

PROCEDURES FOR THE PUNISHMENT OR SUPPRESSION OF UNAUTHORIZED PRACTICE OF LAW

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Of the phenomena associated in recent years with the term "unauthorized practice of law," none are more striking than the procedural. The development of effective legal remedies for use against the unauthorized practitioner, and their adoption on a widespread scale, are, in the main, events of the present decade. Curiously, in this process, criminal prosecution, the one remedy with specific statutory authorization almost everywhere, has been passed by (or despaired of) and, instead, use has been made of more direct proceedings, frequently summary and extraordinary in their nature. Moreover, lawyers, in their search for better methods of meeting this problem, peculiarly their own, have fashioned, with the assistance of the courts, new devices even more direct and summary in their action than the remedies previously available. Not all the courts have displayed a willingness so to adapt their processes to the use of the campaign of the bar associations against unauthorized practice of the law, yet it is generally true that one interested in suppressing unauthorized practice will have a veritable arsenal of weapons at his disposal.

In this paper an inquiry will be made into the availability of the procedures¹ that have been used in the various states against unauthorized practice of the law, and, where considered helpful, something of the theory of the remedy and the mechanics of its operation in this particular field will be indicated. It is probable that a complete analysis of a remedy cannot be made without setting out in detail its application to the practice sought to be controlled, but that would make this paper coextensive with the entire field under consideration. Of necessity, therefore, the question of what constitutes "unauthorized practice of the law" must be left undetermined. The prob-

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¹ The term "procedures" is limited to proceedings instituted against a layman or lay agency because of alleged unauthorized activity. In a broader sense it might well include the questioning of the legal effect of acts of unauthorized practice and the withholding of compensation therefor, see cases collected in BRAND, *UNAUTHORIZED PRACTICE DECISIONS* (1937) 804, as well as the institution of disciplinary proceedings against attorneys who aid in such practice. *Id.* at 802. In a still broader sense it might include such extralegal developments as negotiation and the entering into agreements by the bar and lay groups. See collection in HICKS AND KATZ, *UNAUTHORIZED PRACTICE OF LAW* (1934) Pt. III.

lem attacked by the paper may be stated: "assuming that unauthorized practice of the law exists, what are the procedures that may be used against it?"

CRIMINAL PROSECUTION

In 39 states it is provided by statute² that the practice of law³ by one not licensed therefor is a misdemeanor. Criminal prosecution is thus established in undisputed preeminence as a remedy in this field, if legislative sanction is the criterion. In some instances these statutes contain, in addition to the general prohibition, separate criminal provisions with reference to practice by corporations,⁴ and voluntary associations.⁵ An attempt has been made in a few of the statutes⁶ to define "practice of law," but usually no formal definition is undertaken. At times stress is laid upon such factors as the requirement that the forbidden acts must have been performed in a representative capacity,⁷ or for fee or reward,⁸ or as a business or vocation.⁹ Exceptions and provisos are numerous and in some instances would appear to render the statute

² The statutes enacted prior to 1934 are collected in HICKS AND KATZ, *op. cit. supra* note 1, beginning at p. 15. Additional criminal provisions may be found in the following references: DEL. REV. CODE (1935) §195; IOWA CODE (1935) §12551; LA. GEN. STAT. (Dart, 1932) (Supp. 1937) §449.45; Ore. Laws 1935, c. 28, §25; PA. STAT. ANN. (Purdon, 1930) (Supp. 1936) §1610; R. I. Acts and Resolves 1935, c. 2190, §46, Clause D; Tenn. Pub. Acts 1935, c. 30, §2. The following states do not have a general criminal statute on the subject: Kansas, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Vermont, and Wyoming. Colorado has been classed under the states having a criminal statute, since it states that a violator of the act is subject to a fine recoverable in "any court of competent jurisdiction, in the name of the People of the State of Colorado." COLO. COMP. LAWS (1921) §6015. Penalties may be recovered in other than criminal proceedings. The Colorado statute provides in §6016 that, if a person who has paid an unauthorized practitioner does not bring suit to recover triple the compensation so paid, a *quid tam* action may be instituted for it—one half of the amount recovered to go to the person suing and the other half to the use of the county in which the suit is brought. A similar South Carolina statute is not so complex. A penalty of \$500 is provided for each "cause" solicited by an unlicensed person—"one half to the state and the other half to him or them that will sue for the same." S. C. CODE OF LAWS (1932) §312. There is no record of any action having been instituted under either of these statutes.

³ This term is used in a generic sense but it appears in most of the statutes. Variations include: "practice as an attorney at law" (Arkansas), "engage in the business of a practicing lawyer" (Indiana), "perform the services of an attorney at law" (Maryland). Most of the statutes contain similar prohibitions against an unlicensed person holding himself out as an attorney at law or as qualified to practice law. In Arizona the "holding out" must relate to practice in a court of record. ARIZ. REV. CODE (1928) §4568.

⁴ ILL. REV. STAT. (1937) c. 32, §411; MASS. ANN. LAWS (1933) c. 221, §46; MINN. STAT. (Mason, 1927) (Supp. 1936) §5687-1(e); N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §280; R. I. Acts & Resolves 1935, c. 2190, §46, Clause D; TEX. PEN. CODE (Supp. 1934) art. 430a; UTAH REV. STAT. (1933) §6-0-39; W. VA. CODE (1932) §2854.

⁵ GA. CODE (1933) §9-9903; LA. GEN. STAT. (Dart, 1932) §447; MICH. COMP. LAWS (1929) §10175; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §280.

⁶ ALA. CODE (Supp. 1932) §6248; GA. CODE (1933) §9-401; LA. GEN. STAT. (Dart, 1932) §443; MO. REV. STAT. (1929) §11692; ORE. CODE ANN. (1930) §32-505; TEX. PEN. CODE (Supp. 1934) art. 430a. A 1935 Rhode Island statute approaches the problem of definition in the following manner: "The term 'practice of law' . . . shall be deemed to mean the doing of any act for another person usually done by attorneys at law in the course of their profession, and, without limiting the generality of the foregoing, shall be deemed to include the following . . . [particular activities are then enumerated]." R. I. Acts & Resolves 1935, §45, Clause B.

⁷ ALA. CODE (Supp. 1932) §6248; LA. GEN. STAT. (Dart, 1932) §443(a). MO. REV. STAT. (1929) §11692; TEX. PEN. CODE (Supp. 1934) art. 430a; VA. ANN. CODE (1930) §3426a.

⁸ ALA. CODE (Supp. 1932) §6248; LA. GEN. STAT. (Dart, 1932) §443(b); MD. ANN. CODE (Bagby, 1924) art. 10, §19; MINN. STAT. (Mason, 1927) (Supp. 1936) §5687-1; MO. REV. STAT. (1929) §11692; VA. ANN. CODE (1930) §3422.

⁹ ALA. CODE (Supp. 1932) §6248; GA. CODE (1933) §9-402; TEX. PEN. CODE (Supp. 1934) art. 430a.

almost meaningless.¹⁰ The penalty provided is usually not severe. Fines of up to \$500 or imprisonment of up to six months would cover the punishment in most of the states, although in some instances the penalty is greatly increased when the offender is a corporation.¹¹

The formalities attached to proceedings under these statutes do not seem to vary in any particular degree from those in criminal cases generally. One matter upon which the courts have divided concerns the sufficiency of the indictment. Two supreme courts have held that an indictment for illegal practice of law is sufficient in form if it charges the commission of a crime in the language of the statute.¹² The Delaware Court of General Sessions, however, sustained a demurrer to an indictment charging an offense in the language of the statute.¹³ The accusation did not contain an averment that the defendant practiced law "for fee or reward," and the court regarded this as an essential element of the crime.¹⁴

While many of these enactments have been given a refurbishing recently, criminal laws of the same general nature have been on the statute books of most states for many years. It is somewhat surprising, therefore, to find only eighteen cases involving the application of these statutes in the reports of the appellate courts in this country.¹⁵ Nothing in the decisions themselves is any more revealing concerning the use (and the availability) of this particular remedy than is an examination of the statistics based on these eighteen cases. The cases arose in eleven states, one to each

¹⁰ See *infra* note 20.

¹¹ Rather there is possibility of the penalty being greatly increased. For example, corporate violators are susceptible to being fined up to \$5000 under Louisiana and Utah statutes, while \$1000 and \$500 are the limits respectively for individuals. LA. GEN. STAT. (Dart, 1932) §§445, 447; UTAH REV. STAT. (1933) §§6-0-24, 6-0-39. Massachusetts and Rhode Island make provision for increased penalties for offences subsequent to the first. MASS. ANN. LAWS (1933) c. 221, §41; R. I. Acts & Resolves 1935, §45, Clause I.

¹² *People v. Schreiber*, 250 Ill. 345, 95 N. E. 189 (1911); *State v. Chamberlain*, 132 Wash. 520, 232 Pac. 337 (1925).

¹³ *State v. Adair* 4, W. W. Harr. 585, 156 Atl. 358 (Del. 1922).

¹⁴ It is significant that where no fee has been charged the convictions have been reversed, although other factors were sometimes indicated as controlling the decision.

¹⁵ *Kendrick v. State*, 218 Ala. 277, 120 So. 142 (1928) (conviction rev'd); *People v. Ring*, 70 P. (2d) 281 (Cal. App. 1937) (complaint held sufficient); *State v. Adair*, *supra* note 13 (demurrer to indictment sustained); *People v. Schreiber*, *supra* note 12 (conviction aff'd); *People v. Hubbard*, 313 Ill. 346, 145 N. E. 93 (1924) (conviction aff'd); *People v. Goodman*, 259 Ill. App. 667 (1931) (conviction rev'd); *State v. Rosborough*, 152 La. 945, 94 So. 858 (1922) (conviction aff'd); *Commonwealth v. Grant*, 201 Mass. 458, 87 N. E. 895 (1909) (conviction aff'd); *McCargo v. State*, 1 So. 161 (Miss. 1887) (conviction rev'd); *People v. Peoples' Trust Co.*, 180 App. Div. 494, 167 N. Y. Supp. 767 (1917) (conviction aff'd); *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919), *rev'g* 180 App. Div. 648, 168 N. Y. Supp. 278 (1927) (conviction rev'd); *People v. Alfani*, 227 N. Y. 334, 125 N. E. 671 (1919), *rev'g* 186 App. Div. 468, 174 N. Y. Supp. 527 (1917) (conviction aff'd); *People v. Title Guarantee & Trust Co.*, 191 App. Div. 165, 181 N. Y. Supp. 52 (1920), *aff'd*, 230 N. Y. 578, 130 N. E. 901 (1920) (conviction rev'd); *People v. Goldsmith*, 249 N. Y. 586, 164 N. E. 593 (1928), *rev'g* 224 App. Div. 707, 229 N. Y. Supp. 896 (1928) (conviction rev'd); *People v. Weil*, 237 (App. Div. 118, 260 N. Y. Supp. 658 (1932) (conviction rev'd); *State v. Bryan*, 98 N. C. 644, 4 S. E. 522 (1887) (conviction rev'd); *Dietzel v. State*, 131 Tex. Cr. App. 279, 98 S. W. (2d) 183 (1936) (conviction rev'd); *State v. Chamberlain*, 132 Wash. 520, 232 Pac. 337 (1925) (demurrer to information overruled). Two other related New York decisions are not included in the statistics developed in the text. One is a county court decision, *People v. Stoddard*, 157 Misc. 153, 283 N. Y. Supp. 730 (1935), and the other involved an "ambulance-chasing" prosecution under a statute specifically covering such activity. *People v. Meola*, 193 App. Div. 487, 184 N. Y. Supp. 353 (1920).

state, except in Illinois and New York. Six of the eighteen decisions were by New York courts, three by the Court of Appeals and three by the Appellate Divisions. While extending over the fifty-year period from 1887 to 1937, only six of the cases have arisen since 1925, only two in the last five years. In eight cases the conviction was affirmed or the indictment was sustained against attack, but in ten instances the conviction was reversed or the indictment was quashed. Of the six cases since 1925 there have been two affirmances to four reversals. So much for the working of 39 criminal statutes if the reported decisions correctly reveal it.¹⁶

Some explanation of this state of affairs is in order but there is little to be gleaned from the cases on this point. When the Committee on Professional Ethics and Grievances of the American Bar Association surveyed the unauthorized practice scene in 1930, it noted both the existence and the non-use of the criminal statutes, but little was offered by way of elucidation except an innuendo that the situation might in some way be due to the baleful influence of "the large financial institution"—and a conjecture that there might be no public or professional demand for such enforcement.¹⁷ However, the answers to the questionnaire on unauthorized practice sent out by the American Bar Association in 1934 indicated that the members of the bar at that time did not have any aversion to using the criminal proceeding and that they considered it to be an effective remedy.¹⁸ But a desire by lawyers to see such proceedings instituted is no indication that anything will be done. It is not likely that the public, as a usual thing, will be interested in having these particular laws enforced, and the prosecuting attorney, furthermore, may consider such cases to be actually hurtful to him politically. In this connection, the following statement made by Charles A. Beardsley, then president of the California State Bar, is illuminating:

"I am aware that there are some who object to this method [negotiation] of approaching the problem. They think that the members of the board of governors should spend their time arresting the bankers, title men, real estate brokers, notaries, collection agents, corporation organizers and the members of the automobile clubs and associations. It is not clear just what they expect us to do with them after we arrest them. I am yet to find a district attorney who thinks he could get a jury of twelve laymen to convict another layman of a misdemeanor because he does the things of which we complain. I first tried the district attorneys in the larger cities. They thought it could not be done in the larger cities, but said that perhaps it could be done in the country towns. So I tried in the country towns, but with no better success. The last one I talked to was up in Del Norte County. There were six attorneys in the county and three of them were running for district attorney. I asked the district attorney if he thought he could get a jury of twelve laymen to convict a real estate broker who drew a deed or a chattel mortgage. He replied that he knew that he could not, and that he certainly was not going to try while he was running for office."¹⁹

¹⁶ If a matter is seldom, or never, presented to the appellate courts of a state, usually it may be inferred that the lower courts are not being called upon to deal with it either. The possibility of there being any considerable body of unreported cases involving criminal prosecution of unauthorized practice of law seems precluded when an examination is made of the situation in New York where the lower court cases are reported and of the references in BRAND, *op. cit. supra* note 1 at 802.

