LAW PRACTICE: What constitutes practice of law without a license and for a valuable consideration under Sections 11692 and 11693 R. S. Mo. 1929

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April 18, 1935

Mr. Ralph Varble
Notary Public
Leora, Missouri

Dear Sir:

We wish to acknowledge your letter and enclosure of April 11. Your letter reads as follows:

"Please send me information on the following questions. Can a Notary Public write Mortgages, Deeds, Wills and other legal documents and charge a minimum charge for his or her services in addition to his or her charge for taking acknowledgement of same?

Can a Notary Public write the above and not make charges?

Please give me the desired information as soon as possible."

Your enclosure reads as follows:

" STODDARD COUNTY BAR ASSOCIATION

April 11, 1935

To all Justices of the Peace and Notaries Public in Stoddard County:

Gentlemen:

This is a formal letter being written

to all Justices of the Peace and Notaries Public in Stoddard County.

Herewith we are enclosing a copy of an article which recently appeared in all of the newspapers in Stoddard County. We wish to call your attention to this article and trust that you will comply with it.

A nation wide and state wide effort is being made to prohibit the practice of law by all persons not admitted to the bar.

We call your attention to the fact that the writing of a mortgage,deed, or any other legal document and charging only the fee authorized by statute for a Justice of the Peace or a Notary Public for taking an acknowledgement is a subterfuge,because the consideration received is earned not only by taking the acknowledgement but by performing the legal services. If any such instance is called to the attention of the Bar Committee, proceedings will be filed in accordance with the provisions of the two sections of the revised statutes referred to in the enclosed notice.

We trust that you will abide by the statutes and that it will not be necessary to take any action for violation of the statutes.

It is our duty as members of the Bar Committee appointed by the Supreme Court to address you in this manner, and wish to inform you that every lawyer in Stoddard County has endorsed this action.

Very truly yours,

(signed) C. A. Powell

R. Kip Briney
Members of Bar
Committee. "

This Department has recently received many letters from notaries public, justices of the peace, and laymen inquiring as to their rights to draw mortgages, deeds, wills, and other legal instruments for a valuable consideration, and hence it will be our object to answer all such individuals in this one opinion.

In no instance has the Legislature ever attempted to provide that notaries public, justices of the peace or laymen could draw, procure, or assist in the drawing of deeds, mortgages, wills, or other legal documents.

Section 11692 Revised Statutes Missouri 1929, defines the term 'practice of law' and 'law business', thus:

> "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 or of 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."

Section 11693 Revised Statutes Missouri 1929, sets out the penalty for persons engaging in the 'practice of law' or doing a 'law business,' thus:

"No person shall engage in the 'practice of law' or do 'law business,' as defined in section 11692, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation engage in the 'practice of the law' or do 'law business' as defined in section 11692, or both. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and

> recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri. It is hereby made the duty of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the State."

Under Section 11692, supra, any person drawing, procuring or assisting in the drawing, for a valuable consideration, of any paper, document or instrument affecting or relating to secular rights, may be said to be engaged in the 'law business.' In the case of Allen v. Deming 14 New Hamp. 133, l. c. 139, the court, in defining the term 'secular,' said:

> "The word 'secular' means 'temporal, pertaining to temporal things, things of the world, worldly; also, opposed to spiritual, holy,' and Richardson's English Dictionary, the giving a note certainly pertains to things of this world and is a matter of secular business. The most latitudinarian would scarcely consider it as having a spiritual character. ' "

A deed, which is an instrument conveying real property, (8 R. C. L. 922) or a mortgage, which is a conveyance of property to secure the performance of some obligation, the conveyance to be void on the due performance thereof, (19 R. C. L. 243) or a will, whereby a person makes a disposition of his property to take effect after his death, (28 R. C. L. 58) may be said to be instruments affecting or relating to secular rights.

In the case of People v. Alfani 227 N. Y. 334, 125 N. E. 671, l. c. 673, the question presented was whether the things done by Alfani were open to the public generally, or whether they required a license from the state before a person could perform them for compensation, and as an occupation, the facts in the case were these: - In the basement Alfani had an office in which he carried on a real estate and insurance business; distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sales and wills. A large sign placed over his dining room or basement window bore the words

'NOTARY PUBLIC - REDACTION OF ALL LEGAL PAPERS'.

