3699-II

United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

THE UNITED STATES,
Appellant,

vs.

BHICAJI FRANYI BALSARA,
Appellee.

No. 186.

Brief for the United States, Appellant.

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BRIEF SUBMITTED BY THE APPELLANT.

Statement of Facts.

This appeal is taken from an order of Honorable E. Henry Lacombe, United States Circuit Judge for the Southern District of New York, dated June 22, 1909, admitting the appellee to become a citizen of the United States of America. The only question raised in this appeal is whether or not the appellee is a "free white person" within the meaning of the Naturalization Acts of Congress. He does not claim that he is of African nativity or a person of African descent, nor does the Government claim that he is not otherwise entitled to become a citizen.

It appears from the appellee's declaration of intention made in the United States Circuit Court for the Southern District of New York on the 4th day of December, 1906 (fols. 2–4), and from his petition for naturalization filed in the same court on the 5th day of January, 1909 (fols. 6–10), that the appellee

was born in Bombay, India, on May 24, 1872, and emigrated to the United States of America from Southampton, England, on the 12th day of November, 1900, on the S. S. *Kaiser Wilhelm der Grosse;* that his last foreign residence was Bombay, India; and that it was his *bona fide* intention to renounce all allegiance and fidelity to Edward VII, Emperor of India. The appellee states in his declaration of intention that his color is white and his complexion dark (fol. 2). On the hearing of his petition for naturalization the appellee testified that his grandparents, his parents and himself were all born in Bombay, India, that his people came from Persia some twelve hundred years ago, and since that time have lived in and about Bombay, India (fols. 23-24); that he belongs to what is known as the Parsee race, which is a branch of the Persian race, they having come from the country now called Persia; that about 110,000 of the Parsee race are left, and that they never intermarry with other races (fols. 28-29), although the appellee himself married a woman who was born in New York City.

Judge Lacombe wrote a short opinion admitting the appellee to citizenship, which is found at folios 31 to 35 of the printed record, in which he said:

> "The phrase '*free white persons*' must be taken as used with the same meaning in the various successive statutes in which it appears. There is much force in the argument that the Congress which framed the original act for naturalization of aliens (April 14, 1802) intended it to include only white persons belonging to those races whose emigrants had contributed to the building up on this continent of the community of people which declared itself a new nation, admission to the privileges of citizenship in which was by that statute sought to be restricted. No doubt such interpretation is unscientific and, it may be, not always easy of application; but there are equally serious objections to accepting the words 'white persons' as including all branches of the great race or family known to ethnologists as the Aryan, Indo-European or Caucasian. To do so will not only bring in the Parsees, of which race the applicant is a member and which is probably the purest Aryan type, but also Afghans, Hindoos, Arabs and Berbers. Individuals of those races may be desirable citizens, but it may well be doubted whether Congress intended to make citizenship here free for all of them upon merely the meagre examination of qualifications and antecedents which the statutes provide for."

INTRODUCTION.

The importance of the question before the Court has impelled the Government to make exhaustive research in order that the issues raised may be fully considered from every possible standpoint. Before proceeding with the more formal part of its brief the appellant desires to call attention to the manner in which it has treated the subject, so that the Court, in reading the following pages, may have in mind its reasons for presenting the case in such order.

The principal, if not the only question, is the meaning of the phrase "free white persons" as used in the Naturalization Acts. It was a phrase in more or less common usage in the Colonies and in the original thirteen States prior to the passage of the Acts under consideration, and so we turn naturally to ascertain its meaning when so used.

The word "free" in connection with the word "white" evidently refers to persons not bound out to service and our question narrows to who were considered to be "white persons" in the Colonies and States prior to 1790. It has been held by the Courts, and the appellee and intervenors so contend that by "white persons" Congress meant "Caucasians."

We therefore show:

A. That the term "Caucasian" was not coined until *after* the phrase in question had been in use some time; that, though "Caucasian" had been used before 1790, it could not have been known to Congress at that time. (p. 5).

B. That, from an examination of the Encyclopedias, Gazetteers, Geographies and Histories of the period, there was what was then called a "European race;" that it was synonymous with the "White Race," the races of mankind being usually at that time classified according to the colors of their skins; that all authors of the 18th century considered the races or peoples to whom the appellee and the intervenors belong, as well as other Asiatics, to be not white but dark (p. 14).

We then consider:

C. The various Naturalization Acts enacted in the Colonies and States prior to 1790, as showing the development of the Naturalization laws, the phraseology used, and the gradual restriction of the classes of persons permitted naturalization, up to the Act of Congress in 1790 (p. 40).

D. The various Naturalization Acts of Congress (p. 61).

E. The meaning of the words "free white persons" used in all the Acts, as shown by the debates in Congress (p. 81).

F. That all the cases decided in the various courts until the case of *re Halladjian* have assumed without careful investigation that by "white persons" was meant "Caucasians", and that Judge Lowell in that case has drawn erroneous conclusions (p. 109).

G. Various miscellaneous sources of information, which shed more or less light on the meaning of the term "free white persons" (p. 123).

Point I.

By the use of the term "free white persons" in the various Naturalization Acts from 1790 to date Congress meant Europeans and persons of European descent, and no others.

A. The word "Caucasian," as applied to races of mankind, was first used by Blumenbach, writing in Germany in 1781, and was not known in the United States until after 1790; consequently Congress could not have meant Caucasians by the term "free white persons."

It has been assumed by some and decided by others, after what was doubtless believed to have been careful investigation, that the words "white person" mean a member of the Caucasian race. The reported cases, which are referred to *infra*, all go back to the case of *re Ah Yup*, 5 Sawyer, 155, decided in 1878. So far as precedent is concerned, the appellee and the intervenors and all others similarly situated must rest their claims on these cases.

As Judge Sawyer based his decision largely upon the classification of Blumenbach, and as, in reality, the whole question simmers down to whether or not Congress, in using the phrase "white persons" in the Act of 1790, followed the classification of Blumenbach, and meant "Caucasians," we have quoted at length from that author.

Johann Frederick Blumenbach, who was born in Germany in 1752 and died in 1840, in the first edition of his work "On the Natural Variety of Mankind," published in 1775, made no reference to his now famous classification of races. But in his second edition, published in 1781, translated by R. T. Gore, member of the Royal College of Surgeons in London, and published in London in 1825, he says:

> "I have therefore attempted to form a more natural system of Mammifera: In doing so, I have looked to the general habit of these animals, but particularly to the organs of Motion in the formation of the orders, as being most open to inspection, and correspondent to the general habit. Two of these orders including many animals I have again subdivided into families according to the differences presented by their teeth, and designated them by the names of some of the Linnean orders: the whole class therefore is arranged in the following manner:
>
> "Order I. Bimanus—Man with two hands.
> II. Quadrumana — Animals with four hands.
> III. Chiroptera, etc."

(He then divides Order I as follows):

> "1. Homo. Erectus bimanus. Mentum prominulum. Sentes aequaliter approximati, incisores inferiores erecti."

(Under this he says):

> "There is but one species of the genus Man; and all people of every time and every climate with which we are acquainted *may* have originated from one common stock. All national differences in the form and colour of the human body are not more remarkable nor more inconceivable than those by which varieties of so many other organized bodies and particularly of domestic animals arise, as it were, under our eyes. All these differences too, run so irresistibly by so many shades and transitions one into

> the other that it is impossible to separate them by any *but very arbitrary limits.* I conceive, however, that the whole human species may be *most conveniently* divided into the following five races:
>
> "1. *The Caucasian Race.*—Colour more or less white, with florid cheeks, hair long, soft and brown, running on the one hand into white, on the other hand into black; according to the European ideas of beauty the form of the face and skull most perfect. It includes all of the Europeans with the exception of the Laplanders; the Western Asiatics on this side the Ob, the Caspian Sea, and the Ganges; lastly the Northern Africans; altogether the inhabitants of the world known by the ancient Grecians and Romans.
>
> "2. *The Mongolian Race.*—Mostly of a pale yellow (sometimes like a boiled quince or dried lemon peel), with scanty, harsh black hair; with half-closed and apparently tumid eyelids, a flat face, and lateral projections of the cheek bones. This race includes the remaining Asiatics excepting the Malays; in Europe, the Laplanders; and in North America the Esquimaux, extending from Behring's Strait to Labrador.
>
> "3. *The Ethiopian Race.*—Black in a greater or less degree; with black frizzly hair; jaw projecting forwards; thick lips and flat nose. Composed of the remaining Africans, viz., the negroes who pass into the Moors by means of the Foulahs, in the same manner as other varieties merge into one another in consequence of their intercourse with a neighboring people.
>
> "4. *The American Race.*—Mostly tan colour or cinnamon brown (sometimes like rust of iron or tarnished copper), with straight, coarse black hair; with a wide, though not a flat face, and strongly marked features. Comprises all the Americans, except the Esquimaux.
>
> "5. *The Malayan Race.*—Of a brown colour, from a clear mahogany to the darkest clove or chestnut brown; with thick, black, bushy hair, a broad nose, and wide mouth. To this class belong the South Sea Islanders,

or inhabitants of the fifth part of the world; of the Marianne, Philippine, Molicca, and Lunda Isles, etc., with true Malays.

"The Caucasians must, on every physiological principle, be considered as the primary or intermediate of these five principal races. The two extremes into which it has deviated, are on the one hand the Mongolian, on the other the Ethiopian. The other two races form transitions between them; the American between the Caucasian and Mongolian; and the Malayan between the Caucasian and Ethiopian."

After making the division given above the author says:

"It seems but fair to give briefly the opinions of *other* authors also who have divided mankind into varieties, so that the reader may compare them more easily together, and weigh them *and choose which of them he likes best.* The first person so far as I know who made an attempt of this kind was a certain anonymous writer who towards the end of the last century divided mankind into four races; that is, first, one of all Europe, Lapland alone excepted, and Southern Asia, Northern Africa, and the whole of America; secondly, that of the rest of Africa; thirdly, that of the rest of Asia, with the islands towards the east; fourthly, the Lapps.

"(1684). Leibnitz divided the men of our continent into four classes. Two extremes, the Laplanders and the Ethiopians; and as many intermediates, one eastern (Mongolian), one western (as the *European*).

"(1733). Linnaeus, following common geography, divided men into (1) the red American, (2) *the white European*, (3) *the dark Asiatic*, and (4) the black Negro.

"(1749). Buffon distinguished six varieties of man: (1) Lap or polar, (2) Tartar (by which name according to ordinary language he meant the Mongolian), (3) *South Asian*, (4) *European*, (5) *Ethiopian*, (6) American.

"Among those who reckoned three primitive nations of mankind answering to the number of the sons of Noah, Governor Pownall is first entitled to praise, who, as far as I know, is connected with this subject. *He divided these stocks into white, red and black.* In the middle one he comprised both the Mongolians and Americans, as agreeing, besides other characters, in the configuration of their skulls and the appearance of their hair.

"Abbe de la Croix divides man into white and black. The former again into white, properly so called, brown, yellow, and olive coloured.

"(1775). John Hunter reckons seven varieties: (1) Of black men, that is Ethiopians, Papuous, etc., (2) the blackish inhabitants of Mauretania and the Cape of Good Hope, (3) the copper coloured of Eastern India, (4) the red Americans, (5) the *tawny*, as Tartars, *Arabs, Persians*, Chinese, etc., (6) *brownish*, as the *Southern Europeans*, Spaniards, etc., Turks, Abyssinians, Samoides, and Lapps, (7) *white*, as the *remaining Europeans*, the Georgians, Mingrelians, and Kabardinski.

"(1785). Kant derives four varieties from dark brown Autochthones: *the white one of Northern Europe*, the copper coloured American, the black one of Senegambia, *the olive-coloured Indian.*

"Zimmermann is amongst those who place the aborigines of mankind in the elevated Scythico-leviatic plain near the sources of the Indus, Ganges, and Obi Rivers and thence deduces the varieties of Europe (1) Northern Asia and the great part of North America, (2) *Arabia, India, and the Indian Archipelago*, (3) Asia to the northeast, China, Corea, etc. (4) He is of opinion that the Ethiopians deduce their origin from either the first or the third of these varieties.

"Meiners refers all nations to two stocks: (1) handsome, (2) ugly; the first, white, the latter, dark."

We respectfully call the attention of the Court to the fact that this classification, now justly famous, was made by a physician in 1781, who, while he was doubtless known in medical circles in Europe,

had probably never been heard of by anyone in the Colonies; that it was not written in English, and that in it the author especially calls the attention of his readers to the classifications of writers who had preceded him. Is it reasonable to suppose, even if the members of Congress knew of the classification of Blumenbach, that out of all the other classifications they selected the one made by him as the one upon which they would base the admission of aliens to the rights of citizenship in the United States?

Now as to the question of whether or not Congress had a knowledge of Blumenbach: In 1787 Dr. Samuel Stanhope Smith, President of the College of New Jersey (now Princeton), first published his essay "On the Variety of the Complexion and Figure in the Human Species." In 1799 Dr. Charles White published in London an answering essay, being "An Account of the Regular Gradation in Man," in which he refers to "Professor Blumenbach," who "regards the protuberance of the jaw-bones as the most distinguishing feature in the negro's countenance," and in which he comments quite forcibly on the essay written by Dr. Smith, referred to above. In 1810 Dr. Smith published the second edition of his essay as a reply to Dr. White, and in the preface of his work, page 6, says:

> "This essay was first published in 1787. * * * Dr. Blumenbach, one of the most celebrated naturalists, anatomists and physicians of Germany, published in the year 1795 at Gottingen, the third edition, the only one which I have seen of his famous treatise, *De Generis Humani Varietate Nativa. Of this work I could consequently make no use in my first edition. I believe it had not then come to the public eye.*"

On page 240 of the second edition of his essay Dr. Smith says:

"Blumenbach *attempts to throw* the different races of men into five principal divisions, viz., the Caucasian or handsomest race, the primary seat of which was about the Euxine and Caspian seas, and the countries somewhat to the south, from whom came the Europeans; second the Mongou, or people inhabiting the north-east of Asia, with their descendants to the east of that continent. Third, the African. Fourth, the American. And fifth, the Malayan, occupying the south-east of Asia, and a great part of the isles in the Indian and great South Seas.

"Leibnitz ranks them under *four* orders: the Laponian; the Ethiopic; the eastern Mongou, comprehending the people of Asia; and the western Mongou, embracing those of Europe.

"Linnæus likewise divides them into four: the red American; *the white European; the dark coloured Asiatic*; and the black Ethiopic.

"Buffon arranged them in six: the Laponian in the north of Europe and Asia; the Tartar in the northeast of Asia; the southern Asiatic; *the European;* the Ethiopian, and the American.

"Various other divisions have been made by different writers, as, the Abbé de la Croix; Kant; Dr. John Hunter; Zimmermann and others.

"*The conclusion to be drawn from all this variety of opinions is, perhaps, that it is impossible to draw the line precisely between the various races of men, or even to enumerate them with certainty; and that it is in itself a useless labor to attempt it.*"

If there was a single person in the thirteen States who knew of the classification of Blumenbach in 1790, the President of the College of New Jersey was that person, and we have his own statement to the effect that he had never even heard of Blumenbach until at least after 1795, and *as a matter of fact it was after 1799*, because Dr. White did not publish his essay, answering the essay of Dr. Smith and referring to Blumenbach, in London until 1799.

The first translation into English of the treatise of Blumenbach, in which he first used the term "Caucasian," was made by William Lawrence, Fellow of the Royal College of Surgeons in London, and was published *in London in 1807*. The dedication in this work to Sir Joseph Banks is dated April, 1807, seventeen years after the passage of the first Naturalization Act by Congress, over twenty years after the phrase "free white persons" was first used by the Georgia and South Carolina Assemblies, and eighty six years after the phrase "every free white man" was first used by the South Carolina Assembly. Can it be urged at all by the Appellee and the Intervenors, even with the decisions of the Courts thus far to back them up, that Congress intended "white persons" to mean members of the "Caucasian race," when the term was used in the States years before the coining of the word "Caucasian" and over twenty years before the translation of Blumenbach's treatise?

The learned judges who have passed upon this question seem to have taken for granted that, because Blumenbach wrote in 1781, his works immediately became as well known as though they had been written in the present day with all the modern facilities for the distribution of knowledge.

In the preface to the "New England Dictionary on Historical Principles Founded Mainly on Materials Collected by the Philological Society," edited by James A. H. Murray and published in Oxford in 1888, a monumental work in six large volumes, the author says:

> "The aim of this dictionary is to furnish an accurate account of the meaning, *origin* and history of English words now in general use. * * * It endeavors to show with regard to each individual word, when, how, in what shape and with what signification it became English."

In volume 2, page 191, under the word "Caucasian" the author says:

> "The name given by Blumenbach about 1800 to the white race of mankind which he derived from the region of the Caucasus (now practically discarded)."

And under the date of its first use in English the author says:

> "1807 W. Lawrence—Short System of Comparative Anatomy."

The editor here referred to the translation of Blumenbach's work which we have before mentioned.

Chief Justice Murray of California has very concisely and ably stated the general situation as to the ethnology of the period in his opinion rendered in the case of the *People* v. *Hall*, 4 Cal., 399, decided in 1854. He says:

> "At the period from which this legislation dates, those portions of Asia which include India proper, the Eastern Archipelago, and the countries washed by the Chinese waters, as far as then known, were denominated the Indies, from which the inhabitants had derived the generic name of Indians.
>
> "Ethnology, at that time, was unknown as a distinct science, or, if known, had not reached the high point of perfection which it has since attained by the scientific inquiries and discoveries of the master minds of the last half century. Few speculations had been made with regard to the moral or physical differences between the different races of mankind. These were general in their character and limited to those *visible and palpable* variations which could not escape the attention of the most common observer."

We find then that Blumenbach made his now famous classification of races in 1781, and that he amplified and enlarged his treatise in 1795; that

this treatise was first translated into English by Mr. Lawrence in 1807; that in 1787, six years after Blumembach had written his treatise, the president of the College of New Jersey, now Princeton, had never heard of it; that in 1799 Dr. White, writing from Edinburgh, refers to Blumenbach's classification in a casual manner, and that in 1810, in the second edition of his essay, Dr. Smith, the president of the College of New Jersey, states positively that he had not heard of Blumenbach in 1787 and intimates that he first heard of it through the reading of Dr. White's essay which was published in 1799. This completely and effectually does away with the opinion, expressed by courts and attorneys alike, that Congress intended the term "white persons" to mean "Caucasians."

B. All the text-books and books of reference published prior to 1790, and as recently as 1831, show that at that time there was what was called a "European Race," that it was the "white race," and that all Asiatics and Africans were considered dark and as belonging to the yellow, brown or black races.

If the Colonists in 1790, represented by their Members of Assembly and Members of Congress, had any knowledge as to the classification of the members of the human race, such knowledge must have been derived from books written prior to that date. Therefore, as indicating the knowledge which the Colonists had, we feel that we may turn with confidence to the works which were commonly circulated in the Colonies both before and after 1790, such as the Gazetteers, Geographies, Histories, Encyclopedias, etc., of that period.

These we have examined at length and in detail and in not a single one do we find the term "Caucasian" used, though the term "Caucasus," as referring to the country and to a chain of mountains, appears in each. We have examined every Gazetteer or Geographical Dictionary of the period in question now obtainable and we do not find the term "Caucasian" used at all until after 1810.

1. The Gazetteers or Geographical Dictionaries.

The following is a list of Gazetteers and Geographical Dictionaries, with the dates and places of publication of each, which we have carefully examined, none of which published after Blumenbach used the word, contain the term "Caucasian," and all of which where any attempt at classification of the races is made, classify them on color lines alone.

"A Universal Geographical Dictionary or Grand Gazetteer of General, Special, Ancient and Modern Geography;" in two volumes, by Andrew Brice, of Exeter, published in London in *1759*.

"The Universal Gazetteer," by John Walker, published in London in *1795*.

"The New Universal Gazetteer or Geographical Dictionary," by Rev. Clement Cruttwell, published in London in *1798*.

"The New and Universal Gazetteer or Modern Geographical Dictionary," by Joseph Scott, published in Philadelphia in *1799*.

"A New Gazetteer of the Eastern Continent or a Geographical Dictionary," by Jedediah Morse and Elijah Parrish, published in Charlestown, Mass., in *1802*.

"A New Geographical Grammar," superintended and revised by John Evans, published in London in *1809*.

"Geographical Dictionary or Universal Gazetteer, Ancient and Modern," by J. E. Worcester, published in Salem, Mass., in *1817*.

"New Universal Gazetteer or Geographical Dictionary," by Jedediah Morse and Richard C. Morse, published in New Haven and in Hartford in *1821*.

"The Edinburgh Gazetteer or Geographical Dictionary," published in Edinburgh in *1822*.

"The Universal Preceptor, being a General Grammar of Arts, Sciences and Useful Knowledge," fourth American edition, published by David Blair in Philadelphia in *1822*.

"A Concise New Gazetteer of the World—supplying a vocabulary of Nouns and Adjectives derived from Names of Places," by Christopher Earnshaw, published in Derby, England, in *1824*.

It may be pertinent to state here that Blumenbach, during a portion of the latter years of his life, was Court Physician to the House of Hanover, and it would seem that if any English work at that time would contain the word "Caucasian," that this work of Earnshaw, published in Derby, England, intended to supply "a vocabulary of nouns and adjectives derived from the names of places," would surely contain it. We find it does contain "Caucasus," referring to both the mountains and country, but not "Caucasian."

A "New and Comprehensive Gazetteer and Dictionary of Geography," by G. N. Wright, published in *1834*.

It was, therefore, impossible, as a matter of fact, for Congress to have used the phrase "white persons" as meaning "Caucasians," as the term was not known, when it passed the Naturalization Act.

We will now turn our attention to the question as to whether or not as a matter of common and general knowledge the races and peoples of Asia and the Orient were considered "white persons" in the 18th Century. As bearing upon this question we consider the early Geographies published both in England and the Colonies of the utmost importance.

2. Tho Geographies.

In 1712, S. Clark published in London a "Description of the World, etc.," and referring to the Persians, says on page 134:

> "The people are generally rude—broad faces—flat nosed, *swarthy of complexion* "

and to the people of India, page 140:

> "The natives of India are different according to the climate they inhabit; but in general of a *swarthy complexion*."

In 1733 Patrick Gordon published a "Geographical Grammar" in London, and on page 259 states that the Persees "are the posterity of the ancient Persians," and referring to the inhabitants of India, says, page 258:

> "The inhabitants of the various parts of this vast empire have various tempers and customs. What those of the inland provinces are is not very certain, our intelligence of them being yet very slender, but the people of the southern or Maratime places are * * * strong of body *and in complexion inclining somewhat to that of the negroes.*"

In "Modern History, or the Present State of all Countries," by Thomas Salmon, illustrated by Herman Moll and published in London in 1746, referring to the people of Asia, on page 59, Volume 8, the author says:

> "The people in some parts of Asia, particularly in the peninsula of India on this side the river Ganges, are full as *black* within the tropic of Cancer as any of the negroes in Africa. *Nor is there in the inland country of India at a distance from the coast a single person to be found that is not black:* at least, I never met one, tho' I traveled 100 miles in that country and resided some time in it."

And on page 314, Volume 1, referring to the Persians:

> "The Persians are personable men of a good stature, well shaped, clean limbed and

of agreeable features; and in Georgia and the northern provinces, of an admirable complexion; towards the south they are a little upon the *olive*."

