Louisiana Law Review

Volume 6 | Number 4
The Work of the Louisiana Supreme Court for the 1944-1945 Term
May 1946

Miscellaneous Matters

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of whether the relator was guilty of disturbing the peace by being drunk on the streets of the town of Sulphur."[123] In view of the nature of the proceedings the district judge was entirely justified in excluding any and all testimony concerning the procedure and trial in the mayor's court and the alleged political prejudice existing against the accused. The supreme court refused to pass upon the correctness of the district judge's findings of fact, reiterating the well settled constitutional limitation that questions of fact relating to the guilt or innocence of the accused are not reviewable by that court. In the companion case of *State v. Stanley*,[124] the supreme court dismissed an appeal from the defendant's conviction and sentence in the district court. In addition to the considerations and questions which it had reviewed and disposed of in discharging the rule nisi, the supreme court pointed out that the defendant's only right of appeal was to the district court, and that he was not entitled to a second appeal from that court's judgment to the supreme court. The appellate jurisdiction of the Louisiana Supreme Court in misdemeanor cases is limited to controversies where the constitutionality or legality of an ordinance or of a penalty imposed shall be in question, or where the sentence imposed is a fine exceeding three hundred dollars or imprisonment exceeding six months.[125]

IX. MISCELLANEOUS MATTERS

ATTORNEYS. AUCTIONEERS. BROKERS

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ATTORNEYS—DISBARMENT

Three disbarment proceedings were considered by the court during the 1944-1945 term.

In *Louisiana State Bar Association v. Steiner*[1] the defendant excepted to the jurisdiction of the court rationae personae. He contended that his absence from the state and the fact that he was not, at the time of the institution of disbarment proceedings, an active member of the bar, having been suspended from the practice of law for two years in a prior proceeding,[2] ousted the court's jurisdiction. These contentions were summarily dismissed

123. 207 La. 1075, 1079, 22 So. (2d) 655, 656.
124. 207 La. 1082, 22 So. (2d) 657 (1945).
125. La. Const. of 1921, Art. VII, §10.
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1. 207 La. 408, 21 So. (2d) 426 (1945).
2. Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 16 So. (2d) 843 (1944).

by the court. Substituted service was sustained against the absent attorney in accordance with the earlier expressed rule.[3] This result is consistent with the view that disbarment of an attorney as not a criminal proceeding and the judgment is not a personal judgment but an in rem judgment fixing the status of the attorney as a member of the bar of the court. The prior suspension on a different and distinct ground was properly held no bar to the court's jurisdiction of the new proceedings under the broad constitutional provision conferring such jurisdiction.[4] It is hard to understand how it could be seriously contended that a prior suspension made subsequent proceedings founded on different grounds premature.

A part of the aftermath of *Perez v. Meraux*[5] came before the court in *In re Reed*.[6] This was a disbarment proceeding in which the Louisiana State Bar Association charged that Reed, in collusion with the parties and in collusion with former Judge Meraux who had been removed from office, had obtained illegal divorces in eight cases in which neither plaintiff nor defendant resided in the court's territorial jurisdiction. On a previous hearing defendant's exception of no cause of action had been overruled.[7] The commissioner to whom the matter had been referred by the court found that the evidence did not sustain the charge of collusion but that the defendant attorney had been guilty of professional misconduct. Suspension for one month was recommended by the commissioner. The supreme court sustained the findings of the commissioner but found extenuating circumstances in that the procedure followed in obtaining the divorces had been advised by another attorney. The court therefore merely reprimanded the attorney. In its previous decisions the court had strongly indicated the existence of collusion[8] but such

3. In re Craven, 178 La. 372, 151 So. 625 (1933) was cited as authority. Additional authorities to this effect are collected in 90 A.L.R. 979 (1934).

4. La. Const. of 1921, Art. VII, § 10.

5. 201 La. 498, 9 So. (2d) 662 (1942).

6. 207 La. 1011, 22 So. (2d) 552 (1945).

