THE IOWA TITLE STANDARDS III*

According to a recent survey of the use of title standards to increase marketability of title to real estate, more of such standards have been adopted in Iowa than have been in any other state.[1] Previous articles in this series have considered six of the ten chapters of the Iowa standards.[2] In this article, the remaining chapters, on names, husband and wife, statutes of limitations, and judicial proceedings, are to be considered.

It should be noted that the Iowa Title Standards Committee has recently published an Addenda to the Standards "Due to legislative changes and Supreme Court decisions" which have a bearing on the Standards already adopted.[3] Several of the changes in the Addenda reflect amendments to statutes of limitation, changing the date on which certain claims may be barred from those arising prior to January 1, 1920 or January 1, 1930, to those arising prior to January 1, 1940.[4] Several others cite additional authority in support of the position taken in the Standards, or correct typographical errors.[5] Two Standards (4.1 and 4.5) are amended. The amendment to 4.1 recognizes a substantial change in Code section 614.21, with regard to unrecorded mortgages which are referred to in recorded deeds.[6] Standard 4.5 deals with the recorded stray deed or mortgage,[7] but in its original form referred only to affidavits from the "grantee in the deed or mortgage". As amended, the Standard refers to affidavits from the grantee in the

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1 Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1, 34-35 (1953).

2 *The Iowa Title Standards I*, 2 DRAKE L. REV. 76 (1953), which dealt with chapters on deeds (4.1-4.12), mortgages (7.1), and probate (9.1-9.23), and also with two statutes of limitations, Iowa Code §§ 614.17 and 592.3 (1954); *The Iowa Title Standards II*, 3 DRAKE L. REV. 36 (1953), which dealt with chapters on abstracts of title (1.1-1.11), and municipal and private corporations (2.1, 3.1-3.5). Further footnote reference hereinafter to these two articles will omit their titles.

3 Copies of the Addenda, which may be inserted in bound volumes of The Iowa Title Standards, are obtainable from the Iowa State Bar Association, Des Moines, Iowa.

4 Standards 1.4, 1.5, 8.10, 10.1. In addition, the date in problem 4.1 is changed from "twenty" to "ten" years to correspond with a 1945 amendment to Iowa Code § 614.21. *See* 2 DRAKE L. REV. 76, 83 (1953).

5 Standards 4.12, 9.18, 9.20, 9.23.

6 *See* 2 DRAKE L. REV. 76, 83 (1953).

7 *See* 2 DRAKE L. REV. 76, 88 (1953).

deed or the mortgagor or mortgagee if a mortgage is involved. Comments are added to six Standards.[8]

The Addenda contains an "Additional Comment" with regard to a standard on the question of whether an installment alimony and support judgment constitutes a lien upon real estate for *future* unpaid installments. Even though payments are up-to-date, persons owning property which may be subject to such a lien have been unable to convey and furnish marketable title, in the opinion of some examiners, or to mortgage their property to borrow money. The Committee states that it felt that because of the lack of Iowa authority and the conflict on this point in other jurisdictions, the problem was not a proper subject for a standard at this time. The Comment notes that this problem may be before the supreme court in the near future, and that legislation on the subject may be proposed for consideration at the next session of the legislature.

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[8] (a) The comment added to 4.7 clarifies the position of the Standard that service upon a minor of notice of forfeiture of a real estate contract must be in accordance with IOWA R.C.P. 56(b). *See* 2 DRAKE L. REV. 76, 89 (1953).

(b) 4.11 was criticized in 2 DRAKE L. REV. 76, 90-91 (1953), for adopting without citation of authority "what is incorrectly described to be the common law rule that a contract to sell made by both joint tenants severs the joint tenancy. . . ." It was pointed out that because of the recent decision in In re *Sprague's Estate,* 57 N.W.2d 212 (Iowa 1953), it was desirable to adhere to the Standard. In the Addenda the Committee cites authority purporting to support their position, and comments that the *Sprague* decision fully vindicates the Standard. Their position with respect both to authority and comment may be incorrect. In fact, one of the "supporting authorities" argues that what the *Sprague* case says as to severance is dictum at best, that the joint tenancy should not be held destroyed under the facts present in that case, and that the court "would be well advised to consider the ramifications of this problem with great care in any future case before making this view the basis of decision." Comment, 38 IOWA L. REV. 587, n. 9 (1953). PATTON, TITLES § 146, n. 638, 642 (1938) is cited as supporting authority. Both notes referred to deal with a conveyance or mortgage by one joint tenant of his interest when both are living. IOWA CODE § 557.15 (1954), which is cited as authority, creates a presumption that a conveyance to several grantees creates a tenancy in common unless a contrary intent is expressed, and seems to have no bearing on the problem at hand. Three A.L.R. annotations are cited. The first, 129 A.L.R. 813, discusses what voluntary acts by one or more joint tenants will sever the joint tenancy, and for the most part deals with acts by one tenant. It does, at 817-818, refer to agreements between joint tenants that effect a severance, but even there gives practically no support to the Committee's position. The second annotation, 134 A.L.R. 957, concerns one instance in which an old age assistance lien enabled the state of Wisconsin to claim a portion of land held in joint tenancy, as against the surviving joint tenant. The third, 111 A.L.R. 171, relates to rights and remedies of judgment creditors of one joint tenant against the joint estate, and may even be support for a position contrary to that taken by the Committee. It should be noted, however, that the Nebraska court, in *Buford v. Dahlke,* 62 N.W.2d 252 (Neb. 1954), upon the authority of the *Sprague* case, recently held that a contract by H and W to sell real estate, owned by them as joint tenants, destroyed the joint tenancy.

(c) The new comment to 6.6 will be discussed elsewhere in this article.

(d) 7.1 was discussed in 2 DRAKE L. REV. 76, 87-88 (1953), where some doubt was noted as to the position taken. The Comment indicates that the authority of the Standard has been weakened by a Treasury De-

I. NAMES

Discrepancies in names as they appear in the record chain of title have long offered "fly-specking"[9] examiners a field day. Possible discrepancies in names are infinite, but most variations occur in one or a combination of the following situations: surname spelling; surname change through marriage or other legal action; given (or Christian) name spelling, or abbreviation; use of initials, middle names or initials, or nicknames; or use of prefixes or suffixes, such as Dr., Jr., or of words describing the person. Chapter Eight of the Iowa Title Standards discuses the extent to which objections to title should be made when certain of these variations are found, and includes consideration of possible methods of clearing defects of this category.

8.1 considers the necessity to prove identity, when the only variation is in spelling of a surname, and the several versions of the surname are usually pronounced alike or substantially alike. The Standard states that the doctrine of "idem sonans" should be liberally applied, and the fact of identity of the individuals be

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partment letter of March 7, 1951, indicating that under the facts of the problem the Department's policy is not to claim a lien. As was noted, compliance with the Standard may be the safer course to follow, however.

(e) 9.2. This problem raised the question whether judgments against beneficiaries under a will, or personal taxes assessed against them, were liens on land sold by the executor under a direction in the will to do so. As was noted in 2 DRAKE L. REV. 76, 91-92 (1953), one Iowa case, *Hunter v. Cititzens Sav. & Trust Co.*, 157 Iowa 168, 138 N.W. 475 (1912), supported the position taken not only where there was a direction to sell, but also where the executor was only empowered to sell and the devisee was one of the residuary legatees. The added comment states that the Standard applies "where the will 'empowers' as well as 'directs' the executor to sell real estate." Two of the authorities cited, *Feaster v. Fagan*, 135 Iowa 633, 113 N.W. 479 (1907), and *Beaver v. Ross*, 140 Iowa 154, 118 N.W. 287 (1908), involve wills directing sale. In the third, *Iowa Loan & Trust Co. v. Holderbaum*, 86 Iowa 1, 52 N.W. 550 (1892), the executor was empowered to sell but there were no lien creditors of the beneficiary and the parties claiming the lien were creditors of the decedent's estate. None of the three cases is direct authority for the comment, although there is some supporting dicta in the *Beaver* case. The *Hunter* decision, not cited in the Addenda, does support the comment at least as to residuary legatees, and its reasoning might justify the comment even where the land was specifically devised subject to power to sell. However, the court was careful to point out several times in the *Hunter* opinion that a specific devise was not present, and it may be that the lien is not divested as to property specifically devised to the debtor.

(f) 9.12. This Standard is to the effect that notice by posting may be prescribed where notice is required in probate proceedings and a statute permits the court to prescribe the notice to be given. The Committee originally expressed a caveat as to the effect of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), upon the Standard. As the added Comment notes, it has recently been decided by the Iowa supreme court that the *Mullane* case does not apply to this situation, and that use of published notice is not a denial of due process of law to those served thereby. *In re* Pierce's Estate, 60 N.W.2d 894, 898 (Iowa 1953). The position of the Standard, that the notice is valid, appears to be sustained. *See* 2 DRAKE L. REV. 76, 95-97 (1953).

[9] 2 DRAKE L. REV. 76, 77 (1953); Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1, 9 (1953).

presumed, except where a question of constructive service of notice of proceedings is involved.

The doctrine of "idem sonans" is an audial test. Perhaps at least an academic objection could be made to its application where written records are involved, but the doctrine has long been utilized by the Iowa court, in a variety of situations.[10] Where the variation is between successive conveyances, by virtue of a statute the doctrine also has "presumptive" legislative sanction.[11] However, as will appear in the discussion hereafter, not all spelling variations are excused by application of idem sonans, even though the different versions might sound alike.

It would seem from the decisions that the answer to the problem posed in 8.1 should often turn on whether the variation would affect constructive notice, service of process, or identification. Is the "misnomer" such that constructive notice under the Recording Act[12] is not imparted? This may be called the "record notice" problem. Is the "misnomer" such that a judgment or decree affecting the title could be void for faulty service? This may be called the "adequacy of service" situation. Is the "misnomer" between consecutive transfers or other instruments discovered in the examination, or within one instrument alone, so as to raise the question whether the various names refer to the same individual?

Suppose the grantor's or mortgagor's name is spelled one way in a judgment, and another in a later document under which title is now claimed. Does the holder of the judgment lien have a prior claim on the land, if the two spellings sound the same? In several similar situations the Iowa court has not applied the idem sonans doctrine. Thus, in *Boyd v. Boyd*,[13] where a judgment lien was indexed under the name "Sheffey" and the debtor acquired and mortgaged property under the name "Cheffey", the mortgagee prevailed over the judgment creditor. The court said:

> "Whatever might be said in a case presenting a fact situation different from that we have before us, it must be true here that the matter of pronunciation is of little, if any, consequence. The inquiry into the state of the records proceeded from a name recorded as the title holder. The matter of spelling then became the important thing, because the records do not speak otherwise. And it cannot

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10 Including criminal proceedings. Houston v. State, 4 G. Greene 437 (Iowa 1854) ("Kamberling" was witness before grand jury, his name was indorsed on indictment as "Kimberling"; properly admitted as witness on the trial); cf. Geneva v. Thompson, 200 Iowa 1173, 206 N.W. 132 (1925).

11 IOWA CODE § 558.6 (1954): "When there is a difference between the christian names or initials in which title is taken, and the christian names or initials of the grantor in a succeeding conveyance, and the surnames in both instances are written the same or sound the same, such conveyances or the record thereof shall be presumptive evidence that the surname in the several conveyances and instruments refers to the same person." The history of this section is discussed, *infra*, note 33.

12 IOWA CODE § 558.41 (1954).

13 128 Iowa 699, 104 N.W. 798 (1905).

> be said in reason that the name "Cheffey" appearing as title holder would of itself constitute a warning signal to look out for judgments under the name of "Sheffey" . . . . . Of course we do not mean to hold that, where the initial letters are the same, the doctrine of idem sonans may not be relied on to overcome a difference in spelling, where the pronunciation is substantially the same."[14]

The court's suggestion that a variance other than in the initial letter might lead to a different conclusion was not borne out in at least two Iowa cases. In *Aetna Life Insurance Co. v. Hesser*,[15] where the judgment lien was indexed under "Hesse" instead of "Hesser", the court said: "It is plain that the names are so dissimilar that one searching for encumbrances would not be charged with notice of the judgment or put on inquiry."[16] Another example is *Howe v. Thayer*,[17] where "Furman" mortgaged as "Freeman" and then conveyed as "Furman". In this case the court said:

> "The only question is as to whether the name of the mortgagor was so indexed as to impart constructive notice of the mortgage. To many persons examining the record it might occur that the name of William H. Freeman was written by mistake for William H. Furman, but it would not necessarily and we could not say that an examiner would be guilty of negligence to whom it should not occur. We think then, that the plaintiff did not have constructive notice of the mortgage."[18]

In each of these "record notice" situations, the subsequent title search failed to disclose the prior lien. If the lien had been disclosed, or should have been, it is likely that the idem sonans doctrine would apply. For example, in a case involving variation of the initial letter, the court suggested that "Karney" and "Carney" were idem sonans. In this instance, Carney had purchased at tax sale, and gave notice of redemption by publication. His name appeared as "Karney" in the notice, but as "Carney" in the affidavit of publication.[19] If the surname is spelled different ways in instruments appearing in the abstract, it would seem that constructive notice would be given by other instruments appearing in the records under any of the noted versions. As to those instances, the idem sonans doctrine would be applied liberally.

Where the problem is that of "adequacy of service", the Iowa court has distinguished between the degree of literal accuracy required to constitute adequate service personally and by publication. In *Webb v. Ferkins*[20] it was said that: "It seems to have

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[14] *Id.* at 702, 104 N.W. 798, at 799.

