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THE BAR AND THE UNWRITTEN LAW.

Whatever may be meant by the very indefinite appellation, "the unwritten law," we are convinced that courts and lawyers have no business fooling with it. The law which courts and lawyers are sworn to enforce is every bit of it *written*, either in the statutes passed by competent legislative bodies, the decisions of courts of last resort or the maxims stated and defined by jurists of antiquity and accredited by the decisions of the courts and the treatises of great text-writers of jurisprudence. What is more than these "is of the evil one" as far as the profession of the law is concerned, and a judge or lawyer who gives the influence of his official position to the circulation of the abominable error involved in the term "unwritten law" casts a reflection on the administration of justice which he is expected and sworn to uphold.

These remarks have been provoked by the following editorial which appeared recently in the St. Louis Post-Dispatch:

"In the city of Alton, Ill., the other day the city attorney grandiloquently refused to prosecute a man arrested for assault and the presiding judge, not to be out-done, fined the prisoner the minimum amount, paid it himself and informed the plaintiff that Judge Lynch should sit in his case. The merits of this controversy are not important, for whatever they may have been they cannot change the law provided for just such emergencies. If there were extenuating circumstances favorable to the prisoner he was entitled to the benefit of them. They might palliate and they might even excuse his offense, but under no conceivable conditions was his judge justified in advising mob law or the prosecutor in his spectacular assertion that 'in the country where I came from this would have been a case not for the police court, but for the coroner.' It makes no difference where either the judge or the prosecutor came from. They are now officers of a civilized state, charged with the enforcement of written law. If their admiration of savagery is so pronounced that they cannot uphold the system which has honored them and which trusts them they should in decency retire from office."

This scathing criticism of bench and bar is quite justifiable in this particular instance and handled with a conservatism which is hardly expected from a lay publication. As this editorial properly suggests it makes absolutely no difference what the facts were or are in any particular case. If the law of the state makes an act a crime and this act is proven to the satisfaction of the court, so that there is no alternative but to impose a fine, the action of the court in immediately paying the fine itself and praising the convicted criminal at the bar is an effrontery to the law of the state and a reflection on the justice administered by the courts of that state. If our laws as now constituted and administered do not work out justice it is for the people to change them, not for the court to denounce them or make a mockery of them.

There is a growing tendency among trial court judges to refuse to uphold certain laws on the statute books or laid down by the decisions of superior courts whenever for any reason, they do not approve of the policy of such laws. Thus, we knew a judge who always refused to grant divorces on certain grounds recognized by the statute because to do so did not comport with his ideas as to the sanctity of the marriage relation; and we also knew a judge who stated in open court that no matter what the law was or how many supreme judges held otherwise he would on *habeas corpus* by a father against the mother for the custody of their children, invariably and always give them to the mother. Such reflections on the law by a trial court inevitably tend to bring the law into contempt and to encourage its violation. If a judge's views of justice are not in harmony with the law of his state, he is not at all excusable for the apparent hypocracy involved in taking the oath of office whereby he swears to uphold the laws of his state while at the same time he is secretly cherishing the thought that at the first opportunity he will show his contempt for those particular laws against which he has been so continually prejudiced.

So also the lawyer, a member of that profession which, in this country at least, the peo-

ple have always honored and trusted as the faithful custodian of the laws, is recreant to his trust whenever he drags the law in the dust of public contempt. No matter what may be the cause the lawyer may happen to represent it should not be more important than law itself with whose enforcement he is charged and to which he so often has occasion to appeal. Thus in the otherwise great speech of Clarence Darrow at the Haywood trial, this splendid lawyer so far forgot himself as on several occasions during the heat of the argument to attack the laws of the land and their proper administration and, to plead for a system of laws, uphel d by a sect of publicists known as socialists, which has not yet been accepted by the people and which is at war with many of our present institutions. This attack was especially out of place when this same attorney's client was appealing to the law he so roundly denounced to save him from the hangman's noose.

We feel it our present duty to make these observations at this time and clear the skirts of our profession from the opprobrium which might attach to it if it were generally believed that the silence of the profession with reference to the instances of disregard of law and precedent on the part of the courts and lawyers of the kind just adverted to, might give implied consent to such extreme violations of professional duty and obligation. As for the unwritten law, it is on a par with any other covert attack on the proper administration of the law and is unworthy of any lawyer's notice.

NOTES OF IMPORTANT DECISIONS.

WITNESSES—COMPETENCY OF WITNESS TO TESTIFY CONCERNING TRANSACTION WITH DECEASED PARTY UNDER FEDERAL PROCEDURE.—No rule is more deeply rooted in the law of procedure than that when the mouth of one party to a contract or transaction is closed by death the mouth of the other party will be closed by the stern fiat of the law. This rule is founded on ages of human experience, and therefore, when any court by supercilious or careless construction of a statute fails to recognize this very important principle we feel called upon to enter our most vigorous protest.

The recent case which has thus provoked us to "good works," so to speak, is that of Miller v. Steele, 153 Fed. Rep. 714, where it was held that in a suit in the federal court against a legatee on a contract for services rendered testator in his lifetime, whether plaintiff was a competent witness should be determined by the federal law, and not by the law of the state where the suit was brought, or the law of the state where the services were performed. The court held further that Rev. Stat. U. S., § 858, declaring that no witness shall be excluded because of interest, except that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by testator, intestate, or ward, unless called to testify thereto by the opposite party, did not incapacitate plaintiff to testify in an action against a legatee for services rendered testator, under a contract to pay her $25,000 by a provision made during his lifetime or in his will. The court said: "As is seen, this statute makes a party to the suit competent to testify unless the other party is an executor, administrator, or guardian. The courts have no authority to add others to the exception; nor can this be done by state legislation. White v. Wansey, 116 Fed. Rep. 345, 53 C. C. A. 634; Smith v. Township of Au Gres, U. S. C. C. of App., 150 Fed. Rep. 257; Hobbs v. McLean, 117 U. S. 567, 579, 6 Sup. Ct. Rep. 870, 29 L. Ed. 940."

We believe this to be a most narrow and illiberal construction. Even though a strictly literal construction of this statute might be admitted to justify the result at which the court arrived it should have at least hesitated in reaching a result so opposed to experience and common sense. The court might also have presumed that congress had no intention of upsetting a rule of procedure so firmly fixed in our jurisprudence and in its place to have adopted a rule which encourages perjury and the preferment of fraudulent claims against estates of deceased persons. Some courts, which do not think as deeply on such questions as they might, and which regard all rules of procedure as somewhat arbitrary and technical, have shown a tendency to free under the restraint of the rule which prevents a claimant or party to a transaction or contract from testifying in his own favor when the mouth of the other party is closed by death, and remarks have been made from the bench which evidenced a prejudice against the rule and a sympathy for the "unfortunate" litigant whose contract or transaction with the deceased was in such unsatisfactory shape as not to be proven without his own testimony. Such courts fail to see what other courts and legislatures have had in mind, to-wit, that parties defending an estate are entitled to even greater consideration, since often they are at a tremendous disadvantage in resisting claims against their decedent, not being familiar with his business transactions nor with the evidence necessary to prove or disprove their binding force; and, but for this rule, many a fraudulent claim would be presented against the estates of deceased persons and proven by per-