Denver Law Review

Volume 9 | Issue 3 Article 4

July 2021

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JUSTICE COURT PRACTICE BY THE LAITY

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THE editor of Dicta has asked whether or not persons not licensed to practice law in Colorado have the right to appear in behalf of others in justices' courts. The answer to this depends upon two factors: First, whether practice in such a court is practice of law, and, second, if so, whether the prohibition against practice by unlicensed persons is effective only as to practice in courts of record. In the opinion of the writer, the first question must be answered in the affirmative, and the second in the negative.

Before proceeding further, it should be said that undoubtedly anyone has the right to appear without an attorney and prosecute or defend a case in which he has an interest directly personal to him, whether his appearance be in a court of record or in justice court; but it should be added that this right or privilege cannot be claimed either by one who is merely an assignee for the purpose of suit—such as a bill collector—for that would be an evasion, or by one who appears purely in a representative capacity—such as an executor or administrator —for such a one does not possess the necessary direct personal interest. *In Re Otterness,* 232 N. W. (Minn.) 318.

Further, a corporation, whether suing or defending in behalf of others or of itself, cannot appear in court without an attorney, for a corporation is incapable of personal appearance in court (*Bennie v. Triangle Ranch Co.,* 73 Colo. 586), and a corporation cannot practice law even though the actual work is done by licensed attorneys. *People v. Painless Parker,* 85 Colo. 304; *Johnson-Olmstead Co. v. Denver,* 1 P. (2d) 928; *Re Otterness,* supra; *People v. People's Stock Yards State Bank,* 176 N. E. (Ill.) 901.

Seemingly, it cannot seriously be contended that practice in justice court does not constitute practice of law, even though within a narrower field than in courts of record. Having made the world brighter on numerous occasions for spectators, court attaches, and justices, by falling ignominiously into every pitfall dug by his legal adversary, no earthly court could convince this writer that such practice is not practice of law, and a technical one at that.

However, there is sounder authority to the point. It has been held recently that one who, though not licensed to practice law, instituted and prosecuted suits before a justice of the peace was guilty of contempt of the supreme court for intruding into the office of an attorney and pretending to act under the sanction and authority of such supreme court; and that this was true even though such intruder told no one that he was an attorney at law, and even though the justice, sheriff, and constables with whom he did business knew he was not an attorney, since, as the court said, the charge was not that he deceived or defrauded anyone by his unlawful pretensions, but that he indulged in them. *In Re Morse,* 98 Vt. 45, 126 Atl. 550.

Assuming, then, that such a one is practicing law, it must follow that when he holds himself out generally as being willing and qualified to represent the rights of others in justice courts, he is holding himself out as qualified to practice law and is thereby deceiving the public; and it must be remembered that the fundamental reason for the licensing of attorneys is for the protection of the public in order that it may not be imposed upon by the incompetent or unscrupulous. *People v. Alfani,* 227 N. Y. 334, 125 N. E. 671.

Does prohibition against unlicensed practice apply only to practice in courts of record? It is the common impression, among laymen and lawyers alike, that it does; but, in the opinion of the writer, this assumption is erroneous and is based upon a fallacy.

It arises undoubtedly in this way: Sections 5997 and 6017, Compiled Laws of 1921, both refer to practice in courts of record, and the latter section states that any unlicensed person who advertises, represents, or holds himself out in any manner as an attorney, attorney at law, or counselor at law, or who appears on behalf of others in courts of record, shall be deemed guilty of contempt of the Supreme Court. If that section is valid, it inferentially would follow that, a justice court not being a court of record, anyone can practice in such a court.

The writer believes, however, that the section is a clumsy attempt to define the practice of law, and also is invalid as an attempted invasion of the rights of the judicial branch of our

government in that it assumes to fix the limits of the Supreme Court's control of the practice of law. It presumes to deprive the Court of its inherent and plenary power to pass upon the qualifications of, and to license or refuse to license, those wishing to practice law, and to discipline masqueraders in the ranks of its officers.

