Michigan Law Review

Volume 33 | Issue 8

1935

CONSTITUTIONAL LAW - REINSTATEMENT OF ATTORNEY - CONSTITUTIONALITY OF PARDON STATUTE - LEGISLATIVE ENCROACHMENT ON JUDICIAL POWER

CONSTITUTIONAL LAW — REINSTATEMENT OF ATTORNEY — CONSTITUTIONALITY OF PARDON STATUTE — LEGISLATIVE ENCROACHMENT ON JUDICIAL POWER—In proceedings based on the record of his conviction for attempted extortion, the petitioner was disbarred.[1] Having received a full pardon from the governor, he sought reinstatement, relying on a statute which purported to make reinstatement mandatory on the court upon proof of the pardon.[2] *Held*, the statute is unconstitutional in so far as it directs the court to reinstate a disbarred attorney without a showing of moral rehabilitation. It is an encroachment by the legislature upon the inherent power of the court to admit attorneys to practice and in effect vacates a judicial order by legislative mandate. *In re Lavine*, (Cal. 1935) 41 Pac. (2d) 161.

That an application for reinstatement of a disbarred attorney must be treated as an application for admission to practice and not as an application to vacate the disbarment order is well established by the authorities.[3] Any other view

[1] Cal. Code Civ. Proc. (Deering 1931), sec. 299.

[2] Cal. Stats. (1933), p. 2476, sec. 1; Cal. Code (Deering Supp. 1933), Act 1908a.

[3] Danford v. Superior Court, 49 Cal. App. 303, 193 Pac. 272 (1920); Matter

would come into conflict with the recognized constitutional principle that the legislature cannot annul or set aside the judgment of a court of competent jurisdiction.[4] The question then is squarely raised as to the respective powers of the legislature and the courts in controlling admission to the bar.[5] The traditional position here is that crystallization of the doctrine of separation of powers in our federal and state constitutions has vested in the courts the power, historically exercised at common law, of determining who should be admitted to practice.[6] While there is but scant authority directly denying this proposition,[7] the cases affirming it are themselves divided. A few seem to suggest that the legislature has no power of control whatever;[8] the majority, along with the principal case, take the position that the courts should defer to reasonable minimum regulations by the legislature but that they should not allow themselves to become circumscribed and should always remain free to impose additional requirements.[9] The

of Kaufmann, 213 App. Div. 555, 211 N. Y. S. 256 (1925); Matter of Lindheim, 213 App. Div. 560, 211 N. Y. S. 261 (1925); People ex rel. Colorado Bar Ass'n v. Lindsey, 93 Colo. 41, 23 Pac. (2d) 118 (1933); In re Newton, 27 Mont. 182, 70 Pac. 510, 982 (1902); In re Fleming, 36 N. M. 93, 8 Pac. (2d) 1063 (1932); Ex parte Marshall, 165 Miss. 523, 147 So. 791 (1933). But as to re-examination on the law, see In re Stevens, 197 Cal. 408, 241 Pac. 88 (1925). The major consideration is present moral character. Kepler v. State Bar, 216 Cal. 52, 13 Pac. (2d) 509 (1932). Generally it is held that mere formal proof of good moral character as required on original application is not sufficient for an application for reinstatement. Kepler v. State Bar, supra; State ex rel. Spillman v. Priest, 123 Neb. 241, 242 N. W. 433 (1932).

[4] FEDERALIST, No. XLVII; 6 R. C. L. 162 (1915); State of Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. (59 U. S.) 421 at 431, 15 L. ed. 435 (1855); Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903) (cases collected).

[5] Discussion on this question applies with equal force to the logically co-relative power of disbarment.

[6] Bruce, "The Judicial Prerogative and Admission to the Bar," 19 ILL. L. REV. 1 (1924); Cheadle, "Inherent Power of the Judiciary over Admittance to the Bar," 7 WASH. L. REV. 318 (1932); Green, "The Courts' Power over Admission and Disbarment," 4 TEX. L. REV. 1 (1925).

[7] All of the cases so holding seem to be founded on In re Cooper, 22 N. Y. 67 (1860). This case has been severely criticized, and inroads upon it have been made by later New York cases. (13 HARV. L. REV. 233 (1899); People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 (1928). But see In re Saddler, 35 Okla. 510, 130 Pac. 906 (1913); In re Eaton, 4 N. D. 514, 62 N. W. 597 (1895); and In re Applicants for License, 143 N. C. 1, 55 S. E. 635 (1906). After the decision of the latter case the legislature restored the power to the courts. COSTIGAN, CASES ON LEGAL ETHICS 38, n. 9 (1917), quoting CARTER, ETHICS OF THE LEGAL PROFESSION 22, 23 (1915).

[8] The leading case supporting this view is In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899). See also In re Branch, 70 N. J. L. 537, 576, 57 Atl. 431 (1904); Splane's Petition, 123 Pa. 527, 16 Atl. 481 (1889), overruled by Case of Olmsted, 292 Pa. 96, 140 Atl. 634 (1928).

[9] Case of Olmsted, 292 Pa. 96, 140 Atl. 634 (1928); In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932), noted in 10 N. Y. UNIV. L. Q. REV. 214 (1932); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re Chapelle,

latter view, in addition to being theoretically sound, has the merit of holding forth the most promise for elevating the bar to a higher standard. It gives effect to the progressive features of legislation while nullifying those which would tend to detract from existing standards, and allows the courts at the same time to proceed in the making of regulations on their own initiative. The difficulty with exclusive control by the courts has not been in what the courts have done but rather in what they have failed to do.[10] There seems to be no good reason why the legislature should not be free to formulate regulations for the admission of attorneys to the bar so long as the courts reserve a supervisory control. Reform, regardless of the source from which it emanates, is welcome. But the principal case hardly falls in the category of reform. The statute there sought to be supported tends to relax the all-important requirement of sound moral character. The California court is to be commended for striking it down.[11]

M. F. A. H.

71 Cal. App. 129, 234 Pac. 906 (1925); Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); 66 A. L. R. 1512 (1930).

[10] Beardsley, "The Judicial Claim to Inherent Power over the Bar," 19 A. B. A. J. 509 (1933). Compare 10 N. Y. UNIV. L. Q. REV. 214 at 220, n. 69 (1932).

[11] Recent re-awakening of thought relative to the historical rule-making power of the courts, which in America has been so largely usurped by legislatures, presents a problem analogous to the one discussed above. See Sunderland, "The Exercise of the Rule-Making Power," 12 A. B. A. J. 548 (1926); Pound, "The Rule-Making Power of the Courts," 12 A. B. A. J. 599 (1926).