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Constitutionality of the Incorporated Bar Act

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CONSTITUTIONALITY OF THE INCORPORATED BAR ACT

The Kentucky Legislature conferred authority upon the Court of Appeals to promulgate rules of practice or procedure for disciplining attorneys.1 In pursuance of this authority the Court created a board to hear complaints against members of the bar. This board heard charges against the defendant and made recommendations to the Court of Appeals. Two constitutional grounds of defense to action by the Court were urged; (1) The Court of Appeals has appellate jurisdiction only,2 and (2) The statute provides for an unconstitutional delegation of legislative power to the judiciary.3 The Court of Appeals refused to sustain these defenses and acted upon the recommendations of the board.4

The theory of “inherent judicial power” upon which the Court bases the exception of disbarment proceedings to the constitutional provision giving the Court appellate jurisdiction only, may be supported by numerous decisions in other jurisdictions.5 In these cases, however, a similar constitutional provision was not in issue and the principle invoked by the Kentucky Court was announced in support of other contentions.

The Missouri Court, with a dissenting opinion, reluctantly assumed jurisdiction to disbar under a similar constitutional provision.6 This decision was based entirely on the ground of stare decisis. This construction was modified in Virginia where it was held that the Court of Appeals did not have jurisdiction to absolutely disbar in an original proceeding where the offense was not committed against that Court, and added that the inherent power to disbar extends only as to practice in the court pronouncing judgment.7 The Kentucky Court expressly refused to accept this distinction.

2 Ky. Const., Sec. 110.
3 Ibid., Sec. 28.
5 In re Haddad, 106 Vt. 322, 173 Atl. 103 (1934); State v. Cannon, 196 Wis. 534, 221 N. W. 603 (1923); in re Hansen, —Mont.—, 54 Pac. (2d) 882 (1936); in re Mayberry, —Mass.—, 3 N. E. (2d) 248 (1936); in re Brown, —S. D.—, 264 N. W. 521 (1936); in re Egan, 22 S. D. 355, 117 N. W. 874 (1908); in re Royall, 34 N. Mex. 554, 286 Pac. 156 (1930); in re Wolfe’s Disbarment, 228 Pa. 331, 135 Atl. 732 (1927); Payne v. State, —Ga.—, 133 S. E. 633 (1936).
6 In re Sizer, 300 Mo. 369, 254 S. W. 82 (1923). See also, in re Richards, 333 Mo. 907, 63 S. W. (2d) 972 (1933).
7 Legal Club of Lynchburg v. Light, 137 Va. 249, 119 S. E. 56 (1923).
The Arizona Court held that it had jurisdiction in an original proceeding to disbar where the defendant had appropriated funds of his client. A Washington case was cited in which original jurisdiction was assumed where the defendant had committed an offense against the Supreme Court. In that case, however, another Washington case was distinguished in which it was held that the inherent power to disbar did not apply, under the Constitution, where the offense charged was not committed against the Supreme Court. Although the Arizona Court apparently decided on the authority of the Washington case, the facts do not come under the Washington limitation on the rule and the holding in Arizona is squarely in support of the Kentucky decision. It is submitted that the Virginia and Washington limitations are unnecessary restrictions on the inherent power of the judiciary which is admitted in both jurisdictions.

Although it appears that no case has examined the dual phase of the courts' functions as minutely as the Kentucky opinion, one case has asserted that the power of the courts to disbar is as much the law of the land as the constitution. It seems that the only analysis that will support this conclusion is that employed by the Kentucky Court, for it is fundamental that constitutional restrictions apply generally to all departments of government.

Carried to the logical conclusion, the foregoing argument in support of original jurisdiction, necessarily disposes of the contention that the statute provides for an unconstitutional delegation of legislative power. If it be conceded that disbarment is an inherent judicial function, then there could be no objection to a statute which gives judicial power to the judiciary. A recent case has held that a statute which gives an independent board power to discipline attorneys is void as a delegation of judicial power. The usual objection to a statute of this type is that the legislature has encroached upon the judiciary. It has also been held that the legislature could not irrevocably surrender the right to prescribe minimum requirements for admission to the bar. A distinction has been made, however, between the power to admit attorneys and the power to disbar.

