No. 4229.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Akhay Kumar Mozumdar,
Appellant,

vs.

United States of America,
Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Appellant raises five contentions as a basis for reversing the decree of the District Court and propounds the same contentions as error on the part of the District Court in denying the appellant's motion to dismiss the bill of complaint.

These contentions are:

1. That the purpose of the Act of June 29, 1906, under which this complaint was filed was to combat fraud, perjury, and illegality by court officials dominated by party politics.

2. That appellant's certificate was not "illegally procured."

3. That the judgment admitting appellant to citizenship in 1913 is *res adjudicata* to and against the appellee.

4. That appellee is barred by its laches from seeking the remedy of cancellation in a court of equitv.

5. That appellee is estopped by its long continued acquiescence in the judgment admitting this appellant to citizenship from now challenging his certificate of naturalization.

Considering these contentions in the order in which they appear in appellant's opening brief, we find that appellant procured a certificate of naturalization in 1913; that thereafter this proceeding was instituted to cancel and annul the order made for the issuance of the certificate and to cancel the certificate on the grounds that they were "illegally procured." Appellant moved to dismiss the bill on the ground that the bill of complaint did not state facts sufficient to constitute a cause for cancellation. The motion to dismiss was denied, and upon the failure of the appellant to file an answer within the time allowed by law, a decree was made and entered directing that the said certificate and order granting the certificate be set aside, annulled and cancelled. [P. T., pp. 17 and 18.]

I.

The section of the Act of June 29, 1906, which appellant contends does not authorize this proceeding provides in part as follows:

> "Section 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship *on the ground of fraud* or *on the ground that such certificate of citizenship was illegally procured.*"

It will be observed that this section provides two grounds for cancelling certificates of citizenship, viz: fraud and illegality. Admittedly orders and certificates procured through sharp practices, deceit, misrepresentation, perjury, or bribery fall within the first class. Certificates procured without authority of law or "illegally procured" and not tainted with fraud fall within the second class. This proceeding attacks appellant's certificate and the order granting the certificate on the ground that it was procured illegally. No fraud is charged, and we are here not interested in the purpose of the act as it applies to fraudulent certificates and orders, but only as it applies to certificates procured illegally. It is the contention of appellee that judicial interpretations of this section of the act do not sustain appellant's contention of the purpose of the act as applied to illegal certificates. In the discussion contained herein of appellant's arguments, appellee feels that the cases cited under the second contention refute appellant's first contention,

and no further consideration will at this point of the controversy be given to appellant's first contention.

Before passing to a consideration of appellant's second contention, appellee desires to call to the attention of this Honorable Court the rule that citizenship is not a natural right to which aliens are entitled, but rather it is a privilege in the nature of a gift or bounty which may be granted, withheld, or taken away, with reason, without reason, or for such cause as Congress may prescribe.

United States v. Ginsberg, 243 U. S. 472, 475.

All of the statutory qualifications and requirements prescribed by Congress must be strictly complied with. If there be any doubt whether such statutory qualifications exist, that doubt is resolved in favor of the Government.

United States v. Ginsberg, *supra;*
United States v. Griminger, 236 Fed. 285.

With these propositions in mind, consideration may next be given to the second contention of appellant.

II.

Appellant's Certificate Was "Illegally Procured".

Considering the second contention of appellant, appellee contends that an order of naturalization and a certificate procured thereunder, if "illegally procured," is subject to cancellation under Section 15; that a certificate is "illegally procured" when procured by an alien who is not qualified or admissible to citizenship

by reason of race, residence or lack of other statutory requirements, and that the appellant was not qualified to become a citizen and his certificate should, therefore, be cancelled.

Appellant contends that the certificate procured by him was legally procured and argues that before a certificate is subject to cancellation on the ground of illegality, there must be subornation or an error in procedure. Admittedly, if there be subornation, bribery or misrepresentation, there would not only be illegality but also fraud. If the proceedings be irregular, there might also be illegality, but likewise if the alien is not qualified by reason of race, residence, morals or attachment to the principles of the Constitution, there is illegality. The burden of initiating the proceedings to procure citizenship is upon the alien. He is the one who seeks to become a citizen and represents to the court that he is an eligible person. If a certificate is issued to him by the court upon his showing and representations, it is "procured by him."

