No. 4229.

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Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Akhay Kumar Mozumdar,
Appellant,

vs.

United States of America,
Appellee.

BRIEF FOR THE APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from the final decree [Printed Transcript, pp. 17-18], in an equity suit wherein the United States of America, under section 15 of the Naturalization Act of June 29, 1906, sought (1) to cancel the certificate of naturalization of Akhay Kumar Mozumdar, appellant herein, and (2) to cancel the order [P. T., p. 6] of the District Court of the United States for the Eastern District of Washington, dated June 13, 1913, admitting said appellant to citizenship.

The petition for cancellation [P. T., p. 7], filed on August 8, 1923, in the District Court of the United

States for the Southern District of California, Southern Division, alleged that appellant's certificate of citizenship and the order and decree of court granting same were illegally procured by appellant, in that he "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."

On October 8, 1923, appellant moved the court below to dismiss the government's petition on the following grounds [P. T., p. 8]: (1) that said petition did not state any matter of equity entitling the government to the relief prayed for, and (2) that the facts as stated were not sufficient to entitle the government to any relief against this appellant. Said motion was overruled by the court on November 30, 1923 [P. T., pp. 16-17].

On December 10, 1923, the government filed its praecipe for the entry of appellant's default, which the clerk of the District Court declined to enter [P. T., p. 17].

On December 16, 1923, the court entered its final decree in favor of the government and against this appellant, canceling his certificate of naturalization and the order of the United States District Court for the Eastern District of Washington made ten years previously. From said final decree this appeal was taken on March 4, 1924.

INTRODUCTION.

This case is noteworthy in that it involves much more than the rights of an individual. The answer to the question whether or not appellant shall continue to be a citizen will settle the status of all those who, belonging to the Caucasian peoples of Asia, have been duly and regularly admitted to citizenship in this country by courts of competent jurisdiction after a contest by the government in every case to evoke the most thorough consideration.

The case of the United States against Bhagat Singh Thind, 261 U. S. 204, did not determine the question. For the impropriety of a cancellation suit under section 15 of the Act of June 29, 1906, was not suggested and did not occur to the trial or appellate courts. Hence it is not a precedent which the court is bound to follow when the impropriety of the remedy is urged, as in this case. Cosgrove v. Wayne Circuit Judge, 144 Mich. 682, 108 N. W. 361. For a decision affirming or reversing a judgment is of no controlling force in a subsequent case as to any question involved but not argued nor presented, and left unnoticed or not passed on by the court. Salt Lake Inv. Co. v. Oregon Short Line R. Co., 46 Utah 203, 148 Pac. 439. Nor can a mere concession of counsel in a former case be regarded as a judicial establishment of the point conceded. State v. Keokuk etc. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222 (aff. 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450). And it has been re-

peatedly held that even though a point was involved in an earlier case and should have been decided, the case is not a precedent as to such point if it was not actually considered and decided. Moinet v. Burnham, 143 Mich. 489, 106 N. W. 1126; Atwood v. Sault Ste. Marie, 141 Mich. 295, 104 N. W. 649; Pav. Co. v. Realty Co. (Cal.), 195 Pac. 1058; Matter of Dunning, 213 Ill. App. 602. Nor are any of the precedents to be found precisely similar to the case at bar.

Here the government, with full knowledge of the facts, acquiesced in the decision of the Naturalization Court, adverse to its contention, for a period of ten years. No fraud or misconduct on the part of the appellant has been recently, or at any time, discovered by the government as the means whereby he procured his citizenship. No appeal was taken nor a cancellation suit instituted during all this time. The judgment of the District Court for the Eastern District of Washington has become final for a number of years. The appellant was required in 1913 to renounce absolutely and forever all allegiance to every foreign government and particularly to George V. King of Great Britain and Ireland at the suggestion of the government of the United States; for no divided allegiance would be tolerated by its laws. *In re* Haas, 242 Fed. 739.

If the court below were correct, the man without a country would be transferred from the realm of poetry into the domain of law, since an affirmance of the

decision here appealed from would declare the law of the United States as expounded by its Court of Appeals, to be that there exists under the jurisdiction of the United States an innocent and law-abiding class of persons who are strangers and aliens here and in every other nation of the globe. There can be nothing in law or in fact to justify or necessitate so extraordinary a result.

SPECIFICATION OF ERROR.

The court erred in overruling appellant's motion to dismiss the petition for cancellation of his citizenship.

POINTS.

I. The purpose of the Act of June 29, 1906, was to combat fraud and perjury in naturalization proceedings by the applicant for naturalization or his witnesses, and illegality by court officials dominated by party politics.

II. Appellant's certificate was not "illegally procured."

III. The judgment admitting this appellant to citizenship in 1913 is *res adjudicata* to and against the appellee.

IV. The appellee is barred by its laches from seeking its remedy in a court of equity.

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

VI. The contentions of the appellee are untenable.

ARGUMENT.

I.

Purpose of Act of June 29, 1906.

