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CONTROL OF UNAUTHORIZED PRACTICE BEFORE ADMINISTRATIVE TRIBUNALS IN MISSOURI

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Since the decision of the *Richards* case¹ late in 1933, those interested in improving conditions within the legal profession have turned their attention, in increasing degree, to Missouri. It is because of the leadership assumed by the Missouri Supreme Court in the general movement for bar reorganization and reform^{1a} by reason of that decision that special interest centers on any new cases in this state bearing upon the Court's power to discipline or disbar members of the legal profession, or to punish those who attempt to practice law without the proper authorization.

In the *Richards* case the Court asserted in very broad terms its inherent power to protect not only itself as the agency for the administration of justice, but also the interests of the public in having that function properly performed, by disciplining or disbaring attorneys guilty of professional misconduct. It was also made clear that such power, necessarily incident to the performance of its judicial function, may not be interfered with by the legislative department of the government, "although in the harmonious co-ordination of powers necessary to effectuate the aim and end of government it may be regulated by statutes to aid in the accomplishment of the object but not to frustrate or destroy it."² In application of that doctrine and in refuting the contention that power to disbar ended with acquittal for the criminal offense which the alleged acts constituted, the Court asserted that "statutory grounds of disbarment are not exclusive"³ and that "any statutory enactment undertaking to make an acquittal in a criminal prosecution a bar to such an

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1. In Matter of Richards, 333 Mo. 907, 63 S. W. (2d) 972 (1933). Cf. In re Sparrow, 90 S. W. (2d) 401 (Mo. 1935).

1a. Clark, *Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of Law* (1936) 22 A. B. A. J. 9.

2. In Matter of Richards, 333 Mo. at 915.

3. *Id.* at 920.

investigation would be . . . an unconstitutional encroachment of the legislative upon the judicial department of government"⁴

Recently the Missouri Supreme Court has had before it in several cases the matter of punishing persons engaged in the practice of law without a license. In some, the Court acted upon the basis of statutes enacted under the police power to protect the public from practice by persons not deemed to possess the requisite qualifications, and expressly reserved any opinion upon the question of amenability to law independent of statutes.⁵ More recently the matter of punishing as for contempt of court such unauthorized practitioners has raised an issue of some importance.

In the case of *Clark v. Austin*,⁶ three persons not licensed as attorneys were proceeded against on informations filed by the General Chairman of the Bar Committees of the State charging contempt of court in the illegal practice of law by appearing before the State Public Service Commission representing persons interested in the grant or refusal of certificates of public convenience and necessity. The Court unanimously agreed that the action of respondents in thus appearing before the commission in a representative capacity constituted the illegal practice of law and properly subjected them to punishment, but disagreed as to the basis upon which that conclusion should be arrived at.

Judge Frank wrote what purported to be the opinion of the Court, placing the guilt of respondents upon the power of the Court in the exercise of its inherent judicial power to define and regulate the practice of law,^{6a} to

4. *Id.* at 921. In re Tracy, 266 N. W. 88 (Minn. 1936), holds unconstitutional a statute fixing a two-year period of limitation for bringing disbarment proceedings as an attempted invasion by the legislature of the judicial function, and cites many cases. See Note (1936) 1 Mo. L. Rev. 282.

5. State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 871, 74 S. W. (2d) 348 (1934); State ex inf. Miller v. Mississippi Valley Trust Co., 335 Mo. 872, 74 S. W. (2d) 361 (1934); State ex inf. Miller v. Mercantile Commerce Bank & Trust Co., 335 Mo. 873, 74 S. W. (2d) 362 (1934).

6. 101 S. W. (2d) 977 (Mo. 1937).

6a. In re Lavine, 2 Calif. (2d) 324, 41 P. (2d) 161 (1935); In re Day, 181 Ill. 73, 54 N. E. 646 (1899); People v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); People v. Ass'n of Real Estate Tax-Payers, 354 Ill. 102, 187 N. E. 823 (1933); People ex rel. Chicago Bar Ass'n v. Motorists Ass'n, 354 Ill. 595, 188 N. E. 827 (1934); State v. Perkins, 138 Kan. 899, 28 P. (2d) 765 (1934); Depew v. Wichita Ass'n of Credit Men, 142 Kan. 403, 49 P. (2d) 1041 (1935); Ex parte Steckler, 179 La. 410, 154 So. 41 (1934); Meunier v. Bernich, 170 So. 567 (La. App. 1936); Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932); In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935); In re Morse, 98 Vt.

punish such unauthorized practice of the law as a contempt of court. Judge Ellison, with whom concurred four other members of the Court, concurred in the result arrived at in the principal opinion, but based his holding solely on the ground that respondents had violated a statute.⁷ Judge Gantt wrote a brief opinion in which he concurred in the principal opinion written by Judge Frank, but avoided most of the controversy which separated the other two opinions.⁸

The statutes of Missouri⁹ define the practice of law in terms expressly including such commission appearance as here involved. Likewise, the definition formulated by the principal opinion for purposes of dealing with this case as clearly embraces conduct admitted by respondents.

Both major opinions proceeded initially upon the doctrine of the *Richards* case, that the Court has inherent power to define and regulate the practice of law, has original jurisdiction to disbar attorneys for offenses committed in the practice of law though not connected with proceedings pending in court, and has a like power to discipline persons who are not lawyers for their encroachments upon those functions which only licensed attorneys are legally competent to perform. Both, also, agreed that this result might be arrived at by an exercise of the power of the Court to punish for contempt. The principal opinion bases its holding on the proposition that the whole power to define and regulate the practice of law is exclusive in the Court and one who attempts to practice without a license is thus in contempt of court. The Ellison opinion points out that the legislature has provided by statute¹⁰ that only licensed attorneys are permitted to practice before such a commission as is here involved, asserts that the Court has inherent power to punish persons for contempt for violating the statute regulating the prac-

85, 126 Atl. 550 (1924); Norfolk and Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 172 S. E. 282 (1934); Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, 189 S. E. 153 (Va. Sup. Ct. App. 1937); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932). See Dowling, *The Inherent Power of the Judiciary* (1935) 21 A. B. A. J. 635.

7. 101 S. W. (2d) 977, 985 (Mo. 1937).

8. *Ibid.*

9. MO. REV. STAT. (1929) § 11692.

10. *Id.* §§ 11692, 11693.

tice of law,¹¹ and would rest the holding of the Court upon that basis. Thus it is easy to determine what the Court holds the law to be with respect to the existence of its power to punish such conduct as a contempt of court, but the ground upon which the conclusion is to be based is not entirely clear.

It is by no means easy to understand how the Ellison opinion reaches the conclusion that the contempt process may be employed if the doctrine of inherent judicial power is repudiated. If the statute is to be made the basis of guilt, a proceeding under the statute to punish for the misdemeanor involved in its violation would seem to be the *sine qua non* of the result arrived at. If the holding of contempt is to stand, a recognition of the inherent power of the Court, independent of statute, would seem to be essential. The mere fact that the statute deals with a matter in which the Court has a special interest would not seem to bring it within the power of the Court to punish infractions of the statute as contempt. At one time Missouri had a statute providing that the practice of law without a license should be punished as a contempt of court,¹² but that has long since been repealed.¹³ It is doubtful, however, whether the legislature could confer such power where it did not previously exist, and the proceeding would properly appear to be one based upon inherent power and not upon the statute.¹⁴

Four other members of the Court, Judges Hays, Tipton, Leedy and Collet, concur in the result reached in the principal opinion. This would seem to mean that they concur in the recognition of judicial power to punish

11. *Clark v. Austin*, 101 S. W. (2d) 977, 996 (Mo. 1937). Three cases were cited to support this assertion. Two arose in states where statutes existed which might have been made the basis of criminal prosecutions but the courts proceeded to punish for contempt on the basis of judicial power independent of statute. *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 third arose in Vermont where the only statute referred to was a general one purporting to confer power upon the "Justices of the Supreme Court . . . (to) make, adopt and publish . . . , alter or amend rules regulating admission of attorneys to the practice of law before the courts of this state." The Court acted on the basis of an implied power to punish for contempt a person practicing law without a license. *In re Morse*, 98 Vt. 85, 126 Atl. 550 (1924).