7. In re Reed, 203 La. 1008, 14 So. (2d) 818 (1943).

8. Perez v. Meraux, 201 La. 498, 544, 9 So. (2d) 662, 667 (1942):

"Moreover, the evidence in the record unmistakably shows that the court over which the defendant judge presided was used in obtaining illegal judgments of divorce and annulment of marriages where, in a large number of instances, collusion and fraud were employed. We are not impressed with the protestations of the judge that he had no knowledge of these facts—in other words, his claim that advantage was taken of him by the attorneys and litigants in these cases—for it is difficult for us to understand just how the judge could sit and hear such a large number of cases in which so many irregularities are patent on the face of the record and the notes of evidence so scant, without at least having his suspicions aroused as to what was going on. Particularly is this true when as many as three of these cases

observations were held not binding against defendant in this proceeding. The commissioner found that the attorney was in contact with both the plaintiffs, whom he represented, and the defendants in the various divorce cases; that he prepared the petitions and had the defendants accept service on the face of the petition; that he furnished the defendants with copies of an answer used in another case which would serve as a model for an answer drawn in the attorney's office; that the attorney would have the defendants accept service on a motion fixing the case for trial and would mail the papers to the court. Said the court:

> ". . . we wholeheartedly agree with the Commissioner that for a lawyer to resort to a procedure of that kind is to reflect generally on the entire Bar. What respondent did was certainly unethical, uncommendable, censurable, reprehensible. His malpractice cannot and will not be condoned by this court; rather we condemn it most vigorously and reprove respondent severely."[9]

The court reaffirmed a previous statement that the primary purpose of disbarment proceedings "is not punishment, but protection of the courts and the public, and disbarment should not be decreed if any discipline less severe would accomplish the desired result."[10]

In the face of this evidence it is difficult to justify the court's finding that there was no fraud or deceit practiced on the court. From the evidence as summarized in the court's opinion, it would appear that more severe disciplinary action than a reprimand was warranted. The standing of the legal profession as a whole and the respect and esteem in which lawyers as officers of the court are held are involved in cases of this kind. These considerations should prompt imposition of disciplinary action commensurate with the offense where the charge of professional misconduct is clearly proved.

The case of *Louisiana State Bar Association v. Connolly*[11]

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were heard by him in a single day. Then, too, the striking similarity in the method employed in the handling of these cases by the four principal attorneys who are involved should, in our opinion, have placed him on his guard."

In re Reed, 203 La. 1008, 1014, 14 So. (2d) 818, 820 (1943):

"It is needless to discuss in detail the other divorce suits referred to by the Committee. It suffices to say that in each of the cases the records indicate, to say the least, that there was collusion between the parties to the suit."

9. In re Reed, 207 La. 1011, 1022, 22 So. (2d) 552, 555 (1945).

10. 207 La. 1011, 1025, 22 So. (2d) 552, 556. In re Novo, 200 La. 833, 9 So. (2d) 201 (1942) was relied upon.

11. 206 La. 883, 20 So. (2d) 168 (1944).

was before the supreme court on the merits and the proceedings were ordered dismissed. In March of 1942 the defendant attorney and her husband were convicted of the felony of federal income tax evasion under pleas of *nolo contendere*. In the United States District Court for the Eastern District of Louisiana defendant and her husband were fined and placed on probation for five years. Invoking the provisions of Section 12 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association,[12] the Committee on Professional Ethics and Grievances of the Association filed disbarment proceedings. The petition alleged conviction of a felony and attached thereto was a certified copy of the judgment. Exceptions of no cause of action had been overruled by the supreme court after exhaustive consideration in an earlier decision.[13]

In her answer the defendant denied that she had been guilty of the offense charged in the indictment and further denied that she had been guilty of any misconduct such as would warrant her name being stricken from the roll of attorneys. The commissioner appointed by the supreme court, after findings of fact and conclusions of law, recommended that the proceedings be dismissed. The case was considered by the supreme court on exceptions to the commissioner's report. On behalf of the Louisiana State Bar Association it was contended that a case for disbarment was made out by introducing the judgment of conviction in the federal court in evidence and that all of defendant's evidence was inadmissible. The court sustained the action of the commissioner in admitting defendant's evidence seeking to show that defendant was not guilty of misconduct. Applying the court's former opinion, Justice Hamiter, as the organ of the court, held that the prior judgment of the federal court was not conclusive but only prima facie evidence of misconduct. Evidence to contradict the prima facie showing from introduction of the federal judgment was, therefore, held properly admitted by the

