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THE UNAUTHORIZED PRACTICE OF LAW IN KENTUCKY

Banks and trust companies have been engaging regularly and for compensation as a part of their business in such acts as the drafting of wills, deeds, mortgages, trust instruments, and other legal documents; giving legal advice to customers regarding wills, beneficiaries, estates, and the disposition of estates; conducting necessary litigation through permanently employed attorneys or other hired employees in the course of their powers as trustee; and they have advertised for and solicited such business under the provisions of Kentucky Revised Statutes 30.170, which reads in part:

> "(1) The Court of Appeals shall adopt and promulgate rules:
>
> (a) Defining the practice of law.
>
> . . . . . .
>
> (3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage, or will, or prevent a person from drawing any instrument to which he is a party."

Since 1901 they have done so with the apparent approval of the courts, except, perhaps, as far as conducting litigation is concerned. In *Dunlap* v. *Lebus*,[1] decided in that year, the Court held that a license to practice law was not required to authorize plaintiff to perform services in securing the reduction of a tax claim against defendant, *as such services could be performed by a layman as well as a lawyer, and besides were not rendered in court.* This is the first of two cases decided by the Court of Appeals of Kentucky on the unauthorized practice of law by persons who are not licensed to practice.

In 1937 the Court of Appeals defined the practice of law when it held, in *Howton* v. *Morrow*,[2] "Practicing law is not confined to performing services in actions or proceedings in courts of justice. . . ."[3]

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[1] 112 Ky. 237, 65 S.W. 441 (1901).

[2] 269 Ky. 1, 106 S.W. 2d 81 (1907).

[3] *Accord*, People v. Ring, 70 P. 2d 281 (Cal. 1937); Boykin, Soliciter Gen. v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); *In re* Matthews, 58 Idaho 772, 79 P. 2d 535 (1938); People *ex rel.* Chicago Bar Ass'n. v. Goodman, 366 Ill. 346, 8 N.E. 2d 941 (1937); People *ex rel.* Courtney v. Association of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N.E. 823 (1933); Barr v. Cardell, 173 Iowa 18, 155 N.W. 312 (1915); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936); Cain v. Merchant's Nat. Bank and Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Land Title Abstract and Trust Co. v. Dworken, 129 Ohio 23, 193 N.E. 650 (1934); Rhode Island State Bar Ass'n. v. Automobile Service Ass'n., 55 R.I. 122, 179 Atl. 139 (1935); *In re* Duncan, 83 S.C. 186, 65 S.E. 210, 24 LRA (NS) 750, 18 Ann. Cas. 657 (1909).

The Court in *Howton* v. *Morrow, supra,* also set down some of the acts comprehended in the practice of law when it said, "Practicing law . . . includes giving advice and preparing wills, contracts, deeds, mortgages and other instruments of a legal nature."[4]

In two later decisions[5] the Court stated that a corporation could not be licensed to practice law. In this the Court is in accord with the great majority of jurisdictions which have ruled on this question.[6]

In addition to the above decisions there were in effect at the time the second unauthorized practice case came before the Court, the statute quoted above (KRS 30.170) and Rule 18 of the Court of Appeals of Kentucky which reads:

> " 'The practice of law' is any service rendered for a consideration involving legal knowledge or legal advice, whether of representation, counsel, advocacy, in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any person not holding himself out as a practicing attorney from writing a deed, mortgage, or will without consideration unto himself for such service, and nothing herein shall prevent any natural person from drawing any instrument to which he is a party without consideration unto himself therefor."[7]

At the time the case of *Hobson* v. *Kentucky Trust Co.*[8] came before the Court this was the state of the law as it pertained to the question of the unauthorized practice of law by persons who are not licensed to practice.

On September 27, 1946, The Court of Appeals of Kentucky handed down the decision in the *Hobson* case. While this decision covered a number of legal questions of interest, for the purpose of

[4] *Accord, In re* Eastern Idaho Loan and Trust Co., 49 Idaho 274, 288 Pac. 157 (1930); People *ex rel.* Illinois State Bar Ass'n. v. People's Stock Yards State Bank, 244 Ill. 462, 176 N.E. 901 (1931); Barr v. Cardell, 173 Iowa 18, 155 N.W. 312 (1915); State *ex inf.* Miller, Circuit Atty., v. St. Louis Union Trust Co., 355 Mo. 845, 74 S.W. 2d 348 (1934); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); Hexter Title and Abstract Co., Inc. v. Grievance Committee, Fifth Congressional District, State Bar of Texas, 142 Tex. 506, 179 S.W. 2d 946 (1944); Paul v. Stanley, 168 Wash. 371, 12 P. 2d 401 (1932).

