Recent Legislation

GRANTEE'S ADDRESS REQUIREMENT FOR DEEDS

I. LANGUAGE AND PURPOSE OF THE NEW STATUTE

In 1963 the Missouri General Assembly enacted legislation requiring certain deeds to contain a mailing address of one of the grantees and directing recorders not to record these instruments "absent such addresses." The address requirement provisions appear in Senate Bill 187 which purports to repeal the former section 59.330 and enact in lieu thereof a new section with the same section number. In fact all the language of the old statute is retained with new provisions tacked on. This comment is concerned with the portion of section 59.330 which reads as follows:

It shall be the duty of recorders to record:

(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices: ¹ all deeds, except deeds of trust, easement or right of way² conveying any lands or tenements must contain a mailing address of one of the grantees named in the instrument, and the recorder of deeds shall not record such instrument absent such addresses; provided however, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address; . . . .³

The concept of obtaining a grantee's address is not unique with the Missouri statute—at least fifteen other jurisdictions⁴ have similar provisions on the

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2. The phrase "right of way" appears hyphenated in Mo. Laws 1963, at 115.
3. Emphasis has been added to indicate the portion of the statute which did not appear in the old version of the statute. Language reproduced in regular roman type appeared in section 59.330 before the 1963 changes. The subsections not reproduced here list other instruments which it is the duty of the recorder to record and do not vary from the language appearing before the 1963 legislation.

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books. A few of the statutes, like the one in Missouri, give no indication of the reason for the address requirement.\(^5\) The others indicate a purpose of obtaining an address to which notices affecting or dealing with the property, and especially tax notices, may be sent.\(^6\) This may shed some light on what was in the contemplation of the Missouri legislature when it enacted section 59.330. The legislators with whom this writer has spoken, however, indicated that they were not at all clear what the purpose of the statute was: some believed that principal support came from metropolitan area assessors' offices; others insisted that the county recorders were the real instigators. The latter possibility seems refuted by the fact that the statute excepts certain instruments from the address requirement.\(^7\) Granting that the statute may be for the purpose of providing assessors with an address for sending forth sundry tax bills and notices, one may still wonder why the entire state was saddled with this statute when, in many areas, no such mailing practice exists.

II. PROBLEMS IN INTERPRETATION OF SECTION 59.330

A. General Considerations

Before proceeding to discuss the possible interpretations of specific phrases used in the "new" portion of section 59.330, a few remarks about the style and location of the provision should be made to indicate some of the problems which new legislation in this area might avoid.

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5. See the Delaware, Massachusetts, Michigan, Minnesota, Montana, New York and North Dakota statutes mentioned in note 4, supra.

6. The Arkansas statute, supra note 4, asks for the "address to which the grantee wants future tax statements mailed." A preamble to the enacting legislation for this statute states: "WHEREAS, numerous owners of real estate fail to receive their tax statements through incorrect addresses on the tax books, thereby permitting their property to go delinquent; . . ." Ark. Acts 1933, No. 235. The Colorado statute, supra note 4, indicates that the address is wanted for serving "all notices required by or given in pursuance of the provisions of this article by the registrar of titles or by the court, . . ." The Florida statutes, supra note 4, include a provision that a schedule of the deeds and conveyances filed for record (which includes the addresses of each grantee) shall be furnished . . . "to the respective county tax assessors in the counties where such instruments are recorded." The Illinois statute, supra note 4, provides that "all notices by the registrar or other persons relating to the land therein described may be served on such person at such address." The New Jersey statute, supra note 4, provides that an abstract of the record "together with the address of the grantee" shall be mailed to "such assessor,lector, or other custodian . . ." The Pennsylvania statute, supra note 4, begins with the language: "For the purpose of obtaining with accuracy the precise residence of all owners of real estate, and persons having a taxable interest therein . . ." The Tennessee act, supra note 4, requires a "notation on the face of the deed showing the correct mailing address of the new owner . . . and, if tax bills are to be sent to any person other than the owner, . . . a notation of the name and mailing address of such other person." The Washington statute, supra note 4, appears to be almost identical to the Colorado statute.

7. It has been suggested that the recorders wanted the addresses for the purpose of knowing where to mail the instrument after it is recorded; but, if so, why would this information not be necessary for any instrument to be recorded? The same question may be asked in reply to the suggestion that the statute is for the purpose of ascertaining which John Smith or which Mary Jones, in a metropolitan area, is the grantee in a particular instrument.
The entire section begins with an introductory clause: "It shall be the duty of recorders to record."; one would expect there to follow a listing of those items which it is the duty of the recorder to record. Indeed this is what did follow until the last session of the legislature. Now, however, we interrupt this listing with new clauses and provisions which could not possibly be read as completing a thought begun by the introductory clause.

Looking at subsection (1): the original language told recorders to record the named instruments which have been proved or acknowledged according to law, and "authorized to be recorded in their offices." One would suspect that such language was used because this statute was not the statute which authorized recording. Indeed there is another statute in the books naming the instruments which may be recorded. Section 442.380 provides:

Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated. (Emphasis added.)

Such language would seem to leave little to the discretion of the recorder. Certainly it authorizes the named instruments to be recorded. Does there not appear, then, to be a conflict between section 442.380 (which authorizes the recording of instruments whether or not they contain an address of any grantee) and the new language of section 59.330? If an additional pre-requisite to recording must be added, wouldn't it have been better to incorporate it, or at least refer to it, in section 442.380? Instead we are left with a statute directing that certain instruments shall be recorded and another saying that it is the duty of the recorder not to record these instruments unless they contain the address of one of the grantees. And nowhere in the new legislation is there express provision that statutes in conflict are repealed.8

B. The Exception

Now to look at some of the phrases in the "new" part of section 59.330: In subsection one there are four clauses: the first of these has appeared without change for over one hundred years.9 The remaining three clauses were added by the 1963 session of the legislature. The new language begins: "all deeds, except deeds of trust, easement or right of way conveying any lands or tenements . . . ." Which deeds have been excepted from "all deeds"? A strict grammarian might conclude that the exception embraces only "deeds of trust"—for that phrase and the word "except" are, alone, set off by commas. But it would be difficult to find a reason for the legislature to have so limited the exception. If the purpose of this whole provision is, as suggested above, to provide some address to which tax bills and assessment notices may be sent,10 clearly the deed of trust11 is

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9. See ch. 132, § 10, RSMo 1855.
10. Sec. 137.170, RSMo 1959, provides:
   The assessment of land or lots in numerical order, or by plats and a land
properly excluded because the interest held by the grantee (trustee) is ordinarily considered to be non-taxable. But what about easements and rights of way? Are they to be included in the exception with "deeds of trust"? It would seem that the same reason for excluding deeds of trust from the address requirement would apply to easements or rights of way.

If the "right of way" which the legislature had in mind is either a deed of a fee simple or an easement to the city, county or state for use as a highway, such property is exempt from taxation "for state, county or local purposes." If the

list in alphabetical order, as provided in this chapter, shall be deemed and taken in all courts and place to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes.

Thus it would seem that this makes any mailing of a tax bill to any grantee completely unnecessary. Such a mailing might, however, tend to increase the immediate tax payments.

It should also be noted that § 137.180, RSMo 1959, requires a notification when the valuation of any real property is increased. But even in that section it is provided that the notice may be "either in person, or by mail directed to the last known address . . . ." Nothing is provided in this section for the situation where there is no last known address.

11. The term "deed of trust" is probably used here as a term of art, referring to the customary form of mortgage in Missouri. Probably deeds which create the typical inter-vivos trust are not "deeds of trust" within the meaning of this exception; in the case of such deeds, "one of the grantees" would seem to be one of the trustees.

12. Real property taxes in Missouri are assessed against the land, rather than against any owner, § 137.170, RSMo 1959. The common practice in this state is to use the Deed of Trust in place of the straight mortgage to facilitate foreclosure. The beneficial use of the property in such situation ordinarily remains with the grantor (most often through the use of a lease-back provision) and such person will ordinarily be the one who will make tax payments. See Greenwalt v. Tucker, 8 Fed. 792 (Cir. E.D. Mo. 1881).

Query: Why, if we exclude "deeds of trust" do we not also exclude "mortgages"? May it be inferred that the legislature intended that the ordinary mortgage, though admittedly a rarity in Missouri, be included among "all deeds" because not expressly mentioned in the exception? On the other hand, it should be noted that both "mortgages" and "deeds of trust" are mentioned separately from "deeds" in the first clause of the subsection. This might indicate that it is not comprehended by either the term "deeds of trust" or the phrase "all deeds" in the new provision—thus leaving the straight mortgage completely unaffected by the new provisions. But if the legislature intended such a result, why did it simply fail to mention "deeds of trust" rather than make a specific exception for such instruments, thus also leaving that term unaffected by the new address requirement? Perhaps the most plausible explanation is that the legislature, in its haste, simply overlooked the separate use of the term "mortgages" in the first clause and used the term "deeds of trust" assuming that the term completely covered Missouri mortgage transactions.