The question then arises, "when is a certificate 'illegally procured'?" The term "illegal" has been held to mean "contrary to law."

United States v. Mulvey—232 Fed. 513 (C. C. A 2nd);

United States v. Plaistow, 189 Fed. 1010.

In the case of Grahl v. United States, 261 Fed. 487 (C. C. A. 7th), the court said,

> "'Illegally' means 'contrary to law.' If Section 2171 in truth forbids the admission of alien enemies to citizenship, the action of the court in admitting them is contrary to law; *and the decree of the court, based on a misconstruction of the statute,* involves an error of law, for which the decree should be vacated."

In the case of the United States v. Ginsberg, *supra,* suit was filed to cancel a certificate of citizenship issued to an alien who had not fulfilled the statutory requirement of residence. The question at issue was whether a certificate was "illegally procured" and should be cancelled under section 15 of the Act of June 29, 1906, when the uncontradicted evidence at the hearing on the petition showed undisputably that the petitioner was not qualified by residence for citizenship. The Supreme Court in holding that a certificate procured under such circumstances was "illegally procured," when the court or judge who heard the petition and ordered the certificate misapplied the law and facts, used the following language:

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in Section 15 and demand its cancellation unless issued in accordance with such requirements. If procured when *prescribed qualifications have no existence in fact, it is illegally procured;* a manifest mistake by the judge cannot supply these nor render their existence non-essential."

This latter decision by the court of last resort and the decisions of the above cited Circuit Courts did not consider that fraud, deceit, perjury, bribery, subornation or error in procedure were the only cases in which illegality exists. These elements were not even within the issues of the cases, and appellee, therefore, contends that those cases furnish ample authority not only in refutation of appellant's first point as to the purpose of the act, but also for the proposition that a certificate procured by a person not qualified for citizenship is "illegally procured."

The precise question involved here has been passed upon in three other cases decided in the District Court for the Southern District of California: United States v. Mandel, decided by the Honorable Wm. P. James; United States v. Mohan Singh, and United States v. Pandit, decided by the Honorable Benjamin F. Bledsoe. In the two latter cases, counsel for the appellant herein appeared as counsel for Mohan Singh, and *in propria persona* in the Pandit case. Motions to dismiss were filed by the defendants, and in denying these motions, the learned judge had the following to say:

> "The only question remaining is whether or not an order made admitting such a person to citizenship after full and fair consideration by the court, is an order susceptible of being cancelled under and pursuant to the provisions of section 15 of the Naturalization Law of 1906 as being an instance of a certificate of citizenship "illegally procured." Much learned and technical argument has been indulged in to support the contention that

upon a full and fair hearing, where all the facts were presented to the court, where the Government was represented and made opposition to the order of admission, and where no fraud was involved, the Government may not, under and pursuant to the terms of said Section 15, successfully seek the annulment of the citizenship granted.

"The precise matter has been directly passed upon by Judge James of this court, in two cases, United States v. Mozumdar, No. E-5-J Equity, opinion filed November 30th, 1923, and United States v. Mandel, No. B-90-T, Northern Division, opinion filed December 6th, 1923. Reference to those opinions, the conclusions of which, supported by my own independent investigations, meet with my approval, should suffice as authority for the rulings had herein. Citing United States v. Plaistow, 189 Fed. 1010, Grahl v. United States, 261 Fed. 487, and other cases hereinafter referred to, he held that where a petition for naturalization is presented to a court having jurisdiction to hear it, by a person claiming to fall within the class of eligibles under the law, a decision based upon a mere conflict of evidence would present no case of irregularity or illegal procurement susceptible of cancellation under the terms of section 15. 'Where, however, the case is that the person presenting himself as an applicant for citizenship admits that he belongs to a particular race, members of which are not eligible for naturalization, then no question of conflict of evidence arises and upon the applicant's own petition or testimony, or both, naturalization must be denied.' The granting of it under the circumstances last detailed would not effect a 'lawful naturalization,' (Luria v. United States, 231 U. S., 9, 24.), and only a 'lawful naturalization' is immune from attack under the terms of section 15.

