In Re Lee Sing: The First Residential-Segregation Case

By Charles J. McClain

On February 17, 1890, the San Francisco Board of Supervisors passed by unanimous vote an ordinance requiring all Chinese residing or carrying on business in San Francisco to move to a prescribed area of the city within sixty days. Though it was not mentioned in the ordinance, the area designated was the one set aside by law for slaughterhouses, tallow-rendering plants, and other businesses generally considered noisome or offensive. Failure to abide by the ordinance was made a misdemeanor, punishable by six months' imprisonment in the county jail.

This extraordinary law, the first attempt by an American municipality to segregate its inhabitants on the basis of race, produced a furor in the Chinese community and eventually gave rise to litigation in the Circuit Court of the United States for the Northern District of California. The events leading to the passage of the law and the case that grew out of it constitute one of the more interesting chapters in the legal history of the American West. The episode has a long background, and may even have begun with the first Chinese immigration to the state of California.

It was the misfortune of the Chinese that they chose to settle in the center of San Francisco, cheek by jowl with what was to become the main business district. The location made them a particular focus of Caucasian attention. Inevitably, the area became crowded and quite unsanitary in places (what poor section of a great nineteenth-century city did not?). But these conditions would probably not have caused nearly so much comment in Caucasian quarters had the district not been in the city center and had it not been inhabited by a despised racial group.

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Complaints about the alleged overcrowding and unsanitary conditions in the Chinese quarter, and appeals to do something about it, date from the earliest period of the immigration. As early as 1854, for example, the San Francisco *Herald* printed an editorial criticizing the state of the Chinese quarter and wishing that the Chinese could be relocated to a less desirable part of the city.[1] In 1870 the health officer of San Francisco referred to the Chinese as "moral lepers," whose manner of life was such that they could be counted upon to breed disease wherever they resided. He also expressed the fear that, as they dwelt in the center of the city, any communicable disease that developed in Chinatown might spread rapidly to the whole community.[2] In the same year the San Francisco Board of Supervisors received a petition—the first of many such—from one of the city's main anti-Chinese organizations, describing the Chinese quarter as a focal point for the spread of Asiatic cholera (a nonsensical charge, according to the health statistics) and urging the board "to provide some means of removing the Chinese beyond the city limits."[3]

Demands for the removal of the Chinese were renewed in the latter part of the decade, a period of peculiarly intense anti-Chinese agitation. In July, 1878, an official of the radical Workingmen's Party presented another petition to the board, setting forth, in its words, "the dangers of pestilence from the presence of the Chinese" and demanding that a Chinese reservation be established. The board seemed indiposed to act after a report from its Committee on Health and Police indicated that it did not think such an action would be legal. However, a local journal chided it for its caution. "Can the Board of Supervisors give any good reason why they ignore a respectful petition for the segregation of the Chinese quarter?" the *San Francisco Chronicle* wrote. It was notorious, the paper claimed, that leprosy existed among the Chinese and that the city needed protection. It pointed to the example of Hawaii, noting that lepers were immediately ferreted out from the general population there and quarantined on the island of Molokai.[4] At a subsequent meeting of the board the

[1] San Francisco *Herald*, August 22, 1854.

[2] Health Officer's Report, Board of Supervisors, *San Francisco Municipal Reports for the Fiscal Year Ending June 30, 1870* [hereafter cited as *Municipal Reports, 1870*]. The available health statistics disclose that, if anything, the Chinese were less prone to disease than their Caucasian counterparts. In the midst of his denunciation of the depravity of the Chinese, the health officer was prompted to observe, "It is indeed wonderful that they have so far escaped every phase of disease." Ibid. at 233.

[3] *Evening Bulletin*, June 14, 1870. There were 78 deaths from cholera in San Francisco between July 1, 1877, and June 30, 1878, none of them Chinese. See *Municipal Reports*, supra note 2 at 216-17.

[4] *San Francisco Chronicle*, July 26, 1878.

author of the petition alleged that leprosy was "running wild" in Chinatown and was threatening the whole city. [No support for this charge exists in the available health statistics.][5] Elsewhere, he claimed, municipalities had set aside remote areas for their Chinese while in San Francisco they lived in the center of the city. If officials did not act, he intimated that he might urge the masses to do so in their stead.[6] Notwithstanding these pressures, the board, probably convinced of the correctness of its committee's conclusion about its lack of capacity to act, decided not to take any action. In short order, however, the state legislature would remove that as an excuse.

