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Presented below is the seventh annual Survey of Washington Case Law. The articles in this survey issue have been written by second-year students as a part of their program to attain status as nominees to the *Law Review*. The second-year students were guided in their work by the Casenote Survey Editor of the *Law Review* and by various members of the law school faculty.

The case survey issue does not represent an attempt to discuss every Washington case decided in 1959. Rather, its purpose is to point out those cases which, in the opinion of the Editorial Board, constitute substantial additions to the body of law in Washington.

CONSTITUTIONAL LAW

Constitutional Law—Released Time for Religious Instruction During School Day—Constitutional Aspects of School Participation in Religious Program. In *Perry v. School Dist. No. 81*,[1] the Washington Supreme Court ruled for the first time on the constitutionality of a school district's release of some children during school hours to permit them to receive religious instruction under an organized program. In a unanimous en banc decision, the court held that the Spokane school district violated article I, section 11 and article IX, section 4 of the state constitution when it invited representatives of religious denominations into the schools to distribute registration cards and solicit a "captive audience" of children to enroll in a program conducted by the Spokane Council of Churches. Permitting instructors to make the

[1] 154 Wash. Dec. 920, 344 P.2d 1036 (1959).

announcements and distribute the cards was also condemned. Finding, however, that separation of church and state does not require governmental hostility towards religion, the court ruled that a school superintendent violates no constitutional provision when he releases a child from school to attend religious exercises or to receive religious instruction. Shorn of school participation beyond the act of releasing the children, the Spokane Council of Churches' "released-time" program was allowed to continue.

The action was brought by four taxpayers and parents.[2] The trial court, on a motion for summary judgment, held the program to be constitutional. The plaintiffs appealed.

The Spokane program was primarily administered by the Spokane Council of Churches.[3] Each year a representative of the Council of Churches visited the schools in which the Council had decided to offer the program. Either the representative or the regular classroom teachers told the children about the religious instruction and distributed registration cards for the children to take home. Those parents who wished their children to receive instruction in classes of one of the designated denominations signed the card and returned it to school. At the appointed hour, these children were released into the care of a religious representative who transported them to classes held outside the school. No truancy check was made nor records kept by the school. Those children whose parents had not signed the cards were retained in school. When enough children of a class remained, the regular school program continued, but more often they were engaged in some special activity or given individual help. The weekly classes lasted about an hour. No school funds were used for the program, although, of course, the normal expenses of operating the school continued in the absence of the released children. The trial court found that the services of the school staff in their share of the administration of the program, although paid for by public funds, were within the rule of *de minimis*. No discrimination, coercion, compulsion, or influence were found in the administration of the program.

Theocratic domination of secular affairs was strongly feared when our government was being formed. This fear is largely a matter of history today. Yet, any church activity which might be an opening

[2] The Upper Columbia Mission Society of Seventh Day Adventists, Inc., and the International Religious Liberty Association entered as plaintiffs in intervention.

[3] Representing: American Baptist, Disciples of Christ, Congregational, Covenant, Lutheran, Methodist, Episcopal, Presbyterian, and United Presbyterian denominations. One Catholic parish also participated.

wedge for encroachment into secular government still arouses alarm in many people. Social policy was thus vitally at issue in the *Perry* case. The vocal elements of public opinion urged many conflicting arguments upon the court in the form of briefs amicus curiae. The major arguments were: (1) the program introduced religious divisiveness into the schools;[4] (2) the force of the school's prestige and influence behind the program, coupled with a child's natural imitativeness and tendency to conform, produced a coercive sectarian influence on the child;[5] (3) large sectarian groups were favored to the detriment of smaller groups not able to provide premises or staff;[6] (4) parents are entitled to play the primary role in shaping their child's religious beliefs by initiating religious instruction in the home or church;[7] (5) non-Christian groups were not represented;[8] (6) placing emphasis upon the children's religious affiliations by segregating them into different groups and releasing some while retaining others was a denial of equal protection of the law;[9] (7) the program merely aided parents in their duty to give religious training to their children;[10] (8) the program could aid in preserving children from juvenile delinquency and communism.[11] There appeared to be no disagreement as to the need for religious instruction; the disagreement arose with regard to the propriety of a program initiated in the schools by the churches, approaching the parents indirectly through the child, as compared with the more traditional role of the church in providing religious instruction after school hours, leaving initiative with the parent.