By the Constitution of Colorado the Supreme Court is given "a general superintending control over all inferior courts." Art. 6, §2. A justice's court clearly would come within the category of courts over which the Supreme Court has such a control, even though it may be debatable whether such a court, since the amendment of section 1 of article 6 in 1912, is still a constitutional tribunal. *Courtright Pub. Co. v. Bray,* 67 Colo. 588, 591. And, certainly, the question of who may practice in these "inferior courts" is an important consideration in the scheme of things.

"True," said Mr. Justice Burke in *Kolkman v. People,* 89 Colo. 8, 300 Pac. 575, 585, "said 'control' is to be exercised 'under such regulations and limitations as may be prescribed by law.' But since the two articles must be construed together the 'law' referred to must not usurp judicial powers. To determine what powers properly belong to the judicial department one must go to the common law."

Going to the common law, we find that it was well settled, according to the Supreme Court of the United States, "by the rules of practice of common law courts, that it rests *exclusively* with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." *Ex Parte Secomb,* 19 How. 9, 15 L. ed. 565.

In upholding its inherent and exclusive power to control practice of the law, the supreme court of Wisconsin, in *State v. Cannon,* 199 Wis. 401, has put it thus:

"The power to protect courts and the public from the official ministrations of persons unfit to practice in them was fully established in the former decision of the court in this case (196 Wis. 534), where it was held that when the people by means of the Constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. The courts established by the Constitution have the powers which are incidental to or which inhere in judicial bodies, unless those powers are expressly limited by the Constitution. But the Constitution makes no

attempt to catalogue the powers granted. It is the groundwork upon which the superstructure of government is raised by the exercise of those powers which are essential to carry out the functions imposed upon each department of government. These powers are known as incidental, implied, or inherent powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by the people . . . When the public framed the constitution creating courts those judicial tribunals were endowed with the *inherent power* to admit and disbar attorneys—a power which was generally exercised by the courts at the time the constitution was framed and generally recognized as one of the powers essential to the performance of the judicial duties imposed upon the courts."

Unfortunately, the governor and legislature of Wisconsin have strenuously doubted the soundness of this position of the court, for, in 1931, the lawmaking body passed, and the governor approved, an act purporting to restore to Mr. Cannon the license previously revoked by the court. The outcome of this conflict remains to be seen, but interesting comments on the situation will be found in the September and October issues of the American Bar Association Journal.

Perhaps the most exhaustive historical analysis of the matter is found in *Re Day,* 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519, decided in 1899. The principles there announced have recently been reaffirmed by the Illinois supreme court in *People v. People's Stock Yards State Bank,* 176 N. E. 901, where it maintained its right to punish unlicensed persons. It is there said:

"This court has exercised original jurisdiction of applications for admission to the bar of this state and in numerous cases has entertained original proceedings for disbarment. It is argued that this proceeding is not of that character—that the exercise by this court of original jurisdiction to disbar an attorney is based upon the fact that the attorney is an officer of the court and so this court obtains jurisdiction over him by virtue of having licensed him to practice as such—whereas the court acquires no such jurisdiction with respect to persons who are not so licensed. We believe that such a contention is entirely untenable. Having inherent and plenary power and original jurisdiction to decide who shall be admitted to practice in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has all the power and jurisdiction necessary to protect and enforce its rules and decisions in that respect. Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court

has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of the court, the power to control admissions to the bar would be nugatory. And so it has been held that the court, which alone has power to license attorneys, has, as a necessary corollary, ample implied power to protect this function by punishing unauthorized persons for usurping the privilege of acting as attorneys. In Re Morse, 98 Vt. 84, 126 Atl. 550."

That the Supreme Court of Colorado considers that it has exclusive powers with respect to rules of practice and procedure is shown by numerous decisions, the most recent and most interesting of which is *Kolkman v. People,* 89 Colo. 8, 300 Pac. 575, in which—although strictly speaking, the legislative enactment was not before it—the court in reality declared unconstitutional the attempt of the legislature, by chapter 132, Sess. L. 1931, amending section 444 of the Code of Civil Procedure, to nullify Supreme Court Rule 14b, permitting trial judges to comment upon the evidence.

True, two of the justices dissented so vigorously and with such a violent effect on their brother justices, that if the state record for concurring and dissenting opinions was not broken, it was at least crippled; but the unmistakable fact remains that the Court served notice on the legislature that it would brook no interference with what it considers its inherent and plenary rights.