[15] 77 Iowa 381, 42 N.W. 325 (1889); *cf.* Woods v. Hallowell, 204 Iowa 186, 214 N.W. 675 (1927); Gilbert v. Berry, 190 Iowa 170, 180 N.W. 148 (1920); State Savings Bank v. Shinn, 130 Iowa 365, 106 N.W. 921 (1906).

[16] 77 Iowa 381, at 384, 42 N.W. 325, at 327 (1889).

[17] 49 Iowa 154 (1878).

[18] *Id.* at 155.

[19] McCash v. Penrod, 131 Iowa 631, 109 N.W. 180 (1906). At page 634, 109 N.W. 180, 181, the court said: "The notice was in the name of James Karney and the affidavit as to publication was in the name of James Carney. This is said to be a fatal defect. It is a clear case of idem sonans."

[20] 227 Iowa 1157, 290 N.W. 112 (1940). This is erroneously cited under Standard 8.1 as *Webb v. Perkins*.

been generally held that the application of the rule by the courts is more strict in regard to constructive service than where the service is personal."[21] The title examiner will become aware of this problem when a discrepancy in surname appears in the transcription of legal proceedings appearing in the abstract. Whether the discrepancy invalidates the legal proceedings will be determined by the answers to several questions: (a) is the error as it appears of record a reflection of a similar error in the original notice? (b) was the notice served personally or by publication? (c) did the defendant make an appearance? If the error appeared in the original notice, which was served by publication, and no appearance was made by the defendant, the Iowa court is not likely to apply the idem sonans doctrine liberally.[22]

If inconsistencies in surname appear in consecutive conveyances, or other instruments disclosed by the examination (except in the "record notice" situation), presumption of identity seems warranted, and, as the Standard indicates, the doctrine of idem sonans will usually be liberally applied. There may be situations where proof of non-identity will be required.[23]

None of the standards considers the effect of misspelling of a Christian name. The statute described above[24] is clear authority for use of idem sonans where consecutive conveyances are involved. In "record notice" and "adequacy of service" situations, the surname and Christian name misspellings seem to have been treated similarly. Where by error a judgment lien against "Helen Desney" was erroneously indexed under "Ellen Desney", the court did not consider "Ellen" idem sonans for "Helen".[25] As to adequacy of published service, the following variations have not been pre-

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[21] *Id.* at 1163, 290 N.W. 112 at 115.

[22] Webb v. Ferkins, 227 Iowa 1157, 290 N.W. 112 (1940) (notice served personally, defendant made special appearance, "Ferkins" is idem sonans for "Firkins"); Thornily v. Prentice, 121 Iowa 89, 96 N.W. 728 (1903) (action against "W. H. Thornily", substituted service on "W. M. Thornily" by leaving notice with his son, no appearance, judgment against "Wm. M. Thornily"; idem sonans not applicable and judgment void because defendant's correct name was "Willis H. Thornily"); Hubner v. Reickhoff, 103 Iowa 368, 72 N.W. 540 (1897) (published notice, default decree; "Keesel" not idem sonans for "Keisel"); Mallory v. Riggs, 76 Iowa 748, 39 N.W. 886 (1888) (published notice, defendant appeared and defended; "Van Nortrick" is idem sonans for "Van Nortwick"); Fanning v. Krapfl, 61 Iowa 417, 14 N.W. 727 (1883) (published notice to "P.T.B. Hopkins" not binding on "T.P.B. Hopkins"); *see* Maloney v. Iowa-Illinois Gas & Electric Co., 88 F.Supp. 686, 689 (S.D. Iowa 1950); Note, *Effect of Misnomer in the Service of Notice in Iowa*, 19 IOWA L. REV. 362 (1934). In *Thornily v. Prentice*, the court said, 121 Iowa 89, at 93, 96 N.W. 728, at 729 (1903): "It may be conceded for the purpose of this case that, if the notice had been personally served upon appellee . . . mistake in the name by which he was designated would not necessarily be fatal to the judgment."

[23] This would be true when there are in fact two individuals with substantially similar names, and it is necessary to show that claims against one are not claims against the other whose title to property is being examined, or who belongs in the chain of title.

[24] IOWA CODE § 558.6 (1954), quoted in footnote 11, *supra*.

[25] Thomas v. Desney, 57 Iowa 58, 10 N.W. 315 (1881).

sumed to refer to identical individuals: "Caroline" for "Emeline" Journey;[26] "Chase" for "Chan" Marker;[27] and "Willis" for "William" Thornily.[28]

8.2. The problem posed in 8.2 is whether proof of identity should be required when an individual is designated by one given name and surname in one instrument, and in another by the same names plus a middle name or initial. The Standard recognizes that there is no variation in this instance, according to Iowa case law,[29] but indicates that if the variations appear in instruments of too recent date to be covered by Code section 614.17,[30] it is proper to require proof of identity. In this respect the Standard follows the position taken by Patton.[31] Patton has indicated that the rule is as stated by the Iowa cases, except where the first name is itself only an initial, but that this rule originated when few people used middle names. He believes that recent decisions in other jurisdictions tend to treat the middle name or initial as an essential part of the name,[32] and that proper examination practice would require proof of identity if variation is discovered in such items. It is true that many people today are known by their middle rather than their first name, and often omit the first name in their signature. The desirable practice would seem to be that suggested by the Committee and Patton. Neither, however, mention the

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[26] Journey v. Dickerson, 21 Iowa 308 (1866).

[27] Schaller & Son v. Marker, 136 Iowa 575, 114 N.W. 43 (1907).

[28] Thornily v. Prentice, 121 Iowa 89, 96 N.W. 728 (1903).

[29] The latest case on the point is cited with the Standard, *Vanderwilt v. Broerman*, 201 Iowa 1107, 206 N.W. 959 (1926). In that case it was said, 201 Iowa 1107, at 1116, 206 N.W. 959, at 963, that: "It is a matter of general knowledge that the initial of the second Christian name is frequently omitted, and by the great weight of authority its omission, in the absence of special circumstances raising doubts about identity, is immaterial."

[30] The effects of this statute of limitations, applying now to claims arising prior to January 1, 1940, are considered in 2 DRAKE L. REV. 76, 78-81 (1953).

[31] PATTON, IOWA LAND TITLE EXAMINATIONS § 56 (1929); PATTON, TITLES § 51 (1938).

[32] The jurisdictions cited by Patton, in his work on TITLES, § 51, n. 95 (1938), include the following, with earliest and most recent cases indicated: (1) Colorado: McCracken v. Citizens Nat. Bank, 80 Colo. 164, 249 Pac. 652 (1926) (Frank and F. M.); German Nat. Bank of Denver v. National State Bank, 5 Colo. App. 427, 39 Pac. 71 (1895) (W. J. M. and W. G. M.); (2) Illinois: Rosenberger v. Lincoln Nat. Life Ins. Co., 282 Ill. App. 52 (1935) (Effie and Effie B.); (3) Maine: Dutton v. Simmons, 65 Maine 583, 20 Am.Rep. 729 (1876) (Henry M. and Henry F.); (4) Massachusetts: Terry v. Sisson, 125 Mass. 560 (1878) (Sarah and Sarah F.); Com. v. Hall, 20 Mass. (3 Pick.) 262 (1825) (Charles Hall and Charles Jones Hall); (5) Minnesota: Ambs v. Chicago, St. P., M. & O. R. Co., 44 Minn. 266, 46 N.W. 321 (1890) (William H. and William B.); (6) Missouri: Gray v. Missouri Lumber & Mining Co., 177 S.W. 595 (Mo.App. 1915) (Francis and Francis M.); (7) New Jersey: Bowen v. Mulford, 10 N.J.Law (5 Halst.) 273 (1828) (John and John S.); (8) North Dakota: Turk v. Benson, 30 N.D. 200, 152 N.W. 354, L.R.A.1915D 1221 (1915) (William J. and William G.); (9) Pennsylvania: Jones v. Scranton Coal Co., 274 Pa. 312, 118 Atl. 219 (1922) (David and David D.); Wood v. Reynolds, 7 Watts & S. 406 (Penn. 1844) (John and John M.); (10) Texas: Wicker v. Jenkins, 49 Tex.Civ.App. 366, 108 S.W. 188 (1908) (W.B.F. Wicker and W.F.B. Wicker).

effect of Code section 558.6 upon this matter. That section, which has not been interpreted by the court, would seem to obviate any requirement that identity be proved. At the time Patton wrote, the statute applied only to variations appearing in older instruments, but since 1943 it has applied to all.[33] Support for the position in the Standard is to be found also in *Loser v. Plainfield Bank*,[34] unfortunately a case antedating the present version of the statute. In that case, James William McGregor had mortgaged to A as "William McGregor" and subsequently to B as "J. W. McGregor". To hold that B had constructive notice of A's prior mortgage, legal significance would have to be given to McGregor's middle name. And this the court did. It was said that: " . . . This familiar name may be, and perhaps more often is, the first, but it is not so universally the case that the habitual and common use of the second name may be ignored."[35]

A variant from the problem discussed in 8.2 involves the practice of using the initial letter of the first given name. In *Paxton v. Ross*,[36] where there was a deed to "M. Thompson, of Washington City, District of Columbia", and a subsequent conveyance in which the grantor was described as "Michael Thompson, widower, now of Honolulu, Sandwich Islands", the court said: "We see no reason to doubt that the grantee Thompson and the grantor Thompson are the same person. To require other evidence of identity before the deed could be admitted would be to render it impracticable, if not impossible, in many cases to trace title."[37] It should be noted that the subsequent conveyance was signed "M. Thompson", and the signer was described in the acknowledgment as "Michael Thompson". An analagous position was taken in a "record notice" situation, in *Huston v. Seeley*.[38] Here, the deed had been to "Almira J. Stringham", and there was a later trust deed executed by "J. A. Stringham", which, however, contained a caption as from "Almira J. Stringham" and was indexed

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[33] This provision originated as part of a series of statutes of limitation, among which were the ancestors of Code §§ 558.5, 558.6, 558.7 and 558.8. In its original form, it applied only to documents executed prior to January 1, 1900, and treated the conveyances of record as "conclusive", rather than "presumptive", evidence of identity. Acts, 35th G.A. c. 272 § 7 (Iowa 1913). This could have been construed so that an abstract showing a grant to "John A. Farris" and a subsequent deed from "Mary I. Pharriz" would not offer identity problems. In Acts, 43rd G.A. c. 242 § 1 (Iowa 1929), the limiting date was changed to January 1, 1915, and in § 2 the word "conclusive" was changed to "presumptive". The limiting date was removed and the section put in its present form by Acts, 50th G.A. c. 252 § 2 (Iowa 1943).

[34] 149 Iowa 672, 128 N.W. 1101 (1910); *cf.* Hanson v. Callaway, 36 F.2d 667 (8th Cir. 1929).

[35] 149 Iowa 672, at 679, 128 N.W. 1101, at 1104 (1910).

[36] 89 Iowa 661, 57 N.W. 428 (1894).

[37] *Id.* at 664, 57 N.W. 428 at 429.

[38] 27 Iowa 183 (1869).

as "A. J. Stringham".[39] However, where an "adequacy of service" problem was involved, published notice to "P. T. B. Hopkins" was not adequate to bind "T. P. B. Hopkins".[40]

8.3. The problem considered in this section is whether proof of identity should be required if the given name appears in full in one instrument and in abbreviated form in another. The Standard permits reliance upon "all customary and usually recognized abbreviations and derivations of given names." This is a practical approach, which the Committee supports by citation to two cases and to Patton. Neither case is precisely in point, though both indicate that courts will recognize certain abbreviations or derivations.[41] The major problem here is in determining what abbreviations or derivations are customary and usually recognized. Patton[42] recommends that: "References should be made to the decisions, to determine in each particular case the expressed or probable attitude of the courts." The only Iowa cases to which an examiner could make reference are two: *State v. Moffit*,[43] a criminal case in which proof against "Charles Moffit" was not a fatal variation invalidating an indictment against "Charley Moffit"; and *Thomas v. Desney*,[44] in which the court refused to treat "Ellen" for "Helen" as either idem sonans or a customary deviation. There may be instances in which an examiner might be second-guessed on a derivation he thought to be "usually recognized".

8.6 presents the problem of variations in the grantor's name between the body of the deed, his signature, and the certificate of acknowledgment. The Standard takes the position that the certificate should be accepted as adequate identification, if it agrees with either of the other two. The authorities cited in support of this Standard clearly are in point as to variation between the signature and the certificate, but do not involve variation between the body of the deed and the certificate.[45] However, as the notary acknowledges that the person named in the certificate is the one named in the deed, the Standard seems proper in this respect also.

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[39] Almira's maiden name had been Almira Jane Ashley. Apparently she was commonly known as Jane, and frequently signed her name as Jane A. Stringham or J. A. Stringham. See Bordwell, *Recording of Instruments Affecting Land*, 3 IOWA L. BULL. 25 (1917).

[40] Fanning v. Krapfl, 61 Iowa 417, 14 N.W. 727 (1883).

[41] *State v. Moffit*, 155 Iowa 702, 136 N.W. 908 (1912), is concerned with the sufficiency of an indictment in which defendant's first name may have been mispelled ("Charley" for "Charles"). *Brown v. Piper*, 91 U.S. 37 (1875), was a suit for infringement of a patent for a process of preserving meat. The question involved was whether the court could take judicial notice of the principle upon which the ice cream freezer operated, in testing whether patentee's process met the standards for invention. The Supreme Court said in its discussion, 91 U.S. 37, at 42: "Facts of universal notoriety need not be proved. Among the things of which judicial notice is taken, are: the law of nations; . . . the notary's seal; . . . the customary abbreviations of Christian names . . . ."

