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CORPORATE CAPACITY TO PRACTICE LAW—A STUDY IN LEGAL HOCUS POCUS

By H. H. Walker Lewis*

The origin of the term "hocus pocus" is shrouded in mystery. One enterprising authority has found a Norse demon, Ochus Bochus, at the bottom of it. Others have indignantly repudiated this affront to northern mythology—and so the etymological battle rages. On one point, however, there seems to have been universal peace and agreement, namely that the law furnishes a peculiarly fertile field for hocus pocus whatever it is and wherever it came from. Indeed it has even been irreverently said that

"The law is a sort of hocus pocus science that smiles in yer face while it picks yer pocket."

These should be fighting words, even although presumably spoken with a smile.

Wherever there is legal hocus pocus one can usually suspect either ignorance, laziness or hypocrisy. There is, happily, less and less recourse to those phrases of so-called Latin which once served the double duty of making law a mystery and of affording a cloak for ignorance. But in spite of our progress in this respect it may be well to recognize that we still clutch some small bits to our bosoms.²

Nothing is better settled than the proposition that a corporation cannot practice law.³ It is even one of those singular matters upon which all lawyers are in apparent

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¹ Macklin, Love a la Mode, 1773 (Quoted in Partridge, Dictionary of Slang and Unconventional English).

² For the humorous side of legal hocus pocus no treatise could be more highly recommended than Uncommon Law by A. P. Herbert, 3d Ed. 1937, Doubleday Doran Co.

³ For a full citation of authorities see 73 A. L. R. 1327 and 105 A. L. R. 1364. See also George E. Brand, Unauthorized Practice Decisions, Published in 1937 by the Detroit Bar Association. See also Vol. V, No. 1 (Winter, 1938) of Law and Contemporary Problems, published by the Duke University School of Law, the entire issue being devoted to "The Unauthorized Practice of Law Controversy".

Needless to say a major part of the problem is to determine an acceptable and workable definition of what is embraced in "the practice of law". This of itself is a sufficient subject for a treatise although the results seem chiefly to depend upon who is doing the defining.

agreement. Yet even this rule appears to embody more than its fair share of lazy and wishful thinking.

As such a suggestion should generate indignation in any loyal member of the Bar, it may not be amiss to point out that the reference is not to the propriety of the practice of law by corporations but merely to their legal capacity to do so. No one can deny that there would be serious social evils in throwing open the practice of law to corporations, but it is not so clear that we have been entirely frank in our approach. If it is a social problem it should be met on social grounds and not on technicalities.

THEORIES APPLICABLE TO THE PROBLEM

In denying to corporations the capacity to practice law recourse is usually had to one or more of the following theories:

1. The soul and body theory. The first and most delightful of such reasons is that a corporation has no soul,⁴ this being on the generally accepted theory that no one but God can create a soul and that the legislature is not a proper substitute. It is, of course, flattering to ourselves as lawyers to know that we are by definition possessed of souls, but even this has been doubted.

Akin to this naively metaphysical objection and really part of it, is the more often expressed observation that a corporation has no body. It is, of course, embarrassing to contemplate the practice of law without a body, but it is still more disquieting to observe that the other standard example of corporate incapacity is with regard to the commission of rape.

2. The necessity of knowledge and skill. Many courts have denied corporations the power to practice law on the ground that such activity requires special knowledge and skill as well as qualifications which cannot be possessed by a corporation. It seems obvious, however, that this is an excuse rather than a justification for the rule. Everyone knows that corporations not only must but can and do act

⁴ See Tipling v. Pexall, 2 Bulstrode 233 (quoted in France, Principles of Corporation Law, 2nd Ed. at Page 1).

through agents and that they may very readily act through agents possessing the necessary qualifications.

