KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1942 PART 1-SIXTEENTH ANNUAL REPORT

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For the improvement of our Judicial System and its more efficient functioning.

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ARTICLES IN THIS ISSUE

In recent years there has been much argument whether some of the faults in the administration of justice would not be remedied more readily if the membership of the bar were more closely unified or integrated. In many states the bar has been integrated.

In this issue we have an article prepared by Robert M. Clark, secretary of the Bar Association of the State of Kansas, presenting his views in favor of integration. The Judicial Council has taken no postion in the matter, but believes the article warrants publication. Views of opponents will be given such space in the future as may be available.

There is also printed a comprehensive treatise on the subject of "Land Titles and Abstract Examination" by Miss Margaret McGurnaghan of The Topeka Bar. Miss McGurnaghan is chairman of the Committee on Standards for Title Opinions of the State Bar Association and is assistant secretary of the Section on Real Property, Probate and Trust Law of the American Bar Association, and also a member of the Committee on Standards in that section.

She has spoken upon this subject at a number of legal institutes within the last few years, and her paper has been received with such great interest that we are glad to be able to print it in this BULLETIN.

REVISION OF OUR MAILING LIST

In the act creating the Judicial Council, it is provided that written report of its work shall be made to the governor, and that such reports shall be printed and distributed to all members of the legislature and to judges of the supreme, district, county, probate and city police courts, and to justices of the peace. The reports have been sent to all of the above and also to the clerks of the district courts and to all resident attorneys at law, as well as to many other persons interested in the work of the Council.

Not having a paid subscription, our mailing lists do not tend to self-correction. The mailing lists have grown and now include the names of former members of the legislature, and of persons not now holding official position, as well as other persons who may or may not longer be interested or desire that the reports be sent them.

Printing costs are rising and the Council wishes to keep the same as low as possible by not printing and distributing any excess number of its reports or BULLETINS.

Attention is therefore directed to the last page of this BULLETIN. If you are not now a member of the legislature, or the judge of one of the courts mentioned, or a clerk of the district court, or an attorney at law, but do desire that the BULLETIN be sent you in the future, please fill out the form on that page and mail it to the Judicial Council, State House, Topeka, Kan.

Important: See note on page 29.

KANSAS NEEDS AN INTEGRATED BAR

ROBERT M. CLARK

An invitation from the Judicial Council to prepare a paper for the BULLETIN gives a welcome opportunity to advocate the creation of an all-inclusive organization for the Bar of Kansas. Having been active in affairs of the Kansas Association for the last five or six years, and having been interested in its advancement, I naturally have had a fairly good chance to appraise the Kansas Association and to compare it with those integrated organizations in other states.

As I delve deeper into the subject of an integrated bar, I become convinced that the Kansas Association, as it now exists, is insufficient to meet the present and future demands—which can all be summed up by saying that the Association lacks *integration* as that term is now understood. A brief survey of this situation may well be in order, or perhaps an appraisal of the workings of the present organization may in the beginning assist me in my work as an advocate of integration.

We must observe first that our present Association still is unable to convince a great number of the bar that membership is desirable or beneficial. Even after repeated strenuous campaigns we seem unable to make a successful appeal to many excellent lawyers who stand ready to do their share for the advancement of the profession, but who are unwilling to devote their time to a piece of futile machinery. With a membership of between 1,000 and 1,100 we still fail to reach the remaining few hundred Kansas lawyers in active practice.

Others seem to feel that they cannot afford the time and expense involved in attending meetings, often held at distant points, and at what seems to be an inopportune time, and that membership without attendance is meaningless. To them the Association is something dim and remote, having real existence only two or three days out of the year. They do not connect it with any recognized duty to the profession or to their conscious desire to advance the profession's interests.

The Association fails to appeal successfully to a large class who look upon it as mainly a social institution; but we must recognize that there are many among this group who would be the first to give sympathetic consideration to a proposal to make the Association a living and working entity without trenching upon its very useful field of social contact.

The numerical weakness of the Association is actually realized when a crisis arises in the state's affairs or those of the court, and especially when problems of the profession are involved. *When the Association does not represent all of the lawyers, it cannot speak for all of them.*

Except for three or four Council meetings throughout the year, practically all of the Association's business is handled at the annual meeting. In the interim between meetings, of necessity, the president and the secretary must take upon themselves the job of running the organization. Although the only opportunity for participating in the Association's affairs is at the annual meeting, still at times, there are less than 100 members present at the business

sessions, out of a convention attendance of between five and six hundred. Such attendance as there is seems irregular, so that most of the members come to the sessions as virtual strangers at intervals of two or three years or when the Association next meets close to their home.

There can be little continuity of purpose and accomplishment under such conditions. The carrying out of the work of the Association is ordinarily done by committees, and they operate at a great disadvantage. A year is usually provided for the committee to work and then report. It reports to a different assemblage than that which met the previous year and which authorized its creation. Often the subjects considered are too involved and too technical to permit a thorough consideration by an unprepared audience under the limits of time necessarily imposed. Often an aimless discussion follows a good report.

The Association's officers have little power, for the Association itself, not representing all of the lawyers, and being a voluntary organization has little power itself. The president and the secretary, with the help of the Council, have to furnish the driving power for the entire organization. They all devote many hours of their time to the work of the Association, but are always aware of the fact that the policies which they may establish may not bind any one except those who voluntarily accept them. The secretary must, of necessity, handle all of the detail work of the Association after office hours or at times when his personal business affairs permit.

Complaints, mostly unfounded, reach the secretary's desk almost weekly. The complaints directed against Kansas lawyers should be handled with dispatch. But without funds, and with all investigations having to be made voluntarily, there are times when months expire before some complaints are finally disposed of. Those investigations which develop something serious as far as the Association is concerned, can only result at the most in striking the lawyer involved off of the Association's membership's roll. The practice, of course, has been that when a serious complaint is developed, all information is put in the hands of the State Board of Law Examiners, but still again, another entirely new investigation must be had by that board.

When legislation develops in the legislature involving the interests of the profession, it is impossible to take a stand for the entire profession. For, it is pointed out always, that the Association has no authority to represent all of the lawyers, and without funds, is unable, by mail or otherwise, to bring about a definite stand for or against a certain proposal. For years, there was no question but that the lawyers as a class had fallen steadily into greater and greater disrepute. This was for the very simple reason that a handful of disreputable lawyers were considered representative of the entire profession. I think that the voluntary Association, however, has done much to dispel this general attitude on behalf of the public. Certainly, the Kansas Association, because of its willingness to devote time and attention to matters of public interest, stands high in the eyes of the members of the Kansas legislature. The work of drafting legislation beneficial to the public generally, such as the probate code, the corporation code, and others, could be carried on to a greater degree if funds were available for this purpose.

If it were not, however, for the work of a faithful few, our present Association would stop running. These few attend meetings regularly and try to make the meetings fruitful and interesting. It is not lack of sympathy which sets

this down as clique government. *Under the present system there is no opportunity for anything other than clique government.* Without the incessant attention of those comprising this clique, the organization would die for the want of a driving force.

The average member has few assured points of contact with the Association: (1) He pays his dues, after four or five notices from the secretary. (2) He receives the quarterly *Journal,* reads some of the articles, always reads "Hash Country Style," but pays little attention to the proceedings or to workings of the various committees. (3) He may attend a legal institute in his district, not always attending the business and lecture sessions, but always makes a point to be at the dinner and entertainment. (4) If he attends the business sessions at the annual meeting, and if he is not out in the lobby shaking hands, he may lift his voice when it is moved that the report of the nominating committee be approved, thus he has a small part in choosing the Association's officers.

