



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 14 | Number 4

Article 8

6-1-1936

Disbarment -- Acts Not in Capacity of Attorney Antedating Incorporated Bar -- Constitutionality

B. Irvin Boyle

M. T. Van Hecke

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

B. I. Boyle & M. T. Van Hecke, *Disbarment -- Acts Not in Capacity of Attorney Antedating Incorporated Bar -- Constitutionality*, 14 N.C. L. REV. 374 (1936).

Available at: <http://scholarship.law.unc.edu/nclr/vol14/iss4/8>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

promisor was under a duty to pay, regardless of the coercion, it is stated that the pressure exerted is insufficient to constitute duress. Thus, the rationale in terms of duress would seem to be *ex post facto*.

The principal case appears to have been decided upon like considerations and to have been rationalized in a similar manner. Since such considerations of policy seem to be basic, opinions would be clarified if rationalized in terms of such fundamental factors. Discussion of duress would then be rendered unnecessary.

J. WILLIAM COPELAND.

Disbarment—Acts Not in Capacity of Attorney Antedating Incorporated Bar—Constitutionality.

The defendant was disbarred by the Council of the North Carolina State Bar, for collecting and wrongfully retaining funds belonging to an estate for which he was acting as trustee, executor and attorney, under a clause of the State Bar Act, Ch. 210, *Public Laws 1933*, authorizing disbarment for "detention without a *bona fide* claim thereto of property received or money converted in the capacity of attorney." Upon appeal, the disbarment was sustained by the Superior Court and a jury. On appeal to the Supreme Court, *held*, reversed on the grounds (1) that the acts complained of were committed while the defendant was acting in the capacity of an executor and not as an attorney; (2) all the matters complained of took place prior to the enactment of the State Bar Act in 1933; and (3) "It must be conceded that the plea to the jurisdiction presents a grave and serious constitutional question."¹

Unless specified by statute, it is not necessary that an attorney be acting only in his professional capacity when the acts complained of are committed. Any showing of lack of the good moral character necessary for an officer of the court is a sufficient basis for the revocation of an attorney's license.² Disbarments have been sustained where the offense complained of was participation in a lynching,³ participation in an unlawful assembly and jailbreak,⁴ conviction of adultery,⁵ violation of prohibition laws,⁶ receiving stolen goods while acting in the capacity of

¹ *In re Parker*, 209 N. C. 693, 184 S. E. 532 (1936).

² *Bar Assoc. v. Meyerovitz*, 278 Ill. 356, 116 N. E. 189 (1917); *Bar Assoc. v. Fulton*, 284 Ill. 385, 120 N. E. 252 (1918) (where there was a failure to account for moneys entrusted to an attorney as trustee or where there was a misappropriation, the court held that lack of good moral character was sufficient to warrant disbarment).

³ *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552 (1882).

⁴ *State v. Graves*, 73 Ore. 331, 144 Pac. 484 (1914).

⁵ *Grievance Committee v. Borden*, 112 Conn. 269, 152 Atl. 292 (1930); *Note* (1931) 79 U. OF PA. L. REV. 506.

⁶ *In re Callicate*, 57 Mont. 297, 187 Pac. 1019 (1920); *State v. Johnson*, 174 N. C. 345, 93 S. E. 847 (1916) (where the defendant habitually violated prohibition laws).

pawn broker,⁷ keeping a disorderly house and selling opium,⁸ making exorbitant charges for a legislative appearance,⁹ using the mails to defraud,¹⁰ false representations knowingly made about property which the attorney was selling,¹¹ and where a district attorney accepted a campaign fund for his reelection from an indicted person.¹² In cases where the attorney was acting as a financial fiduciary disbarments have been sustained where the funds of an employer were misappropriated,¹³ where the attorney was acting as guardian,¹⁴ as a receiver in bankruptcy,¹⁵ as administrator,¹⁶ where property entrusted to him was misappropriated,¹⁷ because of conversion of moneys entrusted to him by another lawyer to pay incidental costs of litigation,¹⁸ and because of a refusal to turn over moneys received in satisfaction of a judgment.¹⁹ For these reasons the findings of the Council and of the Superior Court that the defendant converted the funds while acting in the capacity of attorney for the estate should not have been upset merely because the earlier civil judgment for restitution against him and his surety, upon which the findings largely rested, was grounded upon his misconduct as executor.

