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Article 13

Freedom of Silence: Admission to the Bar

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So under the statute the mother's bequest could not be added to the son's trust and be administered as part of that trust even if it were in existence when he died. But under Section 231.47(2) even though the mother's bequest is not accepted, or the son's will is not admitted to probate within the period limited in Section 231.47(1) and the mother's will contained no alternate disposition of the property, her will shall be construed to create a trust upon the terms and conditions contained in the will of her son as of the date of her own death. As the son's will containing charitable bequests was not revoked as of the time of the mother's death, the mother's testamentary bequest would be valid under Section 231.47(2). Had the son revoked his will before his mother's death, the bequest by the mother would not have been valid under the statute because there would be no will of the son in existence at the time of the mother's death from which a trust could be construed.

A final analysis of Section 231.47 leads to the conclusions that this section controls devises and bequests to testamentary trusts and does away with the common law doctrine of incorporation by reference. Under the facts of the *Brandenburg* case a constructive trust will be invoked to sustain the mother's bequest only if the son has not revoked his will including charitable provisions before the mother's death; and if the son revokes his will before the mother's death, the mother's bequest will fall outside the protection of the statute.

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Constitutional Law—Freedom of Silence—Admission to the Bar: On May 6, 1957, the United States Supreme Court decided the first *Konigsberg v. State Bar of California* case.[1] Prior to that time Raphael Konigsberg, having successfully passed the California bar examination, had applied for certification for bar membership. Under California law the California Supreme Court may admit to the practice of law any applicant whose qualifications have been certified to it by the California Committee of Bar Examiners.[2] The Committee declined to certify Konigsberg on the ground that at the Committee hearings Konigsberg refused to answer questions relating to his membership in the Communist Party.[3] At the hearings he had stated unequivocally his disbelief in violent overthrow of government and had stated that he had never knowingly been a member of any organization which advocated such action. He further submitted witnesses to substantiate his good character. He would not, however, answer questions regarding his present or

[1] 353 U.S. 252 (1957).
[2] Cal. Bus. & Prof. Code 6064.
[3] No person may be certified "who advocates the overthrow of the Government of the United States or of this state by force, violence or other unconstitutional means." Cal. Bus. & Prof. Code 6064.1.

prior Communist Party affiliations. He even went as far as to deny he was ever a "Communist" in the philosophic sense, but steadfastly refused to respond to questions regarding Communist *Party ties.* He declared that inquiry into political organizations, or any organization for that matter, was beyond the scope of the Committee's authority.[4] The Committee declined certification because of his refusal to answer. The California Supreme Court refused review. The case proceeded to the United States Supreme Court on certiorari.[5] In that decision the Court decided that because Konigsberg had established a prima facie case of good character, the State's refusal to admit him to the bar was without rational support in the evidence and therefore offensive to the Due Process clause of the Fourteenth Amendment. The court did not determine whether his refusal to answer questions at the investigation to consider his qualifications could constitutionally afford an independent ground for exclusion from the bar. The decision to deny Konigsberg's petition by the California court was reversed and the case was remanded for further proceedings. The California Supreme Court then vacated its previous order denying review and referred the matter back to the Bar Committee. The Committee held more hearings and Konigsberg again refused to answer questions about his alleged membership in the Communist Party while offering evidence as to his good moral character and again declaring that he had at no time ever advocated violent overthrow of the government. The Committee again declined to certify him and the California Supreme Court again refused review.[6] Certiorari was granted to the United States Supreme Court.[7]

In an opinion written by Justice Harlan, the Court found in *Konigsberg v. State Bar of California,*—U.S.—, 81 Sup. Ct. 997 (1961), that an applicant for admission to the bar bears the burden of proof of "good moral character" and that the State was not precluded from asking any questions which might rebut the applicant's evidence of his good character.[8] The essence of the decision was that by refusing to answer the questions presented to him about prior Communist activity, Konigsberg had obstructed a full and complete investigation by the Committee and was rightfully denied admission to the bar.

