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BAR BULLETIN

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OFFICIAL PUBLICATION OF THE MISSOURI BAR ASSOCIATION

LAW JOURNALS—The increasing usefulness of the current literature of the law, as embodied in the various law journals, is evidenced by the references to such sources in the marginal notes of Mr. Justice Brandeis' dissenting opinion in the Duplex Printing Press Co. case.—Journal Issued by Am. Bar Assoc., Vol. VII, p. 157.

CANONS OF ETHICS—One of the recent activities of our Association has been the printing and framing of the Canons of Ethics. We are trying to get the various local bar associations to see that a framed copy of the canons is displayed in every court house in the state. We have already succeeded in placing them in nine court houses. If our Canons of Ethics are a good thing, we ought not to be ashamed of them and we have found that hanging them in a conspicuous place where the public can read has a very good effect.—R. Allan Stephens, Secretary, Illinois Bar Assoc. in Journal Issued by Am. Bar Assoc., Vol. VII, p. 90.

TRIAL BY JURY—Twelve jurors were sworn and duly qualified on voir dire, in a trial for murder; state and defendant accepted the jury, introduced their evidence, and rested; a recess of two hours

was taken; it was then discoveed that the jurors after acceptance had not been sworn "to well and truly try the issue". The court then and there administered that oath, to which defendant objected. Argument proceeded; and a verdict of guilty was rendered.

Held, that the tardy administration of the oath could not cure this fatal error; Smith, C. J., and Etheridge, J., dissenting. (Mississippi; *Miller* v. *State*, 84 So. 161.) Here we are, then, no further along than the middle ages, in our formalistic administration of criminal justice in the year 1920. Shall we never shake off the shackles of technicalism? "And He said unto them, woe unto you also, ye lawyers! For ye lade men with burdens grievious to be borne, and ye yourselves touch not the burdens with one of your fingers!"—J(ohn) H. W(igmore) 15 Illinois Law Review 353.

A review of the same decision in 19 Michigan Law Review 115, states that the only other case found that passes on the precise question holds to the contrary. Curiously, the case (*Boroum* v. *State* (1913) 105 Miss. 887.) was decided by the same court and was not noticed in *Miller* v. *State.*

LEGAL EDUCATION—The Committee on Legal Education, C. Petrus Peterson, of Lincoln, Chairman, recommended that the preliminary requirements for those seeking admission by law office study and examination be raised from three years' high school or the equivalent thereof, to four years in high school or the equivalent thereof, also that preliminary requirements for entrance to law colleges be raised to two years of prior college training.—Allan Raymond, Secretary, Nebraska Bar Assoc. in Journal Issued by Am. Bar Assoc., Vol. VII, p. 91.

In Missouri the only substantial requirement is "a common or grammar school course of study". R. S. Mo. 1919, Sec. 670. Are we to stand still while other states pass by? The Missouri Bar Association bill to raise the standard was adversely reported by the Senate Judiciary Committee of the last General Assembly. If lawyers do not wish the qualifications to be higher how is it expected that laymen will be convinced?

AM. BAR ASSOC. MEETING—Prospects are bright that President Warren G. Harding will spend at least a day at the American Bar Association Convention to be held in Cincinnati, August 30-31, September 1-2.

Within the last few days Mayor John Galvin of Cincinnati, who was largely instrumental in bringing this convention to the Queen City had a conference in Washington with President Harding. During their conversation Mayor Galvin suggested to Mr. Harding that the members

of the association as well as the citizens of Cincinnati would greatly appreciate a visit from the President on this occasion. Without hesitation Mr. Harding assured Mayor Galvin that he would be delighted to attend the meeting and would arrange his affairs accordingly with no possible interference unless Congress be in session at that time.

It is already assured that former Ambassador to England John W. Davis and Honorable Elihu Root will be among the prominent speakers at the convention.—Publicity Committee, American Bar Association.

