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Unauthorized Practice of Law

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UNAUTHORIZED PRACTICE OF LAW

(By the Editor-in-Chief)

THE practice of unlicensed persons of using the inferior courts of this state in furtherance of their business of collecting accounts, instituting replevin actions, suits in forcible entry and detainer and, in some cases, tort actions, continues unabated. A complaint against such practice was filed during the past year with the Committee on Grievances of the Colorado Bar Association and a hearing was had thereon, with the result that the commttee submitted to the Supreme Court a draft of a proposed rule to control such practice. The Supreme Court recently referred to its Standing Rules Committee, composed of Mr. George P. Steele, Chairman, Judge Charles C. Sackmann, Judge George A. Luxford, Judge H. E. Munson, Mr. Ralph L. Carr, Mr. Merle D. Vincent and Mr. Fred C. Storrer, the proposed rule which is as follows:

"No person not an attorney of this court shall, as a general practice and for compensation, represent others in actions in justice of the peace courts."

Thereupon Mr. Steele, in considering whether or not the objectionable practice can be controlled by a rule in that regard, submitted several questions to the members of his committee, and to the writer, who has kept in touch with the activities in different states of various bar associations for the purpose of curbing lay encroachment, and it is the writer's opinion that ample authority exists not only through the inherent power of the Supreme Court to regulate and control, but also through a proper interpretation of the licensing statutes of this state. Three questions were submitted by Mr. Steele, as follows:

"First: Since a justice of the peace court is not a court of record, has the Supreme Court authority to adopt the rule proposed in view of the language of Section 2 of Article VI of the Constitution? Perhaps more specifically this inquiry depends upon what meaning should be attributed to the word 'under' in the phrase of Section 2, which reads:

"* * * and shall have a general superintending control over all inferior courts, *under* such regulations and limitations as may be prescribed by law."

"Second: Has the Supreme Court authority to control persons not members of the bar representing litigants in justice of the peace courts?"

These two queries are so closely related that they may be considered and answered together.

The defense of the layman for his practice in inferior courts is that the legislators intended first, to license an individual as a condition prerequisite to practicing law, and second, to confine to courts of record any penalty for unlawful practice.

He has construed Section 6017, C. L. 1921, the penalty statute, as not reaching him for the reason that that part thereof which reads as follows:

"That any person who shall without having license from the Supreme Court of this state so to do, advertise, represent or hold himself out in any manner as an attorney. * * *"

necessarily implies that he must have a sign "Attorney at Law" on his office door, or list his name in telephone and city directories as an attorney, advertise by card, legal directory or otherwise that he is an attorney, or make statements from time to time in the presence of the public that he is an attorney; that if he does not do any of these things, he is free to practice law in the inferior courts in view of the language of the second portion of Section 6017, to-wit:

"That any person who shall without having a license from the Supreme Court of this state so to do * * * appear in any *court of record* in this state to conduct a suit, action, proceeding, or cause for another person * * *."

With equal speciousness it might be argued that because of the use of the words "courts of record" in Section 5997, the license therein provided for confines the attorney to practice in such courts only, because the language (the phrase being in the conjunctive) reads:

"* * * which license shall constitute the person receiving the same an attorney and counselor at law, and shall authorize him to appear in all courts of record in this state, and *there* to practice * * *."

It has often been held that the constitutional grant of judicial powers to the courts is complete and all-inclusive. The following quotations aptly illustrate this point, to-wit:

"The grant of judicial power to the department created for the purpose of exercising it (the courts) must be regarded as an exclusive grant covering the whole power (In re Day, 181 Ill. 73), and 'leaving no residuum' (Telephone Co. vs. Bank, 74 Ill. 217)."

Since the grant of judicial power to the courts is an exclusive grant, it follows that, if the doing of any act which constitutes the practice of law is the exercise of a judicial function, the person doing such act is under the jurisdiction of the courts, and not of the legislature.

The questions above raised are clearly and fully covered in the language of the court in re: Opinion of the Justices (Mass., 1932), 180 N. E. 725, 81 A. L. R. 1059, in which the definite statement is made that:

"No statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law."

In this case there was a bill pending before the Massachusetts Senate to regulate the correction of answers to bar examination questions and, apparently, the legislators felt that grave doubt existed as to whether the enactment of such a bill properly lay within the legislative province, and an inquiry was submitted to the Supreme Court of the State of Massachusetts which asked, among other things, to what extent was the admission of candidates to the office of attorney at law subject to regulation and control of the General Court.

Briefly, the opinion of the justices in the above case states that statutes respecting admission to the bar were valid where they did not infringe on the right of the judicial department to determine who should practice in the courts, and that, so far as they prescribed qualifications of applicants for admission, they would be regarded as fixing a minimum and not as setting bounds beyond which the judicial department could not go, but that the legislature could not control the judicial department in deciding who should enjoy the privilege of practicing law.