"The purpose of the Act of 1906 was to stop the flagrant abuses and frauds which had become scandalous, by providing safeguards and a strict and uniform procedure. The act was the result of the labors of a commission appointed by an executive order of President Roosevelt, issued March 1, 1905. The commission consisted of one officer each from the Departments of State, Justice, Commerce and Labor. Their report was transmitted to Congress by the President on December 5, 1905 (H. Doc. No. 44, 59th Cong., 1st sess.), and its recommendations formed the basis of the bill which became the act under consideration.

"In its report the commission quoted from the report of the Attorney General for 1903 the following language contained in a report of Mr. Van Deuzen, Special Examiner of the Department of Justice:

" 'The evidence is overwhelming that the general administration of the naturalization laws has been contemptuous, perfunctory, indifferent, lax, and unintelligent, and in many cases, especially in inferior state courts, corrupt.'

"The chief motive which led to fraudulent naturalization was the desire to vote, which caused corrupt politicians to encourage perjury and commit bribery under the guise of paying the naturalization fees, especially just before election. Another motive was found in the labor laws and the rules

> of some labor unions which prevented the employment of aliens in certains classes of work. Another motive was the desire of aliens to go abroad under the protection of the United States. There was no uniformity in the actual admission of aliens to citizenship by reason of the fact that they were admitted by many different courts, State and Federal, with no uniform procedure, many of them of inferior jurisdiction and presided over by inferior judges, and in practice the entire proceedings were often turned over to the clerk of the court. *It was to correct these abuses that the Act of 1906 was framed.* Mr. Bonynge, in presenting the bill to the house, referred to the great amount of fraud which had grown up under the old law and to the appointment of a special prosecuting attorney who in two years had secured 685 convictions and the cancellation of 1,916 fraudulent certificates." Ozawa v. United States, 43 Sup. Ct. 338. Brief of the Solicitor General 13-15.

In 1902 fraudulent and illegal practices in the naturalization of aliens were discovered in the city of St. Louis, Missouri. Some of these misdoings are recounted in Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274. Investigation showed such practices to be common in other cities. Certificates were issued on sham and spurious proceedings. Clerks of courts issued certificates of citizenship without any proceeding in court whatever and frabricated a judicial record to support the certificates. It was even discovered

that some clerks were engaged in a regular brokerage business in certificates of naturalization. Certificates were also sold to aliens residing abroad who had never been in the United States. The results of these investigations were gathered in an elaborate report which was presented to Congress and resulted in the passage of the Act of 1906. Congressional Record, Vol. 40, part of page 7036; House Documents Vol. 44 (Miscellaneous), 59th Congress, 1st Session.

The mischievous practices which the statute was intended to correct fell into two general classes: First, the obtaining of certificates of naturalization through the deception of the court by means of perjury and subornation of perjury—such certificates being *procured by fraud.* Second, *false and spurios certificates were obtained without any judicial proceeding whatever, or by a proceeding in court which was itself sham and spurious.* Certificates thus obtained are accurately described as having been *"illegally procured."* United States v. Lenore, 207 Fed. 865, 866-870.

> "Probably the most serious development of this investigation is the disclosure of the fact that many thousands of certificates have been issued to aliens by courts having no jurisdiction in naturalization matters." C. V. C. Van Deusen, Special Examiner in Relation to Naturalization, in his report of November 4, 1903. House Document No. 9, 58th Congress, 2d Session.
>
> "Experience and investigation had taught that the *wide-spread frauds in naturalization, which*

led to the passage of the Act of June 29, 1906, were in large measure due to the diversities in local practice, *the carelessness of those charged with duties in this connection,* and *the prevalence of perjured testimony* in cases of this character."

United States v. Ness, 245 U. S. 319, 324.

II.

Appellant's Certificate Was Not "Illegally Procured."

Section 21 of the Naturalization Regulations promulgated by the Secretary of Labor under the authority of section 28, Act of June 29, 1906, provides:

> "Clerks of courts shall not receive declarations of intention or file petitions for naturalization from other aliens than white persons. * * * Any alien other than a Chinese person, who claims that he is a *white person* in the sense in which that term is used in section 2169 Revised Statutes, should be allowed if he insists upon it after an explanation is made showing him the risk of denial to file his declaration or petition, as the case may be, leaving *the issue to be determined by the court.*"

The Supreme Court in United States v. Ginsberg, 243 U. S. 472, says of section 2169 R. S.:

> "Prior to 1906 'the uniform rule of naturalization' authorized by the Constitution was found in the Act of 1802 and a few amendments thereto. This enumerated *only general controlling principles.*"

Appellant respectfully submits that in the application of such general principles to concrete cases and in making their findings from proofs adduced at such hearings, the courts are compelled to bring their discretion to bear thereon. And discretionary rulings of courts, even if erroneous, cannot be "illegal" nor unlawful, and can only be corrected by appeal or writ of error; and to them section 15 has no application.

It would seem, moreover, that "illegality" has reference to the omission or disregard of the plain and detailed statutory requirements of the *prescribed proceedings* of a "simple and comprehensive code" as is the Act of June 29, 1906, which "prescribes the exact character of proof to be adduced." United States v. Ness, 245 U. S. 319.