12. Article XIII, § 12, of the Articles of Incorporation of the Louisiana State Bar Association:

"Whenever any member of the bar shall be convicted of a felony and such conviction shall be final the Committee may present to the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the court may, without further evidence, if in its opinion the case warrants such action, enter an order striking the name of the person so convicted from the roll of attorneys and cancelling his license to practice law in the State of Louisiana. Upon the person so convicted being pardoned by the President of the United States or Governor of this State, the Court, upon application may vacate or modify such order of disbarment." The foregoing has been adopted as a rule of the supreme court, Rule 18, § 9.

13. Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. (2d) 582 (1942).

commissioner. Admission of such evidence was held not a "retrial of the criminal charges." The court further held that a plea of *nolo contendere,* although accepted as a plea of guilty, does not prevent the defendant in a civil action from proving his innocence.[14] The disbarment proceeding was considered as a civil action within that rule. Civil disfranchisement was held not to disqualify a lawyer as a member of the bar.[15]

On the merits the court considered the testimony of the defendant and her husband sufficient to overcome the association's prima facie case in the absence of any evidence contradicting such testimony. The defendant had by such evidence sought to show that her husband prepared the income tax returns for the years in question; that she had no knowledge or reason to believe they were incorrect; and that defendant filed the plea of *nolo contendere* largely because it was the best thing to do in the interest of her husband. Accepting the truth of such unrebutted testimony the disbarment petition was ordered dismissed.[16]

The result of this case focuses sharp attention upon the necessity for comprehensive reconsideration of the matter of disbarment and disciplining of attorneys in Louisiana.[17] The earlier

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14. The court cited In re Smith, 365 Ill. 11, 5 N.E. (2d) 277 (1936).

15. The court said that Section 10 of Article VII of the Constitution limits disbarment to "cases involving misconduct." Consequently Section 6 of Article 8 of the Constitution and Act 129 of 1940 [Dart's Stats. (Supp. 1944) §§ 7775.1-7775.4], both of which disfranchise a person convicted of crime did not require disbarment of defendant.

16. The Commissioner's report quoted in Louisiana State Bar Ass'n v. Connolly, 206 La. 883, 895, 20 So. (2d) 168, 172 (1944), said:

"'Do we not know that many of us, even among the oldest and most conscientious members of the bench and of the bar, have preferred to delegate to accountants the tedious and time-consuming preparation of exceedingly complicated and baffling income tax returns under everchanging Federal statutes so involved and intricate as to now require complete revision and simplification by the Congress?'"

17. From October, 1941, to the end of the 1944-1945 term, the following cases involved disbarment or disciplining of members of the bar with the results indicated: In re Cummings, 201 La. 439, 9 So. (2d) 614 (1942) (one attorney disbarred, another suspended); Louisiana State Bar Association v. Leche, 201 La. 293, 9 So. (2d) 566 (1942) (exception of no cause of action overruled, defendant ordered to answer on the merits); Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. (2d) 582 (1942) (exception of no cause of action overruled, defendant ordered to answer on the merits); In re Novo, 200 La. 833, 9 So. (2d) 201 (1942) (attorney suspended for 6 months); In re Steiner, 199 La. 500, 6 So. (2d) 641 (1942) (exception of vagueness overruled); In re Roy, 204 La. 256, 15 So. (2d) 79 (1943) (exception of vagueness and no cause or right of action overruled); In re Reed, 203 La. 1008, 14 So. (2d) 818 (1943) (exception of no cause of action overruled); In re Nunez, 203 La. 847, 14 So. (2d) 680 (1943) (petition dismissed); In re Weber, 202 La. 1037, 13 So. (2d) 341 (1943) (attorney suspended for two months); In re Meraux, 202 La. 736, 12 So. (2d) 798 (1943) (proceeding dismissed); In re Jones, 202 La. 729, 12 So. (2d) 795 (1943) (proceeding dismissed); In re Williams, 202 La. 234, 11 So. (2d) 540 (1942) (attorney suspended for 90 days); Louisiana State Bar Ass'n v. Steiner, 201 La. 923, 10 So. (2d) 703 (1942) (exception of

