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Intolerable

Dicta Editorial Board

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and all defendants, in default, who are or may be in such military service, and protect their interests. Such appointment shall be made upon application of plaintiff, but if no such application be made the Court shall make the appointment on its own motion. Provided, however, no such appointment shall be made if it appears from the affidavit filed by the plaintiff that the defaulting defendant is not in such military service. The Court may, in its discretion, allow a fee to such attorney not to exceed $10.00, to be taxed and paid by the plaintiff as a part of his costs. This rule shall take effect as of November I, A. D. 1940."

Intolerable

Lawrence Sullivan in his recent book, *The Dead Hand of Bureaucracy,* states his conviction as follows: "To check the crippling influence of runaway bureaucracy is our foremost problem; and upon its solution depends the survival of the American way of life." (*The Reader's Digest,* October, 1940, p. 120.)

The latest manifestation of a reach for power by administrative boards is the declaration of a system for the discipline and control of attorneys representing private clients. A few months ago the Federal Trade Commission promulgated a rule empowering a trial examiner to suspend a hearing and recommend to the Commission for disbarment from practice before it any attorney whom the examiner deemed guilty of "disrepectful" language or conduct (*vide supra,* p. 165).

Now the New York State Labor Relations Board has followed suit and issued a rule, effective September 16, 1940, empowering a trial examiner to exclude from further participation in the proceeding any attorney who, in the examiner's discretion, has been guilty of "contemptuous" conduct before him. In such an instance the hearing is to be adjourned so as to afford the attorney's client opportunity to obtain other counsel. A right of appeal to the board is granted to the aggrieved attorney, but the determination of the board is final.

The above regulations pose the question whether a board, frequently consisting of laymen, should ever have the power to sit in judgment on the conduct of a lawyer, a sworn officer of the courts, in defending his client's rights. It is well known that numerous administrative commissions are appointed under statutes of a social-economic character, often of the most controversial nature. It is well known, moreover, that those men who administer these statutes are frequently

imbued with a mission and zeal seldom seen on the bench of any court. Many of the members of these boards, being laymen, have never studied judicial procedure, and are wholly unfamiliar with the history of the common law and of the ancient and ceaseless struggle for the protection of individual rights.

How often in the past has an intrepid member of the bar stood boldly for his client's rights in the face of a hostile tribunal! How often the vigorous and brave conduct of an attorney could be classed as "disrespectful" or "contemptuous" by an administrative zealot untrained in the law and careless of the rights of the respondent!

Many years ago in England Mr. Justice Bayley, in speaking of the privilege of counsel to speak strongly in court, held that, "The law presumes that he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege, because it is for the advantage of the administration of justice that he should have free liberty of speech." (*Flint v. Pike*, 4 Barn. and Cress. 478.)

Or take the instance when the great Sir Matthew Hale was threatened by Cromwell's government for his vigorous defense of the Duke of Hamilton and Lord Capel. Hale replied that he was pleading in support of law, was performing his duty to his clients, and was not to be daunted by any threats.

Or consider the occasion when Lord Ellenborough rebuked Mr. Brougham for a fervid address in behalf of his clients charged with libel. The judge rebuked Brougham for inoculating himself with the virus of his client's libel. But Brougham replied: "My lord, why am I thus identified with the interests of my client? I appear here as an English advocate, with the privileges and responsibilities of that office; and no man shall call in question my principles in the faithful and honest discharge of my duty."

Recall to mind the episode at the close of the Dean of St. Asaph's libel case when Erskine, then 34, stood his ground before Mr. Justice Buller. The judge criticized the jury's verdict holding the defendant "guilty of publishing *only*," and threatened to expunge the word "only." Erskine turned to the jury and asked: "Is the word 'only' to stand part of the verdict?" Juror: "Certainly." Erskine: "Then I insist it shall be recorded." Buller, J.: "Then the verdict must be misunderstood. Let me understand the jury." Erskine: "The jury do understand their verdict." Buller, J.: "Sir, I will not be interrupted." Erskine: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded." Buller, J.: "Sit down, sir, remember your duty, or I shall be obliged to proceed in another manner." Erskine: "Your lordship may proceed in what manner you think

fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct." (The word "only" was duly recorded.)

