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Prohibition--Equitable Clean Hands Doctrine as a Ground for Denial of the Writ

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will disqualify.[7] The apparent policy of the *Webb* case,[8] however, is that the serving of sentence obliterates the offense. When a criminal serves his sentence and returns to society he must be given the widest opportunity for vocational readjustment. This policy is, perhaps, justified by the great increase in statutory felonies embracing many acts which would have been only misdemeanors at common law and would not have disqualified the actor from holding office. This, however, is argument for the change of our legislative policy rather than for a new judicial interpretation of the word "reversed".[9] To enforce this policy as the court has done by saying that a prisoner has "reversed" his conviction by serving his sentence only increases our already burdensome load of legal subtleties. In judicial usage "reversed" means the setting aside, annulling, or vacating an order or judgment.[10] Strictly, it may even be doubted whether a pardon will remove the disqualification created by a conviction.[11] In short, unless the legislature only meant that a person convicted of a felony should not hold public office while in the penitentiary, the interpretation placed upon the statute by the *Webb* case is spurious.[12]

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PROHIBITION — EQUITABLE CLEAN HANDS DOCTRINE AS A GROUND FOR DENIAL OF THE WRIT. — In a recent case, A sued B before a magistrate for money paid for a tract of land. B filed a statutory affidavit stating that the title to the land would come into question, which would deprive the magistrate of further jurisdiction if not met by a sufficient counter affidavit. In his affidavit, B failed to disclose that to his knowledge the title to the land had been adjudicated in a former equity suit. A filed an insufficient counter affidavit, and the justice, after hearing

[7] Crampton v. O'Mara, 193 Ind. 551, 139 N. E. 360 (1923). Writ of error dismissed, 267 U. S. 575, 45 S. Ct. 230 (1924).

[8] *Supra* n. 1.

[9] See, Horack, *In the Name of Legislative Intention* (1932) 38 W. VA. L. Q. 119.

[10] WORDS AND PHRASES, p. 6211.

[11] Morgan v. Vance, 4 Bush. 323 (Ky. 1868). *Cf.* Donham v. Gross, 210 Cal. 190, 290 Pac. 884 (1930).

[12] Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379, 381; Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863; Landis, *A Note on Statutory Interpretation* (1930) 43 HARV. L. REV. 886.

the action, rendered judgment for A. B secured a writ in the circuit court prohibiting the collection of A's judgment. On a writ of error, the Supreme Court of Appeals of West Virginia reversed the judgment and dismissed the writ. It placed the decision on the ground that, even though prohibition is a legal remedy and a matter of right in West Virginia, it will not be issued on the mere showing of a clear technical right, founded on deceit preventing the applicant from coming with "clean hands". *Lyons v. Steele.*[1]

Prohibition is classed as a legal remedy,[2] and therefore retains its common-law function and character as a legal remedy in West Virginia,[3] since this state retains the distinction between law and equity.[4] Statutory regulation does not change this characteristic.[5] But in deciding the principal case, the court, in effect, largely disregarded the distinction between law and equity, and decided that the issuance of the writ is governed by the doctrine of equity, that he who seeks relief must come with "clean hands".

Most of the few courts which have spoken on this question seem to support the principal case. In Arkansas[6] and England[7] the writ has been denied on account of laches, while other English cases[8] indicate that either laches or misconduct by the petitioner may be ground for denial. The New York[9] and Missouri[10] courts agree that prohibition is similar to an injunction in equity. One inferior appellate court of California[11] said that, since the writ is in its effect similar to an injunction, it will be denied when

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[1] Lyons v. Steele, 169 S. E. 481 (W. Va. 1933).

[2] See 50 C. J., Prohibition, § 2, for a collection of cases to this effect.

[3] Johnston *et al.* v. Hunter *et al.*, 50 W. Va. 52, 40 S. E. 448 (1901); Eastham v. Holt, Judge, 43 W. Va. 599, 619, 27 S. E. 883, 890 (1897).

