

11-1-1940

Constitutional Law—Religious Freedom—Requiring Public School Pupils to Salute Flag; Corporations—Action by Assignee—Construction of Statute; Statute of Limitations—Contracts of Employment; Taxation—Levy—Available Surplus; Torts—Assumption of Duties—Negligence

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Recommended Citation

J. S. A., R. W. S., V. C. & R. F. B., Recent Cases, *Constitutional Law—Religious Freedom—Requiring Public School Pupils to Salute Flag; Corporations—Action by Assignee—Construction of Statute; Statute of Limitations—Contracts of Employment; Taxation—Levy—Available Surplus; Torts—Assumption of Duties—Negligence*, 15 Wash. L. Rev. & St. B.J. 265 (1940). Available at: <https://digitalcommons.law.uw.edu/wlr/vol15/iss4/6>

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RECENT CASES

CONSTITUTIONAL LAW—RELIGIOUS FREEDOM—REQUIRING PUBLIC SCHOOL PUPILS TO SALUTE FLAG. Two children belonging to a religious sect called Jehovah's Witnesses refused to salute the American flag as a part of the daily exercises prescribed by statute in a public school in Pennsylvania on the ground that it was an act of idolatry prohibited by their religion. Being expelled, they brought a bill to enjoin the flag salute on the ground that the statute is an unconstitutional violation of their religious freedom. Both lower federal courts found no public need served by compulsory flag salute sufficient to justify sacrificing religious freedom, and so granted the injunction. 21 F. Supp. 581 and 108 F. (2d) 683. The Supreme Court reversed the decision and *held*: Freedom of religion is not an absolute right but is limited by the superior interest of national unity. The various state legislatures should be left to decide the appropriateness of various means to evoke that unity. Mr. Justice Stone dissents. *Minersville School District v. Gobitis*, 60 S. C. 1010 (1940).

Relying on this 8-1 decision the Attorney General of the State of Washington has reversed a previous opinion of that office and in Official Opinion No. 4410, holds that REM. REV. STAT. § 4777 providing for mandatory flag salute by public school children is constitutional.

The Supreme Court has gone farther in this decision than any of the lower courts which have upheld similar statutes on such grounds as: (1) the flag salute is not in any sense a religious rite, *Leoles v. Landers*, 184 Ga. 580, 192 S. E. 218 (1937); *Hering v. State Board of Education*, 117 N. J. L. 455, 189 Atl. 629 (1937); *Nicholls v. Mayor and School Comm. of Lynn*, — Mass. —, 7 N. E. (2d) 577, 110 A. L. R. 377 (1937); *Gabrieli v. Knickerbocker*, 12 Cal. (2d) 85, 82 P. (2d) 391 (1938); *People v. Sandstrom*, 279 N. Y. 523, 18 N. E. (2d) 840 (1939); *Johnson v. Town of Deerfield*, 25 F. Supp. 918 (Mass. 1939); *contra*: *Gobitis v. Minersville School District*, 21 F. Supp. 581 (Penn. 1937). (2) the state is entitled to set up reasonable requirements for attendance in its public schools, *Leoles v. Landers*, *supra*; *Hering v. State Board of Education*, *supra*. (both relied on *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934). In the instant case, the court relies entirely on the principle that the state may interfere with religious practices. *Reynolds v. U. S.*, 98 U. S. 145 (1878); *Davis v. Beason*, 133 U. S. 333 (1890); *Murphy v. Ramsey*, 114 U. S. 15 (1885); *People v. Sandstrom*, *supra*, in furtherance of a legitimate end, and applies the presumption of constitutionality to the statute, refusing to consider the reasonableness and efficacy of the means adopted. Cf. *Johnson v. Town of Deerfield*, *supra*. The Supreme Court in recent years has refused to apply the presumption of constitutionality to statutes involving civil liberties. Rather, the court has been very careful to find that any limitation on individual liberty must have an appropriate relation to the safety of the state, *U. S. v. Carolene Products Co.*, 304 U. S. 144, 152n (1938), and has repeatedly held that judicial scrutiny of such legislation should be more exacting than in other types of due process cases where only economic interests are involved, *Schneider v. New Jersey*, 308 U. S. 147 (1940); 40 Col. L. REV. 531; *Cantwell v. State of Conn.*, 60 S. Ct. 900 (1940), decided only a few days before the instant case. In *Herndon v. Lowry*, 301 U. S. 242 (1937), and *Meyer v. Nebraska*, 262 U. S. 390 (1923), it was held that a desirable end cannot be promoted by a prohibited means,

and that the benefit of legislation to the state must not be disproportionate to the burden it creates. Cf. *Hague v. C. I. O.*, 307 U. S. 496 (1939); *De Jonge v. Oregon*, 299 U. S. 353 (1937). In those cases, acts were held invalid either because there were other ways of achieving legitimate state ends without infringing the asserted immunity, or because the inconvenience caused by the inability to secure that end satisfactorily through some other means did not outweigh individual liberties—either of which tests would seem to render this type of legislation unconstitutional as to these petitioners.