THE CALIFORNIA CONSTITUTION OF 1879

In 1879 delegates elected by the populace at large convened in Sacramento to draft a new constitution for the state. It was clear from the election campaign that the so-called "Chinese question" would be high on the agenda, and early in the proceedings a committee was empanelled to address the topic. The principal result of its deliberations was the incorporation in the new constitution of Article 19, captioned "Chinese." The article contained numerous discriminatory provisions aimed at the Chinese, the most notorious of which was its fourth section, which directed the legislature to "delegate all necessary power to the incorporated cities and towns of this state for the removal of Chinese without the limits of such cities or towns, or for their location within prescribed portions of those limits."[7] The following year the state legislature acted on this constitutional mandate. It enacted a law not simply empowering, but making it the duty of, the legislative body of any city or town to pass legislation providing for the removal of its Chinese inhabitants beyond the city limits or for their enforced residence in some prescribed portion of the city.[8]

[5] *See* Health Officer's Report, Board of Supervisors, *San Francisco Municipal Reports for the Fiscal Year Ending July 1, 1878.*

[6] *Daily Alta California*, August 1, 1878.

[7] California Constitution, 1879, Article 19, Section 4.

[8] Statutes of California, 23d sess., 1880, ch. 66, 114-15. The law in its original form had simply provided for the removal of the Chinese outside the city limits. The alternative of creating a special residential district within the city was apparently included to deal with the protests of state legislators representing districts close to communities with significant Chinese populations. The assemblyman from the county of Alameda, across the bay from San Francisco, said he thought it wrong that San Francisco should be able to empty its Chinese into his or any other county. See *Daily Evening Bulletin*, February 18, 1880.

THE BOARD OF HEALTH ACTS TO REMOVE THE CHINESE

As it happened, the passage of the removal legislation dovetailed nicely with an effort of the San Francisco Board of Health, already under way, to force the entire Chinese population from its customary place of abode in the city. On February 21, 1880, the board passed a resolution officially declaring Chinatown to be a nuisance. On February 24 the city's health officer posted a notice in Chinatown informing its residents that they would be removed en masse from the area in thirty days. "All the power of the law," the notice read in one of its choicer parts, "will be invoked . . . to empty this great reservoir of moral, social and physical pollution, which . . . threatens to engulf with its filthiness and immorality the fairest portion of our city."[9]

Commenting on the board's action, one leading newspaper held out the glorious prospect that might follow upon this evacuation of the Chinese. "With the Chinese expelled [from Chinatown]," it wrote, "it will automatically become, by reason of its abutting on its East side immediately on the most thronged of the business thoroughfares, and on the other side, on the property the most valuable in the city for residence construction, the most high priced real estate of the city." The paper noted that it had been informed by the health officer that capitalists stood ready to purchase and develop the whole area once the Chinese had been removed.[10]

The mayor of San Francisco, I.S. Kalloch, responded with enthusiasm to the health board's actions, suggesting to the San Francisco supervisors that they confer immediately with the Board of Health to determine how they might be of assistance to it in its efforts, as he put it, "to eradicate this foul cancer from the heart of our otherwise splendid civilization." As to what should be done with the Chinese once they had been forced out of Chinatown, he pointed with approval to the bill, then nearing passage in Sacramento, allowing cities to set aside certain districts for the relocation of Chinese.[11]

In Chinatown the mood was one of apprehension, with some residents apparently fearful that the health authorities were preparing to mount a massive raid on the area. The Chinese Six Companies, the coordinating council of the various Chinese district associations (the Cantonese immigrants came from distinct districts in Kwangtung Province and belonged to corresponding associations), contented itself with posting notices

[9] *Daily Alta California*, February 22, 1880; *San Francisco Chronicle*, February 24, 1880.

[10] *Daily Examiner*, February 24, 1880.

[11] *Daily Alta California*, February 28, 1880.

Interior of dry-goods store, San Francisco, ca. 1890. (The Bancroft Library)

advising inhabitants that they should keep their places in good condition to avoid complaint, since feeling was running high against the Chinese at the time.[12] The other principal institution in Chinese San Francisco, however, the Chinese Consulate, decided on a somewhat more assertive course of action. Unlike the Six Companies, whose origins go back to the beginnings of the immigration, it had been in existence for barely more than a year.

The Chinese government, motivated in large part by concern for the tenuous position of Chinese nationals living in the United States, had determined in 1875 to establish a regular and permanent diplomatic presence in this country, but it did not act on that decision until 1878. In September of that year the head of its diplomatic mission, Ch'en Lan Pin, officially presented his credentials as minister to the United States to President Rutherford B. Hayes, and in November informed the Department of State that he was establishing a consulate in San Francisco. He appointed as consuls a relative, Ch'en Shu-t'ang, and Col. Frederick Bee, a Caucasian who for several years had been acting as a

[12] *Evening Bulletin*, February 23, 1880.

CHAP. LXVI.—*An Act to provide for the removal of Chinese, whose presence is dangerous to the well being of communities, outside the limits of cities and towns in the State of California.*

[Approved April 3, 1880.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Board of Trustees or other legislative authority of any incorporated city or town, and the board of Supervisors of any incorporated city and county, are hereby granted the power, and it is hereby made their duty, to pass and enforce any and all acts, or ordinances, or resolutions necessary to cause the removal without the limits of such cities and towns, or city and county, of any Chinese now within or hereafter to come within such limits; *provided*, that they may set apart certain prescribed portions of the limits of such cities, or towns, or city and county, for the location therein of such Chinese.