Social policy was being shaped by the court's decision, but the court's opinion, written by Judge Hunter, did not discuss any of the above arguments, so the policy basis of the decision is unclear. The opinion was confined to the specific issues raised by the appellants,

[4] Brief of Sam L. Levinson, Melville Oseran, Howard P. Pruzan, Bernard Swerland, and Solie M. Ringold as Amici Curiae, associated with the Anti-Defamation League of B'nai B'rith, Perry v. School Dist. No. 81, Spokane, 154 Wash. Dec. 920, 344 P.2d 1036 (1959), at p. 2. See also, People *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (concurring opinion of Justice Frankfurter).

[5] Brief of Amici Curiae, *supra* note 4, at p. 13. See also, People *ex rel.* McCollum, *supra* note 4, at p 227.

[6] Brief of Amici Curiae, *supra* note 4, at p. 21.

[7] Brief of Amici Curiae, *supra* note 4, at p. 15.

[8] Brief of Leonard W. Schroeter and Donald S. Voorhees as Amici Curiae, associated with the American Civil Liberties Union, Perry v. School District No. 81, Spokane, 154 Wash. Dec. 920, 344 P.2d 1036 (1959), at p. 8. et seq.

[9] Brief of Amici Curiae, *supra* note 8 at p. 3.

[10] Brief of Benjamin Kizer, Robert D. Dellwo and Kenneth E. Gemmill as Amici Curiae, Perry, *supra*, at p. 9 et seq.

[11] Brief of Amici Curiae, *supra* note 10, at p. 37.

who argued that the program violated the first and fourteenth amendments to the United States Constitution, article I, section 11 of the Washington constitution (religious freedom), article IX, section 4 of the Washington constitution (sectarian control and influence prohibited), and RCW 28.27.010 (compulsory school attendance).

In answering the contentions concerning contravention of the United States Constitution,[12] the Washington court cited the cases of *People ex rel. McCollum v. Board of Education,*[13] and *Zorach v. Clauson,*[14] in which the United States Supreme Court ruled on the same questions. The Washington court, quoting extensively from the opinion of Justice Douglas in the *Zorach* case, compared the released time programs in these two cases. In the Illinois program, declared unconstitutional in *McCollum,* the school classrooms were used for religious instruction, school officials supervised and approved the religious teachers, school authorities segregated the children by religious faiths, cards were distributed by the school, and children were solicited for religious instruction in the school buildings. In the *Zorach* case, in which the New York program was held to be constitutional, the school activity was limited to release of the children and the keeping of a truancy record. The *Zorach* program was found not to infringe upon religious freedom, nor to involve the expenditure of public funds, and the record was found free from evidence of coercive administration of the program.[15] Justice Douglas reasoned that, although separation of church and state must be complete, there is no need for the state to be hostile to religion. Therefore, the schools can properly release children to attend religious exercises or receive religious instruction.

It will be seen that the Spokane program combined some of the features of both the Illinois and the New York programs. The Washington court found the *Zorach* reasoning persuasive and controlling in *Perry,* insofar as the facts of the *Zorach* program were applicable to the Spokane program. The court pointed out, however, that the distribution of cards and the soliciting of pupils, which was a part of the

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[12] U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend XIV, § 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[13] 333 U.S. 203 (1948).

[14] 343 U.S. 306 (1952).

[15] In the *Zorach* case, proffered evidence of coercion and discrimination was excluded at the trial court level because of non-compliance with state procedure. Thus the issue of coercive influence upon the child was not before the Supreme Court.

Spokane system, was absent from the *Zorach* program; yet these practices were among those present in the objectionable *McCollum* program. No opinion was expressed by the Washington court as to whether these practices alone would violate the federal constitution. The condemnation of these practices was based rather upon their contravention of the Washington constitution, as will be discussed later.

The appellants also contended that the release of the children in the program disrupted the classroom instruction of the non-released children, to their detriment, and thus violated the federal guarantee of equal protection of the laws. The court rejected this contention, saying it found no support in the record; that, on the contrary, individual help and special activities were provided for the non-released children. The record does not make clear the nature of these special activities, nor whether all the children remaining were in need of extra help. It seems reasonable to suppose that the school would refrain from introducing new material or teaching important subjects while many of the children were gone. Therefore, it is probable that the special activities were in the nature of "busy work." The court's decision concerning the allegation that instruction was disrupted might have been different if the record had been more detailed regarding the activities of those remaining at school.

The appellants had case authority to support their contention that the program violated article I, section 11 of the Washington constitution, which reads in part:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.[16]

This constitutional provision has consistently been strictly construed by the court. In *State ex rel. Dearle v. Frazier*,[17] the Washington court pointed out that this provision is "sweeping and comprehensive" and goes further than any other state constitution in marking off the wall between church and state. In that case, the court held unconstitutional a program whereby school credit was to be given for Bible study out-

[16] WASH. CONST. art. I, § 11 (as amended by amendment 4): "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion. . . . No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . ."