12. 1 Mo. LAWS, 1825 REVISION, pp. 158-159.

13. This provision was eliminated by amendment between the revisions of 1879 and 1889. Mo. REV. STAT. (1879) § 487, (1889) § 610.

14. Some states have such statutes at the present time and apparently no question has ever been raised as to their validity. See *State v. Merchants' Credit Service*, 66 P. (2d) 337 (Mont. 1937), where the existence of such a statute was found to be no impediment to punishing, for contempt, conduct which the court held to constitute the practice of law, though not covered by the statute. Mo. REV. CODES (1921) § 8943.

the conduct in question as a contempt of court, since the proceeding was one directed solely to that end. The same judges, however, concur in Judge Ellison's opinion, which, likewise, purports to concur in that same result. The most plausible explanation would seem to be that there is substantial agreement on the basic fundamentals relative to judicial power, but that these members of the Court share Judge Ellison's aversion to the vigorous assertion of inherent judicial power, and the rather vehement denial of legislative authority to interfere, as set out in the principal opinion. Such an attitude may well have been inspired by a fear that the inferences possible to be drawn from that opinion (as were set out in the Ellison opinion) might indicate a seeming conflict between the two branches of the government, which, no doubt, all were anxious to avoid. Such, also, in last analysis, would seem to be the only logical explanation of the Ellison opinion itself, if its concurrence in the result, which is punishment for contempt, is to stand. No statute exists at present purporting to authorize the Court to punish for contempt one who violates the provision against unauthorized practice, and the present writer, by diligent search, has been unable to find any authority to sustain the proposition that a court may proceed to punish the violation of a statute as contempt of court, even though that statute be one regulating the practice of law and directed to the protection of judicial functioning.^{14a}

Possibly all that the Ellison opinion means to assert with reference to this point is that since the legislature has defined the practice of law in a way which is practically accepted by the Court in its definition, it is unnecessary to call into operation the inherent power of the Court to so define it, and that for illegal or unauthorized practice as so defined, one method of procedure is to punish for contempt of court, so that method may be used here. If this is all that opinion means in this regard, then it and the principal opinion are substantially in complete accord on the only issue that was before

14a. In referring to statutes prohibiting the practice of law by unlicensed persons, Thornton makes the statement that, "In some instances punishments are provided for such practice; thus that the offender becomes *liable as for a contempt*; or a misdemeanor." Only two cases are cited under the statement with reference to contempt. Both are Colorado cases where a statute expressly provided that such should constitute contempt of court (Colo. Laws 1905, c. 77, p. 157). 1 THORNTON, ATTORNEYS AT LAW (1914) 105, citing *People v. Ellis*, 44 Colo. 176, 96 Pac. 783 (1908), and see also *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349 (1908).

the Court,¹⁵ though the possible divergent inferences and implications to be drawn from the language of the two opinions may be of considerable importance later when slightly different issues may come before the Court.¹⁶

The principal opinion, grounded as it is upon the doctrine of the *Richards* case, quotes from that opinion with approval to the effect that the power to define and regulate the practice of law "is, in its exercise, judicial and not legislative," but dissents from the view there expressed that the exercise of such power "may be *regulated* by statute to aid in the accomplishment of the object but not to frustrate or destroy it."¹⁷ Perhaps the meaning of *regulated* as there used is not entirely clear. If it means to direct, control, govern or order by rule, etc., as generally understood, clearly the principal opinion in this case repudiates that part of the *Richards* opinion. If, however, it means merely to supplement the work of the Court and aid in the performance of its function by legislation subordinate to the dominant power of the Court, there would seem to be no great divergence between the two opinions.

It is here that the Court divides in the *Austin* case and gives us diverging conceptions of the effect of the distributive clause in our Constitution and the doctrine of separation of powers as thereby made applicable. Article III of the Constitution of Missouri confides each of the three departments of government to a separate magistracy and directs that "no person or collection of persons, charged with the exercise of power properly belonging to one of those departments, shall exercise any power properly belonging to either

15. The statement near the end of the Ellison opinion (101 S. W. (2d) 977, 996) to the effect that "This Court has *inherent power* to punish persons for contempt for violating a statute regulating the practice of law," recognizing and emphasizing, as it does, the court's inherent power, lends support to this conclusion. The reference, however, to the punishment being "for violating a statute," together with the statement in the early part of the opinion (101 S. W. (2d) 977, 985) that, "the statutes are valid and . . . respondents' conviction should be based on their misconduct in violating the same," leaves the reader not a little confused.

16. The matter of judicial promulgation of rules of procedure, for example, might find the members of the Court entertaining varying opinions. In the case of *In re Sparrow*, 90 S. W. (2d) 401, 403 (Mo. 1935), Judge Hays, speaking for a unanimous Court, quoted with approval, however, from 7 R. C. L. 1023, to the effect that, "It is well settled that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings and facilitate the administration of justice as they may deem necessary." Judge Ellison expressly approved of that statement, but is disturbed, apparently, about the limits of legislative power under the doctrine of the principal opinion (101 S. W. (2d) at 986).

17. *Clark v. Austin*, 101 S. W. (2d) 977, 980 (Mo. 1937).

of the others, except in the instances in this Constitution expressly directed or permitted." The whole Court agreed in the *Richards* case that, while the Constitution does not, by express grant, vest the power to define and regulate the practice of law in any department, the power in its nature and in its exercise is judicial and not legislative, and that it belongs to the judicial department by implication as an inherent power. On that basis, and in view of the constitutional injunction against one department encroaching upon the powers properly belonging to another, the principal opinion asserts that "any effort on the part of the legislature to prescribe the qualifications of applicants for admission to the bar, or to define or regulate the practice of law would be an unconstitutional attempt on the part of the legislative department of government to enroach upon the powers and functions properly belonging to the judicial department."¹⁸ Any such attempted *regulation* is not brought within the power of the legislature, according to this opinion, by virtue of its being *reasonable* and not destructive of the court's inherent power.

Judge Ellison definitely departs from the holding of the principal opinion in so far as the latter asserts the power in the Court to be exclusive, and considers the legislature as having power to pass reasonable regulations in the same field "insofar as such statutes do not destroy the inherent power of the courts."¹⁹ The contrary holding, he asserts, would result in holding invalid a great body of existing statutory law, including rules of practice and procedure, provision for a bar examining board, and various other acts. While this assertion was in nowise necessary to a determination of the issue before the Court, it may be noted in passing that the great weight of authority agrees that the courts have inherent power to prescribe rules of practice and procedure,²⁰ and that at least some respectable authority considers the

18. *Id.* at 981.

19. *Id.* at 986.

