Michigan Law Review

Volume 33 | Issue 6

1935

ATTORNEY AND CLIENT-APPROPRIATE PENALTY FOR EMBEZZLEMENT AS EXECUTOR

RECENT DECISIONS

ATTORNEY AND CLIENT — APPROPRIATE PENALTY FOR EMBEZZLEMENT AS EXECUTOR — An attorney over a period of two years converted for his own purposes $12,500 from two estates of which he was executor. Although the Chicago Bar Association Committee on Grievances recommended disbarment it was *held*, three justices dissenting, that defendant should be suspended for two years and until complete restitution was made. *In re Borchardt*, (Ill. 1934) 192 N. E. 383.

It is surprising, not that many cases may be found in the last few years of conversion by attorneys of funds entrusted to them, but that with the many opportunities and temptations a lawyer faces such instances are not even more numerous. Although in the instant case the money converted was not received by the accused in his professional capacity as attorney but rather as trustee, this would seem to make no difference where the misconduct shows untrustworthiness,[1] especially in view of the oft-repeated purpose of disbarment to protect the public and uphold the integrity of the bar rather than to punish the individual.[2] The real issue is rather whether disbarment or suspension is the proper judgment, and these conversion cases indicate various factors which may (though not necessarily) tend to mitigate the penalty.[3] The most important are frankness in answering the charge,[4] which seems to be a *sine qua non* to clemency, and restitution of the money appropriated.[5] Other factors which may enter in are the size of the amount involved,[6] ratification of the taking by the injured party,[7] the

[1] In re Hoffecker, (Del. Ch. 1905) 60 Atl. 981; In re Waleen, 190 Minn. 13, 250 N. W. 798 (1933); In re Stauning, 190 Minn. 405, 252 N. W. 84 (1933); In re Sanitary Dist. of Chicago Attorneys, 351 Ill. 206, 184 N. E. 332 (1932); Grievance Committe Hartford County Bar v. Broder, 112 Conn. 263, 152 Atl. 292 (1930); 9 A. L. R. 189, 193 (1920); 43 A. L. R. 54 at 77 (1926); 43 A. L. R. 107 (1926).

[2] State v. Goldman, (Neb. 1934) 255 N. W. 32; State v. Priest, 123 Neb. 241, 242 N. W. 433 (1932); In re Nelson, 51 S. D. 451, 214 N. W. 808 (1927); McIntosh v. State Bar of California, 211 Cal. 261, 294 Pac. 1067 (1930).

[3] For a general discussion see 43 A. L. R. 54 (1926).

[4] In re Nelson, 51 S. D. 451, 214 N. W. 808 (1927); In re Disbarment of Smith, 183 Minn. 220, 236 N. W. 324 (1931); In re Shoemake, (Okla. 1934) 31 Pac. (2d) 928; Matter of Porcella, 241 App. Div. 344, 272 N. Y. S. 285 (1934); In re Kohler, 240 App. Div. 501, 270 N. Y. S. 634 (1934); Matter of Siegel, 238 App. Div. 744, 265 N. Y. S. 497 (1933); but see In re Westphal, 184 Minn. 28, 237 N. W. 598 (1931).

[5] In re Nelson, 51 S. D. 451, 214 N. W. 808 (1927); In re Shoemake, (Okla. 1934) 31 Pac. (2d) 928; In re Sampley, 160 Wash. 92, 294 Pac. 1118 (1930); Matter of Treadwell, 236 App. Div. 562, 260 N. Y. S. 264 (1932); 43 A. L. R. 54 at 75 (1926). But restitution is no defense to disbarment, People ex rel. v. Hansen, 352 Ill. 144, 185 N. E. 225 (1933); In re Royall, 34 N. M. 554, 286 Pac. 156 (1930); In re Manahan, 186 Minn. 98, 242 N. W. 548 (1932); the reason being that payment does not prove moral character, 43 A. L. R. 54 at 66 (1926).

[6] State v. Kuenzli, 212 Wis. 296, 249 N. W. 511 (1933); but see Matter of Stern, 120 App. Div. 375, 105 N. Y. S. 199 (1907).

[7] Matter of Kohler, 240 App. Div. 501, 270 N. Y. S. 634 (1934); but see

previous good record of the attorney,[8] his age,[9] his poverty and lack of funds,[10] and delay in bringing the charge.[11] As the court in the instant case suggests, the general rule as to disbarment is a flexible one with each case being decided on its own merits;[12] yet a survey of the cases indicates that the courts perhaps have been too reluctant to impose disbarment, and that the high caliber, integrity, and trustworthiness of the bar would be better upheld if the courts were less prone to give effect to the so-called mitigating features. It is submitted that the instant case is an excellent example of this, the court feeling that, in spite of the flagrant misconduct of conversion of $12,500, disbarment was too harsh in view of the attorney's frankness concerning his wrongdoing, his previous lengthy good record at the bar, and a partially executed restitution plan guaranteed by his friends.

G. W. D.

People ex rel. Colorado Bar Ass'n v. Hillyer, 88 Colo. 428, 297 Pac. 1004 (1931).

[8] Mills v. State Bar, 211 Cal. 579, 296 Pac. 280 (1931); State v. Kuenzli, 212 Wis. 296, 249 N. W. 511 (1933); Matter of Cusack, 222 App. Div. 624, 227 N. Y. S. 187 (1928); Matter of Powers, 235 App. Div. 382, 257 N. Y. S. 113 (1932); In re Zahn, 356 Ill. 283, 190 N. E. 419 (1934).

[9] In re Johnson, (Okla. 1934) 33 Pac. (2d) 189.

[10] Matter of Mulry, 234 App. Div. 404, 255 N. Y. S. 249 (1932); Matter of Carroll, 231 App. Div. 623, 248 N. Y. S. 363 (1931); Matter of Cusack, 222 App. Div. 624, 227 N. Y. S. 187 (1928); In re Disbarment of Smith, 184 Minn. 87, 237 N. W. 877 (1931); but that it is no defense, Matter of Campbell, 236 App. Div. 429, 260 N. Y. S. 80 (1932); In re Fitz Gibbons, 182 Minn. 373, 234 N. W. 637 (1931); In re Zahn, 356 Ill. 283, 190 N. E. 419 (1934).

[11] State ex rel. Multnomah Bar Ass'n v. Tarpley, 122 Ore. 479, 259 Pac. 783 (1927); but see In re Disbarment of Moerke, 184 Minn. 314, 238 N. W. 690 (1931).

[12] State ex rel. Multnomah Bar Ass'n v. Tarpley, 122 Ore. 479, 259 Pac. 783 (1927); 6 C. J. 612.