[17] 102 Wash. 369, 173 Pac. 35 (1918).

side the school, after a school examination. The program was held to be a violation of article I, section 11 because it was a use of public funds, in direct contravention of the clear language of the section, because the school would become involved in religious controversy if it administered such a program, and because not only sectarian instruction was proscribed, but also religious instruction per se. *Visser v. Nooksack Valley School Dist. No. 506*[18] stressed that the provisions of the Washington constitution concerning religious freedom go further than do those of the United States Constitution. That the same strict construction would be applied when a released time program came before the court was foreseeable.[19] The distribution of cards and the announcements made under the Spokane program were found to involve a "use of school facilities supported by public funds for the promotion of a religious program," and so were in violation of article I, section 11. That the *de minimis* argument relied on by the trial court was not acceptable to the Supreme Court had already been indicated in *Mitchell v. Consolidated School Dist. No. 201.*[20] The fact that the program was allowed to continue, with the limitation that the condemned practices must cease, may represent a slight softening of the previous strict approach.

These practices, involving actual participation in the religious program by the schools, were also found to be within the prohibition of article IX, section 4 of the state constitution.[21] The effect of permitting the children to be addressed in behalf of the program while assembled in the classroom as a "captive audience," said the court, was to subject them to a sectarian influence.

How does the Washington position compare with that of other states? The Washington constitution prohibits not only sectarian *control,* but also sectarian *influence.*[22] It is this language which

[18] 33 Wn.2d 699, 207 P.2d 198 (1949).

[19] Note, 28 WASH. L. REV. 156 (1953).

[20] 17 Wn.2d 61, 135 P.2d 79 (1943). The court said, at p. 66, "Whether the expense be small or great, is, of course, no justification for the use of common school funds for other than common school purposes."

[21] WASH. CONST., art. IX, § 4: "Sectarian Control or Influence Prohibited. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

[22] Judge Weaver wrote a concurring opinion in *Perry* to point out that the word "influence" in article IX, section 4, was deliberately retained by the framers of the constitution in spite of an attempt to remove it and thus weaken the language. In view of the language and purpose of this section, rather slight evidence could be considered sufficient to show "influence," such as comment by a teacher concerning participation in the religious program, or emphasis upon religious differences by segregating the children according to religious affiliation preparatory to releasing them to their various classes.

requires a stricter construction of the Washington constitution than is given to the constitution of other states. A comparison of the *Perry* case with two cases from other states is illuminating. An extremely broad interpretation of a state constitutional provision is found in a California case, *Gordon v. Board of Educ.*, where school participation was an integral part of the program.[23] The California court found the program to be constitutional, remarking that the family, as a unit, has failed to do its part in this field of education. The program in a New York case, *People ex rel. Lewis v. Graves*,[24] involved less school participation than did the program in the California case, but more than in the Washington program. The New York court found that the acts involved were "trivial and remote, not invoking constitutional questions." It is apparent that the ruling in *Perry*, while it may represent a slight lowering of the wall between church and state, which the Washington court has hitherto maintained impregnable, stops short of permitting the degree of joint church and school action sanctioned by some state courts.

The final contention of the appellants that the program violated the compulsory school attendance statute, RCW 28.27.010,[25] required an interpretation of a section hitherto unconstrued. To the argument that the statute required attendance in public or private school for the full time when the school is in session, the court replied that the release of children under the Spokane program was within the discretion of the district superintendent. This discretion was given him by the clause of the statute authorizing him to excuse a child from school attendance "for any sufficient reason." No previous ruling on this aspect of the clause appears to have been made by the court. An attorney general's opinion[26] had expressed the firm belief that the

[23] Gordon v. Board of Educ., 78 Cal.App.2d 464, 178 P.2d 488 (1947). The program under scrutiny in the *Gordon* case featured expenditure of public school funds for the preparation of informational literature about the program and for the printing of cards, supervision of the program by school staff, segregation of the children according to religious faiths prior to their release to classes outside the school grounds, and the keeping of attendance records. The teachers had the option of continuing to teach the retained children, or not, according to their preference.

[24] 219 N.Y.S. 189 (1927). Under this New York program, children could be released upon parental request for the last thirty minutes of each Wednesday, a regular study period, cards not prepared by the school were distributed in the classrooms, and a truancy check was made.

[25] RCW 28.27.010: "All parents . . . shall cause such child to attend the public school of the district in which the child resides for the full time when the school is in session or to attend a private school for the same time.