[4] W. Va. Constitution, art. 8, § 21; W. VA. CODE (1931) c. 2, art. 1, § 1.

[5] W. VA. CODE (1931) c. 53, art. 1.

[6] Galloway v. LeCroy, 169 Ark. 838, 277 S. W. 35 (1925) (an alternative ground of decision).

[7] Parochial Church v. Chancellor, L. R. 1923 P. D. 38 (1922).

[8] Mayor, etc. of London v. Cox, L. R. 1867 2 H. L. 239, 279 (1867); Farquharson v. Morgan, L. R. 1894 1 Q. B. 552, 559, 70 L. T. R. 152, 154 (1894) (That discretion as to laches or misconduct exists when the defect is not on the face of the proceedings.).

[9] People v. McCue, 76 N. Y. Supp. 485, 37 N. Y. Misc. 741 (1902); People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (n. s.) 159 (1906).

[10] State v. Aloe, 152 Mo. 466, 54 S. W. 494 (1899).

[11] First National Bank v. Superior Court of Lassen County, 12 Cal. App. 335, 107 Pac. 322 (1909) (an alternative ground); *cf.* Havemeyer v. Superior Court, 84 Cal. 327, 402, 24 Pac. 121, 141, 10 L. R. A. 627, 648 (1890) ("The court cannot refuse it (writ of prohibition) on the ground that he (the petitioner) is a bad man and deserves the punishment that he is threatened with.").

its issuance will do more harm than good. As to the latter point the California court is supported by the New York[12] and South Carolina[13] courts. Only one court has said that the issue of the writ cannot be controlled by the conduct of the petitioner, in regard to the subject matter of the suit sought to be restrained.[14] In determining the weight and importance of these decisions, it is important to note that they were all rendered by courts in which the writ of prohibition lies *ex gratia* instead of *ex debito justitiae* as in West Virginia.[15]

The court apprehends that a recent statute,[16] construed along with the statute by which prohibition lies as a matter of right in this state,[17] might prevent a denial of the writ in this case. However, it explains this fear away by applying the "clean hands" doctrine. The necessity of bringing a rule of equity into the law to achieve this result seems doubtful, since the statute, by empowering the court to consider the facts, broadens rather than limits the court's power to determine the fact of jurisdiction.[18]

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[12] People v. McCue, *supra* n. 9; People v. Supervisors, 31 How. Pr. (N. Y.) 237 (1864).

[13] Kinloch v. Harvey *et al.*, Harper (S. C.) 508 (1830).

[14] Havemeyer v. Superior Court, *supra* n. 11 (The court decided squarely on the point and granted the writ even though the petitioner was the cause of the defendant in the superior court being proceeded against for violation of the anti-trust laws).

[15] *Supra* n.n. 6 to 14 inc. (In all of these cases the courts said that the writ of prohibition lay *ex gratia* instead of *ex debito justitiae*.).

[16] W. VA. CODE (1931) c. 53, art. 1, § 8, "The writ peremptory shall be awarded or denied according to the law and facts of the case."

[17] W. Va. Acts 1882, c. 153, § 1; W. VA. CODE (1931) c. 53, art. 1, § 1, "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." N. & W. Ry. Co. v. Pinnacle Coal Co., 44 W. Va. 574, 577, 30 S. E. 196, 197, 41 L. R. A. 414, 415 (1898). "In all cases within the purview of the statute, prohibition lies as a matter of right without regard to other remedies."

[18] W. VA. CODE (1931) c. 50, art. 4, § 16, merely provides for the method of showing the justice that he has no jurisdiction of the subject matter, and must dismiss the suit. It does not prevent a higher court from determining for itself the matter of jurisdiction. Since W. VA. CODE (1931) c. 53, art. 1, § 8, *supra* n. 16, was taken from the VIRGINIA CODE (1919) § 5836, where the writ of prohibition lies *ex gratia*, and since the only real addition made by the statute is to enable the court to consider the facts in addition to the law in granting the writ, it broadens rather than limits the appellate court's power to determine the fact of jurisdiction.