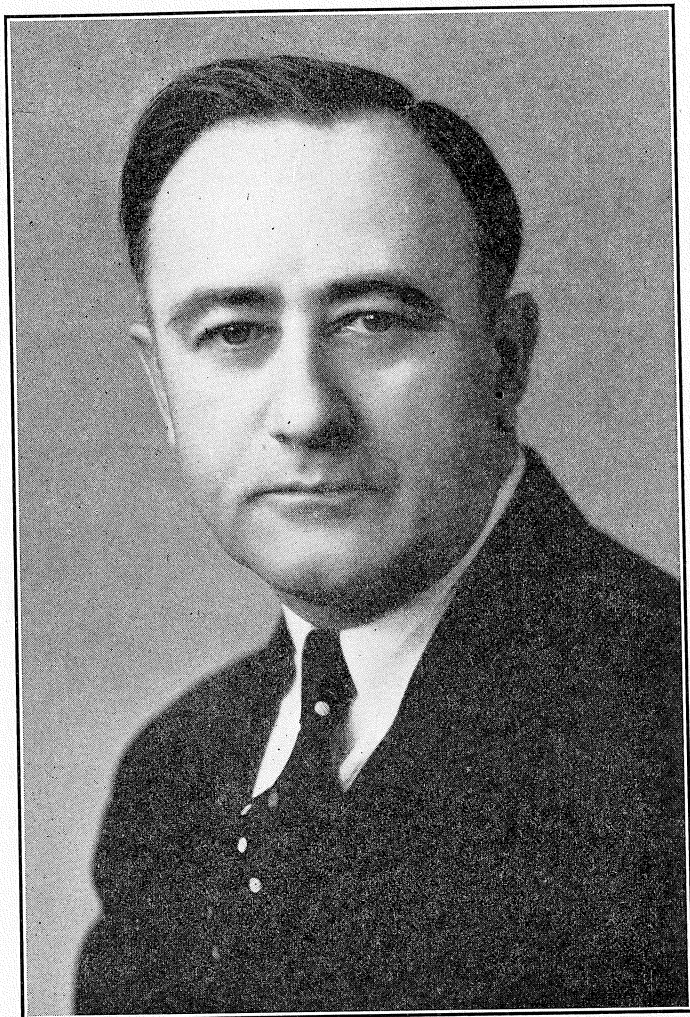


KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1942

PART 2—SIXTEENTH ANNUAL REPORT



HUGO T. WEDELL,
Justice, Supreme Court of Kansas

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 OTHER ORGANIZATIONS, and leading citizens generally throughout the
 state.

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

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ARTICLES IN THIS ISSUE

In this issue we present an article by Justice Hugo T. Wedell of the Supreme Court of Kansas, whose portrait appears on the cover, upon the subject "Light Reading for Hot Weather." Justice Wedell, who needs no introduction to the lawyers of Kansas, has been a member of the Supreme Court since 1935.

At this time we are publishing a list of Kansas lawyers now in the military or naval service of the United States, as compiled by The Judicial Council and more fully explained on page 46. The response of Kansas lawyers to the nation's call in the present emergency furnishes abundant proof of the loyalty and patriotism of the members of our bar.

The uniform act on simultaneous deaths, which is printed herein, has been recommended for enactment by the Judicial Council. This statute was drafted and adopted by the National Conference of Commissioners on Uniform State Laws, and approved by the American Bar Association, and has been enacted in forty states. If you have any comment or suggestions, please write the Council.

In coöperation with the Bar Association of the State of Kansas, we are printing in this issue a number of the papers read at section meetings of the association at the Wichita convention in May, 1942. These include papers on "Tax Foreclosures—Title Procedure under the 1941 Act" by Frank S. Hodge, Hutchinson, with discussions by Ward Martin, Topeka, and L. L. Morgan, Hugoton; and paper on "The Complexities in Preparing a Simple Will" by W. M. Beall, Clay Center, with discussions by Marlin S. Casey, Topeka, and David J. Wilson, Meade; all of which subjects are of interest to the bar of the state.

WHAT THE JUDICIAL COUNCIL IS DOING

The Council has had two meetings since the publication of the last BULLETIN, at which we have outlined our work for the immediate future.

As explained elsewhere in this issue, we have undertaken to compile and keep up to date a card index list of Kansas lawyers in the military or naval service, from which we publish our first list in this issue.

Last fall a committee was appointed to revise the statistical tables which are compiled each year for publication in the October BULLETIN. This committee consisted of members of the Council, and John H. Hunt, of Topeka, who is state director of the survey of the administration of justice of the Section of Judicial Administration of the American Bar Association. At its meeting in April, 1942, the Judicial Council adopted the report of this committee, which provides for the condensing of these statistical tables about one-third, and makes a number of important changes in their form and contents. With these changes, we hope that statistics will be of greater interest to the bar and to the public.

The Council is very grateful to Mr. Hunt for his service upon this committee, which took a great deal of his time, and for his many valuable suggestions which are incorporated in the report.

The next regular session of the Legislature will commence in January, 1943. Proposed legislation and proposed changes in laws will be considered by the Council at its meetings next fall, and should be in our hands at an early date to secure thorough consideration. The Council has already approved for enactment the uniform simultaneous death statute which is printed in this issue, and has approved in principle a change in procedure under the occupying claimants statute which will be prepared and published in the form of an amendatory act.

We have received many suggestions of possible changes in the Probate Code, most of which we consider interpretive rather than legislative. Many of these questions will be clarified by current decisions, and our general policy has been to recommend only those changes upon which the opinion of the bar has crystallized and which are legislative rather than interpretive. Our work will be facilitated if judges and lawyers will write us freely about any suggested changes.

The Council has determined that it would be desirable to make a comparative study of the Kansas code of civil procedure in comparison with the federal Rules of Civil Procedure for District Courts, and we plan to inaugurate some research work along these lines. In so doing, the Council is not taking any position upon the question whether the federal rules should be substituted in whole or in part for the Kansas civil code; but we believe that a comparative table would be of value to any Kansas lawyer who is familiar with the code of civil procedure, whenever he has occasion to practice in the federal court. Due to war conditions, we have been delayed in getting this work started.

LIGHT READING FOR HOT WEATHER

By JUSTICE HUGO T. WEDELL

When asked to write an article for the JUDICIAL COUNCIL BULLETIN, it was my intention to follow the age-old custom of treating some legal subject which was thought to be of interest to the bench and bar. Upon further reflection it occurred to me that since all of us are absorbed with so many serious subjects in these troublesome days it might be permissible to depart from custom and to just ramble promiscuously over a number of rather light and unrelated topics. It is hoped such a departure will not be too shocking.

I frequently have been asked various questions concerning the court as an institution, its personnel, its procedure and most of all about incidents of human interest which arise in connection with our work and which reflect, or tend to reflect, characteristics and attitudes of members of the court. I have, therefore, decided in a general way to touch upon observations made and impressions formed concerning some of these subjects during the past seven years. In doing so I shall first refer to a few incidents of human interest which occurred early during that period.

My first contact with the court in an official capacity and certain occurrences during the first few weeks following my appointment on July 1, 1935, left some rather indelible impressions. It may be recalled it was my privilege to finish the unexpired term of the late Chief Justice Johnston. The first event of real interest naturally was the inauguration ceremony on July 3, 1935, which consisted in the taking of and subscribing to the oath of office. Justice Rousseau A. Burch, who by reason of seniority of service on the bench, had been elevated to the office of Chief Justice on July 1, 1935, presided at the ceremony. The other active justices on the court at that time were: John S. Dawson, W. W. Harvey, Wm. Easton Hutchison, William A. Smith and Walter G. Thiele. These men, together with the late Chief Justice Johnston and E. E. Clark, Clerk of the Supreme Court, constituted the audience on that occasion. The old Chief Justice had not yet moved his personal belongings from his chambers and the ceremony was held in the chambers of Chief Justice Burch, now occupied by Justice Harvey. The atmosphere of the ceremony was informal but dignified. The oath to which a justice of the supreme court is required to subscribe is short but comprehensive. It reads: "I do solemnly swear, That I will support the constitution of the United States, and the constitution of the state of Kansas, and faithfully discharge the duties of the office of justice of the supreme court of the state of Kansas. So help me God."

Just at the beginning of the ceremony and prior to the taking of the oath a distinct silence, akin to reverence, pervaded the atmosphere. It was occasioned by the entrance of the old Chief Justice, who it will be recalled, had passed his 86th birthday. He was characteristically quiet, friendly and congenial. All the members of the court were friendly and courteous, but it seemed to me there

existed also a feeling of curiosity concerning the new member, which of course, was most natural. Following the inauguration the venerable and beloved old Chief Justice, not the new member, was the principal center of attraction, and how eminently fitting and proper that was. It seemed to me there was a most singular and unusual halo on that particular occasion about the old Chief who affectionately has been referred to on numerous occasions as "The Grand Old Man of Kansas." I shall never forget it. Everyone present realized this occasion definitely marked finis on a long, distinguished, active career. It was the end of fifty years and seven months of active service on the same appellate court. It marked the termination of his able and gracious service in the capacity of Chief Justice which had covered a period of over thirty-two years. The realization that the time had now come when he was actually leaving the court brought to the justices a flood of stirring memories and sentiments which naturally overshadowed the addition of a new member to the court.

When the ceremony was over and after a few incidental remarks by those present, the old Chief Justice made a statement which clearly indicated he had not even then entirely lost the spirit of combat. In a jocular mood he remarked: "I am looking for a fight and thought maybe I could find one here."

I assumed he was hinting at court conferences. Such a conference was about to follow in which the July cases were to be decided. Inferentially, I may say to the members of the bench and bar that I soon learned these conferences do present the opportunity for vigorous expression of conflicting views.

The second thing the old Chief Justice said, which also I shall never forget, was in substance as follows: "Young man, I have a robe I want to give you—it may be a bit long but these robes are expensive and I want you to have it." It is needless to tell you I was deeply moved by this incident. It was not only what he said but the occasion and the way in which he said it that combined to make it touching. For just a moment, but it seemed a long time to me, nothing further happened until he said, "Well, come along." I went with him to his chambers. He gave me his robe and said: "I wish you lots of luck." The last statement, and particularly the word "luck," struck me and reminded me of a baseball story, and that helped relieve the tension. I related the story to him and he, being an old ball player himself, got a chuckle out of it. It was the story ball players used to tell on John McGraw while he was manager of the New York Giants and was repeatedly winning national league pennants. Opposing managers, when razzing McGraw, frequently told him he didn't have the brains with which to run a ball club and that all he had was luck. McGraw replied: "You fellows take the brains and give me the luck."

Everybody, of course, knew John McGraw was rough and in some respects quite unpolished, but they also knew of his fighting proclivities and that he was an untiring worker and a close student of the game. I got some comfort out of my own story and went to work. It was very clear to me that pennants which I was to win, if any, were not yet "in the sack." There is one lesson a ball player really learns. It is that a ball game is never "in the sack" until the last man is out.

It was hot in July of 1935—at least I thought so. With the retirement of the old Chief Justice, the moving season was at hand for all the Justices. Chief Justice Burch moved into the former chambers of Chief Justice John-

ston and each of the other Justices moved one place nearer the throne. At this point a perplexing and slightly embarrassing problem was presented to the newest member of the court. Chief Justice Burch took with him the best furniture from his former chambers and the "old cripples" remained in his former chambers or were set into the corridor. Every other Justice, more or less, then followed suit—really the job of disposing of cripples might well have been done years ago. When my friend of long standing, Justice Walter G. Thiele, finished moving out of the east room on the fourth floor, the room always occupied by the junior justice, and also moved such of his stenographer's furniture and equipment as was movable, without coming apart, there was nothing left in those rooms that was worth saving. In the corridors there were only cripples. It soon dawned on me it was probably intended that from these cripples the junior member was to be permitted to outfit his own chambers and his stenographer's office. None of the other justices, however, admitted that to me—I think they intended to make me prove it. Well, so far as I was concerned, it presented a situation in which the doctrine of *res ipsa loquitur* clearly applied. In any event the furniture in the corridors was plentiful, but its character was of the kind one might expect to find in an office of a Justice of the Peace in a Kansas town that boasted a population of 100 or 200 souls. After some investigation I learned it was the duty of the State Executive Council to furnish the state offices. Upon consulting a number of them I was directed to speak to Frank J. Ryan, secretary of state, and secretary of the State Executive Council. He promptly advised the council was short on funds (how strange), but Frank nevertheless informed me in a very solemn, quiet and confidential manner (he almost whispered into my ear), that he personally would guarantee that *perhaps* \$50 or \$75 could be raised to completely outfit both of my rooms. Although I readily recognized and thanked him for his unbounding generosity and willingness to assume such grave responsibility, I advised him not to endanger his chances for reelection by such unprecedented generosity. He was informed I had two nail kegs and few long planks in my garage at Chanute, which I could have the transfer man bring along with our household furnishings, and that the justices could use that bench during the monthly consultations. I reached for the telephone to put in a long distance call to the transfer man at Chanute. It was then for the first time that Frank realized I was serious about the kegs and planks. He interrupted and said, "Don't do that yet, Judge, I'll see those hard-headed members of the executive council again, and see what I can do with them." Well, they did all right—after a few weeks—in order to keep the planks, particularly the kegs, out of the statehouse and out of the chambers of a Justice of the Supreme Court. Needless to say, I have always been grateful to my Irish friend.

As already indicated the 1935 summer was hot. The chambers of the junior member, however, were quite comfortable. It was decided to spend some time there getting acquainted with the wallpaper which, by the way, I think had not been changed since the state house was built, and to do some reading with respect to the subject of original jurisdiction of the supreme court. It occurred to me that, in the temporary absence of other members of the court, attorneys might be coming to obtain an order in such cases.

This really was not a bad hunch. In a few days W. F. Lilleston and Henry Gott, of Wichita, came for an order in connection with an original mandamus action. Strange as it may seem that was the subject which had been receiving my attention. The order they obtained was my first official act. It was important litigation. They were just as concerned as I was that no error should be committed. A legal point concerning which I inquired was well briefed and we had no trouble. This is the only time I recall when Justice Harvey was in Topeka and could not be found at his desk during office hours. I still think he must have been out of town.

It was vacation time. If my memory serves me correctly, Chief Justice Dawson, who has great difficulty staying out of western Kansas, had already taken up his summer abode on one of his Graham county farms. He leaves on his vacations early and returns early in order to make sure everything is in readiness for the October docket. We never have been able to ascertain just how much manual labor, if any, he actually performs while away. We do know there is a tremendous exodus of books and magazines from the State Library about the time he leaves Topeka. They are available to a member of the court for the asking and you can always depend on a Scotchman. The Chief loves the theme "Once a Scotchman, always a Scotchman." The exposition of the theme, however, is entirely superfluous in his case. Pertaining to subjects, other than books and literature, I must confess, he is most generous—for a Scotchman. He sends us messages on U. S. postcards.

