CONSTITUTIONAL LAW:
MAGISTRATES:

In re: Under Section 24, Article V, Constitution of 1945, and Section 2811.103, Missouri R. S. A., preparing state and federal income tax returns is doing law business.

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11-15

October 18, 1946

Honorable Roger Hibbard
Prosecuting Attorney
Hannibal, Missouri

Dear Mr. Hibbard:

This will acknowledge receipt of your letter of recent date asking if Section 2811.103, Missouri Revised Statutes, Annotated, Senate Bill No. 207, Section 3, prohibits magistrates from preparing federal and state income tax returns for individuals. Your letter, in part, reads:

> "A question of the interpretation of Section 2811.103, R. S. Mo. 1939, Laws of Missouri, 1945, Senate Bill 207, Section 3, pertaining to the new office of magistrate has been presented to me, and I herewith request an opinion concerning the following:
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> "The last portion of the above designated section provides 'No magistrates shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate.' Does this section prohibit a magistrate from preparing Federal and State Income Tax Returns for individuals for compensation?"

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Section 18, Article V, Constitution of 1945, provides for the establishment of magistrate courts in each county and reads, in part, as follows:

> "There shall be a magistrate court in each county.* * *In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate.* * *"

Section 24, Article V, Constitution of 1945, limits the compensation of magistrates to their salaries and, in part, provides:

> "* * *The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business,* * *"

Pursuant to the constitutional provisions relating to magistrates and magistrate courts, the 63rd General Assembly enacted Senate Bill No. 207, which was approved March 11, 1946, and is now incorporated in the Missouri R. S. A., chapter 11A, Article I.

Section 2811.103 supra, in part, provides:

> "* * *No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

Getting to the question at hand, we do not believe that a magistrate would be receiving additional compensation for the performance of a public service, as contemplated in Section 24, Article V of the Constitution and Section 2811.103, supra, if he prepared federal and state income tax returns for private individuals and received compensation for making out the returns. Therefore, we must consider whether or not the preparation of federal and state returns would constitute the practice of law, or the doing of law business, as contemplated by the constitutional and statutory provisions.

Section 13314, R. S. Mo. 1939, provides that any person, association or corporation engaging in the practice of law or doing law business without being duly licensed shall be guilty of a misdemeanor. Section 13313, R. S. Mo. 1939, defines the "practice of law" and "law business" as follows:

> "The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of

> any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

A leading Missouri case on unauthorized practice of law is Liberty Mutual Insurance Co. v. Jones, 130 S. W. (2d) 945, 344 Mo. 932, 125 A. L. R. 1149, which involved the determination of whether or not the adjusting of claims by representatives of insurance companies constituted the practice of law or doing law business. At S. W. (2d) l. c. [illegible] the court said, quoting from Clark v. Austin, 340 Mo. 467, 101 S. W.(2d) 977:

> "'It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations, or corporations as to their rights under the law,
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> "'Or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law.
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> "'Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law'"

Again at S. W.(2d) l. c. 955, Ellison, J. said:

> "* * *Broadly speaking, the Clark-Austin definition includes under the term 'practice of law' nearly everything that the statutory definition classes under two heads, 'the practice of the law' and 'law business'. The first paragraph of the former specifies engaging in the business of giving advice as to legal rights for a valuable consideration. The second paragraph includes appearances in court, etc., in a representative capacity, and related activities, but mentions no consideration. The third paragraph covers both classes of acts in behalf of clients but without requiring a consideration."

Also the following appears at S. W.(2d) l. c. 955:

> "It must be admitted that many definitions of the 'practice of law' include acts done both in and out of court, including services where no litigation is in prospect. Nevertheless there are fundamental differences between the practice of law--in the sense of court work--and law business. While a layman may represent himself in court, he cannot even on a single occasion represent another, whether for a consideration or not. And a corporation cannot represent itself in court at any time but must appear by attorney. On the other hand the doing of any single act out of court in a representative capacity that a lawyer might do will not necessarily convict a layman of engaging in the law business. The very term itself implies that he must have engaged in the business or held himself out, as some cases say. Illustrative decisions are cited in the margin. The holding out may be evidenced by repeated acts indicating a course of conduct, or by the exaction of a consideration."