"The superintendent of the schools of the district in which the child resides, or the county superintendent if there is no district superintendent, may excuse a child from such attendance if the child is physically or mentally unable to attend school . . . or for any other sufficient reason."

[26] 1921-1922 Ops. Atty. Gen. 196.

clauses antecedent to the "any sufficient reason" clause, dealing as they do with complete excuse from school attendance for mental and physical reasons or because the child has completed eighth grade, indicated that the "any sufficient reason" clause also referred to complete excuse from attendance and not to sporadic release for religious instruction. The Court's interpretation of RCW 28.27.010, authorizing sporadic release, promotes speculation.

The question of interest now is what will constitute a "sufficient reason" in future cases which may arise. The court has said that participation in a program of religious instruction constitutes a sufficient reason to release children from school. Can it be presumed that a child would be released for religious instruction given by a sect not participating in the program of the Council of Churches? Equal protection issues would certainly be raised if release were denied. Would classes given by a creedless spiritual fellowship group, devoted to high ethical and moral principles, merit the release of children for "religious" instruction? Or, if a group of parents, not acting through any organized sect or denomination, wished to offer classes in comparative religion of today and ethical philosophies of the past, would such classes merit release of a child for religious instruction? If not, would they constitute "sufficient reason," as valuable instruction in things of the spirit which is not permitted in the public schools? Would a child be released to watch a motion-picture depicting the producer's version of Biblical events? These questions could arise as parents and others become aware of the court's interpretation of the compulsory school attendance statute.

The opinion in *State ex. rel. Dearle v. Frazier*,[27] showed that the prospect of public schools ever becoming embroiled in religious controversies was shocking to the court. The words of Justice Jackson, dissenting in the *Zorach* case[28] also seem pertinent:

> . . . [I]f we concede to the State power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted."

If the school authorities of Washington are ever required to answer the questions posed above, they will enter a controversial area. One solution would be to excuse *all* children at a certain hour of the week, preferably towards the close of a school day, with no questions asked

[27] 102 Wash. 369, 173 Pac. 35 (1918).
[28] 343 U.S. 306, at 325 (1952).

by the school as to how the time is used. The latter solution is equivalent to the "dismissed time" program, reported to be in use in France.[29] It could satisfy the desires of parents who believe the week-end affords insufficient time for religious instruction and who seek an hour of the child's school week for that purpose; yet it would avoid embroiling the state, through the schools, in affairs of religion sacred to the conscience of the individual. The Washington compulsory school attendance statute does not specify any fixed number of hours for the school week; but whether the court's interpretation of "any sufficient reason" would stretch to include such a program cannot be foreseen.

Although the policy behind the decision is not clear, the *Perry* case appears to align the Washington court with the body of authority represented by *Meyer v. Nebraska*,[30] which recognizes that primary interest and responsibility for providing religious instruction for children lies with their parents.

JOYCE M. THOMAS

Constitutional Law—Compulsory School Attendance Law—Freedom of Religion. In the recent case of *State ex rel. Shoreline School Dist. v. Superior Court*,[1] the Washington Supreme Court reversed a finding of the juvenile court that the best interests of a dependent child dictated that she not be required to attend a formal school, and summarily dismissed the parents' assertion that requiring the child to attend school infringed their freedom of religion.

The parents and the child, a thirteen-year-old girl, belong to a small religious sect which includes among its prohibitions the eating of meat, fish, or fowl, or being in a room where the same is being eaten; playing or listening to musical instruments; cutting the hair. Because of normal grade school activities, the girl experienced a series of conflicting demands and was at times subjected to ridicule.[2] The parents, without permission from school authorities, kept the child from school and taught her in their home. The juvenile court found that the quality of the home education was at least equal to that offered at the public school and that the child's attainments were above average. The course of study in the home, the books and devices used, and the

[29] See State *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (concurring opinion).
[30] 262 U.S. 390 (1923). See also, Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 (1925).

[1] 155 Wash. Dec. 175, 346 P.2d 999 (1959).
[2] Brief of Relator, State *ex rel.* Shoreline School Dist. v. Superior Court, 155 Wash. Dec. 175, 346 P.2d 999 (1959).

manner and time of teaching were comparable to the public school procedures. The juvenile court found that the interests of the child would be best served by allowing her to remain at home, subject to the continuing supervision of the court.

Reduced to its simplest form, the reason given by the supreme court for reversing the decision was that the home instruction was not and could not be a private school, and therefore the ruling of the juvenile court conflicted with the compulsory school attendance law,[3] its decision about the welfare of the child being of no import.