[42] PATTON, IOWA LAND TITLE EXAMINATIONS § 54 (1929).

[43] 155 Iowa 702, 136 N.W. 908 (1912).

[44] 57 Iowa 58, 10 N.W. 315 (1881).

[45] Paxton v. Ross, 89 Iowa 661, 57 N.W. 428 (1894); PATTON, IOWA LAND TITLE EXAMINATIONS § 58 (1929).

8.7. On occasion there may be found in addition to the given names and surnames such prefixes as Dr., such suffixes as Jr., Sr., M.D., Esq., or words that are descriptio personae, as in the case of "Mary Green, wife of John Green". To what extent should such additional words or abbreviations be disregarded? The Standard states that they are not part of the name and may be disregarded completely, except in the instance of Junior as a given name, and except where both Senior and Junior (or Sr. and Jr.), as suffixes, appear in connection with the same name in the chain of title. This would imply that an examiner may disregard the variation between a conveyance to John Brown, and one from John Brown, Jr. Query, if the two conveyances are many years apart. The authority cited with the Standard would support disregarding a suffix such as "Jr." in any instance,[46] although Patton elsewhere mentions a Florida case which took the exact position that the Standard does.[47] The Standard seems appropriate, with the following possible qualification: if because of other circumstances there appears to be a good possibility that John Brown and John Brown, Jr., are two individuals, proof of identity or proof of the title of John Brown, Jr., should be obtained.[48]

8.4. When a married woman conveys property acquired by her under her maiden name, one method used to avoid uncertainties as to title is for the deed to contain a recital as to her former name, e.g., "Jane A. Stringham, formerly Jane Adams". Is this sufficient to establish that the grantor was the grantee, under her maiden name, in the prior conveyance? A similar problem would be presented if a woman were divorced and either remarried or had her maiden name restored, as to conveyances to her prior to the divorce, or in any case of adoption in which the name of the adoptee was changed. The Standard says, where the change is caused by marriage, "such a recital is sufficient." Authority for this is found in Patton.[49] It should be noted that elsewhere Patton has stated that: "where a difference in the name of a grantee and a succeeding grantor is due to a change in names, the record should contain competent evidence of that fact."[50] He indicates that a deed's recital of change by marriage has been treated as adequate evidence of the change.[51]

8.5 considers the effect of a recital in a subsequent instrument attempting to overcome an error in the given name, names or initials, or a minor error in the surname appearing in a prior

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[46] State v. Dankwardt, 107 Iowa 704, 77 N.W. 495 (1898) (two suits were pending in the county, one enttiled *M v. D*, the other *M Jr. v. D;* indictment for improperly attempting to influence juror in latter case not fatally defective where it referred to second case as *M v. D*, omitting "Jr."); followed in Peterson v. Wallace, 140 Iowa 22, 118 N.W. 37 (1908).

[47] PATTON, TITLES § 50 n. 90 (1938), citing State *ex rel.* Nuccio v. Williams, 97 Fla. 159, 120 So. 310 (1929).

[48] Compare in this respect the committee's position in Standard 8.5.

[49] PATTON, IOWA LAND TITLE EXAMINATIONS § 52 (1929).

[50] PATTON, TITLES § 182 (1938).

[51] *Ibid.*

instrument. The Standard recognizes that such recitals have no evidentiary value, but states that, absent special circumstances creating suspicion, they should be relied upon without requiring additional proof. No authority is cited to support this position, although it is closely related to the type of recital discussed in connection with 8.4. Neither 8.4 nor 8.5 is supported by Iowa case authority. In at least five cases, recitals in deeds have been held not to be competent evidence of the matters recited.[52] The matters involved in those cases may have been so different from those considered in the Standards that the examiner would be safe in following the Standards. It is possible, however, that as a statutory method for correcting discrepancies and variances is available,[53] such recitals would be considered insufficient.

8.8 and 8.9 are concerned with the use of recorded affidavits as a method of correcting discrepancies or variances in names. Standard 8.8, relying upon Code section 558.8, says that the recorded affidavit is a proper means to effect such corrections, but cautions that the affidavit should be so framed as to show that the material statements in it are based upon affiant's personal knowledge. Several Iowa cases have recognized the effect of the statute, and have accepted affidavits explaining defects of various

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[52] McCarty v. Rochel, 85 Iowa 427, 52 N.W. 361 (1892) (deed reciting that grantor is a widow; court holds that even statement that she was widow of record title holder would not be competent evidence of that fact); Soukup v. Union Investment Co., 84 Iowa 448, 51 N.W. 167 (1892) (deed contains recital that grantor is "formerly widow and sole heir" of record title holder; not competent evidence that she had been either widow or sole heir, where title is in dispute); Ross v. Loomis, 64 Iowa 432, 20 N.W. 749 (1884) (deed reciting that record title holder is dead and that named grantors are his widow and heirs at law, not competent evidence as against stranger to title through that conveyance); Costello v. Burke, 63 Iowa 361, 19 N.W. 247 (1884) (same sort of situation as Ross v. Loomis). In *Henderson v. Robinson*, 76 Iowa 603, 41 N.W. 371 (1889), a deed reciting that it was made by a commissioner pursuant to court order, and facts supporting its own validity, was admitted into evidence, probably on the basis that the court could take judicial notice of material in records of its own proceedings. However, a different result was reached under similar circumstances, in *Lawless v. Stamp*, 108 Iowa 601, 79 N.W. 365 (1899), and the court said that the *Henderson* case had been overruled, in effect, by *Shipley v. Reasoner*, 87 Iowa 555, 54 N.W. 470 (1893). The *Shipley* case involved the question whether the court could take judicial notice of admissions in defendant's original answer, when that answer had been withdrawn and replaced by a substitute, and the original had never been introduced into evidence. The court held that judicial notice would not be taken of what was in the withdrawn pleading, but did not mention the *Henderson* case. It would seem possible to distinguish the two cases.

[53] Iowa Code § 558.8 (1954) (providing for recording of an affidavit).

sorts.[54] Where the cautionary advice of the Standard is not followed, the statements in the affidavit might be treated as hearsay, and the court then hold only that affiant believed them to be true.[55] The position taken seems proper.

8.9 asks whether the record should show that the affidavit was filed by, or under the direction of, the owner of the real estate. Affidavits of possession under Code section 614.17 must show these facts, but Code section 558.8 does not require them. Standard 8.9 assumes that no one except the owner of the real estate has any interest in perfecting title, and that it may therefore "be safely presumed that the affidavit was filed by the owner or under his authority." The Record in *Dudycha v. Brennan*[56] indicates that the affidavits involved, of a widow and son of a former holder, were executed and recorded more than thirty years after the property had gone out of the hands of their family. It is likely that these affidavits were filed at the instigation of the then owner, but the Record is silent on this point. Intermeddling may occur, but is unlikely.

Standard 8.10 indicates that affidavits of identity to correct discrepancies in names occurring prior to January 1, 1930, are unnecessary if affidavits of possession conforming to Code section 614.17 are on record, plus certification by the abstracter that no claim is on record as provided in that section. The recently pub-

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[54] Dudycha v. Brennan, 196 Iowa 1065, 195 N.W. 991 (1923); Prichard v. Mulhall, 140 Iowa 1, 118 N.W. 43 (1908); Hantz v. May, 137 Iowa 267, 114 N.W. 1042 (1908). In *Fagan v. Hook*, 134 Iowa 381, 105 N.W. 155 (1905), the affidavit was rejected as not explaining a defect but filling in a gap in the title. Professor Bordwell discussed this position, in *Recording of Instruments Affecting Land, Powers of Attorney, and Affidavits to Explain Defects in Title*, 2 IOWA L. BULL. 51, 65 (1916). The *Dudycha* case may have reached a contrary result. In that case, A, the record holder, acquired title from B in 1852, and the same year executed a deed from himself in which the grantee's name was omitted. This deed was recorded in 1856, and found among B's papers on B's death. B conveyed the property to M in 1862. B's son executed an affidavit recorded in 1896 reciting the finding of the blank deed among his father's papers. B's widow executed an affidavit recorded in 1907 to the effect that B had repurchased the property from A, and the deed had been delivered to B. These facts appear more clearly in the Record of the case than in the opinion of the court. The court held that any apparent break in the chain of title was cured by the affidavits, under the statute as it then existed. The *Fagan* case had been cited to the court, but was not mentioned in the opinion. *Dudycha v. Brennan* may be distinguished from *Fagan v. Hook*, however, because of differences in wording of the statute. When the *Fagan* case was decided, only the first sentence of the present Iowa Code § 558.8 (1954) had been adopted. Acts, 35th G.A. c. 272 § 5 (Iowa 1913), added a provision that affidavits of record in 1913, explaining any defect in chain of title arising prior to January 1, 1900, *or the recorded affidavits made under Code § 2957* (the statute involved in the *Fagan* case), were conclusive evidence of the facts involved in actions involving title to real estate, and affidavits *recorded thereafter under Code § 2957* were to be prima facie evidence of the facts therein for three years and thereafter conclusive. The present form of the statute, Code § 558.8, combines former Code § 2957, and part of the 1913 addition, but omits any reference to affidavits recorded prior to 1913 regarding pre-1900 defects.

[55] *See* Ross v. Loomis, 64 Iowa 432, 20 N.W. 749 (1884).

[56] 196 Iowa 1065, 195 N.W. 991 (1923).

lished Addenda to the Title Standards recognizes that this section has been so changed that the same rule should apply to discrepancies occurring prior to January 1, 1940. A full discussion of this Code section will be found elsewhere in this series of articles.[57]

II. HUSBAND AND WIFE

When one spouse conveys his title to real property without the other spouse's joining in the conveyance, the title acquired by the grantee is subject to complete or partial failure because of two statutory rights that may belong either to the grantor himself or to the non-joining spouse. One of these rights is that belonging to the other spouse, if surviving the grantor, to claim as dower or statutory distributive share a one-third interest in fee in all estates in real property owned by the other at death, or during coverture and transferred without proper release of dower.[58] The other right belong to both spouses but arises only if

[57] 2 DRAKE L. REV. 76, 78-81 (1953).

[58] If one spouse dies intestate, the other is entitled to one-third in value of all legal or equitable estates in real property possessed by the decedent at any time during the marriage, not sold on execution or other judicial sale, to which the survivor has made no relinquishment of dower. IOWA CODE § 636.5 (1954); Carr, *The Widow's Distributive Share*, 21 IOWA L. REV., Nov. Bar Ass'n Sec. 41 (1935). Iowa at first had no statutory dower, and recognized only common law dower rights, under which the wife's dower was only a life estate. O'Ferrall v. Simplot, 4 Iowa 381 (1857); Sturdevant v. Norris, 30 Iowa 65 (1870); Swenson, *Possessory Estates and Future Interests in Iowa*, 36 I.C.A. 73, 85 (1950). Beginning with an early statute, the dower or distributive share has been a fee simple. IOWA CODE § 1394 (1851). The surviving spouse may elect to take the homestead for life in lieu of dower, however. IOWA CODE §§ 561.11, 561.12, 636.27, 636.28 (1954); Thomas v. Thomas, 73 Iowa 657, 35 N.W. 693 (1897). A failure to elect will be treated as an election of the distributive share. IOWA CODE § 636.28 (1954). Prior to adoption of this statute, the opposite rule prevailed. Stoddard v. Kendall, 140 Iowa 688, 119 N.W. 138 (1909); In re Estate of Lund, 107 Iowa 264, 77 N.W. 1048 (1899); Wold & Olson v. Berkholtz, 105 Iowa 370, 75 N.W. 329 (1898); Stephens v. Hay, 98 Iowa 37, 66 N.W. 1048 (1897); Bare v. Bare, 91 Iowa 143, 59 N.W. 20 (1894); Zwick v. Johns, 89 Iowa 550, 56 N.W. 665 (1893); Wilcox v. Wilcox, 89 Iowa 388, 56 N.W. 517 (1893); Egbert v. Egbert, 85 Iowa 525, 52 N.W. 478 (1892); Schlart v. Holderbaum, 80 Iowa 394, 45 N.W. 1051 (1890); McDonald v. McDonald, 76 Iowa 137, 40 N.W. 126 (1888). If the spouse dies testate, and names the survivor as a devisee in the will, it is presumed, unless the intention is clear and explicit to the contrary, that the devise is in lieu of dower and homestead rights. IOWA CODE § 633.2 (1954). For a number of years prior to the adoption of this statute, the courts permitted the wife to claim both her dower right and the property devised, unless to do so would cause an inconsistency with the will. In re Estate of Stevens, 163 Iowa 364, 144 N.W. 644 (1913); Archer v. Barnes, 149 Iowa 658, 128 N. W. 969 (1910); Parker v. Parker, 129 Iowa 600, 106 N.W. 8 (1906); Baldwin v. Hill, 97 Iowa 586, 66 N.W. 889 (1896); Hunter v. Hunter, 95 Iowa 728, 64 N.W. 656 (1895); Herr v. Herr, 90 Iowa 538, 58 N.W. 897 (1894); Daugherty v. Daugherty, 69 Iowa 677, 29 N.W. 778 (1886); Potter v. Worley, 57 Iowa 66, 7 N.W. 685, 10 N.W. 298 (1881); Van Guilder v. Justice, 56 Iowa 669, 10 N.W. 238 (1881); McGuire v. Brown, 41 Iowa 650 (1875); Watrous v. Watrous, 37 Iowa 72 (1873); Metteer v. Wiley, 34 Iowa 215 (1872); Scully v. Nebergall, 30 Iowa 339 (1870). At present, however, absent the clear and explicit contrary intention, she must choose between her devise and her dower rights. IOWA CODE §§ 636.22-636.30 (1954). *See* Note, *Effect of Widow's Election to Take Against Will*, 24 IOWA L. REV. 714 (1939).

the property conveyed includes their homestead. If the homestead right is present, the conveyance is a nullity because of failure to comply with the statutory requirements for transfer of homestead property;[59] and the validity of the conveyance may be attacked by either grantor or his spouse.[60]

The title examiner, wishing to assure his client that the title being purchased cannot be attacked because of outstanding dower or homestead rights, wants the following information if the grantor alone held title: was grantor unmarried when he conveyed; if previously married, was the marriage terminated by death or a valid divorce or annulment; if married, were the steps taken that are necessary to eliminate dower and homestead rights. If the conveyed title had been held and is being conveyed by a man and woman who apparently are husband and wife, the examiner wants to know whether they are husband and wife and were when they acquired title or are related otherwise (such as brother and sister) and had spouses not appearing in the deed to them; if the title is now in the name of a husband and wife are the grantors identical with the previous grantees; if they were not husband and wife when title was acquired, the same information is desired as is wanted when the title was held by one grantor.

