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Attorney and Client - Practitioners Not Admitted or Licensed to Practice - Civil Liability to Injured Third Parties

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RECENT CASES

ATTORNEY AND CLIENT — PRACTITIONERS NOT ADMITTED OR LICENSED TO PRACTICE — CIVIL LIABILITY TO INJURED THIRD PARTIES. — Defendant, who was a notary public and not a licensed attorney, drew up a will for decedent which left all of decedent's property to the plaintiff. The will was not admitted to probate because of insufficient attestation. Plaintiff brought action for damages and received judgment. On appeal, the District Court of Appeal *held,* that the defendant acted as an attorney when he drew the will, in violation of a statute limiting practice to members of the State Bar. This violation permitted the plaintiff to recover the difference between the amount she would have taken, had the will been valid, and the amount actually distributed to her. *Biakanja v. Irving,* 310 P.2d 63 (Cal. 1957).

The practice of law is not limited to the preparation of cases and their presentation in court. It includes legal advice and counsel and the drawing of instruments when such instruments set forth, limit, claim, or grant legal rights.[1] A layman may prepare only instruments such as simple deeds, mortgages, promissory notes, and bills of sale, provided he has an interest in the transaction out of which they arise, and provided no charge is made therefor.[2] One may, however, be guilty of the practice of law without a license even though he receives no fee.[3]

The layman is apt to view the efforts of the various Bar Associations, aided by the courts and state legislatures, in the suppression and prosecution of unauthorized practice, as efforts of self-preservation for the benefit of the Bar alone. This view is wrong, and finds no sanction either in reason or in authority.[4] The purpose of the various unauthorized practice statutes is to protect the public against exploitation by incompetent and unqualified practitioners.[5]

The unauthorized practice of law has been punished by: indictment and prosecution,[6] contempt proceedings,[7] injunction proceedings,[8] quo warranto proceedings[9] and the withholding of compensation.[10] Since the court, in the

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1. See Cain v. Merchant's National Bank & Trust Co., 66 N.D. 751, 268 N.W. 719, 723 (1936). This definition appears to be one of the best of the many available. See also, Agran v. Shapiro, 12 Cal. App.2d 807, 273 P.2d 619, 622 (1954); State *ex rel.* Laughlin v. Washington State Bar Ass'n., 26 Wash.2d 914, 176 P.2d 301, 309 (1947).

2. Petitions of Ingham County Bar Ass'n., 342 Mich. 214, 69 N.W.2d 713 (1955); Cain v. Merchants National Bank & Trust Co., 66 N.D. 751, 268 N.W. 719 (1936).

3. State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

4. See Hicks & Katz, Unauthorized Practice of Law 2 (1934); Foreword by Mr. John C. Jackson, Chairman of the Committee on Unauthorized Practice, American Bar Ass'n.

5. See Lowe v. Presley, 86 Ga. App. 328, 71 S.E.2d 730 (1952); Chicago Bar Ass'n. v. Kellogg, 338 Ill. App. 618, 88 N.E.2d 519 (1949); Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951).

6. See People v. Schreiber, 250 Ill. 345, 95 N.E. 189 (1911); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); State v. Chamberlain, 132 Wash. 520, 232 Pac. 337 (1925).

7. See People *ex rel.* Attorney General v. Castleman, 88 Colo. 207, 294 Pac. 535 (1930); Bump v. District Court of Polk County, 232 Iowa 623, 5 N.W.2d 914 (1942); *In re* White, 54 Mont. 476, 171 Pac. 759 (1918).

8. See Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934); Dworken v. Apartment House Owner's Ass'n., 38 Ohio App. 265, 176 N.E. 577 (1931); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932).

9. See Berk v. State, 225 Ala. 324, 142 So. 832 (1932); State *ex rel.* Boynton v. Perkins, 138 Kan. 899, 28 P.2d 765 (1934).

10. See Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal.App.2d 572, 222 P.2d 314, 317 (1950); Harris v. Clark, 81 Ind.App. 494, 142 N.E. 881 (1924).

instant case, decided that the defendant acted as an attorney and not as a scrivener,[11] the case, as decided, appears to admit to little controversy. A civil action for damages by an injured third party is thus added to the list of liabilities to which a layman practicing law subjects himself.[12]

The requirement of privity of contract and the classification of a legatee under a will as an incidental beneficiary, present vast bulwarks to an intended beneficiary seeking recovery from a negligent draftsman. As the court points out in the instant case, "to say that only the testator has been wronged is contrary to fact and legal fiction."[13] It is submitted that the injured legatee should be protected by holding the negligent draftsman, whether layman or attorney, liable in an action based on contract or tort.

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CONSTITUTIONAL LAW — PROCESS OR NOTICE — IN PERSONAM JUDGMENT ON PERSONAL SERVICE OF SUMMONS OUTSIDE STATE NOT DENIAL OF DUE PROCESS. — Defendant, a resident of Wisconsin, was engaged in the business of selling appliances. He was personally served with a summons in that state by plaintiff, a resident of Illinois, who alleged injuries caused by defendant's agent in delivering a stove to plaintiff in Illinois. The Illinois Supreme Court *held* that the 1955 amendments to Section 17 of the Illinois Civil Practice Act,[1] which authorize the entry of a judgment in personam on personal service of summons on a nonresident outside the state, does not violate the 14th

11. *Compare* the instant case *with* Mickel v. Murphy, 305 P.2d 993 (Cal. 1957) in which the court *held* that the defendant acted as a scrivener and not as an attorney, and was therefore not liable in a tort action, for negligent preparation of a will.

12. It is an interesting contrast to note that there is no such liability in the case of a negligent attorney, no matter how great his negligence. See Bank v. Ward, 100 U.S. 195 (1879) (Defendant was employed by X to examine and report on X's title to certain property. He certified the title to be good and the property unencumbered, while actually X had previously conveyed away the property by duly recorded conveyance which defendant, with a reasonable degree of care, could have ascertained. Plaintiff, in reliance upon this certification, loaned money to X, who became insolvent, and sought recovery from defendant. The court *held* that, there being neither fraud, collusion nor falsehood by the defendant, nor privity of contract between plaintiff and defendant, he was not liable to plaintiff for any loss sustained by reason of the defective certificate.) In Buckley v. Gray, 110 Cal. 339, 42 Pac. 900 (1895), defendant was employed by plaintiff's mother to draw a will, by the terms of which the plaintiff and a brother were to share equally in her estate, to the exclusion of the children of a deceased brother. Defendant had plaintiff sign as a subscribing witness, thus rendering the provisions of the will void as to the plaintiff, and permitting the deceased brother's children to take one-half of the estate. Plaintiff brought action to recover for the attorney's negligence, but the court *held*, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone, that is, to the one between whom and the attorney the contract of employment and service existed, and not the third parties. The only exceptions arise where the attorney has been guilty of fraud, collusion, or a malicious or tortious act.

13. 310 P.2d 63, 68 (Cal. 1957).

1. Ill. Ann. Stat. § 17 (1955) "Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits his person, . . . to the jurisdiction of the courts of this State as to any cause of action arising from . . . the transaction of any business within this State; the commission of a tortious act within this State; the ownership, use, or possession of any real estate situated in this State; or contracting to insure any person, property or risk located within this State at the time of contracting. Service of process . . . may be made by personally serving the summons upon the defendant outside this State, with the same force and effect as though . . . served personally within this State."