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Real Property--Unauthorized Legal Practice--Legal Activity in Connection with Title Closing by Title Insurance Co. Held Not Unauthorized Practice of Law (Bar Ass'n of Tenn, Inc. v. Union Planters Title Guar. Co., 326 S.W.2d 767 (Tenn. App. 1959))

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conceal a material fact [40] or was a prediction calculated to misstate fact or forestall inquiry.[41] For the Court to sustain the action on the theories advanced would constitute an unnecessary extension of an already vague area of the law.

REAL PROPERTY — UNAUTHORIZED LEGAL PRACTICE — LEGAL ACTIVITY IN CONNECTION WITH TITLE CLOSING BY TITLE INSURANCE CO. HELD NOT UNAUTHORIZED PRACTICE OF LAW.—Defendant, a title insurance company, employed both staff and independent lawyers to draft deeds and trust deeds and to execute instruments necessary for correction of defects in title (although this is primarily the business of the customer, not the company), with the giving of legal advice incidental thereto. It was the contention of plaintiff that all these activities constituted the unauthorized practice of law and should be enjoined. The lower court sustained plaintiff's argument and issued an injunction. The Court of Appeals, while agreeing that defendant's activities constituted a practice of law, *held,* by a divided Court, that they were "all legitimately incidental to the main or principle [*sic*] business" of defendant, and consequently did not constitute the *illegal* practice of law. *Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co.,* — Tenn. App. —, 326 S.W.2d 767, *cert. denied,* — Tenn. App. — (1959).

It is difficult, if not impossible, to precisely define the practice of law.[1] Obviously it is not limited to practice before a court of justice, but includes legal advice, and the preparation of legal instruments, whether or not such matters are pending before a court.[2] Nor are merely incompetent individuals excluded from such practice, but the exclusion extends to lay persons or organizations who practice indirectly through competent lawyers.[3]

Since every state, in one form or another, has enacted legisla-

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[40] Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901); Olston v. Oregon Water Power & Ry. Co., 52 Ore. 343, 96 Pac. 1095 (1908).

[41] Von Schrader v. Milton, 96 Cal. App. 192, 273 Pac. 1074 (1929); RESTATEMENT, TORTS § 539 (1938).

[1] Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 190 Atl. 2, 9 (1937); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 Atl. 139, 140 (1935).

[2] Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836, 837-38 (1893); *In re* Duncan, 83 S.C. 186, 65 S.E. 210, 211 (1909).

[3] *E.g., In re* Co-operative Law Co., 198 N.Y. 479, 484, 92 N.E. 15, 16 (1910) (dictum); Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P.2d 721, 723 (1936). See also canons 6, 35, and 47 of the Canons of Professional Ethics (dealing with the duties of lawyers towards conflicting interests, intermediaries in the practice of law, and unauthorized practice).

tion dealing with the practice of law,[4] judicial decisions vary markedly as to what constitutes the illegal practice of law. Some courts, as in the instant case, have allowed the practice of law by persons other than lawyers when incidental to a lawful business.[5] Others have tended to be more restrictive.[6] In either event, however, it has been generally recognized that the unauthorized practice of law is both a danger to the public and the bar.[7]

It appears that the courts have classified and allowed the practice of law by those other than lawyers in four categories:

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[4] ALA. CODE ANN. tit. 46, § 31 (1940); tit. 46, § 42 (Supp. 1955); ALASKA COMP. LAWS ANN. § 35-2-61 (1949); ARIZ. REV. STAT. ANN. § 32-261 (1956); ARK. STAT. ANN. §§ 25-106, 25-205 (1947); CAL. BUS. & PROF. CODE ANN. § 6126 (Deering 1951); COLO. REV. STAT. ANN. § 12-1-1 (1953); CONN. GEN. STAT. § 51-88 (1958); DEL. CODE ANN. tit. 30, § 2301 (Supp. 1958); FLA. STAT. ANN. § 454.23 (1952); GA. CODE ANN. § 9-402 (1933); HAWAII REV. LAWS § 217-14 (1955); IDAHO CODE ANN. § 3-104 (1948); ILL. ANN. STAT. c. 38, §§ 298, 299; c. 32, § 411 (Smith-Hurd 1934); IND. ANN. STAT. §§ 4-3601, 4-3604 (1946); IOWA CODE ANN. § 665.3(2) (1946); KAN. GEN. STAT. ANN. § 7-102, -103 (1949); KY. REV. STAT. ANN. § 30.010 (1955); LA. REV. STAT. §§ 37:212, 37:213 (1950); ME. REV. STAT. c. 105, § 8 (1954); MD. ANN. CODE art. 10, § 1 (1957); MASS. ANN. LAWS c. 221, §§ 46, 46A (1955); MICH. STAT. ANN. § 27.81 (1938); MINN. STAT. ANN. § 481.02 (1958); MISS. CODE ANN. § 8682 (1942); MO. ANN. STAT. § 484.010 (1949); MONT. REV. CODES ANN. §§ 93-2008, -2009 (1947); NEB. REV. STAT. § 7-101 (1954); NEV. REV. STAT. § 7.600 (1957); N.H. REV. STAT. ANN. § 311:9 (1955); N.J. STAT. ANN. §§ 2:111-1, -2, -3, -4, -5, -6 (1939); N.M. STAT. ANN. § 18-1-26 (Supp. 1959); N.Y. PEN. LAW §§ 270, 271, 280; N.C. GEN. STAT. §§ 84-2.1, 84-4, -5 (1957); N.D. REV. CODE § 27-1101 (1943); OHIO REV. CODE ANN. § 4705.01 (Baldwin 1958); OKLA. STAT. ANN. tit. 5, § 12 (1941); ORE. REV. STAT. § 9.160 (1959); PA. STAT. ANN. tit. 17, § 1608 (Supp. 1958); R.I. GEN. LAWS ANN. §§ 11-27-12, 11-27-15, 11-27-16 (1956); S.C. CODE §§ 56-141, -142 (1952); S.D. CODE § 32.1101 (1939); TENN. CODE ANN. §§ 29-302, -303 (1955); TEX. REV. CIV. STAT. ANN. arts. 305-311 (1959); UTAH CODE ANN. § 78-51-25 (1953); VT. STAT. tit. 4, § 841 (1958); VA. CODE ANN. § 54-44 (1950); WASH. REV. CODE §§ 2.48.170, 2.48.180 (1958); W. VA. CODE ANN. §§ 2853, 2854 (1955); WIS. STAT. § 256.30 (1957); WYO. COMP. STAT. ANN. § 33-61 (1957).

[5] Merrick v. American Security & Trust Co., 107 F.2d 271, 276-77 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883, 885 (1934) (dictum): "The drafting and execution of legal instruments is a necessary concomitant of many businesses, and cannot be considered unlawful."

[6] Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P.2d 721, 723 (1936): "one instance of practicing law is as much practicing law as many." See Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934).

[7] Such unauthorized practice is primarily considered to be a threat to the public welfare, and only secondarily an injury to the legal profession. People v. Alfani, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919); Bump v. District Court of Polk County, 232 Iowa 623, 5 N.W.2d 914, 922 (1942); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27, 31 (1943).

For an excellent history of the unauthorized practice of law and its treatment, see Otterbourg, *A 1960 Résumé: Unauthorized Practice of the Law*, 46 A.B.A.J. 46 (1960).

(1) A single or occasional act which does not amount to a business; [8]

(2) A simple legal act, such as filling in the blanks of provided legal forms; [9]

(3) A simple legal act if incidental to a lawful business; [10] and

(4) Any legal act which is incidental to a lawful business.[11]

While New York has condoned single acts constituting a practice of law,[12] and legal acts incidental to a lawful business,[13] it has indicated that the distinction between simple and complex legal acts is illusory.[14]

The Penal Law governs the unauthorized practice of law in New York.[15] Sections 270 and 271 forbid the practice of law by any unauthorized individuals. Section 280 forbids practice by any corporation or voluntary association.[16] Subdivision 5 of the latter section, however, specifically excludes from its application any corporation or association "lawfully engaged in the examination and insuring of titles to real property, in the preparation of any . . ."

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[8] The general attitude has been to allow an infrequent practice of law, if satisfactorily explained. "The occasional drafting of simple deeds, and other legal instruments when not conducted as an occupation or yielding substantial income may fall outside the practice of the law." *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313, 317 (1935).

[9] "[T]he 'preparation of instruments and contracts by which legal rights are secured,' involves something more than the mere filling in of blank forms. . . ." *In re* Matthews, 58 Idaho 772, 79 P.2d 535, 538 (1938). "But, where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required. . . ." *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157, 159 (1930). *But see* People v. Sipper, 61 Cal. App.2d Supp. 844, 142 P.2d 960 (1943) (defendant selected particular form to be used).

[10] "[A] person who is not a member of the bar may draw instruments such as *simple* deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested. . . ." Cain v. Merchants Nat'l Bank & Trust Co., 66 N.D. 746, 268 N.W. 719, 723-24 (1936). (Emphasis added.)

[11] Merrick v. American Security & Trust Co., 107 F.2d 271, 276-77 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883, 885 (1934) (dictum).

[12] People v. Weil, 237 App. Div. 118, 260 N.Y. Supp. 658 (1932).

[13] People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); Wollitzer v. National Title Guar. Co., 148 Misc. 529, 266 N.Y. Supp. 184 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 757, 270 N.Y. Supp. 968 (1934).

[14] People v. Title Guar. & Trust Co., *supra* note 13, at 379, 125 N.E. at 670 (separate opinion); People v. Lawyers Title Corp., 282 N.Y. 513, 521, 27 N.E.2d 30, 33-34 (1940).

[15] N.Y. PEN. LAW §§ 270, 271, 272, 280.

[16] Section 280(1)(e) provides an all inclusive safeguard against practice by such corporation or association by making it a violation of the section to "render legal services of any kind in actions or proceedings of any nature or in any other way or manner." It is well to note, however, that each case presents its own problem, and must be treated accordingly. 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 270 (1952).

instruments necessary and incidental to such examination or insurance, although such authorization is limited to the performance of acts which may lawfully be performed by a layman. Under these sections, the general interpretation of the courts has been that acts which constitute the practice of law are authorized if incidental to a lawful business,[17] while it would seem that incidental acts performed in conjunction with the giving of legal advice constitute an illegal practice of law.[18]

Concerning the instant case, the majority opinion is predicated upon two theories:

(1) That, since real estate brokers have the statutory right to draw up documents pertaining to their business,[19] that right, by analogy, should apply to title insurance companies, as a matter of public policy; and

(2) That the "weight" of authority does not deem such activities unlawful.

The first theory is ably protested by the dissenting judge, on the grounds that the statute was too liberally construed,[20] and that the analogy was faulty.[21] The second is similarly attacked by a penetrating analysis of the primary authorities cited in its support. In fact, the principal case upon which the majority relied for its de-

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[17] People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); Wollitzer v. National Title Guar. Co., 148 Misc. 529, 266 N.Y. Supp. 184 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 757, 270 N.Y. Supp. 968 (1934).

[18] For the judicial interpretation of similar statutes in other states, see Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940) (real estate agent authorized to draw up legal papers incidental to business); New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates, 55 N.J. Super. 230, 150 A.2d 496 (1959) (statutory authorization to perform legal acts incidental to business does not exempt from judicial contempt because the judiciary regulates the practice of law).

[19] TENN. CODE ANN. § 62-1325 (1955): "Any person licensed hereunder [real estate broker section] that engages in drawing any legal document other than contracts to option, buy, sell, or lease, real property, may have his or her license revoked. . . ."

[20] "The Majority Opinion concludes from that provision [the statute, note 19 *supra*] that such a broker is authorized to write deeds, trust deeds, and the like, in connection with his business as a licensed real estate broker. I do not construe the above quote to mean that. . . . I think that provision means just what it says, and that it only gives the real estate broker the right to prepare contracts, giving him the right to bind his client 'to option, buy, sell, or lease, real property', but the preparation of the deeds and other documents necessary to a compliance with the executed contract which he draws are matters which the client must personally do for himself or obtain the services of a lawyer to do." Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co., — Tenn. App. —, 326 S.W.2d 767, 788 (1959) (dissenting opinion).

[21] The dissent believes that the statute is limited to real estate agents, as it names no other benefactors. *Id.* at —, 326 S.W.2d at 787-88. "[W]here a law is expressed in plain and unambiguous terms, . . . the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Lake County v. Rollins, 130 U.S. 662, 670-71 (1889).

cision, *La Brum v. Commonwealth Title Co.*,[22] is shown, by the dissent, to have been based upon a statutory authorization to carry on such activities, rather than upon an interpretation of common law.[23] Nor do the other authorities cited by the majority appear to fully substantiate its position.[24]

Despite the fact that a New York corporation lawfully engaged in the examination and insuring of titles may practice law if incidental to its business, it does not appear that the New York courts adhere to the extreme position of the instant case.[25] Moreover, the Tennessee Court allowed the defendant not only to draw up legal papers incidental to its business, but further allowed it to execute instruments to correct any defects in title. And since those acts are primarily the business of the customer, rather than the defendant, they would not seem to be incidental to the business of the insurer.[26]

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[22] 368 Pa. 239, 56 A.2d 246 (1948). In this case, the court held that a title insurance company which prepared deeds, mortgages, assignments of mortgages and other agreements, all incidental to the issuance of title insurance, was not engaged in the unauthorized practice of law.

[23] The Pennsylvania court itself noted the presence of the statute. "[I]t is well to have in mind that the statute under which defendant was incorporated expressly conferred 'power and right to make, execute, and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor.'" La Brum v. Commonwealth Title Co., 368 Pa. 239, —, 56 A.2d 246, 248 (1948), quoting from PA. STAT. ANN. tit. 40, § 895(A) (1954).

