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No. 10,299

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN T. REGAN,
vs. *Appellant,*

CAMERON KING, as Registrar of Voters
in the City and County of San Fran-
cisco, State of California,
Appellee.

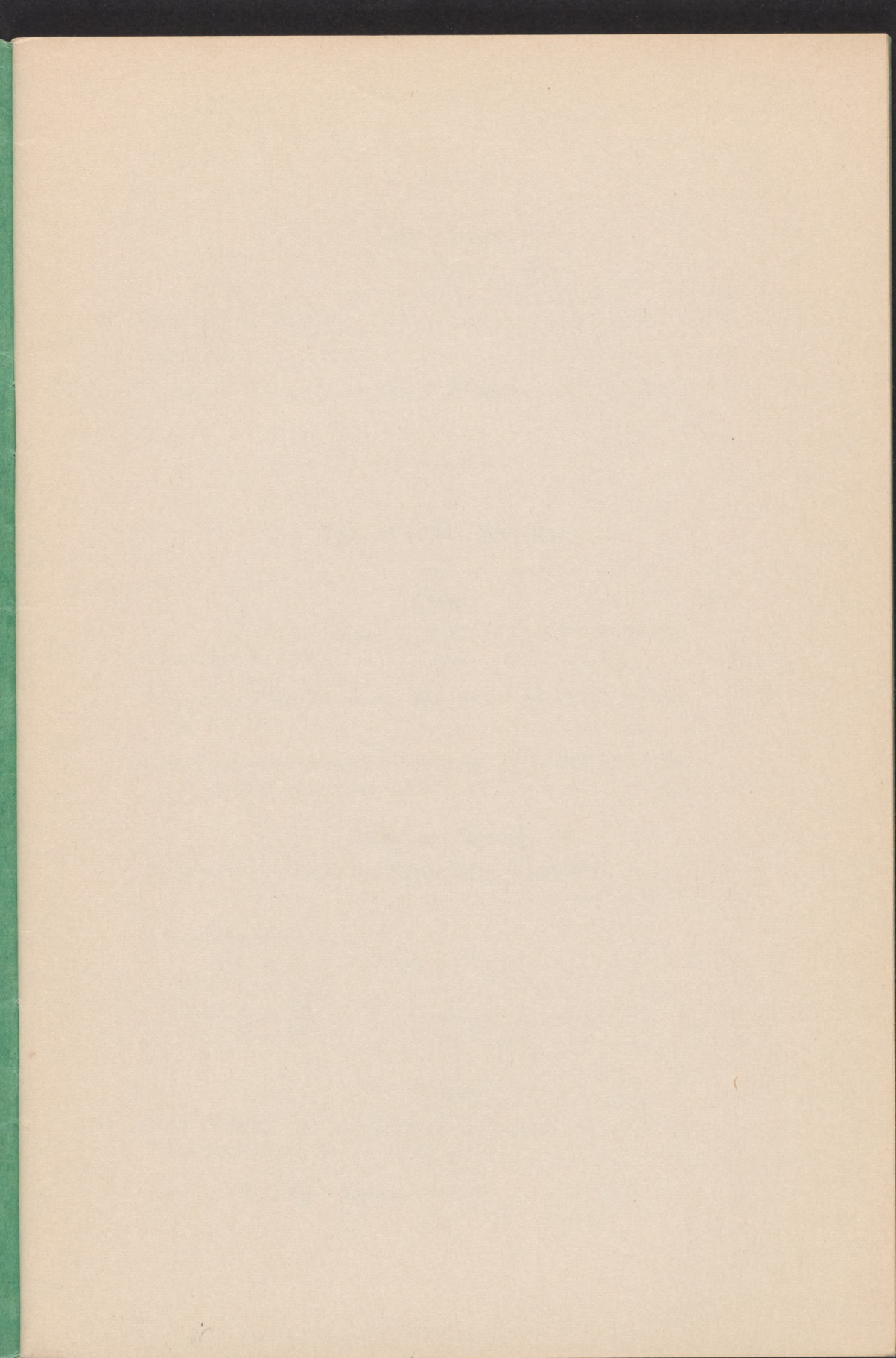
**BRIEF ON BEHALF OF SAN FRANCISCO AND
LOS ANGELES CHAPTERS OF NATIONAL LAWYERS
GUILD AS AMICI CURIAE.**