- 3. Immunity from disciplinary action. It is true that a corporation would not normally be amenable to disciplinary action by our Bar Associations. The lawyers employed by it would, however, be subject to the same rules as other lawyers. In addition a corporation is clearly subject both to quo warranto proceedings and to disciplinary action by the Bench and it is interesting to note that contempt proceedings have been developed into a most effective club against corporations which illegally engage in the practice of law or overstep the bounds of professional propriety. There is therefore an existing remedy which not only applies to the lawyer who acts as agent for the corporation but also touches the pocketbook of the employer. Both would seem sensitive spots.
- 4. Absence of attorney-client relationship. The one seemingly sound basis for the rule that corporations are not capable of engaging in the practice of law is that the relation of attorney and client is an essential element of such practice and that this relation is impossible where a corporation acts as intermediary. This was forcibly expressed as follows by the Supreme Court of California in a case involving a corporation formed to collect bills and perform miscellaneous legal services:⁶

"The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary and divided loyalty to the clientele of the corporation."

This is, of course, getting down to fundamentals and it is to our credit that the most recent decisions stress this theory rather than the metaphysical sieves first referred to.

All lawyers will agree that the relation of attorney and client contains a social benefit which should be fostered and

⁵ See Brand, Unauthorized Practice Decisions 799-801.

^o People v. Merchants Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922).

preserved. Looking at the matter from a purely practical standpoint, however, it is not entirely clear that even this theory holds water under all circumstances. In addition there seems little difference as a practical matter between the corporate form and the form of organization already adopted by some of the larger offices in cities like New York. In many such offices the real work is done by associates who owe their bread and butter to the office, not to the client, and the product is turned out under as resonant a trade name as ever graced a breakfast food or a soap manufacturer.

ASPECTS OF THE EXISTING SITUATION

Perhaps the best test of any theory lies in its application to the existing situation. As far as the rule against the practice of law by corporations is concerned this is illuminating, especially for one engaged in a hunt for legal legerdemain.

A. Insurance Companies

More and more litigation is being conducted by attorneys for insurance companies and it is probably no exaggeration to suggest that the defendants' side of automobile damage suits, our present most prolific source of litigation, is almost monopolized by attorneys for the casualty companies. This is, however, accepted as proper and no attempt seems to have been made to stop the practice or to discipline attorneys handling such matters.

The theory is that the attorney represents the insurance company, which normally has a vital interest in the outcome of the litigation, and that there is therefore a proper attorney-client relationship. This is, however, looking at only one side of the picture. On the other side, we find that the nominal party to the suit is invariably the holder of the insurance policy and that the mere mention of the insurance company is sufficient to provoke a flood of righteously legal or legally righteous indignation. This is, of course, chiefly due to a cherished solicitude for the child-like innocence of jurors, but whatever the reason, the situation is worthy of Gilbert and Sullivan at their best. From the standpoint

of professional practice the courts justify the arrangement solely on the ground that the attorney represents the insurance company, but when it comes to the actual trial of the case they are equally adamant that he exclusively represents the assured. When one blows so hot from one side and so cold from the other almost anyone would call it hocus pocus.

Speaking again practically rather than theoretically, it must be recognized that the defense of suits is one of the best selling points of the casualty companies and that policies are bought not only for the insurance protection but also for the convenience of having a lawyer furnished by the insurer at any time and any place. In addition, the obligation to pay a judgment being separate and distinct from the obligation to furnish a legal defense, there are numerous instances in which insurance companies have denied liability to their policy holders for the payment of a judgment but have nevertheless proceeded with the defense of the suit. In no case, however, does this procedure seem to have been condemned as involving the practice of law by a corporation.

B. Protective Associations

Assuming that our present statesmen remain in power, or even if they do not, we are apt to see tax associations mushrooming all over the place. We already have more groups than we realize which have been organized along corporate lines for the protection of taxpayers of one sort or another and it is not difficult to predict a great increase in their number and effectiveness. It is interesting to note, furthermore, that laymen are usually quite sympathetic towards the desirability of associations of this sort. Any one would be most unpopular who ventured to condemn them merely because of the fact that they improperly intrude upon the practice of law.

One of the most interesting cases among those dealing with the practice of law by corporations involved a non-

⁷ See for example the eulogy, though partisan, of such associations in The Reader's Digest, March, 1938, 56.

profit association formed in Cook County, Illinois, for the purpose of alleviating the pangs of paying real estate taxes.⁸ So successful was the association in this respect that the officials of Cook County enthusiastically undertook to put a quietus on its activities by having it cited for contempt for the unauthorized practice of law. With this sturdy weapon the association was finally disembowelled and buried, but its chief if not its only legal sin was that it was a corporation and that it hired its own lawyers to bring tax suits in the names of its individual members. This according to the Supreme Court of Illnois was sufficient to render it iniquitous on the ground that a corporation cannot practice law and the fact that the association was not operated for profit was held to make no difference.

