University of Missouri Bulletin Law Series

Volume 49 *August 1935* Article 7

1935

Notes on Recent Missouri Cases

NOTES ON RECENT CASES

PRACTICE OF LAW BY A CORPORATION. WHAT CONSTITUTES PRACTICE OF LAW. *State v. St. Louis Union Trust Company.*[1]

This is an action of quo warranto against the St. Louis Union Trust Company, a corporation organized for engaging in a general trust company business. The trust company was charged with violating the laws of the state by practicing law and doing law business not permitted by state laws, in that it advertised for and solicited the business of drafting and writing wills for its patrons, drafted and prepared contracts for life insurance trusts and living trust agreements, and gave legal advice and counsel, all for a valuable consideration. The trust company replied that it had not given legal advice or counsel to anyone for a valuable consideration, and that it always recommends that the will be drawn or approved by an outside lawyer of the customer where it is to act in a fiduciary capacity, but it avers that it "has a legal right, without violation of law, to draft wills and to consult with its patrons concerning wills in which it is named as executor or other fiduciary, where the sole consideration is the nomination of the respondent as executor or fiduciary therein." By section 11693 Rev. Stat. of Mo., 1929, "no person shall engage in the 'practice of law' or 'do law business' " unless he is duly licensed, nor "shall any association or corporation engage in the 'practice of law' or 'do law business', as defined in section 11692." By section 11692, the term "practice of law" is defined to be an appearance as an advocate in a representative capacity or the drawing of papers in such capacity, and the term "law business" is defined as advising, counseling, drawing any papers or doing any act in a representative capacity for a valuable consideration affecting or relating to secular rights.[2] It was held that the trust company has usurped rights and privileges not conferred upon it or warranted by law, in that it has engaged in law business in violation of the state statutes. The unlawful engagement in the practice of law is a misdemeanor regardless of whether or not there is any valuable consideration. But if consideration were necessary, the court said that the nomination of the trust company as executor or trustee constitutes a valuable consideration, as this is a surrender by the maker of his rights to nominate another; and this is valuable when one glances at the yearly income of such trust companies.

The profession of law, which is one of the oldest known to civilization and involving the most sacred confidence, has suffered much and been threatened with demoralization in the last few years by the inroads of the new financial and business methods in this country.[3] But whenever this problem has been presented to the courts, there has been no judicial dissent, even without the aid of statutes, from the propo-

1. 74 S. W. (2d.) 348 (Mo. 1934).

2. "The 'practice of 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 as having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counselling 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 secure for any person, firm, association, or corporation any property or property rights whatsoever." R. S. of Mo. 1929, sec. 11692.

3. United States Title Guaranty Co. v. Brown, 86 Misc. 287, 149 N. Y. Supp. 470 (1914). Affirmed in 217 N. Y. 628, 111 N. E. 828 (1916).

sition that a corporation cannot practice law.[4] The same result is reached in many states by statutes passed in recent years.[5] Most of these statutes have made it a crime for a corporation, its officers, or agents to engage in the practice of law, and the fact that the agent of the corporation is a qualified attorney is no defense.[6] But let us see why a corporation cannot practice law.

It has been uniformly held that the practice of law is not a natural right,[7] but it is in the nature of a privilege and franchise[8] bestowed and conferred only on merit at the discretion of the state and subject to state control.[9] In the absence of statutes, many courts have purported to rest their decisions on the inherent inability of a corporation to secure a personal license to practice.[10] No person can practice unless he has taken an oath to uphold the laws of the state, the honor of the profession, and has become an officer of the court subject to its discipline. This is attested by a certificate of the supreme court and protected by registration. Thus the right to practice law inheres in those individuals who possess these qualifications. Since a corporation is an artificial body, it is evident that it is incapable of satisfying the educational and character requirements for admission to the bar, nor can it take an oath and become an officer of the court subject to its discipline.

The relation between attorney and client is purely personal and confidential in the extreme. The attorney is under all the obligations attached to a fiduciary relation, and above all things he owes an undivided loyalty to his client, unhampered by obligations to any other employer. Such loyalty to a client can be properly maintained only by an attorney who is under no obligation to another, especially under the domination of a third party as its salaried servant.[11] It is obvious that the intervention of a corporation, the general employer of an attorney, between him and his client is a destruction of this relation, since there may be clashes of interest between the corporation and the client. Although an outright disposition might be best for the testator, there would be no trustee's fee. It might be better to have two trustees, yet the fees would have to be shared. Often it is better to have a trust for a short duration, but if it extends over several years it is more profitable to the trust com-

4. People v. Merchants Protective Corporation, 189 Cal. 531, 209 Pac. 363 (1922); People ex rel Los Angeles Bar Association v. California Protective Corporation, 76 Cal. App. 354, 244 Pac. 1089 (1926); In re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930); Midland Credit Adiustment Co. v. Donnelly, 211 Ill. App. 271 (1920); In re Co-Operative Law Co., 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 832, 92 N. E. 15, 19 Ann. Cas. 879 (1910); New Jersey Photo Engraving Co. v. Carl Schornet & Sons, 95 N. J. Eq. 12, 122 Atl. 307 (1923); People v. Title Guarantee and Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919), Reversed 16 N. Y. Supp. 278; In re Richmond Title and Abstract Co., 2 Va. L. Reg. (N. S.) 772 (1917); In re Bensel, 124 N. Y. Supp. 766, 68 Misc. Rep. 70 (1910); State ex rel Lundin v. Merchants Protective Corporation, 105 Wash. 12, 177 Pac. 694 (1919).