> "On the main point, argued to the effect that the granting of citizenship to defendants hereinabove named, under the conditions obtaining, was not an illegal procurement of citizenship, it would seem that the rulings of the United States Supreme Court in United States v. Ness, 245 U. S. 325, and United States v. Ginsberg, 243 U. S. 472, and of the Second Circuit in United States v. Mulvey, C. C. A., 232 Fed. 513, are conclusive and require this court to deny the respective motions to dismiss."

As pointed out by these learned judges of the District Court, the case of Luria v. United States, 231 U. S. 9, 24, cited by appellant, held that the provisions of the Act of June 29, 1906, did not affect or disturb rights acquired through "lawful" naturalization.

The learned district judge in the case of the United States v. Nopoulos, 225 Fed. 656, held that Section 15, "provides for the annulment by appropriate judicial proceedings of *merely colorable rights of citizenships to which their possessors never were lawfully entitled.*" As above pointed out, if the alien was not entitled to citizenship by reason of lack of qualification, a certificate procured by him is "illegally procured." The next consideration is, therefore, whether the appellant was qualified for citizenship.

Section 4 of the Act provides, "that an alien may be admitted to become a citizen in the following manner and not otherwise." This was formerly section 2165 of the Revised Statutes and may, therefore, be considered as applicable to and governing section 2169, which provides as follows:

> "Provisions of this title shall apply to aliens being free white persons and to aliens of African nativitv and to persons of African descent."

No contention is raised herein that appellant is an alien of African nativity or a person of African descent. It is admitted that he claims to be a free white person and that his certificate of citizenship was procured upon his representation that he was such. The complaint herein alleges:

"That the said order and decree of court and certificate of naturalization were illegally procured from said court in question in this that said defendant was at all times herein mentioned a high caste Hindu of full Indian blood, and not a white person entitled to be naturalized under the provisions of section 2169 of the Revised Statutes of the United States."

The motion to dismiss admitted these allegations of the complaint and no further argument should be necessary to establish the proposition that a high caste Hindu of full Indian blood is not a free white person. The Supreme Court of the United States in the case of the United States v. Thind, 261 U. S. 204, decided once and for all that Hindus are not free white persons and are, therefore, not eligible to citizenship as such. The Supreme Court in that case did not make the law, but it simply applied the law as it has been for a long period of years to a particular race and determined that members of that race were not free white persons eligible to citizenship.

Clearly, therefore, appellant was not eligible to citizenship when he procured his certificate and the order and certificate could give him no more than merley "colorable rights of citizenship," to which he was never lawfully entitled. United States v. Nopoulos, 225 Fed. 656. The undisputed evidence at the hearing for citizenship showed that he was not eligible to citizenship and that naturalization should, therefore, have been denied. Having, however, been procured, it was "illegally procured" and must in this proceeding be cancelled. .

The learned judge of the District Court, therefore, properly denied appellant's motion to dismiss and ordered cancellation of the certificate and annulment of the order upon the grounds that they were "illegally procured," unless the remaining contentions of appellant are sufficient to defeat this proceeding.

III.

The contentions of appellant in his third and fifth points, viz.: *res adjudicata* and estoppel, are predicated upon two hypotheses:

(1) That the certificate was *legally procured.*

(2) That the Government could have appealed from the order granting citizenship.

Appellee has herein above answered the first hypothesis of appellant and established the proposition that a certificate procured by an ineligible alien is "illegally procured." The second hypothesis of ap-

pellant is likewise unsupported by judicial authority or reason.

Appellant has not directed the attention of the court to any provision of law authorizing an appeal from the order granting naturalization. Congress has not provided for appeals by the Government in such cases, but has, by section 15, of the Act of June 29, 1906, provided for annulment and cancellation by a *direct attack* upon the order, granting citizenship, and the certificate issued pursuant thereto, in an independent suit.