The reason given for the conclusion that the system of home instruction employed here could not qualify as a private school was that the mother, who did all the teaching, did not have a state teaching certificate. The court stated: "There is one standard which the legislature made applicable to all schools, both public and private, and that standard is that the teacher must be qualified to teach and hold a teaching certificate."[4] The court then quoted a section from Wash. Sess. Laws 1909, which says that to be a qualified teacher within the meaning of the school law one must have a valid state teacher's certificate or diploma.[5]

The statement by the court is subject to question. The chapter quoted from relates to the establishment of a "general and uniform public school system," and title III is labeled "General Common School System." The act as a whole is aimed at setting up a system of public instruction, and the terms "schools" and "common schools" seem to be used interchangeably. Where the act was intended to include private schools, that intent was made unmistakable.[6] Indications that the requirement of certification was not to extend to private school teachers are found in the duty of the Superintendent of Public Instruction to keep a directory "of all teachers receiving certificates to teach in the common schools of this state,"[7] while no provision is made for records of private school teachers' certificates; the duty of the county auditor to "countersign . . . warrants for the payment of all

[3] RCW 28.27.010.

[4] 155 Wash. Dec. 175, 180, 346 P.2d 999 (1959).

[5] Wash. Sess. Laws 1909, c. 97, title III, subchapter 4, art. VII, § 1: "No person shall be accounted as a qualified teacher within the meaning of the school law, who is not the holder of a valid teacher's certificate or diploma issued by lawful authority of this state."

This section is not codified in the Revised Code of Washington, although a very brief condensation of it is incorporated into RCW 28.67.010.

[6] For example, RCW 43.11.030(10) refers to "every educational institution in this state."

[7] RCW 43.11.030(11).

teachers' salaries"[8] (a statement that is as inclusive by its bare language as the section relied on by the court, but one hardly applicable to private school teachers); and the fact that the certificates themselves are classified as "common school certificates" or "city certificates"[9] (issued by the larger cities which desire a closer control over teacher qualifications[10]). It is extremely doubtful that the section quoted by the court was intended to apply to private as well as public schools.[11]

In *MacKenzie v. State*,[12] which antedated the 1909 act, a substantially similar act of 1897[13] was in effect. The 1897 act had a section[14] which was almost identical to the language quoted in the present case,[15] and the context was essentially the same. In answering an allegation that the section was applicable to teachers in state normal schools, the court there said that the holding of a certificate "is limited by the terms of the act to teachers under the common-school system."[16]

In the *Shoreline* opinion, the court also relied on an early Washington case, *State v. Counort*,[17] in which a father was prosecuted for not sending his children to school. In affirming the conviction the Washington Supreme Court said: "The parent who teaches his children at home, whatever be his reason for desiring to do so, does not maintain such a [private] school."[18] Had the earlier court stopped at that point, there would be good reason for asserting that it is a clearly apposite precedent which the court could follow.[19] But the *Counort* opinion goes on to say:

Undoubtedly a private school may be maintained in a private home in

[8] RCW 28.66.040.
[9] Wash. Sess. Laws 1909, c. 97, title III, subchapter 12, art. III.
[10] Wash. Sess. Laws 1909, c. 97, title III, subchapter 12, art. V.
[11] Additional indications that the reference to certificates was not intended to extend to private school teachers are found in RCW 28.67.070; RCW 43.11.030 (3); RCW 43.11.030 (12); and Wash. Sess. Laws 1909, c. 97, title III, subchapter 12, art. 1, § 3 (codified in part in RCW 28.70.110).
[12] 32 Wash. 657, 73 Pac. 889 (1903).
[13] Wash. Sess. Laws 1897, c. 118.
[14] Wash. Sess. Laws 1897, c. 118, § 51.
[15] "No person shall be accounted as a qualified teacher, within the meaning of the school law, who has not first received a certificate issued by the superintendent of public instruction...."
[16] MacKenzie v. State, 32 Wash. 657, 668, 73 Pac. 889, (1903).
[17] 69 Wash. 361, 124 Pac. 910 (1912).
[18] *Id.* at 364, 124 Pac. at 912.
[19] The *Counort* case was also cited for the proposition that home instruction cannot be a private school in People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950), and State v. Hoyt, 84 N.H. 38, 146 Atl. 170 (1929). For cases contrary to *Counort, see* People v. Levisen, *supra,* and State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904), both criticized in People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (1953). See also Annot., 14 A.L.R.2d 1369 (1950).

> which the children of the instructor may be pupils. This provision of the law is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent and character of the endeavor. The evidence of the state was to the effect that appellant maintained *no* school at his home; that his two little girls could be seen playing about the house at all times during the ordinary school hours.[20] [Emphasis added.]

