

## COMMENT ON RECENT DECISIONS

ATTORNEYS—UNAUTHORIZED PRACTICE—CLAIMS DEPARTMENTS OF CASUALTY INSURANCE COMPANIES—[Missouri].—A special Missouri court<sup>1</sup> recently held that casualty insurance companies were engaged in the unlawful practice of law by reason of legal services performed by managers and employees in claims departments, notwithstanding the fact that one or more licensed attorneys were regularly employed in such departments.<sup>2</sup> The acts held to constitute unlawful law practice were the adjustment and settlement of claims, the preparation of releases and covenants not to sue, the giving of advice to the companies and the insured of their legal rights, the appearance before the Workmen's Compensation Commission, and the determination of the legal liability of the companies. The mere discovery of witnesses, the appraisal of damage to property in cases of undisputed liability, the ministerial execution of prepared instruments, and the payment in discharge of claims were acts held not to constitute unlawful practice of the law.

The field of law relative to unauthorized practice is a troublesome one and has assumed considerable importance in recent years.<sup>3</sup> It is well settled that neither corporations nor laymen may practice law.<sup>4</sup> The difficulty arises when an attempt is made to draw the line between what is law practice and what is not. It is universally conceded that trial work,<sup>5</sup>

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1. *Liberty Mutual Insurance Co. et al. v. Clark* (Boone Cty. Ct. Ct., Mo. 1938) 5 U. S. Law Week 643. Two additional judges heard the case as advisory judges by agreement of the parties.

2. For general treatment of this subject see 111 A. L. R. 19; Ann. Cas. 1918 C 131; 7 C. J. S., Attorney and Client (1937) 704, sec. 3; 5 Am. Jur., Attorneys at Law (1936) 262, sec. 3. The cases are collected and arranged in Brand, *Unauthorized Practice Decisions* (1937).

3. Cattarall, *The Unauthorized Practice of the Law* (1933) 19 A. B. A. J. 652; Gleason, *Unauthorized Practice of the Law* (1935) 21 A. B. A. J. 243.

4. For annotations on this point as to corporations see 73 A. L. R. 1327 and 105 A. L. R. 1364; *People ex rel. Lawyers Institute of San Diego v. Merchants' Protective Ass'n* (1922) 189 Cal. 351, 209 Pac. 363; *State ex rel. Boynton v. Perkins* (1934) 138 Kan. 899, 28 P. (2d) 765; *State ex rel. Miller v. St. Louis Union Trust Co.* (1934) 335 Mo. 845, 74 S. W. (2d) 348 (leading case in Missouri); *The Bar Association of St. Louis v. H. Pagels d. b. a. Mutual Adjustment Co.* (St. Louis Ct. Ct., Mo. 1935) No. 2632-C, Div. No. 2 (layman who solicited claims and threatened suit as a collection firm held engaged in unlawful practice of law); *Van Hee v. Kauffman* (St. Louis Ct. Ct., Mo. 1935) No. 211420, Div. No. 3; *State ex rel. Lundin v. Merchants' Protective Corp.* (1919) 105 Wash. 12, 177 Pac. 694. In the leading case of *In re Cooperative Law Co.* (1910) 198 N. Y. 479, 92 N. E. 15, the court said: "The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client."

5. *Cobb v. Judge of Superior Court of Grand Rapids* (1880) 43 Mich. 289, 5 N. W. 309; *Kaplan v. Berman* (1902) 75 N. Y. S. 1002.

preparation of briefs,<sup>6</sup> and the rendition of legal advice to clients<sup>7</sup> are acts which constitute law practice. It is equally well settled that the practice of the law is not limited to the performance of these acts.<sup>8</sup> The recent tendency of the courts has been to curtail the activities of laymen<sup>9</sup> and to include within the term "law practice" the preparation of all legal documents, at least where the determination of a legal mind is involved.<sup>10</sup> Thus the preparation of wills,<sup>11</sup> trust agreements,<sup>12</sup> bills of sale and chattel mortgages<sup>13</sup> have been held to constitute the practice of law. However, in isolated instances or in instances where there is no holding out of such services, the preparation of legal documents has been held not to constitute law practice. Thus it has been held that a real estate broker may draw a deed of conveyance necessary to the transaction of a brokerage business,<sup>14</sup> though in a similar situation a contrary result has been reached.<sup>15</sup> A recent Pennsylvania case has held the preparation and filing of pleadings before a Workmen's Compensation Commission to be of too simple a nature to constitute law practice.<sup>16</sup> But the distinction between simple and complex instruments has been rejected by some courts.<sup>17</sup>

A corporation cannot practice law because it is not subject to the control exercised by the court over the bar.<sup>18</sup> It has therefore been held that a corporation cannot perform services for the incorporation of other firms.<sup>19</sup> For the same reason assessment and condemnation services contemplating appearance before a judicial body,<sup>20</sup> the foreclosure of a mortgage,<sup>21</sup> the

6. *In re Bailey* (1915) 50 Mont. 365, 146 Pac. 1101, Ann Cas. 1917B 1198; *Bank v. Risley* (1844) 6 Hill (N. Y.) 375.