Before pointing out the unsoundness of appellant's contentions as disproved by judicial decisions, appellee desires to point out that the foundation of the doctrine of estoppel is that one party has negligently, wilfully, or fraudulently misled another to his injury by certain acts or words. That the person asserting the estoppel must have been misled to his damage is fundamental. Leather Manufacturers National Bank v. Morgan, 117 U. S. 96. An estoppel *in pais* operates only in favor of a person who has been misled to his injury. Katchun v. Duncan, 96 U. S. 659. There is nothing in this record disclosing any injury or damage to appellant by reason of any act of appellee.

In the case of the United States v. Johannessen, 225 U. S. 227, the Supreme Court considered the question of *res adjudicata* and estoppel by judgment as applied to an action brought under section 15 of the Act of June 29, 1906, when the naturalization hearing was not

adversary. In deciding that these defenses did not prevent a proceeding under section 15, the Supreme Court, page 236, had the following to say:

> "It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. Spratt v. Spratt, 4 Pet. 393, 409. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. See also Campbell v. Gordon, 6 Cranch, 176.
>
> "It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by section 15 of the Act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible."

Admittedly, appellant was responsible for the procurement of the certificate procured by him, for it was upon his representation that he was properly qualified that the certificate was issued.

We quote, for the information of the court, the following passages from the opinion of the Supreme Court in the Johannessen case:

> "In United States v. Beebe, 127 U. S. 338, 342; Mr. Justice Lamar, speaking for this court, said: 'It may now be accepted as settled that the United

> States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked.' See also Noble v. Union River Logging R. R. Co., 147 U. S. 165, 175, and cases cited." (Page 239),

and at page 241:

> "The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard."

and again at page 242:

> "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done."

The Supreme Court in the Johannessen case did not determine whether its rulings were applicable to a case in which the naturalization hearing was adversary. This question was, however, directly presented to the court in the case of the United States v. Ness, 245 U. S. 319. In that case the question presented to the court was:

> "Whether an order entered in a proceeding to which the United States became a party under

> section 11 is *res adjudicata* as to matters actually litigated therein, so that the certificate of naturalization cannot be set aside under section 15 as having been 'illegally procured'?"

that is to say, whether sections 11 and 15 afford the United States alternative or cumulative means of protection against illegal or fraudulent naturalization under the Act of June 29, 1906. In determining that these sections afforded cumulative protection or relief, the Supreme Court used the following language:

> "The remedy afforded by Sec. 15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, United States v. Throckmorton, 98 U. S. 61; Kibbe v. Benson, 17 Wall. 624; but it is narrower in scope than the protection offered under section 11." (Page 325),

and at page 327:

> "Section 11, unlike Sec. 15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under Section 11 on behalf of the Government should be held to create an estoppel, no good reason appears why it should not arise equally whether the appearance is by the duly authorized examiner or by the United States attorney. But in our opinion Secs. 11 and 15 were designed to afford cumulative protection against fraudulent or illegal naturalization."

Appellee believes that these cases decided by the Supreme Court of the United States show clearly that the arguments of appellant, that the order or judgment

is *res adjudicata* and that the Government is estopped from bringing this proceeding, are untenable. As above pointed out, appellant's hypothesis for these arguments is that the Government has a right of appeal from the order. The following language used by the Supreme Court in the *Ness* case shows that no such right of appeal exists:

> "For Congress did not see fit to provide a direct review by writ of error or appeal."

As pointed out in the footnote to the Ness case, at page 326, the provision inserted in the Act for appeals was stricken therefrom.

> "The bill submitted by the commission on naturalization provided for such appellate proceedings and its proposal was recommended to the House by the committee on immigration and naturalization as Sec. 13 (Report of February 6, 1906, p. 5); but after debate in the committee of the whole (40 Cong. Rec., pp. 7784-7787) was stricken from the bill. The bill proposed by the commission and recommended by the house committee contained in addition (as Sec. 17) the provision for cancellation proceedings enacted as Sec. 15."

See also to the same effect as applied to proceedings brought under Section 15, United States v. Milder, 284 Fed. 571, C. C. A. 8th; United States v. Koopmans, 290 Fed. 545.

It has been held in numerous cases involving grants, surveys, or patents to land, that the United States is not estopped by reason of its acts nor the acts of its

officials or agents. United States v. Jeems Bayou Hunting & Fishing Club, 260 U. S. 561, Cramer v. United States, 261 U. S. 219.

