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Constitutional Law - Executive Powers - Legislative Powers - Restrictions on Pardoning Powers

Cyrus N. Lynche

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BAR BRIEFS

COMMENT

Case Note, Ex Parte Chambers.

CONSTITUTIONAL LAW — EXECUTIVE POWERS — LEGISLATIVE POWERS — RESTRICTIONS ON PARDONING POWERS. — In 1936, by virtue of an initiated measure, "engaging in the liquor traffic" ceased to be a crime. In 1937, petitioner was found guilty of the crime of engaging in the liquor traffic, the offense having occurred in 1935. He was thereafter sentenced to the state penitentiary. The Supreme Court affirmed the District Court, 280 N. W. 196, and the Supreme Court of the United States dismissed his appeal to it on April 10, 1939, 59 Sup. Ct. 588, so that, thereupon, he was committed to the penitentiary. A petition to the District Court for a writ of habeas corpus was denied, and application to the Supreme Court followed. N. D. Comp. Laws 1913, Sec. 7316, saves the penalty for violation of a law prior to its repeal. Such section was amended by Chap. 134, Laws of 1939, effective March 18, 1939, so that prison sentences imposed for violation of a repealed law should be extinguished, unless otherwise provided in the repealing act. Petitioner contends that, therefore, after March 18, 1939, he was in the same position as if the law, for the violation of which he had been tried, had been repealed without any saving statute having been in effect. Petitioner further contends that on such date his appeal was pending, and that no court could henceforth compel compliance with the judgment and sentence. The state claims that the act is unconstitutional, as applied to petitioner, in that it operates as a pardon by the legislature, whereas the pardoning power is vested exclusively in the Governor and the Board of Pardons. N. D. Const. Art. 76, as amended by Art. 3. Held, that Chap. 134, Laws of 1939, was, as far as extinguishing petitioner's sentence is concerned, an exercise by the legislature of the pardoning power granted to the Governor and the Board of Pardons, exclusively, except in case of treason or impeachment. Ex Parte Chambers, (N. D.) 285 N. W. 862 (1939)

"The pardoning power is neither inherently nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official board or department of government they choose. *Jameson v. Flanner*, 116 Kans. 624, 228 Pac. 82 (1924). The people had the right to withhold all power from any one of the three branches; or, on the other hand, they had the right to vest the pardoning power in either the legislature or the judicial branches of the government. The executive no more represents the sovereignty of the state than either one of the other branches of the state government. The pardoning power no more vests in the governor, by virtue of his position, than it does in the judicial branch of the government when the constitution is silent." *State v. Nichols*, 26 Ark. 74 (1870). In the case under consideration, the court held that the act in question was an unconstitutional usurpation of the exclusive executive power to grant pardons "after conviction," but the decision indicated that the meaning of the words "after conviction" is not settled and varies in different jurisdictions. In the instant case, the court declared that it

was immaterial whether it meant "after a verdict of guilty" or "after judgment and sentence," and that in either event the act in question was an exercise of legislative clemency "after conviction." The N. Y. Const. Art. 2, Sec. 2, provides that a "person convicted" of an infamous crime shall forfeit the privilege of suffrage. The court, considering the proposition in *People v. Fabian*, 192 N. Y. 443, 85 N. E. 672 (1908), declared that the term "convicted" did not apply in a case where there had been a verdict of guilty, but sentence had been suspended without judgment. The instant case was still pending on appeal when Chap. 134 of the Laws of 1939 was enacted.

There is a difference of opinion as to the authority of a legislative body to grant pardons. The matter is ably discussed pro and con in "Legislative Pardons" (1939), 27 Cal. L. R. 371. In that article, while differing on the subject of legislative pardons, the exponents of either view indicated that the legislature is empowered to grant amnesties. The point was not raised in the Chambers case. Is it possible that Chap. 134, Laws of 1939, was in the nature of an amnesty? An amnesty has been defined as "a general pardon, an act pertaining to a multitude without consideration of the special circumstances of individual cases." Generally, a pardon remits punishment to a specific person, whereas an amnesty remits punishment for a specific crime. N. D. Const., Art. 76, as amended by Art. 3, vests the power to pardon after conviction in the Governor and the Board of Pardons, but the Constitution is silent on the subject of amnesty. A sovereign state has all powers not delegated to the Federal Government, or expressly prohibited by its own Constitution or the Federal Constitution. North Dakota is a sovereign state. The power to grant an amnesty for violation of a state law has not been delegated to the Federal Government. Neither is it expressly prohibited by the Federal Constitution or the State Constitution. Therefore, does the power to grant an amnesty not lie in the sovereign State of North Dakota? If it does, in the absence of mention of the subject in the State Constitution, may the legislature exercise that power?

There was a social reason back of the enactment of Chap. 134, Laws of 1939. What had formerly been the crime of "engaging in the liquor traffic" was now a legitimate commercial enterprise. It was generally understood that numerous persons had engaged in the liquor traffic. Might not the legislature have deemed it socially inexpedient to impose imprisonment for acts no longer generally considered to involve moral turpitude or statutory infringement? If such were the intent of the legislature, is there a difference under the Constitution of North Dakota between a pardon to a specific person and an act which releases all persons within a designated group from imprisonment?

CYRUS N. LYNCH.
University of North Dakota.

LAW SCHOOL NOTES

The School of Law of the University of North Dakota began its forty-first year September 19, 1939. The enrollment for the first semester of this year is 71 and the enrollment for the first