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CASES AND AUTHORITIES CITED

STATUTES AND RULES OF COURT CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

Nos. 795 and 796.

JESSE C. ADKINS, *et al.*, constituting the Minimum Wage Board of the District of Columbia,

Appellants,

vs.

THE CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA.

JESSE C. ADKINS, *et al.*, constituting the Minimum Wage Board of the District of Columbia,

Appellants,

vs.

WILLIE A. LYONS.

APPELLANTS' MEMORANDUM ON THE ISSUE OF THE JURISDICTION OF THE COURT BELOW.

Introductory.

With minimum wage laws enacted in thirteen States not including the District of Columbia, it is of vital importance that the question raised as to the constitutionality of this legislation be disposed of at the earliest possible date. Being desirous of expediting the disposition of the constitutional issues involved, counsel has been exceedingly reluctant to question the propriety and jurisdiction of the Court of Appeals in ordering a rehearing of these causes after the Court had separated for

the summer vacation and adjourned for the Term, the petitions for rehearing filed within the proper time limit having previously been duly denied by the Court. But there are issues involved which cannot be, and ought not to be, waived. Although counsel had originally planned merely to refer to the vigorous dissenting opinion of the Chief Justice of the Court of Appeals, none the less, after reflection, they have concluded that it was their duty, as lawyers and officers of this Court, to present directly to this Court the issue involved in the procedure adopted in these causes in the Court below. This memorandum deals exclusively with the questions thus raised.

The facts with reference to the procedure adopted, as described by Chief Justice Smyth, present no less an issue than whether justice is to be administered in the Court of Appeals for the District of Columbia according to Law, or according to Judge. In all great constitutional struggles, the strength of the judiciary has lain in the orderly and objective character of the judicial procedure employed. The bar, and, through it, the lay public, have always been impressed with a deep conviction that our judges were striving to administer justice according to law, and to find and evolve standards from principles and traditions accepted as our common legal heritage. We venture to suggest that the present record presents a unique instance of the presiding judge of an appellate Federal Court challenging, in effect, the conduct of his colleagues as an arbitrary and personal administration of justice. All the more is it to be regretted that the judges responsible for the procedure below did not deem it necessary to put on the record an explanation of the conduct which evoked such a protest from Chief Justice Smyth.

Facts.

On June 6th, 1922, at the final formal session of the Court for the April term, the cases here in question were

duly decided by the Court of Appeals for the District of Columbia. Mr. Chief Justice Smyth and Mr. Justice Stafford handed down opinions confirming the decrees entered by the Supreme Court of the District, Mr. Justice Van Orsdel delivering a dissenting opinion. At the time the causes were first called for hearing on appeal Mr. Justice Robb was unable to sit because of illness. Pursuant to section 225 of the Code of Law for the District of Columbia (the pertinent parts of which are quoted in the footnote*), the other justices designated Mr. Justice Stafford of the Supreme Court to take his place (R., fol. 40). The order designating him provided that he should "sit as a member of this Court in the absence of Mr. Justice Robb, in the hearing and decision of the following cases", among which were the cases now under consideration. Mr. Justice Stafford accordingly took his place, participated in the hearings of the causes, and in their consideration and final disposition. As stated, the Court on June 6th sustained the constitutionality of the act and affirmed the decrees of the trial Court (R., 43).

A motion for rehearing in each case was filed by the plaintiff on June 14th, in conformity with Rule XXIV of the Court of Appeals.** On June 22nd, the motions

*Sec. 225.— * * * * * If any member of the Court shall be absent on account of illness or other cause during the session thereof [of the Court of Appeals], or shall be disqualified from hearing and determining any particular cause by having been of counsel therein, or by having as justice of the Supreme Court of the District of Columbia previously passed upon the merits thereof, or if for any reason whatever it shall be impracticable to obtain a full court of three justices, the member or members of the Court who shall be present shall designate a justice or justices of the Supreme Court of the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said Court of Appeals and perform the duties of a member thereof while such vacancy or vacancies shall exist. * * * *And provided, also,* that all motions to dismiss appeals and other motions may be heard by two justices in the event of the absence or disqualification of any one of the justices as aforesaid: *And provided further,* That if in any cause heard before two justices as aforesaid the Court shall be divided in its opinion, then the judgment or decree of the lower court shall stand affirmed.