Connolly case[18] and the *Leche* case[19] held that where the misconduct charged against an attorney consists of conviction of a felony, evidence of such conviction constitutes only prima facie evidence of misconduct. It was even indicated that a rule which would go further and attempt to make conviction of a felony conclusive evidence of misconduct would be held unconstitutional. In some jurisdictions conviction of a felony has been made conclusive evidence of misconduct warranting disbarment.[20] The validity of a rule-making power which would sustain such a rule would be more in keeping with the court's inherent authority over admissions and disbarment.[21] The court's present view is a correct construction of the permissive phraseology of its present rule. The present rule as interpreted by the court opens for consideration in each case an inquiry into existence or non-existence of "moral turpitude" which leads to a fairyland of vagueness and indefiniteness as to the true criterion to be applied.[22] The difficulties confronting the Committee on Professional Ethics and Grievances where conviction of a felony is only prima facie evidence of misconduct are well illustrated in the *Connolly* case.

no cause of action overruled); In re Craven, 204 La. 486, 15 So. (2d) 861 1943) (attorney suspended for six months); In re Fallon, 204 La. 955, 16 So. (2d) 532 (1943) (exception of no right or cause of action overruled); In re Armstrong, 205 La. 67, 16 So. (2d) 908 (1943) (petition dismissed); Louisiana State Bar Association v. Steiner, 204 La. 1073, 16 So. (2d) 843 (1943) (attorney suspended for two years); In re Reed, 207 La. 1011, 22 So. (2d) 552 (1945) (attorney reprimanded and proceeding otherwise dismissed); Louisiana State Bar Association v. Steiner, 207 La. 408, 21 So. (2d) 426 (1945) (exception to jurisdiction of the court overruled); Louisiana State Bar Association v. Connolly, 206 La. 883, 20 So. (2d) 168 (1944) (proceeding dismissed).

18. Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. (2d) 582 (1942).

19. Louisiana State Bar Association v. Leche, 201 La. 293, 9 So. (2d) 566 (1942).

20. For example the New York Judiciary Law (1937) § 88 (3) [29 McKinney's Consolidated Laws of New York Ann. 93] provides: "Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys." Under this section it is mandatory that the court disbar an attorney convicted of a felony upon presentation to the court of a certified copy of the judgment. In re Patrick, 136 App. Div. 450, 120 N.Y. Supp. 1006 (1st dep't 1910); In re Summers, 173 App. Div. 961, 159 N.Y. Supp. 86 (1st dep't 1916).

21. See Editorial, The Courts and Disbarment (1935) 21 A.B.A.J. 98 discussing the problem of disbarment after acquittal of an attorney on a criminal charge it was said: "Back of all effective dealing with the problem must be a recognition of the right and duty of the Court to determine who shall be admitted to the roll of its officers and who shall be removed from it. This is a purely judicial power and it should be zealously defended. Its continued exercise is the best guarantee that the profession will be purged of those who violate ethical standards."

22. Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment (1935) 24 Calif. L. Rev. 9.

The disbarment committee must assume the burden of proving all the details of the felony, or risk not having overcome scant rebuttal evidence of the attorney who, despite the criminal record, protests he has not been guilty of misconduct. Under the present state of the jurisprudence it is imperative that a remedy be devised to deal more effectively with cases of this kind.[23]

