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J. Nixon Daniel Jr.

James E. Chase

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REAL ESTATE BROKERS AND THE UNAUTHORIZED PRACTICE OF LAW

JAMES E. CHACE AND J. NIXON DANIEL, JR.

The basic problem with which this article deals involves the determination of those functions that properly may be performed by real estate brokers as contrasted with those whose performance should be left solely to the legal profession.[1] The premise that the right to practice law is vested exclusively in licensed attorneys[2] has lately

[1]As a practical matter, only conveyancing and the preparation of those instruments commonly employed in real estate transactions are involved.

[2]In the beginning of the common law, litigants were denied counsel of any sort, the reason being that the writ commanding the defendant to appear meant an appearance in person; attorneys could not be used without special permission under the king's letters-patent, and they were simply attorneys in fact, 3 BL. COMM. *25; *see* State *ex rel.* Wolfe v. Kirke, 12 Fla. 278, 282 (1868); *In re* Day, 181 Ill. 73, 84, 54 N.E. 646, 648 (1899). As time progressed statutes were enacted permitting attorneys to prosecute or defend any action, even in the absence of the parties to the suit, *ibid.* During this period the courts were given the power to appoint and regulate attorneys, with the result that a monopoly of practice was secured to those who had been admitted to the practice of law by the judges; see 6 U. OF PITT. L. REV. 219 (1940), citing COSTIGAN, CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS 5 (2d ed. 1933).

The Florida statutes in general terms provide for the continuation of the monopoly thus secured, FLA. STAT. c. 454 (1949). The statutes of a decided majority of the states, as do the Florida statutes, prohibit in general terms the practice of law by those unlicensed, and thus leave to the courts the problem of determining what the practice of law is, *e.g.*, COLO. STAT. ANN. c. 14, §21 (1935); CONN. REV. GEN. STAT. §7641 (1949); MICH. STAT. ANN. §27.81 (1944); S. D. CODE §§32.1101, 32.1121 (1939). A substantial number of state statutes forbid in express terms the drafting of legal papers by laymen, *e.g.*, ALA. CODE tit. 46, §2 (1940); GA. CODE §9-9902 (1933); MISS. CODE §§2332, 8682 (Supp. 1948). The statutes of two states, however, specifically permit a real estate broker to draw papers incident to a transaction in which he is interested as broker, MINN. STAT. ANN. §§481.02, 481.03 (1949); N. J. STAT. ANN. §2:111-1 (1949). The legislative enactments of yet other states appear to restrict the practice of law

precipitated spirited arguments as to just what constitutes the practice of the law in specific situations.[3]

As our economy has become more mechanical and complex, groups of laymen have acquired specialized knowledge of particular aspects of the law and have sought the right to make use of that knowledge in their businesses. Real estate brokers, for example, have come to regard the drawing of deeds and the preparation of other legal instruments as essential to the closing of a deal and properly included within the group of services they are entitled to perform.[4] The legal profession, on the other hand, on the ground that the public should be protected against unlearned and unskilled advisors in matters relating to the law,[5] has sought to curtail such activity.

It is true, of course, on grounds of sound public policy, that those who seek admission to the practice of the law must meet stringent educational and character standards and, once admitted, must sub-

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with reference to court appearance only, *e.g.*, S. C. CODE §312 (1942); TENN. CODE §9970 (1932). FLA. STAT. §§83.11, 83.12, 83.21, 83.28 (1951) authorize landlord's agent to initiate distress for rent action and to file petition for removal of tenant. Some Florida real estate brokers do this in practice.

[3]The reports of the American Bar Association Committee on the Unauthorized Practice of the Law, as well as the cases, indicate that the legal profession has taken issue with practices of accountants, trust companies, collection agencies, title companies, law clerks, abstract companies, realtors, notaries public, automotive associations, insurance adjusters, patent attorneys not licensed to practice law, investigating services, justices of the peace and tax services, as well as with practice before administrative agencies by those not licensed to practice law.

[4]See Hill, *Real Estate Brokers and the Courts*, 5 LAW & CONTEMP. PROB. 72 (1938); Note, 25 NOTRE DAME LAW. 346, 348 (1950). And see Report of the Standing Committee on Unauthorized Practice of the Law, 61 A.B.A. REP. 704, 710 (1936): "A militant organization of laymen is the National Association of Real Estate Boards. In the early summer of 1935, that association threw down the gauntlet to the legal Profession . . . ." The American Bar Association Committee on Unauthorized Practice of the Law "accepted the challenge."

