vice of anyone in Washington (see Transcript of District Director's news conference, March 23, 1973). This amounts to an admission that his decisions were taken without reference to the legal conditions prescribed by the waiver which was the basis for Lennon's original admission to the United States (Exhibit 14-A). That waiver required that the District Director in Washington, D.C., was to be consulted with respect to all extensions of temporary stay. The failure of the District Director to follow this procedure likewise amounts to a denial of due process to respondent as presumably the District Director in Washington might have recommended further extensions in the circumstances.

The Immigration Judge has cited, as the basis for his refusal to terminate proceedings or otherwise remedy the denials of due process which had been effected by the action of the District Director, the cases of Lumarque and Geronimo, infra. It is suggested that both cases are distinguishable on the relevant principle of law.

Lumarque v. United States Immigration and Natrualization Service, No. 71-1886 (7th Cir. 1972, argued May 25, 1972, decided June 12, 1972, not as yet reported), does not differ with respondent's position herein. In Lumarque the Court of Appeals had before it a case in which the petitioners had been granted a petition for a third

preference visa, and pending actual issuance of said visa, were permitted to depart voluntarily, leaving the time for such departure indefinite. At some time, after one year had passed, the Service revoked their permission to remain in the United States; petitioners, failing to leave on the date assigned by the Service, were then made the subjects of deportation proceedings pursuant to §241(a)(2).

On appeal, petitioners contended that Operations Instruction 242.10(a) provided that voluntary departure may and normally shall be granted to persons in their position. The Court stated that

> "The operating instruction clearly contemplates a discretionary use of the voluntary departure procedure. A grace normally afforded does not become an enforceable right merely because it is described as a normal practice in an internal operating instruction."

Although it may be true that in a similar situation, the "normally afforded opportunity" granted to aliens in respondent's position is not a matter of right (the opportunity to file a §245 application with the District Director), it certainly is a matter of practice. Moreover, as in the action commenced in Federal District Court by Respondent (See Lennon v. Marks, supra) respondent is not contending that the District Director in exercising his discretion was compelled to decide the discretionary issue in favor of respondent. Respondent's position is clear: he should have been afforded only the normal opporunity

to have the District Director exercise his discretion and adjudicate his application.

Respondent is not attempting to convince this Board that the discretion of the District Director should have been exercised in any particular direction, as in Lumarque, where it was exercised against the aliens, but that it should have been exercised! It is no answer to the fact that the District Director never once exercised his discretion with respect to a §245 application of John Lennon to say that respondent would have had no control over such discretion. Clearly, Lumarque encompasses a distinguishable set of facts: In Lumarque, the discretion was exercised, and the respondent therein argued that, in view of the normal practice related in the Operations Instruction, such discretion should have been exercised in favor of the alien. In the case at Bar, however, the District Director never exercised any discretion at all.

Neither does respondent quarrel with the proposition set forth by the Board in Matter of Geronimo, Interim Decision #2077 (decided March 5, 1971), and in which the Board states as follows:

> "The assertion that the District Director abused his discretion in refusing to permit the respondent to remain in the United States after approval of her visa petition presents no defense cognizable in these deportation proceedings."

Geronomo is a decision of the Board which cites no authority and should not be broadened, Our position is nevertheless, that it is inapposite. In Geronomo, the District Director, contrary to his usual policy, declined to permit the respondent to remain in the United States until a quota number became available, and instead instituted deportation proceedings against her. Taken by itself, that is not an untenable ruling. However, respondent herein contends that the cumulative denials or abstentions by the government amount to a denial of due process, something far greater than the mere abuse of his discretion complained of in Geronomo.

In the case at bar, we find that the record supports the proposition that the District Director acted in an unusual and discriminatory manner. In unprecedented fashion, he refused additional time to accomplish needed temporary purposes; he served a succession of orders to show cause, attempting to retro-actively cancel time already granted; he failed and refused to adjudicate Respondent's third-preference petition within the normal sixty-day period, and in fact, never looked at said application until the commencement of mandamus proceedings in the District Court by Respondent at which time he found

it possible to rule on the petition within one hour! The District Director again failed to afford Respondent the normal opportunity of presenting a Section 245 application, clearly prejudging the outcome of presenting an application ; in violation of normal practice within the Agency. Finally, the District Director abused his discretion in failing to terminate these deportation proceedings. The Immigration Judge refers kindly to this series of events as "precipitous" and should have terminated the proceeding.

Had the District Director merely committed the latter abuse of discretion, the case might be within the rule established by the Board in Matter of Geronimo . But here one is compelled to find not merely a constant abuse of discretion, but a constant and continuous failure to exercise any discretion whatsoever, which Respondent contends amounts to a deprivation of due process. When taken together with the unreasonable sequence of time allowances for filing various briefs at the trial, and the rulings of the Immigration Judge denying Respondent discovery procedures to ascertain whether his case was being singled out for stringent processing in derrogation of his first amendment rights of free speech and association, it must be held that the Respondent has been denied due process of law. The decision below should be reversed,

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POINT II: THE DECISION BELOW HOLDING RESPONDENT DEPORTABLE SHOULD BE REVERSED BECAUSE THE GOVERNMENT HAS NOT SUSTAINED ITS BURDEN OF PROOF BY CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE THAT THE FACTS AS ALLEGED IN THE ORDER TO SHOW CAUSE ARE TRUE.

Respondent was charged under Sections 241(a)(9) and 241 (a)(2) of the Immigration and Nationality Act as being in the United States in violation of law by having, after admission as a non-immigrant, "failed to comply with the conditions of such status", and having "remained in the United States for a longer time than permitted." Respondent denied both conclusions of law. The Immigration Judge sustained the charge of being in the United States in violation of law as an "overstay" and apparently dismissed the other charge relating to compliance with the conditions of status.

In order for the Government to have sustained the remaining charge, it was necessary that it prove the factual allegations of the Order to Show Cause which were put in issue by Respondent's denial, by clear, convincing and unequivocal evidence (cases cited infra). The only evidence adduced by the Governement on these issues was the testimony given by Respondent John Lennon himself. No independent evidence was offered by the Government.

Mr. Lennon testified, in a highly equivocal manner, that he was unable to fix upon any specific intention because his plans depended upon the status of the desperate daily search for Kyoko and of legal proceedings which were still in process in two different jurisdictions in the United States. This is, submittedly, a legitimate temporary purpose, and on the issue of abandonment of temporary

purpose, is so inconclusive a basis for deportation as to fall below the standard of proof imposed upon the Government by decisional law and regulation.

