KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1952 PART 1—TWENTY-SIXTH ANNUAL REPORT

HONORABLE LLOYD M. KAGEY

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FOREWORD

The frontispiece of this issue of the BULLETIN of the Judicial Council is the photograph of the Honorable Lloyd M. Kagey, who served as a Justice of the Supreme Court of Kansas from December 4, 1950, to January 8, 1951. Judge Kagey, who is a native Kansan, was admitted to the Bar in 1927 and started practice at Beloit. Later he removed to Wichita. He served there on occasion as an assistant county attorney and as a district judge in Sedgwick county. We include in this issue an article written by him entitled "Retirement and Pensions of Judges," which we believe warrants the careful reading and thoughtful consideration not only of the Bench and Bar but of all persons interested in the advancement of judicial processes.

Not only the Council, but the readers of its bulletins, are again indebted to Margaret McGurnaghan of the Topeka Bar. In our bulletins for April, 1942, December, 1946, and July, 1949, are articles prepared by her dealing with standards for determining sufficiency of real-estate titles. By reason of the demand therefor and because of the fact that statutory enactments have made revision advisable, the Council requested Miss McGurnaghan to bring the subject up to date. That she has done with her usual, accustomed thoroughness and we are pleased that we can include her review herein.

Changes in the Judicial Council

The Honorable Franklin B. Hettinger, of Hutchinson, Judge of the Fortieth Judicial District, was appointed by Chief Justice Harvey to succeed the Honorable W. D. Vance, Judge of the Twelfth Judicial District, who died at his home city of Belleville on January 5, 1952.

Retirement and Pensions of Judges

HONORABLE LLOYD M. KAGEY

According to the Judicial Council Act I am privileged, as a member of the Bar, to make suggestions "concerning faults in the administration of justice" and among other things "expediting the transaction of judicial business . . . and correcting faults in the administration of justice." Not being a member of the Judicial Council nor a judge, naturally, the opinions expressed herein are my own and do not necessarily reflect the opinions of any of the members of the Council, nor judges of any of the courts. Furthermore, any similarity to previously published articles on this subject, or related subject, is not coincidental.

The quoted parts of the above paragraph, which are excerpts from the statute dealing with the duties of the Judicial Council, seem broad enough to encompass the subject of this article and I will endeavor to stay within its limitations. The method of selection of judges and their tenure has been the subject of much discussion and I know of nothing that I can add to what has already been said. I refer particularly to the able presentations of that subject by Judge Edgar C. Bennett on many occasions and his interesting discussion in the JUDICIAL COUNCIL BULLETIN of July, 1950. I do not urge that the proposals and suggestions contained in this article be considered a substitute for the American Bar Association's plan for the selection, tenure and retirement of judges; rather, confronted with our constitutional and legislative enactments as they now exist, these proposals and suggestions are directed to an *ad hoc* consideration of a situation which, in my opinion, calls for remedial action at the earliest opportunity. Those informed persons, who advocate the adoption of the American Bar, or Missouri plan, acknowledge the possibility of the necessity of a constitutional amendment before that plan could be adopted in its entirety. However, a retirement program for the judiciary could be implemented by straight legislative action without the delay and other attendant difficulties of the amending process, and, I firmly believe, would have an immediate effect upon the administration of justice.

The desirability of some provision for assuring financial security to the lawyer who relinquishes the private practice of law to accept a salary from the state only during judicial tenure is well supported by the example of every advanced social system. England has had such a provision since 1799. The principal divisions of the British Commonwealth of Nations all have pension programs for their judiciary. The dominions have generally incorporated disability provisions into their plan as well as superannuation allowance. France adopted a comprehensive plan in 1853; Germany in 1877. The general government of this country has, since 1869, provided for voluntary retirement of all federal judges on full pay at age seventy and after tenure of ten years. Prior to 1928, nineteen states in this country had some type of program for the retirement of their judiciary. True, the programs adopted and in force before the third decade of this century, were haphazard at best and designed in many instances to reward the long years of service of an individual jurist. Most of the plans were mere superannuation allowances which required in addition to the attainment of a specified age, twenty or thirty years continuous service