5. Ark. Laws 1929, Act. 102; Ill. Rev. Stat. (Smith-Hurd, 1929), c. 32, §§ 411-415; La. Rev. Stat. Ann. (Marr's. Supp., 1926), 55-56; Md. Ann. Code (Bagby, 1924), art. 27, §19; Mass. Gen. Laws (1921), c. 221, §§ 46-47; Mich. Comp. Laws (1929), c. 197, § 10175; Minn. Laws 1931, c. 114; Mo. Rev. Stat. (1929), c. 78, §§ 11692-11693; N. J. Comp. Stat. (Supp. 1924), § 52-214 p-r, (Supp. 1930) 52-214 t; N. Y. Cons. Laws (Cahill 1930), c. 41, §§ 280, 271 a; N. C. Public Laws 1931, c. 157, §§ 1, 2; 2 Ore. Code Ann. 1930, §§ 32-504 to 32-506, 22-1213; R. I. Gen. Laws (1923), c. 401, § 6238; Utah Laws 1927 c. 78, § 345; 2 Wash. Comp. Stat. (Remington, 1922), § 3231 (9) (applies to trust companies only); and West Va. Code (1930), c. 30, art. 2, § 5.

6. People ex rel Los Angeles Bar Association v. California Protective Corporation, supra note 4; People v. Merchants Protective Corporation, supra note 4.

7. Cohn v. Wright, 22 Cal. 293, 317 (1863); In re Durant, 80 Conn. 140, 147, 67 Atl. 497, 500 (1907); In re Ellis, 118 Wash. 484, 203 Pac. 957 (1922); In re Goldstein, 200 App. Div. 107, 220 N. Y. Supp. 473 (1927).

8. In re Collins, 188 Cal. 701, 206 Pac. 999 (1922); In re Thatcher, 190 Fed. 696 (N. Dist. Ohio 1911); In re Popper, 193 App. Div. 505, 184 N. Y. Supp. 406 (1920).

9. In re Bailey, 50 Mont. 365, 146 Pac. 1101 (1915); In re Richards, 333 Mo. 907, 63 S. W. (2d.) 672 (1933).

10. In re Co-Operative Law Co., supra note 4.

11. Committee on Professional Ethics and Grievances of the American Bar Association, Opinion No. 10.

pany. A trustee's powers should be limited, yet trust companies want them as broad as possible. It is also of the utmost importance that the testator should be able to impart confidential communications to one who is under a duty to respect that confidence.[12] To be properly qualified to advise a testator, no province of the law requires deeper learning in the field of trusts, powers, perpetuities, and legal and equitable estates. It is to remedy this growing tendency of corporations to perform legal services through lawyers in their general employ, and owing loyalty primarily to them and not to the client, that many of our statutes were enacted.

While it has been held that a corporation cannot practice law,[13] nevertheless, the problem remains of determining what constitutes the practice of law, because laymen and corporations constantly maintain that certain acts performed by them do not come within the prohibition. This question has been a constantly recurring one, as the profits to be secured by acting as trustee have led more and more trust companies to engage in activities commonly performed by lawyers. The test is the nature of the act, and not the identity of the individual who most frequently performs it.[14] It has been stated by the Supreme Court of the United States as follows: "Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law, within the meaning of that designation as employed in this country."[15] It is uniformly held that the practice of law includes more than an appearance before a court of record or the conduct of litigation.[16] The larger and more responsible part of a lawyer's work is in other fields. According to the generally understood definition of practice of law in this country, it embraces the preparation of pleadings and papers incident to actions and proceedings on behalf of clients before judges and courts, the giving of advice or rendering of any sort of services when the giving of such advice or rendition of such services requires the use of legal knowledge and skill,[17] and the preparation of contracts and legal instruments by which legal rights are secured or created, although such matters may or may not be pending in a court.[18] A corporation has been held to be practicing law when the corporation paid attorneys to give legal advice and service to those paying membership fees,[19] and when the corporation drew up wills.[20] While the mere filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form is generally regarded as the legitimate right of any layman, the shaping of an instrument as a will or contract from a mass of 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, requiring more than the knowledge of the layman, is such a service as, if charged for, constitutes the practice of law.[21]

This question is covered by many state statutes, but the Missouri statute goes further than most of them in giving a fuller and more elaborate definition and in

12. People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. Supp. 767 (1917).

13. Matter of City of New York (Avenue A, etc.), 144 App. Div. 107, 128 N. Y. Supp. 999 (1st Dept., 1911), also see supra note 4 for other cases so holding.

14. People v. Title Guarantee and Trust Co., supra note 4; 68 Pa. L. Rev. 359.

15. Savings Bank v. Ward., 100 U. S. 195, 199 (1879).

16. People ex rel Los Angeles Bar Association v. California Protective Corporation, supra note 4; Commonwealth v. Barton, 20 Pa. Super. 447 (1902); People v. Alfani, 227 N. Y. 234, 125 N. E. 671 (1919); L. Meisel & Company v. National Jeweler's Board of Trade, 90 Misc. 19, 152 N. Y. Supp. 913 (1915); People v. Peoples Trust Co., supra note 12; In re Duncan, 83 S. C. 186, 65 S. E. 210, 211, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657 (1909).