There was thus no unequivocal evidence on the disputed issues:

(1) that Respondent abandoned his intention to depart on or before March 15, 1972;

(2) that Respondent remained in the United States after February 29, 1972, without authority;

nor was there a proper legal revocation of the privilege of voluntary departure.

The District Director claims to have "revoked" the Respondent's permission to remain until March 15, 1972 under a provision of law which he cited expressly in his attempted revocation to be 8 CFR §242.5(c). That section provides:

> "If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without notice by any district director, district officer in charge of investigations, officer in charge, or chief patrol inspector."

To prove a proper revocation under this Regulation, it is necessary for the Government to prove that the original grant of voluntary departure "should not have been granted" or that it was improper ab initio. 8CFR§242.5(c).

The Government submitted no evidence on this issue whatsoever. At no time has the Government claimed, alleged or proved that the original granting of the 15-day

voluntary departure time was improper and therefore revocable under § 242.5(c). On the contrary, its allegation appears to be that the Respondents abandoned their intention to depart from the United States sometime between February 29, 1972 (the date of expiration of their visitors' status) and March 6, 1972 (the date of revocation of voluntary departure), although this is nowhere specifically stated. The Immigration Judge speculates that the attempt to revoke might have been triggered by the filing of third preference petitions. However, he correctly notes that even this act is equivocal as it did not mean that Respondent unequivocally intended to apply for permanent residence while in the United States; it might well have been intended for use in applying for an immigrant visa abroad; indeed, it might have been the mere filing to insure eventual qualification for third preference priority, with no intention to abandon the non-immigrant status.

The Order to Show Cause was therefore jurisdictionally defective in lacking factual allegations to the effect that the alleged abandonment of intention to depart took place at a certain time, and specifically that it occurred prior to March 1, 1972, so that the privilege of voluntary departure "should not have been granted" on that date to March 15th. Without these allegations and lacking proof to support them, the Government failed to prove the claimed legal conclusions and the charge of deportability was not adequately sustained by the evidence of record.

Even assuming for the purpose of argument that the Order to Show Cause contained all the necessary allegations and that the privilege of voluntary departure to March 15th was properly revoked by the District Director (based upon the claim, unproved, that it "should not have been granted" to begin with) the Government failed to prove that the Respondents abandoned their intention to depart from the United States on or before March 15, 1972. The only evidence of record was Mr. Lennon's highly equivocal testimony that he was unable to fix upon any intention, one way or another, during the crucial period of time because of the unsettled status of the search of Respondents' child, Kyoko. His testimony, as it related to the specific period in question, was completely compatible with the intention of a nonimmigrant: namely, to complete the temporary purpose for which he had arrived; to request such additional time as might be needed to complete his temporary purpose; to secure the custody of the child and to return abroad. Any questions relating to a subsequent period of time, including the time of the deportation hearing, though relevant to the issue of voluntary departure, were clearly irrelevant to assist the Government with its burden of proof as to deportability. The Government clearly failed to prove an abandonment of the intention of the Respondents to depart, by clear, convincing and unquivocal evidence, on the issue squarely raised by Respondent's denial.

Lennon stated that he had not abandoned his intention to depart from the United States on or before March 15, 1972, because he and his wife had no way of knowing when they would find the child, Kyoko. When asked as to whether he had any intent to leave the United States by March 15, 1972, Mr. Lennon replied equivocally that he couldn't have any intent "one way or the other"; that in fact, he had no intent either way; and that the reason for this was the uncertainty of the situation with respect to the child, Kyoko. The Immigration Judge agreed that such was the testimony (Opinion, p.3); however, from this testimony he drew the erroneous conclusion that the District Director was correct in arriving at his conclusion that the Respondent abandoned his intention of leaving the United States on or before March 15, 1972. (Opinion, p.2.). Nevertheless, the Immigration Judge goes on to hold that the service may have been somewhat

> "precipitous in issuing the Order to Show Cause and beginning deportation proceedings on March 6, 1972 simultaneously with the revocation of the previously authorized permission to remain until March 15, 1972,"

but finds that the Respondent was not harmed thereby. (Opinion, p.3)." He then goes on to state that

> "technically speaking the Order to Show Cause would have been more accurate to state that [the Respondent] remained in the United States after March 6, 1972 without authority since that was the date on which [his] privilege of voluntary departure was revoked."

What emerges from these proceedings is the fact that there was no evidence produced that prior to March 6, 1972 the Respondent would fail to depart on March 15, 1972 or at such further date as the District Director might have granted in voluntary departure. On March 6, 1972, together with his letter "revoking" the privilege of voluntary departure to March 15, 1972, the District Director served (by personal service)the Respondent and his counsel with Orders to Show Cause, returnable on March 16th, why he should not be deported. Clearly, therefore, from March 6, 1972,the Respondent was not only in the United States with the "authority" of the Immigration Service, but pursuant to its order to appear at deportation hearings. The question of the Respondent's intention to abandon status, therefore, is limited to the period up to March 6, 1972.

To claim the respondent an overstay on the one hand, while preventing his departure by instituting proceedings on the other, is patently improper. Matter of C--C--, 3 I. & N. Dec. 221 (1948). In that case, the Board of Immigration Appeals terminated proceedings in circumstances where an Order to Show Cause was served on an alien while he was in custody.

> "An alien cannot be prevented from departing from the United States in accordance with the terms of his admission and then be found deportable for not so departing." Id. at p. 222.

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Once having granted voluntary departure privilege until March 15th, the Government should be estopped from asserting, as a basis for deportation, a ground it placed the Respondent in by its own act, namely, claiming over-

stay status since February 29th.

In all events, the Government introduced no independent evidence on the issue of the alleged abandonment of intention to remain temporarily and apparently relies exclusively on Mr. Lennon's testimony, which is, at most, equivocal. There is a consequent complete lack of proof to the standards required by decisional law and the Regulations.

There can thus be no doubt that as a matter of law, the Government failed to sustain its burden of proof as to the disputed issues. The decisions are quite clear regarding the quantum of evidence needed.

According to some of the older decisions, where the alien's entry was unlawful, he had the burden of establishing his right to remain. On the other hand, where entry was lawful and deportation is sought on the ground that by his subsequent conduct the alien in question had lost the right to remain, as in the instant case, it was held that the burden is on the governmamt to show that the alien has committed some act or offense by which, under the Immigration Act, he has lost his right to remain. Hughes v. Tropello, 296 F. 306 (3rd Cir., 1924). In Hughes the Court took the view that the presumption of innocense exists in the alien's favor and that it is by virtue of the due process clause of the Constitution that the burden is placed upon the Government to establish the facts warranting the alien's deportation. See also Wood v. Hoy, 266 F.2d 825 (9th Cir., 1959), and Werrmann v. Perkins, 79 F.2d 467 (7th Cir., 1935).