It is true that taxpayers' associations have many times been run as a racket and that they can easily be used by unscrupulous lawyers as a screen for improper solicitation. It is also true that attorneys acting for even the best of such associations are probably motivated more by a desire to achieve the ends of the association than to work out the tax situations of its individual members. Nevertheless, it seems practical, if not theoretical, hocus pocus to knock out a bonafide non-profit tax association merely on the ground that it has been organized in corporate form.

This particular situation is in no way limited to tax-payers' associations. There are few types of business which do not have their trade associations and many such associations employ attorneys to look after the group interests of their members. Insurance companies, for example, support associations which take an active part in the prosecution of frauds which are deemed harmful to the business of their members, and much work of this type is done through attorneys who are employed by and owe their bread and butter to the association itself. Organizations such as this have apparently escaped the condemnation of the courts, but they would be equally within the sweeping language which has been used to polish off the blacker sheep.

 $^{^{\}rm s}$ People ex rel Courtney v. Assn. of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N. E. 823 (1933).

The trouble is that courts and lawyers alike have been so enthusiastic in effecting a kill that they have often used a blunderbuss instead of a rifle.

C. Charitable Agencies

It seems quite well established that a corporation is not exempt from the prohibition against the practice of law merely because it is organized on a non-profit basis. Thus taxpayers' associations and automobile associations organized on a non-profit basis have been regularly led to the gallows on the theory that no corporation, however pure, is pure enough.

On the other hand lawyers and the public generally have come to appreciate the social utility of legal aid bureaus which handle cases for persons unable to pay attorneys' fees. Most such legal aid bureaus are incorporated, but this fact does not seem to have prevented their enthusiastic endorsement by many leaders of the Bar. It is true that organizations of this kind do not pinch the professional pocketbook, but it would be sacrilege to think that this is the test to be applied.9

D. Title Companies

Regardless of how we define the practice of law it is beyond question that in many places title companies perform acts which in other places are considered exclusively within the field of lawyers. It is true that a face-saving device exists in the fact that title companies normally insure the titles which they pass upon and thus fall into the same category as casualty insurance companies. Actually, however, the insurance feature of a title policy is little more than a selling device. What most people are interested in is hav-

[°] In practice it is to be doubted whether corporations of this sort destroy or even interfere with the relationship of client and attorney, and they are therefore not within the spirit of the rule prohibiting the practice of law by corporations even though they may be within its letter. However, the same might with justice be said of some of the non-profit associations which have been penalized for offering legal services to their members. The situation in this respect is closely analogous to that of the practice of medicine by corporations. Such is generally prohibited but hospitals and similar charitable corporations are exempted from the general rule, and there has in addition been a marked growth of non-profit associations designed to dispense medical help on a group basis.

ing a competent party pass on the title and the issuance of an insurance policy means little more than evidence of this.

In addition some title companies issue title certificates (as distinguished from title policies) which seem precisely the same in legal effect as an attorney's certificate of title. Where this is done the insurance element is lacking and the only thing which takes such title companies out of the rule against the practice of law by corporations is the very practical fact that they are often better equipped to perform this service than are individual attorneys. (In some places the public records are notably less complete or less reliable than those maintained by the title companies.)

Actually, the real objection to title companies, viewing the matter from the standpoint of a lawyer, is that they customarily split fees with real estate agents and others. Such is not permitted to lawyers and we are consequently placed at a competitive disadvantage by our stricter rules of professional conduct. The problem should, however, be attacked directly, as was attempted by the Baltimore Bar Association at the 1937 Legislature, 10 rather than by the indirect method of invoking the rule against the corporate practice of law. It is unfortunately true that the result of this approach was defeat of the Bar Association proposals in the legislature, but if it is not possible to win on the real ground no very lasting victory can be expected on a fictitious ground.