Justice Harvey, who talks a fishing vacation exceedingly well, but finds most of his diversion in hunting up more court work to do, was very gracious about helping Mrs. Wedell and me find a rental property. Within less than a block from our residence was located a community grocery store. At the directions of Mrs. Wedell, I went there to stock up on groceries, as the new pantry was entirely bare. After the grocery order was placed, I inquired of the storekeeper whether we might open a monthly account. The storekeeper was informed concerning the place of our residence; that we had just moved to Topeka; that I had assumed my new duties as a Justice of the Supreme Court, and that we should like to pay our grocery bills on the first of each month. After all this careful explanation the storekeeper looked me over, inquired whether I would have an office in Topeka and whether I would receive a monthly salary. Having answered all these queries in the affirmative, he replied: "If it doesn't make much difference to you, I would rather have the cash." Sometime or other I had heard something about a person being deflated. I now knew exactly what that meant. The grocery store did not generally operate on a cash basis. At one of the early court conferences I related this incident to the members of the court and inquired why they didn't pay their bills. They insisted they did. I have never found out.

The regular monthly court conferences at which we decide cases, following the week of oral argument, are exceedingly interesting. They are conducted informally. The conference begins with the cases assigned to the junior member and is concluded with the cases assigned to the Chief Justice. Each Justice presides as chairman of the conference in which cases assigned to him are con-

sidered. Where there is doubt as to the majority view and a vote is required to determine the decision, the junior member votes first. It is thought such a procedure is most conducive to obtaining his independent decision. There is one exception with respect to the general order of voting. With respect to those cases in which a justice writes the opinion, he is accorded the privilege of voting last. In case of a tie vote, or otherwise, he may desire to give further consideration to views expressed in conference before reaching his own decision. The practice, of course, results in giving him the deciding vote in the case of a tie vote between the other members. Such a situation, when it occurs, naturally emphasizes the importance of his own decision. The importance of such a responsibility was early and indelibly impressed upon my mind.

The first conference in which I actively participated was in October, 1935. The first case assigned to me happened to be an exceedingly difficult one. The record was voluminous and the contentions of the respective parties were vigorously presented in both the oral arguments and briefs. The contentions in our own court conference were no less pronounced. During that conference, if my memory serves me correctly, every justice took the floor except Justice Hutchison. I never knew him to arise in conference for the purpose of expressing his views. When the conference ended the vote of the other justices stood three and three. It seemed to me that was a rather vigorous initiation. I confess, however, it was most instructive and illuminating to a new member in numerous ways other than with respect to the views as to the merits of the respective contentions. I am inclined to the opinion that probably I absorbed as many impressions concerning the other justices and their technique of operation during that conference as they did concerning the new member. Touching the subject of technique I am very certain I observed more concerning them than they did concerning me for I had not yet developed any conference technique.

That conference was one of the greatest demonstrations of experienced intellectual foot-work, sparring and slugging for a final knockout I ever hope to witness. It was the type of combat that would pack an arena. It was vigorous, but clean. There was no hitting below the belt. It never once became necessary to part the adversaries. They broke clean. Serving in that conference in the capacity of chairman, in fact as umpire, I called the punches as I saw them. The decision followed and the opinion was written accordingly. The minority members dissented, but no one could have been more gracious and courteous than were the dissenters. No dissenting opinion was written and I always suspected they refrained from writing one, at least in part, for the reason that they believed the initiation of the new member had already been of a sufficiently rigorous character. I must confess I would have been considerably more disturbed by a dissenting opinion in my first case than in a later one. I am sure the dissenters recognized that fact.

Courts are human institutions. They could not be otherwise. They are operated by human beings. The fact a lawyer transfers his scene of operation from a chair behind a private desk to a chair on the bench does not alter his status as a human being. It does not and cannot, in the twinkling of an eye, alter his established character, habits, capacity, attitude or leanings. He brings with him to a court exactly what he is and brings nothing which he is

not. But, whatever his capabilities may or may not be, he remains a human being. The background of judges is the background of men. Their attitudes or point of view toward life and its relationships may vary, but they are all human attitudes and human characteristics. The fact their background and point of view differs is the best evidence that they are all human beings.

After all, is it not fortunate that seven men on an appellate court do not possess the same identical background and that they are not all fashioned after the same identical model? Does not diversity of background and approach make, or tend to make, a more stable and enduring institution? Is not the final product of their labor likely to be sounder by reason of such diversity? Justice Cardozo, of New York, in a lecture before the Yale Law School years ago, remarked:

"One Judge looks at problems from the point of view of History, another from that of Philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of divers minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."

It would seem this diversity of point of view is probably the most definite assurance and guaranty that we shall not succumb to a regimented social order against which we now profess to be waging an all-out war. It has been my observation that a forceful, logical and sincere expression of view, quite opposed to the decision a court is about to reach, is often most helpful, and frequently results in a modified decision and more accurate statement of principle. Such expression and exchange of thought has in the past, and may in the future, require courts to reverse themselves. If that becomes necessary courts should do so frankly and courageously. A judiciary which so functions is worth saving.

The foregoing raises a question concerning a closely related subject. Upon occasions a question has arisen with respect to the value of dissenting opinions. On that subject I, of course, propose to express only my personal views. The value, or advisability, of a dissenting opinion is frequently a debatable matter. That we are living in a changing world cannot be doubted. New conceptions of human relations and responsibilities find their way into legislative enactments. Manifestly, courts cannot become static. When legislation is valid and clear, it is the duty of courts to express the legislative will. When the legislative intent is not clear there is frequently room for diversity of interpretation. The confidence of the public in courts of last resort is, in my opinion, of great importance. If it is reasonably possible to obtain a unanimous decision upon sound principles of law, it would seem courts should strive to reach such a decision. Such decisions tend to maintain the confidence and respect of the people in their institutions. On the other hand if, notwithstanding a sincere effort to bring about a sound unanimous decision, a justice is impelled to dissent, he should feel free to do so, but should do it with due deference to the views of the majority. It at all possible he should state the reasons which impel his dissent. In this connection, however, it should be stated frankly that there are occasions when limitations of time make the writing of a dissenting opinion or of a special concurring opinion impossible.

On occasions a question has arisen with respect to the advisability of one justice writing both the opinion of the court and a dissenting opinion in the same case. It is readily recognized by those who have struggled with the problem that the Kansas practice, which permits this to be done, is not free from criticism. Human nature being what it is, it is difficult, if not wholly impossible, to write an opinion in which you do not concur, as effectively and forcefully as if you were expressing your own personal conviction. It is also true that our practice is subject to the criticism that if the same author had not written a dissenting opinion the views of the majority might have been expressed with greater clarity and effectiveness. On the other hand, there is much to be said in favor of our system of assigning cases to the justices in regular rotation. Under this method no justice is permitted to shirk the responsibility of writing the opinion in a case which, for instance, may involve grave political implications or which he finds unusually difficult or embarrassing for some other reason. Under our system there is no problem of selecting the proper justice to whom a particular case should be assigned. Under it we do not deliberately develop specialists on the court in any class or classes of cases. In this manner, it is believed, by close students of the problem, that litigants come nearer obtaining a decision which represents the labor, ability and views of the entire court rather than the thought or views of any one or only a number of the justices. I am informed that lawyers and judges have frequently discussed this subject in National Bar Association meetings and that lawyers and judges, from states in which the rotation method of assignment of cases is not employed, have expressed themselves as preferring the Kansas system. Personally, I must confess, that while I was never favorably impressed with the practice which permits a justice to write both the majority and minority view, I now prefer to tolerate that practice rather than abandon our system of assigning cases by rotation.

I have frequently been asked whether it is important that lawyers argue their cases orally before the supreme court. Here, again, I express only my personal views. In my mind the answer to the question depends largely upon the nature of the case and the nature and quality of the argument. In cases which are comparatively simple and in which the abstract and briefs clearly present the facts, issues and authorities, it has at times occurred to me the oral argument was not very essential. Cases in appellate courts are not won or lost on oral arguments as much as lawyers are at times inclined to believe. In fact, some lawyers do not help their cause with an oral argument. Some of them would do better to submit their side of the case entirely without oral argument or with a mere straightforward statement of the nature of the case and the issues involved, irrespective of how long opposing counsel argues. The abstract and briefs of some lawyers are frequently far more helpful than their oral argument.

A good oral argument is exceedingly helpful. It clarifies the issues, gives the court an interesting picture of the lawsuit as tried below and gives life to the abstracts and briefs. An oral argument is not designed to cover every detail or even every issue that may be involved. This is especially true where the record is voluminous and the contentions are many. The larger the record

and the more complicated the questions on review are, the greater is the value of a simplified statement which gives the court a definite general outline of the controversy and the principal facts and issues rather than a hurried and minutely detailed statement of the entire record which cannot be absorbed. In making this observation I am not unmindful of the difficulties with which a lawyer is sometimes confronted by a thirty-minute limitation of time for oral argument. On the contrary the suggestion is made by reason of that limitation and because we know lawyers are desirous of using that limited time to their best advantage.

Those of you who were not fortunate enough to attend the State Bar Association meeting at Wichita, missed a treat. The meeting was filled with splendid reports, addresses and discussions. Congratulations are due to Bernard L. Sheridan, last year's president, the Board of Directors of the Association, and to the host of the meeting, The Wichita Bar Association.

At that meeting the Wichita Bar demonstrated that its ranks are filled with writers, musicians and actors of real ability. Marked talent was evidenced in abundance throughout the entire show on Saturday night. The closing number, a patriotic act, was nothing short of a classic. It was a marvelous portrayal of the patriotism of the legal profession throughout the history of the nation. Nothing could have been more fitting. That this act really stirred the patriotic impulses of the audience of Kansas lawyers was clearly reflected not only by the waves of applause but also later by the spirit in which the audience sang, The Star Spangled Banner.

The contents of this issue of the JUDICIAL COUNCIL BULLETIN is clear evidence of the continued and abiding patriotism of the legal profession. At the time of the bar meeting in Wichita in June over 150 members of the Kansas bar had already entered the service of their country. It appears the number has now considerably exceeded the 200 mark and that many others will be added in the near future. That they will commit themselves nobly in the defense of their country, no one will doubt. That they will not all return is equally certain. Their demonstration of loyalty and service on the War front should be a constant reminder and inspiration to each of us to serve better and more willingly on the Home front. In guaranteeing the latter contribution Kansas lawyers at home will not be found wanting.

KANSAS LAWYERS IN MILITARY SERVICE

The Judicial Council has undertaken the preparation of a complete card index file of Kansas lawyers in the military or naval service of the United States, and we expect to keep this list up to date during the period of the present war. As a means of compiling this list, we first wrote to each clerk of the district court and to at least one lawyer in every county in the state, asking them to report: (a) lawyers in the military service; (b) lawyers reported to be in the military service where the report was not definitely confirmed, and (c) lawyers who were expected to be in the military service by July 1, 1942.

We received a gratifying response to this request, and have such reports from all counties. We then wrote personal letters to each lawyer reported under the (b) and (c) classifications, asking them to advise us definitely if and when they had entered the service. We also have received lists from the Bar Association of Kansas and from the Martindale-Hubbell Law Directory who have cooperated to the fullest extent.

From these sources we prepared a duplicate card index, alphabetically and by counties, each card containing all of the information which has been reported concerning the individual lawyer, together with the source of such reports. From this card index we then prepared a list of the lawyers from each judicial district who were reported to be actually in the service, and sent this list to the district judge for checking and verification before publication, and have received responses from most of the judges.

By this means we have attempted to make the following list as nearly accurate as possible. We have not included the name of any lawyer unless we have reports from at least two sources that he is in the service at this time. We realize that, although we have exercised the greatest care, there will be some errors in this list, particularly in the omission of the names of lawyers who have entered the service within the last few months, and of course, others will enter the service while this BULLETIN is being printed. For these reasons we expect to keep a continuous record and to print supplemental lists in each issue of the BULLETIN hereafter published during the war. We hope that every judge, lawyer and clerk will report to us from time to time the names of members of the bar in his county or district who have entered the service and are not included, as well as other corrections in this list.

The BULLETIN will be sent directly to any Kansas lawyer in the service if his military address is furnished.

We wish to thank all of those who have helped us compile this list, and will be very grateful to all who send in names in the future.

The following list contains the names of 254 members of the bar of Kansas who are now in the military or naval service of the United States. They are first listed alphabetically and then by counties.

"The lawyer is doing his part. Right at this time there are more than one hundred fifty Kansas lawyers in the armed forces and more are going into the service every day.*

"The lawyer has always done his part. There has never been a war in which American lawyers did not play a leading part. Many great soldiers have been great lawyers—and the lawyer has always played another great part in every war in our history. He has played the same part in times of peace. The lawyer has ever been the champion of liberty and the advocate of freedom."

—(From tableau presented by the Wichita Bar Association at the annual convention of the State Bar Association, May 23, 1942.)

* Now 254.

ALPHABETICAL LIST OF KANSAS LAWYERS IN THE MILITARY OR NAVAL SERVICE OF THE UNITED STATES

Waldo Aikins, Ozawkie
Bernhard W. Alden, Kansas City
E. Lael Alkire, Wichita
Vincent C. Allred, Leavenworth
Roger P. Almond, Wichita
Brainard L. Anderson, Kinsley

Everett Baker, Lyons
Guy W. Baker, Ozawkie
William A. Baker, Kansas City
Frank L. Barbee, Salina
Richard A. Barber, Lawrence
Charles Robinson Barr, Kincaid
Charles A. Bauer, Jr., Fredonia
Marion Beatty, Topeka
George F. Beezley, Girard
E. A. Benson, Jr., Kansas City
George S. Benson, Jr., El Dorado
Charles Eugene Beven, Muscotah
Walter I. Biddle, Leavenworth
L. Perry Bishop, Paola
Lloyd Cecil Bloomer, Osborne
Francis F. Blundon, Salina
Benjamin A. Boeh, Atchison
Charles A. Bowman, Kansas City
Robert G. Braden, Wichita
Charles W. Bradshaw, Topeka
John K. Brandon, McPherson
F. Quinton Brown, Topeka
Joseph Hayden Brown, Wichita

Washington H. Brown, Kansas City
Hugh E. Brownfield, Kansas City
Mack Bryant, Wichita
John E. Buehler, Atchison
William F. Butters, Topeka
Phillip Buzick, Topeka

W. N. Calkins, El Dorado
Max A. Campbell, Grinnell
Raymond H. Carr, Kansas City
David W. Carson, Kansas City
Clare C. Casey, Topeka
Charles M. Cassel, Pittsburg
Bert E. Church, Wellington
Charles C. Clark, Topeka
Francis M. Clark, Topeka
Raymond L. Cobean, Pratt
J. D. Conderman, Moran
Robert K. Corkhill, Topeka
Dale H. Corley, Garden City
Clyde P. Cowgill, Topeka
George Crane, Topeka
Martin C. Crown, Kansas City
John David Crouch, Everest
Lawrence Cunningham, Kansas City

Frank E. Daily, Jr., Coldwater
Homer Davis, Topeka
John K. Dear, Kansas City
Charles Lowman Decker, Oskaloosa

George Edward Denning, Elkhart
 Harry S. Deutch, Kansas City
 Max L. Dice, Johnson
 Harold E. Doherty, Topeka

Frank F. Eckdall, Emporia
 J. Raymond Eggleston, Medicine Lodge
 Fred Emery, Belleville
 Frank P. Eresch, Topeka
 W. Jay Esco, Wichita

