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Naturalization of the Mixed-Blood— A Dictum

IN A RECENT opinion of the Supreme Court of the United States,¹ prepared by Mr. Justice Cardozo, appears this *dictum*:

"The privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent); and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always (*United States v. Bhagat Singh Thind*, *supra*) being that of common understanding. *Dean v. Com.*, 4 Grat. (45 Va.) 541; *Gentry v. McMinnis*, 3 Dana (Ky.) 382; *In re Camille* (C. C.) 6 F. 256; *In re Young* (D. C.) 198 F. 715, 717; *In re Lampitoe* (D. C.) 232 F. 382; *In re Alverto* (D. C.) 198 F. 688; *In re Knight* (D. C.) 171 F. 299; 2 Kent Comm. (12th Ed.) 73, note. Cf. the decisions in the days of slavery. *Gentry v. McMinnis*, 3 Dana (Ky.) 382; *Morrison v. White*, 16 La. Ann. 100, 102; see *Scott v. Raub*, 88 Va. 721, 727-729, 14 S. E. 178."²

The point actually decided in the case was the invalidity under the due process of law clause of the Fourteenth Amendment of a procedural provision of the Alien Land Law of California. The result reached needed no bolstering by obiter refinements about the possible meaning of "white persons" or "persons of African descent" in the naturalization law. The decision itself is commented upon elsewhere in this Review.^{2a}

I shall address myself solely to what I regard as the very unfortunate and unsupported dictum, included in the quotation above, that a person is ineligible to naturalization although he has no more than a fourth or even less of the blood of ineligible races.

There is internal evidence in the opinion that the learned justice did not consider with his customary mastery what he must have regarded as the penumbra of his reasoning. Toward the end of the opinion it is said that Filipinos, in general being ineligible to naturalization, are "subject to indictment under the laws of California if they have gone into possession [of agricultural land] in aid of a conspiracy" [to violate the Alien Land Law].³ The slip is obvious, for the so-called Alien Land Law of California does not declare all persons who are

¹ *Morrison v. People of California* (Jan. 8, 1934) 54 Sup. Ct. 281.

² *Ibid.* at 283.

^{2a} See *post* p. 420.

³ *Morrison v. People of California*, *supra* note 1, at 286.

ineligible to naturalization to be incompetent to acquire or hold agricultural land but only *aliens* who are ineligible to naturalization. Filipinos are not aliens.⁴ A correct terminological description of their status seems to be that they are non-citizen nationals of the United States. Formerly non-naturalized Indians born in the United States were, it seems, in the same category. Whether a state has power to impose upon non-citizen nationals the same disabilities as to land owning that it may impose upon aliens has never been decided. Certainly California has not attempted to do so. Other inaccuracies in the opinion on points of naturalization and citizenship are indicated in the note below.⁵

⁴ *Gonzales v. Williams* (1904) 192 U. S. 1.

⁵ There is an inaccurate implication in the statement that a person born abroad is a citizen "if his father was a citizen, provided, however, that this privilege shall not exist unless the father was at some time a resident of the United States" in view of the decision in *Weedin v. Chin Bow* (1927) 274 U. S. 657, that a child born abroad is at birth a citizen, only if his father was then a citizen and had resided in the United States prior to the birth of the child. The opinion reproduces the ambiguity in U. S. C. (1926) title 8, § 6 which *Weedin v. Chin Bow* resolved. The further paraphrase of that section, in the opinion, seems to imply that a failure of such foreign born child upon reaching the age of eighteen to record at an American consulate his intention to become a resident and remain a citizen of the United States, or failure at majority to take an oath of allegiance, entails *loss of citizenship*. The statute says that these requirements must be observed "in order to receive the protection of this Government."

There is a clear cut distinction between loss of citizenship and loss by a citizen of eligibility to diplomatic protection, and that the latter only was intended in section 6 is the ruling of the Attorney General in a well reasoned opinion. 30 *OP. ATT. GEN.* 1916, at 529, 532-537, and see Taft, C. J., in *Weedin v. Chin Bow*, *supra* at 668. Probably the learned justice did not intend to commit himself on this open question by an *obiter* declaration.