¹⁷ 55 AM. BAR ASS'N REP. (1930) 481.

¹⁸ 59 *id.* (1935) 535.

¹⁹ Beardsley, *Lay Encroachments* (1931) 17 A. B. A. J. 189, 192.

But it may not be inability to goad the prosecuting attorney into action alone that has led the bar to look to other means than the criminal law to preserve its prerogatives. One important factor is the presence of numerous exceptions and provisos in the statutes.²⁰ While courts have declared these exceptions inapplicable in other types of proceedings,²¹ that would be of no assistance in a criminal prosecution under the statute itself. Then, too, the criminal trial is encompassed with many "safeguards" for the accused, not present in some of the devices to which the lawyers have turned.²² The presence of a jury with all the possibilities of a speech on the "lawyer-monopoly" theme, the opportunity for dilatory tactics and for appeals, the lack of relief against future misbehavior—all these factors keep this device from being particularly attractive to lawyers now, since they have fashioned effective weapons of another sort. Nonetheless, it may be noted that the criminal proceeding has been recommended recently by one bar association for "simple and clear" violations.²³ If much use is to be made of this proceeding it would seem desirable to furnish an adequate description in the statute of what is unlawful and what is not, both for constitutional and tactical reasons.²⁴ A popular understanding and appreciation of the lawyer's position

²⁰ An examination of the statutes referred to in notes 2 through 8 *supra* will reveal exceptions in favor of the following groups: banks and trust companies (Georgia and Texas), collection agencies (Georgia, Illinois, Maryland, and Minnesota), real estate brokers (Georgia, Maryland, Minnesota, and Rhode Island), title companies (Alabama, Arkansas, Georgia, Louisiana, Maryland, Michigan, Mississippi, New York, Texas, and West Virginia), insurance companies (Illinois, Maryland, Minnesota, North Carolina, and Texas), notaries public (Louisiana and Texas). The Minnesota statute also excepts trade associations, labor organizations, "legal columns" in newspapers, corporation service companies, and any activity "authorized under existing statutes." Legal aid organizations are specifically excepted in Arkansas, Georgia, Illinois, Louisiana, Michigan, New York, North Carolina, Rhode Island, and West Virginia.

²¹ *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N. E. (2d) 941 (1937); see *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935).

²² See *State ex rel. Wright v. Barlow*, 271 N. W. 282 (Neb. 1937).

²³ By the committee of the New York State Bar Ass'n, referred to *infra* p. 155.

²⁴ In only one instance has an attack on the constitutionality of one of these criminal statutes been sustained. *Kendrick v. State*, *supra* note 15 (overruled, in effect, in *Berk v. State*, 225 Ala. 324, 142 So. 832 (1932)). In this case the title of the statute contained a reference to "practice of law," but the definition of this phrase in the body of the act included the making of ordinary collections out of court. It was held that the statute was invalid because not expository, and hence violative of the constitutional provision that each law should contain but one subject and that to be clearly expressed in its title. The court said that making collections out of court had nothing to do with the practice of law. An objection on a similar basis to an Illinois statute was overruled in *People v. Schreiber*, *supra* note 12. Here the title of the statute stated that it was an act to punish and prevent frauds in the practice of law. Pretending to be a licensed attorney was a fraud, in the court's opinion, and it added that any means "reasonably adapted" to secure the object stated in the title of a statute may without objection be incorporated in it.

The question of how far the statutes may go in making crimes out of conduct not usually regarded as criminal by laymen might have become a very important question if there had been a more extensive use of this remedy. Aside from the Alabama decision the strongest statement to the effect that there must be a clear and unequivocal expression of legislative intent to make acts criminal which are usually considered innocent is in the dissenting opinion of McLaughlin, J., in *People v. Alfani*, 227 N. Y. 334, 341, 125 N. E. 671, 674 (1919). The Supreme Court of Louisiana has refused to invalidate a statute of the sort under consideration, holding that there was no lack of "due process" or "equal protection." *State v. Rosborough*, *supra* note 15. It might be supposed that a statute which makes it a crime to practice law without a license without defining "practice of law" would run afoul of the familiar constitutional principle that a criminal statute should not be vague or uncertain. A California court met this argument by pointing to judicial decisions defining the practice of law prior to the enactment of the statute. *People v. Ring*, *supra* note 15. These definitions were deemed to be incorporated in the statute. The court said: "Words used in creating a statutory crime do not fail of such certainty [sufficient for a penal statute] merely because

to a much greater degree than presently exists would also seem to be a *sine qua non* of the effective development of criminal prosecution as a remedy against unauthorized practice of law.

CONTEMPT PROCEEDINGS

If an unlicensed person appears in a court room in a representative capacity or if he acts (as an attorney) with reference to matters pending in the court even though not actually appearing there, it does not require an extended argument to demonstrate that either of these may be considered such an affront to the dignity and authority of the court as to constitute direct contempt.²⁵

However, when it is stated that activities are contemptuous although in no way connected with proceedings in that court (and perhaps not with those in any court) then the reasoning is not so apparent, except, perhaps, in the case of the disbarred or suspended attorney who continues to practice.²⁶ It is against activities of this type, rather than with those relating to court proceedings, that most of the recent contempt proceedings in this field have been directed, and usually, it may be added, with success. There is authority to support the broad proposition that practice of law by unauthorized persons *no matter where engaged in* may be punished by contempt proceedings in the supreme court of the state,²⁷ in intermediate appellate courts,²⁸

the offense when viewed through them may not have all the precision in outline of a geometric figure; if the main and central part of the field is clear, some slight lack of definition around its outer edges is not fatal." Without disagreeing with this statement, one may feel that it is still not a complete answer for the man whose activity is near the "outer edges." The problem did not arise in earlier cases, perhaps because the scope of the prohibition was not considered to be so wide. It is probable that the criminal statutes were thought to be directed only at the person who deliberately acted as, or misrepresented himself to be, a licensed attorney. See *people v. Schreiber, supra*.

²⁵ See *infra*, p. 148.

²⁶ Logically, perhaps, no distinction can be made between practice of law by one who has never been licensed and one who has had his license taken away. *In re Hittson*, 39 Cal. App. 91, 178 Pac. 149 (1918). Compare with *In re Lizotte*, 32 R. I. 386, 79 Atl. 960 (1911). The thought has been expressed, however, that the erstwhile attorney is under a greater disability than the ordinary layman, who has not given positive evidence of his unfitness; hence the disciplined attorney could not practice even in those courts where (in that state) unlicensed persons could appear in a representative capacity. *State ex rel. Patton v. Marron*, 22 N. M. 632, 167 Pac. 9 (1917). In considering the application of the remedy it seems that one important distinction exists between practice by the disciplined attorney and by laymen. One has had an order of the court of which he has knowledge expressly directed at him; the other may never have come in contact with the courts at all or be aware that what he is doing is "practice of law." This distinction has not been taken in any of the cases, however. In any event it may be taken as well settled that practice of law by an "unfrocked" attorney is subject to a contempt proceeding in the court where the discipline was imposed because it amounts to a direct flouting of the court's order and a false representation that he is an officer of that court. *People ex rel. Colo. Bar Ass'n v. Humbert*, 282 Pac. 263 (Colo. 1929); *State v. Richardson*, 125 La. 644, 51 So. 673 (1910); *In re Lizotte*, 32 R. I. 386, 79 Atl. 960 (1911); *In re Duncan*, 83 S. C. 186, 65 S. E. 210 (1909); *In re Sullivan*, 265 N. W. 601 (S. D. 1936). The bases upon which the disbarred or suspended attorney is guilty of contempt in the trial and intermediate appellate courts are largely identical with the reasoning applied to other unauthorized practitioners in such instances. *Bowles v. U. S.*, 50 F. (2d) 848 (C. C. A. 4th, 1931), *cert. denied*, 284 U. S. 648 (1931); *Clark v. Reardon*, 104 S. W. (2d) 407 (Mo. App. 1937); see *infra* pp. 147 and 148.

²⁷ *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901 (1931); *Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937); *State ex rel. Wright v. Barlow*, 131 Neb. 294, 268 N. W. 95 (1936); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139 (1935). Accord: *In re McCallum*, 186 Wash. 312, 57 P. (2d) 1259 (1936). *Contra*: *Murphy v. Townley*, 274 N. W. 857 (N. D. 1937).

²⁸ *Clark v. Reardon, supra* note 26.

and in courts of trial jurisdiction.²⁹ A closer examination of the statutes and cases should reveal the accuracy of this generalization.

Statutory Bases for Contempt Proceedings

In some states there is explicit statutory authority for holding unauthorized practitioners in contempt of court. These statutes may be restricted to court appearances or to acts which can be construed as assumption of the office of attorney of the particular court,³⁰ while other such statutes are sufficiently broad in their wording to cover the whole field of unauthorized practice of the law.³¹ In Colorado, Idaho, Michigan, and New Mexico the unauthorized activity is declared to be contempt of the supreme court of the state and of the court of general trial jurisdiction in the district in which the activity occurs. In a Wisconsin statute which provides a criminal penalty there is recognition that an unauthorized practitioner is liable also to be punished "as for contempt."³²

The most recent legislation in this field is the New York statute passed in 1937 which gives the Supreme Court control over all persons practicing or assuming to practice law.³³ This is implemented by an amendment to the Judiciary Law, adding a new criminal contempt (number 7):

"The Supreme Court has power under this section to punish for criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the Court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of the law, or by any bar association incorporated under the laws of this state."³⁴

The reason for the adoption of this statute in 1937 lies in the refusal of the New York courts to concede that their "inherent powers" extend to a control over the bar and the practice of law.³⁵ Since there seems to be a decided trend on the part of the courts to assert such powers, which are said to include the power to punish for contempt one who practices law unlawfully, there is not much likelihood that similar statutes will be sought elsewhere. Moreover, if the principal opinion in a recent Missouri case were considered controlling, such a statute might be declared uncon-

²⁹ *In re Nat'l Title Co.*, BRAND, *op. cit. supra* note 1 at p. 438 (Fla. Circ. Ct. 1935).

³⁰ ARK. DIG. STAT. (Crawford & Moses, 1921) §601; COLO. COMP. LAWS (1921) §6017 (trial courts); IOWA CODE (1935) §12542; MD. ANN. CODE (Bagby, 1924) art. 26, §4; MONT. REV. CODES (Anderson & McFarland, 1935) §8943. It should be noted that there is an ambiguity in these statutes as in those with criminal provisions. What is forbidden might be construed to include only attempts at deliberate misrepresentation that one is a licensed attorney (most of the early cases involved conduct of this sort). On the other hand these statutes might be construed to include engaging in activities permitted only to licensed attorneys, although no attempt is made to deceive as to the status of the person so engaged. The cases have never given rise to a discussion of this matter.

³¹ COLO. COMP. LAWS (1921) §6017; IDAHO CODE ANN. (1932) §3-104; MICH. COMP. LAWS (1929) (Mason's Supp. 1935) §§13586, 13588; N. M. ANN. STAT. (1929) §9-126; N. Y. JUD. LAW (Supp. 1937) §750.

³² WIS. STAT. (1933) §256.30. A similar statutory recognition exists in Washington. WASH. REV. STAT. (Remington, 1933), §138-14.

³³ N. Y. JUD. LAW (Supp. 1937) §88.

³⁴ N. Y. JUD. LAW (Supp. 1937) §750.

³⁵ McCormick, *First Annual Report of the Proctor of the Bar of the Eighth Judicial District* (N. Y. 1937) 11.

stitutional as a legislative invasion of a field exclusively under the control of the judiciary.³⁶ Even in those states where the courts formerly looked to the statute as the basis of the contempt proceeding before them, apparently of late, as will be seen, there has been little stress laid on the existence of the statutes and there are intimations that the power exists in the absence of such a statute.³⁷

Where unauthorized practice of law has been made contempt of the supreme courts by statute,³⁸ some of these courts have not felt it necessary under such circumstances to explain the theory of the remedy and why such a proceeding should be entertained in that court.³⁹ In one Colorado case, however, the contemnor who had not taken part in court proceedings anywhere urged that the statute was unconstitutional because it attempted to define and punish as contempt an act which could not be construed as, or by statute be declared to be, contempt.⁴⁰ The court answered his argument by stating that the rules, which it had made pursuant to its statutory power over admission to the practice of law, are, in effect, orders of the court that no one shall practice law in the state except upon compliance with such rules. Hence one who does is guilty of contempt as for violation of any order of the court.

The great stress laid on the court's "inherent power" over such matters in some of the recent decisions gives to the court's explanation for a proceeding clearly provided for by statute a somewhat old-fashioned air. This same court did not refer to the statute in its most recent decision,⁴¹ and has remarked⁴² that "in the absence of statute it would seem clear that one falsely representing himself as an officer of this court thereby committed contempt of this court."

The Montana Supreme Court in 1915 intimated that the basis of the statutory contempt proceeding lay in the court's power to license attorneys.⁴³ In 1937 the same court states that its jurisdiction to punish for contempt is based on the fact that by statute it has been given exclusive power to admit and disbar attorneys. The inference to be drawn is that the existence of the contempt statute had nothing to do with the decision in the case.⁴⁴

³⁶ *Clark v. Austin*, *supra* note 27 (opinion of Frank, J.).

³⁷ *People ex rel. Colo. Bar Ass'n v. Humbert*, *supra* note 26; *State ex rel. Freebourn v. Merchants' Credit Service*, 66 P. (2d) 337 (Mont. 1937); see reference to the position of Morgan, J., dissenting, in *In re Brainard*, 55 Idaho 153, 157, 39 P. (2d) 769, 771 (1934).

³⁸ *Supra* notes 30 and 31.

³⁹ *People ex rel. Colo. Bar Ass'n v. Erbaugh*, 42 Colo. 480, 94 P. (2d) 349 (1908); *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 Pac. 157 (1930); *In re Bailey*, 50 Mont. 365, 146 Pac. 1101 (1915).

⁴⁰ *People ex rel. Colo. Bar Ass'n v. Taylor*, 56 Colo. 441, 138 Pac. 762 (1914).

⁴¹ *People ex rel. Comm. on Grievances of the Colo. Bar Ass'n v. Denver Clearing House Banks*, 99 Colo. 50, 59 P. (2d) 468 (1936).