Although the courts are not strictly bound by statutes, they

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8 In re Bailey, 30 Ariz. 407, 248 Pac. 29 (1926).
9 In re Robinson, 48 Wash. 153, 92 Pac. 929 (1907).
10 In re Waugh, 32 Wash. 50, 72 Pac. 710 (1903).
12 In re Edwards, 45 Idaho 676, 266 Pac. 665 (1928).
13 In re Tracy, —Minn.—, 266 N. W. 88 (1936); De Krasner v. Boykin, —Ga.—, 186 S. E. 701 (1936); in re Myrland, 45 Ariz. 484, 45 P. (2d) 953 (1935); in re Egan, supra, n. 6; in re Lavine, —Cal.—, 41 P. (2d) 161 (1935); in re Wolfe's Disbarment, supra, n. 6.
14 Ex parte Steckler, 179 La. 410, 154 So. 41 (1934).
15 In re Royall, supra, n. 5.
will follow reasonable legislative regulations. It is not clear from the cases whether this is considered as an exercise of legislative power or a permissible encroachment upon the judiciary, but the latter seems to be the prevailing view. Therefore, a statute, to the extent that it confers this reasonable amount of control to the court, does not delegate legislative power to the courts. A further consideration is pertinent, for, although a delegation of power is involved, a certain degree of delegation is permissible. The power to disbar seems to come under this permissive type, especially since the regulation of attorneys generally is not exclusively a legislative function.

While the foregoing analysis supports the result reached by the Kentucky Court, the argument advanced in that decision indicates a restriction on the power of the legislature in the field of disbarment which seems to be the most serious objection to the constitutionality of the incorporated bar acts generally. This question was not presented in the Kentucky case since the Court had acted under the mandate of the legislature, but it is suggested in the opinion that the Court would not be forced to follow the rules of the legislature concerning discipline of the bar.

It appears that there are no jurisdictions in which it is clearly established that the court is bound by the action of the legislature as to disbarment proceedings. In one jurisdiction the court construed a statute as prohibiting disbarment for the acts alleged and clearly recognized that it was bound by the statute and prevented from disbarring the accused. In a later case, however, the Court, while not invalidating the statute, disbarred the defendant for acts not clearly within its terms and the Court inclined to the position of the majority. A somewhat similar situation prevails in Oklahoma.

Many courts have given effect to statutes out of a spirit of cooperation with the legislature although they did not consider themselves bound by the statutes. This situation has been brought out by a recent writer.

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19 In re Constitutionality of Section 251.18, Wisconsin Statutes, 204 Wis. 601, 236 N. W. 717 (1931).


22 State Bar Commission v. Sullivan, 35 Okl. 745, 131 Pac. 703 (1912); in re Saddler, 35 Okl. 510, 130 Pac. 905 (1913); in re Evans, supra, n. 16

23 Dowling, supra, n. 16.
While it is difficult to determine what the courts will consider a "reasonable regulation" of disbarment proceedings, it must be taken as generally true that only such statutory regulations will be given effect as the courts consider to not interfere with their "inherent power" over the subject.

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RES IPSA LOQUITUR—MALPRACTICE—OTHER INJURY

In a Kentucky case decided in 1936 a child was taken to a hospital for a tonsillectomy. One of the child's teeth was knocked out during the operation and became lodged in its lung. As a result of the tooth being in the child's lung it died and its parents sued the hospital in which the operation was performed. The plaintiff sought to invoke the doctrine of *res ipsa loquitur*. The court rejected the application of the doctrine saying:

"Where it is left entirely to speculation whether a fact occurred as a result of want of care or was something not reasonable to be foreseen, the facts are not sufficient to call for an application of the rule of *res ipsa loquitur*."

An early Kansas case seems to clearly enunciate the holding of the recent Kentucky case above set out. The court held: "The question of negligence or lack of skill in a surgical operation is one of science, to be determined by the testimony of skillful surgeons instead of presumptions."

In another case following the Kentucky line of reasoning where a dentist was removing a decayed tooth and part of it went down the patient's throat, the court said:

"To say that the doctor had complete control of either the tooth or the mouthpack would be carrying the doctrine of *res ipsa loquitur* too far for a mishap such as the flying of a fragment of tooth or filling into a patient's throat while the tooth is being extracted, is not of itself evidence of negligence or want of skill on the part of the doctor."

In a case where the facts were similar to the principal case a California court treated such circumstances contra, saying: "The presumption of a surgeon's negligence arose from child's loss of tooth following surgeon's insertion of gas preliminary to the operation to remove tonsils." The court further stated that *res ipsa loquitur* applies where during the performance of surgical or other skilled operations, an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject,

1 Hazard Hospital Co. v. Comb's Admr., 263 Ky. 252, 92 S. W. (2d) 35 (1936).
2 Tefft v. Wilcox, 6 Kan. 33 (1870).