2-1-1950

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NOTES

THE THIRD ANNUAL NATURAL LAW INSTITUTE

The 1949 sessions of the Natural Law Institute—now a permanent establishment of the College of Law of the University of Notre Dame—were held in the Law Auditorium, December 9 and 10. The President of the University, Reverend John J. Cavanaugh, C. S. C., presided and Dean Clarence E. Manion acted as Chairman. Speakers at the Institute included the Honorable Richard O'Sullivan, K. C., Master of the Bench of the Middle Temple, London, England, whose subject was “The Natural Law and the Common Law”; Dr. Edward S. Corwin, Emeritus Professor of Jurisprudence, Princeton University, whose topic was “The Natural Law and Constitutional Law”; Dr. Stephan Kuttner, Professor of Canon Law, Catholic University, who lectured on “The Natural Law and Canon Law”; and Brigadier General Carlos P. Romulo, President of the United Nations General Assembly, who spoke on “The Natural Law and International Law.” The 1949 sessions were again sponsored by Mr. Alvin A. Gould, of Cincinnati, Ohio.

The excellent scholarship characteristic of all the addresses and the keen interest with which they were received made the 1949 sessions memorable successors of the previous Institutes held in 1947 and 1948. The general public response to the main purpose of the Natural Law Institute—to restore the Natural Law philosophy to the position it once held as the foundation of our jurisprudence—was most gratifying. Mr. Arthur Krock, writing editorially in the New York Times said: 1

In the clashing succession of violent events these days, the discussion to be resumed by the Institute at Notre Dame may seem dull, philosophical hair-splitting, and equally unimportant. But the growth of state controls of man all over the world, including the United States, and his acceptance of the legalism which enforces them, compose an acute, present-day problem for all who are governed.

During the four sessions of the 1949 Institute, the great influence of Natural Law concepts upon four great bodies of positive law—Common, Constitutional, Canon and International—was luminously set forth. The speakers, however, did not limit themselves to mere historical exposition. The cumulative effect of all the addresses was to show that the Natural Law can be for us today a fruitful concept, that in our world today, which witnesses again the renewal of the conflict between increasing state controls and the claims of individual liberty, a restatement of Natural Law in terms of modern problems might well provide a sound “via media” between what some have called “The Road to Serfdom” and others “The Road to Reaction.”

Mr. O’Sullivan with rare felicity and convincing scholarship showed how deeply Natural Law doctrines have been driven into the

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1 N. Y. Times, November 29, 1949, p. 28, col. 5.
body of the Common Law. Indeed the history of the Common Law is unintelligible without an appreciation of the well-springs of Natural Law philosophy from which so many of its principles are drawn. To Natural Law, Mr. O'Sullivan thought, is due the age-old insistence of the common law lawyer that “law is reason.” This tough fiber of the Common Law enabled it finally, in Tudor and Stuart days, to resist successfully the “reception” of Roman Law with its claim that “law is will.” For Bracton “the King is under God and the law,”—“under God and the Natural Law,” as Mr. O'Sullivan suggested; for in the words of Aquinas, Bracton's Thirteenth Century contemporary, “Natural Law is the participation of the Eternal Law in the rational creature.” The weapons used by Coke and his fellows against the King became the weapons in the battle later on against despotic, albeit democratic, legislatures.

Professor Corwin saw “the matrix of American Constitutional Law” as “Natural Law under the skin.” The concept of judicial review antedated written constitutions in the Anglo-American legal system. It stemmed from the principle that positive law violating Natural Law was not law at all, and Coke in *Bonham's Case* 2 could assert the right of the judiciary to ignore an Act of Parliament contrary to reason. And though judicial review in the United States became judicial review limited to the mandates of a written constitution, the older tradition of “Law as reason” is not dead. 3

In Professor Kuttner's profound analysis of the inter-relationships between Natural Law and Canon Law, we are warned that:

... the science of Natural Law, like all knowledge in the realm of practical reason, deals with human acts and cannot be construed *more geometrico*, in an abstract, strictly speculative fashion, i.e., without the empirical data of actual human relations and social compounds. ... (But) to have demonstrated that the natural created order of right reason is necessarily presupposed by, and persists within the unique framework of a society that rests on supra-natural foundations—this is perhaps the greatest contribution of Canon Law to the doctrine of Natural Law.

In the concluding address of the 1949 Institute, General Romulo, in discussing the relation between Natural Law and International Law, stressed the point that the hope for the International Law of the future rests upon a return to the moral basis of all law. The work of the United Nations, General Romulo declared:

... has taught us [that] we cannot have lasting peace ... until we have established a system of just law ... law based on reason, consonant with the essential requirements of man's nature and deriving from the source of all authority, God Himself. I reject as inimical to peace that false law which, recognizing no higher sanction than the authority

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2 *8 Rep. 113b, 77 Eng. Rep. 646 (1610).*
3 *The entire text of Professor Corwin's address is printed in this issue.*
General Romulo thought that the work of the United Nations shows a “definite tendency to make International Law conform to Natural Law.” He referred to the growing “awareness of the basic and inescapable ‘oneness’ of the world, of the inherent and irrevocable inter-relation of men and nations, a reflection of the Christian concept of human brotherhood, an image, discerned as through a dark glass, of the Mystical Body.”

Upon this inspiring note of hope for the future, the Institute adjourned. Notre Dame hopes, and truly feels, that the 1949 sessions have made another significant contribution to the current Renaissance of Natural Law in American jurisprudence.

Constitutional Law

MAY THE STATES, BY STATUTE, BAR SUBVERSIVE GROUPS FROM THE BALLOT?

Since the time of the Trojan horse, the infiltration of an enemy country, with the accompanying disruption of economic and political life, has been recognized as a most efficient method of conquest. The United States, cognizant of this fact, has at various times throughout its history, used forceful measures to protect itself from this menace. The Alien and Sedition Laws, set up to inhibit the spread of French revolutionary doctrines, were the most outstanding of the earlier attempts to purge a young nation of what were then considered "dangerous elements." Under these laws, an enemy alien could be imprisoned at the President's discretion, and heavy fines and imprisonment awaited the man who was convicted of publishing "false, scandalous and malicious writing" against the Government, or of writing anything which brought officers of the Government "into contempt or disrepute." For a nation that had just eight years before ratified the First and Fifth Amendments to the Constitution, these were strong measures. At least the electorate thought so, for the Federalist party, which had passed the laws, was replaced by the Republicans in

1 1 Stat. 570 (1798); 1 Stat. 596 (1798).
2 U. S. Const. Amend. I, ratified June 15, 1791: "Congress shall make no law . . . abridging the freedom of speech . . . ."
3 U. S. Const. Amend. V, ratified June 15, 1791: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."
the election of 1800, before the constitutionality of either of the statutes had been tested by the Supreme Court. With theRepublicans in power, the laws were repealed and the prisoners who had been convicted under them were pardoned.

The heat of the post-Civil War era spawned new attempts by the Federal Government and the states to purge political undesirables. Congress asserted its right to bar from membership those who had taken up arms or voluntarily supported the rebellion, by passing the Test Oath Act. The courts, however, prevented the states from exacting similar oaths before allowing a man to vote, or to carry on his profession.

After the first World War, the Government's attempts to rid itself of those it deemed a threat to American institutions were highlighted by: the newly amended Espionage Act; acting under authority of the newly passed Deportation Act; the expulsion of Victor L. Berger from the Congress of the United States; and the suspension, without hearings, of five members of the Socialist party from the New York Assembly.

The post-World War II period has not been devoid of positive action to achieve loyalty in government. The Government's loyalty program and the present laws concerning seditious activities have set the trend. The expulsion of Benjamin Davis, after his conviction under the Smith Act, paralleled the Berger affair.

The purpose of all these statutes and actions has been to purge American government of what the particular legislatures deem to be subversive elements. In the light of recent history, current events and the fact that it is easier to conquer from within than from without,
it would seem that these law-making bodies acted with a laudable end in mind. But it must be kept in mind that no end may be reached by unjust means; no law can be enforced if it violates the Natural Law as incorporated in our state and federal constitutions. Each new law must be carefully examined to determine whether its enforcement would result in an unwarranted interference with the rights and privileges of the American people.

A new type of statute has made its appearance in fourteen states. This type of statute seeks to exclude from a place on the ballot those political parties or candidates who advocate what are considered to be objectionable doctrines. These statutes, of course, vary in their wording, but they may be divided into three general classes. The first class requires that each political party file an affidavit with the secretary of state affirming that it does not advocate seditious doctrines and that it is not affiliated with any organization that does advocate such doctrines. The act of Delaware will serve as an example:

No political party shall be recognized and given a place on the ballot which advocates the overthrow by force and violence, or which advocates or carries on a program of sedition or treason by radio, speech or press, of our local, state or national government. No newly organized political party shall be permitted on the ballot until it has filed an affidavit by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with any political party or organization, or subdivisions of organizations, which does advocate such a policy by radio, speech or press.

The laws of Indiana, Ohio, Pennsylvania, and Tennessee are similar to the Delaware statute.

The second type of statute excludes the Communist party from the ballot by name. The provisions of the pertinent statute of Arkansas are typical:

No political party . . . which is directly or indirectly affiliated by any means whatsoever with the Communist party of the United States, the Communist international, or any other foreign agency, political party, organization or government . . . shall be recognized, or qualified to participate, or permitted to have the names of its candidates printed on the ballot in any election in this State.

No newly organized political party shall be recognized or qualified to participate or permitted to have the names of its candidates printed on the ballot in any election in this State until it has filed an affidavit

19 Arkansas, California, Delaware, Illinois, Indiana, Maryland, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Wisconsin, and Wyoming.
by the officers of this party in this State under oath that (a) it is not directly or indirectly affiliated by any means whatsoever with the Communist party of the United States, the third Communist *international or any other foreign agency, political party, organization or government. . . .

Of the same general type are the statutes of California, Wyoming, Oklahoma, Illinois, Texas, and Wisconsin.

The final class, represented only by New Jersey and Maryland, is differentiated from the others in that it requires the candidate himself to take an oath swearing that he neither advocates seditious practices nor is affiliated with any organization that does. In New Jersey the refusal to take the oath results in a notation to that effect on the ballot; in Maryland, refusal results in exclusion from the ballot.

The testing of these statutes before the courts of the various states is not complete enough to establish a decisive pattern. However, a trend is perceptible. The Superior Court of New Jersey, in Imbrie v. Marsh, has declared its law unconstitutional on the grounds that the legislature may not alter by statute the qualifications for elected officers as set forth in the New Jersey Constitution; further, that the legislature may not alter by statute the oath required of all elected officers by the constitution. The court would not allow the legislature to require of candidates that which it could not require of elected officers, since that would result in permission to do indirectly something that could not be done directly.

In Maryland, section 15 of the Subversive Activities Act was declared unconstitutional. In reasoning parallel to that of Judge Bigelow in the New Jersey case, Judge Sherbow held in Lancaster et al. v. Hammond, that requiring a candidate to take an oath supplementing that already prescribed in the Maryland Constitution was an indirect method of contravening the Maryland Declaration of

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32 New Jersey Laws 1949, c. 21-25.
33 Maryland Laws 1949, c. 86.
34 ...N. J. Super......, 68 A. (2d) 761 (1949). This decision has been recently affirmed by the New Jersey Supreme Court. See N. Y. Times, Jan. 10, 1950, p. 3, col. 5.
35 Maryland Laws 1949, c. 86 § 15. This section contains the provision for the oath to be taken by the candidate for office.
Rights which expressly prohibited the legislature from providing any oath of office other than that prescribed in the constitution. The rest of the Subversive Activities Act as drawn was declared invalid because:\(^{37}\)

It violates the basic freedoms guaranteed by the First and Fourteenth amendments. It violates the Maryland Constitution and Declaration of Rights, is an unlawful Bill of Attainder, and is too general for a penal statute.

In *Communist Party of the United States v. Peek*,\(^ {38}\) the California Supreme Court, in dealing with the second type of statute, held that the section denying the ballot to the Communist party by name was an unreasonable exercise of power under the California Constitution. The pertinent section of the constitution provides that the "legislature shall have the power to enact laws... to determine the tests and conditions upon which electors, political parties or organizations of electors may participate in any primary election."\(^ {39}\) Refusing to take judicial notice that the Communist party advocated and actually worked toward the overthrow of the American government by force and violence, the court held that to deny the ballot to a group using a particular name was an arbitrary use of a power which must be strictly construed. The part of the act which denied the ballot to any party "which directly or indirectly carries on, advocates, teaches, justifies, aids or abets a program of sabotage, force and violence, sedition or treason against the government of the United States or of this State"\(^ {40}\) was held to be valid as a protection against an immediate threat to the proper functioning of American institutions, and as a protection of free speech. Thus, an oath requiring the officers of all political parties to swear that the party which they represented did not adhere to the doctrines as set forth in the act would not be an unconstitutional abridgement of free speech under the "clear and present danger" doctrine.\(^ {41}\)

The Arkansas Supreme Court, in considering the case of *Field v. Hall*,\(^ {42}\) was of the opinion that no part of its statute was unreasonable. It held that the act did not deal with a civil right, but with a political privilege, and that the legislatures of the states have authority to establish conditions precedent to the existence and operation of political parties. Reviewing the evidence in the record, the court found that the Communist party advocated seditious doctrines, and that as

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\(^{37}\) Ibid.

\(^{38}\) 20 Cal. (2d) 536, 127 P. (2d) 889 (1942).

\(^{39}\) CAL. CONST. ART. II, § 2b.

\(^{40}\) See note 26 supra.

\(^{41}\) For a history of the clear and present danger doctrine and the present-day application of it, see Note, 25 NOTRE DAME LAWYER 99 (1949).

\(^{42}\) 201 Ark. 77, 143 S.W. (2d) 567 (1940).
a consequence, the designation by the legislature was not unreasonable. Thus an oath required of all party officers would be a valid condition precedent to the exercise of a political privilege.

Sifting these authorities, it may be concluded that any law which requires an oath from a nominee will, in all likelihood, be declared invalid in any state which already has an oath prescribed in its constitution. This is the prevailing rule. Justice Story, as quoted in the New Jersey decision, stated in his opus on the Constitution:43

It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others . . . A power to add new qualifications is certainly equivalent to a power to vary them.

To require candidates (one of whom must be elected) to do something which this rule of construction forbids the legislature to require of the elected officer, would seem to be merely an attempt to do indirectly what cannot be done directly, and thus invalid.

The effect of this rule is greatly diminished when the oath is required of the party rather than the candidate. If the party were disqualified because of the officer's non-compliance, the aspiring candidate could, at least, seek a place on the ballot by petition or adherence to another party. Although this would still place a burden on the person seeking office, if the law were otherwise constitutional it would appear that the courts would not disqualify it on this ground. But are these statutes otherwise constitutional? A denial of the right to organize for the selection of candidates is a deprivation of the right to vote;44 the people's right to vote in the primary is protected by the Fourteenth Amendment.45 Thus any attempt by the state to prevent a political party from placing its candidates on the ballot would seem to involve necessarily an unreasonable classification under the Privileges and Immunities Clause. Moreover, if the party's officer disqualifies it by non-compliance, the individual member of the party is deprived of his right peaceably to assemble with other members to nominate a candidate. This is, in effect, a punishment for association. The acts are designed to single out certain groups and deprive them of a specific right. This would seem to constitute a bill of attainder. If the privilege of keeping silent is a part of the right

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43 1 Story, Commentaries on the Constitution § 625 (3d ed. 1858).
44 Britton v. Board of Election Commissioners, 29 Cal. 337, 61 Pac. 1115 (1900).
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of free speech, then the First Amendment is violated. Certainly the objections to this type of statute under the Federal Constitution seem overwhelming.

The Arkansas court has attempted to evade these arguments by proceeding on the assumption that the right of a political party to place candidates on the ballot is a political privilege which may be restricted by conditions precedent. Whether it is a privilege or a right, neither one may be qualified by an unconstitutional condition. The California court meets this argument by declaring that the presence in the government of parties which advocate the overthrow of American government would constitute an immediate threat to the functioning of American institutions and the right of free speech. This reasoning seems to be well substantiated by modern trends. The Federal Government's loyalty program and recent court decisions give great weight to the contention that governments may inquire into the loyalty of their employees. As Justice Holmes, originator of the "clear and present danger" doctrine, stated in an early case:

This reasoning seems to be well substantiated by modern trends. The right of government has again been asserted recently in California:

There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment.

In an even later case from the same state, it was declared that:

It is inconceivable that they [men who hold seditious ideas] should be permitted to represent the People, be supported by the People, and at the same time have the privilege of advocating the overthrow of the very government by which they are employed and earn a livelihood.

46 Field v. Hall, 201 Ark. 77, 143 S.W. (2d) 567 (1940).
48 See Emerson and Helfield, op. cit. supra note 6.
50 McAuliffe v. Mayor, 155 Mass. 216, 29 N.E. 517, 518 (1892).
The only deviation from this line of decisions would seem to be the New York lower court decision in which the Feinberg law was declared unconstitutional. The overthrow of this law can, perhaps, be attributed to the arbitrary procedure by which the law was to be enforced, and not to the fact that it excluded certain people from employment in the government. Thus the instant statutes might be construed as valid attempts by the state to protect itself against those who unlawfully seek to destroy it.

The decisions of the courts in New Jersey and Maryland have yet to be reconciled on this point. Maryland has a constitutional provision that:

No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive . . . in the Government of or in the administration of the business of this State or of any county, municipality or other political subdivision of this State.

Although the Subversive Activities Act was passed under this authority, it was declared unconstitutional in the Lancaster case on the ground that it was poorly drawn, vague in its definition, and arbitrary in its procedural aspects. A carefully drawn act, providing for a different method of effectuating the purpose of this provision, would seem to be without objection under the Maryland Constitution. Whether the Federal Constitution would present any further objection must remain open.

New Jersey's stand is not so easily resolved. Judge Bigelow stated in the Imbrie case:

They [the electors] have the right to select unworthy candidates, candidates whom the legislature fears might bring ruin to the state. That is an essential part of the American system. The legislature has no authority to curb this right of the people.

As authority for this proposition, the court cited a case which holds that the legislature cannot enact a statute which restricts the electorate from selecting any candidate who is qualified to hold office. It must be remembered that in the Imbrie case the court was considering a law which added to the constitutional qualifications of a candidate and not one that imposed an oath upon the political party itself. Whether the legislature may regulate a political organization by statute was not in issue.

It is interesting to note that the constitutionality of the oath required by the Taft-Hartley Act has been sustained. The support-

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53 N. Y. Educ. Law § 3022.
54 See N. Y. Times, Nov. 29, 1949, p. 1, col. 1, for an account of this case.
55 Maryland Const. Art. XV, § 11.
56 See note 34 supra, at 764.
57 In re City Clerk of Paterson, 88 Atl. 694 (1913).
ing cases,\textsuperscript{59} in substance, proceed on the theory that the position of an exclusive bargaining agent is a statutory privilege, not a civil right. The decisions deny that the oath is an infringement of the right of free speech or of liberty of association, or that the law is a bill of attainder, on the grounds that there is no punishment but merely a withholding of statutory privilege. One case, \textit{National Maritime Union of America v. Herzog},\textsuperscript{60} in considering the application of the “clear and present danger” rule, decided that the occupation of the position of an exclusive bargaining agent by a seditious organization constitutes such a danger.