It has been held by the courts that if citizenship is granted, and the judgment is not tainted with any fraud or misconduct of the party in whose favor it is entered, such judgment is final and conclusive against attacks in courts of co-ordinate jurisdiction. Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 691, 15 Sup. Ct. 733, 39 L. Ed. 859; approved in Johannessen v. United States, 225 U. S. 227, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066. For the word *procure,* according to Webster's International Dictionary, means to contrive, to bring about, to effect (as a favor to be granted). And in Nash v. Douglass, 12 Abb. Prac. (N. S.) 187, 190, the court says:

> "The word *procure*, as used in the pleadings in an action, and acted on by the courts, *imports an initial, active and wrongful effort.*"

"Illegally procured" means procured by subornation or some other illegal means used to impose upon the court; it does not mean that the certificate was issued through "error of law," says Judge Hand in United States v. Luria, 184 Fed. 643, 647.

The writer of the article dealing with this subject in *Corpus Juris*, after carefully weighing the diversity of decisions in the interpretation of the phrase "illegally procured" of the naturalization statute, says, at 2 C. J. 1126:

> "Illegally Procured. While there is some difference of opinion as to the meaning of the term 'illegally procured,' the better rule seems to be that it imports a certificate issued without authority of law, and, in effect, false and spurious; not an error of law, but subornation or some other illegal means to impose on the court. When a certificate is issued as the result of a judicial hearing in a good faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of coordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error."

The Supreme Court in Johannessen v. United States, 225 U. S. 227, 242, said of section 15 of the Act of 1906:

> "It (the act) merely provides that on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through *fraud or other illegal contrivance,* shall be examined and determined in orderly judicial proceedings."

Says Chief Justice Marshall:

> "A judgment cannot be unlawful unless that judgment is an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject although it should be erroneous." *Ex parte* Watkins, 3 Pet. 203, 7 L. Ed. 650.

In sustaining the lower court in its dismissal of the government's petition for cancellation of a seaman's citizenship on the charge of "illegality," this honorable court said, in United States v. Rockteschell, 125 C. C. A. 532, 208 Fed. 530, at page 536:

> "The correctness of a finding of fact, so long as the same is within the bounds of reason, involves no question of law, and cannot be reviewed or disturbed."

A perusal of the opinion of the learned naturalization court at 207 Fed. 115, in the matter of Akhay Kumar Mozumdar, will suffice to show that the finding of that court was within the bounds of reason.

The District Courts for the Northern and for the Southern Districts of California, and State and Federal Courts in various parts of the country have approved of and followed the reasoning of Judge Rudkin in the case of this appellant. That conclusion had, moreover, become well established by judicial and executive concurrence and legislative acquiescence.

It is a significant fact that even with regard to some of the semi-prescribed proceedings of the Naturalization Act of 1906, except when there was evident misconduct in procuring the certificate on the part of the naturalized citizen, the appellate courts even when decreeing cancellation have hesitated and abstained from laying down any general rule regarding cancellation of certificates on the ground of illegal procurement thereof. For example, in the case of United States v. Cantini, 212 Fed. 925, the Circuit Court of Appeals prefaced its order of cancellation with these words:

> "Recognizing the difficulties of the present controversy, and disclaiming the intention to lay down a general rule * * *."

The Circuit Court of Appeals, for the Second Circuit, in United States v. Mulvey, 232 Fed. 513, said at page 516:

> "We think that each case of this kind must be decided according to its own circumstances."

It may be further noted that several courts and judges have been quite emphatic in holding that where

the facts are before the court, its findings thereon cannot be disturbed by resort to section 15, even in the matter of prescribed proceedings, if there was any room for the exercise of the court's discretion in relation to the question raised at the hearing of the petition for naturalization.

The District Court for the Eastern District of Michigan, in the case of United States v. Nechman, 183 Fed. 788, 790, said:

> "There is an entire absence of testimony that any fraud was perpetrated upon the court, or that there was any illegality by which Nechman's certificate was procured. There is, therefore, nothing in section 15 of the statute of 1906 which would warrant this court in cancelling the certificate. The facts were all directly before the court and it passed its judgment upon them. 'The judgments of courts may not be impeached for any facts, whether involving fraud or collusion, or not, or even perjury, which were necessarily before the court and passed upon.' The Acorn, 2 Abb. 435, 445, Fed. Cas. No. 29; U. S. v. Gleason, 90 Fed. 778, 83 C. C. A. 272; Spratt v. Spratt, 4 Pet. 393, 7 L. Ed. 272; Hilton v. Guyot, 159 U. S. 207, 16 Sup. Ct. 139, 40 L. Ed. 95; U. S. v. Throckmorton, 98 U. S. 66, 25 L. Ed. 93."

The Circuit Court of Appeals, for the Ninth Circuit, in United States v. Rocktechell, 125 C. C. A. 532, 208 Fed. 530, 534, 535 (where the government sought cancellation of a seaman's certificate on the ground of "illegality", because of alleged non-contin-

uous residence for five years before petitioning for naturalization), said, in affirming the decision of the lower court in dismissing the cancellation petition:

> "It is not for a court in a proceeding of this character to review or set aside *findings of the court of original jurisdiction*, based upon conflicting evidence, or *upon evidence reasonably susceptible to different inferences.*
>
> "The controlling question is whether the respondent misrepresented or wilfully withheld from the court any of the concrete probative facts."

