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Attorney and Client - Bank Found Guilty of Unauthorized Practice of Law

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Generally speaking, other jurisdictions with similar enactments[16] have ruled that such statutes do not operate as legislative mandates,[17] and it may be that Illinois would take this position contrary to the New York courts. Of course neither Illinois nor Massachusetts has a provision similar to New York which provides that a child's religious faith shall be preserved and protected. It is difficult, however, to see why one is required.[18]

In conclusion, it appears that on the basis of the cases discussed herein, the position of the majority of the courts is that although the religion of any child will be recognized and considered, it will not be guaranteed or protected. Moreover, statutes relating to the religion of the child and foster parent create merely one element given consideration in adoption proceedings. The logic of such a position is questionable and inconsistent with any moral philosophy which recognizes the importance of a child's religion.[19]

[16] For a comprehensive list of states with enactments in this particular area, see 54 Col. L. Rev. 376 (1954).

[17] See for example In re Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920); In re Walsh's Estate, 100 Cal. App. 2d 194, 223 P. 2d 322 (1950). For an editorial discussion of the matter see 22 A.L.R. 2d 696 (1952) and 23 A.L.R. 2d 701 (1952).

[18] The Petition of Gally, 329 Mass. 43, 107 N.E. 2d 21, 29 (1952). This is the argument of Judge Ronan in his dissenting opinion.

[19] It is interesting to note that a proceeding on application for an extension of time to file for a writ of certiorari was denied by Mr. Justice Frankfurter, 75 S. Ct. 257 (1954). In the opinion he stated: "Feeling as strongly as I do that compassionate consideration for the feelings and interests of the various parties involved in this litigation calls for its earliest disposition here, I deem it important that steps be taken to have the petition before the Court as soon as may be, with due regard to the Commonwealth's right to respond." However, when the petition did come before the Court, certiorari was unanimously denied, 348 U.S. 942 (1955).

ATTORNEY AND CLIENT—BANK FOUND GUILTY OF UNAUTHORIZED PRACTICE OF LAW

Defendant bank, authorized under the National Banking Act[1] to act generally in a fiduciary capacity as to estates and trusts, had two full-time employees who were licensed attorneys. These attorney-employees looked after all trust and estate matters and prepared and submitted all orders, petitions, and other instruments necessary in the probate and chancery courts. Suit was brought by the Arkansas Bar Association to enjoin the bank from engaging in the unauthorized practice of law. The supreme court of the state held that the bank's probating, through licensed attorneys, of estates and trusts in which it was named executor, administrator, or other fiduciary, constituted unauthorized practice of law and it affirmed and enlarged the injunction granted.[2] *Arkansas Bar Ass'n v. Union Nat'l. Bank*, 273 S.W. 2d 408 (Ark., 1954).

[1] 38 Stat. 261, 262, 265 (1916), 12 U.S.C.A. § 248 (1945).

[2] The Chancery Court had rendered a decree in part favorable to the bank when it refused to restrain the bank's probating a will in which it was executor, or its preparation and present-

It is well settled and even supported by statute in many states that corporations cannot practice law.[3] It is also settled that an individual not a member of the Bar cannot practice law except as to matters to which he, himself, is a party. Corporations, like individuals, can also practice in their own affairs but, as a feature of their very nature, they must act through the agency of some human person. Therefore a corporation can practice law in matters to which it is a party only if it acts through a licensed attorney.

> A corporation has a legal right to employ an attorney or maintain a legal department to handle its own legal business, furnish it opinions, legal counsel or advice for its own benefit in connection with the performance of its lawful duties. . . . But a corporation may not furnish legal services for others and collect fees or profits therefor, directly or indirectly, and it may be enjoined from doing so.[4]

The instant case was decided on the basis of a previous decision[5] which had held that one who is acting in a fiduciary position is not himself a party but a representative of the beneficiaries and creditors, which is in accord with the rule that corporations cannot practice law. However, difficulty arises in trying to determine what, exactly, constitutes the practice of law.[6] Ordinarily it is considered as the rendering, for others, of any and all legal services. The diversity in the cases stems from the breadth of the particular definition followed.