The seven Standards under the heading "Husband and Wife" are intended as guides to the title examiner to help him determine whether a merchantable title with respect to dower and homestead rights is shown in the abstract; specifically, what showing should be made as to marital status (5.4), the extent to which he may rely on recitals in conveyances (5.1-5.3), the extent to which he should make inquiry when certain variations in the name of the wife appear between successive conveyances (5.5, 5.1), and what showing is necessary with regard to release of dower and homestead (5.6, 5.7).

5.4. The problem of this section is what showing is necessary where the deed contains no recitation as to grantor's marital

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[59] Iowa Code § 561.13 (1954) makes conveyances or incumbrances of homestead property invalid unless both husband and wife join in execution of the same joint instrument. If such an invalid instrument embraces non-homestead property, it may be enforced as to real estate other than the homestead, at the option of the purchaser or encumbrancer. Under some circumstances, the two spouses need not execute the joint instrument on the same date. *Cf.* Kettering v. Eastlack, 130 Iowa 498, 107 N.W. 177 (1906), and Lattschwager v. Fank, 151 Iowa 55, 130 N.W. 170 (1911), *with* Alvis v. Alvis, 123 Iowa 546, 99 N.W. 166 (1904).

[60] Wright v. Flatterich, 225 Iowa 750, 281 N.W. 221 (1938); Thayer v. Sherman, 218 Iowa 451, 255 N.W. 506 (1934); Keeline v. Clark, 132 Iowa 360, 106 N.W. 257 (1906); Hostetler v. Eddy, 128 Iowa 401, 104 N.W. 485 (1905); Eisenstadt & Co. v. Cramer, 55 Iowa 753, 8 N.W. 427 (1881); Wilson v. Christopher, 53 Iowa 483, 5 N.W. 613 (1880); Barnett v. Mendenhall, 42 Iowa 296 (1875); Sharp v. Bailey, 14 Iowa 387 (1862); Williams v. Swetland, 10 Iowa 51 (1859); *cf.* Kaiser v. Klein, 29 S.D. 464, 137 N.W. 52 (1912). *But see* (as to grantor) Larson v. Reynolds & Packard, 13 Iowa 579 (1862). *Meylink v. Rhea*, 123 Iowa 310, 98 N. W. 779 (1904), in which the non-joining spouse was estopped, appears not to involve homestead property.

status, and no spouse joins therein. The Standard suggests, first, that no showing need be made if the deed is subject to the statutes of limitations appearing as Code sections 614.15 and 614.17. The second of these sections has been discussed at length elsewhere in these articles.[61] It would bar the claims under discussion, arising because of the marital relationship, if the deed was executed before January 1, 1940, the grantor died before that date, the claim of dower or homestead rights was not filed for record by July 4, 1952, and a proper affidavit of possession is on file. The first statute, section 614.15, relates specifically to the failure of a spouse to join in a conveyance. It bars all claims based on such faliure, as to conveyances executed prior to January 1, 1940, if the grantor died prior to July 4, 1951 and no action on the claim was brought within one year after that date, or if the grantor were alive on July 4, 1951, and no notice of the inchoate claim was filed within two years thereafter, in the manner prescribed in the statute. A prior version of section 614.15, essentially the same except as to dates, was held to be constitutional.[62] It would thus appear, in view of this holding and the comments elsewhere in these articles as to section 614.17,[63] that the position taken as to the effect of the two statutes of limitations is correct.

If claims are not barred by one or the other of the two statutes of limitation, the Standard indicates that a further showing becomes necessary, and that that showing should consist of: (1) an affidavit that the grantor was unmarried when he executed or delivered the deed; or (2) an affidavit that he was married but that his spouse predeceased him, and that the real estate involved was not a homestead; or (3) a further conveyance from grantor and his spouse.[64] But is it necessary that grantor's marital status be shown in his deed or in a supplementary affidavit, if in fact he was single, widowed, or divorced when he conveyed? Is title merchantable if conveyances in the chain omit such showing? Cases on this point are few, and contradictory. What apparently is the first case on the problem in another jurisdiction, *Judd v. Skidmore*,[65] took the position that omission of any recital on marital status was an unsubstantial defect. The court said: "There is no presumption that [grantor was a married man], and therefore no presumption that the deed was defective for want of his signature."[66] This position was followed in part at least in two

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61 2 DRAKE L. REV. 76, 78-81 (1953).

62 The statute was held constitutional, in *Collier v. Smaltz*, 149 Iowa 230, 128 N.W. 396 (1910), *writ of error dismissed for want of jurisdiction*, 223 U.S. 710 (1911). Insanity of the grantor was not recognized as tolling the statute. See also McClain, *General Limitation of Real Estate Actions*, 6 IOWA L. BULL. 77 (1921).

63 2 DRAKE L. REV. 76, 78-81 (1953).

64 The Standard refers to "grantor and wife", IOWA LAND TITLE EXAMINATION STANDARDS 27 (1950), but from the context applies to "grantor and spouse".

65 33 Minn. 140, 22 N.W. 183 (1885).

66 *Id.* at 142, 22 N.W. 183 at 184.

other Minnesota cases,[67] and possibly in New York.[68] A brief and often-cited New York opinion, *Greenberg v. Schiffman*,[69] argues that if grantor was unmarried, no one could attack the title conveyed, and if he was married a recital to the contrary would be of no value. The judge then stated that he thought: "that the mere omission of a recital that a male grantor in a deed was unmarried, does not affect the marketability of the title."[70] Several other cases reaching the same result, that the omission does not affect merchantability of title, appear either to deal with instruments so old that any inchoate rights may have been lost by lapse of time,[71] or to be explainable upon their own peculiar facts.[72]

Other courts have reached a contrary result.[73] The Nebraska court, dealing with an almost identical problem, has said that: "it requires no argument to demonstrate that a conveyance without some such showing in it, or upon which it rests, is not a good or sufficient conveyance."[74] The basis upon which these cases hold

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[67] Ross v. Carroll, 156 Minn. 132, 194 N.W. 315 (1923); Brendemahl v. Schwager, 155 Minn. 321, 193 N.W. 455 (1923).

[68] Russell v. Wales, 119 App. Div. 536, 104 N.Y.S. 143 (4th Dept. 1907); Greenberg v. Schiffman, 119 Misc. Rep. 208, 195 N.Y.S. 65 (Spec. Term 1922).

[69] 119 Misc. Rep. 208, 195 N.Y.S. 65 (Spec. Term 1922).

[70] *Id.* at 209, 195 N.Y.S. 65 at 66.

[71] Scott v. Kirkham, 165 Kan. 140, 193 P.2d 185 (1948) (deed was recorded over 76 years before the objection to it; the court also said, 165 Kan. 140 at 143, 193 P.2d 185 at 188, that defendant "cites no statute which requires an abstract to disclose the existence or nonexistence of a marital relation between grantors."); Ross v. Carroll, 156 Minn. 132, 194 N.W. 315 (1923) (alternative holding: "the lapse of more than 40 years without anyone claiming that [grantor] was married gives rise to an inference that he was not.", 156 Minn. 132 at 134, 194 N.W. 315 at 316); Horton v. Matheny, 72 Ohio App. 187, 51 N.E.2d 41 (1943) (the only dower interest possible when the deeds were executed, in 1861 and 1864, was a life estate); *cf.* Forsyth v. Leslie, 74 App. Div. 517, 77 N.Y.S. 826 (4th Dept. 1902). The facts of *Hyatt v. O'Connell*, 130 Iowa 567, 107 N.W. 599 (1906), illustrate the possibilities of danger in such assumptions. In that case, H conveyed the property involved in 1855, but W refused to join in the deed. H died in 1903, and W then was able to claim her dower interest. The *Hyatt* opinion does not indicate what was recited in the deed, but assumes that W did nothing to make the purchaser believe H was unmarried.

[72] Curtis v. Union Homestead Ass'n, 126 La. 969, 53 So. 63 (1910) (the problem in this case, because of community property rules, was whether H, admittedly married when he conveyed, was married two years earlier when he obtained title; a court had ordered his sale of the property and W and two others had sworn that H was never married before the marriage to W in the two year period); Revol v. Stroudback, 107 La. 295, 31 So. 665 (1902).

[73] Bragg v. Chilcotte, 176 Ill. App. 371 (1912); Wilson v. Perry, 110 Neb. 535, 194 N.W. 455 (1923); Grand Lodge A.O.U.W. v. Fischer, 70 S.D. 562, 21 N.W.2d 213, 161 A.L.R. 1466 (1945); Burks v. Neutzler, 289 S.W. 436 (Tex.Civ.App. 1926), *rev'd on other grounds*, 2 S.W.2d 416 (Tex.Com.App. 1928); *cf.* Atteberry v. Blair, 244 Ill. 363, 91 N.E. 475, 135 Am.St.Rep. 342 (1910); Singer v. Guy Investment Co., 60 Wash. 674, 111 Pac. 886 (1910). See also Annotation, *Marketability of title as affected by lack or insufficiency of proof that one of the parties to an instrument or proceeding in the chain of title was not married*, 161 A.L.R. 1472.

[74] Wilson v. Perry, 110 Neb. 535 at 539, 149 N.W. 455 at 456 (1923).

the conveyance to be defective is not always stated, but often seems to be that the question is not whether the grantor should be presumed to be unmarried, but whether a reasonable doubt as to the true facts concerning the grantor's marital status is possible. Most of the courts holding the defect to be insubstantial appear not to have considered the problem as one involving reasonable doubt; two, however, thought the doubts unreasonable under the facts before them.[75] Some courts assume insufficiency of the conveyance without discussion, and ask only whether it can be cured by affidavit.[76] In some states, including Iowa, a deed conveying homestead property may be a nullity unless both spouses join therein, and this fact may be used in such states to require a recital that grantor is unmarried if the title affected is to be merchantable.[77]

Patton apparently follows the Minnesota view that marriage will not be presumed and that a title is not unmarketable because of failure to show grantor's marital status.[78] He cites two Iowa cases in support of his position, and one opposed thereto. None is precisely in point, and each can be distinguished. In *Renwick v. Bancroft,*[79] the vendor-mortgagee, ordered by a court to comply with his contract to convey, objected unsuccessfully to a purchase-money mortgage tendered to him in which the vendee-mortgagor failed to state that he was unmarried. This was not considered by the court as a question of marketable title. The mortgagee was personally acquainted with the mortgagor to some extent, had offered no proof that the mortgagor was married, and the court refused to presume him married. *Nicodemus v. Young,*[80] an action by the holder of a tax title to quiet title, was against the record title holder. Plaintiff attempted to show that defendant's record title was bad because one deed in the record chain of title failed to show the marital status of the grantor therein. This too was not treated as a question of marketability of title. The court's position was that defendant did not have to prove his own title, but that it was up to plaintiff, claiming under the tax deed, to establish that the record title was in fact defective. The third case, *Thordson v. Kruse,*[81] was an action by a grantee against his grantor to recover the expense of a quiet title action grantee had brought to perfect his title. The grantor argued that there had been no proof of defects in the title conveyed. The court suggests in answer a number of defects which "counsel have apparently over-

[75] Scott v. Kirkham, 165 Kan. 140, 193 P.2d 185 (1948); Hoffman v. Perkins, 3 N.J.Super. 474, 67 A.2d 210 (1949).

[76] Atteberry v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am.St.Rep. 342 (1910); Singer v. Guy Investment Co.; 60 Wash. 674, 111 Pac. 886 (1910); *cf.* Curtis v. Union Homestead Ass'n, 126 La. 969, 53 So. 63 (1910); Forsyth v. Leslie, 74 App. Div. 517, 77 N.Y.S. 826 (4th Dept. 1902).

[77] IOWA CODE § 561.13 (1954); Grand Lodge A.O.U.W. v. Fischer, 70 S.D. 562, 21 N.W.2d 213, 161 A.L.R. 1466 (1945); *cf.* Kaiser v. Klein, 29 S.D. 464, 137 N.W. 52 (1912).

[78] PATTON, TITLES §§ 213, 339 (1938).

[79] 59 Iowa 116, 12 N.W. 801 (1882).

[80] 90 Iowa 423, 57 N.W. 906 (1894).

[81] 173 Iowa 268, 155 N.W. 334 (1915).

looked," including "another, in that there was a failure to state that the grantor was a single man."[82] Whether that defect alone would have been sufficient to destroy marketability of title is not clear. The Iowa court certainly is not committed to the rule that omission of marital status has no effect on merchantability, and may be persuaded that it does have an effect.[83] For this reason, the position of Standard 5.4, that a further showing is necessary if there is no recital as to marital status in the deed, where the statutes of limitation are inapplicable, appears to be well taken.

