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NOTES

THE INHERENT POWER OF THE COURTS IN REGARD TO ADMISSION AND DISBARMENT OF ATTORNEYS

Harrison v *Commonwealth* ex rel. *Kash*,[1] instituted in the Circuit Court by a bill of information filed by the Commonwealth's Attorney, was a proceeding to disbar one Allen Harrison of Jackson County from the practice of law.

Harrison claimed that he took the bar examination in 1918 when seventeen or eighteen years of age, and that he procured a certificate from the County Judge of Jackson County stating he was twenty-one years old. The license was not produced and apparently did not exist. Apparently he did not practice law until after 1930. The trial court found that the purported certificate of the County Judge of Jackson County was forged. The Court of Appeals affirmed stating there were facts " more than sufficient to support the finding of the chancellor that the certificate was forged."[2]

In defense Harrison contended that under Section 484 of the *Code*[3] a proceeding such as this could not be instituted by the Commonwealth's Attorney He further contended that the revocation of his license was barred by a statute which provided that the Court of Appeals might revoke any license procured by fraud within two years from the date it was issued.[4]

As regards the first defense the court said

> "Obviously there is no merit in this contention because it is immaterial who raises the question as to an attorney's qualifications once the machinery of investigation is set in motion."[5]

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[1] 305 Ky 379, 385, 204 S.W 2d 221, 224 (1947).
[2] *Id.* at 385, 204 S.W 2d at 224.
[3] KENTUCKY CODES (Carroll, 1938)
"Commonwealth attorney· when to institute action. It shall be the duty of the several Commonwealth attorneys to institute the actions mentioned in this chapter against usurpers of county offices or franchises, if no other person be entitled thereto, or if the person entitled fail to institute the same during three months after the usurpation."
[4] K. R. S. 30.080 (1944) repealed by the General Assembly in 1946 (Acts 1946, Ch. 207, Sec. 4).
[5] 305 Ky. 379, 380, 204 S.W 2d 221, 222 (1947) Note also *In re* Gilbert, 274 Ky 187, 118 S.W 2d 535 (1938).

Interestingly enough, Kentucky is the only state that has gone so far as to say that it is immaterial who raises the question as to an attorney's qualifications, despite the fact that the Court recognized and commented upon the fact that this action originated as a direct result of personal political enmity between the defendant and others in his home county[6] Courts in other

[6] The following advertisement entitled "Notice of Disbarment" which appeared on the first page of The Jackson County Sun on October 10, 1947, indicates somewhat the extent of this enmity·

"I take this method of notifying my friends and Clients, that I have been permanently disbarred from practicing law, and at the same time I want to thank all of the people that trusted your important law suits to my hands and care.

"I carried locust posts on my shoulder from ground that was so rough that I couldn't get a mule or horse to, and loaded them on my wagon and then hauled and loaded them on a car at Panola in Madison County to pay my way in a study of law by Correspondence.

"The procedure to disbar me was instituted by Hector Johnson, the man that was arrested once or twice for adultery and placed in Jail, also the man that stood on the streets of McKee and argued for Germany against the United States while your boys was in fox holes and losing their lives in that combat, a man that has argued there is no hell and has been heard to say that it was alright for men and women to commit adultery a man that I saw H. L. Minter, when he was County Superintendent, exclude from a teachers examination because he had confessed to a lie bill, the same Heck that hired Ernest Gabbord to build fires for him 25 mornings while teaching school and gave him a cold check and never would pay it.

"The proof shows that Farris Morris, Hon. Joe Pence, John Fowler, and others made up money to help carry on the procedure. I don't know what they think, but I believe that the people of this county would think as much of Joe if he had took the money that he paid to disbar me and paid the officers of the election that he has been owing so long, which amounts to several hundred dollars and which was allowed him for that very purpose. You people that hold these claims know what I am speaking about.

"It cost me around $400.00 to defend that action, all of which was taken from those little white headed boys that treat you so friendly when you see them in McKee, and by so doing it caused them to go all last winter without any underwear, and it was the fruits of Joe Pence, Farris Morris, John Fowler, and J. R. Llewellyn, another man that came here to get law licenses because he had never took any schooling and couldn't be admitted in a state that required it. I want to submit on its merits to the upright and sober minded people of Jackson County for your consideration.

