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CONSTITUTIONAL LAW-CIVIL RIGHTS-DENIAL UNDER COLOR OF STATE LAW OF RIGHT TO SERVE ON FEDERAL JURY

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CONSTITUTIONAL LAW—CIVIL RIGHTS—DENIAL UNDER COLOR OF STATE LAW OF RIGHT TO SERVE ON FEDERAL JURY—Plaintiff, a probationary high school teacher, was dismissed by the Board of Education of New York City upon the complaint of Keyes, the principal of her school, that she was absent from her duties for almost a month while serving on a federal jury.

The state commissioner of education and the state court[1] denied her appeal for reinstatement, on the ground that her status under New York law was merely probationary.[2] Plaintiff sued defendant Keyes in the federal district court, to recover damages under the Civil Rights Act[3] for the deprivation of a right secured to her by the law of the United States.[4] The district court dismissed the complaint. *Held,* reversed. Plaintiff has stated a cause of action under the Civil Rights Act. The cause was remanded for determination of the question whether or not plaintiff's exercise of her federal privilege was unreasonable in the light of her duties as a teacher. *Bomar v. Keyes,* (C.C.A. 2d, 1947) 162 F. (2d) 136, certiorari denied, (U.S. 1947) 68 S. Ct. 166.

The source of the right which plaintiff asserts here bears examination, for the idea that service on a federal jury is a federal right has received little consideration.[5] That the federal law providing qualifications for jurors is in itself creative of the right seems doubtful. More plausibly, the right is akin to the right to vote in federal elections and the other privileges and immunities of national citizenship, which are protected not only by the Fourteenth Amendment, but also by the inherent power of the federal government.[6] Since the right is one which the sovereign has inherent power to protect, it would be possible for Congress to pass legislation applicable to individuals, whether they

[1] Matter of Bomar v. Cole, 177 Misc. 740, 32 N.Y.S. (2d) 825 (1941).

[2] 16 N.Y. Consol. Laws (McKinney 1945) § 872 (1).

[3] 8 U.S.C. (1940) § 43; "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. . . ."

[4] 28 U.S.C. (1940) § 411 provides that "jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications . . . and be entitled to the same exemptions, as jurors in the highest court of law in such State may have and be entitled to. . . ." The New York statute provides that women are exempt from jury duty if they claim this exemption. 29 N.Y. Consol. Laws (McKinney, 1945) § 720.

[5] This is not to be confused with the right of an accused to have a jury selected in a manner which is not discriminatory; the latter is secured by the Fourteenth Amendment and enforced by federal statute. 8 U.S.C. (1940) § 44; Strauder v. West Virginia, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880).

[6] Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1872); United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031 (1941). The indefiniteness as to what rights are privileges and immunities of national citizenship is shown in the concurring opinions in Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954 (1939). Although the decision is of doubtful authority today on the principle for which it stands, the language of Justice Miller in Crandall v. Nevada, 6 Wall. (73 U.S.) 35 (1867), when he speaks of the right of the federal government to call on its citizens to participate in its affairs, would seem applicable. Does not this confer on a citizen a correlative right not to be hindered or penalized for performing his duty? That penalizing one for the exercise of a right is as much within the prohibition of the statute as is deprivation of the right, is well supported by the language of the principal case, and by the decision in Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 877 (1943). However, some doubt may be cast on classification of jury service among these rights, especially in view of the New York statute, which exempts women from jury duty on their request.

act under color of state law or not. But defendant's liability here is solely under the Civil Rights Act, and it is therefore necessary that he be shown to have acted under color of statute. Judge Learned Hand first dismissed this with the statement that there is no need to discuss this question, since the Board of Education acted under the New York statute providing for the discharge of probationary teachers. It may be granted that plaintiff's dismissal was under color of statute, but the action against defendant Keyes is predicated on his having procured that dismissal. Therefore, the basis for finding that Keyes acted under color of law could not be this New York statute, but rather that he was placed in a position to procure plaintiff's dismissal by some statute conferring on him administrative powers. Although this can be asserted in the case of a sheriff or police officer, even though he violates a state law in the process of his administration or enforcement,[7] it is hardly a tenable position in the case of a high school principal, whose office is to supervise one of the state's educational units. Can it be said that the statutory aspect of Keyes' act was supplied by his aid to the Board of Education in dismissing the plaintiff? Judge Hand uses language which may indicate that this is the case, when he says that Keyes' complaint caused plaintiff's dismissal, and that he and the Board of Education combined to cause plaintiff financial loss because she exercised a federal right. In this event, it is unnecessary to inquire whether Keyes' act in itself was under color of statute; his liability under the Civil Rights Act would turn on his complicity as a joint tortfeasor with the Board of Education, which did act under color of statute.[8] But, accepting this proposition, would not any private individual be similarly liable under a statute such as the one in question, when he aids a state officer or agency in the deprivation of a federal right secured against state action? This is certainly a departure from the cases, which have in only very limited situations found private persons susceptible to prosecution, civil or criminal, under a statute requiring action under color of law.[9] The decision may pose a perplexing problem to persons such as Keyes who are charged solely with the administration of an efficient educational unit.

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[7] Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 33 S. Ct. 312 (1913); United States v. Sutherland, (D.C. Ga. 1940) 37 F. Supp. 344; United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031 (1941); Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031 (1945). But in the Screws case, three members of the court dissented, on the ground that action under color of law was limited to acts by a state officer pursuant to an unconstitutional statute. Rotnem, "Clarification of the Civil Rights' Statutes," 2 BILL OF RIGHTS REV. 252 (1942).

[8] Picking v. Pennsylvania Ry. Co., (C.C.A. 3d, 1945) 151 F. (2d) 240, in which the court stated that the civil rights statute in question [8 U.S.C. (1940) § 43] gives a right of action in tort to everyone whose rights are trespassed by one who acts under color of state law. Vicarious liability under section 20 of the criminal code [18 U.S.C. (1940) § 52] has been extended to private persons who assist state officers in the denial of federal rights secured against state action. Culp v. United States, (C.C.A. 8th, 1942) 131 F. (2d) 93.

[9] Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883); For a discussion of the possible expansion of the concept of "color of statute," see Fraenkel, "The Federal Civil Rights Law," 31 MINN. L. REV. 301 (1947). Also, Ex parte Riggins, (D.C. Ala. 1904), 134 F. 404; March v. Alabama, 326 U.S. 501, 66 S. Ct. 276 (1946); Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757 (1944).