NATURALIZATION

MEMBER OF COMMUNIST PARTY DENIED PRIVILEGE OF NATURALIZATION

Petitioner, an admitted member of the Communist Party of the United States, sought to become naturalized. Although not a conscientious objector, he testified that he would support this country with arms only if attacked, and he refused to state unqualifiedly that he would bear arms for the United States in case of war with a Communist power. Held, petition denied: §§305 and 307 of the Nationality Act of 1940[1] in effect deny naturalization to Communist Party members; and petitioner's refusal to say he would support this country in event of war further showed that he was not attached to the principles of the Constitution within the meaning of §307. *In re Mackay*, 71 F.Supp. 397 (N.D. Ind. 1947).

Section 305 of Nationality Act of 1940

Section 305 does not specifically name any group as being ineligible for citizenship; it does provide that members of any organization which advocates the overthrow of the Government by force and violence shall not be naturalized.[2] The instant case is the first to interpret the above provisions of the Act. It was thus necessary to determine whether the Act denies to members of the Communist Party the privilege of naturalization.[3]

The purpose of the Nationality Act of 1940 was to revise and codify the law relating to immigration and naturalization. Section 305 of the bill as originally written was a restatement of the prior naturalization statute which did not include Communists within its scope.[4] However, that fact was noted by

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1. 54 Stat. 1137, 1141, 1142; 8 U.S.C. §§705, 707 (1940).
2. The pertinent provisions of §305 are: "No person shall hereafter be naturalized as a citizen . . . who . . . is a member of any . . . organization . . . that believes in, advises, advocates, or teaches—(1) the overthrow by force or violence of the Government of the United States."
3. "The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, §8, cl.4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate." Tutun v. U.S., 270 U.S. 568, 578 (1926).

the Committee on Immigration and Naturalization of the House of Representatives and §305 was returned to a subcommittee to be amended to include Communists.[5] In the opinion of the Committee as expressed both within the Committee and before the House of Representatives §305, as amended and adopted, denies naturalization to Communists.[6] Perhaps the greatest objection which could be made to placing that construction upon §305 is that the Communist Party might advocate a change in the form of Government by peaceful means rather than by the use of force and violence. Significantly, that objection was expressly rejected by the Committee with regard to the Communist Party.[7]

The legislative history of §305 thus shows that the section was drafted for the express purpose of denying naturalization to Communists and that this purpose of the section was related to the House of Representatives prior to its passage. The decision that petitioner, as a member of the Communist Party, is denied the privilege of naturalization by §305 of the Nationality Act of 1940 is therefore supported by the legislative history of that Act,[8] which is indicative of the Congressional intent.[9]

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4. Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 4 (1940). The prior Act forbade naturalization to disbelievers in organized government, polygamists, and advocates of political assassination. 34 Stat. 596, 598-599 (1906).

5. The Chairman: " . . . Without objection the amendment will include Communists and also Fascists and Nazis and any others who advocate attempting to overthrow the government." Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 322 (1940).
   For further references to the intent of the Committee to deny the privilege of naturalization to Communists, see id. at 4, 68, 210, 304, 327-331, 336, 375, 394, 436, 525.

6. Before the Committee it was stated that §305 is "so comprehensive that it will include anarchists or Communists, Fascists, Nazis, and every other one." Id. at 328.
   The following discussion took place before the House of Representatives:
   Mr. REES of Kansas: " . . . Under this bill, we believe we have covered the question of fascism, nazi-ism, communism, or any other 'ism', although they are not specifically mentioned by name . . . "
   Mr. NORRELL: "In other words, if he is that kind of person to begin with, he cannot become naturalized?"
   Mr. REES: "The gentleman is right." 86 Cong. Rec. 11949 (1940).

7. Hearings before Committee on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess. 327-328 (1940).

8. Instant case at 399.

9. U.S. v. Great Northern Ry. 287 U.S. 144, 154 (1932).

While the "force and violence" provisions of §305 are without prior judicial interpretation, similar provisions in other statutes have frequently been before the courts.[10] Two methods have been used to apply such statutes to members of the Communist Party. One of these methods is the interpretation of Communist literature to determine that the Party advocates the use of force and violence to overthrow the Government.[11] The basic weakness of that approach is that it involves the interpretation of Communist publications without reference to the period or circumstances in which they were written or the immediate purpose of the publication.[12]

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10. Alien Registration Act of 1940. 54 Stat. 670, 671 (1940). 18 U.S.C. §10(a)(3) (Supp. 1947) prohibits the organization of and membership in an organization which advocates the overthrow of government by force and violence; however, the Act has never been applied to Communists. For an application of the Act see Dunne v. U.S., 138 F.2d 137 (C.C.A. 8th 1943).

