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Constitutional Law—Freedom of Religion—Chest X-Ray as a Condition of Admission to State University

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RECENT CASES

Appeal and Error—Appeal from the Juvenile Court. After a husband and wife had instituted adoption proceedings in the juvenile court for a child in custody of that court, the father of the child petitioned the court for custody of the child. The juvenile court dismissed the petition. Appeal. *Held:* Dismissed. In re *a Minor,* 39 Wn. 2d 744, 238 P. 2d 914 (1951).

The order from which the appeal was taken was an oral opinion later repeated in a memorandum decision. Neither an oral opinion nor a memorandum decision of a superior court is an appealable order. *Edward L. Eyre & Co. v. Hirsch,* 36 Wn. 2d 439, 218 P. 2d 888 (1950). Although the Court could have based its decision on this ground, it chose to rest its holding on the broader ground that the juvenile court law does not provide for an appeal. *State* ex rel. *Gray v. Webster,* 122 Wash. 526, 211 Pac. 274 (1922).

The rule that no appeal may be taken from the juvenile court seems to be well settled, notwithstanding the broad provisions of Rule on Appeal 14, 34A Wn. 2d 20, which reads, "Any party aggrieved may appeal to the supreme court in the mode prescribed in these rules from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding: (1) from the final judgment entered in any action or proceeding. . . ." It could be argued that an appeal from the juvenile court should be allowed under the broad language of this rule; but, all the decisions (with the exception of *Fuhrman v. Arvin,* 21 Wn. 2d 828, 153 P. 2d 165 (1944), where counsel failed to raise the point) have been to the contrary. See In re *King,* 39 Wn. 2d 875, 239 P. 2d 553 (1952).

No future harm can result to parties to juvenile court proceedings from the operation of the rule denying appeal to the Supreme Court as the proceedings of the juvenile court are, nevertheless, subject to review. The Court indicates, with a plethora of citations, that a writ of habeas corpus, certiorari, or prohibition may be used for this purpose in a proper case.

ELDON C. PARR

Constitutional Law—Freedom of Religion—Chest X-Ray as a Condition of Admission to State University. The Board of Regents of the University of Washington required that each student submit to a chest X-Ray examination for the purpose of disclosing tubercular infection. *P,* a Christian Scientist, sought to register for her senior year, and when she refused to submit to the examination she was denied admission. She then petitioned to the Regents for an exemption on the ground that to submit would violate her religious convictions. The petition was denied, and *P* now seeks a writ of mandamus to compel the Regents to admit her without requiring the X-Ray examination, contending, *inter alia,* that the requirement was an unjustified abridgement of her religious liberty as guaranteed by the federal and state constitutions. The trial court denied the writ. *Held:* Affirmed. To admit *P* (and others claiming a similar exemption) to the University without taking the required X-Ray examination presents a clear and present danger of an evil which the state may lawfully prevent, and justifies the restrictions on her religious freedom. *State* ex rel. *Holcomb v. Armstrong,* 139 Wash. Dec. 795, 239 P. 2d 545 (1952).

The free exercise of religion is protected from state interference by the due process clause of the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). In addition the constitution of the state of Washington provides a similar guarantee. WASH. CONST. ART. I, § 11 and AMEND. 4. This right is not absolute and must occa-

sionally be restricted for the public good, but it is so fundamental that it may be inhibited only when the particular conduct involved presents a clear and present danger of an evil which the state may lawfully prevent. *Cantwell v. Connecticut, supra.* The protection of civil liberties by the Fourteenth Amendment is designed in part to protect minority groups from the legislative majority, and the "clear and present danger" test would seem to be one for the courts and not the legislature. Antieau, *Religious Liberty under the Fourteenth Amendment,* 22 NOTRE DAME LAWYER 271 (1947).

While the rules relating to freedom of religion and the "clear and present danger" test are accurately stated in the instant case, it is submitted that the constitutional question of religious freedom was not presented by the facts, and that the application of the test to justify the chest X-Ray requirement was unnecessary. No one has an absolute right to attend a state-supported university, and the legislature may impose conditions on the right of admission. *University of Mississippi v. Waugh,* 237 U.S. 589 (1915). The state's power to impose conditions on admission is not unlimited, however, and admission requirements which deny prospective students the equal protection of the laws are invalid. *Missouri* ex rel. *Gaines v. Canada,* 305 U.S. 337 (1938) (racial discrimination). Requirements which openly discriminate against certain classes of persons are clearly beyond the power of the state. A regulation which is uniform on its face but secretly intended to be discriminatory would also violate the equal protection clause. For example, the regents might require all students at the university to eat meat every day of the week including Friday, ostensibly to improve their diet. While such a rule would be of uniform application, the intent to discriminate against Catholics would be readily apparent. However, in the instant case such hidden discrimination is not present, because the purpose of the X-Ray requirement is clearly to discover tuberculosis, and not to exclude Christian Scientists. The mere fact that an unequal burden is imposed by a law, fair on its face, is not sufficient to invalidate the law. *See Cotting v. Goddard,* 183 U.S. 79 (1936).