on the bench. No provisions were made for the removal of judicial officers disabled or incapacitated while on the bench, except upon the voluntary application of the otherwise qualified judge. Since 1928, twenty-four more states have adopted retirement plans for their judiciary; nineteen of the states so acting have passed the necessary legislation since 1944, and much of the recent legislation on the subject has been of an enlightened character, designed to promote the administration of justice by encouraging mature lawyers to surrender the financial rewards of a successful law practice for the dignity and honor of the bench, secure in the knowledge that after their public service they can retire with dignity, honor and economic security; and by encouraging judges, incapacitated by age or other disability, to voluntarily retire with adequate compensation. The amounts of the retirement benefits range from the full salary paid during tenure, through various percentages of the full salary, to elaborate computations based upon combinations of percentages of salary multiplied by years of service. Some states require contributions by the judiciary (some of these simply allow their judiciary to participate in a general pension plan for all state employees). Many states have adopted plans which provide for voluntary retirement after the attainment of a specified age, with a prerequisite of tenure, or disability. Others have adopted straight disability retirement plans. In view of the recent impetus of provisions for judiciary retirement, it is reasonable to presume that in the near future all progressive states will have adopted some kind of judicial pension program. There are now some forty-three states with retirement plans for judges. Kansas remains among the recalcitrant five.

It is indisputable that considerable social status is a concomitant of the office of judge, and, it is an extremely human characteristic, shared by bench and bar, to be reluctant to voluntarily relinquish prestige and position; this is particularly true of a position which is accompanied by the respect, shaded, perhaps, with fear, of the entire community. Coupled with the natural reluctance of the aged or incapacitated judge to descend from the eminence of the bench, it should be remembered that a judge incapacitated by age or other disability might be unable to recognize his incapacity by virtue of the very impairment of the faculties which have incapacitated him. All this, together with the fact that our judges are elected by an electorate composed largely of nonlitigants, who are by nature disposed to reinstate incumbent judges, tends to create an unfortunate situation: The judge, past his prime, who seeks and often obtains re-election, because he no longer is able to provide adequately for himself and his family by the practice of law, and is unwilling to relinquish the power and prestige of his office.

To remedy this unhappy circumstance it becomes nesessary to provide (1) a means of stimulating the incapacitated judge to vountarily retire, and, in the alternative, a method of compelling such judges to retire in the absence of their voluntary act; and (2) a system which mitigates the effect of the surrender, voluntary or involuntary, of the office, and which insures the economic security of the retired jurist. The question has been before our legislature many times in the past, and the Judicial Council of the 1943 state legislature had occasion to make an extended survey, through a judicial committee, of our judicial system and considered among other things "judicial retirement." However, the committee decided not to recommend a retirement plan for Kansas

judges to the 1945 legislature, stating it would be better to raise the pay to a "reasonable level" so that the judges would have sufficient resources to make some provisions for "his own retirement." While I am inclined to agree that the pay of the judiciary should be raised to a "reasonable level," I take the position that the state could effect a real economy by assuming the cost of a retirement plan rather than furnishing sufficient resources to the individual jurist for the purpose of providing for "his own retirement." Several proposals were submitted to the 1951 legislature for legislative action which closely followed the recent trends in provisions for judicial retirement. One proposal provided for voluntary retirement upon disability, and established procedures for compulsory retirement upon cause shown, at a pension equal to one-half of the salary paid during tenure. The retiring judge would receive full salary during the remainder of the term for which he was elected. No provisions were made establishing prerequisites of age or tenure. Another proposal provided for voluntary retirement after fifteen years continuous service and the attainment of age seventy, and established procedures for compulsory retirement for disability upon cause shown. This proposal further provided for voluntary retirement for permanent disability. The pension was to be computed upon the basis of 3½ percent of the retiring judge's annual salary multiplied by the number of years of his service. The retired judge could perform such judicial duties as might be assigned to him by the chief justice and which he was willing and able to perform. A committee of district judges and court reporters proposed a plan which fixed fifteen years of service and age sixty-five as prerequisites to voluntary retirement, and which provided further that if a person eligible to retire and who did not voluntarily elect to do so could be compelled to retire upon cause shown. The retirement benefits were identical with the pension provided in the plan immediately above; justices of the Supreme Court, district judges and official district court reporters would be affected by the last proposal.

