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ABSTRACTERS' LICENSING LAWS

WILLARD L. ECKHARDT*

I. INTRODUCTION

This study had its serious beginning in February 1957, when, as Chairman of the Real Estate and Trusts Committee of The Missouri Bar, I met with a representative of the Legislative Committee of the Missouri Title Association to go over the draft of an abstracters' licensing act being prepared by that Association.¹ My rather intensive analysis of the good points and the patent defects of that proposed bill led in the fall of 1958 to a study of its source and a study of similar legislation. When a substantial amount of preliminary research had been completed, I learned that the "Villanova Project" was under way. This project was a study of the laws regulating title insurance companies and the licensing of abstracters, financed by a grant of \$15,000 for the title insurance phase and \$2,500 for the abstracters' license phase (exclusive of publication costs), the funds being contributed in part by the American Title Association² and in part by interested members. Consequently I shelved my own notes. The Villanova Project was completed in the spring of 1961, and copies of *Public Regulation of Title Insurance Companies and Abstracters* were distributed in June, 1961.³

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1. Eckhardt, *Report of Real Estate and Trusts Committee*, 13 J. MO. BAR 203, 204 (1957). There had been an earlier exploratory meeting with the Legislative Committee in December 1955.

A draft was prematurely introduced as a bill in 1957, *infra* note 97, but was abandoned. Because the final draft of the proposed act would have affected lawyers adversely, the bill would have been actively opposed by interested lawyers, and was never introduced. Eckhardt, *Report of Real Property Committee*, 15 J. MO. BAR 457, 458-59 (1959).

2. The American Land Title Association, Premier Building, 1725 Eye Street N.W., Washington 6, D.C., was founded in 1907 and is the national association of abstract companies, title insurance companies, and their management personnel. Its official publication is *Title News*. The word "Land" was added to the name of the organization in September 1962; the original name, American Title Association, is used hereinafter.

3. Roberts ed. 1961. This book is published by Villanova University Press, Villanova, Pa. The American Title Association, *supra* note 2, has a limited number of copies available at \$10. The Association has furnished complimentary copies to law school libraries. Hereinafter this book will be referred to by a short title, *Title Insurance Companies and Abstracters*.

(1)

I have not made a critical examination of the part of *Title Insurance Companies and Abstracters* which deals with title insurance, but in skimming the 288 pages of text devoted to that subject there seem to be adequate treatments of the origins of title insurance, the development of title insurance legislation, current trends in such legislation, etc. The part on regulation of abstracters came a cropper, however, and was disposed of in sixty lines of text comprised of five hundred and ninety-three words, with twenty-eight footnotes citing statutes but no cases.⁴ Except as a digest of statutory citations to particular types of provisions, that part of the Villanova Project which deals with abstracters' license laws is of no value to title men who are concerned with this type of legislation. Consequently, I completed my independent study of abstracters' license laws.

II. SCOPE OF THE STUDY—INCLUSIONS, EXCLUSIONS, AND METHOD OF PRESENTATION

It is the object of this study to trace the development of abstracters' license laws, to analyze the good and bad features of the several laws, and to indicate unique features, all to the end that lawyers or abstracters who

On the Villanova Project see the following: *Villanova Project*, 38 TITLE NEWS 15 (May 1959); *Summary of Discussions, Abstracters Section, ATA Mid-Winter Conference*, 38 TITLE NEWS 25 (May 1959) (on addition to study of laws affecting abstracters); *General Business Sessions, ATA Mid-Winter Conference*, 38 TITLE NEWS 32, 39-40 (May 1959); Reppert, *Report of Chairman of Abstracters Section*, 39 TITLE NEWS 20, 21 (Jan. 1960) (on addition to study of laws affecting abstracters); Burlingame, *Report of the Villanova Project Compilation of Title Insurance and Abstract Laws*, 39 TITLE NEWS 134 (Jan. 1960); Hughes, *Report of National President*, 40 TITLE NEWS 5, 6 (Jan. 1961); Burlingame, *Villanova Project Report*, 40 TITLE NEWS 23 (Jan. 1961); Note, 40 TITLE NEWS 18 (Sept. 1961); Rawlings, *Report of the National President*, 41 TITLE NEWS 5, 6 (Jan. 1962).

4. TITLE INSURANCE COMPANIES AND ABSTRACTERS, § 10.00, 283-289 (Roberts ed. 1961). The 1962 Supplement does not correct the basic deficiencies of the 1961 text.

§ 0.40, pp. 20-25, on abstract companies, appears to have been included to put title insurance companies in proper focus and is not to be related to § 10.00. § 0.40 goes briefly into the history of abstracting and the division into abstracting and title examination as such, the abstracter's liability, marketable title legislation, and title examination standards.

The editor evidently saw no connection between the privity problem and legislation abolishing the privity requirement, pp. 22-23, nn.5-8, and the bond provisions in abstracters' license laws, p. 285, n.4; at least there is no cross reference between the two. PATTON, LAND TITLES § 27, n.44 (1938), § 44, n.54 (2d ed. 1957), notices this relationship, and the earlier edition of *Patton* is cited in § 0.40, nn.6-8.

The Villanova Project, a study begun in the summer of 1958 and completed in 1961, *supra* note 3, cites the 1938 edition of *Patton*, but does not notice the second edition in 1957. In fact, a short note on abstracters' license laws was added to the pocket part to the 1937 edition of *Patton* and is included in the 1957 edition, § 44, n.54.

may have occasion to be concerned with the amendment of existing laws of this type or the introduction of new laws of this type will not be acting in a vacuum, or with only one or two such laws in view. My personal experience with acts proposed in Missouri proved to me the need for such a study.

I have been concerned primarily with the three basic components of abstracters' license laws,⁵ and in order that the larger view might not be obscured, much detail has been omitted, and many incidental features have been omitted or touched upon only lightly.

The first basic component of an abstracters' license law is the requirement of a bond (or other method of assuring financial responsibility) protecting those using abstracts of title. One important feature of the bond provisions in some abstracters' license acts is the elimination of the privity requirement,⁶ thus enlarging the group of persons to whom the abstracter is liable, and I have dealt with this problem.⁷ On the other hand, I have generally ignored detail as to the size of bond, the official or board which approves the bond, etc. Insofar as the size of the bond is concerned, the only really significant point is that the earliest statutes required a \$10,000 bond, an amount that would stagger some abstracters in 1963.

The second basic component of an abstracters' license law is the re-

5. Abstracters' license laws imposing occupational taxes, either as a flat fee or percentage of income, are not uncommon, and either states or municipal corporations may impose such taxes under more or less specific legislation. Alaska is typical. ALASKA COMP. LAWS ANN. § 35-1-1 (1949) imposed a \$50 annual tax on "abstract offices." In 1949 this was replaced by a gross receipts tax on "business," ALASKA COMP. LAWS ANN. §§ 35-1-71 to 35-1-82 (Supp. 1958).

TITLE INSURANCE COMPANIES AND ABSTRACTERS 289, n.23 (Roberts ed. 1961) lists only Alabama and Alaska, but this listing is incomplete. The revenue type of an abstracters' license act is not further considered in this article.

6. See, e.g., Trusler, *Extension of Liability of Abstracters*, 18 MICH. L. REV. 127 (1919); Phillips, *Liability of Abstracters*, 5 TITLE NEWS 4 (Sept. 1926), reprinted in 62 AM. L. REV. 868 (1928); White, *The Legal Liability of Abstracters and Title Companies*, 9 TITLE NEWS 5 (Oct. 1930) (on certificates of title rather than abstracters' certificates); Hutchinson, *Limiting the Liability of the Abstracter*, 32 TITLE NEWS 31 (Sept. 1953) (discussion of two methods of limiting liability: horizontal, by stating in certificate which records have been searched, which not searched; and vertical, by stating dollar limitation on liability); Warren, *An Abstracters Liability*, 33 TITLE NEWS 2 (May 1954) (much practical advice for the abstracter); Roady, *Professional Liability of Abstracters*, 12 VAND. L. REV. 783 (1959), reprinted in PROFESSIONAL NEGLIGENCE 243 (Roady & Andersen ed. 1960).

7. See generally Hall, Comment, *Abstractor's Liability in Examination of Title*, 6 WYO. L. J. 184 (1952). There being no pertinent cases under the Wyoming statute, Mr. Hall covers the cases in the nine other states with similar statutes. At pp. 186-187 he deals with the very significant point that a statute which broadens the group of persons who have the benefit of an abstracter's certificate does not broaden the certificate itself as to the extent of the search certified.

quirement of adequate abstract records or indexes. The several statutes have phrased this requirement in various ways, but it would extend this study to undue length to consider in detail the variances in wording.⁸ Grandfather clauses are of prime importance with respect to the requirement of an adequate plant, because such clauses tend to create monopoly. The usual form of such clause applies both to existing and future plant, is perpetual, and is not inherently self-limiting as to time except insofar as the benefit is not transferable. These clauses are considered in some detail.