Some years after the above tilt with Mr. Justice Buller, Lord Campbell wrote what he thought of the conduct of Erskine on that occasion. He said: "This noble stand for the independence of the bar, would, of itself, have entitled Erskine to the statue, which the profession affectionately erected to his memory, in Lincoln's Inn Hall. We are to admire the decency and propriety of the demeanor, during the struggle, no less than its spirited and the felicitous precision, with which he meted out the requisite and justifiable portions of defiance. The example has had a salutary effect, in illustrating and establishing the duties of judge and advocate in England." (6 *Lives of the Lord Chancellors*, 415.)

Finally, let us not overlook the valiant Malasherbes, faithful to the end as defender of his king. This great Frenchman was unafraid to face even the dread Convention howling for their monarch's head. Malasherbes as advocate for Louis pleaded his client's hopeless cause, and was content to go to the guillotine for performing his duty.

The long story of the struggle of the lawyer to protect his client even in a court before a judge trained in the law would indicate the danger today of placing like powers of discipline in the hands of laymen appointed to administer the social-economic statutes now on the books. Many a lawyer specializes in the law administered by one of these boards. Is he to have his livelihood in constant jeopardy at the hands of these men? Is he to stand craven before these commissions for fear that some bureaucrat will think him "disrepectful?"

The situation calls for instant remedy. These rules must be abrogated and none others like them ever issued.

The words of the famous Wisconsin lawyer, Edward G. Ryan, in the impeachment trial of Judge Levi Hubbell, are apposite here. He was speaking of the spirit of the bar. "Touch its independence," he cried, "and it rebels to a man, shoulder to shoulder, standing up against the invasion of its rights. A corrupt judge may disorganize it; but a tyrannical court can neither bend it nor break it. The relation of a lawyer to his client is a peculiar and important one. Life, character, liberty, prosperity, all that is dear and sacred in life, are the trust of the client to his lawyer. The world may assail: the world may persecute: death and ruin may overhang; all men may desert, but the unfortunate is ever secure in the zeal and loyalty of his advocate."

If in some rare instance a lawyer is really guilty of unprofessional conduct before some quasi-judicial board, the remedy is not in such rules as described above but in some bill similar to that recently prepared

by the Special Committee on Administrative Law of the American Bar Association and submitted to the House of Delegates of such association at its meeting last month in Philadelphia. That bill provides that whenever an administrative agency believes that a member of the bar has conducted himself in practice before it in a manner violative of recognized standards of professional ethics or conduct, such agency may bring the matter to the attention of the attorney general. If the attorney general finds reasonable grounds to believe such charge is true, he is required to file a proceeding against the member of the bar in the district court of the district where the latter resides, for the purpose of securing his suspension or disbarment. Such proceeding is to be conducted by the court in the same manner as other disciplinary proceedings against attorneys.

—N. Y. State Bar Service Letter.

THE LEGALITY OF ADMINISTRATIVE RULINGS

From recent case rulings it is apparent that certain rules and regulations promulgated by administrative departments are being sanctioned as law. The situation arises where a particular statute, or some section of it, has received an official, departmental interpretation as to meaning or applicability in connection with specific matters. Thenceforth, the construction placed upon the statute, in the form of an administrative ruling, is entitled to the same respect as a legislative enactment, unless or until a subsequent legislature takes affirmative action upon it.

In *Bedford v. Colorado Fuel & Iron*, 102 Colo. 538, 81 P. (2d) 752, (1938) was called to determine whether sales of certain tangible personal property were exempted under the Sales Tax Act, Ch. 230, S. L. 1937. Nearly two years before the case was decided the state treasurer had ruled that certain specific sales were taxable under Sec. 2 (n). In the meantime the legislature had re-enacted the sales tax law, making no change in the latter section. In its opinion the court said that "the legislature was presumptively aware of the construction theretofore given the previous statutes, and was satisfied therewith." It was stated further that "the re-enactment of the sales tax law, after rules of construction promulgated by the state treasurer had been in force for almost two years, in effect, amounted to a legislative confirmation of those rules."

Again in *First National Bank of Greeley, Colo. v. United States*, 86 Fed. (2d) 938, in a contest over the effect of an administrative ruling on requirements of capital stock tax returns, the Circuit Court of Appeals ruled that "repeated congressional revision of income tax statutes with knowledge of treasury regulations relating to taxation of income from sales of corporate property by liquidating receivers of trustees . . . is such