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Statutory Prohibition Against the Corporate Right to Appear in Person

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the Magistrate's Courts, but rather intended to have that provision⁵⁸ apply only to those courts which possess jurisdiction over the felony as well as the personal or custodial jurisdiction of the defendant.⁵⁹

Still, in another instance the statute states, rather clearly, that where a defendant is "charged with an offense not a crime", the court having jurisdiction over the defendant (*i.e.*, the Magistrate's Court) may order a psychiatric inquiry, if necessary.⁶⁰ This provision injects a unique feature into the Magistrate's Court in bestowing upon it the power to order "*de lunatico inquirendo*" proceedings, a right formerly exercised only by "courts of superior jurisdiction".⁶¹ Under the repealed Act, in cases of misdemeanors and lesser offenses, where the accused showed signs of *dementia*, the practice in the Magistrate's Courts was to commit him for an informal observation under the Mental Hygiene Law,⁶² and the hospital did the rest.⁶³ In all probability, as a matter of expediency, the old well-established practice of committing a person, "charged with an offense not a crime", for hospitalization under the Mental Hygiene Law⁶⁴ would be continued, inasmuch as under the new Act it is not incumbent upon the magistrates to order a formal lunacy inquisition, "as the only authorized method."⁶⁵

Thus, as gathered from the foregoing discussion, the Desmond Act has not abolished completely the procedure in lunacy investigations as developed under the repealed Act. The authors of the Act intended to cure one glaring defect in the old statute. They have designed the new Act especially to thwart the liberal practice of making unnecessary appointments of lunacy commissions, and thereby to foster economy. However, there was no necessity for repealing the entire former Act. The same purpose could have been effected merely by amending the provision which permitted court-appointed commissions.

EDWARD S. SZUKELEWICZ.

STATUTORY PROHIBITION AGAINST THE CORPORATE RIGHT TO APPEAR IN PERSON.—The uncertainty in reference to a corporation's right to appear in person, gave rise to a demand either for an absolute decision by the New York Court of Appeals or for a statutory enact-

⁵⁸ N. Y. CODE CRIM. PROC. § 870 ("If at any time it shall appear to a court having jurisdiction of a defendant charged with a felony * * * but not under indictment therefor * * *").

⁵⁹ *People v Pershaec*, 172 Misc. 324, 340, 15 N. Y. S. (2d) 215, 231 (1939).

⁶⁰ N. Y. CODE CRIM. PROC. § 870, subd. 1.

⁶¹ *People v Pershaec*, 172 Misc. 324, 346, 15 N. Y. S. (2d) 215, 236 (1939).

⁶² N. Y. MENTAL HYGIENE LAW § 81, subd. 5.

⁶³ N. Y. LAWS 1936, c. 460, § 870.

⁶⁴ N. Y. MENTAL HYGIENE LAW § 81, subd. 5.

⁶⁵ *People v Pershaec*, 172 Misc. 324, 347, 15 N. Y. S. (2d) 215, 237 (1939).

ment by the Legislature, on the status of a corporation in pleading its own cause before the bar.¹ Section 236 of the New York Civil Practice Act² and Section 280 of the New York Penal Law³ were amended⁴ in March, 1939, so as to remove all doubt⁵ as to the corporate right to appear in person in its own behalf. The Civil Practice Act as amended prohibits a corporation from appearing for itself and the Penal Law adds teeth to that prohibition.

The relative certainty, prior to the aforementioned amendments, of the prohibition against corporate practice of the law is extremely marked.⁶

In the absence of statutes, corporations were prohibited⁷ from practicing law on the ground that very high degrees of trust and confidence are placed in attorneys, and corporations would, of an inherent disability, be unable to enjoy that trust and confidence from their clients.⁸

¹ PRASHKER, PRIVATE CORPORATIONS (1937) 381; see (1939) 8 BROOKLYN L. REV. 351, 353, which discusses the proposed legislation on the corporate right to appear in person.

² Amended by N. Y. Laws 1939, c. 694.

³ Amended by N. Y. Laws 1939, c. 694.

⁴ The bill was introduced by Assemblyman Provenzano and is entitled, "An Act, To amend the penal law and the civil practice act, in relation to forbidding corporations and voluntary associations from practicing law." No. 1938. Int. 1759.

⁵ For cases holding that a corporation may appear in person see: *Sellent-Repent Corp. v. Queens Borough Gas and Electric Co.*, 160 Misc. 920, 290 N. Y. Supp. 887 (1936); *A. Victor & Co. v. Sleining*, 167 Misc. 719, 4 N. Y. S. (2d) 597 (1939), *aff'd*, 255 App. Div. 673, 9 N. Y. S. (2d) 323 (4th Dept. 1939), *reargument denied*, 11 N. Y. S. (2d) 548 (4th Dept. 1939). *Contra*: *Mortgage Commission of the State of New York v. Great Neck Improvement Co.*, 162 Misc. 416, 295 N. Y. Supp. 107 (1937); *J. T. Whalen, Inc. v. Pritzert*, 167 Misc. 471, 3 N. Y. S. (2d) 418 (1937); *Aberdeen Bindery v. Eastern States Printing and Publishing Co., Inc.*, 166 Misc. 904, 3 N. Y. S. (2d) 419 (1938); *J. D. L. Corp. v. Bruckman*, 171 Misc. 3, 11 N. Y. S. (2d) 741 (1939).

