



Spring 3-1-1940

Notes

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>

Recommended Citation

Notes, 1 Wash. & Lee L. Rev. 232 (1940).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol1/iss2/5>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

NOTES

EMPLOYMENT RELATIONSHIPS WITHIN THE SCOPE OF STATE
UNEMPLOYMENT COMPENSATION STATUTES

One answer of the Federal Government to the acute unemployment problem which had confronted the nation during the depression years was the Social Security Act of 1935.¹ Two titles of the Act relate directly to unemployment benefits. Title III authorizes the essential federal appropriations, while Title IX imposes a federal tax upon those employers who do not fall within the enumerated exceptions. The proceeds of this tax are paid like other internal revenue collections. However, should the taxpayer make contributions to an unemployment fund under a state law, he is allowed a credit of not more than ninety per cent of the federal tax. General control of the Act is administered by the Social Security Board which is given power to establish standards of operation, and to approve the state laws under which the government will make credit allowances to employers contributing to a state fund.² Thus it may be seen that the Act contemplates a coordinated state and federal plan, directed toward alleviating the effects of wide-spread unemployment.³

¹Act of August 14, 1935, Ch. 531, 49 Stat. 620, 42 U. S. C. A. §§ 301-1307 (Supp. 1939).

²Section 903 provides that the Social Security Board shall approve any state law which it finds provides that:

- (1) All compensation is paid through such agencies as the Board may approve;
- (2) No compensation is payable within two years of the first period with respect to which contributions are required.
- (3) All money received is payable to the Secretary of the Treasury to the credit of the Unemployment Trust Fund;
- (4) All money withdrawn shall be used solely in the payment of compensation;
- (5) Compensation shall not be denied an individual for refusing to accept new work under an enumerated list of conditions;
- (6) The rights, privileges, and immunities conferred by the Act exist subject to the power of legislative repeal or amendment.

³Prior to the passage of the Act, few states had imposed taxes for unemployment insurance (Wisconsin, 1931, California, Massachusetts, New Hampshire, and New York, 1935) because of the economic disadvantage to their commerce in competition with that of states which did not have this type of tax.

Douglas, J., in *Buckstaff Bath House Co. v. McKinley*, 60 S. Ct. 279, 282 (1939):
". . . under the coordinated scheme which the act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in the absence of a declaration to the contrary, it would seem to be a fair presump-

Influenced⁴ by the provision for a federal tax credit to employers coming within the provision of the National Act, the legislatures of the several states quickly adopted⁵ corollary Acts complying with the requirements of the Social Security Board.⁶

Employers who were opposed to payments thereunder first attacked the whole plan as unconstitutional, but the Supreme Court of the United States upheld the constitutionality, both of the Federal Act and of the complementary state laws.⁷ The opponents of the plan then sought to avoid payments by a showing that they did not fall within the scope of the employment relationships adopted by the state laws. It is to this latter phase of litigation that the present inquiry is directed.

At the outset it must be borne in mind that the common law relationships of master and servant, principal and agent, and hirer and independent contractor have different connotations and that the terms employer and employee may be given diverse interpretations.⁸ Confusion in distinguishing between them has arisen because of a tendency on the part of some courts and writers to use the terms "servant" and "agent" interchangeably, and because of the lack of a definite standard by which to define the scope of the term "independent contractor." In a strict sense "agent" denotes a commercial relationship while "servant" refers to the manual or "service proper" relations, the distinction being chiefly in the degree of control exercised by the "master."⁹ Many tests have been resorted to in an effort to define an independent contractor relationship,¹⁰ but the most realistic approach to the prob-

tion that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize."

⁴The term "coerce" has been in ill repute since the decision of *Stewart Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883, 81 L. ed. 1279, 109 A. L. R. 1293 (1937).

⁵By August 16, 1937, all states and territories and the District of Columbia had passed unemployment compensation laws, covering more than 21,000,000 workers.

⁶*Supra*, note 2.

⁷*Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, 57 S. Ct. 868, 81 L. ed. 1245, 109 A. L. R. 1327 (1937) upheld the constitutionality of the Alabama Act; *Helvering v. Davis*, 301 U. S. 619, 57 S. Ct. 904, 81 L. ed. 1307, 109 A. L. R. 1319 (1937) upheld the Federal Social Security Act; *Stewart Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883, 81 L. ed. 1279, 109 A. L. R. 1293 (1937) upheld the Federal Social Security Act. And see *Howes Bros. Co. v. Massachusetts Unemployment Compensation Commission*, 5 N. E. (2d) 720 (Mass. 1936), cert. denied, 300 U. S. 657, 57 S. Ct. 434, 81 L. ed. 867 (1937) upheld the Massachusetts Act.

⁸Restatement, Agency (1933) § 220, comment *c*.

⁹*American Sav. Life Ins. Co. v. Riplinger*, 249 Ky. 8, 60 S. W. (2d) 115 (1933); Restatement, Agency (1933) § 220, comment *c*.

¹⁰The test most relied upon has been "who had the right of control?" The weakness of this test, it has been argued, lies in the fact that it first necessitates a declara-

lem is taken by the Restatement of Agency which enumerates a list of factors to be considered in determining whether one is a servant or an independent contractor.¹¹

The unemployment compensation statutes under which questions of an employer's tax liability have arisen may be classified broadly into two major types. Under the first type, which the courts have interpreted as affording a maximum coverage, decisions increase the tax burden by extending the benefits of unemployment compensation to a class of employees who under the tests applied at common law might be termed "independent contractors." Statutes of the second type have been interpreted as having a more limited scope, thus restricting the benefits to that group of employees qualifying as common law "servants." This diversity of interpretations, as will be subsequently shown, is due to a fundamental difference in the various statutes, and to a tendency on the part of the courts to define the employer and employee relationships for tax purposes by recourse to inapt decisions in unrelated fields.¹²

tion of the relationship, and then an assertion that the defendant did or did not have control. *Leidy, Salesmen as Independent Contractors* (1930) 28 Mich. L. Rev. 365. More helpful has been the entrepreneur theory, under which liability is imposed upon him who has in fact assumed the risk of profit and loss in the enterprise. Indicative of the entrepreneur are: (a) control, the ability to formulate and execute policies, (b) ownership, legal title to the property used in the performance of the production or marketing functions of the enterprise, (c) chance of profit and risk of loss. The party having the majority of these attributes is the entrepreneur. *Douglas, Vicarious Liability and Administration of Risk* (1929) 38 Yale L. J. 584.

¹¹Restatement, Agency (1933) § 220 (2): "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant."

¹²As precedents for their decisions the courts have relied upon cases arising in the field of tort liability and those arising under the workmen's compensation acts. It should be noticed, however, that in these cases the employment relationships involved are defined in common law terminology. In *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440 (1899), a salesman was held to be a servant and not an independent contractor, hence the employer was held liable for torts committed in the course of the salesman's employment.