Clem William Fairchild, Lawrence
 Alva L. Fenn, Hutchinson
 John Fontron, Jr., Hutchinson
 Leighton A. Fossey, Mound City
 John C. Foulks, Atchison
 Sidney L. Foulston, Wichita

Jo E. Gaitskill, Girard
 Wendell B. Garlinghouse, Topeka
 Virgil Garrett, Burlington
 John Gerety, Wichita
 Robert J. Gilliland, Hutchinson
 Champ A. Graham, Wellsville
 Karl K. Grotheer, Pittsburg

Neil Hambleton, De Soto
 Delmas Haney, Hays
 Justin D. Hannen, Burlington
 David Jerome Harmon, Columbus
 Innis D. Harris, Wichita
 Lew Hasty, Wichita
 C. E. Heilman, El Dorado
 Robert E. Hendrickson, Moline
 Charles E. Henshall, Osborne
 Donald Hickman, Arkansas City
 Donald Higby, Kansas City
 Everett S. Higgins, Wichita
 Morris D. Hildreth, Coffeyville
 Clyde Hill, Yates Center
 Elmer Hoge, Overland Park
 Clarence Holeman, Mullinville
 James R. Hoover, Olathe
 Carl H. Houseworth, Harveyville
 Earl R. Hubbard, Herington
 James C. Hubbard, Jr., Horton
 Maurice R. Hubbard, Olathe
 James A. Hudelson, Jr., Ottawa
 Robert H. Hudkins, Emporia
 Harold Hughes, Manhattan

Donald S. Hults, Lawrence
 Hal Hyler, Parsons

Howard N. Immell, Topeka
 Chester C. Ingels, Hiawatha
 Harold Irwin, Wichita

Roy H. Johnson, Topeka
 Maxwell L. Jones, Goodland

Wm. C. Karnazes, Kansas City
 John F. Kaster, Topeka
 William Roy Kirby, Coffeyville
 Wm. B. Kirkpatrick, Topeka

Paul A. Lamb, Caney
 Maurice Lampl, Wichita
 Daniel O. Lardner, Fort Scott
 Cyrus Leland, Troy
 Wilbur G. Leonard, Council Grove
 James S. Lester, Oskaloosa
 Sol Lindenbaum, El Dorado
 J. C. Linge, Topeka
 Donald C. Little, Kansas City
 Lyle Loomis, Topeka
 Wayne Daniel Loughbridge, Garnett
 Leon W. Lundblade, Beloit

Donald J. Magaw, Osborne
 Charles McCamish, Kansas City
 Charles F. McClintock, Wichita
 Ray McCombs, Ness City
 James Martin McDermott, Winfield
 V. M. McElroy, Greensburg
 Frank McFarland, Topeka
 Harold McGugin, Coffeyville
 Laurence McVey, Independence
 Samuel Mellinger, Emporia
 Robert Merrick, Topeka
 Conrad Miller, Kansas City
 Harry E. Miller, Hiawatha
 John C. Miller, Coffeyville
 Robert G. Miller, Pratt
 Wilton D. Miller, Belleville
 Leo W. Mills, Yates Center
 William M. Mills, Jr., Topeka
 R. Lee Montre, Topeka
 Robert Morton, Wichita
 Kenneth B. Moses, Lawrence

Robert I. Nicholson, Paola
Joe Nickell, Topeka

John F. O'Brien, Independence
Keefe O'Keefe, Leavenworth
Robert E. O'Neil, Axtell
Robert Kenneth Osborn, Stockton

Joseph L. Pierce, Pittsburg
James W. Porter, Topeka
James Postma, Lawrence
Samuel Kishler Prager, Fort Scott
Harlow Preston, Topeka
Leland J. Propp, Hutchinson
G. K. Purves, Jr., Wichita

Hugh Patrick Quinn, Salina

Ralph R. Rader, Howard
Charles C. Rankin, Lawrence
Charles E. Rauh, Hutchinson
William L. Rees, Topeka
Max W. Regier, Newton
Oscar Renn, Arkansas City
John J. Rhodes, Council Grove
Wilford R. Riegle, Emporia
Robert B. Ritchie, Wichita
Kurt Riesen, Wichita
Ralph A. Rodgers, Lincoln
Victor J. Rogers, Wichita
Charles Rooney, Topeka
V. J. Rosecrans, Winfield
John M. Rugh, Abilene
L. H. Ruppenthal, McPherson
Lucien B. Rutherford, Leavenworth

Keene Saxon, Topeka
Paul Schmidt, Wichita
Chas. S. Schnider, Kansas City
David H. Scott, Lawrence
James M. Scott, Kansas City
John Shamberg, Topeka
Douglas Sharp, Kansas City
Willis A. Shattuck, Cimarron
Warren Shaw, Topeka
Karl V. Shawver, Jr., Paola
J. R. Sheedy, Fredonia
Harold Dean Shrader, Holton
J. Logan Shuss, Parsons

Lawrence Martin Sigmund, Netawaka
Thomas Clyde Singer, Lawrence
Donald Burgess Simpson,
Medicine Lodge

Ernest B. Skinner, Junction City
Harrison Smith, Atchison
Herman W. Smith, Jr., Wichita
Wint Smith, Salina
James N. Snyder, Leavenworth
Claude Sowers, Wichita
Corwin C. Spencer, Oakley
James E. Sperling, Stafford
Harris Squire, Topeka
Maurice Stack, Topeka
George Stallwitz, Wichita
Arthur J. Stanley, Jr., Kansas City
Myron S. Steere, Pratt
Walter A. Steiger, Topeka
Frank Steinkirchner, Wichita
Paul W. Stephens, Neodesha
Russell L. Stephens, Kansas City
Edward Stevens, Topeka
John Frederick Stoskopf, Jr.,
Hoisington
Vernon A. Stroberg, Newton
Leo A. Swoboda, Kansas City

James H. Taggart, Wellington
Robert Y. Taliaferro, Jr., El Dorado
James S. Terrill, Syracuse
Wilbert F. Thompson, Topeka
William P. Thompson, McPherson
Arthur N. Turner, Topeka

Bertram Joseph Vance, Garden City
C. Leaman Vancura, Ellsworth
Ernest M. Vieux, Greensburg
Darrel Hedges Vinette, Howard

Cyrus Wade, Jr., Independence
D. Arthur Walker, Arkansas City
James W. Wallace, Mound City
Charles W. Ward, Peabody
Guy E. Ward, Belleville
William R. Ward, Wichita
Fred F. Wasinger, Hays
D. E. Watson, Salina
Harold A. Wayman, Coffeyville
Richard G. Weaver, Concordia

Vernon Webber, La Crosse
 Orlin A. Weede, (Johnson Co.)
 Kansas City, Mo.
 John C. Weeks, Topeka
 Abraham Weinlood, Hutchinson
 Richard C. Wells, Manhattan
 Walton K. Weltmer, Hiawatha
 William J. Wertz, Wichita
 Arthur B. White, Clay Center
 Paul L. Wilbert, Pittsburg
 Kenneth Wilke, Topeka

James A. Williams, Dodge City
 John M. Williams, Topeka
 Blake A. Williamson, Kansas City
 Frederick Woelzel, Lyons
 Earle N. Wright, Arkansas City

Ernest A. Yarnevich, Kansas City
 William Harold Young, Salina

Carl E. Ziegler, Coffeyville
 Eugene P. Zuspahn, Goodland

LIST BY COUNTIES OF KANSAS LAWYERS IN THE MILITARY OR NAVAL SERVICE OF THE UNITED STATES

ALLEN COUNTY

J. D. Conderman, Moran

ANDERSON COUNTY

Charles Robinson Barr, Kinkaid
 Wayne Daniel Loughridge, Garnett

ATCHISON COUNTY

Charles Eugene Beven, Muscotah
 Benjamin A. Boeh, Atchison
 John E. Buehler, Atchison
 John C. Foulks, Atchison
 Harrison Smith, Atchison

BARBER COUNTY

J. Raymond Eggleston,
 Medicine Lodge
 Donald Burgess Simpson,
 Medicine Lodge

BARTON COUNTY

John Frederick Stoskopf, Jr.,
 Hoisington

BOURBON COUNTY

Daniel O. Lardner, Fort Scott
 Samuel Kishler Prager, Fort Scott

BROWN COUNTY

John David Crouch, Everest
 James C. Hubbard, Jr., Horton
 Chester C. Ingels, Hiawatha
 Harry E. Miller, Hiawatha
 Walton K. Weltmer, Hiawatha

BUTLER COUNTY

George S. Benson, Jr., El Dorado
 W. N. Calkins, El Dorado
 C. E. Heilman, El Dorado
 Sol Lindenbaum, El Dorado
 Robert Y. Taliaferro, Jr., El Dorado

CHEROKEE COUNTY

David Jerome Harman, Columbus

CLAY COUNTY

Arthur B. White, Clay Center

CLOUD COUNTY

Richard G. Weaver, Concordia

COFFEY COUNTY

Virgil Garrett, Burlington
 Justin D. Hannen, Burlington

COMANCHE COUNTY

Frank E. Daily Jr., Coldwater

COWLEY COUNTY

Donald Hickman, Arkansas City
 James Martin McDermott, Winfield
 Oscar Renn, Arkansas City
 V. J. Rosecrans, Winfield
 D. Arthur Walker, Arkansas City
 Earle N. Wright, Arkansas City

CRAWFORD COUNTY

George F. Beezley, Girard
 Charles M. Cassel, Pittsburg

Jo E. Gaitskill, Girard
Karl K. Grotheer, Pittsburg
Joseph L. Pierce, Pittsburg
Paul L. Wilbert, Pittsburg

DICKINSON COUNTY

Earl R. Hubbard, Herington
John M. Rugh, Abilene

DONIPHAN COUNTY

Cyrus Leland, Troy

DOUGLAS COUNTY

Richard A. Barber, Lawrence
Clem William Fairchild, Lawrence
Donald S. Hults, Lawrence
Kenneth B. Moses, Lawrence
James Postma, Lawrence
Charles C. Rankin, Lawrence
David H. Scott, Lawrence
Thomas C. Singer, Lawrence

EDWARDS COUNTY

Brainard L. Anderson, Kinsley

ELK COUNTY

Robert E. Hendrickson, Moline
Ralph R. Rader, Howard
Darrel Hedges Vinette, Howard

ELLIS COUNTY

Delmas Haney, Hays
Fred F. Wasinger, Hays

ELLSWORTH COUNTY

C. Leaman Vancura, Ellsworth

FINNEY COUNTY

Dale H. Corley, Garden City
Bertram Joseph Vance, Garden City

FORD COUNTY

James A. Williams, Dodge City

FRANKLIN COUNTY

Champ A. Graham, Wellsville
James A. Hudelson, Jr., Ottawa

GEARY COUNTY

Ernest B. Skinner, Junction City

GOVE COUNTY

Max A. Campbell, Grinnell

GRAY COUNTY

Willis A. Shattuck, Cimarron

HAMILTON COUNTY

James S. Terrill, Syracuse

HARVEY COUNTY

Max W. Regier, Newton
Vernon A. Stroberg, Newton

JACKSON COUNTY

Harold Dean Shrader, Holton
Lawrence Martin Sigmund, Netawaka

JEFFERSON COUNTY

Waldo Aikins, Ozawkie
Guy W. Baker, Ozawkie
Chas. Lowman Decker, Oskaloosa
James S. Lester, Oskaloosa

JOHNSON COUNTY

Neil Hambleton, De Soto
Elmer Hoge, Overland Park
James R. Hoover, Olathe
Maurice R. Hubbard, Olathe
Orlin A. Weede, Kansas City, Mo.

KIOWA COUNTY

Clarence Holeman, Mullinville
V. M. McElroy, Greensburg
Ernest M. Vieux, Greensburg

LABETTE COUNTY

Hal Hyler, Parsons
J. Logan Shuss, Parsons

LEAVENWORTH COUNTY

Vincent C. Allred, Leavenworth
Walter I. Biddle, Leavenworth
Keefe O'Keefe, Leavenworth
Lucien B. Rutherford, Leavenworth
James N. Snyder, Leavenworth

LINCOLN COUNTY

Ralph A. Rodgers, Lincoln

LINN COUNTY

Leighton A. Fossey, Mound City
James W. Wallace, Mound City

LOGAN COUNTY

Corwin C. Spencer, Oakley

LYON COUNTY

Frank F. Eckdall, Emporia
Robert H. Hudkins, Emporia
Samuel Mellinger, Emporia
Wilford R. Riegle, Emporia

MARION COUNTY

Charles W. Ward, Peabody

MARSHALL COUNTY

Robert E. O'Neil, Axtell

MCIPHERSON COUNTY

John K. Brandon, McPherson
L. H. Ruppenthal, McPherson
William P. Thompson, McPherson

MIAMI COUNTY

L. Perry Bishop, Paola
Robert I. Nicholson, Paola
Karl V. Shawver, Jr., Paola

MITCHELL COUNTY

Leon W. Lundblade, Beloit

MONTGOMERY COUNTY

Morris D. Hildreth, Coffeyville
William Roy Kirby, Coffeyville
Paul A. Lamb, Caney
Harold McGugin, Coffeyville
Laurence McVey, Independence
John C. Miller, Coffeyville
John F. O'Brien, Independence
Cyrus Wade, Jr., Independence
Harold A. Wayman, Coffeyville
Carl E. Ziegler, Coffeyville

MORRIS COUNTY

Wilbur G. Leonard, Council Grove
John J. Rhodes, Council Grove

MORTON COUNTY

Geo. Edward Denning, Elkhart

NESS COUNTY

Ray McCombs, Ness City

OSBORNE COUNTY

Lloyd Cecil Bloomer, Osborne
Charles E. Henshall, Osborne
Donald J. Magaw, Osborne

PRATT COUNTY

Raymond L. Cobean, Pratt
Robert G. Miller, Pratt
Myron S. Steere, Pratt

RENO COUNTY

Alva L. Fenn, Hutchinson
John Fontron, Jr., Hutchinson
Robert J. Gilliland, Hutchinson
Leland J. Propp, Hutchinson
Charles E. Rauh, Hutchinson
Abraham Weinlood, Hutchinson

REPUBLIC COUNTY

Fred Emery, Belleville
Wilton D. Miller, Belleville
Guy E. Ward, Belleville

RICE COUNTY

Everett Baker, Lyons
Frederick Woelagel, Lyons

RILEY COUNTY

Harold Hughes, Manhattan
Richard C. Wells, Manhattan

ROOKS COUNTY

Robert Kenneth Osborn, Stockton

RUSH COUNTY

Vernon Webber, La Crosse

SALINE COUNTY

Frank L. Barbee, Salina
 Francis F. Blundon, Salina
 Hugh Patrick Quinn, Salina
 Wint Smith, Salina
 D. E. Watson, Salina
 William Harold Young, Salina

SEDGWICK COUNTY

E. Lael Alkire, Wichita
 Roger P. Almond, Wichita
 Robert G. Braden, Wichita
 Joseph Hayden Brown, Wichita
 Mack Bryant, Wichita
 W. Jay Esco, Wichita
 Sidney L. Foulston, Wichita
 John Gerety, Wichita
 Innis D. Harris, Wichita
 Lew Hasty, Wichita
 Everett S. Higgins, Wichita
 Harold Irwin, Wichita
 Maurice Lampl, Wichita
 Charles F. McClintock, Wichita
 Robert Morton, Wichita
 G. K. Purves, Jr., Wichita
 Kurt Riesen, Wichita
 Robert B. Ritchie, Wichita
 Victor J. Rogers, Wichita
 Paul Schmidt, Wichita
 Herman W. Smith, Jr., Wichita
 Claude Sowers, Wichita
 George Stallwitz, Wichita
 Frank Steinkirchner, Wichita
 William R. Ward, Wichita
 Wm. J. Wertz, Wichita

SHAWNEE COUNTY

Marion Beatty, Topeka
 Charles W. Bradshaw, Topeka
 F. Quinton Brown, Topeka
 William F. Butters, Topeka
 Phillip Buzick, Topeka
 Clare C. Casey, Topeka
 Charles C. Clark, Topeka
 Francis M. Clark, Topeka
 Robert K. Corkhill, Topeka
 Clyde P. Cowgill, Topeka

George Crane, Topeka *
 Homer Davis, Topeka
 Harold E. Doherty, Topeka
 Frank P. Eresch, Topeka
 Wendell B. Garlinghouse, Topeka
 Howard N. Immell, Topeka
 Roy H. Johnson, Topeka
 John F. Kaster, Topeka
 Wm. B. Kirkpatrick, Topeka
 J. C. Linge, Topeka
 Lyle Loomis, Topeka
 Frank McFarland, Topeka
 Robert Merrick, Topeka
 William M. Mills, Jr., Topeka
 R. Lee Montre, Topeka
 Joe Nickell, Topeka
 James W. Porter, Topeka
 Harold Preston, Topeka
 William L. Rees, Topeka
 Charles Rooney, Topeka
 Keene Saxon, Topeka
 John Shamberg, Topeka
 Warren Shaw, Topeka
 Harris Squire, Topeka
 Maurice Stack, Topeka
 Walter A. Steiger, Topeka
 Edward Stevens, Topeka
 Wilbert F. Thompson, Topeka
 Arthur N. Turner, Topeka
 John C. Weeks, Topeka
 Kenneth Wilke, Topeka
 John M. Williams, Topeka

SHERMAN COUNTY

Maxwell L. Jones, Goodland
 Eugene P. Zuspahn, Goodland

STAFFORD COUNTY

James E. Sperling, Stafford

STANTON COUNTY

Max L. Dice, Johnson

SUMNER COUNTY

Bert E. Church, Wellington
 James H. Taggart, Wellington

* George Crane missing in action at Bataan, P. I. (probably captured).

WABAUNSEE COUNTY

Carl H. Houseworth, Harveyville

WILSON COUNTY

Charles A. Bauer, Jr., Fredonia

J. R. Sheedy, Fredonia

Paul W. Stephens, Neodesha

WOODSON COUNTY

Clyde Hill, Yates Center

Leo W. Mills, Yates Center

WYANDOTTE COUNTY

Bernhard W. Alden, Kansas City

Wm. A. Baker, Kansas City

E. A. Benson, Jr., Kansas City

Charles A. Bowman, Kansas City

Washington H. Brown, Kansas City

Hugh E. Brownfield, Kansas City

Raymond H. Carr, Kansas City

David W. Carson, Kansas City

Martin C. Crown, Kansas City

Lawrence Cunningham, Kansas City

John K. Dear, Kansas City

Harry S. Deutch, Kansas City

Donald Higby, Kansas City

Wm. C. Karnazes, Kansas City

Donald C. Little, Kansas City

Charles McCamish, Kansas City

Conrad Miller, Kansas City

Chas. S. Schneider, Kansas City

James M. Scott, Kansas City

Douglas Sharp, Kansas City

Arthur J. Stanley, Jr., Kansas City

Russell L. Stephens, Kansas City

Leo A. Swoboda, Kansas City

Blake A. Williamson, Kansas City

Ernest A. Yarnevich, Kansas City

THE UNIFORM SIMULTANEOUS DEATH ACT

(Recommended by The Judicial Council for enactment)

AN ACT relating to the effect of apparently simultaneous deaths upon devolution and disposition of property, including proceeds of insurance.

Be it Enacted, etc.

SECTION 1. Where title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons concerned have died otherwise than simultaneously the property of each person shall be disposed of as if he had survived, except as otherwise provided in this chapter.

SEC. 2. Where two or more beneficiaries are designated to take successively or alternately by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive or alternate beneficiaries, and the portion allocable to each beneficiary shall be distributed as if he had survived all the other beneficiaries.

SEC. 3. Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other survived. Where more than two joint tenants have died and there is no sufficient evidence that they died otherwise than simultaneously the property so held shall be divided into as many equal shares as there were joint tenants and the share allocable to each shall be distributed as if he had survived all the others.

SEC. 4. Where the insured and the beneficiary in a policy or contract of life or endowment insurance or insurance against accident have died and there is

no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy or contract shall be payable as if the insured had survived the beneficiary.

Sec. 5. This chapter shall not apply to a will, living trust or deed wherein provision has been made for distribution different from the distribution under this chapter, or to a policy or contract of insurance wherein provision has been made for payment of its proceeds different from such payment under this chapter.

Sec. 6. This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

Sec. 7. If any of the provisions of this chapter or the application thereof to any persons or circumstances is held invalid such invalidity shall not effect other provisions or applications of the chapter which can be given effect, without the invalid provisions or application, and to this end the provisions of this chapter are declared severable.

Sec. 8. This chapter may be cited as the uniform simultaneous death law.

TAX FORECLOSURES—TITLE PROCEDURE UNDER THE 1941 ACT*

By FRANK S. HODGE, Hutchinson

The subject of tax foreclosures and title procedure under such is going to become increasingly important and such proceedings will be found more frequently on abstracts in the state because of the present wave of such suits and the fact that in the future all counties will operate under the new law passed in 1941, and all counties will henceforth have to conduct these suits every year. At the last session of the legislature an entirely new tax code was proposed and in a large part adopted. The part adopted is largely what we are to consider in this paper. Whereas, before 1941, tax foreclosures were possible only in those counties which had elected to come under G. S. 79-2324, now all counties are placed under the provisions of G. S. 1941 Supp. 79-2401 (a), a provision similar to section 79-2324, and whereas, tax foreclosures were formerly optional with the counties in which they were possible, they are now compulsory for all. The first suits will undoubtedly be the hardest, for the tax moratorium and the unwillingness of many county commissioners to order these have gotten our tax situation in a very bad shape. Many properties have taxes on them which are delinquent as much as twelve years or more. This accumulation of years means that many parties will be dead, gone and unknown and the first suits are going to be much more difficult than later suits. After the first suit is over the taxes may not become delinquent more than three years without a sale. The owners will be known, whether under disability or not or in military service and procedure will become much easier.

Tax foreclosures are both new and old. The first such statute was enacted in 1877. In 1901 it was amended and put in substantially the form it appears in G. S. 79-280. There are several changes in the 1941 revision, but much is

* Paper read at annual convention of the Bar Association of the State of Kansas, Section of Probate and Title work, Wichita, Kan., May 22, 1942.

unchanged and most of the decisions previously made are still law, and although several decisions have already been made under the 1941 act so that in many respects we have something to go by, there are still some points not as yet entirely clear.

In the first place, what property is eligible for foreclosure and sale? G. S. 1941 Supp. 79-2801 says, "in all cases in which real estate has been or shall be sold and bid in by the county at any delinquent tax sale and shall remain unredeemed for three years after sale." Thus there really are two conditions precedent to an action. In *Morris Co. Commissioners v. Cunningham*, 153 Kan. 340, the court so held under G. S. 79-2701, a similarly worded statute. Likewise in *Crawford Co. v. Radley*, 134 Kan. 704, failure to adopt the provisions of G. S. 79-2324 rendered sales in the county void and the judgment a nullity. As to the first condition, it seems clear that such actions can be brought wherever the county, either by reason of operating under G. S. 79-2324 or through failure to sell to bidders for any reason, has bid such property in at a delinquent tax sale.

As to the second condition, at present, the property must have been held by the county at least four years. Under G. S. 1941 Supp. 79-2809, no suit to foreclose can now be brought until after four years where the property was first bid off to the county in September, 1940, or any prior year. However, property bid off at the sale of September, 1941, and subsequent years will need to be held only three years under G. S. 1941 Supp. 79-2801.

It is of course clear that the county commissioners must order the county attorney to and he must bring such actions. Even though the language of the act is explicit, it has also been brought to the attention of the supreme court in the case of *Womer v. Aldrich* (newspaper account), a Sedgwick county case which held that county officials must prosecute such foreclosures under penalty of forfeiting office. (155 Kan. 446.)

G. S. 1941 Supp. 79-2801, which is identical up to the matter of the summons with G. S. 79-2801, sets out clearly the action can and should be brought against the owners, supposed owners, and all persons having or claiming to have any interest in the property, and it would seem to me that it would be better to put in too many defendants rather than too few, because all titles are good as against any parties to the suit. (G. S. 1941 Supp. 79-2804.)

The petition shall contain a description of the property, the amount of taxes, charges, penalties and interest, date of sale for delinquent taxes such as is fully set out in G. S. 1941 Supp. 79-2801. I see no need of itemizing the taxes by years and going into the detail that so many are going into especially since *Shawnee Co. Comm'rs v. Abbott*, 155 Kan. 154, which held that the statute does not require perfect precision of pleading as to amount, etc., but only as far as practicable. Nor do I see the need of refiguring the interest up to the date of the judgment. Such it seems to me is not practicable for it takes more time and expense than can possibly be saved. In over 1,400 pieces of property which we have sold in Reno county since 1939 only four have brought the amount against them or more. And since Reno county had held such a sale in 1933 its property lists were probably in better than average shape.

Summons shall thereupon issue as in any civil action. This is new. Going back to G. S. 79-2801, the statute required personal service if the defendants

were residents, prescribed an affidavit for publication service, three weeks publication and thirty days for answer. This gave rise to some litigation on whether there must be personal service if the defendant lived in the state and whether publication service could be had on the unknown heirs devisees, etc., of a defendant. These questions came up in *Sheehy v. Lemons*, 99 Kan. 283, and *Training School v. White*, 110 Kan. 498, where the court held that where a proper affidavit for service by publication was made it gave the court jurisdiction even though the defendant did live in the state or even in the county of the action, and the judgment was not void and subject to collateral attack; also, that publication service reached unknown heirs, devisees, etc. However, the question was never actually settled whether a direct attack would be good although the court in *Wyandotte County v. Kerr* held such an attack failed because they did not set out clearly a tender of all taxes, etc. Now procedure follows the code and affidavits and other procedure will follow the usual rules.

G. S. 1941 Supp. 79-2802 and General Statutes provides that as many defendants can be joined as are interested in the real estate described in the petition. It was held in *Douglas v. Leavenworth County*, 75 Kan. 6, that where an action is ordered the county attorney may proceed with one or more actions subject to the power of the trial court to consolidate where such may seem proper. And in *Whitney v. Morton County*, 73 Kan. 502, the court said there should be such a consolidation as to work no hardship on the defendants. Thus it appears any number of pieces of real estate may be included, but the matter is left largely up to the attorney, the only restriction being that there not be too few and thus increase costs disproportionately.

The most serious question, upon which there is no authority, arises as to how far you can combine lots, parcels and pieces of real estate together in the petition, journal entry and sale. Can those of one man be handled together—can the sheriff combine and sell two or more under any circumstances? There are no decisions upon this so far as I can determine. I have noticed that in some actions several lots have been in one cause of action—in some places several lots have been sold together. In our county the sheriff sold two or more lots together after he had failed to get bids separately and one attorney is now turning these down. After considering this problem I have come to the conclusion that each piece, tract or parcel, as carried on the county treasurer's roll, is the base and must be used throughout. In each place in the act they are referred to as lots, pieces or parcels. In G. S. 1941 Supp. 79-2302, the list for sale for delinquent taxes as prepared by the treasurer must be as it appears on the tax rolls. The county bids it in as such and owner may redeem as such. The petition must contain a description of each lot, tract or piece of real estate. The court is asked to determine and must adjudge taxes legally assessed and charged on such tracts, lots and pieces. (2801, 2803.) In 2802, although joinder is permitted, the court must determine the amount to tax to each particular tract, lot or piece and so on until the sale where the sheriff is required to offer each tract, lot or piece separately for sale. Everything is by tract, lot or piece, nothing by owner, so I conclude such separation is essential and everything carried through with the listing by the county treasurer as the base. Failure would undoubtedly permit a direct attack and casts a cloud which causes title examiners to have a ground to hold up the title.

In Reno county the proceeding was taken through separately, but the sheriff found that as a practical matter he could not get bids on one lot or piece but by combining two or more he could. This was done after each was offered separately. Those titles are now in doubt. The same common sense and liberal interpretation given the act so far would indicate that this would be sanctioned, but until it is settled it leaves a question and our sheriff now sells them separately or not at all. As to whether cured by confirmation and time, I shall leave to a later discussion.

G. S. 1941 Supp. 79-2803, provides the court shall decide what taxes have been legally assessed; shall charge the property with a first and prior lien and shall order sale of the same for payment of taxes, charges, interest and penalty and costs of the proceeding and sale, and then says the court shall equitably apportion the costs to each tract, lot and piece of real estate. Just what costs may be included seems no longer a question. In *Labette County Commissioners v. Abbey*, 151 Kan. 710, the question whether the county could include the cost of clerks to figure the taxes and abstracters to certify before filing the petition was raised, but the court refused to pass upon this because no motion to retax had been filed. If this appeared proper to include at least the abstract bills in the costs, as the most serious thing that could happen would be a motion to retax and have such cut out and we had done this since 1939. Now, in *Womer v. Aldrich* (according to an AP dispatch), it has been held that the expense of hiring abstracters is properly chargeable to the costs of the individual suits, but not the fees of special attorney hired to prosecute such actions. (155 Kan. 446.)

What right or rights of redemption now exist is another question. From the time of bidding in by the county for three years the right is absolute in the owner, etc., and this three years can be extended by partial redemption; that is, paying one or more years. [See 79-2401 (a) 1941 Supp.] But can redemption be made after three-year period and before date of suit by paying county treasurer? I am inclined to think so, even though language of section 79-2401 (a) G. S. 1941 Supp. seems otherwise, largely because of the language in *Comm'rs v. Wright*, 151 Kan. 325. Between the time of filing the suit and judgment what is the situation? The only way possible I can see is for the county's attorney to dismiss the action on payment of a fair share of the costs after which the owner, etc., could then pay to the county treasurer his taxes, whether part or all, depending on the agreement at the time or the conditions of the dismissal. This is based on the decision of the court in *Isenhardt v. Powers*, 135 Kan. 111, which held that the court has absolute control of its judgments during the term at which they are rendered; that the purchaser at the tax foreclosure sale is not, strictly speaking, an innocent purchaser nor a purchaser in good faith, but is one to whom the rule caveat emptor properly applies and that the county attorney had the right to have the court set aside sale and confirmation of property sold by mistake. The facts in this case are briefly that the county left a piece of property in a suit which he had promised to leave out. The property was sold, the sale confirmed, after which the county attorney filed a motion to set the sale and confirmation aside. Before the hearing on his motion the owner had paid all of the taxes due. The owner also asked for a writ of mandamus to compel the sheriff to issue him the deed, but this was overruled. Can the action

be dismissed if only one or more years are paid? I can see no reason why not. I would seem to be a matter entirely up to the county commissioners as to the terms of dropping the action. However, after judgment (up to time of sale), redemption can only be and must be made through the clerk of the district court or sheriff for full amount of judgment lien with interest and costs. (G. S. 1941 Supp. 79-2803, which is substantially same as G. S. 79-2803.) In *Comm'rs v. Wright*, 151 Kan. 325, the court held that owner could redeem even after confirmation but before delivery of deed by sheriff where he came in and offered to pay judgment, interest and costs. The court said, the purpose of the statute "was to compel the payment of the taxes legally assessed. Section 79-2803 provides for redemption before the day of sale. Under 2804 sale is to be confirmed. Where the owner appears and before delivery of the deed offers to pay the amount of judgment with interest, charges and costs it should be accepted and sale and confirmation set aside. The end and purpose of the law was to secure payment of the taxes, not to sell the man's home." While the court was construing G. S. 79-2803 and 79-2804 the same provisions appear substantially in G. S. 1941 Supp. 79-2803, although there are minor changes.