This is one of the most complete and carefully compiled works of its kind published in England during the 1700's, and it was in circulation among the educated classes in the colonies in the latter part of that period. The author of it had travelled extensively, and his views and ideas carried weight. There is no indication in any part of the work that the inhabitants of India or of Asia Minor were considered white or even bordering on white.

"The Universal Traveller, or a Complete Description of the Several Nations of the World," by Thomas Salmon, published in London in 1752, in speaking of the inhabitants of India in Asia, page 154, says:

> "The Indians (India in Asia) are of a middle size, seldom corpulent, their features good, but their *complexion for the most part black*; they have long black hair and black eyes; but though the men in the middle of the peninsula are as *black as jet*, towards the north they are *tawny*, as well as on the coast."

Page 259, speaking of the Persians:

> "The Persians are exceedingly well proportioned, moderately tall, good features and complexions, except in the southern provinces, where the excessive heat is a great enemy to beauty."

Page 323:

> "The Arabians have *swarthy complexions* and slender bodies, their stature rather low than tall."

"A New System of Geography," by A. F. Busching, D.D., Professor of Philosophy in the Uni-

versity of Gottingen, a member of the Learned Society at Dinsburg, in six Volumes, translated and published in London in 1762, says in Volume 1, page 57, speaking of the derivation of the word "Europe";

> "Bochart is of opinion that the name of Europe is of Phoenician origin, for the Phoenicians called the principal division of the earth 'Ur Appa,' '*the land of the people with fair faces*,' in contradistinction to the sallow and black complexion of the Africans; this derivation is far more probable than any of the other etymologies usually assigned to the word."

Andrew Price, in his "Universal Geographical Dictionary," published in 1769, in Volume 2, page 1023, says:

> "The Gaures or native old Persians are of rough skin and *olive complexion*, but in most parts the moderns, by a mixture of Georgian and Circassian blood, are much rectify'd."

And on page 734 of Volume 1, referring to the people of India:

> "The people are generally handsome, well made and of good features, *black as jet towards the south, and towards the north of an olive color*."

In "An Inaugural Dissertation," by John Hunter, published in Edinburgh in 1775, the author, in the chapter entitled "Of Colour," says:

> "The varieties of colour are wonderful. Thus in men we meet with white, black, brown, copper-colour; lastly, all shades between white and black, some having one, and others another. And in order to show this more clearly, I have subjoined a table of the colors of man, as they differ according to race, which I put forward, not as an absolutely correct history of colours, but only as an example and specimen of varieties.

TABLE OF COLOURS.

Black—Africans under the direct rays of the sun. Inhabitants of New Guinea and of New Batavia.
Sub-Black—The Moors of Northern Africa. The Hottentots, dwelling towards the south of the continent.
Copper-coloured—The East Indians.
Red—Americans.
Brown—Tartars, *Persians, Arabs, Africans dwelling on the Mediterranean Sea,* Chinese.
Light Brown—Southern Europeans, Sicilians, Abyssinians, Spanish, Turks and others. Samoeides and Laplanders.
White—Almost all the remaining Europeans, as Swedes, Danes, English, Germans, Poles and others, Kabardinski, Georgians, Mingrelians."

This classification states concisely what was doubtless the general idea of the color of the various peoples inhabiting the globe at that period, and it is so far correct that even to-day few, if any, changes could be made in it. Note that the author considers that the Moors of Northern Africa, who are Caucasians, according to Blumenbach, are sub-black in color; that the Persians and Arabs, also Caucasians, are brown, and the East Indians, the inhabitants of India, are copper colored.

In 1777 William Guthrie published in London "A New Geographical, Historical and Commercial Grammar." On page 545, referring to the inhabitants of India, he says:

> "The inhabitants are called Gentoos, or as others call them Hindoos * * * the complexion of the Gentoos is *black,* their hair long, and the features of both sexes regular"

and on page 556 he says:

> "The Persees, or Parsees, of Indostan are originally the Gaurs described in Persia"

and on page 569, referring to Persia, he says:

> "The Persians of both sexes are generally handsome, their complexions are somewhat *swarthy.*"

Here we have an author writing in 1777 at about the period under consideration, referring directly to the race or tribe to which the Appellee belongs and stating that the Parsees were descended from the Persians whose complexion was swarthy.

In 1777 Charles Theodore Middleton published in London "A New and Complete System of Geography." In Volume 1, page 64, referring to the people of Persia, he says:

> "The Persians in general are of middle size * * * *their complexion is tawny*"

and on page 142, referring to the inhabitants of India:

> "The Indians are of a middle stature and good features. The inhabitants of the northern part are of a *deep olive colour,* and those in the south *black;* the natives who dwell on the mountains in the center of the peninsula are *exceedingly black.*"

Does it appear from this work that the inhabitants of Asia, or any of them, were considered white?

"Zoologie Géographiqe," Premier Article, *L'homme* par E. A. G. Zimmermann, 1784. This author on page 177 divides man into four races: "d'aprés les quatre parties du monde, c'est-à-dire en Américains, *Européens,* Africains and *Asiatiques.*"

The first geography published in this country was the "Compendium of Geography," written by Jedediah Morse, and published at New Haven about October 28, 1784. Referring to the various varieties of the human race the author says on page 211:

> "Since the character of almost every nation upon this habitable earth has been particularly

described in the foregoing sheets, we will now consider them under the following general directions:

"The varieties among the human race enumerated by Linnæus and Buffon are six. The first is found under the Polar regions and comprehends the Laplanders, the Esquimaus, Indians, the Samœid Tartars, the inhabitants of Nova Zembla, the Borandians, the Greenlanders and the people of Kamschatka. The visage of men in these countries is large and broad; the nose flat and short, the eyes of a yellowish brown inclining to blackness; the cheek bones extremely high; the mouth large, the lips thick and turning outwards, and the skin a dark grey color. The people are short in stature, the generality being about four feet high and the tallest not more than five. Ignorance, stupidity and superstition are the mental characteristics of the inhabitants of these rigorous climates. For here

'Doze the gross race,
Nor sprightly jest nor song,
Nor tenderness they know, nor aught of life,
Beyond the kindred bears that stalk without.'

"The Tartar race, comprehending the Chinese and the Japanese, forms the second variety in the human species. Their countenances are broad and wrinkled even in youth; their noses short and flat; their eyes little, sunk in the sockets and several inches asunder; their cheek bones are high; their teeth of a large size and spread from each other; their complexions olive colored, and their hair black. These nations in general have no religion, no settled notions of morality and no decency of behavior. They are chiefly robbers. Their wealth consists in horses and their success in the management of them.

"*The third variety of mankind is that of the Southern Asiatics or inhabitants of India.* These are of a slender shape, have long, straight, black hair and generally Roman noses. These people are slothful, luxurious, submissive, cowardly and effeminate.

'The parent sun himself
Seems o'er this world of slaves to tyrannize;
And, with oppressive ray, the roseate bloom
Of beauty blasting, gives the *gloomy hue*
And features gross.'

"The negroes of Africa constitute the fourth striking variety in the human species. But they differ widely from each other. Those of Guinea, for instance, are extremely ugly and have an insupportably offensive scent; whilst those of Mosambique are reckoned beautiful and are untainted with any disagreeable smell. The negroes are in general of a black color and the downy softness of hair which grows upon the skin gives a smoothness to it resembling that of velvet. The hair of their heads is woolly, short and black, but their beards turn grey and sometimes white. Their noses are flat and short, their lips thick and tumid, and their teeth of ivory whiteness. The intellectual and mental powers of these wretched people are uncultivated and they are subject to the most barbarous despotism. The savage tyrants who rule over them make war upon each other for human plunder and the wretched victims bartered for spirituous liquor, or torn from their families, their friends and their native lands and consigned for life to misery, toil and bondage. * * *

"The native inhabitants of America make a fifth race of men. They are of a copper color, having black, thick, straight hair, flat noses, high cheek bones and small eyes. They paint the body and face of various colors and eradicate the hair of their beards and other parts as a deformity. Their limbs are not so large and robust as those of the Europeans and they endure hunger, thirst and pain with astonishing firmness and patience, and though cruel to their enemies they are kind and just to each other.

"*The Europeans* may be considered as the last variety of the human kind. But it is unnecessary to enumerate the personal marks which distinguish them as *every day affords you opportunities of making such observations.*"

Note that he refers to the varieties as enumerated by Linnaeus who wrote in 1735, and Buffon who wrote at about the same time (1749), but does not refer in any way to Blumenbach's classification.

George Louis LeClerc, Comte de Buffon, born in 1707, died 1798, to whom Mr. Morse refers in his geography, wrote and published his "Histoire Naturelle, Génèrale et Particulière," a work consisting of 44 volumes, the first 15 volumes being published in Paris during the period from 1749 to 1767. It was in this portion of the work that the author made his classification of races. As Mr. Morse refers to this classification, we quote from a translation of Buffon published in Dublin in 1791:

> "The Moguls (Hindoos and other inhabitants of the peninsula of India) are not unlike the Europeans in shape and in features, *but they differ from them in color.* The Moguls are of an *olive complexion*, yet in the Indian language the word Mogul signifies white. The women are extremely delicate; they are of an *olive color* the same as the men.
>
> "*The inhabitants of Persia, of Turkey, of Arabia, of Egypt, and of the whole of Barbary may be considered as one and the same people.* * * * The Egyptian men are *very brown;* though the women are commonly rather short, the men are of good height; both generally speaking are of an olive color. * * *
>
> "So intermixed are the inhabitants of Mexico and New Spain that hardly do we meet with two visages. In the town of Mexico there are *white men from Europe*, Indians from the north, negroes from Africa. The real natives of the country are of a very brown olive color."
>
> (Note that Buffon refers to "white men from Europe").

In the "Universal Geography," by Charles Smith, published in New York in 1795, the author on page 23 says:

> "*The Europeans are white* and better made than the Africans or Asiatics who are many

> of them so very unpolished as hardly to resemble the human species. * * * The Chinese are rather of a swarthy complexion * * * *the complexions of the inhabitants of Indostan are no less various than their climate.* * * * The Japanese are of a yellow complexion * * * the inhabitants of Africa are for the most part tawny and in some parts quite black."

In 1795 Nathanial Dwight published at Hartford a "System of Geography of the World's Events," in which, on page 103, referring to Indostan, he says:

> "What are the characteristics of the Hindoos? They are much like the other Asiatics that I have mentioned before. The Persians worship fire, the Persees are more industrious than the *Persians from whom they are descended. Their complexions are rather swarthy.*"

"The Encyclopaedia, or a Dictionary of Arts, Sciences and Miscellaneous Literature," first American edition in 18 volumes, printed by Samuel Dobson in Philadelphia in 1798, "compiled from the writings of the best authors in several languages, the most approved dictionaries, as well as of general science, as of its particular branches, the manuscript lectures of eminent professors on different sciences, etc." contains no mention of Blumenbach or his classification of races, and in volume 1, page 225, subject "Africa", the author says:

> "In many material circumstances the inhabitants of this extensive continent agree with each other. If we except the people of Abyssinia who are tawny * *, they are all of a black complexion."

On page 538, volume 1 of the same work, subject "America", the author says:

> "At the time when this great continent was made more generally known to the

Europeans by the discoveries of Christopher Columbus * * * it was found inhabited by various tribes and nations of men who differed in many respects from most of the people in the three quarters of the world * * *. In Europe and Asia the people who inhabit the northern countries are of a fairer complexion than those who dwell more to the southward. In the torrid zone, both in Africa and *Asia the natives are entirely black or the next thing to it.* * * * The people of Lapland who inhabit the most northerly part of Europe are by no means so fair as the inhabitants of Britain, nor are the Tartars so fair as the inhabitants of Europe who lie under the same parallel of latitude."

In volume 5, page 286, the author says, speaking of the diversity of complexion among the human species:

"On this subject Dr. Hunter hath published a thesis ('An Inaugural Dissertation,' above referred to) in which he considers the matter more accurately than hath commonly been done."

He then takes in the table of colors as given by Dr. Hunter, and also refers to the essay by Dr. S. S. Smith, President of the College of New Jersey, from which we have quoted, and states:

"The natives of many of the kingdoms and isles of Asia are black, those of Africa situated near the line of the same color; those of the maritime parts of the same continent of a dusky brown nearly approaching to it, and the color becomes lighter or darker in proportion as the distance from the Equator is either greater or less. *The Europeans are the fairest inhabitants of the world.*"

Speaking of the Jews, on page 289, the author says:

"It can be shown that the members of the very same family, when divided from each

other and removed into different countries, have not only changed their family complexion, but they have changed it to as many different colors as they have gone into different regions of the world. We cannot have perhaps a more striking instance of this than in the Jews. These people are scattered over the face of the whole earth. They have preserved themselves distinct from the rest of the world by their religion; and as they never intermarry with any but their own sect, so they have no mixture of blood in their veins that they should differ from each other; and yet nothing is more true than that the *English Jew is white*, the Portugese swarthy, *the Armenian olive*, and the *Arabian copper;* in short that there appears to be as many different species of Jews as there are countries in which they reside."

And summing up the author says:

"From the whole of these facts we may conclude that the inhabitants of the earth are children of the same original parents, and that the difference of their appearance has proceeded from incidental causes arising from a combination of those qualities which we call climate."

In volume 10, page 507 of the same work, discussing the various colors of the peoples of the earth, the author says:

"Americans of copper-colored complexion, remarkably erect, their hair is black, lank and coarse.

"*Europeans of fair complexion*, sanguine temperament and brawny form, their hair is flowing and of various shades of brown, the eyes are mostly blue.

"*Asiatics of sooty complexion*, melancholic temperament and rigid fibre. The hair is strong, black and lank, the eyes are dark brown.

"Africans of black complexion, phlegmatic temperament and relaxed fibre, the hair is black and frizzly, the skin soft and silky, the nose flat, the lips are thick."

(In a note appended to a translation of the works of Linnaeus, published in 1788, the editor says):

> "The following arrangement of the varieties in the human species is offered by Dr. Gmelin as more convenient than that of Linnaeus:
>
> (*a*) *White* (Hom Albus). Formed by the rules of symmetrical elegance and beauty, or at least what we consider as such. *This division includes almost all the inhabitants of Europe.*
>
> (*b*) *Brown* (Hom. Badius). *Of a yellowish brown color. This variety takes in the whole inhabitants of Asia.*
>
> (*c*) Black (Hom. Niger). Of black complexion. The whole inhabitants of Africa excepting those of its more northern parts.
>
> (*d*) Copper color (Hom. Cupreus). The complexion of the skin resembles the color of copper not burnished. The whole inhabitants of America except Greenlanders and Esquimaux.
>
> (*e*) Tawny (Hom. Fuscus). Chiefly of a darkish brown color. The inhabitants of the southern islands and most of the Indian Islands."

In 1805 Benjamin Davies published in Philadelphia the second edition of his "New System of Modern Geography," and on page 225 he refers to the table of nations given by Linnæus, who wrote, as we have said, in 1735. Blumenbach, who wrote in 1775, 1781 and 1795, is not referred to at all. Speaking of the inhabitants of India, on page 306, the author says:

> "The native race presents considerable varieties as being fairer in the northern parts and in the southern *almost or wholly black.*"

In "The American Encyclopædia," published in 1807, volume 3, page 417, speaking of Europeans the author says:

> "*Europeans*, the inhabitants of Europe. They *are all white* and incomparably more handsome than the Africans, and even than most of the Asiatics."

(There is no mention in this work of the word "Caucasian" or of Blumenbach.)

In "A General View of the World, Geographical, Historical, Philosophical, on a Plan Entirely New," in two volumes, by Rev. E. Blomfield, published in 1807, on page 41, volume 1, the author, referring to Sir William Jones and speaking of the *Arabs*, Tartars and Hindoos, says:

> "The three races therefore whom we have already mentioned migrated from Iran as from their common country. The Arabians who descended from Shem, the Tartars from Japhet, and the Hindoos from Ham. The Europeans include the Jews, Assyrians, Babylonians, Persians, Syrians, Saracens and Moors. The Hindoos, the Persians, and both peninsulas of India, and China and Japan."

(No mention of "Caucasians.")

The author of the "New Geographical Grammar," published in London in 1809, by John Evans, on page 963, says:

> "*The complexion of the Hindoos is black*, their hair is long, their persons are straight and well formed, their countenances open and pleasant."

And on page 796, referring to the Persians:

> "The Persians of both sexes are in general handsome, their common complexion is fair, somewhat *tinged with olive*, but those in the south and the provinces towards India are of a *dark brown*."

In 1811 "The Modern Geography and a Compendious General Gazetteer" was published in three volumes by "A Society." In volume I, page 308, referring to the inhabitants of India, this work said:

> "The people being rather fair in the northern parts of it, while they are *entirely black* in the south, but they have neither hair nor features which are peculiar to negroes, bearing a stronger resemblance in these respects to the Persians or Europeans."

This work refers to "Caucasus" Mountains and Country, but not to "Caucasian," although it was published at least sixteen years after the third edition of Blumenbach's treatise, and we submit that it clearly shows that the classification of Blumenbach, referred to by Judge Sawyer and Judge Lowell, and relied upon by the Appellee and Intervenors here, was not generally known, even in England, in the early 1800's.

In 1819 Jedediah Morse, page 442, in "The American Universal Geography," speaking of the population of Asia, says:

> "The population of Asia is by all authors allowed to be wholly primitive and original."

Here the author gives the Linnæan table of the nations in Asia with no reference to Blumenbach or to the term "Caucasian." And on page 572, referring to the population of India, he says:

> "The original population may be generally considered as peculiar to the country, yet in so extensive a region and amidst the great diversity of climate and situation there are varieties. They are fair in the northern parts; in the southern almost or wholly black, but without the negro wool or features, the tinge of the women and superior class is olive."

And on page 626, referring to the Persians, he says:

> "The general complexion is fair, somewhat tinged with olive, but those in the south and the provinces towards India are of a dark brown."

The author of the Edinburgh Gazetteer, before referred to, published in 1822, in referring to the Persees, says:

> "The Persees are considered to be the descendants of the ancient Persians, they worship the sun."

And the author of the Universal Gazetteer, *supra*, says:

> "Persees—A people of Persia now scattered into different parts. They are worshippers of fire. On the conquest of Persia by the Mahometans *they removed to India.*"

This geography was followed by "A New System of Modern Geography, or a View of the Principal events of the World," by Sidney E. Morse, published in Boston and New Haven in 1822. In this work there is no reference to the "Caucasian race" or to Blumenbach, but the author, on page 53, referring to the inhabitants of America, says:

> "The number of inhabitants in America is commonly estimated at 35,000,000. They may be divided into three classes according to their color.
>
> "1. Whites. *They are the descendants of Europeans* who have migrated to America at various periods since its discovery.
>
> "2. Negroes. They are the descendants of Africans who were forced from their native country and sold as slaves to the American planters.
>
> "3. Indians of a copper color. The whites constitute more than half the population. The negroes one-eighth part, and the Indians about one-third. The whites and negroes are

rapidly increasing. The Indians are decreasing."

(Note that he says that the whites are descendants of *Europeans.*)

David Blair, in the "Universal Preceptor," above referred to, published in Philadelphia in 1822, speaking of color and gradations of civilization, says, page 109:

> "Those differences (color and gradations of civilization) are the effects of climate, habit and education. * * * Considering man as we find him scattered over the earth, the Laplanders, the Esquimaux, the Samoides, the Greenlanders, the Nova Zemblanians and the Kamschatadales, appear to be of one family inhabiting the northern frigid zone * * * the climate and habits of living * * * render all the inhabitants of the northern frigid zone of a *deep brown color approaching to blackness.* * * *
>
> "The next variety of the human species are the Tartars, the Chinese and the Japanese, who inhabit all that space of Asia from the great ocean to the Caspian Sea. They have broad foreheads and narrow chins, small sunk eyes, * * * and *olive complexions.* * * *
>
> "Another distinct family of the human race are *the black and swarthy inhabitants of India*, and of the islands of the Indian Ocean. They have *European features*, long, black, straight hair and slender shapes. Their manners are effeminate, but their dresses and houses are very elegant. * * *
>
> "The fourth variety of the human species, and the most remarkable of the whole, are the negroes of Africa. *Their black color*, their wooly heads, their flat noses and thick lips are well known among us.
>
> "* * * The next distinct family of men are the native American Indians. * * * They are of a dark *copper colour*, have black hair and small black eyes, high cheek bones, and frequently flat noses. * * *

> "*The sixth variety or the European race* are the English, the French, the Germans, Italians, Spaniards and other modern nations. These had their origin partly from the Scandinavians (Swedes and Goths), characterized by their light hair and blue eyes; and from the Celts, distinguished by black eyes and black hair. The Swedes, English, Irish, Scotch and Germans are very fair; but the Italians, French, Spaniards, and other nations occupying the south of Europe, are of brown complexions. * * *
>
> "Such are the natures and the varieties of men as scattered over the face of the earth."

The first American edition of this work was published in Philadelphia in 1817. As a general work embodying the knowledge of races and peoples known in the United States at that time, it is probably without an equal. It cannot be presumed that the knowlege of races decreased between 1790 and the time of the publication by Mr. Blair of the first American edition of his work in 1817. Therefore, when on page 115 the author refers to "the sixth variety or the *European race,*" he did not have in mind "Caucasians," but meant exactly what he said, that there was a *European race;* that it was a variety of the races of mankind; that it was the race from which the Colonists had sprung, and that it was distinguished from all other races by certain specific characteristics.

In 1823 William C. Woodbridge published the next American geography known as "Rudiments of Geography," and on page 47, referring to the races of man, he says:

> "There are five races of men on the earth distinguished from each other by their features and color.
>
> "I.—*The European race, with features like ours.* In cool climates they have light complexions, but in the warm climates of Asia and Africa and the south of Europe they are swarthy or brown.

"II.—*The Asiatic or Mongolian race of a deep yellow* extends over the Eastern part of Asia. They have straght black hair, small eyes set obliquely and projecting cheek bones. The inhabitants of the Frigid Zone are like the Mongolians except they are dwarfish.

"III.—*The American or Indian race* who are generally found in America *of copper color* with straight black hair and high cheek bones.

"IV.—*The Malay race* found in Malacca and one of the Asiatic Islands, *of a deep brown color* with black curled hair and broad mouths and noses, but otherwise with regular form and features.

"V.—*The African or black race* with broad noses, frizzly hair and thick lips, who are found chiefly in Africa and Australasia.

"The scriptures inform us that all the races are brethren of the same family.

"The great difference between them has been in part produced by the difference in climate, food and mode of living and in part by other causes which we do not fully understand."

Note that this was written 33 years after the passage of the Naturalization Act, and that there is no reference in any part of the work to the term "Caucasian," or to the classification of Blumenbach. The author adopts the old classifition of peoples which was based in this country in the early part of the last century on color alone.

We call particular attention to the words "The *European race* with features like ours," in view of the statement made by Justice Lowell that there was no such race as the "European race," and submit that here is positive proof that there was considered to be a "European race" even as late as 1823.

In 1828 Holbrook and Fessenden compiled "The Historical and Descriptive Lessons, embracing sketches of history, character and customs of *all* Nations, designed as a combination of Goodrich's,

Woodbridge's, Morse's, Smiley's and other school geographies," and on page 252 referred to the Persians:

"The Persians of both sexes are of a *swarthy complexion*, generally handsome, and of dignified aspect."

On page 260, referring to the inhabitants of India:

"The Hindoos are of a *tawny or olive complexion*; in the southern parts the laboring classes are almost as dark as Caffres of Africa; the Brahmins are of a copper colour."