JUDICIAL CAPACITY—Justice Holmes' long and honorable record of dissenting opinions in cases where the courts have ignored the human rights of labor and have unduly extended the rights of property and "freedom of contract", has given people the impression that he is something of a radical. This, however, is not the case. He is a firm believer in the regime of private property and the traditional economics. His dissenting opinions thus manifest a rare intellectual integrity which enables him to distinguish between his own opinions and that which the Constitution leaves to the Legislature to determine. This lends unusual force to his charge that our court, unduly influenced by the fear of Socialism, "have taken sides on debatable questions" and "have unconsciously read into the Constitution economic doctrines which prevailed fifty years ago". "Judges commonly are elderly men and are more likely to hate at sight any analysis to which they are not accustomed".—Morris R. Cohen, The New Republic, Vol., XXV, p. 294.

INCORPORATION OF THE BAR—The bill presented by the committee is entitled, "A Bill to Provide for the Better Government and Greater Usefulness of the Bar of Ohio." After declaring all attorneys at law, and persons thereafter admitted to the practice of law, officers of the Supreme Court of Ohio and members of the State Bar, subject to the provisions of the enactment, a board of governors is created, three representing each of the appellate court districts of the state, making a total of 24 governors, at present. The governors are to be elected biennially by ballot of the entire membership of the State Bar, after nomination by petition signed by at least ten members of the State Bar. The officers of the State Bar are to be chosen by the board of governors from among the members of the board, the secretary being the only officer who is not required to be a member of the board. Jurisdiction is conferred upon the board of governors to investigate complaints and take disciplinary action, by reprimand, suspension or disbarment of attorneys, the action of the board being subject to review by the Supreme Court *sua sponte* or by proceedings in error by the dis-

ciplined attorney. The inherent or statutory powers now possessed by the courts of the State are not affected by the terms of the proposed bill. Provision is made for an annual fee from each member of the State Bar, the funds arising therefrom to be deposited with the State Treasurer and disbursed upon orders of the board of governors. A penalty is provided for practicing without having paid the license fee or without possessing a certificate of good standing in the State Bar. In the hearing of complaints, the board of governors is vested with power to subpoena witness, etc., the same as courts in the trial of causes.

After some discussion the report of the commission was unanimously adopted, not one member present having voiced opposition to the general proposition, and the bill was endorsed by the Association with the understanding that slight amendments would be made before presentation to present session of the legislature.—Report of Ohio Bar Association Meeting, Journal Issued by Am. Bar Assoc., Vol. VII, p. 92.

AXIOMATIC STATEMENTS—This argument carries weight, for alike in equity and in law fraud vitiates all affairs wherein it is predominantly influential.—Goode, J., *State ex rel.* v. *Speer,* 223 S. W. 659.

It seems to me that the proposition that fraud vitiates consent in criminal maters is not true, if taken to apply in the fullest sense of the word and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent, and if fraud vitiates consent every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as, for instance, by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true.—Stephen, J., *Regina* v. *Clarence,* 22 Q. B. Div. 23.

I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.—Lord Esher, M. R., *Yarmouth* v. *France,* 19 Q. B. D. 647.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.—Mr. Justice Holmes, *Lochner* v. *New York,* 198 U. S. l. c. 76.

CRIMES AND PUNISHMENT—In spite of this scientific truth, the worst enemy of law and order is the silly sentimentalist who sees in every brutal criminal only an erring brother, who must be coddled and petted and turned loose again to prey upon the society which he refuses to serve. The man who contemplates a career of crime is given every encouragement. Only a small percentage of criminals is apprehended. If one is apprehended he has better than an even chance of escaping through the maze of legal technicalities, existing apparently to give him a sporting chance. If he does not thus escape, his appeal is usually effective before a jury. If by a rare combination of misadventures he is caught and convicted he listens with a sardonic smile to the sentence of five or ten or twenty-five years. He knows it is a joke. An easy parole or commutation of sentence will save him; or the governor, on Christmas day or May day or Hallowe'en, will invite his soul by pardoning a lot of long-termers. The number of crimes is appalling that are committed by habitual criminals who are at large on parole. The criminal has as good a chance to escape punishment for his crimes as the workman has in some industries of escaping injury from accident. Police efficiency might be improved, though the fault is not chiefly theirs; amendment of the laws might help; but after all, the only cure lies in an aroused public sentiment. The finest code of laws is useless unless the people demand their enforcement; on the other hand, the public usually gets whatever it insistently demands.—Address, Francis M. Curlee, January 26, 1921.