But here the court, through Mr. Justice Frankfurter, attempts to distinguish such cases on the grounds that national unity is superior to the interests protected in prior cases, since "the ultimate foundation of a free society is the binding tie of cohesive sentiment." But even if the end to be attained is more important, Mr. Justice Stone in his dissent points out that there is no reason why the court should forego its duty to scrutinize closely the means adopted, particularly when they clash with fundamental liberties. The broad language used in the majority opinion should have far-reaching effects on sedition laws, as it apparently revives the doctrine of *Gitlow v. New York*, 268 U. S. 652 (1925), which was seemingly overruled by implication in *Herndon v. Lowry*, *supra*. The tenor of the opinion seems to be that wherever national unity is the end to be attained, any measure which promotes that unity will be upheld regardless of whether there is a present and imminent danger to the state, and regardless of whether civil liberties are infringed.

Mr. Justice Frankfurter's second ground for distinguishing the other recent civil liberties cases is the fact that the availability of resort to public opinion is here unimpaired and "the remedial channels of the democratic process remain open and unobstructed." Mr. Justice Stone finds this remedy inadequate because it results in "the surrender of the constitutional protection of the liberty of small minorities to the popular will."

Most previous restraints on religious freedom have been negative in character. But here we have affirmative legislation compelling an act contrary to religious belief. It is extending the use of the police power beyond its usual realm (protection of health, economic welfare, etc.) to overrule religious scruples for the promotion of loyalty and morale. It is to be doubted whether true loyalty and morale can be inspired by such methods. *Minersville School District v. Gobitis*, 108 F. (2d) 683 (1939); Judge Lehman's concurring opinion in *People v. Sandstrom*, *supra*.

J. S. A.

CORPORATIONS—ACTION BY ASSIGNEE—CONSTRUCTION OF STATUTE. In the case of *Association Collectors v. Hardman*, 2 Wn. (2d) 414, 98 P. (2d) 318 (1940), noted in 15 WASH. L. REV. 118, the question was raised whether the assignee of a chose in action could maintain an action when the corporate assignor could not because of the assignor's failure to pay its annual corporate license fee. In holding the assignee of foreign corporation could not sue, the court found it necessary to distinguish *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069 (1913), and *Marshall v. Pike*, 145 Wash. 348, 260 Pac. 531 (1927). These cases held that failure of domestic corporations to pay their annual license fees did not bar an action by their assignees.

In effect at the time of these two decisions was REM. COMP. STAT. §

191, stipulating: "Any assignee . . . of any . . . chose in action . . . may . . . sue and maintain an action . . . in his or her name, against the obligor . . . Provided, that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned . . ." REM. REV. STAT. § 191 was amended by the Laws of 1927, c. 87, p. 66. As revised, the foregoing clause reads: "Provided, that any debtor may plead in defense as many defenses [italics supplied], counterclaims, and offsets, whether they be . . . denominated legal or equitable, or both, if held by him against the original owner, against the debt assigned . . ."

It seems reasonable to assume that it was the intention of the legislature in inserting the word "defenses" in the statute to nullify the effect of the decisions in the *Pacific Drug Co.* and *Marshall* cases, *supra*. It is unfortunate that this amendment was not brought to the court's attention in the *Association Collectors* case, for had this been done the court could have reached the same decision upon a more sound legal basis and without the necessity for distinguishing between the assignees of foreign and domestic corporations. It is submitted that the defense of corporate incapacity to sue may be successfully asserted against the assignee of either a foreign or a domestic corporation in view of REM. REV. STAT. § 191, as amended in 1927.

R. W. S.

STATUTE OF LIMITATIONS—CONTRACTS OF EMPLOYMENT. Plaintiff was employed by defendant at a fixed monthly salary. When plaintiff complained of the excessive hours of work, defendant told him that if he would continue working the long hours he would be paid for overtime. No payment other than the regular salary was ever made, and eleven years later, after he had been discharged, plaintiff brought suit to recover for the overtime. *Held*: The statute of limitations on oral contracts (REM. REV. STAT. § 159) had run on so much of the claim as was based on overtime work done more than three years before the action was instituted. *Gensman v. West Coast Power Co.*, 3 Wn. (2d) 404, 101 P. (2d) 316 (1940).