On page 265, referring to the inhabitants of India beyond the Ganges:

"The inhabitants differ not in complexion from those of China except they are *a little browner*."

There is no reference in this work in any place to the term Caucasian, or to the classification of races made by Blumenbach.

In 1831 John Wright published in Boston a "Natural History of the Globe, of man, of beasts, of birds, etc.," and on page 155, referring to the inhabitants of India, he says:

"The Moguls (Hindoos) and the other inhabitants of the peninsula of India are not unlike the Europeans in shape and features; *but they differ more or less from them in color*. The Moguls are of *an olive complexion*. * * * The women are extremely delicate; * * * they are of *an olive color* as well as the men."

(Even as late as 1831 it appears that the inhabitants of India were considered dark in color and of an olive complexion.)

And in chapter 6, which is headed,

"Of the apparent Varieties of the Human Species — Laplanders — Tartars — Chinese —

Japanese—Formosans — Moguls—Persians—Arabians—Egyptians—Circassians—Turks—Russians—Negroes—Hottentots—Americans—Causes of this Variety—Accidental Varieties—"

he says:

> "The inhabitants of *Persia*, of *Turkey*, of *Arabia*, of *Egypt*, and of the whole of *Barbary may be considered as one and the same people.* * * * Though the women are commonly rather short, yet the men are of a good height. Both, generally speaking, are of *an olive colour.*
>
> "In surveying the different appearances which the human form assumes in the different regions of the earth, the most striking circumstance is that of colour. This circumstance has been attributed to various causes, but experience justifies us in affirming that of this the principal cause is the heat of the climate. Where this heat is excessive, as at Senegal and Guinea, the inhabitants are extremely black; where it is rather less violent, as on the easterly coasts of Africa, they are of a lighter shade; where it begins to be somewhat more temperate, as in *Barbary*, in *India*, in *Arabia*, etc., *they are only brown*, and, in fine, where it is altogether temperate, as in *Europe, they are white.*"

Do these statements indicate that the inhabitants of Asia were considered white by this author? He states that the peoples to which the Appellee and Intervenors belong are *olive colour* or *brown*, and that the Europeans are *white.*

We have referred to and quoted at length from these works published both in England and in the Colonies and States and circulated in the Colonies and States, contending that they indicate with accuracy the prevalent idea among the colonists as to the colors of the various peoples of the earth. From the literature which was accessible to them, from the teachings of men of science, from the tales of travellers who had been in foreign parts, the American colonists must necessarily have derived their knowledge of the inhabitants of Asia and Africa and from no other sources. It is a fact that not in a single work do we find that any of the races of Asia were considered "white." "The European race with features like ours" is the only people whom the authors describe as having a "white" or fair complexion.

We have shown that it was impossible for Congress to have used the word "white" as synonymous with the word "Caucasian," and the only conclusion which can be drawn from these works is that this word "white" was used then to mean exactly what it means now, a person of fair or light complexion, and to exclude all races and peoples of tawny, swarthy, brown, olive, yellow, red or black complexions, in fact that it was, as suggested by Judge Colt, *In re Saito*, used as a term of exclusion and not of inclusion, as claimed by the appellee and intervenors.

In this connection we again respectfully call attention to the fact that Judge Sawyer, Judge Lowell, and the judges passing upon the cases between *In re Ah Yup* and *In re Halladjian*, considered the question from the standpoint of recent authors on anthropology and ethnology. No judge or attorney, so far as we have been able to learn from an examination of the briefs and opinions, has ever considered the question from the standpoint of the knowledge which the colonists and the members of Congress had at the time when the term "white persons" was first used.

It is not, however, a question that can be treated from an ethnological standpoint. This science at that time was unknown. In fact, it has reached a high state of development practically within the last fifty years only. All that the colonists knew of the peoples inhabiting Asia must have been correctly mirrored in the works of that period. If we had found in the early 1800's authors referring to

Blumenbach's classification of races and to the term "Caucasian," we might then with some propriety claim that such classification became and was generally known in America at that time, but from the fact that not a single author refers to it, from the fact that the president of one of the principal seats of learning in the Colonies frankly states that he did not hear of it until at least after 1799, we are forced to the conclusion that not a single member of Congress had ever heard the word "Caucasian" in 1790, and we are convinced beyond all question whatsoever, as the word was not coined until 1781, that no member of the Georgia or South Carolina Assemblies in 1784 and 1785, had ever heard of Blumenbach and his classsification of races, and that Congress intended to permit the naturalization of the "European race with features like ours."

We find that in every Geography, Geographical Dictionary, History or Encyclopædia published during the 1700's and early 1800's, frequent mention is made of a "European race with features like ours," and that in every instance where reference is made to the inhabitants of India or to the Persians or Syrians they are considered to be people with *dark skins*. Every author who refers to the Parsees or Persees states that they are offshoots from the Persians and that they are a *dark-skinned* people. In the early works the races inhabiting Asia Minor were considered as "Persians" and no attempt was made to distinguish one from an other. The country from which the Intervenors came was considered a part of Persia. Not a single author refers to any of the inhabitants of Asia as *white* people. As Judge Murray said in the case of the *People* v. *Hall, supra:*

> "Ethnology at that time (1790) was unknown as a distinct science."

We must assume it to be a fact then that Congress did not seek to draft a Naturalization Act

along ethnological lines, but rather that the words and phrases used were used in their ordinary sense and meaning. A careful analysis of the facts considered from the standpoint of the times during which the Naturalization Acts were passed and not from the standpoint of recent ethnological works shows that Judge Sawyer in the *Ah Yup* case, and Judge Lowell in the *Halladjian* case, arrived at incorrect conclusions; that in 1790 there was a "*European race*," and that it was that race to which Congress intended to extend the privileges of citizenship.

Congress could doubtless have placed in the statute more definite words of exclusions which would have shut out certain specific peoples or races, but the law makers of that day were not prone to the use of unnecessary words. The Constitution which was drafted and passed at about the same time as the first Naturalization Act has existed for a century and a quarter and its main and general provisions have been found sufficient to meet the needs of a country which we believe has grown beyond any of the dreams entertained by its founders. The men of that day were careful choosers of their language, they knew what they intended to say and they said what they meant. If they had intended to extend the privilege of citizenship to "Caucasians" and had known of the word, we are forced to the conclusion from our knowledge of the men of affairs of that time that they would have used the term "Caucasian."

The Intervenors claim that the Government's construction is confusing and difficult of application and "amid ever changing and conflicting ethnological definitions" confusion may arise. As to this we say that the construction which we ask for is the correct and only construction which could possibly be given. The conditions which existed in 1790 will always remain the same, regardless of what recent ethnological and anthropological writ-

ers may promulgate. If Congress did not know of the term "Caucasian" in 1790, and if Congress intended to include "Europeans" and exclude all others, as we contend, any "ethnological differentiation" which may now be made can have no bearing upon the interpretation of these words.

It is not the province of the Court in this case to interpret this Act in the view of present or future conditions. It should endeavor to as far as possible place itself exactly in the position of the Members of Congress in 1790, and having in mind the sources from which the Members of Congress drew their knowledge, say what was the meaning assigned to the phrase "white persons" at that date.

As Justice Strong said in *Platt* v. *Union Pacific Railroad Co.*, 99 U. S., 48, in interpreting the Act of July 1, 1862 (12 Stat. L. 489), incorporating the Union Pacific Railroad Company and granting lands to the Company for the purpose of aiding in the consrruction of the railroad, etc. (pp. 63-64):

> "There is always a tendency to construe statues in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience * * * But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purposes from the language used in connection wtth the attending circumstances."

C. History and Summary of the Naturalization Acts of the several Colonies and original thirteen States.

CONNECTICUT.

Connecticut had no general naturalization laws.

DELAWARE.

"The Act of Union, for annexing and uniting of the Counties of New-Castle, Jones's and Whorekills, alias New-Dale, to the Province of Pennsylvania, and of naturalization of all foreigners, in the said province and counties annexed," given under authority of King Charles II, in 1682, by William Penn, Proprietary and Governor of the Province, in the second year of his government, after annexing the said counties to the Province of Pennsylvania and providing that the people therein should be governed by the same laws as the inhabitants of Pennsylvania, provided (Laws of Del., Vol. 1, Appendix, p. 9):

> "And forasmuch as it is apparent, that the just encouragement of the inhabitants of this province, and territories thereunto belonging, is likely to be an effectual way for the improvement thereof: And since some of the people that live therein, and are like to come thereinto, are foreigners, and so not freemen, according to the acceptation of the laws of England, the consequences of which may prove very detrimental to them in their estates and traffic, and so injurious to the prosperity of this province, and territories thereof,
>
> "Be it enacted, * * * That *all persons, who are strangers and foreigners, that now do inhabit this province, and counties aforesaid, that hold land in fee in the same*, according to the law of a freeman, *and who shall solemnly promise*, within three months after the publication hereof, in their respective county courts where they live, upon record, *faith and allegiance unto the King of England*, and his heirs and successors: *and fidelity and lawful obedience to the said William Penn, Proprietary and Governor of the said province and territories*, and his heirs and assigns, according to the King's letters patents, and deeds aforesaid, *shall be held and reputed freemen of the province and counties aforesaid, in as ample and full a manner as any person residing therein.*

"And * * * that when at any time, *any person that is a foreigner*, shall make his request to the Proprietary and Governor of this province and the territories thereof, for the aforesaid freedom, the said person *shall be admitted on the conditions herein expressed*," etc.

At the first session of the General Assembly, held in 1700, "An Act for Naturalization" was enacted by William Penn, the Proprietary and Governor, by and with the advice and consent of the freemen of the province and territories. This Act contains the same preamble as the Act of 1682 aforesaid and then provides (Laws of Del., Vol. 1, p. 52):

"Section 1. Be it therefore enacted * * * That it shall and may be lawful for the Proprietary Governor, and his heirs, or his or their Lieutenant and Governor for the time being, *by a public instrument under his or their broad seal, to declare any alien, aliens or foreigners, being already settled or inhabiting within this government, or that shall hereafter come to settle, plant or reside therein, having first made and given his or their solemn engagement or declaration to be true and faithful to the King as Sovereign, and to the Proprietary and Governor of this province and territories*, according to the laws and usages thereof, before the Governor for the time being, *to be to all intents and purposes fully and completely naturalized*, and the persons so approved of and named in such instrument or instruments as aforesaid, shall, by virtue of this act, have and enjoy to them and their heirs the same rights and immunities of and unto the laws and privileges of this Government, as fully and amply as any other of the King's natural-born subjects have or enjoy within the same," etc.

"Section 4. Provided always, * * * That *all Swedes, Dutch, and other foreigners, who were settled in this province or territories before the date of the King's letters patents to the Proprietary and Governor, shall be deemed, and by this act are declared, to be fully and completely naturalized*," etc.

In 1788 a supplementary act to this last act was adopted, which provided (Laws of Del., Vol. 2, p. 921):

"Whereas for the encouragement of aliens or foreigners already settled, or that may hereafter come to settle within this State, it is become necessary, since the change of government, that further provision should be made for enabling them to enjoy the rights and privileges of natural-born subjects of this state:

"Section 1. Be it therefore enacted, * * * That *any alien or foreigner already settled, or inhabiting within this state, or who shall hereafter come to settle or reside therein, and shall* before the President of the state, or before the Supreme Court in any of the counties of this state, *take, repeat and subscribe, the oath or affirmation* directed by the twenty-second article of the constitution or system of government of this state (the oath of allegiance), * * * *shall thereupon and thereafter be deemed, adjudged and taken, to be a natural-born subject of this state;* and shall be thenceforth entitled to all the immunities, rights and privileges of a natural-born subject of this state:"

GEORGIA.

The only Naturalization Act in Georgia seems to have been "An Act for ascertaining the rights of aliens, and pointing out a mode for the admission of citizens," adopted on February 7, 1785 (Digest of Laws of Ga., p. 392). This provided:

"Whereas, the many advantages and peculiar blessings which this State enjoys may induce foreigners to apply for a participation thereof: And whereas, it is the intention of the legislature to confer those benefits on all such as may apply and do merit the same:

"Be it enacted by the representatives of the freemen * * *, That *all free white persons, being aliens, or subjects of any foreign*

State or Kingdom at peace with the United States of America, who shall register or enrol their names in the office of the clerk of the Superior Court of the county where such aliens purpose to reside, may be, and they *are hereby vested with the rights and privileges of acquiring * * * personal property*, and renting houses * * * and shall have the right of suing for all such debts * * * other than for real estate," etc.

"II. * * * That *any alien, or subject of any foreign State or power being desirous of becoming a citizen of this State, who hath resided at least twelve months in the same, and, after the expiration thereof, doth obtain from the grand jury of the county where he resides a certificate, purporting that he hath demeaned himself as an honest man, and friend to the government of the State, * * * the alien or person so applying shall * * * take and subscribe the following oath (of allegiance) * * * Then, and in that case, such person shall be entitled to all the rights, liberties and immunities of a free citizen.*"

This act also provided that all such aliens or persons should, nevertheless, be liable to pay such alien duties as might be imposed by the legislature, and that no person on any act of confiscation or banishment, or who had borne arms against Georgia or the United States, being a citizen thereof, during the war, should avail himself of the privileges conferred by the act, with certain exceptions.

MARYLAND.

The first Naturalization Act in Maryland seems to have been adopted by the General Assembly in July, 1779. This act provided (Maxcy's Laws of Md., vol. 1, p. 362):

"Whereas the increase of people is a means to advance the wealth and strength of this state; and whereas many foreigners, from the lenity of our government, the security

afforded by our constitution and laws to civil and religious liberty, the mildness of our climate, the fertility of our soil, and the advantages of our commerce, may be induced to come and settle in this state, if they were made partakers of the advantages and privileges which the natural born subjects of this state do enjoy:

II. Be it therefore enacted, * * * That *every person who shall hereafter come into this state, from any nation, kingdom or state, and shall * * * repeat and subscribe a declaration of his belief in the Christian religion, and take, repeat, and subscribe, the following oath, or affirmation* if a quaker, menonist or tinker, (the oath of allegiance) * * * *shall thereupon and thereafter be deemed, adjudged and taken, to be a natural born subject of this state*, and shall be thenceforth entitled to all the immunities, rights and privileges, of a natural born subject of this state," etc.

The Acts of November, 1789, November, 1792, and November, 1793 (Maxcy's Laws of Md., vol. 2, pp. 93, 178, 199), provided for the relief of foreigners who had settled in the State since the passage of the Act of 1779, and had purchased property, but had not taken the oath there prescribed, by validating their titles and relinquishing the State's right to such property as had been escheated, and provided that the Acts should be published in May in every year in the English, French and German languages in the several newspapers within the State.

The Act of November, 1797 (Maxcy's Laws of Md., vol. 2, p. 388), declared that *all foreigners* who had emigrated and settled within the State before the passage of the Act of 1779, and who had continued as inhabitants of the State, and their descendants, should be taken to have been citizens of the State as if they were natives thereof, doubts having been entertained as to whether such persons were entitled to the benefits of that act.

The first Constitution of Maryland, adopted in 1776, provided in the second section that "*all free men*," having certain property qualifications, should have a right of suffrage in the election of delegates to the General Assembly. (Maxcy's Laws of Md., vol. 1, p. 17.)

By the Act of November, 1801, this was amended so as to provide that "*every free white male citizen*," and no other, having a certain residence in the country or city, should have a right of suffrage for such delegates. (Maxcy's Laws of Md., vol. 3, p. 53.)

MASSACHUSETTS.

On April 5, 1731, the Province of Massachusetts passed "An Act for Naturalizing Protestants of Foreign Nations, Inhabiting within this Province." (Acts and Resolves of Province of Mass. Bay, vol. 2, p. 586.) This Act provided:

> "Whereas divers Protestants, of the French and other foreign nations, have removed themselves and their families into this province, who are well affected to his majesty's government, and useful members of the Commonwealth; but being born out of the king's ligeance, have not by law a right to the privileges and immunities of his majesty's natural-born subjects, but are under divers disabilities, and subjected to many inconveniences and difficulties in their persons and estates; to the intent, therefore, that such persons and all other well-disposed Protestants of foreign nations, may have due encouragement to settle themselves and their families within this province,—
>
> "Be it enacted * * * That * * * *all Protestants of foreign nations, that have inhabited or resided within this province for the space of one year, are hereby declared to be naturalized, to all intents, constructions and purposes whatsoever, within this province;* and from henceforth, and at all times hereafter, shall be entitled to have and enjoy all the rights, liberties and privileges within this province, and no otherwise, which his majesty's natural-born subjects in the said province ought to have and enjoy, as fully to all intents and purposes whatsoever, as if they had been born within the said province.
>
> "Provided always, * * * That all foreign Protestants that shall have the benefit of this act, shall take the oaths by law appointed to be taken instead of the oaths of allegiance and supremacy, and subscribe the test or declaration, and take, repeat and subscribe the abjuration oath," etc.

On June 9, 1792, an Act was passed permitting all persons proscribed by any law of the Commonwealth to be naturalized and admitted as citizens in the same manner and on the same conditions as directed in the Act of Congress of 1790.

NEW HAMPSHIRE.

New Hampshire had no general naturalization laws.

NEW JERSEY.

The concession and agreement of John Lord Berkley, Baron of Stratten, and Sir George Cartaret, Knight and Baronet Vice-Chamberlain of His Majesty's Household, the true and absolute Lords Proprietors of the Province of New Caesarea or New Jersey, to and with all and every the Adventurers and all such as shall settle or plant there, issued February 10th, 1664, gave the General Assembly of the Province power to

> "*give to all strangers, as to them shall seem meet, a naturalization, and all such freedoms and privileges within the said Province as to his majesty's subjects do of right belong*, they swearing or subscribing as afore-

said; which said strangers, so naturalized and privileged, shall be in all respects accounted in the said Province, as the Kings natural subjects."

(Leaming and Spicer's, New Jersey Grants, p. 17).

This seems to have been the only Act pertaining to a general naturalization. There are many private acts naturalizing certain persons named therein but none other of a general nature.

NEW YORK.

On November 1, 1683, "An act for naturalizing all those of forreigné nations at present inhabiting within this province and professing Christianity, and for encouragement of others to come and settle within the same," which was approved by Governor Dongan, was passed, providing as follows (Colonial Laws of N. Y., vol. 1, p. 123):

"Forasmuch as several persons of divers foreign Nations, professing Christianity, now are, and for divers Years past, have been actual and settled dwellers and Inhabitants within this Province, under the Allegiance of his Majesty, of Great-Britain, our dread Sovereign, and the Obedience of his Royal Highness, and so desire to continue and remain, and be naturalized, and become as his Majesty's Natural born Subjects:

"Be it enacted, That *all and every such Person or Persons, of what foreign nation soever they be, professing Christianity, and that now are actual Inhabitants within this Province, and have taken or subscribed, or that shall take or subscribe to the Oath of Allegiance, are, and shall be hereby naturalized*, and in all respects be accounted and esteemed as his Majesty's natural-born Subjects, and shall have and enjoy all such Privileges, Freedom and Immunities within this Province, as other his Majesty's Subjects do have or enjoy.

"Provided, Nothing contained in this Act, is to be construed to discharge or set at liberty, any Servant, Bondman, or Slave, but only to have Relation to such Persons as are free at the making hereof.

"And be it further Declared and Enacted, That *all and every Person and Persons, Foreigners, of what Nation soever, professing Christianity, that at any time hereafter shall come and arrive within the said Province, with an Intent to become his Majesty's Subjects and to dwell, settle and inhabit accordingly, and take the Oath of Allegiance to his said Majesty, and Fidelity to his Royal Highness the Lord Proprietor of this Province; every such Person or Persons, may be naturalized by Act of Assembly*, and from thenceforth shall, in all respects, be accounted, deemed and esteemed as his Majesty's natural-born Subjects," etc.

The Act of July 5, 1715, approved by Robert Hunter, Governor, recited the said Act of 1683, and provided:

"IV.—And be it further Enacted, that *all Persons of foreign Birth, being Protestants, now alive, and inhabiting in this Colony, shall be and are hereby declared to be his Majesty's natural Subjects*, and shall enjoy all the Rights, Privileges and Advantages that any of his Majesty's Natural-born Subjects do, or of Right ought to have and enjoy."

V.—Provided that they take the Oaths within nine months.

Many acts naturalizing individual aliens were passed by the Colonial Assembly and at nearly every session of the Legislature of the State of New York, similar Acts were passed. These latter acts were passed in accordance with the provisions of the Constitution of April 20, 1777, which provided, in Article XLII,

"And this Convention doth further, in the Name and by the Authority of the good

people of this State, Ordain, Determine and Declare. That *it shall be in the discretion of the Legislature to naturalize all such persons, and in such manner as they shall think proper; provided all such of the persons so to be by them naturalized, as being born in Parts beyond Sea, and out of the United States of America, shall come and settle in and become Subjects of this State, shall take an Oath of Allegiance to this State, and abjure and renounce all Allegiance and Subjection to all and every foreign King, Prince, Potentate and State, in all matters ecclesiastical as well as civil.*"

None of the acts show from what nations the individual aliens came or what religion they had previously professed.

NORTH CAROLINA.

North Carolina had no general naturalization laws.

PENNSYLVANIA.

The first Assembly after the Royal Grant from Charles II to William Penn met on December 7, 1682, and passed the following "Act for Naturalization" (Duke of Yorke's Book of Laws, 1676–1682, p. 105).

> "And forasmuch, as it is apparent that the just encouragement of the Inhabitants of this Province and territory thereunto belonging is likely to be an effectual way for the Improvement thereof; and since some of the People that live therein and are like to come thereinto are Foreigners, and so not Freemen, according to the Acceptation of the Law of England, the consequences of which might prove very detrimental to the prosperity of this Province and Territory thereof—
>
> "Be it enacted: That *all Persons who are Strangers and Foreigners, that now do inhabit this Province and Counties aforesaid, that hold Land in Fee in the same,* according to the Law of a Freeman, *and who shall* within three months after the date hereof, in their respective county courts where they live, *solemnly promise upon record, Faith and Allegiance unto the King of England,* and his lawful heirs and successours, *and Fidelity and lawfull obedience to William Penn,* Proprietary and Governor of this Province, etc., and his Heirs and Assigns, according to the King's Letters Patents, *shall be held and reputed Freemen of the Province and Counties aforesaid,* in as ample and full a manner as any Person residing therein."

In 1700 "An Act for Naturalization" was passed, impliedly repealing the act of 1682, *supra* (Statutes at Large of Penn., vol. 2, p. 29). This act is quoted under Delaware, as at that time Delaware and Pennsylvania were both under the rule of Penn.

Various acts were thereafter passed naturalizing the aliens named therein upon their taking the prescribed declarations, all of which recited that the aliens named were of "the Protestant or reformed religion" and were born under the allegiance of the Emperor of Germany, and other princes now in amity with the King of Great Britain, and were desirous of coming under the power and protection of His British Majesty.

On February 3, 1742–3 (Statutes at Large of Penn., vol. 4, p. 39), an act was passed which referred to various acts of Parliament requiring the taking an oath of allegiance and a declaration of fidelity and the subscribing the profession of his Christian belief, and provided that "*all persons being Protestants born out of the legiance of our present sovereign,*" who had inhabited and resided in the Province for seven years or more and who should take the prescribed oaths, etc., aforesaid, *shall be deemed "the King's natural-born subjects of this Province"* to all intents as if they had been born in the province.