This language is favorable to the parents in the *Shoreline* case, not to the state or the position of the court. Precisely what the *Counort* court had in mind as the basis for its decision is not clear; but it appears to have been strongly influenced by the fact that the children were not receiving the education required by law.

If the broad language in the *Shoreline* case is followed in the future, the impact on the private schools in Washington, many of which have a large proportion of uncertified teachers, will be substantial. The issue of certification was not argued in the briefs. It is believed that upon a more detailed investigation the court will return to its position in *MacKenzie v. State*.[21]

The manner in which the court dealt with the authority of school superintendents to waive the compulsory attendance requirements merits some discussion. RCW 28.27.010[22] says that parents must send their children to a public school or to a private school unless excused by the district school superintendent because of certain achievements or defects "or for some other sufficient reason." Proof of absence from public schools or *approved* private school is declared to be prima facie evidence of a violation of the section. It is to be noted that the only reference to an "approved" private school is in the statutory creation of a rule of evidence. The requirement, which the superintendent may waive, is to attend a public school "or to attend a private school." However, the court said that the superintendent may excuse

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[20] 69 Wash. 361, 364, 124 Pac. 910, 911 (1912).

[21] 32 Wash. 657, 73 Pac. 889 (1903).

[22] "All parents ... having or who may hereafter have immediate custody of any child between eight and fifteen years of age ... shall cause such child to attend the public school of the district, in which the child resides, for the full time when such school may be in session or to attend a private school for the same time, unless the superintendent of the schools of the district in which the child resides ... shall have excused such child from attendance because the child is physically or mentally unable to attend school or has already attained a reasonable proficiency in the [subject matter] ... or for some other sufficient reason. Proof of absence from public schools or approved private school shall be *prima facie* evidence of a violation of this section." Wash. Sess. Laws 1909, c. 97, title III, subchapter 16, § 1. The language of RCW 28.27.010, which is based on this section, differs from the foregoing quotation in some immaterial respects.

persons not attending public schools "*provided* such child was attending an '*approved* private school'."[23] [Emphasis added.]

This construction appears to be too narrow. If "other sufficient reason" for which children may be excused from public school attendance is restricted to attendance at an "approved" private school, the superintendent is deprived of any exercise of discretion in excusing children even though such discretion is necessarily implied in the phrase.[24] The dissenting opinion in the *Shoreline* case suggests a number of instances in which children probably should be excused from attendance at any school.[25] If the supreme court adheres to its construction of RCW 28.27.010, some sort of established institution must be found for all children not specifically excusable, regardless of how psychologically unfit for attendance they may be.

[23] 155 Wash. Dec. 175, 180, 346 P.2d 999, 1002 (1959).

[24] An indication that the court did not mean what it said in its extremely restrictive construction is found in the slightly earlier case of Perry v. School Dist. No. 81, 154 Wash. Dec. 920, 344 P.2d 1036 (1959). In that case it was held that releasing pupils for religious instruction was a proper exercise of the school superintendent's authority under the "any other sufficient reason" clause of the statute. It is unlikely that the court would reverse itself so quickly, and without comment, had it given serious consideration to the implications of what it was saying. The *Perry* case is discussed in the preceding Casenote.

Nor did the Shoreline opinion say that school superintendents are deprived of all discretion. The decision whether a school is in fact a private school is said by the court still to be discretionary, and it infers from the statute that the decision-making authority has been delegated to the superintendent. As to standards for guiding the decision, the court said: "Although the legislature did not expressly provide that *all* of the legislative standards for a public common school must be maintained by a private school in order to qualify as such, it is reasonable to assume that the legislature intended that the one to whom it had delegated the power and authority to determine whether a child was attending a *qualified* private school would be guided in that decision by the minimum standards required by the legislature for a public common school." 155 Wash. Dec. 175, 182 (1959).

The quoted matter was followed by citation of a number of statutes: RCW 28.02.020 (administrative officers of public schools); RCW 28.02.030 (display of flag and pledge of allegiance); RCW 28.02.070 (Armistice and Admission Day programs); RCW 28.02.080 (study of state and federal constitutions—specifically made applicable to private schools); RCW 28.02.090 (Temperance and Good Citizenship Day observance); RCW 28.05.030 (physical education); RCW 28.05.050 (history course); and Wash. Sess. Laws 1909, c. 97, title III, subchapter 1, § 2, a condensed version of which is codified in RCW 28.05.010—28.05.020 (basic required courses). Length of school day and school year are found in RCW 28.01.010.

