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Unauthorized Practice of Law--Conveyancing--Title Companies and Real Estate Brokers

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reorganization *but for* the "boot" received.[20] The *Howard* ruling would render meaningless the twenty per cent rule of section 368(a)(2)(B),[21] since any "C" type transaction could be considered as a reorganization if the receipt of "boot" were to be completely omitted.[22] Taking the *Howard* decision to its extreme, it would authorize the giving of non-voting stock or securities and voting stock in any "B" type transaction, since the transaction would meet the statutory requirement when considered *but for* the non-voting stock or securities given.[23] The above situation clearly defeats the statutory definition limiting a "B" reorganization to the use of voting stock.[24]

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UNAUTHORIZED PRACTICE OF LAW — CONVEYANCING — TITLE COMPANIES AND REAL ESTATE BROKERS

Lohse v. Hoffman, 90 Ariz. 76, 366 P.2d 1 (1961)

When the plaintiffs filed complaints seeking a declaratory judgment defining the practice of law in which the defendant realtors and corporate title companies might not engage, the problem presented was one of first impression in Arizona.[1] The court defined the practice of law as the doing of those acts, whether performed in the court room or in the law office, which lawyers historically have carried on. The court held that when the defendants prepared, as between third parties, documents affecting the title to property and when they gave advice as to the legal effects of such instruments, their conduct fell within the ambit of the court's definition, and, further, that such conduct constituted the unauthorized practice of law

The essential importance of the present case, apart from its conclusion, lies, first, in its placing the problem of conveyancing by laymen and lawyers of corporate employers in its proper perspective; second, in its logical and systematic consideration of all the major theories and doctrines applied or rejected by other jurisdictions; and third, in its application of two arguments or theories not given significant consideration in previous cases.

The court took the position that conveyancing in the United States has not always been regarded as falling within the ambit of the practice

20. Johnson, *Reorganizations — Minority Stockholders, Including Dissenters,* N.Y.U. 18TH INST. ON FED. TAX. 821, 839 (1960).

21. See note 11 *supra.*

22. Johnson, *Reorganizations — Minority Stockholders, Including Dissenters,* N.Y.U. 18TH INST. ON FED. TAX. 821, 839 (1960).

23. *Ibid.*

24. *Ibid.*

of law reserved exclusively to lawyers.[2] Tracing the growth of the law from antiquity, the court pointed out that in England conveyancing came to be regarded as a function of those learned in the law However, under the influence of Jacksonian anti-professionalism, the states did not adopt the English view.[3] Therefore, the question before the court was not whether it should permit an exception in favor of the defendants to an established rule, but whether conveyancing was itself a practice which ought to be reserved to the legal profession. This essentially novel approach placed the issue in its proper perspective and permitted the court to consider the theories and doctrines in the light of modern requirements.

Nearly every decision involving the alleged unauthorized practice of law has begun with a consideration of the *public service theory.* This theory requires that the court determine whether a particular matter is so vested with a public interest as to require special safeguards to insure its proper performance. On application of this theory, the court in the present case concluded that the lawyer, by virtue of his special training, because of his responsibility under the confidential lawyer-client relationship, as well as because of the supervision of his conduct by the courts, was best qualified to provide legal services and give legal advice as to legal matters.[4]

The compensation theory, the simple instrument doctrine, the incidental theory, and the long-standing custom theory have all been used to permit practices which the court in the present case prohibited. The Arizona court considered and rejected each.[5]

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1. Lohse v. Hoffman, 90 Ariz. 76, 366 P.2d 1 (1961) The plaintiffs were the integrated state bar and certain attorneys individually and as members of the State Bar Committee on Unauthorized Practice. The complaints alleged that the defendants were engaging in the unauthorized practice of law by drafting and formulating certain documents affecting title to real property, giving legal advice regarding these documents, and, in the case of the realtors, charging a separate fee for the service.

2. The court in the present case accepted the position, taken by the great majority of courts, that the ultimate power to determine the "practice of law" rests with the judiciary. A Minnesota court in the leading case of Cowern v. Nelson, 207 Minn. 642, 290 N.W 795 (1940), adopted the same position. However, that court accepted by rule of comity a legislative declaration of public policy exempting real estate brokers from the application of a state statute prohibiting the unauthorized practice of law when they were engaged in drafting instruments incidental to real estate transactions.

3. In *In re* Leach, 134 Ind. 665, 668, 34 N.E. 641, 641-42 (1893), the court pointed out, "Whatever the objections of the Common Law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens, — that law which accords to every citizen the natural right to gain livelihood by intelligence, honesty and industry in the arts, sciences, the professions, or other vocations."

4. By contrast, in two recent cases it has been held that although standard form conveyancing constitutes the practice of law, the public interest requires that it not be restricted to lawyers. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

5. The *compensation theory* holds that although legal services may be properly performed when incident to a regularly established business, such services become the unauthorized practice of law when separately compensated. This theory was rejected on the ground that reliance

In adopting the *substantial interest theory* the court merely recognized the principal that one may represent himself in *propria persona* in matters where his rights or obligations may be substantially affected. In dealing with this theory, the Arizona court established a guide for the future conduct of the defendants. The court held that neither compensation for services nor premiums on title policies would satisfy the requirements of substantial interest. However, where the defendants acquired either a legal or equitable interest in property transferred between third parties, the requirements would be satisfied. In contrast to the narrow construction given the *substantial interest theory* in the present case, at least one court has held that a title insurance company has sufficient interest in the subject matter to effect the transfer of real property between third parties in order that it might issue a title policy on that property [6]

In laying its proscription upon the defendants, the court relied substantially upon a renewed consideration of two arguments. The first emerged from an analysis of the Canons of Professional Ethics and was applied only in the case of those defendant title companies employing lawyers. In addition to the well-established proposition that a corporation cannot practice law, the court argued that the Canons of Professional Ethics oblige the lawyer-employee to live by a code diametrically opposed to that by which business men must live in order to survive. The defendant title companies' business was the sale of real property and the subsequent issuance of title insurance policies. In facilitating the sale, the lawyer-employee's primary concern was with the interests of the employer rather than those of the client. Furthermore, the lawyer-employee was usually required to represent three clients, the title company and the two customers involved in the transaction. Thus, the lawyer-employee violated the Canons, for, as the court pointed out, under Canon 6 "a lawyer

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by the client on the advice or service rendered determines whether certain conduct constitutes the practice of law, rather than whether the advice or service is rendered for a fee. *Contra,* Washington State Bar Ass n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952) (compensation immaterial) Under the *simple instrument doctrine,* the layman has been permitted to do certain legal work, *e.g.,* filling in standard forms incident to his regular business when it did not involve the resolution of complex questions of law. See Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952) The Arizona court refused to adopt this doctrine for the reason that even simple legal instruments require legal skill in selecting the language which will best effect the objectives of the client.

The *incidental theory,* that legal service given, legal instruments prepared, or other services normally provided by attorneys do not constitute the practice of law when performed ancillary to another business, was rejected because it ignored public welfare. *Contra,* Keyes Co. v. Dade County Bar Ass n, 46 So. 2d 605 (Fla. 1950), *reaffirmed,* Cooperman v. West Coast Title Co., 76 So. 2d 818 (Fla. 1954) The *long-standing custom theory* permits the practice of law by those who would be prohibited from such practice but for the fact that it has "long tacitly [been] permitted and worked reasonably well." State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 199, 109 N.W.2d 685, 692 (1961) The court in the present case held that one does not acquire a prescriptive right to practice law by the mere passage of time and that the public interest required that such conduct be prohibited.

6. Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954); *accord,* Ingham County Bar Ass n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955)