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IN THE

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OF THE

STATE OF WASHINGTON.

In the Matter of the Application of Takuji Yamashita for Amission to the Bar.

BRIEF OF ATTORNEY GENERAL,
SUBMITTED BY REQUEST OF THE COURT.

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Attorney General.

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STATEMENT.

It seems to be conceded that the applicant Takuji Yamashiti is a native of Japan of the Mongolian race. The applicant petitioned for and was admitted a citizen of the United States on the 14th day of May, 1902, by order of the Superior Court of Pierce County, State of Washington. The applicant contends: first, that citizenship of the United States is not a condition precedent to admission to the bar in this state; second, that his certificate of naturalization is not subject to attack in a collateral proceeding, and that this is a collateral proceeding; third, a native of Japan is eligible to citizenship in the United States. These points will be considered in the order in which the same appear in applicants brief.

ARGUMENT AND AUTHORITIES.

I.

The applicant can not be admitted to practice law in this state unless he is a citizen of the United States.

The act of March 19, 1895, Laws of 1895, page 178, as amended by the act of February 16, 1897, Laws of 1897, page 12, embodies the present law regulating the admission of attorneys to the bar of the state.

The act of 1895 made no provision for admission to the bar without examination. Sections 2 and 3 of that act provided for the holding of regular examinations of applicants for admission. Section 4 provided in substance that "No person shall be admitted to such examination unless he * * * has resided in the state for one year next preceding and is a citizen of the United States; * * * but any person residing in the state or coming into the state for the purpose of making it his permanent residence, * * * or having been admitted as an attorney and counsellor at law in some court of record within the United States, may be admitted to such examination * * * "

Section 6 of the act of 1895 provides as follows: "No person shall practice as an attorney and counsellor at law in any court of this state who does not reside in the state, or who is not a citizen of the United States, * * * "

By the act of February 16, 1897, section 4 of the act of 1895 is amended by striking out the words "or has been admitted as an attorney and counsellor at law in some court of record within the United States" and by adding to that section a proviso regulating the admission of attorneys from other states.

The law, therefore, as it exists at this time so far as material to this controversy, is found in section 4 of the act of 1895, as amended by the act of 1897, and section 6 of the act of 1895. Section 4, as amended, so far as material to this controversy, is as follows:

"No person shall be admitted to such examination unless he * * * has resided in the state

for one year next preceding, and is a citizen of the United States; * * * but any person residing in the state or coming into the state, for the purpose of making it his permanent residence, * * * may be admitted to such examination, * * * Provided, That any attorney may be admitted to practice in the courts of this state upon a certificate of admission to the court of last resort in any state or territory of the United States, * * "

Section 6 of the act of 1895:

"No person shall practice as an attorney and counsellor at law in any court of this state who * * * is not a citizen of the United States * * "

In construing these statutes the distinction made by the legislature between admission to examination and admission to practice should be noted.

Section 4 of the act of 1895 authorized the admission to examination of attorneys admitted to practice in the courts of record in other states. The amendment of 1897 eliminates this from the body of the section and appends a proviso authorizing the admission to practice on presentation of a certificate from the court of last resort of any other state or territory.

The legislature has in the first instance, expressed an intention to restrict the right of admission to examination to citizens of the United States who have been residents of the state for one year. A clause is inserted, in the nature of an exception or proviso, designed to relieve persons who are at the time of applying for examination residents of the state but who have not been such residents for the period of one year, and persons who have not resided in the state but have come into the state for the purpose of making it their permanent residence, and who are otherwise qualified for admission, from the necessity of residing in the state for the period of one year before engaging in the practice of their profession. This so-called exception has no relation or reference whatsoever to the admission of attorneys presenting certificates from the courts of last resort of other states or territories. It has reference solely to applicants for examination and original admission to the bar. This clause will be so construed as to harmonize its provisions with the first part of

the section if such construction does not do violence to the language used. To construe this clause as meaning any person being a citizen of theUnited States residing in the state or coming into this state for the purpose of making it his permanent residence may be admitted to examination, would certainly harmonize it with the preceding part of the section and clearly express the intention of the legislature.

