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Conclusive Administrative Decisions

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CONCLUSIVE ADMINISTRATIVE DECISIONS

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I.

EXECUTIVE JUSTICE

Administrative Determination of Rights. The increase in litigation which has accompanied the growth of this country since the close of the Civil War would have resulted in an intolerable burden on the federal courts if Congress had not adopted the system of administrative determination of rights which is aptly referred to as executive justice. Many people now have no contact with the courts in certain kinds of disputes. Instead, their rights are determined by administrative officials having jurisdiction of the particular question raised.[1]

Court Review Only if Administrative Remedies Exhausted. The federal courts ordinarily will not review an administrative decision of a question of fact unless all administrative remedies have been exhausted.[2] Their attitude is clearly shown by the decision of the Supreme Court in the case of *United States v. Sing Tuck.*[3] It appeared from the statement of facts in this case that an immigration inspector had decided against the right of Sing Tuck to enter this country. Although he was informed by the inspector of his right to appeal to the Secretary of Commerce and Labor, Sing Tuck did not appeal. Instead, he sought to be discharged from the custody of the immigration inspector by means of a *habeas corpus* proceeding in the Circuit Court of the United States for the Northern District of New York. The

*See page 577 for biographical note.

[1] While this article deals with the finality of administrative decisions concerning the right to use the mails and the right to enter, or remain in, this country, the general principles developed apply to decisions of all administrative officials of the national government whose decisions on any particular question have been made final by acts of Congress.

[2] *United States ex rel. Cubyluck v. Bell,* 248 Fed. 995 (E. D. N. Y. 1917); *Ex parte Tinkoff,* 254 Fed. 222 (N. D. Ill. 1918); *Napore v. Rowe,* 256 Fed. 832 (C. C. A. 9th, 1919); *United States ex rel. Grau v. Uhl,* 262 Fed. 532 (S. D. N. Y. 1919). *Contra, Whitfield v. Hanges,* 222 Fed. 745 (C. C. A. 8th, 1915). This rule does not apply to administrative decisions of questions of law. *Gonzales v. Williams,* 192 U. S. 1 (1904); *Ex parte Koerner,* 176 Fed. 478 (C. C. E. D. Wash., 1909).

[3] 194 U. S. 161 (1904).

decision of the Circuit Court upholding the detention of Sing Tuck for deportation was reversed by the Circuit Court of Appeals on the ground that he was entitled to a judicial investigation of his claim of American citizenship. The United States obtained a writ of *certiorari* from the Supreme Court and the judgment of the Circuit Court of Appeals was reversed. Mr. Justice Holmes in delivering the opinion of the Court, said:

> "The attempt to disregard and override the provisions of the statutes and the rules of the department and to swamp the courts by a resort to them in the first instance must fail. * * * Before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through * * *." (170.)

Judicial Relief from Administrative Decisions Limited. Even when a question of fact is involved and all administrative remedies have been exhausted or when the question is one of law,[4] a person can obtain judicial relief from an administrative decision only under certain circumstances. In the following pages an effort has been made to set forth when administrative decisions concerning the right to use the mails and the right to enter, or to stay in, this country will be treated by the federal courts as conclusive.

II

DEPRIVATION OF THE USE OF THE MAILS

Exclusion of Obscene and Libelous Matter. The first limitation on the use of the mails was made in 1865 when Congress passed an act forbidding the admission of any obscene publication into the mails of the United States.[5] It is now provided by Section 211 of the United States Criminal Code that obscene and indecent books, pictures, and letters are nonmailable matter which shall not be conveyed in the mails or delivered from any post office or by any letter carriers.[6] The term, "indecent," is defined in this section as including matter of a character tending to incite arson, murder, or assassination.[7] In Section 212 of the Criminal Code all matter on the outside of which is found anything that is obscene or libelous is declared to be nonmailable and the Post-

[4] See page 1, note 2.
[5] 13 Stat. 507 (1866), Sec. 16.
[6] 35 Stat. 1129 (1909), Sec. 211, 18 U. S. C. (1926), Sec. 334.
[7] 36 Stat. 1339 (1911), Sec. 2, 18 U. S. C. (1926), Sec. 334.

master General is authorized to prescribe regulations for withdrawing such matter from the mails.[8]

Decision of Postmaster General on Questions of Law Upheld as Reasonable. In the few cases in which the decisions of the Postmaster General that matter was nonmailable under these provisions of the Criminal Code have been attacked the courts have refused to interfere.[9] Since the facts were undisputed in each of these cases, whether the matter sought to be mailed fell within the prohibitions of the statute involved was a question of law.[10] The courts accepted the decision of the Postmaster General on the question of law in each case because there was a reasonable foundation for the decision.

