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A Loyalty Oath for Candidates

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come was escaping federal taxation annually by virtue of section 101 (6) [17] of the Internal Revenue Code. Under a 1950 amendment to the Internal Revenue Code, Section 302 (a), Revenue Act of 1950, this situation no longer exists. The exemptions extended by the old section have been limited by the new amendment. Charities are no longer small and financially weak and as the tax figures indicate, they have become big business with billions of dollars invested in them.

That charities are no longer weak was well stated by Lester W. Freezer. "The modern institution which is the usual defendant in these cases does not do charity in the manner of the good samaritan of old. It is a thing of steel and stone and electricity, of boards and committees, of card indices and filing systems, and of rules and regulations."[18]

The decisions in the principle cases add weight to the growing trend of an unsympathetic attitude toward the charitable institution and the removal of its immunity from tort liability.

WALLACE A. DELONG

A LOYALTY OATH FOR CANDIDATES

The State of New Jersey in 1949 enacted statutes[1] providing that candidates for nomination or for election to the legislature or to the office of governor must, in addition to taking an oath to support the constitution, take an additional oath in the following terms: "That I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this state; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the governments established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatsoever." Persons elected to office must likewise take the same oath prior to assumption of office.

James Imbrie and others, with the aid and collaboration of the American Civil Liberties Union, brought proceedings to test the validity of these statutes. The trial court rendered judgment supporting the

17. The Tax Magazine, August 1950.
18. 77 Univ. of Pa. L. R. 191 (1928).

1. N.J. Laws of 1949, c. 21-25.

statutes and from that judgment the case was appealed to the New Jersey Superior Court. *Held*: That such a statute, which added an oath additional to that set out in the state constitution, and added qualifications for holding office to those already prescribed by the constitution, was invalid insofar as it related to the governor, senators, and members of the General Assembly and candidates for those offices. The court referred the New Jersey constitution as fixing the qualifications for public office, and held that the legislature may not change them nor add new qualifications.[2] An oath of office was characterized as a promise and assurance of future official conduct, and not a device for making some persons ineligible for office. Putting it a little differently, the court held that since the New Jersey Constitution prescribed a specifically worded oath of office, the legislature may not devise any other oath.[3] *Imbrie v. Marsh*, 5 N.J. Super. 239, 68 A. (2d) 761 (1949).

The logic of *Imbrie v. Marsh* may be questioned. In the first place, the case was brought primarily to test the validity of a statute requiring loyalty oaths as a qualification for *candidacy*. The court reached its ruling on interpretations of the state constitution setting forth qualifications for the *office itself*, and not for candidacy. No reference or authority is given for the conclusion that a loyalty oath for candidacy should be prohibited. Second, despite the court's ruling as to additional oaths required of those holding office, it did admit the validity of an oath which was imposed "for the security of the state" and provided for by the statutes of 1920.[4] This latter oath was justified on the ground that it only stated in another form the allegiance owed to the government, and the willingness to maintain the constitution. Wherein such an oath would differ from the loyalty oath held invalid in the case, and which sets forth the same content in negative terms, is not clear. Third, one questions whether the court is consistent in callng the loyalty oath an oath, and therefore barred by the constitution, then in the next breath holding that it is not really an oath, in that it gives no assurance of future conduct, but is merely a test to separate ineligible from eligible candidates. Fourth, accepting the opinion that this oath is a device to exclude certain classes of citizens from holding office, no authority is given for the conclusion that such a test is unconstitutional. There is authority to the contrary.[5] Fifth, the court contended that one has a constitutional right to be governor or a member of a legisla-

2. People *ex rel.* Hoyne v. McCormick, 261 Ill. 413, 103 N.E. 1053 (1913); State *ex rel.* La Follette v. Kohler, 200 Wis. 518, 228 N.W. 895, 232 N.W. 842 (1930); People *ex rel.* Breckton v. Bd. of Election Com'rs., 221 Ill. 9, 77 N.E. 321 (1906). The legislature cannot prescribe oath in addition to qualification already prescribed by the constitution. Clayton v. Harris, 7 Nev. 64 (1871).
3. Constitutional provision as to oath of officers is conclusive on legislature, mandatory, and self-executing. State v. Callow, 78 Mont. 308, 254 Pac. 187 (1927). Also cf, Miss. County v. Green, 200 Ark. 404 (1909).
4. P.L. of 1920, p. 413; now found in N.J. Rev. Stat. of 1941, c. 1-3.
5. Opinion of the Justices, 165 Mass. 599, 43 N.E. 927 (1896) where women were forbidden, because of sex, to become notaries public. Also see Wyo. Const. Art. 6, sec. 9, providing that those who cannot read the constitution may not vote, and hence are not qualified to hold office.

ture.[6] This view does not stand uncontroverted.[7] And finally, it is illogical to assume that the framers of the New Jersey Constitution intended that those who are bent on destroying that constitution by means that were unconstitutional should do so under the protection of the constitution itself.[8] The reasoning that the constitution may authorize something unconstitutional needs no comment.