20. Gertner, *The Inherent Power of Courts to make Rules* (1936) 10 U. OF CIN. L. REV. 32; Hudson, *The Proposed Regulations of Missouri Procedure by Rules of Court* (1916) 13 U. OF MO. BULL. L. SER. 3; Morgan, *Judicial Regulation of Court Procedure* (1918) 2 MINN. L. REV. 80; Paul, *Rule Making Power of the Courts* (1926) 1 WASH. L. REV. 163, 233; Pound, *Regulation of Judicial Procedure* (1915) 10 ILL. L. REV. 163; *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599; (1926) 10 AM. JUD. SOC. 112; *Senator Walsh, on Rule Making Power on Law Side of Federal Practice* (1927) 13 A. B. A. J. 84; Robinson, *Self-Help or Self-Destruction? The Rule-Making Power* (1937) 9 ROCKY MT. L. REV. 122; Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of*

power of the courts to be exclusive in this respect.²¹ The fact that a power has been exercised by the legislature without serious question does not necessarily mean that the Constitution, properly interpreted, confers such power. It may be further noted that our own Court, due to doubt of the legislature's power, or for other reasons, expressly provided for a bar examining board in its Rule 38, promulgated in 1934, prescribing rules for admission to the bar.²²

Assuming, as one well may, that the Ellison opinion is sound in its interpretation of the doctrine of separation of powers and of Article III of our Constitution as not requiring any watertight separation in practice, and that the three departments of government overlap at many places, it does not necessarily follow that the legislature may regulate the practice of the law to the extent therein contended for.

There has been considerable conflict of opinion as to which department of government properly has the power to regulate and control the legal profession, and to prescribe rules for admission to the bar and for the regulation of professional conduct. At least three general notions have found expression from time to time in the past. First, that the general definitive power belongs to the legislature, to be enforced by the courts; second, that the whole matter is one exclusively within the inherent power of the courts; and third, that while the whole subject in its nature is a judicial one, nevertheless the legislature may prescribe reasonable regulations which do not unduly encroach upon the power of the judiciary which the courts will respect and enforce.²³

Procedure and Control of the Bar (1934) 19 ST. LOUIS L. REV. 163; Sunderland, *The Regulation of Legal Procedure* (1929) 35 W. VA. L. Q. 301; *The Exercise of the Rule-Making Power* (1926) 12 A. B. A. J. 548; *Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium* (1926) 6 ORE. L. REV. 36; *Regulation of Judicial Procedure by Rules of Court—A Bibliography*, *id.* at 54; Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures* (1936) 61 REP. A. B. A. 532. Cf. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 HARV. L. REV. 1303. See Rosenbaum, *Rule-Making in the Courts of the Empire* (1915) 15 J. COMP. LEG. (N.S.) 128. Many courts have asserted the existence of this inherent judicial power, including the Supreme Court of Missouri in a recent case. In re Sparrow, 90 S. W. (2d) 401, 403 (Mo. 1935).

21. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally* (1928) 23 ILL. L. REV. 276.

22. Rule 38, sections 2 and 3, Rules for the Government of the Supreme Court of Missouri, printed in back of Missouri Reports.

23. Green, *The Courts' Power over Admission and Disbarment* (1925) 4 TEN. L. REV. 1, 2.

Perhaps all state legislatures, at one time or another, have taken some action in this field, with at least the tacit approval of the courts. Such action does not, in itself, however, determine the nature of the power. All present controversy seems to center on the question of whether the second or third proposition herein suggested is to control. Such is also the difference between the two opinions in the instant case.

It is not possible to rely completely upon the history of this matter in England, because of the all-inclusive nature of parliamentary power in contrast with the limitations in our written constitutions. That the control of the practice of law has ever been regarded as primarily a judicial function, however, appears quite clear.²⁴ In this country it has almost never been regarded as a legislative matter, though exclusive power in the courts has sometimes been denied. An early New York case²⁵ sustained the validity of a legislative act making graduation from the law school of Columbia College conclusive as to eligibility to practice law, and denied the contention for exclusive power in the courts. This was probably justified, however, on the peculiar provisions of the New York Constitution at that time.²⁶ In only two states does it appear that the courts have gone so far without the aid of similar constitutional provisions.²⁷ The courts in most states have expressly denied the power of the legislature to thus interfere with the inherent power of the court,²⁸ though several cases, like the quoted statement from the

24. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 311-318, 484-512; Green, *supra* note 23; In re Day, 181 Ill. 73, 54 N. E. 646 (1899); State ex rel. Karlin v. Culkins, 248 N. Y. 465, 162 N. E. 487 (1928); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932).

25. In Matter of Cooper, 22 N. Y. 67 (1860).

26. Prior to the Revolution, attorneys were appointed in New York by the Governor of the Colony. The Constitution of 1777 vested the power in the courts. The Constitution of 1822 was silent on the matter. A subsequent legislative act required attorneys to be licensed by courts in which they practice. The Constitution of 1846 provided: "They (the judges) shall not exercise any power of appointment to public office. Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state." The decision was based on this provision, attorneys being held to be public officers within the meaning of this provision. In Matter of Cooper, 22 N. Y. 67, 90-92 (1860).

27. Ex parte Gregory Yale, 24 Calif. 242 (1864) (a test oath case); Re Applicants for License, 143 N. C. 1, 55 S. E. 635 (1906) (two judges dissented vigorously).

28. In re Lavine, 2 Calif. (2d) 324, 41 P. (2d) 161 (1935); In re Day, 181 Ill. 73, 54 N. E. 646 (1899); People v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); People v. Ass'n of Real Estate Tax-Payers, 354 Ill. 102, 187 N.

Richards case, recognize the power of the legislature to act so long as it does not "frustrate or destroy" the court's inherent power.²⁹ It is a bit difficult to have any accurate understanding of the nature of, and the proper repository for, this power on the basis of this last assumption. Eventually, it would seem, a more accurate understanding must emerge. The Ellison opinion in the principal case takes the position that the "legislative department may enact statutes *regulating the legal profession as it does other professions and businesses*," and that "such statutes are not passed merely in aid of the courts" as sometimes suggested,³⁰ but "are enacted through an exercise of the police power in aid of the people."³¹ But the opinion concedes that the courts "can make rules on that subject when there are no statutes, or supplementing statutes and imposing additional regulations. And they can strike down, as unconstitutionally usurping judicial power, any statute unreasonably encroaching upon, and therefore frustrating, their right to protect themselves."³² The conception clearly seems to be that the general regulatory power of a police nature rests with the legislature, while the court has sufficient inherent power to protect its own functioning, including that of declaring invalid any legislative act that *unreasonably* encroaches upon this power of self protection. While purporting to recognize the existence in the court of an inherent power to control entrance into the legal profession, and the practice of law, to the extent necessary to protect itself; but beyond that, in all matters of policy as to what is necessary to protect the public interest, the opinion seems to say the legislative will must prevail.

This would seem to open the way to conflict and provide the opportunity for collisions between the legislature and the courts. Perhaps some such con-

E. 823 (1933); *People v. Motorists Ass'n*, 354 Ill. 595, 188 N. E. 827 (1934); *State ex rel. Chicago Bar Ass'n v. Goodman*, decided by Supreme Court of Illinois, February 18, 1937, not yet reported; *Ex parte Steckler*, 179 La. 410, 154 So. 41 (1934); *Meunier v. Bernich*, 170 So. 567 (La. App. 1936); *Opinion of the Justices*, 279 Mass. 607, 180 N. E. 725 (1932); *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935); *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 189 S. E. 153 (Va. Sup. Ct. App. 1937); *State v. Cannon*, 206 Wis. 374, 240 N. W. 441 (1932). See also Annotation: *Power of Legislature Respecting Admission to Bar* (1930) 66 A. L. R. 1512, (1932) 81 A. L. R. 1064, and cases cited.

29. See Annotations, 66 and 81 A. L. R., *supra* note 28. *Burns v. State*, 76 S. W. (2d) 172 (Tex. Civ. App. 1934).

30. *Meunier v. Bernich*, 170 So. 567, 576 (La. App. 1936); *In re Richards*, 333 Mo. 907, 915, 63 S. W. (2d) 672 (1933).

31. *Clark v. Austin*, 101 S. W. (2d) 977, 994 (Mo. 1937) (Italics supplied).

