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Case Note, *In Missouri ex rel. Burnes National Bank v. Duncan*

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and in pursuance of the provisions of a present existing treaty of commerce and navigation. Such an alien is therefore not covered by the quota provision of the law nor by the exclusion of those ineligible to citizenship. Japanese are therefore admissible without limitation if they come as traders.

It is true that section 15 of the new law provides that this admission shall be for such time and under such conditions as may be by regulations prescribed; but what time limits or conditions will be consistent with a treaty right to carry on a trade, particularly if resting on mere regulation? The difficulty is enhanced by the usual treaty provision that the trader may employ agents of his choice; in view of the history of this provision this would seem to include agents of his own nationality. Will such an agent be covered by the provision of section 3? It will take further litigation to settle this question. ERNST FREUND.

CONSTITUTIONAL LAW—CONGRESSIONAL POWER TO AUTHORIZE NATIONAL BANKS TO ACT AS EXECUTOR AGAINST WILL OF STATE.—*In Missouri ex rel. Burnes National Bank* v. *Duncan*,[1] an interesting question is decided.

A federal bank statute permits national banks to act as trustee, executor, or administrator, in any state which permits its own state banks, trust companies, or other corporations competing with national banks so to act. By the law of Missouri, state and national banks may not act as executors, but local trust companies may do so. This law being upheld by the Missouri Supreme Court[2] against a national bank, the decision was reversed by the United States Supreme Court in the above case.

It has previously been decided in *First National Bank* v. *Fellows*,[3] that Congress could authorize the exercise of such functions by a national bank, at least where not forbidden by the state, as incidental to the banking functions whose sanction goes back to *McCulloch* v. *Maryland*,[4] in order that under modern competitive conditions the business of the bank might be successful. Seven judges of the court thought the same reasoning applied even when the state expressly sought to confine the administration of estates to local trust companies. Mr. Justice Sutherland, with whom concurred Mr. Justice McReynolds, thought the administration of estates a governmental function carried on by state officers—executors and administrators—and that Congress could not control a state in the choice of its officers, even for such purposes.

Doubtless, the choice of state officials exercising governmental functions of a character obviously and largely public could not be dictated, even somewhat indirectly, by Congress[5]; but the duties of executors and administrators are more characteristically those of

1. (1924) 44 S. C. 427.
2. 257 S. W. 784.
3. (1918) 244 U. S. 416.
4. (1819) 4 Wheat. 316.
5. Cf. *Lane Co.* v. *Oregon* (1869) 7 Wall. 71.

fiduciaries of private property interests than of guardians of the public welfare, though the right to act as such, like the right to inherit property, may be subject to state regulation. The decision is a sensible one, though not free from plausible logical objection.

The case naturally suggests two related points of importance upon which the federal Supreme Court has not yet spoken: (1) May a state confine the office of executor to its own citizens or residents, without violating Article IV, Sec. 2, of the Federal Constitution (the original "privileges and immunities" clause)? and (2) May a treaty authorize foreign consuls to administer estates of aliens against the will of the state where the property is? A number of state decisions answer (1) in the affirmative, perhaps the leading one being *re Mulford*[6]; (2) is also more commonly answered in the affirmative.[7] In view of the principal case it is perhaps more likely that the treaty power over the administration of the estates of aliens will be upheld; and it certainly affords some support to the position that a state may not discriminate against citizens of other states in this regard. It has been held that the right to act as trustee of local property cannot be confined to residents of a state.[8] If the right to act as executor, though technically an official position, is so far from being an essentially public function that Congress can compel an unwilling state to accept a national bank for the office, it may well be that such a right is one of the privileges that a state must allow to citizens of other states on the same terms as its own. It is certainly a serious hardship to a citizen of California not to be able to appoint a trusted fellow-citizen as his executor of Illinois property, instead of being compelled to rely upon some relative stranger resident in Illinois or upon the public administrator; and the reasons of public policy that can be adduced for it are more technical than substantial.

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THE NEBRASKA BREAD WEIGHT CASE.—In the case of *Jay Burns Baking Company* v. *Bryan*,[1] the validity of the Nebraska standard bread weight law was involved. That law provided that the standard weights for loaves of bread sold within twenty-four hours after baking should be one-half pound, one pound, a pound and a half, or exact multiples of one pound, and that loaves of other weights should not be sold, except that an excess tolerance of two ounces per pound was permitted, i. e., a half pound loaf could weigh not less than eight ounces nor more than nine ounces, a pound loaf not less than sixteen ounces nor more than eighteen. The weight was to be determined by computing the average of not less than twenty-five loaves.

6. (1905) 217 Ill. 242. See 1 L. R. A. (N. S.) 341, ff. note.
7. *Wyman, Petitioner* (1906) 191 Mass. 276, and cases cited in *Rocca* v. *Thompson* (1912) 223 U. S. 317, 326-7 (which left the question open).
8. *Farmers Trust Co.* v. *C. & A. Ry.* (1886) 27 Fed. 146; *Roby* v. *Smith* (1892) 131 Ind. 342.

1. (1924) 44 Sup. Ct. Rep. 412.