In the earlier case of *Wyandotte County v. Kerr*, 112 Kan. 463, the court was considerably more technical and refused to allow the owner to open up a judgment because his petition did not allege a tender of payment. In *Montgomery County v. Wilmot*, 114 Kan. 819, the court held that a tender made to the clerk before sale was sufficient where the clerk sent the owner to the county treasurer where the full amount was tendered. However, the court based a great part of its decision on the fact that the owner was a minor and the action to set aside the conveyance and redeem was filed within the statutory period. That provision, of course, is now repealed in the new law. In the earlier cases other matters were also involved. It is my conclusion that the court is adverse to seeing property taken from the owner and will construe the laws as liberally as possible in order to permit redemption. Even after the sale it appears that the owner may redeem upon proper application to the court and tender of the amount of taxes plus interest, penalties and costs. After the issuance of the deed there is a question. The only case where this has ever been permitted was the Wilmot case, and the question of the minor seems to have been the deciding factor there. It would seem that there would be no right after issuance of the deed, but in this respect it would be well to take into consideration G. S. 1941 Supp. 79-2804 (b), which is a new provision permitting six months to open and vacate the judgment and proceedings. This, I predict, will be construed simply as a six-months redemption period where proper action is commenced.

Skipping hurriedly over the procedure again, you will note a ten-day waiting period after judgment before the order of sale can be issued. Then a sale notice of four weeks, giving at least thirty days' notice of the time of sale. This is a change from the former procedure which required five publications and thirty days' notice as in ordinary sheriff's sales.

We then come to the question of what title the purchaser gets at the sale. G. S. 1941 Supp. 79-2804, provides the deed issued shall vest in the purchaser or grantee named, a fee-simple title as against all parties to the proceedings, and after confirmation the purchaser may have an execution, if necessary, giv-

ing him possession. This is why, as previously mentioned, you should put in any party who has even a remote interest.

In *Shawnee County Commissioners v. Abbott*, 155 Kan. 154, the court said, "When the property is sold and sale confirmed the purchaser is entitled to a deed conveying a clear title, good against all the world." Let us analyze here briefly just how far this goes.

First, it includes *all* taxes. In the above case the court said "to insure the grantee a clear title unencumbered by current tax liens the statute makes it the duty of the county treasurer to cancel all taxes charged against the real estate which has been sold and conveyed pursuant to the sale in foreclosure and confirmation thereof. Unpaid current taxes and interest thereon which accrued between the time the action was begun and the answer day shall have been included in the judgment in rem." In my opinion, however, this would not be true under foreclosures commenced and completed under the former procedure, for the reason that the provision that the sheriff at the direction of the county board might bid in property for the county for an amount equal to the entire lien cited by the court in reaching its decision, was not in the old code, nor was there any provision in G. S. 79-2805, which required the county treasurer to cancel all taxes charged against the real estate which has been sold and conveyed pursuant to the sale such as now appears. I mention this fact for the reason that I know that in many instances in proceedings before the new code and under the old, property has been sold subject to taxes which accrued subsequent to filing of the suit. Although this question will of course have to be decided by the courts, it would seem that the best authority would be that the old law was not as comprehensive as the new and that such procedure was proper. (See, also, Moore case discussed in next paragraph, where such procedure was not criticized although the question was not raised.) It even includes special improvement tax liens. In *Wyandotte County Commissioners v. Adams*, 155 Kan. 160, the court held that tax lien bills of Wyandotte county were fully extinguished by such a foreclosure action both as to past due payments and to future payments. While it is true that Wyandotte county has a special tax lien law, yet the principle would be the same everywhere and would naturally include all special improvements which are in the nature of a tax lien.

In the second place, rights of minors and incompetents are now completely barred out. In *State v. Wyandotte County Commissioners*, 154 Kan. 222, the court at page 229, pointed out that section 35 of the 1941 tax law expressly repeals G. S. 79-2402 giving minors and persons under disability the right to redeem. This was probably the worst defect in the old act, for if there were any minors or incompetents among the defendants they had a statutory time to come in and redeem. The court then said that such persons now must be represented and have their day in court. This is clear, of course, provided the person under disability is named and a guardian appointed for him, but what if they are unknown—would a general guardian *ad litem* for all unknown minors and incompetents bar them as well? I submit that such is the case for such persons who are now parties (see *Training School v. White*, 110 Kan. 498, where the court held that an action against unknown heirs, devisees, etc., included devisees who were named in the suit and made such devisees a party) and the answer of such a guardian *ad litem* in the form of a general denial would put the plaintiff to proof, which is all that could be done in the event

they were named. It would further have the effect of making anyone who took the title an innocent purchaser.

Third, in the event of irregularities in the procedure, confirmation will cure practically all defects except the want of jurisdiction of parties and subject matter. In *Moore v. Leavenworth County*, 151 Kan. 193, the facts were as follows: Taxes for the years 1927 to 1930 became delinquent and were redeemed. Taxes for the year 1931 became delinquent and the property was bid in by the county in September of 1932. It was unredeemed until October, 1935, when action was begun to foreclose and suit covered the years of 1927 to 1931, inclusive. Judgment was rendered May, 1936, and the property sold at sheriff's sale, July, 1936, and sale confirmed August 1, after which a deed was issued to the purchaser. The sheriff's notice of sale recited the property would be sold subject to taxes for 1931 to 1935, inclusive, although the 1931 taxes were the only ones forming the basis for the suit, and the county had not held this property the required length of time at the time the petition was filed nor when sold. The amount of the tax lien as determined by the judgment was not published in the sheriff's notice of sale as required. The owner filed a motion to vacate and set aside the judgment and was overruled, whereupon this action was begun. The court held that although the action was commenced too soon, the court had jurisdiction of the subject of the action and the mere fact that the plaintiff had a defense did not take this away. Such was a mere irregularity, and when the owners did not appeal from the decision in the former case that became final. It was held that although the sheriff's notice of sale did not contain any statement of the amount of the tax lien charged to each parcel, such omission was a mere irregularity and did not void the judgment. It is to be kept in mind, of course, that this was a collateral attack upon the judgment. In *Training School v. White*, 110 Kan. 498 a collateral attack was made upon a judgment because of service, and again it was held that while a direct attack might be avoided, the judgment was not void so as to be subject to a collateral attack. In *Wyandotte County v. Kerr*, 112 Kan. 463, which is actually the same as the preceding case, and where the owner took the matter up in a direct attack, even then the court was very technical by holding that the answer did not show a tender of the full amount of judgment. In both of these cases the facts are the same and the question involved was whether publication service might be had where the affidavit was incorrect in its statement that service of summons could not be made on the defendant in the county where the suit was brought. In *Crawford County v. Radley*, 134 Kan. 704, which was a direct attack, however, the court held that the entire matter of taxation was statutory and must be followed strictly, and the failure of a county to adopt the provisions of section 79-2324 rendered sales to the county void and a judgment based on such sales a mere nullity. However, in the early case of *Williams v. Kiowa County*, 74 Kan. 693, which was a direct attack, it was held that a judgment rendered on publication service can be opened up if it shows that one percent of the judgment consists of taxes intentionally levied for specific purposes not sanctioned by any provisions of law and interest on such. In the Kerr case the court held that the only defenses which can be set up in such action are, first, the property was not subject to taxation; second, taxes or part of them were illegal, and third, that the taxes had been paid. In *Commissioners of Labette Co. v. Abbey*, 151 Kan. 710, it

was held that where the sheriff's return shows persons served by residence service it gives the court jurisdiction even though the return may be false.

The question which is unanswered is whether such confirmation would cure a situation where the property is handled in groups or sold by the sheriff two or more at a time. However, if the court could determine the matters in the Moore case and others cited above as mere irregularities on collateral attack then most anything could be classed as an irregularity cured by confirmation except actual matters where the court did not obtain jurisdiction of the person or subject matter. The latter is out under the Moore case, leaving only jurisdiction as to person. It would seem on collateral attack that everything else is treated as an irregularity, and is cured. Where, however, the owner of the property makes a direct attack in the case in time, it appears an irregularity will be used to set the judgment or sale aside. These decisions and conclusions are based upon the old code, and the question remains as to whether the new act has changed this. The new act has put in a new provision, G. S. 1941 Supp. 79-2804 b, which provides for a six-months period from the date of confirmation in which legal or equitable actions or proceedings may be brought to open, vacate, modify or set aside any judgment, or any sale. Just how far this will go is a guess, and this would be mine: If within the six-months period a collateral attack is made after confirmation lack of jurisdiction will be about the only ground recognized; if before one of the three defenses set forth in the Radley case will have to be shown; if a direct attack is made by the owner all he will have to do is tender the judgment, costs, etc. After six months has passed there will be no ground of attack except want of jurisdiction of the court over the person.

In these actions there is no personal liability upon the owner. The action is purely in rem. This was decided early in the case of *Atchison County Commissioners v. Challis*, 65 Kan. 179. It is even true where there is a deficiency realized, even though the deficiency may have been caused in whole or part by the removal of improvements from the property while the county's lien for unpaid taxes assessed thereon. The only remedy for the county where the property is being wasted is by the appointment of a receiver under G. S. 1941 Supp. 79-2802a and to secure such appointment of a receiver the action must have first been filed for foreclosure. The act has been held to be an equitable proceeding under *State v. Wyandotte County Commissioners*, 154 Kan. 222, and in the same action was held constitutional.

If the action is filed and some person records a deed or other instrument such is of no effect as against the proceeding, and the county may rightfully proceed to sell for its tax lien (see *Atchison County v. Lips*, 69 Kan. 252). While having nothing to do with title procedure, the latter part of the act has given rise to some questions which were settled in *State v. Wyandotte County Commissioners*, where it was held that after the sale the county assessor or county clerk shall appraise all property bid in in the name of the county; that this is done so that the commissioners will have a basis to negotiate the sale. The county commissioners must hold the land for six months for the full amount of their bid, but thereafter they do not need to hold it indefinitely but may sell it for what in their judgment it is worth. Where the county elects to take the property for its own use it must pay the taxes just as any other purchaser, this being the full amount less the amount of taxes due the county,

but while not decided in this particular action we know that the question has arisen as to whether the county commissioners may bid in isolated pieces or bid it all in at a sale and whether at a sale they are permitted to post bids in order to raise other bidders up to a level which they feel is commensurate with the value of the property. While neither of these questions have been decided, the language of the statute seems to be clear that the county commissioners may instruct the sheriff to bid in any piece of property which they choose and that this applies to any lot or tract which they desire. It also seems plain that the commissioners cannot bid themselves, but merely instruct the sheriff to bid in the real estate where the highest bid on any tract or piece of real estate has not equaled the entire amount of the lien.

In conclusion, it seems to me the above items are the ones for the title examiner to keep in mind when title is made through such an action. And it would further seem that the title conveyed is good and the weaknesses of the old tax deed have been remedied as well as the flaws of the old tax foreclosure action.

DISCUSSION BY WARD MARTIN, TOPEKA

In considering title procedure under the Kansas Tax Foreclosure act of 1941, the writer has examined the tax foreclosure statutes and procedure of a number of states, including Ohio, Missouri, Florida, Illinois, Texas and Nebraska. Due to the lack of similarity in the statutes, this examination failed to produce any information which would be of much value in the construction and application of the Kansas act, but leads to the conclusion that the Kansas procedure was much more comprehensive and efficient than that of most of the other states.

In commenting upon the able paper presented by Mr. Hodge I would like to have you consider first the matter of necessary allegations concerning delinquent taxes which should be contained in the petition. Mr. Hodge reaches the conclusion that it would be unnecessary to itemize the taxes by years.

Section 79-2801, G. S. 1941 Supp. sets out the matters which are to be contained in the petition, and in this connection, among other things, it is stated that the petition shall allege the amount of taxes, charges, interest and penalties as far as practicable and also that the petition shall allege the date of sale for delinquent taxes. Most of the properties which are now being foreclosed became delinquent and were bid in by the county under the statutes in effect prior to the enactment of the present foreclosure law. These earlier statutes provide for the sale each year in September of those properties on which taxes had not been paid. It appears to me that in order for the court to acquire jurisdiction of the judicial foreclosure of tax delinquent property it is necessary that the property shall have been bid in by the county at delinquent tax sale and shall have remained unredeemed for a period of three and one-quarter years prior to the filing of the foreclosure proceeding. It is necessary under the expressed terms of the foreclosure statute to allege the date of the sale for delinquent taxes. Up until September, 1944, every property which is the subject of a tax foreclosure action will have been sold and bid in by the county at four or more separate delinquent tax sales. Under these circumstances it appears to me that the dates of each of the separate sales for de-

linquent taxes should be alleged and also the amount of the bids for respective years, with interest figured to date.

After September, 1944, all of the delinquent tax sales which will be subject to tax foreclosure will have been made under sections 79-2306 and 79-2319, G. S. 1941 Supp. These statutes, which are a part of the new tax code containing the 1941 tax foreclosure procedure, provide that the county treasurer shall bid off the tax delinquent real estate in the name of the county only for the first year that it is delinquent, and thereafter if subsequent taxes are not paid it is not to be sold again, but the subsequent taxes shall be endorsed on the original sale and constitute an additional lien. It would appear to me that after September, 1944, the petition in a tax foreclosure action would only need to allege the date of the first sale to the county and the amount bid at said sale with interest thereon and subsequent years taxes should be alleged in a gross amount without itemizing it by years.

Mr. Hodge has cited the case of *Shawnee County Commissioners v. Abbott*, 155 Kan. 154, as the basis for his conclusion that it would be unnecessary to itemize the taxes by years. Although the supreme court in its opinion stated that the statute only required the taxes, charges, interest and penalties to be set out as far as practicable, the question of itemizing delinquent taxes by years was not before the court. The pleadings involved in the Shawnee county case contained an itemized statement by years of the delinquent taxes against the property and the date of sale for each year's delinquent tax. The question considered and passed upon by the supreme court was whether or not taxes and interest accruing subsequent to the preparation and filing of the petition could be included in the judgment. This case involved the taxes for the current year which were unpaid but had not gone to tax sale. The case is clear authority for the fact that all taxes or interest thereon due at the time of the judgment must be included in the judgment or the same will be canceled thereby.