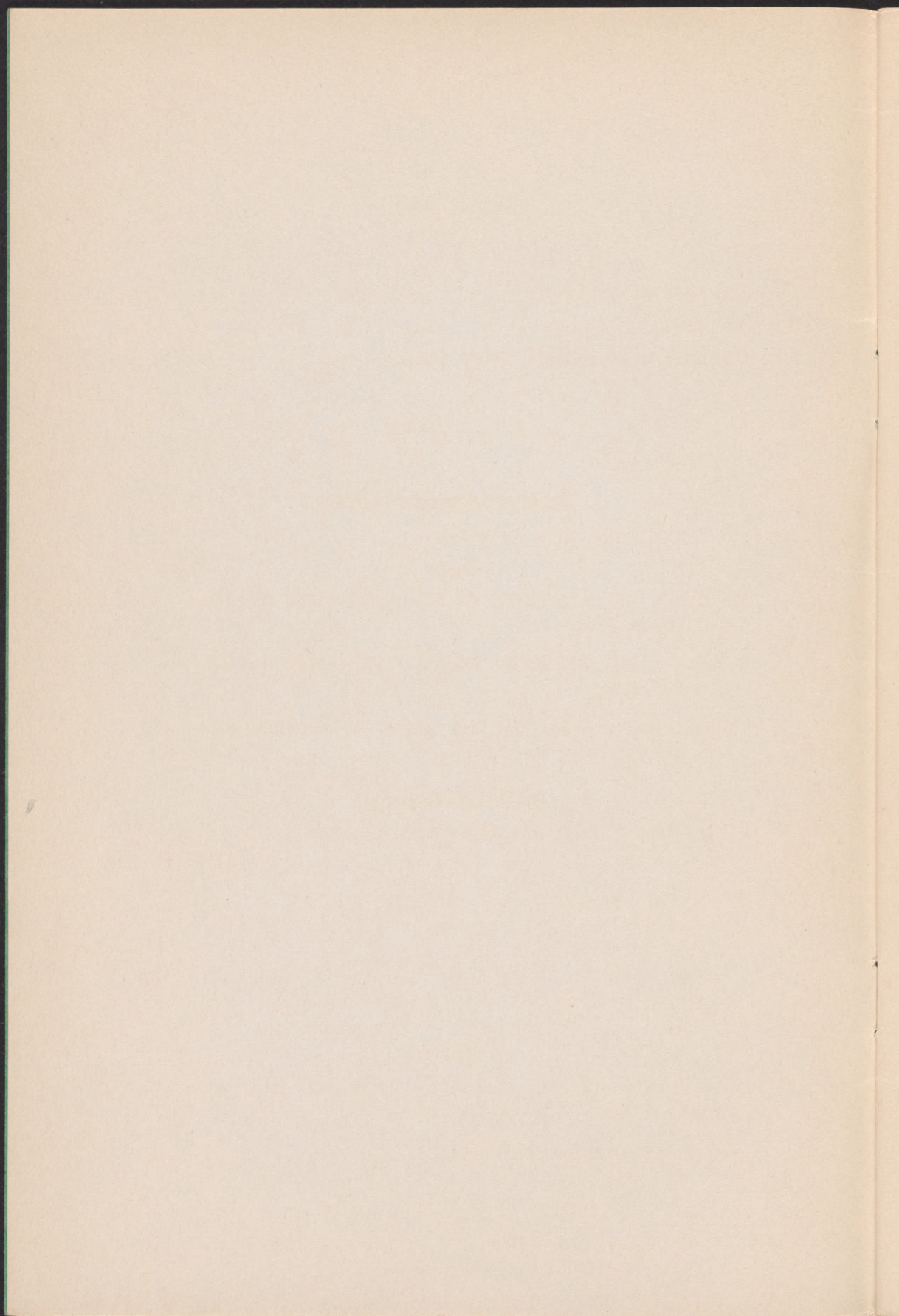
SAN FRANCISCO CHAPTER OF THE
NATIONAL LAWYERS GUILD,
LOS ANGELES CHAPTER OF THE
NATIONAL LAWYERS GUILD,
By HAROLD M. SAWYER,
CHARLES R. GARRY,
CLORE WARNE,
CHARLES KATZ,
CAREY McWILLIAMS,
LOREN MILLER,
LAURENCE WEINBERG,
A. L. WIRIN,
Appearing as Amici Curiae.

FILED

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1887

Received of the Treasurer of the
Board of Directors of the
City of New York

the sum of \$100.00
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the City of New York

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GUILD AS AMICI CURIAE.**

Pursuant to leave of court first had and obtained,
the San Francisco and Los Angeles Chapters of the
National Lawyers Guild respectfully submit as *amici
curiae* this brief in support of the position of appellee
above named.

STATEMENT OF THE CASE.

This is an appeal by appellant who was plaintiff in
the court below from a decree dismissing its complaint
against appellee who was defendant in the court below,

praying for an injunction which would in effect have commanded appellee to strike from the Great Register of the City and County of San Francisco the names of all Japanese born in the United States of full-blooded alien parents. The theory of the complaint and of the appeal is that Japanese, even though born in the United States, do not by virtue of that fact become citizens because they are not of the white race. The argument is that only Negroes and members of the white race attain citizenship by birth in the United States.

It is the purpose of this brief to demonstrate that the argument is legally without merit, and politically calculated to sow disunity at a time when unity not only of the people of the United States but also the peoples of all of the twenty-six United Nations is of paramount importance.

ARGUMENT.