**Rule XXIV of the Court of Appeals of the District of Columbia. "All motions for reargument, or for modifications of judgments or decrees, shall be made in writing and filed with the clerk of the court within 15 days from the time of the opinion or judgment delivered; and it shall be the duty of the clerk of this Court to deliver a copy of such motion to each member of the Court without delay, and during such period of 15 days no mandate shall issue unless upon special order of the Court for good cause shown."

for rehearing were duly considered and overruled by the Court, consisting of the Chief Justice and Mr. Justice Stafford, Mr. Justice Van Orsdel being absent. Section 225* of the code, it will be recalled, provides that where one member of the Court is absent or disqualified, two justices may rule on motions. At the time the motions for rehearing were overruled, orders were made that the mandates be withheld until the appellants had a reasonable opportunity to apply to the Supreme Court of the United States for review (R., fol. 77). As the Chief Justice pointed out in his opinion, the motions for rehearing did not challenge in any way the right of Mr. Justice Stafford to participate in the disposition of them, and the question as to his right to do so was not before the Chief Justice and Mr. Justice Stafford at the time they overruled the motions, and never was submitted to them, nor had any member of the Court been asked to pass on it prior to the overruling of the motions, so far as the Chief Justice was aware. Apart from the disposition of the motions for rehearing duly made under Rule XXIV of the Court, the last formal session of the Court for the April term was held on June 6th, at the time the opinions in these cases were handed down. It appears from the opinion of the Chief Justice, moreover, that the members of the Court actually separated for their summer vacation about June 22nd (R., p. 67).

It was therefore not until after the Court had adjourned *sine die* and had separated for the summer vacation, with no thought of considering any further matters in the April term, that any further question was raised as to the rehearing.

What happened subsequently is set forth in the opinion of the Chief Justice as follows:

*See footnote, page 3, *supra*.

"June 25, three days after the motions for rehearing had been overruled, Mr. Justice Robb wrote to the Chief Justice as follows:

> 'Within fifteen days after the decision was announced in the minimum wage cases, counsel sent me their application for a rehearing, and insisted, and still insist, that I vote thereon. While I incline to the view that Justice Stafford no longer has any jurisdiction in these cases, I wish to look up the authorities, if any there be, before deciding definitely.'

"In answer the Chief Justice said the motions had already been passed upon, and he ventured to suggest reasons which then occurred to him for believing that Justice Stafford had acted within his authority when he united with the Chief Justice in overruling the motions. To this no answer was made, but on July 1 Justice Robb wrote, saying:

> 'After mature consideration, I have decided to vote for a rehearing in the minimum wage cases, and I am advising counsel to that effect, as well as Justice Van Orsdel.'

"Thereafter, in pursuance of directions from him and Mr. Justice Van Orsdel, the clerk entered an order granting a rehearing in both cases, the Chief Justice dissenting.

"About ten days after Mr. Justice Robb had notified the Chief Justice of his intention to vote, motions were filed to set aside the order made by Justice Stafford and the Chief Justice. These motions were based upon the ground that the order was not passed by a majority of the Court as constituted at the time the order was made. This was the first time the right of Justice Stafford was questioned by any pleading or other paper filed in the cases, or by any other method addressed to the Court. These motions were sustained July 13, Mr. Justice Robb

and Mr. Justice Van Orsdel concurring, and the Chief Justice dissenting."

It is for this Court now to determine whether the proceedings above described meet the requirements of judicial process according to law. The Chief Justice himself thus described the acts of his colleagues:

> "It would seem from the foregoing that the appellants, finding themselves defeated, sought a justice who had not sat in the case, but who, they believed, would be favorable to them, and induced him, by an appeal directed to him personally, to assume jurisdiction and join with the dissenting justice in an attempt to overrule the decisions of the Court. I shall not characterize such practice; let the facts speak for themselves."

Argument.

I

Jurisdiction of this Court to review order setting aside denial of original motions for rehearing.

1. It should be observed that Mr. Justice Robb and Mr. Justice Van Orsdel did not ask, and did not purport to ask, the Court below to reconsider the motions for rehearing. They acted on the assumption that the denial of the motions by the Court on June 22nd was an absolute nullity on the ground that Mr. Justice Stafford had no right to participate in their disposition. It should further be observed that the motions made in the Court below to set aside the orders entered by the Chief Justice and Mr. Justice Stafford denying the rehearing, did not request, and did not purport to request, a reconsideration of the motions for rehearing. The motions to set aside were based solely on the ground that the orders were not passed by a majority of the Court as consti-

tuted at the time the order was made. The only possible explanation that can be found for the action of Mr. Justice Robb and Mr. Justice Van Orsdel is that they regarded the orders entered by the Chief Justice and Mr. Justice Stafford as *coram non judice,* and of no binding force whatsoever. Of course, if the Court below had not adjourned *sine die* for the term, it may have been possible for the parties, apart from the requirements of Rule XXIV,* to move for a renewal or reconsideration of the motions for reahearing; or possibly, the Court may on its own motion have concluded to grant a rehearing. But, as has been indicated, Mr. Justice Robb and Mr. Justice Van Orsdel did not purport or intend to bring about a reconsideration of the motions, since they professed to deny that the motions had ever been judicially considered and disposed of.