If a seditious group occupying a position of trust in the economic life of this country is considered an imminent danger, it must follow that a seditious organization which infiltrates into the government also presents such a danger. The federal and state constitutions protect fundamental rights, but they must, at the same time, allow for self-protection. These statutes may apparently violate absolute provisions of fundamental law, but because they seek to defend that fundamental law from real and immediate danger, it would seem that they should be declared valid. This contention is made with the qualification that such laws must have the necessary requisites of any valid law: clarity, ascertainable standards of guilt, and a fair means of enforcement.

From the preceding conclusion, would it follow that discrimination against the Communist party by name is valid? California, in the \textit{Peek} case, ruled that the provisions of its statute directed against the Communists were an unreasonable use of legislative power. The Maryland court, deciding the \textit{Lancaster} case, held that the designation of Communists by name in a penal statute is a bill of attainder. Arkansas expressed a contrary view in the \textit{Field} case. Such a conflict precludes the possibility of prediction based on these authorities alone. There are numerous immigration cases which proceed on the assumption that the aim of the Communist party is the overthrow of American government by force and violence.\textsuperscript{61} In the \textit{Herzog} case, which sustained the constitutionality of the oath required by the Taft-Hartley Act, the court took judicial notice that the purpose of the Communist party is “to create unrest and disturbances in a


\textsuperscript{60} National Maritime Union of America v. Herzog, 78 F. Supp. 146 (D. C. 1948).

\textsuperscript{61} U. S. v. Commission of Immigration, 57 F. (2d) 707 (2d Cir. 1932); Kjar v. Doak, 61 F. (2d) 566 (7th Cir. 1932); Murdoch v. Clark, 53 F. (2d) 155 (1st Cir. 1931); U. S. v. Smith, 2 F. (2d) 90 (D. C. 1924); Skeffington v. Katzeff, 277 Fed. 129 (1st Cir. 1922).
democracy” and “spread Communism.”62 In this same opinion it was stated that a court must respect a “statute encased in the armor wrought by prior legislative deliberation.”63 It gives authority to the contention that enactment of a statute gives rise to the presumption that a situation has been appraised by the law-making body, and a danger found sufficiently imminent to justify a restriction. The preceding observations in the Herzog case were made for the purpose of establishing the reasonableness of the oath required by Congress as a condition precedent to granting a labor union the privilege of becoming an exclusive bargaining agent. The conclusions reached there might, however, provide a basis for discrimination against the Communist party, when taken with the ruling of the Supreme Court that:64

... a state may classify with reference to the evil to be prevented, and
... if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out.

The aforementioned immigration cases, together with the Field case, would supply strong evidence that the Communist party “reasonably might be considered to define those from whom the evil mainly is to be feared.”

Yet there is a distinct conflict of opinion as to the degree of danger presented by the Communist party in the United States. Many cases65 deny that the Communist party “seriously and imminently threatens to uproot the Government by force and violence.”66 An attempt by California to require certain oaths before a group could use a school building for a meeting place was held to be invalid on the grounds that, since a state could not compel the Communists to abandon their doctrines, it could not compel them to forfeit the use of state property when others were entitled to that privilege.67 The effect of so doing, the court reasoned, would be to place an unconstitutional condition precedent on a privilege. More recent

63 Id. at 166, quoting Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941).
66 Bridges v. Wixon, note 65 supra, 326 U. S. at 165.
is the New York trial court ruling that a law which required various state employees to take oaths affirming that they were not affiliated with the Communist party was unconstitutional as a bill of attainder: 68

It is a legislative finding of guilt of advocating the overthrow of government by unlawful means without a judicial trial and without any of the forms and guards provided for the security of the individual by our traditional forms.

There are at least two cases which do not recognize the right of a secretary of state to refuse the Communist party a place on the ballot. 69 In a case decided in Illinois, the secretary of state claimed to be acting under authority of a statute; 70 in a Washington case, where no statute was involved, the court rejected the secretary’s reasoning that the members of the Communist party could not take the prescribed oath of loyalty to the constitution. 71 As long as such conflict exists, the guilt or innocence of the Communist party must be left to the judiciary. The “armor wrought by prior legislative deliberation” may provide the basis for a law of general application, but it cannot protect a legislative act which picks out a class and deprives that class of rights or privileges. When the courts cannot agree as to the imminence of the danger presented by the Communist party, no discrimination against the party by law can be considered reasonable.

Mr. Justice Jackson has said, speaking for the Supreme Court: 72

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

These words reflect the very purpose for which our nation was founded. But when a man enters into the employment of his government to serve the people, he is more than a citizen, he is a guardian of fundamental rights. The people whom he serves should have the right to determine whether his purpose is to protect or undermine. It would not seem to be too much to ask of a man seeking an elective office, that he be opposed to the overthrow of our government by force and violence. Certainly the legislature should have the right to pass reasonable laws which prevent men who hold other views from obtaining positions of trust in government.

Sidney Baker

68 See N. Y. Times, Nov. 29, 1949, p. 1, col. 1, for an account of this case.
69 Feinglass v. Reinecke, 48 F. Supp. 438 (N. D. Ill. 1942); State v. Reeves, 5 Wash. (2d) 637, 106 P. (2d) 729 (1940).
70 Feinglass v. Reinecke, note 69 supra.
71 State v. Reeves, note 69 supra.
Contracts

The Present Application of the Objective and Subjective Theories in Relation to the Parol Evidence Rule

While the law of contracts has probably never demanded a thorough-going application of the so-called "objective theory" in all its formalistic rigors, it must nonetheless be admitted that consideration of subjective factors in searching for the real intent of contracting parties has in the past been more or less tempered by respect for the postulates of this theory. A recent case illustrating the practical effect of the conflict of these considerations, Mason v. Rose, promotes this re-examination of the much discussed objective-subjective problem and the Parol Evidence Rule.

Savigny defines a contract as "the concurrence of several persons in a declaration of intention whereby their legal relations are determined." In ascertaining the legal relations of the parties in a disputed case, the issue will center either upon the question of "concurrency" or upon their "declaration of intention." The former concerns the existence of a contract, with respect to mutual assent; the latter relates to the interpretation of a contract, with respect to meaning. This distinction must be carefully noted. Suppose a written instrument clearly appears upon its face to be a contract, but one party disputes its validity. Should extrinsic evidence be admitted to show intent to form a contract? Where the existence of the contract is controverted, the Parol Evidence Rule is inapplicable; it applies only where a contract admittedly exists and the controversy concerns the interpretation of the written instrument.

In the Mason case, the plaintiff, James Mason, a noted British stage and screen actor, sought a declaratory judgment that a certain document did not "constitute a binding agreement inasmuch as it was not intended to be a contract." The testimony shows that the

1 85 F. Supp. 300 (S. D. N. Y. 1948), aff'd., 176 F. (2d) 486 (2d Cir. 1949). It was held that although Mason did have an intention to form a contract, the contract as made was too indefinite and uncertain to be binding.
2 As quoted in Markby, Elements of Law 299 (6th ed. 1905).
4 Pym v. Campbell, 6 El. & Bl. 370, 119 Eng. Rep. 903 (1856): "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."
plaintiff and the defendant, David Rose, an American motion picture executive, entered into negotiations relative to a contract to establish an independent motion picture producing corporation in the United States. These negotiations resulted in a writing which was the subject of the controversy in the case. Mason was allowed to introduce evidence consisting of preliminary discussions prior to the written agreement, as to what the written instrument was thought to be and to represent. Under the "objective theory," direct statements of intention are not admissible.

In litigation concerning the validity or very existence of a legal writing, the objective-subjective theories act as a guidepost for admitting evidence. The objective theory proposes an external standard for evaluating evidence which may be admitted and, in its most formalistic phase, restricts such evidence to overt acts and words of the parties in ascertaining their intent to form a contract. Basically,

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6 Id. at 303: "Plaintiff's version is that Rose said he wanted the signed letter so that he could have something to show to American producers, directors, and writers, and to indicate that he was 'a person in authority' when he discussed with them the possibilities of deals between them and the projected Mason-Rose Company. Mason's recollection is that he questioned the formality of the writing of June 5, 1946, and that his wife, Pamela Mason, suggested that perhaps a lawyer should be consulted. As to this subject matter, Mason testified: 'Davis laughed at her and he said, "My dear Pam, you know what a contract looks like. You cannot possibly think that this is intended to be a contract, and you remember the contract we worked out together, the one on 'Odd Man Out,' that was a twelve page document very detailed, very carefully drawn out and drafts discussed and everything, whereas this is just what it should be. It is something to prove that he is speaking with authority."'"


8 See *Brant v. California Dairies*, Inc., 4 Cal. (2d) 128, 48 P. (2d) 13, 16 (1935), where the court says: "But it is now a settled principle of the law of contract that the undisclosed intentions of the parties are, in the absence of mistake ... immaterial; and that the outward manifestation or expression of assent is controlling. This is the 'objective' standard established by the modern decisions and approved by authoritative writers."

9 Franklin W. Allen v. Bessinger & Co., 62 Utah 226, 219 Pac. 539 (1923); see 1 *Heusler, Institutions of Germanic Private Law* (1885), as quoted in 9 *Wigmore, Evidence* § 2405 (3d ed. 1940): "A strictly formal system of law knows no contrast between the will and the utterance, and no possibility of a contradiction between the two. This is thoroughly the conception of the Germanic law. The utterance is the law's embodiment. No more, and yet no less, that what is uttered can bind or loose. Hence the minute precision with which obligations of debt were written out ... Hence the legal proverbs, 'one man one word,' 'the word stands,' 'words make the bargain,' and the like. A necessary result is that mistake in contractual relations receives but scanty consideration ... All that a man does is judged alone by its external manifestations and its objective effect, not by his inward motive. The law concedes nothing either to good or to bad faith, as long as it is concerned with the legal consequences of conduct."