32. *Ibid.*

cept of legislative superiority in this field was, to some extent at least, responsible for the recent presentation in the Missouri General Assembly of the so-called Hamlin Bill³³ restricting causes for suspension and disbarment, and setting up new and different methods of procedure in disbarment cases, calculated seriously to interfere with, if not completely to destroy, the present court control of this matter. The passage of such a measure would necessitate a judicial determination as to whose authority must prevail, that of the legislature or of the court.

It is commonly asserted that legislative requirements for admission to the bar are merely minimum qualifications, which the court may add to in its discretion.³⁴ But suppose that the legislature prescribes certain qualifications which the court deems unnecessary or undesirable, as very well might happen. It is thinkable in the present state of opinion in certain quarters of the world that some future legislature might restrict the right to practice law to Aryans. The suggestion is sometimes made that no person employed on a salary as legal adviser to a corporation should be allowed to engage in other law practice. Age and residence qualifications, as well as many others, likewise might form the basis for conflicts of opinion. In such cases, ignoring constitutional questions of due process and equal protection, the doctrine of the Ellison opinion would seem to indicate that the legislative requirements must be respected by the courts. While under this notion, a legislative act *unreasonably* interfering with the performance of the court's judicial functions, or with its power of self-protection, would be set aside, innumerable minor conflicts of authority might well develop.

It is submitted that there are two possible conceptions of the nature of this power consistent with the necessary independence of the courts in this respect. One is that asserted in the early stages of the principal opinion to the effect that it is exclusively a judicial power and any entrance into the field by the legislature is subject to invalidation by the court on constitutional grounds. This, however, would not necessitate placing the stamp of constitutional invalidity upon Section 11693, Revised Statutes of Missouri, 1929,

33. House Bill No. 239, Fifty-ninth General Assembly of Missouri, 1937. This bill was introduced one week after the decision of the Austin case and it is generally believed that the construction placed upon the Ellison opinion in that case by the sponsors of the bill was, in large measure, responsible for its introduction.

34. *Ex parte Steckler*, 179 La. 410, 154 So. 41, 45 (1934); *Re Opinion of the Justices*, 279 Mass. 607, 611, 180 N. E. 725 (1932) citing many cases to same effect in note at p. 611; *State v. Cannon*, 206 Wis. 374, 240 N. W. 441, 450 (1932).

forbidding, under penalty of a fine, the practice of law without a license. The Ellison opinion construes the principal opinion as taking this position. It is by no means clear that such was intended. Judge Gantt's opinion expressly asserts that "the question of the authority of the legislature to enact such statutes is not presented by the record in this case and is not ruled by the principal opinion."³⁵ Only two passages in the principal opinion bear directly on this situation and neither seems to justify that construction. In the first place, that opinion takes exception to the statement in the *Richards* case to the effect that the court's exercise of its inherent power to define and regulate the practice of law "may be *regulated* by statutes to aid in the accomplishment of the object but not to frustrate or destroy it."³⁶ It asserts that since the matter is one properly held to fall within the "range or orbit" of the judicial department, it is not proper, in view of the constitutional injunction that one department shall not encroach upon the powers and functions properly belonging to another department, to hold that the legislature may regulate (albeit reasonably) the judicial exercise of the power.³⁷ It is further stated in the principal opinion that "in view of the constitutional separation of the powers of government into three distinct departments . . . , and in view of the constitutional injunction that neither department shall encroach upon the powers and functions properly belonging to either of the others, *any effort* on the part of the legislature to prescribe qualifications for admission to the bar, or to define or regulate the practice of law would be an unconstitutional attempt on the part of the legislative department of government to encroach upon the powers and functions properly belonging to the judicial department."³⁸ These statements may well call for invalidation of those provisions in our statutes defining "practice of the law" and "law business,"³⁹ fixing rules prescribing qualifications for admission to the bar and providing for their administration,⁴⁰ regulating procedure in disbarment or suspension cases,⁴¹ and otherwise regulating the practice,⁴² but there seems to be nothing in either statement in the least inconsistent with the validity of a statute

35. *Clark v. Austin*, 101 S. W. (2d) 977, 985 (Mo. 1937).

36. *Id.* at 980.

37. *Ibid.*

38. *Id.* at 981.

39. Mo. REV. STAT. (1929) § 11692.

40. *Id.* §§ 11696-11705.

41. *Id.* §§ 11707-11715.

42. *Id.* §§ 11694, 11716, 11717.

making the practice of law without a license a public offense and providing a penalty therefor. Such a statute, enacted for the purpose of protecting the public against the dangers of unlicensed practitioners, would seem to come well within the legitimate police power of a state legislature. The same end, however, may be reached by the exercise of a separate and different power on the part of the Court to punish for contempt one who wrongfully intrudes himself upon the province of the Court by attempting to exercise a privilege which the Court alone has authority to bestow.⁴³ In this respect, the concurring opinion of Judge Gantt would seem to be eminently sound when it asserts that "the legislature may enact statutes condemning the unlicensed practice of law. It may do so under the police power. The enactment of such statutes do not, in any degree, encroach upon the *exclusive* constitutional power of this court to define and regulate the practice of law."⁴⁴

The other conception of the nature of this power, consistent with proper judicial independence in this field yet preserving all possible necessary power in the legislature, would view it as concurrent in the legislature and the courts, though with the latter supreme. Perhaps such a conception is not greatly unlike that asserted to exist with respect to the conflict between law and equity. In all such cases the latter prevails.⁴⁵ A much closer analogy is to be found in the passage by the states of local insolvency laws in the absence of a national bankruptcy statute, or in local regulations of interstate commerce which the states may enact unless and until Congress sees fit to occupy the field or enact regulations in conflict therewith.⁴⁶ There is no encroachment by the states upon national power, but merely the exercise of a power

43. *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards Bank*, 344 Ill. 462, 176 N. E. 901 (1931); *People v. Real Estate Tax-Payers*, 354 Ill. 102, 187 N. E. 823 (1933); *People ex rel. Chicago Bar Ass'n v. Motorists Ass'n*, 354 Ill. 595, 188 N. E. 827 (1934); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139 (1935); *In re Morse*, 98 Vt. 85, 126 Atl. 550 (1924).

44. 101 S. W. (2d) 977, 985 (Mo. 1937).

45. 1 BEALE, *THE CONFLICT OF LAWS* (1935) 40-42; HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 131, 133, 136; PHELPS, *FALSTAFF AND EQUITY* (1901) 45, 46; WALSH, *A TREATISE ON EQUITY* (1930) 28-34; Stone, *Book Review* (1918) 18 *COL. L. REV.* 97, 98.

46. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851), established the doctrine, which has been adhered to since. This problem is dealt with at some length and the authorities are fully collected in a very recent case before the United States Supreme Court. *Townsend v. Yeomans*, 57 S. Ct. 842, 847-849 (1937). REYNOLDS, *THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES* (1928) 79-100; WILLIS, *CONSTITUTIONAL LAW* (1936) 308; WILLOUGHBY, *CONSTITUTIONAL LAW OF UNITED STATES* (2d ed. 1929) 112-116.

in the nature of police regulation to protect the interests of its own inhabitants, but which automatically gives way when Congress acts. The analogy is not complete, as most analogies are not. There, both acts are instances of the exercise of legislative power, in the one case by the state legislature, in the other by Congress. In the problem under consideration, the suggestion has the seeming inconsistency of calling the power "legislative" so long as the courts do not act and the legislature imposes its regulations, but recognizing, all the while, that the power is primarily, and in last analysis, judicial. Perhaps the inconsistency is more apparent than real. The true nature of the power is judicial and properly one for the court to exercise. But in the absence of judicial action, the interest of the public in protection against abuse by unlicensed or improperly qualified practitioners justifies action by the legislature in the nature of police regulations which automatically must give way when the court occupies the field or takes any action inconsistent with the legislatively established regulations.^{46a} Such a conception would prevent the possibility of a complete absence of necessary regulation when the court takes no action, yet would entirely avoid any conflict between the two departments of government.