Exclusion of Matter Connected with Lotteries. Section 213 of the United States Criminal Code makes everything connected in any way with lotteries or gift enterprises nonmailable.[11] Whether a particular enterprise as to which the facts are admitted falls within the prohibitions of the statute is, as pointed out above, a question of law. The decisions by the Postmaster General on this question of law have been rejected by the courts in the three cases in which they have been attacked.[12] In the case of *Post Publishing Company v. Murray,* it appeared that "The Boston Post" had advertised that pictures of fifty women would be taken in the Boston shopping district and would be printed in the Sunday issue of the paper with the heads missing. A five dollar gold piece was promised to each woman who could identify her picture at the newspaper office on the following day. The issues of the paper in which this advertisement appeared were ordered by the Postmaster General to be excluded from the mails on the ground that the scheme was a lottery. The District Court of the United States for the District of Massachusetts agreed with the decision of the Postmaster General, but the Circuit Court of Appeals enjoined the enforcement of the exclusion order on the ground that the advertising scheme did

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[8] 35 Stat. 1129 (1909), Sec. 212, 18 U. S. C. (1926), Sec. 335.

[9] *Davis v. Brown,* 103 Fed. 909 (C. C. S. D. Ohio, 1900); *Anderson v. Patten,* 247 Fed. 382 (S. D. N. Y., 1917); *Burleson v. United States ex rel. Workingmen's Co-Op. Pub. Ass'n,* 274 Fed. 749 (C. A. D. C., 1921).

[10] See *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, 109 (1902).

[11] 35 Stat. 1129 (1909), Sec. 213, 18 U. S. C. (1926), Sec. 336.

[12] *Brooklyn Daily Eagle v. Voorhies,* 181 Fed. 579 (C. C. E. D. N. Y., 1910); *Eastman v. Armstrong-Byrd Music Co.,* 212 Fed. 662 (C. C. A. 8th, 1914); *Post Publishing Co. v. Murray,* 230 Fed. 773 (C. C. A. 1st, 1916).

not fall within the prohibitions of the statute. The Circuit Court of Appeals said that as the statute involved was a highly penal one it was not susceptible of a liberal interpretation that would bring within its prohibitions publications not clearly within its terms.[13] The advertising schemes in the other two cases mentioned above were as unobjectionable as the one just discussed. Irrespective of whether the rule of strict construction applicable in criminal cases should be applied in these civil cases dealing with the exclusion of matter from the mails because the provisions are part of a criminal statute,[14] one has a feeling that the Postmaster General went too far in condemning the novel advertising schemes involved in these cases and that the courts were perfectly justified in rejecting his decisions as an unreasonable interpretation of the statute.

Fraud Orders. The bulk of the litigation over the action of the Postmaster General in denying the use of the mails has come from the issuance of fraud orders. Under Sections 259 and 732 of Title 39 of the United States Code[15] the Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting a lottery or gift enterprise or any scheme for obtaining money or property through the mails by means of fraudulent representations, order the local postmaster not to deliver any mail and not to pay any money orders to such person or company or to the agent of such person or company. Section 259 requires that the word, "Fraudulent," be stamped on all mail addressed to those engaged in the activities denounced by that section and that the mail be returned to the sender under such regulations as the Postmaster General shall prescribe Under Section 732 the Postmaster General is authorized to provide regulations for the return to the remitters of all sums represented by money orders payable to those engaged in the forbidden enterprise. The orders issued by the Postmaster General to enforce these provisions are known as fraud orders.[16] It will be noted that fraud orders prevent the delivery of mail which has been conveyed to the post office from which mail for the addressee is delivered, whereas the exclusion provi-

[13] 230 Fed. 776.

[14] See *Masses Publishing Co. v. Patten,* 246 Fed. 24, 37 (C. C. A. 2d, 1917).

[15] 28 Stat. 964 (1895), Sec. 4 and 26 Stat. 466 (1891), Sec. 3.