The Supreme Court of Colorado recently handed down four decisions in one day dismissing contempt proceedings brought by the attorney general against alleged unauthorized practitioners. *People ex rel. Att'y Gen. v. Kimsey*, 74 P. (2d) 663 (1937); *People ex rel. Att'y Gen. v. Wicks*, 74 P. (2d) 665 (1937); *People ex rel. Att'y Gen. v. Jersin*, 74 P. (2d) 668 (1937); *People ex rel. Att'y Gen. v. Bennett*, 74 P. (2d) 671 (1937). Reports of these decisions were not obtained in time to incorporate them in the text.

⁴² *People ex rel. Colo. Bar Ass'n v. Humbert*, *supra* note 26.

⁴³ *In re Bailey*, *supra* note 39.

⁴⁴ *State ex rel. Freebourn v. Merchants' Credit Service*, *supra* note 37.

The Theory of Contempt Proceedings in the Absence of Statute

(a) In the State Supreme Courts.

The earlier cases involving contempt proceedings in the supreme courts in the absence of statute were against attorneys who had had their licenses revoked, but in 1924 in *In re Morse*⁴⁵ it was held that a layman, who gave legal advice and appeared in justice of the peace courts in connection with his collection business, was in contempt of the Supreme Court of Vermont for practicing law. The court speaks of this conduct as amounting to an "intruding into an office of this court," and "pretending to act under the authority of this court." After noting that there was neither constitutional nor statutory basis for the proceeding, the court stated that none was needed because it had been granted complete power (by the legislature) to admit to practice before the courts of the state. The power to punish an unauthorized practitioner for contempt, the court says, is a power reasonably appropriate and relevant to the granted power over admissions and therefore to be implied from it.

It will be observed that a statutory power over admission to the practice of the law has been set forth as the basis of contempt proceedings in all instances so far examined where an explanation has been forthcoming. The most remarkable development in this field, however, is that of the notion that the courts do not even need an express constitutional or statutory power over admissions to punish unauthorized practitioners for contempt, because inherently they possess full powers over admissions, disbarment, the practice of law and the administration of justice generally. The basis of these powers is usually attributed to constitutional provisions relating to the separation of governmental powers and the vesting of judicial power solely in the courts. All of the powers referred to are said to be included in this judicial power. Pushed to its logical extreme it would seem that this doctrine would invalidate any statute dealing with these matters, even though in aid of the court's powers.⁴⁶

The courts in Illinois and Missouri have been most influential in the development of this doctrine, and the decision of the Supreme Court of Illinois in *People ex rel. Illinois State Bar Association v. People's Stock Yard State Bank*⁴⁷ in 1931 has won recognition as the leading case on the subject. For this reason an extensive summary of the court's reasoning will be given. The bank contended, first, that those original proceedings which might be entertained in the supreme court were enumerated in the state constitution and, since nothing was said there with reference to contempt, the court had no jurisdiction in this case; second, that participation in trial court proceedings was not contempt of the supreme court; and, third, that performance of services of a legal nature outside of court was not contempt of any court. In its answer to the first of these contentions the court, in effect, answers all of them. Reference is made to the fact that the state constitution vests judicial power solely in the courts and that this includes all powers necessary for complete performance of

⁴⁶ 98 Vt. 85, 126 Ad. 550.

⁴⁸ See *Clark v. Austin*, *supra* note 27.

⁴⁷ 344 Ill. 462, 176 N. E. 901.

the judicial functions. Power over the admission and discipline of attorneys is necessarily implied from this grant of judicial power since attorneys are officers of the court and, in effect, part of the judicial system of the state.⁴⁸ The court states that it has exercised without question original jurisdiction over proceedings relating to admission and disbarment (even though such proceedings were not enumerated in the constitutional provision upon which the bank was basing its contentions), and no distinction can be made between such proceedings and one against an unauthorized practitioner. In elaborating upon this point the court says:⁴⁹

“. . . Having inherent and plenary power and original jurisdiction to decide who shall be admitted to practice as attorneys in this state, this court also has all the power and jurisdiction necessary to protect and enforce its rules and decisions in that respect. Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of this court the power to control admissions to the bar would be nugatory. And so it has been held that the court which alone has authority to license attorneys, has as a necessary corollary ample implied power to protect this function by punishing unauthorized persons for usurping the privilege of acting as attorneys. [The court then cites *In re Morse*⁵⁰.]”

With reference to unauthorized appearances in trial courts the court observes that the fact that such conduct is punishable as contempt by these courts does not mean that their jurisdiction is exclusive in this respect. It is contempt of the supreme court also, since the wrongdoer has usurped a privilege solely within the power of the latter court to grant. The court then goes on to point out that its previous observations should be sufficient to dispose of the contention that it has no power to punish for contempt for acts not committed in any court. Much of the practice of law is outside of any court and has nothing to do with court proceedings. Hence it is just as much “usurpation” to engage in this phase of the practice of law without obtaining a license from the supreme court as it is to participate in court proceedings.

The court has had occasion to reassert as “well-settled” the doctrine announced in this case on several occasions⁵¹ but there has been no reexamination of the basis of the court’s power. Since this power is implied from an implied power, one may be allowed to wonder to what extent this process might be carried.⁵² The supreme

⁴⁸ The court relies heavily on *In re Day*, 181 Ill. 73, 54 N. E. 646 (1899), in which the doctrine of the court’s inherent power over admission to the practice of law had been vigorously asserted.

⁴⁹ 344 Ill. 462, at 471, 176 N. E. 901, at 906. ⁵⁰ *Supra* note 45.

⁵¹ *People ex rel. Courtney v. Ass’n of Real Estate Tax Payers*, 354 Ill. 102, 187 N. E. 823 (1933); *People ex rel. Chicago Bar Ass’n v. Motorist’s Ass’n*, 354 Ill. 595, 188 N. E. 827 (1933); *People ex rel. Chicago Bar Ass’n v. Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1 (1935); *People ex rel. Chicago Bar Ass’n v. Goodman*, 366 Ill. 346, 8 N. E. (2d) 941 (1937).

⁵² On the general subject of the inherent powers of the courts, see *Dowling* (1935) 21 A. B. A. J. 635, and the debate between Charles A. Beardsley and Amos C. Miller (1933) 19 A. B. A. J. 509, 616, 728; (1934) 20 A. B. A. J. 26, 124.

courts of Nebraska and Rhode Island have found a similar basis for punishing the unauthorized practitioner for contempt.⁵³

The Supreme Court of Missouri has made many important pronouncements on this subject of inherent power of the courts over the practice of law. The establishment of its control over this field dates from *In re Richards*,⁵⁴ a 1933 case involving admission to practice. Separation of powers and the implications of a full grant of judicial power to the courts were the foundations of the doctrine announced in that case. Hence it is not surprising that the court did not trouble to set forth in detail the basis of its power to punish an unauthorized practitioner for contempt when such a proceeding was brought before it for the first time.⁵⁵ The case developed rather into an extended argument over the meaning of separation of powers and the status of legislation which touches on the practice of law.⁵⁶

Some supreme courts have failed to see that they possess powers sufficient to allow them to entertain contempt proceedings against unauthorized practitioners, even though a constitutional provision similar to that in Illinois and Missouri with reference to separation of governmental powers is present. Bar association committees, however, have met rebuffs of this nature on only three occasions.

The Supreme Court of Indiana dismissed a contempt proceeding which had been brought against a trust company on the relation of the Indianapolis Bar Association on a somewhat technical basis, but it can clearly be inferred from the court's opinion that it would not be disposed to favor such a proceeding in any event.⁵⁷ The respondent trust company had filed a verified response to the bar association's charge, denying under oath any intention to violate the law, any order of the court, or any intention to practice law. It was held that this "purged" the contempt if any existed.⁵⁸ The court said that since it was at least debatable whether the respondent "practiced law" or not the question of intention to do so became material. It is intimated that if what is charged is unambiguous this doctrine would not apply.

⁵³ State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935). The Supreme Court of Washington has stated that it possesses such power because of its control over admissions, but no attempt was made to pursue the matter further. *In re McCallum*, 186 Wash. 312, 57 P. (2d) 1259 (1936). Presumably, the Supreme Judicial Court of Massachusetts would consider that it had this power. See *In re Opinion of the Justices*, *supra* note 21.

⁵⁴ 333 Mo. 907, 63 S. W. (2d) 672.

⁵⁵ Clark v. Austin, *supra* note 27.

⁵⁶ In the principal opinion Frank, J., states that the separation of powers clause must be literally interpreted and that, consequently, any such statutes are void for infringing on judicial power. Ellison, C. J., (with whom a majority of the court concur) announces that the court may punish for contempt where there is a violation of a statute dealing with unauthorized practice. See Howard, *Control of Unauthorized Practice before Administrative Tribunals in Missouri* (1937) 2 Mo. L. Rev. 313. Usually this matter is settled by those courts which stress inherent power by a statement that the legislature under the police power, may enact reasonable statutes in aid of the courts. See *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; *Rhode Island Bar Association v. Automobile Service Ass'n*, *supra* note 53.

⁵⁷ State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., 5 N. E. (2d) 538 (Ind. 1937).

⁵⁸ An Indiana statute provided for this "purging" in the lower courts but the application of this doctrine in the Supreme Court was on the basis that it constituted part of the common law of contempts. For a discussion of this case see (1937) 5 DUKE B. A. J. 106.

While this approach gave the Indiana court a basis for distinguishing cases in other states (where "purgation" was not permitted) nonetheless there is clear indication that the court is in basic disagreement with those tribunals which have held unauthorized practitioners in contempt. These activities that are charged against the trust company are not regarded as being in "actual contempt" of the court and it is only to such cases that the inherent power of the court to punish for contempt is said to extend. The power which had been given by statute to the court over admissions to the bar does not, in the court's opinion, embrace unauthorized practitioners.

"This court has no jurisdiction over one who is not a member of the bar and who is practicing law to punish him for contempt except for some act which affects or interferes with the functioning of this court [because of the existence of a criminal statute providing a penalty for illegal practice of law] . . ."59

It is apparent from this that the court has a much more restricted idea as to what constitutes "interference" with its functioning than do the courts in Illinois and Missouri, for example. The existence of a criminal statute is given an importance not usually attached to it.⁶⁰ As a final blow the court points out that, in any event, the relators are not properly in court even for a contempt proceeding.⁶¹ However, the court would have so many bases upon which to distinguish this case if it felt inclined to do so in the future that it need not necessarily be inferred that contempt proceedings against unauthorized practitioners are forever barred in the Supreme Court of Indiana.

In the case of *In re Frederick Bugasch, Inc.*⁶² the Supreme Court of New Jersey does not make it exactly clear whether it considers that it does not possess the power to punish the unauthorized practitioner for contempt, or that it has the power and is simply reluctant to use it. It is obvious from a reading of the case that the complaining bar associations made strenuous efforts to show the court that it had jurisdiction over contempt proceedings against unauthorized practitioners and to impress it with the importance of the nationwide campaign against unauthorized practice of which that proceeding might be considered a part. The decision indicates that the court remained unimpressed. The court seems to look at the proceeding as brought by lawyers on behalf of lawyers, and it points out that a charge of illegal practice is a criminal charge (the existence of a criminal remedy being stressed) which affects the public as well as lawyers.⁶³ The court concluded:⁶⁴

"While the court is, of course, impressed and concerned with the efforts of all and particularly those of the bar associations, which have for its purposes the vindication and preservation of its powers, for they are wholesome and praiseworthy objectives, nevertheless we are of the opinion that we should not resort to or exercise the inherent, but none the less drastic and extraordinary, power and right of this court to punish, under all

⁵⁹ 5 N. E. (2d) 538, at 543.

⁶¹ See *infra* p. 151.

⁶³ It might be noted that some courts on the basis of a similar line of reasoning have reached the conclusion that they should protect the public interest by entertaining contempt proceedings. See *e.g.*, *Clark v. Reardon*, *supra* note 26.

⁶⁴ 12 N. J. Misc. 788, 791, 175 Atl. 110, 111.

⁶⁰ See *infra* p. 154.

⁶² 12 N. J. Misc. 788, 175 Atl. 110 (1934).

circumstances, those who appear to have committed an act or acts which may be construed as being in contempt of court. It is a power that is not and should not be exercised lightly.

"We are not, under the facts and circumstances of the instant case, inclined to exercise or resort to the mighty power of this court to punish the alleged wrongdoers by and through the process of contempt proceedings."

Probably the most unequivocal renunciation of the whole basis of contempt proceedings in this field is contained in the decision of the Supreme Court of North Dakota in *Murphy v. Townley*.⁶⁵ This court states that, even if the defendants in the case are practicing law without having obtained a license, it has no power to punish them for contempt because there is nothing in the statutes on civil and criminal contempt which deals with this sort of activity. The court's disavowal of power over this subject matter is made more significant by the fact that power to admit to the practice of law was vested in the court by statute, and that "judicial power" was vested by the state constitution in all the courts of the state. The court considers the separation of powers doctrine as having validity but says that "judicial power" requires legislation in many cases to carry it into effect. Without the benefit of such legislation the court could punish only those acts which were understood to be contempt of court at the time when the constitution was adopted. Any subsequent extension of this field must have a statutory basis, the court says, because of the constitutional provision that the legislature "shall pass all laws necessary to carry into effect the provisions of this constitution." Speaking further of its "inherent" powers the court says:⁶⁶

"The inherent power of the court to punish for contempt is exercised to prevent the obstruction of the course of justice, to prevent prejudice to the trial of any action or proceeding then pending in court. The court is created for the administration of justice through matters coming before it, and anything which interferes with or obstructs the work of the court is within the inherent power of the court to punish. But this power is not to be extended by the court beyond this field. It is often difficult to place the dividing line. The court would be derelict in its duty and false to the defense of the judicial power vested in it by the Constitution if it did not exercise this inherent power on all proper occasions. On the other hand, the court must be careful to see that power so lodged in the court is not extended unduly. The inherent power to punish for contempt does not extend beyond those matters that clearly tend to the obstruction of the course of justice."

(b) In Intermediate Appellate Courts.

