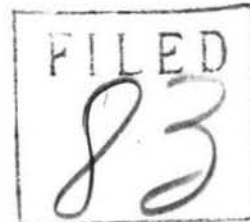


ESCHEATS: Time spent in the army under Section 890 R. S. Missouri, 1929, should be excluded from the twenty-one year limitation on escheats to the state.

December 6, 1939

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of November 28, 1939, which reads as follows:

"I desire to request an opinion of your office on the following statement of facts.

"One Henry B. Smith of Sacramento, California has made inquiry of this office as to how to proceed to receive monies from the above entitled estate, the said Henry B. Smith being a nephew of the deceased.

"The said J. J. McQuinn died in Maysville, DeKalb County, Missouri sometime in the year 1917. His estate was administered in DeKalb County, Missouri and the administrator of said estate remitted to the State Treasurer on August 8, 1918, the sum of \$468.11. The records in office of the State Auditor show that in the years 1924 and 1925, four disbursements were made from this estate aggregating the sum of \$189.32, leaving a balance credited to said estate at this time of \$278.79. The said Henry B. Smith received \$54.84 from the sale of personal property left by the decedent in 1917.

"The said Henry B. Smith, claimant, entered the military service of the United State in the World War in 1917 and remained in service for approximately two years, most of which service was rendered outside the boundaries of the United States.

"Under the provision of Section 642, R. S. Mo., 1929, which provides: 'All monies paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be, on the order of the board of fund commissioners, transferred to the public school fund.' The twenty-one year period of time would elapse August 8, 1939. However, no transfer to the school fund has been made by the board of fund commissioners for the year 1939, as this is usually done once a year.

"The sole question for determination is whether or not the claimant, Henry B. Smith, is entitled to make claim for the monies in said estate at this time, and whether or not the twenty-one year period prescribed by Section 642, R. S. Mo., 1929, can be waived to the fact that the claimant was in the military service of the United States during the years 1917 and 1918, and had no opportunity during those two years to make application."

Section 642, R. S. Missouri, 1929, reads as follows:

"All moneys paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be, on the order of the board of fund commissioners, transferred to the public school fund."

Section 890, R. S. Missouri, 1929, reads as follows:

"That if any citizen of this state, entitled to institute or bring action, suit or proceeding in this state, is unable during the continuance of the present war or during the period of one year after peace is declared, to institute or bring the same within the time limited therefor by the laws of this state, because of absence from this state in the military or naval service of the United States, such person shall not on that account be barred, but shall be entitled to institute or bring such action, suit or proceeding within six months after the removal of such disability; otherwise the same shall be barred."

Section 890, supra, was repealed by the Laws of 1939, page 278, but was in effect in 1919.

In regard to the above section the case of Hammond v. Johnston, 93 Mo. 198, based upon a similar statute which applied to the Civil War. In that case, at page 219, the court said:

"Fourteen years, nine months and fifteen days elapsed from the date of the patent to the commencement of this suit, while the period of our statute of limitations is ten years. The plaintiffs, to overcome the bar of the statute, show that, before, during, and after the late war, they resided in the Confederate States, and to that they couple the claim that the patent did not, in point of fact, become an operative grant until the twelfth of November, 1860. * * * "

Also, in that case, at page 221, the court said:

" * * * As to the states of South Carolina, Georgia, and Alabama, it was held in the case of *The Protector*, 12 Wall. 700, that the war began on the nineteenth of April, 1861, the date of the blockade proclamation, and ended on the second of April, 1866. The same dates were taken as fixing the time for the suspension of statutes of limitations in *Brown v. Hiatts*, 15 Wall. 177; *Adger v. Alston*, 15 Wall. 555, and *Ross v. Jones*, 22 Wall. 576. It is earnestly and with much force argued, that August 16, 1861, the date of President Lincoln's proclamation, declaring that the states before named were in a state of insurrection, and prohibiting commercial intercourse, should be taken as the date of the commencement of the war, and not the nineteenth of April, 1861, the date of the blockade proclamation. But we cannot see that the rule of those cases is modified in the later cases (91 U.S. 3; 93 U. S. 593; 99 U. S. 493), at least, so far as fixing the period during which the statute of limitations was suspended. Until modified, we accept them as fixing the dates by which the computation is to be made in cases like the present one."

It will be noticed that the court considered the statute suspended during the period of the war.

In the case of *Bolz Cooperage Corporation v. Beardlee*, 244 S. W. 611, the court said:

"Claimant pleads and claims the exemption granted under the Soldiers' and Sailors' Civil Relief Act, passed by the Congress of the United States, being Act March 18, 1918, c. 20, sec. 604, 40 Statutes at Large of United States, and particularly sections 10313, 10314, 10315, 10318, 10322, and 10347, as found in Barnes' Fed-

eral Code 1919, and states that, under and by reason of the provisions of said act of Congress and of the facts herein set out in this petition and demand, it is entitled to recover from the said estate of Thomas J. Beardslee, deceased, the sum of \$2,203.70, for which sum, together with its costs herein, it prays judgment.'

"Respondent thereupon pleaded the statute of nonclaim, and also what in effect was a general demurrer; that is, that the demand or petition of claimant does not constitute a valid claim against said estate.

"The court sustained the defendant's plea and entered judgment accordingly, from which judgment Bolz Cooperage Corporation has appealed."