Prior to the decision in Woodby v. Immigration and Naturalization Service, infra, when the test was one requiring only "reasonable, substantial and probative evidence", Courts had still held that where inferences were inconsistent, and the evidence gave equal support to each inference, the test of substantial evidence is not met. N.L.R.B. v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, 293 (4th Cir., 1954), and Sawkow v. Immigration and Naturalization Service, 314 F.2d 34, 38 (3rd Cir., 1963), and Zito v. Moutal, 174 F.Supp. 531 (N.D.Ill., 1959. Therefore, even prior to the Supreme Court's definitive ruling in Woodby, (which establishes a more stringent rule), the Rule in existence would have prevented a finding of deportability under the facts presented at the hearing in the instant case.

Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed. 2d 362 (1966) the leading case, established an even stricter rule. The Supreme Court therein was presented with the question in two cases (one arising in the Second Circuit, the other in the Sixth) as to what burden of proof the Government must sustain in deportation proceedings. The Court concluded that the substantial evidence rule was improper and that it is incumbent upon the Government in such proceedings to establish the facts supporting deportability by "clear, unequivocal and convincing evidence."

"To be sure, a deportation proceeding is not a criminal prosecution. Harisades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow whmn a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land...In words apposite to the question before us, we have spoken of 'the solidity of proof that is required for a judgment entailing the consequences of deportation..."

"In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law.

"No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at laeast, result in explusion from our shores. And many resident aliens have lived in this country longer and established stronger family, social and economis ties here than some who have become naturalized citizens."

"We hold that no deportation order may be entered unless it is bound by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." 385 U.S.276, 277, 87 S.Ct 483, 484, 17 L.Ed.2d 363.

The proposition has since been consistently followed and reiterated in the cases. See Nason v. Immigration and Naturalization Service, 394 F.2d 223 (2d Cir., 1968), Rodrigues v. Immigration and Naturalization Service, 389 F.2d 129 (3rd Cir., 1968).

It is not surprising, therefore, that almost the exact statement is now incorporated in the Code of Federal Regulations:

> "A determination of deportability shall not be valid unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 8 CFR 242.14(a).

The case is in many respects similar to Matter of C...C... 3 I. & N. Dec. 221 (1948) in which a crewman was admitted for 29 days and failed to leave because he was in custody under a smuggling charge, He was acquitted and released from custody after the expiration of his 29-day althorized period of stay. The Special Inquiry Officer held him deportable as an "overstay", for having remained beyond the period authorized without authority. The Board of Immigration Appeals, however, reversed and found him not deportable as an overstay, holding that

> "an alien cannot be prevented from departing from the United States in accordance with the terms of his admission and then be found deportable for not so departing. Lex non cogit ad impossibilia. The appellant should be given a reasonable period of time within which to depart. Failure to so depart would then render the appellant deportable."

The Board then significantly directed that the deportation proceedings would be terminated. Doubtless, the Special Inquiry Officer had, in that case as well, thought the matter to consist of "harmless" error, the mere failure to specify the correct date or an allegation of fact, or the mere failure to grant a period of voluntary departure before enforcing departure. The Board, however, distinguished the case from one in which the alien's act prevented him from departing as required. The alien was, like Mr. Lennon, faultless in incurring his status as an "overstay". The reason offered by Respondent and his wife for the necessity to remain in the United States longer than originally per-

mitted were perhaps the strongest and most compelling imaginable for aliens here as visitors. In the face of serious litigation in two jurisdictions as to custody of the child, and the search for her whereabouts, no justifiable reason is offered for denial of an extension of time, much less for revocation of time already given. In denying the additional time and in revoking the time already given, the District Director, by his own act and without any fault on Respondents' part whatsoever, placed Respondent in "illegal" status and seeks, by these proceedings to expel Respondent with no evidence of wrongdoing on the Respondent's part.

It is respectfully submitted that the District Director, in his haste to remove these aliens, issued an Order to Show Cause on March 6th, 1972, thereafter issued a superseding Order to Show Cause on March 7th, 1972, and in so doing eliminated jurisdictional factual allegations upon which he further failed to produce any proof. At the very least, it was highly prejudicial and a denial of essential fairness for the Government to grant permission to stay until March 15th, revoke it on March 6th, and then find the Respondent deportable because he failed to leave the United States <u>on or before February 29th.</u> Clearly, the revocation of permission to remain can have no retroactive effect, and when taken together with the general absence of evidence of any intention to abandon non-immigrant status, demonstrates that the Government failed to prove its case by clear, convincing and unequivocal evidence.

In sum, the Government failed to prove deportability under Sections 212(a)(2) the only remaining charge, in that:

(a) there was no specific allegation as to when the alleged abandonment of intention to depart took place, nor any proof of such fact;

(b) there was no allegation nor any evidence that the granting of voluntary departure to March 15, 1972 was wrong <u>ab initio;</u>

(c) there was no proper revocation of status;

(d) there was no proof that the Respondent was "in violation of" any law of the United States, and to the extent that Respondent may have been "in the United States in violation of the Immigration Act", the Government should be estopped from charging such violation (if any) caused by its own conduct;

There being a complete failure to sustain the Government's burden of proof by the strict standard required by the law, the decision of the Immigration Judge as to deportability should be reversed.

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POINT III: RESPONDENT'S CONVICTION UNDER THE BRITISH STATUTE IS NOT INCLUDED IN SECTION 212(a)(23) OF THE IMMIGRATION AND NATIONALITY ACT AS A BAR TO HIS APPLICATION FOR PERMANENT RESIDENCE.

A. Analysis of the British statute under which Respondent John Lennon was convicted demonstrates that the statute did not require proof of "mens rea" for a conviction, and that a conviction could thus be obtained without proof that the accused was aware that he possessed a forbidden substance.

The British statute under which Mr. Lennon was convicted has long been a controversial one, to say the least. The statute (The Dangerous Drugs Act 1965)[hereinafter referred to as the ACT and the REGULATIONS, respectively] concerns possession of various controlled substances listed in various schedules. The specific section at issue herein is Section 3 of the REGULATIONS, briefly summarized, states that "a person shall not be in possession of a drug unless he is generally so authorised...." The statute does not specify that possession must be "knowingly" or "with knowledge" and prescribes, therefore, an absolute or insurer's liability.

Mr. Lennon pleaded guilty, as British law does not afford a nolo contendere plea.

The legal controversy in England over the statute apparently commenced upon its enactment, and culminated in the case of Lockyer v. Gibb,(1966) 3 W.L.R. 84, 130 J.P. 306, 110 S.J. 507, 2 All E.R. 653, which remained the leading interpretation of the statute prior to any

decision by the House of Lords.

