

Spring 1964

Legal Profession in Early Missouri, The

Anton-Hermann Chroust
false

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Anton-Hermann Chroust, *Legal Profession in Early Missouri, The*, 29 Mo. L. REV. (1964)
Available at: <http://scholarship.law.missouri.edu/mlr/vol29/iss2/1>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

THE LEGAL PROFESSION IN EARLY MISSOURI

ANTON-HERMANN CHROUST*

Prior to 1804, the year Missouri became attached to the Indiana Territory, few lawyers, mostly French who had come up the Mississippi, practiced in St. Louis. From the beginning, there always was an abundance of legal work for capable members of the profession: Spanish land grants—fraudulent and authentic—and conflicting claims of every sort, growing out of improper surveys, spurious titles, disputed conveyances, and confusing judicial decisions under French, Spanish, and American law, provided lawyers with ample opportunities to display their professional skill and to earn a reasonable livelihood, provided they were “hustlers” and, as often as not, not too particular about the sort of work they were expected to do.¹

The General Court, held on October 29, 1805, after the District of Louisiana had been detached from the Territory of Indiana and had been organized as the Territory of Louisiana, ruled that all attorneys who had been admitted to practice in the Indiana Territory were also to be admitted to the Louisiana Territory upon taking the oath of attorney.² John Taylor, Benjamin Parke, Isaac Darnielle, William C. Carr, Henry Hight, George Bullitt, and John Scott were sworn in the same day³; and

*Professor of Law, Notre Dame Law School.

1. See, in general, BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI (1878); STEWART (ed.), THE HISTORY OF THE BENCH AND BAR OF MISSOURI, WITH REMINISCENCES OF THE PROMINENT LAWYERS OF THE PAST, AND A RECORD OF THE LAW'S LEADERS OF THE PRESENT (1898); FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST (1876); SWITZLER, EARLY HISTORY OF MISSOURI (1872); HOUCK, A HISTORY OF MISSOURI FROM THE EARLIEST EXPLORATIONS AND SETTLEMENTS UNTIL THE ADMISSION OF THE STATE TO THE UNION, 3 vols. (1908); STEVENS, CENTENNIAL HISTORY OF MISSOURI (THE CENTER STATE): ONE HUNDRED YEARS IN THE UNION, 6 vols. (1921); English, *The Pioneer Lawyer and Jurist in Missouri*, 21 THE UNIVERSITY OF MISSOURI STUDIES 2 (1947)—this work contains an excellent bibliography of our subject; BILLON, ANNALS OF ST. LOUIS IN ITS EARLY DAYS UNDER THE FRENCH AND SPANISH DOMINATIONS (1886); 2 SCHARF, HISTORY OF ST. LOUIS CITY AND COUNTY 1449-1515 (1883); Grissom, *Personal Recollections of Distinguished Missourians*, Part I, 18 MISSOURI HISTORICAL REVIEW 129-45 (1924); Part II, *ibid.* at 400-03; Part III, *ibid.* at 546-53; CONRAD (ed.), ENCYCLOPEDIA OF THE HISTORY OF MISSOURI: A COMPENDIUM OF HISTORY AND BIOGRAPHY FOR READY REFERENCE, 6 vols. (1901); GENTRY, THE BENCH AND BAR OF BOONE COUNTY, MISSOURI (1916).

2. 1 RECORD OF THE SUPERIOR COURT OF THE TERRITORY OF LOUISIANA 29 (Missouri Historical Society, St. Louis, Missouri) (1805).

3. *Id.* at 32.

