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Admissions by Failure to Answer Letters

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*.

to unanswered oral statements. 4 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1071, 1073 (3). The general rule seems to be that an unanswered letter which is not part of a mutual correspondence is not admissible in favor of the writer as evidence of the statements contained therein. *Leach and Co. v. Pierson*, 275 U.S. 120, 128, 55 A. L. R. 457, 459 (1927); *Morris v. Norton*, 75 Fed. 912, 924, 925 (C. C. A. 6th, 1896); *Packer v. United States*, 106 Fed. 906, 908 to 910 (C. C. A. 2d, 1901); *Snead v. Commonwealth*, 138 Va. 787, 797, 798, 121 S. E. 82, 85, 34 A. L. R. 550, 555 (1924). Three recognized exceptions to the general rule are: letters part of the *res gestae*, *Murray v. East End Improvement Co.*, 22 Ky. L. Rep. 1477, 60 S. W. 648, 650 (1901); letters relating to an existing contract, *Peninsular Naval Stores Co. v. Parrish*, 13 Ga. App. 779, 80 S. E. 28 (1913); *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952 (1914); *Sturtevant v. Wallack*, 141 Mass. 119, 4 N. E. 615 (1886); and letters containing demand or notice, *Morris v. Norton*, 75 Fed. 912, 924 (C. C. A. 6th, 1896); *Hays v. Morgan*, 87 Ind. 231 (1882). The third exception is the most applicable to the principal case, but the general qualification is that the letter can be admitted only to show that demand or notice was given to addressee, and not that the substantive matter of the letter has been admitted. *Morris v. Norton*, 75 Fed. 912, 924, 925 (C. C. A. 6th, 1896). These letters might be admitted by the court on the grounds that the plaintiff's failure to answer was nonassertive conduct tending to show his admission of the matter contained therein, Falkner, *Silence as Hearsay* (1940) 89 U. OF PA. L. REV. 192; *i.e.*, that there was a duty on his part to answer the letters. *Benn v. Forrest*, 213 Fed. 763, 765, 766 (C. C. A. 1st, 1914).

An unequivocal general rule on this point seems impractical, and precedent indicates that each case must be decided by its peculiar set of facts. 4 WIGMORE, EVIDENCE (3d ed. 1940) § 1073 (3); *Lord and Spencer, Inc. v. M. N. Stout Co.*, 33 F. (2d) 60, 62 (C. C. A. 1st, 1929). Strict adherence to the general rule, if such a rule can be claimed, would perhaps indicate that the court improperly admitted the letters in evidence, for the particular facts do not appear to be sufficient to allow the admissibility of these letters under the general rule.

The court resolves this question, allowing admissibility, under the Federal Rule of Civil Procedure 43 (a), 28 U. S. C. A. §§ 723 (b), 723 (c) (1938), which directs the federal courts to follow the rule, whether state or federal, which favors admissibility.