AN EXAMINATION OF SOME MISSOURI LAWS AND SUGGESTIONS WITH RESPECT THERETO

INTRODUCTION

There are some provisions in the laws of Missouri that are altogether, as I believe, contrary to the commercial spirit of the age, and the policy of the leading states of the Union, and therefore must sooner or later prove detrimental to Missouri, if they have not already done so, and especially to the best interests of its cities, and it should be an axiom that the commercial and agricultural interests of a state are so indissoluble, and mutually dependent, that each must ultimately suffer from an injury to the other. Therefore, if in the facts hereinafter stated, and in the suggestions that follow, the situation pictured is that of commerce, rather than of agriculture, both the facts and suggestions should be considered as vital, in the end, to the best interests of both the city and country life of the State.

ADMINISTRATION UPON ESTATES

One provision of our laws, which is contrary to the laws, I believe, of New York and Massachusetts, and probably to those of other commercially important states, is that which requires administration upon the property in Missouri of a non-resident. The last Missouri case, and the one that seemingly settles the law of this state on this point, is *Troll* v. *Third National Bank*, 211 S. W. 545, decided by your Supreme Court April 7, 1919.

Under this decision a Missouri corporation dare not transfer a share of stock on the endorsement of a foreign executor, or administrator, nor can any amount, whether large or small, due the estate of a non-resident creditor be safely paid by a resident of Missouri to any other than a Missouri executor or administrator.

If the law in all the states is as it has been declared to be in Missouri, and the residents of the several states stood on their rights, that is, required that a payment of a debt should give them a full acquittance for the debt, as may justly be insisted upon, few wholesale merchants, doing business as individuals, and not through corporations, would escape bankruptcy in the collection and settlement of their estate after death.

The laws of New York provide, as I understand, that payment to a foreign administrator may be made after certain statements have been submitted by such administrator to the State Treasurer, and any taxes due have been paid. Furthermore, if administration on the New York

property of a non-resident is necessary the administrator at the domicile of the deceased is eligible for appointment as administrator in New York. Other states possibly have similar laws, and probably few of them are as benighted as Missouri with respect to the estate of deceased non-residents. One immediate effect of our law is to give some fees to a few administrators, but sooner or later, that is, as soon as our administration laws become better known to non-residents they will discourage investments by non-residents in Missouri stocks, and other properties, and will drive out or keep out much foreign capital.

The non-resident owners of stocks in Missouri corporations, and other property in this State, probably largely outnumber Missouri creditors of such non-residents and therefore even if the policy of the law as to the administration in Missouri on the property of non-residents is to be determined by the number of Missouri creditors, or the amount of their claims, as compared with the number of non-resident owners of Missouri stocks or other properties, and the value of their holdings, the non-resident owners of such properties should be favored, if the resident creditors and non-resident debtors alone are considered, for it is much cheaper and easier to prove a claim in another state than to administer on the property of a non-resident in this state; while if the public policy of the situation is considered it is certainly best to require a resident creditor to prove his claim at the late domicile of a deceased debtor, rather than to require administration in Missouri on his property in this state, for such requirement certainly militates against Missouri enterprises commanding foreign capital.

INHERITANCE TAXES

Section 11 of the Missouri Inheritance Tax Law of 1917, provides:

> "If a foreign executor, administrator or trustee shall assign or transfer any stock or obligation in this state standing in the name of the decedent or in trust for decedent liable for any such tax, the tax shall be paid to the State Treasurer on the transfer thereof."