In *Gulf Refining Co. v. Brown*, 93 F. (2d) 870 (C. C. A. 4th, 1938), an oil com-

Illustrative of the broad type of statute is the unemployment compensation act which was passed by the legislature of the State of Washington¹³ pursuant to the provisions of the National Social Security Act.¹⁴ The employment upon which the excise is levied is defined as:

“. . . service . . . performed for wages or under any contract of hire, written or oral, express or implied. . . . Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless it is shown to the satisfaction of the director that:

“(i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of services and in fact; *and*¹⁵

“(ii) Such service is either outside the usual course of the business for which such service is performed, or that such service

pany was held liable for the negligence of its distributing agent. The distributor owned all the equipment and paid all of the expenses of conducting his business, but was held to be a servant because an examination of the contract with the oil company showed that a substantial degree of control over his activities was exercised by the company. *Contra*: (minority) *Greaser v. Appaline Oil Co.*, 109 W. Va. 396, 155 S. E. 170 (1930).

In *Bohanon v. James McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, 60 P. (2d) 510 (1936), a publisher was held not liable for the tort of a distributor who bought newspapers from the publisher and sold them to subscribers along a prescribed route even though the publisher had the right to take over the management of the route at any time the distributor might prove unsatisfactory. The court held that this restriction merely assured a satisfactory quality of work, and that complete, unqualified control determines the master-servant relationship. *Contra*: *Schmitt v. American Press*, 42 S. W. (2d) 969 (Mo. App. 1931).

In *Mountain Meadow Creameries v. Industrial Accident Comm.*, 25 Cal. App. (2d) 123, 76 P. (2d) 724 (1938), the widow of a dairy distributor was held not entitled to workmen's compensation insurance. It was shown that deceased was assigned an exclusive territory, required to sell only the company's products therein from trucks of an approved body and color design. The contract between the parties was terminable immediately for an enumerated list of causes. The court held that these restrictions merely assured a satisfactory performance of the contract and that they were not so detailed as to indicate a master-servant relationship. *Contra*: *Press Pub. Co. v. Industrial Acc. Comm. of California*, 190 Cal. 114, 210 Pac. 820 (1922), wherein a newspaper distributor was held entitled to workmen's compensation insurance; *McDermott's Case*, 283 Mass. 4, 186 N. E. 231 (1933), in which a journeyman steam fitter was held entitled to workmen's compensation insurance. *Glielmi v. Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906 (1930), where a dairy salesman was held entitled to workmen's compensation insurance upon a showing that he bought milk products from the company and resold to customers along a prescribed route. He was required to hire the company's wagons, and to permit the company's representative to ride with him at any time to supervise the handling of the route. The contract was terminable at the pleasure of the company. The court held that he was a servant even though the contract was framed to suggest a different relation.

¹³Washington, Laws of 1937, Ch. 162, p. 574.

¹⁴Supra, note 1.

¹⁵Italics supplied.

is performed outside of all of the places of business of the enterprises for which such service is performed; and¹⁶

"(iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service."¹⁷

By establishing this statutory test which requires the concurrence of these three essential items in order to entitle the employer to an exemption from the social security tax, it is apparent that the legislature intended the concept of employment to be more inclusive than a mere master and servant relationship. The Supreme Court of the State of Washington adopted such an interpretation in the case of *McDermott v. State*¹⁸ when it held that barbers employed under oral lease agreements¹⁹ were "employees" within the meaning of the Act. The court argued that it was unnecessary to decide whether or not the barbers were "servants" ". . . because the parties are brought within the purview of the unemployment compensation act by a definition more inclusive than that of master and servant."²⁰

Construing *similar* statutes, the courts of other jurisdictions have been equally astute in making this differentiation between the statutory definition of employment and the common law concepts designated by the same words. Thus it has been held in Colorado²¹ and North Caro-

¹⁶Italics supplied.

¹⁷Washington, Laws of 1937, Ch. 162, § 19(g), p. 609.

¹⁸196 Wash. 261, 82 P. (2d) 568 (1938), hereafter referred to as the *McDermott* case.

¹⁹It was shown that at the time the National Industrial Recovery Act became effective the plaintiff, who held himself out as owner of the shop, entered into oral lease agreements with his barbers. Under these agreements each was "leased" a chair and the necessary barbering equipment in consideration of a percentage of the gross receipts from the services performed on the chair. When any chair was temporarily vacated by the original "lessee" the lease was suspended. A barber working at a less advantageously located chair might move to the vacant one thus making effective a new lease between himself and the plaintiff. These arrangements were terminable by either party upon a week's notice, and under certain conditions by the plaintiff without notice.

²⁰196 Wash. 261, 82 P. (2d) 568, 570 (1938): "We are clear that the so-called oral lease agreements are, in fact, contracts of service within the meaning of the act. To hold otherwise would be to ignore the realities of the case as disclosed by the . . . [plaintiff's] . . . own testimony." It is of interest to note that no cases were cited in the opinion.

²¹*Industrial Commission v. Northwestern Mutual Life Insurance Co.*, 88 P. (2d) 560 (Colo. 1939). In this case it appeared that the company assigned its general agents to exclusive territories. These agents in turn contracted with district or special agents who subsequently contracted with the various soliciting agents. A general control was exercised over these agents by requiring them to observe certain "Rules and In-

lina²² that insurance agents were "employees" and entitled to unemployment compensation. And the Utah Supreme Court has held that a commission agent was within the purview of the Utah Act.²³ Although the New York Act²⁴ does not establish a list of requirements which must be met in order to exempt an employer from tax payments, its operation was extended to common law "independent contractors" when the

structions" in the issuance of policies, and by prohibiting full time agents from entering other lines of business except with the consent of the company. Each contract denied that a master and servant relationship had been established with the company. Disregarding this provision, the court held that the company was not exempt from the act since it had not shown a concurrence of the three conditions which the legislature considered essential for an exemption. Accord: *Equitable Life Insurance Co. of Iowa v. Industrial Commission*, 95 P. (2d) 4 (Colo. 1939).

²²*Unemployment Compensation Commission of N. C. v. Jefferson Standard Life Insurance Co.*, 215 N. C. 479, 2 S. E. (2d) 584 (1939). Therein an insurance company, which required its agents to devote their full time to their duties, and to issue policies in accordance with the company's instruction, was held not to be able to qualify under the three requirements for an exemption. "The clear and unequivocal meanings of those [statutory] definitions are strongly indicative of legislative intent . . . to disregard a number of the neat categories of the common law. . . . Although the extent of the area encompassed by some of the definitions may cause surprise, *the duty of this Court is to expound and to interpret the law as it is given to us, not to redraft it along lines which may seem to us more conservative and more desirable.*" 2 S. E. (2d) 584, 590. (Italics supplied.)