It is no wonder then, that the Association is somewhat impotent in representing the profession. It represents the Kansas lawyer not because it is well qualified to do so, but because there is no other representation for him. It has accrued by its mere existence and occupation of the field, responsibilities which are constantly growing, responsibilities that need the attention of every individual Kansas lawyer. Without, however, our voluntary Association, we could never arrive at an understanding of what is necessary and desirable, and it therefore would serve no good purpose for me, an officer of this Association, to continue to thus deprecate the activities thereof, or to further indulge in destructive criticism, unless it would be followed up by real constructive suggestions.

By thus emphasizing the shortcomings of our Association, I do hope, however, to drive home the fact that the elimination of weaknesses and the strengthening of helpful activities await in Kansas only the putting into effect the operation of a suitable plan of bar integration.

Now, then, in general, what must the Kansas bar do in order to meet the needs disclosed by the foregoing criticism? The successor organization must do vastly more than honor its deceased members with memorials. It must give every Kansas lawyer a share in the work to keep him interested. This will create a cohesiveness now lacking. It must become a vehicle of policy registering the opinion of all Kansas lawyers on a variety of germane topics—and then, it must have the funds, and shall we say, the striking force to execute these policies. The work must be kept going not only with continuity from year to year, but throughout each year, and the members must be informed frequently of the progress made. The organization must be composed of every Kansas lawyer—if any do not like the way it represents his professional interests, let him kick from within where the kicking may become constructive.

Effective management may be accomplished without much change over the present organizational set-up. The vesting of power in an Executive Council whose members are chosen by ballot taken in each district, seems to me to be wise. Membership on the Council should be for a period of at least two years, and the officers should be chosen by the Council. The real governing power would then be continuous in the Executive Council, the mem-

bers of which are representative of the lawyers in each respective district. Selection of the Executive Council should not be made by those who attend an annual meeting, but should be made by proper ballot and by mail.

Our quarterly *Journal,* although standing high among those journals published by other state organizations, sometimes is too tardy to serve its real purpose of informing members as to the trend of events. With sufficient funds it could be published more often. Bulletins, at least, could be printed and mailed when the need therefor exists. Being upon the exchange list of other publications, I find that in some states the Bar Association publishes Supreme Court decisions and makes them available a day or so after they are handed down. A bulletin or supplement to our quarterly *Journal* might be the answer to this.

Adequate funds would permit a real investigation and a disposal of complaints against its members. Possibly, newspaper ads in behalf of the entire profession could be provided. Time would develop many other possibilities too numerous to mention.

A well-operated Association will need a full-time central office with a full-time secretary (and may I say right here that I do not seek the job) and a stenographer. A young lawyer familiar with the problems of his profession, a man who is energetic and who knows something about the field of public relations, should fill this job. This man would be at the service of the individual members and could be called on to do innumerable tasks outside of the detail work required of such an officer.

If the fees of an integrated bar in Kansas were placed at $10 a year, the membership being all inclusive, I figure that approximately $14,000 would be brought into the treasury each year. Certainly, when carpenters pay from $50 to $100 to their organization so they can pound a nail and be protected in their work, when the plumber and the steamfitter pay a similar amount for protection to their organization, and when we ourselves pay $15 to $25 a year for membership in service organizations, this amount is a mere pittance when it is considered that it is paid into the fund of an association which has the very vital interest of the member's profession at heart. This amount would strengthen the hands of the Association to a marked degree. Out of it could be paid all of the various necessary items of expenses such as rent of headquarters, secretary and stenographer salaries, *Bar Journal* printing and mailing, the expense of investigation, expense of public relations work and legislative work, etc., and there still would remain a sufficient balance to take care of all the expense required by the committees and for entertainment.

At this point it seems desirable to give consideration to the history of the attempts to secure an integrated bar in Kansas, and to the workings of existing integrated bars in other states, and the methods by which the same were brought about. The Kansas Association has for many years given consideration to this proposal. After the California Bar was integrated by a detailed legislative enactment, the Association through its committee on integration gave consideration to a similar proposal. This was finally drafted in the form of a bill and was introduced in the 1933 session. (Senate bill No. 253, Session of 1933.) This bill, from what I am able to learn at this late day, was not taken hold of by the legislature because there was considerable opposition among

the lawyers themselves. There apparently was a general feeling that the bill was entirely concerned with discipline, and without being understood, it was killed in committee. Later, after numerous discussions among the members of the Association at the annual meeting, an attempt was made to secure a plan of integration by court rule without legislative direction. Later, there being some question raised as to whether the supreme court had the power to organize the bar in this manner, there was an attempt in the recent session of the legislature to secure the passage of a short statute directing the court to complete such an organization by rule. The latest bill on this subject covered an amendment to section 7-103, G. S. 1935, so as to provide for the regulation of the Bar by the court. This bill passed the Senate without opposition but died in the House Committee, because of the fact, I feel, that there was no real understanding among the lawyers of the House Committee as to what the bill would do, and as to what rules might be adopted by the court. In other words, I think our association failed seriously by not educating Kansas lawyers on this subject. Since the 1941 session, the Council of the Association and its committee, at numerous meetings, have given further consideration to this problem, and at an Executive Council meeting at Wichita on Sunday, March 8, 1942, it was decided that the Committee on Bar Organization should bring forth for consideration at the annual meeting of the Association in Wichita, on May 22 and 23, a detailed proposal to integrate the Kansas Bar. A subcommittee to draft this proposal and to lead discussion on it is now at work. This committee is composed of Dean Price of Washburn Law School, as chairman, and Franklin Corrick, Ralph Glenn, Byron Gray and Robert Russell. This subcommittee has available for its use a mass of material provided by the American Judicature Society and by the Bars of those states now having integration. I anticipate that a splendid bill will be ready for publication in the May issue of the *Journal,* and for discussion at the annual meeting.

The American Judicature Society, as early as 1914, advocated the integration of the bar by an appropriate statute and later prepared model bills. These model bills have generally furnished the pattern for bills which have been drafted and put into effect in other states. I believe that at this time there are twenty-four jurisdictions having integrated bars and at least three or four now, by active campaigns, giving consideration to the proposal. A few states have attemped the proposal, but by reason of no education on the subject, such plans have failed.

The bars in other states have been integrated in three ways: *First,* by a detailed legislative act and by broad enabling acts leaving the details to the bar or to the court; *second,* by legislative action requesting or directing the court to integrate the bar by rule; and *third,* by the court itself, upon its own motion, or by petition of interested bodies and without legislative intervention. There is a feeling among some lawyers that our Kansas court has lost its inherent power to regulate the bar by court rule because of its failure to act in the past and because of the fact that the legislature from time to time has enacted various statutes concerning the admission to practice of law and the disbarment of members and the handling of unauthorized practice. This, to me, is a strange doctrine—the powers, I feel, are inherent in the court, and to

imply that the court could have exercised them if the legislature had never done so is to assert that the powers are judicial powers. If so, they are by the constitution conferred upon the court. To hold that they can be so lost so that their reacquirement depends upon the legislative determination voluntarily to withdraw from a field which it unconstitutionally entered in the beginning is, to my mind, a rather novel constitutional pronouncement.