James Donalson, Nathaniel Pope, Edward Hempstead, Robert Robertson, and John Rice Jones were admitted soon afterwards.⁴ Of these early lawyers Edward Hempstead, George Bullitt, Rufus Easton, William C. Carr, John Rice Jones, and John Scott permanently settled in that part of the Territory which subsequently became the State of Missouri; and Easton, Hempstead, Carr, and Scott soon came to be the leading lawyers as well as rather prominent politicians during the Territorial period.⁵

Between 1805 and 1812, additional lawyers arrived in the Territory, among them William Mears (from Illinois), Samuel T. Young, James Boyle (from Indiana), Thomas T. Crittenden, James R. Graham, and Andrew Scott. After the War of 1812, lawyers from Tennessee, Kentucky, Virginia, and North Carolina, as well as a few attorneys from the northeastern states, moved into Missouri. These new arrivals settled mainly in St. Louis or in Boon's Lick country, and later in the city of Jackson.⁶ Louis Houck lists a total of fifty-five lawyers who were, or at one time had been, in Missouri prior to the year 1821. But he fails to mention a number of attorneys who moved on after spending some time here. Eighteen of the men referred to by Houck were at St. Louis, five were at Ste. Geneviève, five at St. Charles, sixteen in Boon's Lick country, ten at Cape Girardeau or Jackson, and one at Louisiana. Three of them had died by 1820, and at least four had left for other places. Frederick S. Billon lists thirty-four lawyers who were, or at some time or another had been, at the bar of St. Louis before 1821.⁷ Some of these lawyers, such as John Rice Jones or John Scott, never actually lived in St. Louis, although they practiced there with much success. The *St. Louis Directory and Register* for 1821 lists twenty-six lawyers who permanently practiced in the city at that time.⁸

4. John Rice Jones was the only experienced lawyer who had been in the West for any length of time. He was a native of Wales, England, a graduate of Oxford University, and had been in the Northwest Territory since the Revolution. See HOUCK, *op. cit. supra* note 1, at 249, 256-57, 266.

5. 1 RECORD OF THE SUPERIOR COURT OF THE TERRITORY OF LOUISIANA 37-45.

6. ENGLISH, *op. cit. supra* note 1, at 25.

7. BILLON, *op. cit. supra* note 1, at 162-63.

8. PAXTON, THE ST. LOUIS DIRECTORY AND REGISTER (1821), reprinted in THE ST. LOUIS DIRECTORY FOR THE YEARS 1854-55, 263 (1854). This directory lists the following lawyers: David Barton, Joshua Barton, Edward Bates, Abraham Beck, Thomas H. Benton, Ebenezer Block, Henry M. Brackenridge, Francis Carr, William C. Carr, D. H. Conrad, Horatio Cosens, Rufus Easton, Robert F. Ferris, Henry S. Geyer, Alexander Gray, Charles Hempstead, Luke E. Lawless, William Lucas, Arthur Magerus (Magenis), James H. Peck, Henry Shurlds, George Strother, Robert Wash, Frederick White, B. D. Wright, and Josiah Spalding. Four partnerships are listed: Joshua Barton and Edward Bates, Abraham Beck and Josiah Spalding, Alexander Gray and B. D. Wright, and Robert Wash and Francis Carr.

Of the fifty-five lawyers mentioned by Houck, ten were from Virginia, seven from Tennessee, four from Kentucky, three from Connecticut, and one each from North Carolina, Maryland, New York, Massachusetts, New Hampshire, and Vermont. Three were foreign born, and the origin of the remaining twenty-two can no longer be ascertained.⁹ Just before Missouri acquired statehood men who had grown up "west of the mountains" were arriving; and soon a few persons, such as Edward Bates, Joshua Barton, Ezra Hunt, and George Tompkins, received their professional training in Missouri proper, although James G. Heath appears to have been the only man who was trained in the Territory before 1810.¹⁰ Only a few members of the old Territorial bar were college graduates. The men who came from Tennessee seemed to have had less than an average education; and some of the Virginians as well as some immigrants from other parts of the Union likewise betrayed rather scanty educational backgrounds. The early Missouri bar, it must be admitted, displayed all the diversity in background, education, and social position generally to be found on the frontier.¹¹

In order to eke out a modest living, practically all of the early Missouri lawyers had to be "circuit riders," travelling over the neighboring counties and going at times into Indiana, Illinois, and Kentucky.¹² The vast majority of the cases they handled were of a trifling nature, and it was the large number of law suits rather than the amount involved in each that enabled the average lawyer to make the practice of law pay. Since farming, fur trading, lead mining, general merchandising, money lending, river boating, land speculation, and transportation were the only businesses of any consequence, the practice of law centered around these activities. The greater part of all civil suits dealt with debts, accounts, notes, contracts, titles, foreclosures, ejectments, and bankruptcies. Because money was scarce, for his professional efforts the lawyer frequently received commodities, services, land, slaves, furs, a part interest in a mine, or just credit for merchandise.¹³ Ferris Foreman, a young lawyer from New York

9. ENGLISH, *op. cit. supra* note 1, at 33.

10. 3 HOUCK, *op. cit. supra* note 1, at 261.