The defendant said 'redaction' meant the drawing of legal papers. The court, in an elaborate and well-reasoned opinion, in which numerous cases from all parts of the country are reviewed, said:

> "In Matter of Duncan, 83 S. W. 186, 189, 65 S. E. 210, 211, 24 L.R. A. (N.S.) 750, 18 Ann. Cas. 657, it is said:
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> '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 action 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.'
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> Thornton on Attorneys at Law, in section 69, defines the practice of law in the same terms.

In Eley v. Miller, 7 Ind. App. 529,535, 34 N. E. 836, 837, the court stated:

'As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various states, and in conformity to the adopted rules of procedure. 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 depending in a court.'

To the same effect are Barr v. Cardell, 173 Iowa, 18, at page 31, 155 N. W. 312, and Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621. See, also, People v. Schreiber, 250 Ill. 345, 95 N. E. 189; People v. Taylor, 56 Colo. 441, 138 Pac. 762.

To make it a business to practice as an attorney at law, not being a lawyer, is the crime. Therefore to prepare as a business legal instruments and contracts by which legal rights are secured, and to hold oneself out as entitled to draw and prepare such as a business, is a violation of the law."

* *

"It is common knowledge, for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar today is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills,

are activities which have long been classed as law practice."

* *

"The reason why preparatory study, educational qualifications, experience, examination, and license by the courts are required, is not to protect the bar, as stated in the opinion below, but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry, and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest, and knowledge reveals how it may be avoided.

Why have we in this state such strict requirements for admission to the bar? A regents' certificate or college degree, followed by three years in a law school or an equivalent study in a law office, marks the course to a bar examination, which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man, and all of this with but one purpose in view, and that to protect the public from ignorance, inexperience, and unscrupulousness.

Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum, for a very little can go wrong in a court where the proceedings are public, and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has

> had frequent occasion to guide the young practitioner, or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the Legislature mean to leave this field to any person out of which to make a living? Reason says no. Practicing law as an attorney likewise covers the drawing of legal instruments as a business."

In the case of People v. People's Trust Company 167 N. Y. S. 767, the court, in holding that the drafting and supervising of the execution of wills constituted the practice of law, said:

> "See, also, Matter of Pace, 170 App.Div, 818, 156 N. Y. Supp. 641; Matter of Duncan, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N.S.) 750, 18 Ann. Cas. 657; Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Matter of the City of New York (Avenue A.etc.), 144 App. Div. 107, 128 N. Y. Supp. 999.
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> Under these decisions, as well as in the common understanding of the business world, the drafting and supervising the execution of wills is practicing law. By them legal rights are secured. In giving instructions, confidential communications regarding family relations are often necessary. There is no province of the law requiring deeper learning on the subject of trusts, powers, legal and equitable estates, and perpetuities."

In the case of People v. Title Guaranty & Trust Company, 168 N. Y. S. 278, l. c. 281-282, the court, in holding that the practice of law, as the term is now commonly used, embraces much more than the conduct of litigation, said:

"The 'practice of the law,' as the term is now commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. Drafting instruments creating trusts, formulating contracts, drawing wills and negotiations, all require legal knowledge and power of adaptation of the highest order. Beside these employments, mere skill in trying lawsuits, where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of a lawyer's work."

* *

"In the case at bar, a bill of sale of a store and a chattel mortgage thereon for part of the purchase price were drawn. This is work which is usually done by lawyers. It may not require as deep legal knowledge as the organization of a corporation, although both are sometimes done by the use of printed blanks which can be bought at a stationery shop; but there are questions of law which surround passing title to property and securing rights under a chattel mortgage. Advice as to change of possession of the chattels and filing of the mortgage should be given, and if it were not given in this case it furnishes another illustration of the reason why such work should not be done by employes of a corporation."

In the case of State v. St. Louis Union Trust Company 74 S. W. (2nd) (Mo.) 348, l. c. 357, the court had the following to say with reference to sections 11692 and 11693, supra,

> "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. If the words 'valuable consideration' should be given the narrow meaning sought by respondent, then any act designated in the statute as constituting 'law business' might be performed with impunity by any person, though wholly unqualified or unfit to render the service, for the valuable consideration of advancing a business whatever its nature might be. Such an interpretation would entirely thwart the plain intent and purpose of this part of the statute. For the reasons hereinabove stated, we think that nomination of a trust company as an executor or trustee constitutes a valuable consideration within the meaning of Section 11692, R. S. 1929 (Mo. St. Ann. Sec.11692,p. 621.)."