Several acts were thereafter passed naturalizing the aliens named therein, who, it was recited, were subjects of the King of Prussia, the Emperor of France, various provinces in the German Empire, the King of Sweden, and the King of Denmark.

On June 13, 1777, an act was passed obliging *the male white inhabitants of the State* and all persons coming from any of the United States into the State to take an oath or affirmation of renunciation to the King of Great Britain and of allegiance to the commonwealth of Pennsylvania before July 1, 1778, or immediately on coming into the State (Statutes at Large of Penn., vol. 4, p. 111). See also the Act of April 1, 1778, containing the same requirements with regard to *male white inhabitants above the age of eighteen* (Statutes at Large of Penn., vol. 9, p. 238). The Act of December 5, 1778, declared that *all persons who had taken or should take oaths* should have "all the privileges of a free citizen of this State" (Statutes at Large of Penn., vol. 9, p. 303). This act also provided, in Section 6—

> "*and all strangers from beyond the seas, if otherwise qualified, pursuant to the Constitution of this State, shall be entitled to the privileges of free men upon their respectively taking the oath or affirmation*" prescribed by the Act of June 13, 1777.

The Constitution of 1776 provided, in Section 42:

> "*Every foreigner of good character who comes to settle in the State, having first taken an oath or affirmation of allegiance to the same*, may purchase, or by other just means acquire, hold, and transfer land or other real estate, and *after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this State*, except that he shall not be capable of being elected a representative until after two years residence."

The Act of March 4, 1786 (Statutes at Large of Penn., vol. 12, p. 178), provided that *all male white inhabitants of the commonwealth* who, by reason of having omitted or neglected to take the oaths afore said, had been debarred of the rights of citizenship, should, immediately after taking the oath prescribed in the act, be declared to be a "free citizen of this commonwealth and entitled to all and every the rights and privileges thereof."

RHODE ISLAND.

Rhode Island seems to have had no general naturalization laws.

The General Assembly on October 28, 1652, ordered,

> "That no foriner, Dutch, French, or of any other nation, shall be received as a free inhabitant in any of the Townes of our Collonie, or to have any trade with the Indians, or Indians inhabitinge within our aforesayed Collonie, directly or indirectly;"

And on December 24th, 1652, it ordered,

> "That all men of what nation soever they bee, that are or shall bee hereafter received inhabitants within any of the Townes in this Collonie shall have equall libertie to buy, sell or trade amongst us as well as any Englishman."

In 1762 two Jews, Aaron Lopez and Isaac Elizar, petitioned the superior court for naturalization, but their petition was denied on the ground that "*no person who does not profess the Christian religion can be admitted free of this colony.*" (Superior Court Records at Newport, Book E, p. 184.) In March, 1789, however, Samuel Elam, a Jew, from Leeds, England, was naturalized by the General Assembly (Acts & Resolves, 1789, p. 11). And the General Assembly by specific acts naturalized

11 foreigners between 1753 and 1766, all coming from European States.

The Charter granted by King Charles II in 1663 gave to the Generall Assemblye full power and authority

> "to choose, nominate, and apoynt, such and soe manye other persons as they shall thinke fitt, and shall be willing to accept the same, to be free of the said Company and body politique, and them into the same to admit;"

In a report of Sidney S. Rider, prepared at the request of Governor Utter, for the Commission appointed by Congress in 1905 (see House Documents, 1st Session, 59th Congress, No. 46), he says:

> "The first plan of government in Rhode Island proposed by Roger Williams in 1637, provided that those present in the colony should sign a contract, which all coming after should sign, and that a man must be a master of a family before being made a voter or *free man, as the people then called a fixed inhabitant to whom was given political rights.*"

SOUTH CAROLINA.

The Act of March 10, 1696–7, entitled "An Act for the Making Aliens Free of this Part of the Province, and for Granting Liberty of Conscience to all Protestants," (Statutes of S. C., Vol. 2, p. 131) provided as follows:

> "Whereas Persecution for Religion hath forced some Aliens, and trade and the fertility of this Colony has encouraged others to resort to this Colony, all which have given good testimony of their humble duty and loyalty to his Majesty and the Crown of England, and of their fidelity to the true and absolute Lords and Proprietors of this province, and of their obedience to their Laws, and their good affection to the inhabitants thereof, and by their industry,

> diligence and trade have very much enriched and advanced this Colony and Settlement thereof;
>
> "1. Be it enacted, * * * * That *all aliens, male and female, of what nation soever, which now are inhabitants of South Carolina, their wives and children, shall have, use and enjoy all the rights, privileges, powers and immunities whatsoever, which any person born of English parents within this Province may, can, might, could, or of right ought to have, use, and enjoy,* and they shall be from henceforth adjudged, reputed and taken to be in every condition, respect and degree, as free to all intents, purposes and constructions, as if they had been and were born of English parents within this Province."

4. Provides that no person now of age shall have any benefit by the Act until he shall have taken the oath of allegiance therein set forth.

The Act of November 4, 1704 (Statutes of S. C., Vol. 2, p. 251), contained a similar preamble, and provided that "aliens, which now live in South Carolina and have not already put themselves within the purview" of the Act of 1696–7 aforesaid, and "*all aliens which shall hereafter come into this part of the Province, their wives and children,*" should have the same rights, privileges, etc., as in the previous Act, using the same language, upon taking the oath of allegiance and an additional religious oath, but that no alien born out of the allegiance of the Queen of England should be elected a Member of Assembly.

The Act of September 19, 1721 (Statutes of S. C., Vol. 3, p. 135), provided that "*every free white man, and no other person, professing the Christian religion*" who had certain property and other qualifications should be deemed qualified to vote for Member of Assembly.

So far as we have been able to find, this is the first use of the phrase "free white man" or "free white person" in any Act of the States.

The Act of March 26, 1784, entitled "An Act to confer the Rights of Citizenship on Aliens," repealed the Act of 1704 and provided as follows (Statutes of S. C., Vol. 4, p. 600):

> "Whereas, it is expedient that the admission of aliens to the rights of citizenship in this State should be rendered as easy and extensive as may be compatible with the safety thereof;
>
> "1. Be it therefore enacted, * * * That * * * *all free white persons (alien enemies, fugitives from justice, and persons banished from either of the United States excepted)*, who now are, or shall hereafter become residents in this State for one year, *shall on taking and subscribing the oath of allegiance* * * * *be deemed citizens*, and entitled to all the rights, privileges and immunities to the character belonging; * * * provided also, that no person whatsoever, having or holding any place or pension from any foreign State or potentate, shall be eligible to any office, legislative, executive or judiciary, within this State."

The Acts of 1704 and 1784 (*supra*) were repealed by the Act of March 22, 1786, which provided (Statutes of S. C., Vol. 4, p. 746):

> "Whereas, it is expedient to admit aliens to some of the rights and privileges of citizens, and to exclude them from others, to which they become entitled by a temporary residence in the State, and taking the oath or affirmation of allegiance;
>
> "Be it therefore enacted, * * * That *all free white persons (alien enemies, fugitives from justice, and persons banished from either of the United States excepted), who shall reside in this State for one year, and take and subscribe the oath or affirmation of allegiance * * * shall be deemed citizens, and entitled to all the rights, privileges, and immunities, to that character belonging;* provided always, that no such person shall be entitled to vote at the election of members of the Legislature, * * * nor qualified to serve on

> juries (except, etc.), nor be eligible to the office of Governor, etc., * * * until he shall have been naturalized by a special act of the General Assembly; and provided also, that no person, although a citizen, having or holding any place or pension from a foreign state or potentate, shall be eligible to be a Member of the Legislature, or capable of holding any executive or judicial office in the State."
>
> "II.— * * * provided always, that nothing herein contained shall be construed to deprive any person of the rights and privileges to which he is now entitled by the Act (of 1704), or to deprive any person now resident in this State of the rights and privileges which such person would acquire if the said Act had remained in force."

Several acts naturalizing individual aliens were thereafter passed.

On December 21, 1799, "An Act granting the rights and privileges of denizenship to alien friends, residing, or intending to remove, within the limits of this State," was passed, which provided as follows (Statutes of S. C., Vol. 5, p. 355):

> "I.—Be it enacted, * * * That *all free white persons (alien enemies, fugitives from justice, and persons banished from either of the United States, excepted), who now are, or hereafter shall become, residents in this State, shall, on taking and subscribing the oath or affirmation of allegiance * * * be deemed denizens*, so as to enable such persons to purchase and hold real property, within this State, and in all other respects to entitle such person to the like protection from the laws of this State as citizens are entitled thereto.
>
> "IV.— * * * Provided that nothing herein contained shall be construed to confer on any denizen the right of voting at any election for members of either branch of the Legislature," etc.

VIRGINIA.

In 1671, in the reign of Charles II., the first Naturalization Act was passed. (Hening's Statutes at Large, Vol. 2, p. 289.) This provided:

> "Whereas nothing can tend more to the advancement of a new plantation either to its defence or prosperity, nor nothing more add to the glory of a prince than being a gratious master of many subjects, nor any better way to produce those effects than the inviting of people of other nations to reside among us, by communication of privileges, Be it therefore enacted * * * that *any stranger desiring to make this country the place of their constant residence, may upon their petition to the grand assembly, and taking the oaths of allegiance and supremacy to his majestie be admitted to a naturalization*, and by act thereof to them granted be capable of free traffique and trading, of takeing up, * * * lands, and of all such liberties, priviledges, immunities whatsoever, as a naturall born Englishman is capable of," etc.

In accordance therewith several acts of the Grand Assembly were passed naturalizing individual aliens upon their petition until 1680, when the following "Act for Naturalization" authorizing the granting of letters patents by the Governor of the Colony was passed (Hening's Statutes at Large, Vol. 2, p. 464).

> "Whereas nothing can contribute more to the speedy settling and peopling of this his majesties colony of Virginia than that all possible encouragement should be given to persons of different nations to transport themselves hither with their families and stocks, to settle, plant or reside, by investing them with all the rights and priviledges of any of his majesties naturall free borne subjects within the said colony, Bee it enacted * * * that it shall and may be lawfull for the governour as commander in chiefe of this colony for the tyme being, or any of his successors, governours of this colony, by a

> publique instrument under the broad seale thereof *to declare any alien or aliens, forreigner or forreigners, being already settled or inhabitants of this his majesties colony, or such as shall hereafter come for to settle, reside, or plant in itt, and haveing taken the oath of allegiance before the governour or commander in chiefe for the tyme being to be to all intents and purposes fully and compleatly naturalized*, and that the persons soe approved of and named in the said letters pattents (as aforesaid) shall by virtue of this act have and enjoy to them and their heires the same immunityes and rights of and unto the lawes and priviledges of this colony, and as fully and amply as any of his majesties free borne subjects have or enjoy within the same as if they themselves had bin borne within any of his majesties realmes or dominions," etc.

In 1705 in the reign of Queen Anne another "Act for Naturalization" was passed, which was in almost the same language as the Act of 1680, *supra*, except that it required the taking of the oaths appointed by act of parliament to be taken, instead of the oaths of allegiance and supremacy referred to in that act. (Hening's Statutes at Large, Vol. 3, p. 434.)

In May, 1779, "An act declaring who shall be deemed citizens of this commonwealth" was passed, which provided (Hening's Statutes at Large, Vol. 10, p. 129):

> "Be it enacted, * * * That *all white persons born within the territory of this commonwealth, and all who have resided therein two years next before the passing of this act; and all who shall hereafter migrate into the same, other than alien enemies, and shall before any court of record, give satisfactory proof by their own oath or affirmation that they intend to reside therein; and moreover shall give assurance of fidelity to the commonwealth; * * * shall be deemed citizens of this commonwealth, until they relinquish*

*that character in the manner as hereinafter expressed; and all others not being citizens of any of the United States of America shall be deemed aliens. * * * The free white inhabitants of every of the states, parties to the American confederation, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all rights, privileges and immunities of free citizens in this commonwealth,"* etc.

This act was repealed in October, 1783, by "An act for the admission of emigrants and declaring their right to citizenship," which provided (Hening's Statutes at Large, Vol. 11, p. 322):

"I.—Whereas, it is the policy of all infant states to encourage population, among other means, by an easy mode for the admission of foreigners to the rights of citizenship; yet wisdom and safety suggest the propriety of guarding against the introduction of secret enemies, and of keeping the offices of government in the hands of citizens intimately acquainted with the spirit of the constitution and the genius of the people, as well as permanently attached to the common interest;

"Be it therefore enacted, * * * That *all free persons, born within the territory of this commonwealth; all persons not being natives, who have obtained a right to citizenship under the Act (of 1779) * * * shall be deemed citizens of this commonwealth*, until they relinquish that character in manner hereinafter mentioned; and that *all persons, other than alien enemies, who shall migrate into this state, and shall before some court of record give satisfactory proof by oath (or being quakers or menonists, by affirmation) that they intend to reside therein, and also take the legal oath, or affirmation, for giving assurance of fidelity to the commonwealth * * * shall be entitled to all the rights, privileges and advantages of citizens*, except that they shall not be capable of election or appointment to any office, legislative, executive, or judiciary, until an actual residence in the state of two years from the time of taking such oaths, or affirmations, as aforesaid, nor until they shall have evinced a permanent attachment to the state, by having intermarried with a citizen of this commonwealth, or a citizen of any other of the United States, or purchased lands to the value of one hundred pounds therein.

"II.—Provided always, * * * That no person whatsoever, having or holding any place or pension from any foreign state or potentate, shall be eligible to any office," etc.

In October, 1786, the Act of 1779 was again specifically repealed by "An act to explain, amend and reduce into one act, the several acts for the admission of emigrants to the rights of citizenship, and prohibiting the emigration of certain persons to this commonwealth." (Hening's Statutes at Large, Vol. 12, p. 261). This act was in the same language as the Act of 1783, *supra*, except that it required a residence of five years, instead of two years, before any person so naturalized should be capable of election to an office. It also prohibited all persons who had joined the fleets or armies of the King of Great Britain, or had voluntarily borne arms against the United States, etc., from migrating into, or becoming citizens of the commonwealth.

See pp 75-81 for summary of these laws.

D. History and Summary of the Naturalization Acts of Congress.

The Constitution of the United States provides in Article I, Section 8, as follows:

"The Congress shall have power * * * to establish an uniform rule of naturalization * * * throughout the United States."

In accordance with this provision of the Constitution the House of Representatives at the second session of the First Congress, on February 3 and 4, 1790, considered for the first time a bill establish-

ing an uniform rule of naturalization, which, after such consideration, was recommitted to a Committee of ten. On February 17, 1790, an amendatory bill was presented which, after being discussed in the Committee of the Whole, was amended in several respects and was passed and referred to the Senate. It was there discussed on March 8 and 9, 1790, and committed to Messrs. John Henry of Maryland, Rufus King of New York, Caleb Strong of Massachusetts, Oliver Ellsworth of Connecticut and Samuel Johnston of North Carolina, who reported on March 12, 1790. The bill was discussed by the Senate on March 15, 16, 17 and 18, 1790, and passed with some amendments on March 19, 1790. On March 22, 1790, the House agreed to the amendments, and the bill was approved by President Washington on March 26, 1790 (1 Stat. L. 103).

The first clause of this bill as originally introduced by a committee consisting of Messrs. Hartley of Pennsylvania, Tucker of South Carolina and Moore of Virginia, provided:

> "*All free white persons*, who have, or shall migrate into the United States, and shall give satisfactory proof, before a Magistrate, by oath, that they intend to reside therein, and shall take an oath of allegiance, and shall have resided in the United States for one whole year, shall be entitled to all the rights of citizenship, except being capable of holding an office under the state or general government, which capacity they will acquire after a residence of two years more."

The first section of the bill as finally passed and approved is as follows:

> "Section 1. *Be it enacted*, That *any alien, being a free white person*, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States."

At the second session of the Third Congress on December 22, 1794, the House began the consideration of a bill to amend the Naturalization Act of 1790. After considerable discussion on several days the bill with amendments was on January 2, 1795, recommitted to Messrs. James Madison of Virginia, Samuel Dexter of Massachusetts and Thomas B. Carnes of Georgia. On January 5, 1795, Mr. Madison reported a new bill containing amendments and also whatever was necessary from the old law so that the latter should be entirely superseded, and on January 8, 1795, the bill was passed by the House. The bill was then reported to the Senate and was there debated and amended and referred to Messrs. Rufus King of New York, Henry Tazewell of Virginia and John Brown of Kentucky, and was finally passed on January 26, 1795, with amendments, which the House agreed to. The bill was approved by President Washington on January 29, 1795 (1 Stat. L. 414).

As thus approved the first section of the act is as follows:

> "For carrying into complete effect, the power given by the constitution to establish an uniform rule of naturalization throughout the United States:
>
> "Be it enacted * * * that *any alien, being a free white person*, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:"

Then follow the provisions in the same general form as in the present act, requiring the making of a declaration of intention by the alien three years, at least, before his admission and granting him admission on proof that he has resided within the United States for five years at least and within the State one year at least, and is a man of good moral character, etc., that he will support the Constitution and that he renounces all allegiance to every foreign prince, etc.

It should be noticed that for the first time a previous declaration of intention is required, a provision that was not contained in any of the acts in the thirteen States, and that the required term of residence was increased from two to five years. Thus early Congress was beginning to impose additional restrictions on the right to naturalization.

At the second session of the Fifth Congress an Act supplemental to and to amend the Act of 1795 was passed and approved on June 18, 1798, by President Adams (1 Stat. L. 566). This act provided as follows:

> "Section 1. Be it enacted * * * that *no alien* shall be admitted to become a citizen of the United States, or of any state, unless in the manner prescribed by the act (of 1795) he shall have declared his intention * * * five years, at least, before his admission, and shall * * * prove * * * that he has resided within the United States *fourteen years, at least*, and within the State * * * *five years at least*, besides conforming to the other declarations, renunciations and proofs, by the said act required, * * * Provided," etc.
>
> "Section 4. That *all white persons, aliens* (accredited foreign ministers, consuls, or agents, their families and domestics excepted), *who, after the passing of this act, shall continue to reside or who shall arrive, or come to reside in any port or place within the territory of the United States, shall be reported, if free and of the age of twenty one years by themselves, or be under the age of twenty-one years or holden in service, by their parent, guardian, master or mistress in whose care they shall be, to the Clerk of the District Court of the district,*" etc.
>
> "Section 5. And every person, whether alien or having the care of any alien or aliens, under the age of twenty-one years, or of any white alien holden in service, who shall refuse and neglect to make report thereof, as aforesaid, shall forfeit the sum of two dollars," etc.
>
> "Section 6. That in respect to *every alien*, who shall come to reside within the United States, after the passing of this act, the time of the registry of such alien shall be taken to be the time when the term of residence within the limits, and under the jurisdiction of the United States, shall have commenced, in case of an application by such alien, to be admitted a citizen of the United States; and a certificate of such registry shall be required, in proof of the term of residence, by the Court to whom such application shall and may be made."

Again the restrictions are greatly increased by requiring a fourteen years residence, the registration of all white aliens and the production of such certificate of registry before admission. At this same session the Alien and Sedition Laws were passed. The then prevailing sentiment against all aliens was doubtless the reason for these additional restrictions,

It will be noticed that the first section of this Act uses the words "*no alien*" instead of "*any alien, being a free white person.*" Section 4, however, uses the words "*all white persons, aliens * * * if free * * * or holden in service*" and requires them to be reported. And Section 6 requires that the certificate of registry shall be produced as proof of the term of residence required. In view of these latter provisions. and of the provisions of the Act of 1795, it would undoubtedly have been held that only "*free white persons*" could have

been naturalized under the Act. The Act remained in force only four years, however, and the question does not seem to have ever been raised.

This requirement of fourteen years residence was the cause of so much dissatisfaction, as shown by the petitions and memorials presented to the Sixth and Seventh Congresses praying for a reduction of the term of residence, that at the first session of the Seventh Congress a committee consisting of Messrs. Samuel L. Mitchell of New York, Calvin Goddard of Connecticut, John Smilie of Pennsylvania, Philip R. Thompson of Virginia, Lewis R. Morris of Vermont, Peleg Wadsworth of Massachusetts and Richard Stanford of North Carolina, was appointed by the House to bring in a bill revising and amending the naturalization laws. On January 26, 1802, Mr. Mitchell reported a bill which, after being amended, was passed on March 10, 1802. In the Senate the bill was referred to a committee consisting of DeWitt Clinton of New York, George Logan of Pennsylvania and Thomas Sumter of South Carolina, which amended the bill. The bill, as amended, was finally passed by the Senate on April 3, 1802. The House concurred in the amendments and the bill was approved by President Jefferson on April 14, 1802 (2 Stat. L. 153).

This Act repealed all acts theretofore passed respecting naturalization, and provided as follows:

> "Be it enacted * * * that *any alien, being a free white person*, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise," (these conditions are in almost the same terms as in the Act of 1795, except that an additional requirement of one year's residence in the State is imposed).
>
> § 2. That in addition to the directions aforesaid, *all free white persons, being aliens*, who may arrive in the United States after the passing of this act, shall, in order to become citizens of the United States make registry, and obtain certificates, in the following manner, * * * and such certificate

> shall be exhibited to the Court by every alien * * * on his application to be naturalized, as evidence of the time of his arrival within the United States."

Thus the requirements were reduced to practically those contained in the Act of 1795, with the exception of the certificate of registry.

At the first session of the Eighth Congress a bill which was originally introduced at the Seventh Congress, was passed in addition to the Act of 1802, and approved by President Jefferson on March 26, 1804 (2 Stat. L. 292).

Section 1 of this Act provides as follows:

> "Be it enacted * * * that *any alien, being a free white person*, who was residing within the limits and under the jurisdiction of the United States, at any time between the 18th day of June, 1798, and the 14th day of April, 1802, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act (of 1802)."

This condition was the making of a previous declaration of intention.

At the second session of the Twelfth Congress "An Act for the Regulation of Seamen on board the Public and Private Vessels of the United States," was passed by both Houses and approved by President Madison on March 3, 1813 (2 Stat. L. 811), § 12 of this act (evidently a rider) provided:

> "That *no person* who shall arrive in the United States. from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, *without being at any time during the said five years, out of the territory of the United States.*"

At the first session of the Thirteenth Congress on May 31, 1813, Mr. Abner Lacock of Pennsylvania presented to the Senate a memorial of certain inhabitants of New York City, natives of Great Britain and Ireland, praying to be admitted as citizens, in spite of the fact that because of the War of 1812 they were alien enemies. As a result of this memorial a bill was passed by both Houses and approved by President Madison on July 30, 1813 (3 Stat. L. 53), which provided:

> "Be it enacted * * * that *persons resident within the United States, or the territories thereof, on the 18th day of June, 1812, who had before that day made a declaration according to law, of their intentions to become citizens of the United States, or who by the existing laws of the United States, were on that day entitled to become citizens, without making such declaration, may be admitted to become citizens thereof, notwithstanding they shall be alien enemies*, at the times and in the manner prescribed by the laws heretofore passed on that subject."

At the first session of the Fourteenth Congress Mr. Samuel W. Dana of Connecticut, on December 21, 1815, presented to the Senate a bill relative to evidence in cases of naturalization, which was passed and approved by President Madison on March 22, 1816 (3 Stat. L. 258). This Act provided:

> "Be it enacted * * * that the certificate of report and registry, required as evidence of the time of arrival in the United States, according to the second section of the Act (of 1802) * * * and also a certificate from the proper clerk or prothonotary, of the declaration of intention, * * * required as the first condition, according to the first section of said Act, shall be exhibited by *every alien* on his application to be admitted a citizen of the United States, in pursuance of said Act, who shall have arrived within the limits, and under the jurisdiction of the United States since the 18th day of June, 1812. * * *

> "§ 2. Provided, and be it enacted, that nothing herein contained shall be construed to exclude from admission to citizenship, *any free white person* who was residing within the limits and under the jurisdiction of the United States at any time between the 18th day of June, 1798, and the 14th day of April, 1802, and who, having continued to reside therein without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the United States according to the Act of 1804," etc.