The Hatch Political Activity Act, 53 Stat. 1147, 1148 (1939), 18 U.S.C. §611 (Supp. 1947) makes it unlawful for a federal employee to be a member of an organization which advocates the overthrow of our constitutional form of government. See U.S. v. Marzani, 71 F.Supp. 615 (D.C.D.C. 1947) for an application of the Act to a Communist.

41 Stat. 1008, 1009 (1920), 8 U.S.C. §137(c) (1940) provides that alien members of such organizations shall be excluded from admission into the United States or having entered shall be deported. See cases cited notes 11, 13, and 19, infra.

See also the Labor Management Relations Act of 1947 §9(h), 61 Stat. 143 (1947), 29 U.S.C. §159(h) (Supp. 1947) which provides that affidavits by officers of labor organizations to the effect that they are not Communists and do not advocate the overthrow of the government by force and violence shall be a prerequisite to enforcing certain provisions of the Act. For a discussion of the pertinent provisions of the Act see Reilly, "The Taft-Hartley Act," 20 Tenn. L. Rev. 181 (1948).

11. Instant case at 398-399. In Abern v. Wallis, 268 Fed. 413 (S.D.N.Y. 1920) the court held: " . . . the manifesto and programme of the Communist Party, together with other exhibits in the case, are of such character as to easily lead a reasonable man to conclude that the purpose of the Communist Party is to accomplish its end, namely, the capture and destruction of the state, as now constituted, by force and violence." Accord, first circuit: Skeffington v. Katseff, 277 Fed. 129 (C.C.A. 1st 1922); second circuit: Vojewvic v. Curran, 11 F.2d 683 (C.C.A. 2d 1926); seventh circuit: Kjar v. Doak, 61 F.2d 566 (C.C.A. 7th 1932); ninth circuit: Branch v. Cahill, 88 F.2d 545 (C.C.A. 9th 1937); Sormenen v. Nagle, 59 F.2d 398 (C.C.A. 9th 1932); Ex parte Vilarino, 50 F.2d 582 (C.C.A. 9th 1931); Kenmotsu v. Nagle, 44 F.2d 953 (C.C.A. 9th 1930). Cf. cases cited n.15, infra. But cf. Strecker v. Kessler, 95 F.2d 976 (C.C.A. 5th 1938).

12. The publication most frequently interpreted to determine that the Communist Party advocates the use of force and violence is Marx, "Manifesto of the Communist Party" (1848).

In Schneiderman v. U.S., 320 U.S. 118, 154 (1942), a denaturalization proceeding, the Supreme Court considered the Communist Manifesto and other literature and, while an interpretation

Another possible approach to the "force and violence" provisions of the Act is to take judicial notice that the Communist Party advocates the use of force and violence to overthrow the government.[13] Courts may take judicial notice of matters which are so notorious as not to be disputed or which are capable of immediate and accurate demonstration.[14] Therefore, it becomes necessary to inquire whether judicial notice of Communist Party principles can be justified as being within either of the above categories. While the fact that the Party advocates the use of force and violence has been referred to in language which indicates notoriety, the courts have not held that the Party so advocates without relying, at least in part, on an interpretation of Party literature.[15] The cases which have interpreted Communist literature and held that the Party advocates the use of force would indicate that the matter is capable of immediate proof;[16] however, those cases have not been uniformly followed.[17] Therefore, it would seem that the force and violence issue with regard to the Communist Party is not within the proper scope of judicial notice.[18]

Section 307 of Nationality Act of 1940

Section 307 does not refer to members of any organization but only denies naturalization to individuals who are not "attached to the principles of the Constitution of the United States and well disposed to the good order and happi-

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of this material was unnecessary to the decision in that case, the Court indicated that it would difficult to esablish the principles of a political party by merely reading the publications of the party without reference to the circumstances in which they were written.