In the case of In re Matthews, 57 Ida. 75, 79 Pac.(2d) 535,

the following is said at Pac.(2d) l. c. 538, regarding what services shall constitute the practices of law:

> "'Where the rendering of such services involves the use of legal knowledge or skill, or where legal advice is required and is availed of or rendered in connection with such transaction, this is sufficient to characterize the services as practicing law. People v. Schreiber, 250 Ill. 345, 95 N. E. 189; People v. Alfani, supra; People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E.666; In re Eastern Idaho Loan & Trust Co. 49 Idaho 280, 288 P. 157 (73 A. L. R. 1323).
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> "'Where a will, contract, or other instrument is to be shaped from facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required, and a charge for such service brings it definitely within the term "practice of the law." In re Eastern Idaho Loan & Trust Co., supra.' (Italics inserted.)
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> "In Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, 837, the rule is stated as follows: 'But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. The mere act of a scrivenor who writes something dictated by another would not be practicing law.'(Italics inserted.)"

In the case of Bump et al. v. District Court of Polk County, 232 Ia. 623, 5 N. W.(2d) 914, the following appears: (l. c. 918.)

> "(7,8) There is no question that the preparation of pleadings, management of litigation for clients, advice to clients of their legal rights and all actions taken by them connected with the law, by one not a member of a bar constitutes the illegal practice of law. In Barr v. Cardell, 173 Iowa 18, 155 N. W. 312, 316, the defendant's right to the office of municipal

> judge was assailed, one of the grounds being that he was not a practicing attorney at law at the time of his election, as required by statute. But the Supreme Court held otherwise, and defined the practice in a quotation from In re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. N.S., 750, 18 Ann. Cas. 657: 'It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces 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 actions taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.' Citing also Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836. The opinion in the Barr case then says: 'One may be a practicing attorney in following any line of employment in the profession. If what he does exacts knowledge of the law and is of a kind usual for attorneys engaging in the active practice of their profession, and he follows some one or more lines of employment such as this, he is a "practicing attorney at law," whithin the meaning of the statute.* * * *"

After reading the cases herein cited and many others, we believe that it is practically impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law, or the doing of law business, and that it is necessary to decide each case largely upon its own particular facts.

The Appellate Courts of Missouri have never ruled upon the question of whether or not the preparation of income tax returns constitutes the practice of law by laymen . However, a few other jurisdictions have ruled on this question.

In Merrick et al., v. American Security & Trust Co., (C.C.A. 1939) 107 Fed.(2d) 271, there was involved a suit to enjoin a

trust company from practicing law. Among its various activities was the preparation of tax returns by its lay employees. Regarding this practice, the court said at Fed. (2d) l. c. 278:

> "Appellants do not emphasize the fact that defendant employs laymen to prepare tax returns and address arguments to tax officials. Such work may properly be done by lawyers or laymen.* * *"

Again in the case of Groninger et al. v. Fletcher Trust Co. (1942) 220 Ind. 202, 41 N. E. (2d) 140, the court said at N. E. (2d) l. c. 142:

> "The appellee furnishes to its customers pamphlets descriptive of tax laws state and national, with illustrations indicating tax liability under given circumstances, and the proper method of making tax returns. It sometimes acts through its employees who are not lawyers, in arriving at proper computations and agreements with ministerial taxing officers. It cannot be seriously contended that these activities constitute an unlawful practice of law."