This is not a new question and it is, we submit, conclusively settled against appellant's contentions by the decisions of the Supreme Court of the United States. Even appellant concedes that the purpose of the litigation is again to present the matter to the Supreme Court of the United States in the hope that it will reverse its position and overrule its previous decision which has remained unchallenged for nearly forty-five years, and which has within that period been reaffirmed by two unanimous decisions of the court.

The leading case, and the only one which involves the issue of citizenship of one not a member of the white race acquired by birth in the United States is the case of *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. Ed. 890, decided March 28, 1898, by a six-to-two decision. In this case it was held that a child born in the United States of parents of Chinese descent who at the time of his birth were subjects of the Emperor of China but had a permanent domicile and residence in the United States and were carrying on business there, and were not employed in any diplomatic or official capacity under the Emperor of China, became at the time of his birth a citizen of the United States by virtue of the first clause of the 14th Amendment to the Constitution of the United States.

The Constitution as originally adopted used the words "citizen of the United States" and "natural born citizen of the United States", but not until the 14th Amendment was adopted had there been any definition of the phrase "citizen of the United States". In this case it was held that the phraseology of the 14th Amendment defining citizenship of the United States must be interpreted in the light of the common law, the principles and history of which were well known to the framers of the Constitution. The majority of the court thought that the colonial history of the United States prior to the adoption of the Constitution clearly indicated that the common law theory of citizenship determined by the place of birth had been almost universally accepted by the colonies. The minority, on the other hand, adhered to the view that

of the United States. Counsel therefore contends that the 14th Amendment adopted long after the Founding Fathers were dead, must be construed in the light of the Preamble to the Constitution, and when so construed, leads inescapably to the conclusion that the 14th Amendment means that citizenship is acquired by birth in the United States only in the case of persons who, at birth, are potentially eligible to citizenship by naturalization—in short, only members of the white and black races born in the United States become citizens thereof by birth. This argument and contention we now propose to analyze.

DISCUSSION OF APPELLANT'S RACIAL THEORY.

Appellant's thesis that the framers of the Constitution intended that none other than whites should be admitted to citizenship is based very largely upon the Preamble to the Constitution. However, it ignores completely other great documents in American history which antedate the Constitution.

The Declaration of Independence, signed July 4, 1776, declared as a self-evident truth that "All men are created equal", and that they "are endowed by their Creator with certain inalienable rights among which are life, liberty and the pursuit of happiness". (USCA, Constitution, Part I, p. 3.) If the argument of appellant's counsel is to be believed, then what Jefferson and the other signers of the Declaration meant was that only white men are created equal and only they are endowed by the Creator with these

inalienable rights. Nothing in the Declaration indicates that its authors considered the white race superior to all others.

In the Articles of Confederation finally ratified on January 30, 1871, by the last of the states signatory thereto, it is provided insofar as material to this discussion, as follows in Article IV thereof:

“The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states.” (USCA, Constitution, Part I, p. 10.)

The necessary implication of the above quotation is that with the exception of paupers, vagabonds and fugitives from justice, the free inhabitants are the free citizens of these several states and endowed with all of the privileges and immunities of citizens. There is not the faintest indication of any exclusion from the category of free inhabitants or free citizens of anyone whomsoever because of color, unless he be a pauper, a vagabond, or a fugitive from justice.

On July 13, 1787, the Confederate Congress created by the Articles of Confederation, adopted an ordinance for the government of the territory of the United States Northwest of the River Ohio. Section 9 of this ordinance reads as follows:

“So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall

the civil law concept of citizenship determined by parentage had been the prevailing rule in the colonies and hence if the parents were ineligible for naturalization because not members of the white race, no child of such parents, even though born in the United States, could become a citizen by birth.

Since this decision was rendered, the court has spoken twice upon the subject, first in the case of *Morrison v. California*, 291 U. S. 82, 78 L. Ed. 664, decided January 8, 1934; and second, in the case of *Perkins v. Elg*, 307 U. S. 325, 83 L. Ed. 1320, decided May 29, 1939. But in neither case was the issue raised by the instant appeal presented.

In the *Morrison* case, Mr. Justice Cardozo delivered the unanimous opinion of the court, in the course of which he stated that:

“A person of the Japanese race is a citizen of the United States if he was born within the United States.”

and in support of this statement he relied upon authority of *United States v. Wong Kim Ark*, *supra*. This statement was, however, dictum and not at all necessary to the decision of the case.

In the *Elg* case, Mr. Chief Justice Hughes delivered the unanimous opinion of the court and held that a girl of Norwegian parentage, born in New York, became by virtue of her birth, a citizen of the United States. This statement again was made in reliance upon *United States v. Wong Kim Ark*, *supra*, and again the court clearly reiterated the principle that a

child born in the United States of alien parentage becomes by virtue of such birth, a citizen of the United States.

The court therefore has spoken upon this subject at least three times and always with increasing positiveness and clarity.