Indeed, inasmuch as the Court had adjourned *sine die* for the term, once the petition for rehearing filed within the time limit prescribed by Rule XXIV of the Court had been denied, the decrees entered passed absolutely beyond the power of the Court of Appeals to alter or to vacate. If the orders denying the rehearing were properly entered, the mandates were withheld solely for the purpose of enabling the appellants to have a reasonable opportunity of perfecting their appeals. By Rule XXIV, which may be regarded as a standing order of the Court, the parties had fifteen days within which to file their petitions for rehearing. But, as no time for the resumption of the Court within the April term had been fixed or contemplated, the Court must be regarded as having adjourned *sine die* for the term, except for the consideration of the motions for rehearing filed within the prescribed time limit in respect of any opinions or judgments rendered during the term.

The decisions of this Court are clearly and explicitly to the effect that a Court of Equity has no power to

*See footnote, page 3, *supra.*

alter or vacate its decrees, or to grant a rehearing after the adjournment of the term.

This principle was briefly stated by Mr. Chief Justice Waite, speaking for the Court, in *Brooks* v. *Burlington & S. W. R. Co.,* 102 U. S., 107:

> "At the end of the term the parties are discharged from further attendances on all causes decided, and we have no power to bring them back. After that, we can do no more than correct any clerical errors that may be found in the record of what we have done.

Bronson v. *Shulten,* 104 U. S. 410, is perhaps the leading case on this subject, and has never been questioned. The rule is there stated by Mr. Justice Miller as follows:

> "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it, by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be any exceptions in the State courts they are unimportant. It is a general rule of law that all judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term in which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court.
>
> "But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court passed beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court,

> that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the Court."

In *Lewisburg Bank* v. *Sheffey,* 140 U. S. 448, this court, through Mr. Chief Justice Fuller, said:

> "The application for a rehearing was confessedly made after the adjournment of the May Term, at which the prior decree was entered, and too late, if that decree were final."

See, also, *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31; *Wetmore* v. *Karrick,* 205 U. S. 141; In re *Metropolitan Trust Co.,* 218 U. S. 312; *U. S. Mayer,* 235 U. S. 55; *Street, Federal Equity Practice,* Sections 2076, 2089 and 2111.

It should also be noted that Federal Equity Rule 69 provides:

> "Every petition for a rehearing shall contain the special matter or cause on which such hearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court."

2. It is, of course, the ordinary rule that the granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard, and is not a subject of appeal. *Roemer* v. *Bernheimer,* 132 U. S. 103.

But that, of course, does not mean that a rehearing may be granted after the decree has passed beyond the control of the court attempting to grant the rehearing. Nor does it mean that an order, vacating an order denying a rehearing on the ground that the previous order was entered without jurisdiction, cannot be reviewed on appeal. The rule that an order, granting or denying a rehearing, cannot be reviewed on appeal, is based on the ground that an order of this character rests solely within the discretion of the Court. But the vacating of an order on the alleged ground of want of jurisdiction, is not a matter discretionary with the Court. It is a matter of strict law. As it is a jurisdictional question, it would seem peculiarly a question to be reviewed by this Court. And even if it were not considered a matter of strict jurisdiction, it would, none the less, raise an important point in the law of legal procedure and statutory construction for this Court to consider. It is, of course, well established that if this Court has jurisdiction to review a case because the constitutionality of a law is in issue, it may and should determine all questions involved, even though those questions in other proceedings might not be subject to review. In *Brolan* v. *U. S.*, 236 U. S. 216, 217, Mr. Chief Justice White, speaking for this court, stated:

> "Our jurisdiction to directly review depends upon the constitutional question, since the other matters relied upon are, as a general rule, within the exclusive jurisdiction of the circuit court of appeals of the ninth circuit, although, if power to review attaches to the case because of the constitutional question, that authority gives rise to the duty to determine all the questions involved."

The same principle was stated by Mr. Justice Pitney, in *Louisville & N. R.* v. *Finn,* 235 U. S. 601, 604:

> "The jurisdiction of the Federal Court was invoked because of questions raised under the Constitution of the United States, and not because of diversity of citizenship; but it extends, of course, to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions, or whether it is necessary to decide them at all. *Ohio Tax Cases,* 232 U. S. 576, 587, and cases cited."