17. Boykin v. Hopkins, 162 S. E. 796 (1932).

18. Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836 (1893).

19. People v. Merchants Protective Corporation, supra note 4.

20. People v. People's Trust Co., supra note 12.

21. People v. Peoples Stock Yards State Bank, 344 Ill. 463, 176 N. E. 901, 73 A. L. R. 1323 (1931); In re Eastern Idaho Loan and Trust Co., supra note 4.

distinguishing between "law practice" and "law business" (office practice) as noted above,[22] both of which, however, are forbidden to laymen and lay agencies.

There is a necessity for the practice of law as an independent profession with all the safeguards and standards which now attend it. It is our duty to protect the public, the administration of justice, and the standards of our own profession by attacking every lay encroachment.[23] The legal profession of this state should, therefore, be grateful for these provisions of the Missouri statute.

*HENRY TIFFIN TETERS

*LL.B., '35.

NUISANCE: RECOVERY OF DAMAGES EXTENDING BACK OF A FORMER RECOVERY. *Kelly v. The City of Cape Girardeau.*[1]

The plaintiff owned property in Cape Girardeau which was flooded by heavy rains because of an inadequate storm sewer. He maintained several suits against the city and the condition had been adjudicated a nuisance. In 1931, the plaintiff, sued on and recovered for injuries resulting from several floods. In 1932, the plaintiff brought the present action to recover damages occasioned by floods which occurred prior to 1931, and not included in the action brought in the latter year. The Springfield Court of Appeals held that the recovery in 1931 was not a bar to recovery in this action because each flood was a separate and distinct "cause of action."

In dealing with cases involving claims for damages occasioned by the maintenance of a nuisance the courts have recognized two types of situations, one where the nuisance is regarded as permanent and where the plaintiff must recover all damages, past and future, in one action, and the other, where the nuisance is regarded as temporary or abatable in character, where the plaintiff may recover for successive items of damage as they occur. The nature of this differentiation is outside the scope of this comment,[2] as the problem here involved arises only in the latter type of case. For present purposes, it is sufficient to say that the court in the case under consideration treated the case as one involving a temporary or abatable, as distinguished from a permanent, nuisance.

In such a case the question arises as to whether the items of damages shall be treated as separate "causes of action" for all purposes, so that a plaintiff may bring an action for damages accruing before, but not included in, a prior action for damages from the same nuisance.

It seems to the writer that this case reaches an undesirable result, and one which is not supported by, much less necessitated by, the authorities. There is a well defined policy against permitting a plaintiff to bring a number of suits where one would suffice. In the situation under discussion it is quite clear that a plaintiff may include in one suit all the damages which have arisen, at least up to the time of filing, and in some jurisdictions by statute up to the time of judgment. The question is, should he not be required to do so.

22. See supra note 2.

23. Jackson, Competition and Co-Operation between Bar and Corporate Fiduciaries, 17 A. B. A. Jour. 656 (1931). For other discussions of this problem see: 73 A. L. R. 1323; 44 Har. L. Rev. 1114; 41 Yale Law Jour. 69; 40 Yale Law Jour. 482; 68 Pa. L. Rev. 356; 79 Pa. L. Rev. 96.

1. 72 S. W. (2d) 880 (Mo. App. 1934).

2. L. R. A. 1916E 1003.

The error into which the court apparently fell lies in the fact that it has assumed that because a given set of facts constitutes a "cause of action" for one purpose, it must be treated as a single "cause of action" for all purposes.

Obviously, different considerations apply when the statute of limitations is invoked to bar the recovery of stale items than apply when the question involves the propriety of stating different items of damage in separate counts, and still other considerations apply when the question is whether or not enough facts have been stated to show any right of action. Further, although certain facts may constitute a "cause of action" for the purpose of preventing the recovery of contingent damages, they do not necessarily constitute a "cause of action" for the purpose of applying the doctrine of *res judicata* in an action for damages which antedated damages for which a recovery has already been had. The term "cause of action" is used with different meanings where these different considerations are involved.[3]

The best way to illustrate the above proposition is to review the cases cited by the instant case in their chronological order. It will be seen that the definition of a "cause of action" applied by the earlier courts resulted in desirable decisions in the situations there under consideration. The later courts, however, applied the definitions used in the earlier cases without regard for the fact that different policies might be involved. Thus, they often reach undesirable results. There is a line of authority *contra* the instant case, and those decisions will also be noted.

The first Missouri case cited which discussed the problem of what constituted a "cause of action" in cases of this type was *Van Hoosier v. Hannibal & St. Joseph Joseph Railroad Company*.[4] In the latter case there were periodic floods which damaged the plaintiff's land. The action was for damages which accrued subseq ent to a prior suit. The defendant contended that the prior suit was a bar. The court held that separate actions could be maintained and thus, the prior suit was not a bar.