Senate bill No. 267, as amended by the house committee on judiciary, incorporated some of the features set out in the three proposals and added one or two of its own. It established age seventy and fifteen years tenure as prerequisites to voluntary retirement on one-half salary. Any judge incurring permanent disability while on the bench could elect to retire with an allowance computed as in the last two proposals, and provisions for compulsory retirement upon cause shown were included. The amended bill did not reach the floor in the 1951 legislature. However, it is certain that the question will again be submitted to the legislature, and it is for that reason this effort is offered.

It is the consensus of informed opinion that a retirement program for the judiciary is an essential element of the administration of justice. The reasons should be apparent, but to reassert the obvious the following is submitted: experienced, competent attorneys are generally reluctant to surrender a practice, acquired through years of sometimes bitter, and always strenuous, competition, to engage in a different, but equally bitter and strenuous competition for an extremely uncertain future in terms of financial security. A successful attorney who, through abstract considerations, submits to the hazards of political fortune and attains to the uncertain rewards of the bench, necessarily finds it difficult to reassume the practice he surrenders to discharge the public

function of the judge. For this reason some enlightened program to insure the future of able lawyers who are willing to forego the rewards of a successful practice to accept the responsibilities of the bench should be undertaken.

The primary purpose of a retirement program is not to reward the judiciary but to promote the administration of justice by (*a*) stimulating the successful lawyer to accept the duties and responsibilities of the bench, and (*b*) to encourage the judge who has served the public faithfully for many years, and who has passed his peak of usefullness, to step down with the knowledge that he will continue to be rewarded by the society to which he has devoted his best years.

The principal objection to a retirement plan is economic; a false economy, to be sure, which relates the nominal cost of rewarding public spirited men for services rendered to the very real cost of unnecessary appeals from the rulings of men incapacitated by age or other disability incurred in the public service. This objection could be disposed of easily by increasing the present costs taxed to litigants by a small amount earmarked for a judicial retirement fund. It is my feeling that in light of the current salaries paid to the judiciary, and because under our elective system tenure is uncertain, judges should not be compelled to contribute to a pension fund. The proposed increase in costs would place the expense of promoting the efficient administration of justice squarely upon those to be benefited, the litigants.

The judicial pension programs which have been adopted by our sister states fall roughly into two categories; the disability retirement plan, and the superannuation plan. Some programs incorporate features of both, as do two of the proposals submitted to the 1951 legislature, as well as senate bill No. 267, as amended.

It would appear from a survey of the literature on the subject that the straight disability plan is best adapted to our needs in Kansas. It would avoid the apparently unresolvable controversy as to the age at which a judge should retire. That age, as demonstrated by many examples within our immediate experience, is impossible to ascertain arbitrarily. A jurist who retains his faculties for years past the time that the average man possesses the necessary powers of discernment and temperament demanded of a judge should not be summarily removed from the bench simply because he has reached an age established by arbitrary and artificial standards. On the other hand it is conceivable that some judges might lose the necessary faculties long before reaching the age determined by those standards. Thus, the superannuation plan contains the possibility of double error. A minimum tenure as a prerequisite, while not necessary, could be incorporated in the disability plan. It is suggested that six years continuous service on either the district or supreme court bench be required for eligibility for retirement. The reasons underlying this suggestion are considered. It would require that a district judge be re-elected once before becoming eligible, this requirement would limit the benefits of the plan to those who demonstrate a desire for public service. Justices of the Supreme Court should not be held to the re-election requirement as ordinarily they are more mature when they ascend to the bench, and generally have held office prior thereto. If the prerequisite tenure is had by any otherwise eligible jurist, he could be removed from the bench for cause shown upon his petition

to the Supreme Court, or upon the showing of disability by any officer of the court. I realize the last part of the above suggestion opens an avenue of attack on presiding judges by the losing attorney in every lawsuit, but I am confident that it would be an avenue lightly traveled.

