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NOTES AND COMMENTS

ATTORNEYS

POWER OF SUPREME COURT TO DISBAR

A judge denied a proper motion for a change of venue and later allowed a large fee to his father and law partner as attorney for the receiver. *Held,* that change of venue be allowed and that a commission of lawyers be appointed to investigate the receivership proceedings to ascertain whether future action should be taken because of the conduct of any member of the bar connected therewith and, if so, to institute appropriate proceedings.[1]

This was the first time the Supreme Court of Indiana had on its own initiative taken notice of apparent misconduct before another court and ordered further proceedings pending an investigation. Prior to 1939 the Supreme Court had never assumed original jurisdiction to suspend or disbar an attorney;[2] but it had refused to accept jurisdiction.[3]

The statutes of many other states have provided the authority for disciplining attorneys by creating an incorporated state bar,[4] by authorizing the supreme court to promulgate rules to integrate the bar,[5] or by expressly authorizing the supreme court to take original

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[1] State *ex rel.* Avalon Apartments Co. of Gary, Inc. v. Sammons, Special Judge, —— Ind. ——, 38 N.E. (2d) 846 (1941).

[2] *In re* Hardy, 217 Ind. 159, 26 N.E. (2d) 921 (1940) (on memorandum from appellate court, Supreme Court issued rule to show cause why attorney shouldn't be disciplined for tampering with record to appellate court; rule was discharged on failure of evidence); *In re* Murray, 216 Ind. 295, 24 N.E. (2d) 288 (1939) (ordered not to appear before Supreme Court for one year for changing transcript filed before Supreme Court); State *ex rel.* Indianapolis Bar Ass'n v. Hartman, 216 Ind. 89, 23 N.E. (2d) 437 (1939) (on information of State Bar the Supreme Court disbarred attorney from practicing in all courts of state for fraud in application for admission).

[3] Vivian Colliers Co. v. Cahall, 184 Ind. 473, 110 N.E. 672 (1915) (Supreme Court had no jurisdiction to reverse a judgment in case appealed on confession of error arising from alleged misconduct of attorneys); *see* Walls v. Palmer, 64 Ind. 493, 497 (1879) (whether an attorney be denied the right to practice before a circuit court would not in any way affect the exercise of the functions and power of the Supreme Court).

[4] CAL. CODES, GEN. LAWS & CONST. (Deering, Supp. 1939) *Business and Professions Code* § 6001 (established incorporated state bar); *id.* §§ 6078, 6087 and 6100 (authorized Board of Governors to hold hearings and recommend discipline to Supreme Court, and providing that attorney may be disbarred by Supreme Court on its own initiative or on information of others); WIS. STAT. (1941) 256.28 (state bar authorized to conduct prosecutions, hearings before referee, and to recommend to Supreme Court); WASH. REV. STAT. ANN. (Remmington, Supp. 1939) § 138. For a discussion of the constitutionality of these acts see *In re* Platz, 60 Nev. 296, 108 P. (2d) 858 (1940); notes (1938) 114 A. L. R. 161; note (1937) 26 KY. LAW GUILD Q. 65.

[5] Wyo. Laws 1939, c. 97.

jurisdiction of cases of misconduct.[6] In Indiana no express statutory authority exists for such action,[7] although such authority might be implied.[8]

Since the beginning of our judicial system the inferior courts of record have assumed the power to discipline attorneys practicing before them.[9] This has been termed an inherent judicial power,[10] founded on the necessity of protecting the court and in the interest of its efficient operation.[11] The supreme courts of many states have assumed jurisdiction to discipline attorneys for misconduct on the basis of this inherent power.[12] However, this inherent power to discipline is limited in most cases to jurisdiction over attorneys who are

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[6] ILL. REV. STAT. (Bar Ass'n Ed., 1937) c. 13, § 6 (gives Supreme Court power to strike name of attorney from roll for misconduct); Ill. Sup. Court Rules (April, 1933) (appointed Board of Governors of Illinois Bar Association and Board of Governors of Chicago Bar Association to investigate, hold hearings, and recommend to the Supreme Court); MASS. ANN. LAWS (Michie, Supp. 1939) c. 221. § 40; MICH. STAT. ANN. (Henderson, 1929) §§ 13584 to 13586 (charge may be filed by attorney general in Supreme Court and removal or suspension is effective in every court of the state); MINN. STAT. (Mason, 1929) § 5697 (action may be taken by Supreme Court on its own initiative); N. Y. JUDICIARY LAW § 478 (suspension or removal of an attorney by the Supreme Court is effective in every court of the state); *id.* § 88 (authorizes Court of Appeals to discipline); OHIO GEN. CODE ANN. (Page, 1937) § 1707 (if misconduct comes to attention of Supreme Court or Court of Appeals it is their duty to cause proceedings to be instituted), *see In re* Thatcher, 80 O. St. 412, 508, 89 N.E. 39, 88 (1909). *But see*: Legal Club of Lynchburg v. Light, 157 Va. 249, 119 S. E. 55 (1923).

