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# STATUTORY CONSTRUCTION

## CHANGE IN INTERPRETATION AFTER REENACTMENT

In an application for naturalization, a native of Canada, a Seventh Day Adventist, refused to promise to bear arms in defense of this country on the basis that the promise would be contrary to his religious belief. He was willing to do military service as a non-combatant and was willing to take the oath of allegiance as required of aliens by the Nationality Act of 1940,<sup>1</sup> which does not specifically require that petitioners for citizenship must promise to bear arms. Held: The District Court's order admitting the applicant to citizenship was affirmed.<sup>2</sup> *Girouard v. United States*, 66 S. Ct. 826 (1946).<sup>3</sup>

The question presented is one of statutory construction. Does the statute require an applicant for citizenship to state under oath that he is willing to take up arms in defense of his country? A divided court, interpreting the Naturalization Act of 1906,<sup>4</sup> held in the *Schwimmer*,<sup>5</sup> *Macintosh*,<sup>6</sup> and *Bland*<sup>7</sup> cases that it was an implied requirement.<sup>8</sup> The decisions met with prolific adverse criticism.<sup>9</sup> For

16. Kelley v. Kelley, 317 Ill. 104, 110, 147 N.E. 659, 661 (1925); Hickey v. Thayer, 85 Kan. 556, 118 Pac. 56, 57 (1911), 41 L.R.A. (N.S.) 564 (1913).
17. Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 513 (1921); Sweigart v. State, 213 Ind. 157, 167, 12 N.E. (2d) 134, 138 (1938). E.g., Ill. Rev. Stat. (1945) c. 40, § 1-21.
1. 54 Stat. 1137, 1157, 8 U.S.C.A. § 735 (b) (1940).
2. The decision of the District Court of Massachusetts, admitting him to citizenship was reversed by the Circuit Court of Appeals, *U.S. v. Girouard*, 149 F. (2d) 760 (C.A.A. 1st, 1945). The Circuit Court took its action on the authority of *U.S. v. Schwimmer*, 279 U.S. 644 (1929); *U.S. v. Macintosh*, 283 U.S. 605 (1931); *U.S. v. Bland*, 283 U.S. 636 (1931).

As a matter of statutory construction, the Court held that Congress did not intend to require a promise to bear arms as a prerequisite to citizenship, and that judicial interpretation rendered prior to legislative re-enactment of the Naturalization Act did not preclude judicial review of previous Supreme Court decisions.
3. Stone, C. J., Frankfurter and Reed, J. J., dissenting.
4. 34 Stat. 596 (1906).
5. *U.S. v. Schwimmer*, 279 U.S. 644 (1929).
6. *U.S. v. Macintosh*, 283 U.S. 605 (1931).
7. *U.S. v. Bland*, 283 U.S. 636 (1931).
8. The Court in the principal case has adopted the dissenting opinion of Hughes, C.J., in *U.S. v. Macintosh*, 283 U.S. 605, 635 (1931), ". . . while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship. . ."
9. Fields, "Conflicts in Naturalization Decisions" (1936) 10 Temp.

the next ten years numerous bills were introduced in Congress to nullify the effect of the decisions.<sup>10</sup> Arguments for and against these bills were made in committee hearings<sup>11</sup> and on the floor of Congress.<sup>12</sup> However, all the bills died in committee.<sup>13</sup> In the meantime the decisions were followed.<sup>14</sup> In 1940, after studied deliberation, the Nationality Act was revised<sup>15</sup> and the words of the oath were left substantially the same as in the 1906 act;<sup>16</sup> but non-combatants in the armed forces were permitted to become citizens by an amendment to the Second War Powers Act of 1942.<sup>17</sup>

Both majority and minority agree that the primary rule of construction is to ascertain and declare the intent of the legislature.<sup>18</sup> Legislative history affords accurate and compelling guides to legislative intent.<sup>19</sup> The majority could not find affirmative recognition of the rule of *Schwimmer*, *Macintosh* and *Bland* decisions in the

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L. Q. 272; Carpenter, "The Promise to Bear Arms as a Prerequisite to Naturalized Citizenship" (1931) 10 Ore. L. Rev. 375; Notes (1930) 3 So. Calif. L. Rev. 224; (1929) 101 Literary Digest 9; (1929) 128 Nation 689; (1929) 59 New Republic 92; (1929) 152 Outlook 250.

