



## Notre Dame Law Review

Volume 20 | Issue 2

Article 5

12-1-1944

### Recent Decisions

David S. Landis

Theodore M. Ryan

Francis J. Paulson

Thomas F. Bremer

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

#### Recommended Citation

David S. Landis, Theodore M. Ryan, Francis J. Paulson & Thomas F. Bremer, *Recent Decisions*, 20 Notre Dame L. Rev. 170 (1944).

Available at: <http://scholarship.law.nd.edu/ndlr/vol20/iss2/5>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

The author goes on to explain that Jehovah's Witnesses seek the complete exemption from all service accorded under the Act to "regular or duly ordained ministers of religion," since every Jehovah's Witness is considered to be an ordained minister. The courts have refused to give automatic exemption in such cases. This group further contends they are under no legal obligation to submit to induction or the alternative civilian work provisions for conscientious objectors in lieu of induction if they had been arbitrarily classified. But by refusing to comply, they deprive themselves of the opportunity every inductee has to test the legality of his classification in court at a time and in a manner that does not interfere with the induction process i.e., by habeas corpus only after induction.

The remaining 1,129 convictions after excluding the Jehovah's Witnesses and Negro "moslems" it is important to consider the nature of the violations. Thus, of these, 159 were convicted for failure to register, 38 for failure to return questionnaire, 51 for failure to report for preliminary physical examination and eight for counseling evasion. The balance is as follows: 479 were never ordered to report for military service, either combatant or noncombatant. This group can be described as "Absolutists." The remaining cases were defendants charged with failure to report for induction in armed forces.

Congress was urged while considering the 1940 Act, to follow the British Act and exempt all conscientious objectors rather than only those whose conscientious objections are based on religious training and belief, the author continues, but Congress has refused to do so. It is therefore seen, the author concludes, that under the 1940 Act all recalcitrant registrants must be treated as violators of the criminal provisions of the Act.

*Theodore M. Ryan.*

---

## RECENT DECISIONS

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE BUSINESS—PROPRIETY OF INJUNCTION AND DECLARATORY JUDGMENT IN FEDERAL COURTS.—On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

This was an action by *Spector Motor Service, Inc. v. Charles J. McLaughlin*,<sup>1</sup> Tax Commissioner for the State of Connecticut, for injunction and a declaratory judgment of the nonliability of plaintiff for the Connecticut corporation business tax. Conn. Gen. Stat. Supp. 1935, Sec. 418c, as amended by Conn. Gen. Stat. Supp. 1939, Sec. 354e. This writ was prosecuted to review a decision of the Circuit Court of Ap-

---

<sup>1</sup> 65 S. Ct. 152, decided Dec. 4, 1944.

peals,<sup>2</sup> reversing a judgment in the District Court granting the injunction and declaration prayed for.<sup>3</sup>

The petitioner, a Missouri corporation, was engaged exclusively in the interstate trucking business. It carried on no intra-state business in Connecticut, nor was a certificate of convenience and necessity issued to it for that purpose. It maintained freight terminals in that state solely for the purpose of engaging in its interstate business. Petitioner was, however, pursuant to law, registered with the Connecticut secretary of state, and had designated an agent in Connecticut upon whom process might be served. On this state of facts the State Tax Commissioner ruled that the petitioner was subject to the above mentioned "corporation business" tax. This tax imposed on every corporation, not otherwise specifically taxed and carrying on business within the state, "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state." Conn. Gen. Stat. Cum. Supp. 1935, Sec. 418c et seq. Accordingly, the State assessed the tax against the petitioner for the years 1937-40, inclusive, whereupon this suit was instituted in the U. S. District Court for the District of Connecticut. Petitioner alleged that the tax levied by the Act did not apply to it; and in the alternative, that, if it should be deemed within the scope of the statute, the tax was repugnant to the Connecticut Constitution as well as the commerce and due process clauses of the federal Constitution, Art. 1, Sec. 8, cl. 3, and the 14th Amendment, respectively.

Justice Frankfurter ruling in effect that the federal questions involved had been prematurely anticipated by the petitioner, reflected the Court's inclination in recent cases to insist that the operation and ultimate constitutionality of state tax laws be tested in the courts of the state affected. Only then will removal of such litigation to the federal courts be seasonable.

The Court said in part: "But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. . . . It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. . . . Answers to these questions must precede consideration of commerce clause. The tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality — here the distribution of the taxing power as between the State and Nation — unless such adjudication is

---

<sup>2</sup> 139 F. (2d) 809.

<sup>3</sup> 47 F. Supp. 671.

unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *City of Chicago v. Fieldcrest Dairies*.<sup>4</sup> *In re Central Ry. Co. of New Jersey*.<sup>5</sup> (See other cases cited in the opinion.) Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication."

The judgment of the Circuit Court of Appeals was vacated, and the cause was remanded to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the state court, in conformity with the opinion.

David S. Landis.