[5]The courts universally regard the restrictions placed upon the practice of law as being primarily for the benefit of the public, and not for the protection of the bar from competition; see, *e.g.*, Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943) (not in the protection of the bar from competition but in the protection of the public from being advised and represented by incompetents); Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Clark v. Rearden, 231 Mo. App. 666, 104 S.W.2d 407 (1937) (primarily for benefit of society); Auerbacher v. Wood, 142 N.J. Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1948); State *ex rel.* Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939) (not to create a monopoly in the legal profession or for its protection, but to assure the public adequate protection in the pursuit of justice); Grievance Committee v. Coryell,

scribe to one of the strictest codes of ethics known to the professions.[6] The restrictions and requirements are heavy; but if these are sound in principle then the status they create, even though it smacks somewhat of monopoly, is thoroughly justified.[7] Only the skeptic will contend that the limitation of law practice to licensed lawyers is designed primarily to benefit the legal profession.

Simple Versus Complex

As a general proposition, the practice of law undoubtedly includes the preparation of legal instruments.[8] Consequently, an individual not licensed to practice law who drafts such instruments for others as a business is likely engaged in the unauthorized practice of the law. A number of courts have taken the position that the mere selection of the appropriate blank form or the filling-in of that form constitutes the practice of law. In re *Gore*,[9] for example, a real estate broker drew simple contracts of purchase in transactions in which he was interested as broker and also prepared other instruments essential to the consummation of the deal, including deeds, mortgages, and leases. Always he selected the appropriate blank when he performed this service, although he referred the parties to their attorneys in "complicated matters." The Ohio court held that respondent could draft his own contract of employment as broker, but that when he selected

190 S.W.2d 130 (Tex. Civ. App. 1945).

[6]The Code of Ethics adopted by the Supreme Court of Florida on Jan. 27, 1941, is found at 31 Fla. Stat. Ann. 393 (1950).

[7]It is apparent nevertheless that the limits of the monopoly enjoyed by the legal profession should be co-extensive with the public policy to be subserved; and, when the public interest will not be furthered by the inclusion of a particular activity in the restricted orbit, that activity should be excluded; see Note, 83 U. of Pa. L. Rev. 357 (1934).

[8]The accepted judicial definition of the practice of law, in addition to the conduct of litigation and matters incident thereto, includes conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients and all action taken in their behalf in legal matters, even though outside the scope of the actual litigation of a cause in the courts, *e.g.*, Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); People *ex rel.* Illinois State Bar Ass'n v. Schafer, 404 Ill. 45, 87 N.E.2d 773 (1949); People *ex rel.* Chicago Bar Ass'n v. Tinkoff, 399 Ill. 282, 77 N.E.2d 693 (1948); Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); State *ex rel.* Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939).

[9]58 Ohio App. 79, 15 N.E.2d 968 (1937).

the appropriate blanks, or filled in such blanks, for others in furtherance of a real-estate transaction he was engaged in the practice of law.[10]

Other courts draw a distinction between the preparation of "simple" instruments, including the selection and filling-in of blank forms in which "special facts or conditions" are not involved, and the preparation of "complex" instruments which must be shaped from a mass of facts.[11] In *People v. Title Guarantee & Trust Co.*[12] the New York Court of Appeals was called upon to determine whether a corporation which, without giving legal advice, prepares a bill of sale and chattel mortgage by filling in blanks, upon and in accordance with the specific direction of a customer, is rendering legal services or holding itself out as entitled to practice law. In making a decision the court saw no reason why a corporation should be punished for doing an act that, because of simplicity and lack of confidential character, can be done by laymen.[13] To hold that the prohibition against the practice of law by unlicensed persons forbids the preparation of all blank-form instruments would, the court thought, frequently necessitate the use of an attorney when his services were not actually required Judge Pound, although concurring in the result reached, rejected the basis of the majority holding:[14]

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[10]*Cf.* People v. Sipper, 61 Cal. App.2d 844, 142 P.2d 960 (1943); Clark v. Rearden, 231 Mo. App. 666, 104 S.W.2d 407 (1937).

[11]*In re* Matthews, 58 Idaho 772, 79 P.2d 535 (1938); *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943) (alternative holding, in which the actual practice of the community was said to have an important bearing on the scope of the practice of law); *cf.* Gustafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435 (1941).

[12]227 N. Y. 366, 125 N.E. 666 (1919).