²³*Globe Grain and Milling Co. v. Industrial Commission*, 91 P. (2d) 512 (Utah 1939). In this case the company for which the agent sold products furnished him with stationery, order books, and samples. It also made advances when the agent sold to customers with good credit, and at times collected overdue accounts. The agent furnished his own display room and kept his own hours. The contract was terminable at the will of either party. In holding that this company had not qualified for exemption under the statutory test, the court declared that it was not bound by a strict common law definition of "independent contractors." "The most independent of independent contractors . . . are not included in the class of individuals entitled to benefits, but a class of individuals, who under strict common law concept of independent contractorship were other than employees, are entitled. We need not draw the line. It is drawn for us by the act." 91 P. (2d) 512, 514 (Utah 1939). Upon petition for rehearing, 97 P. (2d) 582 (Utah 1939) the court said of the quotation just given: "The language was merely illustrative, but we delete it so as to avoid confusion. . . . Since the act applies to a new field of law which has its own glossary and defines the relationships to which it applies, *the introduction of old concepts which fitted into the conceptual pattern of tort liability carried over into this field may only be confusing.*" (Italics supplied.)

²⁴Ch. 32, Labor Law (Ch. 31 of the Consolidated Laws), Art. 18, § 502, as amended June 1939, Ch. 662 § 1: " 'Employment,' except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge actual or constructive of the employer, in which all or the greater part of the work is to be performed within this state."

court held that industrial home workers²⁵ and news carriers²⁶ were employees within its terms. Surprisingly, the Washington State Supreme Court has not considered that it was bound by its prior decision in the *McDermott* case. That decision was not only in effect overruled in the case of *Washington Recorder Publishing Co. v. Ernest*,²⁷ but the court went further and substituted a wholly different test to be used in establishing the existence of an employer and employee relationship. In deciding that news carriers were "independent contractors" and not "employees"²⁸ within the meaning of the act, the majority of the court argued that the statute merely established a guide and that the legislature really intended to include only common law "servants" within its scope.²⁹ In support of its decision the court quoted verbatim that com-

²⁵*Andrews v. Commodore Knitting Mills*, 257 App. Div. 515, 13 N. Y. S. (2d) 577 (1939). In this case the company sent raw materials to various home workers together with a statement of the price which would be paid for the finished garments. The other equipment was furnished by the workers. Finished garments which met the company's inspection were bought from the workers at the predetermined prices. The court held that these workers were employees within the meaning of the act since a sufficient control was exercised by the company to establish an employer-employee relationship.

²⁶*Matter of Scatola v. Bronx Home News Pub. Co.*, 257 App. Div. 471, 14 N. Y. S. (2d) 55 (1939). Therein a route carrier who delivered papers to subscribers of the publishing company was held to be an employee and not an independent contractor. It was shown that his deliveries were made over a prescribed route to subscribers whose names were furnished by the company. The carrier made an initial deposit for his papers and at the end of each week paid the company's inspector for the papers which he had delivered. His compensation was the difference between the price of the papers to him, and the sale price to the customers. The contract was terminable at the will of the company. "The relation between this carrier and publisher differs from that of a newsboy who purchases papers and sells them on the street corner through crying his wares. While this carrier paid the . . . [company's] . . . inspector for the papers which he had delivered, his ownership was qualified, as they could be used only in fulfilling the publisher's contract with its subscribers and in furthering the effort of the publisher to obtain new subscribers. In determining whether a person is an independent contractor or an employee, the authorities deem the right to 'hire' and 'fire' of great importance." 257 App. Div. 471, 472.

²⁷199 Wash. 176, 91 P. (2d) 718 (1939). Of the four justices who comprised the majority only two had been on the bench when the decision in the *McDermott* case had been rendered. Simpson, J. concurred in the decisions of both cases. Geraghty, J. who had written the opinion in the *McDermott* case, concurred in the result in the second case. The only mention made of the *McDermott* case in the majority opinion concerns the right to bring this action under the declaratory judgments act.

²⁸The contract involved was the familiar "carrier contract" whereby the publisher "sold" the papers to the newsboy who in turn "resold" them to the publisher's subscribers. The publisher assigned exclusive routes and supervised the handling of accounts. The contract was terminable at the will of the publisher.

²⁹The opinion states that the items in the statutory test do ". . . not differ from the test employed at the common law and by this court in determination of the question whether the relationship is that of employee or independent contractor.

ment of the Restatement of Agency which was favorable to its position.³⁰ Had the court read a paragraph further it would have found that "... *The context and purpose of the particular statute controls the meaning [of the term "servant"] which is frequently not that which the same word bears in the Restatement of this subject.*"³¹ By this process of judicial legislation the court, violating the well-established rule of statutory interpretation that the legislative definition must prevail,³² held that a concurrence of the three items in the statutory definition of "employment" was not essential for exemption under the Act. Since the purpose of this broad statutory definition was to prevent the evasions which arise from the refined distinctions attendant upon common law concepts,³³ it would appear that the decision merely raised additional problems of tax avoidance.

In contrast to the broad statutes of the Washington type are those which correspond to the unemployment compensation acts of Connecticut³⁴ and Kentucky.³⁵ The employment upon which the Connecticut excise is based is defined as "... any service ... performed under any express or implied contract of hire *creating the relationship of master and servant.*"³⁶ The Connecticut court in *Northwestern Mutual Life Insurance Co. v. Tone*³⁷ held that insurance agents hired under a con-

... In the enactment of the Unemployment Compensation Statute the legislature selected or picked out three elements to be considered. The legislature did not say, nor is the language capable of that interpretation, that each of those elements must exist one hundred percent in order to establish the relationship of independent contractor. Surely, the legislature did not intend to establish a different rule than that which has heretofore been employed by this court. To hold otherwise would be to, in effect, eliminate the relationship of independent contractor." 199 Wash. 176, 91 P. (2d) 718, 724 (1939).

³⁰Restatement, Agency (1933) § 220, comment *a, b, c.*

³¹Restatement, Agency (1933) § 220, comment *d.* (Italics supplied.)

³²*Fox v. Standard Oil Co. of N. J.*, 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780 (1934); *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F. (2d) 166, 170 (C. C. A. 8th, 1938), "It is a general rule that where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding"; *Taran v. United States*, 88 F. (2d) 54 (C. C. A. 8th, 1937); *State v. City of Des Moines*, 266 N. W. 41, 42 (Iowa 1936), "In defining terms as applied to any given act, the legislature is its own lexicographer"; *Unemployment Compensation Commission v. City Ice and Coal Co.*, 216 N. C. 6, 3 S. E. (2d) 290 (1939).

³³This point was argued by Blake, C. J. in his vigorous dissenting opinion in which he urged the court to adhere to its decision in the McDermott case.

³⁴Connecticut, General Statutes, Supp. 1937, Ch. 280a.

³⁵Kentucky Statutes, 1939 Supp., § 4748g- 1 et seq.; Acts of 1936, 4th Extraordinary session, Ch. 7, as continued and replaced by Acts of 1938, Ch. 50.

³⁶Connecticut, General Statutes, Supp. 1937, Ch. 280a, § 803d. (Italics supplied.)