The first clause of the section, or the enacting clause, "No person shall be admitted to such examination unless * * * * he is a citizen of the United States," is a positive injunction against the original admission to the bar, or to examination for admission to the bar, of persons not citizens of the United States. That this clause is broad enough to include applicants for examination who have not resided in the state for one year but have merely established a residence or come into the state for the purpose of making it their permanent residence, is manifest. If the first part of the section, or the enacting clause, contained the

words "admitted to practice in the courts of this state" as in the proviso, instead of the words "admitted to such examination" there would be no room for doubt as to the application of the citizenship clause to the provision for the admission to practice of attorneys on presentation of certificates from the courts of last resort of other states. Whatever doubt may arise as to the application of the citizenship clause to the persons mentioned in the so-called exception and the proviso, is set at rest by the provisions of section 6, not referred to in applicant's brief, that no person shall practice as an attorney in any court of this state who is not a citizen of the United States.

Conceding, for the purpose of argument, that the citizenship clause does not apply to the proviso for admission of attorneys from other states, still the determination of that question is neither necessary nor proper for the purposes of this case for the following reasons:

First, the applicant is a resident of this state applying for original admission to the

bar through examination and his case falls directly under the provision that "No person shall be admitted to such examination unless he * * * is a citizen of the United States."

Second, The applicant is not an attorney applying for admission to practice in the courts of this state by virtue of his certified standing before the court of last resort of a sister state.

Third, The right of attorneys to admision to practice in the courts of this state upon presentation of certificates of admission to the courts of last resort of other states rests upon the rule of comity among the states.

Suppose this court should hold that the citizenship clause does not apply to attorneys from other states applying for admission to practice in the courts of this state by virtue of their standing before the courts of other states, and that such attorneys might be admitted although not citizens of the United States, how does that effect the case of the applicant here? Would this court be justi-

fied in disregarding the positive injunction against admitting to examination and admitting to practice in the first instance a person who is not a citizen? The construction contended for by the applicant as to the effect of the so-called exception "but any person residing in the state or coming into the state for the purpose" etc., would render the first part as to citizenship inoperative in all cases. In other words, if applicant's contention was sustained, a Chinese, who resided in the state or came into the state with intent to reside therein, and who possessed the other qualifications, except citizenship of the United States, might be admitted to the examination.

We contend that the so-called exception, beginning with the word "but," only modifies the preceding provision requiring one year's residence within the state and that the provision as to citizenship of the United States is not modified in any degree.

Applicant contends that it was evidently the intention of the legislature in passing the law of 1895

(1897?) to drop or discontinue the requirement of citizenship; that this is the only reasonable inference from their failure to include in the exception introduced "but any person residing" etc., the provision as to citizenship; and that under the express words of the proviso in the law of 1895 (1897?) any person who has been admitted to practice in any of the states or territories may be admitted here regardless of his citizenship; that this court, under the well known rule of construction, that the proviso must be strictly construed, can not inject into the proviso (or into the exception "but any person" etc.) a clause prescribing citizenship. Five authorities are cited to sustain this position (Applicant's Brief, p. 8).

In stating the proposition applicant has put the "cart before the horse." When the proposition is correctly stated the authorities cited sustain the opposite view. The legislature has first laid down a rule to apply to all cases. This rule requiring citizenship is emphasized and made conclusive by the provisions of section 6 of the act of 1895. In

the act of 1895 no provision was made for the admission of attorneys without examination. No proviso was annexed to that section. That act contained the same general rule applicable to all cases that "No person shall be admitted to such examination unless he * * * is a citizen of the United States." Under that act no person could be admitted without examination. That act also contained the so-called exception "but any person residing in the state or coming into the state for the purpose of making it his permanent residence" etc. This section also contained an exception or proviso authorizing the admission to "such examination" of attorneys from other states as follows: "or has been admitted as an attorney and counsellor at law in some court of record within the United States." As stated above, the act of 1897 merely amends section 4 of the act of 1895 by striking from the so-called exception the provision admitting attorneys from other states "to such examination" and adds to that section the proviso authorizing the admission of such attorneys to the bar direct upon presentation

of a certificate of admission to the court of last resort in another state.