13. Section 137.100, RSMo 1959, provides:

The following subjects are exempt from taxation for state, county or local purposes:

(1) Lands and other property belonging to this state;
(2) Lands and other property belonging to any city, county or other political subdivision in this state . . . .
phrase refers to a mere easement to travel across another's property, it is repetitious: such a conveyance would be covered by the term "easement." We thus encounter the question: just what does the term "easement" include? Does it include a conveyance of certain types of mineral rights (i.e., profits a prendre)? — a conveyance of the right to travel across the servient property to reach the dominant? — a conveyance of the right to fly planes over the servient property? — a conveyance to the owner of the fee interest in servient land of easements obtained by prescription? Deeds of "easement" might include any of these, but would require no address so long as we consider that (1) the owner of the fee simple interest is the one to pay the taxes and (2) that the present legislation requires the address only for the purpose of obtaining a mailing address for tax bills. Some difficulty develops, however, when various interests in a single parcel of land (some of which might fall within the term "easement") may be taxed separately. Though the Missouri courts do not now embrace the concept of separate taxable interests in land, a statutory change in that direction would not seem a bad suggestion. Until that day, however, whatever might reasonably be considered a

14. No cases have been found where Missouri courts have allowed a pre-existing ordinary easement to be unaffected by a sale of the servient property to pay taxes against it. 51 Am. Jur. Taxation § 689 (1944) states:

Although there is no constitutional objection to separate assessment of the different interests in real estate, it is not in most jurisdictions the policy of the law to require the assessors to tax the different estates and interests which may exist in a single parcel of land to the respective owners thereof, but the assessment is a unit upon the sum of the interests. . . . [Footnotes omitted.]

15. The Missouri statutes provide a definition of "real property" for whenever that term is used in "laws governing taxation and revenue in the state . . . , except when the context clearly indicates a different meaning . . . ." The definition provided in § 137.010, RSMo 1959, is:

(2) "Real property" includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto . . . . [Emphasis added.]

The statute does not make clear whether a particular parcel of land together with all rights and privileges "belonging or appertaining thereto" comprise a single unit of real property for tax purposes, or whether the latter rights and privileges, while "real property" for purposes of taxation, may be considered as separate from the "land itself." The statute could easily be read either way, but the Missouri court has favored the interpretation that "real property" is taxed as a bundle, all rights and interests included. See Dorman v. Minnich, 336 S.W.2d 500, 504-06 (Mo. En Banc 1960). In that case the court found that the mineral fee in question was not entitled to separate assessment for taxes and did pass under a tax deed which conveyed a fee simple interest in the tract against which taxes had been assessed and remained unpaid. The court does suggest that where mining interests are presented separately for assessment they might then be separately assessed and taxed; but the court distinguishes that question from the one at bar. The court expressly overrules Kernkamp v. Wellsville Fire Brick Co., 237 Mo. App. 457, 170 S.W.2d 692 (1943) which had held that it was the duty of the assessor to separately assess a mineral fee.

On protective measures which might be taken in drafting conveyances of mineral fees, see 7 Peterson & Eckhardt, Missouri Practice § 976 (1960).

16. It seems only proper that the person with a beneficial interest in land is the person to be taxed. It is a ridiculous fiction to suppose that the land itself
conveyance of either an "easement" or a "right of way" would ordinarily not be subject to separate tax assessment, and no other reason appears why the assessor or collector would want addresses of persons who hold such interests.\textsuperscript{17} Again, if the purpose of the legislation is to provide tax bill addresses, it seems likely that the legislature intended the exception to cover not only "deeds of trust," but also deeds conveying easements and rights-of-way.\textsuperscript{18} If the statute as now written is read so that the term "deeds" (following the term "except") is modified by three adjective phrases telling which deeds are excepted (These adjective phrases would be: (1) "of trust"; (2) "[of] easement"; and (3) "[of] right of way."), we can thus include the three named types of deeds in the exception. That is, we would read the first part of the new language as follows: "All deeds, except deeds of trust, of easement and of right of way, . . ."\textsuperscript{19}

C. "All deeds"

Assuming for the moment that the exception includes the three types of deeds, as just discussed: which instruments are left within the embrace of the phrase "all deeds" to which the address requirement does attach? The legislature will pay the taxes and surely no-one has in mind that the ordinary procedure for payment would be for the land to be sold periodically at a tax sale. While it might increase the burden on the assessor and collector to separately compute taxes for the various interests in land, in this age of automatic data processing equipment (not to mention the adding machine and calculator), the burden hardly outweighs the advantage of requiring each person to be individually responsible for only that interest which he may have in the real property. Should one who leases his property for a long term suffer the loss when the taxes go unpaid during the term of the lease? To avoid undue burdens on the assessor, a recording of the conveyance might be made a pre-requisite to any change in tax liability and some minor interests might be made nontaxable.

17 Of course it is also arguable that the tax collector might wish to mail notices or bills to whomever might have a significant easement or right-of-way interest in the hope that such person would pay the taxes rather than lose his interest through a tax sale. But there is no evidence that such a practice is widespread in Missouri and it seems unlikely that this was contemplated by the legislature.

18 This conclusion was not reached by at least one recorder in the state who sent a printed notice to all attorneys in her county stating that the new act requires "all deeds, (except deeds of trust) easement, or right-of-way conveying any lands or tenements MUST contain a mailing address of one of the grantees named in the instrument, and the recorder of deeds shall not record such instrument absent such addresses." (Emphasis, parentheses and punctuation are shown as they appeared in the notice.) Circular distributed by Betty Saunders, Recorder of Deeds, Boone County, Missouri. This recorder's view was undoubtedly that only "deeds of trust" were excepted. After this circular had been distributed, the Attorney General announced a different interpretation. See note 19, infra.

19 This reading of the legislation was suggested to this writer by Mr. Richard Craven and Mr. Kenneth Walter during their oral argument in a University of Missouri Law School Moot Court case involving the statute. The same interpretation later appeared in an opinion by the Attorney General of Missouri:

[The mailing address of the grantee or one of the grantees must be placed upon all deeds except deeds of trust or easement or right-of-way conveying any lands or tenements . . . .]

Opinion of Attorney General of Missouri No. 374, Oct. 11, 1963 (letter to Hon. John Conley, Jr., Member, Missouri House of Representatives, 5852 Wabada Avenue, St. Louis 12, Missouri).
has used sweeping language here, and the fact that some exceptions have been listed would indicate that these exceptions are to be the only ones. *Expressio unius est exclusio alterius.*

Most of the cases which have sought a definition for the term “deeds” base their conclusions on legislative intent in enacting a statute or on the intent of parties who inserted the term in some instrument. Not surprisingly the meanings given the term have varied greatly from contract to contract, from statute to statute and from case to case. But, alas, we are left with the uncomfortable fact that the Missouri legislature, in passing the present statute, nowhere bothered to state what it was trying to accomplish. A practitioner might guess at the legislature’s goal in hope that the courts would arrive at the same conclusion; but a safer approach might be to treat the term as broadly as conceivable.

*Black’s Law Dictionary* defines “deed” as “a conveyance of realty, a writing signed by grantor, whereby title to realty is transferred from one to another.” But even this may not be broad enough for the present statute—because the statute doesn’t say that “title” is what must be conveyed; this statute calls for the required address to be inserted in “all deeds” (with the noted exceptions) “conveying any lands and tenements.” Possibly the Missouri courts would construe this phrase narrowly to mean “conveying a fee simple interest in any lands and tenements,” feeling that this would be sufficient to give tax collectors an adequate mailing list. But, to be as safe as this statute would seem to permit, whatever

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20. This maxim has been applied to Missouri statutes in, *e.g.*, City of Hannibal v. Minor, 224 S.W.2d 598, 605 (St. L. Mo. App. 1949). Of course Missouri courts have also recognized that the maxim is merely an aid to construction and not a rule of law. “It can never override clear and contrary evidences of Congressional intent.” City of Caruthersville v. Faris, 237 Mo. App. 605, 616, 146 S.W.2d 80, 86 (Spr. Ct. App. 1940) (quoting Neuberger v. Commissioner of Internal Revenue, 311 U.S. 83, 88 (1940)).