10. HR 3547, 71st Cong. 1st Sess., 71 Cong. Rec. 2184; HR 297, 72nd Cong. 1st Sess., 75 Cong. Rec. 95; S 3275, 72nd Cong. 1st Sess. 75 Cong. Rec. 2600; HR 1528, 73rd Cong. 1st Sess., 77th Cong. Rec. 90; HR 5170, 74th Cong. 1st Sess., 79th Cong. Rec. 1356; HR 8259, 75th Cong. 1st Sess., 81 Cong. Rec. 9193; S 165, 76th Cong. 1st Sess. 84 Cong. Rec. 67.
11. See committee hearings on the bills listed in n. 10.
12. 72nd Cong. Rec. 6966-7; 75th Cong. Rec. 15354-7.
13. See n. 10 supra.
14. *Shelley v. U.S.*, 120 F. (2d) 734 (App. D.C. 1941); *In re Warkentin*, 93 F. (2d) 42 (C.C.A. 7th, 1937); *Beale v. U.S.*, 71 F. (2d) 737 (C.C.A. 8th, 1934); *In re Losey*, 39 F. Supp. 37 (D.C. Wash. 1941); *In re Aldecoa*, 22 F. Supp. 659 (D.C. Idaho 1938); *Clarke's Case*, 301 Pa. 321, 152 A. 92 (1930). *Contra*: *re John P. Klessen*, (C. P. Allen Co., Ohio 1933); *In re Bubeck*, (C. P. Bergen Co., N.J., 1933).
15. See n. 1 supra. The revision of the naturalization laws was considered by a Congressional Committee and a committee of Cabinet members, one of whom was the Attorney General. Both committees were aware of the *Schwimmer*, *Macintosh*, and *Bland* decisions.
16. Extensive changes were made in the requirements and procedure for naturalization.
17. 56 Stat. 176, 182 (1944), 8 U.S.C.A. § 1001 (1945).
18. The majority and minority purport to ascertain legislative intent. See principal case at pp. 830, 831-33. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863, 870 states that there is no such thing as legislative intent. He modified his view in Radin, "A Short Way with Statutes" (1942) 56 Harv. L. Rev. 388, 410, to say that debates, committee reports and the like are neither irrelevant nor incompetent, but that they are in no sense controlling. See, Miller, "The Value of Legislative History of Federal Statutes" (1925) 73 U. of Pa. L. Rev. 158.
19. See Landis, "A Note on Statutory Interpretation" (1930) 43 Harv. L. Rev. 886.

legislative history of the act.<sup>20</sup> Declaring that there was an absence of clear and explicit direction from Congress, the majority determined what they believed was the basic legislative intent. Relying upon the American tradition of freedom of religious belief,<sup>21</sup> the majority stated that they did not believe Congress intended to exact a pledge to bear arms as a prerequisite to citizenship. They construed the failure of any of the proposed bills to be reported out of committee as congressional silence.<sup>22</sup> Thus, the Court refused to accept what has generally been recognized as an important extrinsic aid in statutory construction.<sup>23</sup> The majority would review previous interpretations of statutes in much the same manner as constitutional construction is reviewed.<sup>24</sup> The justification for such treatment, however, is not similar; unlike constitutional construction erroneous statutory construction can be corrected by legislative action.<sup>25</sup> The majority opinion encourages judicial law-making. Upon occasions it is admitted that this is necessary,<sup>26</sup> but as a general proposition judicial law-making should have a definite and stable limit. For when the subjective determination of policy rests with the courts rather than the legislators, the legislative process is ignored.<sup>27</sup>

The minority determined legislative intention by a consideration of all extrinsic evidence.<sup>28</sup> They carefully analyzed the complete legis-

20. See principal case at p. 830.

21. See *U.S. v. Schwimmer*, 279 U.S. 644 (1929) (dissenting opinion); *U.S. v. Macintosh*, 283 U.S. 605 (1931) (dissenting opinion.)

22. In the interpretation of a statute it has been regarded as improper to resort to a bill on the subject proposed in committee, but never voted upon by the legislature. *District of Columbia v. Washington Market Co.*, 108 U.S. 243 (1879).