It is a fundamental rule of pleading that the plaintiff's petition shall state the facts and not conclusions and it would appear that the necessary facts to be alleged in a petition to foreclose tax liens would be the dates of various sales of such property for delinquent taxes and the amount of delinquent tax for which the property was bid in on said date with subsequent interest which has accrued upon such bid.

Another matter presented by Mr. Hodge which aroused considerable interest in my mind is the matter of the sale of each lot or piece of real estate separately. It is obvious that in a great many instances buildings will be located upon two or more lots or two or more lots will be used as one tract so that the sheriff would be unable to sell the lots separately.

The rule in Nebraska under the tax foreclosure procedure there appears to be that two or more tracts cannot be sold in gross. It should be mentioned that 77-2045, Neb. C. S. 1929, provides that no lot or parcel of land shall be sold for taxes due on any other lot or parcel of land. In *Taylor v. Evans*, Neb. 183 N. W. 89, a tax foreclosure sale was held to be void where separate tracts were sold in gross. It is significant to notice, however, that the tracts sold together by the sheriff in this case had been bid in under separate tax sale certificates and that the judgment of the court directed that the tracts be sold separately.

In the state of Texas, under the tax foreclosure procedure in operation, it has been held that an order of sale should direct the sale of each specific tract of land for only those taxes adjudged against it and where the piece of property was sold for the taxes due against a larger tract of which it was only a part, the sale was held to be void. (*Broocks v. State*, Texas, 41 S. W. 2d 714.) It should be noticed that art. 2378, Texas Civil Statutes, authorizes parties to the suit to request the sale of land in smaller tracts.

The decisions in Nebraska and Texas, holding that on tax foreclosure sales the property must be sold in separate parcels, should not be considered persuasive authority in this state in view of the special provisions contained in the statutes of these states which are not in our tax foreclosure act.

The tax foreclosure act of 1941 uses the same language concerning the real estate to be foreclosed throughout all the sections and provisions of the statute. This language describes the property as, "tract, lot or piece of real estate." This language is general in its terms and, certainly, taken alone, would not require the court or the sheriff to sell numerous contiguous lots belonging to the same owner in separate parcels. In the tax enactment there is no specific requirement for the sale of real estate one lot or parcel at a time. It would therefore appear that the practice in this matter should be controlled by the general rules which apply to judicial sales of real property. This matter was considered by the court in the case of *Town Company v. Lombard*, 57 Kan. 625, where the court said on page 627 of the opinion:

The second ground relied on is that a number of separate lots and parcels of land were sold together. It does not appear that any request was made by the plaintiff in error at the sale that the land be sold in separate tracts. The rule requiring a sale of disconnected pieces of land to be made separately is not an arbitrary one, but is enforced when necessary to protect the rights of the debtor, and to insure the best prices that can be obtained for the property. Circumstances may exist which render it altogether impracticable to realize reasonable prices from separate sales, and this case appears to be such an one. . . . The rule requiring each parcel to be offered separately is a wholesome one, and should be rigidly enforced when there is no valid reason for a sale of all en masse. But where there is a blanket encumbrance exceeding in amount the value of any separate parcel, each purchaser would be subjected to the danger of a sale of his tract to satisfy the prior encumbrance, and it might be a matter of much difficulty, if not of impossibility, to obtain an apportionment of the lien.

This matter was also before the supreme court in the case of *Nesbitt v. Chesbro*, 89 Kan. 863:

Syl. 5. MORTGAGE FORECLOSURE—*Separate Tracts of Land—Sold as One Tract—Judicial Discretion.* The method of disposing at judicial sale of a tract of land embracing many quarter-sections is within the judicial discretion of the trial court; and where by the terms of the decree two unpaid liens will remain on the entire tract after the sale, it is not an abuse of such discretion to order the tract sold as a whole instead of in parcels.

From the foregoing decisions of the Kansas supreme court it will be seen that the ordering of the sale of real estate en masse or in separate parcels rests in the sound judicial discretion of the trial court. Under these circumstances it should be clear that where no request has been made for the lots involved in tax foreclosure suits to be sold separately and the court has ordered the sale of a number of lots to pay the lien or judgment. It should be presumed that court exercised its discretion in favor of the prop-

erty en masse and that the fact that the property was sold en masse should be no ground for setting aside the sale.

As a practical matter it would seem that in tax foreclosure suits the unit of property, be it one lot or ten against which suit is brought for foreclosure, should be determined by the original delinquent tax sale. It would appear that the lien of the county is based upon such sale in much the same manner as though a mortgage had been executed to the county covering a particular number of lots, and the judgment should be given and the sale made upon the same property as was bid in at the tax sale.

In the matter of the redemption of real estate bid in by the county for delinquent taxes it is apparent that under the provisions of 79-2401a, G. S. 1941 Supp., partial redemption may be made before foreclosure by the owner paying the amount for which said premises were sold with accrued interest and costs or such person may make a partial redemption by paying one or more years beginning with the first year for which the real estate was carried on the tax sale book of the county. However, a question may arise under this section where properties which have been delinquent for four or more years are partially redeemed by the owner. Section 79-2401a, G. S. 1941 Supp., provides, among other things, that where partial redemption is made for one or more years, the time when a tax foreclosure sale can be commenced shall be extended by the number of years paid in the partial redemption. For example, many properties in the state are now delinquent for as much as ten years and yet under the strict wording of the statute an owner of property delinquent for that length of time could, by paying two years of his delinquent taxes, extend the time for bringing suit in foreclosure an additional two years even though his property might be subject to foreclosure for being more than four years delinquent the day after his partial redemption was made.

I agree with Mr. Hodge that after suit is brought and before judgment, no provisions are contained in the statute which authorize redemption of the property by the owner as a matter of right. However, under the decisions of the supreme court, and since the general purpose and intent of the act is to obtain the payment of delinquent taxes, property owners should be permitted and encouraged to redeem their property or make substantial partial redemptions thereof and obtain the dismissal of the action by the county attorney or attorney handling the suit.

Mr. Hodge in his able paper has advanced the theory that the six months' period in which actions may be brought to open or vacate foreclosure proceedings established by section 79-2804b, G. S. 1941 Supp., will become an additional period of redemption in which the owner may obtain reconveyance of his property and set aside the proceedings by tendering into court the amount of the lien with interest thereon. Mr. Hodge has directed your attention to a number of decisions of the supreme court which form the basis for the conclusion which he reaches in this regard. Such study as I have made of the tax foreclosure act of 1941 leads me to a different conclusion than that reached by Mr. Hodge. It is my opinion and judgment that the six months' period established under the act for vacating foreclosure proceedings will be strictly construed as a statute of limitation and that after sale and conveyance parties will not be permitted to set aside the foreclosure proceedings unless they comply with the code of civil procedure and show grounds amounting to a de-

fense to the action or fatally defective summons and notice in order to set aside the judgment and sale.

In this connection it is important to notice the particular changes which the 1941 act makes in the earlier tax foreclosure statutes. In section 79-2801, G. S. 1941 Supp., the method of summons by publication is made to conform to the code of civil procedure with the additional requirement that the publication notice contain a description of the real estate. In section 79-2803, G. S. 1941 Supp., the heirs, devisees, executors, administrators and assigns of the owner or holder of the record title are granted the right to redeem said property before the day of sale. In section 79-2804, G. S. 1941 Supp., a provision was added that after sale and confirmation an execution shall issue requiring the officer to deliver possession of the real estate to the party entitled thereto. Section 79-2804b, provides that any proceedings to open, vacate or modify the judgment or sale including all such actions brought on said grounds in the manner prescribed in the code of civil procedure must be commenced within six months after the date of the sale of the real estate. This entire section establishing a statute of limitation is new matter which first appears in the 1941 act. Section 79-2804c, G. S. 1941 Supp., provides that when any sale on foreclosure has been declared invalid or void, the purchaser under such sale may receive back the amount paid for the property with interest at six percent upon the delivery of a quitclaim deed to such person or persons as the county commissioners shall direct.

It is significant that each and all of the substantial changes in the tax foreclosure act indicate a clear intention to increase the authority and finality of the tax foreclosure proceedings. This fact is obviously devised to require diligence on the part of the owners of property in paying their taxes and redeeming their real estate before the same is sold at tax foreclosure sale. These changes, which appear in the 1941 act, also have the effect of inspiring confidence in such proceedings on the part of prospective purchasers with the result that more people will be interested in bidding at such sales and such sales will result in obtaining a greater amount of money to apply upon the delinquent taxes.

The supreme court of this state, in construing the 1941 tax foreclosure in the four cases which have already been before it, has uniformly construed the act so as to best carry into effect the purpose and intent of the legislature and to give strength and finality to proceedings brought under the act. It is upon this basis that I have reached the conclusion that the six months' period for vacating sales under section 79-2804b, G. S. 1941 Supp., will be construed by the court to be a statute of limitation and not an additional period for redemption such as applied under the earlier tax foreclosure statute.

There is one question which was not touched on by Mr. Hodge which I anticipate will arise under the operation of the 1941 tax foreclosure act concerning its effect upon the titles to property. This question arises under the provisions concerning the right of the county to bid upon the property, receive the deed and resell the same.

Section 79-2804, G. S. 1941 Supp., provides, among other things, that the sheriff may at the direction of the board of county commissioners bid in said real estate in the name of the county and further provides that if the county shall purchase more than one tract, lot or piece of real estate the same may

be included in, one deed. Section 79-2804f, G. S. 1941 Supp., provides that real estate acquired by the county under the provisions of 79-2804 shall be sold by the board of county commissioners at private or public sale for the amount of the tax lien and costs with interest at six percent and that if at the end of six months after the acquiring of title by the county, any of said real estate remains unsold the county commissioners may reduce the price and sell the same for the market value thereof. This section also provides that all real estate sold by the county shall be conveyed by good and sufficient deed by the county clerk upon a written order from the board of county commissioners.

In considering the sections of the statute above referred to it will be necessary to also consider the extent of the powers or authority of the county and the board of county commissioners. Section 19-101, G. S. 1935, provides that any organized county within this state shall be a body corporate and politic and as such shall be empowered for the following purpose. . . . Second, to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law; Third, to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants; . . . Section 19-102, G. S. 1935, provides as follows: Any real or personal estate heretofore or which may be hereafter conveyed to any county shall be deemed property of such county. Section 19-211, G. S. 1935, provides in substance that the board of county commissioners of any county shall not sell property belonging to the county of the value of over \$500 and less than \$5,000 unless it is sold by the unanimous vote of such commissioners after twenty days' notice in a newspaper of general circulation, and that no property of the value of more than \$5,000 shall be sold until the sale has been submitted to a vote of the electors and then such sale shall be made after publication to the highest bidder.

Section 79-2804f, G. S. 1941 Supp., was considered by the supreme court in the recent case of *State v. Wyandotte County Commissioners*, 154 Kan. 222, 226, in which case it was contended that the provisions thereof were conflicting and ambiguous and on that account the tax foreclosure act was invalid. The court upheld the provisions of this section as being sufficiently clear, that the meaning thereof and duties imposed thereby could be ascertained, but did not consider the matter of any conflicts which might exist between the terms of this section and prior statutes.

There have been no decisions of the supreme court of Kansas which cast any light upon the conflict which exists between the duties imposed upon and the powers granted to the county commissioners by the tax foreclosure act of 1941 and the restrictions of the powers of such commissioners under the earlier statutes. However, section 79-2805, G. S. 1941 Supp., specifically provides that the proceedings authorized under the tax foreclosure act shall be for the benefit of the state of Kansas, any city, township, school district or any taxing unit interested in such taxes to be recovered, and further provides for a division and distribution of the proceeds of the sale or resale of the property. It would appear from the general intent and purpose of the act and from the expressed provisions of Section 79-2805, G. S. 1941 Supp., that a county is not the owner of property which is deeded to it under the tax foreclosure act, but holds the same as trustee of an express trust for the benefit

of itself and the other taxing subdivisions. The writer submits that when this question arises it would appear that while the county commissioners are acting as trustees, in holding property acquired under tax foreclosure proceedings, and not as owners thereof, property sold in accordance with the provisions of the tax foreclosure act of 1941 should not be subject to the restrictions imposed by the provisions of Section 19-211, G. S. 1935.

The trust theory herein advanced finds some support in the tax foreclosure procedure of Nebraska. In the tax foreclosure case of *City of McCook v. Johnson*, Neb. 281 N. W. 69, the court said: "A city purchasing and foreclosing a tax sale certificate on realty did so as trustee of an express trust for the use and benefit of the state and all other governmental subdivision entitled to participate in the distribution of the proceeds."

I have enjoyed the opportunity of discussing before the association the able paper on the tax foreclosure act of 1941 presented by Mr. Frank Hodge. I regret that so large a part of my discussion is pure curbstone law without the citation of authorities to support it. I think it is apparent from the matters presented this morning that there are many questions affecting the title to real estate under the tax foreclosure procedure which are yet to be decided. In conclusion may I say that I hope the courts and title examiners will agree with the interpretations herein expressed.

DISCUSSION BY L. L. MORGAN, HUGOTON

Although I have not been assigned any particular part of Mr. Hodge's paper to comment upon I have chosen the question he raises as to how far you can combine lots, parcels and pieces of real estate together in the petition, journal entry and sale.

Mr. Hodge has pointed out that this point has not been settled by the supreme court, and to make this point more difficult for title examiners generally and for county attorneys in counties with the same problems as Stevens county, I am wondering what the result would be when applied to tax sale foreclosure suits of mineral interests. Sec. 79-420 of the General Statutes provides,

"That where the fee to the surface of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right or title to any minerals therein is in another or in others, the right to such minerals shall be valued and listed separately from the fee of said land, in separate entries and descriptions, and such land itself and said right to the minerals therein shall be separately taxed to the owners thereof respectively. The register of deeds shall furnish to the county clerk, who shall furnish on the first day of March each year to each assessor where such mineral reserves exist and are a matter of record, a certified description of all such reserves: *Provided*, that when such reserves or leases are not recorded within ninety days after execution, they shall become void if not listed for taxation."

In order to comply with this section of the statutes and by the order and request of the attorney general, made during the early thirties, I presume all counties listed and taxed separated mineral interests, however, at least one county continued this practice for one year only after deciding that the revenue obtained did not justify the work involved.

Several counties listed or attempted to list separately for taxation all subdivisions of mineral interests, under a particular tract of land, for example: A, the fee owner of all the NE $\frac{1}{4}$, sold to B an undivided $\frac{1}{2}$ interest in the oil,

gas and other minerals in or under or that may be produced from said land. B in turn conveyed an undivided 1/160 interest to C and an undivided 1/2 interest to D and so on. Some tracts have over one hundred such divisions and in some cases conveyances were made by B of fractional parts as small as an undivided 1/2560 interest, and in each instance the county attempted to assess and tax each fractional interest separately. Of course the transactions conveying such small interests were made outside of the state of Kansas. Some of these interests were from time to time, and sometimes within the same year, subdivided and it is almost impossible for the county officers to keep the same straight on the tax roll. On some tracts some of the owners pay the taxes charged separately against them and the balance of the owners of said undivided interests do not, and they become subject to sale for taxes.

