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NOTES AND COMMENTS

INJUNCTIVE RELIEF AGAINST THE UNLICENSED PRACTICE OF LAW AS REPRESENTED BY DRAFTING OF LEGAL INSTRUMENTS

During the past several years, encroachments by notaries public, realtors, trust and title companies, and banks and others into fields of activity which the legal profession consider to be practice of law, and from which the Bar feel protection of the public requires exclusion of laymen, have reached such proportions as to create a problem calling for careful consideration by the American Bar Association and the various state and local bar associations. The field into which these encroachments have been most general is that of preparing legal instruments, particularly wills, trust agreements, deeds, mortgages, and contracts. To curb such activity, there has been of late no small amount of litigation in many states wherein the unlicensed practice of law as represented in the drafting of legal instruments has been prosecuted under criminal statutes, or the offenders cited for contempt or restrained by equity from further practice. In several states statutes have been enacted defining the drawing of legal documents as practice of law.¹

In view of the activity along this line in other states, the interesting Washington case of *Paul v. Stanley*,² is of particular note. Plaintiffs, attorneys, for themselves and the other attorneys in the county, brought a bill in equity to enjoin defendant, a notary public and realtor, from the unlicensed practice of law. Defendant had drawn all types of documents, legal and otherwise, simple and complex, from filling in blanks on printed forms to complete drafting of entire instruments, and charged for such work, he gave advice as to the nature, effect, and procedure in filing and service, of legal instruments, both in connection with the drafting thereof and other-

¹ See note 10, *infra*.

² 168 Wash. 371, 12 Pac. (2nd) 401 (1932).

wise, making no charge, however, for advice alone. He advertised that he drew legal documents. He declared his intention to continue to draw legal documents.

The decree, as amended by the Washington court, provided

“ in particular it is further ordered, adjudged and decreed that defendant be and hereby is enjoined from preparing papers, pleadings and documents for others connected with proceedings pending or prospective before a justice court or superior court of this state, from advising and counselling persons as to their legal rights, whether in connection with the drawing of legal instruments, documents and papers relating to the legal rights of persons or otherwise, from preparing or drawing for others, for reward, present or prospective, deeds, mortgages, leases, agreements, contracts, bills of sale, chattel mortgages, wills, notes, conditional sales contracts relating to either real or personal property, options, powers of attorney, community property agreements, liens, bonds, mortgage assignments, mortgage releases, chattel mortgage satisfactions, creditors' claims in probate, notice to vacate premises, notices to quit or pay rent, vendors' statements of creditors under bulk sales law, articles of incorporation, and any other documents requiring the use of knowledge of law in their preparation.”

Stanley, the defendant, was a notary public, and his defense was based in part on the fact that notaries customarily draw all manner of legal instruments. That notaries public under the old Common Law had, and under current practice on the Continent have, the right to draw such instruments is granted,³ but it must be remembered that under both these systems of law notaries were and are particularly trained and bound by the tenets of their own organizations. Under the present Civil Law, notaries are officers of the court. Under modern practice in this country, notaries public do not by virtue of their office have the right to draw legal instruments.⁴

The right to engage in the practice of law is not an inherent right vested in every citizen of the United States, but is one subject to control and limitation by the states. The right of an attorney to practice law is a franchise from the state,⁵ and is a property right,⁶ which as property will be protected by equity, even

³ See the article by Hicks and Katz, "The Practice of Law by Laymen and Lay Agencies, 41 Yale L. Jour. at pages 78 and 94.

⁴ *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919) see *People v. Alfano*, 227 N. Y. 334, 335, 336, 125 N. E. 671, 673, 674 (1919).

⁵ *In re Ellis*, 118 Wash. 484, 203 Pac. 957 (1922) *In re Bailey*, 146 Pac. 1101 (Mont. 1915) *In re Cooperative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55 (1910) see *State ex rel. Lundin v. Merchants' Protective Corp.*, 105 Wash. 12, 177 Pac. 662 (1919).