Attention may also be called to the loose expression: "... though Indians and Filipinos who have done military or naval service may be entitled to special privileges (8 U. S. C. §§ 3, 388)," that is, of naturalization although they are not white persons or persons of African descent. It is true that the second paragraph of section 3 declares, "Every American Indian who served in the military or naval establishments of the United States" during the World War may be granted full citizenship without impairing his interest in tribal property. This provision against impairment of interests in tribal property seems to indicate that only United States born Indians are meant by "every American Indian" and not the ethnologist's sense which might include at least Canadian and Mexican Indians. It is obvious that the second paragraph of section 2, derived from the Act of Nov. 6, 1919, c. 95, 41 *STAT.* (1919) 350, has been rendered obsolete by the Act of June 2, 1924, c. 233, 43 *STAT.* (1924) 253, which declares all Indians born within the territorial limits of the United States to be citizens. This act constitutes the first paragraph of section 3. It includes the Indian veterans of the World War and all other "American Indians." Secondly, the sentence quoted is in error as to Filipinos. The obsolete Act of 1919 did give the privilege of naturalization to American Indians who served *either* in the *military* or *naval* service, but as to Filipinos section 388 grants it only to those who have served in "the United States Navy or Marine Corps or the Naval Auxilliary Service." It is concededly difficult to keep these silly distinctions in mind, but it is necessary to do so if an accurate statement is to be made of what Congress has seen fit to enact.

It is to be hoped that the dictum above quoted is likewise the product of incomplete consideration. The dictum concerns itself with the meaning of "white persons" and "aliens of African nativity" and "persons of African descent" in our naturalization statute.⁶ The last two phrases are commonly taken to mean alien negroes. The statute in form says that the provisions for naturalization "apply" to these two descriptions of persons. It has always been construed as declaring these only to be eligible to naturalization. Who are eligible within these terms is the question. Or, who are white persons and who are negroes within the meaning and benefit of the naturalization law? Few of the decided cases have dealt with persons of mixed blood, the problem here. They have been concerned with the question whether Chinese, Japanese, Hindus, Syrians, Malays, American Indians, etc., as racial stocks, are of the white or negro races.⁷ In most of the cases the alien applying for naturalization was in fact, or was assumed to be, of the full blood of the racial stock discussed. This is true of the only cases on the subject that have gone to the Supreme Court. In *Ozawa v. United States*⁸ a question certified by the circuit court of appeals was: "Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?"⁹

The Court said:

"Beginning with the decision of Circuit Judge Sawyer, in *Re Ah Yup* (1878) 5 Sawy. 155, the Federal and state courts, in an almost unbroken line, have held that the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race. * * * The appellant * * * is clearly of a race which is not Caucasian * * *." ¹⁰

In *United States v. Bhagat Singh Thind*¹¹ a question certified¹² by the lower court was, "Is a high caste Hindu of full Indian blood" eligible? The whole opinion is summed up with fidelity in a single quotation:

"What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculation of the ethnologist, it does not include the body of people to whom the appellee belongs."¹³

⁶ 8 U. S. C. (1926) §359.

⁷ Most of these cases are collected and discussed in McGovney, *Race Discrimination in Naturalization* (1923) 8 IOWA L. BULL. 129-161.

⁸ (1922) 260 U. S. 178, followed in *Takuji Yamashita v. Hinkle* (1922) 260 U. S. 199.

⁹ *Ibid.* at 190.

¹⁰ *Ibid.* at 197, 198.

¹¹ (1923) 261 U. S. 204.

¹² *Ibid.* at 206.

¹³ *Ibid.* at 214-215.

In both cases Justice Sutherland, for the Court, said the test was a racial one and laid down the test of common understanding to determine what races are regarded as white.

The Court did not have before it a person who was half Hindu and half English. The rule of that decision would be applicable to the case of a person half English and half Hindu only to determine that half his blood came from a race whose whole-bloods are ineligible. There is nothing in the opinion or in any other opinion of the Supreme Court prior to Justice Cardozo's dictum that suggests that the Court has ever considered the problem of a person whose parentage is partly of an eligible race and partly of an ineligible race.

Not a single one of the five other naturalization cases cited, decisions of the lower federal courts, supports the dictum beyond the point that one in whom blood of the favored races does not preponderate over the blood of the unfavored is ineligible; they all are cases holding ineligible persons whose blood is only half or less derived from the white race. There are no reported cases holding against one who has only a quarter or less of the blood of ineligible races. There are no cases that have discussed such conditions. It might be supposed that there are other dicta or that some court in a naturalization case had pursued a line of reasoning that would support the dictum, but even this is not true with a possible exception, *Young's* case, soon to be stated. The test suggested by the words "or, not improbably, even less" seems to include the test used in social relations in many parts of the United States whereby a person who has the least visible trace of negro ancestry is regarded as not white. The only cases cited by Justice Cardozo in which a test of a quarter or less has been applied are cases applying it to questions quite remote from naturalization. Before considering them I shall deal with the cited naturalization decisions.

Camille¹⁴ was foreign born, of a white father and Canadian Indian mother. The court applied the Caucasian race test to American Indians as a racial stock, concluding that they are not white persons, and asked, "what is the status in this respect of the petitioner, who is a person of one-half Indian blood?" The court refers to a rule applied in Louisiana, "the colonial *code noir* of France," and "in Carolina," that if the proportion of African blood did not exceed one-eighth, the person was deemed white; and to the rule in Ohio that a person nearer white than black or red was a "white" person. Without choosing between these rules the court said of Camille: "As a matter of fact, he is as much an Indian as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither."¹⁵ The

¹⁴ *In re Camille* (C. C. D. Ore. 1880) 6 Fed. 256.

