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Constitutional Law--Freedom of Conscience--Compulsory Military Training in Land Grant Colleges

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sumes'' consideration.[10] In actions on sealed promissory notes by the payee against the maker, the court has allowed the defense of failure of consideration to be interposed,[11] but indicates by way of dictum that want of consideration is not a defense[12] under the statute allowing equitable set-offs.[13] These cases, however, were decided before the adoption of the uniform Negotiable Instruments Act, and the court has not since passed upon the question.

In some states, the effect of the seal on a promissory note is to confer upon such an instrument a longer period of limitation.[14] In West Virginia, the statute provides for the same ten year period of limitation on both sealed and unsealed instruments.[15]

—HERSCHEL H. ROSE, JR.

CONSTITUTIONAL LAW — FREEDOM OF CONSCIENCE — COMPULSORY MILITARY TRAINING IN LAND GRANT COLLEGES.[1] — Plaintiffs alleged that their expulsion from the state university for refusal to enroll in the required course in military tactics abridges their religious freedom, as conscientious objectors to war, and impairs their liberty without due process of law. The appeal was denied. Mr. Justice Cardozo, concurring, pointed out the chaotic result which might obtain if, for example, a citizen could refuse to pay taxes for war purposes or any other object which might be condemned by his conscience and concluded, ''One who is a martyr to a principle . . . . does not prove by his martyrdom that he has

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[10] See Bolyard v. Bolyard, 79 W. Va. 554, 558, 91 S. E. 529 (1917); National Valley Bank v. Houston, 66 W. Va. 336, 66 S. E. 465 (1909).

[11] Fisher v. Burdett, 21 W. Va. 626 (1883).

[12] See Williamson v. Cline, 40 W. Va. 194, 206, 20 S. E. 917 (1895).

[13] W. VA. REV. CODE (1931) c. 56, art. 5, § 5: ''In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, ... as would entitle him either to recover damages at law from the plaintiff . . . .; or, if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter, as would entitle him to such relief in equity; . . . .''

[14] Note (1920) 29 YALE L. J. 345.

[15] W. VA. REV. CODE (1931) c. 55, art. 2, § 6.

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[1] See generally Martin, *The American Judiciary and Religious Liberty* (1928) 62 AM. LAW REV. 658; Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States* (1930) 39 YALE L. J. 659; Hoff, *Religious Freedom Under Our Constitutions* (1924) 31 W. VA. L. Q. 14; Reeder, *A Monograph on Religious Freedom* (1925) 31 W. VA. L. Q. 192; W. VA. CONST., art. III, §§ 10, 11 and 15.

kept within the law." *Hamilton v. Regents of the University of California.*[2]

The Federal Constitution declares that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[3] "Nor shall any state deprive any person of life, liberty, or property, without due process of law."[4] There is no express mention of conscientious objections, but they are so closely associated with concepts of religious freedom, and liberty as to be nearly synonymous. It is somewhat trite to repeat, however, that no citizen has an absolute right of freedom. Each must surrender certain liberties if the state is to endure. Thus, the law confers an absolute freedom of religious belief,[5] but forbids acts which violate accepted standards of morality, health or good order. On principle it would seem to be a denial of equal protection of the laws to disqualify one to be a guardian because of beliefs unrelated to the proper performance of the trust[6] or to deny the privilege of testifying as a witness in one's own behalf.[7] Of course, conscience would be no defense if a person owed some duty and his belief made him unfit to perform it.[8]

Acts contrary to the laws of morality are not excused by religious doctrines. Thus, a Mormon belief in polygamy as a

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[2] 55 S. Ct. 197 (1934). *Accord*: Pearson v. Coole, 165 Md. 224, 167 Atl. 54 (1933). See also Note (1933) 33 Col. L. Rev. 1441; (1933) 2 G. W. L. Rev. 98; W. VA. REV. CODE (1931) c. 18, art. 11, § 6.

[3] U. S. CONST., 1st Amendment.

[4] U. S. CONST., 14th Amendment.

[5] "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstanes." Reynolds v. United States, 98 U. S. 145, 166, 25 L. Ed. 244 (1878).

[6] There is no judicial authority for this statement but it seems that a classification based generally on religious belief would be unreasonable. Under a state constitutional provision forbidding religious tests for eligibility to offices of trust or profit a guardian may not be removed because of his religious belief. Maxey v. Bell, 41 Ga. 183 (1870); State v. Bird, 253 Mo. 569, 162 S. W. 119 (1913). But see *In re* Jacquet, 40 Misc. 575, 82 N. Y. Supp. 986 (1903); *In re* Crickard, 52 Misc. 63, 102 N. Y. Supp. 440 (1906); *In re* McConnon, 60 Misc. 22, 112 N. Y. Supp. 590 (1908). See also W. VA. REV. CODE (1931) c. 49, art. 4, § 3.

[7] State v. Levine, 109 N. J. L. 580, 162 Atl. 909 (1932). *Contra*: Thurston v. Whitney, 56 Mass. 104 (1848). See W. VA. REV. CODE (1931) c. 2, art. 2, § 7.