In the Senate on February 4, 1824, Mr. John Holmes of Maine reported a Bill from the Committee on the Judiciary, in further addition to the Naturalization Act, which with some amendments was passed by both Houses and approved by President Monroe on the 26th day of May, 1824 (4 Stat. L. 69). This Bill as first introduced into the Senate apparently was applicable to all aliens, for on May 21, 1824, on motion of Mr. Holmes, its provisions were limited to "free white persons." There is no reported debate on this motion, however.

This action is especially significant, as showing that there was even then no desire on the part of anyone to remove the restrictive provision.

This Act provided:

> "Be it enacted * * * that *any alien, being a free white person* and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the Act of

which this is in addition, three years previous to his admission (the Act of 1802), etc.

§ 4. * * * that a declaration by *any alien, being a free white person*, of his intended application to be admitted a citizen of the United States, made in the manner and form prescribed in the first condition specified in the first Section of the Act to which this is in addition, two years before his admission, shall be a sufficient compliance with said condition," etc.

At the first session of the Twentieth Congress a Bill was passed, which was approved by President John Quincy Adams on May 24, 1828 (4 Stat. L. 310), which repealed the second section of the Naturalization Act of April 14, 1802, and the first section of the Act of March 22, 1816, relating to certificates of registry, and provided in Section 2 as follows:

"And be it further enacted, that *any alien being a free white person*, who was residing within the limits, and under the jurisdiction of the United States, between the 14th day of April, 1802, and the 18th day of June, 1812, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become a citizen," etc.

By Chapter 72 of the Laws of 1848, approved June 26, 1848 (9 Stat. L., 240), the first session of the Thirtieth Congress repealed the last clause of § 12 of the Act of March 3, 1813 (2 Stat. L., 811), *supra*, and struck therefrom the words "without being at any time during the said five years out of the territory of the United States."

§ 21 of Chapter 200 of the Laws of 1862, passed at the second session of the Thirty-seventh Congress and approved July 17, 1862, (12 Stat. L., 597), entitled "An Act to define the Pay and Emoluments of certain Officers of the Army and for other purposes," provided:

"That *any alien*, of the age of twenty one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence," etc.

At the second session of the Fortieth Congress, because of the impressment by Great Britain during the Civil War of seamen who had been born within the limits of the British Kingdom, but who had become duly naturalized American citizens, an act was passed entitled "An Act concerning the Rights of American Citizens in Foreign States," approved July 27, 1868 (Ch. 249, 15 Stat. L., 223), declaring that the right of expatriation was a fundemental principle of this government and guaranteeing to naturalized citizens of the United States, while in foreign states, the same protection of person and property that was accorded to native-born citizens in like situations and circumstances. The preamble of this Act is as follows:

"Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and *whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship;* and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed."

The italicized portion of this preamble was hardly in accordance with the facts, as our naturalization

laws had never permitted the naturalization of all aliens.

At the second session of the Fortieth Congress "An Act to amend the Naturalization Laws and to punish Crimes against the same, and for other Purposes" was passed and approved July 14, 1870 (16 Stat. L., 254, Ch. 254), as is more fully explained *infra*. (**E.**) § 7 of this Act, tacked on as a rider by way of amendment: provided:

> "That the naturalization laws are hereby extended *to aliens of African nativity and to persons of African descent.*"

By Ch. 5 of the Laws of 1876, approved February 1, 1876, the first session of the Forty-fourth Congress (19 Stat. L., 2), amended § 2165, U. S. R. S., by providing that the declaration of intention required thereby might be made by "*an alien*" before the clerk of any authorized court.

In the Naval Appropriation Act, approved July 26, 1894 (Ch. 165, 28 Stat. L., 124), the second session of the Fifty-third Congress provided:

> "*Any alien* of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy, or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such," etc.

The "Act to provide a government for the Territory of Hawaii," passed by the first session of the Fifty-sixth Congress and approved April 30, 1900, provided in Section 100:

> "That for the purposes of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act, shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirements of a previous declaration of intention to become a citizen of the United States, and to renounce former allegiance, shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; *but all other provisions of the laws of the United States relating to said naturalization shall, as far as applicable, apply to persons in said islands.*"

This Act in Section 4 declared all persons, who were citizens of the Republic of Hawaii on August 12th, 1898, to be citizens of the United States and of the Territory of Hawaii, and repealed Chapter 102 of the Civil Laws of the Hawaiian Islands, which pertained to the naturalization of aliens. This chapter permitted the naturalization of any alien who was a citizen or subject of any country having express treaty stipulations with the Republic of Hawaii concerning naturalization. Although the Act of Congress provided for the naturalizing of all those who were citizens of Hawaii on August 12, 1898, which has been done in all cases, we believe, where the United States has acquired additional territory by treaty, it limited future naturalization to those only who were, under the laws of the United States, entitled to naturalization here, as clearly appears from the italicized portion quoted. It is apparent, therefore, that as recently as ten years ago, Congress still had no intention of opening the doors to the naturalization of all aliens, even in a remote territory, whose citizens had previously by their own laws permitted the naturalization of all aliens in treaty alliance with them.

The Immigration Act of 1903, passed at the second session of the Fifty-seventh Congress and approved March 3, 1903 (Ch. 1012, 32 Stat. L., 1222), provided in Section 39 that no anarchist or disbeliever in organized government should be naturalized.

The Treaty of July 28, 1868, with China (16 Stat. L., 391), after recognizing the inherent and inalienable right of expatriation and emigration on the part of the citizens and subjects of both countries, and declaring that "reciprocally Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation," provided:

> "*But nothing herein contained shall be held to confer naturalization upon citizens of the United States born in China, nor upon the subjects of China in the United States.*"

"An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882 (Ch. 126, 22 Stat. L., 58), passed at the first session of the Forty-seventh Congress, provided in Section 14:

> "That hereafter no State court or court of the United States shall admit Chinese to citizenship."

And the Convention of 1894 with China (28 Stat. L. 1210) prohibiting the coming of Chinese laborers to the United States, although giving those already here the same protection of person and property that was given by our laws to citizens of the most favored nation, expressly excepted "the right to become naturalized citizens."

This, we believe, is a full and complete summary of all the Acts passed by Congress, pertaining in any way to naturalization, from 1790 to the present Act of June 29, 1906. With but few exceptions (the Acts of 1798, 1813, 1862, 1876 and 1894), they have all contained the phrase "free white persons." (We do not here consider the Revised Statutes of 1873–4, as its omission there was an oversight). And these exceptions were acts merely amending the then existing Naturalization Laws, (the Acts of 1798, 1813 and 1876) so that the omis

sion of the term "free white persons" from them has no especial significance, or acts allowing honorably discharged soldiers and sailors to be naturalized without first making a declaration of intention. (The Acts of 1862 and 1894.) These latter acts have been held by the Courts to be controlled by the phrase "free white persons" in the General Naturalization Laws, and not to permit any such soldier or sailor to be naturalized unless he was a "free white person."

> See *In re Buntaro Kumagai*, 163 Fed., 922.
>
> *Bessho* v. U. S., not reported, decided by the Circuit Court of Appeals for Fourth Circuit.

It is also worth noting that the Report of the Commissioners to Revise and Codify the Laws of the United States in its report to Congress, dated December 15th, 1906, although permitted by the Act of March 3, 1901 (31 Stat. L., 1181), to "propose and embody in such revision changes in the substance of existing law," contained the following provisions in almost the exact language of the existing law:

> "§ 7825. No State court or court of the United States shall admit Chinese to citizenship.
>
> "§ 7826. The provisions of this chapter shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent,"

A comparative study of these laws in the original thirteen States shows that there were no general naturalization laws in Connecticut, New Hampshire and Rhode Island, that in Massachusetts only *Protestants* of foreign nations who had resided within the province, for one year prior to 1731 and should take the prescribed oaths and tests were

naturalized, and that in Rhode Island in 1762 Jews had been refused naturalization by the superior court on the ground that they did not profess the Christian religion, although the General Assembly in 1789 naturalized a Jew. These were the intolerant, Puritanical States and evidently they were not disposed to allow indiscriminate naturalization.

In New Jersey *all strangers* were permitted naturalization on application to the General Assembly. There is nothing, however, in these Acts to show from what foreign countries these persons came or what religions they professed.

In New York prior to the Constitution of 1777 *all persons of any foreign nation professing Christianity* who were actual inhabitants within the colony and who took or subscribed the oath of allegiance could be naturalized by Act of the Assembly. The Constitution of 1777 provided that all persons who were born in parts beyond the sea and who should settle in the State and take the oaths of allegiance and renunciation in all matters ecclesiastical as well as civil, could be naturalized in the discretion of the Legislature. New York, therefore, permitted the naturalization of all aliens who were Christians or who renounced subjection in ecclesiastical matters to every foreign king, etc., the Roman Catholics being excluded, their religion, as European History had taught us to believe, being incompatible with perfect national independence, or the freedom and good order of civil society. (Kent's Commentaries, Vol. 2, p. 73).

In Pennsylvania and Delaware it was declared in 1682 that *all persons who were strangers and foreigners* and inhabited the province and held land in fee therein and promised allegiance to the King of England and the Governor of the Province should be considered freemen of the Province. In 1700 authority was given to the Governor by a public instrument to declare such persons naturalized and *all Swedes, Dutch and other foreigners* who had settled in the Province prior to 1682 were declared naturalized. In 1742 Pennsylvania apparently *limited naturalization to Protestants* who had resided in the Province for seven years and should take the oaths, *but no one was naturalized* by the Assembly *except persons born in one or another of the European countries.* In 1776, however, the Constitution of Pennsylvania provided that *every foreigner* should be deemed a natural born subject after one year's residence in the State, *but* by the Acts of the Assembly *only the male white inhabitants were required to take the oaths.* In 1788 Delaware passed a general naturalization law providing that *any alien or foreigner* who should take the oath should be deemed a natural born subject.

Of the Southern States only North Carolina had no general naturalization law.

South Carolina early provided in 1696-7 and 1704 that *all aliens* then inhabiting the State and who should thereafter come into the State should have all the rights and privileges of persons born of English parents. In 1784 it adopted for the first time in the history of the Naturalization Acts the term "*free white persons*" and provided that *all such persons, alien enemies, fugitives from justice and persons banished from either of the United States alone excepted*, who should reside in the State for one year and take the oath of allegiance should be deemed citizens. It also was the first State to provide that no person holding any place or pension from any foreign State should be eligible to any office in the State. It was also the first and only State, we believe, to provide for a limited or conditional naturalization, by enacting in 1786 that although the free white persons above noted should be deemed citizens on taking the oaths, yet they could not vote, nor be eligible to office, nor serve on juries until they were naturalized by a special act of the Assembly.

In 1785 Georgia passed a general naturalization law which also used the term "*free white persons*" and provided that *such aliens or subjects of any foreign State at peace with the United States* who had resided within the State for twelve months and should obtain a certificate of character from the grand jury and take the oath of allegiance, should be entitled to all the rights of a free citizen.

Maryland in 1779 adopted a general naturalization law which provided that *every person who should thereafter come into the State from any nation, kingdom or state, and should declare his belief in the Christian religion*, and take the oath of allegiance, shoud be deemed a natural born subject of the State. The Constitution of 1776 limited the right of suffrage to "*all free men*," and the Constitution of 1801, limited it to "*every free white male citizen.*"

Virginia in 1671 provided that *any stranger* might upon petitioning the grand assembly and taking the oaths be naturalized. In 1680 it was provided that naturalization should be by a public instrument issued by the Governor instead of by act of assembly. In 1779 a general naturalization act was passed providing that "*all white persons*" who should take the oath should be deemed citizens, and all others not being citizens of one of the States should be deemed aliens, and that the "*free white inhabitants*" *of every State, paupers, etc., excepted*, should be entitled to all the rights of free citizens in this commonwealth. In 1783 and 1786, however, this act was repealed and it was provided that "*all free persons*" born within the territory of the commonwealth and all persons not natives who had obtained the right of citizenship under the act of 1779 should be deemed citizens, and that all persons, other than alien enemies, who should come into the State and take the oath, should be entitled to all the rights of citizens, except that they could not be elected to any office until they had resided

in the State two years (five years by Act of 1786) thereafter and intermarried with a citizen or purchased lands, thus establishing a sort of probationary naturalization.

Senator Vest, of Missouri, speaking before the Jefferson Club in St. Louis in 1895 (see Monticello edition of The Writings of Thomas Jefferson, vol. 12, p. xviii), said:

> "In addition to the legislation abolishing primogeniture, entail, and an Established Church, Jefferson, at the same session of the Assembly (1779), introduced and passed a bill fixing the terms upon which foreigners should be admitted as citizens of Virginia and this Act became the model for the general naturalization law of the United States."

The compiler of the Monticello edition of the Writings and Works of Jefferson says (Vol. 10, page ix):

> "Jefferson was the author of a bill passed by the Legislature of Virginia making easy the conditions to be imposed upon foreigners seeking naturalization, and those liberal conditions were adopted by Congress when the first United States naturalization law was passed, and they have ever since been retained."

As one of the members of the Committee of Congress in 1790 chosen to prepare and present to the House a Naturalization Act was Moore, of Virginia, the statements made by Senator Vest and the compiler of Jefferson's works may have been correct. By a combination of the Acts of the Virginia Assembly of 1779 and 1783 we obtain the exact phraseology of that portion of the Act passed by Congress in 1790, now under consideration.

We are ourselves of the opinion, however, that the bases of the Act of Congress of 1790, so far as this phrase is concerned, were the South Carolina Act of 1784 and the Georgia Act of 1785. Those

acts use the words "*free white persons*" and are the only naturalization acts in the States which did use them. The original draft of the Act of 1790 was prepared in the House by a committee consisting of Messrs. Huntley of Pennsylvania, Tucker of South Carolina, and Moore of Virginia. After debate it was recommitted to a committee of ten, whose names are not given in the Annals of Congress. In the Senate it was referred to a committee of five, consisting of Messrs. John Henry of Maryland, Rufus King of New York, Caleb Strong of Massachusetts, Oliver Ellsworth of Connecticut, and Samuel Johnston of North Carolina.

It will be noticed that one of the members of the House Committee which drew the bill originally presented, and which contained the term "free white persons," came from one of the two States (viz., South Carolina) where that same term was already in use. They undoubtedly were familiar with the language of their own laws, and we have no doubt that they acquainted the other members of Congress with them. Only one of the members of the Senate Committee (Henry of Maryland) came from a State where there was a general naturalization law, unless we include New York, whose Constitution contained a general naturalization provision.

This summary of the naturalization laws in the States shows that in the early days of the Colonies, in most instances, all foreigners were allowed to be naturalized, that later in some of the States religious qualifications were imposed, and that by 1790 several of the States limited naturalization to free white persons and to free persons—a gradual tendency to restriction of the privilege—although some of the States, notably Pennsylvania, in its Constitution of 1776, granted naturalization to persons of all nations.

Speaking of this Constitution, a writer in the *Philadelphia Evening Post* of September 26, 1776, said (Publications Am. Jew. Hist. Soc., Vol. 11, p. 69):

> "The Pennsylvanians have made a new constitution and frame of government for themselves, by which Jews, Turks and Heathens may not only be freemen of that land, but are eligible for Assemblymen, Judges, Counsellors and Presidents or Governors."

Congress, however, did not see fit to adopt such liberality in its naturalization laws. The very fact that there was such diversity of views among the different States is the strongest evidence that naturalization was restricted to "free white persons" advisedly and after careful consideration.

E. It clearly appears from the Debates in Congress, both in the early sessions and in those from 1867-1875, that Congress by the use of the phrase "free white persons" intended to exclude from naturalization all persons except Europeans and those of European descent.

1. THE DEBATES PRIOR TO 1802 REFER ONLY TO EUROPEANS

The debates in the early sessions of Congress are very scantily reported, especially in the Senate, as until 1794 it sat with closed doors, and there were no reports of the debates therein. The debates in the House were only a little more fully reported.

The principal questions which, from the debates as reported, appear to have been the subject of discussion, were the length of residence which should be required before an alien should be permitted to apply for naturalization and be naturalized, and whether or not naturalization should immediately confer upon the alien the full rights of a citizen of the United States, or whether he should only be-

come gradually entitled to these rights after having passed through what might be called a period of probation.

In none of the reported debates at the time that the first naturalization acts were passed, was any reference made by any speaker to any foreign country except Europe.

The first naturalization act introduced at the second session of the first Congress in the House of Representatives, which was first taken up for consideration on February 3, 1790, contained a provision that aliens applying for naturalization must have resided in the United States for one whole year.

Mr. Thomas Tucker of South Carolina moved to strike out the words "and shall have resided within the United States for one whole year." In opposing this motion, Mr. Thomas Hartley of Pennsylvania referred to "the policy of the *old nations of Europe*" in drawing "a line between citizens and aliens" which "policy has existed to our knowledge ever since the foundation of the Roman Empire."

Mr. Roger Sherman of Connecticut presumed "that it was intended by the Convention, who framed the Constitution * * * to guard against an improper mode of naturalization, rather than foreigners should be received upon easier terms than those adopted by the several States. Now, the regulation provided for in this bill, entitles *all free white persons*, which includes emigrants, and even those who are likely to become chargeable."

Mr. John Page of Virginia in speaking in support of the motion was of the opinion that "the policy of *European nations and states* respecting naturalization did not apply to the situation of the United States. I think we shall be inconsistent with ourselves, if after boasting of having opened an asylum for the oppressed of all nations, and established a Government which is the admiration of the world, we make terms of admission to the

full enjoyment of that asylum so hard as is now proposed. It is nothing to us, whether *Jews or Roman Catholics* settle amongst us; whether *subjects of Kings, or citizens of free states*, wish to reside in the United States, they will find it to their interest to be good citizens."

Mr. John Lawrence of New York said: "The reason of admitting foreigners to the rights of citizenship among us is the encouragement of emigration, as we have a large tract of country to people."

Mr. James Madison of Virginia said: "Those who acquire the rights of citizenship, without adding to the strength or wealth of the community are not the people we are in want of."

Mr. James Jackson of Georgia in opposing the motion said that "he hoped to see the title of a citizen of America as highly venerated and respected as was that of a citizen of Rome. I am clearly of opinion, that rather than have the *common class of vagrants, paupers and other outcasts of Europe*, that we had better be as we are, and trust to the natural increase of our population for inhabitants."

Mr. Page on speaking again, said that "every man, upon coming into the States, and taking the oath of allegiance to the government, and declaring his desire and intention of residing therein, ought to be enabled to purchase and hold lands, or we shall discourage many of *the present inhabitants of Europe* from becoming inhabitants of the United States."

Mr. Theodore Sedgwick of Massachusetts in opposing the motion was "against the indiscriminate admission of foreigners to the highest rights of human nature, upon terms so incompetent to secure the society from being overrun with *the outcasts of Europe*. * * * The citizens of America preferred this country, because it is to be preferred; the like principle he wished might be held by every man who came *from Europe* to reside here."

Mr. Edamus Burke of South Carolina was in favor of holding out every encouragement to "useful men, such as farmers, mechanics and manufacturers," to emigrate to America, but said that there were two other classes whom he would discourage and interdict—"*your European merchants, and factors of merchants*, who come with a view of remaining so long as will enable them to acquire a fortune, and then they will leave the country and carry off all their property with them," and "*the convicts and criminals which they pour out of British jails.*"

Mr. Jackson, in speaking again, "had an objection to any persons holding land in the United States without residence, and an intention of becoming a citizen; under such a regulation the whole Western Territory might be purchased up by the inhabitants of *England, France or other foreign nations.*"

Mr. Burke said, further, "foreigners made as good citizens of Republics as the natives themselves. Frenchmen, brought up under an absolute Monarchy, evinced their love of liberty in the late arduous struggle; many of them are now worthy citizens, who esteem and venerate the principles of our Revolution. Emigrants from England, Ireland and Scotland, have not been behind any in the love of this country."

The above quotations are all taken from Vol. I, Annals of Congress, Cols. 1109-1125.

At the second session of the third Congress, in 1794-5, the House went into Committee of the Whole, on a bill to amend the Naturalization Act of 1790 by lengthening the term of residence required. In the course of the debate Mr. Theodore Sedgwick of Massachusetts in supporting an amendment that no alien should be admitted but on the oath of two credible witnesses that the applicant for citizenship was of good moral character and attached to the welfare of this country, said: "The

present he believed the most inauspicious time for the indiscriminate admission of aliens to the rights of citizenship. *A war the most cruel and dreadful which had been known for centuries, was now raging in all those countries from which emigrants were to be expected.* The most fierce and unrelenting passions were engaged in a conflict which shook to their foundations all the ancient political structures *in Europe.* * * * He believed that the amendment now proposed by his colleague, in conjunction with that which had already succeeded, would on the one hand check the admission of foreigners in such numbers as might be dangerous to our political institutions; and on the other, that it would not exclude such meritorious individuals as would be willing to serve the apprenticeship which might qualify them to assume the character and discharge the duties of American citizens."

Mr. Jonathan Dayton of New Jersey, in opposing the phrase "attached to a Republican form of Govenment," said: "A *Venetian or Genoese* might come to this country, and take the oath as proposed, and then excuse himself by saying, 'It was the Republican form of my own country which I had in view.'"

Mr. William V. Murray of Maryland declared "that he was quite indifferent if not fifty emigrants came into this continent in a year's time. It would be unjust to hinder them but impolitic to encourage them. He was afraid that, *coming from a quarter of the world so full of disorder and corruption*, they might contaminate the purity and simplicity of the American character."

Mr. William B. Giles of Virginia in supporting a proposition that applicants should renounce all titles of nobility, said: "At the time when the Constitution was made, nobody could foresee the strange turn which affairs have taken, or that there might be a danger from an inundation of *titled fugitives.*" * * * "If we are allowed to an-

ticipate probabilities, it seems highly probable that we shall soon have a great number of *this kind of persons* here. A revolution is now going onward, to which there is nothing similar in history. A large portion of *Europe* has already declared against titles, and where the innovations are to stop, no man can presume to guess. * * * If a great number of *these fugitive nobility* come over, they may soon acquire considerable influence." * * * "Previous to the late Revolution *the French nobility* were, by the lowest calculation, rated at twenty thousand; and as we may now conclude on France being successful, *a great proportion of these people* may be finally expected here."

Mr. James Madison of Virginia, who subsequently became President, also said: "It is very probable that the spirit of Republicanism will pervade a great part of *Europe*. It is hard to guess *what numbers of titled characters* may, by such an event, be thrown out of that part of the world. What can be more reasonable than that *when crowds of them come here*, they should be forced to renounce everything contrary to the spirit of the Constitution?" * * * "No man can say how far the Republican Revolution that is now proceeding in *Europe* will go. If a Revolution was to take place in *Britain*, which, for his part he expected and believed would be the case, *the peerage of that country* would be thronging to the United States."