However, in fairness I must state that the supreme court of Florida recently denied a petition addressed to it by the Florida Bar Association on similar grounds. That court approved the well-nigh universal doctrine that the power to regulate such matters is in the court, but the Florida court failed to assert its prerogative and the legislature there entered the field and regulated the bar to some extent. For many years the Florida courts have acquiesced in such actions repeatedly. It was there developed by the court that the approval of the proposed rules would amount to an attempted repeal of the acts of the legislature prescribing requirements for admission to the bar and disbarring for unprofessional conduct. In other words, the court there felt that if it could be done it would be unbecoming and improper to attempt the results sought in that manner and that if the policy should be effected it should be done in an orderly fashion after the legislature has withdrawn from the field.

I pointed out above the first method was that of a detailed legislative enactment, but as time has lapsed this method has been less used and most recent integration plans have come under the second and third classes. A closer study of the nature of the judicial department and the position and function of members of the bar as officers of the court whose assistance is necessary to the administration of justice, and to whom the profession of practicing law has been extended by the courts, has resulted in the recognition of the constitutional authority of the court to provide by rule for the organization of the bar as a self-governing body in the interests of the public, of the court, and the bar itself. This type of an act makes possible a more flexible organization than where the mechanical details are set forth in a statute. On the other hand, however, a statute makes it possible to protect the organization from change by unstudied whims. To support this proposition that the organization of the bar as a self-governing body, in the interest of the public and subject to the existing authority of our court is a part of its judicial function under our constitution, I cite in the footnotes a number of cases. (1) While I do not have the citation, I am in receipt of a petition on behalf of the Minnesota Bar Association directed to its supreme court and in support thereof a very detailed and voluminous brief, a copy of which can probably be obtained or at least borrowed from the Minnesota Association.

Bar integration, in its essence, means requiring that all lawyers in the state be members of the state bar organization and, depending upon classification of members, compulsory payment of dues. The principle of integration, when attempted by a petition to a court, need not be preceded by an all-embracing formulation and approval of every feature of the organizational plan. However, it is the hope of our committee that a detailed plan will be available for

(1) In re Nebraska State Bar Association, 275 N. W. 265 (fully annotated in 114 A. L. R. 151); In re Opinion of the Justices, 179 Mass. 607; In re Sparks, 101 S. W. 2d 194; In re Pate, 107 S. W. 2d 157; Clark v. Austin, 101 S. W. 2d 977; Commonwealth, ex rel. Ward, v. Harrington, 98 S. W. 2d 53.

the May meeting for consideration. This detailed plan can then either be placed in shape for introduction in the next legislature as a detailed legislative bill or can be revised to support a petition to the supreme court either with or without legislative direction. The proposed draft, I believe, will recognize and maintain the existing principles of the various district organizations and their relation to the central organization. It will probably maintain the present system of representation as far as the districts are concerned. It will, of course, be necessary that there be a requirement that all lawyers must be members and comply with requirements as to payment of dues. The perfection of such a plan must follow a determination by the lawyers of Kansas that they must have and that they want an integrated bar. The plan that will be presented will include the fundamental concepts and attributes of integration from other states and the committee proposes to inculcate into such a plan the administrative system, which, of course, is peculiar to Kansas.

As I have stated before, the judicial power of our court is not limited and it is exclusive. It must be so to render the administration of justice effective. The courts have the power which cannot be taken away by any other department to make rules to provide for what is reasonably necessary and desirable to make certain the existence and development of an able and vigorous bar. As was said in disbarment of John D. Greathouse (2):

"Lawyers above all others should know and appreciate the realities of life. One who is attempting to practice law must do more than receive—he must give. He must contribute to the ideals of the profession. If he does not appreciate the sense of duty for his own sake, we must impress it upon him for the sake of others in the profession and also for the public welfare; because otherwise the courts cannot administer complete justice."

This decision has been relied on to a substantial extent by the Oklahoma and Nebraska courts in connection with their plans of bar integration; and in view of this reasoning it follows that if the court integrates the bar lawyers can be required to pay dues to their organization. Many decisions from other states are available. (3) As said by the New Mexico supreme court (4):

"The license fee is not imposed upon any one by virtue of, or as an incident to membership in any association. It is imposed upon the attorney by virtue of his status as a member of the New Mexico Bar. Here again, . . . the act is operating in his individual status as a licensed member of the Bar, not as a member of any bar association."

The Arkansas and Missouri Bars have a somewhat unique situation and the courts of those states (5) have required payment of annual fees by all lawyers to defray the expenses of a Commission set up by the court for the purpose of investigating charges of misconduct and conducting disciplinary proceedings.

In connection with our Kansas statutes regarding attorneys and the power of our court, I invite consideration of chapter 7 of G. S. 1935. The sections of this chapter provide generally for the regulation of admissions and for the conduct of lawyers in the practice of their profession and for presentation and de-

(2) 248 N. W. 735.

(3) Carpenter v. State Bar of California, 295 Pac. 23, Kelly v. State Bar of Oklahoma, 298 Pac. 623; In re Gibson, 4 P. 2d 643; In re Integration of Nebraska State Bar Association, 275 N. W. 265; In re Integration of State Bar of Oklahoma, 95 P. 2d 113.

(4) In re Gibson, 4 P. 2d 643.

(5) Arkansas Supreme Court Rule 6, Proceedings of 40th, 41st and 42d meetings, Bar Association of Arkansas, page 29. Missouri Supreme Court Rule 37 (1) 5 Mo. Bar Journal 327.

termination of accusations against Kansas lawyers. These statutes are in general terms and have been supplemented from time to time by court rule. They contain a declaration of policy that the court shall have a comprehensive control over lawyers as members of the Bar. They manifest no intent to reserve to the legislature any particular matter relating to the profession. I believe it is fair construction of these statutes to include integration of the bar within the sphere of the judicial power, as the lawyer is an officer of the court.

Florida is the one state that I am aware of where it has been held that legislation is necessary as a condition precedent to integration by rule of court. As has been pointed out the Nebraska supreme court integrated its bar without legislative aid. Other states have followed, but, if it takes legislative direction or a detailed legislative enactment to bring about integration in Kansas, then I favor a strenuous campaign to bring such a situation about.

The experience of those states having integrated bars justifies integration in Kansas although the same may have to be brought about by detailed legislative enactment.

In the February issue of the *Journal* of the Bar Association of Kansas there is compiled a number of letters which present the views of justices of the courts of other states. By reading these letters it will be seen that after integration the lawyers generally take a greatly increased interest in the program and activities of their organization. This is always indicated by the greatly increased attendance at the annual meetings.

In advocating a proposal of this character it is only fair that an attempt be made to set forth some of the criticisms that have been directed against such organizations and, if possible, attempt to meet such criticism by well-founded arguments. Criticism has appeared in connection with the attempts to integrate the bars of other states, and this criticism after integration has been provided usually develops into an active interest in seeing that the affairs of the organization are properly carried on. It has been suggested:

(*a*) *That the present Association now is accomplishing much good.* This is conceded, but experience in other states demonstrates that the integrated bar can accomplish much more. (6)

(*b*) *That the present Association represents the better element of the legal profession and integration would force into it members who would otherwise be rejected.* Any classification of lawyers on the basis of membership or nonmembership in the present Association is unsound. Any lawyer who has been admitted to the Bar of this state is entitled to have a share in the bar's organized efforts to defend the administration of justice.