The conflict extended to the Municipal Court of the City of New York, where, in the case of *Finox Realty Corp. v. Lippman*, 163 Misc. 870, 296 N. Y. Supp. 945 (1937), the right to appear in person was denied to a corporation by *Justice Matthews*, while in *10th Street and 5th, Inc. v. Naughton*, 163 Misc. 437, 296 N. Y. Supp. 952 (1937), the authority to appear was sustained by *Justice Toney*. See PRASHKER, *loc. cit. supra* note 1.

⁶ 1 CARMODY, N. Y. PRACTICE (1929) 277.

The practice of law by a corporation never was legal, it was always against public policy. *In re Cooperative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910); *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); 13 AM. JUR. (1938) § 837, p. 838; Note (1930) HARV. L. REV. 1114; *cf.* *People v. Title Guaranty Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919) (where a corporation, in a single occasion without giving advice leading to the consummation thereof, prepared a bill of sale and a chattel mortgage by filling out forms, was held not guilty of practicing law. These acts were such as could be done by laymen, without punishment).

⁷ 1 CARMODY, *loc. cit. supra* note 6; Note (1930) 44 HARV. L. REV. 1114 (where it was said that in the absence of statutes the courts have rested their decisions on the inherent inability of a corporation to secure a license to practice law).

⁸ *In re Cooperative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15, 16 (1910)

One of the most often cited cases in New York prohibiting the practice of law is *In re Cooperative Law Co.*,⁹ wherein a corporation was organized for the express purpose of practicing law.¹⁰ The corporation, in support of its purpose, contended that under Section 2 of the Business Corporation Law, three or more persons may become a corporation for any *lawful purpose*. It was held that the practice of law is not such a lawful purpose coming within the purview of the statute, since the right is in the nature of a franchise given by the state and the prerequisites are the required study, oath, and license. However, this discussion is purely academic for the New York Stock Corporation Law¹¹ and the New York Penal Law¹² in no uncertain terms prohibit a corporation from practicing law, and through the provisions of the Penal Law, it is punishable by fine and imprisonment.

I.

At common law, a corporation did not have the right to appear without an attorney to plead its own cause in person.¹³ However, in recent years in New York, a great many cases¹⁴ have been decided by

("The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest degree of 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 directions of the corporation and not of the client. There would neither be contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant * * *"); Note (1930) 44 HARV. L. REV. 1114, 1118 ("The fear that the entrance of corporations into the field of law will cause a lowering of the standard of the bar is derived largely from the impersonal nature of such organizations. But it would not be practicable to impose the same requirements on corporations that are imposed on private attorneys").

⁹ 198 N. Y. 479, 92 N. E. 15 (1910).

¹⁰ See *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922) (The defendant corporation charged a yearly fee for dispensing legal advice and services customarily given by attorneys. Part of the fee was paid to lawyers rendering these services to the defendant corporation, as agents thereof; the corporation was held guilty of practicing law).

¹¹ N. Y. STOCK CORP. LAW §7: "No corporation shall be organized * * * for the purpose or purposes of conducting any branch of the practice of the law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or description * * *."

¹² N. Y. PEN. LAW §280: "It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person * * * or to make it a business to practice as an attorney-at-law, for any person * * * or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature * * *. Any corporation * * * violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every officer, * * * of such corporation * * * who directly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor * * *."

¹³ 14 C. J. (1919) §2921, p. 812; *Aberdeen Bindery v. Eastern States Printing and Publishing Co.*, 166 Misc. 904, 3 N. Y. S. (2d) 419 (1938).

¹⁴ See note 5, *supra*.

the courts, ruling on this right, and a sharp conflict¹⁵ has arisen in reference thereto. The cases supporting¹⁶ this corporate right claim that the appearance in person is not a practice of law as forbidden by the statutory and common law of the state.¹⁷ The question arose through the construction of various sections of the statutes which read:

"It is unlawful for any corporation to practice or appear as an attorney-at-law for any person *other than itself* * * *,"¹⁸

"A party who is of full age may prosecute or defend a civil action in person * * *,"¹⁹

and through a construction²⁰ of Article X, Section 4 of the New York Constitution, which reads:

"* * * And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

One of the first cases on the issue involved, was the *Sellent-Repent Corporation* case,²¹ decided in 1936, which denied a motion to dismiss the complaint and to cancel a *lis pendens* because the corporation was not represented by an attorney. In the course of the opinion the court said:²² "When a corporation does not go outside its own corporate machinery in the performance of a corporate act, it is acting in person and upon an equal footing with a natural person, including the right to sue in person."

The outstanding case denying the right of a corporation to appear is that of *Mortgage Commission v. Great Neck Improvement Co., et al.*,²³ decided in 1937, which was *contra* to the decision in the *Sellent-Repent Corporation* case. This, and the majority of the cases based on the same or similar grounds, held that a corporation could not

¹⁵ *Ibid.*

¹⁶ *Sellent-Repent Corp. v. Queens Borough Gas and Electric Co.*, 160 Misc. 920, 290 N. Y. Supp. 887 (1936); *A. Victor and Co. v. Sleining*, 167 Misc. 719, 4 N. Y. S. (2d) 597 (1939), *aff'd*, 255 App. Div. 673, 9 N. Y. S. (2d) 323 (4th Dept. 1939), *reargument denied*, 11 N. Y. S. (2d) 548 (4th Dept. 1939).

Cases decided outside of the New York courts have mainly refused to grant the corporation the right to appear in person. *Commercial, etc., Bank v. Slocomb*, 14 Pet. 60 (U. S. 1840); *Nixon Ellison & Co. v. Southwestern Ins. Co.*, 47 Ill. 444 (1868); *Nispel v. Western Union R. R.*, 64 Ill. 311 (1872); *State v. Passaic County Agricultural Soc.*, 54 N. J. L. 260, 23 Atl. 680 (1892).

¹⁷ 1 CARMODY, *loc. cit. supra* note 6; N. Y. PEN. LAW § 280; N. Y. STOCK CORP. LAW § 7.

¹⁸ N. Y. PEN. LAW § 280 (prior to amendment N. Y. Laws 1939, c. 694).

¹⁹ N. Y. CIV. PRAC. ACT § 236 (prior to amendment N. Y. Laws 1939, c. 694).

²⁰ Formerly N. Y. CONST. art. VIII, § 3, renumbered 1938.

²¹ *Sellent-Repent Corp. v. Queens Borough Gas and Electric Co.*, 160 Misc. 920, 290 N. Y. Supp. 887 (1936).

²² 160 Misc. 920, 921, 290 N. Y. Supp. 887, 889 (1936).

²³ 162 Misc. 416, 295 N. Y. Supp. 107 (1937).

appear, except by a duly licensed attorney. The *Mortgage Commission* case states that at common law no appearance could be had in person, and that if any changes were effected by the statutes prior to their amendment in 1939 they would, of necessity, be clear and definite, since they would be in derogation of the common law. Section 280 of the Penal Law did not aid the opposing contention since it was not a permissive statute and Article VIII, Section 3²⁴ of the Constitution and Section 236 of the Civil Practice Act did not permit a corporation to appear in person. The reference to "a party who is of full age" excluded the corporation by implication from an application of Section 236 of the Civil Practice Act.

The *Mortgage Commission* case also refers to Section 270 of the New York Penal Law which states:

"It is unlawful for any natural person to practice or appear as an attorney-at-law * * * for another * * * without having first been duly and regularly licensed and admitted to practice law * * *. Any person violating the provision * * * is guilty of a misdemeanor."

This section makes it unlawful for an agent to appear for a corporation, as its attorney, thereby giving another reason for the refusal to construe the statutes as granting the right to a corporation to appear in person.

In *J. T. Whalen, Inc. v. Pritzert*,²⁵ the manager of the plaintiff corporation conducted an examination of the defendant. On motion to punish the debtor for false swearing, it was held that the proceedings were void and the motion was denied on the ground that a corporation cannot appear by itself and act for itself in legal proceedings. The court said: ²⁶ "Legal proceedings are not to be conducted in court by an employee of a corporation who is not an officer of the court and not subject to the discipline of the court and knowing but one master, the corporation which employs him."

The case of *Aberdeen Bindery, Inc. v. Eastern States Printing and Publishing Co., Inc.*,²⁷ followed the *Mortgage Commission* case very closely, holding that the defendant corporation's answer be stricken out because it was subscribed in person. The court there said that a corporation can only act through the agency of a natural person and though a natural person may plead his own cause under Section 236 of the Civil Practice Act, he may not plead in legal matters for another under Section 270 of the Penal Law.

The case of *Victor & Co. v. Sleining*,²⁸ decided in 1939 and

²⁴ Now art. X, § 4, renumbered 1938.

²⁵ 167 Misc. 471, 3 N. Y. S. (2d) 418 (1937).

²⁶ 167 Misc. 471, 472, 3 N. Y. S. (2d) 418, 419 (1937).