10 *Volk v. Atlantic Acceptance & Realty Co.*, 139 N. J. Eq. 171, 50 A. (2d) 488, 489 (1947): "It is one thing to decline to compel a person to perform
the effect of the external standard, as utilized in the objective theory, is to limit the discovery of intent to a determination of manifest intent. More recently, the objective theory has been liberalized to allow admission of other circumstances extrinsic to a disputed writing, in order to interpret the intent and purpose of the parties.

The subjective theory would allow evidence as to the actual intent; that is, it would allow a person to testify to his subjective interpretation of the contract—on the reasoning that justice should not bind a person to perform an act he did not will to do. The element of volition, of intending to be bound by the subject matter fixed in the "meeting of the minds," seems to be an essential part of the concept of "mutual assent" upon which the binding force of an agreement rests. The primary purpose of the subjective theory is to determine whether mutual assent actually existed, and if it did, to discover the meaning of the terms assented to in the contract.

Where the existence of the written instrument as a contract is admitted, and its interpretation is the subject of the action, the evidentiary criterion is the Parol Evidence Rule, which forbids the introduction of parol evidence to alter, contradict, or vary the terms of the writing by the parties related to it. The intent and purpose of the contract is discoverable by its expressed terminology. The rationale of the rule is that:

... it would be inconvenient that matters in writing made by advice and consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.

The problem in the application of the Parol Evidence Rule is the determination of when its myriad exceptions and limitations govern. The exceptions which have been recognized in matters relating to the

an agreement into which he has never decidedly entered and quite another to permit him to escape a peremptory contractual obligation merely because he has changed his mind. The eye of equity must always strive to pierce every curtain of artifice. And so, the application of the one or the other rules to which reference has been made depends fundamentally upon the intentions of the parties to be ascertained by a consideration of the writing and the accompanying condition and circumstances. The determination of the intent of the parties is the solution of a question of fact. . . ."

11 Thompson et al. v. Baltimore & Ohio R. Co., 59 F. Supp. 21, 40 (E. D. Mo. 1945): "Evidence of intent and purpose may not be shown to vary a contract, but it may be offered to show that no contract was in fact made."


13 Id., 33 N. W. (2d) at 805; see also Field-Martin Co. v. Fruen Milling Co. et al., 210 Minn. 388, 298 N. W. 574 (1941): "It is not the subjective thing known as meeting of the minds, but the objective thing, manifestation of mutual assent, which is essential"; CAL. CODE CIV. PROC. ANN. § 1856 (1946); THAYER, PRELIMINARY TREATISE ON EVIDENCE 429 (1898).

14 THAYER, PRELIMINARY TREATISE ON EVIDENCE 401 (1898).
design and object of consideration, void and voidable instruments, the identity of parties, the fact of delivery, the evidence of subsequent parol agreements, waiver and estoppel, collateral agreements, evidence construing interpretation, the nature of usage, and the reformation of mistake, are but some of the problems making application of the rule difficult. Wherever there is an exception to the Parol Evidence Rule, the objective or subjective standard (or some modified version) is used by the courts. Certainly a clear understanding of the objective-subjective theories as a standard in such instances is necessary. The extrinsic facts which may be admitted cannot be enumerated under any ready-made formula. The court is faced with the query: what type of evidence is objective and what subjective? The query is partially answered in determining whether the court will attempt to discover the actual intent or the apparent intent.

Perhaps the furthest the courts have advanced in determining the actual, i.e., subjective intent, is in the field of unilateral acts such as wills, trusts, and deeds. Thayer, questioning the nature of a rule of law which excludes "direct statements of intention," theorized:

... the process of interpretation should ... take account of the writer's actual intention; and while the process of proving this intention must be carried on under the ordinary principles and rules of the law of evidence ... these would ordinarily allow, where intention was a fact to be proved, that it be proved by a person's own contemporary declarations. ...

While in the field of bilateral agreements, modern law has taken a patently objective course, it has felt keenly the need for ascertaining

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17 Crowley v. Lewis et al., 239 N. Y. 264, 146 N. E. 374 (1925).
21 Durand v. Lipman et al., 165 Misc. 615, 1 N. Y. S. (2d) 468 (1937); see Ball et ux. v. Grady, 267 N. Y. 470, 196 N. E. 402 (1935).
25 See Note, 19 TENN. L. REV. 118, 121 (1946).
26 THAYER, PRELIMINARY TREATISE ON EVIDENCE 444 (1898).
the real intent of the parties. This concern is admitted by an English writer who faced the question squarely:27

Once it is conceded (and it must be conceded) that the law is concerned with the real intention of the parties as distinguished from their intention as manifested by the written document it becomes a question of the evidence sufficient to establish the real intention of each of them.

Some compromises, born of a desire to eliminate at least a portion of the undesirable features of both the objective and subjective theories, have been proposed. One such compromise, advocated by Wigmore, might be called the negligence or "reasonable consequences" test:28

We are to fix the person with such expressed consequences as are the reasonable result of his volition. . . . This avoids on the one hand the impracticality of the merely external standard, so far as it would have held the person liable for an apparent act which was not the reasonable consequence of his conduct; and on the other hand, it avoids the impracticality of the merely internal standard, so far as it would have exonerated the person from an unintended consequence which he ought to have foreseen and might have avoided. In short, it adapts, to the general doctrine of legal acts, the test of negligence, i.e., responsibility resting on a volition having consequences which ought reasonably to have been foreseen.

In its application, this test may entail greater impracticalities than those it seeks to avoid. It would bring into play the many interpretations of what are "reasonable resulting consequences" and the confusion surrounding the field of negligence.

One of the most articulate proponents of the subjective theory is Judge Jerome Frank of the Second Circuit of the United States Court of Appeals. Judge Frank, in several decisions,29 levels well-reasoned legal broadsides at formalism, including its offspring, the objective theory and the Parol Evidence Rule. He contends that the judge or juror, unconsciously perhaps, substitutes what his own intention in a given case would have been,30 thereby utilizing a subjectivism which the objective theory tries to avoid.31 Judges or jurors are asked to discover the intent of the parties from an objective viewpoint—through their own subjective processes.32 Judge Frank's

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27 MORISON, REСЕSSION OF CONTRACTS 162 (1916).
28 9 WIGMORE, EVIDENCE § 2413 (3d ed. 1940).
29 Zell v. American Seating Co., 138 F. (2d) 641 (2d Cir. 1943); Beidler & Bookmyer, Inc. v. Universal Ins. Co., 134 F. (2d) 828 (2d Cir. 1943); Hoffman v. Palmer et al., 129 F. (2d) 976, 997, 998 (2d Cir. 1942); United States v. Forness et al., 125 F. (2d) 928, 935, 936 (2d Cir. 1942).
30 See MARKBY, op. cit. supra note 2, at 305.
32 In 2 TAYLOR, EVIDENCE § 1194 (8th ed. 1887), it is stated that "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter."
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realistic approach to the defects of formalism, from the viewpoint of a practicing and active jurist, gives added emphasis to the need for a candid analysis of the problem by the legal profession. Judge Frank, in a recent decision, indicates the illogic in the rationalization of formalism:33

The parol evidence rule is lauded as an important aid in the judicial quest for "objectivity," a quest which aims to avoid that problem the solution of which was judicially said in the latter part of the fifteenth century to be beyond the power of Satan—the discovery of the inner thoughts of man.

In some respects, the problem of interpretation is one of semantics; the meaning of the words used in the legal instrument are often subject to two or more interpretations. To contend, as do the advocates of the "plain meaning of words" concept, that any word has a plain meaning is to overlook such simple words as "team,"34 "transaction,"35 "privileges and appurtenances,"36 and other words bearing a general connotation. The rule against disturbing the "plain meaning" of words is vitiated whenever it is shown that a word in a particular context can reasonably be said to have two or more possible meanings. The difficulty in the interpretation of the meaning of words cannot be resolved by a nice, facile formula, for most assuredly our "language is not a perfect code of signals."37 Holmes,38 Thayer,39 Wigmore,40 and McBaine41 have all written cogent treatises on this continuing dilemma. The interpretation of a contract requires something more than an abstract definition of its terms. As one court has stated it:42

... where the language used in a written contract is such as to leave the intention of the parties in doubt, thereby rendering the contractual obligation assumed by either party fairly susceptible of more than one

33 Zell v. American Seating Co., supra note 29, at 646. See Brian, Y. B. 17 Edw. IV, f. 1: "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man."
34 See, e.g., Ganson v. Madigan, 15 Wis. 158 (1862).
35 See, e.g., Wachs v. Wachs, 11 Cal. (2d) 322, 79 P. (2d) 1085 (1938).
36 See, e.g., Fayter v. North et al., 30 Utah 156, 83 Pac. 742 (1906).
38 In Doherty v. Hill, 144 Mass. 465, 11 N. E. 581, 583 (1887), Holmes said: "In every case the words used must be translated into things and facts by parol evidence."
39 THAYER, op. cit. supra note 26, at 412: A judge "... has no right to expect more of written language than it is capable of, or more care in the use of it than fallible creatures, subject to time and accident, can reasonably supply."
40 9 Wigmore, EVIDENCE § 2462 (3d ed. 1940): "The ordinary standard, or 'plain meaning,' is simply the meaning of the people who did not write the document... The fallacy consists in assuming that there is or ever can be some one real or absolute meaning." (Emphasis supplied.)
41 McBaine, supra note 37.
interpretation, the court, in ascertaining the true intention of the parties with respect thereto, may and should consider the subject matter of the contract, the surrounding circumstances existing at the time when the same was executed and the practical interpretation, if any, subsequently placed thereon by the parties.