(*c*) *That you cannot change men's character and interest by forcing them into an organization.* The experience of states with integrated bars shows that a great increase in interest and participation does take place. This criticism again assumes that many present nonmembers are of an undesirable character and that the purpose of integration is to reform them. Neither is true.

(*d*) *That the lawyer is deprived of his individual liberty or freedom and that it represents regimentation and bureaucratic control, that it constitutes compulsion in deprivation of liberty and freedom and that an attorney is compelled to pay tribute and allegiance to an organization or be denied the right to practice his profession.* Under integration the lawyers of the state, no one

(6) See February, 1942, issue, *Journal* of Bar Association of State of Kansas.

else, decide what policy shall be adopted and who shall execute it. The argument in substance is that the right to practice law should not be restricted, even in the public interest, but it is uniformly the view of the bench and bar and of the public that the right to practice law is subject to reasonable limitations imposed by the court in the public interest. As was said in *People, ex rel. Karlin, v. Culkin,* (7):

"Membership in the bar is a privilege burdened with conditions . . . The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

The fact is that every lawyer who is admitted to practice of necessity acknowledges control of the bar by the supreme court. The bar, even without integration as proposed, and even without an association at all, is already an institution cemented together by traditional duties and obligations of a most compelling character. Lawyers by very instinct and by mutual concession impose upon themselves restraints for the betterment of their great profession. To impose the additional requirement that every practicing lawyer contribute through integration to the strengthening of the naturally existing bond, is but depriving the lawyer of a negligible degree of freedom. An integrated bar carries no threat of interference with business relationships. Certainly, with an integrated bar, freedom of individual expression is complete; democratic self-government will prevail.

(*e*) *That an attorney should not be compelled to belong to an association not of his own choosing.* As was said by the New Mexico supreme court (8):

"Insofar as any duties or privileges are created or conferred upon members of the State Bar collectively, they are entirely optional to be availed of or not as the member elects. Every member of the State Bar is privileged to participate by his vote in the selection of the Bar commissioners, though he cannot be compelled to do so."

With respect to the annual meetings the court says:

"He who does not desire need not attend. Penalty does not attach for non-attendance. And the only detriment suffered for failing to participate in the annual meetings is the loss of the splendid benefits universally conceded to flow therefrom, through an interchange of ideas, discussions for the common good of the bar, and the reading by eminent members of the profession of carefully prepared papers on subjects of current interest."

(*f*) *That the organization will be controlled by a clique.* This need not, and experience in other states shows that it does not follow. Every lawyer has the right to vote for the officers and governing board.

Other lesser criticisms might be advanced, but I firmly feel that they all can be adequately answered.

In conclusion, may I say that it is my hope that the Kansas Bar will not ignore the experiences of other states having integration and that we will no longer be content to let progress in the matter of bar integration pass by. It is my hope that the lawyers of Kansas will take hold of this very timely subject and give honest consideration to the draft of the plan of organization for Kansas which is now under consideration. The subject is a live one. Your views are solicited.

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(7) 172 N. W. 487.

(8) In re Gibson, 4 P. 2d 643.

LAND TITLES AND ABSTRACT EXAMINATION

MARGARET MCGURNAGHAN

It is probable the first record of ownership of land is found in the first chapter of Genesis, where it is said: "In the beginning God created the Heaven and the Earth . . . and God gave Adam dominion over the Earth and all things therein."

For centuries there is little record of individual possession of land as it was held by tribes, kingdoms, and empires. Even under the feudal system, the lord or baron was given the use of the land, but it did not descend by inheritance and he could not part with it unless with the consent of the monarch. The land itself belonged to the king or the state.

When Columbus discovered America, the Indian tribes held the land and there was no private ownership. Pope Alexander VI made the first land partition in this country when he sought to divide Columbus' discovery between Portugal and Spain. By the Declaration of Independence and the successful conclusion of the Revolutionary War, title to land passed from the king to the people of the United States and freeholds came into existence, not, however, until the original states ceded their claims to the lands west of the Alleghanies to the federal government in 1790 and confirmed the title of the colonists to land within their own borders. Men could then begin to convey real estate without the consent of any sovereign.

Henry Ward Beecher once said that there was a distinct joy in owning land, not at all like the joy of acquiring personal possessions; that personal possessions brought one into the society of man, but the ownership of land made one a partner of the original proprietor of the earth.

If this be true, then every one having an interest in real estate should have some conception of what constitutes title to it; should have some idea of how land is measured and described; and should know what protects his property rights therein. Every one cannot give time and attention to this rather highly specialized work. Therefore, the ordinary citizen has to depend upon the abstracter and the attorney to see that he has a good title to the tract of land in which he may have an interest.

Many stories could be told of titles lost or never acquired because purchasers were penny wise and pound foolish and would not spend money to have an abstract extended or the title examined; or because they depended upon the statement of the seller or the realtor that it was unnecessary to have the abstract extended or to have an attorney examine it. This reminds me of the question asked by a prominent title attorney: "Why is it that when one has a twenty-five dollar lawsuit, he looks around for the attorney who specializes in the type of case involved; but if the same person is purchasing a million dollar property, he gazes around, sees a sign 'Bill Doe, Attorney at Law," and without any investigation hands the abstract to Bill Doe for examination?"

As in this state, it is the province of the abstracter to search the records and prepare the abstract, it seems to me that something should be said upon the preparation of an abstract.

Three persons are interested in an abstract of title—the abstracter who prepares it; the person who pays for it; and the attorney who examines it for his

client. The abstract is really made for the attorney to pass upon, and perhaps that gives him some right to suggest what should be shown upon it.

It is within the province of an examining attorney to insist that he have a well-written and well-prepared abstract to examine. He should not be compelled to lose eyesight and temper trying to decipher one which is in rags and tatters; one on which the ink is faded or the sheets held together with thin strips of mending tape; one composed of yard-long sheets with the entries in skelton form and releases, assignments and other notations on the back in different colored ink, or in a fine Spencerian hand so small it is impossible to read them without the help of a magnifying glass. There also comes to the desk from time to time the old book form abstract of three by eight inch sheets, with exhibits folded and hung on to it here and there—a bulky and unweildy mass to handle. The long sheets, these little books and the hand written abstract with its curlycues, have all served their time and should be relegated to the discard with the office furniture and dress of other days. With new office equipment for the abstracter, let us insist that he give us a modern stream-lined abstract.

Let us now consider some of the salient points of a perfect abstract. It must be absolutely correct, as any error, however trivial, detracts from the work, and a few of them will cause the examiner to lose confidence in that particular abstracter. It should be typewritten, be legible and clear and free from erasures. Better do the sheet over again than to soil the page with finger erasures as one of the older abstracters was in the habit of doing.

Everything on the public records pertaining to the particular title should be abstracted, not copied in full. Every entry should be complete in itself, not referring for descriptions or other pertinent facts, as so often happens, to entry so and so. A copy of the entire record is not an abstract, and so far as abstracting from the records of the register of deeds office is concerned, there are only a few instances in which it is in good taste to use it. All exceptions, reservations, restrictions, powers of attorney, and also all variations from the usual form of an instrument should be shown in full. If the instrument is peculiarly worded, it should be copied verbatim. There are some other instruments and some court proceedings which should be copied in full, and attention will be called to them later.