"I have been asked many times what I was going to do for a living and so far I have never said, but I will tell you something that I won't do by the help of God. I will never run a pool room or furnish anybody a room to run one in, neither will I insist on the building of a ball park for any purpose, and I never will be a sheriff that has been hauled in town so drunk that I didn't know where I

jurisdictions have held that such an action can be brought by the State Bar Association,[7] by other attorneys,[8] by bill of information,[9] and by any person who has knowledge of the facts,[10] and courts have instituted the proceedings as well.[11] In Kentucky such proceedings have been instituted by all the above and by County Bar Associations.[12]

In answer to the second defense the Court of Appeals pointed out that since the "license was forged a license was never issued to defendant and therefore does not come under this section of the statutes.[13] In addition the court went further and said

> "However, since an attorney is an officer of the court, the court has the inherent power to investigate and punish a member of the bar who has been found to be guilty of unprofessional conduct meriting censure, suspension or disbarment. There can be no limitation on this right and duty of the courts."[14]

In most cases the unlimited character of the court's power

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was at and then arrest my neighbor's boys and World War veterans for being intoxicated or because their breath smelt.

"I am satisfied that the Christian people of Jackson County has lost more sleep over the pool room that has been run in Farris' own building and it has caused as many boys to be put in jail, and as many heartaches as all the law that I ever practiced in my life.

"There is still one consolation in my law knowledge and that is this: That I can still law for myself and for my infant children and the grand jury is wide open at this time, and if any of those men want to law me for false statements I will not have to hire Heck or Llewellyn to defend me.

ALLEN HARRISON.—Adv"

[7] State Bar v Riccardi, 53 Nev. 128, 294 Pac. 537 (1931)

[8] People v Class, 70 Colo. 381, 201 Pac. 883 (1921).

[9] State *ex. rel.* McCormick v Winton, 11 Ore. 456, 5 Pac. 337 (1895).

[10] People v Chamberlain, 242 Ill. 260, 89 N.E. 994 (1909).

[11] Maginnis' Case, 269 Pa. 185, 112 Atl. 555 (1921).

[12] *In re* Gilbert, 274 Ky 187, 118 S.W 2d 535 (1938) Lenihan v. Commonwealth, 165 Ky 93, 176 S.W 948 (1915) Commonwealth v. Roe, 129 Ky 650, 112 S.W 683 (1908) Nelson v. Commonwealth, 128 Ky. 779, 109 S.W 337 (1908) Underwood v. Commonwealth, 32 Ky. L.R. 32, 105 S.W 151 (1907) Commonwealth v Ritchie, 114 Ky. 306, 70 S.W 1054, 24 Ky L.R. 1218 (1902) Baker v Commonwealth, 73 Ky (10 Bush) 592 (1874), Walker v Commonwealth, 71 Ky. (8 Bush) 86 (1821) Turner v Commonwealth, 2 Metc. 619 (1859) Rice v. Commonwealth, 57 Ky. (18 B. Mon.) 472 (1857)

[13] 305 Ky. 379, 204 S.W 2d 221 (1947).

[14] *Id.* at 380, 204 S.W 2d at 222.

is described differently[15] Justice Nelson speaking for the United States Supreme Court in *Ex Parte Bradley* expressed the general view as follows

> "We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein."[16]

One might well ask from whence comes this power. It has been maintained that the source of the court's power over attorneys is the statute 4 Henry 4, c. 18 (1402) which provides for the admission of attorneys to the practice of law.[17] Whatever the

[15] Bradley v Fisher, 80 U.S. (13 Wall) 335, 20 L. Ed 652 (1871) *Ex Parte* Burr, 2 Cranch (C.C.) 379, Fed. Cas. No. 2186 (1823) Cohen v. Wright, 22 Cal. 293 (1863), People v Goodrich, 79 Ill. 148 (1875), Rice v. Commonwealth, 57 Ky (18 B. Mon.) 472 (1857), Manning v French, 149 Mass. 391, 21 N.E. 945 (1889), State v. Laughlin, 73 Mo. 443 (1881) Matter of Cooper, 22 N.Y. 67 (1860) *In re* Swadever, 5 Ohio Dec. 598 (1895), Austin's Case, 5 Rawle, (Pa.) 191, 28 Am. Dec. 657 (1835), Matter of Lansbuth, 18 Wash. 478, 51 Pac. 1071 (1898) *In re* Currie, 25 Grant Ch. (UC) 338 (1878) Rex. v. Bach, 9 Price 349, 147 Eng. Rep. R. 115 (1821), *Ex Parte* Brounsall, 2 Cowp. 829, 98 Eng. Rep. R. 1385 (1778).