[13]It is everywhere held that a corporation cannot lawfully engage in the practice of the law, nor may it be licensed to do so, *e.g., In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930); People *ex rel.* Courtney v. Association of Real Estate Tax-payers of Illinois, 354 Ill. 102, 187 N.E. 823 (1933) (rule not varied by fact that corporation was organized not for profit); Judd v. City Trust & Sav. Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937); Land Title & Abstract Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934). Nor may it do so indirectly through the employment of qualified attorneys, *ibid.* The reason most frequently assigned for these holdings is that the practice of law by a corporation would destroy the relation of trust and confidence between attorney and client, since the corporation would intervene as the employer of the attorney. See generally Note, 1 WASH. & LEE L. REV. 243, 244 (1940).

[14]*See* People v. Title Guarantee & Trust Co., 227 N.Y. 366, 378, 125 N.E.

"I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced. Skill is sought when another is employed to do the work. If the blank forms used by the trust companies are prepared or approved by their legal counsel, then, when the clerks fill them out, the corporation tacitly advises the client that the forms are proper and sufficient for the purpose . . . ."

This criticism of the feasibility of distinguishing between simple and complex instruments has been quoted with approval by a number of courts,[15] and the distinction as drawn by the majority opinion has since been repudiated in New York.[16] It appears to be an accepted principle that when a layman is acting in the capacity of a mere clerk or scrivener under the direction of another he is not engaged in the illegal practice of the law.[17] This acting under orders, however, does not immunize his employer from attack for practicing the law without a license, unless his employer is a lawyer.

Incidental versus Primary

Realtors, and others whose business interests incidentally seem to require the drafting of instruments for clients and customers, contend that, although the preparation of instruments for others as a primary business constitutes the practice of the law, such is not the case when their preparation is ancillary to a legitimate business. It has been suggested that judicial application of this distinction is but a recognition of the familiar principle that any person may act as his own lawyer and draft his own agreements.[18] Another writer is of the opinion that the holdings in line with this contention involve simply

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666, 670 (1919) (concurring opinion).

[15]*E.g.*, Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932).

[16]People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940).

[17]*See, e.g.*, People v. Sipper, 61 Cal. App.2d 844, 846, 142 P.2d 960, 962 (1943); People *ex rel.* Illinois State Bar Ass'n v. Schafer, 404 Ill. 45, 52, 87 N.E.2d 773, 777 (1949); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 67, 287 N.W. 377, 381 (1939); *cf.* Gustafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435 (1941) *passim.*

[18]Hill, *Real Estate Brokers and the Courts*, 5 Law & Contemp. Prob. 72, 75 (1938), citing Copeland v. Dabbs, 221 Ala. 489, 129 So. 88 (1930).

the giving-way of the policy underlying the restrictions upon the practice of law to the demands of business practicalities and expediency, since the incidental or primary purpose for which an instrument is drafted obviously is not determinative of the competency or integrity of the draftsman.[19] Whatever the real basis, the fact is that a number of courts do recognize the distinction and, further, do not confine it to the drafting of legal instruments alone but extend it to include the incidental rendition of legal advice and other types of legal services.[20]

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[19]See 96 U. OF PA. L. REV. 722 (1948).

[20]Merrick v. American Sec. & Trust Co., 107 F.2d 271 (D.C. Cir.), *cert. denied*, 308 U.S. 625 (1939) (noting specifically that the distinction between the primary and the incidental is not confined to the drafting of papers); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943) (alternative holding); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940) (conveyancing by a realtor); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936) (chattel mortgages and bills of sale prepared by trust company); Auerbacher v. Wood, 142 N.J. Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1947) (knowledge of the law possessed by consultant in industrial relations); La Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948) (preparation by title company of deeds, mortgages, assignments of mortgages, agreements relating to real estate matters, releases of real estate, and declarations of set-off); *see In re* Bercu, 273 App. Div. 524, 532, 78 N.Y.S.2d 209, 216 (1st Dep't 1948), *reversing* 188 Misc. 406, 69 N.Y.S.2d 730 (Sup. Ct. 1947), 1 U. OF FLA. L. REV. 84 (1948) (legal knowledge of accountant); *see* People v. Title Guarantee & Trust Co., 227 N.Y. 366, 378, 125 N.E. 666, 670 (1919) (concurring opinion). Childs v. Smeltzer, 315 Pa. 9, 14, 171 Atl. 883, 885 (1934), involving a notary public, contains the following dictum:

> "There can be no objection to the preparation of deeds and mortgages or other contracts by such [real estate] brokers so long as the papers involved pertain to and grow out of their business transactions and are intimately connected therewith. The drafting and execution of legal instruments is a necessary concomitant of many businesses and cannot be considered unlawful. Such practice only falls within the prohibition . . . when the documents are drawn in relation to matters in no manner connected with the immediate business of the person preparing them . . . . A real estate broker is not prohibited from drawing a deed of conveyance, or other appropriate instrument relating to property of which he or his associates have negotiated a sale or lease."