In United States v. Shanahan, 232 Fed. 169, Judge Dickinson, in dismissing the cancellation petition, said:

> "Congress in pursuance of its constitutional power 'to establish a uniform rule of naturalization' has provided us with our present system. These laws confine the power to certain courts, and impose the duty upon the District Courts of admitting to citizenship. Certain things are preliminarily essential to the exercise of this power. These are the jurisdictional facts. One of them is a previous declaration of the intention of the applicant to become a citizen. Another is that he shall within the prescribed time thereafter file his petition in the required form, and his petition must be verified by the affidavits of at least two credible witnesses, who are themselves citizens, to the fact of residence, etc. What follows is a matter of 'proofs'. In other words it is a finding of facts from evidence. This is a judicial act, or a judgment, the memory of which is preserved in the records of the court * * * When an applicant

has met all the requirements of the law, the privilege accorded him ripens into a right. It is his legal right to submit his petition and proofs to the court as the constituted tribunal to pass upon them. If certain facts appear to the satisfaction of the court, he is entitled to citizenship.

"In similar proceedings like findings made by an official or tribunal other than a judge or a court are not disturbed because a different conclusion might have been reached on the facts. The courts will not assume to sit in judgment to review findings of fact which it is the duty of another tribunal to make. This is the established rule. United States v. Rodgers, 191 Fed. 970, 112 C. C. A. 382. Why should not the same rule apply to a finding by a judge or a court? The principle remains the same when the court in one form of proceeding is asked to review its findings made in the course of another proceeding.

"The rule, of course, has its limitations. These are well recognized. They have their practical application in the provision of the law for cancellations. If the certificate was procured by fraud, it may be cancelled. So likewise if it was 'illegally procured.' The absence from the record of any of the jurisdictional facts would make the certificate 'unlawful,' because issued without warrant of law. *The moment, however, we get beyond the record and the jurisdictional facts we get into the domain of the 'proofs.'* In the first place, we have no record of what these were, and in any event, in the absence of fraud, or an abuse of power by the tribunal which has passed upon them,

> we are doing nothing else than hearing the evidence over again and retrying the case on its facts. * * *
>
> "However this may be, the conclusion reached is that the court, when it admitted this applicant, was 'satisfied' of the fact of residence, and, being so satisfied, it was proper to admit him to citizenship, and we see no justification for cancelling the certificate because of the fact (even if it were the fact) that from a view of part of the proofs which were then before the court we differed in our judgment of the weight of the evidence."

In the case of United States v. Albertini, 206 Fed. 133, 135, the District Court of Montana said that the term ('illegally procured') imports a certificate issued by a court without jurisdiction or in violation of the law's procedure—without a petition, or witnesses, or notice (to the Government), or hearing for example. And the court further held that section 15 of the Act of 1906 does not add to or detract from the rights and remedies of the Government as they existed prior to the statute.

In presenting the bill (which became the Act of June 29, 1906), to the House, Mr. Bonynge, who had it in charge, spoke of the provisions of section 15 as providing for the *cancellation of certificates fraudulently obtained,* and said that that which the section provides for *"can be done now* (*i. e.* without any special aid from section 15) *as decided by the Federal Courts."* 40 Congressional Record, 7873-7874.

The Circuit Court of Appeals for the Fifth Circuit, in the case of United States v. Dolla, 177 Fed. 101, says of the Act of June 29, 1906:

> "The power vested in the court to grant or order the same (citizenship) is on proof to the *satisfaction* of the court, with the petitioner and witness as necessary exhibits—that is to say the question of admission is committed to the *discretion* of the courts—*and discretionary rulings of courts are not reviewable.*"

III.

Res Adjudicata.

The United States District Court for the Eastern District of Washington is a court of general jurisdiction having jurisdiction of naturalization causes, and it possessed in 1913 full jurisdiction over Mozumdar who had applied therein for citizenship. The government of the United States had notice of Mozumdar's application, appeared by its naturalization examiner, contested the application, made argument, filed brief, cross-examined witnesses, appeared and contested at the re-hearing of the case and acquiesced in the judgment of the court. (P. T. pp. 5-6.) The court filed a written opinion which was reported at 207 Fed. 115. The judgment was not reversed upon appeal nor was it vacated. No proceeding prescribed by statute was neglected in the naturalization of Mozumdar. Therefore there was nothing illegal or contrary to law in the proceedings, nor was there any manifest error

committed by the court. Hence, the judgment of the court, even if it were erroneous in matters addressed to its discretion on proofs submitted at the hearing, is conclusive. 7 Co. 76; 1 Pet. 340; 9 Cow. 227; 3 Binn. 410; 6 Pick. 435; 4 Johns. Ch. 460; 106 N. Y. 604; 81 Va. 677; 82 Ga. 168; 7 L. R. A. 577; 11 L. R. A. 155, 308.

In support of our contention may be quoted the well-known maxims:

> *"Nemo debet bis vexari pro eadem causa."*
> *"Interest reipublicae ut sit finis litium."*
> *"Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum."*

It is a general principle that a decision by a court of competent jurisdiction, of matters put in issue before it, is binding and conclusive upon all other courts of concurrent power, and between parties and their privies. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy, and is necessary for the repose and peace of society and the maintenance of civil order. 168 U. S. 48; 125 U. S. 702; 7 Wall. 107.

