IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA
Plaintiff-Appellant
-vs-
SAKHARAM GANESH PANDIT
Defendant-Appellee

No. C-111-T
EQUITY

DEFENDANT'S AMENDED PRAECIPE FOR RECORD

The Clerk of this Court will please insert the following items in the Record on Appeal in this cause, in addition to those indicated in Praecipe filed by Plaintiff:

(1) After Plaintiff's item No. 2 in its Praecipe for Record - at the conclusion of points and authorities attached to Defendant's Motion to Dismiss, filed on November 5, 1923 - add the following abstract of Defendant's argument:-

The motion to dismiss was submitted to the Court on briefs. In his brief Defendant urged that there was no manifest mistake committed by the Court of naturalization in admitting him to citizenship; that the decision of a judge, who tries a case without a jury, finally determines the facts, where the evidence is of such a character that intelligent persons may honestly differ as to what was actually proved; and that under such circumstances, no manifest mistake is committed by a judge holding a view supported by the great weight of authority, even though, many years afterwards an uncertainty and doubt arising in the mind of the Court of Appeals on a similar point, may be resolved by the Supreme Court in opposition to such weight of authority; that to interpret Sec. 15 of the Act of June 29, 1906, in such manner

as to annul the whole doctrine of 'res judicata' and abolish the binding efficacy of all judgments would be unconstitutional, being in contravention of the Fifth Amendment to the Constitution of the United States providing for due process of law; that such interpretation and application of Sec. 15 would also render it an 'ex post facto' law within the prohibition of Article I, Sec. 9 of the Constitution of the United States; that when the courts have pronounced the law, and it has become known to and recognized in the community, though subsequent research and a more deliberate examination may compel a reversal of the decision, ignorance or mistake of the law cannot be imputed to work a forfeiture of rights acquired under the former decisions; that a subsequent decision of a higher court giving a different interpretation of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement; that courts cannot undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law.

Defendant also pointed out that when the law prescribes proceedings (as does the Naturalization Statute of June 29, 1906 for the most part) 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. And it is in reference to the omission of such plainly prescribed proceedings that the Supreme Court held in the case of United States vs. Ginsberg 243 U. S. 472, that "a manifest mistake by the judge cannot supply these nor render their existence non-essential." For as the Court said in that opinion:

"Prior to 1906 the Uniform Rule of Naturalization prescribed by the Constitution was found in the Act of 1802 and a few amendments thereto. This enumerated only general controlling principles." One of these "general controlling principles" is to be found in Sec. 2169 R. S. which provides that an alien being a free white person may be admitted to citizenship. If there is any provision of the naturalization laws addressed to the discretion of the court, this obviously is such a provision. Herein an error of judgment is possible in doubtful and dubious cases, but certainly no illegality can be predicated thereon.

The Defendant in this case, before his petition for naturalization came up for hearing in 1914 had performed all the conditions precedent prescribed by the statute. Thus he acquired the right to demand that he be permitted to present his proofs, among which were proofs of his being a "free white person." The State court of naturalization being satisfied with the competency and weight of the evidence and the credibility of witnesses produced by this Defendant in that regard, made its finding that he is a freewhite person and entered judgment accordingly. And under the rule laid down by the Supreme Court in United States v Ness, 245 U. S. 319, such a finding, and judgment based thereon, are "conclusive even as against the United States." And while it was competent for the government, at its option, to enter an objection, as it did, to his admission to citizenship at the hearing of his application in 1914, it could not, in 1923, base a charge of illegality on "objections to the competency or weight of the evidence or the credibility of witnesses." (United States v. Ness, Supra). The State Court, in concluding its memorandum of decision in the naturalization of this Defendant employed this language: "I am, therefore, of the opinion that the petitioner has succeeded in establishing beyond all reasonable doubt, that he

is a 'free white person' within the meaning of the naturalization act. He will, therefore, be admitted to citizenship." Judge Charles F. Clemens, United States District Judge for the Territory of Hawaii in his opinion in the case of Takao Ozawa, No. 274, at the April 1916 term, refers to the "learned opinion of Judge Willis I. Morrison of the Superior Court of California, rendered May 7, 1914, in the case In re Sakharam Ganesh Pandit," suggesting that in that case there had been "a contest to evoke the most thorough consideration."