The court so held because it did not think that the plaintiff should have been permitted to recover for contingent future damages in the prior suit. This is the weight of authority, and three reasons are usually assigned for the rule. First, the plaintiff should not be permitted to recover for the contingent future injury since the nuisance is subject to abatement or might be voluntarily removed by the defendant, and thus the injuries might[5]never occur. Second, if the plaintiff be required to recover for future injuries in his action, the result would be to give the defendant a sort of easement, to which he has no right, on the land of an unwilling person. Third, it is thought that by successive actions, the defendant might be harassed into voluntarily removing the nuisance. These reasons would seem to be valid as applied to the si ua-tion in the Van Hoosier case, and therefore the court's definition of what a cause of action is in this circumstance is sound since it prevents a recovery of possible future damages. The court cited *Wood on Nuisances*[6] which properly says ". . . when there are successive injuries, successive actions not only may but must be brought."

The Van Hoosier[6] case was cited as authority in the decision under consideration. It is obvious that the reasons for preventing future recovery have no application to the problem of whether the plaintiff can recover for injuries which antedated a prior recovery, and thus the Van Hoosier case should furnish no support for the court's decision.

The next case cited was *Offield v. Wabash, St. Louis & Pacific Railway Company*,[7] in which case the defendant diverted a stream and caused floods which were

3. United States v. Memphis Cotton Oil Co., 288 U. S. 62, 53 Sup. Ct. Rep. 278, 77 Law. Ed. 619 (1933).

4. 70 Mo. 145 (1879).

5. Sec. 869.

6. *Supra*, note 4.

7. 22 Mo. App. 60" (1886).

held to constitute a continuing nuisance. The plaintiff set forth all the floods and damages in one count. The defendant contended that each flood created a separate "cause of action" and thus should have been alleged in a separate count. The court, citing the Van Hoosier case, supported the defendant's contention. The different questions presented in these two cases make it obvious that this court misconstrued the decision in the Van Hoosier case, else it would not have cited that case as authority for its holding. That case merely decided that each flood was a separate "cause of action" for the purpose of preventing a prior judgment from being a bar to an action for subsequent damages. The question here presented is one of pleading only—whether the several floods should be declared on in one count, or each in a separate count. The court in the Offield case apparently thought that if a set of facts be held to constitute a separate "cause of action" for one purpose, it must be held to be such for all purposes even though the same considerations do not apply. However, the decision might not be entirely undesirable, since such separation of the floods into different counts might tend toward orderly procedure and less confusion. In any event the case merely fixes a rule of pleading and does not bear upon the point at issue in the Kelly[8] case.

The next Missouri case was *Bird v. Hannibal & St. Joseph Railroad Company*.[9] That case involved floods caused by an inadequate culvert. The court actually held that the condition was not a continuing nuisance, but was a permanent one, and that therefore the statute of limitations had started running when the culvert was built and was a bar to the action. As *dictum*, however, they expressly overruled the Offield[10] case and said that even if a continuing nuisance had been involved it would not have been necessary to allege each flood in a separate count. The court also said that in such event the structure would have been the nuisance and the various floods would have been merely separate items of damage. Therefore, the court said, the plaintiff might have brought an action on each flood as it occurred, or he might have waited until a series had occurred and then sought redress in one action. It would seem that the *dictum* is sound in that this theory would prevent what the writer considers the improper result reached in the case under consideration —permitting the plaintiff to sue and recover for one flood and then sue and recover for a prior flood.

The next Missouri case cited was *Steiglider v. The Missouri Pacific Railway Company*.[11] In that case the plaintiff was suing the defendant railway under a statute which provided for double liability in the event that the railway permitted the fencing along its right of way to become so defective as to permit animals to trespass upon adjacent land. The plaintiff recovered in a suit for certain trespasses which occurred in 1886, and then brought this action to recover for trespasses which occurred in 1885. The court held that the first recovery barred the action because of the general policy of protecting a defendant from multiplicity of suits and the courts from unnecessary and obstructive litigation. The court also said that the tort consisted of failing to maintain the fence, that the intrusions of the stock were merely separate items of damage, and so the plaintiff could not split the one tort into several suits. This was the first case in this state which really presented the problem presented in the Kelly[12] case, which, however, does not follow the rule of the Steiglider case.

Bunten v. Chicago, Rock Island & Pacific Railway Company[13] was the next case cited in the case under consideration. In this case, the plaintiff had declared on

8. *Supra*, note 1.
9. 30 Mo. App. 365 (1888).
10. *Supra*, note 7.
11. 38 Mo. App. 511 (1889).
12. *Supra*, note 1.
13. 50 Mo. App. 414 (1892).

several floods in one count, and the defendant contended that each flood should have been declared upon in a separate count. Although the case was decided on other grounds, the court, as *dictum*, supported the defendant in his contention and cited the Van Hoosier[14] case, *Wood on Nuisances*,[15] and *Gould on Waters*.[16] We have seen that the Van Hoosier case does not apply since it decided only that the cause of action recovered on in the prior suit did not include damages accruing thereafter. The sections cited from Wood and Gould deal with the same problem and hence these citations are also inapplicable to the present situation. The court in the Bunten case also apparently thought that a "cause of action" for one purpose must be a "cause of action" for all purposes.