¹⁵ *Ibid.* at 258-259.

conclusion was that Camille "is not a 'white person' * * * within any rule that has ever been promulgated on the subject."¹⁶

This seems to be the earliest case of a mixed-blood under the naturalization law. The statute does not say pure white. Judge Deady saw the inapplicability of logic. Camille was as much white as he was Indian. He might be classed with the one race as properly as with the other. "Strictly speaking" he was neither. Obviously a rule of strict speaking is inappropriate. Under it an alien who is half white and half negro would be ineligible, though a full-blood of either race is eligible. Some test must be arrived at that is consistent with the function of the limitation. The actual decision in *Camille's* case is consistent with the view that a mere predominance of eligible blood is sufficient.

Young¹⁷ was half German, half Japanese. The court applied the test of common understanding in determining, "whether we consider the Japanese as of the Mongolian race, or the Malay race, they are not included in what are commonly understood as 'white persons'," which, the court said, includes all Europeans and the Caucasians around the Mediterranean Sea. The court also said that "it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood."¹⁸ The court does not clarify its thought as to common understanding. It immediately refers without discrimination to the Louisiana test of one-eighth and the Virginia and Kentucky test of one-quarter, used in those States to determine who have the disabilities of free negroes, and the Ohio test of predominance of the white blood determining who were eligible to vote as white persons. The actual decision is consistent with the predominance test.

Knight's¹⁹ father was English and his mother was half Chinese and half Japanese. The court said, "no case to which the attention of the court has been drawn seems to specifically determine what percentage of Mongolian blood will exclude the applicant from classification as a 'white person'," and rested its decision, against the applicant, upon *Camille's* case. That case, the court said, "is based upon a number of decisions in Ohio." The court seems to suppose that the court in *Camille's* case applied the Ohio test, that unless the white blood preponderated the applicant was ineligible.

Alverto²⁰ was, "ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race." The court referred to *Camille's* and *Knight's* cases and held Alverto in-

¹⁶ *Ibid.* at 259.

¹⁷ *In re Young* (W. D. Wash. 1912) 198 Fed. 715.

¹⁸ *Ibid.* at 716-717.

¹⁹ *In re Knight* (E. D. N. Y. 1909) 171 Fed. 299.

²⁰ *In re Alverto* (E. D. Pa. 1912) 198 Fed. 688.

eligible. Obviously if the half-white is ineligible the one-fourth white is also. There is no statement of doctrine or test in the opinion.

The only naturalization case remaining of those cited by Justice Cardozo is *Lampitoe's*.²¹ Lampitoe also was one-fourth white and three-fourths Malay. Judge Learned Hand in a six line opinion said that the case fell exactly within the decision in *Alveto's* case, and added:

"There may be some doubt about such cases as *In re Camille* (C. C.) 6 Fed. 256, or *In re Knight*, 177 Fed. 299; but where the Malay blood predominates it would be a perversion of language to say that the descendant is a 'white person'. Certainly any white ancestor, no matter how remote, does not make all his descendants white."

This doubt expressed as to cases holding half white insufficient manifests a clear opinion that a predominance of white blood is sufficient.²²

The only authorities Justice Cardozo cites for the proposition that a quarter or even less of the blood of the disfavored race disqualifies, are early cases in Southern courts determining what degree of negro blood was, according to the law of the state, sufficient to subject a person to the disabilities of negroes, or mulattoes, or colored persons. None of these cases adopt a test of less than one-eighth.

In the case of *Dean v. Commonwealth*,²³ the court was not required to make a judicial interpretation of the words "white" or "negro" when used unexplained in a statute, as in the naturalization statute, but was making a rule of thumb application of a statute that explicitly declared that any person who had a quarter or more of negro blood should have all the disabilities to which free negroes were subjected. This statute making a quarter of the disfavored blood the test has its origin in 1785.²⁴ It expresses the judgment of the Virginia legislature with respect to how far restraints should be imposed in view of the menace of the presence of free-negroes in a slave-holding community, which, as Chief Justice Taney said, produced discontent and insubordination among the slaves and endangered the peace and safety of the state.²⁵ To treat this early Virginia statutory definition adopted with respect to one type of legal restriction as applicable to the interpretation of a statute of widely different subject matter, would be an example of that mechanical juris-

²¹ *In re Lampitoe* (S. D. N. Y. 1916) 232 Fed. 382.

