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Article 9

Constitutional Law - Citizens - Naturalization

M. Wesley Kuswa

kosh, representing, among other things, that they had a cottage on the lake where he could enjoy the sunshine and fresh air to benefit his health. The testator accompanied them and the Mondays devoted themselves to his care and comfort. Prior to this time the intimacy between the nephew and niece and that of the testator was that of comparative strangers.

On September 10, Mayme, the preferred niece, called an attorney to her cottage and the testator executed a will leaving his entire estate to Chris and Mayme Monday. On September 20, 1928, at 3:30 in the morning the testator died. In the forenoon of the same day, the petition for probate of the will executed on September 10, was filed in the county court of Winnebago, before any arrangements were made for the funeral or the relatives notified.

Contestants of the will are his children and until July 1, 1928, cordial relations existed between the testator and his children, evidenced by testator's executing one will on February 9, 1928, and another on June 9, 1928, in both of which he left to them all of his disposable estate in equal shares.

At the time of the execution of the will, offered for probate the testator was of sound mind and of sufficient mental capacity to make a will, although he labored under delusions with reference to his children.

The Supreme Court reversed the order of the county court admitting to probate on the ground that it was produced by undue influence. The important feature of this case is the establishing of the rule that where three of the four elements necessary to establish undue influence are present namely: one, a fit, easy subject; second, an opportunity for exercising undue influence; and third, a result indicating its exercise, a prima facie case of undue influence is established and the fourth element of force may be inferred from the three existing elements. So in this case where the evidence conclusively established by clear and satisfactory evidence the three elements, the court inferred the fourth.

GERTRUDE SPRACKER.

CONSTITUTIONAL LAW — CITIZENS — NATURALIZATION — *United States* v. *Macintosh,* 51 S. Ct. Rep. 570. By the barest majority the United States Supreme Court denied citizenship to the applicant Macintosh, a Canadian born Baptist minister, chaplain and professor of theology at Yale University.

He was denied citizenship because he was unwilling to take the oath of allegiance unqualifiedly. He asserted that he was willing to take up arms in defense of this country except in a war which he

considered morally unjustified. He amplified this statement by saying that he was not a pacifist, but would not support the doctrine of my country right or wrong. He said further that he could not have the majority decide his moral problems. Briefly, his position was that no matter how necessary the war might seem to the government of the day, he would not defend his country by force of arms unless he believed the war to be morally justified.

He raised the point that native born citizens who were conscientious objectors were by act of Congress exempt from military service; and that a naturalized alien is forced by his oath to promise to bear arms, conscientious objector or not, thus being deprived of the privileges of native born citizens. This point was met by the court with the argument that even a native born citizen has no inherent or even constitutional right to such exemption, but has the right only by enactment of Congress, and that therefore it may be revoked at the will of Congress. It was said that a naturalized citizen should promise to bear arms, and rely upon the statutory exemption if he be a conscientious objector.

The Naturalization Act, S4, c. 3592, 34 Stat. 596 (8USCA 372), provides, among other things, that the alien shall declare on oath that he will support and defend the Constitution and the laws of the United States against all enemies, and bear true faith and allegiance to the same. The majority of the court decided that Macintosh did not fulfill this requirement laid down by Congress. They held that the constitutional power of Congress to declare war and to raise armies necessarily implies the power to enforce the duty of all citizens to bear arms in defence of the country when necessary. The minority of the court, however, pointed out that there was no express requirement to this effect, and that in view of the directly contrary practice of Congress, no requirement of willingness to bear arms should be read into the oath. By implying such requirement, said the minority, the court was performing a legislative function.

The oath requires the promise "to support and defend the Constitution_____against all enemies" and does not require *bearing arms.* The minority very convincingly argue that bearing arms is not always necessary in defence of one's country, since the last war demonstrated that engineers, nurses, doctors, and chaplains also find opportunity to serve their country in time of war.

The majority felt that the case was ruled in principle by *U. S. v. Schwimmer,* 279 U. S. 644, where it was decided that a conscientious objector and pacifist, unwilling under any circumstances to bear arms for the country, was unfit for citizenship. On this point the Chief Justice, dissenting, denied that the Schwimmer case controlled the

instant case. He quite properly draws attention to the great dissimilarity of facts between the two cases. In the Schwimmer case, the applicant was a pacifist. Macintosh was not. In fact, he was so far from being a pacifist that he served at the front in the World War as chaplain, and later as head of an American Y. M. C. A. He was simply unwilling to put allegiance to his country before allegiance to his God. This is far removed from pacifism.

Looked at from a philosophical angle, a great deal might be said about this case. From a legal point of view, little can be said beyond what may be found in the very exhaustive opinions in the case. Whether wisely or not, the court is now definitely committed to strict, unyielding naturalization requirements.

It may, however, be remarked that it is strange and not a little surprising that the court should so painstakingly seek technicalities and unnecessary implications in order to exclude a person of such unquestionable moral qualifications for citizenship. It was ably pointed out by Chief Justice Hughes, speaking for the minority, that if a man so highly desirable as a citizen is to be excluded, "the disqualification should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy."

True, if the great mass of citizens in the United States were suddenly to entertain the same philosophy as Macintosh, and if all these persons were to conclude, even mistakenly, that a certain war was unjust, the United States might be placed in an embarrassing situation. This country might find itself unable to prosecute even a necessary war. But obviously such situation is impossible practically, since the great mass of citizens will always as they have in the past, continue to support their country right or wrong. This assumed situation, then, being impossible, it is doubly difficult to see why Macintosh was denied citizenship, since it is elemental that the law is not based upon impossibilities.

M. Wesley Kuswa.

Constitutional Law — Municipal Corporations — Eminent Domain. In *City of Milwaukee v. Milwaukee Electric Ry and Light Co.* 238 N. W. 377 (Wis.) the Supreme Court denied a motion for rehearing on injunction imposed on the defendant Company from operating cars used exclusively for the transportation of freight upon plaintiff's streets, as designated by the franchise of March, 1906. By that franchise the Milwaukee Northern Ry Co., the defendant's predecessor, was authorized to operate on designated streets in City of