⁶ *State ex rel. Rhode v. Sachs*, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857 (1891) *In re Waugh*, 32 Wash. 50, 72 Pac. 710 (1903) *Goodman v. Western Bank & Trust Co.*, 28 Ohio N. P. N. S. 272, 3 Ohio Bar Assn. Rep. 609 (1931).

though the act which invades it is at the same time a violation of a criminal statute.⁷

Statutes making it unlawful for unlicensed persons and for corporations to practice law are general, but rarely define the term "practice of law,"⁸ definition being left for the courts, which have by no means been uniform in defining the term.

It is clear that practice of law is not limited in definition to practice before the courts;⁹ indeed, perhaps the most lucrative work of the profession is the so-called "office practice." Granted that drafting of legal instruments is a regular part of the work of an attorney, is the doing of such work to be included within the term "practice of law" or the term "do work of a legal nature" under statutes forbidding laymen from engaging in the practice of law? In other words, is the drafting of legal instruments a right exclusive to the legal profession? If so, should distinction be made between simple and complex instruments?

Speaking generally, preparation of legal instruments is practice of law and forbidden to the layman, (it being understood, of course, of authority and the newer legislation uphold this proposition.¹⁰ that a person can draw papers for his own use) The great weight

⁷ *Goodman v. Western Bank & Trust Co.*, *supra*, *Dworken v. Department House Owners Assn.*, 38 Ohio C. A. 265, 176 N. E. 577 (1931). The Ohio court in the *Goodman* case said: "Admission of an attorney to practice law confers upon him a right in the nature of a franchise or property right to engage in his profession without competition of others who are not officers of the court or subject to its discipline or orders and such attorney is entitled to the same protection as the owner of any other franchise or property right. Injunction may issue despite the fact the act was also a crime."

⁸ Wash. Rem. Comp. Stat. (Ann.) (1922), P. C. 156 *et seq.* provides: "No person shall be permitted to practice as an attorney or counsellor at law or to do work of a legal nature for compensation, or to represent himself as an attorney or counsellor at law or qualified to do work of a legal nature, unless he is a citizen of the United States and a *bona fide* resident of this state and has been admitted to practice law in this state;" etc.

⁹ *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621 (1879) *Boykens v. Hopkins*, 162 S. E. 796 (Ga. 1932) *People v. People's Stockyards State Bank*, 344 Ill. 462, 176 N. E. 901 (1931) *A. Meisel & Co. v. National Jewelers Board of Trade*, 90 N. Y. Misc. 19, 152 N. Y. S. 913 (1915) *State v. Bryan*, 98 N. C. 644, 4 S. E. 522 (1887) *In re Duncan*, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 757 (1909). *Contra* in Georgia and Kentucky under particular state statutes, *Atlanta Title & Trust Co. v. Boykin*, 172 Ga. 437, 157 S. E. 455 (1931), a case involving practice of law by a corporation, and *Cunlap v. Lebrus*, 112 Ky. 237, 65 S. W. 441 (1901).

¹⁰ *In re Pace*, 170 App. Div. 818, 156 N. Y. S. 641 (1915) *People v. Alfani*, note 4, *supra*; see *Eley v. Miller* 7 Ind. App. 529, 535, 34 N. E. 836, 837 (1893). The newer legislation specifically so provides; Ala. Ann. Code (1928) sec. 6248-b., " advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights." Miss. Code (1930), Sec. 3710, prohibits laymen from drawing any bill of sale, deed of conveyance, deed of trust, mortgage, contract or will, subject to certain exceptions. Mo. Rev. Stats. (1929) ch. 78, sec. 11692, is of particular interest because it clearly separates court and office practice, defining the latter in part as "drawing of a paper, document or instrument affecting or relating to secular rights." Notice also Ore. Code Ann. (1930) sec. 100. Minn. Laws of 1931, chap. 114, sec. C, while forbidding drawing of some types of legal instruments by others than attorneys, excepts from the statute certain simple instruments.