[8] McDowell v. Board of Education of City of New York, 104 Misc. 564, 172 N. Y. Supp. 590 (1918).

divine duty does not prevent a conviction for bigamy.[9] The law gladly lets the members of that church believe they should have two wives, but denies them that privilege in fact. And obscenity is always prohibited without regard to belief.[10] Not even a minister in the pulpit can successfully evade that rule.[11]

The state likewise jealously protects the health of its members. A parent may have the utmost confidence in "faith healers", but that will not remove a duty to furnish medical care to his children.[12] That form of belief neither entitles one to practice medicine without a license,[13] nor confers any immunity against such public health rules as compulsory vaccination,[14] physical examination before marriage[15] or sterilization of defectives.[16] Even the citizen's rest and quiet may be protected against excessive noise by religious groups.[17] On the other hand, blasphemy is unlawful, not as a crime against God, but one against man since it tends to create public disturbances.[18]

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[9] Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1878); see also Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723 (1902). Strangely enough, Mormons were forbidden to vote under a theory that they were members of a criminal organization. Murphy v. Ramsey, 114 U. S. 15, 5 S. Ct. 747 (1885); Davis v. Beason, 133 U. S. 333, 10 S. Ct. 299 (1890); Innis v. Bolton, 2 Idaho 442, 17 Pac. 264 (1888); Wooley v. Watkins, 2 Idaho 590, 22 Pac. 102 (1889). *Contra*: Toncray v. Budge, 14 Idaho 621, 95 Pac. 26 (1908).

[10] Knowles v. United States, 170 Fed. 409 (C. C. A. 8th, 1909).

[11] Holcombe v. State, 5 Ga. App. 47, 62 S. E. 647 (1908); Delk v. Commonwealth, 166 Ky. 39, 178 S. W. 1129, L. R. A. 1916 B, 1117 (1915).

[12] People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187 (1903); Owens v. State, 6 Okla. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633 (1911).

[13] State v. Buswell, 49 Neb. 158, 58 N. W. 728, 24 L. R. A. 68 (1894); State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835 (1905); Smith v. People, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158 (1911); Fealy v. Birmingham, 15 Ala. App. 367, 73 So. 296 (1916); People v. Vogelgesang, 221 N. Y. 290, 116 N. E. 977 (1917); State v. Miller, 59 N. D. 286, 229 N. W. 569 (1930); State v. Verbon, 167 Wash. 140, 8 Pac. (2d.) 1083 (1932); see also People v. Cole, 219 N. Y. 98, 113 N. E. 790 (1916).

[14] Jacobson v. Mass., 197 U. S. 11, 25 S. Ct. 358 (1905); Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251 (1894); Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L. R. A. 1915 A, 632 (1914); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1918); Vonnegut v. Baun, 188 N. E. 677 (1934). See W. VA. REV. CODE (1931) c. 16, art. 3, § 4.

[15] Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778 (1914).

[16] Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584 (1927). See W. VA. REV. CODE c. 16, art. 10, §§ 1, 7.

[17] State v. White, 64 N. H. 48, 5 Atl. 828 (1886); Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566 (1889); Mashburn v. City of Bloomington, 32 Ill. App. 245 (1889); But see In re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310 (1886); City of Louisiana v. Bottoms, 300 S. W. 316 (1927).

[18] People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335 (1811); Updergraph v. Commonwealth, 11 Serg. & Rawle (Pa.) 394 (1824); Commonwealth

The principal case presents still another instance where freedom of belief is permitted, but freedom of action is forbidden. None will deny plaintiff's privilege to believe that all war and preparation for war is sinful and that universal peace may be obtained through complete disarmanent. The law merely declares that the plaintiff has no inherent right to attend the state university without conforming to its regulations.[19] It makes no effort to change his belief or persecute him for his opinions. Thus, this case seems to fall within the principle of previous decisions. This conclusion is strengthened by the holding of the *Selective Draft Law Cases*,[20] that the government has a duty to protect its citizens and they have a reciprocal duty to bear arms for their nation. Still later, the Supreme Court, in *U. S. v. Schwimmer*[21] and *U. S. v. Macintosh*,[22] declared that a conscientious refusal to perform the duty to bear arms is sufficient cause to deny admission to ctizenship and that the government, not the citizen, was to decide when the duty arose. The latter case carefully pointed out that the privileges sometimes given to conscientious objectors were merely favors, not absolute rights. All these cases uphold a wider use of the war powers than is involved in a compulsory course in military tactics with no obligation for further service.

In reality, the whole matter resolves largely into a question of policy and not of constitutional limitation. In these days of "wars and rumors of wars" there can well be a difference of opinion as to the best means of maintaining peace. But aside from questions of policy, the fact remains that the state can exercise such power, for with governments, as with men, "self preservation is the first law of nature."

—RALPH M. WHITE.

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v. Kneeland, 37 Mass. 206 (1836); State v. Chandler, 2 Har. (Del.) 553 (1837); State v. Mockus, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871 (1921).

[19] For example, fraternity membership may be forbidden as a condition of entrance: People v. Wheaton College, 40 Ill. 186 (1866); Waugh v. University of Miss. 237 U. S. 589, 35 S. Ct. 720 (1915). *Contra*: State v. White, 82 Ind. 278, 42 Am. Rep. 496 (1882).

[20] 245 U. S. 366, 38 S. Ct. 159 (1918). See generally, C. E. Hughes, *War Powers Under the Constitution* (1917) 85 CENT. L. J. 206; Cormack, *The Universal Draft and Constitutional Limitations* (1930) 3 SO. CALIF. L. REV. 361.

[21] 279 U. S. 644, 49 S. Ct. 448 (1929).

[22] 283 U. S. 605, 51 S. Ct. 570 (1931); (1931) 37 W. VA. L. Q. 214.