The latter case expressly overruled the *dictum* in the Bird[17] case and said that each flood was a separate "cause of action" as was shown by the fact that the statute of limitations runs on each flood. It would seem to be desirable to have the statute run on each flood since the policy behind the statute is to prevent the litigation of claims which have become difficult to disprove through the lapse of time. In these continuing nuisance cases, the main point in issue usually is the amount of damage and therefore the statute should run on each separate item of damage. This court also fails to recognize that it is using the phrase "cause of action" in two distinct senses.

Shelly v. Ozark Pipe Line Company[18] was the next case in point. The plaintiff brought a second action for injuries caused by a leaky pipe line which ran through his land. The defendant contended that a prior action was a bar to this one for damages which accrued subsequently. The court properly allowed the plaintiff to recover. As *dictum*, however, it was said that the prior suit was a bar to recovery for any injury occasioned by oil which escaped before the bringing of the prior suit. This *dictum* is in harmony with the result reached in the Steiglider case, but the court in the principal case refused to follow the rule so stated.

The next case was *Kelly v. The City of Cape Girardeau*,[19] between the same parties and involving the same nuisance as the principal case. This suit raised the identical question as that presented by the principal case. The plaintiff sought to recover damages for a flood which antedated certain floods for which he had already recovered. The decision properly cited and followed the Steiglider[20] case, and held for the defendant on the very point under discussion. Several cases were cited illustrating the policy against permitting the defendant to be harassed by unnecessary litigation. An analogy was drawn to *Viviano v. Ferguson*[21] which held that if an installment of rent be sued upon, the action is a bar to subsequent suits for installments due at the time the first suit was brought.

In view of the desirable result reached in this earlier case, it is difficult to understand why the Springfield Court of Appeals reversed itself in the subsequent suit between the same parties.

The principal case, in holding that each flood is so distinct a cause of action that suit may be had on one of them without barring suit on a prior one, reaches a conclusion which, in the light of the other cases mentioned, seems unnecessary, as well as being unwise in view of the policy against unnecessary harassment.

There is little direct authority from other states to be found, but the cases discovered hold *contra* to the principal case and are in accord with the Steiglider case and the earlier Kelly case. The rule generally stated is that found in *Indiana Pipe Line Company v. Christensen*,[22] which says, "Successive actions may be maintained so

14. *Supra*, note 4.
15. *Supra*, note 5.
16. Sec. 412.
17. *Supra*, note 9.
18. 327 Mo. 238, 37 S. W. (2d) 518 (1931).
19. 60 S. W. (2d) 84 (Mo. App. 1933).
20. *Supra*, note 11.
21. 39 S. W. (2d) 568 (Mo. App. 1931).
22. 195 Ind. 106, 143 N. E. 596 (1924).

long as the nuisance is permitted to continue, in which damages may be recovered for all injuries occasioned prior to the commencement of the action, and within the statute of limitations, *not extending back of a former recovery*." (Italics mine). *Beckwith v. Griswold*[23] reaches the same result. Recognition of this rule is also implied in many other cases not directly involving the point.

The court in the instant case confessed reluctance in announcing the conclusion reached, and admitted that it was contravening the policy against permitting the plaintiff to cause inconvenience to the defendant and the court by splitting his claim. It, however, believed itself bound by the cases just reviewed which stated that each flood gave rise to a separate and distinct cause of action. It has been shown that these cases were all decided with different policies under consideration—the policy of preventing recovery for speculative injury, of having the statute of limitations run on each injury, and that of having each injury stated in a separate count for convenience of trial and submission. It is submitted that these cases are not so nearly in point as to be binding upon the court in this case.

The court also admits that its decision is *contra* to the Steiglider[24] case, the dictum in the Bird[25] case, and the prior case between the same parties.[26] In this, it is correct, since in those cases the identical considerations as to unnecessary suits were involved as are presented in this case; the reasons which the courts had for holding as they did are equally applicable here. The court distinguishes the Shelly[27] case from the principal case on the ground that in the former the damages were continuous and in the latter they were intermittent. This distinction hardly seems to justify a rule which the court admits contravenes a sound and well established policy.

It is to be hoped that should this question arise again, the reasoning of the principal case may be re-examined and a different result reached.

*S. R. VANDIVORT.

*LL.B., '35.

SUIT TO RESTRAIN THE ENFORCEMENT OF A JUDGMENT FOR ALIMONY. Crow vs. Crow-Humphrey.[1]

This was a suit instituted on behalf of plaintiff by his guardian to enjoin the enforcement of a judgment for alimony, rendered in a divorce proceeding between the same parties, on the ground that the decree of divorce and the judgment for alimony were fraudulently obtained by defendant. In 1918 the present plaintiff was incarcerated in a sanitarium where he remained in custody during the entire pendency of the divorce proceeding, which was instituted in 1920. The record shows that that proceeding was grounded, in part, upon a charge of desertion, and that the present defendant, plaintiff therein, in conjunction with this plaintiff's mother, concealed the facts of his insanity and incarceration from the court and the cause proceeded to a final determination with an award of $150 a month to the plaintiff therein as alimony, under an agreement by which the mother agreed to pay the award. This was paid for one month, when the now defendant remarried, and no further payments were made. At the time the present suit was instituted the unpaid

23. 29 Barb. 291 (N. Y. 1859).
24. *Supra*, note 11.
25. *Supra*, note 9.
26. *Supra*, note 19.
27. *Supra*, note 18.