What showing is necessary? If the grantor was in fact unmarried when the deed was executed and delivered, the Standard states that an affidavit to that effect is sufficient. Several cases in other jurisdictions have indicated that an affidavit by the grantor, or by one acquainted with the facts, is as acceptable as a recital to that effect in the deed itself would be.[84] The second recommended affidavit, that the spouse had predeceased grantor and that the real estate did not include their homestead, would also appear sufficient if a recital in the deed would have been acceptable. When the property involved includes homestead, there is ample Iowa authority justifying the position that the original conveyance was a nullity, and that therefore a further conveyance should be obtained.[85] While there are a number of instances in which grantors were not permitted to treat their deeds to homesteads as nullities, the court either found that the homestead had been abandoned before or at the time of the conveyance,[86] or followed a

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[82] *Id.* at 276, 155 N.W. 334 at 337.

[83] *Cf.* Felch v. Finch, 52 Iowa 563, 3 N.W. 570 (1879).

[84] Atteberry v. Blair, 244 Ill. 363, 91 N.E. 475, 135 Am.St.Rep. 342 (1910); Singer v. Guy Investment Co., 60 Wash. 674, 111 Pac. 886 (1910); *cf.* Curtis v. Union Homestead Ass'n, 126 La. 969, 53 So. 63 (1910); Forsyth v. Leslie, 74 App. Div. 517, 77 N.Y.S. 826 (4th Dept. 1902).

[85] Thayer v. Sherman, 218 Iowa 451, 255 N.W. 506 (1934); Brundson v. Brundson, 199 Iowa 1099, 200 N.W. 823 (1925); Pagel v. Tietje, 193 Iowa 467, 186 N.W. 938 (1922); The Seiffert & Wiese Lumber Co. v. Hartwell, 94 Iowa 576, 63 N.W. 333 (1895); Sharp v. Bailey, 14 Iowa 387 (1862); Williams v. Swetland, 10 Iowa 51 (1859); *cf.* State Exchange Bank of Parkersburg v. Nolan, 201 Iowa 722, 207 N.W. 745 (1926). The headnote in 109 Iowa, to *Browneller v. Wells*, 109 Iowa 230, 80 N.W. 351 (1899), suggests that homestead rights of H and W are superior to a mortgage placed by H on the property before he married. The case, however, holds that they are not.

[86] Shaffer v. Miller, 195 Iowa 891, 192 N.W. 868 (1923); Robison v. Robison, 187 Iowa 1029, 175 N.W. 9 (1919); Albright v. Hannah, 103 Iowa 98, 72 N.W. 421 (1897); Boling v. Clarke, 83 Iowa 481, 50 N.W. 57 (1891); Drake v. Painter, 77 Iowa 731, 42 N.W. 526 (1889); *cf.* Des Moines Marble Co. v. McConn, 210 Iowa 266, 227 N.W. 521 (1930); Crail v. Jones, 206 Iowa 761, 221 N.W. 467 (1928); Winkelman v. Winkelman, 79 Iowa 319, 44 N.W. 556 (1890). In the following cases abandonment was argued but the court held that the homestead had not been abandoned: Alvis v. Alvis, 123 Iowa 546, 99 N.W. 166 (1904); Chew v. Holt, 111 Iowa 362, 82 N.W. 901 (1906); Swingle v. Swingle, 36 N.D. 611, 162 N.W. 912 (1917).

prior decision so holding, in what appeared to be an almost identical factual situation.[87]

5.1-5.3. Whether recitals in conveyances may be relied upon is the subject of three standards. 5.1 indicates that the examiner may rely on recitals, in the body of the deed or the acknowledgment, that grantors are husband and wife, even where preceding instruments in the chain of title show that the name of the owner's spouse was different. 5.2 permits reliance on recitations that the grantor is single, a widower, a widow, or unmarried, even though other instruments in the chain of title indicate that the grantor had been married prior to the date of the deed. If the deed recites that grantor is divorced, the position of 5.3 is that the examiner is on inquiry as to the jurisdiction of the court granting the decree and whether the decree is valid and binding.

Recitals, in most jurisdictions, operate only as an estoppel against the grantor, his heirs and assigns.[88] Thus, a recital that he is single may estop him from claiming otherwise—but if he were in fact married, the dower interest of his spouse would not be barred by the recital alone.[89] Also, a deed executed by grantor and his present "spouse" is ineffective to divest the interest of his lawful spouse, where the prior marriage was not terminated by death or a valid divorce decree.[90] Where the standard required

[87] The following cases cite *Drake v. Painter*, 77 Iowa 731, 42 N.W. 526 (1889), and other cases in the preceding note, but do not speak in terms of abandonment: Scott v. Brenton, 168 Iowa 201, 150 N.W. 56 (1914); Hurst v. Jenkins, 161 Iowa 414, 143 N.W. 401 (1913); Brandes v. Brandes, 129 Iowa 351, 105 N.W. 499 (1906); Caldwell v. Drummond, 127 Iowa 134, 102 N.W. 842 (1905); *semble*, Soper v. Galloway, 129 Iowa 145, 105 N.W. 399 (1905).

[88] PATTON, TITLES §§ 213, 339 (1938). *Cf.* Warner v. Trustees of the Norwegian Cemetery Ass'n, 139 Iowa 115, 117 N.W. 39 (1908).

[89] Dunn v. The Portsmouth Savings Bank, 103 Iowa 538, 72 N.W. 687 (1907); Cruize v. Bellmire, 69 Iowa 397, 28 N.W. 657 (1886); Felch v. Finch, 52 Iowa 563, 3 N.W. 570 (1879); *cf.* Peirce v. O'Brien, 29 Fed. 402 (C.C. N.D. Iowa 1886); Blasser v. Moats, 81 Iowa 460, 46 N.W. 1076 (1890); Warner v. Trustees of the Norwegian Cemetery Ass'n, 139 Iowa 115, 117 N.W. 39 (1908).

[90] Smith v. Fuller, 138 Iowa 91, 115 N.W. 912, 16 L.R.A. (N.S.) 98 (1908) (H sold property to D-1 in 1888, describing himself as unmarried, and other property to D-2 in 1890, his "wife Anna" joining in the deed. H married P in 1875, deserted her in 1882 when he went to Council Bluffs, married twice while there, and returned to P in 1902. P never tried to find H in the period he was gone, supposed him dead, and remarried herself, but her new husband died before 1902. Court held P was entitled to dower in the properties conveyed to D-1 and D-2.); Casley v. Mitchell, 121 Iowa 96, 96 N.W. 725 (1903) (H and W married in England. After several years H left, to find work, and never returned. He changed his name and in Germany married W-2, but no record of divorce from W can be found. H and W-2 came to the United States under his new name, acquired land in Iowa, which they conveyed to D's grantor. W claims dower, and gets it.); Dunn v. The Portsmouth Savings Bank, 103 Iowa 538, 72 N.W. 687 (1897) (About 1856, H took children and left W, going to Council Bluffs. He married C, claiming W was dead, and lived there with C until his death in 1887. His property was divided between C and the children, and C conveyed as administratrix to X, who mortgaged to D Bank. D foreclosed. W brings quiet title action claiming dower, and is successful.); *cf.* Goodwin v. Goodwin, 113 Iowa 319, 85 N.W. 31 (1901); McCraney v. McCraney, 5 Iowa 231 (1857).

for the title conveyed is "marketability", rather than "perfection", it may be appropriate to rely upon recitals in deeds except as to those matters which, such as divorce proceedings,[91] are readily discoverable in public records. Recitals are not prima facie evidence of the facts recited[92] (except that Iowa conveyances executed prior to 1930, in which a grantor is described as surviving spouse or heir at law,[93] are conclusive evidence of the facts recited as far as they relate to the right of the grantor to convey[94]), but a title examiner who requires further showing as to the "facts" recited would set requirements that often could not be reasonably met, especially as the period of time since the original grant from the government and the chain of title lengthen. The alternative in many instances is to require an affidavit, which would be of no greater effect than a recital if the facts stated in the affidavit as true are untrue.[95]

5.5. Where property is conveyed to both husband and wife as joint tenants with right of survivorship, and the joint tenancy has not been severed, the survivor takes the entire fee. He could transfer good title. But, if both are living and have been divorced (without a property settlement) and married to other parties, a conveyance by one joint tenant and his present spouse might not transfer good title. And, if the spouses took as tenants in common, whether one spouse has died or they have been divorced and second marriages have occurred, a conveyance by one tenant in common and his present spouse would not convey the entire title to the tract. Because of these possibilities, it often is important to establish that the husband and wife who are conveying title are the same to whom it was previously conveyed, or, if not, that all interests are being transferred. Suppose the first conveyance were to John Doe, and Jane Doe, his wife, the later one from John Doe, and Mary Doe, his wife. The recital in the second deed could be accepted as indicating that Mary was John's wife when the property was conveyed by them, according to Standard 5.1. A further showing would, however, appear necessary to establish that Mary is the person who was called Jane when the deed to the Does was executed, or to establish that Jane was a different person but no longer has an interest in the fee. The example in the problem presented in 5.5 is the conveyance to John and Mrs. John Doe, and a later deed by John and Mary, and the applicable Standard suggests that affidavits should be required to show that Mary was John's wife when the deed was executed and delivered to them. If such

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[91] Beeman v. Kitzman, 124 Iowa 86, 99 N.W. 171 (1904); *cf.* Blasser v. Moats, 81 Iowa 460, 46 N.W. 1076 (1890); Cruize v. Bellmire, 69 Iowa 397, 28 N.W. 657 (1886).

[92] PATTON, TITLES §§ 21, 213, 339 (1938); *see* cases collected in footnote 52, *supra*. *But see* Williams v. Swetland, 10 Iowa 51 (1859).

[93] Or grantors, as surviving spouse and heir or heirs at law, or as heirs at law.

[94] IOWA CODE § 558.14 (1954).

[95] Atteberry v. Blair, 244 Ill. 363, 91 N.E. 475, 135 Am.St.Rep. 342 (1910); Singer v. Guy Investment Co., 60 Wash. 674, 111 Pac. 886 (1910).

affidavits are obtainable, they should be sufficient to meet the problem presented in the Standard. If not obtainable, a further showing would be necessary.

5.6 The problem of this section concerns the showing necessary where one spouse releases a dower interest but does not join in the granting clause of the deed, or otherwise fails to release homestead rights, and Code sections 614.15 and 614.17 are inapplicable.[96] The Standard indicates that an affidavit that husband and wife did not occupy the property as their homestead is necessary. This position is taken because Code section 561.13 makes any conveyance or encumbrance of the homestead invalid unless both spouses join in the execution of the same joint instrument,[97] and because if the spouse joins only to the extent of releasing dower rights, it has been held that homestead rights were not thereby released.[98] Under certain circumstances, homesteads have been treated as abandoned prior to the execution of the conveyance, and failure of one spouse to join therein has not been invalidating.[99] As the basis for claimed abandonment usually will not appear of record, unless the matter already has been litigated, the examiner is justified in requiring a further showing that the property was not homestead when conveyed.

5.7. An early conveyancing practice in Iowa was for one spouse, conveying his own property, to release the dower of the other by acting as attorney in fact under a duly executed power of attorney.[100] Such release was held to be ineffective, however,

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[96] Iowa Code § 557.13 (1954) permits a spouse to join in a conveyance of real estate owned by the other, without being bound by the covenants of such conveyance unless it is expressly stated in the conveyance that the spouse so joining is to be bound.

[97] Normally, execution by each spouse will occur at approximately the same time. In *Alvis v. Alvis*, 123 Iowa 546, 99 N.W. 166 (1904), W signed the deed in 1899, after H had executed it in 1864. W's name nowhere appeared in the deed and there was no reference to the property as homestead. H and W were able to recover possession from the grantees. However, in *Kettering v. Eastlack*, 130 Iowa 498, 107 N.W. 177 (1906), where W did not sign the contract to convey at first, but signed H's copy before the date specified for delivery of the deed, and notified grantee that she was ready to sign his copy, H and W were held entitled to specific performance of the contract. And in *Lattschwager v. Fank*, 151 Iowa 55, 130 N.W. 170 (1911), where within a two-week period W was ready and willing to join H in the contract conveying their homestead but did not because H and the scrivener told her it wasn't necessary, the purchaser gave notice of rescission of the contract, W and H then executed the deed and put it in escrow, and W signed H's copy of the contract and offered to sign purchaser's copy, the court held that the contract was not absolutely void under the statute but could be ratified. The court in the *Lattschwager* case pointed out that the *Kettering* decision had involved W's signing before the purchaser attempted to rescind and that that fact was mentioned in the opinion, but said that fact was not there controlling and would not be so held in the case before them.

[98] Eisenstadt & Co. v. Cramer, 55 Iowa 753, 8 N.W. 427 (1881); Wilson v. Christopher, 53 Iowa 483, 5 N.W. 613 (1880).

[99] See cases collected in notes 86 and 87, *supra*.

[100] Collier v. Smaltz, 149 Iowa 230, 128 N.W. 396 (1910); Sawyer v. Biggart, 114 Iowa 489, 87 N.W. 426 (1901).

because of Code section 597.2. This section provides, in effect, that a spouse's dower interest cannot be the subject of contract between husband and wife, and was interpreted to invalidate the power of attorney.[101] Standard 5.7 indicates that such a release of dower is sufficient if sections 614.15 or 614.17 apply, or if legalized by Code section 589.17, which reads as follows:

> "No conveyance of real estate made before July 4, 1941, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower through the other spouse, acting as the attorney in fact by virtue of a power of attorney executed by such spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section 3154 of the Code, 1897, or section 10447 of subsequent codes to and including the Code of 1939, but all such conveyances are hereby legalized and made effective."