[7] For provisions regarding disbarment of attorneys see IND. STAT. ANN. (Burns, Supp. 1941) §§ 4-3614 to 4-3618; IND. ADM. CODE (Horack, 1941) §§ 4-3614 to 4-3618.

[8] IND. STAT. ANN. (Burns' Supp. 1941) § 4-3608, IND. ADM. CODE (Horack, 1941) § 4-3608. "The Supreme Court shall have exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations as it may prescribe." IND. STAT. ANN. (Burns, Supp. 1941) § 4-3614, IND. ADM. CODE (Horack, 1941) § 4-3614 (authorizes any court of record to suspend for cause); IND. STAT. ANN. (Burns, Supp. 1941) § 4-3617, IND. ADM. CODE (Horack, 1941) § 4-3617 (proceedings may be started by direction of the court by appointing an attorney to draw up and prosecute the accusation).

[9] *In re* Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *In re* Wolfe's Disbarment, 288 Pa. 331, 135 Atl. 732 (1927); notes (1935) 69 A. L. R. 705, (1935) 96 A. L. R. 686; (1934) 7 FLA. ST. B. A. J. 183.

[10] WILLIS, CONSTITUTIONAL LAW (1936) 145.

[11] Dowling, *The Inherent Power of the Judiciary* (1935) 11 IND. L. J. 116, 127.

[12] *In re* Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *In re* Hansen, 101 Mont. 49, 54 P. (2d) 882 (1936); *In re* Royall, 34 N. M. 554, 286 Pac. 156 (1930); *In re* Brown, 64 S. D. 87, 264 N. W. 521 (1936). Some courts have held that this power is superior to statutory and constitutional provision. State v. Conner, 196 Wis. 534, 221 N. W. 603 (1929); *see In re* Haddad, 106 Vt. 322, 173 Atl. 103 (1934).

members of the bar of the supreme court.[13] For example, the Supreme Court of Indiana on the grounds that it lacked jurisdiction has refused to punish a corporation for the unauthorized practice of law.[14] But other courts have assumed jurisdiction to punish by contempt in similar instances.[15] In view of the purpose of all disciplinary action,[16] there exists no reason why the Supreme Court should not assume jurisdiction over all cases of misconduct by attorneys or for unauthorized practice of law.[17] A necessary corollary to this power is the ability of the court to initiate proceedings on its own motion[18] and order investigations.[19] The Supreme Court of Illinois led the way by punishing for the unauthorized practice of law in an original proceeding over ten years ago.[20] It is urged that similar results may well obtain in Indiana.

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[13] *See In re* Hardy, 217 Ind. 159, 26 N. E. (2d) 921 (1940); State *ex rel.* Indianapolis Bar Ass'n v. Hartman, 216 Ind. 89, 23 N. E. (2d) 477 (1939). *In re* Hansen, 101 Mont. 49, 54 P. (2d) 882 (1936) (officers of the court); State v. Cannon, 196 Wis. 534, 221 N. W. 603 (1929) (officers of the court). This will cause no difficulty in Indiana as to attorneys admitted since 1933. IND. STAT. ANN. (Burns, 1933) § 4-3605, IND. ADM. CODE (Horack, 1941) § 4-3605 (all attorneys are now admitted to the bar of the Supreme Court). See Ind. Sup. Court Rule 3-5, IND. ADM. CODE (Horack, 1941) § 4-3605-2.

[14] *See* State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., 211 Ind. 27, 38, 5 N. E. (2d) 538, 543 (1937). "This court has no jurisdiction over one who is not a member of the bar and who is practicing law to punish him for contempt, except for some act which affects or interferes with the functioning of this court, ... "

[15] State *ex rel.* Johnson, Atty. Gen. v. Childe, 139 Neb. 91, 295 N. W. 381 (1941); State *ex rel.* Freebourn, Atty. Gen. v. Merchants' Credit Service, 104 Mont. 76, 66 P. (2d) 337 (1937); *In re* Morse, 98 Vt. 85, 126 Atl. 550 (1924).