1. 73 S. W. 2nd 807 (1934).

installments totaled $14,000, and defendant was taking steps looking to the collection thereof.

The fact that the record casts some doubt upon the sanity of plaintiff at the time of his marriage to defendant in 1909 may have some bearing upon the equities of the situation, as well as the fact that defendant was still married to one Humphrey at the time of the trial.

The injunction was granted below.

The Supreme Court held that the facts constituted a fraudulent procurement of the divorce decree and the alimony judgment, and that plaintiff was entitled to the relief prayed. As to whether the suit to enjoin was a direct or collateral attack on the judgment, the court said, "when an alimony judgment is awarded it becomes a part of the judgment rendered but it is difficult to see how the fact that the judgment could not have been rendered absent the decree of divorce can affect the question here raised viz., whether a suit to enjoin collection of a judgment for alimony on the ground that the whole judgment is void or voidable for fraud in its procurement, is a direct or collateral attack". The court stated that the Missouri decisions do not deal with this question, but that, "plaintiff challenged the validity of the whole judgment and sought to enjoin the enforcement of the part thereof that defendant was threatening to enforce to his damage. . . . .The relief adjudged by the lower court is not inconsistent with the courts findings nor is one part of the judgment inconsistent with another part thereof".

There is no doubt that a court of equity has jurisdiction and power to set aside[2] a judgment obtained by fraud or enjoin[3] the enforcement of such a judgment. That question has long been settled in Missouri. The fraud must be extrinsic to the cause of action on which the judgment was rendered.[4] The instant case appears to present a set of facts which fall within the above requirement. There has apparently been no doubt that a proceeding to enjoin the enforcement of a judgment is a direct and not a collateral attack on the judgment.[5] The case of Jefferson City Bridge and Transit Co. vs. Blaser[6] quite definitely holds that a suit to enjoin the enforcement of a judgment is not a collateral attack, saying, "whenever a proceeding necessarily tends to impeach the judgment, the enforcement of which is sought to be restrained, although it may not in terms seek to set aside, cancel, or annul the judgment, the proceeding should be construed as a direct attack".

In the principle case, however, the fraud not only entered into the judgment for alimony which the plaintiff sought to restrain but also tainted the decree of divorce. At the present day, there seems to be little doubt but that the plaintiff could, if he had so desired, set aside the decree of divorce and thus have disposed of the alimony judgment as incidental to that decree.[7] The question then arises, whether it is mandatory on the plaintiff to pursue that remedy in order to obtain the desired relief. The court distinguishes the instant case from McCraney vs. McCraney,[8] where the plaintiff filed a bill to set aside a decree of divorce so far as to give the plaintiff dower and one third of personal estate of the defendant, on the ground that de-

2. Miles v. Jones, 28 Mo. 87 (1859); Dorrance v. Dorrance, 242 Mo. 625, 148 S. W. 94 (1912); also see, McClanahan v. West, 100 Mo. 109, 13 S. W. 674 (1890); Einstien v. Strother, (Mo.) 182 S. W. 122 (1916).

3. Collier v. Eastin, 2 Mo. 145 (1829); Brenehan v. Price, 57 Mo. 422 (1874); Payne v. O'Shea, 84 Mo. 129 (1884).

4. Moody v. Peyton, 135 Mo. 489 (1896); Springfield Traction Co. v. Dent, 159 Mo. App. 220, 140 S. W. 606 (1911).

5. Engler v. Knoblaugh, 131 Mo. App. 481, 110 S. W. 16 (1908); also see Wonderly v. Lafayette County, 150 Mo. 635, 51 S. W. 745 (1899).

6. 318 Mo. 373, 300 S. W. 778 (1927).

7. Dorrance v. Dorrance, *Supra* note 2; *but see*, Mansfield v. Mansfield, 26 Mo. 163 (1859); Salisbury v. Salisbury, 92 Mo. 683, 4 S. W. 717 (1887), overruled by Dorrance v. Dorrance. L. R. A. 1917B, 409.

8. 5 Iowa 232, 68 Am. Dec. 702 (1856).

fendant obtained the divorce decree by fraud. The Iowa court in that case held that the plaintiff could not secure such relief because it "would be both logically and legally inconsistent, as it would give plaintiff dower and yet leave so much to the decree in force as dissolved the bonds of matrimony. . . . .It would in effect say there may be dower without the continuance of the matrimonial state". The effect of the holding in the McCraney case is that the plaintiff in order to obtain relief from a part of the effect of a divorce decree, which was fraudulently obtained, must either set aside or annul the divorce decree. However, in that case there is no judgment for alimony, but only a decree of divorce, the effect of which was to cut off the plaintiff's inchoate right of dower and as long as the decree of divorce is outstanding, the plaintiff would not be entitled to dower, as coverture at death of husband is essential to the besting of that right. While in the Crow case, the right to alimony did not arise by operation of law on the granting of the divorce decree but by a separate judgment, which might or might not have been granted,[9] by the court rendering the decree of divorce. So the cases are probably distinguishable.