Conceding for the moment that there may be in Section 2, Article 6, of our Constitution, either in terms or by implication, an indication of a suggested legislative leash on the "general superintending control" over all inferior courts, there is no statute of the State of Colorado which, in terms or by

implication, can possibly be construed as a limitation upon the Supreme Court in any way if it hereafter should lay down its positive mandate that no person shall practice law in the inferior courts of this state unless first licensed as an attorney.

The most that can be urged as indicating legislative control in the Colorado statutes, as contained in Chapter 133 entitled "Attorney at Law," is that two sections thereof, 5997 and 6017, contain the above-quoted awkward references to courts of record (which might be termed repugnant provisions), which have been used as above suggested by proponents of unlicensed practice as argument that thereby the hands of the Supreme Court are tied in any attempt to control the inferior courts. That argument falls flat, however, upon considering the general rule of statutory construction, namely, that all statutes upon the same subject must be considered and construed together, and any repugnant provisions must be rejected, if possible, in an effort to establish the intent of the legislature and to give effect to the probable scope and purpose for which the statutes were enacted.

Certainly, such "general superintending control" should not be deemed circumscribed by mere implication, and the rule should be that when one construction of Section 6017 would tend to tie the hands of the Supreme Court, and thereby limit its inherent power of control, and the other would not, the latter should prevail.

In "re Opinion of Justices," supra, the court states that the government of the commonwealth is divided into three departments, and it is provided that:

"The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them;"

In Kolkman vs. People, 89 Colo. at page 74, the following quotation is of interest:

"No person or collection of persons charged with the exercise of powers properly belonging to one of these departments (legislative, executive and judicial), shall exercise any power properly belonging to either of the others." Art. 3, Colorado Constitution.

"The Supreme Court * * * shall have a general superintending control over all inferior courts. * * * True, said control is to be

exercised 'under such regulations and limitations as may be prescribed by law.' Id. But since the two articles must be construed together the 'law' referred to must not usurp judicial powers. * * *"

There are no other repugnant provisions in the sections composing Chapter 133, and the broadest construction that can be given that part of Section 6017, which refers to courts of record, is that it may operate to prevent imposition of a penalty for unlicensed practice in inferior courts, but *only* until such time as a statute may be enacted, or the Supreme Court may rule, that it shall be unlawful for an unlicensed person so to practice.

In further aid of statutory construction in considering words of doubtful import used in the body of the statute, consideration of the title is material, and the contempt statute is entitled:

"An Act to Provide for the Punishment of One Guilty of *Practicing Law* without a license."

The language of the two ambiguous sections, if they are ambiguous, is in the disjunctive. Therefore, it is consistent with the intent of the legislators, in reading the statutes as a whole, together with the title of the act, to construe Section 5997 to read:

"No person shall hereafter be permitted to practice as an attorney or counselor at law * * * without having previously obtained a license for that purpose * * *."

and to read Section 6017, as interpreting the intent of the legislators to penalize *all* unauthorized practice, as both prohibitory clauses therein are in the disjunctive:

"That any person who shall, without having a license from the Supreme Court of this state so to do, advertise, represent or hold himself out *in any manner* as an attorney * * *."

A further consideration of the statutes shows that in *none* of the other sections is any court designated or referred to.

Section 6000 provides that:

"No person (except as provided in Section 1) shall be entitled to receive a license to practice as an attorney and counselor at law * * *."

The exception above-noted is apparently meaningless, as Section 1, which is the same as 5997, contains nothing by way of exception.

Section 6007 provides that:

"No person whose name is not subscribed to or written on the said roll * * * shall be suffered or admitted to practice as an attorney or counselor at law within this state * * * *anything in this act to the contrary notwithstanding* * * *."

What reason did the legislature have for emphasizing: "anything in this act to the contrary notwithstanding" except to prohibit the practice of law at all until the statutes respecting admission were fully satisfied?

Section 6015 provides that:

"No person shall be permitted to enter his name on the roll, or do any official act appertaining to the office of attorney or counselor at law, until * * *."

Section 6016 provides for:

"* * * recovery back from any person not licensed as aforesaid who shall receive any money * * * property as a fee or compensation for services rendered * * * as an attorney * * * within this state."

In all of the foregoing there is no inference to be drawn that, on the contrary, it *will* be lawful for an unlicensed person to practice law in the inferior courts, in which connection it will not seriously be contended that the unlicensed individual who appears in an inferior court and does every act therein from making out and filing pleadings, thereafter trying the issues or taking a default judgment, and following up judgment by issuing execution thereon or garnishment or attachment summons, or prosecuting an appeal to a higher court is *not* practicing law, or holding himself out in any manner, or rendering services as, or doing an official act appertaining to the office of, an attorney or counselor at law.

It has heretofore been admitted by an unlicensed practitioner in our inferior courts that his conduct therein, as above detailed, would constitute the practice of law if pursued in a court of record, but that he felt free so to act in an inferior court because his interpretation of Section 6017, namely, that part thereof which reads:

"That any person who shall without having a license from the Supreme Court of this state so to do * * * appear in any *court of record* in this state to conduct a suit, action, proceeding or cause for another person * * *."

is that the same is a limitation upon the power of the Supreme Court to discipline him, or any other unlicensed person, who appears in the inferior courts.