But as to whether "legal instruments" is a term including all of those instruments affecting rights and liabilities, used in ordinary business transactions, there apparently was no clear and positive holding in the United States prior to *Paul v. Stanley* to the effect that all such instruments are legal instruments, that no differentiation shall be made between simple and complex instruments, or between preparation of instruments in their entirety and mere filling in of blanks on printed forms. In so holding, the Washington court has gone beyond the prior decisions. In *People v. Title Guarantee & Trust Co.*,¹¹ Hiscock, C. J., speaking of simple instruments, said

"We may take judicial notice of a widespread custom, which has prevailed from time out of memory in this state, and, doing so, we know that laymen have been accustomed to draw such instruments, not merely as a matter of accommodation for friends and neighbors, but for pay"

In a recent Idaho case,¹² after holding drawing of wills and trust agreements to be practice of law, the court went on to say

"Such work as the mere filling out of skeleton blanks or drawing instruments of generally recognized stereotype form, effectuating the conveyance or encumbrance of property such as a simple deed or mortgage, not involving the determination of the legal effect of special facts and conditions, is generally regarded as the legitimate right of any layman."

The Washington court in *Paul v. Stanley* quoted with approval the statement of Judge Pound in a concurring opinion in *People v. Title Guarantee & Trust Co.*,¹³

"I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced."

Use of printed forms of mortgages, deeds, bills of sale, and such is widespread. Although they apparently require only filling in of the blanks from known facts and hence apparently little or no legal knowledge, it is submitted that they are properly included as legal instruments. Any variance from an orthodox set-up in the facts may require a clear understanding of the legal problems involved in order to secure to the client the rights he desires or to protect him against un contemplated obligations. Indeed, a comprehensive knowledge of law may be required to detect such variance.¹⁴

What is the effect of advice as to the nature of the instrument, given in connection with the drafting? In *Paul v. Stanley*, the Washington court first pointed out that giving of legal advice in

¹¹ 227 N. Y. 366, 125 N. E. 666 (1919).

¹² *In re Eastern Idaho Loan & Trust Co.*, 288 Pac. 157 (1930)

¹³ Note 11, *supra*.

¹⁴ *In A. Meisel & Co. v. National Jewelers Board of Trade*, note 9, *supra*, the court, in referring to a printed claim in bankruptcy, stated that it was a legal instrument and retained that character, although printed and capable of completion by filling up the blanks.

connection with instruments drawn was, in fact, doing work of a legal nature, and then stated that in view of the proof that defendant gave legal advice with the instruments he drew, the trial court erred in not enjoining him from drawing simple instruments. This coupling of advice with the drafting of simple instruments weakens the decree, it indicates that the drafting of such instruments would not be practice of law in the absence of legal advice given with them. That the giving of legal advice is itself practice of law seems settled.¹⁵ It is submitted that in absence of express advice to the client as to the legal nature and effect of the instrument, the scrivener of even the simplest form of legal instrument in drafting and tendering to his client such an instrument implies that it is suitable for his requirements and that no other form of instrument would be as good. Rarely does the client know precisely the type and form of instrument he needs, he knows the results he wishes to secure, and from the facts the scrivener proceeds to prepare what he considers the suitable instrument. The implication of advice in fact is surely strong where express advice is not given.

Is remuneration essential to make the drafting of legal instruments by a layman unlawful practice of law? In the matter of remuneration, the Washington court followed many other jurisdictions,¹⁶ stating that the law does not purpose to protect those persons who pay nothing for the service received, and enjoining defendant from drawing legal instruments for "reward, present or prospective." The holding is based on Washington Rem. Comp. Stats. Ann. (1922), sec. 139-4, which statute may, for convenience in considering it, be divided as follows: No person shall (1) practice as an attorney or counsellor at law, (2) do work of a legal nature for compensation, (3) represent himself as qualified to do work of a legal nature, (4) represent himself as an attorney or counsellor at law. It will be noted that this is, in effect, a penal statute, being followed by sec. 139-22 declaring the unlicensed practice of law a gross misdemeanor. The court, following subsection (2) above, held the drafting of legal instruments to be doing work of a legal nature and insisted on the requirement of compensation, refusing to adhere to plaintiffs' contention that the drawing of legal instruments being practice of law, and the statute in question being penal, the court should proceed in this equitable

¹⁵ *Boylkins v. Hopkins*, note 9, *supra*; *Barr v. Cardell*, 173 Iowa 18, 155 N. W. 312 (1915) *People v. People's Stockyards State Bank*, note 9, *supra*, *Eley v. Miller*, note 10, *supra*; *People v. Alfani*, note 4, *supra*, *In re Duncan*, note 9, *supra*.