[16] Fraud orders are set out at length in American School of *Magnetic Healing v. McAnnulty,* 187 U. S. 94, 98-99 (1902), and in *Hurley v. Dolan,* 297 Fed. 825, 825-826 (C. C. A. 1st, 1924).

sions discussed at the beginning of this section prevent the receipt at or transportation from the post office where the sender lives of forbidden matter.

First Class Mail Not Subject to Search. In the statutes just referred to as authorizing the issuance of fraud orders it is specifically provided that nothing in those statutes shall be construed as authorizing any person to open any letter not addressed to himself. It was said in *Ex parte* Jackson[17] that the Fourth Amendment of the Constitution of the United States would prevent Congress from adopting any law permitting the search of sealed mail by the postal officials without a warrant. Congress has never passed a law authorizing the use of search warrants for the search of sealed mail[18] for violations of the postal laws and it has been held that search warrants cannot be issued in the absence of statutory authority.[19]

Sources of Information for Fraud Orders. Since first-class mail cannot be searched, the Postmaster General must rely on other sources of information for the issuance of fraud orders. The most general source is complaints by persons who feel that they have been cheated by fraudulent schemes perpetrated through the mails. Another source of information is advertisements.

Opportunity for Hearing Required Before Fraud Order Is Issued. The Postmaster General is authorized to issue a fraud order upon evidence satisfactory to himself[20] that the mails are being used for a forbidden enterprise. It was said in the case of *People's United States Bank v. Gilson*[21] that a fraud order can be issued without any opportunity to be heard being given to the person against whom it is directed, but the federal courts would certainly hold that any one whose rights are prejudiced by

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[17] 96 U. S. 727, 733 (1877).

[18] Congress has authorized the Postmaster General to prescribe the manner of wrapping all packages of matter not charged with first-class postage, so that the contents of such packages may be easily examined. 20 Stat. 361 (1879), Sec. 24, 39 U. S. C. (1926), Sec. 250.

[19] *United States v. Jones,* 230 Fed. 262 (N. D. N. Y., 1916).

[20] Although the statutes state that the Postmaster General shall issue fraud orders upon evidence satisfactory to him, it is, of course, impossible for him to act personally in the multitude of cases that must be decided. It is enough if he acts upon the recommendations of his duly authorized assistants. See *People's United States Bank v. Gilson,* note 2, *infra,* at page 5; *Lewis Publishing Co. v. Wyman,* 152 Fed. 787, 791 (C. C. E. D. Mo., 1907).

[21] 140 Fed. 1, 7 (C. C. E. D. Mo., 1905).

the lack of a fair hearing cannot consistently with the requirement of due process of law be deprived of the use of the mails.[22]

Issuance of Fraud Order Sustained. When the issuance of a fraud order is based upon a decision by the Postmaster General of a question of law, his decision will stand unless it is palpably wrong.[23] If the decision of the Postmaster General on a point of law is wrong, but there is legal authority for his action on another ground, the courts will also refuse to interfere.[24]

The decision by the Postmaster General of a question of fact[25] is final if it has been reached after an opportunity for a fair hearing has been given and if there is some substantial evidence to support it.[26] The courts have no jurisdiction to disturb the finding of the Postmaster General under these circumstances.

Fraud Order May Prevent Delivery of Proper Mail. A fraud order is not invalid because it prevents the delivery of mail not connected with the forbidden enterprise against which the order has been aimed. It has already been pointed out that the postal officials are prohibited under the Fourth Amendment from searching first-class mail without a warrant.[27] Even if there were authority for the issuance of a warrant for this purpose, the use of search warrants to determine whether mail addressed to a person conducting a fraudulent enterprise is connected with that enterprise would be wholly impracticable. The only way to enforce the law under these circumstances is to prohibit the delivery of all mail to the defrauder. This method of enforcement has been held proper.[28]

Fraud Order Effective Until Forbidden Enterprise Abandoned. When a fraud order has been issued, it is effective until the

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[22] See *Donnell Mfg. Co. v. Wyman*, 156 Fed. 415, 416 (C. C. E. D. Mo., 1907); *Aycock v. O'Brien*, 28 F. (2nd) 817, 817 (C. C. A. 9th, 1928).

