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ATTORNEYS AND COUNSELORS AT LAW
CORDELL, OKLA.

January 2nd, 1931

Mr. C. Guy Cutlip
Wewoka, Oklahoma

Dear Guy:-

Re: J. Silvester Mullen,
Cause No. 11

I am sending you herewith transcript of the evidence in this case, together with my report for it. Those lawyers down at Ardmore did not brief the question we wanted briefed; that is, as to whether the Act means that a conviction of a felony by a lawyer not in the line of his professional duty requires a disbarment or not. In my judgment, however, it was not necessary to go that far in the case, as you will gather from my report.

Take this report and either approve it, add to it or reject it so we may have it ready when the Board meets next.

Wishing you a happy new year, I am,

Your friend,

SCM:H

In Re J. Sylvester Mullen,
Attorney at Law. No. 11.

Concurring in report of Honorable
Sam Hassingale, Reporting Governor.
C. Guy Cutlip, Governor.

I concur in the report of Honorable Sam Hassingale, Governor, but feel constrained to go a bit further than he in some matters I think of importance to a full report:

1. What effect has a full and unconditional pardon have?

2. What effect does a conviction, not involving the duties, professional conduct of professional business of an attorney have, where it is shown that such conviction is technical?

The inquiry naturally arises in my mind what effect and operation the pardon granted by President Roosevelt in April, 1935, have upon this conviction charged as the grounds for disciplinary action. The authorities seem to be in harmony upon the matter. A pardon reaches both the punishment prescribed and when the pardon is full blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if never convicted. If granted after conviction it removes the penalties and disabilities and restores to civil rights, it makes him, as it were "a new man" and gives him a new credit and capacity.

In re Garland 18 L.ed. 371.

An attorney cannot be disbarred solely on a conviction, where he has been pardoned.

In re Simons, 134 Pac. Rep. 519.

In reasoning upon the use of a conviction for disbarment purposes the case supra states:

> Notwithstanding that the respondent at one time stood convicted of a felony and that the record of conviction might have been used as the foundation for this proceeding while the judgment of conviction was in force, it is no longer possible, after the pardon, to disbar him on that record, if it is maintainable at all judgment must go against him without any opportunity to defend against any present imputation against his moral character."

It must be remembered that no charge is here made against the respondent Mullen on account of his action that lead up to the conviction. It is admitted that nothing in those action had to do with his professional conduct or duties. Many most prominent citizen of Ardmore came forward to and did testified as to the respondent's good conduct, high ideals and moral uprightness. A conviction in this proceeding could not be had against him because he has committed acts, either as a man or lawyer that would make him a menace to society, the profession, the courts or a prospective clientile.

Oklahoma has held in In Re Crump:

> "Pardon reaches both the punishment prescribed for the offense and the GUILT OF THE OFFENDER; IT OBLITERATES, IN LEGAL CONTEMPLATION, THE OFFENSE ITSELF, and hence its effect is to make the offender a new man."
>
> Ex Parte Collins, 239 Pac. 696
> citing the Crump Case.

In People v. Hardwick, decided in July, 1928, by the California Supreme Court (269 Pac. 430) that Court reviews the cases above cited as well as others of interest to the question. I am of the belief that the conviction, upon which the

accusation herein is based, cannot be used as evidence in this proceeding. Taking the idea that this board could not go back of the conviction, what defense could one make even when the courts hold and the pardon recites there is no conviction?

The record of conviction, if used, is a "present imputation against" the moral character of Mr. Mullen. And yet that conviction has been erased from being. Under it he is a new man.

But passing on to the second question as to whether or not a conviction based upon acts not having to do with professional business, conduct or duties should or could be used as a basis for disbarment I must confess I have found no authorities. Perhaps the reason is that most such cases go off on the "moral turpitude" question.

In this matter there is no moral turpitude envolved. The conviction was had for "aiding and abetting in the misapplication of funds of a National Bank" and under section 5209, Revised Statutes of the United States. A purely technical violation. conviction shows this pardon under the belief that he had funds in a Ft. Worth bank tendered drafts to an Ardmore bank which were cashed and then those drafts refused by the Ft. Worth bank. Because the Armore banker knew the details of th matter it was denominated a conspiracy, or aiding and abetting. It might just as well have been that a conviction could be had for accepting a loan of more money from a National Bank than the law or regulations allowed- going over the limit-. Under such circumstances and this statute when one accepted such "over" loan he was guilty of aiding and abetting the officers of the bank in the misapplication of funds of the bank. What ordinary citizen, even the best of lawyers, would recognize his conduct in such matter as being unlawful?

This conviction of Mullen was for a misdemeanor. It did not envolve moral turpitude, therefore the statutory provision at 4106 of the Compiled Laws of Oklahoma cannot be used to disbar or suspend Mr. Mullen.

Neither am I convinced, after a careful perusal of the authorities, that a conviction under a Federal statute or, for that matter, in a Federal court comes within the wording by the legislature of this state " the conviction of a felony under the Statutes of OKLAHOMA". Words are used to express meaning commonly understood. When the legislature used the words:' under the Statutes of OKLAHOMA" it should be construed to mean that. There is no statute in Oklahoma covering the "aiding and abetting to misapply funds of a National bank". And even if there was it is questionable in my mind as to whether the legislature did not mean to confine th conviction to the "Statutes of Oklahoma" as stated. There is no opinion of our courts holding that a conviction in the Federal courts is sufficient to envolve this statute. In re Elliott is not in point, that case and disbarment was had upon the facts that caused the conviction. No such contention is here made, this is simplyan accusation based upon a conviction in a Federal Court for a "felony", when it was a misdemeanor and did not envolve moral turpitude.