Under either of the above conceptions the statute punishing unlicensed practice of the law would be valid, and the Court could punish the violation of the statute under a proceeding brought for that purpose, or, on contempt proceedings, as here, could punish the affront to the Court involved in "usurping a privilege solely within the power of the Court to grant."⁴⁷ It

46a. This type of relationship is at least partially illustrated by a recent Kentucky statute (Ky. Laws 1934, c. 3, p. 5) purporting to confer authority upon the Court of Appeals to promulgate rules (a) defining the practice of law; (b) prescribing a code of ethics for attorneys; (c) establishing rules of practice and procedure for disciplining attorneys; (d) for organizing and governing a State Bar Association, etc. Section 2 of the act provides that, "*When and as the rules of Court . . . shall be . . . promulgated, all laws or parts of laws in conflict therewith shall be and become of no further force or effect to the extent of such conflict.*" For its application see Commonwealth ex rel. Ward v. Harrington, 98 S. W. (2d) 53 (Ky. App. 1936).

47. In the following cases statutes were in existence making the conduct in question illegal as the practice of law without a license, but the court chose to punish for contempt of its own inherent authority to control the practice of law. People ex rel. Illinois Bar Ass'n v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); People v. Real Estate Tax-Payers, 354 Ill. 102, 187 N. E. 823 (1933); People ex rel. Chicago Bar Ass'n v. Motorists Ass'n, 354 Ill. 595, 188 N. E. 827 (1934); 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). Cf. In re Morse, 98 Vt. 85, 126 Atl. 550 (1924).

appears, therefore, that the differences between the Frank and Ellison opinions in the case under consideration are by no means fundamental and might well have been entirely avoided. The statute penalizing unlicensed practice was not asserted to be invalid by the former, and the other statutory provisions discussed by the latter were not necessarily involved.⁴⁸ Thus the only real differences between the two opinions as written, so far as the issue before the Court is concerned, are differences in emphasis and in the choice of procedure by means of which the result is to be reached. The one emphasizes the inherent power of the Court to define and regulate the practice of law free from legislative interference, and bases punishment for contempt upon the affront to the Court. The other recognizes a wider field for legislative action, emphasizes the statutory violation involved in the conduct of respondents, and, while concurring in the contempt judgment, apparently would have preferred a proceeding under the statute.

The subsequent decision of the *Dudley* case⁴⁹ in a unanimous opinion by Judge Tipton seems to lend support to this conclusion. In a quo warranto proceeding to forfeit the charter of C. S. Dudley and Company, Inc., for engaging in the unlawful practice of law in the conduct of its collection agency, the Court imposed a fine of one dollar and costs and issued a cease and desist order on penalty of forfeiture of the corporate charter. This was grounded upon a finding by the Court that the corporation was engaged in the unlawful practice of law both as defined in the statute⁵⁰ and in the principal opinion of the Court in the *Austin* case discussed above.⁵¹ In addition to illegal practice of law, the corporation was sharing fees with the attorneys employed by it. This again was held to be condemned both by the statute⁵² and under the inherent power of the Court. For a lay person to

48. "If that reasoning is correct, . . . our whole code of civil procedure . . . , our code of criminal procedure . . . , and the statutes providing a procedure for the liquidation of insolvent banks and the reorganization of building and loan associations are unconstitutional and must fall; as well as our statutes concerning contempts, attorneys at law, creating a bar examining board, and perhaps the Public Service Commission Act, the Workmen's Compensation Act, the Juvenile Court Acts, and many other similar statutes . . ." 101 S. W. (2d) 977, 986. "Seventeen states have all inclusive state bars organized by statute But if the principal opinion is right . . . all these laws are unconstitutional." *Id.* at 994.

49. *State v. C. S. Dudley & Co.*, 102 S. W. (2d) 895 (Mo. App. 1937).

50. Mo. REV. STAT. (1929) § 11692.

51. 101 S. W. (2d) 977, 982 (Mo. 1937).

52. Mo. REV. STAT. (1929) § 11694.

share a fee with an attorney was vigorously asserted to be against public policy entirely regardless of whether any statute applied thereto.⁵³

The Supreme Court of Missouri had previously adopted as rules of conduct for attorneys in this State the American Bar Association's canons of ethics.⁵⁴ Canon 34 with respect to division of fees reads as follows:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. *But sharing commissions between forwarder and receiver, at a commonly accepted rate upon collections of liquidated commercial claims, though one be a lawyer and the other not, is not condemned hereby, where it is not prohibited by statute.*"

The contention that adoption of this canon gave court approval to respondent's practice of sharing fees with licensed attorneys was refuted by the Court by pointing to the statute⁵⁵ expressly making such fee-splitting illegal. Thus, to a certain extent, at least, the Court seemed to be recognizing the validity of the statute which appears to have the effect of regulating the practice of law. This would seem to be out of accord with the broad assertions in the principal opinion in the *Austin* case. Shortly after the decision in the *Dudley* case, Senate Bill No. 181 was introduced in the Missouri General Assembly providing for amending Section 11694, Revised Statutes of Missouri, 1929, making fee-splitting between lawyer and layman unlawful, by adding the proviso that,

"nothing in this section shall be held to prohibit the sharing of commissions between forwarder and receiver, at a commonly accepted rate, upon collections of liquidated commercial accounts, though one be a lawyer and the other not . . ."

If this had been passed, the contention of respondent based on the wording of canon 34 quoted above would seem to have merit, and conceivably might have resulted in an opposite holding. Such a prospect was forestalled, however, by action of the Supreme Court⁵⁶ in amending canon 34 as a rule of court by eliminating the part italicized above relating to commercial claims, so that it now reads merely, "no division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." The effect of this change would seem to be that the fee-splitting

53. *State v. C. S. Dudley & Co.*, 102 S. W. (2d) 895, 901 (Mo. 1937).

54. See Rules for the Government of the Supreme Court of Missouri, printed in back of official reports. Rule 35 contains the canons of ethics.

55. MO. REV. STAT. (1929) § 11694.

56. March 26, 1937, published in 8 MO. BAR J. 56, for April, 1937.

situation such as involved in the *Dudley* case is now to be controlled by court rule alone, without the aid of statute.

Another feature of Senate Bill No. 181 seemed also to be based on that part of the *Dudley* opinion which relied on statute, and possibly also on the broad language of the Ellison opinion in the *Austin* case emphasizing legislative power to regulate the practice of law. This part of the bill would have amended Section 11692, Revised Statutes of Missouri, 1929, defining "practice of the law" and "law business," by providing that these terms as defined in the statute "shall not apply to the collection of liquidated commercial accounts, whether by layman or lawyer, nor to the forwarding of such accounts by laymen, whether incorporated or not, to lawyers for the purpose of collecting same" Undoubtedly the purpose of this proposed amendment was to remove any statutory basis for the holding in the *Dudley* case, and, if the broad doctrines of the Ellison opinion in the *Austin* case were to be followed, remove this feature of the collection agency business from control of the Court under its power to regulate the practice of law.

The *Dudley* opinion, however, is susceptible of an interpretation indicating a conviction that the Court could accomplish the results of that case by an exercise of inherent judicial power alone. This is indicated by its express assertion that the acts of respondent came within the court definition of "practice of the law" as formulated in the *Austin* case, as well as within the statutory definition, and that its fee-splitting activities were illegal as against public policy regardless of any statute on the matter. The Court, however, nowhere expressly bases its decision wholly either on statute or on inherent judicial power to the complete exclusion of the other.

