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Recent Cases

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ATTORNEY AND CLIENT—CONFLICT OF INTEREST—RIGHT TO WITHDRAW

Suit by a minor through his next friend against the defendant insurance company to recover damages for withdrawal of defendant's attorneys from the defense of actions against plaintiff. Plaintiff's father had procured liability insurance from the defendant covering every member of his family over a certain age. Plaintiff was under age at the time of the accident for which the original action had been brought but misrepresented this fact to defendant's attorneys at the time of their investigation. Defendant's attorneys did not learn of the misrepresentations until after the *voir dire* examination of the jury, at which point they were given leave of the court to withdraw. The case proceeded and a judgment was recovered against plaintiff, which in this proceeding the plaintiff seeks to recover from the insurance company. The circuit court gave judgment for plaintiff and defendant appealed. The Springfield Court of Appeals reversed the judgment and remanded the cause for a new trial and upon application of the defendant the case was transferred to the Supreme Court. Held: The trial court erred in not sustaining defendant's demurrer to the evidence and judgment of the trial court should be reversed. The court rests its opinion upon the fact that no obligation of defendant to defend arose under the contract of insurance. Plaintiff's theory that defendant's attorneys took charge of the defense and then abandoned that defense after the trial started, was not made out, because the defense was induced by a misstatement of plaintiff as to his age, upon which defendant's attorneys rightly relied. Upon discovering the true facts it would have been unprofessional conduct on the defendant's attorneys to continue with the defense because of a conflict of interest, in that continuation of the defense would amount to an estoppel on insurer to deny liability under the policy.[1]

Ethics and morality dictate that an attorney once having assumed command of a client's case not withdraw until termination of the entire proceedings.[2] For a failure to so continue an attorney may lose his lien and right to compensation for

1. Helm v. Inter-Insurance Exchange For Automobile Club of Missouri, 192 S. W. (2d) 417 (1946).

2. Rule 4.44 of the Missouri Supreme Court. "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client, except for reasons of honor or self respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also where a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund

services already rendered;[3] be held in contempt of court;[4] and be subject to liability in tort[5] as well as on the contract.[6]

Most of the cases reported in the books arose out of a situation where the attorney after withdrawal sued in *quantum meruit* to recover for the value of his services up until the time of withdrawal and the client defended on the ground that the withdrawal was unlawful.[7] Generally a client may arbitrarily discharge his attorney,[8] yet an attorney may withdraw for good cause[9] and upon reasonable notice[10] and with leave of court.[11]

In *Young v. Lanznar* the attorney gave notice of his withdrawal six weeks before trial because of client's failure to make advances, and the court instructed the jury that failure to make advances justified the attorney in withdrawing.[12] Where a corporation employed attorney to defend an action against it, but before completion of the action a federal receiver was appointed who was unfriendly to the attorney, the court felt the attorney had 'just cause' in withdrawing, saying:

> "The relationship of attorney-client is one of unusual character . . . its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one and makes its obligation on the part of the attorney of the most exacting kind. . . . Any change which destroys the confidence of the client or which requires the unwilling transfer by the attorney of his allegiance in a given manner to a substitute client as to make it desirable to permit a termination of relation rather than to attempt to coerce its continuance under adverse conditions."[13]

Likewise, an attorney is justified in withdrawal from a case if the client breaks

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such part of the retainer as has not been clearly earned." See Eisenberg v. Brand 259 N. Y. Supp. 57, 144 Misc. 878 (1932). Stark County v. Mischel, 42 N. D. 332, 173 N. W. 817, 6 A. L. R. 174 (1919).