Chinese, removal of outside of city limits.

SEC. 2. This Act shall take effect and be in force from and after its passage.

Text from the 1880 Statutes of California, Twenty-third Session, pp. 114-15.

quasi-official spokesman for the San Francisco Chinese community.[13]

On February 26, 1880, Consul Ch'en wrote to Delos Lake, a prominent local lawyer and former state judge, asking for an opinion on the legality of the health authorities' proposed actions. Lake promptly delivered the opinion that those actions went far beyond the limits the Board of Health's authority. He pointed out that judicial proceedings were necessary to remove a nuisance, and that an administrative agency could not act unilaterally. Furthermore, an agency could not seek to condemn a whole area as a nuisance on the basis of, as he put it, "a quick visit to certain premises in that area." If the board persisted with its plans, he added, individual property owners in Chinatown would be privileged to resist with force.[14] The letter, which the consulate

[13] On the establishment of the first permanent Chinese diplomatic mission in the United States, see Shih-shan Henry Tsai, *China and the Overseas Chinese in the United States, 1868-1911* (Fayetteville, 1983) 38-43, and Michael Hunt, *The Making of a Special Relationship: The United States and China to 1914* (New York, 1983) 98-99.

[14] *San Francisco Chronicle*, March 1, 1880. Lake pointed out that judicial proceedings were necessary to abate nuisances, and that government officials could not, on the basis of a visit to certain premises in a large urban district, condemn the whole district as a nuisance.

made available to the city's newspapers, apparently succeeded in causing the health authorities to have second thoughts about their plans to evacuate the Chinese quarter. The letter was reinforced by two decisions handed down by the federal circuit court in San Francisco shortly thereafter.

In March, 1880, the court struck down the provision of Article 19 of the 1879 constitution that made it a criminal offense for corporations to employ Chinese. In June the court nullified an 1880 law that forbade Chinese from fishing in the state's waters.[15] Although neither decision specifically addressed the constitutionality of Section 4 of Article 19, or the law empowering municipalities to segregate their Chinese inhabitants, by clear implication they left the remaining anti-Chinese provisions of the state's law under a cloud.

That was certainly the opinion of many Caucasian officials. For example, on May 24, 1880, when the San Francisco Board of Supervisors sought advice on a petition it had received from a state assemblyman urging it to enforce the act providing for the removal of the Chinese, its judiciary committee (citing the first of the two court decisions) reported to the full board that it did not think such action was within the power of local government.[16]

The constitutional provision and statute remained on the books nonetheless, and continued during the 1880s to tempt legislative bodies in various California municipalities. In late May, 1880, for example, the small town of Nevada City, in the foothills of the Sierra Nevada mountains, passed an ordinance calling for the removal of Chinese beyond the city limits (the town relented when the Chinese Consulate notified it that any attempt to enforce the law would be resisted in the courts). Early in 1886 the Sacramento Board of Trustees narrowly defeated a similar ordinance.[17]

THE BINGHAM ORDINANCE

What led the San Francisco Board of Supervisors in early 1890, after years of refusing to take action, to cast caution to the winds and attempt to implement the Chinese-removal provisions of state law remains something of a mystery. One cannot point to any single catalyst. Anti-Chinese agitation was no more intense at the time than at many others during the late nineteenth

[15] *In re Tiburcio Parrott*, 1 F. 481 (C.C.D.Cal. 1880) [hereafter cited as *In re Tiburcio Parrott*]; *In re Ah Chong*, 2 F. 733 (C.C.D.Cal. 1880) [hereafter cited as *In re Ah Chong*].

[16] *San Francisco Daily Report*, June 2, 1880.

[17] *San Francisco Daily Report*, May 27, 1880; (Stockton) *Evening Mail*, January 19, 1886.

century. Concern about Chinatown's strategic geographic position was certainly high, but no higher than it had been five years earlier, when a special committee of the board had issued a report on the Chinese quarter that was almost hysterical in tone. It described the area as variously "a moral cancer on the city" and "a Mongolian vampire sapping [San Francisco's] vitals," and suggested that urgent action was needed to scatter the Chinese, not only out of Chinatown but out of the state of California altogether. The authors of the report included a detailed map of Chinatown, highlighting the uses to which every parcel of property in the area was being put and showing in the most graphic way its proximity to the San Francisco business district. [One newspaper commented that the map revealed that the Chinese occupied the best part of the most desirable business district in San Francisco and were gradually encroaching upon what remained.][18] Perhaps something had caused Caucasian frustrations and fears to reach breaking point.