[23] *Enterprise Savings Ass'n v. Zumstein*, 64 Fed. 837 (C. C. S. D. Ohio, 1894), affirmed in 67 Fed. 1000 (C. C. A. 6th, 1895); *New v. Tribond Sales Corporation*, 19 F. (2d) 671 (C. A. D. C., 1927). Cf. *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904); *Smith v. Hitchcock*, 226 U. S. 53 (1912).

[24] *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

[25] The Postmaster General has no authority to issue a fraud order in cases in which his decision must necessarily be based on his own opinion rather than on proof of fraud in fact. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

[26] *Missouri Drug Company v. Wyman*, 129 Fed. 623 (C. C. E. D., Mo., 1904); *Putnam v. Morgan*, 172 Fed. 450 (C. C. S. C. N. Y., 1909); *Leach v. Carlisle*, 258 U. S. 138 (1922); *Aycock v. O'Brien*, 28 F. (2d) 817 (C. C. A. 9th, 1928).

[27] Page 8, *supra*.

[28] *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

Postmaster General is convinced that the person against whom the order was issued is no longer desirous of using the mails for the prohibited purpose.[29]

III

EXCLUSION AND DEPORTATION

Statutory Provisions. Section 136 of Title 8 of the United States Code [30] provides that imbeciles, diseased persons, criminals, polygamists, prostitutes, contract laborers, persons likely to become a public charge, Asiatics, with certain exceptions, and illiterates shall be excluded from admission into the United States. And Section 153 of Title 8 declares that in every case in which an alien is excluded from admission into the United States "the decision of a board of special inquiry[31] adverse to the admission of such alien shall be final,[32] unless reversed on appeal to the Secretary of Labor,"[33] Section 155 of Title 8 of the United States Code provides for the deportation of all aliens who within five years after entry are found to have belonged at the time of entry to a class excluded by law and of all aliens who at any time advocate anarchy or assassination of public officials or who indulge in or benefit from prostitution.[34] This section makes the decision of the Secretary of Labor final in every case in which a person is ordered deported from the United States.

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[29] *New Orleans National Bank v. Merchant,* 18 Fed. 841 (C. C. E. D. La., 1884). Cf. *Milwaukee Publishing Co. v. Burleson,* 255 U. S. 407 (1921).

[30] 39 Stat. 875 (1917), Sec. 3.

[31] These boards, consisting of three members, are appointed by the commissioner of immigration or the inspector in charge at the various ports of arrival to pass on the case of every alien who does not appear to the examining inspector to be clearly entitled to land. 39 Stat. 885 (1917), Sec. 16, and 39 Stat. 887 (1917), Sec. 17, 8 U. S. C. Sections 152 and 153.

[32] The statute does not make final under any circumstances an administrative decision admitting a person to this country. *Li Sing v. United States,* 180 U. S. 486 (1901); *Lew Quen Wo v. United States,* 184 Fed. 685 (C. C. A. 9th, 1911). *Contra, United States ex rel. Yee Loy Gee v. Pierce,* 289 Fed. 233 (C. C. A. 2d, 1923).

[33] 39 Stat. 887 (1917), Sec. 17. Appeals are passed on by the Board of Review in the Department of Labor and the decisions of this board are usually accepted by the Secretary of Labor. This mode of disposing of appeals is not a violation of the statute. *Soo Hoo Doo Hon v. Johnson,* 281 Fed. 870 (D. Mass., 1922).

[34] 39 Stat. 889 (1917), Sec. 19.

When Administrative Exclusion Order Is Final. No part of the system of executive justice has been more vigorously and consistently attacked than this which permits administrative officials to decide as to the right of persons to enter, or stay in, this country. The first attempt in the Supreme Court of the United States to invalidate this kind of administrative decision was in the case of *Nishimura Ekiu v. United States* in 1892.[35] Nishimura Ekiu, a Japanese woman, was denied admission by the immigration officials at San Francisco on the ground that she was likely to become a public charge. Thereupon, she applied to the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus,* offering to introduce evidence of her right to land and alleging that the Act of March 3, 1891,[36] was unconstitutional because it deprived her of her liberty without due process of law if it vested exclusive authority to determine that right in executive officers. From the order of the Circuit Court denying the writ an appeal was taken. In delivering the opinion of the Supreme Court affirming the order of the Circuit Court, Mr. Justice Gray said:

"The final determination of those facts (on which the right to land depends) may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted." (660.)