Though *Imbrie v. Marsh* might be considered a leading case on the question of loyalty oaths, the ruling rested largely on the particular provisions of the New Jersey state constitution. The varying provisions of other state constitutions could justify an opposite result. An Illinois court in 1942 was careful to hold a similar non-Communist oath void only because of uncertainty.[9] A holding by a Maryland court that similar statutes passed by the 1949 Maryland legislature were unconstitutional, was reversed by the Maryland Court of Appeals.[10] A statute in New York, known as the Feinberg Law, of slightly different character in that it directed a purge of the public school system of Communists, though first held unconstitutional by the New York Supreme Court, was ruled valid upon reversal of the Appellate Court.[11]

The problem of the validity of a loyalty oath in Wyoming would be resolved by several factors, involving the specific provisions of the Wyoming Constitution, the court's interpretation of any possibly ambiguous terms, and the construction and use of the word "oath". For instance, it is to be noted that the Wyoming Constitution makes no express provision for a prescribed oath of office for the Governor. The validity of a loyalty oath for the governor in addition to his oath of office would depend on whether the court would construe it strictly as an oath, in which case there would be no constitutional bar, or whether the court would consider it an additional qualification as did the New Jersey Court in *Imbrie v. Marsh.*

The issue of security to the state from subversive elements would not be a new one to Wyoming, for a statute was passed in 1941 barring the Communist Party from participating in any primary or general election.[12] The statute is yet to be tested for effectiveness and constitutionality.

However, a cursory glance at the Wyoming Constitution indicates a substantial similarity to the New Jersey Constitution which would support the decision of *Imbrie v. Marsh* under similar reasoning. The Wyoming

6. Kirkpatrick v. Brownfield, 97 Ky. 558, 17 Ky. L. 376, 31 S.W. 137 (1895).
7. State *ex rel.* Jones v. Sargent, 145 Iowa 298, 124 N.W. 339 (1910), and Bickett v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).
8. The right to alter the form of government is limited to the methods and purposes defined by law. Cf, Collier v. Frierson, 24 Ala. 100 (1854).
9. Feinglass v. Reinecke, 48 F. Supp. 438 (Ill. 1942).
10. Hammond v. Lancaster, ——Md.——, 71 A.(2d) 474 (1950).
11. Thompson v. Wallin, 95 N.Y.S.(2d) 784 (1950).
12. Wyo. Comp. Stat. 1945, sec. 31-1404.

Constitution prescribes the oath of office for senators, representatives, and state and county officers.[13] Qualifications for state officers are also prescribed[14] with no reference to loyalty. To become governor of the state, one need only to be 30 years old, a resident of the state for five years, and a qualified elector.[15] To be a qualified elector, only minimum age, residence, and citizenship requirements need be complied with.[16] An elector may be disqualified only by being non compos mentis, being convicted of an infamous crime without restoration of civil rights,[17] or by not being able to read the state constitution.[18]

The Wyoming Constitution is unusually liberal, with a view to political freedom, exemplied by Art. 1, sec. 1, in the Declaration of Rights setting forth the power inherent in the people as follows: "All power is inherent in the people, and all free governments are founded in their authority and instituted for their peace, safety, and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or *abolish* the government *in such manner* as they may think proper," (italics are the writer's) a fitting declaration, at first glance to legalize the overthrow of the government by force or violence. Literally, from Art. 1, sec. 1, there can be implied no constitutional denunciation of doctrines seeking to alter or abolish the government even by force and violence. Under the provisions of Art. 1, sec. 3[19] guaranteeing equal political rights without "distinction whatsoever," it would seem that even avowed enemies of the state may hold key positions in the government without challenge.

Nevertheless, the issue of a loyalty oath for *candidacy* in Wyoming is an open one. *Imbrie v. Marsh* made no distinction between those elected to office and those who applied for candidacy. Such a stand raises an interesting question. May a person who has not yet met the age and residence requirements for a particular office file candidacy for that office if he will have fulfilled such requirements by the time he is to actually take office if elected? It was so held by a Kentucky court in 1895[20] in distinguishing candidacy from the actual taking of office.