The abstract should show only such things as are pertinent to the tract under consideration, not instruments which have no bearing upon its title, for example, oil and gas leases released as to the particular tract but still carried on the abstract to show assignments and releases involved on other real estate in the original lease; townsites or additions which are laid out on the original tract, but not included within the boundaries of the property or addition under consideration.

The abstract should have as a part of it, and not as detached exhibits, a well taken-off abstract of all proceedings relating to the land being examined, as found in the district, county or probate courts, and also transcripts of any federal proceedings of record in the county. If the federal court sits in the county, an abstract of any proceedings in that court which may affect the title should be shown. Court proceedings should be abstracted in sequence, not as they may be picked up from the court files. Petitions, answers, motions, judgments and so on do not necessarily have to be copied in full, but

all the essential parts should be shown. Personal service should be abstracted rather fully, and if service be by publication, the affidavit, notice and proof should be copied in full. All wills should be shown in full. Let the examiner and not the abstracter decide what part of the will applies to the particular title. Also, in order to be certain in regard to findings of heirs or devisees, the petition for administration and the journal entry of final settlement should be copied in full. Do not give us detached exhibits. They are snares and abominations.

There should be attached to the abstract an abstracter's certificate which means something, and which does not try to limit responsibility or liability. Abstracters should adopt the uniform certificate in use by members of the Kansas Title Association, including in it the records of the county court if one sits in the county, or a certificate that no such court has been established in that particular county. Abstracters should certify generally as to grantors and grantees and not confine their certificates to specific individuals or corporations. Abstracters should remember that they are liable for the contents of the abstract, and that they cannot evade this liability by not making a search of the records and stating in the certificate that the county officer informed the abstracter that such and such is the fact.

Some attorneys require a recertification of the abstract every three years, but this does not seem to be quite fair to clients, especially if the abstract has been certified from the beginning by one abstracter and that abstracter is known to be reliable and the accuracy of his work has never been questioned.

The local attorney certainly knows whether the abstracter who has done the work is reliable, which abstracts to accept and which to turn down. In Shawnee county we find old abstracts prepared by men who never had a set of books, whose work is unquestionably unreliable. In examining these, we either ask that the work be checked and the abstract recertified, or require a new abstract from the beginning. You may know of some of these abstracts in your own communities.

The responsibility of the attorney is to examine the abstract, to give a legal opinion on the title, and to see that his client gets a good and marketable title. Our courts have defined a marketable title as one which a reasonably prudent man, familiar with the facts and apprised of the law, would accept in the ordinary course of business. This probably is not the title which would pass muster with the overmeticulous examiner, who has been defined by a Nebraska writer as "a nuisance to the public and to the profession."

I believe that in passing on an abstract for a loan the attorney has at least a moral obligation to see that the title is marketable. It has been said that in examining for a loan, the title does not have to be as perfect as if the examination were made for a purchase, as defects can be cured if foreclosure be necessary. But what if the mortgagee takes a deed in lieu of foreclosure? I think the man making the loan usually depends on the attorney examining for the mortgagee to see that he gets a good title, and this is certainly true if the loan is being obtained to apply on the purchase price of the real estate. I do not see how the attorney in such circumstances can shrug his shoulders and deny all responsibility to the borrower if some question comes up later in regard to his title, and I believe this even though the loan company is paying for the examination.

In all instances, the attorney should see that the title is free from all patent defects, because after the transaction is closed, the grantee's only remedy is founded on whatever covenants may be contained in the instrument by which he obtains his title. If the attorney has knowledge of any facts outside the record which would cloud the title, he should also call attention to these, as such information may save trouble later on.

The state of Kansas, except a small portion in the southwestern corner acquired by the federal government from Texas, was carved out of the Louisiana Purchase, and all land in the state, with the exception of a few foreign grants, was a part of the public domain.

Titles in Kansas are derived through grants made by foreign governments to their subjects; through those made by the federal government to the state or certain individuals, associations or corporations; through grants from the state; and also through federal and state patents.

I shall not begin to trace the title to Kansas real estate from Creation and the Garden of Eden, as was suggested by a harassed and exasperated Louisiana attorney when a young New York examiner refused to accept a title beginning in 1803; but we do find some interesting foreign grants in Kansas to which attention should be called. All over the United States we find at the time treaties were executed between the foreign powers and the United States, tracts of land legally granted by foreign powers to their subjects. These grants were in many instances later confirmed by the federal government either by acts of congress, commissions appointed under statute, or by the United States courts. After the ratification of the foreign grant by the federal government, the patent was issued and our interest in the title begins.

I know of three foreign grants in Kansas, located in the northeastern part of the state—the Manuel de Lisa, the Regis Loisel, and the Louis Lorimier—all included in land coming to the United States through the Louisiana purchase.

The De Lisa grant was patented to Manuel de Lisa or his legal representatives, and Mary de Lisa, who conveyed, was found to be his only heir at law. There is an affidavit of J. E. Taylor, recorded in Book 151, page 558 of the records of Nemaha county, and one of Thomas Foster, recorded in Book 7, page 73 of the Dickinson county records, which show the facts in regard to heirship.

The Regis Loisel grant was patented to his heirs or legal representatives. The case of *Munford v. Papin,* in Nemaha county, in which decree was entered in 1872, vests the title in the persons in interest named in the decree as heirs of Loisel.

In the Lorimier grant, the Surveyor General, under the order of the United States Land Office, found the legal representatives of Louis Lorimier. The history of this grant is found in the case of *Munford v. English,* in which decree was entered in the district court of Nemaha county April 19, 1870, and in the case of *Phillips v. Lorimier,* filed in the district court of Marshall county in March, 1909.

Some very interesting history in regard to foreign grants may be found in the following cases:

U. S. v. Repentegny, 8 Wall. 211; 18 U. S. (L. Ed.) 627.

U. S. v. Percheman, 7 Peters 51; 8 U. S. (L. Ed.) 604.

U. S. v. Delespine, 15 Peters 319; 10 U. S. (L. Ed.) 753.
Astiazaran v. Santa Rita Land & Mining Co., 148 U. S. 80; 37 U. S. (L. Ed.) 376.
U. S. v. Vallejo, 1 Black (U. S.) 541; 17 U. S. (L. Ed.) 232.

The general rule is that the legal title to the public domain does not pass from the federal government until the conditions under which the entry is made have been complied with, and the patent issued; but that the holder of the receipt or certificate has an equitable interest which is assignable. The same rule applies to lands owned by the state of Kansas (52 Kan. 269).

The ordinary patent is usually executed to the entryman, but it may run to his heirs, who take by purchase and not by descent. In such cases, be sure that there is a sufficient showing as to heirship and that the patentees convey all of their interest.

Many titles in the eastern part of the state come through trust or fee simple patents issued to Indians. No title, either equitable or legal, passes to these Indian lands until patents are issued.

In all cases the examiner should require that a full copy of the Indian patent be attached to the abstract, in order that he may note its provisions, examine the particular sections of the treaties upon which it is based, and be sure that any conveyance made under it complies with all the conditions and provisions contained in it.

Fee simple patents are issued to Indians who have been given full rights of citizenship, and a conveyance from them passes the title. If the conveyance is made by Indian heirs, and one has to depend upon a finding as to heirship through tribal customs and usages, it is probably easier to ask that the title be quieted.