It would seem that to obliterate the distinction between "error" and "illegality" and to incline to make the jurisdiction of a controversy dependent upon the correctness of the decision given in that case would establish anarchy in the administration of the law. Chaos can hardly be a remedy for the occasional injustice of fallible human judgment.

It has been held that a court of equity will not afford relief where there has been such laches as to cause it to be inequitable to do so. And in the case of United States v. Kichin, 276 Fed. 818, 821, the court said: "I may suggest that federal courts sitting in equity recognize and apply state statutes of limitation, though they may not be bound by them absolutely." While Sec. 343 and 345 of the California Code of Civil Procedure lay down a limitation against the state of "four years after the cause of action shall have accrued." It is not without significance in this connection, that the Naturalization Act of 1906 provides even in relation to crimes:

> "That no person shall be prosecuted, tried or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime."

Further, the intention of Congress in this regard is clearly shown by the provisions of Sec. 13 of the Naturalization Act as originally framed in 1906, and which section was omitted

from the statute as finally passed only because of the technical difficulty apprehended by some Congressmen in allowing appeals from nisi prius courts of the state to the United States Circuit Court of Appeals:

> "Section 13: That in any naturalization proceeding in any court exercising jurisdiction under this act either party shall have the right of appeal to the United States Circuit Court of Appeals of the proper circuit, and in any case such as is described by Sec. 5 of the judiciary act of March 3, 1891, such appeal may be taken direct to the Supreme Court of the United States: Provided, that all appeals under this section shall be taken within 45 days after the entry of the final order by the court before which such proceeding is had. And in no case in which the United States appears in opposition to the granting of a petition for naturalization shall the court before which such hearing is had, or the clerk thereof, issue a certificate of citizenship within 45 days after the entry of the final order unless the Bureau of Immigration and Naturalization shall file with the clerk of said court a statement to the effect that the United States does not propose to take an appeal. In case an appeal is taken within such time the court shallnot issue a certificate in such case except upon and in conformity with the mandate of the court to which such appeal shall have been taken." (Congressional Record Vol. 40, p. 7784).

In the case of United States v. Thind, 261 U. S. 204, the sole question determined was that of the eligibility of the applicant for citizenship. There was no question presented to, nor discussed by, the Court, concerning the propriety or impropriety of a cancellation suit. Besides the cancellation suit, in that case, was filed almost on the heels of the naturalization order.

Said the Supreme Court in Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968:

> "The true rule affirmed by the authorities, and the prevailing one, is to give a change of judicial construction in regard to a statute the same effect in its operation so as not to disturb vested rights as would be given to a legislative amendment - that is, apply the change made in the interpretation of the law so as to operate prospectively and not retroactively." To the same effect are Haskett v. Maxey,

134 Ind. 182, 33 N. E. 538, 19 L. R. A. 379; Metzger v. Greiner, 29 Ohio Cir. Ct. Rep. 447; State v. Oakwood St. Ry., 30 Ohio Cir. Ct. R. 632; Gibson v. Cleary, 77 Wash. 683, 138 Pac. 269.

The petition for cancellation attempts to base itself on the decision in United States v. Thind, Supra. That decision may be an authority on eligibility, but it may be noted that it does not pretend to lay down any rule on "illegal procurement." Further, it may be pointed out that the main contention in the Thind opinion (at pp. 207,208) is based upon what the Court said in the case of United States v. Ozawa, 260 U. S. 178, 195, 196, a few months before, the Court saying:

> "It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges."

Herein the Court ignores the fact that there are white and also black races natives of, and inhabiting, Asia. Furthermore, an impossible demand is made in the last sentence quoted. Nor does the Dartmouth College case uphold this proposition to support which it is cited - but contradicts it.

The question before Chief Justice Marshall in Dartmouth College vs. Woodward, 4 Wheat. 418, 644, was as to whether the charter of an eleemosynary corporation was protected from legislative interference by the contract clause of the constitution:

> "Contracts, the parties to which have a vested beneficial interest, and those only, it has been said are the subjects about which the constitution is solicitous, and to which its protection is extended." (4 Wheat. 641).