Both the United States Constitution and the Wyoming Constitution are silent as to specific qualifications of *candidates* for office. A constitu-

13. Wyo. Const. Art. 6, sec. 20.
14. Wyo. Const. Art. 4, sec. 11; and Art. 6, sec. 15
15. Wyo. Const. Art. 4, sec. 2.
16. Wyo. Const. Art. 6, sec. 2.
17. Wyo. Const. Art. 6, sec. 6.
18. Wyo. Const. Art. 6, sec. 9.
19. Wyo. Const. Art. 1, sec. 3: "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."
20. Note 6. supra.

tion should be so interpreted as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.[21] Since the Wyoming Constitution does not provide for any qualification of fitness for candidates who wish to run for office in the government, one may presume it was the intent of the framers to leave such matters to the legislature. The omission of a subject in a constitution can well mean the exclusion of that subject from constitutional authority,[22] in which case the legislature may step in and act. Certainly in this instance, omissions of specific qualifications for candidacy cannot be construed to show an intent of the framers and the people who adopted the constitution that those who are *unfit* be allowed to imperil the interests of the people by being permitted to fill important postions in the government and lead to its destruction. In resorting to Common Law,[23] unfitness, if gross and palpable, is a disqualification for holding office,[24] and it is within reason that the framers of the constitution did not, by their silence on candidacy, intend to protect what might destroy the state.[25]

The Wyoming Constitution does go so far however, as to make indirect reference to unfitness in its equal political rights clause by providing that there shall be no distinction "whatsoever other than *individual incompetency,* or unworthiness duly ascertained by a court of competent jurisdiction."[26] (Italics are the writer's) It is not clear just to what extent this phrase may be applied, but it is noted that the word "incompetency" is followed by a comma separating it from "or unworthiness" thus raising a question of exact construction. Grammatically construed, it means that one who is incompetent may not claim equal political rights, whereas one who is unworthy must first be so determined by a court of competent jurisdiction before he may be denied equal political rights. It follows then, under this construction, that if one who follows the Communist Party line is incompetent to hold office, no judicial machinery need be invoked to justify denial of equal political rights to run for office. *Bouvier's Law Dictionary,* 8th Edition, defines "competent" as being "Able, fit, qualified; authorized or capable to act," and *Black's Law Dictionary,* 3rd Edition, defines "competent" as "duly qualified; answering all requirements; able; adequate; suitable; sufficient; capable; legally fit." One who seeks to overthrow a government by force and violence is hardly competent to run for office in that very government he seeks to destroy.

21. Lawrence v. State, 269 U.S. 585, 46 Sup. Ct. 201, 70 L. Ed. 425, 29 Ariz. 247, 240 Pac. 863, 241 Pac. 511 (1925).
22. Wyo. Const. Art. 1, sec. 36, provides that, "Enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people."
23. The framers of the instrument are presumed to have intended no change or innovation on the Common Law further than appears from express declaration or implication. State v. Rector, 158 S.C. 212, 155 S.E. 385, 164 S.E. 865, 164 S.E. 872 (1930).
24. cf, State *ex rel.* Shea v. Cocking, 66 Mont. 169, 213 Pac. 594 (1923); Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021 (1909). See also 28 A.L.R. 772 and 20 Ann. Cas. 418.
25. State v. Gibson, 189 Iowa 1212, 174 N.W. 34, 181 N.W. 704 (1919).
26. Note 19, supra.

In searching for other authority on qualifications for candidacy, it is found that as a general rule, one who has qualifications to fill an office may be a candidate for that office,[27] but the rule throws no light on the question whether qualifications may be greater or less for candidacy than for the corresponding office, nor whether the legislature may independently prescribe qualifications for candidacy differing from qualifications for the office as set out by the constitution. It has also been held that whenever power to prescribe qualification is not mentioned in the constitution, the implication is that the legislature has unrestricted control over the subject.[28] This control has been recognized in Wyoming to the extent that the legislature may designate the nominations of candidates on a ballot and was so held by the Wyoming Supreme Court in 1944.[29] The holding relied on the Wyoming Constitution to that effect.[30] The ruling is abundantly supported in other jurisdictions.[31] A legislature may require a candidate to *show fitness* for the office he desires to fill, even when the constitution provides expressly that no other additional oath, affirmation, declaration or test be required as a qualification for office.[32] A New York court in 1890 held that imposing a test designed to secure the qualifications of a candidate for office, of a nature to enable him properly and intelligently to perform the duties of such office, violates no constitutional provision.[33] Granted that such statutes may appear to evade the constitutional restriction as to qualifications for office, yet in relating to *candidacy*, they have been held valid. A statute requiring swearing by a candidate that he is qualified, as prescribing tests for candidacy, has been also upheld.[34] But the courts have hesitated to go any further and have held in several jurisdictions that a legislature cannot exact of a citizen that he believe in a certain political faith or creed to entitle him to hold office.[35]