It should be borne in mind that although fee simple patents may be issued to Indians, they may be annulled prior to a conveyance by the Indians and trust patents issued instead. A recent case in point is one in which a fee simple patent was issued to a Prairie Band Pottawatomie, and later annulled and trust patent issued. Under the fee simple patent, the Indian had paid taxes in Jackson county, and after the trust patent was issued, suit was brought by the United States on behalf of the Indian ward for the repayment of these taxes, together with interest. The United States district court for the district of Kansas held for the contention of the government, but on appeal the United States supreme court held that the taxes should be repaid, but without interest. (*Board of County Commissioners of the County of Jackson v. United States of America,* 308 U. S. 343; 84 L. Ed. 313.)

So far as trust patents are concerned, there are so many different treaties and acts relating to them that titles should not be accepted under them until all restrictions are lifted and the title conveyed by and with the consent of the Secretary of the Interior.

Chapters 9 and 10, Title 25, U. S. C. A., give the acts relating to allotment of Indian lands, and the rules of descent and distribution, together with a rather full history of Indian titles. These chapters are interesting to those who may have to deal with such lands.

The art of surveying is said to have originated in Egypt, as it was necessary to have some method of land measurement to reëstablish lines obliterated by the annual overflow of the Nile. It is interesting to note that in early Rome,

surveying was considered one of the liberal arts, and that it was entrusted to certain public officials who enjoyed special privileges—probably a forerunner of our official suveyors.

Government survey is not generally used in the original thirteen states and their off-shoots, Maine, Vermont, Kentucky and Tennessee. Our method of rectangular survey in all probability has its origin in the New England system by which the land was laid out into towns or townships before being transferred to private ownership. The favorite size of the town or township was six miles square. This rectangular survey is used in the United States and nowhere else.

A federal survey is always made before the public domain is open for entry. The title examiner should be somewhat familiar with these surveys, the location of the Principal Meridian, base lines, guide meridians, and the standard parallels, correction lines, and jog or slip corners. Under present regulations these correction lines are parallel to the base meridian and at distances of twenty-four miles. Formerly distances of thirty, forty-eight and even sixty miles were used.

The convergence of the meridians affects the measurement of each township so that the north line is about three rods shorter than the south one, and there is also a variation in the length of the east and west lines. The surplus or deficit is taken care of by fractional tracts known as lots appearing on the north and west rows of sections. The patent itself should show whether the section or the particular subdivision thereof, is fractional, and should give the correct description of the land patented and also the acreage. If the patent shows that the land is fractional, and the term "north half" or "west half" of the subdivision is used in a conveyance, the chances are that it is not meant to include any part of the south half or the east half of the subdivision, and a new conveyance should be obtained, correctly describing the land.

A section may show lots not situated as set out above. These are surveyed and noted because of meandering rivers or because of lakes, Indian reservations, government military posts, a previously laid out townsite, and so forth. Perhaps one of the best examples of extra lots in this state is found in Geary county, where a military reservation and two rivers interfere with true section lines. Range 8 in Butler county is another good example of lot surveys, as are the surveys in Doniphan, Atchison and Wyandotte counties along the Missouri river, and in Shawnee county along the Kansas river and the Kaw Half-Breed Indian Lands.

In all cases of fractional tracts or complicated metes and bounds descriptions, a plat should be called for showing lines, distances and acreage. With such a plat before him, the examiner can be fairly certain whether or not correct descriptions are being used.

While on the subject of plats and surveys, it might be well to call attention to the laying out of townsites and additions. In such cases, the attorney should always call for plats showing the location of the townsite or addition with reference to the quarter corners, and with reference to any natural or artificial monuments referred to in the recorded plat, showing the location of the particular lot or lots in the addition. The plat should also show the length and width of the addition, the width of streets and alleys, the length and width of the lots; and should show the location of easements for public improvements, the location of streets and alleys, and any reservations of land from the plat.

When several persons join in the platting of an addition, the abstracter's plat of the addition should show whether the lots at issue are situated in the particular part of the addition platted by the person through whom the title is derived. If additions have been vacated and new ones platted on the vacated part, then the abstracter should give us a plat of the old addition with reference to the quarter corners, and another one showing the exact location of the new addition upon the old one.

Plats sometimes show, among other things, that the lines of an addition do not close; that additions overlap; that more land is included than was owned by the person platting; that correct starting points are not used when land is replatted; that easements for underground public improvements are not on the street or alley lines.

There is another type of federal grant which should be considered while we are on the subject of surveys, and that is the Float. When I first heard the word, I had visions of an Island floating in a river as formerly did the Floating Gardens at Xochomilco. I was surprised to find that a Float simply meant a grant of a certain quantity of land by the federal government to be located and surveyed within the boundaries of a larger tract; that any part of the land within the exterior boundaries of the larger tract is subject to disposal by the government and to sale by the purchaser so long as enough acreage is left to satisfy the Float. If the Float is located and surveyed as a metes and bounds description, or as an uneven tract, the examiner should require that a plat of it be attached to the abstract.

The common-law estates of joint tenancy or tenancy by the entirety were in effect in this state until they were abolished by statute in 1891. Conveyances are often found of a one-half interest in such estates, executed by the surviving tenant, with a deed to the other half interest from the heirs of the deceased tenant, and some of them not so many years ago, as it is only about fifty years since such tenancy was abolished. Of course the heirs of the deceased tenant had no interest, and the survivor has not parted with all his title. It is a break in the chain, and deed should be obtained from the survivor or his heirs, or if that cannot be had then the title should be quieted.

Subsequently to 1891 such estates were frequently created by properly worded conveyances. In 1939, the legislature approved this method of *Joint tenancy* (not just tenancy by the entirety) by enacting section 1 of the new property act, which reads as follows:

"Real or *personal* property granted or *devised* to two or more persons, including a grant or devise to a husband and wife, shall create in them a tenancy in common with respect to such property, *unless the language used in the grant or devise makes it clear that a joint tenancy was intended to be created.* . . ."

The section applies to both real and personal property, and does not confine the benefit of the estate to husband and wife or very near relatives, but permits such an estate to be created between any two or more persons. Such an estate between husband and wife or very near relatives might not invite much criticism, but what if it is created between people not so related. The heirs of the deceased tenant would take nothing, and the creation of such estates by the common-law rule, seems to have been the reason for abolishing them in 1891.

If we are to have joint tenancies, and as the act states that such estates must be clearly expressed, the recommendation is made that the granting

clause in the deed and the bequest or devise in the will run to "X and Y and the survivor of them as joint tenants and not as tenants in common" and that the habendum and warranty clauses in deeds use the words "to said grantees" without incorporating the words "heirs and assigns," as such words are not necessary to create a fee under Kansas statutes.

The question comes up frequently as to the need of affidavits of identity. Some examiners ask for them to show that George and Geo. are the same, or that William and Wm. are the same. There is no question in my mind as to identity here, and I believe the examiner should not ask for such affidavits. Nor do I think he should ask for them when the Anglicized version of a foreign name is used; as for instance Henry for Heinrich, John for Juan or Hans, Paul for Pablo, and so on. But suppose the title were in the name of Wilbur Jones and Will Jones conveys. There may be a question of identity here, and if the defect is not a very old one, the grantor and the grantee should be identified.

A deed is taken in the name of F. S. Jones and wife, or F. S. Jones and Mrs. F. S. Jones, his wife. You find a conveyance from F. S. Jones and Molly Jones, his wife, or even Mrs. F. S. Jones, his wife. Is she the same person who obtained title? There may have been a death or a divorce here, and the affidavit of identity should be required.