This statute cannot be considered as changing the law as declared by our Supreme Court in *Troll* v. *Third National Bank*, but the law as declared in that case could be changed and made, as I believe, much like that of New York, by amending Section 11 of the Inheritance Tax Act so as to read:

> A foreign executor, administrator, or trustee, may assign or transfer any stock, or obligation in this state standing in the name of a decedent, or in trust for a decedent, and may demand, sue for, receive and collect all other prop-

erty of a decedent, or held in trust for him, if any inheritance, succession, or other tax to which such stock, or other property is liable, shall be paid to the State Treasurer on the transfer or receipt thereof.

Why not amend Section 6 of this Inheritance Tax Act so as to extend the time for payment of inheritance taxes without interest from six to twelve months? Section 6 of the United States War Revenue Act of 1918 provides that an estate shall have a year in which to pay an inheritance tax without interest, and an extension of the time for payment of the tax may be granted for eighteen months without interest, and for a longer period with interest at the rate of six per cent, beginning one year from the death of the decedent.

In most cases stocks must be sold in order to pay inheritance taxes due from an estate, and to sell in a short time all that may be necessary to raise the required tax may depreciate the security, and require a sale on a falling market.

Another objectionable provision of our Inheritance Tax Act is the tax levied on charitable bequests. Section 4 of this Act of 1917 (page 117, Acts 1917), even as amended by the Act of 1919 (Acts 1919, page 722), taxes all bequests "for religious, charitable or educational purposes" unless used solely in Missouri. That is, under our laws bequests, even to help christianize a savage people, further the cure of tuberculosis, leprosy, or for other appealing work, if conducted beyond the confines of Missouri, is taxed. Truly our laws seem to demand that with us charity shall begin at home—and stay there.

It should require no argument to procure all possible ameliorations of provisions in our inheritance and administration laws, which bear heavily on most estates, and our widows and orphans especially, since the husband and father is usually the income earner of the family. And the law might, it seems to me, allow without taxation a bequest of more than $100.00 to a friend or faithful servant.

INCOME TAX

Another matter that should receive attention is taxation of incomes.

Under present laws there is not only a local and state annual tax on the value of property, but also in many cases three income taxes, and a like number when the property passes by bequest or inheritance. These three taxes are:

FIRST: Federal;

SECOND: Tax by the state in which the owner of the property resides, and

THIRD: Tax by the state in which the property is situated, if such state is not that in which the owner resides.

Corporations are considered as resident of or located in, the state in which they have been incorporated. Let these taxes, inheritances and income taxes, be thus illustrated:

If a resident of Missouri owns real estate in New York, he pays a tax on the income therefrom to the Federal Government, to the State of New York, and to the State of Missouri, if the income is of a taxable amount, and like taxes when this property passes by decedent or devise on his death.

Inheritance taxes are similarly assessed on stocks owned by a Missourian in corporations organized under the laws of other states, and such taxes are exacted by Missouri, other states, and the Federal Government, on Missouri properties owned by non-residents.

Our state income and inheritance tax laws are largely blind copies of laws adopted by Congress, and a provision in the latter calculated to tax the income of a foreigner from American property—a single tax on such property—when blindly copied by the states, may impose two state income and inheritance taxes, in addition to the Federal tax, on American citizens.

A little figuring will show that the annual state tax levied on the corpus of a property, plus the Federal income tax and possibly another state income tax, takes a large per cent of an income.

It may be that present conditions are such that no remedial legislation, however just and desirable, is now possible; but the subject is of such importance that it should be kept materially in mind, and the corrective amendments of the tax laws adopted at as near a date as is possible, and to this end our lawmakers, who must move in the matter if changes in these laws are to be secured, should inform themselves.

TAXATION ON INCOMES FROM INTERSTATE COMMERCE

Some nice questions have arisen as to the power of the several states to tax incomes which are the result of interstate commerce, but it is needless to examine these questions now, further than to say that the matter has lately been under consideration in several cases by the U. S. Supreme Court, which has made a distinction, so far as taxation by the states is concerned, between the net and gross income derived from interstate commerce, the court holding that such net, but not gross, income may be taxed by the states.

Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292.
Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450.
U. S. Glue Co. v. *Town of Oak Creek,* 247 U. S. 321.