In *Lem Moon Sing v. United States*[37] the Supreme Court refused to interfere with an administrative decision denying the right of a Chinese who had left this country for a short trip to reënter the United States. Mr. Justice Harlan in delivering the opinion of the Court said that a person "cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reënter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers." (548.) The Supreme Court has also accepted as final the decisions of the immigration officials denying the right of an

[35] 142 U. S. 651.
[36] 26 Stat. 1084 (1891), Ch. 551.
[37] 158 U. S. 538 (1895).

alien claiming to be in transit to a foreign country to land in the United States on the ground that the journey was only pretended and was, therefore, a ruse for entering this country for the purpose of staying here.[38]

The first case in which there was presented to the Supreme Court the question whether immigration authorities should pass finally on the right to enter this country of one claiming American citizenship was that of *United States v. Sing Tuck.*[39] It happened that Sing Tuck had not exhausted the possibilities of administrative relief by appealing to the Secretary of Commerce and Labor[40] from the adverse decision of an immigration inspector; so the Supreme Court evaded the question by declaring that "before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through." (170.) But the question was squarely raised in the case of *United States v. Ju Toy.*[41] The Supreme Court held that the Act of August 18, 1894,[42] provided that administrative officials should pass finally on the right of one claiming to be a citizen to enter the United States and that the act was not unconstitutional.

Administrative Deportation Order Final Unless Citizenship Claimed. It is also well settled that the due process clause of the Fifth Amendment of the Constitution of the United States was not violated when Congress made final the decision of the Secretary of Labor in proceedings to deport aliens from this country.[43] The Supreme Court has held, however, in the case of *Ng Fung Ho v. White*[44] that the decision of the Secretary of Labor in a deportation case is not final when a claim of American citizenship has been made and supported by some substantial evidence. The Court said that the due process clause of the Fifth Amendment prevents the deportation of one claiming

[38] *Fok Yung Yo v. United States,* 185 U. S. 296 (1902); *Lee Gon Yung v. United States,* 185 U. S. 306 (1902).

[39] 194 U. S. 161 (1904).

[40] In 1903 the control of immigration was transferred from the Treasury Department to the newly created Department of Commerce and Labor. 32 Stat. 826 (1903), Sec. 4. When the Department of Labor was established in 1913, it was given complete control over the admission of aliens. 37 Stat. 737 (1913), Sec. 3.

[41] 198 U. S. 253 (1905).

[42] 28 Stat. 372 (1895), Ch. 301.

[43] *Zakonaite v. Wolf,* 226 U. S. 272 (1912); *Lai To Hong v. Ebey,* 25 F. (2d) 714 (C. C. A. 7th, 1928).

[44] 259 U. S. 276 (1922). This decision was followed in *Lew Shee v. Nagle,* 7 F. (2d) 367 (C. C. A. 9th, 1925).

to be a citizen without the safeguards afforded by judicial proceedings. (284-285.) The decision of the Supreme Court in the case of *United States v. Ju Toy* is still law,[45] but it is practically impossible to suggest any rational distinction between a proceeding to determine whether one claiming American citizenship shall be permitted to enter the United States and a proceeding to determine whether one making a similar claim shall be permitted to remain in this country.

No Right to Court Trial When Alleged Citizen Has Entered Country Surreptitiously. A person who has entered the United States surreptitiously should be in no better position than one who has presented himself at the border for examination. When a person who has entered this country surreptitiously is held for deportation, he is not, therefore, entitled to a judicial determination of his right to remain here although he makes a claim of American citizenship.[46]

When Administrative Exclusion and Deportation Orders Are Not Final. There are well defined limitations on the finality of administrative decisions in exclusion and deportation cases. One of these limitations is that the rule of finality applies only to administrative decisions of questions of fact and does not extend to administrative decisions on matters of law.[47] Another limitation is that the requirements of due process of law must be observed in the administrative proceedings. The first of these requirements is a fair hearing. The general rule is that the hearing need not be conducted in accordance with the procedure and rules of evidence followed in courts of law.[48] There is, however, a clear split of authority as to whether hearsay evidence is admissible.[49] In order to give the interested party an oppor-

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[45] *Quon Quon Poy v. Johnson*, 273 U. S. 352 (1927).

[46] *Jung See v. Nash*, 4 F. (2d) 639 (C. C. A. 8th, 1925). *Contra, Chin Hoy v. United States*, 293 Fed. 750 (C. C. A. 6th, 1923).

