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articles, each applicable in different factual situations. If the conditions set forth in Article 3423 are met, the property can properly be considered treasure and ownership will vest in the finder at the moment of his finding. Article 3422 provides the general rule and operates to preserve the right of the owner to reclaim his property within ten years. This article will be applicable unless the property specifically fits the requirements of other articles, which operate to vest ownership in the finder immediately.[24] Any general conclusion to the effect that Louisiana has followed the Anglo-American trend toward merger would seem improper since the Code operates to vest the finder with ownership immediately in the one case and not until the passage of ten years in the other. However, all that was necessary for the disposition of the instant case was the determination that the heirs had shown satisfactory proof of the ownership by the decedent and therefore were entitled to recover the certificates. Thus the case does not shed much light on the future interpretation of the code provision pertaining to treasure in Louisiana.

Gerald L. Walter, Jr.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — DISBARMENT OF ATTORNEY FOR PLEADING STATE PRIVILEGE IN A JUDICIAL INQUIRY

A New York attorney was called before a judicial inquiry being held for the purpose of investigating unethical practices in the procurement and prosecution of negligence cases handled on a contingent fee basis. The attorney invoked the state privilege against self-incrimination,[1] refusing to testify or to produce his records on negligence cases for which he had filed retainers. It was not disputed that the assertion of the privilege was in good faith, or that the information sought to be elicited was relevant to the purpose of the inquiry. In an original disbarment pro-

24. LA. CIVIL CODE art. 3420 (1870) (dealing with precious stones); *id.* art. 3421 (dealing with abandoned property); *id.* art. 3423 (dealing with treasure).

1. N.Y. CONST. art. I, § 6 (1938) provides: ". . . nor shall he be compelled in any criminal case to be a witness against himself. . . ." The NEW YORK CODE OF CIVIL PROCEDURE § 83 (1914) provides: "A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness."

ceeding before the appellate division, *held*, disbarred, one Justice dissenting. An attorney who refuses to cooperate with the court in its efforts to investigate matters relevant to his fitness to remain a member of the Bar is subject to disbarment, not on the basis of his having invoked the self-incrimination privilege, but on the basis of his having impeded such inquiry. *In re Cohen*, 195 N.Y.S.2d 990 (1959).

The attorney's relationship to the court is that of an officer; he has a duty to aid the court in its undertakings and to be candid in his dealings with it.[2] To be admitted to the Bar, the applicant bears the burden of proving to his examiners that he is ethically, morally, and educationally fit to enter into his duties.[3] To remain a member of the Bar, the attorney must maintain the qualities which were necessary for his admission; however, the burden of proving him unfit in a disbarment proceeding rests on the party charging lack of fitness.[4] The courts have plenary power over attorneys,[5] but disciplinary actions against them must be conducted as judicial proceedings with due process of law.[6]

The State of New York's privilege against self-incrimination affords protection not only against testimony which might tend to incriminate, but also against testimony which might subject one to any penalty or forfeiture.[7] Two leading cases of that state have held that disbarment grounded on an attorney's refusal to sign an absolute "waiver of immunity"[8] against self-incrimination was invalid and violative of the purpose of the New York guaranty against self-incrimination.[9] Louisiana's constitutional and statutory guaranty against self-incrimination is not so broad as that of New York.[10] It provides only that no one shall be com-

2. *In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1922); People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

3. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

4. Scheiner v. State, 82 So.2d 657 (Fla. 1955); *In re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945).

5. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

6. Scheiner v. State, 82 So.2d 657 (Fla. 1955).

7. See note 1 *supra*.

8. As used here a waiver of immunity is one pursuant to a statutory provision whereby one may absolutely waive his constitutional privilege against self-incrimination *before* he testifies. In the two New York cases, there was much dicta to the effect that an attorney may not be required to answer questions which would tend to incriminate him, but the court did not deal with the specific question of the matter's being relevant to fitness to practice, or with the question of the attorney's refusal to answer on the trial or inquiry itself, rather than prior thereto.

9. *In re* Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940); *In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940).