Thus it is seen that the state of the law, as suported by the authorities, generally recognizes the right of the legislature to control candidacy for

27. State *ex rel.* Curyea v. Wells, 92 Neb. 337, 138 N.W. 165, 41 L.R.A. (N.S.) 1088 (1912); Bordwell v. Williams, 173 Cal. 283, 159 Pac. 869, L.R.A. 1917A, 996, Ann. Cas. 1918E 358 (1916).

28. State *ex rel.* Thompson v. McAllister, 38 W.Va. 485, 18 S.E. 770 (1893).

29. The legislature regulates the making of nominations of candidates for public office whose names will be printed on official ballots. State *ex rel.* Copenhaver v. Jack, 60 Wyo. 405, 153 P.(2d) 149 (1944).

30. Wyo. Const. Art. 6, sec. 11.

31. Legislature has right of regulating nominations of political parties. United States v. O'Toole, 236 F. 993 (1916); Smith v. Allwright, 321 U.S. 649, 64 Sup. Ct. 757, 88 L. Ed. 987 (1944) (dictum).
Legislature may prescribe qualifications provided they do not conflict with provisions of the constitution. Riter v. Douglass, 32 Nev. 400, 109 Pac. 444 (1910).
Powers of parties to make nominations are subject to legislative control. cf, Winston v. Moore, 244 Pa. 447, 91 A. 520 (1914).

32. Note 28, supra.

33. Rogers v. Buffalo, 123 N.Y. 173, 25 N.E. 274, 9 L.R.A. 579 (1890).

34. State v. Haskell, 72 Fla. 176, 244, 72 So. 651 (1916), Legislature may prescribe tests for candidacy. Heney v. Jordan, 179 Cal. 24, 175 Pac. 402 (1918); Hart v. Jordan 168 Cal. 321, 143 Pac. 537 (1914).

35. State *ex rel.* Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1889); Evansville v. State *ex rel.* Blend, 118 Ind. 426, 21 N.E. 267 (1889); People *ex. rel.* LeRoy v. Hurlbut, 24 Mich. 44 (1871).

office. The Wyoming Constitution imposes no qualifications on candidacy for office so as to pre-empt the field and bar legislation on the issue. Equal political rights, including the right to run for office, are only guaranteed to the competent and the worthy, and there is no constitutional bar to legislation against the incompetent. Those who desire to destroy the very government in which they seek office are neither competent nor worthy of equal political rights to run for that office. They cannot resort even to the protection of the 14th Amendment of the United States Constitution guaranteeing equal rights, for the application of those provisions has been held to regard the rights of citizens of sister states, and not to deprive a state of control over its own citizens.[36]

So far as Wyoming is concerned, a loyalty oath as applied to candidates for public office is constitutionally possible. The loopholes of the already existing statute[37] prohibiting the Communist Party from participating in elections as a party, would be effectively plugged by an individual test to bar persons sympathetic to the Communist cause from running for office under the guise of another banner.

TOSH SUYEMATSU.

UNJUST ENRICHMENT OF FRAUDULENT GRANTEE

A coal miner and his wife, believing they were obligated to pay a $500 doctor bill for their adult child, transferred real property to the husband's brother, under an oral agreement to reconvey upon demand. Eleven years passed, the husband died, and the grantee refused to reconvey to the wife. The wife, being in possession, bought suit to have the title quieted in her and the grantee filed a cross complaint for ejectment. Both suits were dismissed by the trial court. The Supeme Court modified the holding and ordered the grantee the reconvey. *Held,* that when a conveyance is made to defraud creditors and there is a parol agreement to reconvey, the purported fraud on creditors will be balanced against the unjust enrichment of the grantee and, if justice requires, the grantee will be compelled to recovery. *Wantulok v. Wantulok,* 223 P. (2d) 1030 (Wyo. 1950).

When a grantor transfers his property without consideration to avoid attachment or execution by creditors, the overwhelming majority rule is: that as between the parties the grantee holds both legal and equitable titles against all the world except defrauded creditors and the fradulent

36. 14th Amendment does not operate to deprive state of power over its own citizens. Little v. Miles, 204 N.C. 646, 169 S.E. 220 (1933) (by implication).
37. Note 12, supra.