II

Mr. Justice Stafford was competent to participate in the disposition of the original motions for rehearing and reargument in the cases in which he sat, by assignment, upon the original hearing.

1. It becomes important to consider whether Mr. Justice Stafford was competent to sit in the Court of Appeals and participate in the decision on the motion for a rehearing of these cases. It is apparently admitted that Mr. Justice Stafford properly participated in the hearing and determination of these cases when first heard on appeal. The point is raised that he was not competent, however, to participate in the hearing and determination of the motions for rehearing because of the fact that Mr. Justice Robb, who had been ill, had returned to the Court. It should be borne in mind that the question in issue is not whether Mr. Justice Robb had jurisdiction to sit, but whether Mr. Justice Stafford was competent to sit. It may be conceded at the outset that if Mr. Justice Robb had returned to the Court, he was competent to sit. But it does not follow from that fact, that Mr. Justice Stafford was not also competent to sit. The power of a substitute judge to continue the causes pend-

ing before him, including the hearing and determination of motions for rehearing or new trial, notwithstanding the return to his duties of the judge for whom he has been substituting, has never before, it is believed, been seriously questioned, either as a matter of precedent or practice, by any court to which the question has been presented. *Shore* v. *Splain,* 49 App. D. C. 6, 258 Fed. 150; *Mayer* v. *Haggerty,* 138 Ind. 628, 635-6, 38 N. E. 42; *State* v. *Stevenson,* 64 W. Va. 392, 62 S. E. 688; *State* v. *Bobbitt,* 215 Mo. 10, 30, 114 S. W. 511; *State* ex rel v. *Williams,* 136 Mo. App. 330, 336, 117 S. W. 617; *Bohannon* v. *Tabbin* (Ky.), 76 S. W. 46, 49; *Dupoyster* v. *Clarke,* 121 Ky. 694, 90 S. W. 1; *Bedford* v. *Stone,* 43 Tex. Civ. App. 200, 95 S. W. 1086; *Fisher* v. *Puget Sound Brick, etc., Co.,* 34 Wash. 578, 76 Pac. 107; *State* v. *Tomlinson,* 7 N. D. 294, 74 N. W. 995; *State* v. *Towndrow,* 25 N. M. 203, 180 Pac. 282; *Johnson* v. *State,* 1 Okl. Cr. 321, 97 Pac. 1059, 1064.

2. Opposing counsel, below, has endeavored to urge against these authorities that, so far as they may be in point, they rest upon statutes. It is true that the provisions regarding substitute judges are, in nearly every case, statutory. But the provisions regarding substitute judges in the Court of Appeals for the District of Columbia are also statutory. The question is one of a fair and reasonable construction of the statute. There is no more reason for giving a strict, technical and wholly uncontemplated interpretation to the statutory provisions in the instant cases than in any other. Indeed, in a number of the cases above cited, the same technical objections which have been urged here, were set up by the complaining party, and were rejected by the Court.

3. That it had been, and that, as a matter of fact, it still is, the practice in the Court of Appeals of the District of Columbia, for the substitute justice to participate in the consideration and disposition of motions for re-

hearing in causes heard by him on appeal, although the regular justice may have in the meantime returned to his duties, is established beyond a doubt by the undisputed testimony of the Chief Justice below:

> "My opinion is that, while the substitute justice may not enter upon any new work after the return of the regular justice, he has the authority, and it is his duty, to complete the work undertaken while the regular member of the court was absent. This has been the practice, without a single exception, save the present case, since the organization of the court. *Shore* v. *Splain,* 49 App. D. C. 6, 258 Fed. 150. After the motions for rehearing were granted in these cases, Mr. Justice Robb refused to consider a motion for rehearing in a case in which he had not sat (*Clement* v. *Roberts,* 51 App. D. C. 29, 273 Fed. 757), and it was necessary to send for Mr. Justice Hitz, who took part in the hearing and decision of the case, to vote on the motion; there being a division of opinion among the other justices. At this moment a substitute justice is considering cases in the hearing of which he participated, though the justice whose place he took has returned to the court and is engaged in the discharge of his duties."