¹⁶ *In re Eastern Idaho Loan & Trust Co.*, note 12, *supra*, and the statutes indicated in note 10. The Alabama statute is representative, stating, "For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, " However, the New York court in *People v. People's Trust Co.*, 180 N. Y. App. Div. 494, 26 N. Y. Crim. Rep. 203, 167 N. Y. S. 767 (1917) held guilty a defendant who had employed an attorney to draw a will for its client, defendant paying the attorney itself and receiving no remuneration from the client save the expectation of future executor's fees under the will. It was shown that defendant solicited trust business by supplying wills to clients free of charge, provided the company was named executor, defendant maintaining a connection with licensed attorneys whom it paid to draw the wills.

action on the broader basis of the inherent power in the court to govern and limit the practice of law irrespective of statute.¹⁷ Plaintiffs contended that under such power, and for public protection, it should be held practice of law to draw legal instruments with or without remuneration, and that a contrary holding would open the doors for endless imposition on the public and the legal fraternity by free preparation of legal instruments by laymen, such as notaries and realtors and lay agencies such as banks and trust and title companies under the heading "accommodation," such agencies in fact deriving from such activities a definite return in the form of good will and enhanced business in other lines. It will be interesting to note whether, in future cases, the Washington court construes such return as "reward, present or future."

In summary, *Paul v. Stanley* establishes in this state the right of an attorney to injunctive relief against the unlicensed practice of law as represented by the drafting of legal instruments, simple or complex, and even where blanks are filled in on a printed form of legal instrument, provided advice be given in connection with the drafting of simple instruments, and provided remuneration be received by the draftsman.

Protection of both Bar and public requires a clear statute, or court interpretation, defining "practice of law," that all may know exactly what activities are forbidden to laymen and lay agencies under Wash. Rem. Comp. Stats. Ann. (1922) sec. 139-4. The instant case is an advance toward that clear definition.¹⁸

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¹⁷*In re Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888) *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918) *State ex rel. Dysart v. Cameron*, 140 Wash. 101, 248 Pac. 408, 54 A. L. R. 311 (1926) *People v. People's Stock Yards State Bank*, note 9, *supra*, *In re Opinion of the Justices*, 180 N. E. 725 (Mass. 1932) *State v. Cannon*, 196 Wisc. 45, 221 N. W 603 (1928) *In re Morse*, 98 Vt. 85, 126 Atl. 550 (1924).

¹⁸Along the same general line, and presenting a holding on another phase of unlicensed practice of law, is the decision of Judge McFarlane of the Superior Court of King County, handed down Nov. 10, 1932, in the action of *Howard Adams et al. v. T. R. Mulligan et al.* Plaintiffs, who were attorneys, sought to enjoin defendants from the unlicensed practice of law, and the decree was granted. Defendants called themselves "adjusters" and were engaged in soliciting personal injury and other tort claims, which they would proceed to settle, either directly with the other party or by litigation, where the matter went to trial, defendants retained attorneys to represent their client. They also prepared releases and advised their clients of their legal rights in respect to the injuries sustained by them. Judge McFarlane said: "I believe that whether work is or is not of a legal nature is to be determined by whether or not the work requires any degree of legal knowledge or skill. Although all business men necessarily use some degree of legal knowledge in their own business, the question of law arises only if some one, not licensed, is hired to draw those contracts by which rights are defined, set forth, limited, terminated, specified, claimed, or granted." Judge McFarlane went on to say that no matter what defendants called themselves, their activities amounted to practice of law and were enjoined when pursued by other than duly licensed attorneys.