In United States v. Dickson, 15 Pet., 141-165, cited by applicant, the rule is announced as consecrated almost as a maxim in the interpretation of statutes:

"That when the enacting clause is general in its language and objects, and a proviso (or exception) is afterwards introduced, the proviso is construed strictly and takes no case out of the enacting clause which does not fall within its terms. In short, a proviso carves special exceptions only out of the enacting clause and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

Applying this rule to the circumstances of this case we find that section 4 of the law, as it exists today, contains a general enactment that "No person shall be admitted to such examination unless he * * * * is a citizen of the United States." The exception merely exempts the applicant for examination from a year's residence, and the proviso merely exempts an attorney, bringing a certificate from another state, from examination. In order to

sustain the contention of the applicant the court would have to read into the exception and into the proviso a provision exempting the applicant from the prerequisite qualification of citizenship of the United States, which can not be done without violating the rule above announced. To the same effect are the other cases cited by the applicant and when, to the first provision of section 4 of the act of 1895, as amended by the act of 1897, and the authorities cited by the applicant, is added the positive provision of section 6 that no person shall practice who is not a citizen of the United States, it is conclusive that the applicant must be such citizen in order to claim the right of admission.

Applicant contends that on account of the proviso to section 4, authorizing the admission of attorneys from other states, that persons not citizens of the United States may be admitted to practice in the courts of this state. This reasoning is based upon the fact, alleged by applicant, that some twenty of the states and territories do not require citizenship as a prerequisite for admission to the bar. In this con-

tention the applicant overlooks the provisions of section 6 of the act of 1895.

In re Hong Yen Chang, 84 Cal., 163, the applicant for admission to the bar presented a certificate authorizing him to practice in all the courts of the State of New York, but the Supreme Court of California denied the application on the ground that the applicant was not a citizen of the United States.

II.

The validity of a certificate of naturalization may be questioned in this proceeding.

The applicant for citizensip must declare on oath "that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state or sovereignty and particularly, by name, to the prince, potentate, state or sovereign of which he was before a citizen or subject." R. S. U. S. Sec. 2165, subd. 2.

"The proceedings must be recorded by the clerk of the court." R. S. U. S., subd. 2, Sec. 2165.

In this case the applicant presented with his petition for examination a certificate or transcript of the order of the court admitting him to citizenship, which shows upon its face the fact that the applicant Takuji Yamashiti was formally a subject of the Emperor of Japan, and in his brief he concedes that he is a native of Japan. Thus it must appear and does appear as a matter of record, upon the face of the judgment of the court admitting applicant to citizenship, that he is or was a subject of the Em-

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peror of Japan. If, therefore, the law of the United States does not authorize the admission to citizenship of a native of Japan of the Mongolian race, then it appears upon the face of the record that the court was without jurisdiction and the judgment is void. A judgment void upon its face may be attacked at any time and in any proceeding or the same may be disregarded.

Savage v. Sternberg, 19 Wash. 679-681.

The following cases are directly in point:

In re Gee Hop, 71 Fed. 274, and in re Hong Yen Chang, 84 Cal. 163, the certificate of naturalization of a Chinaman was held void on its face.

See also Freeman on Judgments, p. 176, sec. 116; and p. 183, sec. 120.

The authorities cited by the applicant to sustain the position that the judgment admitting him to citizenship is conclusive do not sustain him. In Spratt v. Spratt, 4 Pet., 406, the question raised was, the sufficiency of the evidence to show five years residence. The law did not require the evidence to be recited in the record. The court, by Chief Justice

Marshall, held the judgment valid. The error, if any was committed, was mere error or irregularity not apparent upon the face of the record of admission.

In Charles Green's Son v. Salas, 31 Fed. 106, the court found that the evidence did not show that Salas was ever admitted to citizenship by any judicial act, and further, that if he had been so admitted he had thereafter renounced his allegiance to the United States and been redintegrated as a subject of the Spanish king. Salas being a Spaniard no question was raised as to his eligibility to citizenship.

In Stark v. Chesapeake, 7 Cranch, 420, no question was raised as to the eligibility of Stark to citizenship.

All that is really decided in In re Coleman, Fed. Cas. 2980, as we understand the case, is that an affidavit for a complaint of a violation of Sec. 5456 of the Revised Statutes of the United States, alleging unlawful use of a certificate of citizenship knowing the same to have been unlawfully issued, without stating how such use was unlawful or how the cer-

tificate had been unlawfully issued, was not sufficient to authorize the issuance of a warrant. The court also holds, although the foregoing was sufficient to dispose of the case, that a person may actually be a citizen when he has complied with the terms of the statute on his part although the record of his admission may not have been properly made. The jurisdiction of the court to admit the particular person to citizenship or the eligibility of the person was not involved.