21. For a time-consuming, if unproductive, exercise, try to formulate “the definition” of “deed” from the cases collected in 11 *Words and Phrases, Deed* (1940 ed. with 1964 pocket part). The Missouri cases where the term is construed are collected in 32 *Missouri Digest, Words and Phrases* 163 (1954).


... It is evident that in its broader acceptance as signifying a written instrument under seal the term “deed” includes all varieties of sealed instruments, but it is often given a more restricted meaning as signifying a conveyance of realty, hence a “deed” has been defined as a writing by which lands are conveyed; an instrument in writing, duly executed and delivered, conveying real estate; a written instrument conveying title to real property; the act or instrument by which property in real estate is conveyed; the method by which the title and possession of real estate are transferred from one person to another; a sealed writing, signed by the party to be charged, which evidences the terms of the contract between the parties, whereby title to real property is transferred from one to the other inter vivos. If the effect of an instrument, regardless of what it is called, is to sever the estate and to vest the title to a certain part of it in another, it is a deed. ... [Footnotes omitted.]

23. Of course this interpretation makes superfluous the language of the exception—a result that all courts shy away from. And the court, after its own investigation, may find that providing a tax bill address is not at all the purpose the legislature had in mind when it passed this statute.
address is required should probably be included not only in regular warranty and quitclaim deeds, but also in conventional mortgages (though not in the deed of trust type of mortgage customarily used in Missouri); assignments of contingent remainders and sundry other remainder, right of entry and reversionary interests in land; various transfers of mineral rights; leases; assignments and chattel mortgages of leasehold interests—in short, most any instrument which could possibly be thought of as “conveying any lands and tenements” which one might conceivably wish to record.27

D. “Must contain”

Coming now to the first verb phrase in the new language of section 59.330, it is again apparent that the legislature has shunned specificity. The words “must contain,” standing alone, are of little practical help to the draftsman, title examiner or recorder. One interpretation of the phrase would allow the required address to appear at any place on the instrument that might strike the draftsman’s fancy. But also reasonable is the interpretation that the language of the instrument must incorporate this required address just as it must incorporate a description of the property to be conveyed. Use of the language “all deeds . . . must contain” rather than, say, “a grantee’s address must appear” or “all deeds must contain, in the body of the instrument or in the margin, a note,” etc., indicate that the “incorporation” interpretation was intended.28 Do we not ordinarily speak of

24. See the discussion, supra, notes 11, 12.

25. See the discussion, supra, notes 12-16 and accompanying text.

26. “Tenement” is discussed as follows in Black, Law Dictionary 1637 (4th ed. 1951) as follows:

This term, in its vulgar acceptation, is only applied to houses and other buildings, but in its original, proper, and legal sense it signifies everything that may be held, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, liberum tenementum, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, advowsons, franchises, peerages, etc. . . .

27. Apparently “all deeds” as used in the present statute does not include United States land patents. For holdings that are not within the term “deeds” as used in the original clause of sub-section one of § 59.330, see Wilcox v. Phillips, 260 Mo. 664, 681, 169 S.W. 55, 58-59 (1914), and Bell v. Ham, 188 Mo. App. 71, 79-80, 173 S.W. 744, 746 (Spr. Ct. App. 1915) citing Wilcox. The statute referred to in both cases is § 10381, RSMo 1909, which is the same as the present § 59.330 before the 1963 revisions. Procedures for the recording of such patents are now set out in §§ 59.540 and 59.550, RSMo 1959.

28. Most other jurisdictions with similar legislation seem to have foreseen some of the difficulties which are brought about by use of the phrase “must contain.” The Arkansas statute, supra note 4, says only that the recorder shall obtain the required address from the person tendering the instrument; the Colorado statute, supra note 4, requires that the instrument “shall contain or have endorsed upon it” (leaving room for argument that the address may be added at some time after execution and delivery) the required address and provides that changes in address shall be indorsed on the original instrument by the registrar of titles “on receiving a sworn statement of such change”; Delaware’s statute, supra note 4, requires only that the person leaving the deed for record “shall place upon or attach to the deed” the required address; the Florida statute, supra note 4, directs the clerk to “ascertain of all persons presenting” certain instruments for record
words “written on” or “appearing on” a piece of paper, rather than saying that the paper “contains” certain words? Is not “contain” ordinarily used in the sense of incorporation into the text of a writing?

For the draftsman the wisest procedure might be to insert the required address in the premises, immediately following the name of the grantee whose address is given.\textsuperscript{20} Or, if printed forms are used, and there is not sufficient space in the premises to insert the required address, some attorneys have suggested that the address be put in the blank left for description of the property to be conveyed; but care should be taken that, in so placing the address, it is made clear (1) which grantee's address is given, and (2) that this address is not part of the description of the land to be conveyed.\textsuperscript{20} Wherever a draftsman may choose to place the address, it should appear on the face of the instrument so that where photographic recording takes pictures of only the face of a deed this address would be included.

The meaning of the phrase “must contain” is critical for the lawyer or recorder confronted with a previously executed and delivered instrument which does not contain the required address. First we may inquire: does the statute apply to instruments executed and delivered prior to the effective date of the statute? It might be argued that such an application of the statute would be unconstitutional as depriving persons of property rights without due process of law.\textsuperscript{21}

\textquotedblleft the correct post-office address of the grantee or grantees\textquotedblright; the Illinois statute, supra note 4, calls only for the endorsement of the name and address of the person presenting the instrument for registration. Similar provisions may be seen in the other statutes cited in note 4, supra. Language similar to that found in the Missouri statute appears in the North Dakota statutes, supra note 4.

30. While the statute does not make clear that one must specify which grantee's address is given, if the purpose of the statute is to provide a mailing address then it seems only reasonable to require that it be made clear whose address is given.

Where there is an address recital in the space left for the description of property it might read as follows:

The mailing address of the aforesaid John Smith, (one of) the grantee(s) herein, is One North Backwoods Street, Columbia, Missouri, which said mailing address is (the same as) (different from) the premises for which the legal description appears next hereinafore.

31. This Constitutional argument would refer to the “property” rights attendant to the recording; constructive notice of ownership, marketable title, etc. In fact, under Missouri law, a conveyance of property is good only between the parties to the conveyance and those with actual notice until “deposited with the recorder for record.” § 422.400, RSMo 1959. This latter phrase has not been given much individual attention by the courts, but seems to be treated as meaning “recorded” rather than merely “deposited with the recorder.” See, e.g., Morri-
And what of the situation where an instrument has been executed and delivered without the required address—may the address be added to the instrument? If so, by whom? Thus we arrive at the maze of problems attending the alteration of instruments. The decisions in this area are muddy enough that a separate lengthy comment might well be devoted to the status of Missouri law in the field. Some general statements will, however, be made here.

It seems fairly well settled today that any instrument may be "altered" so long as this is done with the approval of all interested parties; such an "alteration" will be binding as between these parties.\(^2\) For some time, however, Missouri treated unilateral alterations in all instruments (at least where made by an interested party) as voiding the instrument.\(^3\) The adoption of the Uniform Negotiable Instruments Act in 1905 added the requirement that, as to negotiable instruments, there had to be a material alteration before the instrument was voided.\(^4\) Slowly this requirement of materiality crept into other areas of the law, and, by 1941, in an ejectment proceeding involving the alteration of a deed, we find the court saying that the "correct rule" is that

any material alteration of an instrument, after the execution thereof, intentionally caused directly or indirectly by the owner or holder thereof, or by one having a beneficial interest therein, without the consent of the party sought to be charged thereon, renders it void as between such non-consenting parties and the person responsible for the alteration, and those claiming under him.\(^5\)

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\(^2\) Son v. Juden, 145 Mo. 282, 297, 46 S.W. 994, 998 (Mo. 1898), referring to § 2420, RSMo 1889.

\(^3\) Notwithstanding this possible argument, the Attorney General of Missouri takes the position that the statute as enacted provides for no exception in the case of an old deed and, therefore, the prohibition contained in said Section 59.330 . . . applies.\(^6\) Opinion of Attorney General of Missouri No. 371, Oct. 11, 1963 (letter to Hon. Edwin W. Mills, Prosecuting Attorney, St. Clair County, Osceola, Missouri).

\(^4\) See generally 4 AM. JUR. 2d Alteration of Instruments §§ 21-24 (1962); 3 C.J.S. Alteration of Instruments § 56 (1936); Patton, 3 AMERICAN LAW OF PROPERTY § 12.85 (Casner ed. 1952).