3. Blanton v. King, 73 Mo. App. 148 (1989). King v. Mann, 315 Mo. 318, 286 S. W. 101 (1926).

4. State *ex rel.* v. Shay, 3 Ohio N. S. 657 (1915).

5. Roehl v. Ralph, 84 S. W. (2d) 405 (Mo. App. 1935). In undertaking the management of the matter committed to his care . . . must be implicity represented to plaintiff that he would exhibit the skill and diligence ordinarily possesd by well informed members of the legal profession in the conduct of such a task as he had undertaken, and his failure to have given his attention to the case would be under plaintiff's theory of the facts, be attributed to nothing less than negligence. However regardless of his negligence as found by the jury, before he may now be held to respond to plaintiff in damages, it must be shown that his negligence proximately worked the loss and the injury which plaintiff sustained.

6. Weekley v. Knight, 116 Fla. 721, 156 So. 625 (1934).

7. See 45 A. L. R. 1135.

8. Allen v. Fewel, 337 Mo. 955, 87 S. W. (2d) 142 (1936).

9. Dempsey v. Dorrance, 151 Mo. App. 429, 132 S. W. 33 (1910). State v. Bersch, 276 Mo. 397, 207 S. W. 809 (1919).

10. Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).

11. Dezino v. William S. Drozda Realty Co., 13 S. W. (2d) 659 (Mo. App. 1929).

12. Young v. Lanznar, 133 Mo. App. 130, 112 S. W. 17 (1908).

13. Matter of Dunn, 205 N. Y. 398, 98 N. E. 914 (1912).

off all communications with him and refuses to speak to him, notwithstanding the case is still pending.[14] (Apparently sufficient time was given client to procure other counsel before the trial of his case). Evidence of bribery of one of jurors by a relative of defendant justified withdrawal of his attorney during the trial, although there was no previous notice to the client, the court saying:

> "Ordinarily the attorney even when it becomes his duty to withdraw, must give his client proper notice before his withdrawal, so that the client may employ other counsel, but if the cause comes up suddenly during the progress of the trial, the court may permit him to withdraw immediately and prevent injury to the client by continuing the case for a sufficient length of time to enable him to procure other counsel."[15]

In *Gebhardt v. United R. R. Co.* it was held not only to be a right but a duty of the attorney to withdraw, when he found upon examination of the client before trial that his case had no foundation in fact.[16] It is also the duty of an attorney to withdraw if at any time he acquires interests diverse or hostile to those of his client.[17] The court in the principal case cited Supreme Court Rules, Rule 35 subsection 6 stating that it would have been unprofessional conduct for the attorney to continue after knowledge of a conflict of interest between defendant (now plaintiff) and insurer.[18]

An examination of these cases discloses that although it is justifiable for an attorney to withdraw, it is generally held that the client must be given reasonable notice in order to secure substitute counsel.[19] In the principal case, although there was no such notice, yet the Supreme Court apparently felt the trial court could prevent prejudice to the client by granting him a continuance.

In view of possible conflict of interest between the insurance company, the attorney's primary employer, and the nominal defendant, a person insured under a policy of liability insurance, it is advisable that attorneys be especially diligent in their investigation of the case to determine if the alleged insured is actually

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14. Dempsey v. Dorrance, 151 Mo. App. 429, 132 S. W. 33 (1910).

15. State v. Bersch, 276 Mo. 397, 207 S. W. 809 (1918). Rule 4.16 of the Missouri Supreme Court: "A Lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses, and suitors. If a client persists in such wrongdoing the lawyer should terminate the relation."

16. Gebhardt v. United R. R. Co., 220 S. W. 677, 9 A. L. R. 1076 (Mo. 1920).

17. U. S. Savings Bank v. Pittman, 80 Fla. 423, 86 So. 567 (1920).

18. Rule 35, subsection 6, now Rule 4.06 of the Missouri Supreme Court: "It is unprofessional conduct to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Helm v. Inter-Insurance Exchange for Auto Club of Missouri, 192 S. W. (2d) 417 (1946).

19. *In Re* Coffin's Estate, 189 Iowa 862, 179 N. W. 123 (1920). Eisenberg v. Brand, 259 N. Y. Supp. 57, 144 Misc. 878 (1932).

covered under the policy and entitled to their defense, for once the defense of insured's case is assumed, if there is no fault on the insured, a court may very well refuse to allow the attorneys to withdraw during the trial, thereby possibly stopping the insurance company from denying liability under the policy.