In Spratt v. Spratt, 4 Pet. 393, 7 L. Ed. 897, Chief Justice Marshall pointed out that the statutes "Submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record

as the judgment of the court. It seems to us, if it be legal in form, to close all inquiry, and, like every other judgment to be complete evidence of its own validity."

In Mutual Benefit etc. Co. v. Tisdale, 91 U. S. 245, 23 L. Ed. 314, Hunt, J., said that the certificate of citizenship "is against all the world a judgment of citizenship."

Says the District Court of Montana, in United States v. Albertini, 206 Fed. 133, referring to section 15:

> "The design is to enable the government to exercise some supervision over the proceedings, some watchfulness, and in its discretion to oppose, contest and convert the proceedings into those actually adversary. It may be that if this discretion be so exercised the judgment and certificate would be *res judicata* in the matter of fraud intrinsic the record."

In the case of Johannessen v. United States, 225 U. S. 227, (a cancellation suit under section 15), Mr. Justice Pitney, speaking for the court, said at pages 237-238:

> "What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgments, section 534a). What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the pur-

pose, and, without notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *'ex parte'* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great number of aliens thus applying at irregular times in the various courts of record of the several states and in the Federal Circuit and District Courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the Government of the United States or to the public, it is of course impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation *when conducted at the instance of and controlled by the interested individual alone.*

"The foundation of the doctrine of *'res judicata,'* or estopped by judgment, is that both parties have had their day in court. 2 Black, Judgments, sections 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern Pacific Railway Co. v. United States, 168 U. S. 1, 48:

'That a right, question or fact *distinctly put in issue and directly determined by a court of competent jurisdiction,* as a ground of recovery, *cannot be disputed in a subsequent suit* between the same parties or their privies.' "

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> "The act (of June 29, 1906), does not purport to deprive a litigant of the fruits of a successful controversy in the courts."

IV.

The Appellee Is Barred by Its Laches in Seeking Its Remedy in a Court of Equity.

When the state invokes the power of equity to establish its rights, it may be denied relief on the ground of its laches.

State v. Livingstone, 164 Iowa 31, 145 N. W. 91.

Laches may be imputed to the commonwealth as well as to an individual. *In re* Bailey's Estate, 241 Pa. 230, 88 Atl. 428; Atty. Gen. v. Central R. Co. 68 N. J. Eq. 198, 59 Atl. 348; Atty. Gen. v. Delaware etc. R. Co., 27 N. J. Eq. 1 (aff. 27 N. J. Eq. 631); Pittsburgh R. Co. v. Carrick, 259 Pa. 333; Commonwealth v. Bala etc. Turnp. Co., 153 Pa. 47; 25 Atl. 1105.

In equity it is the rule that when the court is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience, and reasonable diligence of the party seeking relief are the elements that call a court of equity into action. In the absence of those elements the court becomes passive and refuses to extend its relief or aid. McDearmon v. Burnham, 158 Ill. 62, 41 N. E. 1094.

The existence or non-existence as the case may be, of many facts or conditions will give to a state the right to declare forfeited or to cancel and annul the charter of a corporation under its laws. Any breach of a condition upon which the charter was granted, however, may be waived by the state and the corporation continue under the charter the same as if no breach occurred, and *thereafter the cause for forfeiture cannot be insisted upon by the state.* People v. Ulster Co. 128 N. Y. 240, 28 N. E. 635; People v. Manhattan Co. 9 Wend. 361 (N. Y.); Foster v. Joilet, 27 Fed. 899. And long delay in taking advantage of a ground of forfeiture has been held sufficient to constitute a waiver. People v. Oakland Bank, 1 Dougl. 282 (Mich.).

In this case there has been a delay of ten years in bringing the cancellation suit without any reason whatever being assigned to explain or justify the laches. Such delay is unreasonable and bars the remedy. Moreover, there was no difficulty in reviewing the naturalization order of the court of original jurisdiction by an appeal as from a chancery decree. This has been done in many cases. Furthermore, an action under section 15 "is in no sense an appeal from or review of the proceedings upon the petition. It is an independent action based upon fraud or illegality in the procurement of the certificate. Therefore it cannot be permitted to perform the office of an appeal." U. S. v. Milder, (C. C. A. 8), 284 Fed. 571.

V.

Estoppel.

The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced. *The rule is well recognized that when a party with full knowledge, or with sufficient notice or means of knowledge, of his rights, and of all the material facts, remains inactive for a considerable time or abstains from impeaching the transaction so that the other party is induced to suppose that it is recognized, this is acquiescence, and the transaction though originally impeachable, becomes unimpeachable.* Rothschild v. Title Guarantee & Trust Co., 204 N. Y. 458, 97 N. E. 879, 41 L. R. A. (N. S.) 740. Note: 9 L. R. A. 609.

Ignorance of his legal rights will not prevent one's conduct from working an estoppel if he has full knowledge of the facts. Rogers v. Portland etc. St. Ry., 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316 and note. Note: 48 L. R. A. (N. S.) 773.