13. " . . . the Court may take judicial knowledge of the historical fact that Communism . . . advocates force and a so-called dictatorship of the proletariat as a necessary means of obtaining the objectives of Communism;" Instant case at 399.

14. 9 Wigmore, "Evidence" §2571 (3d ed. 1940); Morgan, "Judicial Notice", 57 Harv. L. Rev. 269, 286 (1944).

15. The fact that the Communist Party advocates the use of force and violence has been referred to in the following language: "well known" Yokinen v. Comm'r of Immigration, 57 F.2d 707 (C.C.A. 2d 1932); "general knowledge" Murdoch v. Clark, 53 F.2d 155, 157 (C.C.A. 1st 1931); and "settled" Ex parte Jurgans, 17 F.2d 507, 511 (D.Minn. 1927). The decisions in the above cases also rely on an interpretation of Communist literature either by the court or in prior cases. By one theory of judicial notice it is improper for a court to hear evidence on a matter of which it has taken judicial notice. Morgan, supra n.14.

16. Cases cited n.11 supra.

17. See n.27 infra.

18. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942); State v. Reeves, 5 Wash.2d 637, 106 P.2d 729 (1940).

ness of the United States. . . . " The instant case raised the question of whether a member of the Communist Party can be attached to the principles of the Constitution.[19]

Assuming that the principles of the Communist Party are incompatible with the Constitution, would it necessarily follow that a Party member cannot be attached to the principles of the Constitution? A holding to that effect is in fact an imputation to the party member of the party principles.[20] The imputation is difficult to justify in the absence of a showing that petitioner has adopted the principles of the Communist Party as his own principles.[21] If members of political parties are to be barred from citizenship upon that basis alone, the determination as to which political parties are to be thus affected is properly a legislative function. Section 305 has the effect of imputing the principles of the Communist Party to a member thereof by providing that membership alone is a bar to naturalization. Therefore, the attempt of the Court in the instant case to apply the same reasoning to §307 was unnecessary.[22]

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19. Instant case at 399.

20. Petitions for naturalization have been denied to members of organizations as such: In re Skoglund, 46 F.Supp. 434 (D.Minn. 1942) (member of Socialist Party, Communist Party, Communist League of America, and Workers' Party of America in succession); In re Olson, 4 F.2d 417 (W.D.Wash. 1925) (member of I.W.W.); certificates of naturalization of party members have been canceled: U.S. v. Topolcsanyi, 40 F.2d 255 (C.C.A. 3d 1930) (Communist); and party members have been deported: Lisafeld v. Smith, 2 F.2d 90 (W.D.N.Y. 1924).

21. It is now settled that the government in a denaturalization proceeding must show lack of attachment by "clear, unequivocal, and convincing evidence." A mere showing of membership in the Communist Party does not meet this requirement. Schneiderman v. U.S., 320 U.S. 118, 158-159 (1942). The rule in a naturalization proceeding has been declared to be that when doubts exist concerning the grant of citizenship, "generally at least, they should be resolved in favor of the United States and against the claimant." U.S. v. Manzi, 276 U.S. 463, 467 (1928). Even the latter more liberal rule does not appear to justify the strict imputation of party principles to a party member. For an interesting application of the Schneiderman decision see U.S. v. Korner, 56 F.Supp. 242 (S.D. Calif. 1944), a denaturalization proceeding, where the court held that the government must prove lack of attachment by facts which show a "clear and present danger" in the defendant's conduct.

22. For a thorough discussion of the attempt to regulate the Communist Party by legislative means see Hearings before Subcommittee on Legislation of the Committee on Un-American Activities on H.R. 4422 and H.R. 4581, 80th Cong., 2d Sess. (1948); the following pages are particularly in point with the problem involved

A further question raised under § 307 by the instant case was whether the refusal of one who was not a conscientious objector to take an oath to bear arms in the event of future wars showed a lack of attachment to the principles of the Constitution.[23] Congress has seen fit to exempt conscientious objectors from their Constitutional duty to bear arms,[24] and the Supreme Court has given effect to this policy by admitting to citizenship persons who as conscientious objectors refused to take the oath to bear arms.[25] However, the Congressional exemption from the duty to bear arms has been limited to those persons whose objections stem from religious training and belief.[26] If the courts are to give effect to this Congressional policy, exemption from taking the oath to bear arms should be similarly limited. Therefore, a petitioner for naturalization who for policital reasons refuses to take the oath to bear arms is properly denied citizenship as a person who is not attached to the principles of the Constitution.

