that it was none the less a contract to be carried out in good faith on both sides, although lacking in the status of a treaty under the United States Constitution. On its side Japan alleged, in the note of May 31st, "the patient, loyal and scrupulous observance" of the agreement down to the date of the exclusion law. It appears that, from 1908–1923, some 8,681 Japanese have been admitted to

the country, including all classes. Of the 578 entering on an average annually it is claimed by Japan only 146 have been laborers.

Could the agreement be abrogated legally by the United States upon its own unilateral motion? Again, it is difficult to see the force of the Japanese contention. The rule of strict construction precludes the suggestion that an agreement without time limit could be regarded as binding the hands of the United States for an indefinite period, subject only to the willingness of Japan to release the United States from the obligation. Moreover, the agreement was between the Government of Japan and the Department of State, not between Japan and the United States, and it did not pretend to restrain Congress except in so far as the Executive Department might do so by way of recommendation.

On the other hand, the passage of the law of May 26, 1924, quite clearly releases the Japanese Government from any obligations assumed under the "gentlemen's agreement." This result the Japanese Ambassador frankly announced in his note of May 31st, saying that it would henceforth be impossible for Japan to continue the undertaking assumed by the agreement. As a matter of practical administration, it may be noted that under the agreement Japan had refrained from issuing passports to Japanese laborers to go to the continental territory of the United States. Instead of a passport, the Japanese immigrant will now need a consular "immigration visa" issued by a United States consul in Japan, in default of which he cannot enter the United States. President Roosevelt's executive order of March 14, 1907, will still operate to deny admission to Japanese laborers whose passports might read to Canada or Mexico and who might seek to enter the United States from those countries, but Japan will be under no obligation to supplement this measure by a continuation of the "strict control" hitherto exercised over the emigration of Japanese laborers to territory contiguous to the United States.

But if the Japanese protest against the exclusion provisions of the Immigration Act is weak on the side of law, it is strong on the side of common international courtesy and decent neighborly conduct. Between nations, as between citizens of the same state, there are rules of intercourse which, however clearly they may lack the force of legal obligations, are none the less fundamental conditions of friendly relationships. The term "comity" is frequently used in diplomatic intercourse to indicate rules of conduct or methods of procedure which correspond roughly to the conventions of social life within the local community. The Japanese note of May 31st refers to the "ordinary rules of comity" as having been disregarded by the Act of Congress. Whether or not comity in its technical sense is applicable to a case of the present kind, there are at least the canons of good manners and the rule of fair consideration of the effects of one's legal act upon a friendly country. Mr. Hanihara's note of April 11th asked of the United States "simply that proper consideration ordinarily given by one nation

to the self-respect of another, which after all forms the basis of amicable international intercourse throughout the civilized world."

It is a question to be decided by Congress whether the "gentlemen's agreement" had failed to secure the results desired and whether the provisions of the new law promised to be more effective. It is the *method of procedure* which is open to just criticism. The "proper susceptibilities" of the Japanese nation, the "just pride" which it feels has been seriously wounded, the "prestige" of Japan in the Far East may seem to the Occidental mind to be somewhat intangible grounds upon which offense could be taken. That these grounds are none the less real makes it imperative that they should be taken into account if mutual confidence and friendly cooperation is to prevail in those other relationships between the United States and Japan which it was undoubtedly not the desire of Congress to interrupt.

C. G. FENWICK.

ENEMY PRIVATE PROPERTY

Probably no rule of international law was regarded in 1914 as more firmly established than the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable. The rule was not adopted in any sudden burst of humanitarian sentiment, but was the result of an evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of modern civilization, namely, a conviction as to the essential distinction between private property and public property, between enemy-owned private property in one's own jurisdiction and in enemy territory, and between non-combatants and combatants, accompanied by the growing realization that the practice of confiscation was reciprocally unwisely destructive and inconsistent with economic common sense. Possibly also the natural-law school of jurists in the eighteenth century were not without their influence in emphasizing the conviction, of mutual advantage, that those surviving the devastating effects of unmitigated war should have something left with which to take up again the thread of life.

At all events, by the nineteenth century, the ancient practice of confiscation had become obsolete, and though occasional judicial *dicta* may be found to the effect that it was a "strict right" of belligerents, Kent as far back as 1825 had characterized it as a "naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."[1] Marshall in 1814 had said that "the mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of the right, but cannot impair the

[1] Kent, Commentaries, I, 3, 65. Quoted also by Clifford, J. in Hanger *v.* Abbott (1867), 6 Wall. 532, 536.