Nor should it have been fatal that the offense occurred prior to the enactment of the State Bar Act.²⁰ The clause quoted from that act under which the proceeding in question was started is a re-enactment of the substance of a cause for disbarment which was in force at the time of the misconduct as a part of the old disbarment statute.²¹ The main effect of the new legislation is to change the machinery for this type of proceeding, although it also creates additional grounds as a basis

⁷ Petition of Law Association of Phila., 228 Pa. 331, 135 Atl. 732 (1927).

⁸ *In re Marsh*, 42 Utah 186, 129 Pac. 411 (1913).

⁹ *In re Carey*, 146 Minn. 80, 177 N. W. 801 (1920).

¹⁰ *In re Crane*, 182 Cal. 707, 189 Pac. 1072 (1920).

¹¹ *In re Stimer*, 171 Minn. 437, 214 N. W. 652 (1927).

¹² *In re Crum*, 55 N. D. 945, 215 N. W. 682 (1927).

¹³ *In re Wilson*, 79 Kan. 674, 100 Pac. 635 (1909); *In re Washington*, 82 Kan. 829, 109 Pac. 700 (1910); *Assoc. of Bar v. Chappe*, 131 App. Div. 328, 115 N. Y. Supp. 868 (1909).

¹⁴ *Re Swaender*, 5 Ohio Dec. 598, 7 Ohio N. P. 446 (1895).

¹⁵ *In re Litchenberg*, 169 App. Div. 505, 155 N. Y. Supp. 482 (1915).

¹⁶ *In re Ward*, 106 Wash. 147, 179 Pac. 76 (1919).

¹⁷ *In re Condon*, 157 Minn. 24, 195 N. W. 492 (1923).

¹⁸ *In re Casey*, 208 App. Div. 24, 203 N. Y. Supp. 61 (1924).

¹⁹ *State v. Kaufman*, 202 Iowa 157, 205 N. W. 321 (1926). For a case allowing disbarment because of exorbitant charges, see *In re Sanitary District Attorneys*, 351 Ill. 206, 186 N. E. 332 (1933); Note (1934) 18 MINN. L. REV. 217. For an article on acts involving moral turpitude which gives rise to disbarment, see Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment* (1935) 24 CALIF. L. REV. 9.

²⁰ *In re Winne*, 208 Cal. 35, 280 Pac. 113 (1929) (where the state bar investigated and took action on matters which happened before the enactment of the statute incorporating the bar).

²¹ C. S. (1919) §206.

for disbarment.²² Even in cases where a statute is criminal, its subsequent incorporation into a new act does not suspend the effect of the law as originally enacted.²³ Consequently, there is no opportunity for invoking any *ex post facto* doctrine.

The character of disbarment proceedings is not criminal, but on the contrary is essentially civil, or even *sui generis*, in the majority of jurisdictions.²⁴ The primary purpose is not to punish the offender, but to protect the courts, the public, and the profession from persons unfit to practice.²⁵ In cases where the statute of limitations would prevent a criminal prosecution for acts that amount to a crime, disbarment proceedings, because of their civil nature, based on the same acts, may be instituted.²⁶ Even where a person has been pardoned for an act, the same act may later be the basis of disbarment proceedings.²⁷ This is based either on the theory that the attorney has ceased to possess that degree of good character that was necessary for his admission to practice, or on the theory that the lack of integrity makes him unfit to be entrusted with legal matters.²⁸ No matter what the purpose or nature

²² *A Survey of Statutory Changes in North Carolina in 1933* (1933) 11 N. C. L. Rev. 191, commenting on the changes in the statute.

