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Attorney--The Fifth Amendment and Disbarment Proceedings

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CASE COMMENTS

Attorneys—The Fifth Amendment and Disbarment Proceedings

Petitioner, *P*, a member of the New York State Bar was disbarred for professional misconduct. *P's* misconduct was based on a failing to honor a subpoena by refusing to testify and refusing to produce certain demanded financial records at a judicial investigation. *P's* sole defense to the disbarment was that he declined to honor the subpoena because his testimony and the production of the records would tend to incriminate him. The New York courts, relying on *Cohen v. Hurley,*[1] held that the privilege against self-incrimination was not available to the petitioner. *Held,* reversed. The self-incrimination clause of the fifth amendment as absorbed in the fourteenth amendment extends its protection to lawyers and should not be watered down by imposing the dishonor of disbarment and deprivation of livelihood as a price for asserting it. *Spevack v. Klein,* 385 U.S. 511 (1967).

The question of how much protection a lawyer has in claiming the fifth amendment privilege against self-incrimination in a disbarment proceeding is a problem the courts have often tried to solve.[2] The problem seemed to have been resolved by the 1961 Supreme Court decision of *Cohen v. Hurley.*[3]

Cohen, having a factual situation analogous to the principal case, permitted the New York State court to construe the constitutional privilege against self-incrimination so as to make it unavailable in judicial inquiries involving lawyer misconduct.[4] By allowing the question to be resolved according to state law, the *Cohen* case necessarily held that the self-incrimination clause of the fifth amendment was not made applicable to the states by the fourteenth amendment. The Court in *Cohen* felt that in dealing with lawyers there should be some way to get to the truth in order to protect society from having questionable persons practicing law, and that lawyers have a duty of cooperation with the court.

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[1] 366 U.S. 117 (1961).

[2] Weigel, *The Fifth Amendment and the Lawyer's Responsibility,* 34 NEB. L. REV. 586 (1955).

[3] 366 U.S. 117 (1961).

[4] The case of Twining v. New Jersey, 211 U.S. 78 (1908), had set the stage for decisions like *Cohen* by declaring that exemption from compulsory self-incrimination in the state courts is not secured by any part of the Federal Constitution.

The four dissenting judges in *Cohen*[5] argued that the theory of the majority would depend on weighing the rights of the states in disbarment proceedings against the rights guaranteed by the Bill of Rights. The dissent also rejected the theory that practice of law is nothing more than a state conferred privilege which can be destroyed by the state whenever it is able to assert a reasonable ground for doing so. The dissent contended this would permit plain confiscation and taking away of rights without due process of law.

The *Cohen* case stood as unchallenged precedent until partially eroded in the 1964 decision of *Malloy v. Hogan.*[6] *Malloy,* while not completely overruling *Cohen,* held that the fourteenth amendment guaranteed the protection of the fifth amendment privilege against self-incrimination from abridgment by the state. The decision states, "[T]he fourteenth amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer *no penalty* . . . for such silence."[7] Interpreting this holding, the Court in *Griffin v. California,*[8] held that the fifth amendment protection is not limited to cases in which the *penalty* would be a fine or imprisonment but rather there is a *penalty* if the asertion of the privilege would be *costly.*

The majority in the principal case was consistent with past decisions in according liberal construction to the fifth amendment privilege.[9] By reasoning that this threat of disbarment and loss of livelihood was within the broadened scope of the term penalty the Court did nothing more than make a logical extension of its expressions in the *Malloy* and *Griffin* holdings and the *Cohen* dissent.

The Court in the principal case, while answering the question of compelled testimony, seemingly allowed the question of compelled production of *required records* to go unanswered when it refused to overrule *Sharpiro v. United States.*[10] *Sharpiro* which dealt with federal price control regulation, held that compelled production of required records did not violate the fifth amendment. The required records were said to be records with public aspects as distinguished

[5] The majority in the principal case adopted the view of the dissent in *Cohen* saying, "These views, expounded in the dissents in *Cohen v. Hurley,* need not be elaborated again." 87 S. Ct. 625, 627 (1967).
[6] 378 U.S. 1 (1964).
[7] *Id.* at 8 (emphasis added).
[8] 380 U.S. 609 (1965).
[9] *See* Hoffman v. United States, 341 U.S. 479 (1951).
[10] 335 U.S. 1 (1948).