Contra: Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939) (preparation of conveyances of real estate and personal property for others for a consideration is unauthorized practice of law although done in connection with business of loan broker); Judd v. City Trust & Sav. Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937) (trust company illegally practicing law when it draws wills, trust agreements, and other legal documents for its customers, and this fact is not altered by the inclusion of the trust company in such instruments

But even among the courts that accept the distinction of incidental versus primary work, there is no substantial agreement as to the full scope of the test. The application of the rule has been limited to simple instruments, leaving complex ones to licensed attorneys even though their preparation might, to some extent at least, be considered incidental to a legitimate business. In *Cain v. Merchants National Bank & Trust Co. of Fargo,*[21] for example, an injunction was sought prohibiting a trust company from representing itself to the public through the medium of advertising as authorized to practice law. The respondent, through its officers or employees, prepared chattel mortgages, bills of sale, and crop contracts. In holding that the respondent had a right to draw chattel mortgages and bills of sale that involved settlements in which it was interested, or which were drawn for the purpose of being pledged to it as collateral, but that it stepped out of its lawful field when it drew such instruments for the accommodation of its customers in transactions in which it had no interest, the court remarked:[22]

> ". . . a person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested provided no charge is made therefor. These simple instruments are usually prepared upon or with the aid of printed forms and seldom involve a high degree of legal skill. The drawing of complicated legal instruments such as wills or trust agreements require more legal knowledge than is possessed by the average layman. . . . One who draws such instruments for others practices law even though such instruments might, to some extent, be incident to a business such as that usually conducted by trust companies."

And in *Cowern v. Nelson* [23] the Supreme Court of Minnesota held

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as fiduciary); *cf.* Commonwealth v. Jones & Robbins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947) (preparation of deeds, deeds of trust, mortgages and deeds of release in connection with the sale of real estate by a real estate broker is not incident of real estate business, despite rule of court defining illegal practice of law in terms of preparation of legal instruments other than notices or contracts incident to regular course of conducting licensed business).

[21]66 N.D. 746, 268 N.W. 719 (1936).

[22]*Id.* at 754, 268 N.W. at 723.

[23]207 Minn. 642, 290 N.W. 795 (1940).

that a realtor might engage in "ordinary conveyancing" as long as no separate charge was made, since this work was a part of his everyday business. The court did not believe that the harm possibly inflicted on the public from "the rare instances of defective conveyances" in such transactions was sufficient to offset the public inconvenience caused by having to call in a lawyer to draft these "simple instruments."[24]

The broad language employed by certain other courts would allow the layman to draft any instrument, regardless of complexity, as long as this process was ancillary to his business.[25]

Consideration

Some courts require that the layman perform the ancillary service free of charge, on pain of being labeled an unauthorized practitioner of the law.[26] Other courts draw no such distinction and permit the incidental performance of legal services, although "consideration" is present.[27] It is submitted that this distinction, when made, is un-

[24]Other cases lending support to the proposition that only simple instruments are contemplated by the incidental-primary test include Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937); Commonwealth v. Jones & Robbins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947) (preparation of deeds, deeds of trust, mortgages, and deeds of releases in connection with sale of real estate by licensed real estate broker is not incident of real estate business, although contracts of sale and contracts giving broker authority to sign for owner are incident, by virtue of rule of court).

[25]*E.g.*, Merrick v. American Sec. & Trust Co., 107 F.2d 271 (D.C. Cir.), *cert. denied*, 308 U.S. 625 (1939); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Auerbacher v. Wood, 142 N.J. Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1948); La Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948); *see In re* Bercu, 273 App. Div. 524, 532, 78 N.Y.S.2d 209, 216 (1st Dep't 1948); Childs v. Smeltzer, 315 Pa. 9, 14, 171 Atl. 883, 885 (1934).