It may be noted that the court's statement is based on its preceding decision that the superintendent of schools is the person who is to decide what is an approved private school. Regardless of who is to make the final decision, relevant standards required of public schools would be useful criteria in seeing if the aims of the public in the education of its citizens, as reflected by legislation, are being satisfied.

[25] "The fallacy of relator's position can be illustrated by considering some of the routine problems which confront a juvenile court: The delinquent or dependent child within the compulsory school attendance age who, by his prolonged absence from school, is too far behind his age group to permit a school adjustment; or such child who is mentally incapable of adjusting in a public school; or such child who is a criminal offender; or such child who is incorrigible and refuses to submit to school discipline; or, as in this case, such child who, because of certain religious principles, refuses to obey instructions and is a misfit in any school." 155 Wash. Dec. 175, 186, 346 P.2d 999, 1005 (dissenting opinion).

Construction of the "approval" aspect was raised in *State v. Counort*.[26] The court there pointed out that:

> The statute does not, in the first instance, provide that the private school shall be an approved one. The gist of the offense is in the failure to attend *any* school, either public or private, without having obtained an excuse for such failure from the superintendent of schools.[27] [Emphasis added.]

This is the better construction. The statute seems to say that one's child must attend one kind of school or the other. If he chooses a private school, he may or may not be within the statutory requirement. If the private school is not an "approved" one, he must overcome the prima facie evidence against him, but with adequate proof he can overcome it.[28] The *Shoreline* case converts the prima facie evidence to conclusive evidence.

A surprising aspect of the *Shoreline* decision is the effect on the juvenile court of determinations made by school superintendents. The superintendent of the Shoreline School District clearly felt that the child involved in the present case was not attending a private school within the meaning of the compulsory school attendance law. The juvenile court concluded "that the welfare of said child will best be served"[29] by allowing the home instruction to continue. The holding of the supreme court, in reversing the related part of the ensuing order, in effect subordinates the juvenile court's power to deal with the welfare of children in this respect to the seemingly exclusive power of school superintendents.

The juvenile court was created in 1909.[30] At that time the definitions of dependent and delinquent children, and hence the jurisdiction of the court, did not include truants. In 1913[31] the scope of "dependent child" was enlarged to include one "who is an habitual truant, as defined in the school laws of the state of Washington."[32] Also in 1913 the juvenile court was given power to make "any order, which in the judgment of the court, would promote the child's health and welfare."[33]

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[26] 69 Wash. 361, 124 Pac. 910 (1912).
[27] *Id.* at 363, 124 Pac. at 911.
[28] This task, of course, is separate from determining whether the child is attending a private school of any sort.
[29] Brief of Relator, p. 44, State *ex rel.* Shoreline School Dist. v. Superior Court, 155 Wash. Dec. 175, 346 P.2d 999 (1959).
[30] Wash. Sess. Laws 1909, c. 190; now codified in RCW c. 13.04.
[31] Wash. Sess. Laws 1913, c. 160; now codified as RCW 13.04.010.
[32] RCW 13.04.010 (14).
[33] RCW 13.04.090.

Presumably, any conflict between the compulsory school attendance law and the juvenile court law would be resolved in favor of the latter, because of the later amendment. This reasoning would give the juvenile court authority to issue orders for the welfare of truants. The decision of the *Shoreline* case severely restricts that authority and subordinates it to the decisions of local school superintendents based on private school, rather than individual welfare, criteria.

The constitutional argument raised in the *Shoreline* case was dismissed with the statement that "religious beliefs, whatever they may be, are not a legal justification for violation of positive law."[34] It is believed that a much firmer ground can be found for the denial of the constitutional issue.

The protection of religion in the first amendment to the federal constitution[35] has been incorporated into the fourteenth amendment[36] and is therefore applicable to the states. The prohibition does not license all kinds of conduct or refusal to conform because of religious beliefs. "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[37] The interest to be balanced against the desirability of religious freedom is the protection and achievement of legitimate state objectives.[38] The balancing process includes an inquiry into the reasonable alternatives that are available both to the state in seeking its ends and the individual in the free exercise of his beliefs.[39] The requirement of a "clear and present danger" to the state if the prohibited act is allowed was first employed in free speech cases.[40] The test has tentatively been adapted to freedom of religion

[34] 155 Wash. Dec. 175, 183, 346 P.2d 999, 1004 (1959). The statement is clearly too broad. A "positive law" could purport to prohibit any number of protected activities.

[35] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

[36] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. New Jersey, 308 U.S. 147 (1939); Gitlow v. New York, 268 U.S. 652 (1925).

[37] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[38] Prince v. Massachusetts, 321 U.S. 158 (1944).