Only one case has presented the question of the jurisdiction of an intermediate appellate court over a contempt proceeding against one who is charged with unauthorized practice in the geographical area covered by the court.⁶⁷ In this proceeding before the Kansas City Court of Appeals in Missouri there was no question of actual court appearance by one not licensed or of any activity in connection with a case pending in the court—these are said to be clear cases of direct contempt because

⁶⁵ *Supra* note 27.

⁶⁶ 274 N. W. 857, 861.

⁶⁷ *Clark v. Reardon*, *supra* note 26. It may be surmised that Mr. Clark brought this action for the purpose of establishing the point that an action of this sort could be entertained by such a court. Certainly he was not forced to do so by an unfriendly atmosphere in the Supreme Court or trial courts in Missouri.

of the fraud and usurpation. However, the court asserts that unauthorized practice within the "territorial presence" of the court is contempt of it, because, subject to the power of the Supreme Court, it has power to regulate and control the practice of law within its jurisdiction. The fundamental principle is, the court says, that it has inherent power to guard the administration of justice in its jurisdiction. This includes superintending control over inferior courts including the bar of such courts.⁶⁸ It is interesting to note that the court here had to establish its power without being possessed of any control over admission to practice. It was claimed that the court's power to entertain and adjudicate disciplinary proceedings against attorneys in its district was precedent for the stand taken in this case. This on the theory that such power was part of the larger power to "guard the administration of justice" in the court's jurisdiction.

(c) In Trial Courts.

Some reference has already been made to the more common type of contempt proceedings which arise in connection with courts of ordinary trial jurisdiction. Appearances in such courts or activity in connection with suits pending therein by one not licensed to practice are usually considered direct contempt of the court and punishable as such.⁶⁹ The reason usually given is that such activity amounts to an imposition and fraud upon the court. The false representation to the judge of the court that the unauthorized practitioner is a duly admitted attorney is the basis upon which the courts usually proceed; however, there has been at least one case where it is doubtful if there could be said to be any such false representation.⁷⁰ In this case the party, a rental agent, was held in contempt for violating a statute requiring that only attorneys appear in the court in a representative capacity. He had brought an eviction proceeding in his own name and was appearing *in propria persona*. An attorney intervened in the suit, moved that it be dismissed and that the plaintiff be held in contempt. This motion was granted, the court making no examination of its power to punish this conduct as contempt.

The more difficult problem is presented when an attempt is made to bring contempt proceedings in a trial court for alleged unauthorized practice in the court's jurisdiction though not in the actual presence of the court. As we have seen the question is settled by statute in some states.⁷¹ It is sometimes asserted as a general proposition of law that inferior courts cannot punish for constructive contempts where civil rights are not involved but the point apparently has not been passed upon directly in an unauthorized practice case by an appellate court in any state.⁷²

⁶⁸ The court further asserts inherent power to determine what constitutes contempt as well as absolute freedom in punishing therefor.

⁶⁹ *Bowles v. U. S.*, *supra* note 26; *Heiskell v. Mozic*, 82 F. (2d) 861 (App. D. C. 1936); *People v. Securities Discount*, 361 Ill. 551, 198 N. E. 681 (1935).

⁷⁰ *Heiskell v. Mozic*, *supra* note 69.

⁷¹ *Supra* p. 141. The use that has been made of such a statute in Michigan is revealed by the references to lower court decisions collected in BRAND, *op. cit. supra* note 1, at 800.

⁷² See *Ex parte Wilkey*, 233 Ala. 375, 172 So. 111 (1937). The issues involved are almost identical with those which arise in connection with the powers of court investigating committees. See *infra* p. 169.

In a concurring opinion delivered in a case involving an injunction proceeding against unauthorized practice,⁷³ Judge Burch of the Supreme Court of Kansas made some statements which have had a great deal of influence in stimulating local courts to act in the manner under consideration. His remarks are applicable not only to a trial court's power to entertain contempt proceedings, but to any method of procedure against unauthorized practice of law. He said:

"I concur in the result, and, treating the case as an injunction action between Depew and others as plaintiffs against the credit association as defendant, the case is well decided. My view, however, is that in essence and substance this is not an action at all. Under the fiction and form of an action between adverse parties, it is a special proceeding relating to the subject of unlawful practice of law.

"It would have been just as well if Mr. Depew had risen in court some morning and had asked leave to file written charges that the credit association was practicing law without license. Leave to file being granted, the court would have caused citation to be issued and served, and would have fixed time to plead. If, after a hearing, the court should find the charges to be true, an order to desist would follow.

"The duty of an attorney to bring such a subject to the attention of the court and the authority and duty of the court to take cognizance of the subject are undoubted. In this instance, charges were made which the court has entertained. The accused is before the court in response to the charges, and I regard the whole subject of remedy by injunction as unimportant."⁷⁴

In a proceeding filed in the Superior Court of Los Angeles County, the State Bar of California sought to have certain adjusters declared in contempt of court for practicing law without a license. The court dismissed the proceedings on the ground that the facts set forth did not show a contempt of court, in that it was not charged that anything had been done in the presence of the court or in relation to a suit pending before it. The State Bar then sought a writ of mandamus in the Supreme Court of the state to compel the Superior Court to exercise its jurisdiction and determine after a hearing whether the acts complained of constituted contempt of court. The Supreme Court held⁷⁵ that the dismissal of the contempt order was final and not reviewable by mandate (or, apparently, by any other means). This decision, of course, does not constitute an authority sustaining the rectitude of the trial court's position.

A Florida Circuit Court⁷⁶ has passed directly on the matter and has asserted that it may adjudge a corporation in contempt of court for engaging in the practice of law within the territorial limits of the court although outside its presence. The court concludes that its holding in this regard is in keeping with the "well-established" rule

⁷³ *Depew v. Wichita Retail Credit Ass'n*, 141 Kans. 481, at 487, 42 P. (2d) 214, at 218 (1935).

⁷⁴ In the opinion of the Kansas court in *State ex rel. Boynton v. Perkins*, 138 Kans. 899 at 906, 28 P. (2d) 765, 769 (1934); (*quo warranto* proceedings against an unauthorized practitioner), the following language, which appears to be relevant in this connection, appears: "The form in which the matter is called to the court's attention is not so important. Since the court has jurisdiction of the subject matter, any recognized procedure by which a charge or complaint is entertained, and the one charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient."

⁷⁵ *State Bar of California v. Superior Court*, 4 Cal. (2d) 86, 47 P. (2d) 697 (1935).

⁷⁶ *In re Nat'l Title Co.*, *supra* note 29.

laid down in the *People's Stock Yards Bank* case.⁷⁷ The facts that that rule was announced by a court of last resort in a proceeding before it, and that the reasons advanced for the rule could have little applicability, if any, in a trial court were not considered. However, the court states that it is impressed by the language of Judge Burch⁷⁸ and, if it is conceded that his words are authoritative, the court has here a much more logical basis for its approach.⁷⁹

If the higher courts feel inclined to allow the trial courts to develop the notions that they have inherent power over the administration of justice in their jurisdiction and that it is their duty to protect by summary action the public interest whenever and however it is threatened, then there may be a great increase in proceedings of this nature, and, conceivably, in fields other than the one with which we are now concerned. One supreme court has rather bluntly rejected the idea that such courts do have any inherent power and authority to protect the public from unauthorized practice of law,⁸⁰ stating that it is their business to try cases according to the usual procedures established by the common law. If it is successfully maintained that the trial courts have the broad powers claimed by the Florida court, it is likely to be on the basis of the constitutional provisions concerning separation of powers and the vesting of judicial power in the courts. It might be asserted that the lower courts are thereby given full judicial power as well as the higher courts, and that the only restraint on such power is that it is subject to the exercise of the same power by intermediate appellate courts, and courts of the last resort. This would be the logical development of the reasoning advanced in *Clark v. Reardon*.⁸¹

Another basis, somewhat related to this, is the theory that an unauthorized practitioner within the jurisdiction of the court is, in effect, representing himself as an "officer" of that court, because, he engages in activities that only licensed attorneys can engage in. Hence he may be punished for contempt for this "false representation."

Questions Encountered in the Use of the Remedy

(a) Relating to Procedure.

A preliminary question of procedure in contempt proceedings is the matter of the identity (or the materiality of the identity) of the complaining or instigating parties. Logically, if a particular activity is considered to be contempt of a court then it should not matter how, or through whom, the court receives information concerning the activity. Of course, as to acts in the court's presence no complaint at all need

⁷⁷ *Supra* note 47.

⁷⁸ *Supra* note 73.

⁷⁹ The Supreme Court of Florida has, by rule, authorized the circuit courts to establish commissions to investigate the professional misconduct of attorneys. *Petition of Jacksonville Bar Ass'n*, 125 Fla. 175, 169 So. 674 (1936). In a recent decision denying the major portion of a petition of the Florida Bar Association that the bar of the state be integrated by rule, the court states that members of the bar and bar associations can secure ample relief against unauthorized practice of law, "if the fact is brought to the attention of the courts in appropriate proceedings" (1938) 12 FLA. L. J. 8, 14. This, of course, still leaves the propriety of the contempt proceeding an open question.

⁸⁰ *Ex parte Wilkey*, *supra* note 72.

⁸¹ *Supra* note 26.

appear—the court may institute the suit of its own motion.⁸² In one such case, however, an individual attorney was allowed to intervene in a suit in a trial court, and on his motion, the plaintiff was punished for contempt because of illegal practice.⁸³

As might be expected, the courts have not made any distinction on the basis of the identity of the complaining party when the alleged contemptuous behavior took place outside of the court's presence. Contempt proceedings have been instituted by the attorney general of the state either on his own initiative⁸⁴ or at the suggestion of someone else such as the court itself,⁸⁵ or individual attorneys.⁸⁶ A local prosecuting attorney has instituted such a proceeding in one instance.⁸⁷ Bar associations, both state⁸⁸ and local,⁸⁹ and the officers⁹⁰ and committees⁹¹ of such associations have instituted such proceedings. The board of commissioners of an integrated state bar,⁹² and the president of such a board⁹³ have taken this action. Individual attorneys with no particular official status have likewise succeeded.⁹⁴ In two instances where the proceedings have failed, however, a point has been made of this matter. The Indiana Supreme Court said that contempt proceedings must be filed as an independent action and prosecuted in the name of the state.⁹⁵ This would indicate that a proceeding on the relation of a local bar association as in this instance would never be entertained in that court. The New Jersey case previously referred to⁹⁶ did not say that the complaining bar association and conference of bar associations had no standing, but, obviously, the court treated the action as if the complainants were parties having a private interest in the matter and that the proceeding was to protect it. The case names indicate that almost every conceivable style has been followed, without question, in the title of the cases. Only the Indiana court has made any point of the matter, stating that the cases must be entitled "State of Indiana v. _____."⁹⁷

⁸² *Bowles v. U. S.*, *supra* note 26; *Lapique v. Superior Court*, 68 Cal. App. 407, 229 Pac. 1010 (1924); *In re Lizotte*, *supra* note 26.

⁸³ *Heiskell v. Mozic*, *supra* note 69.

⁸⁴ *State ex rel. Freebourn v. Merchants' Credit Service*, *supra* note 37; *State v. Richardson*, *supra* note 26; *State ex rel. Wright v. Barlow*, *supra* note 53; *In re Duncan*, *supra* note 26; *In re Ripley*, 191 Atl. 918 (Vt. 1937).

⁸⁵ *People ex rel. Attorney General v. Castleman*, 88 Colo. 207, 294 Pac. 535 (1930); *State ex rel. Patton v. Marron*, *supra* note 26.

⁸⁶ *In re Bailey*, 50 Mont. 365, 146 Pac. 1101 (1915); *In re White*, 54 Mont. 476, 171 Pac. 759 (1918).

⁸⁷ *People ex rel. Courtney v. Ass'n of Real Estate Tax Payers*, 354 Ill. 102, 187 N. E. 823 (1933).

⁸⁸ *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; *People ex rel. Colo. Bar Ass'n v. Taylor*, *supra* note 40; *People ex rel. Colo. Bar Ass'n v. Erbaugh*, *supra* note 39; *People ex rel. Colo. Bar Ass'n v. Humbert*, *supra* note 37; *In re McCallum*, *supra* note 27.

⁸⁹ *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; and *People ex rel. Chicago Bar Ass'n v. Motorists Ass'n*, *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, *People ex rel. Chicago Bar Ass'n v. Goodman*, all *supra* note 51.

⁹⁰ *In re Brainard*, *supra* note 37. Mr. Boyle Clark's position as General Chairman of the Bar Committees of Missouri is unique. His official position seems to be more closely related to the courts than to any organization of the bar. He has instituted proceedings in *Clark v. Austin*, *supra* note 27, and *Clark v. Reardon*, *supra* note 26.

⁹¹ *Rhode Island State Bar Ass'n v. Automobile Service Ass'n*, *supra* note 53; *People ex rel. Committee on Grievances of the Colo. Bar Ass'n v. Denver Clearing House Banks*, *supra* note 41.

⁹² *In re Mathews*, 62 P. (2d) 578 (Idaho 1936).

⁹³ *In re Brainard*, *supra* note 37.

⁹⁴ *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 Pac. 157 (1930); *Wayne v. Murphey-Favre & Co.*, 56 Idaho 788, 59 P. (2d) 271 (1936).

⁹⁵ *State ex rel. Indianapolis Bar Ass'n v. Fletcher Trust Co.*, *supra* note 57.

⁹⁶ *In re Bugasch*, *supra* note 62.

⁹⁷ *State ex rel. Indianapolis Bar Ass'n v. Fletcher Trust Co.*, *supra* note 57.