The "plain meaning" rule is based upon the idea that words have an inherent meaning which is objective, and uniformly used by all. The difficult problems which this concept poses led, at one time, to the ready acceptance of the now generally disregarded "patent-latent ambiguity" rule, which arose from a misunderstanding of Bacon's maxim. Under this rule, "oral evidence is admissible to aid in the interpretation of a writing if there is a latent ambiguity, but where there is a patent ambiguity it can only be cured by the writing itself." This deftly phrased rule does not, however, do much to solve the question of the admissibility of parol evidence. No exceptional ingenuity need be exercised to show, rather conclusively, that a patent ambiguity exists in a given word or phrase of an integrated contract. This fact practically obviates the so-called "plain meaning" rule and, at the same time, further elasticizes the Parol Evidence Rule. Where a party has proved the existence of a latent ambiguity which has resulted from mutual mistake of fact, the contract may be void because of lack of mutual assent.

Obviously, some standard of interpretation is necessary; the following criterion is set forth in the Restatement of Contracts:

... a standard of reasonable expectation, which would attach to words or other manifestations of intention the meaning which the party employing them should reasonably have apprehended that they would convey to the other party. ...

This view is supported by Williston and by some courts. But such a standard, although it would succeed in avoiding the apparent difficulties involved in ascertaining the subjective understanding of the parties who created the words, would do so by substituting that

43 3 Williston, Contracts § 629 (Rev. ed. 1936): The plain meaning rule is applied when the words of a written contract are such "that in the particular case the evidence offered would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate and that, therefore, it was useless to hear the evidence."

44 See Note, 102 A. L. R. 287 (1936).

45 Thayer, op. cit. supra note 26, at 471 et seq.

46 McBaine, supra note 37, at 147.

47 Restatement, Contracts § 227, comment a (1932).

48 3 Williston, Contracts § 603 (Rev. ed. 1936).

49 Roy v. Salisbury, 21 Cal. (2d) 176, 130 P. (2d) 706, 710 (1942), cited in Roller v. Cal. Pac. Title Ins. Co. et al., ... Cal. (2d) ..., 206 P. (2d) 694, 698 (1949): "The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained."
subjectivism inherent in the very act of third-party interpretation, i.e., what the judge or juror presumes the contractual parties should have meant. The better standard, also suggested in the Restatement, would seem to be: 50

. . . [that] mutual standard, which would allow only such meanings as conform to an intention common to both or all the parties, and would attach this meaning although it violates the usage of all other persons. . . .

This standard would ascertain the true meaning of the parties. 51 It would also lessen the subjectivism created in the use of a purely objective standard. If the parties must be held responsible for an agreement, the court ought to interpret the one actually made.

Conclusions

The authorities recognize the Parol Evidence Rule as fixing the scope of evidence which the court will consider while adjudicating some problem rising out of an unambiguous agreement which was admittedly assented to by both parties. Where the Parol Evidence Rule does not apply, the scope of evidence judicially admitted is determined by some objective or subjective standard: where the creation of the contract is controverted, the objective theory predominates; where the interpretation of the contract is in issue, the trend is toward the subjective theory under an ostensible use of a liberal objective theory. Under the liberal objective theory, 52 practically the only "relevant" evidence not admitted by the courts are apparent and direct statements by the parties of their actual intention and understanding of the agreement in the controversy, 53 either as to its validity or interpretation. It has been stated that the adoption of the formal objective theory will assist in establishing uniformity of court decisions, 54 but this cannot be accomplished in disregard of the justness of particular court decisions.

James D. Matthews

Henry M. Shine, Jr.
Disposition of Local Union’s Funds Upon Vote by Right-Wing Majority to Secede from Left-Wing Parent.

On November 2, 1949, the annual convention of the Congress of Industrial Organization (C. I. O.) expelled two of its member unions, the United Electrical, Radio and Machine Workers of America (U. E.) and the Farm Equipment Workers of America (F. E.), from its ranks on the grounds that the ejected unions were Communist dominated. The two expelled unions represent some 450,000 workers. This was the largest mass expulsion since September, 1936, when the American Federation of Labor (A. F. of L.) suspended ten industrial unions which then became the nucleus of the present C. I. O. The consequences of this action will be closely followed and analyzed for their economic, political, and social significance by experts in each respective field. The more limited concern of this note, however, is to study the effect on the property of the local union of an attempt by a majority of its members to secede from the Communist-dominated parent and to affiliate itself with another parent organization. This specific problem has, of course, been brought about by the recent mass expulsion.

1 N. Y. Times, Nov. 3, 1949, p. 1, col. 1. In addition to the charge of Communist domination, the F. E. was accused of failing to heed an order of the C. I. O. to merge with the United Automobile Workers of America (U. A. W.). The F. E. had, instead, merged with the U. E. by a secret pact reached in a meeting in Chicago between September 27 and 30.

2 See Daugherty, Labor Problems in American Industry 370 (5th ed. 1941). Convention approval was secured for the 1936 expulsion in November of that year. The C. I. O., then known as the Committee of Industrial Organization, had been formed in 1935 by the heads of eight labor unions who felt that the traditional craft union principle of the A. F. of L. was not suitable to the mass production industries, and that an industry-wide bargaining unit would be more effective. The C. I. O. definitely established itself as a rival labor movement at its 1938 convention. At this time its name was changed to the Congress of Industrial Organization.

3 A secondary problem is the determination of the proper bargaining agent in the plants where the U. E. has contracts. A spokesman for the International United Electrical, Radio and Machine Workers of America (I. U. E.), which had been set up by the C. I. O. to replace the U. E., stated that up to Nov. 29, 1949, 133 new charters had been granted and sixty per cent of the membership of the U. E. had been won over to the I. U. E. On this basis the I. U. E. would like to test immediately its claims by N. L. R. B. elections. However, the U. E. maintains that elections cannot be held until March 15, 1950, the expiration date of the U. E. contracts with the principal manufacturers. On the employers’ side of the issue, Westinghouse has already filed a petition of its own with the N. L. R. B. for an election. General Electric has suspended contract negotiations until the controversy is resolved. Some of the smaller manufacturers have already signed contracts with I. U. E. See N. Y. Times, Dec. 4, 1949, § 5, p. 9, col. 5.
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At the 1949 convention, the right wing, under the leadership of President Phillip Murray and with a voting majority of seven to one, amended the constitution of the C. I. O. as follows:

Section 4. No individual shall be eligible to serve either as an officer or as a member of the Executive Board who is a member of the Communist Party, any fascist organization, or other totalitarian movement, or who consistently pursues policies and activities directed toward the achievement of the program or the purposes of the Communist Party, any fascist organization, or other totalitarian movement, rather than the objectives and policies set forth in the constitution of the C. I. O. . . .

Section 10. The Executive Board shall have the further power, upon a two-thirds vote, to revoke the Certificate of Affiliation of or to expel or to take any other appropriate action against any national or international union or organizing committee the policies and activities of which are consistently directed toward the achievement of the program or the purposes of the Communist Party, any fascist organization, or other totalitarian movement, rather than the objectives and policies set forth in the constitution of the C. I. O. Any action of the Executive Board under this section may be appealed to the Convention, provided, however, that such action shall be effective when taken and shall remain in full force and effect pending the appeal.

The effects of the foregoing constitutional amendments and several resolutions passed pursuant thereto during the convention were:

1) To bar Fascists, Communists, and persons who follow other totalitarian movements from sitting on the executive board.

2) To expel the U. E. and F. E. from the ranks of the C. I. O. and to set up the International United Electrical, Radio and Machine Workers of America (I. U. E.) to replace the U. E.

3) To grant discretion to the executive board to expel other left-wing unions.

4 See C. I. O. News, Nov. 7, 1949, p. 4, col. 3.

5 N. Y. Times, Nov. 3, 1949, p. 1, col. 1. The charter of the U. E. was turned over to a committee under the temporary chairmanship of James B. Carey, the secretary-treasurer of the C. I. O., who issued the call for a reorganization convention to convene in Philadelphia on November 28, 1949, to set up the new I. U. E.

6 N. Y. Times, Nov. 6, 1949, § 5, p. 2, col. 2. A committee was established to investigate and hold hearings concerning the other ten unions suspected of leftist domination. These unions were:

1. International Fur and Leather Workers;
2. Food, Tobacco, Agricultural and Allied Workers of America;
3. International Fishermen's and Allied Workers of America;
4. International Longshoremen's and Warehousemen's Union;
5. International Union of Mine, Mill and Smelter Workers of America;
6. National Union of Marine Cooks and Stewards;
7. United Furniture Workers of America;
8. United Office and Professional Workers of America;
9. United Public Workers of America;
10. American Communications Association.
As a result of this action taken by the C. I. O., controversies between left and right-wing elements within the locals have arisen concerning the disposition of the property and funds of the various locals. A great number of actions have already reached the courts, and many more are certain to arise. One such action which was recently decided is Seslar v. Local 901, Inc. et al. In that case a corporation was set up by a local, pursuant to a motion of a majority of its membership, for the purpose of taking and holding the real and personal property of the local, so as to protect it from seizure by the left-wing parent. It was held that such action was null and void, because it was contrary to the constitution of the parent, and this constitution was a binding contract between the parent and the local and its members.

In order better to understand the holding of the Seslar case, a brief summary of the history of this type of litigation should be made. The earliest cases dealt with various types of fraternal and benevolent organizations and involved the withdrawal or expulsion of the entire membership of subordinate lodges. In these cases, the subordinate lodges were allowed to keep their funds.