In In re Christern, 43 N. Y. Supr. Ct. 523, no question as to the jurisdiction of the court to admit, or the eligibility of the applicant was raised. The case arose on a petition praying for a formal order or judgment nunc pro tunc on the principal ground that, while the petitioners had complied with all requirements, signed the necessary papers, and subscribed the necessary oaths, still the clerk had failed to enter in the minutes and the judge had failed to sign the formal judgment of admission. The judge had, however, placed his initials, according to the practice of the court, upon the application and or-

ally ordered the admission of the applicant and the clerk had issued the regular certificate reciting the proceedings to have been had by order of the judge. The court properly held that the record was not open to such technical objections not going to the merits or questioning the jurisdiction.

The 18 American Law Register, new series, volume 38, p. 674, is not authority for the position that the judgment is conclusive. The discussion there found is in harmony with the contention that if the defect appears upon the face of the record the judgment is void. We quote from page 675:

"The only question which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are power in the officer, and fraud in the party."

The Superior Court was authorized to admit "free white persons." If a Japanese is not a free white person then the judgment is void on its face for the court was without power and that fact affirmatively appears in the record.

In the Acorn, 2 Abb. U. S. C. & D. C. Rep., 443, the question raised was whether or not M. had re-

sided in the United States five years before applying for citizenship. Since the evidence of residence must be produced before the judge and the sufficiency thereof determined, the finding of the court in favor of the applicant was properly held good against collateral attack. It is held that the question of residence is a question of fact to be determined by the court. This case has no application here.

In People ex rel. v. McGowan, 77 Ill. 641, it was claimed, first, that the record did not show that McGowan, a native of Ireland who arrived in the United States after his majority, had ever made declaration of his intention to become a citizen prior to his taking the oath of allegiance and being admitted, and, second, that the criminal court of the city of St. Louis had no jurisdiction to admit aliens to citizensip. The court, as to the first point, held that the record imports verity and is conclusive against collateral attack as to all preliminary matters. The court, however, considered the question of jurisdiction of the criminal court to admit aliens to citizen-

ship and found that the criminal court answered, in every particular, the description of state courts designated in the act of Congress which are given power to naturalize aliens. The case can have no weight in support of applicant's contention in the case at bar.

The Superior Court of Pierce County found as a matter of fact that the applicant was a native of Japan and if a Japanese is not a white person within the meaning of the acts of Congress then the court had no jurisdiction to admit him to citizenship.

III.

A native of Japan is not a "wihte person" and, therefore, is not entitled to become a citizen of the United States.

Citizenship is a privilege which no one has a right to demand and in construing the acts of Congress upon the supject of naturalization the courts ought not to go beyond what is plainly written.

In re Camille, 6 Fed., 259;

In re Po, 28 N. Y. Supp., 383.

In 1878 the law of the United States relating to naturalization of aliens contained the following provision:

"The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

At that time the Chinese and Japanese stood on the same footing.

In In re Ah Yup, 5 Sawy., 155, Fed. Cas. No. 104, an application for admission was made by Ah Yup, a native of China. Judge Sawyer held that the

applicant was not entitled to admission. In this case the learned judge uses the following language:

"The questions are: First, is a person of the Mongolian race a "white person" within the meaning of the statute? Second, do these provisions exclude all but white persons and persons of African nativity or African descent. Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race."

The court then considers the various classifications of races by different authors and scientists and concludes that "No one includes the white, or Caucasian, with the Mongolian, or yellow race; and no one of those classifications recognizing color as

one of the distinguishing characteristics includes the Mongolian in the white or whitish race."

The Japanese native is always classed as belonging to the Mongolian race and unless the law has been modified this decision is in point.

In closing the opinion Judge Sawyer uses the following language:

"Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of congress."

Undoubtedly had the applicant been a Japanese, of the Mongolian race, the decision would have been the same.

In In re Po, 28 N. Y. Supp., 383, the city court of Albany, in 1894, decided that a native of British Burmah, a man of education, graduate of Colgate Academy, and at that time studying medicine in the Albany Medical College, and desiring to practice his profession in the United States, could not

be admitted for the reason that he was not an alien "being a free white person, nor an alien of African nativity, nor a person of African descent."

In 1882, twelve years before the decision in In re Po, supra, congress passed a law providing "That hereafter no state court or court of the United States shall admit Chinese to citizenship."