[26]*E.g.*, Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940). Some courts hold that the element of consideration is essential to the practice of law and must be proved at trial, *e.g.*, State v. Adair, 4 Harr. 585, 156 Atl. 358 (Del. Gen. Sess. 1922); State v. Bryan, 98 N.C. 644, 4 S.E. 522 (1887); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932); *cf.* Clark v. Rearden, 231 Mo. App. 666, 104 S.W.2d 407 (1937); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934). Others take the more logical view and turn their decisions on the nature of the acts and transactions done rather than upon whether they are done for consideration, *e.g.*, State *ex rel.* Hunter v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937); State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936); Grievance Committee v. Coryell, 190 S.W.2d 130 (Tex. Civ. App. 1945).

[27]*E.g.*, Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); La

sound. In the first place, if the requirement is to have any meaning at all, "consideration" must denote a separate charge, since such legal services are not in fact rendered free of charge in any event. The Supreme Court of Texas has aptly pointed out that the furnishing of incidental legal services constitutes a part of the cost of obtaining the business transacted and is a part of the total services for which the customer pays, although not necessarily as an enumerated item.[28] In the second place, the presence or absence of consideration can have no bearing at all on the layman's competence and integrity. If he is competent to perform legal services as an incident to his business when he makes no separate charge, he is not any less competent when he does make such a charge. If a particular court is willing to disregard the policy underlying the basic reason for the restriction upon the practice of law by allowing a layman to perform legal services as an incident to his business, logically the way should then be clear for him to make a separate charge for those services. This is not to say, of course, that a court should overlook, in the first instance, the sound grounds of policy that support the restrictions upon the practice of law.

Inherent Power of the Judiciary

Although the courts recognize that the legislature in the exercise of the police power may pass laws in aid of the judicial power in order to protect the public against imposition,[29] they refuse, in the

Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948).

[28]Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944).

[29]Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Clark v. Rearden, 231 Mo. App. 666, 104 S.W.2d 407 (1937); State *ex rel.* Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941); Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 190 Atl. 2 (1937); Grievance Committee v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945). In Petition of Florida State Bar Ass'n, 134 Fla. 851, 862, 186 So. 280, 285 (1938), the Florida Court approved ". . . the nigh universal doctrine that the power to regulate such matters [admission to the bar] by rule is inherent in the Courts and cannot be taken from them by the Legislature," while recognizing, however, that legislative enactments as to admissions will be respected as minimum requirements that do not deprive the courts of their inherent power in the matter. The Court noted further that: "Dicta in State v. Kirke, 12 Fla. 278, and Gould v. State, 99 Fla. 662, 127 So. 309, may at first blush appear contrary to the general rule here approved, but careful examination discloses that the dicta in

exercise of their inherent power to regulate the practice of law, to allow the legislature to extend the privilege of practicing law to persons not admitted to practice by the judicial department.[30] Stated differently, the legislature may prescribe reasonable minimum requirements for the protection of the public, but it is not empowered to lower the standards set by the judiciary and to authorize admission to practice when these inferior requirements are met; the judiciary has the inherent and exclusive power over admissions to and the regulation of the practice of the law.

In Florida the excellent cooperation and friendly spirit existing between the Supreme Court and the Legislature has averted practical difficulty. The Supreme Court has in practice regulated admission to the bar, and this year the Legislature specifically quitclaimed whatever powers it may have in this connection.[31] It is confidently anticipated that this harmonious relation will continue.

The use of the term *inherent* is in need of clarification. To the extent that it suggests an authority higher than and apart from the Constitution it is a misnomer, as a claim under any such authority is, of course, unwarranted.[32] Neither is the term meant to convey the thought that the courts have the right to act in only those matters not covered by statute.[33] Rather, as used by the courts, it connotes a power reserved to them by the separation-of-powers doctrine under the Constitution as essential to the existence and orderly functioning of constitutionally created tribunals.[34]

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these cases were merely statements of the early common law rule under which admission to the bar was deemed to be a legislative function, but that it was under the Act of 4 Hen. IV, Chapter 18, made a judicial function which it continued to be and was so [*sic*] when the common law of England was adopted by statute in this state." See, however, note 39 *infra*.

[30]*Ibid.* See also People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Judd v. City Trust & Sav. Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937); Land Title & Abstract Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); Grievance Committee v. Coryell, 190 S.W.2d 130 (Tex. Civ. App. 1945).

[31]Fla. Laws 1951, c. 26655, §1, effective May 18, 1951, provides: "The Supreme Court of the State of Florida shall have the power to prescribe from time to time the requirements, qualifications and standards to be met and procedures to be followed by all persons for admission to practice law in any of the Courts of the State of Florida or its political subdivisions."