[16] See note 12, *supra*. *See Ex parte* Wall, 107 U.S. 265, 288, 289, 2 S. Ct. 569, 588, 589, 27 L. Ed. 552, 561, 562 (1882). "The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice therein."

[17] Dowling, *The Inherent Power of the Judiciary* (1935) 11 IND. L. J. 132. ". . . throughout the United States, and specifically in Indiana, broad inherent judicial authority is found to exist, ample for the betterment and control of the bar."

[18] *In re* Keenan, 287 Mass. 577, 192 N. E. 65, 96 A. L. R. 679, 686 (1934); People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N. E. 487, 60 A. L. R. 851, 860 (1934); 5 Am. Jur. (1936) § 289, Attorneys at Law.

[19] *In re* Keenan, 287 Mass. 577, 192 N. E. 65, 96 A. L. R. 679, 686 (1934) (general investigation); *accord, In re* Hansen, 101 Mont. 49, 54 P. (2d) 882 (1936); State v. Peck, 88 Conn. 477, 91 Atl. 274 (1914). WILLIS, CONSTITUTIONAL LAW (1936) 145 (inquestorial procedure to learn the facts); Dowling, *The Inherent Power of the Judiciary* (1935) 11 IND. L. J. 116 (inquiry into conduct of individual, or general investigation).

[20] People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 334 Ill. 462, 176 N. E. 901 (1931). Although the respondent had never appeared before or in connection with the Supreme Court, the Supreme Court held that its inherent judicial

A proceeding before the Supreme Court is a summary proceeding in which some of an attorney's rights are not protected in the traditional manner.[21] However, recent cases have by implication overruled prior decisions which entitled the accused attorney to a jury trial.[22] Notice and opportunity for a hearing must be given the attorney, but courts may inquire into the conduct of attorneys without infringing rights guaranteed by the Fifth Amendment to the Constitution of the United States[23] and without violating the Indiana Constitution.[24]

EVIDENCE

ADMISSIONS BY FALIURE TO ANSWER LETTERS

Plaintiff sued to recover amounts deducted from his salary for pension reserves. On a counterclaim for losses resulting from plaintiff's acts, defendant, among other things, introduced in evidence letters, detailing specific items of plaintiff's embezzlements, which were delivered to plaintiff, but to which plaintiff made no reply. *Held*, this failure to reply constituted tacit admission of the charges in the letters. *Boerner v. United States*, 117 F. (2d) 387 (C.C.A. 2d, 1941), *cert. denied*, 313 U.S. 587 (1941), (1942) 17 IND. L. J. 438.

The familiar legal maxim, *qui tacet consentire videtur* (silence gives consent) is not generally applicable to unanswered letters, as it is

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power included all powers necessary for the complete performance of judicial functions, including the power to discipline or disbar attorneys for misconduct, and to punish for contempt those who practiced without authority. That such power does not vest by virtue of the fact that the attorney is admitted to the bar of the Supreme Court, but that it extends throughout its territorial jurisdiction.

[21] *In re* Darrow, 175 Ind. 14, 92 N. E. 309 (1910) (pleadings and trial shall be the same as in other cases of a civil nature: there shall be adverse parties, issues joined, a jury trial, and change of venue if necessary); *Ex parte* Trippe, 66 Ind. 531 (1879) (entitled to notice and trial); Heffner v. Joyne, 39 Ind. 463 (1872) (complaint must request disbarment); Reilly v. Cavanough, 32 Ind. 214 (1869) (attorney is authorized by statute to demand that issues formed be tried by jury); *Ex parte* Smith, 28 Ind. 47 (1867) (charges must be filed and attorney accorded notice and opportunity for hearing). *Contra*: *Ex parte* Robinson, 3 Ind. 52 (1851) (not entitled to jury trial).

[22] *In re* Hardy, 217 Ind. 159, 26 N. E. (2d) 921 (1940); State *ex rel.* Indianapolis Bar Ass'n v. Hartman, 216 Ind. 89, 23 N. E. (2d) 477 (1939).

[23] *Ex parte* Wall, 107 U.S. 265, 288, 289, 2 S. Ct. 569, 588, 589, 27 L. Ed. 552, 561, 562 (1882). The contention that a summary proceeding against an attorney to exclude him from the practice of law for acts for which he may be indicted and held for trial by jury is in violation of the Fifth Amendment as depriving him of property without due process of law is unfounded. "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved." *In re* Mayberry, 295 Mass. 155, 3 N. E. (2d) 248 (1936); *In re* Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933). 6 R. C. L. (1915) § 453, Constitutional Law.

[24] See note 22, *supra*.