22 Stat. at Large, p. 61, sec 14.

It is argued by the applicant and to some extent in the Central Law Journal, and In re Rodriguez, hereinafter discussed, that this act amounts to a legislative construction of the naturalization laws of the United States and expresses an understanding on the part of congress that the former laws did not exclude Mongolians, and, therefore Japanese, from citizenship, but that by the passage of the act of May 6, 1882, congress virtually said that it was the understanding of that body that theretofore Chinese and Japanese might be admitted and that after the passage of the act of 1882 the Chinese alone were excluded. The acts of congress will bear no such construction. The act of May 6, 1882, is

entitled "An act to execute certain treaty stipulations relating to China." The preamble is as follows: "Whereas, in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof, therefore," The entire act is directed against the entry of Chinese coolies or laborers into the United States. Congress did not have before it the question of naturalization of aliens, nor the question to what race the Chinese laborer belonged. It was a question of nationality, not race. The country, and particularly the Pacific coast, was in arms against the admission of the Chinese laborer into the United States and congress, to make certain that no harm should come from the Chinese already here, or those hereafter to come, without considering their rights under the naturalization laws, unnecessarily injected into the repealing clause of a statute containing fifteen sections, the words above quoted. The Japanese people as a race were not in the mind of congress, nor was any other nationality, nor was

the question of naturalization of aliens generally considered, and no intimation of an intent to repeal or modify the naturalization laws can be gathered from the act. The principal design was to exclude Chinese coolies from entering the country at all. This act should be given, and has been given slight, if any, weight in determining the meaning of the words "free white persons" in all previous legislation.

Twelve years after the passage of that act, on June 27, 1894, in the case entitled In re Saito, 62 Fed., 126, Judge Colt, of the circuit court of Massachusetts, decided that a Japanese of the Mongolian race, was not entitled to citizenship. This case was decided upon a review of the acts of congress and prior decisions, and the learned judge concluded that whether the question be viewed in the light of congressional intent, or of the popular or scientific meaning of "white persons," or of the author ity of adjudicated cases, a Japanese could not be admitted to citizenship.

In In re Po, supra, the court, in determining the effect of the act, of 1882, says:

"This seems to have been an unnecessary enactment, simply declaratory of the existing conditions, unless it was feared that some one might figure out that the Chinese were free white persons or of African nativity or descent."

In re Camille, 6 Fed., 256;
Kanaka Nian, In re, 6 Utah, 259;
Webster on Naturalization, pp. 13, 14 and 15.

The contention that a native of Japan is not eligible to citizenship is, therefore, sustained,

First, by the language of section 2169 of the Revised Statutes, "being free white persons," in connection with the fact that in no classification of the human race is a native of Japan treated as belonging to any branch of the white or whitish race.

Second, by the decision of Sawyer, J., in In re Ah Yup, supra, decided in 1878, denying the application of a Chinese for naturalization on the ground that he was not a white person, at a time when, it is admitted, the Chinese and Japanese had equal rights and were subject to equal disabilities under the law.

Third, by the decision of Judge Colt, of the circuit court of Massachusetts, decided in 1894, twelve years after the passage of the act of 1882, excluding Chinese, denying the application of a native of Japan for naturalization on the ground that he was not a white person.

Fourth, by the decision of Judge Deady, in In re Camille, supra, decided in 1880, denying the application of a native of British Columbia, half white and half Indian, for naturalization on the ground that he was not a white person.

Fifth, by the decision of the supreme court of Utah in Kanaka Nian, In re, supra, decided in 1889, denying the petition of a native of the Hawaiian Islands for naturalization upon the ground that he was not a white person within the meaning of the naturalization laws but belonged to the Malay-Polynesian races.

Sixth, by the decision of the city court of Albany in In re Po, supra, decided in 1894, denying the application of a native of British Burmah for naturalization on the ground that he was not a white person within the meaning of the law.

In argument the applicant attemps to overthrow the force of these decisions and the reasoning of the courts by citing the congressional debates. He contends that the amendment offered by Senator Sumner in 1870, proposing to strike the word "white" from the statute, was opposed upon the sole ground that the change would admit Chinese and that those favoring the amendment replied that this was the very purpose of the proposed change. We believe a careful reading of the proceedings will show that the purpose of those favoring the amendment was to reverse the policy theretofore existing and to admit all classes of aliens without distinction of race or color, and in particular the Chinese, and that congressional opinion was divided on the general question, the Senators from the Pacific coast basing their opposition on the ground that the amendment would admit the Chinese.

The amendment proposed by Senator Sumner was in words as follows:

"And be it further enacted, that all acts of congress relating to naturalization be and the same

are hereby amended by striking out the word "white" wherever it occurs so that in naturalization there shall be no distinction of race or color."