On February 3, 1890, Henry Bingham, a member of the Board of Supervisors, introduced a resolution providing that after the expiration of sixty days from the date of passage it would be unlawful for any Chinese person to settle, live, or carry on business anywhere in San Francisco except in an area bounded by Kentucky, First, I, Seventh, and Railroad avenues. This was the area set aside by previous legislation for slaughterhouses, tallow factories, hog factories, and other businesses deemed prejudicial to the public health or comfort. Bingham argued for quick passage of the ordinance but agreed that it should first go to the Judiciary Committee for consideration.[19]

There was much external support for the resolution. The central committee of the Democratic Party endorsed the measure at a special meeting called for the purpose. "We have in our midst hordes of Chinese who have located in the heart of our city and there erected one of the most pernicious plague spots ever known in the history of civilization," the resolution read. It alluded to the growing importance of that part of the city from a commercial standpoint and the steady push of the Chinese population outward beyond the borders of Chinatown.[20] A similar theme was struck by the *Evening Bulletin*, which described Chinatown as a blight athwart the northern portion of the city, cutting off some of the fairest residential areas of town from the commercial center.

[18] *San Francisco Daily Report*, July 25, 1885. The full report can be found in Board of Supervisors, *San Francisco Municipal Reports for the Fiscal Year Ending June 30, 1885*.

[19] *Examiner*, February 4, 1890. For the ordinance designating the area for offensive trades, see Order 1587, Sec. 2, *General Orders of the Board of Supervisors* (San Francisco, 1890) 17.

[20] *Examiner*, February 9, 1890.

Moreover, the quarter was a "cancer" that was gradually spreading outward "toward the old aristocratic quarters . . . perilously near Nob Hill and . . . threatening the old select regions of Powell and Mason streets." With the removal of the Chinese would come a healthy expansion of manufacturing establishments, of commerce and of living quarters for whites.[21]

The Examiner, a Hearst paper, argued that Chinatown was a "social, moral, industrial, sanitary, and business curse" and wondered why it had taken so long to act on the state constitutional provisions. In explaining the delay, the editors acknowledged that in previous instances the courts had nullified anti-Chinese measures passed by the city and implied that this ordinance might also face rough going if challenged. However, the paper seemed to encourage the supervisors to pass their measure and then dare the courts to nullify it. "The glorious future that would lie before this city with Chinatown removed is surely worth an effort to attain it," it wrote.[22]

The Judiciary Committee of the Board of Supervisors met on February 4 and decided to report favorably on the proposed ordinance, but voted to refer it to the city and county attorney for his opinion. This the city attorney furnished a week later. Abandoning the position taken by his predecessors, he now thought the order within the power of the board to enact. Limiting himself to the narrow question of whether the municipality had been specifically granted power to do what it proposed to do and citing the pertinent provisions of the state constitution and state law, he declared: "If those laws do not delegate power to the Board of Supervisors to take such action as contemplated by the proposed order, then it is difficult to understand what language or law would be sufficient to delegate such power."[23] At its regular meeting of February 17 the San Francisco Board of Supervisors voted unanimously to pass the measure to print. A final vote of approval was taken on March 3, and the ordinance received the mayor's endorsement on March 10.

[21] See the *Evening Bulletin*, February 9, 12, 1890. The *Bulletin* noted that the Bingham ordinance provided for the removal of the Chinese to a part of the city they did not own, and that they would have to rely on private landowners to sell or lease to them. Therein might lie the ultimate solution to the Chinese question, thought the paper: "No treaty compels any owner to lease land to Chinese if he does not want to do so. If the Chinese cannot get any land he must go."

[22] *Examiner*, February 12, 1890.

[23] Ibid. In 1882 the then city and county attorney had informed the board that such action would in his view be unconstitutional. *Daily Evening Post*, May 2, 1882.

