

truly international in character, and in addition it offers a means of familiarizing the nations with the idea of a court of arbitral justice, which it was sought to create at the Second Hague Conference, but which could not be carried into effect for lack of agreement as to the method of constituting its membership.

THE PASSPORT QUESTION BETWEEN THE UNITED STATES AND RUSSIA.

The Jewish question, or so-called "passport question," with Russia arises out of the fact that the Russian Government, for certain historical reasons based on economic and political considerations, reserves the right to exclude from entry into Russia all alien Jews. For this purpose the point of religious faith has been adopted as the readiest test or shibboleth of race. Very many exceptions are made to the rule of exclusion, so that in practice very few persons of Jewish race or religion who have legitimate business in Russia are excluded. These rules and exceptions are applied alike to all nationalities other than Russian.

The Jewish question is to be carefully distinguished from the questions arising from the unlawful emigration and naturalization in other countries of Russian subjects. Russia is one of those countries which not only denies the right of expatriation, and therefore regards as invalid the naturalization which any of her subjects may secure in foreign countries, but imposes severe penalties therefor. It is more usual in practice, however, for the Russian consuls simply to refuse the necessary *visé* to the passports of naturalized Americans who were formerly subjects of Russia.

The Jewish question is also to be distinguished from that arising out of Russia's refusal to waive the claim of military service in the case of her subjects who have emigrated.

The legal elements involved in the present question arise out of the Treaty of Commerce and Navigation concluded between the United States and Russia in 1832. Article I of that treaty reads as follows:

There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective States, shall, mutually have liberty to enter the ports, places, and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce.

For thirty years it has been contended by certain elements of opinion in this country that the exercise or assertion by the Russian Government of a right to exclude from Russian territory any American citizen on the ground that he professes the Jewish faith is inconsistent with the spirit of the Treaty of 1832.

The agitation of the question in the United States has been particularly active during the past year. On February 10th last, Mr. Herbert Parsons, of New York, introduced in the House of Representatives a joint resolution calling upon the President to denounce the Treaty of 1832 on the ground that Russia had violated that treaty by subjecting American citizens to a discrimination based upon religious belief. Five other resolutions in identical terms were also introduced in the House. On April 6th Mr. Sulzer, of New York, introduced a resolution substantially similar to the Parsons resolution, but referring not to "religious belief" alone, but to "race or religion." Senator Culberson had meanwhile introduced a resolution, "that it is the sense of the Senate that the Treaty of 1832 with Russia be abrogated." No action on any of these resolutions was taken by either House of Congress during the special session. Upon the reassembling of Congress on December 4th last, Mr. Sulzer again introduced his resolution for the termination of the treaty. This resolution passed the House by a vote of 301 to 1 (87 members not voting) on December 13th. The text of the resolution reads as follows:

RESOLVED, etc., That the people of the United States assert as a fundamental principle that the rights of its citizens shall not be impaired at home or abroad because of race or religion; that the Government of the United States concludes its treaties for the equal protection of all classes of its citizens, without regard to race or religion; that the Government of the United States will not be a party to any treaty which discriminates, or which by one of the parties thereto is so construed as to discriminate, between American citizens on the ground of race or religion; that the Government of Russia has violated the treaty between the United States and Russia, concluded at St. Petersburg, December 18, 1832, refusing to honor American passports duly issued to American citizens, on account of race and religion; that in the judgment of the Congress the said treaty, for the reasons aforesaid, ought to be terminated at the earliest possible time; that for the aforesaid reasons the said treaty is hereby declared to be terminated and of no further force and effect from the expiration of one year after the date of notification to the Government of Russia of the terms of this resolution, and that to this end the President is hereby charged with the duty of communicating such notice to the Government of Russia.

The debates in the House give expression to the criticisms against the treaty which have been advanced for many years from public and private sources. These criticisms may be summed up as follows:

1. The provisions of Article I of the treaty are general and admit of no exception; hence the refusal by Russian consuls to visé passports of American Jews is a violation of that article.

2. There has been discrimination (only one case is cited) against American Jews, in that a passport which the Russian consul at New York refused to visé, was viséd by the Russian consul at London.

3. The clause "on condition of their submitting to the laws and ordinances there prevailing" refers to persons who have been admitted into the country, and does not acknowledge a right on the part of Russia to exclude a given class of persons.

4. Even though Russia can not be charged with having violated the treaty, the compact is one which is no longer responsive to the political principles and to the commercial needs of the two countries.

5. The treaty, in the closing sentence of Article X, recognizes a right on the part of Russia to enforce the doctrine of indefeasible allegiance. Inasmuch as the United States has long repudiated that doctrine, it should not be a party to a treaty which recognizes it.

6. The United States can not constitutionally acquiesce in any treaty which would permit a foreign government to make between American citizens religious or racial distinctions of which the United States itself could not take cognizance.

On the other hand, the Russian view of this question appears to be that the treaty contains of course no specific reference to the "Jewish Question," which in fact arose, as between Russia and the United States, almost half a century after the conclusion of the treaty; that neither by international law and comity nor by treaty are Americans or other aliens entitled to other treatment than that accorded to Russian subjects, among whom Russian law distinguishes according to race or religion; that in the absence of special provisions, the general concession of rights to the citizens of one party to travel in the territories of the other can not be considered as precluding either of the contracting governments from its natural sovereign right to prevent the immigration or access of any class or category of aliens whose presence it considers incompatible with its own domestic interests; that the practice of the United States in this respect, sanctioning the exclusion of Mongolians, of believers in polygamy, and of theoretical anarchists, is itself inconsistent with any other view of

such a general treaty provision; that whereas the Russian laws complained of may potentially exclude approximately two million American Jews (although the number actually refused admittance to Russia is declared to be insignificant), on the other hand, the American laws exclude potentially many millions of Russian Mongolian subjects, and Mohammedans who profess theoretical adherence to the polygamous tenets of their faith.