\(^5\) See, e.g., the opinion by Scott, J., for the Missouri court in Haskell v. Champion, 30 Mo. 136, 138 (1860);

The law, in dealing with the subject of the alteration of written instruments, looks further than to the materiality of immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those entrusted with such instruments to alter them and afterwards defend their conduct by alleging the immateriality of the alteration. . . . As the nature and purposes of contracts require that they should pass to the hands of those who are interested in altering them to the prejudice of those who execute them, and as the facilities for making alterations are numerous and the difficulty of proving them is great, all means should be employed to impress on the minds of those who are in the possession of such paper a sense of its inviolability.


\(^7\) Dodd v. Turner, 348 Mo. 1090, 1093-94, 156 S.W.2d 901, 902 (1941) (emphasis added).
With regard to instruments which have been executed and delivered (transactions no longer executory), however, the rule is that alteration of the instrument does not undo the transaction or divest the title of the transferee, at least as between the parties to the instrument and their privies. But where the instrument has not yet been recorded, some unilateral alteration of it, which enables it to be recorded (when without the alteration it could not be recorded), is considered a material one. The Missouri cases indicate that, whether or not the alteration would void the transaction as between the parties, the instrument is not entitled to be recorded and may be stricken from the record. Should all parties consent to the alteration or addition, however, this would seem sufficient to make the alteration a part of the deed and thereby entitled to record.

One might suggest that the easiest way around the present dilemma would be for the recorder simply to overlook the address requirement and record. On the other hand, if the recorder should add an address to the instrument (or spread on the record an instrument which has been altered by a unilateral addition of the address), we no longer have an instrument recorded which simply does not contain the required address (a situation where the instrument would be brought within the saving provisos of the last clause of the amendment); instead we have spread on the record an instrument which has been fraudulently altered and which, but for this alteration, would not have been entitled to be recorded. Even if "must contain" is interpreted to mean that the address could be added in the margin, the fact remains that this would amount to a material alteration of the instrument—because without the addition of the address the instrument could

36. See Robb v. N. W. Elec. Power Coop., 297 S.W.2d 385 (Mo. 1957), which finds "not . . . persuasive" two earlier cases (Kempf v. Phillips Pipe Line Co., 61 S.W.2d 422 (St. L. Mo. App. 1933), and Hardt v. Phillips Pipe Line Co., 85 S.W.2d 202 (St. L. Mo. App. 1935), which had voided an executed agreement because of alteration.


38. Where a deed was altered by the addition of a false acknowledgment, the court has held that the instrument should be stricken from the record—for without this pre-requisite to recording, the instrument is not entitled to be recorded. Robb v. N. W. Elec. Power Coop., supra note 36 at 389; McCoy v. N. W. Elec. Power Coop., 297 S.W.2d 390 (Mo. 1957).

39. This comment does not attempt to find solutions for more intricate problems in this area, such as: How is it possible to effectively alter a deed when it takes effect from the moment of delivery? Does it take effect all over again, etc.? The problems are somewhat metaphysical and best forgotten with the suggestion that formulas for "when" a deed takes effect need not necessarily be applicable to questions of what the deed says. At any rate the purpose of this comment is to demonstrate that the present legislation needs to be replaced and to discuss what may be the safest courses of conduct in the interim.

40. There might be some practical objections to this by the recorder. See notes 44-46 and accompanying text, infra. Beyond this, although the record would give notice and the instrument would still be valid under the provisions of the last clause of the new language in § 59.330, the title might nevertheless be left unmarketable. See notes 64-66 and accompanying text, infra.

41. In Robb v. N. W. Elec. Power Coop., supra note 36, at 389, the court held that where the acknowledgment was fraudulently added, the instrument could be stricken from the record. See also McCoy v. N. W. Elec. Power Coop., supra note 38.
not have been recorded and the legal incidents of recordation would not attach to
the instrument and the parties to it.

E. "A mailing address"

The most obvious difficulty with the language calling for "a mailing address
of one of the grantees" is that no indication is given of how specific the address
must be. Would it be sufficient to use: (1) merely the name of a city and state—or
a county and state? (2) a post-office box number together with the name of
the post office? (3) a business address? (4) "General Delivery" at some specified
post-office? One would think that it should be sufficient that the grantee whose
address is given regularly receives United States mail at the address shown. But
suppose the grantee is moving into the property which is conveyed by the in-
strument—or is planning a move in the near future, perhaps before the instru-
ment can be recorded. The address at which the grantee receives mail at the
time the conveyance is delivered would seem a commendable choice: after all,
some other address may not truly be the grantee's address, but merely an antici-
pated address. Still, one wonders why the legislature made no provision for modi-
cation of the address if the grantee should decide to receive his mail elsewhere.42
If attempts are made to keep the address current from the time of execution and
delivery and up to the time of recording, we again face the alteration problems
discussed above.

The statute requires a mailing address of one of the grantees named in the
instrument. There is no indication of which grantee's address (when there are
several grantees) must be provided. Suppose we have a conveyance of Blackacre
by A to B for life, then to C for life, then to T (on a spendthrift trust for the
benefit of B’s wife Mary Alice during the life of Mary Alice), with the remainder
to B Church in fee, provided, however, that if instrumental music is played
on the premises at any time during the first twenty years that these premises
are held by B Church, then over to the State of Missouri in fee. Given such a
limitation, would the address "Jefferson City, Missouri" (such being a mailing
address of the State of Missouri) be an adequate address? If so, might not the
purpose of the present statute (whatever that purpose may be) always be
avoided by merely including some remote, contingent interest in the State of
Missouri (or even some straw party)? If the purpose of the statute is to provide
some place for the tax assessor to forward tax bills, such an address would be of
little help.

More difficult problems arise when the address of one of the grantees is un-
known. In that situation delivery of the instrument might take place by del-
ivery to a third person acting as "agent" (for the purpose of accepting delivery)
of the grantee. Indeed, the name, as well as the address, of the intended grantee
might be unknown and still a valid conveyance could be made unless this is pro-
hibited by the new address prerequisite to recording. We also have the problem of
an instrument executed in favor of a grantee who has died before the instrument

42. Query whether this oversight might not frustrate whatever purpose the
legislature may have had in passing this statute.
was recorded. Suppose an old deed conveying Blackacre to Aunt Lucy (sans address) is found in a trunk in her attic by the administrator of her estate. Alas, the instrument has never been recorded. Even if by some sort of hocus-pocus we could get around the alteration-of-instrument difficulties, do we show Aunt Lucy's address as of the time the instrument was delivered (perhaps involving a fruitless search of family records and old letters if Aunt Lucy had a yen to wander)?—or may we insert the address of the local cemetry? Sufficient variations on these and other themes are not so improbable that, should it occur to the legislature that this legislation needs revision, it might be desirable to call for addresses of all grantees named in the instrument, dispensing with the requirement as to those grantees who are deceased or whose whereabouts are unknown. Of course, the new legislation should also provide that if the address is not "contained in" the instrument, it may be provided in some other manner.

F. "Recorder shall not record"

Comes next the provision in the new legislation that "the recorder of deeds shall not record such instrument absent such addresses."43 Inasmuch as this provision is included in an area of the statute books which is principally concerned (at least until the advent of this piece of legislation) with setting forth the duties of the recorder, the recorder will be subject to the same sanctions for negligence or misconduct in this duty as in others. The statutes provide for forfeiture of and removal from office whenever "any person elected or appointed to any county . . . office in this state . . . shall be guilty of any willful or fraudulent violation or neglect of his official duty . . . ."44 Specifically with regard to recorders the statutes provide:

If any recorder to whom any deed or other writing, proved or acknowledged according to law, is delivered for record . . . neglects or refuses to record the deed or other writing within a reasonable time after receiving the same, . . . he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder.45

Especially appropriate to the situation where the recorder jots the required (but absent) address in the margin of the instrument and then records might be the following language:

If any recorder shall willfully neglect or refuse to perform any of the duties required of him by this chapter, or shall willfully perform them in any other manner than is required by law, he shall be deemed guilty of a misdemeanor in office, and proceeded against accordingly; and shall, more-

43. Space in the text will not be consumed pointing out that "addresses" has been used in this clause where we have been speaking of only a single instrument ("such instrument") and where we have previously been told that the instrument must contain only "a mailing address of one of the grantees." (Emphasis added.)
44. § 106.220, RSMo 1959. The section refers to §§ 106.230-290 for the manner of removal.
45. § 59.650, RSMo 1959.
over, forfeit and pay to the use of the county a sum not exceeding three hundred dollars, to be recovered by civil action.\footnote{46}

It would seem wise for recorders to concur with the opinion of the Attorney General where he has given one.\footnote{47} And until further word from the courts, the recorder probably should record instruments clearly falling within the categories of “deeds of trust, [deeds of] easement and [deeds of] right of way” though they contain no address of any grantee; he probably should not record instruments (regardless of their age or of the date of execution and delivery) which (1) may be considered “deeds,” (2) do not expressly fall within the above exceptions and (3) do not contain the required address. Certainly the recorder should not participate in any “addition” of the address to a completed instrument; on the other hand, he probably should not quibble over whether the instrument does “contain” the required address when it in some manner appears on the paper. Recorders might avoid a good deal of personal difficulty by not inquiring whether an address which does appear on the instrument (1) was placed on the instrument prior to execution and delivery, or (2) is correct at the date of recording, or (3) is sufficient (i.e., if there is any likelihood that mail addressed to the grantee at the address shown would reach him).