As to the pecuniary benefits, I am of the opinion they are a matter for the legislature to determine. It is sufficient to say they should be substantial if the plan is to achieve the purposes for which it is designed, that is, to promote the administration of justice by insuring adequate compensation to our judiciary and providing security to those judges who become incapacitated in the public service.

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 to the state.

When Columbus discovered America, the Indian tribes held the land. 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; but not, however, until the original states or commonwealths in 1790 ceded their claims to the lands west of the Alleghanies to the federal government and confirmed the title of the colonists to land within their own borders. Man could then begin to convey real estate without the consent of the sovereign.

Henry Ward Beecher once said that there is a distinct joy in owning land, not at all like the joy of acquiring personal possessions; that personal possessions bring one into the society of man, but the ownership of land makes 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 abstractor and the attorney to see that he has a good title to the tract of land in which he may be interested.

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 to date or have an attorney examine it; or to take out title insurance on the purchase. 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 an 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 abstractor to search the records and prepare the abstract, it seems to me that something should be said about the preparation of an abstract.

Three persons are interested in an abstract of title—the abstracter who pre-

pares it; the person who pays for it; and the attorney who examines it for the purchaser. 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 eye-sight and temper trying to decipher one that 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 skeleton form, and releases, assignments and other notations on the back in different colored inks, and written in a fine Spencerian hand so small it is impossible to read them without the aid of a magnifying glass. There still come to the desk from time to time the old book form abstracts of three-by-eight-inch sheets, with exhibits folded and hung on to them here and there—a bulky and unwieldy mass to handle. These long sheets, these little books and the hand-written abstract with its curlycues have served their time and should be relegated to the discard with the office furniture and dress of other days. With up-to-date office equipment for the abstracter, let us insist that he give us a modern, streamlined 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 such errors will cause the examiner to lose confidence in that particular abstracter. It should be typewritten, be legible, and free and clear from erasures. Better do the work over again than to soil the page with finger or other erasures.

Everything on the public records pertaining to the particular tract of land 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. So far as abstracting from the records in the office of the register of deeds is concerned, there are only a few instances in which it is in good taste to copy the record. All exceptions, reservations, restrictions, powers of attorney, and all variations from the usual form of an instrument should be copied in full. If the instrument is peculiarly worded, it should be shown verbatim. There are some other instruments and some court proceedings which should be shown in full. These will receive attention later.

The abstract should show only such things as are pertinent to the tract under consideration. It should not show instruments which have no bearing upon its title; for example oil and gas leases earlier released as to the particular tract under consideration, but still carried on the abstract to show assignments and releases involved on other real estate contained 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, probate and county 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 as to findings of heirs and devisees, the petition for administration and the journal entry of final settlement should be shown in full. Do not give the examiner detached exhibits. They do not do the work, and 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 used by members of The Kansas Abstracters Association, including in it the records of the county court, or a certificate that no such court has been established in that particular county. There should also be a certificate as to the probate court from the acquisition of the title from the United States. (See *Hamilton v. Binger,* 162 Kan. 415.) 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 that liability by not making a search of the records, and stating in the certificate that the county officers informed them that such and such is the fact. This is particularly true as to some abstracter's certificates in regard to the payment of taxes. The examiner does not want the abstract to show what the county treasurer may have said, but what the abstracter himself found.

Since divisions have been abolished from the United States District Court for the District of Kansas, it is necessary to have a federal court certificate for owners of land in every county of the state, instead of as formerly, for owners of land located in the particular county in which the court sat. These certificates are easily obtainable from abstracters in Topeka, as the clerk's office here has a master index, both as to civil and criminal cases, for the entire state subsequent to 1939.

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 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, the attorney either asks that the work be checked and the abstract recertified, or requires a new abstract from the beginning. There are probably some such abstracts in other communities of the state.

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. This is unquestionably not a perfect title, and surely is not the type of title which would pass muster with the over meticulous 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 the 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 purchaser, as defects can be cured if foreclosure is necessary. But what if the mortgagee takes a deed in lieu of foreclosure? The mortgagor usually depends upon the attorney examining for the mortgagee to see that he gets a good and marketable title. This is certainly true if the loan is being obtained to apply on the purchase price of the real estate. I do not see in such a case how the attorney can shrug his shoulders and deny all responsibility to the borrower if some question comes up later in regard to the title; and I believe this even though the mortgagee is paying the attorney for the examination.