Konigsberg's principal contention was that he was constitutionally justified in refusing to answer these questions because by ordering him to answer such questions his rights of freedom of speech and association under the First Amendment as embodied in the Fourteenth Amendment would be violated. In rejecting this contention, the Court reiterated the well-recognized principle that freedom of speech and as-

[4] *Supra* note 1, at 294.
[5] 351 U.S. 936 (1956).
[6] 52 Cal. 2d 769, 344 P. 2d 777 (1959).
[7] 362 U.S. 910 (1960).
[8] 81 S. Ct. 997, 1002 (1961).

sociation are not "absolute" freedoms.[9] The Court then mentioned two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk or remain silent. The first type of cases mentioned are those in which the now famous "clear and present danger" test had been used.[10] This test had been applied to situations where certain types of speech have been considered outside the constitutional protection because the utterances create a danger to the people of the United States. This test was not applied in the *Konigsberg* case because the Bar Committee's procedural rules were not aimed at outlawing or restricting a particular type of speech or association. Also, the Court did not rely on the "tendency" test as formulated in *Gitlow v. New York*[11] or the formula worked out in *Dennis v. United States*[12] because the Konigsberg situation dealt with "freedom of silence" rather than "freedom of speech."

The test that was applied in the case was one that has been labeled the "sliding-scale"[13] test or "balancing" test.[14] An excellent description of this test was laid down in *American Communication Ass'n v. Douds*.[15] In substance it states that when the effect of a regulation upon First Amendment liberties is relatively slight and the public interest to be protected is substantial, the public interest outweighs the partial loss of freedom and the regulation should be upheld. Although the *Douds* case was concerned with "dangerous speech," the test seems to be the same when the subject is "dangerous silence."[16] In the present case the Court weighed the loss of Konigsberg's freedom against the State's interest in having loyal and qualified individuals as attorneys and officers of the court and came to the conclusion that the State's interest outweighed the individual interest.[17] Thus, the Bar Committee was able to deny Konigsberg's petition to become a member of the California Bar.

It seems to follow from the case that if Konigsberg had admitted he had previously been a member of the Communist Party while offering a prima facie case of present non-advocacy of overthrow of the government, the Bar Committee would have been compelled to admit him. This is assuming, of course, that there was no other evidence that indicated he had current Communist ties. Apparently the sole ground for denying admission was that by refusing to answer the questions pre-

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[9] N.A.A.C.P. v. State of Alabama *ex rel.* Patterson, 357 U.S. 499, 460 (1958).
[10] Schenck v. U.S., 249 U.S. 47 (1919).
[11] 268 U.S. 652 (1958).
[12] 341 U.S. 494 (1951).
[13] Lusk, *The Present Status of the "Clear and Present Danger Test"—A Brief History and Some Observations,* 45 KY. L. J. 576, 600 (1957).
[14] Konigsberg v. State Bar of California, — U.S. —, 81 Sup. ct. 997, 1013 (1961).
[15] 339 U.S. 382, 399 (1950).
[16] Barenblatt v. United States, 360 U.S. 109, 126-127 (1959).
[17] Konigsberg v. State of California, *supra* note 14, at 1007-1008.

sented, he thwarted the Committee's investigation of his "good moral character."[18]

Justice Black wrote a strong dissent which exemplified his long standing position in the area of free speech.[19] The basis of his opinion is that he feels the Bill of Rights is being "balanced" right out of existence.[20] His thought is that the "clear and present danger" test is itself too restrictive of individual freedom and, of course, the "balancing" test is objectionable because it further restricts freedom of speech or silence. He suggests that the Court abandon any or all such tests and interpret the First Amendment literally. It appears that if the Court were to follow Justice Black's philosophy on the matter, freedom of speech or silence would become "absolutes" or "near-absolutes."