What constitutes the practice of law generally has been decided within the last two years in a number of decisions of the courts of other states, and in legislation passed defining the same. Such suits as have been filed have been brought against corporations, collection agencies and individuals for unauthorized practice of law, in inferior courts as well as courts of record, and generally the decisions hold that the practice of law is not confined to practice in the courts but is of larger scope, including the preparation of pleadings and other papers incident to any action or special proceedings in any court or other judicial body; the preparation of all instruments whereby a legal right is secured; the giving of legal advice in any action taken for others in any matter connected with the law; the preparation of necessary papers, filing and conducting suits, and endeavoring to enforce judgments by proceedings in aid of execution; whoever, as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with either of whom, as in privity or in the relation of employer and employee in the ordinary sense, is practicing law.

The question of control of persons not members of the bar would seem to have been settled by the Court's interpretation of the licensing statutes, as laid down in People vs. Taylor, 56 Colo. 441, in which (although being a matter affecting a court of record) the court says, among other things:

"* * * This court has adopted rules providing for a committee of law examiners. * * * These rules are in effect an order of this court that no person shall practice law in this state except upon a compliance with such rules and the laws governing the admission of attorneys."

The third question raised is:

"Third: Assuming ample authority in the premises, would the suggested rule be (a) practicable, or (b) expedient, and if practicable and expedient, then (c) necessary elsewhere than in Denver?"

The wisdom, expediency and practicability and the absolute necessity of construing our licensing statutes to include all courts of this state

"in the exercise of the police power to protect the public from those lacking in ability, falling short in learning, or deficient in moral qualities * * *." (In re: Opinion of The Justices, supra),

becomes more apparent and of greater urgency than ever when it is shown that there are in the United States 160,000 licensed attorneys, with 40,000 students in the law schools, and that there is an average admission per year of 9,500 who enter the practice of law. Out of that mass the element of human frailty will claim many who will be amenable to discipline and for whose derelictions the public will in some measure have redress. Why, therefore, complicate the situation by permitting the practice in inferior courts of the rapidly-growing numbers of unlicensed, uneducated and unqualified individuals, against whose sins of omission or commission, and ignorance, the public has no redress and for which the qualified attorney eventually suffers to a certain extent.

The license to practice law, as provided by Chapter 133, is full and complete and extends to all courts: so should be construed the prohibition against unauthorized practice. No sound distinction can be drawn between the power to admit to practice in all courts and the power to prohibit unlicensed practice therein.

There should not be permitted to continue in this state any condition or situation which challenges the authority of the Supreme Court to regulate and control *all* the courts of the state. It is a peculiar situation, indeed, where the interests of litigants may be entrusted to licensed attorneys who have taken the required courses of study in law schools and colleges and, because of such previous education, possess the mental capacity to pass rigid examinations, and also have the other qualifications necessary to secure a license, among which is the highly important requisite of good morals, whereas on the other hand the same interests in the inferior courts are at the mercy of the layman-practitioner who need not and frequently does not possess any such capacity, requirements or qualifications.

The interests of the public are the same elsewhere as in Denver. If abuses due to unauthorized practice arise and exist in the inferior courts in Denver, it is safe to assume that they will creep into and exist in all inferior courts throughout the

state, and the public is entitled to full and complete protection at the situs of any court.

Expedience and practicability become a necessity in view of the constant encroachment of the ever-increasing multitude of alleged collection agencies and associations represented by laymen-practitioners, which use the practice of law as a business and thereby place it on a level with a grocery, department store, or manufacturing establishment—in complete disregard of the fact that the law is a profession.

The collection associations frequently are owned by stockholders and are profit-seeking organizations. Their existence depends upon the retention of at least one-half of the debts, accounts, etc., upon which they file actions in the inferior courts, or an agreement to collect the same upon an equally high percentage basis. Their interest, as well as the interest of the layman-practitioner, is wholly financial. Such an interest on the part of the practitioner was recognized by the early lawmakers as subversive to the client and as tending to destroy the high standards of ethics and morals required of the solicitor, and the law of champerty and maintenance came into existence. Still, in Colorado the inferior courts are overrun with uneducated, unqualified, unlicensed laymen-practitioners having not the slightest professional interest in the matter in court, but whose sole concern is the personal financial prize in the offing.

The answer to the questions raised, in my opinion, is that when the license authorizes the practice of law in all courts, the prohibition against unauthorized practice should cover the same field. The Supreme Court heretofore, by rule 83c, has barred from practice in Justice of the Peace court, or other courts, disbarred attorneys, and persons whose applications have been rejected through failure to show good character, and by rule 83d it has forbade the practice in probate by unlicensed persons. The writer believes that in the rule proposed the phrase "as a general practice and for compensation," will raise a never-ending controversy over what constitutes "general practice," and I believe the evil above complained of can be controlled by a rule similar to 83d, namely, that

"The present rules prohibiting the practice of law by those not thereto licensed hereafter shall include practice in all inferior courts."