Congressional Globe, 1869-70, part 6, page 5121.

Senator Williams of Oregon proposed an amendment to the amendment of Senator Sumner in words as follows:

"But this act shall not be construed to authorize the naturalization of persons born in the Chinese Empire."

The amendment proposed by Senator Williams was withdrawn and Senator McCreery offered the following:

"Provided, That the provisions of this act shall not apply to persons born in Asia, Africa or any of the islands of the Pacific, nor to Indians born in the wilderness."

Id. 5123.

This amendment was rejected. Senator Sumner stating his position said:

"I have here on my table at this moment letters from different states, from California, from Florida, from Virginia, all showing a considerable number of colored persons, shall I say of African blood?

Aliens under our laws, who can not be naturalized on account of that word "white." Now, sir, there is a practical grievance which needs a remedy."

And again:

"I propose to bring our system in harmony with the Declaration of Independence and the Constitution of the United States. The word white can not be found in either of these great title deeds of the Republic, how can you place it in your statutes?

The amendment was rejected. Id. 5123.

Senator Sumner again moved his amendment, above set forth, to the House bill. Senator Williams renewed his amendment, above set forth. The Sumner amendment was once carried and the vote by which the same was adopted was reconsidered.

Id. 5173.

Senator Howe moved an amendment to the amendment of Senator Sumner in words as follows:

"Provided, That nothing in this or any other act of congress shall be so construed as to authorize the naturalization of any person born in a pagan country unless with his oath of allegiance the applicant shall take and file an oath abjuring his belief in all forms of paganism."

Id. 5175.

In support of this amendment Senator Howe said in part:

"I can not believe that the fact of a man's being born black is a reason of itself for excluding him from naturalization and, therefore, I cannot withhold finally my vote from the proposition moved by the senator from Massachusetts, but if that be adopted it will ex vi termini admit into our society, and to the rights of American citizens, certain classes of people occupying the eastern coast of Asia, occupying the Islands of the Indian Ocean, that I think we have a right under the constitution to exclude and whom I think it is our bounden duty to exclude from these privileges. Therefore, I shall vote for this amendment."

Meaning the amendment offered by the senator speaking, excluding persons born in pagan countries.

An amendment was proposed by Senator Saulsbury in the following language:

"Provided, That nothing in this act shall be construed to authorize the naturalization of persons born in the Chinese Empire or persons of the negro race of foreign birth."

Id. 5160.

During the desultory discussion Senator Sumner read letters in the interest of persons seeking naturalization, being natives of Africa, the West Indies, and others (Id. p. 5155), all excluded by the word "white."

Many other races and nationalities were mentioned under various names and appellations, including Chinese coolies, bushmen of South Africa, Hottentots, Digger Indians, heathens, pagans and cannibals. (Id. 5157, last paragraph, page 5155.) Mongolians, (Id. 5156, last column). Indians, Mongolians or Chinese, (Id. 5157). Asiatics, Indians of Alaska, Espuimaux, (Id. 5161). Chinese or Japanese, (Id. 5164).

The proposal to strike the word "white" from the statute was finally defeated.

Senator Warner, on July 4, 1870, Congressional Globe, page 5176, after stating that he presumed there was but little opposition to extending the naturalization laws to alien Africans, offered the following amendment:

"And be it further enacted that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

Which was agreed to in committee of the whole and also by the Senate. Id. pages 5176-7.

It is true that the opposition of the Senators from the Pacific coast was largely based upon the fact that striking the word "white" would admit the Chinese, because the Chinese question was at that time pressing, but as we have seen, the debates covered a wide range, and there is nothing to indicate that the Senate constured the law as excluding only the Chinese and Africans, on the contrary, there is much to indicate that the words "white" or "being white persons" in the law, were understood as excluding all races except the white regardless of nationality. The question was at all times considered as one of race exclusion and not exclusion on account of nationality. At least one of the Senators said that the amendment proposing to strike the word "white" with a proviso to the effect that persons born in the Chinese Empire should not be admitted would exclude white persons or persons belonging to the Caucasian race born in the Chinese Empire. That it was

understood by the Senate that the word "white" in the law excluded all races except the white is manifest from the fact that the Senate refused to adopt amendments expressly excluding the Chinese, but, on the contrary, retained the word "white" and added a clause expressly extending the laws to Africans.