Overlooking the many extravagant statements that have been made in denunciation of the Treaty of 1832, it seems reasonably clear that the treaty is inadequate. Whether rightfully or wrongfully, Russia has interpreted the treaty in such a way as formally to exclude from her territory an important class of American citizens. Diplomatic representations have thus far been unable to obtain from Russia a more liberal interpretation. The United States may well refuse to continue to be a party to a treaty in which it recognizes or acquiesces in doctrines which are contrary to its political principles of religious freedom and the right of expatriation. It is another question to assert that Russia has been guilty of violating the treaty, and, as was pointed out by Mr. Root in his address before the Senate, those who have been so ready to make the charge would do well to consider the policy of the United States in a closely analogous matter. As a point of law it may be observed that the right to exclude whatever persons it pleases from entrance into its territories is one of the sovereign rights of a state, and that nothing less than an express renunciation of that right can be regarded as estopping the state from asserting it. Russia claims that by the general terms of the Treaty of 1832 in which she agreed that inhabitants of the United States shall have liberty to enter her territories, she did not surrender her fundamental right to exclude any class of persons whose presence in her territory she might later consider dangerous to her interests. What has been the policy of the United States? In the original Chinese Exclusion Act of May 6, 1882, as amended by the Act of July 5, 1884, it is held (Section 15) that the provisions of the Act apply to all Chinese "whether subjects of China or any other foreign power." In 1894 an opinion of Attorney-General Olney was rendered, holding that natives of China who have become citizens of Great Britain can not enter the United States. It would seem, then, that the United States has not regarded the exclusion of Chinese who are subjects, or in the language of the treaty, inhabitants, of Russia as inconsistent with the Treaty of 1832.

What will be the situation if the treaty is abrogated? Unless another

treaty is made in the meantime, the relations between the United States and Russia will fall back upon the general rules of international law, and American citizens will have only such privileges in Russia as that country may, in accordance with the comity of nations, deem it to her interest to grant. It is, however, confidently asserted that in the year which must elapse before the present treaty expires, the two governments may be able to come to an understanding and formulate an agreement which will be satisfactory to both of them.

On December 17, the President, presumably having regard to the almost unanimous expression of opinion in the House of Representatives in favor of terminating the treaty, caused the Ambassador at St. Petersburg to hand to the Russian Minister for Foreign Affairs on December 17th a communication giving the official notification contemplated by Article 12 of the treaty, whereby its operation would terminate, in accordance with its terms, on January 1, 1913. The note pointed out that the old treaty had been recognized as "no longer fully responsive in various respects to the needs of the political and material relations of the two countries," and that it had from time to time given rise to certain regrettable controversies; and it expressed the desire of the American Government to renew the efforts that had been made to negotiate a modern treaty of friendship, commerce, and navigation.

On December 18th the Senate Committee on Foreign Relations presented to the Senate a substitute for the House resolution. The text reads as follows:

Whereas the treaty of commerce and navigation between the United States and Russia, concluded on the 18th day of December, 1832, provides in Article XII thereof that it "shall continue in force until the first day of January in the year of our Lord one thousand eight hundred and thirty-nine, and if one year before that day one of the high contracting parties shall not have announced to the other by an official notification its intention to arrest the operation thereof this treaty shall remain obligatory one year beyond that day, and so on until the expiration of the year which shall commence after the date of a similar notification;" and

Whereas on the 17th day of December, 1911, the President caused to be delivered to the Imperial Russian Government by the American Ambassador at St. Petersburg an official notification on behalf of the Government of the United States announcing intention to terminate the operation of this treaty upon the expiration of the year commencing on the 1st day of January, 1912; and

Whereas said treaty is no longer responsive in various respects to the political principles and commercial needs of the two countries; and

Whereas the constructions placed thereon by the respective contracting parties differ upon matters of fundamental importance and interest to each; Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the notice thus given by the President of the United States to the Government of the Empire of Russia to terminate said treaty in accordance with the terms of the Treaty is hereby adopted and ratified.

It will be observed that the resolution makes no mention of the political principles held by the United States, and omits the charge that Russia has violated the treaty. The substitute resolution was concurred in by the House on December 20th and approved by the President on December 21st.

THE INTERNATIONAL JOINT COMMISSION BETWEEN THE UNITED STATES
AND CANADA

On January 11, 1909, a treaty was signed between Great Britain and the United States concerning the boundary waters between the United States and Canada, the ratifications of which were exchanged on May 5, 1910. The treaty had a threefold purpose: first, to prevent disputes regarding the use of boundary waters; second, "to settle all questions which are now pending between the United States and the Dominion of Canada, involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier"; and third, "to make provision for the adjustment and settlement of all such questions as may hereafter arise." It would therefore appear that the existence of disputes regarding the use of boundary waters gave the opportunity, which was eagerly seized, to agree to settle all pending questions, whatever their nature; and at the same time, in order that the friendly relations between Canada and the United States should not be disturbed, Great Britain and the United States agreed to make a provision for the adjustment and settlement of future disputes. It is not the purpose of the present comment to analyze in detail this important treaty, as it has been the subject of an extended comment in a previous issue of the *Journal*.¹ It is intended merely to call attention to the method by which the three classes of disputes are to be settled peaceably and the steps taken to make the method effective.

By Article VII of the treaty Great Britain and the United States agree to establish a permanent International Joint Commission.

¹ See Editorial Comment in the July, 1910, number, p. 668, and text of the treaty in the SUPPLEMENT for July, 1910, p. 239.