Mr. Robert Bland Lee of Virginia thought that Mr. Giles' strongest argument was the "*corrupting relations which existed in Europe between noblemen and their dependents.*"

Mr. Thomas Fitzsimons of Pennsylvania said, "Nature seems to have pointed out this country as an asylum for *people oppressed in other parts of the world.*"

Mr. Elias Boudinot of New Jersey also reminded the House of the late proclamation by the President, wherein, among other things, it was said that

this country is an asylum to *the oppressed of all nations.*

These extracts are all taken from Annals of Congress, 3d Session, Cols. 1004–1009, 1022–1023, 1031, 1033–1035, 1044, 1049–1050, 1066.

At the second session of the fifth Congress in 1798 Mr. Joshua Coit of Connecticut said that "from the present situation of things, he apprehended some alterations would be necessary in the present law."

Mr. Samuel Sitgreaves of Pennsylvania said that "he thought our present situation called for regulations on this head (registration); since, at a time when we may very shortly be involved in war, there are *an immense number of French citizens in this country.*"

Mr. Samuel Sewell of Massachusetts reported for the Committee on the Protection of Commerce and the Defense of the Country, that, in his opinion, a longer residence before admission was essential, and that *some precautions against the promiscuous reception and residence of aliens were at this time especially necessary*, especially for securing or removing those suspected of hostile intentions.

Mr. Robert Goodloe Harper of South Carolina, in discussing the amendment requiring a residence of fourteen years, said "he believed the United States had experienced enough to cure them of *the folly of believing that the strength and happiness of the country would be promoted by admitting to the rights of citizenship all the congregations of people who resort to these shores from every part of the world.*"

Mr. James A. Bayard of Delaware said "he believed there were as many *Jacobins and vagabonds* come into the United States during the last two years as may come for ten years hence."

These references are from Annals of Congress, 5th Congress, Vol. II, Cols. 1427, 1453, 1566–1567, 1776.

The Debates of the Seventh Congress, which adopted the Act of 1802, contain nothing of interest on this subject.

2. INTERMEDIATE DEBATES.

At the second session of the 28th Congress on December 10, 1844, Mr. J. R. Ingersoll of Pennsylvania presented a petition of a number of citizens asking that the Naturalization Act be amended so as to require a residence of twenty-one years. A few days later Mr. Henry Johnson of Louisiana offered a resolution instructing the Committee on Judiciary to inquire into the expediency of extending the time allowed for foreigners to become citizens and to require greater guards against frauds, and said in support of it: "We might again have our Lafayettes and Gallatins, our Montgomerys and Emmetts. But we cannot act on exceptions. We must look at the mass—*at the swarms of needy, ignorant people, which the necessities of Europe are annually casting on our shores.*" (Congressional Globe, 2d Sess., 28th Congress, p. 32.)

3. THE DEBATES SUBSEQUENT TO THE CIVIL WAR REFER TO NEGROES AND ASIATICS.

After the Civil War was over and the negroes had been emancipated, their friends began to demand the right to naturalization for them, and some even demanded that no one of whatever race or color should be excluded from naturalization.

At the first session of the Fortieth Congress, Mr. Charles Sumner, Senator from Massachusetts, the renowned Abolitionist, on July 19, 1867, introduced a bill to amend the several Acts of Congress relating to naturalization by striking out, wherever they occurred, the words "being a free white person," and the words "free white," and the words "a free white person and," so that in naturalization there

should be no distinction of race or color, and said in support of it:

> "I will state that I have received a letter from Norfolk calling my attention to a very hard case of *a colored person* who has been an inhabitant, and in my opinion a citizen in all his rights, for more than twenty-five years, but he is unable to obtain naturalization because of the *words of color* in our naturalization laws. I think it is only reasonable that now we should put an end to that. *In short, I wish to punch that word 'white' out of the statute book wherever it appears.*"

Senator Edmunds of Vermont, another Abolitionist, objected to immediate consideration of the bill, although saying that he was as much in favor of the idea of the bill as his friend was, and as a result the bill was referred to the Committee on the Judiciary where it died. (Congressional Globe, First Session, Fortieth Congress, pages 728-729.)

At the third session of the Fortieth Congress, Mr. William N. Stewart, Senator from Nevada, introduced a bill providing "that *all white persons of foreign birth*, not convicted of crime and who have not participated in insurrection or rebellion against the United States, and who now are or who shall hereafter become permanent residents of the United States and elect to be citizens thereof are hereby declared naturalized citizens, and entitled to all the rights and privileges of other citizens of the United States."

At the time of the introduction of this bill Mr. Sumner objected to including the word "*white*" therein. Nothing, however, was done at this session. (Congressional Globe, Third Session, Fortieth Congress, page 1159.)

At the first session of the Forty-first Congress Mr. Sumner again introduced his bill to amend the several Acts of Congress relating to naturalization, by striking out the words *supra*, but nothing was

done at this session. At the next session, however, the bill was taken up and very fully discussed both in the Senate and the House.

Early in the session a bill had been introduced into the House to amend the naturalization acts and to punish crimes against the same, which, after considerable discussion, had been amended so as to provide only for punishment of crimes against the naturalization acts and not to amend the naturalization system.

In the debates in the House Mr. Thomas Fitch, of Nevada, moved to insert after the word "alien" in the phrase "any alien may become a citizen of the United States," the words "*except natives of China and Japan.*"

In explaining the nature of the bill Mr. Noah Davis, of New York, who reported the bill from the Committee on the Judiciary, said:

> "By the present law, as is doubtless well known to the House, *no alien can be admitted to citizenship except he be a free white person.* The language used in the first proposition of this bill necessarily changes the present law in that respect. It proposes to admit '*any alien*' *irrespective of the question of color.*" (Congressional Globe, Second Session, Forty-first Congress, pages 4266–4267.)

Various members of the House, in speaking upon the bill, expressed themselves as follows:

Mr. Hamilton Ward, of New York, referred to the great numbers of naturalization frauds and to the hawking about in the markets of *Europe* of fraudulent naturalization certificates at $2 apiece (page 4269).

Mr. Charles A. Eldridge, of Wisconsin, in opposing the bill and the Republican party which introduced it, said:

> "The law and proceedings for naturalization are almost as well understood now *in Ireland, Great Britain, Germany. and in the*

> *other countries on the Continent from which our foreign population has chiefly come* as they are here. * * * It comes here moved and inspired by their ancient hate and hostility of the Irish and German voter in particular and the Catholic population which we have received from foreign countries in general. * * * That party that now, by this bill, *strikes from our law the word "white," and thereby extends the same invitation of citizenship to all India, Japan, China and Africa that is extended to the people of those countries of Europe from which we or our ancestors have all come.* That party, those men purify the ballot box and elevate the ballot, who would now *for the first time* open wide the doors of the Republic to more than 800,000,000 Pagan idolators, and welcome them on the same terms and with the same cordiality to a participation in the Government and use of the ballot that they do the intelligent Christian of our own race and blood! The idea is absurd and revolting. * * * Nothing can be done so adverse, so damaging to every material interest of the United States as to adopt a policy that can by any possibility have the effect to turn *the tide of European immigration from our shores.* * * * The chief attraction to the *European immigrant* has been at all times the liberality of our Government and laws and the generosity with which he is received. * * * In thus speedily admitting aliens who come here from *Europe* to naturalization I should apprehend no danger to our country, its institutions, its freedom, its strength, or its perpetuity" (pages 4271–4274).

Mr. Aaron A. Sargent, of California, stated that he wished to address himself more particularly to that feature of the bill which related to the Pacific coast, and that he did not think that the trouble was that our naturalization laws had been too liberal, but that the wrongs and frauds which had occurred in our elections were due to repeating and not naturalization; and that he would vote against the bill for this reason unless the amendment

offered by Mr. Fitch should be adopted. He was opposed to the naturalization of Chinese, and presented a long argument to the effect that the proposed amendment of Mr. Fitch was not in conflict with either the fourteenth or the fifteenth amendments to the Constitution, in the course of which he said that in the original drafting of the fifteenth amendment the word "nativity" and certain other words were stricken out "for the purpose of leaving the United States Government or any State Government, should it see fit to do so, *free to probibit the naturalization of Chinese*," and that in the original draft of the treaty of 1868 with China there was no provision with regard to naturalization; that an objection was made in the Senate that the treaty as first drawn would be construed as allowing the naturalization of Chinese, and that Senator Sumner, of Massachusetts, in his own handwriting, had offered an amendment as follows:

> "But nothing herein contained shall be held to confer naturalization upon the citizens of the United States in China, nor upon the citizens of China in the United States" (pages 4275-4277).

Mr. Job E. Stevenson, of Ohio, said:

> "I would allow *the European immigrant* to declare his intention * * * when he steps upon American soil, and be naturalized in two years thereafter. We have admitted all classes of natives to citizenship, and *the average European immigrant* is equal to the average native" (page 4277).

Mr. Fitch in saying that he should vote against the bill unless his amendment was inserted, expressed, as it seems to us, the true explanation of the principle of the Constitution. He said:

> "*And I call the attention of gentlemen to the fact that while we invite the natives of all portions of the world, while we invite men of all nations, creeds and climes, of all*

> *characters, of all grades and capacities, to come here and live among us, we do not invite all to become citizens. Any man may become a denizen here, whether he be a fugitive from justice or whether he be a man of good moral character, whether he be an Imperialist, a Monarchist, or a friend of Republican institutions; but only men of good moral character, only men who are, above everything else, attached to the principles of the Constitution of the United States, can lawfully become American citizens; * * * There are races of men possessing distinct civilizations of their own who are without any appreciation of the idea of Republican institutions—men to to whom the word 'Republican' translated into their tongues, would have no meaning, and would convey no significance whatever.* * *
>
> "But when we pass eastward from Europe, *when we enter upon the continent of Asia, we find* not merely individuals, but nations, races, which through centuries and centuries of civilizations peculiar to themselves, have been ever guided by an idea now incorporated into their very moral being, *an idea of Patriarchal government*, an idea which prevents their becoming citizens of the United States, because its existence is incompatible with the other idea of attachment to Republican institutions. I call attention to the fact that *the Persians, the Turks, the Chinese and the Japanese are races of tyrants and slaves. * * * I have confined my amendment to the Chinese and Japanese because they are the only races of Asiatics who have evidenced any intention of coming here.* I say they are Imperialists; as such they come, and as such they remain among us, and the theory of our naturalization laws does not include an invitation to Imperialists to become citizens of the United States. *And here we can draw a proper distinction between the Asiatic and the European. In every European country on the face of the earth, in every Kingdom, Empire and Principality in Europe there are people who will make good American citizens because they are attached*

to Republican institutions, and who have aspirations for Republican freedom" (pages 4277-4278).

Mr. S. B. Axtell, of California, in speaking against the bill also said:

"This is a bill of obstacles; our true policy is to introduce measures of encouragement. We desire that *Europeans* residing in our country should become citizens, not more for their good than our own. *We are all of the same tribes and families;* we want no distinction in our society, no aliens, no foreigners, but all citizens and brethren. The right step was taken when soldiers and sailors who fought in our army and in our navy were thereupon admitted to be citizens. We shall take another right step when we allow *all Europeans* who come to reside permanently in our country to become citizens as a matter of right, irrespective of time or witnesses. * * * *This bill also seeks to open our doors to all nations of the earth to become citizens; to Hindoos, Chinese, Mongols, Africans, and to all the Islanders of the Pacific; a mistake and a vagary which would never have been thought of but for the accident of American slavery.* Some good men think that because we enforce the doctrine of equal civil rights, consistency and principle compel us to adopt the doctrine of equal political privilege. This is neither logic or morality. None should be taken into the national family who are not qualified by race, and lineage to form a part of our domestic life. We will protect their civil rights; we will conserve our political privileges exclusive of them. *Citizenship conferred upon the Chinese, for instance, would bring into the national family Pagans.* * * * The condition of the American negro is anomalous. He is here by our own wrong, and must be endured as one of those punishments which descend from fathers to children. But because we are compelled to endure him it does not follow that we must also incorporate into our family the cannibal of the South Seas. *Our forefathers wisely inserted 'white' in the naturalization laws. I am unwilling to see it struck out unless the word 'European' be substituted in its place."*

(Congressional Globe, Second Session, Forty-first Congress, Appendix pages 452-453).

Owing to the opposition manifested to the provisions in this proposed bill with reference to the method of naturalization, the term of residence required, etc., it was recommitted and a new bill introduced providing only for punishment of crimes against the naturalization acts, which was passed by the House on June 13, 1870 (page 4368).

When this bill reached the Senate on July 2, 1870, Mr. Sumner in Committee of the whole offered a new section which he said had already been reported upon favorably by the Judiciary Committee as follows (page 5121):

"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."*

Mr. George H. Williams, of Oregon, thereupon offered the following amendment to this proposed section:

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

He, however, withdrew the amendment before it was acted upon (pages 5121-5122).

Mr. Thomas C. McCreery, of Kentucky, then offered the following amendment:

"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."

which was greeted with laughter and voted down page 5123).

Mr. Sumner's amendment then came to a vote and was rejected by 22-23, absent 27. In speaking to his amendment Mr. Sumner said, after detailing the efforts which he had made to bring the Senate to a vote on the question both during the present Congress and the previous one:

> "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 cannot be naturalized on account of that word 'white.'* * * * You are now revising the naturalization sytem, and I propose to strike out from that system a requirement disgraceful to this country and to this age. I propose to bring our system in harmony with the Declaration of Independence and the Constitution of the United States. The word 'white' cannot be found in either of these two great title deeds of this republic. How can you place it in your statutes?" (page 5123)

The Senate substitute for the House bill was then defeated and the House bill was taken up for consideration, to which Senator Sumner again offered his amendment which this time was passed by a vote of 27 to 22, absent 23 (pages 5123-5124).

Mr. Williams again offered his amendment and the bill was under discussion most of the Fourth of July. Mr. Stewart, of Nevada, discussed the Chinese peril and the fifteenth amendment very throughly and said:

> "America is the palladium of free institutions, and we are but the trustees to guard those rights. *We must not incorporate any foreign element which is hostile to free institutions.* Because we have protected our own citizens and given them their rights, because we have freed the slaves and then given them their civil and political rights, does it follow

> that we must extend those political rights *to all people throughout the globe*, whether they will accept them or not? Why, sir, it would render American citizenship a farce. It is no part of the logic of the Republican party to incorporate any element that is hostile to free institutions in the American Government or to divide political power with them. *The people coming here from Europe are of our own race.* They have had struggles there for liberty. They have heard of free institutions from their earliest childhood, and yet even some of them have difficulty in comprehending the situation here. They speak our language, or at all events they meet here a large body of people who speak theirs; no matter what European language they speak. They are of us, and assimilate rapidly, and aid in the development and progress of our country. Let them come. We are glad to receive them. They add to our wealth. *But how is it with these Asiatics? They have another civilization at war with ours;* a language which we shall never understand—a language which is more arbitrary and difficult than any other spoken language" (pages 5150-5152).

Mr. John Sherman, of Ohio, said:

> "The amendment offered by the Senator from Massachusetts raises *the question whether we shall adopt by our naturalization laws the whole Pagan races of the world and engraft them in our population.* These are among the most grave and difficult propositions that have ever been submitted to Congress" (page 5152).

Mr. Sumner again said, after reading the letters above referred to:

> "Here are Africans in our country shut out from rights which justly belong to them, simply because Congress continues the word 'white' in the naturalization laws * * *"

(Then after reading the Declaration of Independence):

> "Now, sir, the great, the mighty words of this clause are that these great, self-evident, inalienable rights belong to 'all men.' It is 'all men,' and not a race or color that are placed under protection of the Declaration; and such was the voice of our fathers on the Fourth day of July, 1776. * * * But the statutes of the land assert the contrary; they declaring that only all white men are created equal. * * * But if you are not ready to change the original text, you must then change your statutes and bring them in harmony with the text. *The word 'white' wherever it occurs, as a limitation of rights, must disappear. Only in this way can you be consistent with the Declaration.* Senators undertake to disturb us in this judgment by reminding us of the possibility of large numbers swarming from China; but the answer to all this is very obvious and very simple. If the Chinese come here they will come for citizenship or merely for labor. If they come for citizenship, then in this desire do they give a pledge of loyalty to our institutions, and where is the peril in such vows? * * * While if they come merely for labor, then is all this discussion and all this anxiety superfluous" (pages 5154–5155).

Mr. Williams also said in supporting the amendment:

> "Now, sir, I ask the Senator (Stewart), and I ask every candid man in this body, *does the Declaration of Independence mean that the Chinese coolies, that the Bushmen of South Africa, that the Hottentots, the Digger Indians, heathen, Pagan, and cannibal, shall have equal political rights under this Government with citizens of the United States?* Sir, that is the absurd and foolish interpretation which the Senator from Massachusetts gives to that instrument" (page 5155).

There was a great deal of discussion among the Senators upon this amendment, Mr. Allen G. Thurman, of Ohio, even going so far as to argue that any naturalization law which did not allow all foreigners to be admitted, no matter whence they came or the color of their skins, was unconstitutional (pages 5155–5166, 5168–5177).

After the debate a motion to reconsider the amendment of Senator Sumner was adopted by 27 to 14, 31 absent (page 5173), and the amendment was rejected by 14 to 30, 28 absent (page 5176). Mr. Willard Warner, of Alabama, thereupon 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 adopted with no ensuing debate by a vote of 21 to 20, 31 absent.

When the Committee of the Whole reported the bill to the Senate the amendment of Mr. Warner was adopted by 20 to 17, 35 absent, and the amendment of Mr. Sumner, which was again offered, was rejected by 12 to 26, 34 absent, and an amendment offered by Mr. Lyman Trumbull, of Illinois, adding the clause, "and to persons born in the Chinese Empire" to the amendment of Mr. Warner, which he said he offered so as to bring the distinct question before the Senate whether they would vote to naturalize persons from Africa and to refuse to naturalize those from China, was rejected by a vote of 9 to 31, 32 absent. The bill was then passed as amended by a vote of 33 to 8, 31 absent (page 5177).

The House concurred in the amendment made by the Senate by a vote of 132 to 53, not voting 45, on July 11, 1870, and the bill was finally signed by President Grant on July 14, 1870.

Senator Joseph S. Fowler, of Tennessee, in speaking in favor of the amendment of Senator Sumner, said:

> *"Still, the bill, as it is before us, proposes to naturalize almost all races and tribes and kindreds and tongues of men. The Arabian, the Parthian, the Moor, the Armenian, the Jew, the Greek, the Roman, all are brought in and no questions are to be asked further than have been proposed to the Frenchman, the Englishman, or the German, until we come to the Chinaman and some of the Asiatic races. Only when we come to the races of the Eastern coast of Asia have we had any difficulty. There, and there alone, is the line of demarkation drawn"* (Appendix, page 575).

At the Second Session of the Forty-second Congress, on March 17, 1871, a joint resolution was passed by the House extending the provisions of Section 21 of the Act approved July 17, 1862, authorizing the naturalization of honorably discharged soldiers to aliens who have enlisted or may enlist in the naval and marine service (Cong. Rec., First Session, pp. 144–145, 147–148).

Nothing, however, seems to have been done with it in the Senate.

At the Second Session, however, the resolution was incorporated as Section 29 of Ch. 322 of the Act approved June 7, 1872, relating to the appointment of shipping commissioners and to the shipping and discharge of seamen engaged in merchant ships belonging to the United States and for their further protection.

At the First Session of the Forty-third Congress the report of the Committee on the Revision of the laws was taken up. This was the report which resulted in the adoption of the Revised Statutes of 1873. Mr. Benjamin F. Butler, of Massachusetts, who presented the report on December 10, 1873, said that the Committee had felt it their duty to allow no change in the law, even in a single word or letter, so as to make a different reading or a different sense; that they had only stricken out the obsolete parts and had brought the statutes together in *pari*

materia (Cong. Rec., First. Sess. 43d Cong., p. 129). The proposed revision was discussed in the House at evening sessions for many weeks, and when it was presented to the Senate on May 25, 1874, Mr. Roscoe Conkling, of New York, stated that it had been the aim of the Committee to preserve absolute identity of meaning, though the phraseology might have been changed, and that they had not intended to change the law in any particular (Cong. Rec., 43d Cong., First Session, p. 4220).

In spite of such care on the part of the Committee, whether accidentally or by design, the words *"being free white persons, and to aliens"* were omitted from their draft (see Vol. 1, Commissioner's Draft, pp. 1039–1043), so that, as finally incorporated in the Revised Statutes of 1873–4, these sections read, as they were in the original draft, as follows:

> "§ 2165. *An alien* may be admitted to become a citizen of the United States in the following manner, and not otherwise: (then follow the conditions) * * *
>
> "§ 2169. *The provisions of this Title apply to aliens of African nativity, and to persons of African descent.*"

At the next session, Mr. Sargent, of California, called the attention of the Senate to this omission on December 23, 1874, in speaking upon a bill to provide for the authentication of the Revised Statutes, which was under consideration in the Committee of the Whole (Cong. Rec., 43d Cong., Second Sess., p. 227). In the course of his remarks, he said:

> "Any one acquainted with the legislative history of the past few years knows that the question has been raised on a number of occasions whether the word 'white' should be stricken from the naturalization laws or not. Some of the Senators and Members who are more familiar with the condition of things existing upon the Pacific Coast thought it

would be disastrous to the interests of civilization and good government on that coast to have Chinese naturalized, and therefore, and for that reason only, resisted the striking of the word 'white' out of the naturalization laws.

I need not perhaps give the basis for that belief; but they thought, among other things, that as these persons were actually imperialists, if they had any political sentiments, as they were ignorant of our language and very slowly acquired it, they might be naturalized in large numbers and sent in platoons to the polls, and consequently anything like free government under proper influences would be lost to American citizens where they were in large numbers. At any rate we made a most earnest struggle in both Houses of Congress on that matter. The object of those who pressed for legislalation in that direction was to enable certain persons who were of African descent to be naturalized, and finally there was a compromise made, by which the word 'white' was left in the naturalization laws, but it was provided that aliens of African blood or African descent might be naturalized. So the law was placed in the statute-book, Africans being allowed to be naturalized, but the word 'white' being retained for the very object that was explained in the debates at the time the provision was adopted in regard to Africans, that the Chinese might not be naturalized."

Mr. Thurman, of Ohio, also said:

"The legislation which he (Senator Sargent) states has taken place in Congress is precisely what he says it has been, and how these revisers could have misunderstood that legislation passes my comprehension. It was stated here and in the other House that this revision was no change of the law at all, that it was only to make the law conform to what had been decided to be the law and to eliminate from the statutes, where neces sary, mere repetitions of the same provisions of law and reconcile and harmonize those

which seemed contradictory; and even that attempt to remove repugnancy, it was said, was pursued in a very slight degree; but there was to be no change in the laws. If there was a change in any phraseology, it was simply to make more clear the legislative intention as it had been expounded by the courts. But now we find, if my friend from California is correct in his statement, that there has been a most material change in the law; and how it could have taken place is a thing that is very singular to me" (p. 227).

Mr. Matthew H. Carpenter of Wisconsin who was the second member of the Committee on the Revision of the Laws said:

"I remember the discussion and the legislation referred to by the Senator from California; and I think he is entirely right in his statement of it, and of course the change to which he referred is a mere blunder; but it is one of those blunders which I can very well see how the revisers might fall into without any intention to usurp the law making power. The action of Congress has for so long a time been directed to striking the word 'white' out of the Constitution and laws that they thought undoubtedly it was by omission or mistake that it was left in that law. * * * The point mentioned by the Senator from California is clearly a blunder" (p. 227);

Mr. Edmunds of Vermont then said:

"A bill once passed the Senate, I think, for that purpose, but it does not seem to have become a law" (p. 227).