G. The “Curing” Proviso

The final clause of the new language in section 59.330 reads: “provided, however, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address.” It seems that what the legislature must have had in mind is a situation where (1) the recorder accidentally recorded an instrument without the required address, or (2) the recorder ignored the immediately preceding clause and recorded an instrument which did not contain the required address.\footnote{48} Though the proviso does not expressly so confine itself, it obviously refers only to those instruments for which an address is required.

1. “Statutory constructive notice”

Most likely the “statutory constructive notice” spoken of would be the “notice” of the contents of recorded instruments which section 442.390 “imparts” to all persons “from time of filing the same with the recorder for record.”\footnote{49} This

\footnote{46} § 59.660, RSMo 1959.

\footnote{47} Missouri statutes contain no provision for such Attorney General’s opinions to be requested by a recorder. Such opinions must be given, in writing, without fee, only to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, commissioner of education, grain warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney. § 27.040, RSMo 1959.

\footnote{48} While in the latter situation the present proviso may cure the “notice” aspect of the record and the validity of the instrument which flows from its proper recording, it certainly would not condone the improper conduct of the recorder in this respect. See the references to the sanctions against and liabilities of the recorder discussed supra.

\footnote{49} This appears to be the position taken by the Attorney General of Missouri in his Opinion No. 374, Oct. 11, 1963 (letter to Hon. John Conley, Jr., Mem-
author feels called upon, however, to further muddy the waters by pointing out that the statute books also contain section 490.340 which reads as follows:

All records heretofore or hereafter made by the recorder of any county by copying from any instrument in writing or copy thereof affecting real estate at law or in equity, which instrument or copy is not entitled to be recorded because it is not certified or is defectively certified, shall from the date this section takes effect, or one year after the recorded instrument or copy is filed with the recorder for record, whichever date is later, impart notice of the contents thereof in the same manner and to the same extent as would an identical recorded instrument or copy which is duly certified. The certification referred to in this section includes not only certification of proof or acknowledgment, or other certification, but also verification, authentication, attestation, or any other condition precedent to recording made by law. (Emphasis added.)

If the phrase "or any other condition precedent to recording made by law," as used in this section, may be given its natural meaning, it would include the condition precedent to recording incorporated in section 59.330(1). Such an interpretation of this proviso may not be acceptable, however, because it leaves this part of the proviso useless—a waste of words; section 490.340 would presumably operate to the same result without this proviso ever having appeared. Of course, when we look at other "notice" statutes, we see that all of them operate independently of any requirements or provisos (such as the proviso in section 59.330) which appear in other chapters.

The proviso in the new language was probably hastily added by legislators recalling court decisions to the effect that instruments that are not entitled to be recorded but which come to be spread on the record books give no notice of their contents. Probably this worry was unnecessary. Section 442.390 imparts the notice of "every such instrument in writing, certified and recorded in the manner herein prescribed . . . ." (Emphasis added.) If the term "herein" refers to the "manner . . . prescribed" in Chapter 442 (the chapter which contains section 442.390), then an instrument recorded in the manner prescribed in Chapter 442

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ber, Missouri House of Representatives, 5852 Wabada Avenue, St. Louis 12, Missouri). The Attorney General elaborates:

The statute under discussion herein, Section 59.330(1), and this above stated provision, only provide that if the recorder should file said instrument without the required mailing address being thereon, that this shall make no difference as to the legal effect of Section 442.390. . . .

50. § 490.340, RSMo 1959.
51. Other meanings might be: "or any condition precedent to recording like those just mentioned which are made by law"; or "any other presently existing condition precedent to recording made by law."
53. See, e.g., the discussion in Williams v. Butterfield, 182 Mo. 181, 81 S.W. 615 (1904) [citing § 2419, RSMo 1889 (now § 442.390, RSMo 1959)]; Heintz v. Moore, 246 Mo. 226, 232, 151 S.W. 449, 450 (1912) (relying on Williams, supra); State ex rel. Crites v. Short, 351 Mo. 1013, 1016, 174 S.W.2d 821, 822-823 (1943). See generally Patton, 4 AMERICAN LAW OF PROPERTY § 17.31 (Casner ed. 1952).
54. Section 443.390, RSMo 1959, contains a provision that, in cities of 600,000 inhabitants or more and in all first class counties, the recorder is not to accept for record any trustee's deed or mortgagee's deed under power of sale in foreclosure of any deed of trust or mortgage "unless the principal note or notes or other principal obligations which were unpaid when the foreclosure sale commenced and for the default in payment of which the foreclosure is had, are produced to the recorder . . . ." The section contains no proviso that the instrument would give notice or be valid if recorded without such requirement being met. Note that this statute is also in a different chapter (Chapter 443) from that of section 442.390. Thus, if "herein" (as used in § 442.390) refers only to requirements of Chapter 442, a trustee's deed, etc., recorded contrary to the requirements of § 443.390 would give constructive notice if all the requirements of Chapter 442 are met. (No decisions on the point have been found.)

It is interesting that through the 1939 revision of the Missouri statutes, the fore-runners of § 442.390, though otherwise identical to the present statute, use the word "hereinbefore" rather than "herein." See, e.g., § 5427, RSMo 1939. Use of the term "hereinbefore" in this statute may be traced back to Mo. Laws 1889, at 50, § 25. "Herein" first appears in the 1949 revision. § 442.390, RSMo 1949. When the word "hereinbefore" appeared in the statute, the most reasonable interpretation would be that this term referred to the prerequisites for recording which had been previously set out in the same chapter. (Bear in mind that the wording of this section remained the same over these years—using the term "hereinbefore"—while the order in which various chapters were placed in a compilation might vary from one compilation to another.) Surely no one would suggest that "hereinbefore" would refer to requirements set out in chapters (or even sections) following the one in which that term appears. Unfortunately when the 1949 revision appeared no reason was given for this change in terminology.

Someone may suggest that when "herein" was used to replace "hereinbefore" in the 1949 revision, this was done so thereafter § 442.390 would refer to the entire compilation of statutes and would thereby include the requirement set forth in § 443.390, and, in future years, whatever other requirements for recording that the legislature might choose to sprinkle through the statute books. In support of that argument we see that § 443.390 did not assume its final form until after an amendment in 1945. Mo. Laws 1945, at 682, § 1. The time between 1945 and 1949 would have been long enough for the legislature to discover that this change in terminology would be needed to prevent an instrument recorded contrary to the requirements of § 443.390 from giving constructive notice by operation of § 442.390. On the other hand the legislators may have thought that constructive notice ought to be given even though an instrument were recorded contrary to § 443.390, and, feeling that this result would follow from the language of § 442.390, saw no need to add further provisions to § 443.390. It is conceivable, too, that the legislature never actually considered the problem. Indeed this writer is unable to uncover any specific legislative direction that the language of § 442.390 be changed. It is also difficult to read the authority to make such a change into the statute under which the revising committee acted at that time. See Mo. Laws 1949, at 545, § 3.06.

There does seem to be a consistent pattern in the handiwork of the revisors of the statutes for the 1949 edition demonstrating that they were bent on "clearing up" the "legal" language by substituting shorter words here and there. Changes similar to the one we have been discussing were made in carrying over several other sections from the 1939 to the 1949 edition of the Revised Statutes. See, e.g., § 573, RSMo 1939 (appearing as § 145.060, RSMo 1949 and 1959, after changing "hereinafter" to "herein"); § 575, RSMo 1939 (appearing as § 145.080, RSMo 1949 and
2. "The validity of the instrument"

The reference in the proviso to "the validity of the instrument" would seem to refer to section 442.400 which states that "no such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."85 Notice that this statute mentions two kinds of validity, however: (1) validity before recording, as between the parties and "such as have actual notice"; and (2) validity after deposit with the recorder.66 The Attorney General of Missouri takes the position that the "validity" which is not to be affected is that which attends a proper recording.57 The legislature probably did intend to preclude a use of the new address requirement to declare that an instrument spread on the record without the address gives no notice. But the door has been left open for the courts to demonstrate the folly of poor draftsmanship by finding that the "validity" referred to by the proviso is merely "validity" as between the parties and such as have actual notice.