It is doubtful if the *Konigsberg* decision had any real impact on the case law concerning restrictions on freedom of remaining silent except to reiterate the Court's position.[21] However, the decision does make it clear that admission to a state bar is considered of sufficient public interest to make the "balancing" test applicable to procedure for admission. The case also points out that past membership in the Communist Party is not sufficient per se to exclude an individual from a state bar. The regulating group of the bar association must, however, be free to consider all available information before determining whether the applicant is presently a member of a subversive organization or advocates overthrow of the United States Government by force. This includes an opportunity to weigh any information which the applicant possesses.

An interesting case was decided by the New Jersey Supreme Court subsequent to the *Konigsberg* decision. The facts in *Lowenstein v. Newark Board of Education,* 35 N.J. 94, 171 A. 2d 265 (1961), are very similar to the main case except that the individual involved was engaged in teaching rather than aspiring to practice law. This case was the culmination of litigation beginning in 1957.[22] The Newark Board of Education had dismissed Lowenstein because he refused to answer questions pertaining to his Communist Party activities before 1953. He answered questions presented by the Board pertinent to conduct from

[18] The Court also rejected Konigsberg's contention that the California procedural rule was unconstitutional because the burden of proof was shifted back to the applicant after he had made out a prima facie case of good moral character. The Court's determination was that the burden of producing substantial evidence on the issue of advocacy was not upon Konigsberg but upon the Committee. See *supra* note 8, at 1009.

[19] With whom Chief Justice Warren, and Mr. Justice Douglas concur. Mr. Justice Brennan wrote a separate dissenting opinion joined by Chief Justice Warren.

[20] Konigsberg v. State Bar of California, *supra* note 14, at 1012.

[21] Beilan v. Board of Public Education, 357 U.S. 399 (1958).

[22] Prior occasions before the New Jersey Supreme Court are reported in Laba v. Newark Board of Education, 23 N.J. 364, 129 A. 2d 273 (1957) and Lowenstein v. Newark Board of Education, 33 N.J. 277, 163 A. 2d 156 (1960).

the present to 1953 but would not answer anything regarding his activities beyond that year. In its most recent remand the New Jersey Supreme Court stated that the Board of Education could inquire into Lowenstein's past Communist ties only if they doubted his present Communist affiliations. The Board then repeated their questioning as to his ties with the Communist Party before 1953, apparently because they doubted his present Party membership. Again Lowenstein refused to answer these questions giving 1953 as the cutoff date beyond which he would give no answers. Lowenstein did, however, make certain replies and offered evidence intended to establish present loyalty. The Board nevertheless again dismissed him. The New Jersey Court then reversed this dismissal on the ground that the answers given by Lowenstein were not enough to engender doubts as to his present loyalty. The court's determination of this question is somewhat difficult to understand because whether the Board had honest doubts is something which only the Board itself could decide and the Court, in effect, stated that the Board should have no doubts because the Court had no doubts. This position seems inconsistent with the prior remand.

The *Lowenstein* decision is certainly not consistent with the *Konigsberg* ruling although there is a possibility that the Court based its holding on the fact that two members of the Board who voted for dismissal grounded their vote on facts unrelated to the teacher's advocacy or non-advocacy of overthrow of the government.[23] The dissent in the case cited the *Konigsberg* decision and felt that the Board was justified in its dismissal because of the failure to answer the questions.[24]

In conclusion, the writer feels that the majority in the *Konigsberg* decision was correct. The United States of America should be allowed to protect its national security from subversive organizations even though by doing so there is a partial restriction on our freedom to remain silent. The undermining influence that is recognized as the Communist conspiracy should not be aided by the courts of a nation in which a change of government may be accomplished through the peaceable means of democratic elections. It should be kept in mind that there is always a danger that the Court will become too militant in restricting freedoms and not "weigh" the conflicting dangers accurately. However, this possible consequence is quite remote as the United States Supreme Court is very much aware of the dangers in restricting individual liberty when it is not vital to the public interest to do so.

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[23] One member voted for dismissal because he had grave doubts as to whether Lowenstein was "a normal American teacher." A second member voting to dismiss stated that he was not going to base his decision on legal technicalities but rather on the moral issues involved. 171 A. 2d 265, 276 (1961).

[24] *Id.* at 293.