Our Supreme Court has had this question of marketability before it many times. Some of the later cases decided by it take up the following questions:

(*a*) The necessity of having an abstracter's certificate from the acquisition of the title from the United States certifying as to probate proceedings (*Hamilton v. Binger,* supra);

(*b*) As to marital status of grantors and discrepancies of names in the early history of the title; and defining perfect and marketable title (*Scott v. Kirkham,* 165 Kan. 140);

(*c*) As to whether or not a nonresident titleholder, receiving title under a deceased spouse's will probated in the foreign jurisdiction, and recorded in the probate court in Kansas, must elect to take under the WILL under the Kansas statutes (*Brooks v. Carson,* 166 Kan. 194);

(*d*) The effect of selling all real estate belonging to a decedent in the probate court, when not in one tract, for payment of debts and costs of administration, and incidentally to distribute proceeds of sale to heirs, when the real estate is in separate tracts and the sale of all of it is not necessary to pay debts and costs of administration (*Magaw v. Emick,* 167 Kan. 580);

(*e*) Effect of attorney's requirements in regard to oil and gas leases; changing his requirements and defining marketable or merchantable title (*Peatling v. Baird,* 168 Kan. 528);

(*f*) Effect of restrictions imposed by city ordinances, and restrictions fixed by covenants or other private restrictive agreements (*Lohmeyer v. Bower,* 170 Kan. 442).

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 upon whatever covenants may be contained in the instruments by which he obtains his title. If the attorney has any knowledge of facts outside the record which would cloud the title, he should call attention to them because 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. 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, and to certain individuals, associations and corporations; through grants from the state; and 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 tracts of land which had been legally granted by foreign powers to their subjects prior to the time when the federal government acquired title to public domain by treaty or otherwise from the foreign power. These grants were in many instances confirmed by the federal government either by acts of congress, by commissioners 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.

There are three of these foreign grants in the northeastern part of Kansas, 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. 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. These affidavits show the facts in regard to heirship.

The Regis Loisel land 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 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, 1876, 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; *Astiararan 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 has been 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. (32 Kan. 289.)

Many titles in the eastern part of the state come through trust or fee simple patents issued to Indians. 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 treaty or 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.

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 Indian and trust patents issued instead. A case in point is one in which a fee simple patent was issued to a member of the Prairie Band of Pottawatomies. Later this patent was annulled and a trust patent issued. Under the fee simple patent, the Indian had paid taxes in Jackson county. After the trust patent was issued, suit was brought by the United States in 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 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 treaties and acts relating to them that titles should not be accepted under them until all restrictions are lifted or 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 re-establish 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 surveyors.

Government survey is not generally used in the original thirteen states and their off-shoots, Maine, Vermont, Kentucky and Tennessee. In all probability our method of rectangular survey 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 this town or township was six miles square, and this is the size approximately of the township under our federal survey of public lands. This rectangular survey is used in the United States and nowhere else.

Before the public domain can be opened for entry, a federal survey must be made. The title examiner should be somewhat familiar with these surveys, the location of the Principal Meridian, the base line, guide meridians and standard parallels; correction lines and jog or slip corners.

The convergence of the meridians affects the measurement of each township. The north line of the township is about three rods shorter than the south line, and there is also a variation in the length of the east and the west lines. The surplus or deficit is taken care of by fractional parts known as lots appearing on the north side of the north sections and on the west side of the west sections in the township. Section six in every township will show lots on its north and west sides.

The patent should show whether the section or the particular subdivision

thereof is fractional, and should give the correct description of the land patented and its acreage. If the patent shows that the land on the north or west is fractional and the term "north half" or "west half" of the subdivision is used in the conveyance, the chances are that it is not meant to include any part of the south half or of the east half of the subdivision. A new conveyance should be had correctly describing the land.

A section may show lots not situated as above set out. These occur because of meandered rivers or 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 regular sections and regular acreages. Range 8 in Butler county is another good example of lot surveys, as are 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 acreages. With such a plat before him, the examiner can be fairly certain whether or not correct descriptions are being used.