Under Mr. Hodge's interpretation of section 79-2302, G. S. 1941 Supp., these small interests would each have to be sold separately, and it might take a full day to sell the mineral interests under one quarter section of land; and I believe Mr. Hodge is correct in his interpretation.

As a practical matter I believe that in these instances all the minerals under one tract of land, and separated from the surface, should be sold together and then trust and hope that the confirmation of the sale would cure the defects as to collateral attack, and with the aid of father time maybe an attorney examining for the purposes of an oil and gas lease would pass the title to such mineral interests acquired by a sheriff's deed.

In order to start an argument and to educate myself I am advocating that the counties tax these subdivided mineral interests as a whole under each tract of land, as tenants in common, as provided by the real estate tax laws, although I have been unable to get much assistance to support this theory from the indirect inferences pertaining to this matter as contained in the supreme court decisions, and by a strict interpretation of section 79-420 of the statutes; however, as yet I believe there are no decisions prohibiting such a practice.

The only light shed upon this point seems to be in the case of *Shaffer v. Kansas Farmers Union Royalty Company*, 146 Kan. 84, from which the following paragraph is copied, which does not seem to help my theory, to wit:

"Appellees argue the statute should not apply because they have not all the mineral rights, but a fractional part of them only, and point out that our statute for the assessment of real property does not assess separately the interest of cotenants. While this is true as to real property generally, we see no legal reason why it could not be otherwise. The statute in question provided for listing and assessing the right or title to any mineral. We think this clearly authorizes the assessment of a fractional interest in the mineral."

This case authorizes the separate assessment of fractional mineral interests, but does not expressly prohibit an assessment as a unit based on the undivided mineral interest first severed from the fee title.

That part of section 79-420, General Statutes, which says—"Where . . . the right or title to any minerals therein is in another or in others, the right to such minerals shall be valued and listed separately from the fee of said land, in separate entries and description, and such land itself and said right to the minerals therein shall be separately taxed to the owners thereof respectively," seems to infer that each subdivision or resale of mineral interests should be

listed and taxed separately, and the clause: "Provided, That when such reserves or leases are not recorded within 90 days after execution, they shall become void if not listed for taxation," adds strength to such inference.

In support of my contention numerous Kansas cases, including *Mining Company v. Crawford County*, 71 Kan. 276, and *Shaffer v. Kansas Farmers Union Royalty Company*, 146 Kan. 84, have stated the principal that the grantee in a mineral conveyance becomes the owner of all or the stated portion of the oil and gas in the land, and our legislature has recognized that such an ownership may be valuable and is property distinct from the remainder of the land, and has provided for its taxation separate and apart from the remaining portion of the land.

It seems that the first sale, or division of ownership, and the listing of said conveyance for taxation, creates the taxable value of said minerals, as recognized by the separation, and that a redivision or subdivision adds nothing to that value and would not neglect taxing that property referred to by the court as "property distinct from the remainder of the land."

I do not believe the Kansas supreme court has applied the 90-day recording or listing for taxation clause to a subdivision of minerals.

The case of *Fry v. Dewees*, 151 Kan. 488, and followed by *Drake v. Drake*, 153 Kan. 56, denied partition of minerals as against the surface, but inferentially recognizes that mineral interests, and ownership thereof (where the surface was not involved) might be partitioned, and thus the owners of the minerals would be tenants in common.

In the case of *Mining Company v. Crawford County*, 71 Kan. 276, the court stated,

"The act in question having been passed as supplemental to the general tax law it is a part thereof, and if wanting in provisions for its enforcement, such provisions may be found in the general tax law of the state."

The owners of various undivided interests in the surface of land are cotenants and it logically follows that the owners of various undivided subsurface or mineral rights are likewise cotenants or tenants in common, consequently where the surface of land is taxed as a unit regardless of its undivided ownership it naturally follows that the undivided ownership of minerals should also be taxed as a unit, and each co-owner of such mineral interests should and would have the remedy of contribution for taxes paid on another co-owner's interest. It is frequently observed that logic is of minor importance to the legislature, and a valid law must be enforced regardless of its lack of reason or its departure from ordinarily accepted rules, and if our supreme court says the legislature requires, in all cases, a separate assessment of fractional mineral interests, then some work should be done by our lawmakers.

These remarks would probably be more appropriate in the county attorney's division, however, since available oil and gas leases in Stevens county are becoming scarce, and we have pending such a foreclosure action, I am anticipating that some of these questions will be submitted to me for my opinion.

THE COMPLEXITIES IN PREPARING A SIMPLE WILL*

By W. M. BEALL, Clay Center

To the lawyer, there is, in the title of the subject assigned to me by the Committee on Organization of Sections of the State Bar Association an apparent contradiction, for, if a will is truly simple, it is not complex. And the converse is true. A complex will is certainly not simple. But in considering this apparent contradiction, we must approach it from the standpoint of the layman. A layman, in planning his will, may embody therein provisions which to him appear perfectly simple; but, when considered by the lawyer, they may appear very complicated. When understood from this viewpoint, all inconsistencies, shall we say, disappear.

When a client asks me to draw a simple will, there instantly arises in my mind a lurking suspicion that the word "simple" has some relation to the word "fee." Not, however, "fee simple"—just simply "fee." You must understand that until you actually agree on the fee to be charged, you are still dealing at arm's length. But that is not true of all clients—far from it. Most of them simply do not have an appreciation of the legal implications involved in many provisions which they consider perfectly simple.

Of course, the best example of a simple will is where one gives his property to another, absolutely and forever, without any strings whatever tied to it. But, of course, here we are not dealing with a will so simple as that. As an example, the committee asks that we consider the kind of will to be drawn when the client wants his property to go to his wife for life, with remainder to his children absolutely, provided, however, that the children should not be able to sell any of the property until they have reached the age of thirty years. This example presents the problem of the validity of restraints on alienation of property, and it is with this idea in mind that I have prepared this paper.

Many persons, especially widows—what a "stale, flat and unprofitable" world, especially unprofitable, this would be without them—in disposing of their property oftentimes take rather a fiendish delight, it seems to me, in inventing or conjuring up provisions in wills which offend against all the laws of wills and property. "Why is this so?" you may ask. Frankly, I do not know. That is primarily a problem for the psychologist. But I have an idea women, generally, value *things* more than men do. They have more pride of ownership and possession. Their attachment to certain tangible things very often ripens into that intangible but very real thing which the law writers and judges sometimes refer to as *pretium affectionis*, and it apparently makes no difference as to the mode of acquisition. It is the same whether they earn or inherit it. So when I see a tottering old lady, a widow, accompanied, perhaps, by a maiden daughter, coming into my office for the purpose of making a will, I have more or less of a sinking feeling. In such a case, after she has gone over all the provisions, restrictions, conditions, contingencies and limitations of which her mind is capable of inventing, you scratch your head and inquire meekly whether she is sure she has mentioned all of the things that

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she really had in mind. After she has assured you that she has, then it is your turn. You must summon to your aid all the tact, patience, diplomacy, suavity, persuasion and resourcefulness that you possess. For you will surely need it all to cope with the situation. Some way or other, she has gotten the idea that after her death her dead hand should control the descent of *her* things, from generation to generation, world without end. So you must carefully and tactfully explain to her that many of the provisions of her proposed will are against the law and contrary to public policy and that she will have to modify and simplify them greatly to meet the requirements of law. After you have done that and have finally persuaded her to make a will that will stand the scrutiny of the courts and the microscopic inspection of meticulous lawyers for disinherited relatives who think they are entitled to her bounty, then you may feel with pardonable pride that you have accomplished something really worth while. And there are obvious compensations for the lawyer who acts for the discerning and intelligent client under such circumstances. But here may I sound a note of warning. In your persuading and importuning, please be sure that you do not invade the sphere of undue influence, as defined by *Ginter v. Ginter*, 79 Kan. 721, and that you do not substitute your will and ideas for those of your client. There is a twilight zone, you must remember, beyond which you must not go. If you stop some place short of actual undue influence, the will will meet the test; otherwise not.

But, seriously, if we leave the field of glittering generalities in which we have thus far found ourselves, as we must if this discussion is to be of any value, and enter that of concrete example, it may safely be said that, generally speaking, the reasoned authority is in favor of the view that a clause in a will, or deed for that matter, in restraint of alienation for a definite period of years is void. This is based upon the salutary rule that the chief incident of ownership of property is the right of alienation. Many wills contain simple restraints against alienation for a definite period of years without assigning any reasons for them. Probably most of them, however, state the reasons. Whether expressed or not, the controlling motive back of all such restrictions is the solicitude that the testator has for the well being of his beneficiary, such as the anxiety that a father may have for his weak and improvident son; or a mother for her daughter who, by reason of infirmities, is unable to wage life's battles. He wants to place the property he gives in his will beyond the reach of creditors. He rightly reasons that he is under no obligation to pay with his property the debts of his beneficiary. But any attempt to make the interest of the beneficiary inalienable or to withdraw it from the claims of creditors is void as being repugnant to the estate given. Ch. J. Ames, in *Tillinghast v. Bradford* (1858), 5 R. I. 205, aptly stated the reason for the rule in this language:

"Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit should be also amenable to the demands of justice."

The mere proviso that the interest of the beneficiary shall not be liable for his debts is void for the reason that "the continued enjoyment of property is incompatible with its nonliability for his debts; he cannot enjoy his property while holding off his creditors." (*Lynch v. Lynch*, 161 S. S. 170, 159 S. E. 26, 80 A. L. R. 997.)

Courts generally are very zealous in carrying out the intention of the testator once that intention is ascertained and it does not violate positive rules of law. We have seen that simple restraints do violate these rules. How then may a testator fix his will so that the property he gives his beneficiary may be safely beyond the reach of creditors? Simple enough. All that he has to do is to insert a provision in his will for cesser or forfeiture or right of re-entry or gift over or provide for the appointment of a trustee having active duties to perform, as a bar or penalty, upon the attempt of any creditor to subject the property to the payment of his debts or the attempt of the beneficiary to make a voluntary disposition thereof. If such attempt should be made, the interest of the beneficiary thereupon ends and the title would go to another, as the will may direct.

The first Kansas case, to my way of thinking, that framed any positive and definite rule on the subject is that of *Wright v. Jenks*, 124 Kan. 604. However, the rule is discussed in *Sherman v. Havens*, 94 Kan. 654, hereinafter cited, but what was there said was dicta. In that case a testatrix, after devising a life estate in land to her husband, in substance gave the remainder to her two children "during their natural lives and to their children of their bodies after them, they not having the right to sell, encumber or dispose of the same." No effective bar to enforce this clause was provided. During the life of the life tenant, one of the children quitclaimed his interest in the land to Jenks. Some years after the death of the life tenant, such child who conveyed to Jenks brought suit for the possession of the land and, in support of his action, made the claim, among others not here material, that the quitclaim deed was void as being in violation of the restriction against sale, contained in the will. The court, in considering the matter, said, commencing on page 609 of the opinion:

"We have referred above to the power of a grantor or testator to place reasonable restriction for limited periods upon the right of his grantee or devisee to alienate the property granted or devised. But a mere admonitory gesture in a deed or will is insufficient to do so. (Citation of authorities.) To make such restriction effective some practical bar to a breach of such restriction must appear, *e. g.*, by the intervention of trustees having active duties to discharge during the restrictive period; by provision for reentry or alternative grant or devise over for breach of conditions prescribed in the instrument itself. (Citation of authorities.)"

In *Hinshaw v. Wright*, 124 Kan. 792, the testator, briefly stated, devised to his four children specific tracts of real estate and by a subsequent paragraph of his will stated the devises were upon the express condition the same—

"shall not be subject to attachment, execution, garnishment or any legal process in favor of any creditor of such devisee or legatee . . . and if any creditor shall attempt . . . to subject my bequests or devises . . . to the payment of any of the debts or obligations of the said devisee or legatee, and the court shall finally hold that such devise or bequest is subject to the payment of debts of a devisee or legatee, it is my will that the portion of the property which I have devised or bequeathed to any such devisee or legatee shall immediately become a part of the residue of my estate and such devise and bequest shall immediately lapse and end."

The testator made provision for a trust. Hinshaw undertook to appropriate the share of one son for the payment of a debt. He prevailed. On appeal, Hinshaw, the creditor, contended that the devise was in fee simple and that the provision against alienation was contrary to law, against public policy and void. The court first considered whether the restraint offended against any

rule of law or public policy and held that it did not. The court then considered the question of an effective bar or penalty which would terminate the devised estate in the event of breach of the restrictions. Following *Wright v. Jenks*, supra, it was held that such property was not subject to the payment of Hinshaw's note. There was, as we have seen, an effective bar or penalty for breach of the conditions.

The case of *Somers v. O'Brien*, 129 Kan. 24, involved a deed. As far as I can discover, however, such restrictive provisions against alienability in both deeds and wills stand on the same footing in Kansas. In the deed in that case, which in effect conveyed an estate tail, there was a provision that the land should "not be subject to alienation by her (grantee) nor liable for her debts or those of her husband, either on execution, attachment or otherwise." Notwithstanding such restriction she conveyed. There was no provision of forfeiture or cesser in the event of breach of such restriction. The court held that the provision against alienation was void.

A more recent case is that of *Guarantee Title & Trust Co. v. Siedhoff*, 144 Kan. 13. There a testator gave to his widow a life estate in his real estate, and to his children successive life estates in particular tracts thereof, and by a later clause of his will provided:

"Until the termination of the life estates herein devised, no person shall have any right to sell, mortgage or otherwise dispose of any interest in said real estate (except leasing as aforesaid), nor shall the same be subject to the debts of said devisee by execution, garnishment, attachment or other process, provided. . . ."

No provision for forfeiture, limitation over or other enforceable consequence for breach of such restriction was made. It was held the attempted restriction on alienation was void. The court, after reviewing the foregoing cases, summarized the law in question, as it exists in Kansas, in this language:

"Other cases from Kansas cited in the quotations above made, and in the opinions referred to, might be discussed, but we deem it unnecessary. The effect of all of them is that a provision in a devise, either of a fee-simple title or a life estate, that it shall not be subject to alienation, or shall not be liable for the debts of the devisee, nor subject to be seized, attached or sold for his debts, is ineffectual and void where there is no limitation over nor provision for forfeiture in event of violation of the condition. Mere admonition is not sufficient. To make the restriction effective there must be a practical bar to a breach of the restriction as above indicated." (p. 18.)

By the ninth paragraph in the will involved in *Bank of Powhattan v. Rooney*, 146 Kan. 559, the testator, after devising a life interest in certain lands to one of his sons, made the following interesting provision:

"Ninth: It is my will that any of the beneficiaries under this will shall have the privilege of selling their interest in lands bequeathed to them to any other beneficiary at any time, but shall not sell to an outsider until three (3) years after my death."

A judgment creditor of said son, within three years after the death of the testator, levied upon his interest in said land. Against the objection, among others, that such creditor could not sell the interest of such beneficiary within such restricted period, the court held that such restriction was a mere nullity, because, in accord with *Wright v. Jenks*, supra, there was no practical bar to the breach of the restriction.

The question was also raised in that case as to whether the fact that the restriction on alienation was limited so that the land might have been sold to the other devisees rendered it valid. The court, however, held that this made no difference and that such provision was void.