ALFRED E. HOFFMAN

NATURALIZATION — STATUTORY CONSTRUCTION

Girouard v. United States[1]

Involved in this case is the question of whether an applicant for naturalization may be required to promise to bear arms as a condition precedent to naturalization. Petitioner replied in the negative to the following question included in the application for naturalization—"If necessary, are you willing to take up arms in defense of this country?" Petitioner testified in the district court that he was a member of the Seventh Day Adventist denomination. He stated that the reason for his negative answer to this question was entirely religious. He said that he was willing to serve in the army as a non-combatant but would not bear arms.

The question before the court was not one of constitutionality but rather of statutory construction. Naturalization is a privilege and is bestowed upon such conditions as congress sees fit to impose.[2] The problem is not whether congress can require a promise to bear arms as a condition precedent to naturalization, but rather whether congress has done so.

Although there are some factual bases for distinguishing the instant case from preceding cases dealing with this question,[3] the same general problem is involved.

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1. Girouard v. United States, 66 Sup. Ct. 826 (1946).
2. United States v. Macintosh, 283 U. S. 605, 51 Sup. Ct. 570 (1931).
3. In United States v. Schwimmer, 279 U. S. 644, 49 Sup. Ct. 448 (1929), the petitioner was a woman and was more than fifty years of age at the time of the decision by the Supreme Court. Because of her sex and age she would not have been required to perform military services if she had been admitted to citizenship. She testified that she had conscientious scruples against fighting. The Court did not rely entirely on the refusal of petitioner to promise to bear arms for its decision. The Naturalization Act of June 16, 1906, 34 STAT. 597, Chap. 3592 (1906) 8 U. S. C., Sec. 382 (1940), provides: "It shall be made to appear to the satisfaction of the court . . . during that time (at least five years preceding the application) he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same . . . ." Petitioner testified that she had no sense of nationalism. The Court felt that one who has no sense of nationalism is likely to be incapable of attachment to the principles of the Constitution. The petitioner admitted that she was an uncompromising pacifist and indicated that she would be likely to spread propaganda concerning her pacifistic views. The Court stated that the influence of conscientious objectors upon others is likely to be more detrimental than their refusal to bear arms on their own part.

In United States v. Macintosh, 283 U. S. 605, 51 Sup. Ct. 570 (1931), the petitioner was not opposed to all wars on conscientious or religious grounds. He was

In three previous cases the court held that an alien who refuses to promise to bear arms can not be admitted to citizenship. In *Girouard v. United States* the court reconsiders its former position and finds that the *Schwimmer, Macintosh,* and *Bland* cases do not state the correct rule of law.[4]

The oath administered in naturalization proceedings does not expressly require a promise to bear arms.[5] If there is held to be such a requirement it must be read into the Naturalization Act by implication. The court in the *Girouard* case relies upon the form of the oath as being an indication of the intent of Congress. Article VI of the Constitution provides that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States".[6] The oath administered to Congressmen and other public officers is substantially the same as the one required of persons being naturalized. A religious scruple against participating in warfare would not bar one from becoming a member of Congress or holding other public offices. Hence the court concludes that congress intended to set up the same standard for those seeking admission to citizenship as it did for public officials.[7] However, the Court disregards the fact that the oath required of holders of public offices is the same as that prescribed for military and naval officers.[8] To conclude therefrom that the oath administered to military and naval officers does not include a promise to bear arms would be preposterous.[9]

A more satisfactory method of ascertaining the intent of Congress is to consider its policy toward citizens in general in regard to the duty to bear arms in defense of the United States. Since colonial times there has been a long-established practice of exempting from military service those having religious convictions against such service.[10] The Court in the *Girouard* case says that Congress has recognized that one may discharge his obligations as a citizen by rendering noncombatant as well as combatant service. The Court points out that during the recent conflict many services important to the war effort were rendered by persons

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unwilling to promise in advance to bear arms. He explained that he was not willing to participate in any war that he did not believe was morally justified.