11. ENGLISH, *op. cit. supra* note 1, at 33-34.

12. Conversely, lawyers from Indiana, Illinois, and Kentucky also went into Missouri to practice law.

13. In his autobiography, Thomas L. Anderson relates: "The litigation was generally of a small nature—there was a great deal however, in proportion to the population. Litigation at Palmyra [Missouri] increased rapidly. We had three terms per annum—and frequently I would bring about fifty suits. The collection of debts furnished a very lucrative practice . . ." AUTOBIOGRAPHY OF THOMAS L. ANDERSON 9-10 (Western Historical Manuscript Collection, University of Missouri, Columbia, Missouri).

in search of a place to settle down in the frontier, in 1836 had this to say about the Missouri bar: "All the gentlemen of the legal profession, who have means, engage in speculation. . . . Men [who] have small capital, by taking advantage of the time, make fortunes here in a few years. Men here do not attend to their business [the practice of law] as assiduously as in the state of New York, or indeed, anywhere North or East. Men make money here easy and spend it profusely."¹⁴

The early Missouri bar, then, included all sorts and types of men: college graduates; men who had attended one of the budding law schools in the East or South, or who had been educated to the law in the office of some eastern or southern lawyer; and plain adventurers, some of whom were semi-illiterate at best. They came from every section of the Union, seeking fame and fortune. Men coming from New England or from the mid-Atlantic states, such as Abiel Leonard (Vermont), Ezra Hunt (Massachusetts), Rufus Easton (Connecticut), and James Carr (Pennsylvania), as a rule found that their geographical origin was a tangible disadvantage in Missouri¹⁵ and, hence, often pretended to be "southerners" or "westerners." But if they could adjust themselves to the ways of the "rampaging frontier" and to the spirit of the pioneer—something which not all of them were able to do¹⁶—and if they were capable of hard work, known for their honesty and "plain dealing," renowned for their professional skill, or at least for their rousing oratory, and accepted for their understanding of the particular "genius" of time and place, in due time they were bound to succeed in a modest way. "There was something adventurous and exhilarating in the life of a young lawyer in Missouri fifty-five years ago," James O. Broadhead nostalgically reminisced, "who commenced as most of them did, with a horse, bridle, and a pair of saddle bags as his only posses-

14. Letter of Ferris Foreman to Clark Hyatt. A copy of this letter can be found in the Western Historical Manuscript Collection, University of Missouri, Columbia, Missouri.

15. See, for instance, BAY, *op. cit. supra* note 1, at 50. Since at that time prejudices against "northern people" ran pretty high in Missouri, James Carr, who had come from Pennsylvania, pretended to be a Virginian. See STEWART (ed.), *op. cit. supra* note 1, at 69.

16. Henry M. Brackenridge of Philadelphia, for instance, could not stomach the widely practiced and generally accepted habit of duelling and of walking around with pistol and knife (or both) all the time, including in the court room. Hence, he decided to return to the more peaceful surroundings of the "City of Brotherly Love." Abiel Leonard of Vermont, on the other hand, fully accepted the *mores* of his new environment, and in 1824 fought a famous duel with Taylor Berry, another lawyer, which resulted in Berry's death and, incidentally, in Leonard's temporary disfranchisement and disbarment.

sions, except perhaps, a copy of the Revised Code of 1835, and 'Blackstone, *Commentaries*,' and a copy of Chitty's *Pleadings*. His ambitions and his hopes were the incentives that stimulated his energies and open[ed?] upon him a bright future. For a while at least he depended upon his credit, and credit was freely given to anyone who had an honest face, a correct deportment, and industrious habits. . . . [W]hen a young lawyer swept out his office, chopped his own wood and made his fires, he was considered worthy of credit, of one month's credit at least. . . ."¹⁷