[32]Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635 (1935).

[33]*Ibid.*

[34]*Ibid.* See also cases cited in notes 29 and 30 *supra*. In Petition of Florida

This doctrine of "inherent" or "implied" power has not gone without challenge. It has been argued that, while it is true that the courts could not function properly without lawyers, neither could the legislative and executive departments of the government. Consequently, the legislative and executive branches should have the same claim to control over the bar and the practice of law as does the judiciary.[35] This argument, of course, is fallacious. There can be no question that the courts have the power, however designated, to determine the qualifications of attorneys who appear before them and to punish intruders, since such attorneys are in a very real sense officers of the court, and regulation of their activity is clearly within the orbit of the judiciary.[36]

Neither the legislative nor the executive branches, however, require the appearance of attorneys as such before them; indeed, when an attorney does appear before a legislative committee, he is officially known as a lobbyist. Difficulty is encountered, if at all, when the courts go further and take the position that the practice of law over which the power exists is not confined to matters coming directly within the purview of the courts.[37] Historically, the admission to the practice of law and the regulation of that practice have been judicially determined, albeit by virtue of early enactments of Parlia-

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State Bar Ass'n, 40 So.2d 902, 905 (Fla. 1949), the Florida Court indicated that it recognized fully the nature of the so-called inherent power: "Inherent power arises from the fact of the Court's creation or from the fact that it is a court. It is essential to its being and dignity and does not require an express grant to confer it. Under our form of government it is the right that each department of government has to execute the powers falling naturally within its orbit when not expressly placed or limited by the existence of a similar power in one of the other departments."

[35]Beardsley, *The Judicial Claim to Inherent Power over the Bar,* 19 A.B.A.J. 509 (1933).

[36]See 95 U. OF PA. L. REV. 218 (1946). *In re* Clifton, 115 Fla. 168, 155 So. 324 (1934), the Florida Court recognized that an attorney is an officer of the court exercising a privilege of franchise although he does not hold an office of public trust in the constitutional or statutory sense of that term. See also Petition of Florida State Bar Ass'n, 40 So.2d 902 (Fla. 1949); Baruch v. Giblen [*sic*], 122 Fla. 59, 164 So. 831 (1935); 3 BL. COMM. *26.

[37]*See In re* Cannon, 206 Wis. 374, 395, 240 N.W. 441, 449 (1932), in which it was assumed that the legislature might completely curtail a portion of the judicial power by distinguishing between "officers of the court" and practitioners outside the courtroom. See also 33 COL. L. REV. 1072 (1933); 95 U. OF PA. L. REV. 218 (1946); 80 U. OF PA. L. REV. 1021 (1932).

ment.[38] It can plausibly and forcefully be argued that Parliament, in allowing the courts thus to regulate the practice, recognized that such regulation was properly a judicial function, since Parliament is the supreme authority in England and is therefore more nearly analogous to our constitutional convention than to our legislature.[39] The difficulty is, however, that the practice of law at that time was more restricted in scope than it is today and consisted primarily in the representation of clients in matters pertaining to litigation.

The plain fact, nevertheless, is that the courts today, on grounds of essential policy, do consider the regulation of the practice of law as now defined a prerogative of the judiciary.[40]

THE MEMPHIS AGREEMENT

On May 5, 1942, a National Conference of Realtors and Lawyers, composed of lawyer-members of the American Bar Association and realtors appointed by the President of the National Association of Real Estate Boards, was organized in Memphis, Tennessee, and immediately formulated a statement of principles[41] subsequently ap-

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[38]Discussion of the early English statutes may be found in State *ex rel.* Wolfe v. Kirke, 12 Fla. 278, 95 Am. Dec. 314 (1868); Yeats, *Need for Regulating the Practice of Law in Florida, and the Power and Duty of Our Supreme Court in the Premises,* 12 FLA. L.J. 96, 99 (1938).

[39]Dowling, *supra* note 32. Yeats, *supra* note 38 at 100, notes that it must be remembered that ". . . Parliament has from ancient times exercised all three powers of government as we know them, so, in examining into English 'statutes,' it is always necessary to inquire into the essential nature of the subject-matter dealt with."

[40]See cases cited in notes 29 and 30 *supra.* Although matters of "policy" are properly determined by the legislature within the field of jurisdiction assigned to it by a constitution, matters of constitutional "policy" are decided by the judiciary; and if constitutional change is needed the electorate must decide the issue via the specified amending process.