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7 On Nov. 2, 1949, in Boston, Mass., the left-wing members of Local 201 filed a suit to tie up the local's funds. A subpoena was issued ordering the right-wing union officers to appear and show cause why the $200,000 estimated funds should not be held within the control of the local as constituted before the expulsion of the U. E. from the C. I. O. See N. Y. Times, Nov. 3, 1949, p. 32, col. 1.

On Nov. 28, 1949, in Montgomery County Common Pleas Court of Ohio, Justice Calvin Crawford refused to grant a temporary injunction, to twenty-five "loyal" U. E. members, that would have prevented right-wing officers of three locals from using union funds or property. The defendants in the Common Pleas Court were forty officers of Locals 801, 755 and 768, representing twenty different plants. All three locals had voted to secede from the U. E. in order to join the I. U. E. See N. Y. Times, Nov. 29, 1949, p. 21, col. 3.

8 N. Y. Times, Nov. 30, 1949, p. 1, col. 6. Temporary chairman James B. Carey told the I. U. E. convention that more than 300 restraining orders had been served on him since the revocation of the U. E. charter.

9 ... F. Supp. ... (N. D. Ind. 1949).

10 It should be noted that in this case the question of secession was not in issue, and the court found that there had been no attempt by the parent to seize the property of the local.

11 For a more extensive analysis of the cases, see Notes, 58 YALE L. J. 1171 (1949); 22 NOTRE DAME LAWYER 99 (1946); see also Notes, 131 A. L. R. 902 (1941); 15 L. R. A. (n.s.) 336 (1908).

to constitute a general rule, they are not strictly applicable to the problem at hand, since they dealt with the expulsion or secession of the entire membership of a subordinate lodge, while in the cases which have arisen in regard to the present problem, and in most of the cases which will arise, there is or will be a split in the vote of the local union members. The early cases can also be distinguished in that they dealt with funds collected solely for the benefit of the members of the subordinate lodges; the courts now distinguish between "special" funds, which are exclusively the property of the local, and "general" funds, which inure to the benefit of the parent subject to the terms of the constitution of the parent.

In the cases dealing with unincorporated locals, the right to secede and all rights to the property of the local are determined by the constitution and by-laws of the parent organization, since, as was stated previously, the constitution of the parent union is a contract binding upon the local and its members.

A clause governing the manner of secession and allowing for the disposition of the local's funds and property is now common in parent constitutions. The terms and methods used by the various parent organizations differ. Some use clauses which declare any vote to disaffiliate null and void so long as a minimum number in the local remain loyal; others insert provisions which expressly limit the local's

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13 See Note, 15 L. R. A. (n.s.) 336 (1908).

14 The general rule today is that upon secession or expulsion of the entire membership of a subordinate lodge or local union, the secedents are entitled to the property of the subordinate organization. Sufferidge v. O'Grady, 84 N. Y. S. (2d) 211 (1948).

15 See notes 7 and 9 supra.

16 See note 8 supra.

17 O'Neill v. Delaney, 158 N. Y. S. 665 (1909); Shipwrights', Joiners' and Calkers' Ass'n. Local No. 2 v. Mitchell et al., 60 Wash. 329, 111 Pac. 780 (1910).

18 Lumber and Sawmill Workers' Union v. International Woodworkers, 197 Wash. 491, 85 P. (2d) 1099 (1938).

19 Incorporated locals, since they are chartered by the state, are allowed to secede and to keep their funds even over the dissident voice of the minority. Moyer v. Butte Miners' Union, 232 Fed. 788 (Mont. 1916); Goodman v. Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13 (1887); Wells v. Monihan, 129 N. Y. 161, 29 N. E. 232 (1891).

20 Harris et al. ex rel. Carpenters' Union No. 2573 v. Backman et al., 160 Ore. 520, 86 P. (2d) 456 (1939); Weighers', Warehousemen and Cereal Workers' Union Local 38-123 of International Longshoremen's Ass'n. v. Green, 157 Ore. 394, 72 P. (2d) 55 (1937); Lumber and Sawmill Workers' Union No. 2623 v. International Woodworkers of America, Local 49, 197 Wash. 491, 85 P. (2d) 1099 (1938).

right to withdraw;\(^{22}\) and still others use the “forfeiture” clause\(^ {23}\) or a combination “minimum number-forfeiture” provision.\(^ {24}\)

Most of the federal and state courts rely on the constitution and by-laws of the parent union to determine whether the seceding majority, the loyal minority, or the parent gets the property.\(^ {25}\) The use of the parent constitution in this manner represents an adoption of the law of voluntary benevolent associations based on an analogy between such associations and labor unions.\(^ {26}\)

If the local-secession cases which have heretofore arisen are considered indistinguishable from those which arise under the present problem, it would seem that the courts will continue to use the analogy of voluntary associations and apply the principles of contract law to these cases also. Since the constitution of the U. E. seems likely to be involved in most of the forthcoming secession cases,\(^ {27}\) its pertinent provisions are set forth:

U. E. Constitution, Art. 10, § I. The General Executive Board shall have the power to revoke the charter of any affiliated local in circumstances which arise which threaten the existence of such local or might injure the local, district, or international membership. . . .

If a local’s charter is revoked by the General Executive Board in accordance with this Section, upon notice of such revocation to the local affected, the local Secretary and Trustees and other persons having

\(^{22}\) Steinmiller v. McKeon, 21 N. Y. S. (2d) 621 (1940), aff’d. mem., 261 App. Div. 899, 26 N. Y. S. (2d) 491 (1941), aff’d. mem., 288 N. Y. 508, 41 N. E. (2d) 925 (1942); Local No. 2618, Plywood and Veneer Workers v. Taylor, 197 Wash. 515, 85 P. (2d) 1116 (1938).


\(^{24}\) Low v. Harris, 90 F. (2d) 783 (7th Cir. 1937); Hogan v. Williams, 160 Ore. 520, 86 P. (2d) 456 (1939). For an extended analysis of judicial interpretation of the various types of parent constitutional provisions, see Note, 58 YALE L. J. 1171 (1949).

\(^{25}\) New Jersey seems to be alone in making a distinction between “independent” locals, i.e., those whose existence antedated the national, and “dependent” locals, i.e., those created by the national. Harker et al. v. McKissock et al., .... N. J. Eq. ...., 62 A. (2d) 405 (1948). Under this view, an “independent” local, having been in existence prior to the parent, can secede by majority vote and keep its property, whereas a “dependent” local could not, since it depends upon the parent for its existence. International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C. I. O. et al. v. Beecher et al., 142 N. J. Eq. 561, 61 A. (2d) 16 (1948), aff’d., .... N. J. ...., 67 A. (2d) 900 (1949). In its affirmance of the lower court, the supreme court used the “special funds” doctrine and not the “independent local” doctrine.

\(^{26}\) Grand Lodge of International Ass’n of Machinists v. Reba, 92 Conn. 235, 116 Atl. 235 (1922); Liggett v. Koivenen, .... Minn. ...., 34 N. W. (2d) 345 (1948); Harris et al. ex rel. Carpenters’ Union No. 2573 v. Backman, 160 Ore. 520, 86 P. (2d) 456 (1939).

\(^{27}\) Since the F. E. merged with the U. E., and since the U. E. has more than half of the membership of all the leftist controlled unions, in all probability the vast majority of cases will concern the U. E.
custody of funds and property belonging to the local, shall send all such funds and property to the General Secretary-Treasurer or to a representative designated by him. The General Secretary-Treasurer shall hold this property intact until the action of the next International Convention or until the action of the International membership through a referendum vote.

Art. 18, § N. If a local disbands, the local Secretary and Trustees shall send all funds and property belonging to the local to the General Secretary-Treasurer. The General Secretary-Treasurer shall hold this property intact for one year. If within that time, an application is made by at least seven (?) former members, a charter will be reissued and the funds and the property returned. Should no application be made within the year, the funds and property shall revert to the International Union.

Art. 18, § 0. Any local union whose good standing members fall below seven (?) may have its charter revoked in accordance with the provisions of Article 18, Section N, and Article 10, Section I, of the International Constitution. Members of such a group may become members-at-large, affiliated directly with the International Union in accordance with Article 20, Section C, or they may transfer to other local unions in the area.

Any disbandment, dissolution, secession or disaffiliation of any local union shall be invalid and null and void if seven (?) or more members of such local union shall vote against such disbandment, dissolution, secession, or disaffiliation at a special meeting called for that purpose.

The construction and application by the courts of the above provisions would be controlling in the forthcoming cases if the analogy is followed.

Although it has been stated by legal authorities that the principles applicable to some types of benevolent associations are also applicable to labor unions, it would seem that the fundamental differences between benevolent associations and labor unions, notably the great socio-economic and political ramifications of the latter, should be considered at length by the courts before applying principles which were evolved before strongly organized and centrally controlled labor unions had been developed.

The fact of the great economic influence of modern labor unions over their members lessens the applicability of the benevolent association analogy to cases involving the rights of such unions and their members. The Bureau of Labor Statistics published figures in 1946 indicating that of 15,000,000 workers in organized labor, 11,000,000 were subject to collective bargaining agreements requiring union membership as a condition of employment. Under such conditions, membership in a labor union cannot be considered voluntary in the same sense as membership in a benevolent association. The economic advantages of employment and job-security frequently depend upon union mem-

28 Chañee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1021-23 (1930); WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS 55, 56 (1916).
bership, and thus an employee cannot change from one labor organization to another without risking the loss of his means of livelihood.

Most of the cases decided prior to the recent left-right-wing split have involved secession or expulsion of a rebellious majority of a local because of dissension among its members concerning the relative merits of one parent over another, or because of a personal disagreement between the head of a local and the president of a parent, etc. These have been union "family affair" problems and thus have not been of national importance. The cases which will arise under the present problem cannot be distinguished completely on legal grounds from cases which have arisen previously in secession and expulsion cases. However, the economic harm done to the members of the local unions in the attempt to break away from a minority which is loyal to a Communist-controlled parent is so great that a distinction between the two types of cases may be warranted.