In 1875 it was found that the committee on revision had omitted from the law the word "white." Why the word was omitted is not explained, but it seems to have been by inadvertence. A committee to correct errors in the revision reported the omission of the word "white" and this word was restored to the statute, not by way of amendment or enactment, but as a declaration of what was and had been the law.

Mr. Poland in presenting the report said:

"The leaving out of the word "white" would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans or persons of African descent. We have proposed by this amendment to restore the law to just the con-

dition in which it was before the revision was made."

Cong. Record, 1875, vol. 3 part 2, page 1081.

Mr. Willard said:

"I understand that members from California and the Pacific coast make objections to the naturalization of Asiatics, more especially the Chinese."

Mr. Cox, in speaking of a former statement made by him, said:

"I naturally asked the question therefore whether there had not been some little carelessness in the revision of the laws by which the whole Asiatic Malayan race were allowed to come in here and be naturalized.

Id. page 1082; and again:

"I did not say I would vote for it; I did not vote for the naturalization of the black man, and a fortiori I would not do it for the yellow man."

We are satisfied that a careful examination of the congressional records and debates will show that those who favored striking the word "white," and particularly Senator Sumner, understood that the law as it then existed excluded all races except the

white, or Caucasian race, and especially that all persons belonging to the Mongolian race were excluded. The negro question was before the Senate and the chief desire, culminating in the adoption of an amendment to that effect, was to admit persons of African nativity and persons of African descent, and in order to be consistent they adopted the worn out argument, or as it might more appropriately be termed, the star spangled banner argument, based on the Declaration of Independence, that all men are created equal, and in order to be consistent it was necessary for them to take the position that the exclusion of any race or nationality was inconsistent with the fundamental principles of our government, but the congress refused to strike the word "white" or to insert in the statute any proviso against the Chinese that might be construed as an admission that other members of the Mongolian or Malay races were entitled to admission.

It is claimed that the act of congress of July 27, 1868, (R. S. U. S. sec. 1999) has the effect of a con-

gressional interpretation of the naturalization laws as meaning that immigrants from all nations are entitled to naturalization, and some support is drawn from this section by the learned judge in the Rodriguez case, hereinafter discussed. Congress never intended by that act to change or modify the naturalization laws. The context and contemporaneous history entirely overthrow the argument advanced on this point. At the time of the pasage of that act European sovereigns denied the power of their subjects to absolve themselves from their obligations by taking the oath of allegiance to the United States and renouncing their former allegiance. Many naturalized citizens of the United States, on returning to the land of their nativity, were thrown into prison and their right to call upon the United States for protection denied. This act, comprising sections 1999, 2000 and 2001 of the Revised Statutes, was passed with a view,

First, To declare and establish the status of naturalized citizens;

Second, To declare their right to equal protection with natural born citizens; and,

Third, Commanding the President to demand their release and report the facts to congress. The act does not in any degree relate to the right of aliens to naturalization. It is entitled "An act concerning the rights of American citizens in foreign countries." 15 Stat. at Large, p. 223. This argument is also overthrown by the congressional debates of 1870, referred to by applicant, and of 1875, herein referred to, where it is conceded that as the law stood before the amendment of 1870 admitting Africans, at least natives of Africa and China were excluded. Indeed this much is conceded by the applicant.

Finally the decision of Judge Maxey in In re Rodriguez, 81 Fed., 337-348, is relied upon as overthrowing the reasoning of all former cases and establishing the right of the applicant to citizenship. The applicant for naturalization in that case was a native of Mexico, "a pure blooded Mexican, bearing no relation to the Aztecs or original races of Mexico," and being a citizen of the Republic of Mexico, as found by the court. The decision does not pur-

port to overthrow the doctrine of Ah Yup, announced by Judge Sawyer; on the contrary, Judge Maxey, in referring to that case, says:

"The opinion of Judge Sawyer is by no means decisive of the present question as his language may well convey the meaning that the amendment of the naturalization statutes referred to by him was intended solely as a prohibition against naturalization of members of the Mongolian race."