from private papers. Therefore, it appears with *Sharpiro* as precedent, that the fifth amendment protection against self-incrimination has not been extended far enough to provide a sanctuary to the attorney refusing to produce required records.[11]

West Virginia has, by statutes and rules, provided procedures to be followed in disbarment proceedings.[12] However, the statutes and rules make no mention of any inferences or consequences that can result from the refusal of the accused to answer questions. Furthermore, research has failed to disclose any West Virginia case dealing with the fifth amendment privilege against self-incrimination in a disbarment proceeding. The court did, however, in *In re Damron*[13] state that the misconduct which justifies the suspension or the annulment of a license to practice law must be established by full, clear and preponderant evidence. The court in *West Virginia State Bar v. Earley*[14] called the right to practice law a valuable privilege. These cases seem to imply that West Virginia courts treat the right to practice law as a franchise worthy of protection which should not be deprived without due process of law. Thus, the extension of this fifth amendment right to state disbarment proceedings is not a rapid departure from past West Virginia procedure but rather would appear merely to be one step further in guaranteeing due process of law.

The full effect of the *Spevack* case is yet to come. However, it is apparent that it stands as a logical extension of the trend of recent Supreme Court decisions to insure greater protection to basic individual rights.[15] By such an extension of the protection of rights of attorneys, various bar associations may be somewhat hampered in their attempts to discipline the members of their respective bars. The Court has apparently decided that this social cost is outweighed by consideration of the individual rights of attorneys.

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[11] The majority in the principal case felt they did not have to overrule *Sharpiro* because all of the proceedings up to the New York Court of Appeals had proceeded on the theory that Spevack could claim the privilege as to the records but his consequence may be disbarment. However, when the case reached the New York Court of Appeals, he was challenged as to his right to claim the privilege. The court relying on Cole v. Arkansas, 333 U.S. 196 (1948), felt this was denying the petitioner procedural rights to challenge the reasons for his disbarment and therefore refused to consider *Sharpiro*.

[12] W. VA. CODE ch. 30, art. 2, § 7 (Michie 1966); W. VA. STATE BAR BY-LAWS, art. VI.

[13] 131 W. Va. 66, 45 S.E.2d 741 (1947).

[14] 144 W. Va. 504, 109 S.E.2d 420 (1959).

[15] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

Constitutional Law—Civil Rights— State Action Under the Fourteenth Amendment

Ds, the Governor of Ohio and other officials, proposed to enter into construction contracts for a public educational facility. *Ps,* two Negroes who had made repeated unsuccessful attempts to gain membership in certain labor unions, brought a class action for declaratory and injunctive relief to enjoin *Ds,* alleging that qualified Negroes would be unable to get jobs because the contractors would use only union hiring sources and some union officials prevented Negroes from obtaining union membership. *Held,* injunction granted. *Ds'* proposed action would be a deprivation of *Ps'* privileges and immunities under color of state law. The state is not allowed to avoid responsibilities under the fourteenth amendment by ignoring or failing to perform them. *Ethridge v. Rhodes,* 268 F. Supp. 83 (S.D. Ohio 1967).

The pivotal issue in the principal case was whether *Ds'* conduct amounted to state action within the prohibitions of the fourteenth amendment.[1] Federal courts have long held that the fourteenth amendment applies only to state action and not to individual action.[2] In the *Ethridge* case individual actions (union discrimination practices) were primarily responsible for the harm complained of by plaintiffs. The court logically held, however, that the state's dealings with the union (through the construction firms) amounted to participation in the discrimination. This in itself was enough to constitute "state action."[3]

One of the first cases to define "state action" was *Ex parte Virginia.*[4] In this case the Supreme Court sustained an indictment against a state officer for excluding Negroes from a jury list. Holding that the action by the state officer was state action, the Court said:[5]

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[1] U.S. CONST. amend. XIV, § 1. The applicable part of this section reads:

> 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.

[2] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Barbier v. Connolly, 113 U.S. 27 (1885); Civil Rights Cases, 109 U.S. 3 (1883); Neal v. Delaware, 103 U.S. 370 (1880); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); *But see* United States v. Guest, 383 U.S. 745 (1966). For a comment on the state action concept in the area of individual actions, see 66 W. Va. L. Rev. 325 (1964).