---

COPYRIGHT — INFRINGEMENT.—In the case of *Gingg v. Twentieth Century Fox Film Corp., et al.*,<sup>1</sup> the plaintiff had composed approximately fifty to seventy-five songs, many of which she submitted to publishers, but none were published. In the summer of 1941 she composed the words and music of the song entitled *There'll Never Be Another You*, alleged to have been infringed by the defendants. She made several copies of this song, including the one filed with the copyright office on September 5, 1941. One copy was forwarded to a music publishing house in New York City. Another was submitted to a publishing concern in the city of Los Angeles known as Melody Lane; still another copy was sent to an organization called B. M. I. It was her recollection that she made about five copies of this song in all.

Plaintiff admitted prior to the trial that she had never met either the defendant Gordon, writer of the lyrics of the alleged infringing song, or the defendant Warren, composer of the music thereof. Likewise she acknowledged that she never submitted her song to any of the defendants.

The music of plaintiff's composition consists of melody only. The alleged infringing song is entitled *There Will Never Be Another You*. The defendant Gordon is a nationally known figure in the field of popular song writing. He testified that he did not know the plaintiff and that prior to the commencement of the suit he had not heard or read either the words or the music of plaintiff's song.

---

<sup>4</sup> 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355.

<sup>5</sup> 136 F. (2d) 633.

<sup>1</sup> 56 Fed. Supp. 701, decided June 12, 1944.

The court in finding for the defendant went into great detail in stating that the words and the beat of the music were different. The court followed the rule as laid down in the case of *Fisher, Inc. v. Dillingham*,<sup>2</sup> which said in part that to sustain it (an infringement suit) more must appear than the mere similarity or even identity of the supposed infringement with the part in question. In the last mentioned case, the court stated that in this lies one distinction between a patent and a copyright: one may infringe a patent by the innocent reproduction of the machine, thing or process patented, but the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted. The court in the instant case further delved into the discussion of copyrights by referring to the case of *Marks v. Leo Feist, Inc.*,<sup>3</sup> where the court explained that the musical signs available for combinations are about 13 in number. They are tones produced by striking in succession the white and black keys as they are found on the key board of a piano. In a popular song, the composer must write a composition arranging combinations of these tones, and is limited by the range of the ordinary voice and by the skill of an ordinary player. Necessarily, within these limits, there will be found some similarity of tone succession. To constitute an infringement of the appellant's composition, it would be necessary to find a substantial copying of a substantial and material part of it. The court in the present case failed to find any *substantial* similarity between the music or lyrics of the respective compositions and therefore found for the defendants.

Theodore M. Ryan.

---

DOMESTIC RELATIONS — PARENT AND CHILD.—In the case of *Hart v. Howell*<sup>1</sup> there was an appeal by the plaintiff in error from a decree of habeas corpus which gave to the appellee the custody of his natural child. Unless the facts of the case were of a most unusual character, the court would be required, following a long line of previously adjudicated cases, to grant the natural parent custody of his child. The facts were briefly as follows:

The appellee had married Faye Hart and lived with her until shortly after the birth of the child in question in 1935. They obtained a divorce in 1937 by mutual agreement and the appellee gave the mother the custody of the child, who, in turn, gave him to his maternal grandparents who were the appellants in this action. The mother died under mysterious circumstances in 1944 and neither parent has seen the child,

---

<sup>2</sup> 298 F. 145.

<sup>3</sup> 290 F. 959.

<sup>1</sup> 19 So. (2d) 317, decided Oct. 3, 1944.

now nine years old, for several years, although the grandparents gave both ample opportunity for such visits. Further evidence indicated that neither parent had contributed to the support of the child either in material or spiritual aspects. The appellee based his petition upon the grounds that he had now acquired a comfortable home, a second wife, and a good job and consequently was in a better position to afford the child the material benefits of life. He also charged that the moral environment in which the child was thrust was unwholesome.

Florida's supreme court justice, Tarrell, who wrote the decision, decided that the facts of the case were sufficiently unusual to warrant a reversal of the general rule that, all things being equal, the custody of a minor child should be given to his natural parent. This meant a reversal of the decree and the awarding of the child back to the grandparents.

Terrell, writing a picturesque decision, said in part: "When the froth is blown off the evidence, the picture left of the appellants is that of two good old pioneers, symbols of a type that cleared the forest and settled the country but who have almost vanished from its face. They (the pioneers) were not so sophisticated as their sons and daughters whom they sent to college but their moral convictions were more deeply rooted. . . . They were not versed in Latin and Greek but they swore by the efficacy of quinine and calomel and brought up one of the most stable generations of sons and daughters that this country has produced. . . . From the conditions under which he was molded, he imbibed a high level concept of God and right and justice, so his spiritual anchorage was not shaken by the dishwater casuistries of bunkshooters, hocus-pocus mystics and those who would extract the millennium from ouija boards."