FOREIGN CORPORATIONS

In 1864 an act was passed limiting the capital of business corporations incorporated under the laws of Missouri to $2,000,000.00. (See R. S. 1865, page 368.)

In 1879 this limit was raised to $10,000,000.00.

In 1899 (Acts 1899, page 130) an act was passed providing that if a foreign corporation could not be incorporated under the laws of Missouri, it could not be licensed to do business in the State. That is, under the letter of this law, a foreign business corporation could not be licensed to do business in Missouri, if it had a capital of more than $10,000,000.00 and did not have at least one citizen of Missouri on its board of directors.

In 1903 (Acts 1903, page 124) the number of Missouri citizens necessary on the board of directors of a Missouri corporation was raised from one to three.

This requirement as to the citizenship of directors of Missouri corporations was so onerous that it has been ignored, as had been the requirement of one Missouri director under the law of 1899, and the limitation on the licensing of foreign corporations in Missouri has been by common consent construed to apply to its capital stock only. But any day some court, on the petition of some stupid person, or rival of a foreign corporation licensed to do business in Missouri, may decree a forfeiture of the license and drive out of the state all foreign corporations which have not at least three Missourians on their boards. Is not this startling? And yet, such would be the result, if the prohibition in question is construed literally, as it may be.

Of course, it is possible that our courts, following the labored ten page reasoning of our Supreme Court in *State ex rel. Standard Tank Car Company* v. *Sullivan,* 221 S. W. R., page 728, which involved the licensing in Missouri of a foreign corporation having stock without a par value, may rule that the prohibition does not exclude corporations without at least three Missouri directors. But why have a law drawn in such terms as makes it possible for a ruling that would play thunder (or worse) with hundreds of useful corporations, and thousands upon thousands of their employes, as well as seriously interfere with important financial and public interests?

I cannot but believe this provision of our laws with respect to Missouri directors in foreign corporations, if it is to be construed literally, has been left in our laws thoughtlessly. If it is insisted upon, many, if not most, foreign corporations will close their offices in Missouri and sell us from Chicago, Indianapolis, Cincinnati, Louisville and Omaha. St. Louis and Kansas City are two of the best geographically located cities in the Union—and they are the Missouri cities in which

most foreign corporations licensed in this state have offices, but neither of these cities, nor the State of Missouri, can assume a "big business be damned" attitude and must bid for most of what they get commercially or industrially.

In 1907 (R. S. 1909, Sec. 3347, Acts 1907, page 166) the $10,000,000.00 capital stock limit on Missouri corporations was raised to $50,000,000.00 and the same time (R S. 1909, Sec. 3343, Acts 1907, page 168) it was provided that if a foreign corporation was otherwise qualified to engage in business in this state it might be licensed though its capital exceeded $10,000,000.00, provided it did not invest in Missouri, more than Missouri corporations were permitted to be capitalized for. That is, a foreign corporation may be licensed to do business in Missouri, if it does not invest more than $50,000,000.00 in the state. Just here it is pertinent to remark that when the town of Pullman was established, it was stated in the newspapers that St. Louis was under consideration as the site for the company's works; but it would have been then impossible for it to locate in Missouri, because the Pullman Company had a capital stock of more than $10,000,000.00 and unless the law had been changed, many corporations incorporated in other states, and now doing business in Missouri, and essential to its best interests, would have been denied admission to our state.

The fact that with a $50,000,000.00 investment limitation the law in question may not be a deterrent influence with many corporations is no answer to an objection to the law; because it evidences a policy of the state that does us no good, and may be harmful. It does no good, because the refusal to a foreign corporation of a license to do business in Missouri does not prevent it from competing with our domestic enterprises, but does prevent it from investing in the state as it otherwise might, and employing our citizens.

Therefore this query: If the great commercial states of our Union have no such limitations, why should we have them? We who are in the very center of a country with the grandest commercial possibilities in the history of the world now opening to it.