7. *People ex rel. Colorado Bar Ass'n v. Erbaugh* (1908) 42 Colo. 480, 94 Pac. 349; *Fichette v. Taylor* (1934) 191 Minn. 582, 254 N. W. 910, 94 A. L. R. 356.

8. *Clark v. Austin* (Mo. 1937) 101 S. W. (2d) 977; *Eley v. Miller* (1898) 7 Ind. App. 529, 534, 34 N. E. 836, 837.

9. *Decisions Defining Practice of Law* (1938) 5 U. S. Law Week 648.

10. *In re Eastern Idaho Loan and Trust Co.* (1930) 49 Idaho 280, 288 Pac. 157, 73 A. L. R. 1323; *Crawford v. McConnell* (1935) 173 Okl. 520, 49 P. (2d) 551; *Paul v. Stanley* (1932) 168 Wash. 371, 12 P. (2d) 401, where it is said that one giving legal advice to those for whom he draws instruments does work of a legal nature "when such instruments set forth, limit, terminate, claim or grant legal rights."

11. *People v. People's Trust Co.* (1917) 167 N. Y. S. 767.

12. *Ibid.*; *In re Eastern Idaho Loan and Trust Co.* (1930) 49 Idaho 280, 288 Pac. 157, 73 A. L. R. 1323.

13. *People v. Title Guaranty and Trust Co.* (1917) 168 N. Y. S. 278. This decision is criticized in a Note (1918) 31 Harv. L. Rev. 886, on the broad ground that it tends to hamper economic development.

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

15. *In re Gore* (Ohio App. 1937) 5 U. S. Law Week 569.

16. *Shortz v. Farrell* (Pa. 1937) 193 Atl. 20. See also *Cain v. Merchants' Nat. Bank and Trust Co.* (1936) 66 N. D. 746, 268 N. W. 719.

17. *Re S. E. Matthews* (Idaho 1936) 62 P. (2d) 578, 111 A. L. R. 13; *People v. People's Trust Co.* (1917) 167 N. Y. S. 767; *Paul v. Stanley* (1932) 168 Wash. 371, 12 P. (2d) 401.

18. *In re Opinion of the Justices* (1935) 289 Mass. 607, 194 N. E. 313.

19. *In re Pace* (1915) 156 N. Y. S. 641. On this point see 73 A. L. R. 1335.

20. For collection of cases see 73 A. L. R. 1333.

21. *Re Otterness* (1930) 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319.

enforcement of a creditor's claim in bankruptcy proceedings,<sup>22</sup> and proceedings in matters of estate and guardianship<sup>23</sup> have been held to constitute the practice of the law. Similarly, though the collection of claims without resort to courts of law does not constitute the practice of law,<sup>24</sup> it does constitute law practice where the collector undertakes to give legal advice, threaten debtors with legal proceedings, or represent the employer in court either directly or through an attorney engaged for him.<sup>25</sup> But merely paying the expenses of a particular litigation or retaining an attorney on an annual salary basis to attend to the legal business of the corporation is not practice of the law.<sup>26</sup>

The growth of administrative tribunals has presented a problem in the unauthorized practice field. Appearance before a tax board was held to constitute practice of the law,<sup>27</sup> but four years later a contrary result was reached in the same jurisdiction.<sup>28</sup> In line with the latter case, the preparation and argument of appeals before a Board of Standards and Appeals was held not to constitute law practice.<sup>29</sup> But in recent cases the handling and adjusting of claims by a layman before the Workmen's Compensation Commission has been held to be unlawful practice of the law.<sup>30</sup> The same result has been reached where appearance before a Public Service Commission was involved.<sup>31</sup> From recent holdings it would seem that adjustment and settlement of claims by corporations or laymen, whether before an administrative tribunal or not, constitutes law practice whenever the determination of legal rights and liabilities is involved.<sup>32</sup>

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22. *Meisel and Co. v. National Jewelers' Board of Trade* (1915) 152 N. Y. S. 913.

23. *Re Otterness* (1930) 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319.

24. For general collection of authorities see annotation in 84 A. L. R. 750.

25. *Berk v. State ex rel. Thompson* (1932) 225 Ala. 324, 142 So. 832, 84 A. L. R. 740; *Creditors' Nat. Clearing House v. Baumwart* (1917) 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C 130; *Bar Association of St. Louis v. National Alliance Corp.* (St. Louis Ct. Ct., Mo. 1936) 2 *Unauthorized Practice News* (March, 1936) 34, where order to cease and desist was made upon finding that the corporation solicited claims and attempted to force settlements by threat of legal proceedings; *Missouri ex inf. McKittrick, Attorney General, v. C. S. Dudley and Co., Inc.* (Mo. 1937) 102 S. W. (2d) 895 (leading case in Missouri); *Re Cooperative Law Co.* (1910) 198 N. Y. 479, 92 N. E. 15. Cf. *Dietzel v. State* (Tex. Crim. App. 1936) 98 S. W. (2d) 183.

