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Is the Power of the Courts to Control the Bar Exclusive?

J. Jerald Johnston
University of Kentucky

NOTES

IS THE POWER OF THE COURTS TO CONTROL THE BAR EXCLUSIVE?

Recent events[1] have directed the attention of lawyers as well as the public to the inherent power of the courts to control and regulate matters pertaining to the legal profession. A substantial line of decisions dealing with the question leaves little doubt that the judiciary can and will guard its power to define the practice of law, to decide what is unauthorized practice, to disbar members of the profession and to govern the admission to practice. The theory on which such power rests is that the judicial power is inherent,[2] however, the trend in the cases seems to point to its being exclusive as well. It is the purpose of this note to examine directly this idea that the inherent power of the courts to prescribe rules and regulations for the practice of law is an exclusively judicial power. As will be seen below the problem can arise in a number of ways, but we are concerned primarily with situations where the legislature, as well as the courts, attempts to control directly the matter in question.

The majority of cases brought before the courts concerning the questions of disbarment and admissions can be handled easily by the courts on the basis of their inherent power only. The question as to a court's right to disbar, for example, often is raised in a case where the legislature has prescribed by statute certain grounds for disbarment, and other grounds are stated as the reason for the particular petition for disbarment. The

[1] Hobson v Kentucky Trust Co., 303 Ky. 493, 197 S.W 2d 454 (1946) Ky H. B. 334 (1948) which provided that graduates of the University of Kentucky and the University of Louisville law schools and of other schools which met the standards of these two schools and were approved by the Court of Appeals should be admitted to the practice of law in Kentucky without a bar examination; and the opinion of the Kentucky Attorney General to the effect that the preparation of income tax returns by anyone other than a licensed attorney for a fee is the illegal practice of law. KY. OP. ATT. GEN. 24858, 25082, 25284 (1948)

In this connection, see Note, 37 Ky. L. J. 58 (1948)

same may be true in the case of admissions where the legislature has specified certain qualifications, and the courts have added other qualifications to those specified. In *Commonwealth* v *Roe*,[3] for instance, respondent contended that since the statute had prescribed causes for which an attorney could be disbarred the court could not disbar him for any cause not stated in the statute. The Kentucky Court held that courts, independent of statute, had the inherent right to disbar an attorney guilty of such personal or professional conduct as proves him unworthy to have his name on the rolls. As pointed out in *Louisville Bar Association* ex rel. *Drane* v *Yonts*,[4] the court bases its right to control and regulate attorneys traditionally on the fact that attorneys are "officers of the court," and are subject to the court s right to punish them for acts of professional misconduct. In *Commonwealth* ex rel. *Ward* v *Harrington*,[5] the Court of Appeals held that it has original jurisdiction over an inquiry into charges against an attorney notwithstanding the constitutional provision conferring appellate jurisdiction only, since the inquiry did not involve judicial power and authority as contemplated in the Constitution. In the same year the constitutionality of the Bar Integration Act,[6] which authorized an original proceeding in the Court of Appeals to discipline or disbar an attorney, was challenged. The court held that the statute gave the court no power which it did not already possess, since courts had inherent power to deal with matters relating to attorneys, and found the Act constitutional.[7] In this case, the court did say, in effect, that in setting up the machinery called for in the Bar Integration Act, it was acting out of comity and deference to the legislature, and was merely exercising an inherent power.[8] In fact, this would seem to be the nearest that the Kentucky Court has come to declaring that its power of control over affairs of the Bar is exclusive. In other jurisdictions the situation is similar to that in Kentucky, in that the courts in general state that while the legislature may prescribe minimum standards for admission and

[3] 129 Ky. 650, 112 S.W 683 (1908).
[4] 270 Ky. 503, 109 S.W 2d 1186 (1937)
[5] 266 Ky. 41, 98 S.W 2d 53 (1936).
[6] Ky. R. S. (1946) 30.170.
In re Sparks, 267 Ky 93, 101 S.W 2d 194 (1936)
[8] *Id.* at 97, 101 S.W 2d at 196.

grounds for disbarment, the judiciary has the power to make additional requirements and grounds.[9]

In virtually all of these cases, both in Kentucky and other jurisdictions, the power of the courts to control matters of the bar has been upheld merely by the court's invoking its inherent power, without any serious question arising as to the extent of the legislature's right to exercise a statutory control over the matter. The question whether the power of the courts over affairs of the bar is exclusive seems to receive appropriate attention only in those cases in which the legislature attempts to regulate affirmatively affairs of the profession, and a conflict between judicial power and legislative power results. For example, suppose that the Court of Appeals follows the opinion of the Attorney General, mentioned *supra,*[10] and declares that the preparation of income tax returns is the practice of law, and that such preparation by accountants and others is the unauthorized practice of law Suppose further that the legislature should pass a statute defining the practice of law and specifically exempt the preparation of income tax returns from the definition. What decision would the court reach in a proper case testing the constitutionality of such a statute? Or, suppose that the legislature had passed the bill requiring that graduates of certain law schools in Kentucky be admitted to practice without an examination. Either situation would put to a clear test the court's often asserted inherent right to control admissions to the bar and define the practice of law.