The most recent case ruling upon the question of preparation of tax returns as constituting the practice of law is Lowell Bar Association v. Loeb (1943) 315 Mass. 176, 52 N. E.(2d) 27. In this case the defendants were conducting a business styled "The American Tax Service" which made out tax returns, both state and federal, for persons whose income consisted entirely, or almost so, of wages or salaries. They did not attempt to make out income tax returns for corporations, partnerships, estates or other businesses. In ruling on the question of whether or not the laymen, who made out such returns, were engaged in the practice of law, the court said, beginning at N. E.(2d) l. c. 34:

> "Moreover, we do not decide at this time whether considering, or advising upon, questions of law only so far as they are incidental to the preparation for another of an income tax return may constitute the practice of law where the return is more complicated than were those in the case before us, and the questions of law as well as of accounting are correspondingly more difficult and important.

"Confining our decision to the case at bar, we find the respondents engaged in the business of making out income tax returns of the least difficult kind. The blank forms furnished by the tax officials for that class of returns are made simple, and are accompanied by plain printed instructions. The forms may appear formindable to persons unused to mental concentration and to clerical exactness, but they can readily be filled out by any intelligent taxpayer whose income is derived wholly or almost wholly from salary or wages and who has the patience to study the instructions.

"We are aware that there has been said to be no difference in principle between the drafting of simple instruments and the drafting of complex ones. People v. Lawyers Title Corp., 282 N.Y. 513, 521, 27 N.E.(2d) 30; Paul v. Stanley, 168 Wash. 371, 377, 378, 12 P.2d 401. But though the difference is one of degree it may nevertheless be real. Irwin v. Gavit, 268 U.S. 161, 168, 45 S.Ct. 475, 69 L.Ed. 897; Rideout v. Knox, 148 Mass. 368, 372, 19 N.E. 390, 2 L.R.A. 81, 12 Am.St.Rep. 560; Smith v. American Linen Co., 172 Mass. 227, 229, 51 N.E. 1085. There are instruments that no one but a well trained lawyer should ever undertake to draw. But there are others, common in the commercial world, and fraught with substantial legal consequences, that lawyers seldom are employed to draw, and that in the course of recognized occupations other than the practice of law are often drawn by laymen for other laymen, as has already been shown. The actual practices of the community have an important bearing on the scope of the practice of law. People v. Alfani, 227 N.Y. 334, 339, 125 N.E. 671; People v. Title Guarantee & Trust Co., 227 N.Y. 366, 377, 379, 125 N.E. 666.

"We think that the preparation of the income tax returns in question, though it had to be done with some consideration of the law, did not lie wholly within the field of the practice

> of law. See Shortz v. Farrell, 327 Pa. 81, 92, 193 A. 20; Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. Dist. & Co. R. 413, 422 429, 430; Gustafson v. C. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435; Crawford v. McConnell, 173 Okl. 520, 523, 49 P.2d 551; In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157, 73 A.L.R. 1323; In re Matthews, 58 Idaho 772, 79 P.2d 535; Id., 57 Idaho 75, 62 P. 2d 578, 111 A.L.R. 13, and note at page 29; Note, 125 A.L.R. 1174 et Seq. * * *"

We believe that, in the above case, the court manifested a reluctance to rule that the preparation of income tax returns of a more complex nature would not constitute the practice of law. In this connection it is worthwhile to quote from the dissenting opinion in the Merrick case, supra, where it is said at l. c. 287:

> "With respect to taxation: Many aspects of tax work do not require the knowledge and skill of the lawyer as distinguished from that of the businessman or accountant. It seems probable, however, that to advise concerning what constitutes income for purposes of taxation would require substantial professional knowledge of the detail of judicial decisions and skill in applying them to the tax facts of a particular customer's affairs. It seems probable further that the giving of information concerning tax statutes and regulations would require the exercise of professional understanding of judicial decisions construing them.* * *"

Sections 13313 and 13314, supra, and the cases herein cited, pertain to and treat the problem of laymen engaging in unauthorized practice of law. Admittedly, the cases relating to the preparation of income tax returns indicate that the preparation of state and federal income tax returns does not constitute the practice of law insofar as they may be prepared by laymen, however, we are inclined to believe that the decisions of those cases would not be an absolute basis for permitting a magistrate, compensated by salary, to fill out tax returns for individuals for compensation.