The last expression of our supreme court on this proposition is found in the case of *Lewis v. McConchie*, 151 Kan. 778. In that case, the testatrix in her will gave all of her earthly possessions to her four children. This devise was followed by the statement "I wish said property or real estate to be held in common as long as my children live . . . and said real estate" shall "be kept together and after the present encumbrance is canceled no other mortgage shall ever be put on real estate again." The court said these particular phrases merely expressed the hope and expectation the children would be able to pay the mortgage then encumbering the land. There was nothing imperative about them, because there were no alternative consequences to flow from the inability or failure of the children to carry them out.

Generally speaking, the above cases, as well as authorities cited therein, dealt with either fee simple or fee tail legal estates. In *Guarantee Title & Trust Co. v. Siedhoff* and *Bank of Powhattan v. Rooney*, supra, however, life estates were involved; and, as we have seen, the court held that the same rules relative to restrictions on the right to alienate estates in fee simple applied also to life estates.

With respect to the rule applicable to equitable estates, I desire to refer to *Sherman v. Havens*, 94 Kan. 654. The question involved in that case was whether the following provision in the will created a spendthrift trust, to wit:

"To my brother, Arthur B. Havens, should he survive me, an annuity of one thousand dollars, and I direct my said executor-trustees to pay him two hundred and fifty dollars quarterly in advance from my death until his; but should he pre-decease me, and in any event after his death, such annuity fund to be added to the trust estate hereinafter created for my said daughter Elizabeth and her issue."

When properly construed, the court held that it did not create a spendthrift trust in favor of the brother. That case is the first one in Kansas dealing with this question. It will be noticed, too, that there was a gift over of the estate to the daughter. The court, after quoting from various authorities, adopted the rule followed by the majority of American courts on this question. On page 658, the court said:

"It cannot be doubted that by the great weight of authority in this country it is settled that the founder of such a trust may secure the enjoyment of it to the objects of his bounty by providing that it shall not be alienable by them or become subject to be taken by their creditors, and that the testator's intention in this respect when clearly expressed by him will be carried out."

The chief difference, it appears, between restraints on alienation of legal estates as distinguished from equitable estates is that no provision for cesser, forfeiture, right of reëntury or gift over is necessary in the case of spendthrift trusts. This is because a creditor of the donee has no right to look to the property of another man for the payment of his debts. The title to the property is in the trustee. The beneficiary or donee has the *use* but not the absolute *title*.

Another case of interest is that of *Pond v. Harrison*, 96 Kan. 542. There the owner of a quarter section of land devised it to trustees to be handled in their

discretion, the net income to be devoted to the support of his son, but to be exempt from his control and seizure for his debts. The son lived in the dwelling house on the property, which was nearly destroyed by fire. He rebuilt it from funds received from an insurance policy, but failed to complete payment for the lumber. The court, in discussing the provision in the will, the substance of which is given, held that it created a spendthrift trust and that the lumber dealer could not recover.

In creating a spendthrift trust, is the testator required definitely to state that the interest of the beneficiary shall be beyond the reach of creditors? That question was involved in *Everitt v. Haskins*, 102 Kan. 546. The answer was that no such declaration is necessary. It is sufficient if the intention can be clearly ascertained from a reading of the whole will. Neither is it necessary that the cestui que trust be denominated as spendthrift nor that testator give his reasons for creating the trust.

From the foregoing, subject, however, to the general limitations of the rule against perpetuities, the law in Kansas on this question, I think, may be rather definitely summarized as follows:

- a. Restraints on both voluntary and involuntary alienation of property are invalid unless there is some enforceable consequence for the breach of the restriction.
- b. The rule applies to legal estates in fee simple and life estates.
- c. Such restraints without some penalty attached to them for breach thereof are but "mere admonitory gestures."
- d. Restraints on alienation of equitable estates, commonly known as spendthrift trusts, are valid without any provision of forfeiture or cesser upon breach thereof; provided the trustee has active duties to discharge.

Somewhere in my reading on this subject, I ran across the broad statement that no man wants to die intestate. I scarcely believe that. The records in our probate courts disprove it. Some may say that many of these persons whose estates were probated died suddenly or prematurely, fully intending to make wills. Even so, that could not truly be said of a very large percentage of them. In a few testate cases, there was really no necessity for the wills. They really accomplished nothing. They merely disposed of the property in the same way the law would have without a will. But many of such wills, I dare say, were written by well intentioned, but uninformed, laymen. No lawyer who is worthy of the name would do it. But there are plenty of opportunities for him to do just that thing. Without claiming any credit for it, for none is deserved, I state as a simple truth that many times we have all turned away from our offices clients who simply desired their property to go according to the law of descents and distributions, but who, in ignorance of that law, thought wills were necessary. So we must first make sure that our client thoroughly understands the law of intestate succession, and, after having made sure of that, and he wants to make a different disposition of his property from that provided under the law, then prepare a will that is simple, direct, clear and explicit and one that vests the title to the property bequeathed and devised certainly and definitely in someone at some time prescribed by the rule against perpetuities and with an absolute minimum of frills and extra provisions, restrictions and conditions of dubious or doubtful meaning. In other words, make it as simple as you can make it. The simpler, the

better. If we should do this, we would be rendering an invaluable service not only to our clients, but especially to those who would come into the property after them. At the same time we would enjoy the satisfaction of a piece of work well done.

This is a streamline age. Wills are no exception.

DISCUSSION BY DAVID J. WILSON, MEADE

The subject assigned to me for discussion left me in that utter state of confusion that I oftentimes find myself in trying to interpret some of the decisions of our supreme court. In considering the subject I had some conception as to its meaning, but did not give birth to any thoughts in connection therewith until I had read the discussion by Mr. Beall. By judicial interpretation, he arrived at the conclusion that the complexity mentioned in the subject applied primarily to the client and not to simple wills. In his discussion of the subject, Mr. Beall has confined his remarks largely to questions of restraint against alienation of property by will and I feel that he has ably handled the subject. The conclusions drawn by Mr. Beall should materially assist the practicing lawyer in the solution of problems of that kind.

I would like to discuss with you for a few moments some of the practical problems that I feel should be considered by the attorney and the client in the preparation of a will. A client comes to your office with a plan for the disposition of his property and he either wishes to restrict alienation thereof, place the property in trust, or make some other disposition whereby restrictions are imposed upon the property. The layman has thought out his plan and naturally it seems very simple to him. He feels that his judgment should control his property even after his decease and that his loved ones will be much better taken care of because of the fine plan he has worked out for disposing of his property. Most of us, when such a client comes into our office, listen to his plan, take down some notes, look wise and inform the client that it will take a couple of days for us to prepare the will. After he is gone we look up a few cases, grab a form book, and prepare the will. We follow the same routine in such matters that we have been following since our entry into the practice of law.

It is my suggestion that before we undertake the drawing of any will that restricts the use or disposition of property we should carefully discuss with our client some of the problems that may arise as a result of such a will. I feel that it is up to the lawyer to attempt to broaden the perspective of the client so that he will thoroughly understand the operation and effect of his will under present conditions. I shall attempt to set forth in this discussion a few of the problems that I feel should be called to the attention of the client in getting this information across to him.

In the first place the client should be shown exactly how his will operates. It should be explained to him that the will he is now making operates only at the time of his decease. The client should be made to understand that it may be five years or it might be twenty-five years before the will becomes operative, unless, of course, the will is subsequently revoked. The client should fully understand that upon his death the will becomes operative immediately and that the terms thereof cannot thereafter be changed. In my opinion it is very important that the operation and effect of the client's will

be carefully explained to him, as the layman ordinarily does not think these things carefully.

In the second place the change of economic and social conditions should be discussed with the client in relation to the effect that such changes may have on his property. As we all know, we are living in an era of rapid change. The past twelve years has shown us that changes have come about that none of us anticipated, and probably during the next ten to twenty-five years more radical changes will follow. These changes have affected and are bound to further affect the property rights of individuals. The client probably is just as much aware of the economic and social changes that are going on about him as the lawyers, but he is not likely to have considered that these changes may affect the property which he is disposing of by will. It should be carefully pointed out to the client that these changes may have an effect upon his property and upon his plan of disposition thereof and that considerable damage may result in restricting the use or disposition of property under the uncertain conditions that now exist. Most of us have seen many instances during the past ten or twelve years where restrictions upon the use or disposition of property in wills have worked hardships and in some instances have caused the total estate to be lost. The client should be given the advantage of our experiences in matters of this kind.

In the third place I feel that the question of taxation should be carefully discussed with the client at the time of drawing the will. I believe that most members of the legal profession have become tax conscious during the past few years and probably most of you do discuss the tax question with your client at the time of preparation of his will. When we realize that during the past few years the federal estate tax exemption has been reduced from \$100,000 to \$40,000, we are certain that the \$40,000 exemption will be materially lowered. The lawyer should suggest to the client that his estate probably will be subject to some sort of a tax and that enough of the estate should be left in a liquid condition so that these taxes may be paid. It is impossible for us to tell the client how much of his estate will have to be used for the purpose of paying taxes, and about the only thing that the lawyer can do is to impress him with the thought that the more restrictions he places in his will the more difficulty his beneficiaries may experience with matters of taxation. The simpler the disposition of the property the easier it will be to liquidate sufficient of such property to meet any taxes that will have to be paid by the client's estate.

In the fourth place perhaps some of the restrictions suggested by the client are such that there is a possibility that litigation may result from the will of the client. If there is a possibility of litigation arising, the lawyer should call this to the attention of the client at the time of drawing the will. Wills restricting the use and disposition of property are much more likely to be subjected to litigation than simple wills, and most of our clients do not relish the idea of any litigation over their estates. If the client gets the idea that litigation may come about in connection with his estate he is usually very glad to change the terms of his will. He never relishes the idea of sharing his estate with the lawyers. Nor does he relish the idea of ill feeling among his beneficiaries and he realizes and knows that if litigation ensues ill feeling will result.

I realize that there are many cases in which the client is justified in placing restrictions on the use or disposition of his property in his will and it is not my thought in this discussion that every client who wishes to place restrictive provisions in his will should be discouraged from doing so. He may be absolutely justified in his reasons for placing the restrictions in the will and it is my purpose in this discussion to suggest a few of the things that I feel should be brought to the attention of the client so that his perspective will be broad enough so that he will properly comprehend the effect of his will and events that may affect his property rights after his decease. If the client does see fit to simplify his will after these matters have been discussed with him, it is then up to the lawyer to draw the will in simple, clear and concise language that will carry out the intention of the client. Lay aside high-sounding legal phraseology inserted oftentimes in legal documents to impress our clients with our legal knowledge and ability and insert only such legal terms as are necessary to express clearly the intention of the testator.

The legal profession must keep abreast of the times in the drawing of wills and we must keep our clients informed as well as we can of the effect of changes in economic and social conditions on property rights. It appears to me that the practical problems that confront the lawyer in the preparation of a will today are just as important in the proper drawing of a will as are the legal questions involved. It is my feeling that the legal profession oftentimes is too slow in recognizing that conditions have changed and that we are prone to do things as we have done them in the past instead of adjusting ourselves and our business to conditions as they actually are.

DISCUSSION BY MARLIN S. CASEY, TOPEKA

I am sure that you who are here today and have heard Mr. Beall's excellent paper will have the same reaction that I had upon reading it in advance, that is, there is very little I can add to what he has written and said on his subject, "The Complexities in Preparing a Simple Will," especially in relation to the validity of restraints on alienation of property.

In the ten minutes allotted to me the Committee has suggested that I discuss the problem of a client who thinks he wants a simple will, but in reality desires a disposition of his property which raises complicated legal problems.

I want to discuss the more or less common question of the client failing to disclose all of the necessary information, having specifically in mind real estate which stands in the name of the wife which is disposed of by the husband in his will. Perhaps we, as lawyers, should carefully check all titles involved in the will, but this is not always done I am sure, especially when the husband is positive that the title to the real estate stands in his own name.

In the case which I have in mind, the husband devised the remainder of his property to the trustee to hold in trust for his wife, who was to receive the income, and after her death the property was to go to the children. Item four of the will read as follows:

"I give and devise unto my beloved wife, . . . , the use of our homestead located at . . . for and during her natural life."

Item six (C) of the will read as follows:

"Upon the death of my wife, . . . , or if during her lifetime she should desire that the homestead above described be sold and in writing so signifies to

the trustees, then said trustees shall have the same power and authority to sell said homestead as is granted them for the sale of any of the other property of said trust; and the proceeds from such sale shall be handled in the same manner as the other property of said trust is handled."

The homestead referred to had been deeded by the husband to the wife a number of years before the will was drawn, and apparently both parties had forgotten about it. The wife consented to the will and no opposition was made by her when the estate was probated.

When the trustee took over the management of the estate, the provisions of the will above noted were examined, but when it was found that title to the property stood in the name of the widow, the particular property was not taken into the trust. Nothing was done for three or four years, until the widow decided that she would like to sell the property. Not having in mind any legal difficulties, the widow discussed the sale of the property with the trustee, and it was only through a chain of circumstances that the trustee found the case of *Aten v. Tobias*, 114 Kan. 646. Briefly stated, the title to the home place in that case was held by the wife. The husband made a will in which he gave a life interest in the home place to his wife. The wife gave her written consent to the will at the time it was executed. Later, litigation arose over the construction and operation of the will. The court in the first paragraph of the syllabus held as follows:

"Where a testator devises property the title to which is held by his wife and she gives her written consent to such testamentary disposition of it, the wife thereby in effect renounces her right of ownership in the devised property and bars all persons whose rights thereto must be claimed under and through her."

In the opinion the court held the rule to be that if a testator devises property not owned by him, but owned by a devisee or legatee under the will of such testator, and such devisee or legatee accepts a devise or legacy bestowed upon him by the will, he thereby in effect renounces his right of ownership in the property which the testator has assumed to make of it and confirms and ratifies the testamentary disposition made of it by the testator. This decision is cited with approval in the case of *Lytle v. Wade*, 129 Kan. 671, and in that opinion, the court again lays down the rule that the doctrine of election as applied to the law of wills simply means that he who takes under a will must conform to all its provisions. He cannot accept a benefit given by the testamentary instrument and evade its burdens. He must either conform to the will or wholly reject and repudiate it.

So with the case in hand in this instance the wife executed a prima facie valid consent to her husband's will. After his death no attempt was made to overthrow such consent. She accepted the benefits flowing from the provisions of her husband's will, and under the rule above quoted, she, therefore, at the same time must assume its burdens. Fortunately, as a practical proposition no particular problems arose due to the fact that she and the other devisees and legatees under the will were in entire agreement and accord as to how the matter should be handled. She filed a written request with the trustee in accordance with the provision in the will, and the trustee later gave a quitclaim deed to the purchaser. The proceeds from the sale did not go to the widow, but were paid into the trust estate.

Surely, here was a will which was simple enough in its terms, but which did not, by inadvertence, express the desire of the testator who, apparently, had forgotten that he had deeded the property in question to his wife. Probably she would not have consented to the will had she read it carefully and known that she was relinquishing her rights to the homestead in the manner by which the provisions of her husband's will would dispose of the same. To me this case illustrates the absolute necessity of ascertaining exactly and in detail from the client all pertinent information, especially as to the title to property disposed of by will. Then, and then only, can the "Complexities" in preparing the simple will become simple.



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