The argument of appellant's counsel is frankly based upon the dissent in *United States v. Wong Kim Ark, supra*, and upon an alleged inconsistency between the definition of citizenship in the 14th Amendment and the restriction of naturalization by act of Congress to members of the white race. *The argument founded upon the dissent is a purely racial one and has no place in a democracy dedicated to the principle that there shall be no discrimination because of race, color, creed or political belief.*

The thesis is that the colonies knew only white people and the blacks then enslaved by the whites; and as slaves were, in the opinion of the colonists, nothing but chattels and were held scarcely to be endowed with human attributes, therefore the intention of the colonists by their war of revolution was to found a white man's country for white men only, and that none other than whites should be admitted to citizenship.

It is said that the majority opinion in the *Wong Kim Ark* case, *supra*, failed to consider the effect of the Preamble to the Constitution and that the Preamble itself clearly establishes the principle that none other than whites were contemplated by the Founding Fathers as beneficiaries of the right of citizenship

receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: Provided, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative." (USCA, Constitution, Part I, p. 19.)

In this document also there is no indication whatsoever that citizenship is restricted to members of the white race. Under Section 9 the only requirements for citizenship were that the citizen should be free, male, of full age, and either have been a citizen of one of the United States for three years, and be a resident in the district, or shall have resided in the district three years, and in either case possess in his own right in fee simple 250 acres of land within the district. Not only is there no racial requirement whatever, but on the contrary, it is contemplated by the ordinance

that Negroes shall be citizens provided they are otherwise qualified.

Article VI of Section 14 of the ordinance declares that there shall be neither slavery nor involuntary servitude in the said territory otherwise than in the punishment of crimes whereof the parties have been duly convicted. (USCA, Constitution, Part I, p. 27.)

It is not true, therefore, as stated in appellant's brief (p. 25), that the Negroes with whom the colonists came in contact were all slaves.

Neither is it true, as alleged in appellant's brief (p. 25) that during the colonial period there were no Asiatics in this country. There were Poles, and in fact one of the great officers who tendered his services to Washington in the Revolution, was Thaddeus Kosciusko, a Pole born in Lithuania. The Poles are a branch of the Slavic race, essentially Asiatic in origin. Notwithstanding Kosciusko's race, he was highly honored both by Washington and the Congress which at the close of the war gave him a vote of thanks and conferred on him the rank of Major General. (New Standard Encyclopedia, Vol. V.)

In short, there is nothing in the great documents of constitutional history of the United States preceding the Constitution which indicates any intention to limit citizenship by birth to members of the white race. In fact, the implications of these great documents of American liberty are all to the contrary.

Indeed, it is only a tortured construction of the Preamble to the Constitution which lends any color to

appellant's argument. There is nothing in the language of the Preamble quoted by appellant (Brief, p. 40) which in and of itself furnishes any support for appellant's theory of white racial superiority. The opening phrase is "We, the people of the United States" and not "We, the *white* people or we the *European* people, etc." Appellant's whole argument on this point is based upon an endeavor to establish that the purposes of the Japanese people as a whole, and particularly those resident in the United States, are entirely inconsistent with the purposes set forth in the Preamble. The implication that the Japanese all worship the Son of Heaven completely ignores the hundreds of thousands of Christianized Japanese both in the United States and in Japan. It is further stated that there is no credible proof of the loyalty of the Japanese in the United States. (Brief, p. 45.) These statements are all calculated to prove that the purposes of the Japanese without material exception are wholly at variance with the objectives set forth in the Preamble.

We do not regard the Preamble as controlling in the decision of the present issue, namely, whether citizenship by birth is restricted to members of the white race. Everything that appellant has said of the Japanese people with whose government we are now at war could have been and doubtless was said of every people whose governments have been at war with us from time to time. These are sentiments born of war and have no place in the determination of the present issue. Furthermore, these sentiments entirely overlook the

fact that the much despised Japanese people were our allies in the first World War.

It is claimed that because the Japanese are not white people they cannot assimilate with what appellant calls Caucasians. (Brief, p. 42.) It is further said that the presence of the Japanese in the United States has resulted and can result only in evil, and this evil is intensified and multiplied by their ability to exercise the privileges of citizenship. (Brief, p. 43.) While we do not think that this argument is material, it should be borne in mind that unless one adheres to the fascist and undemocratic distinction of superior and inferior races, there is no race that is not assimilable unless they have become the victims of persecution and discrimination. If the Japanese in America are a race apart and a menace to the people of the United States, the responsibility for this condition rests in large part upon the discrimination which we ourselves have practiced.

These statements do not advance the inquiry, and moreover they are not true. Ever since the evacuation of the Japanese from the coastal area of the Pacific slopes, there has been a steady relaxation of restrictions and a growing recognition that disloyalty among the Japanese is sporadic and not the invariable rule. Furthermore, last week Secretary of War Stimson declared it was the policy of the Government to permit enlistment in the armed forces of native born Japanese. If they are good enough to fight for the United States and the accomplishment of its war aims, they are certainly good enough to enjoy the citizenship conferred upon them by birth in the United States.

