Louisiana Law Review

Volume 16 | Number 3
April 1956

Legal Profession - Disbarment Proceedings - Privilege Against Self-Incrimination

Jerry G. Jones

made a right under federal law nor a violation of it."[20] The result of these two decisions is to define an area which is outside the jurisdiction of the NLRB, thus tracing the reverse side of the *Garner* doctrine.[21] Assuming that the decision in the instant case is correct, employers must seek relief from "harassing tactics" either by discharging employees or by proceeding under state statutes. The courts may also have the problem of determining what types of economic pressure by *employers* are beyond the pale of the employer's duty to bargain in good faith under section 8(a) (5).[22]

John S. White, Jr.

LEGAL PROFESSION — DISBARMENT PROCEEDINGS — PRIVILEGE AGAINST SELF-INCRIMINATION

Defendant attorney appeared before a United States Senate subcommittee, but refused to answer questions relating to his past and present membership in the Communist Party. His refusal to answer was based on the protection against self-incrimination in the first and fifth amendments of the Federal Constitution and sections 12 and 13 of the Declaration of Rights of the Constitution of Florida. Subsequently, the Florida State Attorney filed a motion to disbar defendant for misconduct and unprofessional acts, alleging that defendant was a member of the Communist Party and that he had refused to answer questions regarding his membership. It was also contended that invoking the privilege against self-incrimination is evidence of misconduct by an attorney. During the trial of the case defendant was again questioned as to his communist affiliations. He refused to answer, again claiming the privilege against self-incrimination of the Federal and State Constitutions. The trial court entered an order of disbarment and defendant appealed. The Florida Supreme Court *held,* reversed.[1] "There may be circumstances under which claiming the privilege against self-incrimination would be cause for discipline or even disbarment,

20. *Id* at 265.

21. Garner v. Teamsters Union, AFL, Local 776, 346 U.S. 485 (1953). In that case, it was held that state courts may not enjoin union picketing for the purpose of coercing employers to compel their employees to join a union, because such conduct was regulated by section 8(b) of the act.

22. Section 8(a) provides: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

1. Jones, J., dissenting.

but they should be demonstrated by adequate proof." Defendant was not accorded due process since an inference of membership in the Communist Party cannot be drawn from his invocation of the privilege and refusal to answer. *Sheiner v. Florida*, 82 So.2d 657 (Fla. 1955).

The privilege against self-incrimination guaranteed by the fifth amendment to the Federal Constitution cannot be invoked in state proceedings, and is not an essential of due process secured by the fourteenth amendment.[2] However, in those states that have granted a privilege against self-incrimination, due process does require that no inference of guilt be drawn from the invocation of the privilege.[3] In cases involving the dismissal of policemen and teachers, as well as the disbarment of lawyers, the courts have been faced with the problem of whether or not an inference from the invocation of the privilege should be drawn in order to justify dismissal from employment.[4] However, in the policemen and teacher cases, the courts do not discuss the issue of dismissal in terms of drawing an inference from the invocation of the privilege, but speak rather in terms of "public administration" and of the authority of an employer to impose any condition he desires on employment. Thus it has been consistently held that police officers may be dismissed for invoking

---

2. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

3. In Adamson v. California, 332 U.S. 46, 55 (1947), Mr. Justice Reed stated in the majority opinion: "It is, of course, logically possible that while an accused might be required, under appropriate penalties, to submit himself as a witness without a violation of due process, comment by judge or jury on inferences to be drawn from his failure to testify, in jurisdictions where an accused's privilege against self-incrimination is protected, might deny due process." Burdick v. United States, 236 U.S. 79 (1915); United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 130 (2d Cir. 1954), where it is stated: "But whatever the underlying motivation, an invocation of the Fifth Amendment is no ground at all for an inference of guilt . . . . [T]he privilege created by the amendment is for the innocent as well as the guilty and no inference can be drawn against the person claiming it that he fears that he is 'engaged in doing something forbidden by federal law.'"