[41]The agreement is set out in full in 14 UNAUTH. PRAC. NEWS No. 3, p. 27 (1948). Before the promulgation of the Memphis Agreement, the American Bar Association Standing Committee on the Unauthorized Practice of the Law had taken the view that the realtor could neither draft nor select instruments that affected the rights and interests of the parties to a real estate transaction, regardless of whether this work was incidental to his principal business or whether a separate charge was made. The Committee reasoned that the broker had an interest adverse not only to the party whom he did not represent but also to the party in whose behalf he did act, since his interest would be favored if neither of the parties he was bringing together obtained independent counsel or advice

proved by both the American Bar Association and the National Association of Real Estate Boards. Article I of the agreement provides:[42]

> "(1.) The realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer.
> (2.) The realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as a broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use, by the Bar Association and the Real Estate Board, in the locality where the forms are to be used.
> (3.) The realtor shall not seek to participate in the lawyer's fees, or in any way seek to influence the lawyer's compensation in real estate transactions in which the lawyer is consulted as legal counsel."

Article II seeks to limit the activity of the lawyer in real estate transactions and provides, in fine, that he will not volunteer his opinion concerning the business prudence of real estate transactions in which his services as legal counsel are used, that he will not seek to participate in or influence the realtor's compensation in such transactions, and that a lawyer who engages in business activities ordinarily undertaken by a realtor should qualify under the Real Estate License Law of his state, unless he is acting for himself as principal or fiduciary.

The third and final article defines the aims of the joint Conference to be, among other things, consideration and attempted disposal of any controversies referred to it between realtors and lawyers, pro-

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or made or had made an independent inquiry into the state of the title, the suitability of the instrument and its provisions to state the parties' agreement, or any other matter that might delay or prevent consummation of the transaction; see 62 A.B.A. REP. 769, 778 (1937); 61 A.B.A. REP. 704, 710 (1936).

[42]14 UNAUTH. PRAC. NEWS No. 3, p. 27 (1948).

mulgation of such other statements of principle as may be agreed upon, and rendition of assistance in any advisory capacity by local and state bar associations and real estate boards in carrying out the principles agreed upon by the Conference.

The National Conference of Realtors and Lawyers is the result of the long-time effort of the American Bar Association Standing Committee on the Unauthorized Practice of Law to treat the unlawful-practice-of-law problem through the medium of friendly and co-operative action.[43] Although such agreements are not binding on the courts in the determination of what constitutes the practice of law, it has been held that they will be judicially noticed and that they raise ". . . the strongest presumption that in general no present cause of complaint . . . with respect to minor and collateral matters now exists."[44]

THE *KEYES* CASE

Against this background of legal thought the Supreme Court of Florida in May, 1950, decided *Keyes Co. v. Dade County Bar Association*,[45] the only unauthorized practice case yet to reach it. The decree below specifically enjoined the Keyes Company, a licensed real estate broker, from preparing leases, lease agreements, rental contracts, deeds, mortgages, and contracts for the sale of property, including filling in printed forms or causing them to be executed, unless the instruments were drawn in transactions in which it was acquiring, mortgaging, leasing, or selling its own property or lending its own money. In general terms it prohibited any other act constituting the practice of law.[46] On appeal, the Supreme Court looked to the Real Estate License Law[47] in order to determine what acts a realtor is authorized to perform, found that the law contemplated the performance of acts preliminary in nature, and held that a realtor may

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[43]See, *e.g.*, 67 A.B.A. REP. 218 (1942); 70 A.B.A. REP. 257, 259 (1945); 63 A.B.A. REP. 322, 325 (1938).

[44]People *ex rel.* Committee on Grievances v. Denver Clearing House Banks, 99 Colo. 50, 52, 59 P.2d 468, 469 (1936).

[45]46 So.2d 605 (Fla. 1950), the subject of favorable comment at 4 VAND. L. REV. 344 (1951).

[46]See Brief for Appellant, p. 6, Keyes Co. v. Dade County Bar Ass'n, 46 So.2d 605 (Fla. 1950).

