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United States v. Macintosh

Kenneth Craddock Sears

likely to recur. But we believe that, if it does, its rejection can be placed on grounds which would not again permit of dissent.

II

By Kenneth C. Sears*

Dean Wigmore's comment on the *Macintosh* case considered in the light (or the heat) of other comments on this and the *Schwimmer* case[6] seems to demonstrate that the subject matter is very likely to kindle the emotions. Accordingly, dispassionate consideration and an objective judgment become difficult.

Considerable could be written in a critical analysis of Colonel Wigmore's comment. Suffice to say at this point that he seems to have overstated his argument when he refers to the "triple inapplicability" of the argument in the minority opinion as rendered by Mr. Chief Justice Hughes concerning the tradition of the country with reference to a certain type of religious objectors. The distinction that has been made in federal legislation in this country between conscientious objectors and members of a well-recognized religious sect which is opposed to war was set forth by Mr. Donald B. MacGuineas in a recent number of this review.[7] The writer, however, does not understand that Mr. Chief Justice Hughes and other members of the Supreme Court who agreed with him were making any argument that Mr. Macintosh's case was controlled by the notion that *he,* as a possible conscientious objector, was nevertheless entitled to take the oath and be admitted to citizenship. On the contrary the argument of the minority was that the matter should be considered from the point of view of a person who in the future might apply for citizenship and who as a member of a well-recognized religious sect opposed to war in any form would be able to take the position that he, though an alien, is in the same class as many citizens of the United States who have been for a long time exempt from combatant service. From this point of view the writer does not think that the argument of the minority was inapplicable. However, the main purpose of this additional comment will be to emphasize a few observations which have already found their way into print. Dean Carpenter's letter in the American Bar Association Journal[8] and Professor Freund's re-

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6. *U. S.* v. *Schwimmer* (1929) 279 U. S. 644, 49 Sup. Ct. 448, 73 L. Ed. 889.

7. (1931) 25 Illinois Law Review 723.

8. 17 Am. Bar Ass'n Jour. 551.

view of the *Schwimmer* case[9] have anticipated this comment to some extent, at least.

In the first place the dogmatism of Mr. Wigmore's remarks seems to be unjustified. In the *Schwimmer* case (which has been distinguished from the other two cases), the district judge and six judges of the Supreme Court were on one side; three judges of the Circuit Court of Appeals and three judges of the Supreme Court were on the other side. In the *Macintosh* case the district judge and five members of the Supreme Court were of one opinion; three judges of the Circuit Court of Appeals and four judges of the Supreme Court were of the other opinion. The line-up in the *Bland* case was the same as the *Macintosh* case except that a presumably different district judge was unfavorable to naturalization. All of this would seem to demonstrate that the question is one upon which able and fair-minded individuals will differ.

Regardless of this, it seems to be reasonably clear that the controversy is pathetically futile. The tangible result to date, so far as known, has been the exclusion from citizenship of two women and one man, all of whom are among the best for citizenship save for the notion of supporting some future war which may not occur during their lives. If Mr. Macintosh and Miss Bland, at least, had crossed their fingers and had taken the oath without explaining their ideas, even the *Chicago Tribune* might have been contented. Thus, they pay the penalty for having sensitive consciences; the very quality that should make them desirable citizens in all things except possibly one is the quality that results in their exclusion from citizenship. The pity of it is that this barrier being largely subjective will mean nothing to such individuals as "Mops" Volpe. The oath thus tends to work inversely, i. e., keeps out the best in some instances and is no barrier to the worst applicants. Furthermore, it is difficult to believe that the oath will mean anything significant to the large mass of applicants. Most applicants probably will regard the oath as a part of the rigmarole of being admitted, and if impressed at all will not be too much impressed. The truth seems to be that despite a few interesting cases, this country must take its chances about the admission of aliens who may resist governmental processes in future wars. The causes of opposition to war are so various, the state of public opinion, locally and nationally, on the subject is so fluctuating that an average person cannot be expected to visualize the circumstances that will

9. 7 N. Y. U. L. Q. R. 157.

surround future wars. Then why exclude only very cautious individuals with New England consciences?

An oath seems to be an unsatisfactory means of testing the likelihood of good citizenship. It has broken down as a means of obtaining truth from a witness. If an oath is needed in naturalization proceedings for some formal purpose why not make it as colorless as possible and then resort to other means to ascertain the essential facts concerning the applicant? We need a more objective method of testing. Section 4 of the naturalization act provides for ascertainment of the facts about a person. Probably it should be amplified. Search the man's record and ascertain how he has lived, abroad as well as in this country. If all of this is done now under departmental regulations, then nothing more can be done except to perfect the technique and so far as possible choose the best who offer themselves. Why strain at an oath which will result only in eliminating some of our best prospects?

III

By Ernst Freund*

Two collateral questions are suggested by the foregoing two comments upon the decision in the *Macintosh* case as well as by the decision itself: First: If the law requires as a condition precedent to admission either to citizenship or to any other position of public trust the taking of a prescribed form of oath, is it the presumable intent of the legislature that there shall or may be an inquiry into the truth or falsity of the oath? By the common law of evidence it is legitimate to ascertain whether the sanctions of the oath are operative in point of conscience, but the power of inquiry stops at that point. The terms of the oath prescribed by the Naturalization Act are admittedly vague and fall short of any standard of legal precision. The eventuality of a defense of the Constitution and laws of the United States against all enemies, foreign and domestic, is as remote, as the bearing of true faith and allegiance to the same is subjective and undefinable. Phrases such as these may be appropriate to a solemn utterance meant to impress moral sense and conscience, but defy minute and logical analysis. The statute in the fourth paragraph of section 4, where it prescribes, not the terms

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