²³ *State v. Williams*, 117 N. C. 753, 23 S. E. 250 (1895); *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113 (1897); *State v. R. R.*, 125 N. C. 65, 34 S. E. 106 (1899); *State v. Hollingsworth*, 206 N. C. 739, 175 S. E. 99 (1934).

²⁴ *Philbrook v. Newman*, 85 Fed. 139 (C. C. D. Colo. 1898); *Maloney v. State*, 182 Ark. 510, 32 S. W. (2d) 423 (1930); *In re Vaughn*, 189 Cal. 491, 209 Pac. 353 (1920); *State v. Peck*, 88 Conn. 447, 91 Atl. 274 (1914); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930); *People v. Stonecipher*, 171 Ill. 506, 111 N. E. 496 (1916); *In re Smith*, 73 Kan. 743, 85 Pac. 584 (1906); *Bar. Assoc. v. Scott*, 209 Mass. 200, 95 N. E. 402 (1911); *In re Ebbs*, 150 N. C. 44, 63 S. E. 190 (1908); *In re Breidt*, 84 N. J. Eq. 222, 94 Atl. 214 (1915); *Notes* (1931) 10 N. C. L. Rev. 58; (1921) 9 CALIF. L. REV. 484; 6 C. J. 602; 2 R. C. L. 1109.

²⁵ *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552 (1882); *McIntosh v. State Bar*, 211 Cal. 261, 294 Pac. 1067 (1930); *In re Vaughn*, 189 Cal. 491, 209 Pac. 353 (1922); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930); *In re Kerl*, 32 Idaho 737, 188 Pac. 40 (1920); *Bar. Assoc. v. Greenhood*, 168 Mass. 169, 46 N. E. 568 (1897); *In re Breidt*, 84 N. J. Eq. 222, 94 Atl. 244 (1905); *In re Rous*, 221 N. Y. 81, 116 N. E. 782 (1917); *In re Egan*, 52 S. D. 394, 218 N. W. 1 (1928); *In re Stalen*, 193 Wis. 602, 214 N. W. 379 (1927); *State v. Kearn*, 203 Wis. 178, 223 N. W. 629 (1930); *Note* (1921) 5 MINN. L. REV. 14; 2 R. C. L. 1088; 8 C. J. 602.

²⁶ *In re Danforth*, 157 Cal. 425, 108 Pac. 332 (1910); *cf. In re Ulmer*, 268 Mass. 373, 167 N. E. 749 (1929); *Joseph v. Manrix*, 133 Ore. 329, 288 Pac. 407 (1930). For a note discussing the applicability of the Statute of Limitations to disbarment proceedings, see (1920) 7 A. L. R. 93.

²⁷ *Nelson v. Comm.*, 128 Ky. 779, 109 S. W. 337 (1908); *In re Sutton*, 50 Mont. 88, 145 Pac. 6 (1914); *In re E*, 65 How. Pr. 171 (N. Y. 1879); *In re Attorney*, 86 N. Y. 563 (1881); *Johnston v. State*, 174 N. C. 345, 93 S. E. 847 (1917) (where a conditional pardon was no bar); *Petition of Law Assoc. of Phila.*, 288 Pa. 331, 135 Atl. 732 (1927) (leading case).