I therefore join with Mr. Keating in recommending that the accusation be dismissed.

Governor.

BEFORE THE BOARD OF GOVERNORS OF THE BAR OF OKLAHOMA.

In the Matter of the Disbarment of
J. S. MULLEN.

B R I E F

Without waiving our contention that the present bar act of Oklahoma is unconstitutional, we desire to leave this matter without argument, for the reason that we feel the members of the Board of Governors have definitely made up their minds upon this question and it would be needless to re-hash the argument, so often made. But, we want it distinctly understood that we are not waiving this contention at this time or any other time.

It is charged as a ground for disbarment, that in 1922 the respondent, J. S. Mullen, was convicted in the United States District Court of a crime and sentenced to the penitentiary, and we desire to present to you two questions.

The first one, that you cannot disbar this respondent, for this reason, and the second one is, that the respondent having been pardoned by the President of the United States, that this is not ground to disbar him now.

Under the first proposition presented above we desire to call your attention to Section 4106 C. O. S. 1921, which reads as follows:

> "The following are sufficient causes for suspension or revocation:
> First. When he has been convicted of a felony under the statutes of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence.
> Second. When he is guilty of a wilful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession.
> Third. For the wilful violation of any of the duties of an attorney or counselor."

From the above section you will see that the right to disbar an attorney is limited to the conviction of a felony under

the statutes of Oklahoma, or a misdemeanor involving moral turpitude. This was the statute as it stood at the time Mullen was convicted and we say that you cannot extend this statute to involve other grounds after his conviction.

In other words, to make a conviction in the Federal Court a ground of disbarment after the conviction is a violation of the Constitution, for the reason that it would punish a man for a crime which was not punishable under the law at the time the crime was committed.

The Supreme Court of the United States in the case of In the Matter of A. H. Garland, 18 L. Ed. (U.S.) 366, considered this matter and held that you could not make an act a ground for disbarment and disbar an attorney after the act was committed. The court there said:

> "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the Act, as against them, operates as a legislative decree of a perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the Act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of the bills of attainder, under which general designation they are included.
>
> "In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an ex post facto law. In the case of Cummings v. Missouri, just decided (ante, 356), we have had occasion to consider at length the meaning of a bill of attainder and of an ex post facto law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the Constitution of Missouri is equally applicable to the Act of Congress under consideration in this case."

This authority should, in our minds, settle the case, and we therefore pass this question for the present.

We call your attention to the fact that before this action was begun by the President of the United States has had pardoned Mullen and that his pardon is unconditional.

The effect of a pardon is well stated by the Criminal Court of Appeals in the case of Ex parte Collins, 239 Pac. 693, where the court on page 696 says:

> "There being no limitation on the power of the Governor, he may grant an unconditional pardon which upon delivery to the offender completely exonerates him and releases him from the force and effect of the sentence, as was said in the case of Ex parte Crump, 10 Okl. Cr. 133, 135 P. 428, 47 L. R. A. (N.S.) 1036, a 'pardon" is an act of grace and mercy bestowed by the state through its chief executive, upon offenders against its laws after conviction, and a full, unconditional pardon reaches both the punishment prescribed for the offense and the guilt of the offender; it obliterates in legal contemplation the offense itself, and hence its effect is to make the offender a new man."

The United States Supreme Court in the case of Osborn vs. United States, 23 L. Ed. (U.S.) 388, lays down this same rule. In a case where the Government had confiscated property belonging to Osborn because he had engaged in a rebellion against the Government. The court there says, that the pardon carries with it the release of all punishment even including the confiscation of his property.

This same rule is stated in the case of Ex parte Garland, 18 L. Ed. (U.S.) 366 above cited. That was a case in which they were attempting to prohibit Garland from practicing law for participating in the rebellion, and the court there held that the pardon not only relieved him of punishment, but that he could not thereafter be disbarred and holds that the pardon is a full release from punishment and blots out the existence of guilt so that in the eyes of the law the offender is as innocent as if he had not committed the offense.

The Supreme Court of California in the case of In Re Emmons, 154 Pac. 619, states this rule explicitly and holds that the mere proof of a conviction of a crime where the respondent had been pardoned was not sufficient to disbar the respondent. This case is cited with approval and with additional authorities in the case of People vs. Hawkins, 260 P. 946, and the same case in 269 Pac. 427.

We also desire to call your attention to the case of Sanborn vs. Kimball, 64 Me. 140-150, and the case of Scott vs. State, 25 S. W. 337. All these cases hold as we have above indicated, that where an attorney has been pardoned that the mere evidence of his conviction is not sufficient for a disbarment, and we, therefore, respectfully submit that in this case there should be no judgment against the respondent, Mullen, for the two reasons above outlined.

Respectfully submitted,

SIGLER & JACKSON

Attorneys for the Respondent.