Appellant's entire argument is based upon the theory of the racial superiority of the whites, but it is submitted that any such theory is a complete denial of democracy in the United States. Racial superiority is the hallmark of fascism. It has been the cornerstone of imperialism and colonial policy and its leading exponent is Adolf Hitler. We quote:

"Without this opportunity to use men of a lower type, the Aryan could never have taken the first step toward his later civilization—just as he would never, without the help of various suitable animals which he succeeded in taming, have arrived at a technical development which now is gradually permitting him to do without these very animals.

* * *

"Thus the availability of inferior races was one of the most important essentials for the formation of higher cultures, since it alone could make good the lack of technical tools without which advanced development is quite unthinkable. Beyond question the first civilization of humanity rested less on domesticated animals than on employment of inferior human beings." (*Mein Kampf*, 1st unexpurgated American ed. publ. by Stackpole Sons, N.Y.C., pp. 286-7.)

There is absolutely no evidence whatsoever in the great historical documents of American liberty that any of them were motivated by theories of white racial superiority.

The second great reliance of appellant is upon the conflict between the 14th Amendment as interpreted in the *Wong Kim Ark* case, and the naturalization laws which restrict citizenship by naturalization to mem-

bers of the white race. Appellant places great reliance upon the inconsistency of unlimited citizenship by birth with limited citizenship by naturalization. It must not be forgotten, however, that Congress has plenary power under the Constitution to establish uniform naturalization laws, and the fact that Congress has chosen to exercise only a portion of this power and to limit naturalization to members of the white race, is hardly a justification for narrowing by construction the broad words of the 14th Amendment. The inconsistency between the limitation of the naturalization law and the unlimited character of citizenship by birth can easily be resolved by a further exercise of the naturalization power of Congress. That is, there is no reason why citizenship by naturalization should be limited to members of the white race and those of African descent. Equally clear is it that Congress must extend the right of naturalization to the three-fifths of the world's peoples now excluded, but who compose in large measure our allies in the present struggle for democracy.

We are fighting a war for the preservation of the Four Freedoms enunciated by President Roosevelt for the installation of the Atlantic Charter and for the triumph of democracy over slavery, but if democracy is only to be for the white people, our war aims are meaningless and there is little distinction between them and Hitler's aim to conquer the world for the "Aryan" people. The possibility that our war aims could be so limited is revolting to every right-thinking American citizen.

We have already in the Far East sustained terrific losses because of the insistence of white people upon their racial superiority to all others. The loss of Singapore, Malaya, Burma, and the Dutch East Indies is in large measure attributable to the smug complacency of white colonial administrators. The United Nations, composed of various racial stocks, are not racially homogeneous and they could never be united in any common war effort for the preservation of democracy on any slogan of white racial superiority. The idea that this is a white man's war and that peoples of other colors must always be ruled by whites, will not win the support of the masses of the people in India and China and Africa. And unless such ideas, which challenge the sincerity of our war aims, are completely rooted out of our thinking, the Axis powers may well win this war.

Traditionally, the United States has long been the melting pot, and the so-called white people in the United States are themselves the product of racial intermixtures and hybrid strains which have materially contributed to the development of the people of the United States.

It is because the present action can only be regarded as disruptive of the war effort that we have sought to appear as a friend of the court. This case presents not only a legal but a political question of the first magnitude.

The law, we submit, is clear. Not only the plain language of the 14th Amendment, but the judicial construction placed upon it for nearly 45 years, leads

inevitably to the conclusion that all persons born within the United States and subject to the jurisdiction thereof, are citizens regardless of the color of their parents.

The political question is equally clear. Either this country is a democracy with equal and universal suffrage, or it is a narrow, bigoted and intolerant oligarchy based on the infamous and detestable conception of race superiority. There is no validity either legally or politically to the argument of appellant, and it is respectfully submitted that the decree of the court below should be affirmed.

Dated, February 5, 1943.