Since the decision of the *Dudley* case, the Kansas City Court of Appeals, in *Clark v. Reardon*,⁵⁷ by contempt proceedings, found the operator of a collecting business guilty of practicing law without a license. The court relied on the *Austin* and *Dudley* cases discussed above, among others, and expressly asserted the power, without the aid of statute, to punish for contempt a layman who exercises those functions which the court finds to constitute the practice of law. It was pointed out that,

"One not licensed and who engages in the practice of law may be punished under sections 11692 and 11693, R. S. Mo. 1929, as for a crime. But respondent is not being prosecuted under the statute. . . . The legislature had a right to declare by statute what should con-

57. 104 S. W. (2d) 407 (Mo. App. 1937).

stitute a crime and prescribe a penalty therefor, which is what the mentioned statute does. But the legislature cannot restrict the ancient right of this court to declare what shall constitute a contempt of it. . . . Nor can any act of the legislature, by laying down a definition of what shall constitute the practice of law, render this court impotent to punish for contempt one who is in fact guilty of contempt⁵⁸ We have the power, subject to the supervision of the Supreme Court, *without statutory aid, to regulate and control* the practice and administration of the law within this jurisdiction. This includes the power to prevent its unlawful administration or practice by anyone not qualified, whether he be lawyer or layman. We necessarily have the power to enforce our authority, by contempt proceedings, if necessary."⁵⁹

This opinion, written by Commissioner Sperry and concurred in by the full court, is undoubtedly based on that court's understanding and interpretation of the Supreme Court opinions in the *Austin* and *Dudley* cases. It sets forth clearly and forcibly the nature of the court's complete power to define and regulate the practice of law, both to protect itself and the interest of the public,⁶⁰ free from legislative restrictions, and appears to be an eminently sound exposition of the problem.⁶¹

58. *Id.* at 410, citing *Meunier v. Bernich*, 170 So. 567, 575, 576 (Ia. App. 1936), and *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139, 142 (1935), both of which amply bear out the statement of the court.

59. *Id.* at 412.

60. Unlike the position taken in the Ellison opinion that this power can be exercised by the court only for the purpose of self-protection, while only the legislature can act to protect the interests of the public, this court takes a firm stand with respect to the latter. It is asserted that "This authority (to regulate and control the practice of law within that court's jurisdiction), we exercise primarily not to punish for a wrong, but to protect the court from imposition, and *the public from the evils of unethical practices* by those unfit to be longer permitted to advise clients in regard to legal matters. . . . It would be illogical to say that we have the inherent power to revoke the license of, or to punish, one who was once deemed, by competent authority, to be fitted to advise the public in legal matters, and also to hold that such inherent authority does not extend far enough to *protect the public* and the reputation of the law, the courts, and the ministers of the law and the courts, against one never considered qualified to advise in and practice law. 'To deny the power of the court to deal with such offenders would be tantamount to a destruction of the power itself.' *Ibid.* Besides the authority of the *Austin* case, and the more recent case of *Curry v. Dahlberg*, decided by Missouri Supreme Court, Division Number One, April 21, 1937 (not yet published), this position is amply supported by cases from other jurisdictions. *Rosenthal v. State Bar Examining Committee*, 116 Conn. 409, 415, 165 Atl. 211 (1933); *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards Bank*, 344 Ill. 462, 473, 176 N. E. 901 (1931); *State v. Perkins*, 138 Kan. 899, 906, 907, 28 P. (2d) 765 (1934); *Fichette v. Taylor*,

In both the *Reardon* case and the *Dudley* case a statute made the conduct involved a criminal offense. In the former, the court proceeded to punish for contempt of its own inherent authority in accord with the principal opinion in the *Austin* case. The statute was not regarded as any impediment to this procedure. In the latter, a quo warranto proceeding to forfeit a corporate charter for the unlawful practice of law, the Court's emphasis upon the illegal character of respondent's acts, independent of statute, is strongly indicative of a conviction that the Court's own inherent power would have been sufficient upon which to ground the conclusion as to unlawful conduct. Both cases were decided without dissent and lend force to the conclusion arrived at above to the effect that the rival opinions in the *Austin* case are not far apart on fundamentals, and that such divergence as appears was not necessary to a determination of the issue before the Court.^{61a}

One other feature of the Ellison opinion in the *Austin* case merits careful consideration. The assertion is made that the Public Service Commission, before which the illegal practice was being carried on, "is a creature of the legislative department of the state *exercising law making powers . . .*"⁶² It is further asserted that "if the courts have inherent judicial power to regulate the practice of law . . . , then by the same token, the legislative department has the inherent power to prescribe qualifications for those practicing

191 Minn. 582, 254 N. W. 910, 911 (1934); State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95, 98, 99 (1936); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139, 143 (1935); Norfolk and Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 842, 172 S. E. 282 (1934). Cf. Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n of City of Richmond, 189 S. E. 153, 157 (Sup. Ct. App. Va. 1937), asserting the power of the court under the declaratory judgment statute to inquire into the conduct of a lay association alleged to be practicing law, contrary to the public policy of the state.

61. Cf. *Creditors' Service Corp. v. Cummings*, 190 Atl. 2 (R. I. 1937); *People ex rel. Chicago Bar Ass'n v. Goodman*, decided by Illinois Supreme Court Feb. 18, 1937, not yet reported, punishing unauthorized practice before the Workmen's Compensation Commission. Goodman had been prosecuted for violation of the criminal statute against practicing law without a license, convicted, and turned loose on appeal. Neither the statute nor the prior proceedings under it constituted any obstacle to contempt proceeding, in the opinion of the Court.

61a. The recent opinion of Commissioner Hyde, April 21, 1937, unanimously adopted by the Court, Division Number One, in *Curry v. Dahlberg* (not yet published), and his later opinion denying the motion for a rehearing in the same case on June 30, 1937, both lend support to the conclusion which the writer has reached as to substantial agreement of the whole Court on the fundamental issues herein discussed.

62. 101 S. W. (2d) 977, 995 (Mo. 1937) (Italics supplied).

before the Public Service Commission *which exercises delegated legislative powers*,"⁶³ and that on the theory of strict division of powers adopted in the principal opinion "the inherent power of this court does not extend far enough to entitle it to hold, independent of statute, that persons practicing before the legislature's delegated agent, the Public Service Commission, must be licensed by us."⁶⁴ It is intimated that if the Court does have this power it might also make a rule "permitting only licensed attorneys to appear in a representative capacity before legislative committees investigating facts preparatory to the enactment of statutes."⁶⁵

It is humbly submitted that it is time the courts in this country should reconsider the nature and function of administrative tribunals, such as public service commissions, and modify any conception responsible for statements such as those quoted above. That such a tribunal exercises only law making powers certainly is hard to justify in the light of its day-to-day functioning. Most assertions of this nature go back to the case of *Prentis v. Atlantic Coast Line Co.*,⁶⁶ in which Mr. Justice Holmes denied the power of the federal court to enjoin the application of a rate schedule fixed by the State Corporation Commission of Virginia. The ground of denial was that the rate as fixed was not final but might be modified on appeal; therefore, as the state agencies were not yet through with the process of rate making, the court should not interfere by injunction. In so holding, the rate making process was referred to as legislative in its nature, to distinguish it from judicial, for purposes of applying the Act of Congress there involved forbidding the United States Courts to enjoin proceedings in "any court of any state."⁶⁷

"The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind (The) proceedings . . . are not a suit in which a writ of error would lie The decision upon them cannot be *res judicata* when a suit is brought."⁶⁸

63. *Ibid.* (Italics supplied).

64. *Id.* at 996.

65. *Ibid.*

66. 211 U. S. 210 (1908). For a contemporary case taking the contrary view as to the nature of the function, see the opinion of Chief Judge Cullen in *People v. Wilcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

67. U. S. REV. STAT. § 720; 28 U. S. C. A. 379.

68. 211 U. S. 210, 226, 227 (1908). Three justices disagreed with the assertion that this was legislative in nature.