NOTES TO UNLICENSED FOREIGN CORPORATIONS

Speaking of foreign corporations, it will no doubt startle most Missouri bankers to learn that a note given to an unlicensed foreign corporation in Missouri on account of business done by it in this state (other than interstate or foreign commerce) is void, even in the hands of an innocent endorsee. But such was the decision by the St. Louis Court of Appeals February 4, 1919, in the case of *German-American Bank* v. *Smith,* 108 S. W. R., page 878.

This decision is based on several decisions of the Kansas City Court

of Appeals and our Supreme Court, which are cited, and the New Hampshire Supreme Court has given a like decision.

Therefore, it behooves every one accepting as a payee, or endorsee, the note of a corporation organized under the laws of a state or country other than Missouri, to satisfy himself at his peril that the corporation is licensed to do business in Missouri, or that the transaction represented by the note was interstate or foreign commerce and not intrastate business.

The rule in question may work both ways. That is, if a note given under the circumstances stated *to* a foreign corporation is void, and therefore cannot be recovered on, even by an innocent holder, a note given by such corporation under like conditions, should, it would seem, also be void.

A note, though obtained by fraud, may be recovered on by an innocent holder who acquired it before maturity for value (*Downs* v. *Horton,* 209 S. W. 595, Feby. 25, 1919); but not so, as we have just seen, when a note is given to a foreign corporation under the conditions set forth in the cases just cited, nor possibly, when given *by* such corporation.

If the rule declared in the case referred to (*Bank* v. *Smith*) holds with respect to notes given by a non-licensed foreign corporation, the people of Missouri may be heavily penalized for dealing with such corporations, however innocently, by being refused judgment on their notes.

The fact that the laws of some of the other states may be as harsh and dangerous as ours with respect to the notes of unlicensed foreign corporations should not be considered as justifying our law; but should rather be regarded as giving us a chance to happily distinguish ourselves by beating them to an amendment of the law.

CONCLUSION

The census just finished shows that in some seventy counties of Missouri the population is less than it was in 1910; and in the past ten years the whole state has increased in population only 3.3 per cent. Furthermore, since 1900 the state has fallen from fifth place in population to ninth, while St. Louis has fallen from fourth place amongst cities to fifth or sixth place, though it is the most centrally located important city of the Union, and is the center of a country which within a radius of 300 miles has more people, the best soil, more varied resources, richer agricultural lands, and the best all-year-around climate of any area within a like radius around any other large city in the United States.

Should not these facts but our loss of rank, nevertheless, make us "Stop, Look and Listen"?

Many millions of dollars are about to be spent to give Chicago and other lake cities an all-water route via St. Louis to New Orleans. This route should mean more for St. Louis than for Chicago and other lake cities; and as much for Missouri as for Illinois. Therefore, should we not get ready to avail ourselves of the advantages this river route will give us? That is, should we not encourage "big business" and prepare to handle it? How can we better do this than by making our laws as favorable to commercial enterprises, and as attractive to non-resident investors, as are the laws of any state in the Union, and especially as attractive as those of our biggest commercial states?

"Big Business" means bigness in everything—men employed, wages paid, opportunities for work, raw materials bought, desirability in every particular, and undesirableness in none. Our denial of opportunities for "Big Business" means that it will set itself up elsewhere, and not that we can kill it, or not pay tribute to it. Other cities and other states will welcome it, and Missourians will become contributors to its greatness, but not sharers therein—that is, "hewers of wood and drawers of water" for it.

Should it be necessary to say more to induce our lawmakers to study our laws with the desire to make them at least as encouraging to business, big and little, as are the laws of any other state? Have Delaware, West Virginia or New Jersey, lost anything by their liberal corporation laws? Or have we gained anything by our narrow corporation and administration laws, except an occasional administrator's fee to some one who administers on the estate of a non-resident, but which will presently keep non-residents from investing in Missouri property, or corporations.[1]

GEORGE R. LOCKWOOD.

St. Louis, Missouri.

[1]This article was issued in pamphlet form prior to the meeting of regular session of the General Assembly. Perhaps some changes were made in the statutes as suggested. At this time a copy of the session acts is not available.—Ed.

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