[3] Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

[4] 100 U.S. 339 (1879).

[5] *Id.* at 347.

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Two other cases previous to *Ex parte Virginia* revolved around the same central theme. The Supreme Court struck down a West Virginia statute which denied Negroes the right to serve as jurors in *Strauder v. West Virginia.*[6] In *Virginia v. Rives*[7] the question of state action was raised where a judge overruled a motion to modify an all white jury to include one third Negroes in a murder trial of two Negroes.[8]

The principle established by these and other decisions is that the fourteenth amendment governs *all* action of a state whether through its executive or administrative officers, legislature, or courts.[9] The question of state action has arisen over the years in a number of cases,[10] the Court applying the above principle to the facts of each case.[11] It must be remembered, however, that not all the acts of state officers are acts of the state. They must act under state authority or "color of state authority,"[12] or under "color or pretense "[13] of law before such acts constitute state action.[14]

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[6] 100 U.S. 303 (1879).

[7] 100 U.S. 313 (1879).

[8] *Id.* The Court defined state action, but determined that there was none here.

[9] Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[10] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (court permitting damage judgments for breach of racially restrictive covenants); Hurd v. Hodge, 334 U.S. 24 (1948) (court enforcing racially restrictive covenants); Shelley v. Kraemer, 334 U.S. 1 (1948) (same); Lovell v. City of Griffin, 303 U.S. 444 (1938) (city manager requiring license to distribute literature); Mooney v. Holohan, 294 U.S. 103 (1935) (prosecuting attorney contriving to procure conviction and imprisonment of individual); Nixon v. Herndon, 273 U.S. 536 (1927) (statute prohibiting Negro participation in primary elections); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) (city ordinance establishing telephone rates).

[11] For discussions of the historical development of the state action concept, see Barnett, *What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 ORE. L. REV. 227 (1945);Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne and Karst, *State Action*, 14 STANFORD L. REV. 3 (1961).

[12] Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931).

[13] Civil Rights Cases, 109 U.S. 3, 17 (1883).

[14] "Color" would include those acts which are done under a semblance of authority, as opposed to those done under actual authority. BLACK'S LAW DICTIONARY 331 (4th ed. 1951).

A plaintiff injured as a result of state action may obtain relief through federal statutes such as those relied on in the principal case.[15] The court held that the plaintiffs correctly asserted jurisdiction under 42 U.S.C. § 1983 (1964),[16] which had been defined and applied previously in the landmark decision of *Monroe v. Pape*.[17] Under this section any public officer who violates the constitutional rights of a citizen may have an action or suit brought against him. Plaintiffs in *Ethridge* case, having established state action on the part of the defendants, were enabled to seek and obtain injunctive relief.

Even though plaintiffs had established jurisdiction in the federal courts, the more important issue arose as to whether intervention by the federal court was premature. Federal[18] and state[19] statutes distinctly spell out the procedure under which plaintiffs would have obtained redress in this situation, *i.e.*, racial discrimination. Under the federal statute monetary damages arising out of discriminatory work practices equal to the amount of back pay dating to the time of discrimination may be awarded. Plaintiffs were obligated to prove that the injury to them warranted the extraordinary relief of an injunction by a federal district court rather than just monetary damages.[20] The court here reasoned that injunctive relief was warranted since such discrimination tends to have an adverse psychological effect on the class discriminated against which cannot be remedied by the payment of money.[21] This identical argument was made by the Supreme Court in the now famous decision of *Brown v. Board of Education*.[22]

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[15] 28 U.S.C. §§ 1331, 1343 (3), 2201 (1964); 42 U.S.C. §§ 1981, 1983 (1964).

[16] 42 U.S.C. § 1983 (1964) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress. (Emphasis added.)

[17] 365 U.S. 167 (1961). *See also* Sigue v. Texas Gas Transmission Corp., 235 F. Supp. 155 (W.D. La. 1964); Tribune Review Pub. Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957); Oppenheimer v. Stillwell, 132 F. Supp. 761 (S.D. Cal. 1955).

[18] 42 U.S.C. § 2000(e) (1964).