FIRST ARRESTS AND THE INITIATION OF LITIGATION

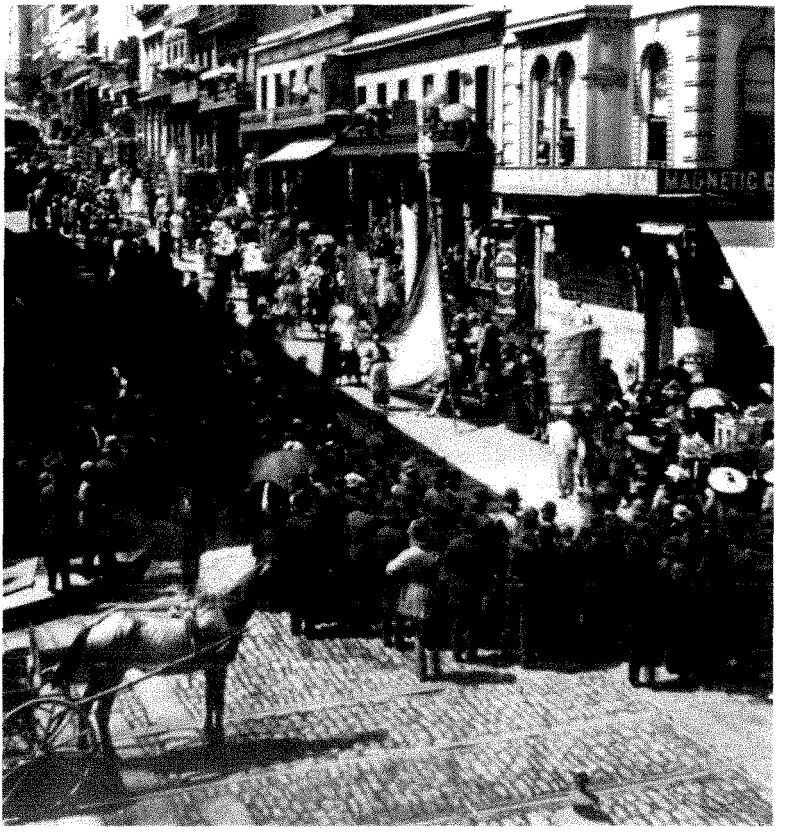
The Bingham ordinance went into effect on May 10, but the city authorities decided to proceed in a cautious and orderly fashion in implementing it. A plan appears to have been worked out with the consent of the Chinese Consulate, by which a single Chinese would be arrested for violating the law. The arrest would then serve as a vehicle for getting a quick court test of the ordinance's validity. Until that determination was reached, the understanding was, no other Chinese would be harassed or molested in any way.[24] Accordingly, on May 12, the chief of police and the prosecuting attorney had a sergeant of the Chinatown squad swear out a complaint against a prominent Chinese merchant living in the district. The man was arrested and committed to the city prison to await trial. No sooner had the arrest been made than the Chinese vice-consul, Frederick Bee, appeared with a writ of habeas corpus issued by Judge Ogden Hoffman of the Federal District Court, returnable that afternoon. In short order the prisoner was turned over to the U.S. Marshal and admitted to bail (set at $2,000), and the matter was set for hearing on July 14.[25]

These well-laid plans were sabotaged by none other than Bingham himself, who had decided to take the matter into his own hands. On May 20, accompanied by his attorney, he went to the local police court, where he obtained some seventy-five essentially blank warrants for the arrest of alleged Chinese violators of the law. (Since he did not know their real names he gave them fictitious ones such as "Jack Pot," "One Lung," and so on.) These he placed in the hands of the chief of police. In the company of the supervisor and a contingent of the local press, a squad of police then descended upon the Globe Hotel in Chinatown, where they randomly arrested twenty Chinese, not without a certain amount of brutality. A father was forcibly pried away from a sick child, for example, and the queues of the Chinese prisoners were at first tied together to prevent them from escaping. They were later untied, and the prisoners were marched off, two in the custody of each police officer. One of the Chinese prisoners voiced his protest. "Wha' fo' we here?" the *Morning Call* reported him as saying, "No mo tleaty us. No constituton? Chinaman not good as 'Melican man: no mo', eh?"[26]

[24] *Daily Alta California*, May 22, 1890.

[25] *Morning Call*, May 14, 1890; *Examiner*, May 13, 1890. The chief of police told a reporter for the *Examiner* that, should the ordinance be upheld, "You can state for me that I will do everything in my power to carry [it] out to the full extent." He said that in an emergency the city jails could accommodate up to 600 prisoners and he intended to keep them full.

[26] *Morning Call*, May 21, 1890; *Examiner*, May 21, 1890.



Chinese procession, San Francisco, ca. 1890. (The Bancroft Library)

The *Daily Alta*, San Francisco's leading Republican journal and an outspoken antagonist of the Democratic-controlled Board of Supervisors, had, from the moment the Bingham ordinance was introduced, dealt with it as not to be taken seriously. To the paper it was nothing more than a grandstanding play on Bingham's part. (According to the *Alta*, when the ordinance was passed, the public looked upon it as "a bit of humor.") It treated the first arrests made under the law in the same vein, comparing the raid on Chinatown to Don Quixote's tilt at windmills.[27]

The diplomatic representatives of the imperial Chinese government did not see the matter in the same light. The Chinese Consulate reacted to the arrests with indignation. Bee described them as "a high-handed outrage," and warned the city that the

[27] *Daily Alta California*, May 21, 22, 1890. The *Alta* did, however, venture to predict that the city might have to pay a "very heavy bill of damages" on account of "the ridiculous attempt on the part of the author of the Bingham ordinance to pose as a great public benefactor."

Chinese government would bring civil suits for damages on behalf of each arrested Chinese. The City of San Francisco, he predicted, would be held strictly liable in damages.[28] More important, the arrests set off a major diplomatic brouhaha at the ambassadorial level in Washington.