A District of Columbia case[7] sets up a criterion considered to be the majority rule as to the right of a fiduciary to practice law in the matter in which he is concerned. This test is known as the "incident to the business" rule. This court held that most anything necessary to the conduct of the authorized business, if reasonably incidental, was also impliedly authorized and it concerned the business no less because it also concerned the customers. The matter is the fiduciary's own separate affair if clearly ancillary to the primary business of being fiduciary and can be enforced by him as his own.

The Supreme Court of Ohio,[8] in construing an Ohio statute authorizing banks to act as trustees and administrators, stated that in performing the legal phases

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ment of instruments in probate and chancery courts when necessary in administration of estates and trusts to which it was fiduciary. The Supreme Court of Arkansas extended the injunction to also prohibit these activities.

[3] In Re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910).

[4] Stewart Abstract v. Judicial Commission, 131 S.W. 2d 686, 690 (Tex. Civ. App., 1939).

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

[6] Land Title Abstract and Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650, 652 (1934). Here the practice of law was defined as: ". . . the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law."

[7] Merrick v. American Security & Trust Co., 107 F. 2d 271 (App. D.C., 1939).

[8] Judd v. City Trust and Savings Bank, 133 Ohio St. 81, 12 N. E. 2d 288 (1937).

of the business the attorney-employees (as in the instant case) are acting for their employers and not for others except as those others are incidentally affected. The court reasoned that as long as the trust company confines its efforts to those beneficial to itself, the benefits of a legal nature passing to others do not necessarily make the activity unauthorized and thus unlawful. The intent is to perform its own duties and not to do that which it is unauthorized to do.[9]

The constitutionality of a statute empowering trust companies to act as such fiduciaries and accordingly qualifying the corporation to engage in what would otherwise be the practice of law was upheld by the Supreme Court of Michigan in 1937.[10]

A borderline view has also been advanced which allows some of the more simple legal services to be offered so as not to grossly offend the general rule of corporations not practicing. The drawing of simple deeds, mortgages, bills of sale and other common documents was allowed as within the ordinary scope of business, but services so complicated as to be beyond the abilities of the ordinary layman were excluded as being unauthorized practice.[11] This seems to be the more reasonable "incident to the business" rule since it shows more flexibility and tends to guarantee everyone a qualified legal effort in his behalf. The intent to help its own business might still be prevalent but the complicated services are more than incidental to the work it was authorized to do. For example, a firm might be authorized to hold itself out as a trustee and in turn be allowed to invade the practice of law to do things necessary to draw up and execute the trust. However, this would not be so in the case of a will because almost the entire activity in carrying out a will is dependent on the legal abilities of an attorney.[12] In this view each individual set of circumstances must be analyzed to see if allowing an unauthorized body to do acts which constitute the practice of law would be helpful or harmful to the person indirectly represented.[13]

The third view follows strictly the general rule that a corporation cannot practice law regardless of what business it is primarily engaged in and how

[9] An interesting analogy is shown in the case of Merrick v. American Security & Trust Co., 107 F. 2d 271, 277 (App. D.C., 1939): "Real estate brokers furnish prospective customers with transportation . . . but he makes no charge as for transportation, and a prospective buyer who buys nothing pays nothing for his ride. Licensed passenger carriers cannot complain of the broker's activities. . . . Carriage is incidental to his business, and not the business itself."

[10] Detroit Bar Association v. Union Guardian Trust Co., 282 Mich. 216, 276 N.W. 365 (1937).

[11] Cain v. Merchants National Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).

[12] See People v. People's Trust Co., 180 App. Div. 494, 167 N.Y. Supp. 767 (2d Dep't., 1917).

[13] It has also been held that occasional drafting of simple instruments is not unauthorized practice even when not incidental to the business. People ex rel. Attorney General v. Jersin, 101 Colo. 407, 74 P. 2d 668 (1937); In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935).

related the questioned activity is to its ordinary role. If the activity comes within the definition of practicing law, which definitions are countless, then only a qualified, licensed attorney directly representing his client in a matter in which his client is concerned can engage in it. The decision upon which the instant case is based[14] specifically says that no person not duly admitted to practice law (and a corporation is not) may appear unless he is a party to the claim in the proceedings:

> . . . Only a person beneficially interested as an heir, devisee, legatee, or as a creditor in relation to his own claim shall be considered such a party. An executor, administrator or guardian, as such, has no right to conduct probate proceedings except in matters where his personal rights as representative are concerned. . . .[15]

A later case in Colorado[16] expressly adopted a rule for that jurisdiction forbidding the practice of law to corporations and expressly noted that counsel for executors and trustees may not represent their creators and testators but only themselves. The instant case is in direct accord with this third view without even mentioning whether the activity forbidden was incidental to its authorized business.