In Lockyer, a Queen's Bench Division decision, the appellant was stopped by the police, and in a large bag which she was carrying was found a small brown bottle containing tablets. The appellant said that she did not know what the tablets were and that a friend had given them to look after for him. When asked for his name, she gave a different explanation saying that she was in a cafe with him and some other people when the police came in, and he must have dumped them on her. On analysis, the tablets were found to be a "dangerous drug" as defined by the ACT and REGULATIONS. The appellant was charged with possessing the tablets without being duly authorised, contrary to Section 9 of the REGULATIONS [Note that Section 9 is almost identical in language to Section 3, the Section here at issue.]

The appellant contended that she did not know what was in the bottle, nor what the tablets contained. The lower court (Magistrate) convicted the appellant, being of the opinion that the offense was sufficiently constituted by her being in unauthorized possession of a bottle containing the dangerous drug (morphine sulphate), notwithstanding she did not know the contents of the bottle and that her contention that mens rea was an essential ingredient of the charge was not well founded.

On appeal, the Queen's Bench Division affirmed and dismissed the appeal, stating that Section 9 of the REGULATIONS "on the face of it imposed an absolute liability" subject to license and authorization, and, while it was necessary to show (as had been shown) that the appellant knew that she had the article which turned out to be a drug, it was not necessary that she should know that in fact it was a drug.

The Court in Lockyer, supra, by Lord Parker, C.J., discussed the aspects of both "mens rea" and "possession."

> "In my judgment, before one comes to a consideration of a necessity for mens rea or, as it is sometimes said, a consideration of whether the regulation imposed an absolute liability, it is of course necessary to consider possession itself. In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she has control." 2 All E.R. 653, 655.

However, as to the appellant's further contention that she could not be convicted unless it is proved that she was knowingly in possession of drugs, the Court stated that it was "not necessary that she should know that in fact it was a drug..." 2 All E.R. 653, 656. The Court also stated:

> "I cannot, though it is not conclusive, omit from consideration the fact that the work "knowingly" does not appear before "possession"." 2 All E.R. 653, 656.

The Court referred to Beaver v. R. S. C. R., 531 (1957), a Canadian Court of Appeal of Ontario decision, in which a divided court (3-2) had held just the opposite under a similar Canadian statute, and stated that he preferred the Canadian "dissenting judgment". The Lockyer decision was unanimous.

Lockyer, supra, was followed religiously by the lower courts in literally hundreds of cases, and by the Court of Appeal, Criminal Division, in R. v. Warner, 1 W.L.R. 1209; 131 J.P. 485; 111S.J. 559 (1967); 3 All E.R. 93; 51 Cr. App. R. 437 (1967).

In Warner police stopped the driver of a van and in the van was found one case containing bottles of perfune and another case containing twenty thousand amphetamine sulphate tablets. The appellant testified that he had picked up both cases thinking both to be perfume and that he did not know that one case contained any drugs whatsoever. The jury was directed that absence of knowledge by the appellant of what the second parcel contained went only to mitigation (as per the rule of Lockyer, supra) of sentence and could not be considered as a defense.

On appeal to the Court of Appeal, the lower court's judgment was affirmed, The Court, considering and applying Lockyer in its totality, held that the offense was one of absolute liability and the fact that the appellant did not know what the second parcel contained was no defense. The appeal was dismissed.

Warner was appealed further, and culminated in the first House of Lords decision on the issue. Warner v. Metropolitan Police Commissioner, 2 All E.R. 356 (1968, decided on May 2, 1968).

In a 39-page decision, the five Lords thoroughly discussed all the issues. The only solid holding of all five Lords was that the appeal should be dismissed. Lord Reid, in a sole dissenting opinion, although he concurred in dismissing the appeal, believed that it should be a defense that the person convicted did not know that what was in his actual posssession was a drug prohibited by law to be in his possession. Two Lords thought that the defendant should have a reasonable opportunity to detect the contents; two Lords throught that the statute was reasonable as interpreted by Lockyer, supra, and by the lower courts.

Lord Reid was clearly upset, and rightly so, with the interpretation of the statute by the decision:

> "Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely

> farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result." 2 All.E.R. 356, 366.

Lord Reid gave a further example:

> "...suppose that an innkeeper is handed...a box or package by a guest for safe keeping. He has no right to open the box--it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents; but what if he is told nothing, or is told that it contains jewellery and it contains prohibited drugs? It may contain nothing but drugs or it may contain both jewellery and drugs or it may be an antique trinket apparently empty but containing drugs hidden in a small secret recess. It would in my opinion be irrational to draw distinctions and say that in one such case he is in posssession of the drugs and therefore guilty of an offence, but not in another. It is for that reason that I cannot agree with the contention that if the possessor of a box genuinely believes that there is nothing in the box then he is not in possession of the contents, but that on the other hand if he knows there is something in it he is in possession of the contents though they may turn out to be something quite unexpected." 2 All E.R. 356, 368.

Unfortunately, Lord Reid's discussion remains dicta. The appeal was decided on a technical ground,

leaving the Lockyer interpretation to stand as law, although called into question quite seriously by at least three of the five Lords. (The appeal was dismissed on the ground that since the Lords could not believe that any reasonable jury would accept the appellant's story, and would be certain to return a verdict of guilty, there was no miscarriage of justice in the case, and the appeal should be dismissed under Section 4 of the Criminal Appeal Act 1966).

With respect to the other Lords' opinions, it has been said that

> "When we turn to the majority judgments we find that their Lordships seem to have had little difficulty in holding that Parliament intended an absolute offence when it enacted...the Drugs Act 1964." "Possession of Drugs and Absolute Liability," 84 Law Quat. Rev. 382, 387.

See also "Possession of Drugs -- The Mental Element," 26 Cambridge Law J. 179.

This was the status of the law when the respondent, John Lennon, pleaded guilty to violation of the ACT and REGULATIONS. No "mens rea" was present as an element to be proved by the prosecution; absolute liability prevailed. One needed the necesssary mental intent to possess the "container," but the statute was automatic with respect to the "contents." No mens rea

whatsoever was necessary for prosecution or conviction with respect to the "contents." In the respondent's case, the "dangerous drug" was found inside Mr. Lennon's binocular case which had only recently been delivered to Mr. Lennon's home, and which had been in the possession of many others for a period of the previous six months. Mr. Lennon was totally unaware of the contents of the binocular case.

Therefore, the British statute, which was considered carefully by the House of Lords of England, and which had caused great controversy in the legal establishment in England, was consistently held to be one of "strict liability," and the fact that the defendant had no knowledge that he was in possession of a drug was not a defense to its prosecution -- it was an element which could only be pleaded in mitigation of punishment.