The original version of section 589.17, enacted in 1902, differed in several respects. It referred to "a power of attorney executed by *each* spouse" rather than "*such* spouse", and legalized such conveyances of the right of dower "*of*" rather than "*through*" the other spouse, which were "heretofore made" instead of "made before July 4, 1941".[102] This version was held unconstitutional shortly after its enactment, in *Swartz v. Andrews*,[103] because it

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[101] Keeline v. Clark, 132 Iowa 360, 106 N.W. 257 (1906); Sawyer v. Biggart, 114 Iowa 489, 87 N.W. 426 (1901); Wilkinson v. Getty, 13 Iowa 157 (1862). An antenuptial contract might be used to defeat W's dower right, despite this statute. Cummings v. Wood, 197 Iowa 1356, 194 N.W. 945, 199 N.W. 369 (1924); Rankin v. Schiereck, 166 Iowa 10, 147 N.W. 180 (1914). Some contracts between husband and wife have been given effect, though interests protected by the statute were involved, where the contract was a part of a separation agreement. Martin v. Farmers Loan & Trust Co., 180 Iowa 859, 163 N.W. 361, 7 A.L.R. 238 (1917); Manatt v. Griffith, 147 Iowa 707, 124 N.W. 753 (1910); *cf.* Paup v. Shelby County State Bank, 195 Iowa 1213, 193 N.W. 529 (1923); Miller v. Miller, 104 Iowa 186, 73 N.W. 484 (1897). *Contra:* Caruth v. Caruth, 128 Iowa 121, 103 N.W. 103 (1905); Newberry v. Newberry, 114 Iowa 704, 87 N.W. 658 (1901). An argument that W was estopped to contest a contract with H in which she agreed not to claim dower, because she had accepted gifts from H on the understanding they were in lieu of dower, was said by Justice Ladd to be "preposterous", in In re *Estate of Kennedy*, 154 Iowa 460, at 468, 135 N.W. 53, at 56 (1912) (Justice Deemer dissenting). An oral promise by W to the grantee that she would never make any claim of dower, in consideration of payment to her of the purchase money, was said not to be void because of the statute, and she was estopped to claim dower, in *Dunlap v. Thomas*, 69 Iowa 358, 28 N.W. 637 (1886). A conveyance of his property to W, by H, pursuant to an agreement that on W's death it would go to T, H's granddaughter, either by will or by deed, was held not to be a contract dealing with dower, and thus not subject to the statutory inhibition. Young v. Young-Wishard, 227 Iowa 431, 288 N.W. 420 (1939). In *Hatcher v. Sawyer*, 243 Iowa 858, 52 N.W.2d 490 (1952), a contract between H and W under which W deeded her real estate to their grandsons, in exchange for H's promise to will his to their granddaughters, was enforced, though H and W did not join in the same joint instrument. The court in the *Hatcher* case relied in part on *Drake v. Painter*, 77 Iowa 731, 42 N.W. 526 (1889), and the cases following it, which are collected in footnotes 86 and 87, *supra*.

[102] Acts, 29th G.A. c. 237 § 1 (Iowa 1902).

[103] 137 Iowa 261, 114 N.W. 888, 126 Am.St.Rep. 285 (1908).

was construed as a curative act which purported to destroy vested rights. The case involved a power of attorney executed by W alone in 1886, a deed by H in 1888 signed by H and "W by H, her attorney in fact", and the death of H intestate in 1900 leaving W as his surviving widow. Thus the widow's dower right had accrued before passage of the curative act and could be said to be vested. This the court recognized. In addition it indicated that, as H had no power to execute the deed and release W's dower, the act, attempting to validate an invalid instrument, was unconstitutional for that reason alone. It was also argued that the use of "each spouse", in the statute, indicated a requirement for a jointly executed power of attorney. Apparently both counsel and the court overlooked the fact that in 1904, several years before the case was argued, the word "each" had been changed to "such".[104] The section has not received further appellate construction. It has, however, been the subject of occasional legislative action. In 1917 the version held unconstitutional, as amended, was repealed, and reenacted, except that "through the other spouse" was substituted for "of the other spouse".[105] This legislation also provided that it should not "affect pending litigation, nor shall it operate to revive rights or claims already barred by" what is the present section 614.15.[106]. A 1943 amendment struck out "heretofore made" and substituted "made before July 4, 1941".[107] If section 589.17 is constitutional, because of sections 614.15 and 614.17 it is of importance today only where the release under power of attorney was executed after December 31, 1939, and before July 4, 1941, or where the spouse has acted in accordance with the terms of the two statutes of limitations in such a manner as to preserve her dower right. The 1941 date may, however, be extended by subsequent legislative action. If section 589.17 was unconstitutional, in *Swartz v. Andrews*, only because the husband had died before the statute was passed, leaving a widow with a vested dower right, it is arguable that the curative act prevents acquisition of vested dower rights under such circumstances today, and the conveyance cannot be attacked because of the release under power of attorney when subject to the act. This result may have been an objective of the 1917 legislation. If, however, the original act could not constitutionally validate an *invalid* instrument, as some of Judge McClain's language suggests, this same argument would make section 589.17 unconstitutional both as to conveyances before and conveyances after its enactment. The 1917 legislation, and perhaps Standard 5.7 itself,[108] may be persuasive to the court that the

[104] Acts, 30th G.A. c. 118 (Iowa 1904).
[105] Acts, 37th G.A. c. 351 § 2 (Iowa 1917).
[106] Acts, 37th G.A. c. 351 § 3 (Iowa 1917).
[107] Acts, 50th G.A. c. 262 § 16 (Iowa 1943).
[108] In *Grand Lodge A.O.U.W. v. Fischer*, 70 S.D. 562, at 570, 21 N.W.2d 213, at 216, 161 A.L.R. 1466, at 1471, the South Dakota court, discussing short term statutes of limitations such as Iowa Code §§ 614.15 and 614.17 (1954), refers to the Iowa Land Title Standards on Statutes of Limitations.

statute is constitutional but does not affect any dower rights accruing before 1902 (or perhaps 1917). Where a conveyance is in the form covered by the Standard, and was made after July 3, 1941, the old decisions invalidating the release of dower are applicable at present, and the position taken by the Standard as to them is proper.[109]

III. STATUTES OF LIMITATIONS

The Iowa Code contains several limitations statutes designed to bar all claims arising prior to a designated date or definable time regardless of any legal disability on the part of the claimant. Some effects of several of these, sections 448.15, 448.16, 614.17, and 614.21, are the subject of Chapter 10 of The Iowa Title Standards. Each of the sections, as will be noted, has been considered elsewhere in this series of articles.

10.1. The question posed is "to what extent may Code Section 614.17 be relied upon as a cure or remedy for imperfections in the chain of title?" Discussion of the Standard and this Code Section appears in *The Iowa Title Standards I,* 2 Drake Law Review 76, 78-81 (1953).

Standards 10.2 and 10.3 are concerned with the use of tax title affidavits, under sections 448.15 and 448.16, to cure or remedy imperfections in a tax deed. Brief reference was made to these affidavits in a preceding article.[110] These sections permit the record holder of a tax title, in possession, to file an affidavit of his possession and claim title, after two years from the issuance of his tax deed. Any claims adverse to his title, not filed within 120 days thereafter, are barred. As Standard 10.2 indicates, these sections have been held to constitute a valid statute of limitations, and, when complied with, to bar all claims based upon defects in tax deeds—either mere irregularities or jurisdictional defects.[111] As in the case of section 614.17, the Committee states that claims owned by a state or the United States cannot be cut off in this manner.[112] According to Standard 10.2, except with regard to such claims, the abstract need show only the recording of the affidavit, and that no claims have been filed thereunder within 120 days after the recording.

However, in several cases where such affidavits were recorded and no claims filed in the 120 day period, the court did not rely upon the statutory bar to the claim, but examined the claim and determined it not to be valid.[113] According to the form of the affidavit, the holder of the tax deed must be in possession of the property at the time the deed is filed. Possession by a tenant

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109 See cases collected at footnote 101, *supra.*
110 3 DRAKE L. REV. 36, 40-41 (1953).
111 Swanson v. Pontralo, 238 Iowa 693, 27 N.W.2d 21 (1947).
112 Standard 10.1; 2 DRAKE L. REV. 76, 81 (1953).
113 Adams v. Jensen, 47 N.W.2d 799 (Iowa 1951); Patterson v. May, 239 Iowa 602, 29 N.W.2d 547 (1948); Blondel v. Verlinden, 238 Iowa 439, 26 N.W.2d 342 (1947).

holding under the affiant is sufficient.[114] But in one case in which possession through a tenant was claimed, the court determined that the "owner" was not in possession.[115] In this case the affidavit recited that the tax title holder was "in possession of such real estate through his tenant, Carl Bishop."[116] Bishop, the alleged tenant, was the president of the corporation that had owned and occupied the property before the tax sale, and had continued in occupation thereafter. As the affiant introduced no evidence to support his claim that Bishop was occupying under a landlord-tenant arrangement, the claim of the corporation to the property was held not to be barred. This case would suggest that if there are special circumstances creating suspicion that the holder of the tax deed who filed the affidavit might not have been in possession, further steps may be necessary to cut off claims of former owners, or assure that they have been cut off.

10.3. This Standard suggests that the affidavit may be filed not only by the tax title holder in possession, but also by anyone having knowledge of the facts who files at his request. That this is proper is suggested by the form of the affidavit, as given in section 448.15. The Code heading for section 448.15, "Affidavit by tax title holder", was inserted by the Code editor and is not part of the statute itself. The title appended to the enacted legislation is "Affidavit of Adverse Possession under Tax Deed".[117] The court has taken the position that the claims to be filed within the 120 day period need not be filed personally by the claimant but may be filed by his agent or attorney.[118] As the reasons used by the court are applicable also in the instance of the affidavit itself, and for the other reasons noted, it seems apparent that the affidavit need not be filed personally by the tax title holder in possession.

Standards 10.4 and 10.5, relating to the "ancient mortgage" statute, Code section 614.21, indicate that mortgages which are more than twenty years old are barred unless the record shows affirmatively that less than ten years have elapsed since the date of maturity of the indebtedness secured by the mortgage, or any part of it. The Standards appear to be correct.[119]

IV. JUDICIAL PROCEEDINGS

It is important that the title examiner make a detailed examination of judicial proceedings appearing of record. If title is

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[114] Swanson v. Pontralo, 238 Iowa 693, 27 N.W.2d 21 (1947).

[115] Modern Heat and Power Co. v. Bishop Steamotor Corp., 239 Iowa 1267, 34 N.W.2d 581 (1948).

[116] *Id.* at 1278, 34 N.W.2d 581 at 587.

[117] Acts, 49th G.A. c. 257 (Iowa 1941); Acts, 50th G.A. c. 223 (Iowa 1943). The explanation for the statute was stated as: "An act to provide the means of creating title to real estate by adverse possession, and to limit the time within which actions may be brought to recover real estate after the issuance of a tax deed."

[118] Patterson v. May, 239 Iowa 602, 29 N.W.2d 547 (1948).

[119] 2 DRAKE L. REV. 76, 82 footnote 31 (1953); 3 DRAKE L. REV. 36, 41-42 (1953).

held under a judicial sale or other judicial proceedings the examiner must look behind the actual instrument of conveyance and determine the existence and validity of the judgment or decree upon which the instrument is based.[120] The examiner should be primarily concerned with determining whether the court had jurisdiction over the parties and the subject matter of the action; and eight of the standards in this chapter are concerned with this problem. The examiner must also ascertain the validity of judicial proceedings purporting to foreclose or discharge liens on the premises, as such liens, if not validly discharged, are encumbrances on the title.[121] The remaining three standards relate to aspects of this problem.

The court obtains jurisdiction over a defendant by a valid service of an original notice, and without such service any judgment or decree rendered by the court is void.[122] A title based on such a judgment or decree is void, in the absence of statutes of limitations, legalizing acts, or other independent bars to a claim.[123] If the service is not valid, but the defendant makes a general appearance, he has waived the defects in the service and his appearance is sufficient to confer jurisdiction.[124]

It should be pointed out that the examiner is entitled to two presumptions in his determination of whether service was sufficient to confer jurisdiction. He may presume that the return of service is correct.[125] If the court states in a decree or judgment that the court found there to be sufficient and complete service, there is a presumption that such finding is correct.[126] Regardless of these presumptions the examiner should make objection to obvious defects of record.[127]

Standards 6.1, 6.2 and 6.3 are concerned with the sufficiency of an original notice to confer jurisdiction when the notice contains errors of commission or omission on the part of the draftsman.[128] Not every error or defect will prevent the court from having jurisdiction. The Iowa court has adopted a rule of considerable liberality in sustaining the jurisdiction of the court notwithstanding

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120 PATTON, TITLES § 253 (1938).

121 *Id.* §§ 310, 320.

122 Farley v. Carter, 222 Iowa 92, 269 N.W. 34 (1936); Kitsmiller v. Kitchen, 24 Iowa 163 (1867).

123 For a listing of the various statutory bars to claims, see *The Iowa Title Standards I*, 2 DRAKE L. REV. 76, 77 (1953). A discussion of the effect of two statutes of limitation appears therein at pages 78-82.

124 State v. Knapp, 178 Iowa 25, 158 N.W. 515 (1916); Van Vark v. Van Dam, 14 Iowa 232 (1862); Des Moines Branch of the State Bank v. Van, 12 Iowa 523 (1861).