4. See Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955), where the author notes that the privilege was historically granted not only to impede inquisition, but to impede inquisition in those cases where religious and political beliefs are an important element. Likewise, "where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone." GRISWOLD, THE FIFTH AMENDMENT TODAY 8 (1955).

the privilege against self-incrimination.[5] This rule is predicated upon the close relationship between the duty owed by police officers to expose crime and the duty to expose their own criminal conduct.[6] The courts have also upheld the dismissal of teachers who plead the privilege when questioned as to subversive affiliations. The teacher has a constitutional right to refuse to incriminate himself, but has no constitutional right to remain a teacher when found to be unfit by school authorities.[7] But cases involving an attempt to disbar an attorney

5. An example of the penalty imposed upon public officials for refusing to testify is LA. R.S. 33:2426 (1950), which provides: "If an officer or employee in the city service or any officer or employee of the state or political subdivision of the state wilfully refuses or fails to appear before any court or judge, or any legislative committee, or any officer, board, or body authorized to conduct any hearing or inquiry, or if the employee or officer having appeared, refuses to testify or answer any question relating to the affairs or government of the city or the conduct of any city officer or employee on the ground that his testimony or answers would tend to incriminate him, or refuses to waive immunity from prosecution on account of any matter about which he is asked to testify at any such hearing or inquiry, he shall forfeit his position and shall not be eligible for appointment to any position in the classified service of the city for a period of two years."

6. "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." Justice Holmes in McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). See also Pfitzinger v. United States Civil Service Commission, 96 F. Supp. 1 (D.C.N.J. 1951) (privilege against self-incrimination cannot be invoked to protect one from removal from office under an act which forbids political activity); Christal v. Police Commission of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939) (grand jury investigation to determine if officers had been guilty of criminal activities in connection with their duties as police officers); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949) (commission could properly discharge city police officers in classified service for refusal to execute waiver of immunity from criminal prosecution which might arise out of testimony by officers before grand jury); Scholl v. Bell, 125 Ky. 750, 102 S.W. 248 (1907); Canteline v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940) (officers refused to execute waiver of immunity).

7. In Dariman v. Board of Education of City of New York, 306 N.Y. 532, 119 N.E.2d 373 (1954), the court emphasized that no inference of membership in the Communist Party may be drawn from the assertion of one's privilege against self-incrimination, but nevertheless allowed the teacher to be fired for refusing to answer. The court talked in terms of an employer-employee relationship in allowing the dismissal. Faxon v. School Committee of Boston, 331 Mass. 771, 120 N.E.2d 772 (1954), involved the dismissal of a teacher who had refused to answer questions concerning communist activities. The court held: "Refusal to testify does not prove guilt and no inference of guilt can be drawn from it in a *criminal case.* But *the question here is not one of guilt or innocence. It is a question of administration by a public board in the public interest.*" (Emphasis added.) In Board of Education of Los Angeles v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 84 (1954), the court cited with approval McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), involving the dismissal of police officers. The United States Supreme Court, in Adler v. Board of Education of City of New York, 342 U.S. 485, 492 (1952), clearly stated: "It is equally clear that they [the teachers] have no right to work for the State in the school system on their own terms. They may

for exercising his privilege against self-incrimination are more difficult of solution. Generally, an attorney cannot be disbarred for exercising the privilege.[8] Some courts restrict the application of this general rule to cases where the privilege is exercised in good faith.[9] However, one jurisdiction has refused to *admit* an attorney to the bar because he invoked the privilege before a committee inquiring into his fitness.[10] These cases involving attempts to disbar an attorney recognize the rule that no inference of guilt can be drawn from the invocation of the privilege.

In the instant case three issues were presented to the court: Is membership in a subversive organization sufficient to justify disbarment for "professional misconduct"? Can membership in such a subversive organization be inferred from defendant's re-

---

work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

8. *In re* Dorsey, 8 Ala. (7 Porter) 293 (1938); *Ex parte* Marshall, 165 Miss. 523, 147 So. 791 (1933); *In re* Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907); *contra, In re* Rouse, 221 N.Y. 81, 116 N.E. 782 (1917), where the court held that where the witness is an attorney, evidence obtained under a grant of immunity may be used in a subsequent disbarment action, as such an action is civil in nature rather than criminal and involves no penalty. Justice Cardoza stated: "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission. . . . To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime." *Id.* at 84.

9. Matter of Ellis, 258 App. Div. 558, 17 N.Y.S.2d 800 (2d Dep't 1940); *In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); Matter of Levy and Becker, 225 N.Y. 223, 174 N.E. 461 (1913); People *ex rel.* Taylor v. Forbes, 143 N.Y. 219, 38 N.E. 303 (1894); Notes, 40 COLUM. L. REV. 708 (1940), 25 CORN. L.Q. 420 (1940), 53 HARV. L. REV. 871 (1940).