Under Section 5(b) of the REGULATIONS, the House of Lords later held that "mens rea" was a necessary element for prosecution. Sweet v. Parsley, 1 All E.R. 347 (1969), in a case decided some time after Mr. Lennon pleaded in his case. Section 5(b), however, deals with the duties of a landlord (see Statutes Referred to, supra).

In Sweet the defendant was a tenant of a farmhouse. After moving out, she sub-let the rooms to various sub-tenants, and occasionally visited the house to collect rent. After a search, the police found small quantities of drugs. The defendant was charged with being concerned in

the management of premises which were used for the purpose of smoking cannabis or cannabis resin contrary to Section 5(b). The lower Court, Queen's Bench Division, upheld the trial court and the conviction and held that although the fact that appellant was tenant of the house and thus responsible for its rent and maintenance did not of itself establish that she was concerned in the management of the premises, yet the justices were fully entitled to hold that the appellant was concerned in the management of the premises under all the circumstances of the case. The fact that Ms. Sweet was unaware that the premises were being used for the purpose of smoking dangerous drugs was held to be no defense. 2 All E.R. 337 et seq. (1968).

The opinion in Sweet was written by Lord Parker, C.J., the author of Lockyer, supra, and was decided eleven days after the House of Lords decision in Warner, supra; absolute liability still prevailed. It was clear, however, that this matter should go tothe House of Lords for a thorough review, which it finally did.

The House of Lords considered the appeal and reversed the Queen's Bench Division. 1 All E.R. 347 (1969), decided January 23, 1969. The Court held that no offense under Section 5(b) had been disclosed since (by three of the Lords) for the offense to be committed it must be shown that it was the appellant's purpose that the premises be

used for smoking cannabis; i.e., that she intended that the premises be so used; (by two of the Lords) that the section required that, before conviction, the appellant must be shown to have had knowledge of the particular purpose to which the premises were being put. However, the Lords were still split on how best to make a definite ruling on the issue of "mens rea," and the Sweet decision unfortunately did not in any way effect the Warner rationale, although Sweet did create quite a stir in England.

The Difference between Warner and Sweet was discussed thoroughly in many law review articles and attempts at clarification were made. See, for example, "Absolute Liability, 85 Law Quat. Rev. 153 (April, 1969); "Sweet v. Parsley and Public Welfare Offences," 32 Mod. L. Rev. 310 (May, 1969).

As was said in "Sweet v. Parsley: Disappointment and Danger,"

> "While all their Lordships..commented at length on the question of 'mens rea' in criminal offences, the actual decision rested on an interpretation of the meaning of the following term in the Subsection: 'a person...concerned in the management of any premises (used for the forbidden purpose)'. Their Lordships unanimously held that on that question the said term must be narrowly interpreted as referring only to one who manages premises actually and specifically for the forbidden purposes, and does not apply to a person who manages premises for a legal purpose but on which premises unknown to the manager someone is conducting an illegal activity." 3 Manitoba L.J. 63 (1969).

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And in "Drugs--The Unpurposeful Manager," 27 Camb. L.J. 174, at page 177:

> "The decision in Sweet v. Parsley is welcome, and it is hoped that lower courts will not be less ready to infer an intention to impose strict liability. Legilsation is still necessary to deal with existing cases of strict liability, such as Warner [1968] 2 W.L.R. 1303"[emphasis supplied].

Therefore, even after Sweet, it was the general considered legal consensus that under Sections 3 and 9 of the REGULATIONS (relevant to this case herein), Warner was still the existing rule and that part of the REGULATIONS existed as a "strict liability" statute, although Sweet had somewhat changed a similar interpretation of Section 5(b). And even of Sweet it has been said that,

> "It would be safe to conclude that the decision of the House of Lords in Sweet v. Parsley is one of the most important statements to be uttered by the judiciary concerning mens rea and crimes of strict liability. However, a reservation must be appended to such a conclusion; and this would be founded on the lack of agreement between some of the Law Lords as to the exact nature of mens rea, and on some indecisiveness displayed by their Lordships as to its relationship to crimes of strict liability." "The Mental Element in Drug Offences," 20 Nor. Ire. L.Q. 370 (December 1969).

And further, the author continues in "The Mental Element,"

> "Regrettably, it is not possible to conclude that the attitude of the House of Lords in Sweet v. Parsley will necessarily be followed in the lower courts; the tenor of Lord Wilberforce's speech indicates that his is a decision on paragraph (b) of section 5 of the Dangerous Drugs Act 1965 only, and it is to be viewed as such. Moreover, the House was dealing with an offence quite distinct from that which arose in Warner [prosecuting landlords for what their tenants did, rather than prosecuting simple possessors] and was clearly substantially influenced by the social implications of holding that s.5(b) did not require a mental ingredient." 20 Nor. Ire. L.Q. 370, at 371.

The law was subsequently repealed in England. Its replacement, the Misuse of Drugs Act 1971, has accepted the majority view of the House of Lords in Warner, and has recently allowed "lack of knowledge" to be a defense. [See Sections 28, et seq.] The same act has also reclassified cannabis and cannabis resin to be "Class B" Drugs, a less harmful category including such drugs as codeine, as opposed to the old "Class A" listing, which included, among others, cocaine, opium, and morphine.

The 1971 Act repealed the Dangerous Drugs Act 1965, and the Dangerous Drugs Act 1967 which had followed it.

The Immigration Judge, in analyzing these various British decisions, has failed to carefully explain the chronological devlopment of case law in Geat Britain, and his reliance on cases for various points appears to be incorrect.

For example, the Immigration Judge cites Regina v. Marriott, 1 All E.R. 595 (1971) to support the proposition that "completely innocent and unknowing custody or potential control over a drug is not possession within the meaning of the act and regulations." (Opinion, p.20). However, Marriott does not stand for this proposition. A careful reading of Marriott will disclose the following: the decision was rendered in September 1970, two years after Lennon's conviction; second, that in Marriott, the quantity of the drug ('cannabis') was so slight that only a laboratory examination disclosed that on the tip of the penknife held to be in defendant's possession was an amount of .03 grains of the drug. In addition, the Court, in discussing the application of Wanrer, supra, to the defendant in Marriott, stated that "if knowledge of the existence of some foreign matter is established, the decision in Warner's case must lead to the conclusion that thereafter it could be no defence to say 'Although I could see just a speck of stuff sticking to the penknife, I did not know the speck was cannabis.'" The Court went on to distinguish its present case from Warner, and held that under current law, the jury should be directed that the Crown has to establish that the accused person had reason to know that there "was foreign matter on the" penknife. Admittedly, the Court said that it felt that

nothing "said in Warner's case negatives the necessity for some such direction." However, as can be seen supra, this was not what was stated in Warner. Warner clearly sets forth the rules that must be followed, and establishes the law to be as follows: the fact that the defendant had no knowledge that he was in possession of a drug was not a defense to its prosecution -- it was an element which could only be pleaded in mitigation of punishment. Therefore, in Mr. Lennon's case, it was no defesne that he did not know the contents of his binocular case contained hashish. (See Opinion, p. 21). REgina v. Buswell, (1972) Crim. L. R. 50, is no different. Therein the Court merely ruled on one issue: whether the possession of drugs originally obtained by lawful means (by prescription) becomes unlawful when, in the belief that the original supply had been disposed of or destroyed, a further supply was prescribed, and the original supply was rediscovered.