Respectfully submitted,

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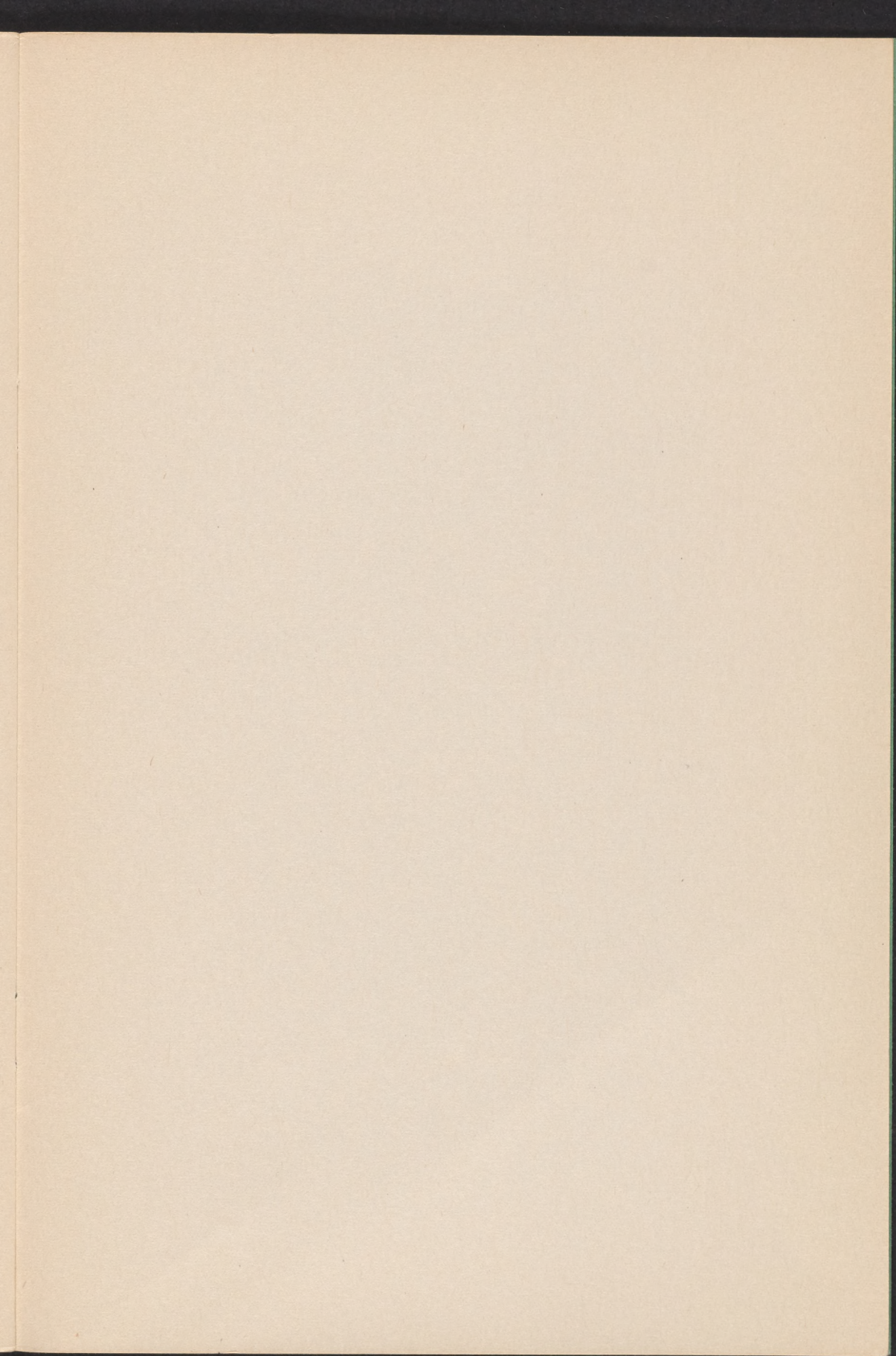
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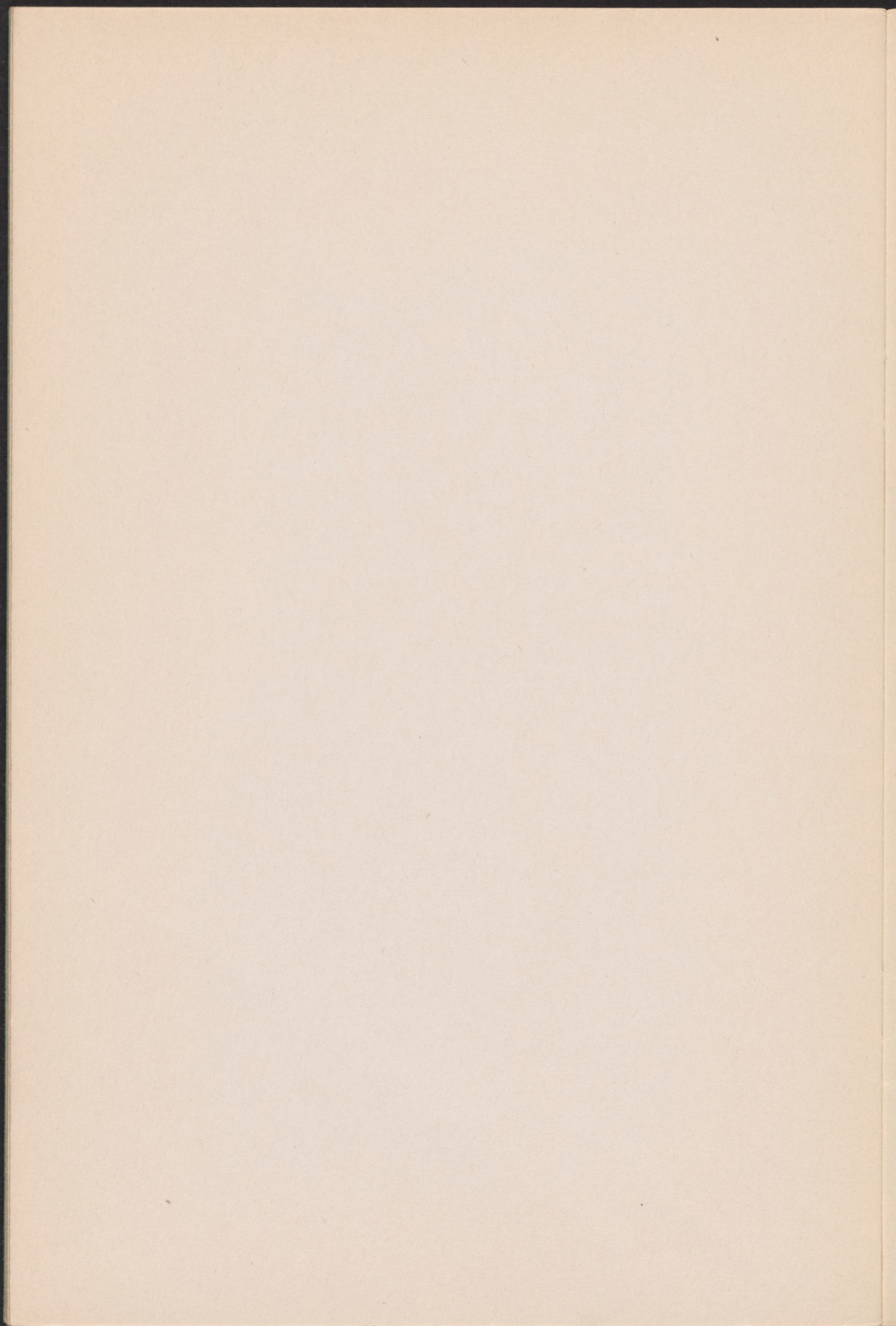
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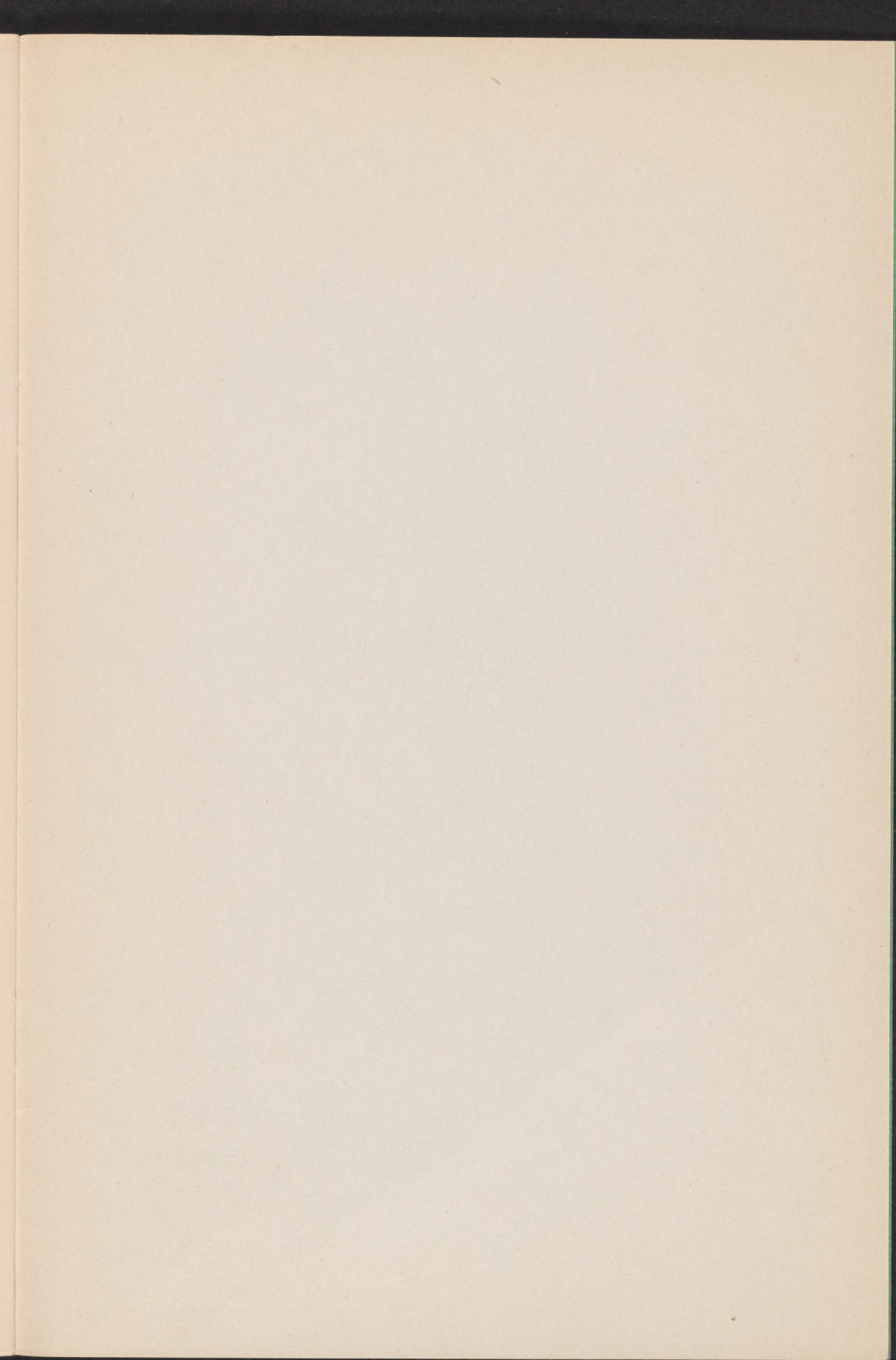