The third basic component of an abstracters' license law is the requirement that individuals, as distinguished from abstract companies as business units, be examined to determine professional competency. Again the grandfather clauses have some importance, but here such clauses are self-limiting as to time because of the death or retirement of those who have benefit of the clause. The examination requirement is of special significance because of its impact on lawyers who do abstracting, or perform limited services which might come within a definition of abstracting. Details as to how the examination is administered and what it covers generally have been ignored.

The typical abstracters' license act creates an abstracters' board of examiners composed of three abstracters. Significant variances as to the composition of the board have been noted, but details as to administration and appeals from board actions have not been discussed.

Many abstracters' license acts cover related matters, but by and large these matters have been excluded from this study as not germane to the fundamental purposes of an abstracters' license act. For example, the problem of access to the public records by a private abstractor is covered by

8. TITLE INSURANCE COMPANIES AND ABSTRACTERS 285-86, n.6 (Roberts ed. 1961), is in error and misleading where it is stated: "One state [Oklahoma] requires that these indices be *compiled* from, rather than copied from, the instruments of record affecting real estate in the county office having custody of such records." What Oklahoma requires is an independent set of abstract books or other system of indexes compiled from the instruments of record, rather than indexes copied from the official *indexes*. OKLA. STAT. ANN. tit. 1, § 13 (1951), construed in Application of Richardson, 199 Okla. 406, 184 P.2d 642 (1947). See note 187 *infra*.

Cardon, Johnson & Dykins, *The Abstracters License Law in Operation*, 21 TITLE NEWS 16, 18 (Jan. 1942), reports a case in southern Oklahoma where a person made card indexes from the official indexes. His application for a license was rejected by the county clerk on the basis that the card indexes were not sufficiently comprehensive. He appealed the denial to the district court. There is no reported decision.

statute in at least nine states.⁹ At least nine states, with variations in wording, provide that abstracts certified by a licensed abstracter are admissible in evidence and are prima facie evidence of their contents.¹⁰ *Title Insurance Companies and Abstracters* is a valuable source of citations to statutes on these and other incidental matters affecting abstracters.

A title insurance company which engages in abstracting may be subject to an abstracters' license law, may be exempted from certain provisions of an abstracters' license law, such as the financial responsibility requirement, or may be completely exempted from an abstracters' license law. These matters have not been explored.¹¹

Insofar as research sources are concerned, the basic materials are obviously the statutes and cases dealing with the construction and validity of the statutes. *Title News*, the official publication of the American Title Association, is the best single source of information on and discussion of abstracters' license laws, although generally from a trade journal point of view. There are two difficulties with reference to *Title News*: first, very few complete files exist even in the better law school libraries;¹² and second, much of the material is buried in transcripts of speeches and committee

9. See *Title Insurance Companies and Abstracters* 286-287, nn.10-11 (Roberts ed. 1961), citing pertinent statutes.

Jaques, *Rights, Privileges and Obligations of a Title Company in the Public Offices*, 24 *TITLE NEWS* 9 (April 1945), starts with a report of a problem in June 1944 with reference to space in the recorder's office in Milwaukee Co., Wisconsin, and then reviews the pertinent law in Wisconsin and in other states. The problem in Oklahoma is discussed in *Not-for-Rent Sign Given Courthouse*, 37 *TITLE NEWS* 29 (June 1958). As to the problem in Arkansas, see *infra* note 191.

10. See *TITLE INSURANCE COMPANIES AND ABSTRACTERS* 287, n.13 (Roberts ed. 1961), citing pertinent statutes.

11. *Id.* at 283, n.1, cites statutes dealing with the other side of the coin: whether abstracters are subject to title insurance laws. As to whether title insurance companies are governed exclusively by the title insurance law, see *id.* at 290-95.

12. Vols. 1-5, 1922-1926, with the exception of two numbers of vol. 5, have not been available to me. Vols. 10-24, 1931-1945, consist of one to three numbers each, devoted primarily to the proceedings of the annual conventions. During some if not all of this period from 1931 through 1945, bulletins were issued two or three times a month, but a file of these bulletins has not been available to me. Vols. 25-28, 1946-1949, consist of four or five numbers each year. Starting with vol. 29 in 1950, there have been from nine to twelve numbers a year.

9 *TITLE NEWS* 3-7 (Sept. 1930) has an index to vols. 1-8, 1922-1929. 35 *TITLE NEWS* 1-34 (Jan. 1956) has an index to vols. 24-34, 1945-1955. These indexes, for the periods covered, are much better than the Index to Legal Periodicals, which omits many pertinent articles. The only way to find all the materials in point is to leaf through each number and skim each item. For example, it was not immediately apparent from the title that Bodley, *Up From the Depths to Sublimity*, 8 *TITLE NEWS* 86 (Dec. 1929), was a discussion of the 1929 South Dakota abstracters' license law.

reports and does not get indexed. Reasonable diligence has been used to unearth the significant materials in *Title News*, particularly in the 1927-1931 period when the drive for the Model Abstracters' Licensing Act was on, but no attempt has been made to cite every scrap of information. State bar association journals and state title association journals are other sources of information; with these there are the same basic problems as with *Title News*, but problems infinitely compounded. Some bar journal material has been cited, but in general local association journals have not been available for consultation.

In presenting and discussing these materials, it was deemed advisable to use a modified chronological or historical approach, as opposed to the digest method adopted in *Title Insurance Companies and Abstracters*.¹³ The historical approach has the virtue of letting the reader see not only the area's present stage of maturity but also its growth from infancy—a necessity if one is to develop an insight as to what future modifications are needed or may be expected. Such an approach also helps make clear the motivation behind the several acts. Early legislation in the field was for the protection of the public and not to freeze out competition. A shift came in 1928, however, with the Model Act and its extreme grandfather clause as to plant, and much of the legislation since has been monopolistic in purpose.

A quasi-index to the several statutes is printed at the end of this article. The acts are listed in strictly chronological order and each act is followed by footnote references which lead to the pertinent text material.

III. ABSTRACTERS' LICENSE ACTS PRIOR TO 1925

A. *Nebraska, 1887-Date (Bond)*

In 1887, Nebraska enacted an abstracters' bond act which would seem to be the forerunner¹⁴ of the modern abstracters' license acts. This act, with minor amendments and with additions, is still the law in Nebraska.¹⁵

13. *Supra* note 3.

14. The earlier 1885 Minnesota abstracters' bond act (now MINN. STAT. ANN. § 386.18 (1947)), did not apply to abstracters generally. This act is considered *infra* note 198.

15. Neb. Laws 1887, c. 64, §§ 1-5 (as amended, now NEB. REV. STAT. §§ 76-501 to 508 (1943)).

§ 76-501, from 1887, is the basic bond provision. § 76-507, from 1887, provides for the period of the bond, and for additional security under certain circumstances. § 76-508, from 1887, provides for appeals from orders regarding additional security.

Section 76-501, the basic provision in the 1887 act, provides that it shall be unlawful for any person to engage in the business of compiling abstracts of title to real estate for compensation without first filing a \$10,000 bond "conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued" by such person. Under section 76-506 an abstracter so bonded is certified as such by the county judge, and under that section and section 25-1292, abstracts certified by a bonded abstracter are admissible in evidence and are prima facie proof of the existence and contents of abstracted records.¹⁶

Two things are especially noteworthy in the bond provision. First is the size of the bond—\$10,000 in 1887. Second is the abolition of the privity requirement insofar as the abstracter's liability is concerned; the abstracter is liable to "any party or parties" injured. Thus the act of 1887 would seem to be solely to protect the public and not to benefit the abstracters by restricting competition, unless the size of the bond would have the effect of eliminating curbstoners. The Nebraska courts have construed the act in accord with its evident intent.¹⁷

§ 76-505, from 1907, is a penalty section and provides both criminal and civil penalties (the civil penalty being double the price of the abstract). From 1887 to 1907 there was apparently no penalty for violation.

§ 76-503, from 1911, is concerned with the place for filing an abstracter's bond where the officer with whom the bond normally would be filed has a conflict of interest.

§ 76-504, from 1933, prohibits certain county officers from engaging in abstracting. In cases of violation, the certificate that the abstracter is bonded and the abstracter's certification of abstracts are said to be "absolutely void." Thus, unless the plain meaning is construed away, the real penalty falls upon the innocent person who buys the abstract, a result probably not intended. § 76-502, from 1935, prohibits district judges from engaging or being interested in abstracting.

§§ 76-506 and 25-1292, both from 1887, are concerned with the admissibility of abstracts in evidence. See note 16 *infra*.

16. § 76-506 provides that an abstract certified by a licensed abstracter is admissible in evidence and prima facie proof of the existence and contents of abstracted records. § 25-1292 provides that when a party intends to introduce an abstract in evidence he shall furnish a copy of the abstract to the opposing party before the trial. This section originally followed § 76-506 but in the process of compilation was shifted to the chapter on evidence, and "any abstract of title to real estate as herein provided" [*i.e.*, by a bonded abstracter], was changed to "any abstract of title to real estate." Although the notes to § 76-506 include a cross-reference to § 25-1292, the notes to § 25-1292 do not include a cross-reference to § 76-506. § 25-1292 is cited but not discussed in *Worm v. Crowell*, 165 Neb. 713, 726, 87 N.W.2d 384, 392 (1958).

17. *Gate City Abstract Co. v. Post*, 55 Neb. 742, 76 N.W. 471 (1898) (abstract furnished to one Fleck when he purchased land, relied on by one Post

The Nebraska act has no requirements with reference to the abstractor's professional competency or the adequacy of his abstract records. The act affects these matters only indirectly and to the extent that an incompetent abstractor with inadequate records might not be able to file the required bond.

The Nebraska act has been influential in shaping abstractors' license acts in other states. This influence will be noted at appropriate places.

B. Idaho, 1897-Date (Bond)

Although several states adopted abstractors' license acts after Nebraska and before Idaho, it is convenient to consider Idaho next, because the 1897 Idaho act was almost identical with the Nebraska act of 1887¹⁸ and obviously was derived therefrom. The 1897 Idaho act, with minor amendments, is still the law in Idaho.¹⁹ Liability is not based upon privity, and the abstractor is liable to "any party or parties" injured.²⁰

C. North Dakota, 1889-1895 (Bond), 1895-1925 (Bond and Plant)

In 1889, two years after the Nebraska act,²¹ Dakota Territory adopted a similar act, with one important additional feature: a maximum fee schedule.²² The act clearly was derived from the Nebraska act because

when Fleck subsequently sold to Post); *Thomas v. Carson*, 46 Neb. 765, 65 N.W. 899 (1896) (*dictum*) (apparently the abstract was furnished to a mortgagee, and relied on by an assignee of the mortgage).

18. *Supra* note 15.

19. Idaho Laws 1897, at 92-94, §§ 1-6 (as amended, now IDAHO CODE ANN. §§ 54-101 to -105 (1957 repl.)).

20. In *Merrill v. Fremont Abstract Co.*, 39 Idaho 238, 227 Pac. 34 (1924), a purchaser sued an abstractor for damages resulting from the abstractor's omission of a mortgage from an abstract furnished the vendor. The action was not on the abstractor's bond, nor did the record show whether the abstractor in fact was bonded. The majority held the abstractor liable notwithstanding the lack of privity, relying principally on the Nebraska case, *Gate City Abstract Co. v. Post*, *supra* n.17. A dissenting judge took the view that the abstractors' bond act enlarged liability only under the bond, did not change the common law privity requirement absent a bond, and only subjected the unbonded abstractor to a misdemeanor penalty.

21. *Supra* note 15.

22. Dakota Laws 1889, c. 1, §§ 1-8, as amended, N.D. COMP. LAWS §§ 3090-3099 (1913) and S.D. REV. CODE §§ 10541-10547 (1919). At the end of the 1889 act are certificates that the objections of the governor were read at length and entered upon the journal, and that upon vote the bill passed notwithstanding the governor's objections.

North and South Dakota each adopted its constitution later the same year. In view of the act of the Territory of Dakota, both states started out with identical laws.

many of the provisions were identical in wording. The territorial act of 1889 was retained as the law in North Dakota and South Dakota when those states were admitted to the union later that year, and continued substantially unchanged in South Dakota until 1929, when it was replaced by the Model Act of 1928.²³ Several significant amendments were made in the North Dakota act, but after 1895 its basic coverage remained unchanged until 1925, when it was replaced by a new comprehensive abstracters' license act,²⁴ which in turn became the Model Act of 1928.²⁵ Because the North Dakota act has had so much more impact on the laws of the other states than the South Dakota act, the North Dakota act will be dealt with here; the South Dakota act will be considered later in the article.

Insofar as the abstracter's liability was concerned, in the original act the bond was for the benefit of any party or parties injured.²⁶ In 1895 this was changed by the North Dakota legislature to protect "any person for whom any abstract or certificate of title is made," thereby codifying the privity requirement.²⁷ By amendment in 1907, the benefit of the bond was again changed to run to "any person," thus abolishing the privity requirement.²⁸ There has been no North Dakota judicial construction of the act on the privity point.

As previously mentioned, a significant innovation in the Dakota act of 1889 was a schedule of maximum fees for abstracters.²⁹ Such a schedule might help a few rural abstracters to raise fees, but by and large would be objectionable to abstracters, a factor which probably accounts for the rather limited adoption of such schedules.³⁰

In 1895 North Dakota added a requirement that before a person could engage in abstracting for compensation he must have "for use in such business a complete set of abstract books or records of all instruments filed or of record in the office of the register of deeds in and for the county in which such business is to be conducted, or in good faith [have] engaged

23. *Infra* note 109.

24. *Infra* note 48.

25. *Infra* note 53.

26. Dakota Laws 1889, c. 1, § 1.

27. N.D. CODES § 1774 (1895).

28. N.D. Laws 1907, c. 1, at 1.

29. Dakota Laws 1889, c. 1, § 7 (last amended in 1953 and now N.D. CENT. CODE § 43-01-18 (1960)).

See generally Stephens, *Constitutionality and Legality of Fixing Abstract Charges by Legislation*, 8 TITLE NEWS 10 (Feb. 1929), an able discussion of the legal problems involved and a review of the statutes of the several states.

30. See TITLE INSURANCE COMPANIES AND ABSTRACTERS 287, nn.14-15 (Roberts ed. 1961).

in the preparation for not less than three months of such books or records."³¹ No doubt this provision was borrowed from the Wyoming act of 1891.³² Although the act had a criminal penalty section,³³ the certificate of authority to engage in abstracting was issued on the basis of satisfying the bonding requirement, and there was no machinery for an advance determination as to the adequacy of the books or records and no requirement that the books or records be completed or kept up to date.³⁴

Apparently the requirement as to books or records was honored in the breach, because in 1911 the act was amended in an effort to make the books or records provision effective.³⁵ The term "abstract books or records" was defined to include tract indexes and copies of maps and plats. As mentioned above, the original act required a complete set of books or records or that the person have spent at least three months in preparing such books or records; the new act required in addition that at least one-fourth of the entire record be actually completed, and provided deadlines of from two to five years for full completion, failure to so complete being "conclusive evidence of lack of good faith." It was also required that the records be kept current from day to day. Provision was made for determinations as to the status of the records in connection with the issuance and cancellation of the abstracter's certificate of authority to engage in abstracting. This bill was vetoed by the governor on the ground that "the subject . . . seems to be already thoroughly covered by the statute in as far as the legislature has power to go."³⁶ Both the wisdom of and the reasons assigned for the veto seem unsound. The veto was attacked as being untimely, this contention was upheld,³⁷ and the act was reinstated, only to be repealed at the next session.³⁸

As indicated above, North Dakota in 1925 adopted a comprehensive abstracters' license act which will be considered in detail below.

D. Wyoming, 1891-Date (*Bond and Plant*)

In 1891 Wyoming became the fifth state to adopt an act regulating abstracters, and included the significant innovation of a plant requirement.³⁹

31. N.D. CODES § 1774 (1895).

32. *Infra* note 39.

33. Dakota Laws 1889, c. 1, § 5.

34. Dakota Laws 1889, c. 1, § 2.

35. N.D. Laws 1911, c. 329, at 581, §§ 1-6.

36. N.D. Laws 1911, at 583.

37. State *en rel.* Watkins v. Norton, 21 N.D. 473, 131 N.W. 257 (1911).

38. N.D. Laws 1913, c. 1, § 2.

39. Wyo. Laws 1890-91, c. 41, §§ 1-2 (now WYO. COMP. STAT. ANN. §§ 33-12 to -13 (1957)).

The act did not slavishly follow the wording of any of the four acts then existing, but no doubt was suggested by Nebraska, Kansas, or the Dakotas.

A \$10,000 bond was required for "the use of any person who shall sustain loss or damage by reason of the failure of any [abstracter] in the performance of [his] duty as such abstracter." The bond was to be filed, but no provision was made for a certificate of authority to engage in abstracting. It will also be noticed that there was no requirement of privity for liability; no Wyoming case has construed the act on this point.

Wyoming was the first state to include a plant requirement. To engage in abstracting, a person must have "a full and complete set of abstract records of title of all the real estate situated in the county" in which the business is carried on; or if the business is limited to a city, "a complete set of abstracts of all real estate" in the city. *Quaere* whether there is a significant difference between a "complete set of abstract records" and a "complete set of abstracts." This Wyoming provision ultimately led to the current requirement in abstracters' license acts with reference to the abstract plant.

The Wyoming act has no administrative machinery for civil enforcement,⁴⁰ but does have a criminal penalty.

E. New Mexico, 1921-Date (Bond)

In 1921 New Mexico adopted an abstracters' bond act.⁴¹ This act is reviewed out of chronological order because of its direct derivation from the Wyoming act of 1891.⁴² The bond provisions are almost verbatim those of the Wyoming act, including criminal sanctions, although the requirement as to abstract records is omitted. In *Gallegos v. Ortiz*, a criminal prosecution, the act was attacked as being indefinite and not specific and complete, but its validity was sustained.⁴³ The 1921 act was amended in several

40. There was a move in Wyoming in 1930 to add a state abstracters' board, based on the provisions of the Model Act. Graham, *Chairman's Address (Abstracters Section)*, 10 TITLE NEWS 19, 20 (Jan. 1931); Johns, *Legislative Regulation of Abstracters*, 10 TITLE NEWS 38, 39 (Jan. 1931). Nothing came of this move.

41. N.M. Laws 1921, c. 73, § 1.

42. *Supra* note 39.

43. *Gallegos v. Ortiz*, 28 N.M. 598, 216 Pac. 502 (1923). The court stated that the purpose of the act was to make the abstracter liable to persons to whom he would not have been liable at common law, and to guard against insolvency.

particulars in 1923,⁴⁴ apparently to correct the deficiencies alleged in the *Gallegos* case,⁴⁵ but still remains purely an abstracters' bond act.⁴⁶

IV. THE NORTH DAKOTA ACT OF 1925: THE MODEL ABSTRACTERS' LICENSE ACT, 1928

The North Dakota abstracters' license acts of 1889 and 1895, with their basic requirements of a bond and abstract records, together with a schedule of maximum fees, have been considered previously.⁴⁷ In 1925, in an elaborate revision of the 1889 act, North Dakota added a third basic requirement—competent personnel—and became the first state with a comprehensive abstracters' license act.⁴⁸ This act became the prototype of much of the legislation in the ensuing years.

Two men were largely responsible for the preparation of the Model Act and the vast amount of legislative activity in 1929 and 1931. The first was James S. Johns of Pendleton, Oregon, who became chairman of the Abstracters Section of the American Title Association in 1926 and served until February 1930. It is evident to one who peruses *Title News* for this period that Mr. Johns not only was an extremely able and successful abstracter, but a ball of fire as well.⁴⁹ The second man was Richard B. Hall, then of Kansas City, Missouri, and later of Chicago, who became Executive Secretary of the Association in 1922 and continued to serve in that office until September 1931. Mr. Hall kept out of the limelight, but much of the credit is his.

44. N.M. Laws 1923, c. 117, §§ 1-4 (now N.M. STAT. ANN. §§ 70-2-1 to -2-4 (1961 repl.)).

45. *Supra* note 43.

46. In 1957 a bill adding a plant requirement was defeated in New Mexico. The bill was not sponsored by the state title association. Turner, *State Legislative Committee, Report of Chairman*, 36 *TITLE NEWS* 52 (Nov. 1957).

47. See textual material accompanying notes 22-29 *supra*.

48. N.D. Laws 1925, c. 1, §§ 1-13. § 14 was an emergency clause: "The present law does not properly cover the making of abstracts of title to real property." The act was announced to the industry in *North Dakota License Law*, 4 *TITLE NEWS* 11 (April 1925).

Some sections of the North Dakota act were broken down into two or more sections in the compiled statutes. See N.D. REV. CODE §§ 43-0101 to -0121 (1943). Many of the sections have continued without change to the present time, but in 1953 very significant changes were made in some. See N.D. CENT. CODE §§ 43-01-01 to -01-22 (1960), discussed *infra* note 164.

In the text discussion which follows, references to the North Dakota act are to the original section numbers in the session law because in the main these parallel the section numbers in the Model Act.

49. A brief report in 6 *TITLE NEWS* 15 (Dec. 1927), of the convention of the Missouri Title Association states that Mr. Johns was kept on the floor four hours and twenty minutes, bombarded with questions.

In 1926, Mr. Hall collected the abstracters' license statutes of seven states (he missed three states: Idaho, Montana, and New Mexico). With these seven statutes as a basis, Hugh Ricketts of Muskogee, Oklahoma, prepared a paper which he read at the Mid-Winter Conference of the Association in February 1927. Mr. Ricketts described these statutes very briefly, and then evaluated the bond, plant, personal examination and maximum fee provisions as to their general practical merits; to this day it is the best discussion in *Title News* of abstracters' license acts.⁵⁰

Abstracters' license legislation was discussed further at the Mid-Winter Conference in January 1928.⁵¹ Six months later, in June 1928, the American Title Association approved⁵² what may be called the Model Abstracters' License Act.⁵³

The Model Act was in large part copied verbatim from the 1925 North

50. Ricketts, *State Regulation of Abstract Companies*, 6 TITLE NEWS 16 (March 1927). Mr. Ricketts was of the opinion that the bond frequently is worthless because the sureties are worthless, but that the requirement is harmless; that the maximum fee schedule is an abomination; that the plant requirement is highly desirable as eliminating curbstoners and other irresponsible abstracters, and would not eliminate responsible competition; and that anyone could pass an abstracters' examination, which would be about as worthless as a civil service examination.

The only other general discussion of abstracters' license laws I have found is Wetzel, *Legislation Affecting Abstracters*, 17 TITLE NEWS 31 (No. 1, circa Fall 1937). This is a lawyerlike statement of the need for such legislation and classification of the types of acts, but is very brief and does not have any real analysis of existing legislation.

51. Hall, *Report of Executive Secretary*, 7 TITLE NEWS 6, 7 (March 1928): "The next is a Legislative Program. I want to say frankly and openly that after all my years of being in the abstract business myself and in various branches of the title business and being Executive Secretary of this Association for nearly six years, I am firmly of the opinion that we have played ostrich long enough and if we are going to make this Association work and make the title business one of standing and profit, we are going to have to do some legislative work like the hairdressers and other associations have done."

Johns, *Report of Chairman, Abstracters Section*, 7 TITLE NEWS 35, 37 (March 1928), is a brief discussion of the 1925 North Dakota act, how it operates, and its virtues; it is stated that the personal examination requirement actually works.

See also Dougherty, *Observations on Abstracters and State Title Associations*, 7 TITLE NEWS 20, 21, 22 (March 1928). This article is a reaffirmation of previous material, Dougherty, *Statutory Regulation of Title Business—A Forecast and a Suggestion*, 7 TITLE NEWS 20 (Jan. 1928), wherein the author urges abstracters' license laws with at least bond and personal competency requirements, to give the abstracter professional status.

52. *Association Sponsors Pretentious Legislative Program*, 7 TITLE NEWS 3 (Nov. 1928).

53. See *Explanatory Bulletin on Proposed Abstract Law*, 7 TITLE NEWS 4 (Nov. 1928), which sets out the complete text of the act together with an introductory statement and explanatory marginal notes.

Dakota act.⁵⁴ There is, however, one basic distinction. In view of North Dakota legislation dating back to 1889, and the attempt in 1911 to make effective the requirement of abstract records, the North Dakota act of 1925 appears to have been an attempt to improve existing legislation for the protection of the public, tempered by such compromises as are necessary to get any restrictive legislation passed. On the other hand, in view of the changes made by the American Title Association in drafting its Model Act, it would seem that the basic motivation here (perhaps largely subconscious) was to freeze the business in the hands of existing abstract companies and to prevent new abstract companies from coming into existence and into competition.⁵⁵ This view is supported by the following excerpt from an address to the convention which adopted the Model Act:

This [act] is fine for the general public. I want to tell you privately it is going to be good for you. The way it worked [*sic*] out in practice, a board of examiners has to pass all the qualifications of any new company which wants to start up. If there is a plant in that county, a new plant must be started with lots of expense. And when the plant is in shape to be examined, the officers have to pass an examination, or the managing officer. How do they know that they are going to be able to pass that examination?⁵⁶

54. Johns, *Annual Address of Chairman [of Abstracters Section]*, 8 TITLE NEWS 73, 76 (Dec. 1929):

I learned that the title people of North Dakota had done something and I went there to find out what they had done. You paid my expenses. They have a law in North Dakota, which Mr. Hall [Executive Secretary of the Association] and I copied, made general in its terms—we didn't expect it to be adopted verbatim in any state—but we generalized it to be a model to be worked on in each state.

55. Technological advances since World War II have made the monopolistic features of the Model Act less dangerous:

Today in 1956 we do not have the position of invulnerability from competition we once enjoyed. Time was when for one to enter your county in competition with you meant an arduous lengthy building of a title plant by means of the one single new mechanical device on the market—the typewriter [—] and the segregation of that immense volume of material into a geographical arrangement—and the posting of the material into tract books. It was so stupendous a job that few ventured into it. Today with the camera, the film card, the sorting machine, the multilith, and the thousand and one other mechanical devices, plus labor-saving machinery, one can be in active competition with an established abstractor within a matter of months—perhaps even weeks—and probably, in a somewhat tragic fashion, in some few instances with a much more complete title plant. Sheridan, *Me and My Crystal Ball*, 35 TITLE NEWS 49, 50 (Nov. 1956).

56. Johns, *Address of Chairman [of Abstracters Section]*, 7 TITLE NEWS 41, 44 (Sept. 1928). At 43-45 Mr. Johns describes the principal features of the Model Act, and urges an active legislative program.

This point should be kept in mind in reading the material which follows. Monopoly may perhaps be in the public interest if fees and services are regulated, as in Oklahoma, where abstracting is declared to be a public utility.⁵⁷ It is not in the public interest, however, where competition is eliminated and where there is no regulation of fees and services.

Because the 1925 North Dakota act and the 1928 Model Act have been so important in subsequent legislation and in proposed legislation being prepared currently, because so many provisions are identical, and because the changes made in the Model Act so clearly show the monopolistic tendency of that act, it will be convenient to state the substance of the 1925 North Dakota act,⁵⁸ and compare it with the Model Act.⁵⁹ At the same time, a critical analysis of the two acts will be made. For convenience, the term "abstract company" will be used to designate the individual or business organization desiring to engage in abstracting.

A. N.D. Act § 1; Model Act § 1. Abstract Records Required

Section 1 of the North Dakota Act requires that an abstract company desiring to engage in or continue the business of abstracting must "have for use in such business a complete set of abstract books or records of all instruments of record in the office of the Register of Deeds in and for the County in which such [abstract company] has [its] place of business, or shall have been in good faith in the preparation for not less than three⁶⁰

In Johns, *Chairman's Annual Address [Abstracters Section]*, 6 TITLE NEWS 75 (Oct. 1927), Mr. Johns discussed at length the elimination of competition in the abstract business (but did not mention any enabling legislation).

In fairness, however, it must be remembered that in this period in many areas abstracters were in a desperate plight. Fees were low and competition was cut-throat; rebates and commissions often ate up any potential profits. The business drained off by curbstoners would have provided a decent competence for the capable abstracter with a large investment in plant.

My abstracter friends are sincere in their belief that an abstracters' license act will improve existing abstract companies and benefit the public. The basic difference is one of opinion as to the long-range effect of the grandfather clauses, and whether there really is anything in the Model Act which will compel improvement in the case of substandard existing abstract companies. These same friends are good abstracters and have good plants; the public does not need to be protected from them by legislation.

The fundamental difference between a grandfather clause as to individual competency and a grandfather clause as to abstract records is considered at some length in the discussion of the Model Act clauses, *infra* note 64-66 and accompanying text.

57. OKLA. STAT. ANN. tit. 1, §§ 7, 10 (1951). *Cf. infra* note 183 and accompanying text.

58. *Supra* note 48.

59. *Supra* note 53.

60. This was changed to six months by N.D. Laws 1929, c. 1, § 1. The 1929 act made the same changes in §§ 5 and 6.

months of such books or records." Section 5 requires the company to obtain a certificate of registration and section 7 states that the company must file the required bond, subject to any exceptions contained in the act.

The Model Act, section 1, is substantially the same with two exceptions. First, the words "a set of abstract books or other system of indexes or records showing in a sufficiently comprehensive form all instruments of record or on file" are substituted for the words "a complete set of abstract books or records of all instruments of record." The wording in the Model Act would seem to be an improvement. Second, the Model Act omits the exception in the case of an abstract company in good faith preparing records for not less than three months, and instead, in section 12, a grandfather clause, excludes existing abstract companies which have been in business for two years from any plant requirement, present or future. New abstract companies, however, must have adequate plants.

Comment: Except for the bond requirement, the plant requirement is the heart of any effective abstracters' license law. The North Dakota act is weak in that there is no provision requiring plants to be brought up to standard, the thing that North Dakota attempted to accomplish in 1911. The Model Act is altogether undesirable, in that it completely eliminates the plant requirement for existing abstract companies.⁶¹ A proper act would permit existing abstracters to continue for a reasonable period of time but would require plant perfection. A good plant requirement will make provision not only for bringing a plant up to standard, but also for periodic inspections to ascertain that the plant is being properly maintained.

The requirement of complete abstract records of all instruments of record in the recorder's office creates two problems. First, if some of the official records have been lost, stolen, destroyed or are illegible, the instruments are still of record but cannot be abstracted, and a new set of abstract books cannot be complete. Second, only records affecting land are actually needed, not all of the records in the recorder's office.

Furthermore, under both acts, only records in the recorder's office need be abstracted to meet the plant requirement. An act should be sufficiently broad to include other local records affecting land: typically, at least, certain of the records of the probate and circuit courts.

61. That this is the intention is clear. But in Montana the court construed grandfather provisions identical to those in the Model Act as applying only to the initial one year period of the license, not to renewal periods. See note 151 *infra* and accompanying text.

Finally, in the case of large cities where one (or perhaps more than one) abstract company has a complete abstract plant and leases its services to a number of other abstract companies or title insurance companies, a refusal to renew the leasing agreement would throw the others out of business. Any plant requirement should be drawn with this problem in mind.

An alternative solution is to eliminate any plant requirement, but to require that the abstracter's certificate make a full disclosure as to the extent of the plant. This was the approach taken by a proposed Abstracters' Certificate and Bond Act prepared by the Title Examination Standards Committee of The Missouri Bar. Following rather elaborate definitions of "abstract of title," "abstract records," and "person," the bill in part provided that any person certifying an abstract of title

shall state the extent . . . of the abstract records maintained and used by him in the conduct of his business, and such person shall, unless otherwise expressly limited in such certification, be deemed to expressly warrant that (1) he has complete abstract records, either as owner or lessee or licensee, for the area for which he makes, compiles, issues, or certifies such abstracts of title. . . .⁶²

B. *N.D. Act §§ 2-4; Model Act §§ 2-4. Board of Examiners;*

Organization of Board; Reports of Board

Section 2 of the North Dakota Act creates a three member abstracters' board of examiners "to carry out the purposes and enforce the provisions

62. Blair, *Report of Title Examination Standards Committee*, 5 J. MO. BAR 133, 134 (1949). The proposed act required abstracters to be bonded, and provided for uniform construction of abstracters' certificates regardless of individual variations in wording except as the certificate expressly stated otherwise. The provision quoted in the text was not acceptable to a substantial number of Missouri abstracters and was struck from the final draft. An emasculated draft was approved by The Missouri Bar but was not introduced because enough Missouri abstracters opposed the bill to make its defeat almost certain. Neither draft is printed in the cited committee report. The bond provisions are not unusual, but so far as I know, the abstracters' certificate provisions are unique.

Cf. MICH. STAT. ANN. § 5.1006 (1961), which provides in part: "Every such abstract [issued by a county] shall have attached thereto a certificate that all conveyances and other matters of record in the public offices of said county affecting the title to the property covered thereby are correctly set forth therein or a certificate of such lesser extent as may be provided in such ordinance or resolution." The section cited is one section of a 1921 law authorizing counties to purchase or make tract or other indexes and to issue abstracts. Although the law in terms applies to all counties, I have been informed that it was enacted for Detroit (Wayne County).

See also the provision of the Missouri act introduced (but not passed) in 1957, empowering the abstracters' board of examiners to prescribe the form of abstracter's certificate, *infra* note 97.

of this article," and provides for the appointment by the governor of members to staggered terms. One member must be an abstracter recommended by the state title association; there are no special qualifications for the other two members. Section 3 provides for the organization of the board, grants the board power to make necessary rules and regulations, and provides for nominal compensation for and expenses of board members. Section 4 provides for biennial reports to the governor. Sections 2-4 of the Model Act are substantially the same except that section 2 requires that all three members of the board be abstracters with not less than five years' experience, recommended by the state title association.

Comment: The provisions of both acts, relating to the board of examiners as an administrative agency, its finances, powers, etc., are primitive and inadequate in view of the proliferation of boards and agencies and the development of elaborate "standard" provisions as to such boards.

Neither act provides that the state title association shall recommend a number of persons from whom the governor shall select. Read literally, the Model Act, in effect, permits the state title association to name the entire board, using the governor as a conduit; the North Dakota act is less objectionable only in that the title association names one member of the board instead of all three. Probably neither provision is lawful; the status of a state title association is entirely different from the status of an integrated bar. At most an act should authorize the state title association to make recommendations to the governor for his due consideration, but such recommendations can be made without legislation.

It is doubtful whether board membership should be confined to abstracters (whoever they may be; neither act defines "abstracter"). I am inclined to think that one member of the board might well be a lawyer who is an expert in the title field but who is not an abstracter.⁶³ A public member on the board might be desirable. The North Dakota act is better in this respect, in that there is more flexibility. A board composed solely of abstracters might make it too difficult for new abstract companies to enter the field, thus realizing the monopolistic potential of an act.

C. *N.D. Act § 5, first clause; Model Act, § 5. Certificate of Registration*

Section 5 of the North Dakota Act provides that any person, firm or corporation which desires a certificate of registration shall make application therefor, and that the applicant or partner or managing officer shall

63. The Minnesota act of 1957, *infra* note 204, requires one member to be a lawyer, but the board has five members instead of three as in the model act.

be examined (and presumably must pass). Issuance of the certificate of registration to the abstract company is expressly subject to a condition precedent of satisfying the bond requirement of section 7, and presumably by board rules will also be made subject to a condition precedent of satisfying the abstract records requirement of section 1, although there is no such express requirement. A flat fee of \$25 is paid where the abstract company applies for initial registration, without any separate fee for individual examinations or for inspection of the plant. The Model Act, section 5, is identical in substance.

Comment: It is in these provisions, tying together the licensing of the abstract company as a business unit with the competency of an individual abstracter, that both acts become sticky. Any competent abstracter should be able to make abstracts from any adequate set of abstract records. Under a workable act, however, an abstract *company*, whether it be an individually owned business, a partnership or a corporation, should be able to issue abstracts of title only when three conditions precedent have been met: first, the abstract company should have adequate abstract records available for use; second, the abstract company should have professionally competent personnel in charge of making abstracts; and third, the abstract company should be financially responsible, either by means of a surety bond, insurance, or a deposit of securities. The determination whether these three conditions precedent are satisfied may be by one board or several boards or by individuals.

One function of the board should be to conduct professional examinations for abstracters as individuals and to certify their competency as individuals, much in the manner of a board of bar examiners. If desired by the legislative authority, individual character could be investigated, as in the case of applicants for admission to the bar. Certification of individual competency should be completely divorced from any particular abstract company and any particular set of abstract records. A state with one hundred abstract companies might have one thousand certified abstracters. Such a certification could be called by any distinctive name, including "licensed abstracter" or "registered abstracter." Lawyers should be exempted from examination and should be considered competent by virtue of admission to the bar.

Neither act makes any provision for the examination of individuals except in connection with an application of an abstract company for a certificate of registration. If the licensing of the abstract company as a

business unit and the licensing of the individual abstractor as a competent individual were separated, many of the drafting problems that have plagued draftsmen of local abstractors' license laws could be easily resolved.

One of the greatest difficulties in drafting an act within the framework of the Model Act is in providing for the situation in which an individual who has passed the examination or has had the benefit of the grandfather clause is separated from the abstract company by disability, death, resignation, etc. Must business be suspended for weeks or months while the license application procedure is gone through again? Can the public go without the abstract company's vital services for such a period? If the competency of individuals is separately certified, an abstract company might have several certified abstractors in its employ, and there would be no interruption in business if the employment of one of them was terminated. Or, if an abstract company had only one certified abstractor in its employ and his employment terminated, business would be suspended only until the abstract company could employ another certified abstractor on a temporary or permanent basis.

A second function of the board should be to ascertain by inspection or other means the adequacy of abstract records. After initial approval there should be periodic reinspections.

A third function of the board or a deputy should be to examine and file security and periodically to reexamine the security.

A certificate of authority to engage in the abstract business should be issued to an abstract company as a business unit after satisfaction of the three conditions precedent mentioned above, and should be conditioned upon continued satisfaction of these requirements.

D. N.D. Act §5, last clause; Model Act §§ 6, 12. Grandfather Clause as to Individual Competency and Abstract Records

The last part of section 5 of the North Dakota act is a grandfather clause covering both the competency of the individual abstractor and the adequacy of the abstract records. It provides for a certificate of registration for such abstract companies existing on the effective date of the act as by timely affidavit show that the applicant (or other appropriate individual) is a practicing abstractor and that the abstract company has proper abstract records or has engaged for not less than six⁶⁴ months in the preparation

64. As previously mentioned, *supra* note 60, the act originally specified a period of three months, but was amended in 1929 to six. It would seem that this amendment moved the whole grandfather clause forward from 1925 to 1929.

of such records, subject, of course, to satisfying the bond requirement. In the North Dakota act the grandfather clause does not apply to abstract records.

In the Model Act the grandfather clause as to individual competency is set out separately as section 6, but is, nevertheless, tied in with the certificate of registration of the abstract company: two years of practice as an abstracter next preceding the act is required. The Model Act in section 12 adds a grandfather clause as to abstract records where the abstract company has been in the business of making abstracts for the two years next preceding the act, completely exempting such companies from the abstract records requirement, past or future. Proof is by affidavit.

Comment: As a practical matter, there must be grandfather clauses in any new licensing legislation. The real problem is to determine how far such clauses should go.

Insofar as individual competency is concerned, the clause should apply to all practicing abstracters of certain qualifications, not just to the owner or manager of the abstract company. The difficulty is in drawing the line somewhere between the top abstracter in an abstract company and the clerk-typist at the bottom. The period of timely application for the benefit of the grandfather clause also needs some flexibility, to take care of an abstracter in military service.

A rather liberal grandfather clause as to individual competency can do no great harm and is relatively short-lived. In the first place, most abstracters are competent, and financial responsibility requirements will tend to force out any incompetents. In the second place, the period of active abstracting for those who get the benefit of the clause will end not later than death, and generally will end earlier. Within a relatively short period of time, notwithstanding the grandfather clause, all active abstracters will be persons who have established their competency by examination or otherwise. The net consequence, of course, is an inevitable upgrading of the profession.

Insofar as abstract records are concerned, there should be provision that existing abstract companies must bring deficient records up to standard within a reasonable period of time, as was attempted in the ill-fated North Dakota act of 1911,⁶⁵ as well as to maintain adequate records in the future.

65. *Supra* notes 35-39.

A grandfather clause completely exempting existing abstract companies from a requirement as to abstract records, past and future, on the other hand, is not self-limiting. If the abstract company is a corporation the exemption is perpetual, and by construction may be perpetual in other cases where there is substantial continuity. If the exemption is only as to past records, then the grandfather clause as to abstract records becomes self-limiting as a practical matter, because the live and dangerous period as to title defects is (with some exceptions) not more than the most recent forty years. Where the exemption also includes future records, however, the problem is obvious. Too many abstracters have not understood the fundamental difference between a grandfather clause as to individual competency, which by its nature is self-limiting, and a grandfather clause as to abstract records, which is not self-limiting but perpetual, and none of the discussions of the problem by abstracters that I have heard or read noticed this basic distinction. The upgrading of abstract records, of course, is not inevitable.

To the extent that a grandfather clause as to abstract records is to be adopted, it should take succession into account, although none of the acts deal with this problem. If the abstract company is a corporation there is generally no problem of succession, but if the abstract company is an individual proprietorship or a partnership, succession on the death of the individual or a change in the partnership will mean that the new individual or new partnership will lose the benefit of the grandfather clause as to abstract records. Unless there is some provision for succession, an abstract company operating under a grandfather clause may be almost completely worthless by reason of the death of an individual or a change in a partnership with consequent termination of the benefit of the clause.⁶⁶ Furthermore, it should be possible to transfer the benefit of the grandfather clause to a corporation if the individual or partnership incorporates.

Attention is called to a Montana case wherein the grandfather clause as to abstract records was effectively eliminated from the Montana act by the court's construction of a license renewal clause identical with that in the Model Act.⁶⁷

66. This problem arose in South Dakota, where the view is that under the Model Act the benefit of the grandfather clause as to abstract records can not be transferred. See notes 115-116 *infra* and accompanying text.