One possible solution is that reached by a New York court on December 6, 1949. In that case the local, by an overwhelming vote of its membership, decided to continue as an affiliate of the C. I. O. by joining a parent affiliated with it, the newly organized I. U. E. A committee was set up by the local to safeguard the funds of the local against the contingency of seizure by the former parent, U. E. Nine loyal members of the local sought an injunction to restrain the committee from holding the funds, alleging that this act violated the constitution and the by-laws of the U. E. It was held by Justice Morris Eder that the compact between the local and the U. E., founded on the affiliation of the U. E. with the C. I. O., was abrogated when the U. E. was expelled from the C. I. O., and that therefore the constitution and by-laws of the U. E. had no binding effect on the local.

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30 Low v. Harris, 90 F. (2d) 783 (7th Cir. 1937) (local voted to leave the United Mine Workers and to join the Progressive Miners of America); Harris et al. ex rel. Carpenters' Union No. 2573 v. Backman et al., 160 Ore. 520, 86 P. (2d) 456 (1939) (A. F. of L. to C. I. O.); Lumber and Sawmill Workers Union No. 2623 v. International Woodworkers of America, Local 49, 197 Wash. 491, 85 P. (2d) 1099 (1938) (A. F. of L. to C. I. O.).

31 Weighers', Warehousemen and Cereal Workers' Union Local 38-123 of International Longshoremen's Ass'n v. Green, 157 Ore. 394, 72 P. (2d) 55 (1937) (disagreement between local and parent).

32 "When the basic objective was destroyed by the U. E.'s expulsion from the C. I. O. . . . continuance by Local 450 of membership in the U. E. was a meaningless and valueless connection and under the particular facts of this case, Local 450 and its members were relieved of any further obligation to continue membership in the U. E.

"In the peculiar nature of this case. . . . membership was authorized under its constitution to 'join or associate with any other body as would accomplish affiliation with C. I. O., and . . . the acts of the defendants and the members of Local 450 were legal and valid." Justice Morris Eder as quoted in N. Y. Times, Dec. 7, 1949, p. 4, col. 2.
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Even if this solution is not followed by other courts in similar cases, it is still possible that deference will be given to the public policy of the United States toward communism as expressed through Congress \(^{34}\) and the decisions of the courts.\(^{35}\) If this is done, a contract between a local and a parent, for example, though valid in its terms and objects when entered into, may be considered as avoided by the breach of the parent and therefore not binding upon the local, because of the implied condition in the contract that neither party thereto would pervert the original objects of the contract by espousing a cause contrary to the public policy of the United States and to the aims of the majority of those contracting.\(^{36}\)

Another possibility open to the courts, but one which would be applicable in fewer instances, would be an attack upon the unreasonableness of parent constitutions which provide that, if seven members remain loyal, any vote to disaffiliate will be null and invalid. In at least one instance such a provision in the constitution would allow the dissenting vote of seven men to thwart the desires of 17,000 others.\(^{37}\)

Before all of the cases concerned with this problem are finally decided, the N. L. R. B. will have determined the proper bargaining agents for many of the locals involved, in proceedings before it.\(^{38}\) The most just procedure may be to allow that local which is recognized as the bargaining agent to keep the funds and property. Otherwise, an anomalous situation will arise in which a union, unrecognized


\(^{35}\) See National Maritime Union of America v. Herzog, 78 F. Supp. 146 (D. C. 1948) (non-Communist affidavit). At least judicial recognition of the public attitude toward Communism can be seen in the growing number of cases holding the imputation of Communist affiliation to be libelous per se. In this regard see Spanel v. Pegler, 160 F. (2d) 619 (7th Cir. 1947); Wright v. Farm Journal, 158 F. (2d) 976 (2d Cir. 1947); Grant v. Readers' Digest, 151 F. (2d) 733 (2d Cir. 1945); Boudin v. Tishman, 264 App. Div. 842, 35 N. Y. S. (2d) 760 (1942); Ley v. Gelber, 175 Misc. 746, 25 N. Y. (2d) 148 (1941); see also Note, 24 Notre Dame Lawyer 542 (1949). The Civil Service Commission can discharge one known as a Communist sympathizer. Freidman v. Schwellenbach, 159 F. (2d) 22 (D. C. Cir. 1946), cert. denied, 330 U. S. 838, 67 S. Ct. 979, 91 L. Ed. 1285 (1947).

\(^{36}\) As far back as 1935, the A. F. of L. convention adopted an amendment to its constitution excluding "Communists or any person espousing Communistism" from city central bodies and state federations. See 45 Yale L. J. 1248 n. 26 (1936), citing Proceedings, 55th Convention, A. F. of L., XXVI, 168-69 (1935).

\(^{37}\) Local 201 at the Lynn General Electric Plant is the largest U. E. local, with a membership of 17,000.

\(^{38}\) See note 3 supra.
as a bargaining agent and therefore of no economic value to its members, is allowed to keep property which it received only because it then had economic value, while the only union thereafter capable of representing its members is deprived of that property.

Since most of these cases arise in proceedings in equity, the opportunity for a just solution unfettered by strict principles of law is amply afforded. Whatever theory is used to decide these cases, the courts should not allow a group which is patently against the economic, political and legal principles of the nation to use those very principles to gain a firmer foothold in American labor.

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Practice of Law

Unauthorized Practice: A Decade of Conflict

The traditional theory that the right to practice law shall be exercised only by licensed attorneys often conflicts with the conduct of various forms of specialized business enterprises. However, such conflicts, concerning the issue of what persons have the right to render advice upon legal problems, appear to have become much more serious during the past decade. As certain forms of public service associations have become more and more specialized, they have tended to include within their boundaries the determination of all aspects of their particular business, which have often involved the deciding of legal questions. While bar associations throughout the United States bitterly complain of such intrusions and of the resultant injury to the general public, the specialists maintain that their business will be unduly hindered if the courts uphold a strict rule allowing no one but a licensed attorney to answer a legal question.

Most attorneys have been forced to admit that in many fields, especially that of accounting, the specialists have acquired a knowledge of the law pertaining to their particular endeavor which would take

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39 As illustrated in the above cited cases, the great majority of actions are bills for injunctions against the seceding majority of the local.

1 "The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law." Judd v. City Trust and Savings Bank, 133 Ohio St. 81, 12 N. E. (2d) 288, 291 (1937).
the average practicing attorney a great deal of time to master. Notwithstanding this fact, the attorney can logically answer that a knowledge of the law of a particular subject is certainly not knowledge of the law in its broader aspects. It is very seldom indeed that a legal problem may be answered through a "knowledge" of the law within the academic confines of a particular subject. The prime object of allowing only a licensed attorney to practice law is the protection of the public.\(^2\) The question then resolves itself into one of determining what method may be best devised to enable the specialist to proceed with the least amount of incumbrances commensurate with the safety of the general public.

The unauthorized practice of law may range from the filling in of blanks in standard forms by a notary public \(^3\) or an insurance adjuster,\(^4\) to the complex situation presented in the prevalent "heir hunting" cases.\(^5\) One of the most troublesome problems, however, concerns the rendition of legal advice and opinions by income tax accountants. The situation may best be illustrated by reviewing the case of In re Bercu.\(^6\) Bernard Bercu, a certified public accountant, was asked by the officers of a corporation to give an opinion as to the deductibility during 1943 of a city sales tax which had been incurred in the production of income in previous years. If such a deduction could be made it would result in a substantial saving to the corporation.\(^7\) Their regularly employed attorney, however, had previously advised against this method as being illegal under the tax laws. Bercu disagreed with this contention, nevertheless, and verified his view, after a search of tax court decisions, with a case substantiating his theory. He then billed the corporation for his services and, upon nonpayment, brought a suit which was dismissed on the ground that the claim was based upon the illegal practice of law. On appeal,\(^8\) it was held that Bercu had never held himself out to the public as anything but a certified public accountant, that his clients understood this fact, and that his legal research did not extend beyond the purview of strict income tax law, with which he of necessity had to become familiar in order to continue in his practice. This decision

\(^3\) Union City and Obion County Bar Ass'n v. Waddell, 205 S. W. (2d) 573 (Tenn. App. 1947).
\(^4\) State ex rel. Milwaukee Bar et al. v. Rice, 236 Wis. 38, 294 N. W. 550 (1940).
\(^5\) See In re Reilly's Estate, 81 Cal. App. (2d) 564, 184 P. (2d) 922 (1947), and cases discussed therein.
\(^7\) The corporation had made substantial profits in 1943, but none in the years 1935, 1936, and 1937.
\(^8\) In re Bercu, 188 Misc. 406, 69 N. Y. S. (2d) 730 (1947).
was in turn reversed on the ground that the problem involved actually exceeded "the regular pursuit of his calling." The court stated: 10

We must either admit frankly that taxation is a hybrid of law and accounting and, as a matter of practical administration, permit accountants to practice tax law, or, also as a matter of practical administration, while allowing the accountant jurisdiction of incidental questions of law which may arise in connection with auditing books or preparing tax returns, deny him the right as a consultant to give legal advice. We are of the opinion that the latter alternative accords to the accountant all necessary and desirable latitude and that nothing less would accord to the public the protection that is necessary when it seeks legal advice.