26. *Re Otterness* (1930) 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319.

27. *People ex rel. Trojan Realty Co. v. Purdy* (1916) 162 N. Y. S. 56.

28. *Tannenbaum v. Higgins* (1920) 180 N. Y. S. 738.

29. *Croker Nat. Fire Prevention Eng. Co. v. Harlem French Cleaning and Dyeing Works* (1927) 230 N. Y. S. 670.

30. *People of the State of Ill. ex rel. Chicago Bar Ass'n v. Goodman* (1937) 366 Ill. 346, 8 N. E. (2d) 941, 111 A. L. R. 1. See also *Clark v. Austin* (Mo. 1937) 101 S. W. (2d) 977.

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

32. *Meunier v. Bernich* (La. App. 1936) 170 So. 567 (leading case on claim adjusters); *Hightower v. Detroit Edison Co.* (1933) 262 Mich. 1, 247 N. W. 97, 86 A. L. R. 509; *State Bar of Missouri v. Universal Adjustment and Inspection Co.* (Mo. 1935) 2 *Unauthorized Practice News* (Sept. 1936) 101, where ouster order was issued against corporation which threatened

In order to determine whether particular acts fall within the scope of law practice, courts<sup>33</sup> and legislatures<sup>34</sup> have formulated definitions ostensibly for the guidance of those concerned with the problem. Such definitions are far too broad to be dependable. It has been suggested that the need is for a definition of law practice which will cover the field of activities that are *exclusively* legal without attempting to take in others which are *properly* legal, but also legitimate for other vocations.<sup>35</sup>

It would seem that the actual holdings of the cases must be considered carefully with respect to the particular facts involved. Upon such an analysis it is clear that the overwhelming tendency is to extend the definition of law practice for reasons of public policy. The instant case follows the general trend of decisions, though the wisdom of the policy is yet a matter of controversy.<sup>36</sup>

A. B. H.

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CONSTITUTIONAL LAW—TAXATION—IMMUNITY OF STATE AGENCY FROM FEDERAL TAXATION—[United States].—The difficulty which governmental bodies have experienced in finding suitable revenue sources has naturally given rise to a tendency to limit the immunity of governmental agencies from taxation. The doctrine of *Collector v. Day*<sup>1</sup> was again limited by the United States Supreme Court in two recent decisions. In *Helvering v. Mountain Producer Corporation*<sup>2</sup> and *Helvering v. Barline Oil Co.*<sup>3</sup> the

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legal proceedings in order to force settlement of solicited claims; *The Bar Ass'n of St. Louis v. International Ass'n of Commerce, Inc.* (St. Louis Ct. Ct., Mo. 1937) No. 6013, Div. No. 3.

33. A definition of law practice often quoted is that pronounced in *Eley v. Miller* (1893) 7 Ind. App. 529, 34 N. E. 836: "As the term is generally understood, the practice of the law is the doing or performing services in a court of justice \* \* \* But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured." See also *Clark v. Austin* (Mo. 1937) 101 S. W. (2d) 977, and *Paul v. Stanley* (1932) 168 Wash. 371, 12 P. (2d) 401.

34. In Missouri the "law business" is "the advising or counselling, for a valuable consideration, of any person, firm, association, or corporation as to any secular law or the drawing or procuring of or assisting in the drawing for a valuable consideration in a representative capacity, obtaining, or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever." (R. S. Mo. (1929) sec. 11692). In *State ex rel. Miller v. St. Louis Union Trust Co.* (1934) 335 Mo. 845, 74 S. W. (2d) 348, the mere naming of the corporation as executor, where no charge was made for drawing the will, was held a valuable consideration within the meaning of the statute.

35. *Ashley, Unauthorized Practice of the Law* (1930) 16 A. B. A. J. 558.

36. For an excellent discussion of the present and potential evils of unlawful practice of the law see Swaffield, *Unlawful Practice of the Law: The Profession's Responsibility in Relation Thereto* (1932) 5 S. Cal. L. Rev. 181. See also *supra*, notes 3 and 35. See dissenting opinion in *Liberty Mutual Ins. Co. v. Clark* (Boone Cty. Ct. Ct., Mo. 1938) 5 U. S. Law Week 643.

1. (1871) 78 U. S. 113, 20 L. ed. 122.
2. (1938) 5 U. S. Law Week 8.
3. *Id.* at 11.