[5] Kendall v. Beiling, 295 Ky. 782, 175 S.W. 2d 489 (1943); Mutual Bankers Corporation v. Covington Bros. and Co., 277 Ky. 33, 125 S.W. 2d 202 (1938).

[6] Boykin, Soliciter Gen. v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); People *ex rel.* Courtney v. Association of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N.E. 823 (1933); People *ex rel.* Illinois State Bar Ass'n. v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Land Title and Abstract Co. v. Dworken, 129 Ohio 23, 193 N.E. 650 (1934).

[7] Rules of the Court of Appeals of Kentucky, now cited as Section 3.020.

[8] ——— Ky. ———, ——— S.W. 2d ——— (1946).

this discussion we will limit ourselves to the consideration of only a few of the questions involved.

The "practice of law" was held to include "the writing of wills, deeds, conveyances and other legal documents requiring expert knowledge and equipment in their phraseology so as to comport with the law relating to such matters; or engaging in preparing any instrument wherein it" (the bank, trust company, or association) "is designated as fiduciary to enforce and administer the provisions in same, or to hold itself out as possessing the requisite knowledge to do so." However the Court stated further, "If however, the maker of such an instrument on isolated occasions should apply without solicitation on his own volition to defendants to act as the maker's amanuensis in framing the instrument he desires to execute, and for which defendant receives no compensation, it may perform such duty, and likewise it may, for and on behalf of itself *beneficially,* prepare any instrument creating such benefit to itself as a 'party' thereto, but all other acts charged in the petition, and admitted by defendants, should be permanently enjoined."

"Other acts charged in the petition" and which are permanently enjoined by the Court in this case are: (1) "drafting wills, deeds, trust instruments, and other legal documents in which it" (the bank or trust company) "is appointed for compensation, as agent or other fiduciary that may be required to carry out the provisions of a particular writing"; (2) giving "legal advice to the maker of such document with reference to the disposition or transmission of estates, as well as the rights of the beneficiaries and other pecuniarily interested parties therein"; (3) engaging "in the practice of law by conducting necessary litigation, through its *permanently* employed attorneys, or other hired employees that may be required of it as the duly appointed fiduciary, in the administration of its powers conferred upon it as such."

In answer to defendant's contention that since under the excerpt it is party to the instruments, the terms of which it enforces in its capacity as fiduciary, the statute prevents the Court from declaring in its Rule 18, that the practice of law shall be limited to natural persons, the Court held that the excerpt is not susceptible of the construction placed upon it, and that "the word 'party' in that excerpt clearly means one who has a beneficial interest in the corpus of the estate being administered by the fiduciary, and does not apply to a fiduciary whose duties are purely ministerial." Thus Rule 18 was upheld.

It was held also that a corporation could not qualify so as to obtain a license to practice law.

In holding an injunction a proper remedy in situations of this kind the Court said: "The remedy of injunction to prevent unlicensed persons from practicing law, notwithstanding the offender

may be punished by attached penalties, or by contempt proceedings, is quite universally recognized by courts and text writers. . . ."[9]

On the question of what branch of the government controls the rules of practice and procedure, the Court reaffirmed its decision in *Burton* v. *Mayer*[10] in which it said: "Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the administration of justice. The courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind."[11]

The decision in the *Hobson* case will be a severe blow to those firms in Kentucky which are engaged in the acts held therein to constitute the practice of law. The definition of the practice of law as laid down in previous Kentucky cases[12] has been enlarged considerably, and a clarification of the power of the Court in this respect has been made.