This case was decided twenty-nine years ago when administrative tribunals as known today were largely non-existent, and when the historical precedent of legislatively fixed rates was a fresh one. As a matter of fact the practice was still in use in many states at that time.

Since many state legislatures, at one time or another, have, by ordinary legislative enactment, provided for flat two-cent passenger fares on all intrastate roads, or other similar rates, and since historical precedent is one factor of importance in determining the nature of a disputed governmental function, a potent argument is always available to establish the legislative character of rate-fixing bodies such as our Public Service Commission. But if the function performed be carefully analyzed, such a conclusion is hard to reach.⁶⁹ A decision on an application for a certificate of public convenience and necessity as involved in this case, or the determination of what it is a reasonable rate to be fixed in a particular case, seems to partake somewhat of the nature of both a legislative and a judicial act without being strictly either. In either situation the result is a special determination of a particular case, applicable only to the party before the commission. If, as asserted in the *Prentis* case, it "is the making of a rule for the future," it is a special rule for a particular case which is more like a judicial determination than it is like the prior practice of legislatures to fix a rate of so much per mile or per ton, applicable alike to all carriers operating within the state.

Not only is the determination or order of a public service commission, in its nature and effect, more like a judicial determination than a legislative enactment, but the procedure by which the tribunal functions requires a similar characterization. The commission proceeds upon complaint, either upon its own motion or by another, or by petition.⁷⁰ It summons witnesses, compels the production of books and papers by subpoena *duces tecum*,⁷¹ administers oaths, holds hearings upon notice to all parties to a controversy, takes testimony, examines and weighs evidence, makes rulings of law and finding of fact, determines rights, and renders decisions required by law to be published,⁷² by which it builds up a body of precedent in a way not

69. See Brown, *The Functions of Courts and Commissions in Public Utility Rate Regulation* (1924) 38 HARV. L. REV. 141, 148-152; Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation* (1921) 30 YALE L. J. 681, 682-686.

70. MO. REV. STAT. (1929) § 5164.

71. *Id.* § 5163.

72. *Id.* § 5139.

greatly unlike ordinary courts. Such proceedings are started only upon due notice to all parties whose rights are to be affected,⁷³ are conducted substantially according to judicial practice, are participated in throughout by those parties in person or by attorney with full right to present all pertinent evidence, and would seem to be judicial in their nature. Decisions of the commission are subject to review on "writ of *certiorari* or review"⁷⁴ by the circuit courts, where all matters are determined on the basis of the record made before the commission.⁷⁵ The orders and decisions of the commission become final and binding unless modified on rehearing or review within the statutory period,⁷⁶ and when they so become final are made conclusive in all collateral proceedings.⁷⁷ Such functions as performed by the commission are clearly not legislative, but judicial in their essential character.⁷⁸ Courts commonly speak of them as being *quasi-judicial*,⁷⁹ to distinguish them from the

73. *Id.* §§ 5230, 5232.

74. *Id.* § 5234.

75. *Ibid.*

76. *Id.* §§ 5233, 5234.

77. *Id.* § 5238.

78. Compare Judge Lamm's early characterization of the Commission's function as "administrative" rather than "legislative" or "judicial" as those terms are used in the Constitution, but note his emphasis upon functions judicial in nature. "Section 16 prescribes the *jurisdiction* of the commission. . . . By other sections we see that its *decisions* are to be published for public information and use and are to be conclusive, unless modified on rehearing or review; that it is given compulsory process, by other sections, for witnesses and papers, and that its orders are to be obeyed under pains and penalties." *State ex rel. Missouri Southern Railroad Co. v. Public Service Commission*, 259 Mo. 704, 718, 719, 168 S. W. 1156 (1914).

79. Berle, *The Expansion of American Administrative Law* (1917) 30 HARV. L. REV. 431, 432, 433, 434, 440; Eastman, *The Place of the Independent Commission* (1923) 12 CONST. REV. 95, 97; Wiel, *Administrative Finality* (1925) 38 HARV. L. REV. 447, 458, 459; Comment: *Administrative Tribunals—Distinction in Legal Effect Between Legislative and Quasi-Judicial Orders of the Interstate Commerce Commission* (1936) 34 MICH. L. REV. 672. For an excellent discussion of the judicial or quasi-judicial nature of administrative tribunals such as public service commissions, see Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 583. *Interstate Commerce Commission v. Humbolt Steamship Co.*, 224 U. S. 474, 484 (1912); *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91 (1913); *Baer Bros. Mercantile Co. v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 486 (1914); *The Chicago Junction Case*, 264 U. S. 258, 265 (1924); *Interstate Commerce Commission v. United States*, 289 U. S. 385, 388 (1933); *Butte, Anaconda & Pacific Ry. Co. v. United States*, 290 U. S. 127, 136, 142, 143 (1933); *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific R. R. Co.*, 64 Fed. 981, 982 (C. C. S. D. Ohio 1894); *Pitzer Transfer Corp. v. Norfolk & W. Ry. Co.*, 10 F. Supp. 436, 437 (Md. 1935); *Farmers Elevator Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 266 Ill. 567, 572, 107 N. E. 841 (1915). For a definition of what courts mean by "quasi-judicial" see *Hoyt v. Hughes County*, 32 S.

strictly judicial proceedings of a court. This would certainly seem to indicate that they are regarded as being other than legislative in character.

The courts further assert that "the orders of the commissions are entitled to great weight, can be set aside only if arbitrary and unreasonable or in clear violation of a rule of law," that "courts should review or interfere . . . only so far as necessary to keep them within their *jurisdiction* and protect constitutional rights," and if their determinations are not thus defective and are "supported by substantial evidence we accept (them) as final."⁸⁰ For purposes of sustaining the validity of the Missouri Public Service Commission Act under our constitutional distribution of powers and provision for the creation of courts, our Supreme Court has said that, "the design of the Act was to create an administrative agency" which "does not fall under the head of any of the courts described in the Constitution." "The Public Service Commission is not a court. If it were a court then its organization as such would be in the very teeth of the Constitution."⁸¹

D. 117, 142 N. W. 471, 473 (1913); *In re Courthouse of Okmulgee County*, 58 Okla. 683, 161 Pac. 200, 201 (1916); *Board of County Commissioners v. Cypert*, 166 Pac. 195, 198 (Okla. 1917); *Green v. Board of Commissioners*, 126 Okla. 300, 259 Pac. 635, 637 (1927).

80. *Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission*, 268 Ill. 49, 57, 108 N. E. 729 (1915); *Public Utilities Commission v. Chicago, Milwaukee & St. Paul Ry. Co.*, 287 Ill. 412, 416, 417, 122 N. E. 803 (1919); *Public Utilities Commission v. Smith*, 298 Ill. 151, 163, 131 N. E. 371 (1921); *Wabash, Chester & Western R. R. Co. v. Commerce Commission*, 309 Ill. 412, 417, 141 N. E. 212 (1923); *Campbell v. Commerce Commission*, 334 Ill. 293, 295, 165 N. E. 790 (1929); *City of Harrisonville v. Public Service Commission*, 330 Mo. 1, 9, 12, 49 S. W. (2d) 614 (1932); *State ex rel. Kansas City Power & Light Co. v. Public Service Commission*, 335 Mo. 1248, 1265, 76 S. W. (2d) 343 (1934); *People v. McCall*, 219 N. Y. 84, 88-90, 113 N. E. 795 (1916); *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454 (1907); *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 471 (1910); *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547 (1912); *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562 (1919); *United States v. New River Co.*, 265 U. S. 533, 542 (1924); *Northern Pacific Ry. Co. v. Department of Public Works of Washington*, 268 U. S. 39, 44 (1925); *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271 (1926); *Chicago Rock Island & Pac. Ry. Co. v. United States*, 274 U. S. 21, 33, 34 (1927); *Assigned Car Cases*, 274 U. S. 564, 580, 581 (1927). *Cf.* *Tagg Brothers & Moorhead v. United States*, 280 U. S. 420, 443, 444 (1930). For a discussion of this aspect of the probem see, DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 157-202.