Persons seeking entrance to a university are not *compelled* to do acts which are prescribed as conditions of admission because no one is required to attend a state university. *Hamilton v. University of California,* 293 U.S. 245 (1934) (military training). This factor distinguishes cases where the requirement of the flag salute of all students in grade school was held to violate freedom of speech. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943); *State* ex rel. *Bolling v. Superior Court,* 16 Wn. 2d 373, 133 P. 2d 803 (1943). As primary education was compulsory in both of these cases the students were in a true sense compelled to perform the required flag salute. Such compulsion is wanting when admission requirements are imposed by a university, because a person unwilling to submit to the conditions of entrance may choose not to attend. He has only a conditional right of admission, and his constitutional rights are not infringed when the regents require acts which the applicant is unwilling to perform for religious reasons. *Hamilton v. University of California, supra.*

The Regents at the University of Washington are vested with ". . . full control of the university . . .," RCW 28.77.130 [RRS § 4557], and under this general grant they have all powers fairly or necessarily implied to effect the objects and purposes of the institution. *Juntila v. Everett School District No. 24,* 178 Wash. 637, 35 P. 2d 78 (1934). However, regulations imposed by the university administration under these powers must be reasonable. *Foley v. Benedict,* 122 Tex. 193, 55 S.W. 2d 805 (1932). Therefore, if the requirement of an X-Ray examination is within the Regents' power, an inquiry into the reasonableness of the condition should conclude the matter since *P* has only a conditional right of admission and is not compelled to attend. The constitutional right of free exercise of religion and the "clear and present danger" test would not be involved at all.

Testing the case by this analysis, may the Regents impose health regulations, and is the X-Ray requirement reasonable? The protection of students from contagious diseases while attending the University is of primary importance, and when dealing with an insidious disease such as tuberculosis the Regents, having "full control of the university," should have ample authority to protect students from possible exposure. *Williams v. Wheeler,* 23 Cal. App. 619, 138 Pac. 937 (1913) (vaccination). A blanket requirement of an X-Ray examination seems an effective and reasonable method of discovering infected persons, so that they may be prevented from exposing other students to the disease. The dissenting opinion argues that the potential exemption of two hundred students per year on religious grounds would not present a very serious problem, because present incidence of undiscovered tuberculosis at the University indicates that this exemption, if granted, would result in only one undiscovered case every seven and one-half years being concealed within the ranks of the religiously exempt. While the argument is appealing at first blush, it overlooks the fact that one of the most probable reasons for the falling incidence of tuberculosis at the University is that *all* students are examined, and that to exempt some students would tend to increase the chances that students would be exposed to the disease. Thus if the requirement is a reasonable one, the Court's decision in the instant case was correct, although based on an unnecessary application of the "clear and present danger" test.

GORDON F. CRANDALL

Statute of Frauds—Real Estate Brokers' Contracts—Agency. *P* orally engaged *D* to sell *P*'s land, for which *D* was to receive a commission of $1,000. *D* falsely represented that he had procured a purchaser who would buy the property if he could obtain a loan of $10,000, and that *D* could procure the necessary loan upon paying a bonus of $3,000 to the lender. *P,* in reliance on these representations, entered a written agreement to pay *D* $4,000. *P* brought an action to recover the $3,000 which *D* had received and converted to his own use. *Held:* The oral agreement created an agency relationship which *D* breached by his misrepresentations, and RCW 19.36.010 (5) [RRS § 5825(5)], which provides that "An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission" shall be void unless in writing, is not applicable since it refers only to agreements for the payment of a commission, and does not require that the actual authority to sell or purchase be in writing. *Mele v. Cerenzie,* 140 Wash. Dec. 115, 241 P. 2d 669 (1952).

There is ample authority in Washington for the proposition that the agency to sell or purchase on the one hand, and an agreement to pay a real estate broker's commission on the other, are separate and distinct, and that it is only the latter which is required by the statute to be in writing. *Stewart v. Preston,* 77 Wash. 559, 137 Pac. 993 (1914); *Ewing and Clark v. Mumford,* 157 Wash. 617, 289 Pac. 1026 (1930); *Pederson v. Jones,* 35 Wn. 2d 180, 211 P. 2d 705 (1949). In the *Pederson* case, the broker, employed to purchase land for his principal, bought the land himself at a lower price, and then resold it to the principal at a profit. The court held that the broker could not avoid liability for his fraud by the plea that his agency was not in writing. However, in an earlier Washington case, the orally employed broker had purchased land in his own name with his own funds and later had sold it to a third party at a profit, and the court held that no constructive trust could be placed upon the proceeds of the sale in the broker's hands, on the basis, in part, that under RCW 19.36.010 (5) [RRS § 5825(5)], an agreement employing an agent or broker to sell or purchase real estate for compensation is void unless in writing. Therefore, the relationship of principal and agent did not exist. *Carkonen v. Alberts,* 196 Wash. 575, 83 P. 2d 900 (1938). In a comment on the case in 14 WASH. L. REV. 210 (1939), the