On May 23, 1890, three days after the twenty arrests were made under the Bingham ordinance, an official of the Chinese Legation in Washington, Pung Kwang Yu, wrote a strongly worded letter to Secretary of State James G. Blaine, informing him that he had received news of the arrests. He complained bitterly of "the enormity of the outrage which is sought to be inflicted upon my countrymen," and demanded that the federal government (by which he clearly meant the executive branch) intervene immediately and forthrightly to stop it. This, in his view, was mandated under Article 3 of the 1880 treaty between the United States and China, which provided: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."[29]

Blaine quickly acknowledged receipt of Pung's letter, but denied that the executive branch was under any obligation to act under Article 3 of the treaty. He pointed out that the U.S. Constitution made treaties the supreme law of the land and that the judicial power of the United States extended to all cases that arose under treaties. He noted that the Chinese who had been arrested could apply to the courts for release from imprisonment and a determination of the legality of the San Francisco ordinance, and implied that this was sufficient compliance with the treaty. He informed Pung that he had forwarded a copy of his letter to the attorney general for his consideration.[30]

Pung replied that under the circumstances he thought something more was called for than pointing out that the courts of the United States were open to Chinese subjects. They always had been, he noted. He emphasized that during the negotiations leading to the 1880 treaty China had surrendered certain rights regarding immigration at the United States' insistence, and had done so with the understanding that Chinese subjects remaining

[28] *Daily Alta California*, May 22, 1890.

[29] Pung to Blaine, May 23, 1890, in *Papers Relating to the Foreign Relations of the United States*, H.R. Exec. Doc. 1, pt. 1, 51st Cong., 2d sess. (Washington, 1891) 219-20.

[30] Blaine to Pung, May 27, 1890, ibid.

in the United States would receive some *special and additional* protection from the federal government. Pung wrote with more than a trace of sarcasm: "It would hardly have been considered by the Imperial Government as a sufficient inducement to enter into the new treaty to be assured that, when the authorities of the great and powerful city of San Francisco should seize upon the Chinese subjects in that city and drag them from their long-established homes and business, the Federal Government would do nothing more than point them to the courts, where they would have the poor privilege of carrying on a long and expensive litigation against a powerful corporation in a community where they were treated as a despised and outcast race."[31]

Blaine, however, persisted in a narrow and literal interpretation of the treaty language, contending that it meant that the federal government was bound to take new steps only where existing measures or remedies were found to be inadequate. As yet, he insisted, there had been no such showing. The Chinese had an ample and immediate remedy in the courts. He noted that he had received a reply from the attorney general confirming him in this view and informing him that in the attorney general's opinion the San Francisco ordinance violated both the treaty and the Fourteenth Amendment to the federal Constitution. Blaine reminded Pung that in more than one instance federal courts had vindicated the supremacy of federal treaties over the positive law of the state of California.[32]

What Blaine said was literally true but, one suspects, not of much comfort to the Chinese. It seems clear that the minister was looking for some concrete manifestation of solidarity from the national government—an intervention in court by the U.S. attorney on the scene, for example, or even a statement from some prominent federal official. He was to get none of these.

In the meantime, the consulate in San Francisco had in the meantime already taken decisive steps of its own. Only a few hours after the twenty Chinese had been arrested in Chinatown, Bee had filed a petition for a writ of habeas corpus on their behalf in the federal circuit court for the Northern District of California. The petition alleged that the ordinance under which they had been arrested was unconstitutional and void inasmuch as it abridged rights, privileges and immunities granted the Chinese under the U.S. Constitution, statute and treaty and constituted a rank discrimination against them as opposed to other ethnic groups.[33] In the afternoon the prisoners were brought before Judge

[31] Pung to Blaine, June 7, 1890, ibid. at 221-22.

[32] Blaine to Pung, June 14, 1890, ibid. at 223-26.

[33] Petition for Writ of Habeas Corpus, Case File, *In re Lee Sing et al.*, Case 10730, Record Group 21, Old Circuit Court Cases, National Archives, San Francisco Branch [hereafter cited as *In re Lee Sing*].

Hoffman, who was sitting in the capacity of an acting circuit judge. They were released on bail and their cases were consolidated with that of the single merchant whose case was already pending.[34]

The hearing on the Chinese habeas cases had originally been scheduled for July 14, but the city moved successfully to have the matter postponed several weeks. It then filed an extended amendment to its original return to the habeas petition, in which it sought to set forth at some length its justification for the ordinance under challenge. The pleading deserves a brief discussion inasmuch as it represents one of the more appalling statements of racial bigotry in western legal history. Among other things, it alleged that the Chinese were criminal as a race, vicious and immoral; that they were incorrigible perjurers; that they abandoned their sick in the street to die; that their occupation of property anywhere deteriorated the value of surrounding property; that their presence in any number anywhere was offensive to the senses and dangerous to the morals of other races; and that these racial and national characteristics could only be made tolerable if they were removed from the center of town to a remote area where they would have less contact with other races. (To its credit, the court eventually ordered most of these allegations concerning the racial propensities of the Chinese stricken from the record—whether on motion or *sua sponte* is not clear.)[35] The case of *Lee Sing* came for oral argument on August 18 before Circuit Judge Lorenzo Sawyer.

