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Constitutional Law—Invoking Privilege Against Self Incrimination—Grounds for Discharge

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in industry. A similar result was reached in *Lincoln Candies v. Department of Labor*⁴¹ where the setting of minimum hours per week for women was held constitutional as a means to effectuate the policy of article 19 of the Labor Law.⁴²

Since this statute is not unconstitutional on its face, the only issue remaining is whether it is unconstitutional in its application to plaintiff. The Court of Appeals refused to decide this issue because the plaintiff had not exhausted his remedies under the act. Section 662⁴³ allows matters of law to be reviewed by the Board of Standards and Appeals as provided in §110⁴⁴ which states that matters of validity and reasonableness shall be proper for that Board's review. Thereafter appeals from that determination can be taken direct to the Appellate Division, third Department. Due to the plaintiff's failure to seek relief under these sections before appealing to the Court of Appeals, that body followed the well-established rule that constitutional issues will not be decided unless there are no other grounds on which to dispose of the case in controversy.⁴⁵

The dissent would have decided the constitutional question as to application in favor of the plaintiff in this instance instead of relegating him to his remedy under the statute.

In the light of the prevailing doctrine in the federal as well as the state courts to avoid constitutional issues if possible,⁴⁶ the majority's approach to this problem is the more acceptable.

Invoking Privilege Against Self Incrimination—Grounds For Discharge

A controversial area of law today is the extent of the protection given by the courts to a party who invokes the privilege against self-incrimination. Although the basic merits of the privilege have been questioned,⁴⁷ the right seems firmly entrenched in our legal system.⁴⁸ Dean Griswold has called it "one of the landmarks in man's struggle to make himself civilized."⁴⁹

Due process considerations were present in *Lerner v. Casey*,⁵⁰ where petitioner

41. 289 N.Y. 262, 45 N.E.2d 434 (1942).

42. See note 35 *supra*.

43. See note 39 *supra*.

44. N.Y. LABOR LAW §110.

45. *Schieffelin v. Goldsmith*, 253 N.Y. 243, 170 N.E. 905 (1930); *O'Kane v. State*, 283 N.Y. 439, 28 N.E.2d 905 (1940).

46. *Ibid*; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1938).

47. 74 U. PA. L. REV. 139 (1925). For a discussion of the privileges against self-incrimination, see 6 BUFFALO L. REV. 343 (1957).

48. 24 FORDHAM L. REV. 19 (1955); see *Maffie v. United States*, 209 F.2d 225 (1st Cir. 1954).

49. GRISWOLD, THE FIFTH AMENDMENT TODAY, 7 (1955).

50. 2 N.Y.2d 355, 161 N.Y.S.2d 7 (1957).

sought to compel the New York Transit Authority to reinstate him in his position as a conductor in the subway system of New York City. In an appearance before the commissioner of investigation of New York City, petitioner refused to answer the question whether or not he was then a communist, on the ground that the answer might tend to incriminate him. He persisted in his refusal, even after being advised of the provisions of the Security Risk Law,⁵¹ under which provisions he was subsequently discharged. The sole ground for his discharge was that he had invoked the fourteenth amendment.

The majority of the Court, in affirming a denial of the petition, agreed that the New York Transit Authority was a "governmental agency" within the terms of the Security Risk Law, and that the transit authority was properly designated a security agency under said statute. The Court also held that the invocation of the fourteenth amendment was sufficient reason, that is, reasonable grounds, for discharge. A distinction was drawn that the petitioner's dismissal was not due to any possible communist membership, but rather such conduct of using the privilege against self-incrimination was in itself evidence of doubtful trust and reliability so as to constitute sufficient grounds for petitioner's discharge.