²² The only mixed-blood naturalization cases not cited by Justice Cardozo, so far as my search has revealed, are: *In re Rallos* (E. D. N. Y. 1917) 241 Fed. 686 (half Spanish, half Malay-Filipino); *In re Fisher* (N. D. Cal. 1927) 21 F. (2d) 1007 (one-quarter Portuguese, three-quarters Chinese), both held ineligible on the authority of the cases above discussed.

²³ (1847) 45 Va. (4 Gratt.) 541.

²⁴ (1823) 12 Hen. Stat. at Large 184; 2 KENT'S COMMENTARIES (2d ed. 1832) 72, note.

²⁵ *Dred Scott v. Sanford* (1857) 60 U. S. (19 How.) 393, 417.

prudence which the learned justice would certainly be among the first to deplore. It should not be assumed that the Virginia legislature would give the word "negro" the same definition for the purposes of another type of restriction, much less that Congress would do so.

The second "negro" case cited for the dictum, is the early Kentucky case of *Gentry v. McMinnis*.²⁶ The degree of relevancy or irrelevancy of the case readily appears. The Kentucky Court of Appeals held that it was a proper instruction to the jury in a suit by a woman to establish that she was not a slave, "that if they should, on their own view, believe that she was not a white woman, then *prima facie*, or in the absence of any opposing evidence, she was a slave."²⁷ The court said that this presumption was based upon the fact that from about 1620 to 1778 all negroes in Virginia (of which Kentucky was a part) were slaves, "and because, as to slaves, *partus sequitur ventrem* is the established rule."²⁸ The court then said:

"Therefore, being a mulatto, or having at least one fourth of African blood, has been held, in Virginia and in Kentucky, to be presumptive evidence of being a slave. And, *e converso*, it has been as well settled, that being a white person, or having less than a fourth of African blood, is *prima facie* evidence of freedom. The rule is, that a person visibly a negro is *prima facie* a slave."²⁹

The word "visibly" might indicate that the test for the application of the presumption of slave status was any trace of negro blood, but hardly so in view of the definite statement that the test for it was the quarter blood. Besides, these presumptions were purely evidential devices overcomable by evidence that the almost pure white was nevertheless a slave and the almost pure negro a free man, the ultimate test of slavery or freedom at birth being the status of the mother. What connection is there between the test for applying this presumption of slave status, a status that did not depend upon degrees of color, and the interpretation of "white person" in the naturalization statute of the United States?

That degree of blood was not a test of slave status is the sole point decided in *Morrison v. White*,³⁰ the next to the last case referred to in support of the dictum. The Louisiana court, in a suit to establish freedom, said:

"The plaintiff is proved to be of fair complexion, blue eyes and flaxen

²⁶ (1835) 33 Ky. (3 Dana) 382.

²⁷ *Ibid.* at 386.

²⁸ This basis for the presumption disregarded the exceptional case of the free mixed-blood born of a free white mother and a negro father, and also the presence of emancipated persons of color.

²⁹ *Ibid.* at 385.

³⁰ (1861) 16 La. Ann. 100.

hair. But the presumption of freedom, arising from her color, is not a presumption *juris et de jure*. It must yield to proof of a servile origin. The Legislature has not seen fit to declare, that any number of crosses between the negro and the white shall emancipate the offspring of the slave; and it does not fall within the province of the judiciary to establish any such rule of property."³¹

Justice Cardozo finally says, "see *Scott v. Raub*."³² In that case the test of popular repute was applied to determine whether a person of mixed negro and white blood was "colored" and within the application of a remedial statute beneficial to "colored" persons. The statute, enacted in 1866, validated prior marriages of "colored persons" who had cohabited as man and wife, and legitimated their offspring. Sarah Raub was suing to establish heirship to her father's land. Her father was a free man of less than one-fourth negro blood. Her mother had been a slave when the plaintiff was born and also was of less than one-fourth negro blood. Neither parent was a "negro" within the Virginia statutory definition, but the court held them to be "colored persons" within the Act of 1866, because they were "socially of the class known as colored persons." The court gives as its reason for this construction:

"It is a general rule that a remedial statute should be construed liberally, and a statute made *pro bono publico* should be so construed that it may, as far as possible, attain the end proposed."³³

This exhausts the list of cases which Justice Cardozo cites as supporting or having some relevancy to the dictum. In a footnote he dismisses, apparently as irrelevant or distinguishable, two Ohio decisions, saying:

"The opinions in *Jeffries v. Ankeny*, 11 Ohio, 372, and *Gray v. State*, 4 Ohio, 353, rest upon peculiar provisions of the Ohio Constitution."

This is incorrect on two counts. First, the provision of the state constitution that was interpreted in *Jeffries v. Ankeny* was not at all peculiar. It was the typical state constitutional provision, before the Fifteenth Amendment to the Constitution of the United States, which confined suffrage to white male citizens. Neither its substance nor its phraseology was peculiar.