[16] *Ex Parte* Bradley, 74 U.S. (7 Wall) 364, 374 (1868).

[17] 4 Henry 4, c. 18: "Item, For sundry Damages and Mischiefs that have ensued before this Time to divers Persons of the Realm by a great number of attornies, ignorant and not learned in the Law, as they were wont to be before this Time; it is ordained and stablished, That all the attornies shall be examined by the Justice, and by their Discretions their Names put in the Roll, and they that be of good and virtuous, and of good Fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign Country; and the other attornies shall be put out by the Discretion of the said Justice; and that their Masters, for whom they were attornies, be warned to take others in their places for that in the mean time no Damage nor Prejudice come to their said Masters. And if any of the said attornies do die or do cease, the Justices for the time being by their Discretion shall make another in his Place, which is a virtuous Man and learned, and sworn in the same Manner as afore is said, and if any such attorney be hereafter notoriously found in any Default of Record, or otherwise, he shall forswear the court, and never be received to make any Suit in any Court of the King. And that this Ordinance be holden in the Exchequer after the Discretion of the Treasurer, and of the Barons there."

Note the comment of the Tennessee Court on this statute and its effect in Calvin M. Smith v The State of Tennessee, 1 Yerg, 228, 229 (Tenn. 1898), "Much inquiry has been made into the powers of the courts to remove attorneys; if the old statute of H. 4, had been examined, that which has been searched for, and found obscurely hinted at in so many authors, could have been found in a short paragraph; the statute first provides that all who are of good fame shall be put upon the roll, after examination of the Justices, at their dis-

source, it is clear that the courts in America have long recognized and used this power, considering it a power of the courts so essential to their proper function as would defeat their purpose and authority were it not vested in them.[18]

Most of the courts undoubtedly feel that such power, being inherent, does not contravene either the United States Constitution or the constitution of the state, though only a few have so stated.[19] The Iowa Court has taken a definite stand on this however and said "And the suspension or cancellation of his license by a court exercising its inherent or statutory authority is not in contravention of any of the provisions of the Constitution of the United States or of this state."[20] Under our system of separation of governmental powers if the officers of one branch are allowed power over another branch the purpose of the constitutional provision is utterly defeated.[21]

Possibly the defendant here would have presented another defense had he contended that the court could not disbar him since he had never actually been licensed to practice law, and that not being an attorney, the court had no jurisdiction over him as an officer of the court. Actually the defendant was not

cretion. and after being sworn well and truly to serve in their offices; and if any such attorney be hereafter notoriously found in any default, of record, *or otherwise,* he shall forswear the court, and never after be received to make any suit in any court of the King. They that be good and virtuous, and of good fame shall be received and sworn at the discretion of the justices; and if they are notoriously in default, at discretion, may be removed upon evidence either of record, or not of record."

"This statute has received the sanction of four centuries, without alteration, and almost without addition; governing a profession more numerous and powerful (when applied to counsel also, as in most of the United States) than any known to the history of the world, without complaint of its provisions, or abuse of power on the part of the court, in its exercise, so far as the judicial history of England or America furnishes instances. It is remarkable that there is not a provision in any act of assembly of Tennessee upon the subject, but what is in strict affluance of it; nor does a single provision go beyond it; our statutes require that the attorney shall be of good moral character, learned, and of capable mind. A loss of either of these, is good ground for withdrawing the privileges conferred by the license."

[18] *See In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932)

[19] *In re* Cate, 273 Pac. 617 (Cal. 1928)

[20] *In re* Cloud, 217 Iowa 3, 250 N.W 160, 163 (1933).

[21] Myers v United States, 272 U.S. 52, 71 L.Ed. 60, 47 S. Ct. 21 (1926).

authorized to practice law. This fact raises the question, "Does the court have inherent power to proceed against a person who under the guise of an attorney, is guilty of the unauthorized practice of law?"

To answer that question we must first determine whether the courts have the inherent power to control the admission of persons to the practice of law. Once it is agreed that a court can control the admission of persons to the practice of law we have no great difficulty in holding that since Harrison voluntarily placed himself under the power of the court by representing himself to be a duly licensed attorney he is thereby estopped from denying the jurisdiction of the court.