125 Coster v. Jensen, 218 Iowa 1215, 257 N.W. 303 (1934); Glenn v. Miller, 186 Iowa 1187, 173 N.W. 135 (1919); Pyle v. Stone, 185 Iowa 785, 171 N.W. 156 (1919).

126 Allen v. First National Bank, 191 Iowa 492, 180 N.W. 675 (1921); Clark v. Little, 41 Iowa 497 (1875) (the court's finding must appear in the decree before the presumption arises).

127 PATTON, TITLES § 253 (1938).

128 IOWA CODE R.C.P. 50 (1954) lists the information which the original notice shall contain.

many defects in the original notice.[129] "The notice which a party must have . . ., is not any paper that may be served on the party, but a writing which informs him of the proceeding and the time and place where action will be taken therein against him. The service of a notice informing the defendant of the pendency of an action against him, but which fails to inform him where or when he is required to appear, is therefore *no* notice of such proceedings."[130] The defects must be so material as to destroy its essential character as a statutory notice before the notice is wholly void.[131]

The distinction between a "mere defective" notice and a "wholly void" notice is important. If the notice is only defective and the trial court rules that sufficient notice was made, the court was in error in so ruling but such ruling is only subject to a direct attack.[132] Therefore, when the time for appeal or for motion to vacate or for other direct attack has expired, the judgment or decree will continue to be valid. However, if the notice is so materially defective as to be void, it matters not that the trial court deemed it sufficient, because there was no jurisdiction over the defendant, the court had no authority to render a judgment, and any judgment so rendered may be successfully attacked collaterally at a later date.[133] The only showing an examiner need require if the notice was merely defective is that time for direct attack has expired. If, on the other hand, the notice was void, the examiner should consider the subsequent proceedings also void and if title is based on such proceedings there is a cloud on the title.

Standard 6.1 states that an original notice in a mortgage foreclosure proceeding is sufficient to confer jurisdiction even though the notice incorrectly describes the land and gives the wrong book and page of record of the mortgage, if the notice otherwise correctly describes the mortgage. Rule 53 provides that the original notice, when no copy of the petition is attached, shall contain a general statement of the cause or causes of action and the relief demanded, and, if for money, the amount thereof.[134] This provision has been construed to mean that the draftsman need only briefly state the substance of the remedy sought and the nature

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[129] Rhodes v. Oxley, 212 Iowa 1018, 1020, 235 N.W. 919, 920 (1931). Kindig, J. (dissenting), stated at 1022, 235 N.W. 919, 920: "In the long list of our cases involving defects in the original notice, a holding adverse to the sufficiency of such notice is rather exceptional." For a partial list of the cases sustaining the sufficiency of the notice and the defects appearing therein, see the dissenting opinion, 212 Iowa 1018 at 1021, 235 N.W. 919 at 920.

[130] Lyon v. Vanatta, 35 Iowa 521, 526 (1872).

[131] Farley v. Carter, 222 Iowa 92, 269 N.W. 34 (1936); Cummings v. Landes, 140 Iowa 80, 117 N.W. 22 (1908); Daugherty v. McManus, 36 Iowa 657 (1873).

[132] Allen v. First National Bank, 191 Iowa 492, 180 N.W. 675 (1921); Farmers Ins. Co. v. Highsmith, 44 Iowa 330 (1876); De Tar v. Boone County, 34 Iowa 488 (1872).

[133] Rhodes v. Oxley, 212 Iowa 1018, 235 N.W. 919 (1931); Lyon v. Vanatta, 35 Iowa 521 (1872); Kitsmiller v. Kitchen, 24 Iowa 163 (1867).

[134] IOWA CODE § 11055 (1939) required the statement in all original notices.

or subject of the action.[135] There is no requirement that a notice in foreclosure proceedings describe the land[136] or make reference to the record of the mortgage.[137] The court has held that errors in the description of the land[138] and errors in describing the record of the mortgage[139] do not render the notice void as long as the defendant is not misled.[140]

The problem considered in 6.2 is the sufficiency of an original notice to confer jurisdiction if the notice requires the defendant to appear at the next term of court without naming the term but naming the date of the commencement of the term. Prior to the new rules of civil procedure, the original notice was to be served at least a minimum number of days before the term[141] and the notice was required to order the defendant to appear at the second day of the next term, naming it, or a default would be entered against him.[142] If the commencement day of the term was named, but the term itself was not named, the notice was defective but not subject to collateral attack as a nullity.[143] The Standard (6.2) correctly takes this position and further points out that all such notices prior to January 1, 1941, have been legalized.[144] This legalizing act has been amended to include all such notices served prior to July 4, 1943.[145] The new rules of civil procedure became effective on this same date[146] and as they change the return day to a fixed number of days after service,[147] instead of the second day of the next term, the problem posed in Standard 6.2 should no longer be of concern to the examiner.

Standard 6.3 states that a default judgment entered after service of an original notice which fails to name the commencement date of the term but does name the term, is valid if the

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135 Farley v. Carter, 222 Iowa 92, 269 N.W. 34 (1936).

136 Lindsey v. Delano, 78 Iowa 350, 43 N.W. 218 (1889); Van Sickles v. Town, 53 Iowa 259, 5 N.W. 148 (1880). The original notice in an action to quiet title to real property must describe the property. IOWA CODE § 649.3 (1954).

137 Fleming v. Hager, 121 Iowa 205, 96 N.W. 752 (1903).

138 *Ibid.*; Lindsey v. Delano, 78 Iowa 350, 43 N.W. 218 (1889).

139 Fleming v. Hager, 121 Iowa 205, 96 N.W. 752 (1903).

140 Note, *Requisites of an Original Notice in Iowa*, 23 IOWA L. REV. 246, 248 (1938).

141 IOWA CODE § 11059 (1939). The number of days varied as to distance between place of service and place of appearance.

142 IOWA CODE § 11055 (1939).

143 Farmers Ins. Co. v. Highsmith, 44 Iowa 330 (1876); De Tar v. Boone County, 34 Iowa 488 (1872); Knapp, Stout & Co. v. Haight, 23 Iowa 75 (1867). Two cases hold the notice to be valid where neither the name of the term nor the commencement date were included. Decatur County v. Clements, 18 Iowa 536 (1865); Butcher v. Brand, 6 Iowa 234 (1858). When the failure to name the term was accompanied by other defects the notice has been held to be void. Rhodes v. Oxley, 212 Iowa 1018, 235 N.W. 919 (1931); Kitsmiller v. Kitchen, 24 Iowa 163 (1867).

144 IOWA CODE § 578.3 (1954).

145 Acts, 54th G.A. c. 200 § 1 (Iowa 1951) (effective July 4, 1951).

146 IOWA CODE R.C.P. 1(b) (1954).

147 IOWA CODE R.C.P. 53 (1954).

notice was served prior to April 27, 1931,[148] but if served after that date the notice was insufficient and the judgment entered without jusisdiction. *Swan v. McGowen*[149] is cited as authority for this position. The case clearly holds that a failure to name the commencement date does not void the notice when the term is named.[150] *Swan v. McGowen* was decided prior to April 27, 1931,[151] and there are no cases deciding the effect of a failure to state the term commencement date in the original notice after the date was required to appear in the notice. The validiy of notices omitting the date which were served between April 27, 1931 and July 4, 1943, is not clear. It may be thought that the legislature intended to effectuate a result different than that reached in *Swan v. McGowen*, and at least one writer assumes such notice to be void.[152] As mentioned above, however, the court does not require strict compliance with the statutory requirements of an original notice and there are many cases sustaining jurisdiction where such requirements were not met.[153] The court might well adopt the reasoning of an early Iowa case where it was held that the commencement date of the term is fixed by law and everyone is presumed to know the law.[154] As there are no decisions for guidance, the Standard wisely takes the more cautious stand.

Where an erroneous date appears in the original notice as the commencement date, the courts have usually held the notice to be void.[155] These cases can be distinguished from the cases holding a failure to state the commencement date does not void the notice, as an erroneous date would tend to mislead the defendant.[156]

6.4. The problem posed in this Standard is: "Where an original notice is served before the commencement of the term, but not within the time required by Section 11059 of the Code of 1939, is it sufficient to confer jurisdiction by default?" The Standard asserts that such notice confers jurisdiction if the court found it sufficient and no application was made to set the default

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148 Acts, 44th G.A. c. 222 (Iowa 1931) (effective April 27, 1931), amending IOWA CODE § 11055 (1927) to require the original notice to state the commencement date of the term.

149 212 Iowa 631, 231 N.W. 440 (1931).

150 *See* Pendy v. Cole, 211 Iowa 199, 201, 233 N.W. 47, 48 (1930).

151 June, 1930 (rehearing was denied in May, 1931).

152 Note, *Requisites of an Original Notice in Iowa*, 23 IOWA L. REV. 246 (1938).

153 See list of such cases referred to in note 129, *supra*.

154 Butcher v. Brand, 6 Iowa 234 (1858); *cf.* Worster, Templin & Co. v. Oliver, 4 Iowa 345 (1856).

155 Union Savings Bank & Trust Co. v. Carter, 214 Iowa 1131, 243 N.W. 523 (1932); Pendy v. Cole, 211 Iowa 199, 233 N.W. 47 (1930); Fernekes & Bros. v. Case, 75 Iowa 152, 39 N.W. 238 (1888); Genther v. Fuller, 36 Iowa 604 (1873); Boales v. Shules, 29 Iowa 507 (1870). *Contra*: Burr v. Wilcox, 19 Iowa 31 (1865) (majority held no prejudice because erroneous date was later than date defendant by law was required to appear; a strong dissent was registered by Justice Cole); Lemonds v. Trench, 4 G. Greene 123 (1853).

156 Pendy v. Cole, 211 Iowa 199, 201, 233 N.W. 47, 48 (1930); Fernekes & Bros. v. Case, 75 Iowa 152, 153 (1888).

judgment aside before the third day of the next term. As pointed out in discussion of Standard 6.2, prior to the new rules the return day was the second day of the next court term after service. This was true, however, only if service had been made the required number of days before the term.[157] If service was not made sufficiently in advance of the term the defendant was required to appear before the third day of the second term following the service.[158] To render a default judgment after such notice and prior to the third day of the second term was, therefore, defaulting the defendant before he was required to appear. If he appeared as required by law, he could move to set the default judgment aside, as such service was defective.[159] The service was not void, however, and could not be attacked collaterally.[160]

Problems similar to that presented in Standard 6.4 arise where the petition was not filed on or before the date stated in the original notice,[161] and where the petition was not filed the required number of days before the term.[162] The defendant's remedy for these errors was by motion to dismiss,[163] and if he failed to so move and a default judgment was entered against him, he could not attack the judgment collaterally.[164]

A problem that may arise under the present rules concerns an original notice that demands the appearance of the defendant within a lesser number of days than he is entitled to under Rule 53. The Iowa court has held that such a notice is not void.[165]

6.5. Must a return of substituted service state that the defendant was not found in the county, in order to confer jurisdiction to enter a judgment by default? This problem can not arise under the present rule, as substituted service is no longer conditional on the absence or illness of the defendant.[166] Under the prior statute, however, the defendant could only be served by such service if he was not found in the county;[167] and the return was defective if it showed substituted service without stating that the defendant was not so found.[168] An early case held that such a

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157 IOWA CODE § 11059 (1939).
158 IOWA CODE § 11059(3) (1939).
159 Streeter v. Gleason, 120 Iowa 703, 95 N.W. 242 (1903).
160 Walters v. Blake, 100 Iowa 521, 69 N.W. 879 (1897); Griffith v. Milwaukee Harvester Co., 92 Iowa 634, 61 N.W. 243 (1894); Darrah v. Watson, 36 Iowa 116 (1872); Ballinger v. Tarbell, 16 Iowa 497 (1864). *But cf.* Dayton v. Patterson, 216 Iowa 1382, 250 N.W. 595 (1933).
161 IOWA CODE § 11055 (1939) required the original notice to state the date on which the petition will have been filed.
162 IOWA CODE § 11057 (1939) required the petition to be filed ten days before the term.
163 IOWA CODE § 11057 (1939); Sioux County v. Kosters, 194 Iowa 1300, 191 N.W. 315 (1922); Cibula v. Pitt's Sons' Mfg. Co., 48 Iowa 528 (1878).
164 Hildreth v. Harney, 62 Iowa 420, 17 N.W. 584 (1883); Brown v. Mallory, 26 Iowa 469 (1868).
165 Kruger v. Lynch, 242 Iowa 772, 48 N.W.2d 266 (1951).
166 IOWA CODE R.C.P. 56 (1954).
167 IOWA CODE § 11060(2) (1939).
168 Clark v. Little, 41 Iowa 497 (1875); Lyon v. Thompson, 12 Iowa 183 (1861); Chittenden v. Hobbs, 9 Iowa 417 (1859).

defective return could not be attacked collaterally as the service was not void.[169] This is the position of the Standard.

Later cases, however, look at the return in a different light. They agree that the notice is presumed to be correct[170] but the real problem is the sufficiency of the service and not the sufficiency of the return as it is the *fact* of service and not the return that confers jurisdiction.[171] Consistent with this reasoning, the return has been permitted to be amended,[172] and in one instance service was proven by oral testimony of the person making the service as the return had been lost.[173]

In *Coster v. Jensen*[174] the plaintiff brought an action to set aside a default judgment entered against him three years previously. The return of service in the prior action showed substituted service but failed to state that the plaintiff (defendant in that action) was not found in the county. After this action was commenced, the return in the prior action was amended to include the omitted statement. The plaintiff then introduced testimony to show that defendant's attorney had called at plaintiff's home to serve the notice; that plaintiff's wife informed the attorney that plaintiff was at a neighboring farm threshing; and that the attorney did not make any additional effort to serve the plaintiff personally but served the wife in his behalf. The trial court found no valid service in the prior action, and set the judgment aside. This decision was affirmed, and the supreme court held that the question to be decided is the sufficiency of the service, not that of the return. Substituted service is authorized only when the defendant is not found in the county, and there must be a diligent search to find the defendant. In the *Coster* case, the presumption of a correct return was rebutted and the substituted service proved to be unauthorized as no diligent search for the husband had been made. As the service was not valid, the judgment was void for want of jurisdiction.

