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Article 10

Constitutional Law - Municipal Corporations - Eminent Domain

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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

Milwaukee interurban cars which are used primarily—yet not necessarily exclusively—for passenger service. Although the defendant Company was granted two three-months trial periods in 1928, the court was of the opinion that this was *not* a consent to the enlargement of terms of the franchise, and hence by subjecting the property to this added burden, without compensation to the abutting owners would be unconstitutional.

In Article 1 Section 13 of the Wisconsin Constitution is preserved inviolate the right of the individual to possession of property, for "the property of no person shall be taken for public use without just compensation therefor." It is a fundamental tenet that the question of the necessity for taking lands for public use by right of eminent domain, and the extent and manner of its exercise, are questions of policy which belong to the legislature. Since the legislature is the sovereignty from which power emanates, it may delegate the exercise of such powers to municipal corporation or municipal officers. *Wisconsin Water Co. v. Winans* 85 Wis. 26, *State ex rel. Baltzel v. Stewart* 74 Wis. 620, *Smeaton v. Martin* 57 Wis. 364, *Smith v. Gould* 59 Wis. 631.

Having acquired private land for public use, and dedicated it to public travel, the city may grant a franchise to a common carrier for hire to subject certain designated streets to ordinary surface street railway service. Although such a franchise also grants the right to erect poles to support the overhead trolley wires, which poles are set near the outer edge of the sidewalk—with due regard to the property owner's convenience—it is not an additional burden upon the fee, but an improved method of using the street for its original purpose, namely public travel. *Hobart v. Milwaukee City Ry Co.* 27 Wis. 194, *State ex rel. Attorney General v. Madison St. Ry Co.* 72 Wis. 612, *La Crosse City Ry Co. v. Higbee* 107 Wis. 389, *City of Milwaukee v. Milwaukee Electric Ry and Light Co.* 173 Wis. 400.

In the instant case, although modern conditions demand a greater elasticity than granted in the 25 year old franchise, the court declares that using these ordinary surface street railway tracks (which were erected for the purpose of transporting persons from place to place on such streets at their convenience) for a certain number of cars used exclusively for freight does impose an additional burden upon the fee. The court refuses to enlarge the scope of eminent domain when it says, "Courts cannot by interpretation enlarge rights conferred upon street railway by municipal ordinances or subject private property to additional burdens without consent of, or compensation to, the owner, although changes in transportation condition may warrant additional grant."

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