Most state and territorial statutes before 1820-1830 required a student to spend at least two years, and sometimes three, studying law under the supervision of a practicing lawyer or a judge before he could be admitted to the bar. After 1830, however, there was a widespread tendency to abolish this requirement and to allow a young man to practice law on the frontier as soon as he could convince any judge that he knew some "law." These relaxations in standards, which can also be observed in early Missouri, were in keeping with "western egalitarian" views which proclaimed that the rough school of actual court practice and court experience was the best professional training a young man could possibly have; and that every ambitious and honest young man had the "immemorial right" to make a living and rise in his chosen profession as well as in the community if he could succeed in the hard school of practical experience.¹⁸ Upon application for a license to practice he was, as a rule, subjected to a purely perfunctory examination as to his knowledge of the law by a disinterested and often ignorant judge or by a "board" of equally disinterested lawyers appointed by the court.¹⁹

In keeping with the new democratic spirit of the frontier, judges and lawyers alike were willing and at times even eager to give a young man an opportunity, provided he could produce a few recommendations, appeared to be reasonably pleasant, honest, and somewhat intelligent; and could convince them, if they were not already convinced, that he knew some of the rudiments of the law.²⁰ Since at that time large sections of Missouri were still without lawyers, the bar and the courts were only too eager to create additional attorneys and place them in the small county seats where

17. STEWART (ed.), *op. cit. supra* note 1, at 13.

18. English, *op. cit. supra* note 1, at 12-13. See also Zillmer, *The Lawyer on the Frontier*, 50 AM. L. REV. 33 (1916); Rogers, *The Epic of the American Lawyer*, PROCEEDINGS OF THE STATE BAR ASSOCIATION OF WISCONSIN 84 (1934).

19. See ENGLISH, *op. cit. supra* note 1, at 95-96.

20. See STEWART (ed.), *op. cit. supra* note 1, at 73.

they might, at some future time, act as agents for some established lawyer in the larger centers of population.²¹ It was this situation which prompted Judge William B. Napton to make the following critical comments about early Missouri lawyers: "Many lawyers here are found to be profoundly ignorant of the law as a science . . . but who are honorable and dishonorable as they might be considered elsewhere."²²

Some of the earlier Missouri lawyers soon acquired national renown, especially by handling the many entangled cases growing out of the several land grants under the Spanish and French regimes, and their fees were often correspondingly large. Among these noted men were Edward Hempstead, until 1817 probably the most active lawyer in the Territory;²³ Rufus Easton, a native of Connecticut and a resourceful and well trained lawyer who was very successful in Spanish land grant litigations, representing a large number of claimants;²⁴ John Scott, a native of Virginia and a graduate of Princeton, who practiced in true "frontier style" for over fifty years;²⁵ George Tompkins of Virginia, a man of great integrity and reasonable competence, who first taught school in Kentucky and, after 1810, in St. Louis, and who was admitted to practice in 1816, removed to Boon's Lick country, and ultimately became a Justice of the Supreme Court of Missouri (1824-1845);²⁶ Henry S. Geyer of Maryland, the compiler of the early Missouri Statutes (of 1818) and one of the great lawyers of his time, who came to St. Louis in 1815;²⁷ Edward Bates of Virginia, who came to Missouri in 1815, studied law with Rufus Easton, was admitted to the bar in 1816, and became Attorney General of the United States in Abraham Lincoln's cabinet;²⁸ Rufus Pettibone, a graduate of Williams College in

21. ENGLISH, *op. cit. supra* note 1, at 96.

22. Napton, Notebook 41-42, in possession of Mrs. T. H. Harvey, Marshall, Missouri; quoted in English, *op. cit. supra* note 1, at 97-98.

23. Upon his death in 1817 he left a considerable estate, the size of which would indicate that he found the frontier a lucrative place to practice law (and to engage in all sorts of business enterprises).

24. See 2 SCHARF, *op. cit. supra* note 1 at 1454; BAY, *op. cit. supra* note 1 at 78-91. Easton had studied law at the Litchfield Law School in Connecticut as well as with Ephraim Kirby, the editor of KIRBY'S REPORTS (Connecticut). He practiced first in Connecticut, then in Rome, New York, then in Vincennes, Indiana, and, after 1805, in Missouri.