The Ohio constitution in question was that of 1802. It declared: "In all elections, all white male inhabitants above the age of twenty-one years . . . shall enjoy the right of [sic] an elector."³⁴ The constitution contained no definition of white. The question was, is a person who is the offspring of a white man and a half-breed Indian woman eligible to vote. The court decided that he was, that preponderance of

³¹ *Ibid.* at 102.

³² (1892) 88 Va. 721.

³³ *Ibid.* at 728.

³⁴ Art. IV, § 1.

the white blood was sufficient, and spoke of the rule as "intelligible" and "practicable," adding that "further refinements would lead to inconvenience, and to no good result."

Second, *Gray v. State* rested not at all upon the Ohio constitution but upon a statute. This statute was not "peculiar" to Ohio—not unique, unusual, nor queer as judged by the standards of the day. It dates back to 1807. "No black or mulatto person" may testify in the criminal prosecution of a "white person" or in a civil action where either party is a "white person."³⁵ In 1831 a person offered as a witness for the state was undisputedly a negro. Polly Gray, the accused, charged with robbery, was of mixed negro and white blood. Was she to have the privilege of "white persons"? Was the negro witness incompetent to testify against her? The court said that the statute used the three words, "black," "mulatto," and "white." It accepted the narrowest definition of "mulatto," *viz.* a half-blood, and reasoned that since the pure negro and the half-negro were the only ones expressly put in the excluded class all others were, in the contemplation of the statute, to be regarded as having the privileges of white persons.

This is the first appearance of the preponderance rule in Ohio, and the case of *Gray v. State* was cited by the Ohio court in its opinion in *Jeffries v. Ankeny*. Also was cited a decision in 1834 that a statute confining the common school fund to the education of "white youth" included in the latter all persons in whom white blood predominated.³⁶ Neither of these cases was cited as controlling.

If the Ohio court meant that necessarily the constitutional requirement of "white" as a qualification for voting, and the statutory terms "white person" (against whom mulattoes and blacks could not testify) and "white youth" (eligible to the school fund) should receive the same interpretation, I do not commend them. The intention of the law-maker might well have been different with respect to each. The function or purpose of a legal standard is an important guide in determining whether the law-maker intended it broadly or narrowly.

These Ohio decisions, however, seem fully as relevant to the meaning of "white persons" in the naturalization law as the Virginia, Kentucky and Louisiana citations. The basic irrelevancy of them all is that they are all local, state standards, dealing with mixtures of white and negro, or white and Indian, chiefly the former. The national standard, declared by Congress, with respect to naturalization is that the negro and the white are on a basis of equality. Also the old local standards as to eligibility of citizens to vote have been wiped out by a

³⁵ 2 HURD, LAW OF FREEDOM AND BONDAGE (1862) 118.

³⁶ *Williams v. School Directors* (Ohio 1834) Wright 578.

national standard declared in the Fifteenth Amendment which forbids discrimination in that respect because of race or color. Even in the field of state power there has never been any uniform standard in applying race distinctions to the mixed-blood. I refer to the standards applied by the various states in making *legal* distinctions. The rule of "common understanding"—if by that is meant, how a person passes in his community—is in many communities for *social* purposes taken to be the least ascertainable trace of negro blood. It does not follow, as legislation abundantly illustrates, that a people who apply this test in social intercourse, apply it to all distinctions in legal rights.³⁷ This extreme standard seems to be found with respect to laws that deal with matters closely related to social intercourse. Thus laws requiring racial segregation of children in the public schools,³⁸ or racial segregation in public conveyances,³⁹ when they contain no statutory standard, are sometimes construed as intending this extreme standard. But even in the slave states where there was a deep seated conviction that the free negro was a serious menace and therefore to be held in subjection by denial of most of the common civil rights, the standard determining who was a negro within these laws was almost never the extreme social standard but either a statutory or judge made rule of degrees of blood. The policy of these laws, it was thought, did not require refinement beyond the quarter blood in Virginia and Kentucky—beyond the one-eighth in other states. Take the very wide spread rule making negroes incompetent to testify against whites. The standard under this law in Ohio, as we have seen, was predomination of one blood over the other, in Virginia it was a quarter of negro blood, in Indiana it was an eighth,⁴⁰ whereas in Louisiana this disqualification of free negroes did not exist at all. In 1850, the Supreme Court of Louisiana said:

³⁷ See *Tucker v. Blease* (1914) 97 S. C. 303, 81 S. E. 668, discussing different South Carolina standards as between miscegenation and school segregation.