10. LA. CONST. art. I, § 11, provides: "No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject

pelled to give evidence against himself which might subject him to criminal prosecution.[11] Florida's Supreme Court has rejected as violative of Fourteenth Amendment due process[12] a proposed amendment to its Bar rules, which provided that invocation of the privilege by attorneys in response to inquiries regarding Communist affiliations was grounds for disbarment, and prima facie evidence of lack of fitness to practice.[13] The same court has refused to disbar an attorney on grounds that he had invoked the Fifth Amendment privilege when asked questions in a federal inquiry concerning membership in the Communist Party.[14] One United States Supreme Court case has held that the refusal of an applicant to the Bar to answer questions concerning his membership in the Communist Party did not alone justify denying him admission to the Bar where there was otherwise adequate proof of the applicant's fitness.[15]

It is generally held that no inference of guilt is to be drawn from the invocation of a privilege against self-incrimination.[16] A recent series of cases has indicated, however, that states may discharge public employees who refuse to answer questions relevant to their fitness for employment. On this basis, the United States Supreme Court has upheld the discharge of state public employees[17] and teachers[18] who refused to answer questions on a matter considered relevant to fitness — Communist Party affiliations. In each of these cases, the discharge was based upon a state statute making such refusal "insubordination" or evidence

him to criminal prosecution, except as otherwise provided in this Constitution. No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made."

11. An exception is that anyone may be compelled to testify in a proceeding against persons charged with bribery, but such testimony shall not afterwards be used against him in any judicial proceeding other than prosecutions for perjury arising out of such testimony. *Id.* art. XIX, § 13.

12. U.S. CONST. amend. XIV.

13. Revision of, or Amendment to, the Integration Rule of the Florida Bar, 103 So.2d 873 (Fla. 1956).

14. State v. Sheiner, 112 So.2d 571 (Fla. 1959).

15. Konigsberg v. State Bar of California, 353 U.S. 252 (1957). In Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957), the court found as a matter of fact that the Bar examiners were not justified in concluding that Schware should not be allowed to take the state bar examination. The court held that Schware had, under all the facts, sustained his burden of proving his fitness to take the examination. There is one state decision which held contrary to *Konigsberg*. *In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

16. Konigsberg v. State Bar of California, 353 U.S. 252 (1957); *In re* Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907).

17. Nelson v. County of Los Angeles, 80 Sup. Ct. 527 (U.S. 1960); Lerner v. Casey, 357 U.S. 468 (1958).

18. Beilan v. Board of Education, 357 U.S. 399 (1958). *Cf.* Adler v. Board of Education, 342 U.S. 485 (1952).

of "incompetency."[19] A state decision has affirmed the discharge of policemen who refused to testify as to their involvement in corrupt police activities, based on a policeman's duty to report candidly all knowledge of crime.[20] These decisions have characterized public employment as a privilege giving rise to a correlative duty of candor and frankness as to matters affecting employment, with the result that the privilege against self-incrimination is asserted at the expense of the employment.[21]

The issue with which the court dealt in the instant case was whether or not disbarment of the attorney would violate the state privilege against one's being compelled to give testimony which might tend to incriminate him, or subject him to any penalty or forfeiture. The court answered that it would not. The court distinguished the "waiver of immunity" cases as settling only that an attorney who is unwilling to sign a waiver of immunity *before testifying* is not subject to discipline by reason of such refusal. It was also made clear in the instant opinion that no reliance was placed upon a New York case in which an attorney had been disbarred for pleading the privilege in *bad faith*, the court there having in dictum indicated that it was not consid-

19. The statutory provision by which Nelson was discharged in Nelson v. County of Los Angeles, 80 Sup. Ct. 527 (U.S. 1960), was the CALIFORNIA GOVERNMENT CODE ANN. § 1028.1 (1943), which provided that "any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