³⁷125 Conn. 183, 4 A. (2d) 640, 121 A. L. R. 993 (1939).

tract which subjected them to a substantial degree of control³⁸ were not "servants" within the statutory meaning. It has been thought, however, that because of the company regulations which govern the issuance of policies and the division of territories, and the company prohibition forbidding agents to engage in other business activities except with express permission, the agents qualified as "servants" within the restrictive language of the act.³⁹ A subsequent decision by the same Connecticut court in *Jack and Jill, Inc. v. Tone*⁴⁰ would indicate that where the contract of employment merely creates the appearance of an independent contractor relationship, the "master" will not be exempt from tax liability. That case presented a situation in which an ice cream company sought to avoid payment of the tax by "selling" its products to its truck drivers who in turn "resold" to customers along a prescribed route. It was shown that at the end of each day's deliveries the "unsold" ice cream was returned to the company for full credit, that the drivers were required to "borrow" the company's trucks, and that they were required to permit the company's inspectors to supervise the management of the routes. In reaching its decision the court rightly held that since the drivers had no substantial discretion as to manner of performance of their services, they were mere "servants." It seems unfortunate, however, that the court, in defining the relationships which arose in an entirely unrelated field of law, sought recourse to the common law concepts of "servant" and "independent contractor."⁴¹

The Unemployment Compensation Law of Kentucky differs from the restrictive Connecticut Act in several important particulars. In the first place, the law specifically provides that "This Act shall be liberally construed to accomplish the purposes thereof."⁴² Secondly, "'Covered employment' means service performed for wages or under contract of hire in which the relationship of the individual performing such services and the employing unit for which such services are rendered is, as to those services, *the legal relationship of employer and employee.*"⁴³

³⁸For a fuller discussion of the contract see *Industrial Commission v. Northwestern Mutual Life Insurance Co.*, 88 P. (2d) 560 (Colo. 1939), *supra* note 21.

³⁹Commenting upon this decision, in the case of *Industrial Commission v. Northwestern Mutual Life Insurance Co.*, 88 P. (2d) 560, 567 (Colo. 1939), *supra*, note 21, the court said: ". . . a reading of the opinion in the Connecticut case will disclose that the Supreme Court there placed a rather strained construction on the relationship of master and servant as applied to its Unemployment Compensation Act."

⁴⁰9 A. (2d) 497 (Conn. 1939).

⁴¹See *Globe Grain and Milling Co. v. Industrial Commission* (on rehearing) 97 P. (2d) 582 (Utah 1939), *supra* note 23.

⁴²Kentucky Statutes, 1939 Supp., § 4748g-21.

⁴³*Barnes v. Indian Refining Co.*, 280 Ky. 811, 134 S. W. (2d) 620, 622. (Italics supplied.)

The Kentucky court in construing this statute apparently has adopted a construction as narrow as that of the Connecticut decisions.

In the Kentucky case, the Indian Refining Company asked for a declaration of its rights under the above act, and that it be adjudged that a distributing agent was not an employee within the statutory definition. The Kentucky court in *Barnes v. Indian Refining Co.*⁴⁴ held that this agent was an "independent contractor" and not within the class of persons benefited by the Act. In reaching such a conclusion the court seemed to be influenced by these considerations: first, the control exercised by the oil company was directed merely towards results and not details; second, even though the legislature said that the act was to be liberally construed it did not mean that its operation was to be extended to persons not within its letter; third, the act is a taxing statute and should be construed most strongly against the taxing power; fourth, one of the company's agents was a corporation and it is clearly apparent that the legislature did not intend to include within the scope of the Act services rendered by corporations.⁴⁵

It seems unfortunate that this erroneous decision was considered as controlling in another jurisdiction.⁴⁶ In the first place, it was shown, and it has often been held,⁴⁷ that the oil company exercised a substantial degree of control over the distributing agent. Secondly, it is difficult to see how a statute of this nature can be "liberally construed to accomplish the purposes thereof" without extending its benefits to a larger class of persons than is embraced within the common law concept of "servant." Thirdly, this legislative declaration for liberality of construction should take precedence over the canon of interpretation that excises should be construed in favor of the taxpayer. And lastly, while the

⁴⁴280 Ky. 811, 134 S. W. (2d) 620 (1939).

⁴⁵In *Texas Co. v. Wheelless*, 187 So. 880 (Miss. 1939) construing a similar contract under a similar statute, the court held that a consignment agent was without the provisions of the act. Apparently the court was influenced by the facts that: (1) this was an excise tax and hence should be construed most strongly against the taxing power, (2) many of the consignment agents were corporations, and (3) "employment" should be interpreted in its ordinary sense. Accord: *American Oil Co. v. Wheelless*, 187 So. 889 (Miss. 1939).

⁴⁶*Indian Refining Co. v. Dallman*, 8 U. S. L., Week 441 (S. D. Ill. 1940).

⁴⁷*Gulf Refining Co. v. Brown*, 93 F. (2d) 870 (C. C. A. 4th, 1938), and cases therein cited. For a complete discussion of the consignment contracts and the control which the petroleum companies exercise over their distribution agents and gasoline station operators see, *Gulf Refining Co. v. Fox*, 11 F. Supp. 425 (S. D. W. Va. 1935) aff'd 297 U. S. 381, 56 S. Ct. 510, 80 L. ed. 731; *Ashland Refining Co. v. Fox*, 11 F. Supp. 431 (S. D. W. Va. 1935), aff'd, 297 U. S. 381, 56 S. Ct. 510, 80 L. ed. 731; *Maxwell v. Shell Eastern Pet. Prod. Co. Inc.*, 90 F. (2d) 39 (C. C. A. 4th, 1937), cert. denied, 302 U. S. 715, 58 S. Ct. 34 (1937).

legislature admittedly did not intend to bring the services rendered by a corporation within the Act, such a reason has no bearing upon the present case. The question to be determined here is whether or not consignment agents in their individual capacities are to be considered employees of the company. Moreover, it might well be shown that it was the intention of the legislature, even though the consignment agent was a corporation, to consider the employees of the corporate agent employees of the oil company within the meaning of the Act.

At the present time a prediction regarding the trend of decisions under either type of statute would be mere conjecture. A brief summary of the past decisions might, however, serve as a guide. Where an admitted control has been exercised by the "employer" over the details of the services sought to be included within the ambit of an unemployment compensation statute, the courts have held that the person performing such services was entitled to the benefits of unemployment compensation under either type of statute.⁴⁸ Where it has been shown that a substantial degree of control has been exercised by the employer, but under a common law test an independent contractor relation can be made out, cases arising under the narrow type of statute have held that the individual performing the services under the contract was not an "employee."⁴⁹ On the other hand, courts construing a broad statute have held that an employment relationship subject to the Act has been established.⁵⁰ Where no substantial degree of control could be shown, the "employer" has been held not liable for tax payments under either type of statute.⁵¹

It is argued that the primary cause of these inconsistent decisions is

⁴⁸Jack and Jill, Inc. v. Tone, 9 A. (2d) 497 (Conn. 1930); McDermott v. State, 196 Wash. 261, 82 P. (2d) 568 (1938).