³⁸ *Wall v. Oyster* (1910) 36 App. D. C. 50, (1911) 31 L. R. A. (n.s.) 180; *Mullins v. Belcher* (1911) 142 Ky. 673, 134 S. W. 1151; and see the statute, specifically adopting this test for school segregation, quoted and applied in *Johnson v. Board of Education* (1914) 166 N. C. 468, 82 S. E. 832.

³⁹ *Lee v. New Orleans Great Northern R. R.* (1910) 125 La. 235, 51 So. 182.

⁴⁰ By statute in 1817 the Indiana test for this purpose was the quarter-blood; by statute in 1853 the test was made one-eighth. *Hurd, op. cit. supra* note 35, at 128, 131. In Illinois a curious distinction was made. A statute of 1827 made "a negro, mulatto, or Indian" incompetent to testify against a white person, and declared a person having only a quarter of negro blood to be a "mulatto." In 1845 a definition of Indian was added but the test adopted was the half or more of Indian blood. Thus the test for one mixture differed from the test for the other. A similar distinction between Indian and negro blood was made in a Virginia statute of 1705, which made any "negro, mulatto or Indian" ineligible to vote and declared the child of an Indian and the child, grandchild, or great grandchild of a negro should be deemed a mulatto. (1823) 3 Hen. Stat. at Large 250.

"This difference of public policy has no doubt arisen from the different condition of that class of persons in this State. * * * In some districts they are respectable from their intelligence, industry and habits of good order. Many of them are enlightened by education, and the instances are by no means rare in which they are large property holders. So far from being in that degraded state which renders them unworthy of belief, they are such persons as courts and juries would not hesitate to believe under oath."⁴¹

Even in miscegenation statutes where the extreme social standard might be expected, the common practice is a statutory rule of degree, one-fourth (Alabama, Maryland, North Carolina, Tennessee, Oregon, West Virginia); one-eighth (Florida, Indiana, Mississippi, Nebraska, North Dakota); or one-sixteenth (Virginia). In thirteen other states the statute fixes no standard but leaves the words "negro," "white" or "colored person" to judicial interpretation. In nineteen states, according to the commentator⁴² I am following, in none of which colored persons exceed five per cent of the population, there are no miscegenation statutes.

It is obvious that for purposes of legal distinctions there are no national standards of color. It is a national standard that is sought for the interpretation of a national law.

We come finally to the crux of the matter. What are the policies that are expressed in race discrimination in naturalization? Why are aliens of the pure blood of the "yellow," "brown" and "red" races declared ineligible to naturalization because of race alone and regardless of the personal qualifications of particular applicants? Clear thought requires naturalization to be distinguished from immigration. Naturalization is the process of conferring citizenship upon a permanent resident; the problem of immigration is, what persons shall be allowed to become permanent residents of the United States. Whom we shall permit to reside here is very different from what we shall do with those whom we permit or have permitted to become permanent residents.

Among the requirements of naturalization is not only that the applicant shall have had a permanent residence in the United States for five years⁴³ but that he shall have entered lawfully for permanent residence.⁴⁴

What is the change in his legal relations made by the grant of citizen-

⁴¹ State v. Levy (1850) 5 La. Ann. 64.

⁴² Note (1927) 36 YALE L. J. 858.

⁴³ 8 U. S. C. (1926) § 382.

⁴⁴ *Ibid.* §377b, applied in Subbi Mustafa Sadi v. United States (C. C. A. 2d, 1931) 48 F. (2d) 1040. See also United States v. Kreticos (App. D. C. 1930) 40 F. (2d) 1020; *In re Pezzi* (S. D. Cal. 1928) 29 F. (2d) 999.

ship? Practically speaking he becomes eligible to vote.⁴⁵ He becomes immune from deportation for subsequent misconduct. By the laws of some countries his naturalization here terminates his former allegiance. Even where this is not true his naturalization gains him some immunity from demands of the country of his other allegiance, at least so long as he remains in the United States. He becomes eligible to diplomatic protection by the United States. He also becomes eligible to employment in public work in those states which confine such employment to citizens. (Why should not a permanent resident be eligible? Usually he is a tax-payer.) Also his citizenship qualifies him to practice law if he qualifies in legal learning, moral character, etc. Under the equal protection of laws requirement of the Constitution, even as an alien he is entitled in most other respects to equality with the citizen.