In deciding against this view, which urged restriction of the constitutional provision and exclusion of charters of charity organizations from its protection, the Chief Justice goes on to say:

> "It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent occurrence, to which the temptation was stronger and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given." (Italics ours).

This is immediately followed by the words quoted in the Ozawa case at p. 136, and referred to in the Thind case at pp. 207-208:

> "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

Accordingly, no matter what the framers of the provision regarding "white persons" in the naturalization law had specially in mind when the statute was enacted, and although the case of the white people of Asia or of Hindus and other Western Asiatics, "may not in itself have been of sufficient magnitude to induce a rule, yet it must be governed by the rule when established." Besides, in not mentioning the people of Europe, and in extending the privilege of naturalization to any free white person, it seems reasonable to think that Congress must have believed that there were white persons natives of countries outside of Europe. It would be clearly misleading to speak of a European race, of a European or white race, to which

substantially all inhabitants of Europe belong, or of an Asiatic race, of an Asiatic or yellow race, which includes substantially all Asiatics.

(2) After item No. 3 in Plaintiff's Praecipe, add Defendant's Exception to the ruling of the Court and the Court's order thereon allowing the exception, dated February 18, 1924.

(3) In Plaintiff's item No. 4 include the entire answer of Defendant filed March 10, 1924, without omitting the portions indicated by the Plaintiff under (a), (b), (c), and (d).

(4) After Plaintiff's item No. 5 insert the following:

The motion to strike out pleas was submitted to the court on briefs. The Defendant contended in his brief:

STATEMENT

On May 7th, 1914, after a contest by the United States of America, the defendant was admitted as a citizen of the United States by an order duly given and made by the Superior Court of Los Angeles County, State of California; and, until this cancellation proceeding was commenced, the defendant has been recognized as a citizen and enjoyed all the privileges of citizenship, and been subject to its obligations as fully set forth in his answer.

The first specification in the motion seeks to strike out the plea of res adjudicata, stated in only an incidental way, and the second specification seeks to strike out the denial of the allegation in the petition of plaintiff that the certificate and decree of naturalization were illegally procured and the affirmative allegation that the defendant was and is a white person, entitled to be naturalized under the provisions of Section 2169 of the Revised Statutes of the United States.

The other specifications in the motion seek to strike out the special defenses of res adjudicata, laches and estoppel pleaded in the answer, in bar of the further prosecution of this so-called equitable proceeding of cancellation.

Unless we are to conclude that the defendant is required to admit that the certificate and decree of naturalization were "illegally procured," as alleged in paragraph four of the petition, it necessarily follows that defendant is within his rights in denying this allegation. If, on the other hand, the allegation in the petition is a mere legal conclusion, it should not be considered, and the only effect of the denial would be that no issue is raised. But if it is a proper allegation in the petition, and it undoubtedly is, then certainly its denial is proper according to the most elementary rules of pleading.

The second specification of the motion is the very dominant, controlling issue involved in this action, (aside from the special defenses), namely, whether or not the defendant is a white person, within the meaning of Section 2169 of the Revised Statutes of the United States. The plaintiff alleges that he is not, and the defendant alleges that he is. We know of no rule of pleading that would justify the position of the plaintiff on this point. In fact, the motion to strike assumes the truth of the allegations sought to be stricken out (according to the opinion of Judge Bledsoe in this very case, upon a motion made by the defendant) to-wit: "that the defendant is a white person entitled to be naturalized under the provisions of Section 2169 of the Revised Statutes of the United States." It is only necessary to apply this well settled principle of pleading to this specification, to conclude that it is entirely without merit.

In fact, the same rule should be applied to all of the special defenses, for it not only nowhere appears in any of these special defenses that the defendant is not a "white person" within the meaning of Section 2169 of the Revised Statutes, but it is expressly alleged that he is. It does appear that he is a native of India, but the Court will take judicial notice that many "white persons" of the English and other races are born in India, about whose right to be naturalized there can be no question. This principle was successfully invoked by the plaintiff, upon the defendant's motion to dismiss the petition herein, and the same rule should be applied upon this motion; and, if so, the motion should be denied in toto. If this rule is applied, no further discussion or consideration would be necessary, but since the attorneys for the plaintiff have discussed the motion upon the assumption that the merits of the case are involved, we will briefly reply to their contentions.