20. Christal v. Police Comm'r of City and County of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939).

21. In each of the United States Supreme Court cases on discharge of state public employees, there have been strong dissents by Justices Black, Brennan, Douglas, and Warren (who did not join in consideration of Nelson v. County of Los Angeles, 80 Sup. Ct. 527 (U.S. 1956)). In Beilan v. Board of Education, 357 U.S. 399 (1958), Chief Justice Warren said that he considered the case to be controlled by Slochower v. Board of Education, 350 U.S. 551 (1955), "since a plea of the Fifth Amendment before a congressional committee is an invalid basis for discharge from public employment." *Id.* at 411. In the *Beilan* case and in Lerner v. Casey, 357 U.S. 468 (1958), Justices Black and Brennan stated that the dismissals violated Fourteenth Amendment Due Process in that they denied to the employees the freedoms guaranteed by the First Amendment; in these two cases, Justice Douglas indicated his opinion that the discharges were invalid because not based upon sufficient evidence to show lack of fitness, and thus were "very much at war with the Bill of Rights." 357 U.S. at 416. Justice Brennan, dissenting in the *Beilan* and *Lerner* cases, stated that the true reason for the discharges of the employees was that they were disloyal, and that there was in fact no "competent evidence" of that fact. 357 U.S. at 425. In the *Nelson* case, Justice Black, joined by Justice Douglas, dissented on the grounds that pleading the Fifth Amendment before a congressional committee could not be the basis for a penalty imposed by the state, and also that such dismissal violated due process under the Fourteenth Amendment in its "authentic historical sense" (*id.* at 532) by encroaching upon the rights guaranteed by the Federal Constitution. Justice Brennan indicated in the *Nelson* decision that he thought the case to be governed squarely by the *Slochower* case.

ering the question of good faith reliance upon the privilege. Cases relied upon by the attorney, but involving disciplinary actions against attorneys for contempt and for refusing to answer questions on matters not relevant to fitness, were also distinguished by the court.

The court in the instant case did not deal directly with the question of whether or not the type of penalty imposed upon the attorney for his refusal to testify or produce his records violates the Fourteenth Amendment guaranty of due process. The court noted the basic similarities between the issues which it faced and those involved in the public employee discharge cases, pointing out that refusal to answer in the latter made the employee subject to discharge on the basis of a state *statute* which imposed upon the employee the duty to speak concerning matters relevant to his fitness for employment. Those cases would seem to lend support to the proposition that disbarment of an attorney under the circumstances of the instant case does not violate Fourteenth Amendment due process. It would seem that the relevancy of the matters sought to be elicited to the attorney's fitness to practice law is even more evident than is the refusal of a subway employee or a school teacher to answer questions concerning Communist affiliations relevant to fitness to continue in their respective capacities. Thus, there seems to exist a stronger basis for supporting the court's reasoning in the instant case than in those situations.

Other than in pointing out the high station of an attorney, no reference was made in the instant case to the United States Supreme Court case which held that one could not be denied admission to the Bar solely for refusing to answer questions before the Bar examiners concerning Communist affiliations. That decision, however, does not seem in conflict with the instant case. The rationale in that case was that refusal to answer questions concerning Communist affiliations did not alone provide a rational basis for concluding that the applicant was morally or ethically unfit for admission, where he was otherwise qualified. The rationale of the instant case, on the other hand, was that an attorney may not with impunity impede a judicial inquiry into practices clearly in violation of the Bar's ethical standards — that such hindrance *can* provide a rational basis for concluding that the attorney no longer has the requisite fitness to practice.

The court made no attempt to deal with the Florida Supreme Court cases in which it had been indicated that no disciplinary

proceedings against an attorney could arise from his pleading of the federal constitutional privilege against self-incrimination. Those decisions, however, would seem distinguishable, in that the questions put to the Florida attorneys would not necessarily be asked by a judicial inquiry into improper practices. Thus the basis of the decision in the instant case, that disbarment was grounded upon hindrance of a judicial inquiry into matters relevant to fitness, would not necessarily be available. Furthermore, while there may be some argument about the probative value of past membership in the Communist Party *per se* as to fitness to practice law, there can hardly be any dispute about the pertinence and weight of retaining runners or financing plaintiffs in personal injury suits.