3. "Absence of the address" and Alteration

The proviso, by its terms, applies to those instruments afflicted with an "absence of the address." Query whether instruments would give "statutory constructive notice" or have "validity" if the address were only insufficient—or erroneous? Certainly the proviso does not extend "statutory constructive notice" to instruments which have been altered to supply an address (or to correct one which already appeared). Once the instrument has been materially altered, it is not entitled to appear of record for, among other reasons, it is no longer properly executed or acknowledged. The courts reason that, even though spread on the record, the instrument gives no notice and acquires no other incidents of recordation because it is not entitled to be recorded.58 As yet we have no corrective

1959, after changing "hereinbefore" to "herein"); § 579, RSMo 1939 (appearing as § 145.130, RSMo 1949 and 1959, after changing "hereinafter" to "herein"); § 591, RSMo 1939 (appearing as § 145.310, RSMo 1949 and 1959, after changing "hereinbefore" to "herein").

55. The phrase "no such instrument" appears to refer back to the instruments mentioned in § 442.380, RSMo 1959: "Every instrument in writing that conveys any real estate . . . ."

In Godwin v. Gerling, 239 S.W.2d 352 (Mo. 1951), a case involving the construction of Section 302, subsection 1 of the Soldiers' and Sailors' Civil Relief Act of 1940 (as amended in 1942), the court held that a grantee under a deed which had been neither acknowledged nor recorded was neither an equitable nor a legal owner, having only an "equitable claim" against his grantor. See generally Gibson, Note, Real Property—Title Under Unrecorded Deed—Soldier's and Sailor's Civil Relief Act, 17 Mo. L. Rev. 471 (1952). See also cases cited in Ring, Comment, Adverse Possession Under Unrecorded Deeds, 16 Mo. L. Rev. 461 (1951). The true significance of these cases, if any, is yet to be determined.

56. On the meaning of "deposited with the recorder," see note 31, supra.


58. To the effect that instruments which have been materially altered after execution may not be entitled to be recorded (and therefore would acquire none of the incidents of recordation), unless such instruments have been re-executed or
legislation to provide that instruments may be recorded although they have been altered if the contents of the instrument before alteration could be determined from an examination of the instrument itself.

The Patrons, writing in American Law of Property, provide an excellent discussion of the "Dual Effect of Title Records." They develop the point that a record has two essential characteristics: (1) it has evidentiary value, and (2) it constitutes constructive notice to all who have an obligation to examine the records. Elsewhere Patton comments that only authorized and properly made records possess these incidents; unauthorized copies possess them only to the extent granted by special statute. But the Missouri legislature, in its proviso to the new portion of section 59.330(1), provides only that the statutory constructive notice and the "validity" will not be affected when an instrument is recorded without the required address. No mention is made of the other great incident of proper recordation—its evidentiary value.

Section 490.410 provides that "every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved, and certified as herein prescribed, may, together with the certificates of acknowledgment or proof, and relinquishment, be read in evidence without further proof." This statute does not deal with recording at all—it merely provides that when an instrument meets certain requirements, that very instrument may be read into evidence without proof of delivery or other proof of execution. When this section is read together with section 490.430 we find that it merely creates a rebuttable presumption of the re-acknowledged, re-delivered, etc., see, e.g., Wagle v. Iowa State Bank, 175 Iowa 92, 156 N.W. 991 (1916); Brim v. Fleming, 155 Mo. 597, 37 S.W. 501 (1896) (dictum); cf. Robb v. N. W. Elec. Power Coop., 297 S.W.2d 385 (Mo. 1957). See generally Annot., 67 A.L.R. 364 (1930). That it may be rather difficult to obtain an effective alteration by the parties, see Church v. Combs, 332 Mo. 334, 58 S.W.2d 467 (1933).


60. Id., § 17.31 at 614-15. The Missouri statutes appear to attach a third incident to recording: a conveyance of real property is not valid, except as between the parties (and those who have actual notice), until it is recorded. § 442.400, RSMo 1959. Perhaps this is little more than a re-emphasis of the importance of recording and a negative restatement of section 442.390 and the estoppel decisions.

61. Further light may be shed on the meaning of the term "herein" as used in §§ 442.390-400, RSMo 1959, in the discussion in note 57, supra. Section 490.410 also uses the word "herein" as a replacement for "hereinbefore" beginning with the 1949 revision of the statutes. Prior to 1949 the section appeared in the same chapter with what are now §§ 442.390-400, RSMo 1959. See, e.g., § 3435, RSMo 1939. This would probably indicate that the term "herein" in all of these statutes could only refer to the provisions contained in ch. 23, RSMo 1939, which are retained in ch. 442, RSMo 1959, and, perhaps, additional requirements now made part of ch. 442. Probably the revisors of the statutes would have more accurately compiled the statutes had they replaced the word "hereinbefore" with specific section numbers rather than the vague term "herein." It could hardly be thought that by merely changing the term "hereinbefore" to "herein," the compilers could amend so many statutes to make them refer to all the requirements connected with recording wherever they may be found in the entire statutory compilation.
facts of delivery and execution and of the authenticity of the acknowledgment. But we also have section 490.420 which provides that if the instrument is also "recorded, in the manner herein prescribed," the record or certified transcript of the record may be read in evidence without further proof if the party wishing to use the instrument (or anyone knowing the fact) shows the court under oath (or by affidavit) that the original is lost or not within the power of the party wishing to use it. Again this statute has been interpreted to provide the same benefits when the instrument has been recorded, but cannot be found or produced, that have been given to original instruments which meet the specified requirements. Again, if "herein prescribed" (as used in this statute) may be read to mean "prescribed in those sections of Chapter 23, Missouri Revised Statutes 1939, which remain in force," then one might feel that this "incident" of recorded instruments is allowed to instruments recorded without the address now required by section 59.330(1). Still we are confronted with the fact that the legislature took the time to add a proviso to the new section providing that "statutory constructive notice" and "validity" of the instrument are not to be affected should the instrument be recorded without the address; and, since the legislature has taken the trouble to mention that these two incidents of recording should not be affected, the usual rule of construction would lead us to conclude that it did not intend that other incidents should not be affected. Expressio unius est exclusio alterius.

III. Effect of the New Language on Marketability

We come now to a provision expressly set out in the statutes which allows some of the evidentiary incidents of recording to instruments which have been spread on the records, but which were not entitled to be recorded. Section 490.350 provides:

Certified copies of such records as are contemplated in section 490.340 shall not be received in evidence until the execution of the original instrument or instruments from which such records are made has been duly proved according to law, except where the record has been made thirty years or more prior to the time of offering the certified copies in evidence.

The records which are "contemplated in section 490.340" are those which have been spread on the books, though not entitled to be recorded because "not certified" or "defectively certified." "Certification" is defined by that section to include "certification or proof of acknowledgment, or other certification, ... verification, authentication, attestation, or any other condition precedent to recording made by law." (Emphasis added.) We have already noted that the most logical interpretation of the "other condition precedent to recording" phrase would be to include instruments which do not meet the condition precedent to recording contained in the new portion

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62. See, e.g., Wilcox v. Coons, 359 Mo. 52, 220 S.W.2d 15 (En Banc 1949); State v. Page, 332 Mo. 89, 58 S.W.2d 293 (1933); Keener v. Williams, 307 Mo. 682, 271 S.W. 489 (1925); Harrison v. Edmonston, 248 S.W. 586 (Mo. 1923).