Rules against reading anything into a statute by implication are particularly applicable to provisions expressly rejected by the legislature. *Carey v. Donohue*, 240 U.S. 430 (1916); *Pennsylvania R.R. v. International Coal Min. Co.*, 230 U.S. 184 (1913). This contention is that the court can have no means of knowing the reasons that influenced the legislature in such rejection. Similarly, the court can have no knowledge of the reasons that influence passage.

23. See 2 Sutherland, "Statutory Construction" (3d. ed. 1943) §§5505, 5006, 5007, 5008, 5015.

24. See Willis, "The Part of the United States Constitution Made By The Supreme Court" (1937) 23 Iowa L. Rev. 165; Lobinger, "Precedent in Past and Present Legal Systems" (1946) 44 Mich. L. Rev. 955, 978, n. 128; (1946) 4 Nat. Bar. J. 137; (1946) 32 A.B.A.J. 345. See Lyon, "Old Statutes and New Constitution" (1944) 44 Col. L. Rev. 599, 631.

25. "Courts are not responsible for the law." *Thomas v. Industrial Commission*, 243 Wis. 231, 10 N.W. (2d) 206 (1943.)

26. See Horack, "In the Name of Legislative Intention" (1932) 38 W. Va. L. Q. 119.

27. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time." Landis, "A Note on Statutory Interpretation" (1930) 43 Harv. L. Rev. 886, 892.

28. See Horack, "Cases and Materials on Legislation" (1940) 491.

lative history and saw that the former interpretation had been presented to Congress in a precise form.<sup>29</sup> The minority would place the burden of proof upon those who are attempting to show that Congress did not intend to adopt existing interpretations. Statutory interpretation should be on the basis of the assumed acquiescence of the members of the legislature to the prevailing interpretations.<sup>30</sup> Granting that the Court in the first instance misinterpreted the Act of 1906, there has been abundant opportunity for Congress to give further expression to their will.<sup>31</sup> Its failure to do so amounts to ratification.<sup>32</sup> Congress having adopted the statute by reenactment, neither the department charged with its execution nor the courts should be at liberty to disregard it.<sup>33</sup> This properly places the responsibility of settling controversial issues of interpretation on the legislature and relegates the judicial function to that of making a determinable statute somewhat more determinate.<sup>34</sup>

## SUPREME COURT

### SELECTION FEDERAL JURY PANEL

Petitioner was injured when he jumped from moving train operated by respondent. Suit in a California court alleging negligence, was removed to federal court in San Francisco where petitioner moved to strike jury panel as it represented "mostly business executives or those having the employer's point of view. . ." Evidence showed the jury commissioners excluded day laborers from the jury list since this group probably would have been excused by the trial judge anyway on grounds of financial hardship. Motion denied. Court of appeals

29. See n. 10 supra.

30. *U.S. v. Anderson*, 269 U.S. 422 (1926). See *U.S. v. SouthEastern Underwriters Ass'n*, 322 U.S. 533 (1944) (Dissenting opinion by Stone, C.J.).

31. See n. 10 supra.

32. *Manley v. Mayor*, 68 Kan. 377, 75 Pac. 550 (1904); *U.S. v. Elgin J. & E. Ry.*, 298 U.S. 492 (1935). Contra: *Rosse v. St. Paul & D. Ry.*, 68 Minn. 216, 71 N.W. 20 (1897). See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109.

33. See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109. For a discussion of this problem in the field of tax and administrative law, see Alford, "Treasury Regulations with the Wilshire Oil Case" (1940) 40 Col. L. Rev. 252; Brown, "Regulations, Reenactment, and the Revenue Acts" (1941) 54 Harv. L. Rev. 377; Feller, "Addendum to the Regulations Problem" (1941) 54 Harv. L. Rev. 1311; Griswold, "A Summary of the Regulations Problem" (1941) 54 Harv. L. R. 398; Paul, "Use and Abuse of Tax Regulations in Statutory Construction" (1940) 49 Yale L. J. 660; Surrey, "The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes" (1940) 88 U. of Pa. L. Rev. 556; "If there has been a series of uniform decisions on the same point they ought to have the force of law, because in this case they become conclusive evidence of the law. . ." Lieber, "Hermeneutics" (3d ed. 1880).

34. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863.