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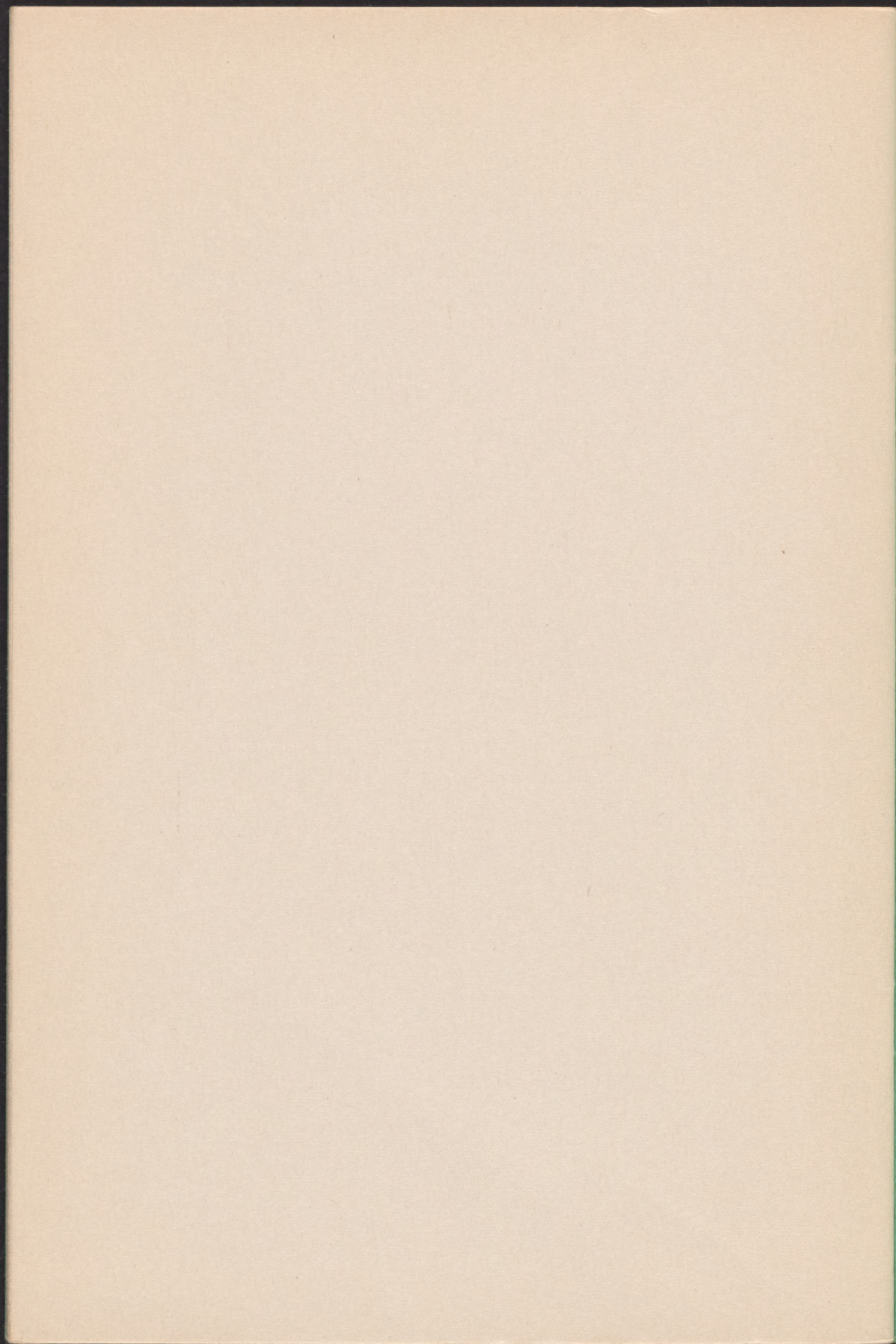
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Due service and receipt of a copy of the within is hereby admitted

this.....day of February, 1943.

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Attorneys for Appellant.

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City Attorney
of the City and County of San Francisco,

.....
Chief Deputy City Attorney
of the City and County of San Francisco,
Attorneys for Appellee.