But, before doing so, the special defenses pleaded in the answer should be considered, because if they are, or any one of them is, a defense, the merits of the controversy need not be further considered.

RES ADJUDICATA

Our first contention is that the plaintiff is barred by the naturalization proceeding, to which it was a party, from prosecuting this action. It is obvious from the facts pleaded that any other litigant would be barred by a decree rendered under the facts pleaded in the answer; but counsel for plaintiff contend that the United States is not so bound. We deny the soundness of this conclusion.

In Tinn v. United States District Attorney 148 Cal. 773, the Court said:

> "The contention of the petitioner is that an order admitting an alien to citizenship, made by a court of competent jurisdiction, is a judgment, possessing all the characteristics of an ordinary judgment of a court having jurisdiction of the subject-matter and the person; that after the lapse of six months from the time such order is made it is too late to institute proceedings by motion to vacate the same; that when such proceedings are instituted after such lapse of time the court is without jurisdiction to act therein, and that the only proceeding which can be thereafter taken to vacate such order is an action in equity to set aside, on the ground that it is procured by fraud or mistake. We think this contention is correct. It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. (United States v. Norsch (C.C.), 42 Fed. 417; Commonwealth v. Paper, 1 Brewst. 263; In re McCoppin, 5 Sawyer 632, (Fed. Cas. No. 8713); Spratt v. Spratt, 4 Pet. (U.S.) 408; Stark v. Chesapeake Ins. Co., 7 Cranch. 420; People v. McGowan, 77 Ill. 644, (20 Am. Rep. 254).) This being so, such judgment must possess the same qualities as any other judgment of a court having jurisdiction, and consequently it cannot be set aside, except in some recognized lawful mode."

And the learned Judge in United States v. Norsch, 42 Fed. 417 very clearly shows not only that the special defense of res adjudicata is proper, but that the petition for cancellation in the case at bar is without merit; the Court said:

> "It is apparent, I think, from the whole scope and tenor of the complaint that it was drawn upon the theory that the defendant was guilty of a fraud in presenting himself before the court as a candidate for naturalization, knowing, as he is alleged to have known, that he was not then entitled, under any provisions of the laws of the United States, to become a citizen. If the bill discloses any fraud committed by the defendant, it is a fraud of that description, and none other. But as I have recently had occasion to rule, in the course of the trial of indictments for naturalization frauds in the district court, a person does not commit a fraud, in a legal sense, by merely applying to a court of justice for relief or for the grant of some privilege, even though the applicant believes that under the law, rightly administered, he is not entitled to the relief sought or to the privilege claimed. Whatever a person's own opinion may be touching his right to relief in a given case, he is entitled to take the judgment of a court having jurisdiction to hear and determine the cause, and in so doing he commits no fraud. A litigant in such case only crosses the line dividing legal frauds

> from conduct that is merely reprehensible from a moral standpoint, when he resorts to false testimony, or to some trick or artifice, with a view of deceiving the court, and thereby obtaining a judgment to which he is not entitled. The present bill neither shows that the decree sought to be avoided was procured by false testimony given on behalf of the applicant on the hearing of the application for naturalization, or by means of any other fraudulent device. It shows, indeed, that the decree was and is erroneous, and that it was likewise irregular, in that there was no such judicial inquiry into the case as the act of congress contemplates shall be with such cases; but these are defects in the decree which can neither be remedied by a bill of this character, nor by this court. The demurrer is accordingly sustained."

In opposition to our plea of res adjudicata counsel cite two cases: United States v. Johannessen 225 U.S. 227; 56 L. Ed. 1066 and United States v. Ness, 245 U.S. 319; 62 L.Ed. 321.