In determining the answer to such a question, one must have a clear definition of terms. Bouvier's Dictionary defines "inherent power" as "an authority possessed without its being derived from another. A right, ability or faculty of doing a thing, without receiving that right, ability or faculty from another." "Exclusive" is defined as "not including, debarring

[9] *In re* Myeland, 45 Ariz. 484, 45 P 2d 953 (1935), James v. State, 61 Ga. App. 860, 7 S.E. 2d 398 (1940), *Ex parte* Steckler, 179 La. 410, 154 So. 41 (1934) *In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932) State *ex rel.* Ralston v. Turner 141 Neb. 556, 4 N.W 2d 302 (1942) *In re* Olmstead, 292 Pa. 96, 140 Atl. 634 (1928), Grievance Committee of State Bar of Texas, 21st Congressional District v Dean, — Tex. Civ. App.— 190 S.W 2d 126 (1945) *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918), Integration of Bar Case, 244 Wisc. 8, 11 N.W 2d 604 (1943) *see In re* Williams, —Mo. App. — 113 S.W 2d 353, 356 (1938)

[10] KY. OP ATT. GEN. note 1 *supra.*

from participation. Shut out not included." That the courts have construed their power in accordance with the dictionary meaning of "inherent" is obvious from the cases already mentioned. Have they at the same time ruled out the possibility of its being "exclusive" in the sense of "debarring from participation" by recognizing and enforcing statutes which set up requirements for admission, grounds for disbarment, and which describe certain acts as the unauthorized practice of law? Under the definition above, the answer at first glance would seem to be in the affirmative. However, the mere fact that courts have enforced rules made by the legislature and thus given the legislature some participation in the regulation of the bar does not of itself mean that the legislatures have the *power* to make valid rules. Recognizing an enactment out of comity differs greatly from enforcing a lawful statute because of the court's duty

The Kentucky Court, while it has not had to decide the question of exclusiveness directly, has consistently taken a stand which indicates that it will not be subservient to the legislature in matters of this kind. It has repeatedly held that it holds its power independently of statute.[11] Other jurisdictions which have had to meet the problem have held generally that the final decision on matters concerning the bar is a judicial one. California denied the *right* of the legislature to prescribe rules and regulations for admission to the bar to which courts must conform.[12] The court stated there that attorneys are part of the judicial branch, and not subject to the control of the legislature. The Louisiana court in Ex parte *Steckler*[13] held that prescribing ultimate qualifications for admission to practice is a judicial function, and that a statute providing that the holder of a law degree from Tulane University was authorized to practice law could not deprive the judiciary of its right to add to legislative requirements for admission to the bar. Wisconsin, in *State* v *Cannon*,[14] took the position that the legislature cannot compel the courts to admit to the bar persons deemed by the courts unfit to exercise the prerogatives of an attorney at law. Georgia recognizes the right of the legislature to pass laws to *aid* the

[11] Commonwealth *ex rel.* Ward v. Harrington, 266 Ky. 41, 98 S.W 2d 53 (1936), *In re* Sparks, 267 Ky 93, 101 S.W 2d 194 (1936).
[12] *In re* Cate, —Cal.— 273 Pac. 617 (1928)
[13] 179 La. 410, 154 So. 41 (1934).
[14] 206 Wis. 374, 240 N.W 441 (1932)

courts in their regulation of attorneys, but reserves the power to admit and disbar to the court.[15]

In connection with the same question, the Massachusetts court held that " control of both admissions to and removal from the bar of the courts of the Commonwealth is *exclusively* in the judicial department of government, and interference therewith by the legislative department would conflict with constitutional provisions prohibiting the exercise of executive and judicial powers by the legislative department."[16] In the same case, the court said that the requirements enacted by the legislature were restrictions on the individual and not on the courts.

Both the Nebraska and Oklahoma courts have decided cases dealing directly with statutes providing that the graduates of certain law schools should have certain privileges and be deemed to have certain qualifications with regard to admission to the bar. The Nebraska statute[17] declared that graduates of all resident law schools operating within the state should be eligible to take the state bar examination without reservation. In deciding that the statute was unconstitutional, the court said that it " constitutes an endeavor on the part of the Legislature to go beyond the concept of minimum requirements of an applicant to take an examination for admission to the bar, and to dictate to the supreme court that the judicial department shall be shorn of its power to place higher standards or requirements of applicants for admission to the bar than the legislature has provided."[18] The Oklahoma statute[19] provided that any graduate of any "Grade A" law school should be admitted to the practice of law in Oklahoma without examination, upon motion. The court, in the case of In re *Bledsoe*,[20] held that the statute constituted an invasion of the court's inherent power to determine the ultimate requirements for admission to the bar and therefore was unconstitutional. It becomes increasingly apparent that most courts consider that control of the bar is, in the final analysis, a

[15] James v. State, 61 Ga. App. 860, 7 S.E. 2d 398 (1940).