63. See Ming v. Olster, 195 Mo. 460, 92 S.W. 898 (1906).
of section 59.330. The legislature, then, while making some provision that recordation of an instrument without the required address will not affect "statutory constructive notice" or "validity," has made no provision with regard to the evidentiary incident of recordation: records of such instruments, it would seem, may not be introduced into evidence in lieu of the original until after they have appeared of record for thirty years. They do not acquire the "ten-year benefit" conferred by section 490.360.64

The failure of the legislature to include this incident in its "curing" proviso would seem to make unmarketable any title which has in its history a deed, recorded on or after October 13, 1963 (the effective date of section 59.330 as amended), which does not contain the address of a grantee and which has not been of record for thirty years. Title is unmarketable because one of the great incidents of recordation is missing—i.e., the record may not be used to prove the title until after the passage of thirty years from the date of recording one of the instruments. Patton and Patton, in *American Law of Property*, state:

"Usually the absence of either attribute [constructive notice or evidentiary value] makes the particular record unacceptable as a link in the chain of title to the interest to which it pertains. The examiner's client is entitled to a record which he can use as evidence if need be, and which in the meantime, separately or with other records, will afford notice of the existence and ownership of that interest."65

Title examiners, then, would be wise to include in their check-lists the "grantee's address" requirement and abstractors should probably show whether or not this is present in the instrument, where it is located and whether it appears to have been scribbled on as an after-thought. Such steps should at least be taken until the validity and effect of this statute is determined by the Supreme Court of

64. Section 490.360 provides:

Whenever the records in the recorder's office of deeds of any county shall contain a record of any writing, instrument or deed, purporting to affect any real estate, or any right or interest in or to the same, and such real estate, right, or interest in or to the same shall have been claimed or enjoyed by any person, by or through such writing, instrument or deed, for a period of ten consecutive years, such writing, instrument or deed, and a certified copy thereof, and of the time of its record, shall be *prima facie* evidence of the execution of such writing, instrument or deed, and of its genuineness and time of record; provided, the said record thereof shall have been made at least ten years next before such writing, instrument or deed, or certified copy thereof, is offered in evidence.


Not all title examiners would agree with Patton. Several months ago a leading title authority in Missouri stated to Professor Willard L. Eckhardt, School of Law, University of Missouri, that the major title insurance company which he represents would not consider this impairment of the record as evidence serious enough to prevent insuring marketability. But a conservative individual title examiner frequently must follow a stricter standard than a title insurance company which can properly assume a limited business risk.

The author is indebted to Professor Eckhardt for suggesting the problem that § 59.330, RSMo 1963 Supp., presents regarding impairment of the evidentiary value of the record.
Missouri or until the General Assembly not only repeals the statute but declares in positive form that all incidents of properly recorded instruments will attach to instruments recorded without the required address. 66

IV. DEFECTIVE TITLE OF BILL

There is some possibility that, should a case dealing with section 59.330 reach the supreme court, the new language of this section would be declared unconstitutional because of a defective title to the enacting legislation. Article III, Section 23, Constitution of Missouri, provides: "No bill shall contain more than one subject which shall be clearly expressed in its title . . . ." 67 This suggests two arguments against the constitutionality of any legislation: (1) that it contains more than one subject and (2) that the title does not clearly express the content of the bill. Both attacks are appropriate against the recent amendments to section 59.330.

The title of the bill which gives us the current section 59.330 is as follows: "An Act to repeal section 59.330, RSMo 1959, relating to the recording of certain papers and documents and to enact in lieu thereof one new section, relating to the same subject." 68 Note what the bill does under such a title: (1) It declares the duty of recorders to (a) record "all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices" and certain other named instruments; and somewhat inconsistently, (b) not record "all deeds, except deeds of trust, easement or right-of-way conveying any lands or tenements" which do not contain an address of one of the grantees. (2) It declares that there shall be a new prerequisite to recording of certain deeds: they must now contain an address of one of the grantees. (3) It declares that certain incidents of properly recorded instruments shall attach to instruments which are recorded contrary to express statutory direction. Do all of these matters constitute "one subject"? Are all of them clearly expressed in the phrase "relating to the recording of certain papers and documents"? There are thousands of sections in the statute books which might be said to "relate" in some manner to the recording of certain instruments: if all of them could be thrown out and altered in a bill with such a title—a bill which does not purport to be a comprehensive redraft of all recording provisions—the constitutional restraint has served no purpose at all.

While there is no dearth of cases concerned with defectively titled legisla-

66. Of course legislative correction along the suggested lines might still not improve the status of the record where an instrument is recorded following an alteration to insert the address.

Supposing that the absence of the address does make title unmarketable of record, then what would suffice to cure the record? Would a recorded affidavit, stating the address, be sufficient? Probably it would not—because of the statutory language that the instrument must contain the address.

67. Certain exceptions to this provision (including appropriations bills) are not here relevant.

tion, the law in the area is couched in rather general rules of thumb which the court has been able to apply with remarkably differing results. A few of these rules will be mentioned here together with a discussion of how they might be applied to determine that the new language of section 59.330 is unconstitutional.

In State ex rel. United Rys. v. Wiedewaupt the court stated that one test to be applied was whether

the design of the promoters of this act was . . . to mislead the public and the members of the General Assembly as to its object, or to prevent a careful consideration of the bill before its enactment into a statute, or, whether so designed by its promoters or not, if such was its effect . . . .

The court also cited with approval a statement that the purpose of such constitutional provisions is:

[F]irst, to prevent hodge podge, or "log rolling" legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.

Both the above statements of the rule could be used to deny the constitutionality of the bill enacting the new section 59.330. One reading the title of the bill is told that the new section relates to the "same subject" as the section being repealed. But the section repealed dealt with the duties of the recorder: it declared that the recorder should record certain named instruments including those relating to interests in real property which are elsewhere authorized to be recorded. The new section does this—but it also purports to impose further requirements for recording and declares that certain instruments erroneously spread on the record shall have certain incidents of properly recorded instruments. The title is misleading because the new statute does not deal with the same subject as the

69. 231 Mo. 449, 133 S.W. 329 (En Banc 1910). The bill proposed in its title to amend the chapter relating to ferries by adding to it six new sections relating to the establishment of wharfs, piers, and ferry landings, and the condemnation of private property for that purpose. The court found that the title was insufficient, for "neither the public in general nor the members of the legislature would naturally understand that a bill proposing by its title to amend the statutes relating to ferries would contain in its body provisions for the condemnation of land for and the construction of wharfs and piers." The court also found that the title was misleading by the use of the "catch word 'ferries,' thereby implying that the wharfs, piers, and ferry landings called for are designed to be in aid of ferries present or future; whereas, it is not essential to the fulfillment of the design . . . that there should be any ferry at all." 231 Mo. at 466, 133 S.W. at 334.

70. Id. at 459, 133 S.W. 331.

71. Id., citing COOLEY, CONSTITUTIONAL LIMITATIONS 205 (7th ed.). This statement has been cited with approval in a number of subsequent Missouri cases. See, e.g., State v. King, 303 S.W.2d 930, 933 (Mo. 1957); Edwards v. Business Men's Assur. Co., 350 Mo. 666, 685, 168 S.W.2d 82, 92 (1942); Southard v. Short, 320 Mo. 932, 937, 8 S.W.2d 903, 905 (1928).
repealed statute and because the old statute did not deal broadly or generally with "the recording of certain instruments"—but, rather, with the duty of recorders to record certain instruments. The entire chapter in which the new language is placed deals with matters of election and duties of the recorder and with matters of organization and operation of recorders offices. Certainly the bill would fit the phrase "hodge podge legislation." The title of the bill could readily be found to have misled the public and members of the General Assembly and to have prevented a careful consideration of the bill.

In State v. Niedermeyer v. Hackmann, the court pointed out that one objective of the constitutional provision was to assure that titles to bills are not misleading. Even though matters are sufficiently related that they might be enacted under one title, they must "be within the subject 'clearly expressed in the title' of such act."

In Edwards v. Business Men's Assur. Co. the court reviewed a number of Missouri decisions on the constitutional provision, stating:

The mere generality of the title will not prevent the act from being valid, where the title does not tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection, and in case of an amendatory act a requisite of congruity is that such act shall pertain to and admit of being made a consistent part of the law to be amended.

The court then found that an insurance section which abolished the defense of suicide in actions on life insurance policies was sufficiently included in the title of the enacting bill. While the title of the bill involved in the Edwards case might at first blush appear to be no broader than the title to the bill enacting the new section 59.330, it should be noticed that (1) the terms "revise and amend" indicate that changes may be extensive and far-reaching; even a haphazard legislator would have his attention drawn to the specific contents of the legislation by such a title. But in the present legislation the title states that the section repeals an existing section "relating to the recording of certain papers and documents" (a misnomer) and that it enacts "in lieu thereof one new section, relating to the same subject." The language would indicate that the subject matter of the new

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72. 292 Mo. 27, 237 S.W. 742 (En Banc 1922). The court declared the particular statute unconstitutional because its subject matter was not "clearly expressed" in the title.
73. Id. at 32, 237 S.W. at 743.
74. 350 Mo. 666, 168 S.W.2d 82 (1942).
75. Id. at 685-86, 168 S.W.2d at 93. The quoted language appears directed at an amendatory act. Senate Bill 187 is not by the nicest legal definition an amendatory act, for it expressly repeals a section and enacts a new one to replace the one repealed. But the only difference in text between the old statute and the new one is that the words dealing with the addition of the address have been added. Have we not, in fact, "amended" the old law? It seems doubtful that the court would want its interpretations of the constitutional provisions read so as to allow the legislature a looser title standard if they stop "amending" and always repeal the old law before making changes.
76. The bill was entitled: "An Act to revise and amend the Insurance Laws of the State of Missouri." Id. at 684, 168 S.W.2d at 92.
section 59.330 will be substantially the same as that of the old section by the same number: unfortunately such a statement is far from the fact. The title does "tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection."