⁴⁹Northwestern Mutual Life Insurance Co. v. Tone, 125 Conn. 183, 4 A. (2d) 640, 121 A. L. R. 993 (1939); Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620 (1939); American Oil Co. v. Wheelless, 187 So. 889 (Miss. 1939); Texas Co. v. Wheelless, 187 So. 880 (Miss. 1939).

⁵⁰Equitable Life Insurance Co. of Iowa v. Industrial Commission, 95 P. (2d) 4 (Colo. 1939); Industrial Commission v. Northwestern Mutual Life Insurance Co., 88 P. (2d) 560 (Colo. 1939); Andrews v. Commodore Knitting Mills, 257 App. Div. 515, 13 N. Y. S. (2d) 577 (1939); Matter of Scatola v. Bronx Home News Pub. Co. 257 App. Div. 471, 14 N. Y. S. (2d) 55 (1939); Unemployment Compensation Commission v. Jefferson Standard Life Insurance Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). Contra: Washington Recorder Pub. Co. v. Ernest, 199 Wash. 176, 91 P. (2d) 718 (1939).

⁵¹Probably the court which has been most liberal in its decision on this particular point was the Utah court in *Globe Grain and Milling Co. v. Industrial Commission*, 91 P. (2d) 512 (Utah 1939). It will be noticed, however, that even there the attempt was made to establish the control element in order to hold that the commission agent was an employee within the meaning of the Utah Act.

the failure of the various legislatures to define clearly the employment relationships which they intended to include within the scope of the Acts. This failure, coupled with the economic predilections of the several courts,⁵² and their apparent inability to distinguish satisfactorily between the relationships of master and servant, principal and agent, and hirer and independent contractor, has unduly restricted the coverage of many of the statutes. In view of the purpose for which the Social Security Act was passed, the fact that the older concepts of master and servant arose in entirely different and unrelated fields, and the ease with which evasions can be effected under an interpretation based upon common law principles, it would seem that a liberal construction would offer the better approach under either a broad or a narrow unemployment compensation statute.

EMERY COX, JR.

THE CORPORATE PRACTICE OF LAW

The problem of the corporate practice of law, though not a new one in the courts,¹ has in recent years been receiving wide spread attention due to the increased activities of trust companies and collection agencies.² The rapid increase in the number of trusts being administered by banks and trust companies in the United States,³ each maintaining a separate legal department with its own attorney-employee officers drafting various types of instruments which the lawyer has been accustomed to designate as legal instruments, and the drafting of which to the mind of the average attorney constitutes the "practice of law,"

⁵²See *Unemployment Compensation Commission of N. C. v. Jefferson Standard Life Insurance Co.*, 215 N. C. 479, 2 S. E. (2d) 584 (1939), *supra* note 22, and *Stone, J.*, dissenting in *Morehead v. People of the State of New York*, 298 U. S. 587, 633, 56 S. Ct. 918, 933, 80 L. ed. 1347 (1936).

¹As early as Lord Coke's day it was the recognized doctrine that a corporation could not appear "in person" by its officers or agents, who were not attorneys, in an action against itself. 1 *Coke On Litt.* 66b.

²*Otterbourg, Collection Agency Activities: The Problem From the Standpoint of the Bar* (1938) 5 *Law and Contemp. Prob.* 35, "There are now functioning in the United States approximately four hundred twenty-nine committees on unauthorized practice of law in addition to the National Committee of the American Bar Association."

³*Encyc. of the Social Sciences* (1935) 125, "In the year ending June 30, 1933, it was reported by the comptroller of the currency that national banks were administering over 100,000 individual trusts with assets aggregating over \$6,000,000,000 and were handling corporate trusts . . . aggregating over \$10,000,000,000." See also 1 *Powell, Cases and Materials on Trusts and Estates* (1932) 41-47.

has furnished a major source of the litigation. Collection agencies have likewise fallen under the ban against the corporate practice of the law because, even though attorneys are hired by the agencies to collect debts, such attorneys are answerable to the agencies rather than to the creditor members upon whose claims suits are being brought.

A corporation, being an artificial entity which exists only in contemplation of law, has neither the right nor the power to practice law.⁴ The reasons assigned for excluding corporations from the practice of law have regard to the special nature of the attorney's calling. The practice of the legal profession calls for skill and knowledge, necessarily involves the intimate and confidential relationship of trust and confidence which exists between attorney and client, and is subject to the power of the courts to use summary proceedings by disbarment or otherwise, if necessary, to enforce on the part of the attorney observance of obligations and duties growing out of this relationship. The courts hold that a corporation cannot adequately satisfy these considerations.⁵ It is conceded that a corporation could comply with the prerequisite of skill and knowledge by hiring licensed attorneys to act for it, but the cases uniformly hold that the practice of law by corporations would be destructive of the relationship of trust and confidence between attorney and client⁶ should the corporation intervene as an employer of attorneys.⁷

The exclusion of corporations from the practice of law has been effected in various ways and upon differing theories. Courts in some

⁴*People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); *Pacific Employers' Ins. Co. v. Carpenter*, 10 Cal. App. (2d) 592, 52 P. (2d) 992 (1935); *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932); *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); *In re Otterness*, 181 Minn. 254, 232 N. W. 318 (1930), 73 A. L. R. 1319 (1931); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910), 139 Am. St. Rep. 839, 32 L. R. A. (N. S.) 55 (1911), 19 Ann. Cas. 879.

⁵*People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); *In re Shoe Manufacturers' Protective Ass'n*, 3 N. E. (2d) 746 (Mass. 1936); *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919), rev'g 180 App. Div. 648, 168 N. Y. S. 278 (1917); *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S. E. 153 (1937); *State ex rel. Lundin v. Merchants' Protective Corp.*, 105 Wash. 12, 177 Pac. 694 (1919).

⁶*People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); *United States Title & Guaranty Co. v. Brown*, 166 App. Div. 688, 152 N. Y. S. 470 (1915); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910), 139 Am. St. Rep. 839, 32 L. R. A. (N. S.) 55 (1911), 19 Ann. Cas. 879; *Montgomery v. Utilities Ins. Co.*, 117 S. W. (2d) 486 (Tex. Civ. App. 1938); *State ex rel. Lundin v. Merchants' Protective Corp.*, 105 Wash. 12, 177 Pac. 694 (1919).

⁷See Jackson, *The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciary* (1938) 5 *Law and Contemp. Prob.* 80.

states have excluded corporations from law practice under the power which "inheres" in courts to determine who shall practice law.⁸ Even if the charter attempts to empower the corporation to engage in practice, the provision is held to be void because the practice of law is not a business open to the public generally but is subject to the regulation of the courts.⁹ Statutes which permit the organization of corporations for the purpose of carrying on any business which an individual can lawfully conduct do not give the corporation the right to practice law, since the individual has no such right unless he complies with the requirements set forth by the courts and the legislatures. A number of states have forbidden the corporate practice of law by adopting special statutes on the subject.¹⁰ Where this has been done, the courts uniformly uphold the statutes. It is only where the legislature attempts to set a standard below that required by the court for the practice of law, that a conflict arises. In such cases the legislative action of formulating requirements is held by the courts as setting only a minimum standard, and the courts may go above these requirements and apply higher standards to those desiring to practice law.¹¹

⁸In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); Compare: Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); Ex parte Stackler, 179 La. 410, 154 So. 41 (1934), where the same principle was applied to individual persons rather than to corporations.

