Michigan Law Review

Volume 47 | Issue 8

1949

LEGISLATION-CANONS OF CONSTRUCTION-PRESUMPTION OF TERRITORIALITY

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LEGISLATION—CANONS OF CONSTRUCTION—PRESUMPTION OF TERRITORIALITY—Plaintiff, an American citizen, was employed by defendant contractor to work on construction in Iraq carried on under a contract with the United States. Plaintiff brought suit in New York for overtime pay under the Federal Eight Hour Law[1] applying to work done under "Every contract made to which the United States . . . is a party. . . ." A verdict for the plaintiff was upheld by the New York Court of Appeals.[2] On certiorari to the United States Supreme Court, *held,* reversed. In absence of contrary intent, legislation is presumed to apply only within the territorial jurisdiction of the country. *Foley Bros., Inc., v. Filardo,* 336 U.S. 281, 69 S.Ct. 575 (1949).

Increasing use of legislative records and other indications of legislative policy have featured the movement away from strict adherence to the literal meaning of the words of a statute and from the rigid application of ancient canons.[3] But as

[1] 40 U.S.C. (1946) §§ 321-326.

[2] Filardo v. Foley Bros., 297 N.Y. 217, 78 N.E. (2d) 480 (1948), reversing 272 App. Div. 446, 71 N.Y.S. (2d) 592 (1947).

[3] See Transcontinental & Western Air v. Civil Aeronautics Board, (U.S. 1949) 69 S.Ct. 756; United States v. American Trucking Assns., 310 U.S. 534, 60 S.Ct. 1059 (1940).

legislation becomes wider in scope its boundaries become more difficult to define, and greater are the areas in which there is no ascertainable legislative policy or intention.[4] The problem of a court in such a case is a difficult one. Justice Reed, however, resolves it easily in the principal case by applying "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." In support of this presumption, the Court cites only *Blackmer v. United States*[5] in which Justice Hughes dismissed the rule as one of construction rather than power. The presumption was earlier applied by Justice Holmes in *American Banana Co. v. United Fruit Co.*[6] where he refused to apply the Sherman Act to alleged monopolistic practices in South America. Basing his decision on the notions of the conflict of laws that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," Holmes concluded that legislation is prima facie territorial. An exception to this doctrine was spelled out in *United States v. Bowman* where the rule of interpretation was said not to apply to criminal statutes "not logically dependent on their locality for the Government's jurisdiction."[7] The use of the canon in the principal case is "based on the assumption that Congress is primarily concerned with domestic conditions," rather than upon an analysis of possible factors that should preclude extra-territorial application.[8] The concurring opinion of Justice Frankfurter, however, supplies a far clearer exposition of the administrative and economic difficulties involved in applying the law to foreign work.[9] It would seem that the validity of the Court's conclusion in this case ought to rest on the weight of his arguments rather than upon the presumption of territoriality. The eight hour law appears to have been passed with mixed motives, and without considera-

[4] While the courts and most writers speak of legislative intent and purpose, see Radin, "Statutory Interpretation," 43 HARV. L. REV. 863 at 881 (1930): "The 'intent of the legislature' is a futile bit of fiction." Cf. Landis, "A Note on 'Statutory Interpretation'," 43 HARV. L. REV. 886 at 892 (1930). Frankfurter warns that "intention" is a "beclouding characterization"; Frankfurter, "Some Reflections on the Reading of Statutes," 47 COL. L. REV. 527 (1947).

[5] 284 U.S. 421 at 437, 52 S.Ct. 252 (1932); cited in principal case at 285.

[6] 213 U.S. 347 at 356, 29 S.Ct. 511 (1909). Cf. Ex parte Blair, 12 Ch. D. 522 at 528 (1879).

[7] 260 U.S. 94 at 98, 43 S.Ct. 39 (1922). The presumption has also been applied in state court decisions refusing out-of-state charities the benefit of local tax exemption laws. Such cases are based on both a strict construction of tax exemptions and a view of exemptions as a reward for charitable services within the state. In re Robinson's Estate, 138 Neb. 101, 292 N.W. 48 (1940). A few other applications of the presumption may be found in 2 LEWIS, SUTHERLAND ON STATUTORY CONSTRUCTION, §513 (1904). For the English decisions see RANDALL, BEAL'S CARDINAL RULES OF LEGAL INTERPRETATION 270 (1924).

[8] Principal case at 285.

[9] Id. at 296. Justice Frankfurter relies on the same policy factors that he found in Vermilya-Brown Co. v. Connell, 335 U.S. 377, 69 S.Ct. 140 (1948), where he dissented from the decision applying the Fair Labor Standards Act to leased bases in foreign countries on the ground that we should not impose domestic standards upon foreign economies. His concurrence in the principal case vigorously attacks the inconsistency of the majority.

tion of the problem involved in the principal case.[10] While Congress may be primarily concerned with domestic economic conditions, it would seem that they are also concerned with government contracts and government work standards wherever they are performed. Congress categorically applied the eight hour law to *every* government contract. The jurisprudential problem seems clear: what circumstances justify the exclusion of a particular contract from the scope of this broad language? The Court will construe a statute to avoid manifest absurdity, or even to avoid an unreasonable result in the light of the legislative purpose.[11] In the absence of either absurdity or a clarifying policy, the Court appears faced with three alternatives. It might apply the act literally; it could reach a result by application of a canon as categorical as the "literal meaning" approach;[12] or it may admit that Congress has probably not considered the problem of the instant case, and then proceed to consider whether particular policy considerations in the light of the act's purpose, should take the case out of the operation of the act. It is submitted that the majority opinion chooses the most unsatisfactory of the alternatives. The growth of statutory law demands a frank as well as enlightened jurisprudence. If the scope of the legislative purpose is unascertainable, it would seem better for the Court to openly determine the result upon an original determination of policy rather than to arrive silently at a conclusion and outwardly achieve it by the application of canons.[13]

David H. Armstrong, S.Ed.

[10] Cf. debates in 23 CONG. REC. 5723-5737 (1892); SPERO, GOVERNMENT AS EMPLOYER 77 (1948); Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353 (1916).

[11] See Reed, J., in United States v. American Trucking Assns., 310 U.S. 534 at 543, 60 S.Ct. 1059 (1940); Boston Sand & Gravel Co. v. United States, 278 U.S. 41 at 48, 49 S.Ct. 52 (1928); Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S.Ct. 511 (1892).

[12] A canon that remedial acts to improve labor conditions should be liberally construed would lead to a contrary result in the principal case. 3 HORACK, SUTHERLAND'S STATUTORY CONSTRUCTION, §7207 (1943).

[13] There is little dissent from the statement of Landis: "To condone in these instances the practice of talking in terms of intent of the legislature . . . when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man." Landis, "A Note on 'Statutory Interpretation'," 43 HARV. L. REV. 886 at 891 (1930). See also GRAY, NATURE AND SOURCES OF LAW 165 (1909); Horack, "In the Name of Legislative Intention," 38 W. VA. L. Q. 119 at 129 (1932); Pound, "Spurious Interpretation," 7 COL. L. REV. 379 at 381 (1907). Cf. Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 65 S.Ct. 335 (1945).