[47] *Gonzales v. Williams*, 192 U. S. 1 (1904); *Gegiow v. Uhl*, 239 U. S. 3 (1915).

[48] *Mok Nuey Tau v. White*, 244 Fed. 742 (C. C. A. 9th, 1917); *United States ex rel. Di Battista v. Hughes*, 299 Fed. 99 (C. C. A. 3d, 1924); *Johnson v. Kock Shing*, 3 F. (2d) 889 (C. C. A. 1st, 1924); *Dong Ying Fun v. Nagle*, 5 F. (2d) 310 (C. C. A. 9th, 1925); *Moy Said Ching v. Tillinghast*, 21 F. (2d) 810 (C. C. A. 1st, 1927).

[49] Such evidence was held properly admitted in *In re Jem Yuen*, 188 Fed. 350 (D. Mass., 1910); *Morrell v. Baker*, 270 Fed. 577 (C. C. A. 2d, 1920); *Moy Yoke Shue v. Johnson*, 290 Fed. 621 (D. Mass., 1923); and in *United States ex rel. Smith v. Curran*, 12 F. (2d) 636 (C. C. A. 2d, 1926). The use of such evidence was held to have amounted to a denial of a fair

tunity to explain or rebut adverse testimony, it is held that the administrative decisions must be based solely on evidence produced at the hearing.[50] Under the statutes and under the rules of the Department of Labor an applicant for admission to this country has no right to be represented by counsel at the hearing before a board of special inquiry.[51]

A denial of a fair hearing in either exclusion or deportation cases can be established by showing a violation of the rules established by the Department of Labor for such proceedings.[52] A denial of a fair hearing can also be established by proof of prejudice on the part of the officials who conducted the hearing.[53]

A second requirement of due process of law closely allied with that of a fair hearing is that the decision of the administrative officials must not be arbitrary, i. e., without any substantial support in the evidence.[54] The federal courts will not, however, give relief from one of these administrative decisions merely because it is against the weight of the evidence.[55]

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hearing in *Ex parte Radivoeff*, 278 Fed. 227 (D. Mont., 1922); *Ungar v. Seaman*, 4 F. (2d) 80 (C. C. A. 8th, 1924); and in *Maltez v. Nagle*, 27 F. (2d) 835 (C. C. A. 9th, 1928).

[50] *Ex parte Keisuki Sata et al.*, 215 Fed. 173 (N. D. Cal., 1924); *Whitfield v. Hanges*, 222 Fed. 745 (C. C. A. 8th, 1915); *McDonald v. Siu Tak Sam*, 225 Fed. 710 (C. C. A. 8th, 1915); *In re Chan Foo Lin*, 243 Fed. 137 (C. C. A. 6th, 1917); *Chew Hoy Quong v. White*, 249 Fed. 869 (C. C. A. 9th, 1918); *Lewis ex rel. Lai Thuey Lem v. Johnson*, 16 F. (2d) 180 (C. C. A. 1st, 1926).

[51] *United States ex rel. Buccino v. Williams*, 190 Fed. 897 (C. C. S. D. N. Y., 1911); *United States ex rel. Falco v. Williams*, 191 Fed. 1001 (C. C. S. D. N. Y., 1911); *Brownlow v Miers*, 28 F. (2d) 653 (C. C. A. 5th, 1928).

[52] *Ex parte Radivoeff*, 278 Fed. 227 (D. Mont., 1922); *Sibray v. United States ex rel. Plichta*, 282 Fed. 795 (C. C. A. 3d, 1922); *United States ex rel. Chin Fook Wah v. Dunton*, 288 Fed. 959 (S. D. N. Y., 1923).

[53] *Ex parte Chin Loy You*, 223 Fed. 833 (D. Mass., 1915); *Ex parte Lee Dung Moo*, 230 Fed. 746 (N. D. Cal., 1916).