⁹People v. Merchants' Protective Corporation, 189 Cal. 531, 209 Pac. 363 (1922); Creditors National Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C, 130 (1907); State ex rel. v. Retail Credit Men's Ass'n of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931).

¹⁰2 Ark. Laws (1929) Art. 182; Cal. (Pol. Code) §§ 4013 subd. 11, 4115, 4300i (Civ. Code) §§ 172c, 1296b; Idaho Code (1932) § 3-104; Ill. Rev. Stat. (Smith Hurd, 1929) c. 32, § 411-415; Ind. Stat. Ann. (Burns, 1933) §§ 30909, 4-3601, 4-3602, 4-3605; La. Rev. Stat. Ann. (Marr Supp., 1926) §§ 55-56; Mass. Gen. Laws (1932) c. 221, §§ 46-47; Md. Ann. Code (Bagby, 1924) Art. 27, § 19; Mich. Comp. Laws (1929) c. 197, § 10175; Minn. Laws (1931) c. 114; Mo. Rev. Stat. (1929) c. 78, §§ 11692-11693; Mont. Rev. Code (1935) §§ 8944-9067; N. J. Comp. Stat. (Supp. 1924) §§ 52-214P-r (Supp. 1930) 52-214; N. Y. Cons. Laws (Cahill, 1930) c. 41 §§ 280-281a; N. D. Comp. Laws (Supp. 1925) § 811, as amended by Laws of 1933, c. 143; Ohio Gen. Code, § 8623-3; Ore. Code Ann. (1930) §§ 32-504, 32-506, 22-1213; R. I. Gen. Laws (1923) c. 401, § 6238; Texas Stat. Ann. (Vernon, 1936) Art. 430a; Utah Laws (1927) c. 78, § 345; Va. Code 1919, § 3422 as amended by Acts 1922, c. 389 sec. 1; Wash. Comp. Stat. (Remington, 1922) § 3231a (applies to trust companies alone); W. Va. Code (1931) c. 30 Art. 2, § 5.

See People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Banks Performing Trust Functions, 99 Colo. 50, 59 P. (2d) 468 (1936), where corporations were excluded from the practice of law by special rule of the Supreme Court.

¹¹In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725, 727 (1932): "Statutes of that nature are valid provided they do not infringe on the right of the judicial department to determine who shall exercise the privilege of practicing in the courts. . . . Where and so far as statutes specify qualifications and accomplishments, they

When sued, corporations cannot appear "in person" by their own officers who are not attorneys.¹² Nor may they engage in the practice of law for other persons by hiring attorneys to act for them;¹³ and if they do render the services in violation of this rule, they will not be allowed to recover compensation.¹⁴ Even if all the officers and directors of the corporation are attorneys, still the corporation will not be permitted to represent a client through its lawyer-officials.¹⁵ In the latter situation the courts point out that as the interest of such officers is subject to transfer by sale, what was formerly a corporation composed entirely of lawyers may later become one composed only of lay directors and officers, with the corporation still retaining the same rights, powers and duties.

Whether trust companies should be forbidden to draw instruments which are normally incident to their business, has proved to be a diffi-

will be regarded as fixing the minimum and not as setting bounds beyond which the judicial department cannot go." *Ex parte Stackler*, 179 La. 410, 154 So. 41 (1934); *In re Cannon*, 206 Wis. 374, 240 N. W. 441 (1932).

¹²*Nightingale v. Oregon Central R. Co.*, 18 Fed. Cas. 239, No. 10, 264 (C. C. D. Ore. 1873); *Bennie v. Triangle Ranch Co.*, 73 Colo. 586, 216 Pac. 718 (1923); *Nispel v. Western Union R. Co.*, 64 Ill. 311 (1872); *Clark v. Austin*, 340 Mo. 467, 101 S. W. (2d) 977, 982 (1937): "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. . . . In legal matters, it must act, if at all, through licensed attorneys"; *Culpeper National Bank Inc. v. Tidewater Imp. Co.*, 119 Va. 73, 89 S. E. 118 (1916). *Contra*: *Sellent-Repent Corp. v. Queens Borough Gas and Electric Co.*, 160 Misc. 920, 921, 290 N. Y. S. 887 (1936), *Brower, J.*, holding that a corporation may appear in person by its officers who are not attorneys when the complaint was subscribed in the corporate name said: "When a corporation does not go outside its own corporate machinery in the performance of a corporate act, it is acting in person and upon an equal footing with a natural person, including the right to sue in person."

¹³*People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal. App. (2d) 592, 52 P. (2d) 992 (1935); *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932); *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); *In re Otterness*, 181 Minn. 254, 232 N. W. 318 (1930), 73 A. L. R. 1319 (1931); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910), 139 Am. St. Rep. 839, 32 L. R. A. (N. S.) 55 (1911), 19 Ann. Cas. 879.

¹⁴*Midland Credit Adjustment Co. v. Donally*, 219 Ill. App. 271 (1926); *Collacott Realty Inc. v. Homuth* (Ohio Municipal Ct. Cleveland 1939), 6 U. S. L. Week 761; *Crawford v. McConnell*, 173 Okla. 520, 49 P. (2d) 551 (1935). But see *United States Title and Guaranty Co. v. Brown*, 166 App. Div. 688, 152 N. Y. S. 470 (1915), where a corporation which had made a contract with a third person to undertake legal proceedings in violation of § 280 of the Penal Laws of New York, was permitted to compel an attorney to account for money in his possession belonging to the corporation. The court held that public policy would not permit the attorney to profit by his own wrongful act though the corporation earned the money in the unauthorized practice of law.

¹⁵*People ex rel. Los Angeles Bar Ass'n v. California Protective Corp.*, 76 Cal. App. 354, 244 Pac. 1089 (1926).

cult problem for the courts. The cases are uniform, however, in holding that a trust company may not engage in the supervision and drafting of complicated legal instruments, such as wills, and trust agreements of a testamentary nature.¹⁶

Some courts have taken a rather liberal approach which permits both corporations by their attorneys, and individuals who are not lawyers, to draft simple, stereotyped, non-testamentary instruments, providing no consideration has been charged for such services.¹⁷ Opposed to this view, however, there is substantial authority holding that neither the simplicity of the instrument,¹⁸ nor the fact that a consideration may or may not have been charged¹⁹ is the controlling factor. Most of these cases look to see whether legal skill and knowledge have been employed in the preparation of instruments which secure legal rights.²⁰ Trust agreements, as such, have been held to be complicated instruments the drafting of which requires legal skill and knowledge.²¹ If this view be followed, then even jurisdictions that permit corporations by their attorneys and unlicensed individuals to draft simple, stereotyped instruments would forbid the drawing of trust agreements by corporations.