The importance of the instant case to Louisiana attorneys seems clear. The reasoning of the court seems as applicable in this state as in New York — an attorney cannot with impunity impede the progress of a judicial inquiry into matters relevant to his fitness to practice. Moreover, as a matter of state law, the attorney's situation in Louisiana is considerably weaker than was the attorney's in the instant case. The attorney could claim the broad New York privilege even though his answer might not incriminate him, if it might expose him to a penalty or forfeiture, *e.g.*, disbarment. Louisiana does not have such a "penalty or forfeiture" provision; thus it is doubtful that a Louisiana attorney could plead the privilege without either perjuring himself or being held in contempt.[22]

The court in the instant case indicated that the attorney was not disbarred for pleading the privilege against self-incrimination, but for violating his duty of full and frank disclosure arising from his relationship to the court. This would seem to amount to little more than a play on words. The fact is that he *was* disbarred for pleading the privilege, for it was that act which constituted the breach of duty. A more realistic approach is to say that when an attorney's privilege against self-incrimination collides directly with his duty as an attorney, he may be

22. An interesting analogy might serve to clarify the position of the court in relation to an attorney: suppose the court were to appoint a tutor for the administration of the affairs of a minor, and it were later suspected that the tutor had been mishandling the funds of the minor; if the court called the tutor before it, asking that he produce his records and testify as to his activities, and the tutor refused to answer on the grounds that such might tend to incriminate him, could it be contended with reason that the court would not be justified in relieving the tutor of his position? It seems not, and it is submitted that, on a somewhat more involved level, such was the problem before the court in the instant case.

forced to choose between the two. Either the privilege or the duty must yield, and it is preferable in balancing conflicting values to make inroads into the privilege than to abrogate the duty. It is submitted that the instant decision is not only justified, but necessitated by the high station of the attorney and his relationship to the courts. If attorneys are to retain the confidence of the public, they must conduct their affairs in a manner which would justify such confidence, or, failing to do so, be removed from the profession.

John Schwab II

CRIMINAL LAW — INSANITY — BURDEN OF PROOF

Defendant was charged with murder. As a defense defendant pleaded insanity at the time of the commission of the crime.[1] During the voir dire examination of prospective jurors, the trial judge sustained an objection by the state to a statement made by defense counsel concerning the degree of proof required where insanity is urged as a defense. In so doing, the judge stated: "[M]y idea is that the defense is required to prove insanity not only by a preponderance of evidence but beyond a reasonable doubt of *insanity,* not reasonable doubt of sanity."[2] (Emphasis added.) At the time this statement was made five jurors had been accepted, and four of the five then being examined eventually served. On appeal to the Louisiana Supreme Court, *held,* reversed. Where insanity is urged as a defense to a criminal charge the defendant need only prove his insanity by a preponderance of the evidence.[3] *State v. Stewart,* 117 So.2d 583 (La. 1960).

1. Defendant also pleaded present insanity, but the court did not consider this issue.

2. State v. Stewart, 117 So.2d 583, 584 (La. 1960).

3. In the instant case the Supreme Court stated that an erroneous statement of law made by the trial judge which is prejudicial vitiates the verdict and entitles the accused to a new trial even though the judge subsequently charges the correct law. State v. Langford, 133 La. 120, 62 So. 597 (1913) was cited by the court. In addition, the court stated that an erroneous instruction cannot be cured by another instruction unless the erroneous instruction is expressly admitted to be such and formally withdrawn from the jury by the trial judge, citing State v. Jones, 36 La. Ann. 204 (1884). It is interesting to note that in the instant case the judge instructed the jury erroneously in the charge as well as on the voir dire. The charge given was: "After you have weighed and given credit to the evidence on both sides of the question if you still entertain a reasonable doubt that this defendant is insane the defendant should be held by you to be sane." Record, vol. 7, p. 1989. A bill of exception was taken to parts of the instruction, but the bill did not include the above language. It would seem that had the language been included, the Supreme Court could have rested its decision on this more direct ground rather than on statements made by the judge on voir dire.