[54] *Ex parte Lam Pui*, 217 Fed. 456 (E. D. N. C., 1914); *Ex parte Wong Foo*, 230 Fed. 534 (N. D. Cal., 1916); *Chan Kam v. United States*, 232 Fed. 855 (C. C. A. 9th, 1916); *Ong Chew Lung v. Burnett*, 232 Fed. 853 (C. C. A. 9th, 1916); *Wong Yee Toon v. Stump*, 233 Fed. 194 (C. C. A. 4th, 1916); *Chryssikos v. Commissioner of Immigration*, 3 F. (2d) 372 (C. C. A. 2d, 1924); *United States ex rel. Mantler v. Commissioner of Immigration*, 3 F. (2d) 234 (C. C. A. 2d, 1924); *Ex parte Chung Thet Poy*, 13 F. (2d) 262 (D. Mass., 1926), affirmed in 16 F. (2d) 1018 (C. C. A. 1st, 1927); *Tillinghast v. Wong Wing*, 33 F. (2d) 290 (C. C. A. 1st, 1928); *Wong Tsick Wye v Nagle*, 33 F. (2d) 226 (C. C. A. 9th, 1929).

[55] *Ex parte Chin Doe Tung*, 236 Fed. 1017 (W. D. Wash. 1916); *White v. Fong Gin Gee*, 265 Fed. 600 (C. C. A. 9th, 1920); *Ng Hin Fook v. John-*

Court Trial on Merits if Administrative Action Objectionable. If it is once established that an immigration or deportation hearing was unfair or that the decision was arbitrary, the courts may decide the issue on its merits.[56] They will usually do so when a person prejudiced by an improper exclusion order makes a claim of American citizenship.[57] Some cases hold that when there has been a denial of a fair hearing in immigration or deportation proceedings not involving a claim of citizenship the court should not render a decision on the merits, but should make an order discharging the aggrieved person unless he is given a fair hearing by the administrative officials within a specified time from the date of the order.[58] Such an order would not prevent subsequent deportation proceedings if it did become effective because it purposely leaves the merits undisposed of.

Administrative Order Not Res Judicata. While a proper exclusion or deportation order has been made final by the statutes, an administrative decision admitting a person to this country or allowing him to remain here has not been made final.[59] Such a decision is not, therefore, a bar to a subsequent deportation proceeding because the principle of *res judicata* is not applied to administrative decisions.[60]

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son, 299 Fed. 618 (D. Mass., 1924); *Damon ex rel. Lew Goon Wong v. Johnson,* 13 F. (2d) 284 (D. Mass., 1925), affirmed in 13 F. (2d) 285 (C. C. A. 1st, 1926).

[56] *Whitfield v. Hanges,* 222 Fed. 745 (C. C. A. 8th, 1915); *Sibray v. United States ex rel. Plichta,* 282 Fed. 795 (C. C. A. 3d, 1922).

[57] *Chin Yow v. United States,* 208 U. S. 8 (1908); *In re Chan Foo Lin,* 243 Fed. 137 (C. C. A. 6th, 1917); *Kwock Jan Fat v. White,* 253 U. S. 454 (1920); *United States ex rel. Chin Fook Wah v. Dunton,* 288 Fed. 959 (S. D. N. Y., 1923); *Lewis ex rel. Lai Thuey Lem v. Johnson,* 16 F. (2d) 180 (C. C. A. 1st, 1926). *Contra, White v. Wong Quen Luck,* 243 Fed. 547 (C. C. A. 9th, 1917).

[58] *United States v. Petkos,* 214 Fed. 978 (C. C. A. 1st, 1914); *Ex parte Chin Loy You,* 223 Fed. 833 (D. Mass., 1915); *Tod v. Waldman,* 266 U. S. 113 (1924).

[59] The decisions under the immigration statute are set forth in note 3 on page 12, *supra.* The same reasoning applies to the provisions of the deportation statute discussed on pages 12 and 13, *supra.*

[60] *Pearson v. Williams,* 202 U. S. 281 (1906); *Ex parte Stancampiano,* 161 Fed. 164 (C. C. S. D. N. Y., 1908); *Lim Jew v. United States,* 196 Fed. 736 (C. C. A. 9th, 1912).

IV

CONCLUSION

Private Rights Protected by Courts Against Unjust Administrative Action. The federal courts have welcomed the relief which the system of executive justice has brought to their congested dockets, but they have been unwilling to increase such relief by surrendering their well established right to examine into the legality of executive action. To the declaration by Congress that an administrative decision denying the right to use the mails or the right to enter, or stay in, this country shall be final, the federal courts have, therefore, added the limitations that only an administrative decision on a question of fact can be made final and that such a decision is final only when there has been a fair hearing and the decision is supported by some substantial evidence.

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