In upholding the constitutionality of the statute, the Court found it necessary to distinguish the recent Supreme Court decision of *Slochower v. Board of Higher Education*.⁵² In that decision, state action in dismissing a teacher from his position and basing such dismissal on the ground that he invoked the self-incrimination privilege, was declared unconstitutional. Slochower had invoked it before a Federal Committee twelve years before his dismissal by the State of New York. The Court in the instant decision found the time period not remote, and also stated that under the Security Risk Law, petitioner was provided an opportunity to explain his use of the privilege against self-incrimination, while in the *Slochower* decision, no explanation for this conduct was available, and that in the instant case petitioner was discharged for creating a "doubt" as to his truthfulness and reliability.⁵³

The importance of the New York Transit system is easily recognized,⁵⁴ for it would be a primary means of exodus in case of enemy attack. Any possible conduct by petitioner to hinder the proper operation of the system in case of emergency was also noted. Yet, taking these facts into consideration, the Court does not adequately explain why the mere refusal to answer a question on the grounds of self-incrimination, was sufficient evidence to establish petitioner's lack of trust-

51. 2 MCK., UNCONSOLIDATED LAWS §§1101-08.

52. 350 U.S. 551 (1956).

53. NEW YORK CITY CHARTER §903 (1956).

54. See *New York City Transit Authority v. Loos*, 2 Misc.2d 733, 738, 154 N.Y.S.2d 209, 214 (Sup. Ct. 1956). For a related topic, see *Gardner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1950).

worthiness. In the *Slochower* opinion, the Supreme Court asserted that the "invocation of the privilege . . . would be reduced to a hollow mockery if its exercise would be taken as equivalent either to a confession of guilt or conclusive presumption of perjury." The Court of Appeals, declared that the raising of the privilege is evidence of doubtful trust which is the basis of discharge, and *not* the invocation of the fourteenth amendment. The validity of this semantic distinction will soon be tested, since this decision now rests on the docket of the Supreme Court. Dismissal based solely upon the invocation of the privilege against self-incrimination presents a grave constitutional problem involving the scope and reach of the due process clause.

Civil Rights—Discrimination In Public Places

Under section 40 of the Civil Rights Law, no person can be excluded from places of public accommodation, resort, or amusement because of race, color, creed, or place of national origin. This restriction does not apply, however, to institutions, clubs, or places of accommodation that are distinctly private. Two questions thus arise when an individual is denied access to a certain establishment. Was such access refused because of the individual's race, color, creed, or place of national origin? Was the establishment public as distinguished from private? Affirmative answers to these questions in a certain situation clearly demonstrate a violation of the Civil Rights Act. Such a conclusion was reached by the Court of Appeals in *Castle Hill Beach Club v. Arbury*⁵⁵ in affirming the order of the Appellate Division.

In this case, the Castle Hill Beach Club, a membership corporation, refused to sell to Mrs. Brown, a negro, season locker rights which would have entitled her to use beach facilities. The Court of Appeals easily determined that the denial of access to Mrs. Brown was solely because of her color. The real problem was determining whether the Beach Club was a private or public amusement.

The Court's conclusion that the Beach Club was public leaves us with the problem of how to distinguish between public and private establishments. Generally it can be stated that public and private characteristics of a place of amusement will be considered in their overall effect giving greater weight to those features to which the public attention has been drawn. Whichever features are predominant will determine the nature of the amusement facilities.⁵⁶ Moreover, if the predominant purpose of creating private characteristics is to avoid the effect of the Civil Rights Act, the court will probably feel more prone to label the facilities public. This distinction is not entirely satisfactory as it leaves much to

55. 2 N.Y.2d 596, 162 N.Y.S.2d 1 (1957).

56. Cf. *Delaney v. Central Valley Golf Club*, 28 N.Y.S.2d 932 (1941), *aff'd*, 263 App. Div. 710, 31 N.Y.S.2d 834 (1st Dep't 1941), *appeal denied* 263 App. Div. 870, 32 N.Y.S.2d 1016 (1st Dep't 1942), *aff'd*, 289 N.Y. 577, 43 N.E.2d 716 (1942).