A bill to correct errors and omissions in the Revised Statutes was later introduced at this session in the House by Mr. Luke P. Poland of Vermont from the Committee on the Revision of the Laws, which amended Section 2169 by inserting after the word "aliens" the words "being free white persons, and

to aliens." Mr. Poland in calling attention to this amendment, said (Cong. Rec. 43d Cong., 2d Sess., p. 1081):

> "I feel it my duty to call the attention of the House to two matters that otherwise would have escaped their attention. The Committee have felt bound, as we assured the House when we had the revision before the House at the last session, that it was the intention of the Committee to make no change in the law whatever—we have felt it our duty where any error has come to our notice to bring it before the House, that it shall not be said that there has been any change of law through the action of the Committee that has not been sanctioned by Congress. * * * The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful upon the Pacific Coast. After considerable debate, instead of striking out the word 'white', it was provided that the naturalization laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white' but has kept in the provision in relation to Africans and persons of African descent. 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 condition in which it was before the revision was made. The member of our Committee who had this chapter on the

> naturalization laws to examine as a subcommittee, failed to notice this change in the law or it would have been brought before the House when the revision was adopted."

Mr. Willard of Vermont, interrupting Mr. Poland, said (p. 1081):

> "I desire to call attention to the last question raised, the exclusion of the word 'white' in the naturalization laws. I do it because this subject was referred during this session of Congress to the Committee on Foreign Affairs, of which I have the honor to be a member, and some little consideration has been given to it, and I was authorized by that Committee to report adversely upon a bill which was submitted to the Committee restoring the word 'white' to the naturalization laws as now proposed by the Committee on the Revision of the Laws.
>
> "I understand that the Committee on the Revision of the Laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the revision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is not a wise statute. I understand that members from California and the Pacific Coast make objection to the naturalization of Asiatics, more especially the Chinese. That question has been before Congress at different times. As has been suggested by my colleague, it was squarely presented in the Senate by the proposition of Mr. Sumner to strike out the word 'white' from the naturalization laws.
>
> "I cannot see why there should be this invidious distinction made against any class of foreigners. We invite immigrants to this country from all countries; we open our ports wide to every immigrant who comes to our

shores. And if this word 'white' shall be restored we will keep upon our statute a provision by which only a portion of those who come to this country can be naturalized, and certainly, as far as we know, not by any means necessarily the least intelligent portion of the emigrants who come here. I merely call the attention of the House to this matter for the purpose of suggesting that if they are ready to say that this word 'white' should be retained in the naturalization laws on principle, or on the merits of the question, of course it is proper for them to say so. But I think it is a good time now, inasmuch as we have it out of the law, to let it remain out."

He therefore moved to amend the proposed bill by striking out the paragraph relating to Section 2169, but after some opposition he withdrew the motion.

Mr. Horace F. Page of California, in opposing the motion, said (p. 1082):

"When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word 'white' from the naturalization laws, the Pacific Coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, which would exclude Asiatics."

Mr. Samuel S. Cox of New York said (p. 1082):

"Mr. Speaker, the other day when this matter came up about the tariff I made a statement here that the Committee on the Revision of the Laws had authorized the striking out, or had stricken out, the word 'white,' and that brought about a certain trouble, and there being a law upon the statute book to authorize the naturalization of all aliens and persons of African nativity and African descent, approved July 14, 1870, it became necessary for some purpose, humanitarian or otherwise, the Committee

on Foreign Affairs should act in reference to the naturalization of the Chinese. 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. That excited a good deal of attention in the country, and especially on the Pacific Coast, and now when gentlemen have a chance to save our committee further trouble when they can legislate on the word 'red' or 'yellow,' they escape the dilemma on a point of order raised by my honorable friend from Pennsylvania by the strictness with which they are held by the chair. If they want to naturalize the Chinese 'as a man and a brother,' let them try it now and at this time."

The bill was then passed. When the bill was reported in the Senate on February 13, 1875, Mr. Orris S. Ferry of Connecticut moved to amend it by striking out the provision with reference to Section 2169, saying (p. 1237):

"By the existing law all persons, without distinction of race, nativity or color, may, with certain qualifications of residence and character, be naturalized. That is the law now. It is proposed by the part of this bill which I move to strike out to limit the capacity of naturalization to persons of white and of African descent, excluding entirely Asiatics who may desire to become naturalized and possess the requisite qualifications. I think that is contrary to the whole tendency of legislation and of government in this country for the last twenty years; and if the revisers of the statutes have produced any change more enlarged and progressive by their revision than the law was before, I would not now, at this stage of the history of our Government, go back to the invidious distinctions which this amendment creates."

Mr Sargent, in reply, said (p. 1237):

> "A change was made in the statutes, not by legislative discretion but by a blunder, a blunder of the most obvious character. It resulted in an accident by which there is an important change in the law. Now, to insist that an accidental change of that kind in the law, without the intelligent assent of either House of Congress, without the idea of any member of either House that this important change was being made in the law, shall stand, on account of that mistake, as the law of the land, is to advance a proposition which is not, as the Senator says, fair, but entirely unfair."

The amendment was then withdrawn by Mr. Ferry and the bill was passed and approved by President Grant on February 18, 1875.

We have quoted at such lenght from the Debates during the years 1870-1875, not with the idea that they have any bearing upon the meaning with which Congress used the phrase "free white persons" in 1790, but for the purpose of showing that, in spite of the prolonged dissention over Senator Sumner's proposed amendment in 1870 opening the doors to the naturalization of all aliens, the phrase was inadvertently omitted from the Revised Statutes in 1873-4 and was restored as soon as the omission was noticed, and that such restoration was not accomplished without a considerable struggle between the advocates of an unrestricted naturalization and those who desired to restore the naturalization laws to the condition In which they had always been. These quotations also show that the opposition to Senator Sumner's amendment was based upon opposition not only to the coming in of the Chinese but also to the coming in of all the Asiatics—the Malays, Hindoos, East Indians, Persians, Turks, Arabians, Parthians, Moors, Armenians, etc.—for whom he proposed to let down the bars.

The speeches delivered in Congress in 1870 are very interesting and well worth reading in full. But for the length to which this brief has already reached, we would have quoted even more fully from them.

F. The decided cases have all proceeded upon the erroneous theory that by the phrase "free white persons" Congress meant Caucasians.

In re Ah Yup, 1 Fed. Cases, 223 (5 Sawyer, 155), decided in 1878, is the first reported case in which the meaning of the term "free white person" has come before the courts. Judge Sawyer in the Circuit Court for California refused to permit the naturalization of a native of China of the Mongolian race. He referred to the Debates in Congress in 1870 and 1875 and to the various classifications of races by Blumenbach, Buffon, Linnaeus and Cuvier, and said:

> "The questions are: 1. Is a person of the Mongolian race a 'white person' within the meaning of the statute? 2. Do those 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 description of a 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. * * *

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race. *Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races.* I am not aware that the term 'white person,' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. *While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians.* * * *

"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. * * *

"*The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude unless it be the Chinese.*"

In re Camille, 6 Fed., 256, decided in 1880 in the Circuit Court in Oregon, Judge Deady refused naturalization to a person who was born in British Columbia, his father being a white Canadian and his mother a native Indian woman of British Columbia, following *re Ah Yup* and several Ohio case with reference to persons of mixed white and negro blood. He said:

"In all classifications of mankind hitherto, color has been a controlling circumstance, and for that reason Indians have never, ethnologically, been considered white persons, or included in any such designation. *From the first our naturalization laws only applied to the people who had settled the country —the Europeans or white race—and so they remained until in 1870, when, under the pro-negro feeling, generated and inflamed by the war with the southern states, and its political consequences, Congress was driven at once to the other extreme, and opened the door, not only to persons of African descent, but to all those of "African nativity"—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the 'dark continent,' while withholding it from the intermediate and much better qualified red and yellow races. However, there is this to be said in excuse for this seeming inconsistency; the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.* * *

"The power to say when and under what circumstances aliens may become American citizens belongs to Congress. Citizenship is a privilege which which no one has a right to demand; and *in construing the acts of Congress upon the subject of naturalization the courts ought not to go beyond what is plainly written.*"

In re Kanaka Nian, 6 Utah, 259, decided in 1889, a native of Hawaii, whose ancestors were Kanakas, was refused naturalization. The court in reaching its conclusion that the Hawaiians are Malays, and

therefore excluded, relied solely on ethnological considerations, citing the classifications of races made by Blumenbach, Cuvier and Huxley and the articles on Malayo-Polynesian Races in the American Encyclopedia and Polynesia in the Encyclopedia Britannica (9th Edition), and after referring to *re Ah Yup*, said:

> *"We are of opinion that the law authorizes the naturalization of aliens of the Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded."*

In re Hong Yen Chang, 84 Cali., 163, in 1890, a Chinaman applied to be admitted to practice as an attorney, presenting a certificate of naturalization and a license admitting him to practice in the courts of New York State. He was, however refused, the court following *re Ah Yup*, *re Look Tin Sing*, 21 Fed., 905, and the Chinese Exclusion Act of 1882.

In re Saito, 62 Fed., 126, Judge Colt in the Circuit Court for Massachusetts in 1894, refused the application of a native of Japan for naturalization. He referred to the Debates in Congress in 1870 and 1875, to the classifications of Blumenbach in 1781, Cuvier and Huxley and to the cases of *re Ah Yup*, *re Camille*, *Fong Yue Ting* v. *U. S.*, 149 U. S., 698 and *Elk* v. *Wilkins*, 112 U. S., 94, and said:

> "These words were incorporated in the naturalization laws as early as 1802. 2 Stat. 154. *At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when Congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian.* * * *
>
> *"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.*
>
> "The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.
>
> *"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.*
>
> *"And this is true from a scientific point of view.* Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, *the color of the skin is considered the most important criterion for the distinction of race, and it lies at the foundation of the classification which scientists have adopted.* * * *
>
> "Whether this question is viewed in the light of congressional intent, or of the popular or scientific meaning of 'white persons,' or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied."

In re Po, 7 Misc., 471, Judge Danaher in the City Court of Albany in 1894 refused to naturalize an East Indian born in British Burmah, who was studying medicine, on the ground that he was a Malay and therefore, under modern ethnological subdivisions, a Mongolian, citing *re Kanaka Nian*, *re Ah Yup*, *re Camille*, and *Elk* v. *Wilkins*, 112 U. S., 94.

In re Gee Hop, 71 Fed., 274, Judge Morrow in the District Court in California in 1895 refused to allow a Chinaman to enter the country, although he had

been naturalized in the Common Pleas Court in New Jersey in 1890 and had obtained a passport from the State Department as a United States citizen, holding in accordance with *re Ah Yup* and the Chinese Exclusion Act of 1882 that the New Jersey court had no power to naturalize Chinamen and that the certificate was therefore void.

In re Rodriguez, 81 Fed., 337, decided in 1897, Judge Maxey of the District Court in Texas admitted to naturalization a native-born "pure-blooded" Mexican, although very illiterate and ignorant. This conclusion was reached because of the provisions of § 10 of the Constitution of Texas of 1836, which declared that all persons (Mexicans included) who resided in Texas on the day of the declaration of independence (March 2, 1836) should be considered citizens of the Republic, the Treaty of Guadalupe-Hidalgo with Mexico, concluded February 2, 1848, and the Gadsden Treaty, proclaimed June 30, 1854, which provided that all Mexicans who remained in the territory ceded by the treaties and who failed to declare their intention to remain citizens of Mexico within a year, should be considered to have elected to become citizens of the United States, the Acts of Congress of 1850 admitting California into the Union and establishing territorial governments for New Mexico and Utah (9 Stat. L., 452, 446, 453), which recognized as citizens of the United States Mexicans who had been declared citizens by the Treaty of Guadalupe-Hidalgo, the Fourteenth Amendment to the Constitution, the Treaty relative to Naturalization with Mexico, concluded July 10, 1868, by which the treaty-making power recognized that Mexicans were embraced within our naturalization laws, and the Act of Expatriation of July 27, 1868 (§ 1999 U. S. R. S.). He also referred to the cases of *re Ah Yup*, *re Camille*, *re Kanaka Nian* and *re Saito*, and said:

> "*Indeed, it is a debatable question whether the term 'free white person,' as used in the original act of 1790, was not employed for*

> *the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country.* But it is not necessary to enter upon a discussion of that question; nor is it deemed material to inquire to what race ethnological writers would assign the present applicant. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white. It is certain he is not an African, nor a person of African descent. According to his own statement, he is a 'pure-blooded Mexican,' bearing no relation to the Aztecs or original races of Mexico. * * *
>
> "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*, and his application should be granted if he is shown by the testimony to be a man attached to the principles of the Constitution, and well disposed to the good order and happiness of the same."

In re Burton, 1 Alaska, 111, decided in 1900, an Indian, a native of British Columbia, was denied naturalization.

In re Yamashita, 30 Wash., 234, decided in 1902, a Japanese, who had studied law, applied for admission to the bar of the State and presented a certificate of naturalization as proof of his citizenship. His application was denied on the ground that no Japanese could be lawfully naturalized, Chief Justice Reavis saying:

> "When the naturalization law was enacted, the word 'white,' applied to race, commonly referred to the Caucasian race (citing *re Ah Yup*, *re Camille*, *re Po*, *re Kanaka Nian*, *re Saito*, *re Rodriguez*). * * * The law seems to base the classification upon ethnological and racial considerations, rather than on any national distinction. *Whether*

> *the classification according to color is technically scientific or natural is not a proper subject of inquiry here. From its existence co-extensively with the formation of the American republic, it must be taken to express a settled national will."*

In re Buntaro Kumagai, 163 Fed., 922 (1908), Judge Hanford in the District Court of Washington refused to naturalize a Japanese, who had been honorably discharged from the U. S. Army and claimed the right under § 2166 R. S. He said, following *re Ah Yup*, *re Saito* and *re Yamashita:*

> *"The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."*

In re Knight, 171 Fed., 299, it was decided by Judge Chatfield in the Eastern District of New York in July, 1909, that a person, whose father was an Englishman and whose mother was half Chinese and half Japanese, though he was an honorably discharged seaman within the Act of July 26, 1894 (28 Stat. L., 124), was not entitled to naturalization because he was not a white person. He followed *re Camille*, *re Saito* and *re Kumagai*.

In re Najour, 174 Fed., 735, decided in December, 1909, Judge Newman in the Circuit Court in Georgia admitted to citizenship a Syrian who was born within the dominions of the Sultan of Turkey, relying upon the classification of races made by Dr. A. H. Keane, in "The World's People," who included Syrians in the Caucasian or white race, and saying:

> "Although the term 'free white person' is used in the statutes (Rev. St., Sec. 2169 [U. S. Comp. St., 1901, p. 1333]), *this expression, I think, refers to race, rather than to color, and fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucasian race, and I consider the Syrians as belonging to what we recognize, and what the world recognizes, as the white race.* The applicant comes from Mt. Lebanon, near Beirut. He is not particularly dark, and has none of the characteristics or appearance of the Mongolian race, but, so far as I can see and judge, has the appearance and characteristics of the Caucasian race."

In re Halladjian, 174 Fed., 834, decided in December, 1909, by Judge Lowell in the Circuit Court in Massachusetts, four Armenians, two of whom were born in Asiatic Turkey and two on the west side of the Bosphorus, were admitted to citizenship. They were white persons in appearance; as Judge Lowell said, not darker than some persons of North European descent and lighter than many South Italians and Portuguese. The grounds upon which they were admitted were (1) that the inclusion of the phrase "free white persons" in § 2169, U. S. R. S., by the Amendment of 1875, operated to exclude all other persons from naturalization, (2) that there is no "European or white" race to which substantially all inhabitants of Europe belong, nor an "Asiatic or yellow" race, which includes substantially all Asiatics, (3) that Armenians have always been classified in the white or Caucasian race, (4) and have, so far as "ideals, standards and aspirations" are concerned, usually been found on the European side, (5) that they can become westernized, (6) that the census acts, both of the Colonies and the States, and modern statutes requiring separate accommodation in travel, all show that the word "white" was used to designate persons not otherwise classified, (7) and that the courts have interpreted the naturalization statutes substantially in accordance with these principles.

It will be observed that this conclusion was reached not in accordance with an investigation of

what the Members of Congress in the latter part of the Eighteenth Century believed with reference to the races of mankind or what they were seeking to accomplish and to guard against in offering naturalization to foreigners, but in accordance with present-day knowledge and ideals and by the application of present-day knowledge to conditions 125 years ago. No endeavor was made by the Court to put itself in the situation of our forefathers and to look at the question through the glasses which they used.

After citing practically all the decided cases, the Court said in conclusion:

> "We find then: *That there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia;* That the mixture of races in western Asia for the last twenty-five centuries raises doubt if its individual inhabitants can be classified by race; That if the ordinary classification is nevertheless followed, Armenians have always been reckoned as Caucasians and white persons; that the outlook of their civilization has been toward Europe. We find further: That the word 'white' has generally been used in the Federal and in the State statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; That Armenians, as well as Syrians and Turks, have been freely naturalized in this Court until now, although the statutes in this respect have stood substantially unchanged since the First Congress: That the word "white," as used in the statutes, publi cations and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect. To provide more specifically what persons may be admitted to citizenship seems desirable. While the statutes are unchanged, without proof, if proof be admissible, that the meaning of the word 'white' has been

> still further narrowed, this Court will not deny citizenship by reason of their color to aliens who, like the Armenians, have hitherto been granted it."

In re Mudarri, 176 Fed., 465, decided in January, 1910, Judge Lowell in the Circuit Court in Massachusetts also admitted to citizenship a Syrian, born in Damascus. He there, however, recognized the embarrassments of the rule of classification previously laid down by him *in re Halladjian*, *supra*, saying:

> "The case at bar is pretty well covered by the opinion of this Court in the Halladjian Case, 174 Fed., 834, although what was there said of Armenians does not apply in every respect to Syrians. Those who call themselves Syrians by race are probably of a blood more mixed than those who describe themselves as Armenians. However this may be, the older writers on ethnology are substantially agreed that Syrians are to be classed as of the Caucasian or white race. Modern writers on ethnology, who have departed from the ancient classification, are not agreed in substituting any other which can be applied under Section 2169. Inasmuch as Syrians have been classified as above stated, and as this Court has long admitted Syrians to citizenship, the petitioner will also be admitted.
>
> "*While the case at bar is thus free from considerable doubt, yet the Court may properly point out that cases of difficulty are likely to arise in construing Section 2169, unless its wording is changed and the intent of Congress is made to appear. That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration*

into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under Section 2169 without making distinctions which Congress certainly did not intend to draw—e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The Court greatly hopes that an amendment of the statute will make quite clear the meaning of the word 'white' in Section 2169."

In *Bessho* v. *U. S.*, not yet reported, decided in February, 1910, the only case in which any Appellate Court has considered the naturalization question, the Circuit Court of Appeals for the Fourth Circuit decided that a Japanese could not claim naturalization under the Act of July 26, 1894, as an honorably discharged sailor, his argument being that the provisions of that Act were not limited by the provisions of § 2169, U. S. R. S., as the former was later in point of time. Judge Goff, after referring to the amendment of § 2169 made in 1875, said:

> "The attention of the legislative branch of the Government was thus particularly called to the point we are now considering, and the action then taken by it is most significant, and clearly indicates that the Congress then intended to exclude all persons of the Mongolian race from the privileges of the naturalization laws. * * *
>
> "A careful examination of the statutes relating to naturalization, commencing with the Act of Congress, of April 14, 1802, and ending with the enactment of July 14, 1870, discloses the fact that *such statutes during all that time had in view the purpose of preventing all aliens, not free white persons, from becoming citizens of the United States; in other words, all alien races except the Caucasian were excluded. From and including the Act of July 14, 1870, to and inclusive of the Act of June 29, 1906 (except the period between the revision of 1873, and the amendments thereto of 1875), the intention was to exclude from naturalization all aliens except those of the Caucasian and the African races.* The history of the country through all the time thus indicated,—to which we think we may with propriety allude,—clearly develops the necessity for the legislation mentioned, and points out the purpose of the Congress in exacting it. * * *.
>
> "(And referring to the claim that §14 of the Chinese Exclusion Act of 1882 indicated that the policy of Congress was to exclude Chinese, but not other aliens of the Mongalian race, from naturalization). The section referred to was evidently incorporated in the Act mentioned, to dispel a doubt entertained in some sections, as to the sufficiency of the legislation on the subject of naturalization then in force, to prevent Chinese from being admitted as citizens. * * * Surely there can be no serious contention concerning the ineligibility of Chinese to be naturalized under the statutes existing when this act became a law. The courts had theretofore considered such applications and rejected them (*re Ah Yup, re Camille, Fong Yue Ting* v. *U. S.*, 149 U. S., 698, 716).

It will be noticed that, with but two or three exceptions, all the decided cases have cited and followed *re Ah Yup,* the earliest decided case, and that they have all adopted the opinion of Judge Sawyer there expressed, that Congress did not intend to include in the term "white person" any other than an individual of the Caucasian race. If Judge Sawyer had known that in 1790 Blumen-

bach's classification of races was unknown in this country, he would never have fallen into the error of assuming that by that term Congress meant the Caucasian race. He would, on the contrary, have undoubtedly reached the conclusion that by that term Congress meant the white or the European race—the race which Judge Deady in *re Camille* said was the only race to which our naturalization laws had ever applied—for there was in 1790 generally understood to be such a race, in spite of Judge Lowell's statement to the contrary. The judges before whom the question subsequently came would then have adopted the correct construction of the laws, and this long line of erroneous precedents would never have been established, and the doubt expressed by Judge Lacombe in the case at bar would have been easily solved.

The appellee cannot claim that because the Courts have hitherto decided that all members of the Caucasian race were entitled to naturalization, he has a right to naturalization, if in fact he is not a white person within the meaning of § 2169 U. S. R. S.

A long continued rule of construction of a statute doubtless is entitled to great weight, but where, as here, that rule has been adopted only by the courts of original jurisdiction, and where the question has only once been reviewed by an appellate court, that rule is by no means binding. If the statute has been erroneously construed, no precedent can be created thereby, and it is always the duty of the appellate court to construe the law independently, and, if need be and a proper construction of the law demands it, to reverse the prior erroneous rulings.

G. Miscellaneous references in speeches, debates, cases, etc., shedding some light upon the meaning of the term "free white persons."

As positive proof that Congress did not have in mind immigration from countries other than Europe, we refer to the "History of Immigration to the United States," by William Bromell, of the Department of State, published in 1856, page 16:

> "Of the 4,212,624 passengers of foreign birth arriving in the United States during the period of 36½ years from September 30, 1819, to December 31, 1855, 16,714 were born in China; 101 were born in the East Indies; 7 were born in Persia; 16 were born in Asia, division not designated; 14 were born in Liberia; 4 were born in Egypt; 11 in the Barbary states; 118 were born in Africa, division not designated."

During the period prior to 1854 the aggregate number of Chinese known to have arrived was only 88, so that for 35 years from 1819 to 1854 but 212 immigrants from Asia entered the United States and only 147 from Africa, or a total from both continents of 359, hardly an average of ten per year. Of the total of 4,212,624, over 3,549,000 came from Great Britain and Germany alone, another 300,000 came from the other countries of Europe and the rest came from the countries and islands to the south of the U. S. If during the thirty-five years from 1819 to 1854 but an average of ten immigrants per year came from Asia and Africa combined, what, we ask, can we believe the immigration was from those continents prior to 1790? Certainly it was not sufficiently large to have attracted any attention.