Coster v. Jensen indicates that it is the actual facts of the service that must be determined in order to ascertain whether there was jurisdiction to enter a default decree. Standard 6.5 can not be said to be wrong because if it is only the return and not the actual service which is defective, the judgment is valid and the return may be amended. If, however, the service is also defective for failure to make a diligent search for the defendant, the judgment is void. As was pointed out above, a return of service is presumed to be correct. Because of the hazardous

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169 Bonsall v. Isett, 14 Iowa 309 (1862); *accord*, Clark v. Little, 41 Iowa 479 (1875) (defendant, in an action on a judgment obtained 17 years earlier, raised the defective return as a defense; this was held to be a *direct* attack and the earlier judgment was set aside).

170 See note 125, *supra*.

171 Coster v. Jensen, 218 Iowa 1215, 257 N.W. 303 (1934); Mintle v. Slyvester, 197 Iowa 424, 197 N.W. 305 (1924).

172 See the cases cited in the previous footnote.

173 Christensen v. Esbeck, 167 Iowa 130, 149 N.W. 76 (1914).

174 218 Iowa 1215, 257 N.W. 303 (1934).

position the title examiner is in when he faces this problem, it would seem to be wiser to demand that the return be amended so that a presumption would arise that the defendant was not in the county.

6.6. This Standard asserts that it is unnecessary to name the spouse of a titleholder as a defendant in a mortgage foreclosure action in order to cut off the spouse's inchoate dower interest.

The Iowa dower statute permits the widow to be deprived of her dower interest by a relinquishment or by execution or other judicial sale prior to her husband's death.[175] If the spouse joins with the title holder in the execution of a mortgage or instrument of conveyance she relinquishes her dower right[176] It is well established in Iowa that so long as the dower right remains inchoate it can be effectively cut off by a judicial sale in a judicial proceeding against the titleholder alone.[177] The recently published Addenda to the Standards points out that a forfeiture of a real estate contract under Code Chapter 656 falls within the purview of "execution or other judicial sale."[178] It appears that the Standard is correct in stating that the examiner need only require an affidavit showing the dower right to have been inchoate at the time of the sheriff's sale.

Standard 6.7 asserts that there is no lien on realty in favor of the persons who are ultimately entitled to the costs in a judgment for costs, therefore there is no necessity to join such persons as defendants in a mortgage foreclosure action where the judgment is junior to the mortgage. The Standard reasons that a lien is created only by operation of a statute and there is no statute creating a lien in favor of a person who may ultimately be entitled to the costs.

In an early decision, the Iowa court, holding a clerk of court could not issue execution for costs due the county, stated: "A judgment when entered is subject to the control of the party in whose favor it is. He, his agent or attorney, may, in the use of proper process of law, enforce it, and no other person. It is his judgment. If fees be due to the officers of the court, or witnesses,

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[175] IOWA CODE § 636.5 (1954).

[176] County of Louisa v. Grimm, 203 Iowa 23, 212 N.W. 324 (1927); Huston v. Seeley, 27 Iowa 183 (1869).

[177] Frahm v. Seaman, 179 Iowa 144, 159 N.W. 206 (1917); Bowden v. Hadley, 138 Iowa 711, 116 N.W. 689 (1908); Pierce v. O'Neil, 132 Iowa 530, 109 N.W. 1082 (1906); Williams v. Wescott, 77 Iowa 332, 42 N.W. 314 (1889); Kemerer v. Bournes, 53 Iowa 172, 4 N.W. 921 (1880); Lucas v. Sawyer, 17 Iowa 517 (1864). Where the dower right has vested it is not cut off by judicial sale. Moomey v. Maas, 22 Iowa 380 (1867).

[178] Eastman v. DeFrees, 235 Iowa 488, 17 N.W.2d 104 (1945). Other types of proceedings held to have been "judicial sales" are: sale in partition proceedings, *Frahm v. Seaman*, 179 Iowa 144, 159 N.W. 206 (1917); sale under bankruptcy proceedings, *Taylor v. Highburger*, 65 Iowa 134, 21 N.W. 487 (1884); sale under assignment for benefit of creditors, *Stidger v. Evans*, 64 Iowa 91, 19 N.W. 850 (1884); sale under a provision in a trust deed, *Pierce v. O'Neil*, 132 Iowa 530, 109 N.W. 1082 (1906).

and they are unreasonably delayed in this collection by the parties to the proceeding, the law gives them a remedy for services rendered. They may enforce their rights by proceeding against the party liable."[179] It has also been held that the judgment creditor, and not his attorney, is entitled to receive the statutory attorney's fees taxed as costs in the proceedings.[180] It would appear therefore that if a lien does exist in favor of one entitled ultimately to receive costs, the lien would be unenforceable.

Standard 6.8 is concerned with the effect of a failure to comply with the Soldiers' and Sailors' Civil Relief Act in obtaining a default judgment.[181] The Standard asserts that an affidavit should be filed in the proceedings stating that the defendant was not in the military service and when this is done the examiner need require no further showing. A recent Iowa case may well be cited as authority for this Standard, as this exact problem was before the court and the result therein indicates that the Standard is correct. *Bristow v. Pagano*[182] was an action for specific performance of a real estate contract. The defendant-purchaser had refused to perform stating that title was unmerchantable because it was based on a default judgment and the affidavit required by the Soldiers' and Sailors' Civil Relief Act was not filed until six days after the entry of the judgment. The court, in affirming a decree for the plaintiff, held that title was merchantable and the affidavit, although filed late, was entitled to a presumption of its truthfulness. The court further pointed out that the requirement that the affidavit be filed is not jurisdictional.[183]

6.9. This Standard states that a failure to appoint a guardian ad litem[184] in an action against a minor or incompetent is not a jurisdictional defect and if the time for direct attack on the judg-

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[179] Hampton, *ex parte*, 2 G. Greene 137, 139 (1849).

[180] Van Buren County Savings Bank v. Rockwell, 154 Iowa 26, 134 N.W. 424 (1912); Schnitker v. Schnitker, 109 Iowa 349, 80 N.W. 403 (1899); Root v. Heil, 78 Iowa 436, 43 N.W. 278 (1889).

[181] "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." 54 STAT. 1180 (1940); 50 U.S.C. APP. § 520 (1946).

[182] 238 Iowa 1075, 29 N.W.2d 423 (1947).

[183] *Gibbons v. Belt*, 239 Iowa 961, 33 N.W.2d 374 (1948) also holds the affidavit is not jurisdictional.

[184] IOWA CODE *R.C.P.* 13 (1954) states: "No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory, or any state hospital for the insane, or one judicially adjudged incompetent, or whose physician certifies to the court that he appears to be mentally incapable of conducting his defense. Such defense shall be by a guardian ad litem; but the regular guardian or the attorney appearing for a competent party may defend unless the court supercedes him by a guardian ad litem appointed in the ward's interest."

ment has expired no further showing is necessary. This position is substantiated by ample authority.[185]

A problem arises as to how long an incompetent or minor has to bring a direct attack on the judgment. One of the grounds for making a motion to vacate a judgment is "erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record."[186] Code section 683.1[187] provides that proceedings to vacate a judgment must be commenced within one year after the judgment or order was made unless the party entitled to bring the proceedings is a minor or person of unsound mind, and then within one year after removal of such disability. Rule 253 provides that proceedings to vacate a judgment must be brought within one year, and makes no exception for a minor or incompetent. Wayne G. Cook, who was chairman of the Advisory Committee to Assist the Court in Preparation of the Rules, in his commentary on the Rules, states that Rule 253 makes one substantial change in the prior statute: "The clause which gave a minor the right to bring the proceedings within one year after his majority is now eliminated."[188] This may have been the intention of the committee, but as section 683.1 was not superseded and still appears in the Code it is doubtful that this has been accomplished.[189] In view of the conflict it appears that the examiner would be wiser to demand a showing that the disability involved has been removed for the period of at least one year after entry of the judgment.

6.10. By virtue of a statute sureties on the bail bonds of a criminal defendant have liens on their real property for the amount of their bonds.[190] Problem 6.10 asks: "Is it necessary to obtain a discharge of a bail bond by the court when the principal defendant has appeared and been sentenced?" The Standard says that a court order should be obtained releasing the surety as there is no code provision for the automatic discharge of the bond upon sentence. A search by this writer has also failed to disclose any statutory or case authority providing for automatic discharge. It is interesting to note that at one time there was statutory provision for the discharge[191] but the section was later repealed.[192]

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185 Equitable Life Ins. Co. v. Cook, 229 Iowa 911, 295 N.W. 428 (1940); Rice v. Bolton, 126 Iowa 654, 100 N.W. 634, 102 N.W. 509 (1905); Hoover v. Kinsey Plow Co., 55 Iowa 668, 8 N.W. 658 (1881); Drake v. Hanshaw, 47 Iowa 291 (1877); Myers v. Davis, 47 Iowa 325 (1877).

186 IOWA CODE R.C.P. 252(c) (1954), superseding IOWA CODE § 12787(3) (1939).

187 IOWA CODE § 683.1 (1954).

188 3 COOK, IOWA RULES CIVIL PROCEDURE 173 (rev. ed. 1951).

189 For a collection of cases deciding conflicts between the Rules and statutes, see 1 COOK, IOWA RULES CIVIL PROCEDURE 3-6 (rev. ed. 1951).

190 IOWA CODE § 764.1 (1954).

191 IOWA CODE § 5519 (1897).

192 Acts, 40th G.A. c. 219 § 4 (1923).

Even then there was a question as to whether the statute "required" the clerk of court to discharge the lien.[193]

6.11. This Standard states that a guardian can lawfully acknowledge service on a minor or incompetent. Taking an acknowledgement or acceptance of service has long been, and continues to be, a lawful method of service.[194] It has been held that any person upon whom notice may be served may acknowledge service.[195] As the guardian is a proper person to serve in action against a minor or incompetent[196] it would seem that the guardian may also acknowledge the service.[197] The notice must, of course, be addressed to the defendant.[198] If the action is brought on behalf of the guardian, he is not a proper person to serve[199] and therefore it would seem he would then be unable to acknowledge service.

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[193] Bruntlett v. Carroll County, 193 Iowa 875, 883, 188 N.W. 142, 145 (1922).

[194] IOWA CODE § 11060(3) (1939), superseded by IOWA CODE R.C.P. 56(a) (1954).

[195] Collinson v. City of Dubuque, 242 Iowa 986, 47 N.W.2d 839 (1951), *reversing upon rehearing* the prior decision in the case which appeared in 45 N.W.2d 148 (1950); McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904). See Professor Vestal's note on the original opinion in the *Collinson* case, 36 IOWA L. REV. 381 (1951).

[196] IOWA CODE R.C.P. 56(b), (c) (1954). Prior to the new rules an incompetent could be served only by serving both the guardian and the incompetent, IOWA CODE § 11069 (1939), except where he was confined in a state hospital and personal service might be injurious to health, IOWA CODE § 11068 (1939). However, only the minor's guardian need have been served. IOWA CODE § 11080 (1939).

[197] *See* Cummings v. Landes, 140 Iowa 80, 85, 117 N.W. 22, 24 (1908).

[198] Sleeper v. Killion, 166 Iowa 205, 147 N.W. 314 (1914).

[199] IOWA CODE R.C.P. 56(b), (c) (1954); In re Estate of Wissink, 242 Iowa 441, 46 N.W.2d 717 (1951).

EDITORIAL NOTES

CUSTODY OF CHILDREN IN THE CONFLICT OF LAWS, 1 Drake L. Rev. 19 (1951), discussed the scope of "full faith and credit" to be given to foreign custody decrees. In *May v. Anderson*, 343 U.S. 528 (1953), the Supreme Court held that the Ohio court was not constitutionally required to give full faith and credit to a Wisconsin decree, obtained at the domicile of the father and children by the father, where the Wisconsin court had no personal jurisdiction over the mother (who resided in Ohio with the children). As noted in HABEAS CORPUS IN IOWA, 3 Drake L. Rev. 30, 32 n. 23 (1953), the court appears to be holding that a court determining custody of children must have personal jurisdiction over the spouse defendant in the divorce proceedings. Justice Frankfurter's concurring opinion suggests that even if the decree were jurisdictionally valid in Wisconsin, it need not be enforced in a sister state with a legitimate interest of its own in the children. His position would seem to be support for the result of such Iowa decisions as *Boor v. Boor*, 241 Iowa 973, 41 N.W.2d 155 (1950), involving foreign decrees where the foreign court had jurisdiction over both parents but the children were residing in Iowa.

The 1954 summer school classes begin June 15, and end August 27. Registration is June 14. A student may take 3 courses. Courses offered for beginning students are: Foundation for Law Study, Torts, and Criminal Law. Advanced courses are: Insurance, Sales, Wills and Adminstration, Creditors Rights, and Conflict of Laws. 3 credit hours are given for each course successfully completed. Tuition is $12 per credit hour.

The annual luncheon of the Drake Law School Association will be Friday, June 4, at Hotel Fort Des Moines, South Ballroom.