On the other hand, what are the gains to the United States in naturalizing an alien? He becomes subject to conscription for military service.⁴⁶ The United States is no longer responsible to any other country for what injustice he may suffer from its own action or the action of local governments in the United States. The responsibility of the United States for the treatment of aliens here is not an inconsiderable one.⁴⁷ Minor liabilities the change imposes, such as subjection to a wider jurisdiction to punish for crimes abroad than can be exercised with respect to aliens and liability to some taxation to which aliens are not subject; for example, taxes on tangible property located outside the United States and on income earned abroad by a citizen domiciled abroad. I shall not attempt here to catalog completely the effects of change from resident alienage to citizenship. It is clear that the popular notion that naturalization brings gain only to the person naturalized is erroneous. There are burdens, obligations, liabilities that weigh heavily in the scales. I have no criticism of what seems to be the present policy of the United States, a threefold policy (1) to admit only desirable aliens to the country and in limited numbers, (2) to deport all undesirable aliens, and (3) to naturalize all permanently resident aliens who are lawfully here and lawfully entitled to remain and who are able to satisfy all the requirements of personal fitness. I include the last among the accepted policies because the race discrim-

⁴⁵ Technically he gains, as to voting, only an immunity from discrimination on account of his race or color. U. S. CONST., Amend. XV. Since, however, citizenship and age of majority are the sole requirements for voting in most of our states, practically speaking naturalization of an adult alien makes him a voter.

⁴⁶ See the difficulties the United States encountered during the World War when it was discovered that one out of every six males within the draft ages was an alien, discussed in McGovney, *op. cit. supra* note 7, at 216-219.

⁴⁷ *Ibid.* at 219-224.

ination in our naturalization law is merely an inconsistent exception to that general policy.

The theory of that exception goes to the heart of the matter in hand. It must be remembered that any alien white or negro or mixed white and negro must, to obtain naturalization, satisfy a long list of requirements, which may be called the attainable personal fitness requirements: (1) Lawful entry; (2) five years continuous residence; (3) intention to reside here permanently; (4) ability to write his name; (5) ability to speak English; (6) good moral character; and (7) attachment to the principles of the Constitution of the United States.

Why is a permanently resident alien of the "yellow," "brown" or "red" races not eligible on the same terms? Let us not forget that his children born in the United States will be citizens at birth, regardless of their race, under the rule of the Constitution. The denial affects only the first generation, that is, the immigrant himself, not his descendants. Denial of naturalization does not change the fact of his membership in the community, a person here to be dealt with for good or ill, nor disqualify him as a progenitor of future citizens, of his own blood or mixtures thereof. Why do we say that because of his race he cannot assume the benefits and burdens of citizenship though he desires them, while they are imposed upon the offspring of the same race or blood regardless of their desire? Certainly our judgment is that that race or blood of itself is not a disqualification. There is only one reason for the distinction. That is, we hold a presumption that immigrants of the "yellow," "brown" and "red" races, by and large, can not "Americanize" themselves, as is said, in the first generation. Hence we lay it down as a general rule of administration, believing that exceptions will be so few that they are not to be bothered with. Particular members of those races have demonstrated that they are in fact exceptions,⁴⁸ but they are not legally so.

What I have just said bears on the policy of the law as to the full-bloods of ineligible races. What shall we say of the half-blood, the typical case of the person whose blood is half derived from white ancestors? How does the presumption of inability to become "Americanized" apply to such a permanent resident? The fact that one of his parents is white establishes that he is from childhood exposed to the mores of white "civilization." When we weigh the matter in all its setting are we to impute to Congress by its use of "white persons" a judgment that the presumption operates against the half-white strongly enough to put him in the same class with the alien of the pure ineligible blood? This question suggests the sensible approach to the

⁴⁸ *Ibid.* at 129-132.

meaning of the statute, an attempt to ascertain from the function and policy of the words used the probable intention of Congress as to what they embrace. Why impute to Congress a narrow prejudice beyond the necessities of its policy? When we think mechanically of the term, "white person," it seems logically difficult to say that a half-white is white. It is well settled, however, that color in the sense of complexion is not meant, but membership in the white race. Such mechanical thinking is inappropriate to the question whether a person half of whose blood is derived from white ancestors is a member of the white race. But whatever may be concluded as to the half-blood, certainly predominance of white blood satisfies the purpose and policy of the law.

Finally, I repeat, naturalization is totally unrelated to the problems of social intercourse dealt with in statutes which segregate the races in public schools and public conveyances; and as to the race purity notion behind the miscegenation statutes, naturalization of permanently resident aliens has no bearing, although immigration does have. Moreover the statutes on these subjects are concerned in most of the states only with persons of African descent, who, if aliens, are eligible to naturalization. The laws of ten states, however, declare void or make criminal, or both, intermarriage between white persons and persons of one or more of the races ineligible to naturalization. One or more states mention Mongolians, Malays, Kanakas, American Indians, or Chinese only, not all Mongolians. The details are interesting⁴⁹ but