If the statute of Henry 4 [22] is conceded to be the source of the court's inherent power over attorneys certainly it should be clear that it is also the source of the court's power to control the admission of persons to the practice of law, and that such a power is also inherent.[23]

This leaves only the question whether power that is inherent in the courts can be regulated by the legislature. In Webster's *New International* Dictionary, 2d ed., the word "inherent" is defined as, " 2. involved in the constitution or essential character of anything, belonging by nature or settled habit, inalienable, as inherent rights or powers " Under this definition of inherent power as inalienable, the power to control the admission of persons to the practice of law and to control attorneys could not be exercised by any other body except the courts without defeating completely the essential function of the judiciary and making the judiciary subservient to another branch of government in open violation of the United States Constitution and the state constitutions. However, one court considers itself bound by the statutes. In re Applicants for License the North Carolina Court said

> "From the existence of these two admitted and well established principles we draw the conclusion that when a Legislature, by positive enactment, has prescribed the qualifications required to enable one to enter the legal profession, and a citizen presents himself for examination and is shown to possess these qualifi-

[22] 4 Henry 4, c. 18 (1402)
[23] Smith v. Tennessee, 1 Yerg, 228 (Tenn. 1898)

> cations, the courts must admit him to the practice of the law. We exercise our judicial functions in determining whether the applicant possesses the required qualifications, and here our power in the premises ends. To hold, as we are requested to do here, that, when a Legislature has acted and established the qualifications which shall be required, the court can go on and superadd others, would, in effect, destroy the right admitted to be in the Legislature and uphold the court in the exercise of legislative power."[24]

Apparently no other court has gone so far as the North Carolina Court in holding that the legislature has such a right, though some courts are rather vague on that point.[25] However, most courts deny the power of the legislature to control the admission or disbarment of attorneys,[26] Kentucky certainly being among this group as far as disbarment is concerned.[27]

The North Carolina decision suggests that the legislatures under their police powers have the power to control attorneys as well as the admission of persons to the practice of law. This issue has been decided by the California District Court of Appeals which said "Paragraph (3) [of the petition for rehearing] is to the effect that the Legislature, in the exercise of the police power, may prescribe reasonable rules and regulations for admission to the bar, to which the courts must conform. This statement, we think, is erroneous."[28]

There are, no doubt, those who would contend that where the courts have failed to exercise their inherent power to adequately protect the legal profession and the public generally the legislature not only could, but should, assert their police power to meet the situation. To those, however, Justice Craig in his concurring opinion in *In re Cate* directed these remarks

> "Our courts have been slow, perhaps neglectful, in the exercise of their authority in this behalf. Their failure to act may even have invited the Legislature

[24] 143 N.C. 1, 55 S.E. 635, 636 (1906)

[25] State *ex rel.* McCormick v. Winton, 11 Ore. 456, 5 Pac. 337 (1885) *In re* Daugherty, 103 W Va. 7, 136 S.E. 402 (1927).

[26] *Ex Parte* Wall. 107 U.S. 265, 27 L.Ed. 552, 2 Sup. Ct. 509, (1882) People v. Ford, 54 Ill. 520 (1870), *In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932) In The Matter of Mills, 1 Mich. (1 Man.) 392 (1850) *In re* Shoemake, 168 Okla. 77, 31 P 2d 928 (1934) *In re* Burton, 67 Utah 118, 246 Pac. 188 (1926).

[27] Harrison v Commonwealth *ex rel.* Kash, 305 Ky. 379, 204 S.W 2d 221 (1947).

[28] *In re* Cate, 273 Pac. 617, 619 (Cal. 1928)

> to take action amounting to an attempt to take over the performance of this judicial duty, but this fact, if it be one, cannot effect in the slightest degree the constitutional apportionment of the separate governmental functions."[29]

Thus in regard to attorneys it is seen that courts have inherent power to control (1) the admission of persons to the practice of law, (2) attorneys, and (3) those who in the guise of attorneys engage in the unauthorized practice of law. While Kentucky takes a firm stand on the power of the courts to control the admission and disbarment of attorneys she takes the only stand consistent with the proper separation of powers as provided for by the Constitution of the United States and the Constitution of the Commonwealth of Kentucky,[30] which is the same power recognized by the common law for the past several hundred years as well.

J PELHAM JOHNSTON

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[29] 273 Pac. 617, 625 (1928).
[30] Secs. 27 and 28.