4. A weighty analogy is found in the practice in force in the various Circuit Courts of Appeal throughout the country. Section 117 of the Judicial Code provides that the Court shall be composed of three judges, and section 120 provides that the chief justice, the associate justices of the Supreme Court assigned to the circuit, the circuit judges and the district judge in the circuit, shall all be competent to sit as judges on the Circuit Court of Appeals. So far as counsel can ascertain, the invariable practice in all the circuits is to refer motions for rehearing to the judges who originally heard the appeal, including the district judge or judges who sat by assignment, if they are available, and, if a rehearing is granted,

it is the usual practice of the presiding judge to endeavor to have the same judges sit on the reargument. This does not mean that in case of need, other judges may not consider the motion for rehearing. Indeed, it would seem to be clear under the rules, that it is only necessary for one of the judges who sat on the original appeal to concur in the motion granting the rehearing.* In nearly every circuit, there are four to five circuit judges, not including the district judges, who commonly sit in the Circuit Court of Appeals. It is not believed that the presiding judge in any circuit would tolerate for a moment any attempt on the part of counsel to select from the panel of competent judges, any particular judge or judges to participate in the disposition of a motion for rehearing. If such a practice were tolerated, it would obviously undermine the integrity and honor of the American judiciary, and rob it of the respect and confidence of the people.

5. That the sound administration of justice is furthered by having those judges who originally heard the appeal pass on the motion for rehearing, is hardly open for question. It has always been assumed that statutory rules of procedure were to be interpreted in the light of reason and with a view to furthering and not frustrating the interests of justice. This is well pointed out by the Court in *Mayer* v. *Hagerty, supra.*

> "Besides, in this case, the special judge was peculiarly the person to whom the petition for a *nunc pro tunc* entry and the motion for a new trial should have been addressed. He was 'the court rendering the judgment.' R. S. 1881, section 1064;

*Rule 30 of the rules of the United States Supreme Court, which is found as Rule No. 29 in the rules of the Circuit Court of Appeals for most circuits, reads as follows:

> "A petition for rehearing after judgment can be presented only at the term at which judgment is entered unless by special leave granted during the term; and must be printed and briefly and distinctly state its ground and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

> Burns R. S. 1894, section 1076. 'When the regular judge yields the bench, calls in a special judge, and duly appoints him to try a designated cause, the special judge thus acquires full authority over the cause throughout all of its stages.' *Perkins* v. *Hayward*, 124 Ind. 445. Section 415 R. S. 1881. Burns R. S. 1894, sec. 419, provides that a special judge 'shall have power to hear and determine said cause until finally disposed of.' The law provides for the motion for a new trial and for petitions and *orders for nunc pro tunc* entries, and in the very nature of things no one else could intelligently dispose of them."

The point is forcibly expressed by Mr. Justice Field in *Giant Powder Co.* v. *California Vigorit Powder Co.*, 5 Fed. 197, 202:

> "Where cases have been heard by the circuit judge sitting alone, I do not myself hear applications in them for a rehearing or motions for a new trial except by his request. This consideration to the different judges composing the court is essential to the harmonious administration of justice therein. As observed by me in a case reported in 1 Sawyer: 'The circuit judge possesses equal authority with myself on the circuit, and it would lead to unseemly conflicts if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case' (p. 689)."

6. A careful examination of the authorities cited by opposing counsel below shows that they go no further than to establish that the regular judge on his return to his duties, may be competent to consider, or participate in the cnsideration of, a motion for rehearing or new trial of a cause heard by the substitute judge. The cases relied upon are all cases where the term of office of the judge acting as the substitute judge had expired, and his

successor acted upon unfinished business, or where the special judge withdrew, leaving work to be done. Of course, parties are not to be denied their right to move for a rehearing or new trial because of the unavailability of the judge or judges before whom their cause was originally heard. But that is a wholly different aspect of the administration of justice than that which is involved in sanctioning the procedure below of disqualifying upon motion for the rehearing of a case a judge who sat, by lawful assignment, upon the original hearing.

The challenge of the chief justice below for a controlling authority for, or adequate explanation of, the singular procedure adopted, remains unanswered:

> "Cases where a judge's term of office had expired and his successor acted upon unfinished business, or where a special judge withdrew leaving work to be done, have no application. In such cases public policy required that the unfinished work be disposed of; but here no question of that kind existed, for Justice Stafford had completed the work for which he had been assigned before Mr. Justice Robb had decided to act. The Shore case is directly in point. Why was it not followed? No explanation is offered. If we are not to respect our own decisions, their publication is an idle ceremony, and must have a tendency to mislead the profession."

Conclusion.

It is therefore respectfully submitted that the motions for rehearing of these cases below were duly denied by the Court, including Mr. Justice Stafford; that any subsequent action by Mr. Justice Robb and Mr. Justice Van Orsdel was null and void, and inconsistent with the forms of judicial process recognized and in force in courts administering justice by law under the Constitution.

Respectfully submitted,

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