¹⁶People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Bank, 99 Colo. 50, 59 P. (2d) 468 (1936); In re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); In re Shoe Manufacturers' Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); People v. Peoples' Trust Co., 180 App. Div. 494, 167 N. Y. S. 767 (1917).

¹⁷In re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931). Cf. In re Matthews, 62 P. (2d) 578 (Idaho 1936); Crawford v. McConnell, 173 Okla. 520, 49 P. (2d) 551 (1935). See People v. Title Guarantee and Trust Co., 277 N. Y. 336, 125 N. E. 666, 671 (1919) (concurring opinion); Cain v. Merchants' Nat. Bk. & Trust Co., 66 N. D. 746, 268 N. W. 719 (1936).

¹⁸Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937). See People v. Title Guarantee & Trust Co., 277 N. Y. 336, 125 N. E. 666, 670 (1919) (concurring opinion).

¹⁹In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930) (court was concerned with whether the work required the application of a legally trained mind); People v. Association of Real Estate Tax-Payers, 354 Ill. 102, 187 N. E. 823 (1933); Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937); People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. S. 767 (1917); Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942 (1933), 90 A. L. R. 278 (1934).

²⁰Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932); In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); Ely v. Miller, 7 Ind. App. 529, 34 N. E. 836 (1893); Matter of Pace, 170 App. Div. 818, 156 N. Y. S. 641 (1915); In re Duncan, 83 S. C. 186, 65 S. E. 210 (1909), 24 L. R. A. (N. S.) 750 (1910), 18 Ann. Cas. 657 (1911).

²¹Cain et al. v. Merchants Nat. Bank & Trust Co. of Fargo, 66 N. D. 746, 268 N. W. 719, 723, 724 (1936): "The drawing of complicated legal instruments such as wills or trust agreements require more legal knowledge than is possessed by the average layman. . . . One who draws such instruments for others practices law even though such instruments might, to some extent, be incident to a business such as that usually conducted by trust companies."

In the case of *Merrick v. American Security and Trust Company*,²² the United States Court of Appeals for the District of Columbia, by a two to one decision, recently held that a trust company organized to carry on a fiduciary business as "executor, administrator, trustee, guardian, agent, custodian, and manager," was not engaged in the practice of law by drafting simple, nontestamentary trust agreements, where the corporation was named a party in the instrument. The court's position was that the company should be permitted to draw such instruments as are "incidental to the authorized business" of a trust company. This decision represents a definite departure from the usual holding that a trust company may not draft trust agreements. Cases taking the more restrictive position hold that a trust company cannot participate in the drafting of trust agreements by its own attorney-employees,²³ although the trust company may take all necessary steps, legal or otherwise, in the execution of such trust agreements once the instrument has been drawn and the company made a party thereto.²⁴

Besides being contrary to the weight of authority, the holding in the *American Security* case, is questionable because of the nature of the case authority relied upon by the prevailing justices. Two of the cases cited as supporting the rule there adopted did so only by way of dicta,²⁵

²²107 F. (2d) 271 (D. C. App. 1939), cert. denied, 60 S. Ct. 380 (1940). The United States Court of Appeals for the District of Columbia, a six-judge court, now sits in "divisions" of three judges.

²³People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Bank, 99 Colo. 50, 59 P. (2d) 468 (1936); In re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); In re Shoe Manufacturers' Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. S. 767 (1917).

²⁴Where statutes authorize trust companies to act as executors and administrators, the companies may, after being so appointed, take such action by their own attorneys as is necessary to probate the will, or carry out the trust agreement. Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 216, 276 N. W. 365 (1937); Judd v. City Trust and Savings Bank, 133 Ohio St. 81, 12 N. E. (2d) 288 (1937). Contra: In re Otterness, 181 Minn. 254, 232 N. W. 318, 320 (1930), 73 A. L. R. 1319, 1322 (1931), 15 Minn. L. Rev. 107: "An executor, administrator, or guardian, as such, has no right to conduct probate proceedings, except in matters where his personal rights as representative are concerned, as, for instance, where his account as representative is in question, or misconduct is charged against him as representative."

²⁵People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919) was cited by the majority as holding that a trust company might draft such instruments as are "incidental to the authorized business of the corporation." All the case actually held, however, was that a corporation might draw such simple instruments as laymen in the state were permitted to draw, if there was no pretense or simulation to the character of an attorney by such corporation, as the giving of legal advice. Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934), cited as authority that real estate brokers

while another hinged on the peculiar construction of a local statute which was not involved in the *American Security* case.²⁶ Three other cases relied upon are equally weak as authority on the point for which they were cited.²⁷

The position taken by Mr. Justice Stephens in his dissenting opinion in *Merrick v. American Security and Trust Company*,²⁸ that the drafting of trust agreements by trust companies did constitute the corporate practice of the law, unquestionably represents the majority view on the question in this country.²⁹ The view of the dissent was that the

may draw such instruments as are incidental to their business, did not contain such a holding by that court. The actual holding of the case found a stenographer guilty of the practice of law by drawing legal instruments for hire. The dictum of the court on the point dealing with real estate brokers was in response to briefs filed amici curiae by such brokers, but did not constitute a holding by the court.

²⁶*Detroit Bar Ass'n v. Union Guardian Trust Co.*, 282 Mich. 216, 276 N. W. 365 (1937) permitted the drafting of revocable trust agreements by a trust company; but it should be noted that as the legislature had granted certain specific exemptions from its prohibition of the corporate practice of law, the court felt it had no power to intervene unless the practice of law by such corporations took place in one of the courts of the state. Even this is not a majority view on the point involved. Other states having similar statutes have held that it is a judicial function, not a legislative power, to determine what amounts to the practice of law; and in so far as the legislature attempts to grant trust companies the right to practice law, such a law is unconstitutional. *People ex rel. v. People's Stock Yard Bank*, 344 Ill. 462, 176 N. E. 901 (1931); *People ex rel. Motorists Ass'n*, 354 Ill. 595, 188 N. E. 827 (1933); *In re Opinion of the Justices*, 180 N. E. 725 (1932); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139 (1935), 100 A. L. R. 226 (1936).

²⁷*Liberty Mutual Insurance Co. v. Jones*, 130 S. W. (2d) 945 (Mo. 1939), was relied upon for the holding that an insurance company could have its lay adjusters fill out and obtain releases on claims by third parties against their insured; yet the court pointed out that what the adjuster did in the settlement of claims bore no relation to the practice of law since the adjuster did not purport to advise any claimant on his legal rights but merely made a statement of the amount the company would settle the claim for; that the interests of the claimant and the adjuster instead of being confidential (as in attorney-client relation) were actually adverse. *Cain et al. v. Merchants National Bank & Trust Co. of Fargo*, 66 N. D. 746, 268 N. W. 719 (1936) was cited to show that a trust company drafting simple instruments was not representing that it gave legal advice. The case actually held, however, that trust agreements were complicated instruments and one who drew them was engaged in the practice of law even though such instruments might, to some extent, be incidental to the business transacted, such as a trust business. *Judd v. City Trust & Savings Bank*, 133 Ohio St. 81, 12 N. E. (2d) 288 (1937) is not authority for the proposition for which it was cited, that in performing the legal phases of a trust business, attorney-employees of a trust company are acting for their employer. For this case also holds that the drafting of trust agreements requires the exercise of legal skill and knowledge for the customers of the bank who want such instruments drawn. Drawing such instruments by trust companies is the unauthorized practice of law even though the trust company is named trustee in the instrument drawn.