A Massachusetts case presents a similar problem in a much more commercialized form. Loeb, a Boston attorney, had conceived the profitable idea of establishing an organization, the American Tax Service, which employed three hundred persons, including one accountant, for the purpose of aiding wage earners in filing their income tax returns for a nominal fee. The business was placed in the attorney's wife's name and, as a result of a vast advertising campaign, it enjoyed a thriving existence. Patrons of the service had been promised counsel in handling income tax matters during the tax year, the service employing as an advertising slogan, "We stay with your taxes." The court admitted the difficulty of ascertaining a sharp line between the field of the lawyer and that of the accountant and recognized the existence of a troublesome penumbra, but held that in this instance not only was the regular attorney-client relationship destroyed, but also that the business had bound itself by contract to sell legal services which it was clearly incompetent to render.

The close relation, in many aspects, of the subject matter dealt with by an attorney and by a real estate broker has also caused much argument as to whether the latter is practicing law when he prepares deeds, mortgages, leases, options, etc., even when incidental to the business for which the broker is licensed. Real estate brokers generally contend that all instruments which need to be drafted in relation to real property transactions should be considered to be within the realm of their business. A Virginia case involved a corporation engaged in the real estate brokerage business, which habitually prepared deeds, deeds of trust, mortgages, and deeds of release, in connection with the sale of real estate. The corporation alleged that these were mere contracts incident to the regular course of conducting a

10 Id., 78 N. Y. S. (2d) at 220.
12 People ex rel. Illinois State Bar Ass'n. v. Schafer, ...Ill...., 87 N. E. (2d) 773, 25 NOTRE DAME LAWYER 387 (1950).
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licensed business, but the court held that their preparation constituted the illegal practice of law. The defendant corporation relied upon rules of the court which authorized the drafting of contracts if they were incident to a particular business. However, the court considered these contracts to be extraordinary, since they were muniments of title to real estate and the parties did not know or appreciate their legal effect. As the court stated in pointing out the difficulty:

Titles to real property at times have been upset and in some cases the owner either lost his property or was compelled to fight a costly lawsuit all because of a defective deed prepared by an untrained layman. Certain concessions were made to the brokers in that they were permitted to draft simple contracts of sale, options and leases, where the broker signed as agent.

The courts have also enjoined the conduct of a real estate office in passing judgment upon the validity of titles. Quite naturally, the courts do not desire to be considered as intermeddlers in any type of business enterprise, but the ultimate objective of protection of the public must be constantly kept in view. Any hardship suffered by the broker should be considered as insignificant in comparison with the possible harm to the general public.

The illegal practice of law by title insurance companies and trust companies has also been frequently scrutinized by the courts. An equitable solution to the problem was reached in a Pennsylvania case. The court held that the defendant title company did not hold itself out to the public as willing, able or authorized to do any business except title insurance business. The evidence showed that they had prepared deeds, mortgages, assignments of mortgages, releases, etc., only in situations in which such instruments were incidental to the insuring of titles to real estate. The court was of the opinion that the company was engaged in the practice of conveyancing, and not the practice of law, because the disputed transactions were intimately connected with the general purpose of insuring titles. In a like manner, an insurance adjuster is generally allowed to fill in blank forms prepared by an attorney, but it has been held that it is improper to determine for others what constitutes a proper blank form.

Collection agencies have become an integral part of our modern mercantile mechanism, but they have also afforded opportunities for individuals to step beyond the bounds of collection and trespass upon

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15 See note 13 supra, 41 S. E. (2d) at 724.
16 See note 3 supra.
17 La Brum v. Commonwealth Title Co. of Philadelphia, 368 Pa. 239, 56 A. (2d) 246 (1948).
18 See note 4 supra.
19 In re Gore, 58 Ohio App. 79, 15 N. E. (2d) 968 (1937).
the field of law. A Utah case illustrates the illegal practice of law carried on by such agencies. The collection agency in this case solicited the general public to place with the agency various commercial accounts and claims for collection. They agreed to collect, bring suit if necessary, pay court costs and furnish legal services, in return for a right to deduct and retain for their own use a fixed percentage of any sum recovered. Twenty-seven per cent of all civil actions brought in the City Court of Ogden during a period of one year were suits by the collection agency in its own name as assignee of the real owners of the claims. The court held these suits to be "a fraud upon the court," intended purely to circumvent the statute requiring a license for the practice of law. Although an individual does not practice law by acting for himself, the policy of the courts and legislature could not be negated by the subterfuge of a layman in taking an assignment to permit him to carry on the business of practicing law. The fact that the collection agency hired a regular attorney did not remedy the defect; it could not do through an employee or an agent that which it could not do by itself. The attorney's master would not be the client, but the corporation. An attorney should be directly amenable to the client rather than to some intervening master or principal.

The courts have also held illegal the conduct of an appraiser in seeking out insured property owners shortly after the occurrence of fires which damaged their property, and offering his services as an adjuster for a percentage of the amount recovered. A similar result was reached in a case against a person who had arranged a settlement between the parties in a divorce proceeding for a stipulated percentage of the property. However, a consultant in industrial relations and personnel management who advertised his "availability" to employers for guidance in these fields and collaboration with members of the legal profession, has been held not to be engaged in the illegal practice of law. The court concluded that, while certain fields might overlap the law, yet where "the primary service is nonlegal, the purely incidental use of legal knowledge does not characterize the transaction as the wrongful practice of law."

Another business activity which frequently encroaches upon the practice of law by qualified attorneys is the "heir hunting," or as some courts term it, "heir chasing" agency. The operators of such an enterprise would prefer to have it described as a "probate re-

21 Rhode Island Bar Ass'n v. Lesser, 26 A. (2d) 6 (1942).
24 Id., 59 A. (2d) at 864.
The usual procedure is for a representative of such an agency to follow local probate proceedings to determine whether all of the possible claimants to an estate have made an appearance or have been notified. In many instances the correct name and address of a nonresident prospective beneficiary of an estate is on file, and the agent need only arrive before the notification mailed by the probate court. The “missing heir” is then induced to sign an extensive power of attorney, which generally includes an authorization to represent and appear for the heir in all proceedings in the decedent’s estate, to accept service of process, to retain and discharge attorneys and counsel of his own choosing, to collect and receipt their share of the estate, to institute, conduct or defend all litigation concerning the subject matter of such powers, to advance moneys for any and all cognate purposes and to reimburse the agent for his services and disbursements out of the funds coming into his hands from the estate. The amount of reimbursement may be as high as forty per cent of the amount recovered from the estate.

However, the courts generally regard these arrangements as void, as against public policy, whether or not the compensation could be regarded as reasonable. The practice amounts to the employment of a middleman intervening for profit in the conduct of legal proceedings, and is a commercial exploitation of the legal profession.

Disbarred attorneys have also been frequently found guilty of the illegal practice of law. One disbarred Illinois attorney had conceived the idea of forming an organization termed the International Adjustment Company, which became the assignee of claims owned by other individuals. In a number of cases the disbarred attorney brought garnishment proceedings to recover fees for himself as an attorney, and in all of these suits he physically appeared before the court and argued the cases. The court did not hesitate to find this conduct a fraud upon the court and fined the former attorney for direct contempt of court for practicing law without a license. In a similar case, the court held that where one appeared in court representing one of the parties to the litigation, counseled and advised the party in reference to that party’s case, the court had jurisdiction to order a fine for contempt of court.

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26 Id. at 398.
27 See note 5 supra.
29 In re Larson's Estate, ... Cal. App...., 206 P. (2d) 852 (1949); In re Butler's Estate, 29 Cal. (2d) 644, 177 P. (2d) 16 (1947); In re Reilly's Estate, 81 Cal. App. (2d) 564, 184 P. (2d) 922 (1947); In re O'Donnell's Estate, 85 Cal. App. (2d) 1, 192 P. (2d) 94 (1948); In re Seery's Estate, 81 Cal. App. (2d) 971, 184 P. (2d) 926 (1947); Carey v. Thiem, 64 A. (2d) 394 (N. J. Ch. Div. 1949).
30 In re Butler's Estate, supra note 29.
32 People ex rel. Chicago Bar Ass'n. v. Tinkoff, 399 Ill. 282, 77 N. E. (2d) 693 (1948).
to his rights in the suit, selected the kind of pleading and drafted it, and assumed general control of the action, he was engaged in the practice of law. This was merely an attempt to nullify an order of the court which had disbarred him.

Courts vary in their decisions as to whether a layman may be entitled to practice before an administrative or legislative commission. A New Jersey court interpreted a state statute that prohibited a person, except in his own case, from prosecuting any action unless he was a licensed attorney, to apply to the Unemployment Compensation Commission; on the other hand, a lay investigator or adjuster may participate in an informal conference with or before the Workman's Compensation Commission to bring about an amicable agreement between the insurer and the injured employee according to a Missouri decision. A lay counsel for a transportation company, who acted as an attorney while practicing before the Nebraska State Railway Commission, was found guilty of contempt, the court stating that, "It is the character of the act and not the place where the act is performed that constitutes the controlling factor." However, the dissenting judge could not believe that the appearance before a commission whose sole purpose was to make or adjust transportation rates, was an invasion of the field of law. As the dissenting judge phrased the objection, "Of what court was he in contempt?"

The reasoning applicable to all cases of this nature was very aptly stated by a New Jersey court:

In confining the practice of law and nonlegal endeavors within their respective areas, guidance is to be found in the consideration that the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law.

From a review of the cases, it may be seen that the greatest consideration of the courts is the safeguarding of the public. If a layman or a lay agency threatens the public welfare by the unauthorized practice of law, the courts will enjoin such operations. The specialist

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34 "No person, except in his own case or that of an infant, shall be permitted to appear and prosecute or defend any action in any court, including the small cause courts and the courts of common pleas on appeals from the small cause courts, unless he is a licensed attorney at law of the supreme court of this state, who shall be under the direction of the court in which he acts." N. J. REV. STAT. § 2:26-3.3 (1937).
37 Id., 23 N. W. (2d) at 723.