81. *City of Macon v. Public Service Commission*, 266 Mo. 484, 490, 181 S. W. 396 (1916); *Lusk v. Atkinson*, 268 Mo. 109, 116, 186 S. W. 703 (1916); *Missouri Southern Ry. Co. v. Public Service Commission*, 279 Mo. 484, 489, 214 S. W. 379 (1919); *State ex rel. Mo. Pac. R. R. Co. & Mo. So. R. R. Co. v. Public Service Commission*, 303 Mo. 212, 218, 219, 259 S. W. 445 (1924). *Cf.* *State ex rel. Guar-*

It is not necessary in this discussion to consider the matter of exactly how the administrative function fits into our tri-partite set-up of governmental powers. Such commissions as here under consideration are habitually characterized by the courts as administrative tribunals, which clearly they are, defying accurate classification within any one of the time-honored categories—legislative, executive, or judicial—but partaking of the nature of all three, and performing functions characteristically appropriate to each.⁸²

No definite characterization of the administrative tribunal would seem to be necessary, however, to make it perfectly obvious that appearance before it in a representative capacity, for the purpose of securing a determination of legal rights and duties on the part of the person represented, neces-

anty Co. v. Harty, 276 Mo. 583, 597, 598, 208 S. W. 835 (1919), where Judge Walker discusses functions judicial in their nature performed by other agencies than courts; and State ex rel. Brewen-Clark Syrup Co. v. Workmen's Compensation Commission, 320 Mo. 893, 898, 8 S. W. (2d) 897 (1928), where Judge Ragland, dealing with a similar function of the Workmen's Compensation Commission and speaking for a unanimous court, asserted that, "it must be conceded that the Commission is not invested with judicial power in the sense in which that term is used in Article III of the Constitution, providing for the distribution of the powers of government. But . . . in hearing and determining the facts the Commission clearly performs a judicial function." For a lengthy discussion of the same problem and a collection of cases characterizing the function as quasi-judicial, see De May v. Liberty Foundry Co., 327 Mo. 495, 513, 514, 515, 37 S. W. (2d) 640, 650 (1931). For a discussion of the nature of the functions performed by the Missouri Public Service Commission, see Simonton, *Judicial Control of the Missouri Public Service Commission* (1924) 30, 31 and 32 U. OF MO. BULL. L. SER., 30, 31 and 36 respectively, and, especially, 31 at 32 and 33.

82. BLACHLY AND OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934) (This concept is emphasized throughout the book); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 15-20; 1 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1931) 288; 2 SHARFMAN, *op. cit. supra*, 350; 1 SPURR, *THE GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION* (1924) 160-193; Eastman, *The Place of the Independent Commission* (1928) 12 CONST. REV. 95; Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power* (1912) 27 POL. SCI. Q. 34; (1913) 28 POL. SCI. Q. 215; Thelen, *Practice and Procedure Before Administrative Tribunals* (1928) 16 CALIF. L. REV. 208. Cf. REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT OF THE GOVERNMENT OF THE UNITED STATES (January 1937) 36-38. In an early case involving the Interstate Commerce Commission before its present rate-making powers existed, Mr. Justice Brewer asserted that, "the power given is partly judicial, partly executive and administrative, but not legislative." *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 501 (1897); *Springer v. Government of the Philippine Islands* (Mr. Justice Holmes' dissent), 277 U. S. 189, 210, 211 (1928). "It is clear that the power . . . to establish a public service commission for the better administration of the law regulating public service corporations (is a) part of the 'legislative power' as defined in the Constitution. . . . The power exercised by the Public Service Commission is administrative, and not legislative." *State ex rel. Lashly v. Becker*, 290 Mo. 560, 636, 637, 235 S. W. 1017, 1027 (1921).

sitating a knowledge of law and an ability to take the necessary steps properly to protect the legal interests of the party represented, involves the performance of functions which fall within the broad conception of the practice of law as understood at the present time.⁸³ This would seem to be equally true whether the person in question be representing clients in the ordinary fashion, as were respondents Austin and Hull in the case under consideration, or acting on behalf of an employer, as was respondent Coon.⁸⁴ If it is ever proper to include in this conception the performance of functions not involving appearance before a court of record, this would seem to furnish an illustration. Rights are determined in first instance by the commission, that determination is reviewed by the courts on writ of *certiorari*, and the record made before the commission constitutes the sole basis for the action of the court. It would seem, therefore, that the Court's inherent power to regulate the practice of law, admittedly including all sorts of office practice as well as appearance in court, should include, without the aid of statute, the commission appearances involved in the *Austin* case.⁸⁵

83. *Boykin v. Hopkins*, 174 Ga. 511, 516-520, 162 S. E. 796 (1932); *People v. People's Stock Yards Bank*, 344 Ill. 462, 475, 476, 176 N. E. 901 (1931); *People v. Ass'n of Real Estate Tax-Payers*, 354 Ill. 102, 109, 110, 187 N. E. 823 (1933); *State v. Perkins*, 138 Kan. 899, 907, 908, 28 P. (2d) 765 (1934); *Depew v. Wichita Ass'n of Credit Men*, 142 Kan. 403, 49 P. (2d) 1041, 1046-1048 (1935); *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313, 317 (1935); *In re Shoe Mfgs. Protective Ass'n, Inc.*, 3 N. E. (2d) 746, 748 (Mass. 1936); *People v. Alfani*, 227 N. Y. 334, 338-340, 125 N. E. 71 (1919); *Shortz v. Farrell*, decided by the Supreme Court of Pennsylvania, June 25, 1937, not yet published; *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139, 144, 145 (1935). *Cf. Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937), and *Curry v. Dahlberg*, decided by the Supreme Court of Missouri, April 21, 1937, rehearing denied June 30, 1937 (neither opinion published as yet). This case has been transferred to the Court en Banc.

84. Mr. Coon alleged that he was not acting as an attorney but in his capacity as assistant general freight agent for the Missouri Pacific Railway Company. It is universally recognized, of course, that corporations, unlike natural persons, cannot act in person, but must act through agents. If legal matters are involved it can only act through licensed attorneys. *Mullin-Johnson Co. v. Pennsylvania Mutual Life Ins. Co.*, 9 F. Supp. 175 (N. D. Calif. 1934); *People v. People's Stock Yards Bank*, 344 Ill. 462, 176 N. E. 902 (1931); *People ex rel. Chicago Bar Ass'n v. Motorists Ass'n*, 354 Ill. 595, 188 N. E. 827 (1934); *Cary & Co. v. Satterlee & Co.*, 166 Minn. 507, 208 N. W. 408 (1926); *State ex inf. Miller v. St. Louis Union Trust Co.*, 335 Mo. 847, 74 S. W. (2d) 348 (1934); *New Jersey Photo Engraving Co. v. Carl Shonert & Sons, Inc.*, 95 N. J. Eq. 12, 122 Atl. 307 (1923); *Black & White Operating Co. v. Grosbart*, 107 N. J. L. 163, 151 Atl. 630 (1930); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910).

85. *Cf. People ex rel. Chicago Bar Ass'n v. Goodman*, decided by Supreme Court of Illinois, Feb. 18, 1937, not yet published; *Michigan State Bar Ass'n v. McGregor*, 14 Mich. S. B. J. 145; *State Bar of Oklahoma v. Waldron*, Dist. Ct. of Tulsa County, Okla., 1935, reported in BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) 442; *Shortz v. Farrell*, decided by the Supreme Court of Pennsylvania, June 25, 1937, and not yet published.