The decision is based principally on the constitution of Texas and the act of congress admitting that state into the Union and upon other acts of congress and treaties admitting large bodies of Mexicans and other aliens to citizenship, collectively by special act or treaty, but not individually under the general naturalization laws. It is in harmony with the decision of the United States Supreme Court in Elk v. Wilkins, 112 U. S., 94, excluding Indians born subject to their tribal relations but within the territorial limits of the United States, because the court found that the applicant did not belong to the original races of Mexico, otherwise there would be a conflict. The decision is also based upon special treat-

ies between the United States and the Republic of Mexico, notably the treaty terminated February 11, 1882, prior to the rendering of the decision in that case, which seemed to recognize or admit, while in force, that before its adoption the United States had made citizens of Mexicans and the Republic of Mexico had made citizens of Americans, whether collectively, by special act or treaty, or individually under the general naturalization laws does not appear. This will appear conclusive when the language of the court in concluding the opinion is considered, to-wit:

"When all the foregoing laws, treaties and constitutional provisions are considered, which either affirmatively confer the rights of citizenship upon Mexicans or tacitly recognize in them the right of individual naturalization, the conclusion forces itself upon the mind that citizens of Mexico are eliglble to American citizenship and may be individually naturalized by complying with the provisions of our laws."

See also page 354. Here the learned judge refers to the act of July 27, 1868, as strengthening his position. This act related to the rights of citizens of

the United States in foreign countries exclusively and the court fails to give due consideration to the motives of congress in passing that act or to the context of the section cited. The learned judge, however, admits that it is probable that congress never intended that act to have such far reaching consequences and that the primary purpose was to protect the rights of American citizens in foreign states. The court concludes the opinion in the following language:

"After a careful and patient investigation of the question discussed, the court is of opinion that whatever may be the status of the applicant viewed solely from the standpoint of the ethnologist he is embraced within the spirit and intent of our laws upon naturalization."

The opinion of the court in that case is very much weakened, if not entirely overcome, by the fact, that since forty-nine years had elapsed since the negotiation of the treaty of Guadalupe-Hidalgo, which treaty greatly increased our territorial area and incorporated many thousands of Mexicans into our citizenship, the question of the naturalization

of a Mexican was then for the first time submitted for judicial determination. It is fair to assume that during the forty-nine years mentioned, thousands of Mexicans in the State of Texas had consulted the bench and bar of that state relative to their right to be admitted as citizens of the United States, and that the bench and bar of that state, since no Mexican had been individually admited, construed the law to mean that native Mexicans were not eligible.

It must be borne in mind that the learned judge proceeds upon the theory that the applicant was a citizen of the Republic of Mexico, a pure blooded Mexican, bearing no relation to the native Aztec or original races of Mexico, therefore the applicant was not an Indian and must have belonged to some branch of the white race. This case really overrules nothing and decides nothing except that the Mexican citizen; whose case was before the court, was entitled to citizenship even though he was densely ignorant of the principles upon which this republic was founded. Undue weight is given this opinion

in the brief of applicant and in the superficial editorial in the Central Law Journal, cited by applicant. Note particularly, the decision is based upon the several special acts of congress and treaties admitting Mexican citizens to the United States citizenship. It is considered by the court that these special acts and treaties serve to weaken the general law that the applicant for citizenship must be a "free white person" in order to be entitled to admission. A moment's reflection will convince the average mind that under every rule of construction the fact that congress and the treaty making power considered it necessary to make these very exceptions, made by special acts and treaties, serves to strengthen the position that under the general law these persons were not entitled to admission. The learned judge requested the opinions of various prominent members of the bar of Texas. He received what is considered by some able briefs supporting his decision, but when these briefs are duly analyzed it will be found that one brief supports and three briefs are opposed to the opinon of the court. The brief submitted supoprting the opinion of the

court is to some extent at least based upon what has been heretofore termed, the worn out star spangled banner orations, based upon the Declaration of Independence that all men are created equal and upon the theory that the courts can disregard the plain language and intent of congress and admit members of one branch of a race of people because they are more enlightened than the great body of people belonging to the same race who are excluded. Such is the concluding paragraph of applicant's brief. He argues that in the enactment of the statute of the United States in 1802, containing the word "white" and the refusal of congress in 1870 and 1875 to eliminate the word "white" the congress did not intend to exclude natives of Japan for the reason that within the last twenty of twenty-five years the Japanese people have advanced in civilization to such an extent that they now stand in the front rank among the civilized nations of the world. This argument might well be addressed to congress but before this court it seems to us it should have little weight.

In conclusion we are satisfied that without recognizing attempted judicial legislation and substituting judicial legislation for the plain enactments of congress this court can not recognize the applicant as a citizen of the United States, and that he is not entitled to practice law in this state.

Very respectfully submitted,

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