The examiner should not ask for these affidavits if the defect is a very old one and there is no chance of the title of the present owner being disturbed. Certainly affidavits should not be taken from persons who will swear to anything for a small consideration. Let us get rid of the professional affidavit maker. He usually does not know the persons involved and only makes the affidavit because someone wants it and someone is willing to pay for it and get rid of the importunate examiner.

All affidavits should be recorded. In many instances they are very important and hard to obtain. Why attach them to the abstract with the chance of their being lost, after one has spent days and perhaps weeks in getting them and within a few years new ones might be impossible to obtain?

All affidavits should contain a description of the land to which they apply and abstract entries should not be used. The old abstract may be lost, a new one made, and the entry numbers be different, and thus the affidavit would not be of much value.

Several railroads (Union Pacific, Santa Fe, Missouri-Kansas & Texas, for example) have received land grants in aid of railroad construction from the federal government or from the state of Kansas. In disposing of these lands, the railroads reserve rights of way, and sometimes mineral interests. The examiner should require a certificate from the abstracter showing whether any part of the right of way is located upon or crosses the tract of land being examined. If it does, then the right of way should be excepted from the attorney's certificate, as should also be excepted any mineral reservations.

The courts have held that the Union Pacific, by its grant under the act of Congress of July 1, 1862, and the amendatory act of July 2, 1864, is the owner in fee of a four hundred foot right of way, and that this is superior to any claim initiated after 1864, and is not defeated by adverse possession. (See act of congress June 24, 1912, and 102 Kan. 513; 110 Kan. 373.) On account of these decisions, the Union Pacific leases the right of way not actually

used by it, to abutting landowners. In examining abstracts over which this road has constructed a line of railroad, the attorney should be sure of the acreage and that it does not take in any part of the right of way.

Abstracts do not show accretions or relictions unless there is some record evidence of them.

In all cases of accretion or reliction, the shore lines should be established by survey and recorded boundaries, and by exchange of deeds wherever possible. The abstracter should be asked to attach a showing of such recorded boundaries and acreage. If deeds cannot be had, and the owner of the land desires record evidence of his title, a suit should be brought to have the matter determined.

As development goes forward oil and gas leases are becoming more and more important in the state of Kansas.

If the abstract shows an oil and gas lease, a requirement should be made for a full copy of it. If the lease contains the usual provisions and is for a term of years and as long thereafter as oil and gas is produced, and if no affidavit has been filed showing production during the definite time (sec. 55-205, G. S. 1935), a release may not be necessary. However, in such case it should be required that an affidavit be obtained and recorded showing that there has been no production during the definite period, or if there was production that it has ceased and the lease has been abandoned.

If the lease is a comparatively new one, or one which permits delay rental or contains some other provision which might keep it in force, it should be released by the lessee if no further work is being done under it and it has been abandoned; or if a release cannot be had, the landowner could proceed to obtain a release as provided by sections 55-201, 202 and 206, G. S. 1935. If no release can be obtained, the attorney's certificate should be made subject to the oil and gas lease, or in some instances the title might be quieted against it.

The absracter sometimes notes an instrument as an oil and gas lease when it is a mineral deed conveying an interest in all oil, gas and other minerals under the land. A mineral deed may also be abstracted as a royalty deed. Obtain copies of all such instruments and clear up all question as to what interest the grantee therein has in the land.

The oil, gas and mineral exception in deeds is becoming worthy of note. As land becomes more valuable from the viewpoint of minerals under it, sales are made reserving an interest in these minerals. One of the large lending agencies in this state, when it obtains title under foreclosure and then sells, reserves the minerals, giving the purchaser title to the surface. This reservation is sometimes a general one and sometimes for a term of years, and is generally found in connection with titles where oil and gas development is going forward.

The examining attorney should note carefully all easements such as pipeline rights of way, highways, rights of way for telephone and telegraph lines, for underground public improvements, and so forth. In one case which recently came to my attention, a sale of real estate was not completed because the contract of sale did not mention a pipe-line right of way, and the owner suffered a real loss through the carelessness of an agent. These easements should appear on the abstract, and although they may look like a small

thing as they take up little land and do not interfere materially with its use, they are encumbrances and should be noted as such.

In the examination of titles to city property, it is very important to know whether any easements for public improvements cross or are upon the lots, and just where they are located. A survey may be necessary to show them. They are usually found on the rear or side lot lines, but we sometimes find them without definite width, and meandering at will all over the addition.

In 1911 the legislature passed an act which provides that all assignments and releases of corporation mortgages shall be valid when executed by the president, vice-president, secretary, treasurer or cashier, and attested by the seal of the corporation (sec. 67-318, G. S. 1935). We find assignments and releases executed since the passage of this act by assistant secretaries or assistant treasurers. These should not be accepted unless they are accompanied by a duly certified copy of the resolution of the board of directors shown of record authorizing these officers to act. If there is no such resolution, and no validating statute which takes care of the irregularity, new assignments or releases should be obtained.

The last session of the legislature passed an act which helps with defective assignments and releases by validating them if of record for five years prior to the taking effect of the act, and if the debt secured by the mortgage has been due and payable for at least five years prior to the taking effect of the act. You will notice this does not validate any assignment or release defectively executed which has not been of record for at least five years prior to this act of 1941.

Unless a power of attorney is coupled with an interest or some consideration has been paid for it, it may be revoked by the maker at any time; and in the above cases it may be revoked if the power reserves the right so to do.

Generally, the power is revoked by written instrument signed by the principal, or by his death or incompetency. These powers must be recorded, and they are strictly construed, but not as one young attorney recently suggested. The power had the usual clause that the attorney was authorized to do all things in connection therewith which the principal could do if personally present, and the young attorney interpreted this to mean that the attorney in fact had the right to do anything which the principal himself could do in regard to the title, whether set out specifically in the power or not.

Abstracts frequently show powers of attorney executed years before the attorney acts under them. Anything may have happened to the principal in the meantime. He may be dead, may have married or obtained a divorce, may have gone insane. When the power is executed, there should be a showing that the principal is living, not under disability; that his status has not been changed. This information may be hard to obtain, especially if the principal is living without the country—a missionary to China for instance. If the information cannot be had, then the examiner should require a conveyance from the principal if competent to make it, or from his heirs if he is dead, or the title should be quieted unless the transaction is an old one or has been taken care of by validating acts.

There is one particular thing in reference to court proceedings which should be stressed, that is the sufficiency of the affidavit for publication service. From the way some of these are prepared, it would seem that the attorney placed

his feet on the desk, a cigarette in his mouth, called his stenographer, and dictated the affidavit in a sort of freehand fashion. The result is that the affidavit does not, even inferentially, follow the statute, and as it is jurisdictional, the judgment under it has no force. Then the title examiner has to ask that the work be done over again, and the client of the attorney who brought the suit immediately has the feeling the examining attorney is entirely too technical, or that his own attorney has been extremely careless. The General Statutes are always handy, and it is much easier to consult section 60-2528 in the first place than to wish one had done so later on.

The matter of asking for federal court certificates in all instances has come up within the past few years. Although it has not been the general practice to ask for them, one large insurance company investing money in Kansas requires them whether the federal court sits in the county or not, stating that it does so in order to protect itself so far as is practically possible against liens created by bankruptcy proceedings. All examiners may not consider this necessary, but there seems to be a growing feeling that such a certificate is a protection and should be required.