E. Trust Companies

No real encroachment into the field of law is more important from the lawyer's standpoint than that of the trust companies. In fact the mere mention of the practice of law by corporations is usually sufficient to conjure up their image. It is, however, interesting to analyze the real objections to the preparation of legal instruments by such companies.

It is obvious that the objection that a corporation cannot have the special qualifications required for legal work falls down as applied to most trust companies, which usually em-

¹⁰ House Bill 321, which passed the House of Delegates but died in the Senate.

ploy attorneys of high calibre and of particular fitness to handle matters in such a specialized field. The real objection must therefore be found in the absence of an attorneyclient relationship.

No one is naive enough to think that trust companies are interested in drawing wills and other instruments in cases in which they do not contemplate acting as executor or trustee. The danger is therefore that any attorney employed by a trust company will necessarily look at the matter from its standpoint rather than from the standpoint of the real client. This is admittedly an evil and some states, such as Missouri, have tackled the situation by legislating in effect that no trust company may act as executor in any case in which the will has been prepared by some one acting on its behalf.

All lawyers will agree that it is dangerous to permit either an individual or a corporation to represent conflicting interests, especially when one of such interests is selfishly personal. It is, however, troubling to consider how we as lawyers can consistently condemn trust companies for acting in this fashion and at the same time give tacit approval to identically the same situation when a lawver rather than a trust company is involved. If it is a social evil to permit a trust company to participate in the preparation of a will in which it is to be named executor, it is probably equally an evil to permit an attorney to draw a will naming himself as executor. To be logical we must either apply the same test to ourselves that we seek to apply to trust companies or admit that our case against the trust companies is hocus pocus and a cover for competitive advantage.11

It can scarcely be denied that most if not all of the charter companies practice law. The more reputable of such companies, however, make a conscientious effort to deal only with or through lawyers rather than directly with lay clients and thus preserve the attorney-client relationship.

¹¹ In addition to the types of corporations already described as actively engaging in at least certain phases of the practice of law, there should be noted the charter companies and the collection agencies.

It is even more clear that many incorporated collection agencies actively engage in practice before magistrates and before the Peoples Court. In Maryland, however, the Act (Md. Code, Art. 27, Sec. 19) prohibiting the practice of law by corporations does not apply by its own terms to "the collection or adjustment of mercantile claims in which a corporation or voluntary association may be lawfully engaged."

MARYLAND LAW

In some states, such as New York and Ohio, there has grown up a substantial body of statutes and decisions relating to the practice of law by corporations. Fortunately or unfortunately Maryland is not one of these but it may be of interest to examine such material as there seems to be.

Judging from the dates of statutory enactments elsewhere and of the first articles published on the subject,12 the incursions of corporations into the practice of law were first seriously felt in the years immediately preceding the World War. In Maryland we seem to have been visited by these twin calamities more closely together and the first official notice of the matter appears in a report of the Grievance Committee of the Baltimore Bar Association made in the early winter of 1916 under the chairmanship of present U. S. District Judge William C. Coleman. of this report legislative action was recommended and a bill drafted by the Committee was passed at the 1916 session of the General Assembly. This Act, now codified as Section 19 of Article 27 of the Code, makes it unlawful for any corporation or voluntary association to solicit legal business or hold itself out to the public as competent or equipped to furnish legal service, regardless of the fact that it may employ and act through properly qualified attorneys.

In view of the frequent application and construction of the New York statutes on the subject, it is interesting and important to note that this Act was largely based on the New York law as it then existed. In New York, however, the fine is fixed at \$5,000 for every offense, as against \$500 in Maryland, indicating that our New York legal brethren, then as now, had bigger and better ideas as to the value of their services.

In drafting the 1916 Act the Bar Association Committee deferred to the known position and strength of the title insurance companies by providing that the statute should

¹² Apparently the first treatment of the question in any legal periodical was in an article by George B. Bristol, *The Passing of the Legal Profession* (1913), 22 Yale L. J. 590, the key-note of which is the pessimistic prediction that "The lawyer, as such, is being devoured by his own Frankenstein."

not apply to the business of examining and insuring titles in which a corporation or voluntary association might be lawfully engaged. At the General Assembly this exclusion was broadened so as also to cover (a) corporations engaged in the collection or adjustment of mercantile claims and (b) insurance companies defending the insured under a policy of insurance. Around these exclusions have centered most of the attempts which have later been made to secure a further legislative solution of the problem, as follows:

1931—House Bill 52: addition to such exclusion of charitable corporations or associations organized for the purpose of assisting persons without means. Died in House Judiciary Committee.