It is common learning that a court may summarily convict and punish for contemptuous acts in its presence without any preliminary complaint or affidavit. Presumably a court appearance by an unauthorized person would fall in this class⁹⁸ but a federal decision indicates that a trial court is not entirely unrestrained in such an instance. In this case the court held that an order providing that a person is to be punished for contempt must state facts to show that the court had jurisdiction to enter such an order.⁹⁹ The defendant in this instance had been adjudged in contempt of a federal district court for representing himself to the court as an attorney when in fact he had been disbarred. The Circuit Court of Appeals stated that there could not be a summary conviction of this sort unless the court is disturbed or has *legal* knowledge of the facts involved. The case was reversed and remanded because the court could not *know* that the respondent had been disbarred until so informed in a regular proceeding.¹⁰⁰ The lower court then changed its procedure to conform to the opinion, the respondent was again convicted and this conviction was sustained.¹⁰¹ A California decision held a contempt order invalid in a somewhat similar situation on the ground that it did not contain a recital that the respondent was not licensed to practice law.¹⁰²

Since most contempt proceedings for unauthorized practice must make use of the theory of the indirect or constructive contempt, the general rule that proceedings against such contempts must be based on petition (variously denominated affidavit, complaint, information, and the like) is followed, as is the requirement of notice and hearing in connection with the complaint. So far as the steps in a constructive contempt case can be generalized their outline would be: (1) requesting the court for leave to file an information charging that some unauthorized person has committed certain acts constituting contempt of the court, (2) granting the leave, (3) filing of the information, (4) filing and disposal of motions with reference to the sufficiency of the information, (5) issuing a show cause order to the alleged contemnor, (6) answer by the contemnor, (7) determination of the facts—either by the court or a referee, (8) issuance of the court's order based on findings of fact and conclusions of law.

It has been stated by the Supreme Court of Idaho that the petition alleging facts upon which the proceeding is to be based must be verified under oath and that an allegation "on information and belief" is insufficient to support such a proceeding that may be called "quasi-criminal" in its nature.¹⁰³ In a case decided several years later by the same court a petition in which the allegations were in effect based upon "information and belief" was held to be sufficient.¹⁰⁴ The court strives for a nice distinction between the two cases on this point. In the first case the allegations were

⁹⁸ *Heiskell v. Mozie, People v. Securities Discount Corp.*, both *supra* note 69.

⁹⁹ *Bowles v. U. S.*, 44 F. (2d) 115 (C. C. A. 4th, 1930).

¹⁰⁰ It does not seem likely that most state courts would adhere to such a meticulous approach.

¹⁰¹ *Bowles v. U. S.*, *supra* note 26.

¹⁰² *Lapique v. Superior Court*, *supra* note 82.

¹⁰³ *In re Eastern Idaho Loan & Trust Co.*, *supra* note 94.

¹⁰⁴ *In re Mathews*, *supra* note 92.

prefaced with "the affiant is informed and believes that . . ." and "that affiant states that in his opinion . . ." The approved form in the second case took this approach "that your affiant is informed and believes and therefore alleges the fact to be that . . ." It was stated in the *Fletcher Trust Company* case¹⁰⁵ that facts in an information charging criminal contempt must be verified by oath on the personal responsibility of the relator and are not to be stated "on information and belief."

The contempt in these cases is said to be criminal as distinguished from civil because the dignity and authority of the court itself is involved rather than the rights of private parties.¹⁰⁶ This distinction has not been of any particular importance in these decisions, except that it has led to some discussion of the extent of which the "safeguards" in an ordinary criminal proceeding carry over to a proceeding of this sort. Contempt proceedings have been referred to as "quasi-criminal"¹⁰⁷ and "in the nature of a criminal proceeding" but in the same case it is made emphatically clear that there are vast differences between the two proceedings and that contempt is really *sui generis*. Although the opinion states that contempt is governed by the strict rules applicable to criminal proceedings,¹⁰⁸ yet the court does not hesitate to deny the alleged contemnor the right of jury trial,¹⁰⁹ the right to claim the privilege against self-incrimination, the right to confront witnesses in person, and the right to claim any benefit from a statute of limitations with reference to misdemeanors. The principal rule applicable to criminal cases which may be salvaged is that the evidence must show the alleged contemnor to be guilty beyond a reasonable doubt, a mere preponderance not being sufficient.

The idea that there should not be a deprivation of jury trial in cases of this sort has apparently carried some weight in those instances where the courts have refused to entertain contempt proceedings.¹¹⁰ If this objection is based on the belief that there should be some fact-finding machinery independent of the court which is to impose the punishment for the alleged contempt, then it should be noted that extensive use is being made in these cases of a referee or a commissioner for such a purpose.¹¹¹ While the person so designated by the court to conduct hearings, take testimony, and make findings of fact and conclusions of law is not circumscribed by the rules which accompany a jury trial yet the court seems to treat his findings as

¹⁰⁵ *Supra* note 57.

¹⁰⁶ *In re Morse*, *supra* note 45. A contrary statement in *In re McCallum*, *supra* note 53, must be based on a mistake as the context would indicate. ¹⁰⁷ *Bowles v. U. S.*, *supra* note 26.

¹⁰⁸ *State ex rel. Wright v. Barlow*, 271 N. W. 282 (Neb. 1937).

¹⁰⁹ See also *Bowles v. U. S.*, *supra* note 26.

¹¹⁰ *State ex rel. Indianapolis Bar Ass'n v. Fletcher Trust Co.*, *supra* note 57; *Murphy v. Townley*, *supra* note 27.

¹¹¹ The most extended use of commissioners or referees to take evidence and report conclusions and recommendations has been in Illinois. *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; *People ex rel. Courtney v. Ass'n of Real Estate Tax Payers*, *supra* note 87. *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, *supra* note 51. This fact-finding method was availed of in the following cases also, *Clark v. Reardon*, *supra* note 26; *State ex rel. Freebourn v. Merchants' Credit Service*, *supra* note 37; *State ex rel. Wright v. Barlow*, *supra* note 108. In Colorado the Committee on Grievances of the Colorado Bar Association has acted as a referee. *People ex rel. Comm. on Grievances of Colo. Bar Ass'n v. Denver Clearing House Banks*, *supra* note 41.

they would similar ones by a jury. The testimony is taken in a variety of ways, by stipulation, affidavit, and deposition as well as directly. When the referee files his report, objections to his findings and conclusions are made, and the courts have not hesitated to sustain these objections.¹¹² The use of this method of fact-determination makes the contempt proceeding much less summary than it is ordinarily thought to be. In effect, it is under these circumstances a trial much as any other (overlooking certain informalities), than an appeal with the ordinary concomitants of appellate procedure and hearing.

(b) The Effect of the Existence of Other Remedies.

The existence of other remedies has been urged in numerous cases, but there has never been a direct holding that it affected the court's power to punish for contempt. In cases where the court has refused to entertain the particular proceeding considerable stress has been laid on the existence of criminal statutes prohibiting unauthorized practice, but in these cases there was either a denial that the activity constituted contempt¹¹³ or a reluctance to use such a drastic implement in the particular case before the court.¹¹⁴ Thus the existence of another remedy may affect the court's willingness to entertain a contempt proceeding or to recognize that a certain activity constitutes contempt. Usually the other remedy that is referred to is a criminal statute¹¹⁵ although the Supreme Court of Washington refers to the availability of injunction proceedings.¹¹⁶ A related question that has not yet arisen is the matter of double jeopardy. If a person has been punished for contempt because of unauthorized practice, could he then be prosecuted criminally on the same facts, or vice versa? The Illinois Court in the *People's Stock Yards Bank* case mentions the possibility of this problem arising, but states that it is not necessary to pass on it because no criminal prosecution against the respondent was involved. Another Illinois case¹¹⁷ presents a situation that is getting close to the line. The respondent in this case (decided in 1937) had been convicted of unauthorized practice under a criminal statute in 1927, but on appeal this conviction had been reversed.¹¹⁸ While the respondent had been engaging in the same general line of business over the whole period it was stated that this prior decision did not "work an estoppel" with reference to the 1937 contempt proceeding because identical issues were not involved.¹¹⁹

¹¹² *People ex rel. Courtney v. Ass'n of Real Estate Tax Payers*, *supra* note 87; *Clark v. Reardon*, *supra* note 26.

¹¹³ *Murphy v. Townley*, *supra* note 27.

¹¹⁴ *In re Bugasch*, *supra* note 62; *In re McCallum*, *supra* note 53. In the *Rhode Island Bar Ass'n* case, it was stated that other remedies should be used first if possible. See *infra* p. 155.

¹¹⁵ *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; *Clark v. Austin*, *supra* note 27; *State ex rel. Wright v. Barlow*, *supra* note 108; *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, *supra* note 53.

¹¹⁶ *In re McCallum*, *supra* note 53.

¹¹⁷ *People ex rel. Chicago Bar Ass'n v. Goodman*, *supra* note 51.

¹¹⁸ *People v. Goodman*, 259 Ill. App. 667 (1931).

¹¹⁹ Another theoretical possibility is jeopardy from multiple contempt proceedings. Would a discharge in a trial court affect contempt proceedings in the supreme court of the state involving the same activity, and vice versa?

Caution in the Use of the Remedy.

It is believed that enough has been said to indicate why contempt proceedings prove attractive to bar association committees searching for a remedy against unauthorized practice. More important than the elimination of procedural delays and technicalities is the fact that in these proceedings the court is made, in effect, a party plaintiff. The reality of the resulting psychological advantage is made apparent by the cases, but an awareness of this same factor has led, in the writer's opinion, to a hesitant attitude on the part of other courts. It is significant that some of the courts which concede that a contempt proceeding may be used against unauthorized practitioners seem nevertheless to treat the remedy rather gingerly. The Rhode Island Supreme Court, after concluding that such a proceeding could be maintained, said:¹²⁰

"Nevertheless, we do not encourage it. In trivial or unimportant instances of illegal practice of law, it should not be used. Where other remedies are available and efficient to right the wrong complained of, they should first be invoked, unless there is, as in the instant case, an evident need for summary action to protect the public and the jurisdiction of the court. This inherent power of the judiciary to punish for contempt is a necessary but also a dangerous power, and is therefore to be used with great caution."

Reference has already been made to the language of the Supreme Court of New Jersey in an even more conservative vein.¹²¹ Approval of this language was expressed by the Supreme Court of Washington in *In re McCallum*, which also spoke of the dangerous character of the court's power to punish for contempt. Such a drastic remedy cutting off jury trial and other safeguards must be very sparingly used, the court said, its use depending upon the fact situation in each case.

These cautioning remarks have been re-echoed in bar association reports and elsewhere. The recommendations of the committee of the New York State Bar Association are noteworthy because they were formulated after a statute¹²² had been passed making unlawful practice of the law contempt of the Supreme Court of that state. The concluding recommendation is:

"That great discrimination be exercised in the selection of cases to be brought. Activities justifying the bringing of a contempt proceeding should be such that the court will want to stop them because their existence interferes (a) with the administration of justice, (b) with the court's control over the general practice of law and (c) with the upholding of the canons of ethics and standards of proper professional practice."

INJUNCTION PROCEEDINGS

Since 1931 bar groups have been obtaining equitable relief against unauthorized practice of the law to a constantly increasing extent. This has been due not only to the enactment of enabling statutes but to the pronouncement of certain courts that in the absence of legislation the injunction is a proper remedy against activity of this sort. The propriety of the remedy has been denied specifically in only one instance

¹²⁰ Rhode Island Bar Ass'n v. Automobile Service Ass'n, *supra* note 53 at 129, 179 Atl. 139, at 142.

¹²¹ *Supra* pp. 146-147.

¹²² *Supra* note 34.

in the courts,¹²³ and the effect of this denial has been erased in that jurisdiction by a subsequent statute. Injunctive relief is frequently prayed for and occasionally granted in other types of actions,¹²⁴ but, primarily, we are concerned here with proceedings instituted for the purpose of enjoining the alleged unauthorized activities of the defendant and not with incidents of other remedies.

Statutory Development of the Remedy

Seven states have adopted laws providing specifically that proceedings may be brought to enjoin violations of the *statutes* dealing with unauthorized practice of law,¹²⁵ four of these being enacted in 1935. It may be noted that in each instance it is violation of the statutes that is to be enjoined and not just "unauthorized practice of law." This might very well be construed to mean that in a proceeding under the injunction law full recognition would have to be given to such exceptions and provisos as might be contained in the statutes.¹²⁶ On the other hand, in a common law proceeding the court may say that it will determine for itself whether or not the activity complained of constitutes practice of law.¹²⁷ In most of these statutes it is provided that the attorney general of the state may bring the proceeding,¹²⁸ and in Minnesota, North Carolina, and Texas, the local prosecuting attorney is given such authorization. Any bar association is a proper party plaintiff in Massachusetts, and likewise in New York, if the supreme court of the state will so permit, after a showing that the attorney general refused to act when requested. Three individual attorneys can institute proceedings under the statutes in Maine and Massachusetts, and in Rhode Island any licensed attorney may bring the action. Usually the courts of general trial jurisdiction are indicated as the proper place for bringing the action if the statute makes any reference to the forum. However, in Maine and Massachusetts the courts of last resort are given concurrent jurisdiction with the lower tribunals in this respect; thereby making it possible in these states to eliminate the delay attendant upon appeals.

When confronted with proceedings under these statutes the courts have not felt called upon to go into the theory of the remedy,¹²⁹ being content to accept the

¹²³ *Wollitzer v. National Title Guaranty Co.*, 148 Misc. 529, 266 N. Y. Supp. 184 (1934).

¹²⁴ Contempt proceedings: see *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, *supra* note 47; *People ex rel. Courtney v. Ass'n of Real Estate Tax Payers*, *supra* note 87; *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, *supra* note 53. Declaratory judgment: see *Richmond Bar Ass'n v. Richmond Ass'n of Credit Men*, 167 Va. 327, 189 S. E. 153 (1937). *Quo warranto*: see *People ex rel. Los Angeles Bar Ass'n v. California Protective Corp.*, 76 Cal. App. 354, 244 Pac. 1089 (1926); *State ex inf. Miller v. St. Louis Union Trust Co.*, 335 Mo. 84, 74 S. W. (2d) 348 (1934).

¹²⁵ Maine Laws 1937, c. 142; MASS. ANN. LAWS (Supp. 1937) c. 221, §46B; MINN. STAT. (Mason's Supp. 1936) §5687-1(e); N. Y. CIV. PRAC. ACT, art. 75A, §1221a; N. C. CODE (1935) §199(d); Rhode Island Acts & Resolves 1935, c. 2190, §47; TEX. PEN. CODE (Supp. 1934) art. 430a.

¹²⁶ Possibly this is the reason that the plaintiffs in *Fitchette v. Taylor*, discussed *infra* p. 157, brought their suit on a common law basis instead of under the Minnesota statute.

¹²⁷ In *In re Maclub*, 3 N. E. (2d) 272 (Mass. 1936), the petition was brought by the Attorney General under the Massachusetts statute. The court says that in view of this it would not be necessary to determine what remedies might be available to the petitioner apart from the statute. See *infra* p. 158.