Sawyer had been federal circuit judge in California since 1870. Before that he had served as a justice—and for a time as chief justice—of the state supreme court. Over the years his circuit court had acted as a kind of federal censor of Sinophobic legislation passed by the state of California and its municipalities, striking much of it down on the grounds that it trenched on rights guaranteed to Chinese residents by federal law. Sawyer had written a concurring opinion in the 1880 case that struck down the California constitutional provision making it illegal for corporations to employ Chinese, and had also written the opinion that nullified the California law forbidding Chinese immigrants from fishing in the state's waters. In 1886 he had struck down a Stockton ordinance aimed at driving the city's Chinese laundrymen out of business.[36] During the 1880s his court had had to

[34] *Daily Alta California*, May 22, 1890.

[35] Amendments to Return, Case File, *In re Lee Sing*, supra note 33.

[36] *In re Tiburcio Parrott*, supra note 15; *In re Ah Chong*, supra note 15; *In re Tie Loy*, 26 F. 611 (1886). For an able discussion of Sawyer's decisions on Chinese civil rights, see Linda C.A. Przybyszewski, "Judge Lorenzo Sawyer and the Chinese Civil Rights Decisions in the Ninth Circuit," *Western Legal History* 1 (1988) 23-56.

handle an avalanche of individual cases arising from the successive Chinese-exclusion acts Congress had enacted in that decade.

The attorney for the Chinese, Thomas Riordan, a man well known to the circuit court as a defender of Chinese interests (he had represented the Chinese in both the fishing-rights and Stockton-laundry cases), argued to the bench that the San Francisco ordinance constituted the broadest and most scandalous discrimination imaginable against the Chinese. He pointed out that it compelled all Chinese, not merely those living in Chinatown, to move into the new district or leave the city, whereas some 30 percent of the city's Chinese lived outside the Chinese quarter. If implemented, the ordinance would cause enormous financial damage to Chinese merchants, whose business in San Francisco amounted to $15 million a year.

The city, for its part, claimed that the ordinance was a measure of self-defense. Counsel likened it to an immigration law excluding paupers, lepers, and known criminals from landing on a nation's shores. Chinatown, he said, was "an ulcer in the very heart of a prosperous city." During oral argument Sawyer betrayed considerable irritation with the ordinance and with the city's attempt to defend it. Echoing Riordan's point, he noted that it painted with the broadest brush imaginable, being directed at a whole community regardless of class or business. He curtly rejected an offer by counsel for the city to present evidence on the extent of vice and crime in Chinatown. It was a well-known fact, said the judge, that there were ten times as many Caucasian prostitutes in the city as there were Chinese.[37]

JUDGE SAWYER'S OPINION

Sawyer read his opinion in open court on August 25. It was pithy, to the point, and, though it did not mention that body by name, extremely sarcastic toward the Board of Supervisors. Three provisions of positive law were applicable to the case: the Fourteenth Amendment to the Constitution, with its guarantees to all persons of the equal protection of the laws and due process of law; Article 6 of the Burlingame Treaty with China, which assured Chinese subjects visiting or residing in the United States that they would have the same "privileges, immunities, and exemptions" as the citizens or subjects of the most favored nation; and Section 1977 of the Revised Statutes of the United States, which provided that

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to

[37] *Daily Alta California*, August 19, 1890.

> make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

That the ordinance discriminated against the Chinese, in violation of each of these, should, Sawyer said, be apparent to any intelligent person, whether lawyer or layman.[38] The ordinance was not aimed at any particular vice or immoral occupation or practice, but was designed, as he put it, "to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city whch they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing and otherwise, for more than 40 years."[39] Upon no groups other than the Chinese were such disabilities imposed, he noted.

Besides discriminating against the Chinese and being unequal in its operation as between them and other groups, the ordinance amounted to an arbitrary deprivation of property. Forced to leave their customary places of abode and relegated to a single section of the city, the Chinese would be at the mercy of the landowners in that vicinity. "They would," as he put it, "be compelled to take any lands, upon any terms . . . or get outside the city and county of San Francisco."[40]

Sawyer considered the question of the ordinance's invalidity not worthy of extended discussion. Aiming another barb at Supervisor Bingham and his colleagues, he wrote: "To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unncessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection . . . discussion or argument would be useless."[41] He concluded by citing a long line of federal decisions vindicating Chinese rights against hostile governmental action, among them his own in *In re Ah Fong* (the Chinese fishing-rights case) and *In re Tie Loy* (the Stockton-laundry case), and that of the U.S. Supreme Court in *Yick Wo v. Hopkins*, four years previously, which voided a San Francisco

[38] *In re Lee Sing et al.*, 43 F. 359 (C.C.N.D. Cal. 1890), at 360.