²⁸ *In re Haymond*, 121 Cal. 385, 53 Pac. 899 (1898); *Bar Assoc. v. Cantrell*, 49 Cal. App. 468, 193 Pac. 598 (1920); *Iowa v. Mosher*, 128 Iowa 82, 103 N. W. 105 (1905) (cases where the attorney had ceased to have the same degree character essential to admission); *State v. Johnson*, 142 Iowa 462, 128 N. W. 837 (1910) (where the test was whether the defendant still possessed sufficient integrity to

of the proceedings is, it is of course necessary to give effect to the fundamental essentials and requirements of due process.²⁹ Therefore, unless the act was committed in the presence of the court,³⁰ sufficient notice and opportunity to be heard and explain or defend the charges must be granted,³¹ plus the right of appeal to a court of last resort.³² As balanced against these fundamentals it is not a denial of due process in these proceedings to comment on the refusal of the accused to take the stand and testify in his own behalf by saying it raises an inference of guilt,³³ although a presumption of innocence in favor of the defendant exists when the proceedings start.³⁴ There is no vested right whereby the accused is entitled to be faced by witnesses, and depositions may be used wherever proper in civil cases.³⁵

The objection to the constitutionality of the State Bar Act on the ground that in effect it denies the jury trial that it professes to grant by providing that the procedure on appeal to the Superior Court must conform to that followed in consent references, seems without foundation.^{36a} There are some states, including North Carolina, which specifically provide by statute for a jury during some phase of the proceedings;³⁶ but

handle legal matters); *Iowa v. Rohrig*, 59 Iowa 725, 139 N. W. 908 (1913); *Cowley v. O'Connell*, 174 Mass. 253, 53 N. E. 1001 (1899); *In re Mills*, 1 Mich. 392 (1850).

²⁹ *People v. Love*, 298 Ill. 304, 131 N. E. 809 (1921); *Bar Assoc. v. Sleeper*, 251 Mass. 6, 146 N. E. 269 (1925); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918). See also *State v. Winburn*, 206 N. C. 923, 175 S. E. 498 (1934) which holds that the privilege of practicing is a right which may only be deprived by a judgment of the court.

³⁰ *People v. Turner*, 1 Cal. 143 (1850); *In re Durant*, 80 Conn. 140, 67 Atl. 497 (1907); *Warren v. Connolly*, 165 Mich. 274, 130 N. W. 637 (1911); *In re Eldridge*, 82 N. Y. 161 (1880); *State v. Root*, 5 N. D. 487, 67 N. W. 590 (1896).

³¹ *In re Day*, 181 Ill. 73, 54 N. E. 646 (1899); *People v. Kavanaugh*, 220 Ill. 49, 77 N. E. 107 (1906); *Hanson v. Grattan*, 84 Kan. 843, 115 Pac. 646 (1911); *In re Davies*, 93 Pa. St. 121 (1880); *Ex parte Steinman*, 95 Pa. St. 220 (1880).

³² *McIntosh v. State Bar*, 211 Cal. 261, 294 Pac. 1067 (1930); *Herron v. State Bar*, 212 Cal. 196, 298 Pac. 474 (1931); *Burns v. State*, 213 Cal. 151, 1 P. (2d) 989 (1931). See also *State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935) (where it was stated that in the absence of constitutional or statutory requirements a notice or hearing before an administrative body was not necessary to due process, because the guaranty of judicial review was sufficient).

³³ *McIntosh v. State Bar*, 211 Cal. 261, 294 Pac. 1067 (1930); *Fish v. State Bar*, 214 Cal. 215, 4 P. (2d) 937 (1931); *Notes* (1923) 11 CALIF. L. REV. 137; (1923) 24 A. L. R. 863, discussing applicability in disbarment proceedings of the constitutional privilege of not testifying against oneself.

³⁴ *In re Haymond*, 121 Cal. 385, 53 Pac. 899 (1898); *In re Parsons*, 35 Mont. 478, 90 Pac. 163 (1907); *In re Nenby*, 82 Neb. 235, 117 N. W. 691 (1908); *In re Attorney*, 175 App. Div. 653, 161 N. Y. Supp. 504 (1916); *In re Riley*, 75 Okla. 192, 183 Pac. 728 (1919); *Note* (1920) 7 A. L. R. 93.

³⁵ *In re Vaughn*, 189 Cal. 491, 209 Pac. 353 (1922); *Fish v. State Bar, Cal.*, 214 Cal. 215, 4 P. (2d) 937 (1931); *People v. Stonesipher*, 271 Ill. 506, 111 N. E. 496 (1916) (emphasizing not criminal proceedings).