¹²⁸ Maine, Mass., Minn., N. Y., and Rhode Island.

¹²⁹ *In re Maclub*, *supra* note 127; *In re Shoe Mfgs. Protective Ass'n*, 3 N. E. (2d) 746 (Mass. 1936); *In re Thibodeau*, 3 N. E. (2d) 749 (Mass. 1936); *Bennett ex rel. N. Y. Co. Lawyers Ass'n v. Supreme*

statute without question. It may be noted that all the proceedings under the statutes have been brought by public officials rather than bar associations or individual attorneys, a fact which would indicate that the bar has been able to secure better official cooperation under these laws than seemed to be true in the case of criminal prosecutions. That the existence of a statute does not always solve the problem is shown by the fact that a Minnesota case brought in 1934 by bar association officers disregarded entirely the existence of a 1931 statute in that state, providing for institution of injunction proceedings by either the attorney general or the county attorney. Under the wording of this statute refusal of these officials to act would have effectively blocked the proceeding provided. It is not known, of course, that this was the reason that use was not made of the proceeding authorized by statute.¹³⁰

One of the most interesting developments in connection with this remedy has a statutory basis although the legislation is not specifically directed toward unauthorized practice of law. In Tennessee the legislature has provided¹³¹ that the carrying on, without a license, of any profession, business, or occupation for which a license is required is a public nuisance, subject to abatement by injunction, or under any other procedure by which such nuisances may be abated. It is further provided that the writ of injunction may be sued out by the official body charged with the supervision of the particular business or profession or by any person affected by the nuisance. Under this statute, injunctions have been obtained upon three occasions against alleged unauthorized practitioners.¹³² The court did not elaborate upon the remedy, simply noting in each instance that the defendant's activity fell within the wording of the statute. Statutes similar to this are in existence in other states, and they have been used as the basis of injunctions against the illegal practice of other professions.¹³³ The possibility of using this "nuisance theory" in the absence of statutory authorization will be considered subsequently. It might be observed that the Tennessee Court did not attach any importance to the status of the parties who brought these cases, nor did the style of the proceeding seem to make any difference. Two of the cases were brought in the name of the state by certain members of the bar, without any allegation that the suit was being brought on behalf of a class, or any reference to authorization.¹³⁴ In the last case, however, the form used was that of a class action; the form usually followed in injunction proceedings in the absence of statute.

Enforcement Corp., 250 App. Div. 265, 293 N. Y. Supp. 870 (1937), *aff'd* 11 N. E. (2d) 315 (1937); State *ex rel.* Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

¹³⁰ See reference to another possibility *supra* note 126.

¹³¹ TENN. CODE (1932) §§9316, 9317.

¹³² State *ex rel.* Chattanooga Bar v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S. W. (2d) 1918 (1931); State *ex rel.* v. James Sanford Agency, 167 Tenn. 339, 69 S. W. (2d) 895 (1934) (these two cases combined a proceeding in the nature of *quo warranto* with the prayer for injunctive relief); Lamb v. Whitaker, 105 S. W. (2d) 105 (1937).

¹³³ See State v. Fray, 214 Iowa 53, 241 N. W. 663 (1934). See note 162, *infra*.

¹³⁴ See *infra* pp. 164-165.

Theory of the Remedy in Absence of Statute

(a) Protection of a "Franchise."

The development of the use of the injunction proceeding against unauthorized practice of law must be credited largely to the Ohio courts and, more accurately perhaps, to the activities of two attorneys in that state.¹³⁵ The supreme court of the state did not even pass on the matter until 1934,¹³⁶ but since 1931 a decision of an Ohio intermediate appellate court has been recognized as a leading case. In *Dworken v. Apartment House Owners' Ass'n*,¹³⁷ the Court of Appeals for Cuyahoga County announced that lawyers, in their license to practice law, have an interest in the nature of a franchise which may be protected by injunction. Apparently, the court was troubled here, as other courts have been since, by the oft-repeated dogma that the practice of law is not a property right but may be more properly termed a "privilege burdened with conditions"¹³⁸ on the one hand, and the idea that an injunction does not issue except to ward off threatened injury to property on the other. The court picked its way cautiously between the horns of the dilemma by describing the "right" to practice law as a "valuable privilege," exclusive in a class of individuals who have demonstrated a special fitness. What the licensed attorneys possess then, according to the court, is a "right in the nature of a franchise." The final step in the reasoning is the proposition that franchises are property and are frequently invested with the attributes of property generally. The only support for this proposition, the court admits, are cases dealing with the granting of exclusive franchises to corporations. Hence in its conclusion the court recedes to the position that what is being protected is an "interest in the nature of a property right."

While the court's holding must be placed on the reasoning indicated, yet it is significant that a great deal of time was spent by the court in toying with the propositions that equitable relief is not restricted to the protection of property rights, and that in the granting of relief the court is not hampered by mere absence of precedent. This, it might be added, seems to be the usual technique in the cases which are based on the "property right" notion.¹³⁹

In developing the injury-to-property-rights theme the plaintiff alleged that he was practicing by virtue of a franchise granted him by the supreme court of the state and the federal courts; that he had been practicing for 17 years and had built up a large and valuable practice; and that the practices of the defendant were contrary to the rights of the plaintiff and all other attorneys and that they tended to bring the legal profession into disrepute. It is further stated that the plaintiff had no adequate

¹³⁵ Sol Goodman of the Cincinnati Bar Association and Jack B. Dworken of the Cuyahoga County Bar Association, Cleveland, seem to have undertaken their injunction campaign at about the same time. Their activity is illustrated by the large number of cases in the lower Ohio courts entitled, "Goodman v. ———" and "Dworken v. ———." As party plaintiffs their only close competition is from Milton Yeats of the Tampa, Florida, Bar Association. See cases collected in BRAND, *op. cit. supra*, note 2, at 808 and 810.

¹³⁶ Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934).

¹³⁷ 38 Ohio App. 265, 167 N. E. 577 (1931).

¹³⁸ Cardozo, J., in *People ex rel. Karlin v. Culklin*, 248 N. Y. 465, at 470, 162 N. E. 487, at 489 (1928).

¹³⁹ See, particularly, *Fitchette v. Taylor*, 191 Minn. 582, 254 N. W. 910 (1934).

remedy at law and that he (and other attorneys) would be irreparably damaged if the injunction did not issue. There was no allegation of special injury or damage.

The Supreme Court of Ohio, when it later had occasion to pass on this same question in 1934, stated that it was "quite generally held" that a licensed attorney has a "special privilege in the nature of a franchise" and that the adequate remedy for an invasion of the "right thus vested in him" was by injunction.¹⁴⁰ Reference was made to a 1933 New Jersey case in support,¹⁴¹ but there was no mention of the earlier Ohio Court of Appeals case. In the most recent decision of the Ohio Supreme Court in this field, the propriety of the injunction proceeding was not even called into question.¹⁴²

The most straightforward assertion of the "property right" theory appeared in the 1933 New Jersey case referred to.¹⁴³ The court says that attorneys at law in that state received their right to practice law by letters patent issued by the governor and so are holders of a franchise. On the authority of a dictum in a case involving criminal prosecution of illegal practice of dentistry, the court points out that the practice of any ordinary calling, business, or profession is property, and hence, *a fortiori*, the right to practice the profession of law, boasting so noble a pedigree,¹⁴⁴ is a property right.

Minnesota and Washington courts have announced adherence to the "franchise theory."¹⁴⁵ Other courts have indicated the possibility of using the injunction proceeding without making clear the basis upon which they would proceed.¹⁴⁶ Some courts would, undoubtedly, prefer the doctrine discussed in this section since it represents formal adherence to the more orthodox equitable principles.

The decision of a lower New York court in *Wollitzer v. National Title Guaranty Co.*¹⁴⁷ is the only one which specifically denied the propriety of the use of an injunction proceeding against an unauthorized practitioner. There are bases upon which the case could be distinguished, *viz.*, the action was not a class suit but was brought by an individual attorney,¹⁴⁸ and the defendant's acts were said not to constitute unauthorized practice of law. However, the court considered and disapproved the Ohio decision in the *Apartment House Owners* case.¹⁴⁹ The principal ground of the

¹⁴⁰ Land Title Abstract & Trust Co. v. Dworken, *supra* note 136.

¹⁴¹ Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 Atl. 229 (1933).

¹⁴² Judd v. City Trust & Savings Bank, 133 Ohio St. 81 (1937).

¹⁴³ Unger v. Landlords' Management Corp., *supra* note 141.

¹⁴⁴ The historical roots of the New Jersey practice, the court said, go to the "king's prerogative" which was also the source (and part of the substance) of franchises.

¹⁴⁵ Fitchette v. Taylor, *supra* note 139; Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932).

¹⁴⁶ See Rinderknecht v. Toledo Ass'n of Credit Men, 13 Fed. Supp. 555 (N. D. Ohio, 1936); Sharp-Boylston Co. v. Haldane, 182 Ga. 833, 187 S. E. 68 (1936); Murphey v. Townley, *supra* note 27. Compare Cain v. Merchants National Bank, 66 N. D. 746, 268 N. W. 719 (1936). See State Bar of California v. Security First National Bank (1934) 9 L. A. Bar Bull. 181 (Super. Ct., Calif., 1934). The extent to which the injunction proceeding is being used in this field is not fairly indicated by the decisions of the appellate courts. See collection of references in BRAND, *op. cit. supra* note 2, at 808-814.

¹⁴⁷ 148 Misc. 529, 266 N. Y. Supp. 184 (1934), *aff'd* 241 App. Div. 757, 270 N. Y. Supp. 968 (1934).

¹⁴⁸ See Steinberg v. McKay, 3 N. E. (2d) 23 (Mass. 1936).

¹⁴⁹ *Supra* note 137.

court's holding seems to be the absence of a showing of special damage, it being stated that the plaintiff's allegation that his practice had "greatly suffered" was insufficient for this purpose. Since this decision a New York statute has been passed permitting injunctions against unauthorized practice of law.¹⁵⁰

(b) Protection of the Administration of Justice.

Some of the courts which have used the "property right" theory have indicated that it was not altogether satisfactory, and in no recent decision has any stress been placed upon it. The reason for this abandonment is not hard to find. One of the greatest difficulties of the bar associations' campaign against unauthorized practice has been to dispel the idea that what was being done was for the material benefit of the lawyers and to replace it with the idea that it was primarily the public welfare with which the bar was concerned. It is not surprising, therefore, that the reasoning of the *Apartment House Owners* case should be frowned upon as tending to defeat this objective. There has been developed as an alternative to the theory of the latter case, a hypothesis, with no very clearly defined basis in precedent, that injunction proceedings are appropriate and necessary to protect not only attorneys but the courts and the public as well against unauthorized activity, since this activity tends to bring the entire administration of justice into disrepute. It is obvious that this approach is closely analogous to that which was announced in connection with proceedings against constructive contempts.¹⁵¹

Apparently the earliest case which might be considered as adopting this approach is the 1934 decision of the Supreme Court of Pennsylvania in *Childs v. Smeltzer*.¹⁵² The court did not go at any length into the propriety of the injunction proceedings but there is no reference whatsoever to "property rights," and the court said:¹⁵³

"The strict regulation and control of persons who render legal services is as necessary and essential to the welfare of the public at large as the requirements for the practice of medicine or dentistry. A duly admitted attorney is an officer of the court and answerable to it for dereliction of duty. Except in proceedings of the character of the one now before us, the courts are powerless to supervise the unlicensed practitioner."

Decisions of the Minnesota and Oklahoma courts during the same year use language indicating a similar viewpoint although the actual holdings are on a more restricted basis.¹⁵⁴ The Minnesota court pointed to its powers over attorneys, which included preventing them from engaging in the unlawful practice of law. "It would be anomalous," the court says, "if we had no similar power to protect the public from the illegal practice of law by laymen. . . . While the traditional office of an injunction is the protection of property . . . there is a noticeable absence of judicial attempt . . .

¹⁵⁰ *Supra* note 125.

¹⁵¹ *Supra* p. 144.

¹⁵² *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934).

¹⁵³ *Ibid.* at 15, 171 Atl. at 886.

¹⁵⁴ *Fitchette v. Taylor*, *supra* note 139; *State Bar of Oklahoma v. Retail Credit Ass'n*, 170 Okla. 246, 37 P. (2d) 954 (1934). In *Boyd v. Second Judicial District Court*, 51 Nev. 264, 274 Pac. 7 (1929) it was stated that courts have inherent power to prevent injustice, and hence may enter an order enjoining the appearance of an attorney in a case in which he could not ethically participate.

to hamper the power of equity to grant injunctive relief where obviously it is needed in the interests of justice." The court finds, however, that it does not have to venture into new fields but can grant the injunction on the basis of protecting a property right.¹⁵⁵

The first instance where this idea of protecting the administration of justice was set forth clearly as the basis of the decision was by the Supreme Court of Kansas in *Depew v. Wichita Retail Credit Ass'n.*¹⁵⁶ The plaintiffs in this case had made allegations very similar to those set forth in the *Apartment House Owners* case as to the value of their practice. However, if the court was to grant relief on the basis suggested by such allegations, it was faced with the task of distinguishing some of its previous decisions in which it had emphasized the fact that the practice of law was not a property right.¹⁵⁷ The court did not choose to overrule these cases, and stated that a license to practice law is not property, although it is in the nature of a franchise. Instead, the propriety of the remedy was explained as follows:¹⁵⁸

"So whether or not the interest of the plaintiffs in their professional capacities is in the nature of a property right, they have . . . a special privilege, franchise, and duty as officers of the court to protect the legal profession, the courts, and the administration of justice generally and it would seem to be well within such special franchise and privilege to protect, not only themselves, and others of their profession, but the courts of which they are officers, against the illegal and unprofessional conduct of others. . . .

"Licensed privileges of attorneys and duties as court officers are so closely related and interwoven as to justify their maintaining an action to sustain the honor of the court and restrain the unlawful practice of law."