The remaining question to be considered, then, is whether the Court has manifested in any way that it might overrule any legislative fiat attempting to give unlicensed persons the right to practice law in any court over which the Supreme Court has a superintending control.

The answer is that the Court already has displayed its conviction that it is bound by no statute assuming to give unlicensed persons the privilege of practicing in certain phases of the work of a court of record. Section 6020 of the Compiled Laws of 1921 reads:

"Nothing in this chapter shall be construed so as to prevent any male citizen over the age of 21 years, of good moral character, from practicing as an attorney in the county courts of this state, while sitting for probate business, without having obtained a license as an attorney as provided herein."

This statute has been on the books since Colorado attained statehood, and if there were anything to the theory that, by surrendering for many years to the legislative department a part of its rule-making power, the Court had waived its right to exercise its inherent powers, certainly here is a striking example.

A recent investigation demonstrated that, under the foregoing statute, unlicensed persons have been permitted to practice as "probate attorneys" for more than 50 years. Yet, in 1929, the Court adopted Rule 83d, reading: "The present rules prohibiting the practice of law by those not thereto licensed shall hereafter apply to practice in probate." And the significant thing is that the Court did not refer to the present "statutes" or "laws" relative to unlawful practice, but referred to the "present rules"—that is, to its own enactments.

And finally, in the opinion of the writer, the Court has voiced its opinion that it controls practice in justice courts as fully as in courts of record, and has said in effect, although, perhaps, not in such unmistakable terms as might be desirable, that none except licensed attorneys may practice before justices of the peace. Supreme Court Rule 83c, passed in 1929, reads:

> "Neither disbarred attorneys nor persons whose applications for examination or admission have been rejected for their failure to show good character, will be permitted to practice as attorneys in any *justice of the peace* or other court in this state."

Manifestly, one whose license has been cancelled, or one who has been rejected for a license, would not be within the jurisdiction of the Court if the sole test of that tribunal's right to regulate practice of the law were whether or not the offender was one of its officers. But, by the foregoing rule the Court has announced that it will discipline such persons if they attempt to practice in justice courts.

So, after all, the test must be as to the fitness of the practitioner to be entrusted with the protection of the legal concerns of others; and the only method by which anyone may have that fitness tested, and his qualifications, moral and educational, approved, is prescribed in detail in 15 pages of the rules of the Supreme Court.

Theoretically, at least, any person who has not had the stamp of approval placed upon his fitness to advise others and act for them with respect to their legal affairs, must be deemed conclusively to be unfit; and hence such a one cannot practice law on behalf of others in any court in this state, whether a court of record or a justice court, even though, in the words of Mr. Justice Belford, "his talents may not be inferior to those of a Webster or a Choate."

The present interest in this subject has arisen because of the many complaints of abuse of process in justice courts by collection agencies, whose non-lawyer members prosecute suits through all stages. Attachment and garnishment writs unquestionably have been converted into bludgeons of oppression by those agencies. One instance given the writer by one of the Denver justices showed that in attempting to collect a $12.50 debt, the collection agent had run four garnishments within as many weeks, had piled up costs of $17, had extracted but $8 from the debtor's wages, and had left the debtor, at the end of the session, owing $12.60, or $9 more than at the beginning.

And yet, in all fairness, it must be said that unethical practices in the collection of accounts are not confined to laymen. In the December issue of Dicta was printed an insidious and slimy "Disclaimer of Liability"—as brazen an instrument as can be imagined—inferentially threatening a debtor with loss of position and injury to prestige, credit standing, reputation, and influence. It was signed by the "Legal Division" of a stores company, and that "Legal Division" is a licensed attorney at law.

We cannot criticize unlicensed practitioners too freely when our own garments are by no means free of stain. In the words of the South Dakota supreme court:

> "Attorneys should never forget that they are officers of the court; that justice under the law is all that their clients are entitled to and all that they have a right to seek for them; that theirs is an honorable profession whose true votaries never try to justify their acts on the old saw, 'The end justifies the means.' The collection of claims is a legitimate field of work; but it is a sad commentary on the legal profession that there are attorneys who are willing to resort to any and all means to make collections, knowing that there are many creditors who care little the means that are used by their collectors so long as the desired end is gained."