[19] OHIO REV. CODE, ch. 4112 (1964). For the applicable West Virginia statute see W. VA. CODE ch. 5, art. 11, §§ 1-15 (Michie Supp. 1967).

[20] Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967); *accord*, Local 499, IBEW v. Iowa Power & Light Co., 224 F. Supp. 731 (S.D. Iowa 1964).

[21] Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

[22] 347 U.S. 483 (1954).

At this point it is important to note that the same statute which would award back pay also admits the complaining party into the union which is guilty of discrimination thereby giving him *complete* relief. Plaintiffs in the principal case could have obtained relief through the state and federal administrative procedure. Federal courts have long held that they cannot interfere in such matters until all administrative procedures are exhausted.[23] Although this rule has been modified to some extent,[24] general speaking it is still the law.[25] However, it must be remembered that the principal case involves a *class* action instead of an *individual* action, and the rule would not necessarily be binding by analogy. Furthermore, the relief sought must be considered. Plaintiffs were seeking to enjoin defendants from participating with discriminatory unions and in no way asked for back pay or admission to a union. The above issues will be important if the decision is appealed, for it is upon these issues that the plaintiffs' right to federal court relief rests.

In the principal case Negroes as a class were successful in attacking union discrimination indirectly through state officers dealing with the union. The decision has a twofold effect: (1) It forces the state of Ohio to take notice of racial discrimination in labor unions, and (2) it forces the labor unions to reconsider past decisions concerning the continued practice of such discrimination. This case does raise the problem of federal intervention in state affairs: it limits those parties with which a state may contract, perhaps an undue restriction on the freedom of parties to contract with whomever they choose. However, the court balanced this freedom of contract against the rights of individuals as guaranteed by the Constitution and again upheld those rights. This decision may well be followed in the future as it represents a speedy and effective means by which Negroes and other groups as a class may secure recognition of their civil rights. It also represents one of the largest extensions of the state action concept since its inception. When any action interferes

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[23] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934); United States v. Illinois Central R.R., 291 U.S. 457 (1934); Matthews v. Rodgers, 284 U.S. 521 (1932); Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir. 1959); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956); Carson v. Bd. of Educ., 227 F.2d 789 (4th Cir. 1955).

[24] Perez v. Rhiddlehoover, 247 F. Supp. 65 (E.D. La. 1965).

[25] For a discussion on the problem of exhaustion of administrative remedies, see K. DAVIS, ADMINISTRATIVE LAW §§ 20.01-20.10 (1959).

with the guarantees of the fourteenth amendment, and especially action in some manner sanctioned or authorized by a state, other extensions may arguably be warranted.

John Charles Lobert

Damages—Vehicle—Recovery of More Than Actual Physical Damage When the Vehicle is Partially Destroyed

D negligently damaged the taxicab of *P*. The cost to repair the taxicab was $1,349 while the difference in market value before and after the collision was $415. *P* claims that under the special circumstances of a city ordinance he is not permitted to buy a used car and convert it to a taxicab. *P*, therefore, contends he must have the *cost of repair* to make him whole. The lower court held he was entitled only to the *difference in fair market values. Held,* affirmed. The general rule for damages to personal property partially destroyed is that the *difference in fair market values* before and after the accident is the proper element of recovery where such is less than the *cost of repair*. Here *P* failed to show the necessary special circumstances which would have made this general rule inapplicable, *i.e., P* failed to show that he could not buy a used taxicab which would satisfy the city ordinance. In the absence of such a showing he was completely compensated by recovering the difference in fair market values. *Norview Cars Incorporated v. Crews,* 156 S.E.2d 603 (Va. 1967).

The rule of damages in the principal case is a widely accepted one used in many jurisdictions.[1] It focuses on the actual physical damage inflicted. However, it is but one of several elements of recovery available to the injured party who might also be able to obtain recovery for loss of use or rental value, loss of profits, removal and storage, and interest.

The purpose of compensatory damages is to compensate the person wholly for the losses sustained concurrent with the least burden to the wrongdoer. In cases of personal property where there has been total destruction, this objective is achieved by awarding the fair market value, at the time of the accident, of the item destroyed less any salvage value. Where there has been partial destruction, the

[1] 22 AM. JUR. 2d *Damages* § 145 (1965).