The overtime employment was clearly at the will of either party. Plaintiff became entitled to payment as he worked. 1 WILLISTON, CONTRACTS (2d ed. 1936) § 39. Logically, therefore, the court was correct in holding that there could be no recovery for services rendered more than three years before the action was begun. But most courts hold that the statute does not begin to run, where neither the length of service nor the time of payment are fixed, until termination of the employment. *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312 (1900); *Carter v. Carter*, 36 Mich. 207 (1877); *Officer v. Cummings*, 127 Ore. 320, 272 Pac. 273 (1928); *Potts v. Village of Haverstraw*, 93 F. (2d) 506 (C. C. A. 2d, 1937); *Wax v. Adair*, 16 Cal. App. (2d) 393, 60 P. (2d) 904 (1936). Note (1937) 12 WASH. L. REV. 148 (suggesting as a reason that an employee must otherwise quit his job and sue, or lose the pay); 6 WILLISTON, CONTRACTS § 2029 (suggesting an unfair burden on employees in determining when the statute had run). The Washington court followed this rule in *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352 (1902). Cf. *Wamsley v. Rostad*, 150 Wash. 192, 272 Pac. 722 (1928).

Moreover, in the majority of jurisdictions the rule is applied even though a weekly or monthly salary is fixed, this being construed merely as the setting of a rate of pay and not of a time for payment. *Schaffner v. Schaffner*, 98 Kan. 167, 157 Pac. 402 (1916); *Harmon v. Smitch*, 86 Ind.

App. 527, 157 N. E. 284 (1927); *Decker v. Van Buskirk's Estate*, 280 Mich. 673, 274 N. W. 362 (1937); *Phifer v. Phifer's Estate*, 112 Neb. 327, 199 N. W. 511 (1924). The majority rule was first enunciated in this state in a case where plaintiff's salary was fixed on a monthly basis. *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639 (1896) (dictum), and was followed in *Sibley v. Stetson and Post Lumber Co.*, 110 Wash. 204, 188 Pac. 389 (1920), where an employee sought to recover a yearly bonus. The court said: "The fact that the salary was to be paid monthly, or that the bonus was to be paid yearly, would not start the running of the statute of limitations, but it would commence only when the services were terminated."

There is a minority rule which would apply the statute at the end of each pay period where a weekly, monthly or yearly salary is fixed, *Gardiner v. Montegut*, (La. App.) 175 So. 120 (1937), or directly as the service is rendered, where there is no provision as to payment, *Dempsey v. McNabb*, 73 Md. 433, 21 Atl. 378 (1891). But our court would seem to have committed itself to the majority rule in both situations. The plaintiff in the instant case cited the *Morrissey*, *Ah How* and *Sibley* decisions, *supra*. The court said that they were "not controlling" because here the total amount earned was payable every month. But these are substantially the facts of the *Ah How* and *Sibley* cases, *supra*. Although the court did not purport to depart from the rules applied in the earlier cases, there is sufficient factual similarity between them and the present case to leave the problem in confusion.

V. C.

TAXATION—LEVY—AVAILABLE SURPLUS. At the end of 1939 Pacific County had a cash surplus of \$65,000 in its current expense fund and \$41,000 in a road bond sinking fund, against which \$9,000 of bonds, not yet due, were outstanding. To meet the 1940 budget the county commissioners levied 5.63 mills for current expense, the balance, after mandatory millages, of the ten-mill levy permitted under the property tax limitation act. To provide \$19,000 more needed under the 1940 budget for current expense, that amount was to be taken from the existing cash surplus in the current expense fund. The residue of the cash balance in this fund was to be retained until a later year for contemplated repairs to the court house and for a projected timber cruise (the first since 1908) upon which to base assessments for taxation. A taxpayer sought to enjoin the 5.63-mill levy on the theory that the cash balance in the current expense fund and the net surplus of the road bond retirement fund must be used before any levy for 1940 current expense can be made. *Held*: The levy is invalid because available surpluses in both funds were not taken into account. *Weyerhaeuser Timber Co. v. Roessler*, 2 Wn. (2d) 304, 97 P. (2d) 1070 (1940).

The court stated that the County Budget Law (Wash. Laws 1923, p. 523; REM. REV. STAT. § 3997-1 through 3997-10) "outlines the conditions under which the counties may levy taxes and is an express limitation upon the power vested in them." It provides that the auditor shall prepare a budget and submit it to the county commissioners who "shall then fix the amount of the levies necessary to raise the amount of the estimated expenditures as finally determined, less the total of the estimated revenues from sources other than taxation, including *available surplus* and such expenditures as are to be met from bond or warrant issues." (Italics supplied, REM. REV. STAT. § 3997-4). The budget law does not contemplate

"the accumulation in the current expense fund of a surplus in excess of the current needs as reflected by budgeted expenditures." *Available surplus* was then defined as "any cash surplus remaining in the current expense fund at the beginning of the fiscal year, after payment of all outstanding obligations against the fund." A minority, however, felt that the county commissioners should be allowed a certain amount of discretion in providing for future contingencies.