In addition to the acts laid down in the *Hobson* case as being unauthorized practice of law, it is believed that under Rule 18[13] the Court will, in any future case to come before it on this matter, interpret Rule 18 in accordance with the holdings of the highest courts of our sister states.[14] This would include a holding that the drafting

[9] KY.R.S. 30.990. (1) "Any person who violates any of the provisions of KY.R.S. 30.010 shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense." KY.R.S. 30.010 forbids the practice of law without a license; People *ex rel.* Illinois State Bar Ass'n. v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *cf.* Depew v. Wichita Ass'n. of Credit Men, 142 Kan. 403, 49 P. 2d 1041 (1935), certiorari denied, 297 U.S. 710, 56 S. Ct. 574, 80 L. Ed. 997 (1936); State Bar of Oklahoma v. Retail Credit Ass'n., 170 Okla. 246, 37 P. 2d 954 (1934), 5 A. Jur. 272, Sect. 17; Nelson v. Smith, ——— Utah ———, 154 P. 2d 634, 157 ALR 512 (1944); Paul v. Stanley, 168 Wash. 371, 12 P. 2d 401 (1932).

[10] 274 Ky. 263, 267, 118 S.W. 2d 547, 549 (1938).

[11] *Cf.* People ex rel. Illinois State Bar Ass'n. v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Commonwealth *ex rel.* Atty. Gen. v. Furste, 288 Ky. 631, 157 S.W. 2d 59 (1941); *In re* Sparks, 267 Ky. 93, 101 S.W. 2d 194 (1936); Rhode Island State Bar Ass'n. v. Automobile Service Ass'n., 55 R.I. 122, 179 A. 139 (1935).

[12] Mutual Bankers Corporation v. Covington Bros. and Co., 277 Ky. 33, 125 S.W. 2d 202 (1938); Howton v. Morrow, 269 Ky. 1, 106 S.W. 2d 81 (1937); Kendall v. Beiling, 295 Ky. 782, 789, 790, 175 S.W. 2d 489, 493 (1943).

[13] Rules of the Court of Appeals of Kentucky, now cited as Section 3.020.

[14] *Cf.* People *ex rel.* Chicago State Bar Ass'n. v. Motorists Ass'n. of Illinois, 354 Ill. 595, 188 N.E. 827 (1933); People *ex rel.* Illinois State Bar Ass'n., v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 318 (1931); Howton v. Morrow, 269 Ky. 1, 106 S.W. 2d 81 (1937); *In re* Otterness, 181 Minn. 254, 232 N.W. 318 (1930); People v. Lawyer's Title Corporation, 282 N.Y. 513, 27 N.E. 2d 30 (1940); Land Title Abstract and Trust Co. v. Dworken, 129 Ohio 23, 193 N.E. 650 (1934); Hexter Title and Abstract Co., Inc. v. Grievance

of wills, deeds, mortgages, and other legal documents, as well as the giving of any legal advice by an attorney employed by a firm or corporation to a customer of said firm or corporation for consideration is the practice of law. There is dictum to that effect in the *Hobson* case.

In *People* v. *Lawyers Title Corporation*[15] the Court held that the statutory provisions exempting a corporation engaged in the examination and issuing of titles to real estate from the prohibition against practicing law has no application whatever to services which cannot lawfully be rendered by a person not admitted to the practice of law in the State of New York.

The Rhode Island Court, in *Rhode Island State Bar Association* v. *Automobile Service Association*,[16] was in accord with the New York Court when it held that an association of proprietors of an automobile service association contracting with customers to furnish legal advice and assistance, with a licensed member of the Bar, did not absolve the proprietors from responsibility for the unauthorized practice of law.

Of the numerous arguments for holding that a corporation cannot hire attorneys to carry on the business of practicing law for it,[17] two are particularly persuasive: (1) in all cases the attorney is not controlled by the client but by the corporation for which he works, and (2) the corporation is interested in the outcome of the transaction in most cases.

In regard to the first point the Court, in *In re Co-Operative Law Company*[18] 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

Committee, Fifth Congressional District, State Bar of Texas, 142 Tex. 506, 179 S.W. 2d 946 (1944); Rhode Island State Bar Ass'n. v. Automobile Service Ass'n., 55 R.I. 122, 179 A. 139 (1935). *Contra:* Cain v. Merchants Nat. Bank and Trust Co., 66 N.D. 746, 268 N.W. 719 (1936).

[15] 282 N.Y. 513, 27 N.E. 2d 30 (1940).

[16] 55 R. I. 122, 179 Atl. 139 (1935).

[17] People *ex rel.* Illinois State Bar Ass'n. v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *In re* Otterness, 181 Minn. 254, 232 N.W. 318 (1930); *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936); Cain v. Merchants Nat. Bank and Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Rhode Island State Bar Ass'n. v. Automobile Service Ass'n., 55 R.I. 122, 179 Atl. 139 (1935); Hexter Title and Abstract Co., Inc. v. Grievance Committee, Fifth Congressional District, State Bar of Texas, 142 Tex. 506, 179 S.W 2d 946 (1944); State *ex rel.* Ludin, Pros. Atty., v. Merchants Protective Corporation, 105 Wash. 12, 177 Pac. 694 (1919).

[18] 198 N.Y. 479, 92 N.E. 15, 16 (1910).

> to the direction of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation. . . ."

A concrete situation in which the corporation did actually control the attorney is met with in *Hexter Title and Abstract Co., Inc.* v. *Grievance Committee, Fifth Congressional District, State Bar of Texas*[19] where the Court held the corporation was practicing law through a hired attorney, and in its decision said:

> "The fact that the corporation has several licensed lawyers in its employment to prepare the instruments in question does not alter the case. According to the agreed statement of facts the executive officers of the corporation direct the kind of instruments to be drawn and what should be put in them. But even in the absence of such direction by the executives the result would be the same. The attorney in preparing such papers does so as the agent of the corporation by whom he is employed. His first obligation of loyalty is to the corporation. His acts are the acts of the corporation and even though the corporation acts through an attorney, it is nevertheless practicing law."

As to the question of consideration, there is no doubt that where mortgages are foreclosed by advertisement and the attorney's fee is included in the costs there is consideration moving to the corporation.[20]

The probability is that if such acts as are held to be the practice of law are done without consideration of *any sort* the individual or corporation would not, under the Kentucky rule as it stands today, be found guilty of practicing law provided it refrained from conducting litigation in court. However, it is thought that the definition of "valuable consideration" will be broadened considerably should occasion present that question to the Court.

It has been held that where as a part of a job for a customer a corporation drafts instruments for said customer and where there is no direct charge for the drafting of such instrument, there is, nevertheless, consideration where the customer pays for the service as a whole despite the fact that the corporation advertises that the drafting of such instruments is gratis.[21]

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[19] 142 Tex. 506, 179 S.W. 2d 946, 953 (1944).

[20] *In re* Otterness, 181 Minn. 254, 232 N.W. 318 (1930).

[21] State *ex inf.* Miller, Circuit Atty., v. St. Louis Union Trust Co., 335 Mo. 845, 74 S.W. 2d 348 (1934); Hexter Title and Abstract Co., Inc. v. Grievance Committee, Fifth Congressional District, State Bar of Texas, 142 Tex. 506, 179 S.W. 2d 946 (1944); State *ex rel.* Ludin, Pros. Atty., v. Merchants Protective Corporation, 105 Wash. 12, 177 Pac. 694 (1919).

In *State ex inf. Miller, Circuit Attorney* v. *St. Louis Union Trust Company*,[22] the Court said: "Nomination of a trust company as executor or trustee is 'valuable consideration' for drafting of wills and trust agreements. . . ."[23] and later ". . . we may say respondent's services here in question 'are not eleemosynary'. They are part of a total for which the estate of the maker of the will or trust pays, and the fact that the price of the whole is attributed to particular services other than those in question is not important."[24]

Should the question of the illegal practice of law by a corporation through an attorney where the attorney's work is entirely out of court come before the Court, it is believed that the Court will rule in accordance with the spirit of the decisions cited above, which decisions represent the majority rule. The trend today, and properly so, is toward a much stricter limitation on the practice of law by unlicensed persons and corporations.

In view of the decision in the *Hobson* case, *supra*, and taking into consideration the trend of the law on the matter of the unauthorized practice of law as is shown by the recent decisions in the United States, it is believed that the day when a corporation could provide a person with a will, handle all litigations pertaining thereto, and act as trustee of the estate has passed in Kentucky. A bank or a trust company can no longer be a "general store" so to speak, with everything, legal as well as the usual banking and trust business, for sale. These corporations will be limited to their proper role and will not be enabled to spread their conquests further.

J. PELHAM JOHNSTON

[22] 74 S.W. 2d 348 (Mo. 1934).
[23] *Id.* at 357.
[24] *Ibid.*