Also, the court further said: (l.c. 612)

"Appellant next insists that the claimant, though a corporation, is relieved from the bar of the statute of nonclaim by the Soldiers' and Sailors' Civil Relief Act, passed during the Sixty-Fifth Congress. It is argued, on the other hand, by respondent, that said act of Congress cannot be construed to relieve a corporation from such bar. We share the latter view. Said act (volume 40, c. 20, U. S. Stat. at Large) recited (section 100) that the purpose of said act is to extend certain privileges and exemptions to 'persons in military service.' Section 101 of this act defines what is meant by persons in military service. The same provides:

'That the term "persons in military service,"

as used in this act, shall include the following persons and no others: All officers and enlisted men of the regular army, the regular army reserve. * * *

"Without setting forth the entire section, it is enough to say that the enumerated list is a class of natural persons; that is, individuals engaged in different branches of the military and naval services of the United States. Corporations are not included, and, not only that, they are expressly excluded from the privileges and exemptions of the act because the list is written in terms made exclusive, since the act provides that only the persons named and no others shall receive the benefit of the act. * * "

And, the court further said at page 613:

"* * In the latter the term 'person' is made broad enough to include all persons, artificial as well as natural, while, as already said, in the former it is limited to natural persons only. No contention is made that this claim is other than a claim in favor of a corporation, though Bolz, the agent, is conceded to have been the owner of some stock in the corporation. We are jealous to liberally construe the Soldiers' and Sailors' Civil Relief Act so as to effectuate its purpose, but we cannot read into the Act something which is not therein contained and which is clearly excluded. We therefore rule that the Soldiers' and Sailors' Civil Relief Act cannot be construed to relieve this corporation from the statute of nonclaim. Our Missouri statutes likewise contain no exception applicable to this claimant, a corporation. Section 182, R. S. Mo. 1919; section 1345, R. S. Mo. 1919."

In the case of Gray v. Shelton, 282 S. W. 53, 1.c. 55, the court said:

" * * * Aside, however, from the failure of the defendant to preserve the objection for consideration, it appears that the court, on its own motion, excluded the testimony on the ground that the statute was limited to citizens of this state, and that Edgar and Charles Gray were residents, at the time of their enlistment for military service, of the state of Arkansas. Thus excluded from the consideration of the jury, the defendant suffered no injury on this account, and this assignment must go for naught."

It will be noticed under this holding that the statute is construed to apply to only citizens of this state and I am assuming that Henry B. Smith was a citizen of this state at the time of his entering the army.

21 C. J., page 862 states the following rule:

"* * Statutes providing for escheat for defect of heirs usually protect the rights of heirs by providing a certain period within which persons claiming as such may come in and establish their title, * * *
While the state may as a matter of grace agree to reimburse the rightful owner of escheated property subsequently appearing, it is not bound to do so, and it may exact conditions on which it will make reimbursement, and limit the time within which reimbursement will be made, provided such limitation does not interfere with vested rights. * * "

Under this rule the state is not forbidden

to acknowledge a claim against the escheats fund, even after the time had gone by for filing the claim.

You also state in your request that no transfer to the school fund has been made by the board of fund commissioners for the year 1939.

In view of that statement we are citing the case of *Mathews v. Savings Union Bank & Trust Company*, 184 Pac. 418 (Cal.) 1.c. 419:

"So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.

"Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act are correlative. They deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of 20 years. The Bank Act provides that the moneys in such deposits- 'which shall have remained unclaimed for more than twenty years * * * and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall * * * be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure.' Stats. 1915, p. 1106.

"The general language of the Code section is the same, except that the last phrase reads 'shall * * * escheat to the state.' Code Civ. Proc. sec. 1273. The section then provides that, when the Attorney General shall learn of such deposits he shall bring suit in the superior court of Sacramento county, and that upon the trial, 'if it be determined that the moneys * * * are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated,' and commanding the bank to deposit the money with the state treasurer thereafter to be dealt with as other escheated property.

"So careful is the state of the rights of its citizens that even after the adjudication, for a period of 5 years, any person not a party or a privy to the escheat judgment may sue the state to recover the money, and this time is extended to infants and persons of unsound mind for a period of one year after the removal of the disability. Code Civ. Proc. section 1272."

Also, in the case of Commonwealth v. Thomas' Adm'r. 140 Kentucky 789, l. c. 796, the court said:

"* * * The State may in its generosity, or sense of fairness, say that it will not in such case hold the proceeds against the original claimant, if he subsequently appears, and may provide for his reimbursement. It may do less. As by shortening the time in which it will make reimbursement, or it may exact conditions. In the instance here the State has declared that for escheated property which it dedicates to purposes of education, it will not make reimbursement. Rather, it fails to make

provisions for it in such instances. It was in the competency of the state to so provide, or fail to provide as it saw fit. The policy is one of legislative discretion, and is not a condition precedent to the State's exercise of power. * * * "

CONCLUSION.

In view of the above authorities, it is the opinion of this Department, that although Section 390, supra, was repealed by the Laws of 1939, page 278, it was in effect during the twenty-one year limitation, and the right to bring action was suspended during the period of the war and that time spent by the claimant in the service of the army should be deducted from the twenty-one year limitation.

It is further the opinion of this Department that the state, under the facts in this case, may waive the statute of limitation and acknowledge the claim for the reason that the money has not been transferred to the school fund by the board of fund commissioners for this year.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW