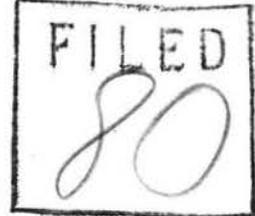


RECORDER OF DEEDS -- May purchase new abstract and index to trust deeds and be reimbursed by county court

January 6, 1938

Honorable J. Scott Graham  
Circuit Clerk and Ex-officio Recorder  
Madison County  
Fredericktown, Missouri



Dear Sir:

This is to acknowledge receipt of your request of January 1, 1938, for an opinion, reading as follows:

"We have in our office an index to Trust Deeds, which is used every day and the book is practically all in pieces. A large number of the pages are loose. I have consulted various firms who inform me that the record cannot be rebound with any success.

"I have consulted the County Court about the matter and they do not wish to go to the expense of buying a new book and recopying it. I am wondering if I would be safe in ordering and rewriting a new book, as I feel that I am the one to be responsible for the maintenance of the record. I would also like to know if the fee for rewriting the record is extra above the salary allowed the Circuit Clerk."

At the outset of our opinion, we observe that by virtue of your being the Circuit Clerk in a county of less than 20,000 population, you also act as Recorder of Deeds. Laws Mo. 1933, page 360.

We direct your attention to applicable statutes.

Under the provisions of Section 11527 of R. S. Mo. 1929, it is provided that the county court shall provide suitable books for the Recorder of Deeds. Said section reads in part as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, \*\*\* "

It is provided by Section 11546 of R. S. Mo. 1929 that the Recorder shall keep an abstract and index of deeds. Said section reads in part as follows:

"The recorder of each county in this state shall keep in his office a well-bound book or books, to be known as the 'abstract and index of deeds,' \*\* "

From these statutory considerations, which are plain, unambiguous and mandatory in their terms, you will have noticed that the county court is required to provide the Recorder of Deeds with "suitable books", which books are to be used in the recordation of instruments of writing required to be recorded; also, that the Recorder is required to keep in his office "a well-bound book or books." From this it follows, what are "suitable" and "well-bound books"? Webster defines the word "suitable" in the following language:

"Capable of suiting; proper; appropriate."

In the case of *White vs. U. S.* 69 Fed. 93, the court held that the test of the suitability of an article for a certain purpose is not whether it is commonly used therefor, but whether it possesses actual, practical and commercial fitness for that purpose.

In the case of *Miller vs. Estabrook*, 273 Fed. 143, 151, the U. S. Circuit Court of Appeals (4th) considered a

statute of the code of West Virginia that required the Clerk of the County Court to admit to record and record deeds and other writings in a "well-bound book." It was argued that the claim of title was not good, because the Clerk recorded the deed in a book which contained other records, when the statute required such deeds to be recorded in a "well-bound book" set apart and exclusively used for such recordations. The court, in ruling this contention, said:

"We think, if the clerk recorded the instruments mentioned in one of two or three such books, preserved and indexed as required by the statute, so that the books and contents were readily accessible to all persons concerned with land titles and liens, this would be a substantial compliance with the law."

(underscoring ours)

These observations lead us to conclude, in construing the words as have been used in our statutes, in order to arrive at the legislative intention, that a suitable and well-bound book means one which possesses actual and practical use, properly preserved so as to be readily accessible to those concerned. The importance of such book need not be stressed in the course of this opinion.

If, as you have suggested by your request for an opinion, the "index to Trust Deeds, which is used every day and the book is practically all in pieces", and "a large number of the pages are loose", it cannot be said or argued that such book is still suitable and is well-bound so as to fulfill the requirements of the statute.

In reaching our conclusion, we are not unmindful of Section 11563 of R. S. Mo. 1929, relating to the making of a new abstract and index for deeds, which reads in part as follows:

"When the county court of any county in this state shall consider it necessary to provide a new abstract and index of deeds for the recorder's office of such

county, \*\* such court may, by an order duly entered of record, direct the same to be done by the recorder or some other competent person, and when any such abstract and index shall become so worn and defaced as to be illegible, such court shall, \*\* direct the recorder or some other competent person to copy the same in a suitable book; \*\*\* "

Other parts of the statute relate to the fee for making up the new abstract and index and the copying of such abstract and index.

It may be that the county court is mindful of this section of the statute wherein an apparent discretion is given them for determining when an abstract and new index is necessary, but even though a discretion is vested in the county court to determine when a new abstract and index of deeds may be made, what is the Recorder to do in the event the county court does "not wish to go to the expense of buying a new book and recopying it?"

A somewhat similar situation arose in the case of *Ewing vs Vernon County*, reported in 216 Mo. 681. In this case the court considered what is now Section 11527, supra, together with other sections placing a duty upon the Recorder of Deeds. The county court did not want to pay for janitor service for the Recorder, and after considering other sections of the statute, the court said: (l.c. 692)

" \*\* it becomes plain that the county is to furnish the necessaries in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. \*\* "

In ruling upon whether or not the county court was required to pay for janitor service which the Recorder had assumed as a personal liability when the court refused to pay for such service, the court said: (l.c. 693)

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"And if the county court, as the agent of the general public in county affairs, without legal right or excuse, refuses to do that duty in the recorder's office, what is the recorder to do? His only sensible course is to do what this recorder did, viz., avoid an unseemly wrangle, pay it out of his own pocket and trust to the courts and the law to reimburse him. \*\*\* "

It is to be observed, before concluding, that a Recorder of Deeds may not only be liable civilly in an action on his official bond, if such Recorder be negligent in the performance of his duties, to the detriment of any persons, but may also be liable criminally. Section 11564 and Section 11565, R. S. Mo. 1929.

As relates to the second question propounded in your request for an opinion regarding the fee for re-writing the record, which is made the subject of this opinion, I am enclosing copy of an opinion dated January 4, 1938, directed to the Honorable Melvin Englehart, Prosecuting Attorney of Madison County, Missouri, which opinion was written by Harry H. Kay, Assistant Attorney General, and approved by J. E. Taylor, Acting Attorney General, wherein you will find this subject fully discussed.

#### CONCLUSION

In view of the above, it is the opinion of this department that if any county court refuses to purchase a new abstract and index to trust deeds when such book is not practical and usable, that the Recorder of Deeds may pay for such abstract and be reimbursed by the county court.

Yours very truly,

RUSSELL C. STONE  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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