In United States v. Bland, 283 U. S. 636, 51 Sup. Ct. 569 (1931), the person desiring naturalization, in addition to refusing to promise to bear arms in defense of the United States under any circumstances, refused to take the oath of allegiance except with the written interpolation of the words, "as far as my conscience as a Christian will allow."

4. Girouard v. United States, 66 Sup. Ct. 826 (1946).

5. 54 STAT. 1157, 8 U. S. C. § 735(b) (1941) provides that the oath of allegiance shall read as follows: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

6. U. S. CONST. Art. VI, cl. 3.

7. Girouard v. United States, 66 Sup. Ct. 826, 828 (1946).

8. 23 STAT. 22, 5 U. S. C. A. § 16 (1928).

9. Note (1931) 80 U. OF PA. L. REV. 275.

10. United States v. Macintosh, 283 U. S. 605, 51 Sup. Ct. 570 (1931).

having religious scruples against participating in combat duty. Indeed, it would seem reasonable to conclude that if one may defend the Constitution and laws of the United States without bearing arms he may promise to defend them without promising to bear arms.

The dissent relies upon the doctrine that legislative re-enactment of a statute, in the same terms, after it has been judicially interpreted, indicates legislative adoption and confirmation of the judicial interpretation.[11] There is authority to support this doctrine in past decisions of the Court.[12] In answer, the majority opinion cites the case of *Helvering v. Hallock*.[13] There the Supreme Court reversed a previous case, though Congress had taken no action to avoid the effect of the ruling of the Court. However, the *Girouard* and *Helvering* cases are distinguishable. In the *Helvering* case the statute was re-enacted as a part of a code. That is not true of the statutory re-enactment of 1940 in the instant case. (On this point the *Helvering* case appears inconsistent with *Sessions v. Romadka*).[14] In *Helvering v. Hallock* there was no indication that Congress had had its attention directed to the decision reversed by the Court. It did not appear that there had been a single bill introduced into Congress in reference to the question decided. In contrast there were efforts to amend the Naturalization Act commencing two days after the *Schwimmer* case was decided and continuing for a period of eleven years.[15]

The majority opinion states that the history of the 1940 Act contains no affirmative recognition of the rule of the *Schwimmer, Macintosh,* and *Bland* cases. It does not explain what is meant by affirmative recognition. Apparently the Court would require something more than re-enactment above for Congressional adoption of a judicial construction. The Court states that Congress acted affirmatively on the question in 1942 by specifically granting naturalization privileges to non-com-

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11. See Mr. Chief Justice Stone, dissenting in Girouard v. United States, 66 Sup. Ct. 826, 830 (1946).

12. In Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799 (1892), it was held that Congress, by re-enacting a statute in the Revised Statutes, adopted the construction given by the Supreme Court to the particular statute. In United States v. Ryan, 284 U. S. 167, 52 Sup. Ct. 65 (1931), the Court stated that, by re-enacting an act in the Revised Statutes,Congress adopted the interpretation given thereto by the lower federal courts. In McCaugher v. Hershey Chocolate Co., 283 U. S. 488, 51 Sup. Ct. 510 (1931), it was held that re-enactment of a statutory provision in the same terms, preceded by a consistent administrative construction, is persuasive of legislative approval of the administrative construction. Accord: New York, New Haven, and Hartford R. R. v. Interstate Com. Com., 200 U. S. 361, 26 Sup. Ct. 272 (1906); United States v. Hermanos y Compania, 209 U. S. 337, 28 Sup. Ct. 532 (1908); United States v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633 (1902); United States v. Sweet, 189 U. S. 471, 23 Sup. Ct. 638 (1903).

13. 309 U. S. 106, 60 Sup. Ct. 444 (1940).

14. Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799 (1892), cited *supra* note 12.