²⁸107 F. (2d) 271, 278 (D. C. App. 1939).

²⁹*People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Bank Performing Trust Functions*, 99 Colo. 50, 59 P. (2d) 468 (1936); *In*

criterion for judging whether a trust company's activities constitute the practice of law should be: "Does the legal service rendered (whether advice, or the determination whether to use an instrument and if so what should be the nature and contents thereof) require in a substantial sense the knowledge and judgment of a lawyer; and is it rendered in whole or in part to a customer of the corporation rather than solely to the corporation."³⁰

Collecting agencies which solicit claims for collection for a fixed fee, where no resort to the courts is had in the enforcement of such claims, are held not to be engaged in the corporate practice of the law.³¹ They may not, however, employ the services of an attorney in putting the claim through the courts without falling into the prohibited field of corporate law practice.³² The courts point out that if an incorporated collection agency engages an attorney to sue on a claim placed with it for collection, its inability as a corporation to practice law requires that the relation of attorney and client be established between the attorney employed and the creditor, rather than between agency and creditor with the attorney acting as a mere employee of the agency.³³ It makes no difference that the charter of incorporation authorizes the collecting agency to employ attorneys in order to collect the claims of third parties.³⁴ Attempts by collection agencies to evade the rule against corporate practice of law by having the creditor make

re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1323 (1931); State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); Cain et al. v. Merchants Nat. Bank and Trust Co., 66 N. D. 746, 268 N. W. 719 (1936); Judd v. City Trust and Savings Bank, 133 Ohio St. 81, 12 N. E. (2d) 288 (1937).

³⁰Merrick v. American Security and Trust Company, 107 F. (2d) 271, 284 (D. C. App. 1939).

³¹Neander v. Tillman, 232 App. Div. 189, 249 N. Y. S. 559 (1931); In the Matter of the Application of Associated Lawyers' Co., 134 App. Div. 350, 119 N. Y. S. 77 (1939); Public Service Traffic Bureau v. Haworth Marble Co., 40 Ohio App. 255, 178 N. E. 703 (1931); Kendrick v. State, 218 Ala. 277, 120 So. 142 (1928); State v. James Sanford Agency, 167 Tenn. 339, 69 S. W. (2d) 895 (1934).

³²People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); Creditors National Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886 (1917), Ann. Cas. 1918C 130; Richmond Ass'n of Credit Men v. Bar Ass'n of the City of Richmond, 167 Va. 327, 189 S. E. 153 (1937).

³³State ex rel. Retail Credit Men's Ass'n of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931); Richmond Ass'n of Credit Men v. Bar Ass'n of the City of Richmond, 167 Va. 327, 189 S. E. 153 (1937).

³⁴People v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); People v. Merchants' Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922); In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 175 (1930), 73 A. L. R. 1323 (1931); Creditors' National Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886 (1917), Ann. Cas. 1918C 130; State ex rel. v. Retail Credit Men's Ass'n of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931).

an assignment of the claim to the agency for collection, where no consideration is paid for the assignment and the agency merely retains its fee after collection and sends the balance to the creditor, have been equally unavailing.³⁵ The proper course open to the agency after its demands for payment from the debtor have failed, has been pointed out in the case of *State ex rel. McKittrick v. C. S. Dudley & Co. Inc.*³⁶ The court there said:

"If collections cannot be made without the services of an attorney, the respondent [collection agency] should return the claim to the creditor who should be free to select and employ his own attorney. The respondent should not engage directly or indirectly, in the business of employing an attorney for others to collect claims or to prosecute suits therefor, nor have any interest in the fee earned by the attorney for his work."

The case authority which exists on the subject of the corporate practice of the law still clearly denies a corporation the right to practice law. Only when the corporation is the real party in interest to the litigation may its own attorney-employees handle the case in the courts for the corporation. Some writers suggest that the reason for the rule denying the corporation the right to practice law no longer exists, because a court could very well subject corporations to the same requirements as are now imposed upon attorneys, thereby eliminating any possibility of an unfair advantage being taken of the client.³⁷ Others, however, feel that the advent of the corporation into the field of the practice of law would be utterly destructive of the essential personal element.³⁸

It would seem that if corporations practicing law could be held to the same rigid requirements as are now imposed upon attorneys, the possibility of public sentiment demanding that they be permitted to practice may ultimately prevail. And this for the reason that a cor-

³⁵*State ex rel. McKittrick v. C. S. Dudley & Co. Inc.*, 340 Mo. 852, 102 S. W. (2d) 895 (1937); *State ex rel. Freebourn v. Merchants' Credit Service*, 104 Mont. 76, 66 P. (2d) 337 (1937); *State v. James Sanford Agency*, 167 Tenn. 339, 69 S. W. (2d) 895 (1934). Cf. *Mutual Bankers Corp. v. Covington Bros. & Co.*, 277 Ky. 33, 125 S. W. (2d) 202 (1939).

³⁶340 Mo. 852, 102 S. W. (2d) 895, 902 (1937), cert. denied, 302 U. S. 693, 58 S. Ct. 12, 82 L. ed. 535 (1937).

³⁷(1931) 44 Harv. L. Rev. 1114, 1118: "The fear that the entrance of corporations into the field of law will cause a lowering of the standards of the bar is derived largely from the impersonal nature of such organizations. But it would not be impracticable to impose the same requirements on corporations that are now imposed on private attorneys."

³⁸Jackson, *The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciary* (1938) 5 Law and Contemp. Prob. 80.

porate law organization would be able to render a specialized form of service at a reduced fee, due to the volume of business transacted. The allowance of corporate practice could not be accomplished by statutory enactment alone, in view of the present holdings of the courts that theirs is the inherent power to say who may practice law.³⁹ Indicative of the care with which courts guard their authority is the holding in *Ex parte Stackler*.⁴⁰ There an act of the state legislature which gave the graduate of a state university law school the right to practice law automatically on receiving his degree was incorporated into the state constitution by amendment. The court held, however, that this amendment did not deprive the supreme court of the state of the right to demand further proof of qualifications by requiring such applicant to take the state bar examination. The court purported to obviate the constitutional problem by saying it could have required higher standards than those set by the legislature, and the mere putting of such a statute into the form of a constitutional amendment gave it no greater efficacy than a legislative enactment. It would seem, however, that since courts may be created or abolished by constitutional amendment, so may their powers be curtailed by the amending process.⁴¹

LESLIE D. PRICE

³⁹In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); *Ex parte Stackler*, 179 La. 410, 154 So. 41 (1934).

⁴⁰179 La. 410, 154 So. 41 (1934).

⁴¹In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932).