In Illinois, as in Arkansas, a statute expressly forbids the practice of law by corporations[17] and enumerates many of the particular activities to which it applies. A 1931 case,[18] with a factual situation very similar to the instant case, found the defendant bank guilty of unauthorized practice but based its decision primarily on the fact that the fees charged and obtained were being wrongfully appropriated to the corporation. The court found that any counseling or services rendered that involved *any* degree of legal knowledge or skill was unauthorized whether part of the authorized business or not. A later case[19] involved a licensed real estate and insurance broker who was engaged in preparation of deeds and mortgages as part of his brokerage duties. The broker claimed to have a lawful right to do any legal work in connection with real estate transactions, especially to draw up real estate contracts, deeds, mortgages, and the like. The court went through the various theories and concluded that since the practice of law has not been, and could not be, completely defined, any activity, for others, requiring legal skill or knowledge in excess of ordinary business intelligence would be the practice of law.

The standard theory that the right to practice law resides only in licensed attorneys has raised many conflicts with various forms of specialized business

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

[15] Ibid., at 258 and 320.

[16] People ex rel. Committee on Grievances of Colorado Bar Association v. Denver Clearing House Banks, 99 Colo. 50, 59 P. 2d 468 (1936).

[17] Ill. Rev. Stat. (1953) c. 32, §§ 411–415.

[18] People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931).

[19] People ex rel. Illinois Bar Association v. Schafer, 404 Ill. 45, 87 N. E. 2d 773 (1949).

enterprises. These enterprises, in becoming more and more specialized, have included within their activities all the aspects of their business, even those involving the determination of legal questions. The bar associations have jealously guarded against this "Institutional Practice of Law" as it is sometimes called. There are, however, many fields, particularly accounting,[20] taxation,[21] probate research[22] and others, which would take the average practicing attorney a great deal of time to master. The prime consideration of the courts in restricting practice to licensed attorneys is the safeguarding of the public[23] and this serves as the rationale and the basis for the decisions in the jurisdictions following any of the three rules described.

[20] In re Bercu, 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dep't, 1948).

[21] Lowell Bar Association v. Loeb, 315 Mass. 176, 52 N. E. 2d 27 (1943).

[22] In re Reilly's Estate, 81 Cal. App. 2d 564, 184 P. 2d 922 (1947).

[23] Auerbacher v. Wood, 142 N.J.Eq. 484, 59 A2d 863, 864 (1948): "In confining the practice of law and nonlegal endeavors within their respective areas, guidance is to be found in the consideration that the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law."

CONSTITUTIONAL LAW—STATUTE ALLOWING DIRECT ACTION AGAINST INSURER UPHELD ALTHOUGH PROHIBITED BY POLICY

The plaintiff was injured by a product of an Illinois manufacturer which was bought and used in Louisiana. An action was brought directly against the nonresident liability insurer of the tortfeasor. The insurance contract, which was issued in Massachusetts and delivered in Illinois, contained a clause barring a direct action against the insurer until after a suit against the tortfeasor, which clause is binding under the laws of Massachusetts and Illinois. The action was brought in a federal district court sitting in Louisiana, and was based on a Louisiana statute[1] allowing a direct action against the liability insurer of a tortfeasor without regard to a "no direct action" clause and without regard to the fact that the contract of insurance may be made in another state and be binding there. The defendant insurance company had previously complied with another section of the statute[2] requiring consent to such direct suits as a condition precedent to getting a certificate to do business in the state. The Supreme Court upheld the constitutionality of both provisions of the statute and allowed the plaintiff to recover in this direct action. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

[1] L.S.A.-Rev. Stat. (1950) § 22:655, as amended by Act 541 of the Louisiana Legislature of 1950.

[2] L.S.A.-Rev. Stat. (1950) § 22:983, as amended by Act 542 of the Louisiana Legislature of 1950.