[24] In Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954), the court was more restrictive than the Court of the instant case. Other citations were given by the majority in a vain attempt to create a public policy basis for the decision. See Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co., — Tenn. App. —, 326 S.W.2d 767, 785-87 (1959) (dissenting opinion), where the authorities are thoroughly discussed.

[25] See People v. Lawyers Title Corp., 282 N.Y. 513, 520, 27 N.E.2d 30, 33 (1940). The exemption from the provisions of § 280 has "no application whatever to services which cannot be lawfully rendered by a person not admitted to practice law in the State of New York." That provision itself seems adequate enough to settle the question. But there is more: the continuous performance of "legal services of a character usually performed by lawyers as a part of their ordinary office practice . . . [is] squarely within the prohibitions of the statute." *Ibid.* Again, "to protect the public from unskillful preparation of legal documents and the unskillful handling of legal transactions, the policy of the State . . . is to bar corporations from doing those acts and carrying through such transactions as were usually required to be performed by licensed attorneys and counsellors at law." *Id.* at 521, 27 N.E.2d at 33.

The test is not whether the act is one commonly performed by an attorney, but whether it may lawfully be performed by a layman. People v. Title Guar. & Trust Co., 227 N.Y. 366, 374, 125 N.E. 666, 668 (1919).

Since a layman may prepare a simple legal instrument, a corporation may do the same. *Id.* at 376, 125 N.E. at 669. But, by implication, a corporation may not practice law beyond the preparation of simple instruments incidental to its business.

[26] Of course, if the acts were not incidental to the insurer's business, there would be no authority whatsoever for their performance in New York. In fact, the theory of the instant case itself would doubtless collapse.

Nor were the attorneys hired by the defendant employed solely in its affairs, since they were also acting on behalf of its customers.[27]

It appears that the Court in the instant case has unduly extended the status of the law concerning unauthorized practice by its too liberal interpretation of statutory and judicial authority.[28] This position is not substantiated by the policies of other states, and a more restricted application of such statutes is desirable for the protection of the public, the bar, and the courts.[29]

TAXATION—NEW YORK CITY PROPERTY TRANSFER TAX HELD INAPPLICABLE TO DEEDS DELIVERED OUTSIDE CITY. — Plaintiff-grantor executed, acknowledged and delivered real property located within the City of New York. Under protest the plaintiff paid a tax levied on the deed by which his real property was conveyed as required by the Real Property Transfer Tax law.[1] Plaintiff alleged that he was entitled to a refund since the transaction was consummated outside the territorial limits of the City of New York. The Court *held* that he was entitled to a refund and that the Real Property Transfer Tax law is invalid to the extent that it purports to tax a deed delivered outside the city limits. *Realty Equities Corp. v. Gerosa,* 142 N.Y.L.J. 11 (Sup. Ct. 1959).

The Real Property Transfer Tax law imposes a tax on a deed regardless of where made, executed or delivered, whereby any real

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[27] Thus an interesting problem of conflict of interests arises. Canon 6 of the Canons of Professional Ethics provides that "it is unprofessional to represent conflicting interests, except by express consent of all concerned given after a *full* disclosure of the facts." (Emphasis added.) And in People v. Peoples Trust Co., 180 App. Div. 494, 167 N.Y. Supp. 767 (2d Dep't 1917), the court indicates that §280 of the Penal Law was specifically enacted to avoid a conflict of interests. It explains: "The relation between attorney and client is confidential in the extreme. The attorney . . . owes undivided loyalty to his client, unhampered by obligations to any other employer . . . . It is obvious that the intervention of a corporation, the general employer of an attorney, between him and his client, is destructive of this necessary and important relation." *Id.* at 496, 167 N.Y. Supp. at 768.

[28] The Standing Committee on Unauthorized Practice of Law (American Bar Association) has registered its violent disapproval of the ruling in this case, contenting itself with the possibility that it "appears to be limited to the particular facts of the case." 25 COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW, AMERICAN BAR ASS'N, UNAUTHORIZED PRACTICE NEWS 203-04, 252 (1959).

[29] To permit a lay intermediary to be interposed between attorney and client "would destroy the confidential relationship of attorney and client, thwart the control of the courts over the practice of law, and irreparably impair the sound administration of justice." Stack v. P.G. Garage, Inc., 7 N.J. 118, 80 A.2d 545, 547 (1951).

[1] N.Y.C. ADMIN. CODE ANN. § I46-2.0 (Supp. 1959-60).