In a pamphlet entitled "Immigration into the United States, showing the number, nationality, etc., from 1820 to 1903," prepared by O. P. Austin, Chief of the Bureau of Statistics of the Treasury Department, on page 4346 appears a table showing

the number of immigrants coming from Asia and Africa during the years 1820–1868. An examination of this shows that in the year 1820 there was one immigrant from China, one from India, three from Asia, division not specified, making a total of five; none at all in the year 1821; only one from India in the year 1822; none in the year 1823; one from India in the year 1824; one from China in the year 1825; one from India in the year 1826; one from the same country in 1827. The table continues in about the same proportion during the entire period, the highest number coming in any one year from India being seventeen, in the year 1866.

The entire immigration from all the countries of Asia is insignificant until the year 1854, when over thirteen thousand Chinese were brought into the country to assist in constructing the railroads across the Western plains and mountains.

A comparison of the tables published in this work, showing the immigration into the United States from the various countries, shows conclusively that Congress did not have in mind the naturalization of Asiatics.

Senator Lodge speaking in the Senate on March 16, 1896, in support of a bill to further restrict immigration by excluding those who could neither read nor write, said (Cong. Rec., 54th Cong., 1st Ses., p. 2819):

> "During this century, down to 1875, then, as in the two which preceded it, there had been scarcely any immigration to this country, except from kindred or allied races (the Dutch, the Swedes, the Scotch-Irish, the Germans, the French Huguenots, and, of course, the English), and no other, which was sufficiently numerous to have produced any effect on the national characteristics, or to be taken into account here."

It does not seem to us that the Census Acts of either the Colonies, the original States, or the United States shed any light upon the true meaning of the phrase "free white persons" in the Naturalization Laws. Not until recent years have these acts provided for the enumerating of facts relative to the places of birth, nationality, etc., of the inhabitants. In the eighteenth and early part of the nineteenth centuries these acts simply provided for the counting of the inhabitants, dividing them into the two (or, where Indians were counted, three) general classes of white and black persons, of which, it might be said with almost exact truthfulness, the entire population of this country consisted. There was no further reason for further classification, because the number included in any further class would have been almost infinitesimal.

The appellee may refer to the statement made by President Madison as to this country being an asylum for the "oppressed of all nations" and claim that by such a remark Mr. Madison intended to include the nations of Asia.

An examination of the writings of Madison, Monroe, Hamilton, Jefferson, Franklin, Washington, Jay, Clay and Webster discloses that in not a single instance did one of those men refer to the immigration of aliens from Asia or Africa, and that all reference to immigrants was to those coming from *Europe*.

Mr. Madison, writing to Jefferson January 11, 1795 (See "Letters and other Writings of James Madison," volume 2, page 31), said:

> "The last subject before the House of Representatives was a bill revising the naturalization law, which from its defects and the progress of things *in Europe* was exposing us to very serious inconveniences."

And on page 121, volume 3, writing to Richard Peters February 22, 1819, Mr. Madison says:

> "According to the laws of *Europe* no emigrant ceases to be a subject."

There is no reference here to Asia or Africa; there is no intimation in any particular that emigrants from those continents were considered at all. But there is every intimation that the men of affairs of that period had in mind the naturalization of "The European race with features like ours," and that by the use of the words "white persons" they intended to provide for the naturalization of that race.

The state of affairs existing between this country and the Barbary states, *whose inhabitants*, according to Blumenbach's classification, *were Caucasians* at the time of the passage of the first Naturalization Act, furnishes further proof of our claim that Congress did not intend the phrase "free white persons" to include "Caucasians." It is a well known historical fact that pirates from the Barbary states had plundered for years prior to the nineteenth century, almost without hindrance, the shipping of the world.

Speaking of the Barbary states, Jefferson, writing from Paris, August 2, 1785, to John Page (Writings of Jefferson, volume 1, page 401) says:

> "The question is whether their peace or war will be cheapest. * * * If we wish our commerce to be free and uninsulted we must let these nations (the Barbary states) see that we have an energy which at present they disbelieve. The low opinion they entertain of our powers, cannot fail to involve us soon in a naval war."

And again writing to John Adams, July 11, 1786, page 591, Mr. Jefferson says:

> "However, if it is decided that we shall buy a peace (referring here to the paying of tribute to the Barbary states), I know no reason for delaying the operation, but should rather think it ought to be hastened, but I should prefer the obtaining it by war."

And again, writing to Col. Humphreys, August 14, 1786, (Volume 2, page 10), he says:

> "They (the Algerian states) refused even to speak on the subject of peace."

And again, writing from New York to E. Rutledge, July 4, 1790 (Volume 3, page 164), he says:

> "In yours of April 28th you mention Dr. Turnbull's opinion that force alone can do our business with the Algerians. I am glad to have the concurrence of so good an authority on that point. I am clear myself that nothing but a perpetual cruise against them, or at least for eight months of the year and for several years, can put an end to their piracies."

Putting it plainly, the appellee and intervenors contend that Congress intended to exclude the brown East Indian and to include the black Moor and swarthy Algerian who had plundered our merchant vessels for years and with whom they were about to engage in a maritime war.. The unreasonableness of this contention is apparent upon its face. If Congress intended to include all Caucasians, as the appellee contends, they must have intended to include the inhabitants of the Barbary states, and it is not reasonable to suppose that the members of Congress considered for an instant the naturalization of members of the tribes which had harassed their merchantmen and whose actions had called forth the famous statement: "Millions for defence but not one cent for tribute."

The treaties subseqently concluded with the Barbary States contain nothing with reference to naturalization of their subjects and nothing to indicate that Congress contemplated their immigration hither.

Chancellor Kent in his Commentaries published in 1826 (Vol. 2, p. 72) said:

> "The Act of Congress confines the description of aliens capable of naturalization

to 'free white persons.' I presume this excludes the inhabitants of Africa and their descendants; *and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefit of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law.*"

In *Boyd* v. *Thayer*, 143 U. S., 135 (1892), where the effect upon a minor of his father's declaration of intention to become a citizen was one of the questions involved, Chief Justice Fuller said at page 163:

> "*All white persons or persons of European descent* who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were by the declaration invested with the privileges of citizenship."

In spite of the language of the Declaration of Independence that "*all men are created equal*," Chief Justice Fuller thus limited those upon whom the privileges of citizenship were conferred by the declaration to persons of European descent.

In *Fong Yue Ting* v. *U. S.*, 149 U. S., 698 (1892), which involved the constitutionality of the registration and deportation provisions of the Chinese Exclusion Act of May 5, 1892, Justice Gray said at p. 716:

> "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws,"

In *U. S.* v. *Wong Kim Ark*, 169 U. S., 649 (1897), where it was decided that a child born in the

United States, whose parents were of Chinese descent and subjects of the Emperor of China, became at the time of his birth a citizen of the United States by virtue of the Fourteenth Amendment, Chief Justice Fuller, in his dissenting opinion at p. 712, said:

> "The emigration which the United States encouraged was that of those who could become incorporate with its people; make its flag their own; and aid in the accomplishment of a common destiny; and it was obstruction to such emigration that made one of the charges against the Crown in the Declaration."

IN CONCLUSION.

We feel that in the foregoing pages we have made it clear that Congress in 1790 could not have intended the Caucasian race by the phrase "free white person," interpreted, as it should be, in the light of the knowledge of the races of mankind which the Members of Congress and the inhabitants of the United States then had, but that it must have intended the European or the white race, and furthermore, that the phrase was used by Congress as a term of exclusion.

That by its use Congress could not have had in mind the exclusion of the Africans is apparent from the fact that, at the time of the Declaration of Independence and the subsequent adoption of the Constitution, the people of this country did not consider the Africans as human beings like ourselves, but as chattels—slaves—subject to private ownership, and incapable, therefore, of being naturalized, whether free or in bondage. Nor did it intend thereby to exclude the Indians, the former inhabitants of this country, for, though they were considered as members of foreign nations, and therefore capable of being naturalized, the possibility of their applying for naturalization, or of

being capable of enjoying the privileges of a citizen, would not have occurred to anyone.

See the famous case of *Dred Scott* v. *Sandford*, 19 How, 393, decided in 1856, where Chief Justice Taney, in holding that a negro, whose ancestors were imported into this country and sold as slaves, could not, even though he himself subsequently became free, become a member of the political community formed and brought into existence by the Constitution of the United States, said at page 403, 407, 417 and 419:

> " The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Goverments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the

> United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. *But they way, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States:* and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people. * * *
>
> " In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. * * *
>
> " No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. *The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.* * * *
>
> " To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitu tion that we have given. Three laws, two of which were passed almost immediately

after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words 'people of the United States' and 'citizen' in that well-considered instrument.

"The first of these acts is the naturalization law, which was passed by the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens '*to aliens being free white persons.*'

"*Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one. of any color, who was born under allegiance to to another Government. But the language of the law above quoted, shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.*

"*Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community.* And, moreover, the atrocities they had recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. *No one supposed then that any Indian would ask for, or was capable of enjoying the privileges of an American citizen, and the word white was not used with any particalar reference to them.*

"*Neither was it used with any reference to the African race imported into or born in this country, because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.*

"It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure."

If, therefore, Congress did not have in mind, when it used the term "free white person," the exclusion from naturalization of the African race, whom it could not naturalize, nor the Indian race, whom it would not naturalize, what races did it intend to exclude from the privileges of citizenship? It must have intended to exclude some race, or, instead of using the phrase "free white persons," it would have used the words "all aliens," or "all foreigners," or a similar general phrase. We have show from the debates in 1790 that, when discussing the terms of the proposed naturalization law, the Members of Congress contemplated the immigration into this country of Europeans, citizens of European countries from which they had themselves come. The inference is clear that in using the term "free white persons," they used it with reference to the European race and, therefore by necessary inference, to exclude the Asiatic race, the Chinese, Malays, Turks, Persians, Moors, Berbers, etc., the men of brown, yellow or olive colored skins, as they were known to it. The word "free" was used to exclude those bound out to service or in bondage, the word white to include the Europeans, those of similar ideals to ours, and to exclude all others.

Article 1, Section 2 of the Constitution provides that representatives and direct taxes shall be apportioned among the several States, according to their respective numbers, "which shall be determined by adding to the whole number of *free white per-*

sons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

Point II.

The phrase "free white persons" must be construed in the light of the knowledge that the members of Congress possessed in 1790, and it is both necessary and proper to refer to every source of information which will reveal that knowledge.

The phrases "free white persons," as well as "white persons" and "free persons," was frequently used in the various naturalization acts passed in the colonies and States prior to its incorporation in the Act of Congress, and its subsequent use in the various acts of that body. It is evident that whatever meaning was given to this phrase by the several assemblies, the same meaning was given to it by Congress, and that the phrase was used in the various statutes without change in its meaning. To ascertain its meaning, we have the sanction of the Courts to turn to the history of the times.

In 1816, the case of *Preston* v. *Browder*, 1 Wheaton, 115, which involved the construction of an Act of the Assembly of North Carolina, was before the Supreme Court, and Todd, J., in the opinion of the Court, said:

> "In the construction of the statutory or local laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of many of the provisions in them, to enable a Court to apply,

> with propriety, the different rules for construing statutes."

The opinion of the Court in this case has been followed, with approval, down to the present time.

In 1892, Justice Brewer said in the well known case of *Holy Trinity Church* v. *U. S.*, 143 U. S., 457:

> "Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, as it was pressed upon the attention of the legislative body."

In 1892, in the case of *Smith* v. *Townsend*, 148 U. S., 490, a case which turned on the construction of certain acts of Congress and a proclamation of the President, Justice Brewer again said:

> "Courts in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

Citing *U. S.* v. *Union Pacific Railroad Co.*, 91 U. S., 72; *Aldridge* v. *Williams*, 3 How., 9; and *Preston* v. *Browder*, *supra*.

In 1894, in the case of *Mobile and Ohio Railroad* v. *Tennessee*, which involved the construction of an Act of the Legislature of the State of Tennessee, Justice Jackson in the majority opinion, after referring with approval to *Preston* v. *Browder*, *supra*; *U. S.*. v. *Union Pacific Railroad Co.*, *supra*, and *Platt* v. *Union Pacific Railroad Co.*, 99 U. S., 48, quoted with approval the opinion of Mr. Justice Strong in the last case, as follows:

> "*There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience.*

> * * * *But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purposes from the language used in connection with the attending circumstances.*"

These words of Justice Strong, which were quoted with approval by Justice Jackson sixteen years later, concisely state the position of the Government in the present case. The Courts which have construed the phrase under consideration have thus far apparently construed it in the light which *they themselves had* and have not endeavored to place themselves "in the light that Congress enjoyed." It has been the appellant's endeavor to place before the Court all of the sources of information from which the light of Congress must have been derived in 1790, so that this phrase may now be construed by consideration of the attending circumstances and the history of the times.

In 1897 Judge Gray, in *U. S.* v. *Wong Kim Ark*, 169 U. S., 649, again expressed the opinion of the Supreme Court as to the construction of Acts of Legislation, as follows:

> "In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, *regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.*"

Point III.

Section 2169 U. S. R. S. was not repealed by the Naturalization Act of June 29, 1906 (Chap. 3592, 34 Stat. L. 596-607), either by implication or otherwise.

The question as to how many and what sections of the Revised Statutes and of the previously existing Laws relating to Naturalization were repealed by implication by the Naturalization Act of June 29, 1906, has been several times before the Courts. Section 26, the repealing section of the Act, is as follows:

> "That sections 2165, 2167, 2168, 2173 of the Revised Statutes of the United States of America, and section 39 of chapter 1012 of the Statutes at Large of the United States of America for the year 1903, and all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed."

Title XXX of the Revised Statutes, entitled Naturalization, consisted of sections 2165 to 2174, both inclusive. There were also in force in June, 1906, the Act of July 26, 1894, Ch. 165 (28 Stat. L. 124), providing for the naturalization of honorably discharged seamen, and Section 14 of the Act of May 6, 1882, Ch. 126 (22 Stat. L. 61), prohibiting the naturalization of Chinese.

Section 2165 contained the general provisions relating to the procedure for naturalizing aliens. If it had not been specifically repealed, it would have been superseded by Section 4 of the Act of June 29, 1906.

§ 2166 provides for the naturalization of honorably discharged soldiers, and the Act of July 26, 1894, Ch. 165 (28 Stat. L. 124), for the naturalization of

honorably discharged sailors. As there are no provisions in the Act of 1906 specifically providing for the naturalization of such persons, if § 2169 was impliedly repealed, these provisions of the law must be held to have been impliedly repealed also.

§ 2167 provided for the naturalization of aliens who arrive in the United States under the age of eighteen years. The Act of 1906 contains no provision for the naturalization of such persons and it therefore specifically repealed this section.

§ 2168 provided for the naturalization of the widow and children of an alien who dies after making a declaration of intention, but before being actually naturalized. Its place has been taken by Paragraph 6 of Section 4 of the Act of 1906, which is in very similar language, and for that reason, if it had not been specifically repealed, it would undoubtedly be held to have been impliedly repealed.

§ 2170 provided for a continuous residence of five years in the United States. It was re-enacted in Paragraph 4 of Section 4 of the Act of 1906, and there was therefore no necessity for specifically repealing it.

§ 2171 provides that alien enemies shall not be naturalized. It was not specifically repealed by the Act of 1906. Do the Intervenors claim that this section has been impliedly repealed? Their argument to prove that § 2169 has been impliedly repealed applies with equal force to this section and logic requires that, if one has been thus repealed, the other has. They will hardly dare to assert that Congress, by providing a uniform rule for naturalization in 1906 and failing to provide therein that alien enemies should not be naturalized, thereby impliedly repealed this section and left the door open for the naturalization of such persons.

§ 2172 provided that children of persons who had been duly naturalized under any law of the United States, being under the age of twenty-one years at

the time thereof, should be considered as citizens, if dwelling in the United States. This section was not specifically repealed, nor does the Act of 1906 contain any similar provision. Is it likely that Congress intended to repeal such a beneficient provision of the law and not substitute any provision of any sort therefor?

§ 2173 provided that the Police Court of the District of Columbia should have no power to naturalize foreigners. This was specifically repealed, as Paragraph 3 of Section 4 specified the various courts which should have the power to naturalize aliens.

§ 2174 provided that seamen who had declared their intentions of becoming citizens and had served three years on board a merchant vessel of the United States subsequent thereto could be naturalized and should be deemed citizens for the purpose of serving on board any merchant vessel of the United States. This section was not specifically repealed nor is there any similar provision in the Act of 1906. Yet if §2169 has been impliedly repealed, this section must also have met the same fate.

§ 39 of Chapter 1012 of the Statutes at Large for 1903 was that portion of the Immigration Act of 1903 which prohibited the naturalization of anarchists and disbelievers in organized government, etc. Its place has been taken by Section 7 of the Act of 1906 and it was therefore repealed specifically.

Counsel for the Intervenors see the pitfall which their argument was digging for them so far as Section 14 of the Act of May 6, 1882, Ch. 126 (22 Stat., L. 61), prohibiting the naturalization of Chinese, was concerned, and to avoid it, state that their contentions in no manner affect this section. Yet, if § 2169, which *in re Ah Yup* Judge Sawyer, prior to the passage of the Act of 1882, decided excluded Chinese from naturalization, has been impliedly repealed by the Act of 1906, Section 14 of that Act which, in the light of that decision, was a wholly

superfluous enactment, must also have been impliedly repealed. There can be no escape from this conclusion.

In *U. S.* v. *Rodiek*, 162 Fed., 469, the Circuit Court of Appeals for the Ninth Circuit held not only that Section 100 of the Organic Act of Hawaii (Act of April 30, 1900, Ch. 339, 31 Stat., L. 161), which authorized the naturalization as citizens of the United States of persons who had resided in Hawaii for five years prior to the taking effect of the act, without a previous declaration of intention, was in conflict with Section 8 of Article 1 of the Constitution which gave Congress the power to establish *an uniform rule* of naturalization, for the reason that it applied only to residents of Hawaii, but also that it had been impliedly repealed by Section 4 of the Act of 1906, which covered "the whole scheme of naturalization, with the few exceptions hereafter to be noted." Circuit Judge Gilbert then said, at page 471:

> "*In other words, the section (Section 26) provides for the repeal of all prior rules of naturalization as expressed in the Revised Statutes, except section 2166, which dispenses with a previous declaration of intention after more than one year's residence in the United States, in favor of a soldier, honorably discharged from service in the army of the United States, section 2169, which extends the privilege of naturalization to aliens of African nativity and to persons of African descent, section 2170, which provides that no alien shall be admitted to become a citizen who has not resided within the United States five years continuously next preceding his admission, section 2171, which excludes the admission of alien enemies, section 2172, which makes certain provisions for the citizenship of children of naturalized persons, and section 2174, which makes special provision as to admission to citizenship of alien seamen who have served three years on board merchant vessels of the United States.* * *

> "But we think that, in the present case, the intention of Congress to repeal the special law is manifest. The title of the act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. The terms of section 4 explicitly provide that naturalization cannot be had otherwise than by first making a declaration of intention two years prior to admission, and the repealing section of the act expressly repeals all acts or parts of acts inconsistent with or repugnant to its provision. The special act dispensing with the declaration of intention in the territory of Hawaii was clearly inconsistent with section 4 of the act of June 29, 1906. There is no reason to presume that in enacting the latter statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States, and to provide for no exception as to any portion or section of the geographical territory subject to the authority given to Congress in the Constitutional grant of power to 'establish an uniform rule of naturalization.'"

In re Loftus, 165 Fed., 1002, Judge Ward in the Circuit Court in this District held that § 2166, U. S. R. S., was not repealed by the Act of 1906, and that an honorably discharged soldier could be naturalized upon producing only one witness as to his residence and good moral character. He said (p. 1003):

> "Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress

must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified. As section 2166 expressly confines the proof in their case to such as is 'now provided by law,' I think that, consistently with the act of 1906, they may still be admitted under section 2166, with the degree of proof required by it."

See also *U. S.* v. *Meyer*, 170 Fed., 983, to the same effect

And *in re McNabb*, 175 Fed., 511, Judge Wolverton of the District Court in Oregon followed *in re Loftus* (*supra*), and held not only that § 2166, U. S. R. S., was not repealed or amended by implication by the Act of 1906, but that under Section 10 of the Act of 1906 the applicant might prove his residence within the United States for one year by deposition.

And in *Bessho* v. *U. S.*, not yet reported, the Circuit Court of Appeals for the Fourth Circuit, in affirming the order of the District Court refusing to naturalize a Japanese, who had received an honorable discharge from the U. S. Navy, on the ground that a Japanese person was not a free white person within the meaning of § 2169, U. S. R. S., expressly held that section 2169 was not repealed by the Act of 1906. Circuit Judge Goff said:

"That Act is entitled, 'An Act to Establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the the United States.' Stats. at Large, Vol. 34, part 1, page 596. By this legislation a new

and complete system of naturalization was adopted, all of the details of which together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In section 26 of that Act is found an express repeal of sections 2165, 2167, 2168, and 2173, of the Revised Statutes. These repealed sections are all included in Title XXX of said Revised Statutes, and demonstates beyond doubt that the Congress carefully considered all of the provisions of that title, and that it intended that the unrepealed sections thereof should still remain in force. *Among those unrepealed is section 2169, which we thus find to be virtually reenacted, and declared to be one of the rules under which future naturalizations are to be conducted.* Another part of that title not repealed is section 2166, which relates to aliens who have enlisted in the armies of the United States, and provides that an alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, and has been, or may be thereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, under certain conditions therein mentioned. This section is quite similar to the Act of 1894, providing for the naturalization of aliens who have enlisted in the Navy—the Act under which the appellant applied—which last mentioned Act is also left in full force and effect by the Act of June 29, 1906."

In *U. S.* v. *Tynen*, 11 Wall., 88, Mr. Justice Field lays down the true rule with reference to the repeal by implication of one statute by a later statute on the same subject, as follows:

"*It is a firm doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible*, but if the two are repugnant in any of their provisions the latter act without any repealing clause

> operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions clearly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act "

In this case the Act of 1813 was held to have been impliedly repealed by the Act of 1876 because there was a clear repugnancy in the provisions of the two acts. The first act made the punishment for the offences designated imprisonment *or* fine and provided that the imprisonment should not be less than three years and might be extended to five years and that the fine should not be less than $500, while the act of 1870 made the punishment both imprisonment *and* fine, allowed the imprisonment to be fixed at one year and from that period upwards to five years and allowed the fine to be as low as $300. Justice Field also said that

> " when repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the Government as to the manner in which the offences shall be subsequently treated."

This case has been cited and followed many times since. The doctrine laid down therein applied to the Naturalization Act of 1906 makes it clear to our mind that neither Section 2169, U. S. R. S., nor any of the other Sections of the Revised Statutes or Laws above referred to were repealed by implication by it.

The repeal of an early statute by a later one, wherein are no words of repeal of former acts, rests in the presumption that the legislative body intended to give effect to its enactments. Where the changes make it impossible for both statutes to be

in force, this presumption of intention will arise, where however if the two may subsist together; and each have operation, it will be presumed that the legislature had this possibility in mind where they added to the later act no words of repeal and that they intended both to stand.

Point IV.

The Order of the Circuit Court should be reversed, with costs, with a direction that the Certificate of Citizenship issued to the Appellee be cancelled.

Respectfully submitted,

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