15. See Mr. Chief Justice Stone's dissent in Girouard v. United States, 66 Sup. Ct. 826, 830 (1946).

batants who were prevented from bearing arms by their religious scruples.[16] Since no change in the form of the oath was made, and the same oath is administered to non-combatants as to others being naturalized, the Court concludes that the oath must mean the same thing in both instances. In assuming this position, does the Court infer that there has been an implied repeal of the implied requirement of a promise to bear arms?

The dissenting opinion points out that repeals by implication are not favored in the absence of a necessary inconsistency.[17] As previously indicated, the same form of oath is used for civil as for military and naval officers.[18] Evidently the oath does not have the same significance in the one instance as in the other.[19] Hence there would appear to be no necessary inconsistency in attributing diverse meanings to oaths that are identical in form.

If Congress had desired to avoid the effect of the judicial construction requiring a promise to bear arms as a condition precedent to naturalization, it could have made an express provision to that effect. The dissent cites the case of *Apex Hosiery Co. v. Leader*;[20] where it was held that legislative enactments curtailing the application of a judicial construction are persuasive of legislative recognition of its correctness. Hence it would appear that the majority opinion is not strengthened by introduction of the contention that the 1942 amendments to the Naturalization Act require the admission of non-combatant aliens to citizenship without a promise to bear arms.

The *Girouard* decision is indicative of a tendency on the part of the present Court to disregard rules of law that are incompatible with its conception of the requirements of justice in a particular case. When confronted with certain embarrasing rules of statutory construction, the Court employed evasive tactics, giv-

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16. The Court refers to the case of *In re* Kinloch, 53 F. Supp. 521 (D. C. 1944). In that case the Court construed the express provision: "(That the Act) shall not apply to . . . any conscientious objectors who performed no military duty whatever or who refused to wear the uniform" 8 U. S. C. A. § 1004 as implying the affirmative —that a conscientious objector performing military duty and wearing the uniform is entitled to citizenship. Contra: *In re* Nielsen, 60 F. Supp. 240 (D. C. 1945).

17. The dissent cites United States v. Borden, 308 U. S. 188, 60 Sup. Ct. 182 (1939), which holds that, where there are two acts pertaining to the same subject, the rule is to give effect to both if possible. For there to be a repeal by implication there must be a positive repugnancy between the provisions of the new law and those of the old; and then the old law is repealed by implication only to the extent of the repugnancy.

18. 23 STAT. 22, 5 U. S. C. A. § 16 (1928).

19. Note (1931) 80 U. OF PA. L. REV. 275.

20. Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 Sup. Ct. 982 (1940). In United States v. Elgin, Joliet, and Eastern Railway Co., 298 U. S. 492, 56 Sup. Ct. 84 (1936), the Court held that Congressional approval of a Supreme Court interpretation of an Act of Congress was indicated by failure to amend the Act subsequent to the interpretation. In Missouri v. Ross, 299 U. S. 72, 57 Sup. Ct. 60 (1936), the Court held that failure of Congress to amend a federal statute which has received a long and uniform construction by the lower federal courts, and closely related provisions of which have been amended, imparts Congressional adoption of such interpretation.

ing the rather ambiguous reply that in this particular case there had been no affirmative action on the part of Congress, neglecting, however, to elucidate as to the scope of its conception of affirmative action. At one point in its opinion the Court seemed to hint at implied repeal or amendment as a possible basis for its decision. The confusion of the Court is evidenced by its failure to employ such language as would clarify its position relative to this proposition. As a practical matter the Court would find itself in considerable difficulty if it should openly reverse prior decisions dependent upon application of certain of the arbitrary rules of statutory construction involved in the *Girouard* case. Numerous questions of law, previously regarded as settled, would be rendered doubtful and uncertain. There would be much more involved than the narrow issue as to whether applicants for naturalization may be required to promise to bear arms. Too, the Court might wish to employ the rules to justify its opinion on some future occasion. It is probable that when, on a future occasion, the rules of statutory construction discussed herein support the conclusion which the Court desires to reach, they will be considered by that august tribunal to be at least equally as sacred as the Ten Commandments.

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