25. See BAY, *op. cit. supra* note 1, at 114-17.

26. *Id.* at 30-36.

27. He provided some of the main arguments advanced in the *Dred Scott Case*. The Geyer Act of 1839 set up the plan for public schools in Missouri as well as the law providing for the University of Missouri.

28. In 1850 President Fillmore offered Bates the post of Secretary of War, but Bates declined. In 1856 he presided at the Whig Convention held in Baltimore; and in 1858 Harvard conferred upon him the honorary degree of Doctor of Laws.

Massachusetts (1805), who prior to his arrival in Missouri had been admitted to the bar of Albany, New York, in 1808; Hamilton R. Gamble of Virginia, a graduate of Hampden-Sydney College in Virginia, who before he had reached the age of twenty-one was admitted to the bar in Virginia, Tennessee, and Missouri (1819);²⁹ David Barton, one of the first United States Senators from Missouri and President of the Missouri Constitutional Convention of 1820, who studied law in Tennessee (where he was admitted to the bar in 1810) and came to Missouri in 1812; Josiah Barton, who studied law with Rufus Easton, and who was according to his contemporaries probably the best legal mind at the St. Louis bar until his premature death in 1823;³⁰ John F. Darby of North Carolina, who in 1825 went to Kentucky to study law with John J. Crittenden, returned to St. Louis in 1826, and was admitted to practice the following year;³¹ Josiah Spalding, a famous St. Louis lawyer who had a vast clientele; Luke E. Lawless, a graduate of the University of Dublin, Ireland, a member of the Irish bar, and a soldier under Napoleon, who came to St. Louis in 1824;³² Abiel Leonard of Vermont, who attended Dartmouth College, studied law in New York State where he was admitted to the bar in 1818, migrated to Missouri in 1818 or 1819, and practiced mostly in Boon's Lick country;³³ Bryan Mullenphy, a native of Maryland and a successful lawyer in St. Louis, who represented some of the wealthiest and most important people in that city;³⁴ Nathaniel

29. He started to practice in Howard County, moved to St. Charles in 1823, and to St. Louis in 1825. In 1851 he was elected to the Supreme Court of Missouri, and during the Civil War he was Governor of the State. See BAY, *op. cit. supra* note 1, at 288-97. Gamble's brother Archibald likewise became a distinguished lawyer in St. Louis.

30. In 1819 he was elected the first librarian of the St. Louis Library Association. He also served as the first Secretary of State for Missouri. He was killed in a duel with Thomas C. Rector. See BAY, *op. cit. supra* note 1, at 278.

31. He was also Mayor of St. Louis in 1837 and 1840. See STEWART (ed.), *op. cit. supra* note 1, at 114; ENGLISH, *op. cit. supra* note 1, at 114-15; 3 HOUCK, *op. cit. supra* note 1, at 106.

32. This firebrand Irishman had a bitter struggle with Judge James H. Peck of the United States District Court in 1826. This struggle caused much excitement in Missouri as well as in Washington, D. C.

33. Considered one of the most skillful and competent lawyers in the State and perhaps on the whole frontier, Leonard was elected to the State Supreme Court in 1855. Although he served only two years on the bench, he is said to have been one of the most profound jurists ever to sit on that court. He was an utterly fearless, thoroughly honest, and extremely industrious man. See CULMER, *Abiel Leonard*, Part I, 27 MISSOURI HISTORICAL REVIEW 113-31 (1933); Part II, *id.* at 217-39; Part III, *id.* at 315-36; Part IV, *id.* vol. 28, at 17-37 (1933); and Part V, *id.* at 103-24 (1934); BAY, *op. cit. supra* note 1, at 356-70; ENGLISH, *op. cit. supra* note 1 at 107-11; GRISSOM, *Personal Recollections of Distinguished Missourians*, Part II, 18 MISSOURI HISTORICAL REVIEW 400 (1924).