67. See note 151 *infra*.

E. *N.D. Act § 6; Model Act § 7. Records of the Board and Renewal of Certificates of Registration*

Both acts are substantially the same, providing for a register of certificates of registration and for periodic renewal of certificates of registration upon proof (normally by affidavit) that the "applicant has complied with the provisions of this act."

Comment: It is evident that the sponsors of the Model Act assumed that renewals would be a matter of course, with full benefit of the grandfather clause as to abstract records. However, the words quoted above were construed in Montana to mean full compliance with the act *without* benefit of the grandfather clause.⁶⁸ In view of this construction in Montana, the quoted words should be redrafted to make the intent clear—either that there is continued benefit of the grandfather clause or that there is not.

F. *N.D. Act § 7; Model Act § 8. Bond Required*

Both sections are substantially identical and are typical bond provisions. In both cases the bond protects "any person" injured, thus eliminating the privity requirement. However, the Model Act was almost immediately informally amended to put in a privity requirement, so that the bond would protect only "any person *having a cause of action* by reason of" an error in the abstract.⁶⁹

Comment: The abstracter's liability should not be limited to those in privity with the abstracter. The defense of lack of privity of contract is at best a technical one and cannot be supported on functional grounds. Many states have moved toward broader abstracter's liability even without benefit of statute. An alternative is to abolish privity unless the abstracter's certificate expressly invokes it, as in Oregon.⁷⁰

Aside from the privity question, it would be desirable to add a provision making it clear as to when the cause of action arises, namely, whether on certifying the abstract or on injury, and to make the period of limitation clear, at least in those states which do not have definitive de-

68. *Ibid.*

69. "It is a change of only five words, but makes a great deal of difference." *Abstracters' Law To Be Introduced in Several States*, 7 TITLE NEWS 5 (Dec. 1928). I regret to note that the change was initiated by Missouri in its adaptation of the Model Act for introduction in Missouri. On the bond provision in the Model Act and bond provisions in other states, see generally Johns, *Bonding of Abstracters*, 8 TITLE NEWS 25 (Feb. 1929).

70. *Infra* note 215.

cisions on these problems. It also would be desirable to add a provision exempting from the bond requirement those title insurance companies which issue abstracts of title and whose financial soundness is assured in other ways. Finally, at least at the present time, the alternatives of insurance or deposit of securities should be made available.⁷¹

G. *N.D. Act § 8; Model Act § 9. Access to Public Records;
Duty to Make Abstracts*

Both of these sections carry the misleading catch-line "Certificate of Authority" (not "certificate of registration," as in the prior sections), but no additional or different certificate seems to be contemplated. Rather, the sections provide that an abstract company which has a certificate of registration may engage in the abstracting business and has the privilege of access to the public records of the several public offices of record.

The North Dakota act goes on to place a duty upon the abstract company to furnish original abstracts or to make continuations of abstracts. The Model Act omits this provision.

H. *N.D. Act § 9. Fees*

Under the North Dakota act, a schedule of maximum fees is provided. The Model Act has no comparable provision. The schedule of the North Dakota act, of course, has been revised upward from time to time.

Comment: If the effect of an abstracters' license act is to give a virtual monopoly to existing abstract companies and to make it almost impossible for new abstract companies to enter the field (and this certainly is a purpose and the effect of the Model Act), then it is essential that the existing abstracters be duty-bound to serve the public and that fees be regulated.

I. *N.D. Act § 10; Model Act § 10. Revocation of Certificates of Registration*

These sections, entitled "Regulation and Appeal," are concerned with revocation of certificates of registration for violations of the licensing act, or crime, or incompetency (in the sense of habitual carelessness, inattention to business, etc.). There is provision for an appeal.

Comment: Here again, the tying together of the abstract company and the individual abstracter makes license revocation unnecessarily com-

71. As to the practical difficulties involved with a deposit of securities, see note 216 *infra* and accompanying text.

plicated and awkward. Some of the grounds for revocation should affect the individual only, and should have no effect upon the abstract company. Furthermore, at the present time the provisions for an administrative hearing on license revocation should be more elaborate than those contained in the Model Act.

J. *N.D. Act § 11; Model Act § 11. Seal*

Provision is made for a seal, a copy of the impression to be filed with the board, and abstracts or abstract certificates are required to be sealed. The Model Act has an additional requirement that the names of persons authorized to sign abstract certificates be filed with the board, and apparently requires that abstracts or certificates to abstracts be signed with the seal below the signature (several words are missing between lines seven and eight of Section 11 of the Model Act, either by reason of a defect in the printer's copy or the loss of several printing slugs).

Comment: The folk magic of the seal has been with us for thousands of years and apparently will be with us for some time to come, notwithstanding the widespread abolition of the private seal in the late 1800's. Recent years have witnessed engineers' seals, architects' seals, land surveyors' seals, and others. It is interesting to note, however, that the seal of the abstracter is not required to bear the legend "Registered Abstracter" or equivalent.

The provision in the Model Act with reference to filing the names of persons authorized to sign would seem to serve no useful purpose and to constitute an additional hazard to the public if the abstract company denies the authority of the one who signs the certificate. The important thing is not who signs the certificates in behalf of the abstract company, but who is in charge of the preparation of abstracts.

K. *Model Act § 13. Where There is No Licensed Abstracter in the County*

This section eliminates the requirement of abstract records in counties where there is no licensed abstracter. There is no corresponding provision in the North Dakota Act.

Comment: This section is designed to take care of the problem of the "small" rural counties (though they may be large in area) where the volume of business is so small that no one can afford the investment necessary for tract indexes. Missouri, for example, has some counties of this type in

the Ozarks. When titles need to be abstracted, the work is done by a lawyer or by an abstracter using the official name indexes; the quantity of records is not large. Breaks in the chain of title frequently may be supplied by the history of the tract which is a matter of common knowledge in the community. An abstracters' licensing act must take into account counties of this type if any such exist in the particular state. A grandfather clause as to abstract records is an effective solution only so long as the grandfather continues in the active practice of abstracting; the grandfather clause does not help the man who takes his place. Even a clause exempting lawyers from the licensing requirements is not effective unless lawyers practice in such counties and are willing to do abstract work; some such counties do not even have a lawyer.

The Model Act solution, turning as it does on the mere presence or absence of a licensed abstract company (which itself under the grandfather clause may have no abstract records), would be void in most states as an unlawful and arbitrary classification. The less vulnerable basis for classification would be to exempt from the records requirement of the licensing act all abstracters in a certain class of counties; this classification may be justified on the basis that the quantity of records is so small that tract indexes are not essential.⁷²

L. *N.D. Act § 12; Model Act § 14. Penalty*

These are typical misdemeanor penalty sections for violation of the licensing acts. Civil penalty by way of revocation of license has been mentioned above.

Comment: Although a misdemeanor penalty section may be enough to curb the unlicensed abstracter, the more effective remedy is by way of injunction, and an act should include express provisions covering injunctive remedies.

M. *General Comment*

The basic structural flaw in both the North Dakota act of 1925 and the Model Act of 1928 was and is that only abstract companies are licensed, with the examination of individuals as to competency tied thereto as an

72. The technique is the familiar one of special legislation by way of general classification. See the statute cited in note 211 *infra*, where Minnesota, by breaking county population at 200,000, set off Duluth, Minneapolis and St. Paul.

incident thereof. Most of the practical and theoretical problems with the acts arise because of this fault.

Furthermore, neither act takes lawyers into account, although any well-drawn abstracters' licensing act should. While abstracting is not the practice of law, traditionally it has been in many areas a function performed by lawyers, and lawyers should not lightly give up the right to do abstracting.⁷³ At the very least, licensed lawyers should be exempted from any examination as to individual competency.

The problem of exempting lawyers from a requirement as to abstract records is much more difficult. I have seen the draft of one proposed abstracters' license act which would prevent a lawyer from furnishing his client a copy of a recorded deed, will or other title document. In more populous areas in the "abstract" states, of course, no lawyer would attempt to make a complete abstract, but extensions may be feasible, and frequently lawyers will search the records to cover the period between the date to which an abstract was certified and the date of closing a contract for the sale of land.

A blanket exemption of lawyers from any abstract records requirement may be undesirable insofar as the protection of the public is concerned. One possible solution is to require the lawyer without complete abstract records to certify from what records he compiled his abstract.

A recent development affecting lawyers has been the attempt of abstracters to prohibit anyone except a licensed abstracter from acting as the issuing agent for a title insurance company. Such legislation would seem undesirable. The lawyer, who is qualified to examine titles (and this is the practice of law), is better qualified than the abstracter to issue title insurance, and the objection, if any, is not as to the lawyer's qualifications but is a professional problem as to the activities in which a lawyer should engage.⁷⁴ The current development of state bar association title insurance companies would indicate that lawyers have a real interest in not being hampered or excluded by legislation sponsored by abstracters.