^{36a} *Ex parte Thompson*, 228 Ala. 118, 152 So. 229 (1933) (Ala. State Bar Act not invalid for authorizing disbarment by board without jury).

³⁶ *Ibid.* These include Ark., Ga., Ind., La., Tex., and Wyo.

in the absence of such a statute no such right exists at common law.³⁷ Congress has never attempted to enact any legislation on this point, and the federal courts, feeling it was not necessary to due process, have never allowed the use of a jury in this type of proceeding.³⁸ Where such statutes exist, they are constitutional, as they do not infringe on any inherent power of the court.³⁹ The verdict of the jury is not merely advisory, but it has the same effect as in any other civil case.⁴⁰ However, where such statutes exist, they are followed only as a matter of courtesy in a great many instances.⁴¹ This is undoubtedly due to some extent to the fact that a jury is not always a feasible unit in this type of proceeding, because the ideas of laymen regarding the standards of ethics are often, due to business practises, as in cases of solicitation, at a wide variance with those of the legal profession.⁴² It has been suggested that in order to circumvent this difficulty, the jury should be limited to making special findings of fact.⁴³

Within the last few years there has been a marked increase in the number of bar associations that have incorporated for the purpose of regulating admission and disbarment as well as to function as a unit in otherwise protecting the public and the profession.⁴⁴ Such corporations because of their functions and titles are necessarily public ones within

³⁷ *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 562, 27 L. ed. 552 (1882); *In re* Adair, 34 F. (2d) 663 (D. C. Del. 1929); *Ex parte* Robinson, 3 Ind. 52 (1851); *In re* Norris, 60 Kan. 649, 57 Pac. 528 (1899); *State v. Fouchey*, 106 La. 743, 31 So. 325 (1901); *In re* Carver, 224 Mass. 169, 112 N. E. 877 (1916); *In re* Shephard, 109 Mich. 631, 67 N. W. 971 (1896); *Burnes Case*, 1 Wheel. Crim. 503 (N. Y.); *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578 (1894); *State Bar Comm. v. Sullivan*, 38 Okla. 26, 131 Pac. 703 (1912); *State v. Rossman*, 53 Wash. 1, 101 Pac. 357 (1909); Note, Ann. Cas. 1913 D 1162.

³⁸ *Ex parte* Burr, 22 U. S. 529, 6 L. ed. 152 (1824); *Ex parte* Secombe, 60 U. S. 9, 15 L. ed. 565 (1856); *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 562, 27 L. ed. 552 (1882); *In re* Boone, 83 Fed. 944 (C. C. N. D. Cal. 1897); Potts, *Trial by Jury in Disbarment Proceedings* (1933) 11 TEX. L. REV. 28.

³⁹ *State Law Examiners v. Phelan*, 43 Wyo. 481, 5 P. (2d) 263 (1931); Note (1932) 78 A. L. R. 1323.

⁴⁰ *State Law Examiners v. Phelan*, 43 Wyo. 481, 5 P. (2d) 263 (1931).

⁴¹ COSTIGAN, *CASES ON LEGAL ETHICS* (2nd ed. 1933) 163.

⁴² Potts, *Jury Trial in Disbarment Proceedings* (1933) 11 TEX. L. REV. 28.

⁴³ Note (1932) 45 HARV. L. REV. 738. In case the evidence is uncontroverted, the judge may direct a verdict as in any other civil case tried by a jury. *Weirnmont v. State*, 101 Ark. 210, 142 S. W. 194 (1911).