There is no question but that the certificate should be required when the federal court sits in the county, even though it is necessary to obtain the certificate from another abstracter. It seems to me neither the abstracter nor the attorney is doing his full duty if the certificate is omitted in such an instance. Certainly the abstracter is not making a complete abstract of the record in his county, and the attorney is failing to protect his client.

There are two things which do not appear upon the abstract, and which an examiner should consider in making his examination of the title. They are the possibility of mechanics' liens and possession of the property. A requirement should be made that investigation be had as to any possible work or labor performed or material furnished which might subject the property to mechanics' liens; and also a requirement that investigation be had as to who is in possession and just what interest the occupant claims. It may be found there are unpaid bills which will create a lien, or that the person in possession really has more than a rental interest.

Another thing which comes up to bother the title examiner and the would-be purchaser is the unrecorded contract of sale. Some owners of real estate and some real estate dealers do not seem to give these unrecorded contracts much consideration, and seem to think all that is necessary to get rid of them is to tear them up and throw them in the wastepaper basket. The grantee under such a contract certainly has at least an equitable interest in the property and deed should be obtained from him and his spouse, if married. These contracts should be recorded, even though it may add to the tax burden, and neither owners, dealers nor attorneys should advise any one to accept a title, knowing such contracts are in existence, until all interest under them has been extinguished.

Since 1939, two measures have been passed by the state legislature, and one by congress, which have a decided bearing upon real estate titles in this state. These are the probate code and the property act, which went into effect July 1, 1939, and the soldiers' and sailors' civil relief act of 1940, effective October 17, 1940.

The probate code has been criticized for the multiplicity of its pleadings, notices and orders, but if the criticism is justified, the legislature can change what it has enacted. The last session passed some amendments which clarified some of the sections, especially those dealing with probate matters relating to nonresident estates, and another session may make further amendments should they be needed.

All civil benefits accruing to persons in the service are controlled by the soldiers' and sailors' civil relief act of October 17, 1940, effective until May 15, 1945, unless the United States shall then be engaged in war, in which event it is to remain in force for six months after a treaty of peace is proclaimed by the President.

The act was passed for the purpose of strengthening the national defense, and in order to fullfill this requirement provision is made to suspend temporarily certain civil liabilities of persons in the military service of the United States. The act is applicable to women as well as men if they are on active duty as registered nurses or members of the voluntary reserve, who as such are members of the naval reserve—a component part of the navy.

The provisions of the act which are of the most interest to the profession are found in articles II and VI. Section 200 provides that if there shall be a default of appearance by the defendant in any action or proceeding, the plaintiff, before judgment is entered, must file an affidavit setting forth facts showing that the defendant is *not* in the military service. If the plaintiff is unable to file such an affidavit, he must either file one showing *that the defendant is in the service, or he is unable to determine whether or not he is in such service.* If the plaintiff cannot file an affidavit showing the defendant is not in the service, an order of court has first to be secured directing judgment; and if the defendant is in the service such an order cannot be had until the court, upon application, appoints an attorney to represent the defendant and to protect his interests, but such an attorney cannot waive any rights which the defendant may have or bind him by his acts.

There is probably no question about the constitutionality of the act, as the supreme court held the 1918 act constitutional. In 130 A. L. R. 774-812 appears an annotation of the 1918 act, which points out the similarity or dissimilarity of sections under that act and the one now in force, and also the applicability of the provisions of the 1918 act to the act of 1940, and citing cases under the 1918 act.

If it is known that the defendant is *not* in the military service, the affidavit should state the facts upon which the maker bases his knowledge; such as stating where the defendant lives, when the affiant last saw him, his approximate age; anything which will show that the affiant has the proper information to make the affidavit.

If a showing is made that the defendant is in the service, the affidavit should set out the facts concerning such service. One is not inducted into the service until he has passed the physical examination and has taken the oath. So far as members of the national guard and reservists are concerned, as they have already taken the oath, I have been advised they are inducted upon their passing the physical examination.

In cases where the defendants are sued in the alternative or the unknown heirs, and so on of deceased persons are parties defendant, some attorneys

take the view that all that is necessary is to file the affidavit showing the plaintiff does not know whether or not the defendants are in the service, show to the court that they are only made parties to remove a cloud from the title; that the judgment to be taken is one in rem; and with this showing the court should make an order allowing the judgment to be taken.

Other attorneys have said that they will not bother about filing the affidavits required as the act will be in effect but a short time; that the chances are that not many of the defendants in default will be in the military service, and only a few of those who would desire to open the decree would have been prejudiced by it or would have a meritorious or legal defense to the action.

As stated above, when the plaintiff does not know whether or not the defaulting defendant is in the service, under the act an affidavit showing that fact must be filed and an order of court obtained authorizing the entry of the judgment. In talking recently with a district judge, he remarked if one did not know whether or not the defendant was in the service, it was possible he might be, and he thought the affidavit should be filed and the court appoint an attorney to represent him.

Many of the attorneys in this state are having attorneys appointed when it is impossible to secure an affidavit stating the defaulting defendants are not in the service or that they are in the service. This same procedure is being followed by many of the title attorneys of other states who are members of the Real Property Section of the American Bar Association. I believe the careful attorney should follow this procedure and not look for short cuts in securing judgments.

The act applies to all civil actions in the district courts of the state. Since under the new probate code, proceedings in the probate court are to be considered adversary ones, the provisions should be followed there, perhaps not for all orders, but surely for orders to sell, lease or mortgage real estate, and for the order of final distribution. We should probably follow the procedure of other courts in the country, and file the affidavits when judgments are taken in city or county courts.

Although the property act of 1939 is supposed to sound the death knell to estates tail arising in the future, we are not yet free from them, and because of instruments already effective will have to pass upon them for a few more generations.

Until the supreme court passes on the act there will be uncertainty as to its interpretation. Some questions attorneys are asking themselves are: If estates tail have been abolished, just what interest does the remainderman take and when does it become effective? Are contingent remainders and defeasible fees out of the picture? Who is the "next taker" referred to in different sections? When is the fee possessed?

Here are some of the many questions which come to the desk of a title examiner. There are others which might be stressed, and still others of which you may have knowledge with which I am not familiar.

A few years ago, I ran across a poem, written about three hundred years ago, and found in the manor court office in Wakefield, England. It was writ-

ten in regard to titles of that day, but I believe it contains some pertinent advice which may well be applied to titles of today. It reads as follows:

"First see the land which thou intend'st to buy
Within the seller's title clearly lye.
And that no woman to it doth lay claim
By dowry, joynture, or some other name
Which may incumber. Know if bond or fee
The tenure stand, and that from each feofee
It be released; that the seller be soe old
That he may lawful sell, thou lawful hold
Have special care that it not mortgag'd lye
Nor be entailed upon posterity.
Then if it stand in statute bond or no
Be well advised what quitt rent out must goe,
What customs service hath been done of old
By those who formerly the same did hold.
And if a wedded woman put to sale
Deal not with her unless she bring her male.
For she doth under covert barren goe,
Although sometimes some trafficue soe (we know).
Thy bargain made and all this done,
Have special care to make thy charter run
To thee, thy heirs, executors, assigns,
For that beyond thy life securely binds.
These things foreknown and done, you may prevent
Those things rash buyers many times repent;
And yet when you have done all you can
If you'd be sure, deal with an honest man."

REQUEST

To the Judicial Council, State House, Topeka, Kan.:

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