> "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape." 10 R. C. L. 698 (quoted with approval by this court in the Tampico, 270 Fed. 537 at p. 542).

A state department in a matter of procedure and within the scope of departmental powers, may be estopped. Chicago etc. R. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744.

In this case the executive department of the Government had full knowledge of the facts, had due notice, appeared and contested, and after a judgment adverse to its claims neither appealed nor sued for cancellation of appellant's certificate for ten years. Such inaction could not but induce the belief that there was no further objection forthcoming from the appellee and that it had acquiesced in the judgment of the naturalization court. Hence, the appellee is now estopped from impeaching the judgment of the District Court of the Eastern District of Washington or the certificate based thereon, or from subjecting the appellant to the loss of a possession of acknowledged worth—citizenship of the greatest country in the world and the right to vote therein.

VI.

The Contentions of the Appellee Are Untenable.

It may be that counsel for the appellee will present to this Honorable Court some of their contentions made elsewhere. We shall, therefore, revert to them briefly in this place:

(a) Chinese or Japanese cases since 1882—of those admittedly belonging to the Mongolian or Yellow race—are no precedents for this case.

The Act of May 6, 1882, c. 126, Sec. 14, 22 Stat. 61 (U. S. Comp. St. 1901 p. 1333), expressly forbade the naturalization of Chinamen; and the courts even before 1882 had construed Sec. 2169, Revised Statutes, as excluding Mongolians from naturalization. See *In re* Ah Yup (1875), 5 Sawy. 155, Fed. Cas. No. 104. A certificate of naturalization issued, *after 1882,* to a Mongolian—and Chinese and Japanese are admittedly and obviously Mongolians—is issued in violation of the *obvious and express mandate* of the law, and therefore unlawful and void on its face. Chinese and Japanese belong to the Mongolian or Yellow race and are, therefore, inadmissible to citizenship in the United States, where citizenship is an exclusive privilege of white men and Africans. Section 2169 Revised Statutes; Ozawa v. United States, 260 U. S. 178.

There is no parallel between these cases and the case at bar. There has been no express and obvious law forbidding the admission of Hindus to citizenship. The words "white persons" do not clearly or manifestly exclude Hindus. Indeed, with the exception of one or two cases, federal and state courts have consistently held for at least twenty years, that Hindus are Caucasians and therefore of the white race. And such is also the consensus of learned opinion in the world.

(b) The reasoning of the Hon. William P. James in the opinion filed in this case (P. T. pp. 8-17), may be exhibited in the form of the following syllogism:

Mozumdar is an ineligible alien;

Certificate granted an ineligible alien is illegally procured;

Therefore, certificate granted Mozumdar is illegally procured.

Referring to the text of the opinion (at page 10, P. T., last lines), it is evident that the court overlooked the fact that the precise and only issue between Mozumdar and the naturalization examiner was as to whether a Hindu is or is not a free white person—Mozumdar asserting the affirmative and *claiming to be a white person.* (P. T. p. 6, lines 1-3). The naturalization court heard the evidence, weighed it, and decided that it preponderated in favor of Mozumdar's claim and so made the order (P. T. p. 6 last 4 lines) admitting him to citizenship. 207 Fed. 115.

(P. T. p. 11, lines 1 to 5): The learned judge overlooks the obvious fact that until the decision in the case of United States v. Bhagat Singh Thind the preponderance of judicial opinion was that Hindus were eligible to citizenship. The executive department of the Government as well as Congress had acquiesced in such interpretation of section 2169 by the courts; and it was just *the* question fought out in every Hindu naturalization case. This is an equity case, and therein obvious and outstanding *facts* cannot be waved out of existence by any presumptions. For here conscience must rule; as the purpose of equity is to mitigate the hardships which assail and at times

mar the working of the law. Hence, the petition could not have been denied by the eminent jurist who presided over the naturalization court "upon the applicant's own petition or testimony, or both," without violating the dictates of his own reason or conscience, in view of the testimony presented at the hearing, where both sides were represented and issue was joined on this very question of eligibility. 207 Fed. 115.

It has been held that where the law is changed by judicial decision, such change will not affect transactions made with reference to the law as it stood previous to such change. Metzger v. Greiner, 29 Ohio Cir. Ct. R. 447. And that as judicial construction of a statute has the same effect on existing rights as would be given a legislative amendment, adjudications which seem to render Revised Statutes Sec. 2502 unconstitutional, will not be given a retroactive effect on a franchise founded on a good consideration and granted when this statute is not questioned. State v. Oakwood St. Ry., 30 Ohio Cir. Ct. R. 632.

Moreover, the authority of precedents must yield to the force of reason and the paramount demands of justice and the decencies of civilized society. Norton v. Randolph, 40 L. R. A. (N. S.) 129, Am. Cas. 1915 A. 714, 58 So. 283, 176 Ala. 381.

(P. T. p. 11 middle of page): In the Nopoulos case, 225 Fed. 656, the opinion, towards the end, goes on to say:

> "In United States v. Plaistow, 189 Fed. 1010, the court says: 'The term illegally procured is not limited to irregularity of procedure, but also denotes the determination by the court contrary to law of the matter submitted to it. Tiedt v. Carstensen, 61 Iowa 334, 16 N. W. 214.'"

Evidently, the Plaistow opinion erred in its definition of "illegality," as did the Nopoulos opinion which followed it. For the Supreme Court of Iowa has consistently held to exactly the opposite view regarding the meaning of "illegality" from what it is made out to have held in the aforementioned cases which profess to follow it. Here are the words of the Iowa court:

> "When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. * * * But *if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal.* If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and parties are within its jurisdiction; for the law entrusts the decision to the discretion of the tribunal. * * * *The distinction between erroneous proceedings which are termed 'illegalities,' and erroneous decisions of fact, is obvious.* See Smith v. Board of Supervisors, 30 Iowa 531; McCollister v. Shuey *et al.*, 24 Iowa 362; Jordan v. Hayne *et al.*, 36 Iowa 9." Tiedt v. Carstensen, 61 Iowa 334, 116 N. Y. 214.

This disposes of the Nopoulos and Plaistow cases as authorities on the point to support which they are cited in the opinion of the lower court. We may, however, quote from the opinion of the Supreme Court of Iowa in another case:

> *"The statute contains no other provision as to how these matters shall be inquired into and determined;* but as said in Wood v. Farmer, 69 Iowa 537, 'It is a familiar rule of law that authority to do an act implies authority to do all other acts necessary to be done in executing the power conferred. The law will always presume the existence of authority to do acts incidental and necessary to the discharge of lawful power.' We think it clear that the defendant board *did have power, by proper investigation, to determine,* etc." Iowa Eclectic Medical College Association v. Schrader, 20 L. R. A. 355, 358.

> *"The board* (of examiners) *having jurisdiction to determine this question of fact, and having determined it, upon full investigation and evidence* by unanimous vote, *we must hold their action legal, even though we might reach a different conclusion on the facts,* if it were our province to consider them." Iowa Eclectic Medical College Association v. Schrader, 20 L. R. A. 355, 359.

Thus it is obvious that "illegality" may arise in a court *acting* contrary to law in *proceedings prescribed* by the law. But there can be no illegality in an erroneous decision of a matter of fact where the law confers discretion on the court in deciding. And

whether or not there is any discretion conferred in deciding the presence or absence of certain statutory conditions laid down by the Act of 1906, the question under section 2169 Revised Statutes, as to whether an applicant is white is preeminently a matter addressed to the discretion of the naturalization court.

The opinion in the Mulvey case declines to lay down any general rule, and emphasizes the fact that each case of this kind must be determined on its own circumstances. The case was decided by a divided court and Judge Hough wrote a vigorous dissenting opinion.

The Circuit Court of Appeals for the Second Circuit in United States v. Meyer, 241 Fed. 305, 154 C. C. A. 185, Ann. Cas. 1918 C. 704; and District Courts in *In re* Nananga, 242 Fed. 737; *In re* Weisz, 250 Fed. 1008; *In re* Pollock, 257 350; and *In re* Kreutzer *et al.,* 241 Fed. 985, took the opposite view in construing the statute to that adopted by the court in Grahl v. United States, 261 Fed. 487. Further, "The Department of Justice was requested by the Department of Labor to take the matter (of the construction of section 2171) to the Supreme Court of the United States, and the Department of Justice replied that after consideration of the subject it declined to take the case to the Suprefe Court." *In re* Kreutzer, 241 Fed. 985.

In every one of the cases cited in the learned opinion (P. T. pp. 11-13), the cancellation suit was filed

almost on the heels of the naturalization order, and no acquiescence in the order of the naturalization court, nor laches, were exhibited by the Government.

(P. T. p. 12 lines 3-4): The question of "lack of residence for the required time" is a question of *quantity* requiring the exercise of much less of the faculty of discretion in determining, than the question of whether the applicant is a white person, which refers to *quality* and is not susceptible to mechanical measurement.

The quotation from the Ginsberg opinion on p. 11 (P. T.) lines 6-15, is made up of *obiter dicta.* Moreover, a careful perusal of the reported opinion at 243 U. S. 472 reveals the fact that the learned justice in writing the opinion, had throughout, reference to the prescribed proceedings of the Act of 1906—"a code of procedure" which "specifies with circumstantiality the *manner* ('and not otherwise') in which an alien may be admitted to become a citizen of the United States; what his preliminary declaration shall be; form and contents of his sworn petition to the court and witnesses by whom it must be verified," etc. —all "with the studied purpose *to avoid well-known abuses.*" The words quoted by the Honorable William P. James on page 11 do not refer to "the general controlling principles found in the Act of 1802 and a few amendments thereto," wherein Sec. 2169 belongs.

Referring to the words quoted on page 11 (P. T.) we submit that the learned justice in writing his opin-

ion did not contemplate that the Government should challenge a certificate for "illegality" years after the judgment had become final. And we venture to think that there was no *manifest mistake* made by Judge Rudkin in admitting Mozumdar to citizenship, especially in view of the fact that the Supreme Court is supposed (at p. 13, last 10 lines, printed transcript) to place Mozumdar among individuals in border line cases with respect to whom "controversies have arisen and will no doubt arise again." He evidently falls, in the view of the court, in the zone of more or less debatable ground, and is, in the opinion of the learned Justice Sutherland, neither clearly eligible not clearly ineligible. Under these circumstances how could the naturalization court avoid perplexity or doubt? And how could it off-hand deny the petition on the "applicant's own petition or testimony, or both;" or obviate "conflict of evidence"?

In view of what is said in the preceding lines, the statement of Judge James at page 16, lines 5 to 9 from bottom of page (P. T.) seems to us to be too sweeping. Jurisdiction is the power to determine a cause or controversy and necessarily includes the power to decide it correctly as well as incorrectly. It does not relate to the rights of the parties as between each other but to the power of the court.

> "Jurisdiction of a question is the lawful power to enter upon the consideration of, and to decide it. It is not limited to making correct decisions.

It necessarily, includes the power to decide an issue wrong as well as right." Foltz v. St. Louis and S. F. Ry. Co., 8 C. C. A. 635, 60 Fed. 316, 318.

"When the District Court of Comanche county had acquired jurisdiction of the prisoner and of the charge against him and the question arose in what manner the grand jury should be selected, that issue could not have been beyond the limits of its jurisdiction. The law had conferred upon it the power, and had imposed upon it the duty to try the petitioner for his alleged offense and the decision of that question was indispensable to such a trial. That court could not have lawfully stopped and refused to determine the issue. If it decided that question wrong, its action may have been error, but it was nevertheless the exercise of its lawful jurisdiction." *Ex parte* Moran, 75 C. C. A. 396, 144 Fed. 594, 604.

Mr. Justice Bradley, in speaking for the Supreme Court in Hans Nielsen, petitioner, 131 U. S. 176, 183, 184, distinguished between erroneous and void judgments, saying:

"The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte* Siebold, 100 U. S. 371, 375, and is illustrated by the case of *Ex parte* Parks, as compared with the cases of Lange and Snow. *In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having juris-*

diction of the case. In the cases of Lange and Snow there was a denial or invasion of a constitutional right."

In State v. State, 12 Pet. (U. S.) 718, it is said:

> "Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them; the question is whether, in the case before a court their action is judicial or extra-judicial; with or without authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

In *Ex parte* Watkins, 32 U. S. 568, the rule is laid down that:

> "The jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it at all."

This language was quoted with approval in United States v. Maney, 61 Fed. 140.

The Supreme Court of California in Chase v. Christianson, 41 Cal. 253, says:

> "It is not the particular decision which makes up jurisdiction, but it is the authority to decide the question at all. Otherwise the distinction between erroneous exercise of jurisdiction on the one hand, and the total want of it on the other must be obliterated."

In Buckley v. Superior Ct. 96 Cal. 119, 31 Pac. 8, the lower court had granted a motion to dismiss an appeal taken to it from the judgment of a justice's court. The appeal was in all respects regularly taken, and the Superior Court, under the law, should not have dismissed the appeal. Speaking of the action of the court in dismissing the appeal it was said:

> "If it had jurisdiction to hear the motion, and as to that matter there can be no question, then the ruling upon the motion was simply an exercise of that jurisdiction; and however erroneous such ruling might be, it would be only an error of law, in no manner subject to review by an original proceeding in this court. *In this case the court had jurisdiction to hear the motion, and it would be an absurdity to say that upon submission of the matter the court had jurisdiction to deny the motion to dismiss the appeal, but no jurisdiction to grant it.*"

In Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565, the Superior Court had erroneously stricken out an answer filed by a defendant, and entered judgment against him without any further trial, in a case appealed from a justice's court. The court, upon the application for a writ of *certiorari,* said:

> "Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision made. The court in this case had the power, and in the regular course of proceeding in the disposition of the case before it, was actually called upon to determine, as a matter of law,

> whether or not the answer of petitioner was properly filed, and whether he was legally in default in the action; and the fact that the court erred in such decision does not render its judgment void."

Each of the two last cited cases was a case where no right of appeal existed, and the petitioner was without redress as to the action of the lower court founded upon a pure error of law.

In White v. Superior Court, 110 Cal. 60, 42 Pac. 480, the court quoted with approval from Von Roun v. Superior Court, 58 Cal. 358, this language:

> "If the order is one which the court had power to make, it is not for use to inquire whether this power was properly exercised or not. The writ of review is not a writ of error."

To the same effect is History Company v. Light, 97 Cal. 56, 31 Pac. 627.

Conclusion.

It would seem that there was no illegal procuring of the certificate of naturalization by the appellant in 1913; that the District Court for the Eastern District of Washington did not act illegally nor in excess of its jurisdiction, nor committed manifest mistake, nor was bound to decide one way only, nor was its decision beyond the bounds of reason, when it admitted appellant to citizenship; nor was there any abuse of its power by that court. The government's petition is without merit, and the lower court erred in overruling the motion to dismiss said petition.

It is, therefore, most earnestly urged by counsel for appellant that in the light of the decisions above cited, and the manifest error of the lower court in the premises, this Honorable Court will reverse the decree, with such directions as justice and equity may require.

Respectfully submitted,

S. G. PANDIT,

Solicitor and Counsel for Appellant.

Dated, Los Angeles, April 15, 1924.

Italics throughout the foregoing brief are ours.

S. G. PANDIT.