[39] Ibid. at 361.

[40] Ibid.

[41] Ibid. at 361-62.

laundry ordinance because of the discriminatory manner in which it was being applied.[42]

The *Examiner* reported that a large number of Chinese were present in Sawyer's courtroom when he read his opinion and that it gave them general satisfaction. The paper's editors said the decision was exactly what was to be expected from Judge Sawyer —"Mandarin Sawyer," as it dubbed him. "To Judge Sawyer's mind discussion or argument on any question affecting the Chinese is wholly unnecessary. The only thing needed is a glimpse of the almond eye."[43] The city, for its part, does not appear to have given any thought to appealing the decision.

CONCLUSION

The author of a major study of race relations and the law in the late-nineteenth and early-twentieth centuries has called residential segregation "racism's ultimate expression,"[44] and it is difficult to imagine any more vicious expression of Caucasian antipathy toward the Chinese race than the state constitutional provision, the state statute, and the local ordinance that have been the subject of this discussion. The extremity of the state law provisions, calling as they did for the forcible uprooting of thousands of people from their customary places of abode, doubtless made them suspect from the beginning even in the minds of their sponsors. This may be why California towns and cities were reluctant to act on them. That there was a will to act cannot be doubted. As noted earlier, at least one California municipality did enact a removal statute and several others came close to doing so. It must also be remembered that in the years immediately preceding the enactment of the San Francisco ordinance marauding bands forcibly drove Chinese inhabitants out of any number of communities in the western states.[45] Had the decision concerning the San Francisco law come down the other way, it would unquestionably have led to the enactment and the implementation of similar measures in other California municipalities. The circuit court decision ended once and for all any thought of that.

[42] 118 U.S. 356 (1886).

[43] *Examiner*, August 26, 1890.

[44] Benno Schmidt, "Principle and Prejudice: The Supreme Court and Race Relations in the Progressive Era. Part 1: The Heyday of Jim Crow," *Columbia Law Review* 82 (1982) 444, 500.

[45] For a discussion of these events, see Charles McClain, "The Unusual Case of *Baldwin v. Franks*," *Law and History Review* 3 (1985) 349.

[46] For a history of the movement, see Roger Rice, "Residential Segregation by Law, 1910-1917," *Journal of Southern History* 34 (1968) 179-99.

Given subsequent events, it is somewhat odd that *Lee Sing*, with its ringing condemnation of racial segregation, did not have a greater impact upon constitutional history. Attempts to achieve the residential separation of blacks and whites by law did not begin until the early twentieth century. In 1910 the city of Baltimore enacted a residential-segregation ordinance, and several other cities in border and southern states followed suit in subsequent years. The typical form these ordinances took was to forbid blacks from buying property on blocks where the majority of occupants were white, or vice versa.[46] Though nominally less extreme (most did not disturb the rights of existing property owners), these measures had much in common with the San Francisco law. They were an expression of deep-seated racial hostility and of fear about the alleged lowering of property values from the presence of non-white populations. They also had the same object. Like the San Francisco law, they were calculated—albeit more indirectly—to ghettoize a racial minority in undesirable areas. The laws were initially challenged in state courts, where, unlike other Jim Crow laws, they met a mixed reception. The Maryland Supreme Court, for example, struck down the Baltimore ordinance, and the Georgia court, at least initially, nullified a similar ordinance passed in Atlanta.

Eventually the National Association for the Advancement of Colored People, alarmed by the spread of such legislation, determined to seek a definitive test of de jure residential segregation in the federal courts. The vehicle chosen was a challenge to a segregation ordinance passed by the city of Louisville, in Kentucky. In 1917 the U.S. Supreme Court, in *Buchanan v. Warley*, ruled unanimously that the Louisville law and all similar measures violated the rights of blacks to be free of racial discrimination in the purchase and sale of property and the property rights of whites as well as blacks.[47] Though *Lee Sing* was the only federal precedent on the subject of residential segregation by race, it played little role in the argument or decision of any of these cases. Counsel for the plaintiff-in-error challenging the law in *Buchanan* cited the case in support of his argument that the Louisville law was unconstitutional. While the NAACP's Moorfield Storey also mentioned it in his brief, neither discussed it extensively, and it is not mentioned at all in the decision by Justice Day.[48]

[47] 245 U.S. 60 (1917).

[48] See Brief for Plaintiff-in-Error, 40-41, Brief for Appellant, 25, Supreme Court Records and Briefs, *Buchanan v. Warley*. The thrust of Storey's argument was that the ultimate purpose of the Louisville law was "to establish a Ghetto for the colored people of Louisville."