It was in this same case that Judge Burch delivered the concurring opinion set forth previously,¹⁵⁹ which has some applicability to the point under discussion, in that, under his approach, there would be no need to consider the proceeding as adversary in character, and, therefore no need to show an interest of some sort on the part of the moving parties. In a later case the Kansas court has granted an injunction without discussing the propriety of the remedy.¹⁶⁰

The influence of the principal case may be noted in certain of the lower court decisions instituted since it was announced.¹⁶¹ Because this doctrine does away with the necessity of fitting the proceedings into the conditions precedent to the granting of an injunction to protect property, because of its convenient generality, and because it is more in keeping with the development of the "inherent powers" of the court over the practice of law, it is likely to displace the "franchise theory" to a large extent and lead to a more extended use of the injunction in unauthorized practice cases.¹⁶²

¹⁵⁵ *Supra* note 139 at 585, 254 N. W. 910 at 911. ¹⁵⁶ 141 Kans. 481, 42 P. (2d) 214 (1935).

¹⁵⁷ *In re Casebier*, 129 Kans. 853, 284 Pac. 611 (1930).

¹⁵⁸ 141 Kans. 481 at 485, 42 P. (2d) 214 at 217. ¹⁵⁹ *Supra* p. 149.

¹⁶⁰ *Depew v. Wichita Ass'n of Credit Men*, 142 Kans. 403, 49 P. (2d) 1041 (1935).

¹⁶¹ See cases in *BRAND, op. cit. supra* note 1, at 808-814.

¹⁶² An interesting subject for speculation is the possibility of securing injunctive relief against unauthorized practice of law on the ground that such activity is subject to abatement as a public nuisance. As a matter of fact the "protection of the administration of justice" theory might be considered a refinement of such an approach. Such a theory has not been announced by any court except in Tennessee where

Existence of Legal Remedies

In granting an injunction against certain forms of unauthorized practice of law the courts have usually been called upon to sidestep the principle that an injunction should not issue where there is an adequate remedy at law.¹⁶³ In no instance have the courts allowed this principle to prevent the granting of the relief prayed for. In those proceedings where there has been a refusal to grant the relief, this has never been announced as the basis for the refusal.

The legal remedies which have been urged as preventing the issuance of an injunction against unauthorized practice are criminal prosecution and *quo warranto* proceedings. The existence of this last remedy has been raised in both Kansas¹⁶⁴ and Ohio¹⁶⁵ without success but in neither instance was the contention discussed satisfactorily by the court. The Kansas situation was rather unusual because there was no criminal statute in that state forbidding unauthorized practice of law; *quo warranto* being the established method of dealing with such practice.¹⁶⁶ In passing on the question the court refers to, but does not declare to be controlling, its language in a previous *quo warranto* proceeding against unauthorized practice of law in which it had been stated that the form in which the matter was brought to the court's attention was not important.¹⁶⁷ Then, after setting forth several quotations to the effect that injunctive relief was being rapidly expanded, the court passes to the consideration of other matters. The Ohio court disposes of the contention by referring to some rather obscure language appearing earlier in its own opinion, apparently sanctioning indirect attacks by use of the injunction on corporate charters.¹⁶⁸

The existence of a criminal statute may take on a two-fold aspect. It may go to the question of the adequacy of the legal remedy, but more often it is discussed in connection with the principle that equity will not enjoin the commission of a crime. Sometimes the point is disposed of with the assertion—for which precedent is ample—that this principle will not prevent the issuance of an injunction if there is ground for it otherwise.¹⁶⁹ An Ohio court, however, has actually come to grips with the

there was a specific statutory declaration. *Supra* note 132. The strongest argument for the use of the theory, even in the absence of a statute similar to that in Tennessee, is the fact that it has been availed of by other professions. *Kentucky State Board of Dental Examiners v. Payne*, 213 Ky. 382, 281 S. W. 188 (1926); *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784 (1936); *Sloan v. Mitchell*, 113 W. Va. 506, 168 S. E. 800 (1933); see (1937) 35 MICH. L. REV. 497.

¹⁶³ A similar principle that there should be a threat of continued unlawful acts raised the question of the effect of a promise by a corporate officer that certain acts of unauthorized practice would not be engaged in. In *Depew v. Wichita Ass'n of Credit Men*, *supra* note 160 at 413, 49 P. (2d) at 1047, the Kansas court said: "This general principle of law may be correct, but the feature of reliance on a promise, if it were a personal case, is different from reliance upon the promise of a corporation and its officers and managers all of whom may be replaced and their successors feel differently about obeying such promise. Courts are not required to accept and rely upon promises under all circumstances, and, unless they do so rely, the danger of repetition of a wrong may be prevented by injunction."

¹⁶⁴ *Depew v. Wichita Retail Credit Ass'n*, *supra* note 156.

¹⁶⁵ *Dworken v. Apartment House Owners' Ass'n*, *supra* note 137. ¹⁶⁶ See *infra* p. 166.

¹⁶⁷ *Supra* note 74. ¹⁶⁸ 38 Ohio App. 265, 274, 176 N. E. 577, 580.

¹⁶⁹ *Fitchette v. Taylor*, *supra* note 139; *Unger v. Landlords' Management Corp.*, *supra* note 141; *Paul v. Stanley*, *supra* note 145.

problem, and solved it, by denominating criminal prosecution as an inadequate remedy “. . . recourse to the criminal statutes would afford an inadequate, cumbersome and complex method of accomplishing that which the plaintiff seeks to bring about . . . namely, a cessation of illegal practice of law.”¹⁷⁰ The court further pointed out that the defendant’s acts would have been illegal even in the absence of the criminal statute.

This last statement is suggestive of the approach taken by the Oklahoma Supreme Court in dealing with the “criminal remedy” point.¹⁷¹ The State Bar, created by statute, was seeking in this case to have a corporation restrained from unauthorized practice of the law. The court said:¹⁷²

“The State Bar Act does provide that any unauthorized person who engages in the practice of law shall be guilty of a misdemeanor. That statute is not purely or primarily a criminal statute. The act was passed to further regulate the practice of law, to provide for [creation of integrated bar]. . . . As an incident thereto it made persons guilty of a misdemeanor who practiced law in violation of the act. That provision was evidently adopted as an addition or positive deterrent to the unauthorized practice of law by those not entitled to practice. It is difficult to find in this provision any possible restriction or limitation upon the duties or power of the state bar. The primary purpose of the act was not to create a crime but to provide for the public welfare.”¹⁷³

Whether this reasoning is available in those states where no statutory bar exists is matter for conjecture. The test laid down seems to be whether or not the criminal provision is “incidental” to the principal purpose of the statute. It is not likely that even this test would be invoked if by doing so it would operate to defeat the remedy, for it seems obvious that the courts are not going to allow the existence of a criminal statute to prevent the issuing of an injunction where they are otherwise inclined to grant it.

Parties Plaintiff

It has been observed that injunction proceedings under statutes have in every instance been prosecuted by public officials,¹⁷⁴ even though it was permissible for other parties to act. In the absence of statute it would seem that the attorney general or local prosecuting attorney could bring such proceedings.¹⁷⁵ Georgia is the only state, however, where a public official (the prosecuting attorney) has brought injunc-

¹⁷⁰ 38 Ohio App. 265, 274, 176 N. E. 577, 580. In this case the allegedly illegal acts of the defendant numbered into the thousands.

¹⁷¹ State Bar of Oklahoma v. Retail Credit Ass’n, *supra* note 154.

¹⁷² *Ibid.* at 250, 37 P. (2d) at 958.

¹⁷³ The court finds authority for this approach in Kentucky State Board of Dental Examiners v. Payne, *supra* note 162.

¹⁷⁴ *Supra* p. 157.

¹⁷⁵ See State Bar of California v. Security First National Bank, *supra* note 146. If the “abatement of a nuisance” theory were made use of against unauthorized practitioners (see note 162 *supra*), then possibly a public official would be required to institute the proceedings because of the doctrine that public nuisance may not be abated by a private individual without a showing of special injury. Cf. Wollitzer v. National Title Guaranty Co., *supra* note 123.

tion proceedings in the absence of statute, no question being raised as to the propriety of his act.¹⁷⁶

The power of an integrated state bar to bring such proceedings is a question which will probably be of increasing importance. Only the Oklahoma Supreme Court has passed on the point directly in *State Bar of Oklahoma v. Retail Credit Ass'n.*¹⁷⁷ The State Bar in this instance had been given by statute the power to sue and be sued and to "aid in the advance of the science of jurisprudence and in the improvement of the administration of justice." It was further provided in the statute that only active members of the bar therein created could practice law in the state. The court interprets the act to mean that the State Bar is empowered to enforce the provisions of the statute creating it by the use of whatever lawful means it might wish to employ for that purpose, including the injunction. In 1934 a lower court in California held that the integrated bar in that state could not prosecute an injunction proceeding against unauthorized practice.¹⁷⁸ It does not appear that an appeal was taken, and no attempt seems to have been made to institute such proceedings since that time. This court's approach is rather difficult to follow, for after holding that the State Bar could not prosecute the action, it stated that an individual attorney might do so, and probably an unincorporated bar association also.¹⁷⁹ The reasoning of the court was that the State Bar was a corporation with limited powers over the practice of law, and the power to institute proceedings of this sort was not delegated to it. Furthermore, the proceeding was not a class action since the state bar could not practice law and had no interest in the profits of its members. The Washington State Bar Association (likewise an integrated bar) has prosecuted a proceeding for an injunction which was denied on grounds not related to the point under discussion.¹⁸⁰ It would be of doubtful wisdom to attempt any generalization on the basis of these cases, except that it may be concluded that the answer probably depends upon the statute under which the bar was created.

The predominant form in which injunction proceedings are prosecuted is that of the representative or class suit, the class comprising the representatives and a larger group of attorneys usually described as those "similarly situated." It is frequently added that the suit is also being brought on behalf of certain bar associations, the courts, and the public.¹⁸¹ The group of attorneys included in the class has varied from those in the same city¹⁸² to those throughout the state.¹⁸³ Most courts have

¹⁷⁶ *Atlanta Title & Trust Co. v. Boykin*, 172 Ga. 437, 157 S. E. 455 (1931); *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932).

¹⁷⁷ *Supra* note 154.

¹⁷⁸ *State Bar of California v. Security First National Bank*, *supra* note 146.

¹⁷⁹ There is no reported instance of an unincorporated bar association instituting injunction proceedings of this nature.

¹⁸⁰ *Washington State Bar Ass'n v. Merchants' Rating & Adjusting Bureau*, 183 Wash. 611, 49 P. (2d) 26 (1935).

¹⁸¹ See *Fitchette v. Taylor*, *supra* note 139; *Dworken v. Apartment House Owners' Ass'n*, *supra* note 137; *Child v. Smeltzer*, *supra* note 152; *Shortz v. Farrell*, 327 Pa. 81, 193 Atl. 20 (1937); *Paul v. Stanley*, *supra* note 145.

¹⁸² *Depew v. Wichita Retail Credit Ass'n*, *supra* note 158.

¹⁸³ *Unger v. Landlords' Management Corp.*, *supra* note 141.

failed to make explicit the necessity (if it exists) for following this form in bringing the suit for an injunction. However, in every instance, in the absence of statute or action by a public official, where the relief was granted the class suit was used. Furthermore in two instances of denial of relief it is possible that failure to adopt the class action form had some bearing on the result. The extent to which this is true in the *Wollitzer* case¹⁸⁴ can not be stated exactly, but it is a condition accompanying the adverse decision. The Supreme Judicial Court of Massachusetts apparently relied upon this basis to dismiss the complaint in *Steinberg v. McKay*,¹⁸⁵ stating that it appeared that in all successful suits of this nature the bill had been brought on behalf of an entire class of licensed practitioners. The same court has not been hesitant about granting injunctions against unauthorized practice.¹⁸⁶

Undoubtedly, the plaintiffs will continue to adhere to the representative suit in form in these injunction proceedings, even if its exact effect remains a matter of mystery. There are good reasons for its use. If the "property right" theory is being advanced as the basis for the injunction, it would be easier to attach pecuniary value to the practice of a whole class of attorneys than to any one, and the adverse effect of unauthorized practice upon the aggregate of legal business in a city or county is not quite so elusive a matter as is its effect upon any individual attorney. A proceeding under the "protection of the administration of justice" theory is bolstered by the class suit—the idea of all attorneys joining hands in keeping the processes of justice undefiled being an attractive one, and quite in keeping with their positions as officers of the court which gives them the interest sufficient to bring the action. Finally, if the idea were developed that unauthorized practice of law could be abated as a public nuisance¹⁸⁷ the class suit might escape the prohibition against private abatement of such nuisances. A suit on behalf of a class of attorneys, the courts and the public has a ring of the "official" about it that might aid in dispelling the idea that the suit was a private one for the benefit of the actual plaintiff or plaintiffs. It is possible, also, if a showing of special injury is to be required, to advance the argument that attorneys, as a class, suffer damage from instances of unauthorized practice that is quite distinct from that suffered by the public at large.

EXTRAORDINARY REMEDIES AND THE DECLARATORY JUDGMENT

Quo Warranto

Since *quo warranto* or, more properly, a proceeding based on an "information in the nature of *quo warranto*" has traditionally been used to inquire into the right to exercise the privileges of a certain office or franchise, it was a natural development that this remedy should be used against those who practiced law without a license. It has been invoked against both individuals and corporations.

¹⁸⁴ *Supra* note 123.

¹⁸⁵ *Supra* note 148.

¹⁸⁶ See *In re Maclub*, *supra* note 127, and *In re Shoe Mfgs. Protective Ass'n*, *supra* note 129. These cases were instituted by the Attorney General under statute but the court in *In re Maclub* indicates that the remedy would be available apart from statute.

¹⁸⁷ *Supra* note 162.

Statutory *quo warranto* proceedings against individuals were carried to the supreme courts of Alabama¹⁸⁸ and Kansas,¹⁸⁹ resulting in each instance in cease and desist orders. The Kansas statute, which seems declaratory of the common law, authorizes the proceeding when any person shall usurp, intrude into or unlawfully hold or exercise any public office or shall claim any franchise within the state to which he is not entitled. The Kansas court justified the use of the writ by referring to the facts that the licensed attorney is an officer of the court and that his license has been quite commonly denominated a franchise.