It would appear that again Justice Terrell has written much sound law into his unique legal phraseology and when one considers the situation presented in the instant case it seems manifestly just, from the child's point of view, that the decree giving his natural parent his custody be reversed. For, as Justice Terrell pointed out, the love of the appellee for the child was not the brand "required to furnish and prepare its food, wash its diapers, give it paragoric, and say 'no' one hundred times a day until it enters public school, pay its bills, and plant in its mind and ear from day to day the thousand and one precepts essential to make it a competent citizen and social unit in our scheme of democracy, and love to do it."

*Francis J. Paulson.*

LABOR LAW — INJUNCTION.—The case of *Walling, Adm'r Wage and Hour Division, U. S. Department of Labor v. Payne*,<sup>1</sup> an action to enjoin alleged violation of the Fair Labor Standards Act. To review a judgment of the Circuit Court of Appeals,<sup>2</sup> which modified and affirmed a judgment of the District Court denying an injunction, plaintiff brings certiorari.

The defendant was engaged in production of oil and gas for interstate commerce. Prior to October 24, 1938, the effective date of the Act, defendant's employees worked 8, 10, and 12 hours daily shifts and were paid a specified wage for each shift. These wages were in excess of the minimum required by the Act. To secure the same wage levels after the Act, the defendant made contracts with employees under a split-day plan. Each shift was divided into two parts. For example, the first four hours of each eight hour shift were assigned a specific hourly rate. The remaining hours were treated as "overtime" figured one and one-half times the regular rate. The contracts also called for no more than 40 hours to come under the base rate in any one week.

The new contracts were obviously made with the intent to keep the total wages for each shift the same after the Act as before it. Justice Murphy, who gave the opinion of the court, affirms these views and further states that the actual and regular work week was accordingly shorn of all significance.

Although the District Court and the Circuit Court of Appeals both held that the split-day plan of compensation under the decision in *Walling v. Belv. Corp.*,<sup>3</sup> did not violate the Act, this court disagreed. It maintained that the split-day plan satisfies neither the purpose nor the mechanics of the requirement of section 7(a) of the Act, which limits to 40 per week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "no less than one and one-half times the regular rate at which he is employed."<sup>4</sup>

The Court asserted that the Act had two purposes: "(1), to spread employment by placing financial pressure on the employer through the overtime pay requirement; and (2) to compensate employees for the burden of a work week in excess of the hours fixed in the Act." See *Overnight Motor Co. v. Missel*.<sup>5</sup> Neither objective could be obtained under the split-day plan. In effect there was an 80 hour maximum work week instead of the allowed 40.

---

1 65 S. C. 11, decided Nov. 6, 1944.

2 138 Fed. (2d) 705.

3 316 U. S. 62, 62 S. Ct. 1223, 86 L. Ed. 1716.

4 29 U. S. C. A. 207 (a).

5 316 U. S. 572, 62 S. Ct. 1216.

The defendants also violated the basic rules for computing correctly the actual regular rate contemplated by the Act. The plan in fact perpetuated the pre-statutory wage scale by providing for a fictitious regular rate consisting of a figure lower than the rate actually received. The so-called overtime pay was based on this fictitious rate.

Even though the defendants had ceased the split-day plan two months after the action was started, a decision on its legality remained. "Voluntary discontinuance of an alleged illegal activity does not operate to remove the case from the ambit of judicial power." See *Hecht v. Bowles*<sup>6</sup>; *Otis & Co. v. Securities and Exchange Commission*.<sup>7</sup> If no decision were made, the defendants would feel free at any time to resume the plan.

The judgment of the lower court was reversed with direction to remand the case to District Court for further proceedings in conformity with the opinion.

The opinion rendered here seems entirely correct, since the defendants were unmistakably attempting to bypass the Fair Labor Standards Act through an ingenious subterfuge. If such practices were allowed, the purpose of the act would be frustrated.

*Thomas F. Bremer.*

---

PROCEDURE — HABEAS CORPUS.—The case of *Hawk v. Olson*<sup>1</sup> is a habeas corpus proceeding instituted by the petitioner, Henry Hawk, against Neil Olson, warden of the Nebraska State Penitentiary, as respondent, to obtain the prisoner's release. From an order denying the writ the petitioner has appealed to the Nebraska Supreme Court.

Petitioner was serving a sentence in a federal penitentiary for another crime, and while serving the federal sentence he was indicted and brought to trial in the Nebraska courts. Hawk was found guilty of the crime of murder in the first degree and was sentenced to life imprisonment. He was returned to the federal prison to finish his sentence and when that term in the federal penitentiary expired the federal authorities turned him over to the state authorities in Nebraska.

Petitioner complains that at the time he was tried he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and therefore outside of the jurisdiction of the state. Further, that when he had completed his term in the federal prison he was turned over to the Nebraska authorities and confined in the state penitentiary without further order.

---

<sup>6</sup> 321 U. S. 321, 64 S. Ct. 587.

<sup>7</sup> 106 Fed. (2d) 579.

<sup>1</sup> 16 N. W. (2d) 181, decided Nov. 3, 1944.