The court had more difficulty in classifying the surplus in the road bond retirement fund as *available surplus*. Statute provides that such funds shall not be diverted to any purpose other than the payment of the bonds (REM. REV. STAT. § 5594). Five of the court held that the surplus should be returned to the taxpayer "by the process of inclusion in the budget set-up, thereby reducing the current levy upon his property." Where the purpose for which a tax has been levied has been accomplished and a surplus remains it must be treated as a part of the general county funds and as available for general county purposes. *Chicago R. I. & P. Ry. Co. v. Excise Board of Pottawatomie County*, 167 Okla. 326, 29 P. (2d) 586 (1934); *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35 (1901); *Field v. Straube*, 103 Ky. 114, 44 S. W. 363 (1898). The minority in the present Washington case felt that the surplus could not be considered in the budget until after the bonds were paid. But the majority held that the surplus was "in existence at the time the levy was made and readily ascertainable with certainty." Thus, it is seen that the dissenting view is not squarely opposed to the views of the majority on the question of the use of the surplus, but goes off on the point of whether there actually is a surplus.

The case is interesting when considered in the light of the Tax Limitation Law in this state. Under that law it is impossible for counties to finance in any one year anything extraordinary, as the ten-mill limit does not allow sufficient margin above the ordinary costs of county government. This decision makes it impossible to build up any surplus with which to finance extraordinary projects in the future. They must be financed either by warrants, on which interest must be paid, or by bond issues, which require elections as well as the payment of interest. Some counties will be unable to pursue either course as their constitutional debt limits have already been reached. Those counties not so restricted will be able to issue warrants or float bond issues, but only at the risk of being unable in the future to call upon their credit in case of emergency without exceeding the debt limit. Thus the counties are forced from the pay-as-you-go business practice contemplated by the budget law into deficit financing. This results in weakened credit for those counties still possessing it, and diminishes the funds available for current county expenses because of the added necessity for paying interest charges out of the limited millage allowed by law.

R. F. B.

TORTS—ASSUMPTION OF DUTIES—NEGLIGENCE. Plaintiff, injured by falling into an elevator shaft through the failure of a defective door to close automatically, brought suit against the owner of the building. The owner dying, The Aetna Casualty Company, owner's insurer, was brought in by amended complaint. Though not bound by its policy to do so, the Aetna had gratuitously assumed the duty of inspecting the elevator and sending in quarterly reports of its condition to the city building depart-

ment on behalf of the owner. These reports were required of the owner by a city ordinance which provided that "if, from the report of such inspection, the Superintendent of Buildings had reason to believe that such inspection is inadequate or improperly made, he is authorized and empowered to require further and additional inspection of any such elevator and to order operation and use thereof discontinued until such additional inspection is made." (Ord. 44903, § 3, City of Seattle). The reports furnished by the Aetna did not disclose the defective condition of the elevator, although those of another insurer having coverage did. *Held*: Since the Aetna had gratuitously assumed the duty of reporting it was bound to use due care in doing so, and its negligence made it liable to any person injured by the defective condition on which it failed to report. *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wn. (2d) 423, 100 P. (2d) 1024 (1940).

Normally, when A assumes a duty to B and B is injured through A's negligent performance or non-performance liability is imposed whether the assumption be gratuitous or contractual. Courts easily recognize this duty running to the person injured, whether its source be found in the contract, in the law which imposes it upon a status created by contract, or in the risk created by a reasonable reliance upon performance. Where, however, A assumes a duty to B and C is injured, the question is more complicated. The right-duty relationship essential to liability cannot be based on contract, *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 Pac. 939 (1927); hence the liability must be derived solely from the risks to C created or increased by A's conduct. *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425 (1922). This showing is usually impossible when A has simply been guilty of non-feasance. *Hanson v. Blackwell Motor Co.*, *supra*. The instant case is an illustration of the possible difficulties; the duty of sending in quarterly reports of the elevator's condition, which was assumed gratuitously by the Aetna Company, was a duty running to the owner of the building rather than to the plaintiff, and accordingly unless it can be said that the inaccurate report either created or increased a risk of harm to the plaintiff there is no basis for recovery. It did not create the risk; whether it increased it, or indeed could be said to be a substantial factor in the result at all, rests upon a chain of hypothesized events rendered even more conjectural by the fact that reports of another insurer of the same elevator had already disclosed its hazardous condition without result. Put most strongly for the plaintiff, all that can be said is that if the report had been accurately made, the Superintendent of Buildings *might* have decided that further inspection was necessary, and *might* have ordered the operation of the elevator discontinued at a time which *might* have prevented the plaintiff from falling into the shaft,—a remarkably slender basis upon which to send a case against an insurance company to the jury.

D. R. C.