⁴⁴ Statutes incorporating the bar. ALA. CODE (Michie, 1928) §§6220-6239; Ariz. Session Laws 1933, c. 66; CAL. GEN. LAWS (Deering, 1931) act 591; IDAHO CODE ANN. (1932) §§3-401 to 3-417; KY. REV. STAT. (Baldwin Supp. 1934) §101-1; La. Acts (2nd Ext. Sess.) 1934, no. 10, p. 70; MICH. COMP. LAWS (Mason Supp. 1935) §13603-1; MISS. GEN. LAW 1932 c. 121; NEVADA COMP. LAW (Hillyer, 1929) §§540-590; N. M. ST. ANN. §§9-201-9-212; N. C. CODE ANN. (Michie, 1935) §§215 (1)-215 (18); N. D. COMP. LAWS ANN. (Supp. 1925) §§81341-81345; Okla. Laws 1929 c. 264; Oregon Laws 1935 c. 28; S. D. LAWS 1931 c. 84; UTAH REV. ST. (1933) §§6-0-1 to 6-0-23; WASH. REV. ST. (Remington Sup. 1934) §§138-1 to 138-17.

the meaning of the constitutional provisions against creating private corporations by special act of the legislature.⁴⁵ The constitutionality of the North Carolina organization was not passed on in the instant case, although the question was raised. The previous North Carolina decisions, however, are in line with those in the majority of jurisdictions in holding that the legislature may prescribe reasonable rules and regulations applicable to the admission and disbarment of attorneys, so long as they do not infringe on any inherent power of the court.⁴⁶ They have emphasized the fact that the judiciary is not shorn of all its power over disbarment by virtue of the statutes, but to the contrary there is recognition that two separate methods exist, to wit: (1) the legislative and (2) the judicial.⁴⁷ Prior to the State Bar Act, the legislative method provided for disbarment by the Superior Court and a jury, on evidence furnished by the Bar Association and on charges prosecuted by the solicitor, with an appeal to the Supreme Court. Today, under the new act, with the old statutory grounds only slightly revised, the Council disbars, with an appeal to the Superior Court and thence to the Supreme Court. In two recent cases the Supreme Court has exercised its inherent right to disbar on its own initiative—the judicial method—the charges usually being made by the Attorney General.⁴⁸ Thus there is no basis for fearing that the State Bar Act has deprived the courts of any of their original or supervisory control over disbarment proceedings. In recognizing the validity of legislative regulations in this field, the courts hold that a coördinate authority exists between the legislative and judicial branches of the government.⁴⁹ It has been sug-

⁴⁵ *State Bar v. Superior Court*, 207 Cal. 323, 278 Pac. 342 (1929); *In re Scott*, 53 Nev. 24, 292 Pac. 291 (1930). For a case showing there is no unconstitutional delegation of either legislative or judicial power, see *Brydonjack v. State Bar*, 208 Cal. 439, 281 Pac. 1018 (1929).

⁴⁶ *In re Bailey*, 30 Ariz. 407, 248 Pac. 29 (1926); *In re Spriggs*, 36 Ariz. 262, 248 Pac. 1521 (1930); *In re Lavine*, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935); *In re Day*, 181 Ill. 73, 53 N. E. 646 (1899); *In re Opinion of Justice*, 279 Mass. 607, 180 N. E. 725 (1932); *In re Humphrey*, 178 Minn. 331, 227 N. W. 179 (1929); *In re Richards*, 339 Mo. 907, 63 S. W. (2d) 672 (1933); *Ex parte Schenck*, 65 N. C. 354 (1871); *In re Applicants for License*, 143 N. C. 1, 55 S. E. 635 (1906); *Ex parte Ebbs*, 150 N. C. 44, 63 S. E. 190 (1916) *semble*; *In re Branch*, 70 N. J. L. 537, 57 Atl. 431 (1904); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918).

⁴⁷ *Committee v. Strickland*, 200 N. C. 630, 158 S. E. 110 (1931); *In re Stiers*, 204 N. C. 48, 167 S. E. 382 (1932).

⁴⁸ *Attorney General v. Gorson*, 209 N. C. 320, 183 S. E. 392 (1935); *Brummitt v. Winborn*, 206 N. C. 923, 175 S. E. 498 (1935).