⁴⁹ Thus seven states condemn marriages between whites and "Mongolians" (Calif., Miss., Mo., Nev., S. D., Utah, Wyo.); two others, between whites and "Chinese" (Mont., Ore.); and one other, between whites and "Chinese" or "Japanese" (Neb.). One of the above (S. D.) includes "Coreans" in addition to "Mongolians." Four of the above additionally forbid marriages between whites and "Malays" (Calif., Nev., S. D., Wyo.); one (Ore.) marriages between whites and "Kanakas." Only three of these statutes in terms carry the prohibition beyond the intermarriage of a white person with a person of the whole blood of the other race. Thus Mississippi forbids marriage between a white person and a person of one-eighth or more of negro or Mongolian blood; Nebraska, one-eighth or more of negro, Japanese or Chinese blood; Oregon, one-fourth or more negro, Chinese or Kanaka blood, or more than one-half Indian blood. The "yellow peril" is taken more seriously in Mississippi and Nebraska than the Chinese and Kanaka peril in Oregon! In five other of these ten states the statutes speak only of "Mongolians" or "Malays" leaving open the construction that the full-blood only is meant. In the remaining two states the statutes use words that compel this construction. Thus Missouri forbids marriage between a white and either a "Mongolian" or a "negro or a person having one-eighth part or more of negro blood." So Montana, using the words, "Chinese person," "Japanese person," "negro or a person of negro blood or in part negro." In both, the specification of the part-blood negro contrasts with the failure to make a similar specification as to Mongolians. The statutes referred to in this note are: CAL. CIV. CODE §60; MISS. CODE ANN. (1930) §2361; MO. REV. STAT. (1929) §§2974, 4263; MONT. REV. CODES (Choate, 1921) §§ 5700, 5701, 5702; NEB. COMP. STAT. (1929) §§ 42-103; NEV. COMP. LAWS (Hillyer 1929) §§ 10197, 10198; ORE. CODE ANN. (1930) §§ 14-840, 14-841; S. D. COMP. LAWS (1929) § 128;

of slight relevance. So in Mississippi Chinese children may be assigned to the "colored schools,"⁵⁰ and in California local school authorities have an almost wholly unused⁵¹ permission to establish separate schools for children of Mongolian parentage. I mention these slight evidences of a national social policy toward members of those races merely to point out their irrelevance to the problem in hand. The distinction between the purposes of such laws and naturalization is evident from the fact that those laws apply equally to the citizen and the alien. The social policy, whatever it is, that a few states have expressed in such laws is not interfered with by naturalization of the mixed-blood (or the whole-blood) of those races because the alien become a citizen is still subject to them.

There may be an almost nation-wide standard of discrimination against persons of African descent in matters related to social intercourse but even in that field there is slight evidence of a national standard with respect to the Chinese, the Japanese, or the Hindus, much less with respect to the half-bloods of these races. Even if there were such a standard how can we assume that Congress intended to apply it to naturalization, which does not affect the relations in which this standard is supposed to operate?

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UTAH REV. STAT. ANN. (1933) §40-1-2; WYO. REV. STAT. ANN. (1931) §§ 66-118.

Oklahoma should, perhaps, be added to the above ten states. In that state inter-marriage of persons of African descent with Mongolians, Malays, American Indians, or white persons is forbidden, but marriage is valid between whites and American Indians, or between either of these and a Mongolian or a Malay. (OKLA. STAT. (1931) §§ 1677, 1678). It would be humorous to suppose that Oklahoma is bent solely upon preserving the purity of the negro race. Of course her policy is equality of the white and Indian elements of her population and non-mixture of these with the negro. The peculiar effects of her statute with respect to Mongolians and Malays were probably not foreseen by the draftsman.

⁵⁰ *Rice v. Gong Lum* (1925) 139 Miss. 760, 104 So. 105, *aff'd* as not denying equal protection, *Gong Lum v. Rice* (1927) 275 U. S. 78.

⁵¹ CAL. SCHOOL CODE § 3.3 declares: "The governing body of the school district shall have power to establish separate schools for Indian children and for children of Chinese, Japanese or Mongolian parentage." CAL. GEN. LAWS, act. 7519, §3.3. Local authorities are not required to establish separate schools; they are merely permitted to do so. In fact in the entire state the only separate schools are six elementary schools for American Indians, and one school for Chinese. The last is a large school located in the Chinese section of San Francisco. None but Chinese may attend it. It is an elementary school, from the kindergarten to the sixth grade, inclusive. During the past few years Chinese children of elementary school age residing in other districts of the city have been permitted to attend the school in their home district open to children of all other races. Complete segregation of Chinese of elementary school age has been abandoned. In the high school grades Chinese are not segregated in San Francisco, nor is there any segregation of Japanese or other races, in any grade. A careful inquiry has disclosed no other racial segregation in the public schools of California. Contrary to the statistical table in the Biennial Report of the State Department of Education of California (1929-1930) Part II, p. 76, there are no schools in Sacramento exclusively for Chinese or Japanese.