In an Arizona case[10] the plaintiff sought to set aside a decree of divorce in so far as it related to the settlement of property rights and the custody of children, on the ground of fraud in obtaining the decree. The court held that plaintiff was not entitled to relief because she had not shown a meritorious defense to the original divorce action and further said another reason equally fatal to the plaintiff's suit was, "one which concerns the integrity of judgments and their impeachment in part only. . . . .the powers (of the court rendering the divorce decree) to adjudicate concerning property rights or to award the custody of children were incidental to its jurisdiction to decree the dissolution of the marital relation and to be exercised only when a decree was made." The court said that a decree may not be set aside in part where the sole ground of impeachment of such decree is fraud of defendant in obtaining the decree at all. "The defendants dishonesty has not left its mark solely upon that portion of the decree which affects the property rights or the custody of children". Obviously this case involves two different questions, the settlement of the property rights and the custody of the children. As concerns the property rights, the effect of the divorce decree, making no specific disposition of the property, was to change by operation of law the relationship of the parties from that of owners of community property to that of tenants in common. It required no separate order or judgment by the court rendering the divorce decree to determine these rights and the plaintiff in order to change the effect of the decree would have to set the decree aside. So the dictum of the Arizona court as it relates to the property rights is not contra the Crow case. In this phase it more nearly resembles the case of McCraney vs. McCraney.[11] However, in so far as the dictum of the Arizona court relates to the custody of the children, it appears to be inconsistent with the holding in the Crow case, as the custody of children is awarded by a separate order of the court and may be given in favor of either the plaintiff or the defendant.[12] In this respect it is similar to a judgment for alimony and the same considerations should be applicable.

If the fraud claimed had only tainted the judgment for alimony there are cases holding that the defrauded party is entitled to relief against that judgment even though he could not have secured relief against the decree of divorce in its entirety.[13]

9. Mo. R. S. 1929, Sec. 1355.

10. LeBaron v. LeBaron, 23 Ariz. 560, 205 Pac. 910 (1922).

11. *Supra* note 8.

12. Mo. R. S. 1929, Sec. 1355; Trammell v. Trammell, 80 S. W. 119 (1904).

13. McMurray v. McMurray, 67 Tex. 665, 4 S. W. 357 (1887); Klaes v. Klaes, 103 Iowa 689, 72 N. W. 777 (1897); In Re Smith, 74 Kan. 452, 87 Pac. 189 (1906).

So the fact that in the principle case the fraud inhered in the decree of divorce should not bar the plaintiff from relief against a judgment for alimony which was fraudulently obtained. This is treating the divorce decree and the alimony judgment as more or less separate and distinct. This treatment seems to be proper in light of the fact that a judgment for alimony may or may not be given, and must be given before the right to alimony accrues and is subject to modification without affecting the decree of divorce.[14]

A final question remains to be considered, that is, treating the judgment for alimony and the decree of divorce as separate, is the suit to enjoin the enforcement of the judgment for alimony a direct or a collateral attack on the decree of divorce? A collateral attack is "an attempt to avoid the binding force of a judgment by some proceeding not prescribed by law, that is, without seeking to set aside, annul, correct, modify, or enjoin such judgment."[15] The plaintiff in his suit to enjoin the enforcement of the judgment for alimony is not seeking to avoid the effect of the decree of divorce as it is not necessary to impeach that decree in order to obtain the demanded relief. So it appears that the suit to enjoin the enforcement of the alimony judgment is not a collateral attack on the decree of divorce.

The court in the principle case has reached a desirable and satisfactory solution of the problem on the facts, and that, apparently, without overstepping the traditional restraints upon its equitable powers.

*A. D. SAPPINGTON

WAIVER OF PROCESS AND ENTRY OF APPEARANCE IN DIVORCE SUITS—*State ex rel Robbins v. Gideon.*[1]

In view of a contemplated divorce action the plaintiff husband prevailed upon the defendant wife to sign the following instrument purporting to be a waiver of service and process and an entry of appearance: "Now comes ....., defendant in the above entitled cause and waives issuance of a summons herein; waives the necessity of service thereof by an officer; acknowledges service thereof; waives all question of jurisdiction of the court to hear and determine this matter; enters her appearance in said cause and agrees that said cause may be tried at any regular, adjourned, or special term of the Circuit Court in any county in the Thirty-first Judicial Circuit of Missouri." Thereafter plaintiff filed his petition and this instrument at a special term of court and was granted a decree of divorce. The decree being set aside upon motion of the defendant at the next term of court, plaintiff appeals. *Held*, the instrument signed by the defendant is void as against public policy and the court acquired no jurisdiction over the defendant or the cause of action. Since the instrument purports to be a waiver of notice and an entry of appearance in any divorce suit the plaintiff might see fit to bring at any time, in any county in the judicial circuit, it amounts to an agreement not to defend such action, and, even if entered into bona fide, smacks strongly of collusion. Judgment affirmed."

However, the court does not hold that a party to a divorce suit may not waive service of process and enter his appearance; nor that a defendant in such case is

14. Mo. R. S. 1929 Sec. 1361.
15. 2 Words and Phrases 1249.

*LL.B., '36.