From the foregoing cases, we are of the opinion that the practice of law is not limited to the preparation of pleadings and other papers incident to actions, and special pleadings, and the management of such actions and proceedings on behalf of clients before judges and courts. The person practicing today spends the greater part of his time in his office counseling and advising, drawing agreements, organizing corporations and preparing papers connected therewith, drafting of legal instruments of all kinds, including contracts for real estate, deeds, mortgages, bills of sale and wills. The courts have recognized the

need of training and special fitness for those persons practicing law and each year finds stricter requirements for admission to the bar, and all of this is with but one purpose in view, protection of the public.

The drawing of instruments affecting secular rights not only requires legal knowledge and power of adaptation of the highest order, but also advice on questions of law involved. Where such is not given the person having the instrument drawn may be very materially damaged. Our statute was enacted under the police power (State v. St. Louis Union Trust Company, supra,) for the protection of the public, and the State is an interested party.

The facts, as set out in the case of People v. Alfani, supra, are familiar to those licensed to practice law. Persons carrying on real estate and insurance business, however, are not the only guilty parties illegally practicing law but often include such office holders as notaries public and justices of the peace. Many of these individuals, distinct from their work, draw legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills, all affecting secular rights, and many advertise themselves as engaged in such business. We are of the opinion that such practice is clearly in violation of Section 11692, supra, relating to the 'practice of law' and is subject to the penalties as set out by Section 11693, supra, relating to the 'practice of law without a license.' Our statutes set out specifically the powers and duties of justices and notaries public, and in no instance are they permitted to draft, procure or assist in procuring, any instrument affecting or relating to secular rights, nor are they permitted to practice law unless duly licensed in the manner as provided by statute.

Section 11692, supra, states however, that the drawing, procuring or assisting in procuring, of any paper, document or instrument affecting or relating to secular rights must be for a valuable consideration. The court, in the case of State v. St. Louis Union Trust Company 74 S. W. (2nd) (Mo.) 348, l. c. 355, in construing the above section as it relates to 'valuable consideration,' held that the statute was not limited to cases wherein there was a monetary consideration or a consideration that may

be definitely measured in money, and that a nomination of a trust company as an executor or trustee constituted valuable consideration within the meaning of the statute.

The court said:

"Furthermore, we have approved a more comprehensive definition than the one here proposed by respondent. In the early case of Mullanphy v. Riley, 10 Mo. 309, 311, we said: 'A valuable consideration is one, that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. 2 Kent's Com. 465.' In Green v. Higham, 161 Mo. 333, 337, 338, 61 S. W. 798, 799, we said that a valuable consideration is ' a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it to the party injured.' 4 Minor, Inst. pt. 1, p. 16; 2 Bl. Comm. 445, note; 19 Smith, Cont. 141.' Also in Strode v. St. Louis Transit Co., 197 Mo. 616, 623, 95 S. W. 851, 853, 7 Ann. Cas. 1084, we quoted with approval as follows from 6 Am. and Eng. Ency. Law (2d) 703; ' A valuable consideration consists either in some right, interest, profit, or benefit accruing to the party, who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered or undertaken by the party to whom it is made.' Abundant authority for such definitions is indicated in note 12, sec. 67, p. 654, 6 R. C. L., where the text states that 'a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. ' "

From the foregoing, we are of the opinion that whenever a person draws, procures, or assists in the drawing of a deed, mortgage, will or other instrument affecting or relating to secular rights and makes a charge for same without having been first duly licensed, he may be punished in the manner as provided for in Section 11692, supra. We have seen that "valuable consideration" is not limited to cases where there is a monetary consideration that may be definitely measured in money. If notaries public, justices of the peace, or laymen hold themselves out as able or willing to draw legal instruments, and do so, in order to earn the fees entitled to them under the statute, or for the purpose of furthering their business interests, whichever the case may be, they come within the terms of Sections 11692 and 11693, supra, relating to the practice of law, without a license and for a valuable consideration.

Respectfully submitted,

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