Accordingly, when the Immigration Judge (Opinion, p. 21) discusses which elements were admitted by the respondent in his plea in November,1968, he is in error. The Immigration Judge claims that respondent, by his plea, admitted (1) that thematerial discovered was in fact cannabis resin; (2) that he was in "possession" of such drug by reason of the fact that it was either in his custody or in his control; and (3) that he was aware that there was some extra substance in the

Binocular case which was in his home but not necessarily that he knew it was cannabis resin.

In fact, if Mr. Lennon admitted anything at all by his plea, it was (1) that thematerial discovered was cannabis resin; (2) that he was in "possession" of the Binocular case, or had control over it. Nowhere, under the rulings of Lockyer or Warner, supra, was it necessary for conviction that Mr. Lennon know that within the Binocular case there was a foreign substance. In Lockyer, supra, the defendant had contended that "mens rea" was not a requirement of the statute; the Appeals Court agreed, but stated that it was "not necessary that she should know that in fact it was a drug..." The majority of the Court in Wanrer also felt that the statute intended an absolute liability, and that even though "mens rea" was absent as an element the statute was sufficient. As the Immigration Judge states, in citing the language from Marriott, supra,

> "If a man is in possession, for example, of a box and he knows there are articles of some sort inside it and it turns out that the contents comprise, for example, cannabis resin, it does not lie in his mouth to say: 'I did not know the contents included resin.' On the contrary, on those facts he must be regarded as in possession of it and, if not lawfully entitled, would, therefore, be guilty of an offense such as that charged in the present case."

Therefore, the conclusion is unmistakeable that if anything was admitted by Mr. Lennon on his plea of guilty,

it was that he was in possession of the Binocular case only, and, since that case contained cannabis resin, even though he was unaware of such fact, he was still guilty of possessing the substance.

Additionally, the Immigration Judge's discussion (Opinion, p. 21) that the defendant need not know that it was the particular drug whose identity the government established, was never a point raisedin respondent's brief (i.e. no argument was ever made that Lennon thought he had marijuana or some other substance but reallly had hashish, and therefore should not have been prosecuted for possession of hashish, as such was not the case). This point was never contended by respondent.

Respondent merely contends that the element of "mens rea" should be present in the statute, that its absence negates any defense he may have had that he was unaware of any foreign or proscribed substance being present in the Binocular case in his possession, and hence, that his plea of guilty in any way acknowledged that he had knowledge of the presence of any substance whatsoever in the Binocular case.

B. Only those convictions of marijuana possession under circumstances which would enable the accused to traffic in the substance are included in Section 212(a)(23) of the I.N.A.

Not all convictions for possession of marijuana result in excludability or deportability under the Immigration and Nationality Act.

Varga v. Rosenberg, 237 F.Supp 282 (S.D.Cal. 1964) held that an alien who had been convicted under the California statute of being under the influence of narcotics was not subject to deportation under the federal statute providing for deportation of any alien who is convicted of a violation "of any law or regulation relating to illicit possession of narcotic drugs or marijuana."

The petitioner, in a habeas corpus proceeding, was a Mexican citizen admitted to the United States on March 31, 1961 as a permanent resident; on December 9, 1963 he was convicted in the United States of violating California Health and Safety Code Section 11721 which prohibited the use of narcotics. On February 7, 1964 the Immigration Service held a hearing pursuant to an Order to Show Cause under § 241(a)(11).

The question put by the trial Court was whether the Immigration law's bar included the crime of which petitioner was convicted in the California court. The legislative

history was cited by the Service to clearly include this offense (unlawful use). The Court stated that "while Congress undoubtedly intended to close 'every possible loophole where a person had been convicted of a crime relating to the possession of narcotics,' the legislative history indicates that the Committee's aim was to eliminate traffic in narcotics as distinguished from use." 237 F. Supp 282, at 284. The Court quoted from the concluding words of the Legislative committee:

> "Drug addiction is not a disease. It is a symptom of a mental or psychiatric disorder. Because contact with a drug is an essential prerequisite to addiction, elimination of drug servility on the part of addicted persons can best be accomplished by the removal from society of the illicit "trafficker." It is to this end that your committee has taken favorable action on H.R. 11619." 1956 U.S. Code, Cong. & Adm. News, p. 3274, et seq., 3281." 237 F.Supp. 282 at p. 284.
>
> "Congress undoubtedly has aimed its attack upon possession which would give the possessor 'such dominion and control as would have given him the power of disposal.' The quoted words are borrowed from Toney v. United States, 62 App.D.C. 307, 67 F.2d 573, a case involving the crime of possession of liquor." 237 F. Supp 282, at 284.

Petitioner in Varga was convicted for use or being under the influence of narcotics. The Court held that the alien was hardly in a position to traffic in the

drug under these circumstances and can hardly be said to have had the type of possession as would give him such dominion and control which would include the power of disposition.

In Mr. Lennon's situation, a conviction was entered although the defendant did not even know that he was in possession of the drug, under a statute which did not allow proof of lack of knowledge as a defense. This could not have been the type of "possession" which Congress contemplated as would give respondent such dominion and control as to include the power of disposition. The conviction, therefore, should not bar an application for adjustment of status.

The Varga rationale has been adopted as the official view of the Immigration Service. In Matter of Sum, decided by the Board of Immigration Appeals on May 22, 1970, INterim Decision #2045, the Board overruled all its precedents holding that a conviction for unlawful use of proscribed drugs makes an alien deportable as one who has been convicted for unlawful possession of such drugs. In that case, the respondent had been convicted of violating Section 11720 of the California Health and Safety Code in 1941 for "taking or otherwise using any narcotics." The Board decided to follow Varga, which was never appealed, observing that although aware of the decision, the Solicitor General of the United States declined to authorize an

appeal in Varga; it thereby adopted its rationale as binding.

