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Statute of Frauds—Real Estate Brokers' Contracts—Agency

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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

author concluded that the court was bringing the situation within the operation of that part of the statute of frauds (represented in Washington by RCW 64.04.010, [RRS § 10550]) which requires every conveyance of real estate or of an interest therein to be by deed, and that in reaching the result by this avenue the court was supported by precedent in many jurisdictions. If this was the view of the court, the *Carkonen* case appears to be inconsistent with the *Pederson* case which held that RCW 19.36.010 [RRS §5825] was controlling in this type of case. In the *Mele* case the *Pederson* case was cited for this position, and the interpretation given that statute was quite different from that given it in the *Carkonen* opinion. In the latter case the court mentioned certain prior Washington cases, stating that the "fraud perpetrated by the agent in those cases distinguishes them from the present case." If there can be a distinction between the *Carkonen* decision and the two recent cases, the quoted portion from that opinion is the apparent answer. It seems questionable, however, whether this is a valid distinction, when the ultimate question for decision is whether an agency relationship was created by virtue of the oral agreement.

Although the *Carkonen* case may possibly stand alone on its facts, the reasoning of the *Mele* and *Pederson* cases appears inconsistent and seems preferable. The fact that fraud is not present may be a means of reaching the result that no constructive trust could arise, but it does not seem a valid reason for a different interpretation of RCW 19.36.010 [RRS § 5825]. The literal interpretation of that statute in the *Carkonen* case might easily further the perpetration of fraud upon an innocent landowner or prospective purchaser. The court quoted with approval in the *Mele* case a passage from *Rathbun v. McLay,* 76 Conn. 308, 56 A. 511 (1903), which sums up this line of reasoning adequately: "To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleases, and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing." It is to be hoped that in the future the Washington court will adhere to the principles advanced in the *Pederson* and *Mele* cases.

JAMES B. MITCHELL

Statute of Frauds—Sufficiency of Memorandum. Action on a contract whereby *P* agreed to sell and *D* to buy 4200 day-old poults. Such a contract is unenforceable unless a memorandum signed by *D* is sufficient to satisfy the requirements of the statute of frauds. RCW 63.04.050 (1) [RRS § 5836-4(1)]. *P* relied on a printed contract form, filled in by *P* but unsigned by either party, and a postal card signed by *D* on which *D* wrote, "Dear Mr. Grant: I have decided to not raise any turkeys this year so will you please cancel my order? . . ." *P* contended that the word "order" incorporated by reference the terms of the form filled in by *P*. Judgment for *P*. On appeal, *Held:* Reversed. *Grant v. Auvil,* 39 Wn. 2d 722, 238 P. 2d 393 (1951).

The decision turns on the construction of the reference in the postal card to the "order." The Court cited RESTATEMENT, CONTRACTS § 208, *Illus.* 9 where a distinction is drawn between a written memorandum of an agreement and the intangible agreement which is evidenced by the memorandum. According to the RESTATEMENT, a letter referring to the "agreement between us" would constitute a sufficient memorandum if the reference is to the writing, but not if the reference is to the intangible agreement. Whether the reference is to the writing or to the intangible agreement is a question of interpretation. RESTATEMENT, CONTRACTS, *supra.* Here, the Court said there was nothing to indicate that the postal card referred to an extrinsic writing.

When the seller has filled out a printed contract form, unsigned by the buyer, and the buyer later writes to the seller making reference to the "order" and acknowledges