1935—House Bill 177: striking out all exclusions from Section 19 of Article 27. Introduced in both House and Senate but was still-born in both places and never got out of Committee.

1937—House Bill 321: amendment of Section 27 of Article 19 so as to remove exclusion of collection agencies and so as to prevent fee-splitting by title companies. Passed House after amendment to restore exclusion as to collection agencies but ended in that well known graveyard of the Senate, the Committee on Judicial Proceedings.

In addition to the above, several attempts have been made to amend Section 19 of Article 10 so as to make specifically applicable to corporations the prohibition against the practice of law by persons who have not been admitted to the Bar, and to implement the Section by imposing a \$100 fine. The first of these Bills (1933—House Bill 202) was passed by both branches of the General Assembly but was vetoed by Governor Ritchie. Since that time the same Bill has been reintroduced in 1935 (H. B. 178 and S. B. 122) and 1937 (H. B. 323) but in neither instance has it been passed by both branches of the Legislature.

Another important effort to tighten up the statutes involving the practice of law by corporations was embodied in Senate Bill 159 as introduced at the 1937 session. This Bill was designed to require the licensing of collection agencies and to prohibit such agencies from furnishing legal

services directly or indirectly, but although it was passed by the Senate with unimportant amendments it died in the House Judiciary Committee.

Apparently the only decision in Maryland directly involving the practice of law by corporations is Rehm v. Cumberland Coal Co.¹³ The direct holding of this case was that a judgment of the People's Court was not subject to attack because of the fact that the plaintiff had been represented therein, not by an attorney-at-law, but by an incorporated collection agency. The effect of this decision seems limited, but the case itself is of particular interest because of the active participation therein of the Baltimore Bar Association's Committee on the Unauthorized Practice of Law and because of Judge Adams' full opinion in the lower court and the excellent briefs which were filed on appeal.

No summary of the Marvland situation would be complete without reference to the agreements which have been negotiated by the Baltimore Bar Association with the trust companies and with nine of the collection agencies. former of these agreements was reached in 1931 and although couched in very general terms it seems to have proved effective as a practical matter and to have eliminated most of the bones of contention which formerly existed. The agreement with the collection agencies is much more recent, being dated February 16, 1938 and printed in The Daily Record of February 23, 1938, and it is probably too early to appraise its effect. As both such agreements are in very general terms, their success necessarily depends upon the good faith with which they are applied rather than upon any legal sanction. In view of this it may be suspected that the more volatile nature of the collection business will prevent the collection agency agreement from working with as much satisfaction as has apparently been obtained by that with the trust companies.

Conclusion

Assuming that every paper must have a thesis, the thesis of this article is *not* that corporations should be permitted to engage in the general practice of law. On the contrary

^{18 169} Md. 365, 181 Atl. 724 (1935).

no thinking person can ignore the fact that such would probably result in improper diffusion of legal responsibility, conflicts of interest, and the extension of ambulance chasing.

If, however, there is a real evil in the practice of law by corporations it should be met on real grounds.¹⁴ Only mythological demons can long be exorcised with hocus pocus.

¹⁴ If the question is treated as one of social policy (as it should be) very interesting problems arise as to the control to be exercised by the courts and by the legislature respectively. It is generally conceded that the regulation of the practice of law is a judicial rather than a legislative function, at least insofar as practice before the courts is concerned. It has been held or stated that under our doctrine of separation of powers the legislatures may not validly authorize corporations to engage in the practice of law, as see Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); Dworken v. Guar. Title & Trust Co., 129 Oh. St. 23, 193 N. E. 650 (1934); Howe v. State Bar of California, 212 Cal. 222, 298 Pac. 25 (1931). It has, however, been recognized that the legislatures may enact statutes in aid of the judicial power to regulate the practice of law, and as a practical matter the courts seem inclined not to question any clear legislative declaration of policy affecting the subject.