The court in Southard v. Short requires that a title be "an index finger" pointing inexperienced, and even experienced, legislators to the substance of the bill and that it be a "guidepost" for the interested public. The index finger in the title to Senate Bill 187 points only to "the same subject" as old section 59.330 and says that this relates "to the recording of certain papers and documents." Both the chapter number given to the legislation and the statement that the new section relates to the same subject as the old section would lead one to believe that the new section again relates only to the duties of a recorder with regard to the recording of certain instruments elsewhere declared appropriate for recording. There is no "guidepost" in the title of Senate Bill 187 which would point to the other matters contained in it.

When the court finds a challenged statute to be within the constitutional requirements, it has frequently relied on the statement in State ex rel. Lorantos v. Terte to the effect that when it is not clear that legislation is outside the title of the act, or when it is not clear that the act relates to more than one subject matter, the doubt should be resolved in favor of validity "if the challenged legislation is germane and relates either directly or indirectly to the main subject." This presumption of validity was used here in a case where a single act contained provisions which might, by another court, have been found both diverse and only remotely connected to the matters specifically mentioned in the title. In cases

77. 320 Mo. 932, 8 S.W.2d 903 (1928). The court declared unconstitutional one section included in a bill entitled:

An Act to repeal sections 311, 312, and 314 of article XV, of chapter 1 of the Revised Statutes of Missouri for the year 1919, entitled "Descents and distributions," and to enact four new sections in lieu thereof, all relating to the descents and distributions of estates and to form a part of said article XV of said chapter 1, said sections to be designated and numbered, respectively, as sections 311, 311a, 312 and 314. Laws of Mo. 1921, at 117.

The court said:

It cannot be said that the section ... providing for the institution of a suit by the mother of a child born out of wedlock against the reputed father of such child to obtain a decree establishing paternity properly comes under the subject "Descents and Distributions of Estates." 320 Mo. at 938, 8 S.W.2d at 905.

78. 320 Mo. 932, 938, 8 S.W.2d 903, 905 (1928).

79. 324 Mo. 402, 23 S.W.2d 120 (En Banc 1929).

80. Id. at 405, 23 S.W.2d at 121. This presumption of validity has been oft cited in support of declaring legislation with questioned titles to be constitutional. See, e.g., State v. King, 303 S.W.2d 930, 932 (Mo. 1957); State ex rel. Wallach v. Beckman, 353 Mo. 1015, 1026, 185 S.W.2d 810, 816 (1945).

81. The title to the bill reads:

An Act amending chapter 95, Revised Statutes of Missouri, 1919, by adding thereto a new article ... providing for the supervision, regulation and conduct of transportation of persons for hire over the public highway of the state of Missouri by motor vehicles; conferring jurisdiction upon the public service commission to license and regulate such transportation;

https://scholarship.law.missouri.edu/mlr/vol30/iss1/18
where the court decides to declare the statute unconstitutional, the Terte presumption seems to be ignored.\(^2\)

The court appears most likely to make use of the title requirement provisions of the constitution to strike down bad legislation (i.e., where the legislation does not meet with the court's approval for other reasons)—though this may not be clearly stated in the opinions. The provision seems to have been used to declare statutes unconstitutional in four main categories: where the court was dealing with (1) legislation which the court would like to find invalid because of some bad effect it would have on the proper disposition of the case at bar;\(^3\) (2) legislation

providing for the enforcement of the provisions of this act and for the punishment for violation thereof; and repealing all acts or parts of acts

or laws inconsistent with the provisions of this article.

The act then provides that before carriers are licensed they must be covered by liability insurance binding the obligors to make compensation for injuries to persons and damages to property resulting from the negligent operation of the motor vehicle; further that certain safety rules set forth in the act must be included in rules promulgated by the commission; further, that the carrier must make a detailed report covering accidents arising from the operation of motor vehicles. The act then sets forth provisions for enforcement of the act and punishment for violation thereof and also for the issuance of licenses and such additional regulation as the commission might deem necessary. Then there appears a section providing some special service and venue provisions. It is the latter section which is specifically objected to in the case. The court says:

Of course, provisions for the enforcement of the act and punishment for violation thereof are necessary to the main purpose announced in the title. Promulgation of rules without means for enforcement would be no regulation. Thus it appears the protection of the traveling public was the purpose of the act. (Emphasis added.) 324 Mo. at 405, 23 S.W.2d at 121.

The court concludes:

[A] restricted venue for suits against common carriers operating through several counties and the application to them of the usual method of serving process, would encourage insufficient equipment and negligent operation. On the other hand, the provisions of the challenged section encourage proper equipment and the operation of vehicles in a careful and prudent manner. They are highly regulatory and tend to the safety and convenience of the travelling public. 324 Mo. at 406, 23 S.W.2d at 121.

Note that nowhere in the title of the act is there stated a purpose of "protection of the travelling public." This purpose the court has simply "found" or "gathered" in its efforts to find the legislation constitutional.

But the court will not always bend so far. In State ex rel. Normandy School Dist. v. Small, 356 S.W.2d 864 (Mo. En Banc 1962) the proponents of the legislation attempted to use such an argument, but the court flatly rejected it, stating that "higher education" is not the title of the Act. The title is much more specific. 356 S.W.2d at 870. It might be noted that in this case there was other legislation on the books which itself purported to cover the matters which were alleged to be allowed under the new legislation. There is good opportunity for analogy between the fact situation present in that case and the circumstances surrounding the new § 59,330.

\(^2\) See, e.g., United Bhd. of Carpenters & Joiners v. Industrial Comm'n, 352 S.W.2d 633 (Mo. 1962); State ex rel. Fire Dist. of Lemay v. Smith, 353 Mo. 807, 184 S.W.2d 593 (En Banc 1945). The Terte case was called to the court's attention in State ex rel. Normandy School Dist. v. Small (discussed supra note 81), but the court provides no detailed explanation of why the presumption would not apply. 356 S.W.2d at 870.

\(^3\) When this situation is present it is not articulated by the court. It would seem that it played a part, however, in the decision of the following list of cases:
which is vague and seemingly in conflict with other statutes.\textsuperscript{84} (3) legislation in which no stretch of the court’s imagination could bring the provisions within the title;\textsuperscript{85} (4) legislation which may be declared unconstitutional on other grounds as well. On the other hand instances may be found where legislation which the court felt was salutary, necessary and timely, have been declared constitutional—even though the court must stretch the title of the act (or strain the meaning of the constitutional provision) to come to such a result.\textsuperscript{86}

V. Conclusion

The court may be inclined to strike down the present statute when confronted with the myriad problems it poses rather than attempt to clarify and revise by court decision. As the court itself has said: “It is always better to seek the correction of a situation caused by confusing or conflicting statutes, in the legislature, where the power to regulate lies, rather than in the courts which cannot change the statutes but only interpret and enforce them.”\textsuperscript{87} The court should not encourage titles to become unmarketable or a flood of litigation to determine piece-meal just what the statute demands and affects. The present statute may easily be found to have been passed in violation of the constitutional provisions for titles to legislation. By so holding, in the somewhat unlikely event a case involving the statute should reach the appellate level, the court may do a service to the state at large as well as to the legislature. Such a declaration of unconstitutionality would leave no great gap: to declare the entire enactment unconstitutional would also annul the repealer portion of the statute—and old section 59.330 would remain in effect to declare the duties of recorders. The only language that would, in actuality, be done away with, would be that which was added to the old statute in the recent enactment.

\textbf{William B. Morgan}

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\textsuperscript{85} See, e.g., \textit{United Bhd. of Carpenters & Joiners v. Industrial Comm’n}, 352 S.W.2d 633 (Mo. 1962); \textit{Hunt v. Armour & Co.}, 345 Mo. 677, 136 S.W.2d 312 (1939); \textit{Fidelity Adjustment Co. v. Cook}, 339 Mo. 45, 95 S.W.2d 1162 (1936); \textit{Southard v. Short}, 320 Mo. 932, 8 S.W.2d 903 (1928); \textit{State ex rel. United Rys. v. Weihaupt}, 231 Mo. 449, 133 S.W. 329 (En Banc 1910).
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\textsuperscript{87} \textit{Stribling v. Jolley}, 253 S.W.2d 519, 522 (St. L. Mo. App. 1952).
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