It is a matter of common knowledge that in the past few years the number of people paying income tax and filing returns has tremenduously increased, lawyers all over the country have acquired additional business and more clients as a result of persons retaining them to prepare their income tax returns and a lawyer considers such tax work as much a part of his law business as the preparation or drafting of other legal papers and documents.

The constitutional and statutory provisions do not prohibit magistrates from practicing law or doing business for the reason that they are unqualified to handle such affairs, and to do so would make them subject to prosecution, but the purpose of these prohibitions is to keep the standard of the judiciary high and so that magistrates, who preside over their respective courts, may do so with the highest degree of impartiality.

Regarding the preparation of state income tax returns by a magistrate, it is conceivable that a magistrate may sometime find himself in the embarrassing position of having litigation in his court dealing with the payment of state income tax or a penalty and involving a state income tax return that he had advised his client about and had prepared. In such an instance he would probably be disqualified to rule on the question before him.

In construing a constitutional and statutory provision it is a primary rule that we must determine and adhere to the intent of the law-makers.

In the case of State v. St. Louis Union Trust Co. 335 Mo. 845, 74 S. W.(2d) 348, the court said at S. W.(2d) l. c. 357:

> "It must be remembered that we are construing a statute enacted under the police power and primarily intended to protect the public from the rendition of certain services, deemed to require special fitness and training on the part of those performing the same, by persons not lawfully held to possess the requisite qualifications. While its penal provisions should be strictly construed, the statute as a whole should be interpreted, if possible, so as to effectuate the legislative intent. * * *"

Looking to the intent of the framers of the Constitution we quote from the Journal of the Constitutional Convention where, on the 151st day, May 31, 1944, at page 2764, Mr. Phillips, a delegate from St. Louis, said the following in connection with the drafting of Section 24, Article V of the Constitution, supra:

> "Now, not only does his amendment undo all of the good work of the Committee but if you look through the mud, you will see a nice little clause here that has been eliminated that a whole lot of people want eliminated and that is the clause that says that no judge or magistrate shall practice law or do law business, Mr. President, that is one of the most important provisions of this section. We had quite an argument about it in the Committee. It was shown there that some of our judges were receiving secret fees for their services doing law business while they were still judges of our courts. I don't have to make that any plainer. That is pretty plain. If somebody wanted to influence a decision of the judge, all he had to do was to hire him to do a little law business on the side and the judge would be friendly to every case of that man that came into his court. The whole purpose of this judicial article is to raise the standard of our judiciary and put them above small things like accepting fees, both public and private, and pay salaries, make them efficient and honorable men. The amendment strikes all that out, and I think it is bad.

Section 25, Article V, Constitution of 1945, and Section 2811.103 R. S. A., supra, provide that persons must be licensed to practice law to qualify for the office of magistrate unless they were justices of the peace on February 27, 1945, the date of the adoption of the Constitution, or have heretofore been justices of the peace in this state for at least four years. The ultimate result of these constitutional and statutory provisions relating to the qualifications of magistrates would be to make all magistrates lawyers. In other words at sometime in the future all former justices of the peace will be gone and the only persons who will be able to qualify for the office of magistrate will be those who are licensed to practice law within the state. Therefore, in many instances magistrates will be lawyers duly licensed to practice law who will have a law practice at the time they assume the duties of their office. We do not believe that, under the constitutional and statutory provisions prohibiting magistrates to practice law or do law business, the framers of the Constitution and the legislators, intended that a lawyer, who is elected magistrate, should be

permitted to continue handling what he has undoubtedly considered as part of his law business, viz, the preparation of state and federal income tax returns, and receive his customary fees for making them out.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the preparation of state and federal income tax returns by magistrates for compensation would constitute the doing of law business under Section 24, Article V of the new Constitution and Section 2811.103, Missouri Revised Statutes, Annotated, and as such is prohibited.

Respectfully submitted,

APPROVED:

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