[47]FLA. STAT. §475.01(2) (1949).

prepare those instruments or papers that record his legitimate handiwork in real estate transactions as contemplated by the Real Estate License Law, leaving other steps utlimately to be taken in the hands of the parties or, in the event they desire representation, of their lawyers. By way of illustration, the Court noted that when a broker is employed to find a purchaser of property his function is performed when he produces a prospective purchaser, ready, willing and able to buy, or procures from him a binding contract. In such a case the realtor is restricted in the drafting of papers ". . . to those, such as a memorandum, deposit receipt, or the contract, as the case may be, recording his handiwork — that is, the bringing together of buyer and seller."[48]

Justice Terrell, joined by Justice Hobson, dissented on the ground that the Legislature, in the Real Estate License Law, impliedly authorized the real estate broker to execute a blank deed or any other instrument mentioned in the lower court's decree;[49] and summarized his disagreement as follows:[50] "I never heard of a 'sale' or 'closing' the sale of real estate that did not contemplate a deed and it is common knowledge that the legislature so contemplated when it passed the act."

Analysis of the *Keyes* decision indicates that both the majority and dissenting opinions were concerned with statutory construction. The dissenting opinion necessarily assumes that the Legislature is supreme in the premises; the majority opinion, although based on a careful consideration of the function of the realtor in our society as portrayed by the Real Estate License Law, has not ruled out the possibility of a future holding that the Supreme Court has the inherent and exclusive power to define and regulate the practice of law.[51] It does not necessarily follow from the majority opinion that, had the Legislature spelled out the authority of the realtor to draft deeds, mortgages and other instruments not preliminary in nature, the Court would have acquiesced in the legislative declaration of policy. On the other hand, neither did the majority commit the Court to the inherent-or-implied-power doctrine. The probability, in view of

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[48]Keyes Co. v. Dade County Bar Ass'n, 46 So.2d 605, 606 (Fla. 1950).

[49]*See id.* at 607 (dissenting opinion), referring to FLA. STAT. §475.01(2) (1949).

[50]*See id.* at 608 (dissenting opinion).

[51]In fact, Justice Terrell was of the opinion that the majority "crawled over on the legislative side of the fence where Judges are forbidden to be," Keyes Co. v. Dade County Bar Ass'n, 46 So.2d 605, 607 (Fla. 1950).

its past declarations,[52] is that the Florida Court will assert such a power in unauthorized practice situations once the issue is squarely presented.

CONCLUSION

It is at once apparent that there are rather striking similarities between the holding in the *Keyes* case and certain portions of the Memphis Agreement. Both contemplate the performance of acts by the realtor that fall short of a conveyance or final disposition of a particular transaction, and both proceed upon the proposition that lawyers and realtors operate in separate, ascertainable spheres. The agreement confines the realtor to the use of an earnest-money contract, which may or may not be specifically enforceable; the *Keyes* holding allows the realtor to draft such instruments as are necessary to record his handiwork, including earnest-money contracts. Under the Florida holding, however, the realtor is not confined to earnest-money contracts. Hence the holding allows realtors more latitude than does the agreement.

It is difficult to find fault with the decision of the Florida Court, provided that the problem is one of statutory construction; but the result reached may fall far short of protecting the rights of the parties. Their rights are fixed by the contract of sale; and if a lawyer thereafter enters the transaction he may find his entry too late to secure for his client, whether buyer or seller, the rights expected, and which might have been embodied in the contract.

Much more is involved in a real estate sale than a simple transfer of title to real property. Not infrequently the effectuation of the intention of the parties to a realty transaction involves creation of vested and contingent remainders, springing and shifting uses, deeds to take effect in the future, the law of homestead, easements, legal and equitable mortgages, mechanics' and materialmen's liens, county and city taxes, special assessments and zoning regulations, as well as other more or less complicated legal devices and concepts. Further, when married persons are parties to the transaction, there is always the problem of dower and the question whether the deed should be made to the husband or the wife solely or to the husband and wife as tenants by the entirety. Consideration of the law of federal

[52]See notes 29 and 34 *supra.*

and state taxation should also enter the picture before the rights of the parties are finally determined.

Finally, the real estate broker does not draw the contract of sale or binder merely because he wishes to give legal advice; he probably does so because he wishes tangible evidence that he has closed the deal and thus earned his commission. At best, the question is debatable whether a broker who represents the seller, as is usually the case, and who has a direct financial interest in the consummation of the deal, should be permitted to draft the contract that determines the rights of the parties when the buyer has no legal adviser.

The Florida Court is to be commended for attempting to reach a practical solution of the differences between lawyers and realtors. One may well question, however, whether, in seeking to resolve the conflict between real estate brokers and lawyers, the Court accorded due weight to the paramount right of the public to be able to rely with confidence upon the legal competence of anyone authorized to render advice on legal matters.