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

[17] NEB. COMP. STAT. (Supp. 1941) Sec. 7–102.

[18] State *ex rel.* Ralston v. Turner, 141 Neb. 556, — 4 N.W 2d 302, 311 (1942).

[19] OKLA. STAT. ANN. Tit. 5, Sec. 15 (1939)

[20] 186 Okla. 264, 97 P 2d 536 (1940).

judicial power,[21] although the cases already discussed show that a number of them accept reasonable regulation by the legislatures.

Logic and fundamental policy would seem to support this position of the courts, for in a sense the people hold the courts responsible for swift and efficient administration of justice, and as an aid in that administration, attorneys should be considered officers of the court. Then, too, inefficiency of an attorney or a defalcation or misconduct on his part reflects upon the courts and upon the entire legal profession, and since a strong and respected judiciary is a principle of our governmental system, the courts should have the power to protect themselves by prescribing standards for admission and conduct of attorneys. As a necessary corrollary to this power to protect itself and its officers, the court must have the right to decide what shall constitute the practice of law, and who shall be authorized to practice it. At the same time, however, the legislature, under its duty to provide for the general welfare, has the same interest as the court in having well-trained, highly qualified men of good character as attorneys to guard and protect the legal interests of the people. Logically, also, it would seem to be within the "police power" for the legislature to enact statutes which set up *minimum* standards for the profession.

Truly this is a place where the distinctions between judicial and legislative functions are largely a matter of policy Fortunately there is some precedent for making a choice as to policy It is found in those cases dealing with the question of procedural reform, which is another area of considerable conflict between judicial and legislative power. In the leading case of *Burton* v *Mayer*,[22] the Kentucky Court of Appeals has said, "Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the administration of justice. The courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this

[21] *Contra:* The North Carolina court considers that its duty consists merely in giving effect to statutory enactments on the subject of regulation of the bar. *In re* Applicants for License, 143 N.C. 1, 55 S.E. 635 (1905)

[22] 274 Ky. 263, 118 S.W 2d 547 (1938).

kind."[23] In the same opinion the following paragraph is illustrative of the attitude of the court

> "So long as rules of practice fixed by the Legislature accord with the proper and effective administration of justice, they should be, and they are, followed to the letter Where, however, a situation arises in which the administration of justice is impaired or general rules of practice are unworkable, the duty undoubtedly rests on the courts to draw on the reserve of their inherent power to carry out the purpose of the Constitution."[24]

A number of writers have urged the supremacy of the judiciary in regard to this matter, the most extreme view being presented by Dean Wigmore, who stated that " *all legislatively declared rules for procedure,* civil or criminal, *in the courts, are void,* except such as are expressly stated in the Constitution."[25] He points out that even if the sentence "Each house may determine the rules of its proceedings "[26] had not been found in the Constitution, no one believes that the judiciary could claim the right to control legislative rules of procedure, and therefore, the legislature should not be permitted to do that to the judiciary However, many questions of judicial procedure have a direct bearing on the rights of the citizenry and for this reason are largely political and should be decided by the legislature. Practically speaking, not all governmental functions can be completely divided between the departments. There are a number of powers which fall within the functions of both the judiciary and the legislature. The regulation of procedural matters is illustrative of such a power. It has been suggested that the field of procedure must remain divided between these two bodies.[27] It will be readily seen that public policy would dictate that the legislature should control that part of the field having to do with the political rights of the people while the courts themselves should control such matters of procedure as form of pleadings, the methods of securing obedience to its orders, and other matters

[23] *Id.* at 267, 118 S.W 2d at 549.

[24] *Ibid.*

[25] Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally,* 23 ILL. L. REV. 276 (1928)

[26] U. S. CONST. Art. I, Sec. 5.

[27] Warner, *Role of Courts and Judicial Councils in Procedural Reform,* 85 U. OF PA. L. REV. 441 (1937) and see Shanefeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar* 19 ST. LOUIS L. REV. 163 (1934).

having to do generally with the court's routine. Reasonable enactments should be followed by the courts, but the legislative code of procedure should not be permitted by the courts to hamper them in the administration of justice. The same arguments would seem to apply equally to the problem of legislative control over the bar.

In conclusion, it is submitted that the inherent power of the courts to regulate the admission to practice and disbarment, to define the practice of law, and to decide what is the unauthorized practice of law is not necessarily *exclusive,* since the legislature has the right, under the police power, to enact minimum requirements and standards, but that the power of the courts in this respect, like their power as to rules of procedure, is *superior* to that of the legislature where there is a conflict, since statutory enactments on the subject are in no way restrictions on the power of the judiciary

J JERALD JOHNSTON