In Matter of Schunck, File A13 120 444, 40 L.W. 2687 (decided April 18, 1972), the Board of Immigration Appeals held that where an alien was convicted of violation of California Health and Safety Code Section 11556 (providing that it is unlawful to visit or be in any room or place where narcotics are being unlawfully smoked or used with knowledge that such activities are occurring) was not a proper basis for deportation. The Special Inquiry Officer (Immigration Judge) had correctly reasoned that the section was broad enough to result in the conviction of a defendant who was not himself involved in trafficking in marijuana or narcotic drugs. The Board affirmed that Section 241(a)(11) cannot be interpreted to include the conviction of a non-participating bystander under a statute that seeks merely to discourage visits to places where narcotics are unlawfully used. It was held that it was not the intent of Congress to deport an alien who finds himself in a place where marijuana or narcotics are unlawfully used, such action not being related to trafficking under the Varga rationale. This is completely in accord with the decision of the Board in Matter of Martinez-Gomez, Interim Decision #2138 (decided March 23, 1972), that a conviction of violation of California Health and Safety Code Section 11556 (a statute providing that it is unlawful to maintain any place for the purpose of unlawfully selling, giving away or using any narcotic) is a conviction of a law relating to "illicit traffic in narcotic drugs or marijuana" within the meaning of §241(a)(11).

As stated in Martinez-Gomez, supra,

> "The issue before us is whether Section 11557 is a law relating to illicit trafficking in narcotic drugs or marijuana. Relying on our decision in Matter of Sum, Interim Decision 2045 (1970), the special inquiry officer held that it was not such a law. However, Matter of Sum dealt with a different question, namely the question of whether a conviction for unlawful use of proscribed drugs rendered an alien deportable as a person convicted for unlawful possession of said drugs. This respondent was convicted for violation of a statute which does not at all require, for conviction, the unlawful use or possession of proscribed drugs by the accused person. Section 11557 of the California Health and SAfety Code under which this respondent was convicted was clearly designed to eliminate the illegal traffic in narcotic drugs by making it a crime for a person to provide a place for the unlawful disposal of narcotics."
>
> "We are of the opinion that the statute taken at its minimum involves a law "relating to...illicit traffic in narcotic drugs or marijuana." The primary purpose of Section 11557 is to eliminate or control traffic in narcotics by making it a crime to"maintain any place" for the "selling, giving away or using" any narcotic."

The essential difference is between convictions of persons who have ability to traffic in the drugs (and are in sufficient dominion and control over the drugs to do so), i.e., are maintaining a place for the purpose of unlawfully selling, giving away or using any narcotic, and those persons who, although convicted of a statute "relating to " possession of marijuana, do not have such

sufficient dominion and control over the drugs to traffic in them, i.e., standing in aroom where drugs are being used, having drugs in one's bloodstream, or in Mr. Lennon's case, having drugs in one's home, in a Binocular case located therein, but being totally unaware of the presence of any substance in the Binocular case. See also, Matter of Amiet, Interim Decision #2150, decided May 19, 1972.

Matter of T C, 7 I.&.N. Dec. 100 (1956) (citied by the Immigration Judge as Matter of P C), holding that a conviction of selling a substance in lieu of a narcotic is a conviction of "violation of a law relating to...narcotic drugs",is completely distinguishable. The decision did not relate to the meaning of the term "possession"but rather to the term "relating to" as the alien was convicted of selling a substance rather than of possession of any substance. The decision is not at all pertinent to the meaning of the term "possession." If relevant at all, it proves that the possession involved in attempting to sell a non-narcotic substance and pass it off as a narcotic involves such dominion and control as imports "possession" as contemplated by the Immigration Act; respondent does not argue with this proposition. (See argument, infra, as to Matter of Paulus and its effect on Matter of T C.)

For, in a sense, all laws touching on narcotics relate to their traffic, however remotely. Even the

statute in the Varga case related to actual or potential traffic in drugs. The Immigration law, however, limits its concern to those which directly touch upon traffic or, in cases of possession convictions with which we are here concerned, limits its concern to those which clearly require the type of possession in which there is a power to traffic in or dispoe of the substance. Knowledge is an essential element of this power. It is clear from the British statute and case law, that the British statute under which respondent Lennon was convicted mandated convictions for possession at the time in question regardless of the mental element and that lack of knowledge was not a defense. This is indeed what occurred in Lennon's case and was one of the prime considerations in his decision to plead guilty. As he stated at the hearing, the "stuff was planted" on him without his knowledge in containers that were his. This could not conceivably have been the type of "possession" contemplated by the U.S. Immigration law to render him ineligible for residence under §212(a)(23). What Mr. Lennon contends, simply put, is that he cannot be chagged with trafficking in a substance which he did not know was there: that his lack of knowledge of its existence, while not a defense under the statute in England under which he pleaded guilty, was not of the character which renders him excludable from U.S. residence -- and while it constituted "possession" as used in the British statute, it is not encompassed in the term as used in §212(a)(23) of the Act, as defined by Varga and Sum.

In essence, it is Mr. Lennon's major contention that he is therefore statutority eligible for permanent residence in the United States.

Mr. Lennons' admission under the British statute that he was in "possession of" cannabis resin should therefore be distinguished from the Immigration Judge's position (Opinion, p. 18) that "mere possession without intent to traffic in drugs would be sufficient to bring the alien within the statute" even under Varga, "since he would have such dominion and control as would give him the power of disposal." The Immigration Judge's conclusion (Opinion, p. 19) that the Court in Varga, supra, would have found that Mr. Lennon had sufficient dominion and control under the act is clearly without foundation, because the Immigration Judge refers to the intention to traffic, while Varga refers to the proper definition of "possession" in the Immigration Act. Varga holds that regardless of intent one cannot be in "possession" of marijuana under the Act unless the possession itself imports such dominion and control as would permit of traffic. Varga, in short, defines "possession" in objective rather than subjective terms. No one disputes the Immigration Judge's statement that "mere possession without intent to traffic in drugs would be sufficient to bring the alien under the statute." However Varga mandates that to bring the alien under the statute the possession must be of a certain nature, which was impossible in the Lennon case.

The language in Varga, and the supporting language of the Board of Immigration Appeals in Matter of Sum, clearly support the proposition that Mr. Lennon did not have such sufficient dominion and control to come within the meaning of "possesion of" marijuana as the term is used in §§. 241(a)(11) or (a)(23) of the Act.