34. See BAY, *op. cit. supra* note 1, at 197-221.

Beverly Tucker, a Virginian, a graduate of Princeton, and a very capable lawyer, who came to Missouri in 1815 and returned to Virginia in 1833 or 1834 to assume a law professorship at the College of William and Mary;³⁵ Myron Leslie, a native of Vermont; Uriel Wright; Richard Blennerhassett, a native of Ireland; Thomas Gantt; Payton R. Hayden of Kentucky, who came to Missouri in 1819, settled first in Boon's Lick country and then in Boonville;³⁶ Robert Wash from Virginia, a prominent St. Louis lawyer, who became a Justice of the Supreme Court of Missouri; Nathaniel Watkins, a native of Kentucky; Alexander Steuart, a native of Virginia; Frederick Hyatt; David Todd, a native of Kentucky and a graduate of Transylvania University, who became a circuit judge (1818-1836);³⁷ Henry Shurlds, a native of Virginia, who had studied law with William Wirt back in Virginia; Roswell M. Fields, a native of Vermont and a graduate of Middlebury College (1822), who was admitted to the Missouri bar in 1825 at the age of eighteen;³⁸ and Greer W. Davis.³⁹

The lawyer most noted nationally in early Missouri was probably Thomas Hart Benton,⁴⁰ the outspoken foe of the Missouri Compromise. After some rather spotty legal studies, he was admitted to the Tennessee bar in 1811, but moved to St. Louis in 1815, where he became a successful legal practitioner as well as the influential editor of the *Missouri Enquirer*. He soon identified himself with his adopted state, and in 1820 was elected to the United States Senate. Subsequently he turned to national politics and won considerable fame in the National Bank controversy,⁴¹ the "hard money issue," the Oregon dispute, and the Texas question. He argued

35. He advocated a states-right theory, which he might have derived from Spencer Roane of Virginia, with so much vigor in the *Partizan Leader* that this almost prophetic outline for secession was reprinted in Boston in 1861 as proof that the South planned secession for many years. See ENGLISH, *op. cit. supra* note 1, at 30.

36. Although Hayden had little formal education, he became a formidable trial lawyer who frequently bested the highly educated Abiel Leonard, See BAY, *op. cit. supra* note 1, at 356-72.

37. See *id.* at 389-91.

38. Fields, who was also acquainted with the laws and the languages of Spain and France, became a most successful real estate lawyer.

39. For additional important lawyers in Missouri, see literature mentioned in note 1, *supra*.

40. See, in general, ROOSEVELT, THOMAS HART BENTON (1886); MEIGS, THE LIFE OF THOMAS HART BENTON (1904); ROGERS, THOMAS H. BENTON (1905).

41. In the United States Senate he became one of the most outspoken opponents of the alleged "despotic power over the states" wielded by the Supreme Court of the United States. He violently denounced its "judicial tyranny and oppression."

Craig v. Missouri,⁴² where he spoke out truculently and violently against the appellate jurisdiction of the Supreme Court of the United States over the several sovereign states. He was especially indignant over the fact that the Supreme Court could, by a writ, summon under penalty the sovereign State of Missouri to appear before this Court. In 1835, on the death of John Marshall, he was considered as a possible successor to the Chief-Justiceship.⁴³ He himself insisted, however, that he would not accept the nomination if offered to him.

Out of rather modest beginnings and the turmoils of a lively frontier the legal profession of early Missouri developed fairly rapidly into a respectable and significant bar which soon commanded the attention of its brethren along the eastern seaboard. Missouri came to be the main "receptacle" of all those lawyers and "would-be-lawyers" who moved westward in the search of new and greater opportunities. At the same time it became the pivotal point through which law and the orderly administration of justice spread throughout the West and the Southwest. Hence it may be claimed that the legal profession of early Missouri is the true "Gateway to the West" for the American lawyer.

42. 29 U. S. (4 Pet.) 249 (1830).

43. The *Trenton True American* of July 11, 1835, wrote: "Col. Benton having been spoken of as the probable successor of the late Chief Justice, Marshall, the *Globe* asserts positively that the Col. would not accept, should the office be tendered to him. The people cannot spare Benton from the Senate as long as the Bank is in the field"