There is another federal grant which should be considered while we are on the subject of surveys. 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, Mexico. I was surprised to find that a Float simply meant a grant of a certain quantity of land made by the federal government, which was to be located and conveyed 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 so long as enough acreage is left to satisfy the grant. The Float must be in one tract. If it is located and surveyed as a metes and bounds description, or as an uneven tract, the examiner should require a plat of it attached to the abstract.

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

When several persons join in the platting of a townsite, addition or subdivision, the abstracter's plat should show whether the lots at issue are located in the particular part platted by the person through whom the title is derived. If additions or subdivisions have been vacated and new ones platted on all or any part of the vacated tract, then the abstracter should make a plat of the old addition or subdivision with reference to the quarter corners, and another one showing the exact location of the newly platted tract upon the one vacated.

Plats sometimes show that the lines of the tract platted do not close; that additions overlap; that more land is included than that owned by the person platting; that correct starting points are not used when land is replatted or re-

surveyed; that easements for underground public improvements are not on the street or alley lines. Any of these will raise a question for the attention of the examiner.

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. 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 38-501 Gen. Stat. 1949, known as The Property Act of 1939, which section 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 such grant or devise makes it clear that a joint tenancy was intended to be created: Except that a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise."

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. It permits such an estate to be created between any two or more persons, related or unrelated. Such an estate between husband and wife or very near relatives might not create too severe criticism, unless everything they owned were placed in joint tenancy; but what if it is created between people not so related? The heirs of the deceased tenant would take nothing, and the survivor everything.

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 grantees in the deed and the devise or bequest in the will be "X and Y and the survivor of them as joint tenants and not as tenants in common." The granting clause in the deed should be to the parties of the second part and to the survivor of them, and the warranty clause should be to the second parties, their assigns, and the heirs and assigns of the survivor of them.

Conveyances are sometimes found of an undivided one-half interest in such estates, executed by the surviving tenant, and a deed to the other undivided half interest executed by the heirs of the deceased joint tenant. Of course the heirs of the deceased tenant had no interest in the real estate and the survivor has not conveyed all of his interest. This is a break in the chain of title and a deed will have to be obtained from the survivor if living; from his heirs or devisees if dead; or a suit to quiet title may be the only means of taking care of this.

Joint tenancy may be severed or terminated by a partition suit; by conveyance of the interest of any or all joint tenants; by execution sale of any interest subject thereto, and so forth. A very interesting case on this subject is that of *Berry v. Berry,* 168 Kan. 253. In this case Berry and his wife made a joint, mutual and contractual will by which the survivor was to take a life estate in all the property of the deceased, and upon the death of the survivor all property was to be divided between two sets of children. Upon Berry's death, the widow claimed to hold the particular property as survivor under a joint tenancy deed. Our Supreme Court held that the terms of the will effected a severance of the joint tenancy, and therefore, that the surviving spouse took only a life estate.

In connection with joint tenancy estates, it should be borne in mind that the surviving tenant does not take the title to the property free from federal estates

and state inheritance taxes in the deceased tenant's estate, if the deceased tenant paid for the property out of his own funds and if his estate, including the jointly owned property, is subject to such taxes.

I do not believe that chapter 348, Session Laws of 1951, providing for proceedings for the termination of life estates and estates in joint tenancy would be sufficient to free property going to the survivor in joint tenancy from any federal estates taxes, inheritance taxes; or from the provisions of a joint, mutual and contractual will (*Berry v. Berry,* supra); or that the property could be safely accepted until clearance from taxes and the year after the death of the joint tenant had elapsed and there was no chance for a will coming into the picture.

The question comes up frequently as to the need of affidavits of identity. Some examiners ask for them to show that George and Geo., William and Wm. are the same names. 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 Hans or Juan; Paul for Pablo; and so on. But suppose the title were in Wilbur Jones and Will Jones conveys? There may be a question of identity here. If the defect is not a very old one the grantee and the grantor should be identified. (See Title Standard 6.)