Moreover, respondent's conviction for possession of marijuana is not a conviction for "illicit possession" of marijuana within the meaning of §212(a)(23) of the Immigration and Nationaltiy Act. The effect of the inclusion of the term "illicit" in the statute is to limit its applicability to aliens who have been convicted of "illicit" possession of marijuana. The use of this adjective, a term appearing nowhere else in the Act, to modify "possession" would appear to require a showing of more than mere possession; "illicit" in this context imports criminal unlawfulness or at the very least, a knowing kind of possession. The Immigration Judge would not appear to contradict this understanding of the term "illicit" when he states that:

> "...it was the intention of Congress to make deportable those who had been convicted merely of illegal possession of a narcotic drug, though it erroneously concluded that under the decided cases mere possession would result in deportability under the statute as originally drawn..." (Opinion, p.15) [Emphasis supplied.]

Current statutory and common law in the United States substantiates the "knowing possession" interpretation of the term "illicit." Illegal possession of marijuana in each of our fifty states refers to possession wherein the defendant has knowledge of the presence of the substance. See 91 A.L.R.2d 810, 821, cited supra. This presumed knowledge of the presence of the marijuana, an essential element of conviction under §212(a)(23), was absent from the charge, the plea and the conviction of John Lennon.

C. The Use of the Dangerous Drugs Act of England as a bar to residence under §212(a)(23) would deny respondent due process.

United States law is applicable in determining whether a crime committed by an alien in another country is a crime of a class which will preclude his admission. Giammario v. Hurney, 311 F.2d 285 (3rd Cir. 1962). It is therefore relevant to consult equivalent U.S. statutes on the subject.

From a comprehensive review of the law of all fifty (50) states, the Federal law, and the law of neighboring countries, it is apparent that all the said statutes concerning possession of marijuana require as an element of prosecution and conviction, that the defendant be shown to have had possession with knowledge of such possession, i.e., that the statutes all contain the "mens rea" requirement significantly missing in the Dangerous DRugs Act 1965 and the Regulations of 1964, in England. The same is true

of the Mexican statutes as interpreted by Mexican case law. See Titulo Septimo, Delitos contra law salud, Capitulo I., Art. 193, 194 et seq., Codigo Penal Para El. D.F. Y Terriotiros F; and the same has been held true in Canada. (See earlier discussion of Beaver v. R., supra.)

Under our system, it is considered that the fairness of a criminal proceedding and the essential substantive and procedural safeguards of the criminal law would be endangered by a statute which required no proof of criminal intent. See United States v. Fueston, 426 F.2d 785 (9th Cir. 1970); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); Truner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); Casella v. United States, (D.N.J. 1969)., and many other well-established cases.

The Uniform Narcotic Drug Act, adopted by forty-six states, the District of Columbia, and Puerto Rico, provides in Settion 2 thereof that it shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized by the Act. In order to convict a defendant of the offense of possession of a narcotic drug within the meaning of Settion 2 of the Act, it is necessary to show that the defendant was aware of the presence and character of the particular substance, and was intentionally and consciously in possession of it. California, one of the few states which did not ratify

the Uniform Narcotic Drug Act, has its own statute which has been interpreted to require the "mens rea" requirement, missing from the British statute herein concerned. See People v. Winston, 293 P.2d 40 (1956), and People v. Hancok, 319 P.2d 731 (1947), and People v. Redrick, 357 P.2d 255 (1961). Similarly, the Federal statutes, including the Food and Drugs Act, the Internal Revenue Act, and the Marijuana Tax Act, all require "mens rea."

No claim is made that a foreign convictionmust necessarily conform to constitutional guarantees in the United States. What is claimed, however, as fundamental law, is that where a foreign conviction was obtained in a manner where it denied due process of law, we are not precluded from making further inquiry, Marino v. Holton, 227 F.2d 886 (7th Cir. 1955), cert. denied 350 U.S. 10006, and can indeed disregard it as a ground for deportation or exclusion. Thus a conviction void on its face under local law can be disregarded. United States ex rel. Freislinger v. Smith, 41 F.2d 707)7th Cir. 1930); Wilson v. Carr, 41 F.2d 704 (9th Cir. 1930); and a conviction in absentia will not be recognized for deportation purposes. Ex Parte Kowerner, 176 F. 478 (E.D.Wash. 1909); Ex Parte Watchorn, 160 F. 1014 (S.D.N.Y. 1908). Likewise in Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958), where a military tribunal did not have the same safeguards deemed essential to fair trials of civilians in federal courts, the Court held that a court-martial conviction of larceny and robbery would

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not suffice to warrant a deportation, although a conviction by a U.S. Federal Court of the same crimes would be sufficient to support deportation.

Under British law, there was no criminal intent required for conviction of illegal drug possession under the law in question at the time of Lennon's conviction (See discussion, supra). Innocent possession of a package or substance which later proved to be a narcotic was held sufficient to result in a conviction, despite the fact that the accused had no knowledge or reason to know either the contents of the package, or the nature of the substance it contained. This type of conviction, lacking an element which we consider to be essential to elementary fairness, is alien and abhorrent to our system. Its use as a basis for exclusion from permanent residence of an applicant whose child is a United States citizen and whose spouse is a permanent resident, is a patent denial of due process.

The Immigration Judge, when presented with the above argument, made several points in his opinion with reference to respondent's argument (See Opinion, pp. 22-29). His first contention is that "it has been held in a minority of jurisdictions that such knowledge (knowledge by defendant of the existence of thenarcotics where found) is not an element" of immediate and exclusive control or at least joint control or constructive possession.

In support of this proposition, the Immigration

Judge cites various authorities from what he considered to be a minority of jurisdictions. Respondent herein demonstrates that said authorities are no longer controlling.

The general rule of American law requires knowledge as an essential element in criminal possession. It is "generally necessary to show that the defendant was aware of the presence and character of the particular substan ce, and was intentionally and consciously in possession of it." What constitutes "possession of a narcotic drug prescribed by §2 of the Uniform Narcotic Drug Act, 91 A.L.R.2d 810, at 811. Some jurisdictions have required a lesser standard ofknowledge. "However, no case has been found in which the defendant's conviction of illegal possesion of narcotics has been sustained where the prosecution has failed to prove, either directly or by inference, that the defendant had knowledge of the presence of the contraband substance." 91 A.L.R.2d 821.

The four American jurisdictions listed as exceptions to the general rule are: Washington, Florida, Massachusetts, and Maryland. A more careful examination of the current law in these states reveals that, with the possible exception of Maryland, they do not refute the contention that in the United States, knowledge is a requisite element in the crime of possession of proscribed drugs.

Washington has the most extensive case law on the subject, and is referred to by the Immigration Judge in his opinion. (See Opinion, pp. 22-23). The origin of their doctrine may be traced to State v. Henker,