1. State ex rel Robbins v. Gideon, 77 S. W. (2d) 647 (Mo. 1934).

bound to defend the action; as is shown by a statement by the court to that effect.[2] Indeed, a Missouri statute provides that suits may be instituted in courts of record by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause of action, and by the voluntary appearance of the adverse party thereto.[3] The court suggests that a waiver of service of summons and entry of appearance in a divorce suit will be valid and will give the court jurisdiction over the person of the defendant if it is directed to a particular suit filed in a particular court. Several jurisdictions have so held.[4] In all of the divorce cases where a waiver of service and entry of appearance by defendant has been held valid the entry has been executed after the filing of the petition and directed to a cause filed in a particular court so that the defendant had notice and an opportunity to defend. In view of the interest of the state in the marital relation of the parties it is submitted that the instrument in the principal case was properly held void as against public policy as the defendant was deprived of due notice and an opportunity to defend by virtue of the clause permitting the filing of the suit in any court within a circuit and at any regular, adjourned, or special term, making it highly probable that the time and place of the suit would be unknown to the defendant, and lending itself to fraud.

The question is suggested whether in a civil suit other than divorce or annulment, a like waiver executed by the defendant should be held to give the court jurisdiction over the person of the defendant. In this type of case there is not the element of the interest of the state in the relation of the parties or of preventing a judgment grounded on collusion.

Missouri has a statute providing for acknowledgment or waiver of service.[5] and a statute providing for judgment by confession.[6] It is difficult to determine any legitimate advantage which might be gained from the use of a waiver of service and entry of appearance drawn in such broad terms which would not be equally available by compliance with the above statutes. If a waiver of this type should be held valid it would only afford the plaintiff an opportunity to defraud the defendant by concealing the time and place of the suit, when the defendant may have signed only as a convenience and to avoid costs with the intention of appearing and defending the action. So, while there is no such public interest involved here, as in the divorce cases, it seems that the waiver should be held void when in such broad terms because there is no legitimate end to be gained by it, and it increases the opportunity for fraud.

It has been held generally in other jurisdictions that a waiver of service and voluntary entry of appearance removes the necessity of service of summons on the defendant and gives the court jurisdiction of his person.[7] This has been extended to the case where the defendant was a resident of another state,[8] and to the case of the execution of the waiver during vacation and filed with, and at the same time as, the petition,[9] the court saying that if defendant filed a motion at the same time as the petition that it would give the court jurisdiction and there being no reason to differentiate between that and the entry of appearance, it should operate to give the court jurisdiction. Acknowledgment of service may be made upon a separate piece of paper and attached to the petition;[10] and it may be made before the declaration or petition is filed.[11]

2. Ibid. 649.
3. Section 724 Mo. Rev. Stat. (1929).
4. Davis v. Davis, 271 S. W. 643 (Tex. 1925), Radford v. Radford, 42 S. W. (2d) 1060 (Tex. 1931), Wooden v. Wooden, 113 Okla. 81, 239 Pac. 231 (1925), Fuller v. Curry, 162 Ga. 293, 133 S. E. 244 (1926).
5. Section 730 Mo. Rev. Stat. (1929).
6. Section 945, 946 Mo. Rev. Stat. (1929).
7. Laramore v. Chastain, 25 Ga. 592 (1858), Humphreys v. Humphreys, 1 Morris 473 (Iowa 1844).
8. Epps et al v. Buckmaster, 30 S. E. 959 (Ga. 1898).
9. Salina National Bank v. Prescott et al, 61 Kan. 490, 57 Pac. 121 (1899).
10. Hill v. Hatcher, 53 Ga. 291 (1874).
11. Steadman v. Simmons, 39 Ga. 591 (1869).

In Missouri appearance may be made by stipulation,[12] by motion for change of venue,[13] and the filing of a demurrer to the petition is held to be a waiver of process and entry of general appearance.[14] It therefore seems likely that a waiver of service and entry of appearance filed with the petition would be held to give the court jurisdiction in accordance with the general rule as indicated by the reported cases.

By analogy to the case of a note authorizing confession of judgment by warrant of attorney and which Missouri holds void as against the public policy of the state because it would permit a man, when entering into an obligation, to bargain away his right to be heard in court if a question should ever arise concerning it, and because it would enlarge the field for fraud by the debtor putting himself at the mercy of the creditor,[15] it seems likely that the Missouri courts would hold a waiver as broad as in the case of State ex rel Robbins v. Gideon to be void in a civil suit other than divorce or annulment because in such case the defendant is putting himself at the mercy of the plaintiff as he has no way of knowing when and where the suit is brought, and has in effect given away his right to defend, and nothing is gained that cannot be accomplished by acting under the statutes except that, as in the note case, the field for fraud is enlarged.

*JACK S. CURTIS

12. Bradley v. Welch, 100 Mo. 258, 12 S. W. 911 (1890).
13. Feedler v. Schroeder, 59 Mo. 364 (1875).
14. Boyd v. St. Louis Brewing Ass'n, 318 Mo. 206, 5 S. W. (2d) 46 (1928), Davis v. Fleming, 253 S. W. 798 (Mo. 1923).
15. First Nat'l Bank of Kansas City v. White, 220 Mo. 717, 120 S. W. 36 (1909).

*LL.B., '35.