[39] Kovacs v. Cooper, 336 U.S. 77 (1949). Despite Justice Frankfurter's protestations (see his concurring opinion in the Kovacs case), many Supreme Court opinions have reflected the feeling that the guarantees of personal freedom enjoy a "preferred position" and that legislation interfering with them will more easily be upset than other legislation challenged on constitutional grounds.

[40] The term was first used by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919). It has subsequently been employed in a number of cases. See CONSTITUTION OF THE UNITED STATES, ANN., 772-92 (Corwin, 1953). An analysis of the actual fact situations which have been held to satisfy the clear and present danger requirement indicates that the danger need not be especially clear or present. In the *Schenck* case itself, the likelihood that the defendant's conduct would cause any tangible obstruction of the government's interest was, at most, remote.

cases by the United States Supreme Court[41] in a few instances and has specifically been applied by the Washington Supreme Court in a religion case.[42]

The special interest of the state which prompted passage of the compulsory school attendance law is to have its children well enough educated to become responsible members of society. This interest has been held elsewhere to be strong enough to override a positive religious tenet that children over a certain age should receive no secular education;[43] a fortiori, receipt of an education that is inadequate by reasonable minimum standards cannot be sustained on religious grounds.[44]

An argument that the state may properly prohibit home instruction in lieu of attendance at a more formal school could be based on the difficulty of supervising the quality of the instruction. In an isolated case there would not be much difficulty, but if the practice were allowed to become widespread, state control would, as a practical matter, be impossible.[45] Argument to the contrary could be two-pronged: the state could administer a series of tests to keep check on the progress of the children, and there is little likelihood of the supervision's becoming burdensome because few people have such unusual religious beliefs that they would be precluded from attendance at a regularly conducted school. The latter argument could invoke the "clear and present danger" test—there is no clear and present danger that the state would have an incompetent citizenry because a few children were taught at home (but perhaps there is a clear and present danger that the home-taught child will become an incompetent citizen).

An additional consideration favoring school attendance is the process of learning to adjust to society. The child whose contact with others is limited to a small group is less well prepared for the conflicts he will encounter in the future.

The state cannot require children to attend public schools.[46] The alternatives are to allow attendance at private schools and to allow private instruction. Washington has not chosen to provide specifically for private tutoring by persons of acknowledged competence. For the child involved in the *Shoreline* case, the allowable alternative

[41] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[42] State *ex rel.* Holcomb v. Armstrong, 39 Wn.2d 860, 239 P.2d 545 (1952).

[43] Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

[44] People v. Donner, 302 N.Y. 857, 110 N.E.2d 48 (1951).

[45] The opinion in State v. Hoyt, 84 N.H. 38, 146 Atl. 170 (1929), presents a useful discussion of this point.

to public schooling is attendance at an approved private school (under the court's interpretation of the statute). It seems very probable that a child who must avoid music, dancing, and lunch rooms could nevertheless find a private school that would make acceptable arrangements. Under these facts, it is doubtful that the child's position is extreme enough to lead to a finding that the compulsory school attendance law is unconstitutional as applied to her. The alternatives are not unreasonable. A stronger case would be made out for one whose religious beliefs bar association with large groups.[47] In such a case, the state could very well be required to take the next step in loosening control, the allowance of private tutoring. TIMOTHY R. CLIFFORD

CONTRACTS

Contracts — Consideration — Promise to Perform Duty. The Washington court, in the recent case of *Reynolds v. Hancock*,[1] abruptly disposed of a very complicated problem. Performance by a promisee of a duty already owed to a third person was held not to be sufficient consideration.

The defendant, a prospective home purchaser, became interested in a house in Seattle owned by persons residing in another state and signed an earnest-money agreement form furnished by the plaintiff, a real estate broker. The plaintiff's commission was to be paid by the owners. The printed form contained a provision which recited that the purchaser promised the real estate broker not to revoke his offer for a certain period of time in "consideration of agent submitting this offer to seller. . . ."

Before the form reached the owners for acceptance, the defendant sent a telegram to them revoking the offer, thereby precluding the formation of a contract to sell. The plaintiff sued on the above provision in an action for breach of contract, to recover the commission that would have been received from the owner if the sale had been completed.

The court, without citing any previous decisions or discussing the theoretical problems involved, summarily confirmed the trial court's

[46] Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 (1925).

[47] This situation arose in People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950), where the parents, Seventh Day Adventists, believed that school atmosphere led to pugnaciousness in children and inhibited their receptiveness to the teachings of the Bible. The case was not expressly decided on the constitutional ground, however. The court construed its compulsory school law to allow home instruction.

[1] 53 Wn.2d 682, 335 P.2d 817 (1959).