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Constitutional Law--Procedural Due Process--Exclusion from Public Employment for Invoking the Fifth Amendment

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situation how can an indigent defendant be granted an appellate review? Will the court have to adopt new methods of procedure, or will this be a situation where the rule of the principal case will not apply? The language of the principal case seems broad enough to require a state to change its appellate procedure: "Destitute defendants *must* be afforded as adequate appellate review as defendants who have money enough to buy transcripts." However, subsequent interpretation of the principal case may impose certain limitations on its application.

The principal case has been followed in *People v. Jackson*, 152 N.Y.S.2d 893 (1956), upon a similar set of facts. In *Barber v. Gladden*, 288 P.2d 986 (Ore. 1956), a statute requiring an appeal bond as a condition to a right of appeal was held unconstitutional under the equal protection clause, as applied to a prisoner who sought to appeal a dismissal of his habeas corpus action. The decision was based on the authority of the principal case. The Oregon court, however, expressly limited the application of the decision to the specific facts of the case, and made it plain that the decision was not the result of their own reasoning, but resulted from the necessary implications of the principal case. *Id.* at 990. This is indicative of the potential unpopularity of the principal case, and of the efforts which will be made in the future to narrow its application.

The principal case establishes a new rule of law which represents another step toward the realization of equal justice for all. However, the administration of the rule will involve a multitude of problems, and may necessitate substantial changes in appellate procedure in some states. As a result, the principal case will probably prove to be an unpopular decision.

R. M.

CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—EXCLUSION FROM PUBLIC EMPLOYMENT FOR INVOKING THE FIFTH AMENDMENT. — Appellant was summarily discharged from his position as professor at Brooklyn College, under the New York City charter, for exercising the privilege against self-incrimination by refusing to answer authorized inquiries as to his Communist Party membership, when appearing before a congressional committee investigating matters of national security. Upon review by the highest state court, the proceedings were upheld. *Held*, (5-4) that the summary dismissal

of appellant violates due process of law. Reversed and remanded. *Slochow v. Board of Education*, 76 Sup. Ct. 637 (1956).

New York City has decided that it does not want in its employ persons in whom the public faith has been shaken. When a public employee pleads the fifth amendment in reply to authorized inquiries concerning matters of national security, it is not unreasonable to assume that public faith in the employee will be shaken. To preserve public purpose, security and faith in the local government and its agencies, New York City has placed a condition on public employment which forbids the invoking of the fifth amendment when questioned concerning "loyalty to the federal government." *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E.2d 373 (1954).

It is well established that where a state law is enacted for public purpose, courts of law will not hear complaining parties who seek to invoke protection under the fourteenth amendment. There must be shown a "plain case of departure from every public purpose which could reasonably be conceived", before the courts can intervene. *Robinette v. Chicago Commission*, 115 F. Supp. 669 (N.D. Ill. 1951). New York City is prima facie sole judge of the reasonableness and necessity of its laws, and there is a presumption of the constitutionality of such laws. *Dean Co. v. Madison*, 257 Wis. 308, 43 N.W.2d 480 (1950); *American Mining Co. v. Special Comm. of Indiana*, 268 Fed. 563 (D. Ind. 1920); *Bordens Co. v. Baldwin*, 293 U.S. 194 (1934).

The Court has held that a city cannot condition public employment so as to deprive an employee of a constitutional right. However, constitutional rights are continually waived in whole or in part in many relationships of life. *United States v. Hoyt*, 53 F.2d 885 (S.D.N.Y. 1931). "The relation which an individual chooses to occupy towards society, or the privileges offered by society of which he may wish to avail himself, may, during the continuance of that relationship, or whilst he is availing himself of those privileges, necessarily limit or wholly suspend the exercise of some of his constitutional rights. . . ." *Gitlow v. Kiely*, 44 F.2d 227 (S.D.N.Y. 1930).

In *Moyer v. Brownell*, 137 F. Supp. 594 (E.D. Pa. 1956), it was held that one in the public employ could be forbidden to enter politics actively. Also, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), Justice Holmes stated that "there is nothing in the constitution . . . to prevent the city from attaching a condition to

the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The city may impose any reasonable condition upon holding offices within its control.”

Section 903 of the New York City charter does not deprive complainant of any constitutional right. The constitution provides only that he need not give testimony which might lead to his prosecution and incrimination. He has availed himself of this provision and is thus free from prosecution under his own testimony if he is in fact guilty, and is free from entrapment by ambiguous circumstances if he is innocent of disloyal activity. See GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955).

It is not necessary to infer guilt or innocence, or to classify the “knowing” with the “unknowing”. The legislature has placed a condition on public employment over which each employee exercises sole control. If that condition occurs, it is absolutely voluntary and the question of guilt is irrelevant. It should be considered the same as a voluntary resignation. *Daniman v. Board of Education, supra*.

The very fact that Slochower refused to answer was considered, and properly so, to stamp him as a person unfit to hold an official position. There need be no hearing or trial to determine that fact. New York City should have the right to decide that it doesn't want employees who refuse to give information concerning their official conduct to such authorized groups as the Internal Security Subcommittee, particularly when those employees are instructors to youth. See Wyman, *The Fifth Amendment: The Case of the Three Professors*, 41 A.B.A.J. 801 (1955). Whether or not Slochower is a Communist, is disloyal or subversive is not relevant. He has cast a shadow of doubt on his person and New York City does not want that type of employee.

In view of the present public policy of forbidding public employment to persons whose loyalty is questionable and whose secrets are more important than the occurrence of the condition upon which their jobs are dependent, it is submitted that the line of reasoning utilized by Justice Holmes in the *McAuliffe* case, *supra*, would be more sound.

C. R. S.