The cases cited by appellant in support of his points of *res adjudicata* and estoppel do not support his contentions, but in view of the above cited cases, it must follow that his contentions are insupportable by judicial authority.

IV.

The Appellee Is Not Barred by Laches From Prosecuting This Proceeding.

In support of his fourth point that the appellee is barred by laches from prosecuting this proceeding, appellant has not cited one case or statute of limitations to establish the laches. The doctrine of laches is, of course, an equitable doctrine of the legal defense of statute of limitations. Appellant has cited no statute of limitations applicable to this proceeding. He has cited state cases in support of his point that laches may be imputed to the commonwealth as well as to an individual. Whatever might be the statutory rule in some states, making the state subject to statutes of limitations, there is no such rule as to the United States. Statutes of limitations do not run against the United States. Gibson v. Chouteau, 13 Wall. 92.

Neither the statute of limitations nor the equitable doctrine of lapse of time can have any effect against the United States. Simmons v. Ogle, 105 U. S. 271.

Statutes of limitations have no force in actions brought by the Federal Government to enforce a public right or to assert a public interest. U. S. v. Beebe, 127 U. S. 338.

Since, therefore, this point is here advanced on a motion to dismiss, which challenges only defects appearing on the fact of the pleading, and nothing appears from the face of the pleadings herein which discloses that this action would be barred by a statute of limitations or laches; since there is no statute of limitations or laches applicable to this proceeding or to actions brought by the United States, and since no right of appeal by the Government was provided and therefore no statute of limitations or doctrine of laches applicable to the limitation of appeals or writs of error exists, it must follow that the United States is not barred by laches from prosecuting this proceeding, and that appellant's fourth contention is insupportable.

V.

The Contentions of Appellee Are Sustained by Statute, Judicial Authority and Reason.

Appellant in his sixth point endeavors to point out wherein certain arguments of appellee are untenable. We shall therefore refer briefly to these points.

(a) The argument of appellee is not based upon any statutory provision or judicial authority referring to Chinese or Japanese. Appellee's case is based upon the allegations of the complaint, admitted by the mo-

tion to dismiss, that the appellant is a high caste Hindu and not a free white person. That such a person is not admissible to citizenship cannot now be questioned.

United States v. Thind, 261 U. S. 204.

(b) The reasoning of the Honorable Wm. P. James in the opinion filed in this case is sound and logical and replete with judicial learning. The position of the Honorable Judge is unanswerable. It is, briefly, that an order for naturalization and a certificate of citizenship issued pursuant thereto are subject to cancellation under the provisions of Section 15 of the Act of June 29, 1906, if "illegally procured"; that an order and certificate procured by an alien ineligible to citizenship by reason of race is "illegally procured"; that appellant is admittedly ineligible to citizenship by reason of race, and that, therefore, his certificate must be cancelled, and the order granting citizenship annulled. It is submitted that the learned judge did not err in denying the motion to dismiss, and that the decisions of the Honorable Benjamin F. Bledsoe in the Mohan Singh and Pandit cases approving the conclusions of Judge James were correct and sustained by judicial authority.

The state cases cited by appellant are not applicable to this proceeding, which is especially prescribed by statute providing for the cancellation of merely colorable rights to which the alien was never lawfully entitled.

Conclusion.

It would seem that the certificate of naturalization procured by appellant and the order admitting appellant to citizenship were subject to cancellation if "illegally procured"; that they were "illegally procured" because the defendant was a person not entitled to citizenship, and that this procedure to cancel the order and certificate is proper under the provisions of section 15 of the Act of June 29, 1906; that the order is not *res adjudicata* nor is the Government estopped by reason of any matters appearing on the face of the pleadings, nor is the Government barred by laches. The Government's complaint was, therefore, properly upheld by the lower court and no error committed in denying the motion to dismiss.

It is therefore respectfully submitted that in view of the failure of appellant to support his contentions and in light of the decisions cited herein by appellee and the sound judicial findings of the lower court, that this Honorable Court should sustain the decree and deny this appeal.

Respectfully submitted,

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Italics throughout the foregoing brief are ours.
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