A deed is taken in the name of F. S. Jones and wife; or F. S. Jones and Mrs. F. S. Jones, his wife. A conveyance is found from F. S. Jones and Molly Jones, his wife; or even Mrs. F. S. Jones, his wife. Is she the same person as the person who obtained a one-half interest in the title? There may have been a death or a divorce here, and the affidavit of identity may be necessary.

The examiner should not ask for these affidavits if the defect is a very old one, and if there is no chance of the title of the present owner being disturbed. (See Title Standard 6.)

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 some one wants it and some one is willing to pay for it to get rid of the importunate examiner.

All affidavits should be recorded. In many instances they are very important and it would be hard to replace them. Why attach them to the abstract with the chance of their being lost after one has spent days and perhaps weeks in obtaining them. Put them where they will stay as permanent records. All affidavits should contain a description of the land to which they apply. Abstract entries should not be used as a method of identification. The old abstract may be lost or worn out; a new abstract may be obtained for a number of reasons with different entry numbers; and then the affidavit would not be of much value.

Several railroads (Union Pacific, Santa Fe, Missouri, Kansas & Texas for instance) have received land grants in aid of construction from the federal government or from the state of Kansas. In disposing of these lands the railroads reserve rights of way and at times 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 land which is being examined. If it does,

then the right of way should be excepted from the attorney's certificate; as should also mineral rights if any are retained.

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; that this is superior to any claim initiated subsequent to 1864, and is not defeated by adverse possession. (See Act of Congress June 24, 1912; 102 Kan. 513; 100 Kan. 373.) On account of these decisions, the Union Pacific leases the right of way not actually used by it to abutting land owners. In examining abstracts over which the road has constructed a line of railroad, the attorney should be sure of the acreage of the tract at issue and that it does not take in any part of the right of way.

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 recorded evidence of his title, a suit should be brought to have the matter determined. Abstracts do not show accretion or reliction unless there is some record evidence of them.

As development has gone forward, oil and gas leases have become 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 or as long thereafter as oil and/or gas is produced, and if no affidavit has been filed showing production during the definite time (sec. 55-205, Gen. Stat. 1949), a release is not necessary. However, in such a case, an affidavit should 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. (No. 66, Standards for Title Opinions.)

If the lease is a comparatively new one, or if it contains provisions which permit delay rental or 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 sec. 55-201, 202 and 206, Gen. Stat. 1949. If no release can be obtained, the attorney's title certificate should be made subject to the oil and gas lease, or in some instances the title might be quieted against it.

The abstracter sometimes notes an instrument as an oil and gas lease, or the instrument is so named of record, when in fact it is a mineral deed conveying oil, gas and other minerals under the land. A mineral deed may also be noted as a royalty deed. Obtain copies of all such instruments and clear up all question as to what interest the grantee may have in the land.

The oil, gas and mineral exception in conveyances is becoming worthy of note. As land becomes more valuable from the point of view of minerals under it, sales are being made reserving an interest in these minerals. One of the larger lending agencies in this state, when it obtains title under foreclosure and then sells, reserves the minerals or an interest in them, giving the purchaser entire title to the surface. This reservation is sometimes a general one and sometimes for a term of years. It is generally found in connection with titles

where oil and gas development is going forward. The examiner's certificate should except these reservations.

The examining attorney should note carefully all easements such as pipe-line rights of way, highways, rights of way for telegraph and telephone lines, for underground public improvements, transmission lines, and so forth. In one case not so many years ago, a sale of real estate was not completed because the contract did not mention a pipe-line right of way. The owner of the land suffered a real loss through the carelessness of an agent. These easements should appear on the abstract, and although they may seem like a small thing as they take up little land and do not materially interfere with its use, they are incumbrances and should be noted as such.

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. 1949.) 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 certified copy of the resolution of the board of directors, duly recorded, 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.

In 1941, the legislature passed an act (sec. 67-329, 330, Gen. Stat. 1949) validating certain defective assignments or releases of mortgages if such were of record for five years prior to the taking effect of the act. This is not a continuing statute, and does not affect any assignment or release recorded subsequent to the passage of the act or within a five-year period prior to such passage.