⁴⁹ *Ex parte Secombe*, 60 U. S. 9, 15 L. ed. 565 (1856); *Ex parte Garland*, 71 U. S. 333, 379, 18 L. ed. 366 (1866); *Ex parte Coleman*, 54 Ark. 235, 15 S. W. 470 (1891); *Brydonjack v. State Bar*, 208 Cal. 439, 281 Pac. 1018 (1929); *Carpenter v. State Bar*, 211 Cal. 358, 295 Pac. 23 (1931); *In re Taylor*, 48 Md. 28 (1877); *In re Opinion of Justices*, 279 Mass. 607, 180 N. E. 725 (1932); *State v. Johnson*, 171 N. C. 799, 88 S. E. 437 (1916); *Committee v. Strickland*, 200 N. C. 630, 158 S. E. 110 (1931); *In re Olmstead*, 292 Pa. 96, 140 Atl. 634 (1928); *In re Barclay*, 82 Utah, 288, 24 P. (2d) 302 (1933); *Board v. Phelan*, 43 Wyo. 481, 5 P. (2d) 263 (1931).

gested that this co-authority exists as a matter of comity between the two branches of the government, and that it is a recognition by the court that both departments should function because it is not clear that either should have exclusive control.⁵⁰

Incidentally, the State Bar Act was not constitutionally weakened by the provision that⁵¹ "neither a councillor nor any officer . . . of the State Bar shall be deemed as such to be a public officer as that phrase is used in the Constitution or laws of the State of North Carolina." That was merely an ineffectual⁵² attempt to prevent an attorney from being ineligible to serve as an officer or councillor under the dual office-holding ban of the state constitution,⁵³ in case he also happened to be a notary public⁵⁴ or county commissioner.

With respectful deference, it is submitted that the Council and Superior Court in the principal case could have been affirmed on all three grounds. Such a ruling would have been equally fair to the defendant and more in the public interest.

B. IRVIN BOYLE,
M. T. VAN HECKE.

Evidence—Dying Declarations in North Carolina.

The North Carolina courts have recognized dying declarations as competent evidence since 1815.¹ The bases of this exception to the general rule that all testimony must be given under oath and subject to cross examination are that this kind of evidence is necessary and especially trustworthy. Even though other witnesses are available, still if the deceased's information is to be availed of, his hearsay utterances must be received. Moreover, in many cases the deceased was the only witness, and a refusal to admit his statements would permit his assailant to escape. Further, this type of declaration is especially trustworthy

⁵⁰ Cheadle, *Inherent Power of Judiciary Over Admittance to the Bar* (1932) 7 WASH. L. REV. 320; Green, *The Court's Power over Admission and Disbarment* (1925) 4 TEX. L. REV. 1; Lee, *Constitutional Power of Courts over Admission to Bar* (1899) 13 HARV. L. REV. 233, 251; Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment* (1935) 24 CALIF. L. REV. 9. See also STATE BAR ACTS ANN. (1934 ed.); Note (1932) 16 MINN. L. REV. 857.

⁵¹ N. C. CODE ANN. (Michie, 1935) §255 (3).

⁵² Attorney-General v. Knight 169 N. C. 335, 85 S. E. 418 (1915) (General Assembly is without power to declare a public office is not such an office).

⁵³ Art. XIV, §7.

⁵⁴ Harris v. Watson, 201 N. C. 661, 161 S. E. 215 (1931).

¹ The earliest case in which a dying declaration was admitted in evidence was McFarland v. Shaw, 4 N. C. 200 (1815). In an earlier case, State v. Moody, 3 N. C. 31 (1798), the court refused to admit a dying declaration. Stone, J., said, "How is it possible that a man can be a witness to prove his own death?" Another early case in which a dying declaration was held to be competent is State v. Poll, 8 N. C. 442 (1821).