²⁷ 166 Misc. 904, 3 N. Y. S. (2d) 419 (1938).

²⁸ 167 Misc. 718, 4 N. Y. S. (2d) 597 (1939), *aff'd*, 255 App. Div. 673, 9 N. Y. S. (2d) 323 (4th Dept. 1939), *reargument denied*, 11 N. Y. S. (2d) 548 (4th Dept. 1939).

affirmed by the Appellate Division, upset the general trend²⁹ of the decisions by granting a corporation the right to appear in person. The corporation signed its own name to a summons and complaint, as plaintiff. The defendant appeared specially to set aside the service on the ground that the plaintiff, a corporation, appeared in person and not by a duly authorized attorney. The court, in denying the motion, relied on an interpretation of the relevant statutes. It held that, under the common law, no corporation could appear in person, but by the statutes involved, that power was granted.³⁰

The court claimed that Section 280 of the Penal Law³¹ frees the corporation from liability for pursuing such an action, and although this is not an enabling statute, still some force will be ascribed to the obvious intention of the Legislature in immunizing a corporation from criminal liability.³²

The arguments against allowing a corporation to appear in person were presented and answered by the court. The arguments against this right are that the courts have an interest in having litigation conducted by experienced persons so that the courts will not be embarrassed in their work; and also that a support of the corporation's contentions will allow disbarred lawyers to practice law, as officers of corporations engaged in large amounts of litigation. The court answers these arguments by saying that few corporations will do away with licensed lawyers and also that many corporations may be too poor to engage counsel for every bit of litigation it must contend with.

The *Victor & Co.* case upset the general rule which was followed but for few exceptions, and the need for some definite deciding factor then became apparent.

II.

In March, 1939, the Legislature passed amendments³³ to Section 236 of the Civil Practice Act and to Section 280 of the Penal Law, to take effect September 1, 1939, absolutely prohibiting a corporation from appearing in person to defend or prosecute an action. Section 236 of the Civil Practice Act now reads as follows:

²⁹ With the exception of *Sellent-Repent Corp. v. Queens Borough Gas and Electric Co., et al.*, 160 Misc. 920, 290 N. Y. Supp. 887 (1936) and *10th Street and 5th, Inc. v. Naughton*, 163 Misc. 437, 296 N. Y. Supp. 952 (1937) (wherein it was held that a corporation could appear in person, and that it was not an equivalent of the forbidden practice of law).

³⁰ In the *Victor & Co.* case the court held that since § 37 of the N. Y. GEN. BUS. LAW said that the term "person" includes corporations, that under § 236 of the CIVIL PRACTICE ACT (prior to amendment) and under Article VIII, § 3 of the N. Y. CONSTITUTION (now art. X, § 4) a corporation may appear in person as a natural person.

³¹ Prior to amendment N. Y. Laws 1939, c. 694.

³² The words "other than itself" in § 280 of the N. Y. PENAL LAW, prior to its amendment in 1939, had this effect.

³³ N. Y. Laws 1939, c. 694.

“Appearance in person or by attorney. A party who is of full age may prosecute or defend a civil action in person or by attorney unless he has been judicially declared to be incompetent to manage his affairs. If a party has an attorney in the action he cannot appear to act in person except with the consent of the court. *Any corporation or voluntary association must appear by an attorney-at-law duly licensed to practice under the laws of this state.*” (Italics ours.)

Section 280 of the Penal Law was amended by striking therefrom the words “other than itself.” The omission of these words from the Penal Law destroys the contention in the *Victor & Co.* case that the intent of the Legislature was to permit the appearance in person by a corporation by immunizing them from liability.

III.

Through these amendments, a corporation now has absolutely no right to appear in person, since the so-called “enabling statutes” have been amended to exclude definitely corporate bodies, and the immunizing section has been amended, striking out the immunity. A corporation is now subject to prosecution for practicing law, even if it appears in person.

The corporations may see fit to contest Section 236 as being unconstitutional, on the ground that they are denied equal protection of the laws under the United States Constitution. By Section 37 of the General Business Law the term “person” includes corporations, and the Fourteenth Amendment to the United States Constitution states that: “* * * nor shall any state * * * deny to any *person* within its jurisdiction the equal protection of the laws.”³⁴ However, a probable answer is that corporations are mere creatures of statutes³⁵ and may, therefore, be regulated by the state which created them.

SEYMOUR C. SIMON.

PUBLIC SALARY TAX ACT OF 1939.—Ever since the Federal Government has undertaken to combat the evils caused by the great world-wide economic depression, the burden of our national debt has become steadily more onerous. The governmental measures taken to bring about a financial recovery, although they are quite different

³⁴ 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1931 (“The provisions of the Fourteenth Amendment guarantee to individuals and to corporations that they shall not by state law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from”).

³⁵ N. Y. STOCK CORP. LAW; N. Y. GEN. CORP. LAW.