In the first case the court refused to pass upon the question involved in the case at bar for after citing Spratt v. Spratt, 4. Pet. 393, 408; 7 L.Ed. 897, 902, in support of the proposition that a judgment admitting an alien to citizenship was like, every other judgment, complete evidence of its own validity; Mr. Justice Pitney, speaking for the court said:

> "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."

That is exactly what the government did in the case at bar, while in the Johannessen case the proceeding was ex parte.

In the second case cited (U.S. v. Ness) it is true that the court held, in that particular case, that the government was not estopped by the judgment admitting the defendant to citizenship, from prosecuting cancellation proceedings under Section 15 of the Naturalization Act. But in the opinion the binding character of such a judgment on certain issues is recognized, for the court says:

"Opposition to the granting of a petition for naturalization may prevail, because of objections to the

competency or weight of evidence, or the credibility of witnesses, or mere irregularities of procedure. A decision on such minor question, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. For Congress did not deem it to provide for a direct review by writ of error or appeal." (Italics ours)

The defendant in the case at bar contends that he falls within the recognized classification stated in the above quotation, for the judgment of naturalization was based upon the competency and weight of the evidence introduced to sustain the issue of the defendant, being a free white person, within the meaning of Section 2169 of the Revised Statutes of the United States.

This was the very issue tried and determined; the United States government having appeared under Section 11 of the Naturalization Act, and contested this issue with the defendant herein; and, in the language of the Supreme Court in the Ness case, supra; the "decision" . . . . . ."is conclusive, even against the United States". (Italics Ours)

L A C H E S

While language may be found in the decisions to the effect that the Government may not be defeated by laches, yet the cases on equitable estoppel indicate that the lapse of time, coupled with other circumstances showing hardship, may have a very persuasive effect in causing a court of equity to deny relief, in an equitable proceeding such as the one at bar. In fact, this was one of the elements of the decision in United States v. Stinson, 197 U. S. 200, 49 L.Ed. 724.

In Goulden and Smith v. Cook (4 Wend. (N.Y.) 217, the Court said:

> "After a lapse of now full ten years, to set aside a judgment for irregularity, on the grounds relied on in this case, would be an extraordinary and unprecedented exercise of the powers of the court . . . . . It may be very injurious to the defendant that he can not be relieved, but the blame rests with himself. There must be some limitation to applications of this nature and the length of time which has elapsed in this case must estop the defendant. For the most manifest error apparent on the record, the defendant could not be relieved by writ of error, the time for bringing such writ having expired; and if for error apparent on the record he is remediless, he can not expect to have a judgment set aside for less cogent cause."

We can not better conclude our discussion on this point than by citing the great author on Equity Jurisprudence (4 Pom. Eq. Jur. (2d Ed.) Section 1442 and cases cited. He said:

> "The true doctrine concerning laches has never been more concisely and accurately stated than in the following language of an able living judge: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief.'"

See also an interesting resume of the doctrine of laches in Penn. Mutual Life Ins. Co. v. City of Austin, 168 U.S., 685, 42 L.Ed., 627, cited, together with many other authorities, in the note to the above Section 1442.

The facts suggested in the above quotation as a proper basis for applying the doctrine of estoppel as "a ground for denial of relief" are all found in the case at bar.

Counsel meet this contention by the bald assertion that the government is not affected by laches, but the authorities are to the effect that the Government, in an equitable suit, is bound by equitable principles just as any other litigant, and hence the motion should be denied and the evidence permitted upon the trial to support the special defense of laches pleaded in the answer.

(5) Plaintiff's No. 7 (A Statement of the evidence in condensed and narrative form) when settled by the Court after objections and amendments suggested by the defendant are presented to it;

(6) Omit from all of the foregoing documents also, the formal parts thereof, as per Plaintiff's direction No. 10.

S. F. Landis

Defendant

Due service and receipt of a copy of the defendant's foregoing amended praecipe of record is hereby acknowledged this 7th day of April, 1926.

Samuel W. McNabb
United States Attorney

Donald Armstrong

~~J. Edwin Simpson~~
Assistant United States Attorney

Solicitors for Plaintiff.

The foregoing amended praecipe of record is approved this May 11th 1926.

U. S. District Judge.