Section 67-332, Gen. Stat. 1949, provides that all mortgages or deeds of trust securing a debt on real property which was recorded prior to January 1, 1914, or referred to or described in any instrument of record prior to that date, should after July 1, 1948, be void as against creditors of the mortgagor or subsequent purchasers or mortgagees, unless the owner or holder of the mortgage should have filed in the office of the register of deeds of the county where the land was situated prior to July 1, 1948, an affidavit showing the mortgage in full force and effect. This act excepted railroad mortgages; and further provided that infancy, incompetency or nonresidence should not affect the operation of the act. This statute was re-enacted in 1951, being chapter 378, Session Laws of 1951, extending the time of record to January 1, 1919, and the effective date of the act to July 1, 1952. This also is not a continuing act.

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.

Courts have held that the affidavit for service is jurisdictional and the statute must be followed, at least so there will be no question of the court's holding that it has been inferentially followed. If the statute is not followed the judgment under it has no force.

The 1951 session of the legislature passed a statute amending sections 60-2525, 60-2526 and 60-2527, and repealing these sections. This statute is found in chapter 549, Session Laws of 1951. This statute has come before different Bar Associations of the state and suggestions and recommendations have been made in regard to it. Suffice to say now that under this one does not use the old constructive service sections which have been repealed and the new statute is now in existence.

The matter of asking for federal court certificates in all instances has come up within the past ten or twelve years. Now that divisions are no longer used in the Federal District Court in Kansas, it would seem to be necessary to have this certificate even though the court does not sit in the particular county. Under the rules it applies to every county in the state; and, therefore, in examining abstracts in any county the certificate should be called for. It can readily be obtained from the abstracters in Topeka, where there is a record of all proceedings, civil and criminal. This certificate also serves in a measure as a protection against liens created in bankruptcy proceedings.

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, and acts amendatory thereto.

The probate code has been subjected to criticism for the multiplicity of its pleadings, notices and orders. If the criticism were justified in any degree, the legislature can change what it enacted. Amendments have been made at every session since the code has been in existence. Some of these have clarified the code; some are open to criticism. However, the code has been in existence now for over twelve years; attorneys are becoming used to it; and it seems that without question it fills the need for which it was enacted.

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 deal with them for some time to come. Therefore, it is still up to the examiner to be informed on the rule in Shelley's case; to know what is meant by the rule in Wild's case; the doctrine of worthier title; and just what is an estate tail.

All civil benefits accruing to persons in the armed services are controlled by the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, and acts amendatory thereto.

The act was passed for the purpose of strengthening the national defense. The act is applicable to women as well as to men if they are on active duty.

If there be a default of the defendant in any action or proceeding, the plaintiff before judgment is entered must file an affidavit setting forth facts which show that the defendant is not in the military service as defined in the act. If the plaintiff is unable to file such an affidavit, he must file one either 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. If the defendant is in the service such an order cannot be obtained until the court, upon application, appoints an attorney to represent the defendant and to protect his interests, but such attorney cannot waive any rights which the defendant may have or bind him in any way.

If it is known that the defendant is not in the military service, the affidavit should state the facts upon which the knowledge is based; such as where the defendant lives, when the affiant last saw him, his approximate age, anything which shows that the affiant has the proper knowledge 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 that they are inducted upon their passing the physical examination.

Some attorneys have stated they will not bother about filing the affidavit; that the chances are that not many of the defendants in default will be in the service, and only a few of those who might desire to open the decree, would

have been prejudiced by it or would have had a legal or meritorious defense to the action. But what if the person in the service is sued as an unknown heir or devisee of a named defendant; or if the named defendant is really in the service?

Many of the attorneys in the state are having attorneys appointed when it is impossible to secure an affidavit stating that the defaulting defendants are not in the service. This same procedure is being followed by attorneys in other states. I believe attorneys should follow the procedure and not look for short cuts in securing judgments.

Since under the new probate code, proceedings in the probate court are considered adversary proceedings, the provisions of the Soldiers' and Sailors' Act should be followed there; perhaps not for all orders, but certainly for proceedings to sell, lease or mortgage real estate, and for the order of final distribution.

Here are some of the many questions which come to the desk of the 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 written 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."

□

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