AUCTIONEERS

Auctioneer held not a "public officer." Section 351 of the Revised Statutes[24] requires registration of the bonds of "public officers, whether State or Parish" in the mortgage records of the several parishes where the principal obligor may own real estate and further provides that bonds so registered, except bonds signed by surety companies, shall operate as a legal mortgage upon all of the real estate of the principal obligor. In *State ex rel. Danziger v. Recorder of Mortgages for Parish of Orleans*[25] there was presented the question of whether an auctioneer is a "public officer" within the contemplation of that statute. The issue was raised in a mandamus proceeding brought by a New Orleans auctioneer to compel the Recorder of Mortgages of the Parish of Orleans to cancel and erase from the mortgage records relator's personal bond given by him as auctioneer, or in the alternative to cancel and erase its inscription from a mortgage certificate and to omit it on any future mortgage certificates applied for in relator's name. The supreme court held that the relief prayed for in the alternative demands should be granted and affirmed a lower court decision making the writ of mandamus peremptory. This was based on the absence of affirmative provisions requiring recordation of bonds of auctioneers in the separate statutory provisions requiring the furnishing of bonds.[26] Recognizing the difficulty, if not impossibility, of phrasing an all-inclusive definition of a "public office" or a "public officer," the court concluded that the provision of Section 351 of the Revised

23. Among other problems involved may be mentioned: How shall conviction of a felony under federal law be treated where it does not constitute a felony under state law? See Matter of Donegan, 282 N.Y. 285, 26 N.E. (2d) 260 (1940) (refusing to disbar attorney convicted of federal felony which was misdemeanor under New York law). Authorities on this problem are collected in (1940) 9 Fordham L. Rev. 417. Shall a judgment of conviction following a plea of *nolo contendere* be treated the same as a conviction following trial? In accord with the Louisiana Supreme Court's holding on this point in the *Connolly* case is People ex rel. Att'y Gen. v. Laska, 101 Colo. 220, 72 P. (2d) 693 (1937). See Note (1938) 10 Rocky Mt. L. Rev. 203.

24. As last amended by La. Act 180 of 1928 [Dart's Stats. (1939) § 7731].

25. 206 La. 259, 19 So. (2d) 129 (1944).

26. La. Rev. Stats. of 1870, §§ 139-142 [Dart's Stats. (1939) §§ 470-472, 475].

Statutes were inapplicable to auctioneers as that statute required bonds of state officers to be in favor of the governor, while the statute requiring the auctioneer to furnish bond provided for a bond in favor of the auditor of public accounts of the State of Louisiana. This difference was held equivalent to a legislative expression that auctioneers were not "public officers" within the meaning of Section 351 of the Revised Statutes. The supreme court also expressed the view "that an auctioneer is not an officer of a state, parish or municipality; he is merely a private citizen who conducts a business or trade that is subject to be reasonably regulated by the Legislature."[27] Such regulations imposed in the interest of the public include the requirement of bond, oath and license;[28] but an auctioneer essentially serves only private individuals,[29] is not invested with sovereign functions of the government; and the requirement that he collect certain taxes or duties for the state[30] was held not to constitute him a public officer.[31]

This case raised but left open the question of whether a notary public is to be considered a public officer. To justify the assumption that he is, as distinguished from the auctioneer, it was pointed out that the notary must obtain a certificate of competency from a designated court and must be appointed and commissioned by the governor.[32] The inference is not to be drawn, however, that mere recordation of a notarial bond creates a legal mortgage. By Act 48 of 1928 it has been specifically provided that notarial bonds shall not operate as a mortgage against

27. 206 La. 259, 268, 19 So. (2d) 129, 132 (1944).

28. La. Rev. Stats. of 1870, §§ 139-140 [Dart's Stats. (1939) §§ 470, 471]. Any citizen may become an auctioneer for the parish in which he is a qualified voter upon giving bond and security and taking the oath. Before entering on his duties he shall execute his bond in favor of the auditor of public accounts, conditioned for the faithful performance of all duties, and for the prompt payment of all taxes or commissions payable to the state, and of all sums belonging to other persons. The district attorney of the parish shall test the bonds given by auctioneers every second year.