10. *In re* Anastaplo, 3 Ill.2d 471, 479, 121 N.E.2d 826, 831 (1954): "While technically not a government employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable to truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate." The court further stated that the attorney must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry, relying on the cases involving suspension of public employees cited in note 6 *supra*. See also *In re* Summers, 325 U.S. 561 (1945).

fusal to answer for fear of self-incrimination? Is defendant guilty of "professional misconduct" for invoking his constitutional privilege against self-incrimination? The first question was answered in the affirmative, the court stating that present membership in a subversive organization would definitely be grounds for disbarment. However, the court gave no indication as to the effect of past membership on an attorney's right to practice law. The second question was answered in the negative. The court considered it a violation of due process for the trial court to have inferred membership in a subversive organization from the mere refusal of defendant to answer questions concerning his conduct. In drawing an inference from some established fact, due process requires that there be some reasonable relationship between the fact proved and the fact presumed or inferred.[11] In the instant case, the only fact proved was that defendant had refused to answer questions concerning his membership in subversive organizations. The court concluded, however, that membership cannot be reasonably inferred from this fact, as defendant may have invoked the privilege for reasons unrelated to membership.[12] If the state wished to disbar the defendant, the burden rested upon the state to prove membership in a subversive organization. This burden was not satisfied by mere proof of the exercise of the privilege. The third question is not expressly answered, but the court implies that invocation of the privilege by an attorney is not sufficient to constitute misconduct. However, the dissenting opinion takes issue on this question and argues that there is no absolute or inalienable right to practice law. This is so because the practice of law is a privilege granted by the state and may be regulated in the public interest, even to the extent of requiring an attorney to forego exercising his constitutional privilege.[13] This argument of the dissenting judge is met in the majority opinion only to the extent of saying that due process requires proof before an attorney can be disbarred. Evidence of the invocation of the privilege is insufficient proof.[14]

11. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Bailey v. Alabama, 219 U.S. 219 (1911).

12. For an interesting discussion of this situation, see GRISWOLD, THE FIFTH AMENDMENT TODAY 14 (1955).

13. In connection with the language used by the dissent, it should be noted that once the practice of law is classed as a *privilege*, as contrasted to a *right*, there is no longer the guarantee of constitutional protection. See Bailey v. Richardson, 341 U.S. 918 (1951).

14. In a concurring opinion by Justice Floyd, it is pointed out that democracy must be sold on its merits, and not on the demerits of communism. Therefore,

The writer suggests that the court correctly distinguished the instant case from the cases involving dismissal of public employees. In the interest of public safety and welfare some inquiry must be made into the character of the public employee. If the employee does not cooperate in this examination of his character, then he has not qualified himself as a public servant. However, the status of the attorney is not "public employment" but is a "public trust." If such status is to be denied the attorney for refusing to disclose his subversive activities, this denial should come from the client and not from the public authority. It is an entirely different matter, however, when *membership* in a subversive organization is *proved.* In that case the attorney is no longer qualified to hold this "public trust."

Jerry G. Jones

PROPERTY — CEMETERIES — DEDICATION — PRESCRIPTION

In 1895 a tract of land was sold to one of defendant's authors in title subject to a reservation of a portion of the land as a public graveyard. This reservation was included in every subsequent act of sale. No formal acceptance was made or other action taken by the governing authorities, but since 1895 the land has been used by the general public as a cemetery. Plaintiffs, relatives of deceased persons interred in the cemetery,[1] brought an action to establish the boundary between the cemetery and defendant's land, alleging that defendant had appropriated a portion of the cemetery property. Defendant pleaded the acquisitive prescription of thirty years, which was sustained by the trial court. On appeal, *held,* reversed. The reservation in the original act of sale, combined with the public use of the cemetery for more than half a century, constituted an effective dedication of the land to public use. Land dedicated for use

conviction should be by an American process, that is, charge, try, *prove,* and convict on the basis of time-honored tradition of democratic precepts. The state has failed to establish a "preponderance of evidence" which would justify disbarment. 82 So.2d 657, 667 (Fla. 1952).

1. Defendant contested the plaintiffs' right to sue, but the court, relying on Humphreys v. Bennett Oil Corp., 195 La. 531, 197 So. 222 (1940), in which the same problem was presented, found that plaintiffs' personal interest in preserving the cemetery as a burial place for members of their family and in being buried alongside their departed relatives gives them standing to sue. For earlier cases granting citizens the right to sue where "public things" were involved, see Sheen v. Stothart, 29 La. Ann. 630 (1877); Morgan v. Lombard, 26 La. Ann. 462 (1874); Burthe v. Fortier, 15 La. Ann. 9 (1860); Allard v. Lobau, 2 Mart. (N.S.) 317 (1824).