The strongest ground for the decision in the instant case is the legislative history of §305 of the Nationality Act of 1940. It is unfortunate that more weight was not given to that ground in the opinion. In so far as the decision rests

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in the instant case: 130-145, 434-445, 456-457, 458-469, 470-490, 492-493, 493-495.

See Biddle, "The Nurnberg Trial", 33 Va. L. Rev. 679, 691-693 (1947) for a discussion of criminality of membership in an organization in relation to the War Crimes Trials.

23. Instant case at 400.

24. The Selective Service Act of 1940, 54 Stat. 885, 889 (1940); 50 U.S.C.App. §305(g) (1940) provides: " . . . Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . . " Other statutes providing such exemptions were: 40 Stat. 557, 558 (1918); 40 Stat. 76, 78 (1917); 39 Stat. 116, 197 (1916); 32 Stat. 775 (1903); 13 Stat. 6, 9 (1864).

25. Girouard v. U.S., 328 U.S. 61 (1945) (Seventh Day Adventist). Prior to the Girouard case the refusal to take an oath to bear arms for any reason was a ground for denying citizenship; the following cases which denied citizenship upon that ground were expressly overruled by the Girouard case: U.S. v. Bland, 283 U.S. 636 (1931) (Nurse with religious scruples against bearing arms); U.S. v. Macintosh, 283 U.S. 605 (1931) (Baptist minister, member of faculty of Divinity School, Chaplain of Yale Graduate School, and Dwight Professor of Theology); U.S. v. Schwimmer, 279 U.S. 644 (1929) (Uncompromising pacifist).

26. Berman v. U.S., 156 F.2d 377, 382 (C.C.A. 9th 1946); U.S. v. Kauten, 133 F.2d 703, 707 (C.C.A. 2d 1943) interpreting the Selective Service Act of 1940, n.23, supra.

upon the interpretation of Communist literature, judicial notice of Communist Party principles, or the imputation of Communist Party principles to a party member, it is of doubtful validity. While prior decisions support these grounds, the more recent and better reasoned cases reject them.[27] Finally the holding that the refusal to take an oath to bear arms is a ground for denying citizenship to one who is not a conscientious objector is in accord with the Congressional policy of exempting conscientious objectors from the duty of bearing arms and does not conflict with the policy of admitting such conscientious objectors to citizenship without the oath to bear arms.

TORTS

EMPLOYER'S LIABILITY IN HIRING PHYSICALLY UNFIT EMPLOYEE

An employee sued his employer in tort[1] for personal injuries caused when the employee's serious heart disease was aggravated by hard manual labor. The complaint alleged that the employer required a physical examination at the time of hiring, which disclosed the heart ailment; but that the employee was unaware of the disease and the employer did not inform him of it although the employer knew that strenuous labor would be likely to cause harm. It was further alleged that the employer had breached two duties: that of refraining from assigning the employee hard manual labor, and that of informing him of his infirmity. The trial court gave judgment for the employee. On appeal, the Supreme Court of Maine reversed, holding the complaint defective in

27. Recent cases rejecting these grounds are: Schneiderman v. U.S., 320 U.S. 118 (1942); Strecker v. Kessler, 95 F.2d 976 (C.C.A. 5th 1938); Ex parte Fierstein, 41 F.2d 53 (C.C.A. 9th 1930); Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942); State v. Reeves, 5 Wash. 2d 637, 106 P.2d 729 (1940).

1. The employee in the principal case did not bring his action under the Maine Workmen's Compensation Act because that Act provides for recovery against employers only when the injury was caused by an "accident." Me. Rev. Stat. (1944) c. 26, §8. Here the heart injury resulted gradually from the work and did not result directly from a sudden strain. Cf. Comer's Case, 130 Me. 373, 156 Atl. 516 (1931), where a pre-existing heart ailment, aggravated by a sudden strain, was held to be "accidental" within the meaning of the Maine statute. See also Brown's Case, 123 Me. 424, 123 Atl. 421 (1924): "Sudden heart dilatation caused by a strain would be we think in ordinary parlance called accidental."