29. See Arts. 2601-2615, La. Civil Code of 1870; Arts. 964.120 and 1012.51, La. Code of Practice of 1870.

30. La. Rev. Stats. of 1870, § 145, as amended by La. Act 315 of 1942 [Dart's Stats. (Supp. 1944) § 478].

31. Said the court: "His [the auctioneer] is merely a legalized and licensed trade or business, not a public office; it is one which the Legislature can and does, under the police power of the state, regulate in the interest of the general public good." 206 La. 259, 270, 19 So. (2d) 129, 133 (1944).

32. Justice Hamiter said: "Assuming for the sake of argument, but not deciding, that a notary public is a public officer, it can be correctly said that he does not acquire that status by merely taking the oath, furnishing bond and being licensed, as does the auctioneer in qualifying. To serve as a notary public, in addition to those stated requirements, one must obtain a certificate from a designated court declaring his competency to exercise the profession of notary public, and further he must be appointed and commissioned by the Governor." 206 La. 259, 269, 19 So. (2d) 129, 133 (1944).

the property of the principal or surety unless (1) suit has been filed against the notary to recover on the bond, and (2) notice of lis pendens has been recorded in the parish where the bond is recorded.[33] Only when such formalities are complied with after suit on the bond does its recordation operate as a legal mortgage against the property of principal and surety. The question raised in the principal case will not have to be litigated as to notaries because the statute provides: "The clerks of court in preparing mortgage certificates shall not include notarial bonds thereon unless an action has been commenced on said bond and a notice of lis pendens has been filed in connection therewith as above provided."[34]

BROKERS

Commission Recoverable on Quantum Meruit. Sugar Field Oil Company v. Carter[35] was a suit for recovery of a commission for services rendered in obtaining a purchaser for certain oil properties of the defendant Carter. In its first opinion, the court sustained a plea of prematurity based upon the defendant's contention that the sale of the defendant's properties had not yet been consummated and the fee not earned. It appeared that the plaintiff had rendered valuable services pursuant to an agreement in obtaining Midland Oil Corporation as prospective purchaser for an interest in the properties. But the prospective purchaser had merely entered into an agreement under which, in return for a substantial cash payment it secured an option to purchase terminating on May 1, 1943, with privilege of extension of the option by additional payments. At the time of the filing of plaintiff's suit the option had not been exercised and its time had not expired. The trustee for the creditors of defendant Carter who held title to the properties pursuant to plans for a friendly adjustment of Carter's indebtedness to his creditors was joined as party defendant. The plaintiff's prayer for an injunction to restrain disposition of the fund was, on the first hearing, denied on the ground of prematurity of the action.[36] On rehearing, the

33. La. Act 48 of 1928, § 1. [Dart's Stats. (1939) § 6300].
34. La. Act 48 of 1928, § 2. [Dart's Stats. (1939) § 6301].
35. 207 La. 453, 21 So. (2d) 495 (1945).
36. Art. 158, La. Code of Practice of 1870 cited by the court provides: "When the demand is premature, that is to say, when the action has been brought before the debt had become due, the suit must be dismissed, leaving to the party his right to bring his action in due time.

The same rule must be observed if the object due be demanded out of the place where it was to have been delivered, or if the obligation be conditional, and its execution be demanded before the condition has been fulfilled."

court concluded that its first decision should be reversed because of plaintiff's alternative demand for recovery of a commission on a *quantum meruit*. Under this aspect of the case plaintiff contended that a commission was due under his agreement even though some contract other than a completed sale were entered into by the prospective purchaser. The court concluded that the plaintiff was entitled to recover on the grounds of unjust enrichment and, accordingly, overruled the plea of prematurity, directed issuance of a temporary restraining order, and remanded the case for further proceedings. The decision in this matter was a proper disposition to prevent unjust retention of a benefit.[37] The conservatory writ of injunction issued in this case is authorized under Article 303 of the Code of Practice. Although the supreme court has held that a contract for a commission, even if no sale is made, is inequitable and will not be enforced in the absence of proof that those who signed it understood and intended to be so bound,[38] such doctrine should not be applied to a case like the instant one in which substantial benefits are conferred upon the principal by the broker and the parties intend that compensation be paid.

37. The court relied on Art. 1965, La. Civil Code of 1870.
38. Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932).