Early use of the proceeding in this field was against corporations organized for the purpose of furnishing legal services.¹⁹⁰ In each case the corporation's charter was revoked since it neither had nor could acquire a license to practice law and the carrying out of its declared objects would necessarily involve such practice. The courts did not rely on statutory definitions of "practice of law," using instead the common understanding of the term. Two of the cases arose in California where by statute it was declared to be lawful to form a corporation for any purpose for which individuals could lawfully associate themselves. The court purported to answer this by asserting that even attorneys may not form a corporation for the practice of law.¹⁹¹

These cases differ somewhat from later cases in that in the former it was sought to prevent unlawful use of powers expressed in the corporate charter. The charge in more recent cases is that the corporation, even though it does not pretend to practice law or offer legal services, is unlawfully exercising a power which it does not possess.¹⁹² This approach, of course, will make the decision turn on the definition of "practice of law" adopted by the court. In the cases involving corporations organized specifically to render legal services the courts did not hesitate to revoke the charter, but such a harsh remedy has not been used when the proceedings have been directed against corporate collection agencies and trust companies. In such cases the courts assert a discretionary power to direct an ouster as to the activities deemed to constitute the practice of law without revoking the charter.¹⁹³ With this ouster order is usually coupled a warning that revocation will follow violations of the order.

The attorney general is usually regarded as the proper official to institute such proceedings,¹⁹⁴ but local prosecutors have also acted in this capacity.¹⁹⁵ In some

¹⁸⁸ Berk v. State, 225 Ala. 324, 142 So. 832 (1932).

¹⁸⁹ State ex rel. Boynton v. Perkins, 138 Kans. 899, 28 P. (2d) 765 (1934).

¹⁹⁰ People ex rel. Lawyers Institute of San Diego v. Merchants' Protective Corporation, 189 Calif. 531, 209 Pac. 363 (1922); People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); State ex rel. Lundin v. Merchants' Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919).

¹⁹¹ People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., supra note 190.

¹⁹² State ex rel. Beck v. Wichita Ass'n of Credit Men, 142 Kans. 403, 49 P. (2d) 1041 (1935). State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); State ex rel. McKittrick v. C. S. Dudley & Co. 102 S. W. (2d) 895 (Mo. 1937).

¹⁹³ State ex rel. Beck v. Wichita Ass'n of Credit Men; State ex inf. Miller v. St. Louis Union Trust Co.; State ex rel. McKittrick v. C. S. Dudley & Co., all supra note 192; State ex rel. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S. W. (2d) 918 (1931).

¹⁹⁴ People ex rel. Lawyers' Institute v. Merchants' Protective Corp., supra note 190; People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., supra note 190; State ex rel. Boynton v. Perkins, supra note 189; State ex rel. Beck v. Wichita Ass'n of Credit Men, supra note 192; State ex rel. McAllister

instances a group of attorneys alone have acted as moving parties.¹⁹⁶ In a California case brought by the attorney general at the instigation of a local bar association, the naming of the association as relator was challenged. The court said:¹⁹⁷

“In support of its contention that respondent had no legal capacity to sue, appellant says that ‘the relator,’ the Los Angeles Bar Association, ‘is not a corporation and therefore has no standing in court to sue in the name of the association.’ This contention betrays an inexplicable misunderstanding of the nature of this proceeding and of the relation thereto of the ‘people’ as plaintiff. The wrong of which complaint is made is of public, not private, concern. The only connection of the bar association with the case is shown by the opening of the complaint, wherein it is recited that the ‘people,’ by their attorney general, ‘upon the information and complaint of the Los Angeles Bar Association,’ complain of defendant and allege the cause of action. The addition of the name of the bar association to the complaint did not make this a private action. It, doubtless, is true that the arm of the law moved as the result of information given to the attorney general by the bar association; but that did not make the bar association the plaintiff in this action.”

In many respects this remedy would seem to be the simplest and most direct of those so far considered. It does not require the use of the rather tenuous theories upon which contempt proceedings must sometimes be based. It does not require a showing of a special interest in the moving party that characterizes the use of the injunction. Frequently it may be brought as an original proceeding in the supreme court of the state thus obviating the delay attendant upon appeals. The hazards of jury trial are eliminated. In view of these facts it is somewhat surprising that greater use has not been made of the remedy.

Mandamus and Prohibition

Even among extraordinary remedies mandamus and prohibition occupy a position of “high prerogative.” These writs are, in a sense, correlative, the one commanding and the other forbidding certain official action. Higher courts may thus command inferior courts or other tribunals, and, with the writ of mandamus at least, public officials. The use of these remedies in the unauthorized practice field would require a different approach from that of the other procedures considered. The latter have involved direct proceedings against the alleged unauthorized practitioner, while these remedies would necessarily be indirect in their effect unless the tribunal or official to which the writ was directed was engaged in unauthorized practice.¹⁹⁸

Reference has already been made to the failure of the State Bar of California to secure a writ of mandamus from the Supreme Court of that state directed to a lower

v. Sanderson, 280 Mo. 258, 217 S. W. 60 (1919); State *ex rel.* McKittrick v. C. S. Dudley & Co., *supra* note 192.

¹⁹⁶ State *ex inf.* Miller v. St. Louis Union Trust Co., *supra* note 192; State *ex rel.* Lundin v. Merchants’ Protective Corp., *supra* note 190.

¹⁹⁸ Berk v. State, *supra* note 188; State *ex rel.* v. Retail Credit Men’s Ass’n, *supra* note 193. In the two California cases, *supra* note 190, bar associations appear as the moving parties and this was true in fact, but nonetheless the attorney general of the state brought the action.

¹⁹⁷ *Supra* note 190 at 358, 244 Pac. at 1091.

¹⁹⁸ *E.g.*, a justice of the peace, or a probate judge. See Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932).

court which had dismissed contempt proceedings brought against alleged unauthorized practitioners.¹⁹⁹ In that instance the lower court had not refused to act judicially, but had simply dismissed the proceedings on the ground that the facts alleged did not set forth a contempt. It is frequently stated that recourse is not to be had to mandamus to control the form that judicial action shall take, its purpose being rather to compel the discharge of the judicial function in appropriate instances.²⁰⁰

Prohibition was used successfully as the remedy in *Goodman v. Beall*,²⁰¹ decided by the Supreme Court of Ohio in 1936. In this case the members of the Unauthorized Practice of Law Committee of the Ohio State Bar Association brought original proceedings in the Supreme Court for the writ of prohibition to be directed against the members of the State Industrial Commission, to "restrain" them from permitting laymen to appear before the commission in a representative capacity. The writ was allowed in part, but the question of the remedy was not treated because the defendants did not challenge its propriety. The Court does state, however, that it has recognized previously the applicability of the writ of prohibition to the Industrial Commission, and no doubt the case will be treated as substantial authorization for its use. Prohibition is regularly used to prevent tribunals from exceeding their jurisdiction. Presumably in applying this principle to the case of the Industrial Commission it would be argued that the commission had exceeded its jurisdictional powers in permitting the practice of law before it by laymen because the admission to practice is a matter over which the Supreme Court alone has control.

The effectiveness of the writ may be observed from the fact that it affected all "lay" practitioners before the Ohio Commission, even though they were not made parties to the suit.²⁰² This procedure, when used against administrative tribunals and state officials who license or issue permits to groups accused of unauthorized practice, would seem to be as sweeping an attack as possible, since it interdicts certain activity on the part of a whole class of individuals within the state, an objective not ordinarily achieved by any other means.

Declaratory Judgments

Where available the declaratory judgment makes possible an adjudication of right even though no consequential relief is, or could be, sought. As a method of proceeding against unauthorized practice of law it has been used on only one occasion. In this instance the Richmond Bar Association brought a suit in equity against the Richmond Association of Credit Men asking for a declaratory judgment under the Virginia statute,²⁰³ that the Association was engaged in the unauthorized practice of law. Such a decree was entered and sustained on appeal with immaterial changes.²⁰⁴ The propriety of the remedy was not attacked; in fact, the defendant association

¹⁹⁹ *State Bar of California v. Superior Court*, 40 Cal. (2d) 86, 47 P. (2d) 697 (1936). See p. 149, *supra*.

²⁰⁰ *Ex parte Alabama State Bar Ass'n*, 92 Ala. 113, 8 So. 768 (1891).

²⁰¹ 130 Ohio State, 200 N. E. 470 (1936).

²⁰² This may be compared with the contempt proceedings against individual practitioners before a similar body in Missouri. *Clark v. Austin*, *supra* note 27.

²⁰³ VA. CODE (1936) c. 254A, §§6140a *et seq.*

²⁰⁴ *Richmond Bar Ass'n v. Richmond Ass'n of Credit Men*, 167 Va. 327, 189 S. E. 153 (1937).

expressed its desire to have a declaration from the court stating what the law was on the subject.

There would seem to be little doubt of the applicability of this remedy to the unauthorized practice situation.²⁰⁵ It should be borne in mind, however, that the declaratory judgment does not do away with the usual procedural and substantive requirements, except as to the invoking of consequential relief.²⁰⁶ In the Virginia case the court coupled an injunction order with the declaratory judgment but the lack of such a sanction would not deprive the proceeding of its tactical value in the unauthorized practice campaign.

METHODS OF FACILITATING THE INSTITUTION OF ACTIONS

Court Committees

Some of the most remarkable procedural developments in the unauthorized practice of law field relate to the preliminary investigation of complaints rather than to the application of remedies. Bar groups in certain of the states have requested their courts to appoint committees to investigate instances of unauthorized practice within their jurisdiction. In complying with these requests lower courts in Florida, Minnesota and Ohio have usually designated the petitioning committee as its committee for the purpose, and to facilitate their work have given them power to subpoena witnesses and documents and take testimony under oath.²⁰⁷ In the earlier instances, the courts did designate one judge to conduct the hearings in connection with the investigation²⁰⁸ but more recently this practice has not been followed, the full exercise of the powers being given to the committee itself, acting as an "arm of the court." Missouri is the one state in which such a committee has been set up on a state-wide basis, and the explanation for this is to be found in the attitude of the supreme court of that state concerning its inherent powers over the practice of law.²⁰⁹ Most of the committees have been appointed by courts of general trial jurisdiction and the authority under which they can do this is not very clearly defined. Essentially, it is the same problem as arose in connection with the power of these lower courts to punish for constructive contempt.²¹⁰ To sustain their power to establish committees to conduct a general investigation into the practice of law in that locality it must be established that, inherently, they have power to control law practice and the administration of justice within their territorial jurisdiction. It has been asserted by an Ohio appellate court that such is the case,²¹¹ but in the only instance in which

²⁰⁵ It is interesting to note that in two cases laymen have brought actions against the bar groups for declaratory judgments. See (1937) 3 UNAUTH. PRAC. NEWS 67, and (1938) 4 *id.* 16.

²⁰⁶ BORCHARD, DECLARATORY JUDGMENTS (1934) 24.

²⁰⁷ *In re* Petition of Committee on Rule 28 (Ohio C. P. 1931); *In re* Inquiry into Unauthorized Practice of Law in Franklin County (Ohio C. P. 1935); *In re* Inquiry into Unauthorized Practice of Law in Columbiana County (Ohio C. P. 1935); *In re* Inquiry into Unauthorized Practice of Law in Dade County (Fla. Cir. Ct. 1935); *In re* Petition for Investigation of Unauthorized Practice of Law in Hennepin County (Minn. Dist. Ct. 1936), all references are collected in BRAND, *op. cit. supra* note 1, at 815.

²⁰⁸ *In re* Petition of Committee on Rule 28, *supra* note 207; see *Morton v. Beery*, 39 Ohio L. Rep. 273 (Ohio App. 1933).

²⁰⁹ *Supra* p. 145. See Clark, *Missouri's Accomplishments and Program for Eliminating the Unauthorized Practice of Law* (1936) 22 A. B. A. J. 9.

²¹⁰ *Supra* p. 148-150.

²¹¹ *Morton v. Beery*, *supra* note 208.

a court of last resort has passed on the matter, the power was denied.²¹² The status of these committees must remain a matter of doubt, then, until the matter has been passed upon by the upper courts of the states in which they are functioning.

Proctor of the Bar

The office of the Proctor of the Bar for the Eighth Judicial District in New York established in 1936 might be considered a refinement of these court committees. The proctor is a full time, salaried official whose duties include, among others, the investigating and reporting to the Appellate Division on instances of unauthorized practice of law. He is empowered to conduct hearings, administer oaths, take testimony and subpoena witnesses and documents. The work of this new officer is set forth in his first annual report, recently published.²¹³ The most important legal distinction between the proctor and the court committees previously referred to is, of course, the statutory authorization for his existence and powers.

The Continuing Proceeding

The new devices discussed in this section have related to investigation—to the ascertainment of facts. The proceeding by which relief is granted on the basis of the facts might perhaps be any one of the procedures so far considered in this article. Certain of the committees, however, have made use of a unique procedure, which for want of a better name has been designated a "continuing proceeding." The proceeding is entitled "*In re Unauthorized Practice of Law in . . . County*" and is given a certain docket number. When the committee has a complaint to make against an alleged unauthorized practitioner, it comes in, reports the facts to the court and asks that appropriate relief be given (usually by injunction). The courts then issue an order to the defendant requiring him to appear and show cause why the relief should not be granted. The only reported case considering this method of proceeding was *Morton v. Beery*,²¹⁴ in which the defendant urged that there was no "action" pending before the court which gave it jurisdiction to enter an order, pointing to the constitutional provision prescribing a single form of action in Ohio. The court answered this contention by designating the procedure in question as a "special proceeding" and not affected by the constitutional provision. The court reasoned that a proceeding not authorized by statute and yet designed to exercise the inherent powers of the court must be a special proceeding, and pointed out that there was both notice and ample opportunity for a hearing. Hence the court upheld the procedure although no precedent was available.

These proceedings seem to reflect the dictum of Judge Burch, quoted above,²¹⁵ that no action in the ordinary sense is involved in a proceeding against unauthorized practice of law. More than any of the other remedies considered they demonstrate the willingness of the courts to adapt their processes to the exigencies of the unauthorized practice campaign.

²¹² *Ex parte Wilkey*, *supra* note 72. The circuit court did not have power to appoint a commission to enquire into unauthorized practice of law in the absence of an effective statute or rule of court. Such an enabling rule was later announced. See (1937) 3 UNAUTH. PRAC. NEWS 134.

²¹³ *Supra* note 35.

²¹⁴ *Supra* note 208.

²¹⁵ *Supra* p. 149.