73. In Mississippi, making or certifying an abstract of title is practice of law, but domestic title or abstract of title guaranty companies acting through a lawyer as agent, and domestic abstract companies with a paid up capital of \$50,000 are excepted. MISS. CODE ANN. § 8682 (1956 repl.). In 1927 one abstract company in Mississippi was qualified; the others had lawyers sign their certificates of title. Ricketts, *State Regulation of Abstract Companies*, 6 TITLE NEWS 16 (March 1927).

74. See Opinion 304, February 16, 1962, Committee on Professional Ethics, 48 A.B.A.J. 383 (1962), the headnote of which states:

A lawyer who receives a commission for recommending or selling title insurance without fully disclosing to the client his financial interest in the

V. ABSTRACTERS' LICENSING ACTS AFTER 1928

A. Model Act in 1929 Legislative Year and Thereafter

The Model Abstracters' License Act was approved by the American Title Association in June 1928⁷⁵ and promptly was adapted for introduction in seven states: Colorado, Kansas, Missouri, Montana, Nebraska, Oregon and South Dakota.⁷⁶ South Dakota⁷⁷ and Colorado⁷⁸ adopted variants of the Model Act in 1929; in the other five states the bills failed in 1929.

1930 was an active year for the Abstracters Section of the Association, which reviewed its successes and prepared for the 1931 legislative year. The extent of this activity is indicated by the quantity of material published in *Title News* between the 1929 and 1931 legislative sessions.⁷⁹ How-

transaction is guilty of unethical conduct. On the other hand, there is nothing unethical in recommending title insurance to buttress a lawyer's opinion or to provide for contingencies beyond his knowledge.

Two canons are directly involved: Canon 6, on Adverse Interests and Conflicting Interests; and Canon 38, on Compensation, Commissions and Rebates. Canon 27, on Advertising, Direct and Indirect, also must be considered. Cf. Informal Opinion 501, 48 A.B.A.J. 473, 474 (1962): "A lawyer may not ethically act as agent for a title insurance company on a fee basis." This informal opinion was published one month after opinion 304, but may in fact have been an earlier opinion.

75. *Supra* note 52.

76. *Abstracters' Law To Be Introduced in Several States*, 7 TITLE NEWS 5 (Dec. 1928). See also Hall, *Editor's Page*, 8 TITLE NEWS 3 (Jan. 1929) (brief note on legislation being introduced, with special emphasis on absence of maximum fee provisions, and on one proposed bond act extending the abstractor's liability); Hall, *Report of Executive Secretary*, 8 TITLE NEWS 4, 5 (Feb. 1929) (brief statement that abstractors should write their own regulatory laws rather than have outsiders write them); Johns, *Report of Chairman, Abstracters' Section*, 8 TITLE NEWS 7, 8 (Feb. 1929) (discusses grandfather clauses; urges Model Act be modified to fit local state situations).

77. *Infra* notes 109-124 and accompanying text. In Bodley, *Up From the Depths to Sublimity*, 8 TITLE NEWS 86 (Dec. 1929), the man who successfully spearheaded the South Dakota act describes the local situation antedating the act and the manner in which the enactment was brought about.

78. *Infra* notes 125-136 and accompanying text. Wagner, *Found: What the Abstract Business Needs*, 8 TITLE NEWS 85 (Dec. 1929), is a detailed description as to how the Colorado enactment was effected, and the early experience with the act in operation.

79. In addition to the reviews of the successes in South Dakota and Colorado, cited in the two notes next above, see the following: Hall, *Report of Executive Secretary*, 8 TITLE NEWS 6, 10 (Dec. 1929) (brief statement on need for abstractors to take initiative in legislation, to better their status); Hall, *Mid-Winter Meeting [a] Real Conference*, 9 TITLE NEWS 7, 8 (March 1930) (brief report that abstractors' license laws had been the principal work of the ATA for the past two years, and that the act would be introduced in twelve states next, stating: "The abstractors' license, bonding and plant requirement bill is now known to be the only thing that will make [abstracting] a profitable responsible business"); Johns, *Report of Retiring Chairman, Abstracters' Section*, 9 TITLE NEWS 17 (March 1930) (brief

ever, notwithstanding all of this activity, only Montana adopted an abstracters' licensing act in 1931.⁸⁰

In the October 1931 convention of the American Title Association there was some of the old zeal left, but a review of the proceedings makes evident a shift in emphasis from salvation by legislation to salvation by minimum fee schedules. James S. Johns stepped out as Chairman of the Abstracters Section, effective February 1930 (he became President of the Association in October 1931). Richard B. Hall, Executive Secretary of the Association, resigned in September 1931. These two men had been the driving force behind the Model Act. The extent of the discussions on abstracters' license laws at the 1931 Convention is indicated in the footnotes.⁸¹ The last echo

statement that regulatory legislation is coming, and abstracters should take initiative in writing it; that abstracters' license law has worked in North Dakota for years).

9 TITLE NEWS 27, 30 (March 1930), is a transcript of an open floor discussion, where it is stated that the abstracters' license act was introduced in nine states in 1929, and that bills would be introduced in at least seven states in 1931; reasons for failure in several states are discussed, together with a statement as to how the act was successfully sponsored in South Dakota and the early experience with the South Dakota act in effect. 9 TITLE NEWS 36, 37 (March 1930), is a transcript of a discussion on tactics with reference to getting abstracters' license laws enacted, with some discussion of maximum fee schedule legislation.

"Reports from those states having the abstracters qualification and license law are more and more showing that the law is the thing for the abstract business. In fact the results are far above expectations. The law is working. The business is a profession and now respected." Hall, *Editor's Page*, 9 TITLE NEWS 3 (May 1930). Mr. Hall adds advice on careful groundwork for the 1931 bills. See also Graham, *Chairman's Address*, [Abstracters Section], 10 TITLE NEWS 19, 20 (Jan. 1931) (brief discussion of bills to be introduced in 1931, noting the handicap of lack of Association funds); Johns, *Legislative Regulation of Abstracters*, 10 TITLE NEWS 38 (Jan. 1931) (operation of the existing North Dakota and Colorado laws briefly considered, as well as 1931 legislation to be introduced).

80. *Infra* notes 143-155 and accompanying text.

81. At the American Title Association convention in October 1931, the following appears with reference to abstracters' license acts. Richard B. Hall, Executive Secretary, who had resigned, stated in his final report:

[Three years ago I suggested] that there should be some legislative requirements for entering the title business so that every person with a "misguided ambition and a typewriter," as we have heard said so often, could not become a title man. We worked hard on that program. It was heresy then, but since that time four states have adopted the abstracters' license law and you will here hear how it is working in those states. I want to say this, the abstract business will never amount to anything until those states that do not now have such legislation get a law on their statute books.

Hall, *Report of the Executive Secretary*, 11 TITLE NEWS 10, 11 (June 1932).

At that same convention there were two short reports on legislation, the first that Montana had passed an abstracters' license act, Marriott, *Annual Address of the Chairman*, [Abstracters Section], 11 TITLE NEWS 30 (Jan. 1932), and the

of the militant push for legislation was in 1933.⁸²

By 1934 the American Title Association itself had adopted a neutral attitude, leaving the decision as to abstracters' license laws to the several state associations. In part this shift may have come as the result of sharp differences of opinion among abstracters concerning the effect of such legislation on them individually. The dissension, for example, within the Indiana Title Association over a 1931 proposed license act sponsored by that association virtually wrecked the group and it took almost six years for recovery.⁸³ So also in Wisconsin a bill presented by the Wisconsin Title Association was killed by Wisconsin abstracters.⁸⁴

An additional reason for the shift in policy, no doubt, was that much of the energy of the American Title Association in the 1930's was spent in fighting the Torrens system of title registration. In 1936 the Executive Secretary of the Association reported: "Legislation continues to be a source of irritation to all of us. . . . Virtually, all business seems to be under attack in one form or another today."⁸⁵ This indeed was a fight for life, because with title registration the need for abstracts of title and title insurance is largely eliminated.

At the present time it would be difficult to determine to what extent the change in American Title Association policy was the consequence of the personal views of the new leadership and to what extent the new leaders simply reflected the temper of the times. James E. Sheridan of Detroit became Executive Secretary of the Association in 1931 and served until his death in 1959. Upon occasion he reported on abstracters' licence

second that bills had failed in Oregon, Indiana and Oklahoma, Sheridan, *Report of the Legislative Committee*, 11 TITLE NEWS 63 (Jan. 1932).

There was also discussion of the actual operation of the 1929 South Dakota act during the two and one-half years since its enactment, Bodley, *Report on Operation of License Law In South Dakota*, 11 TITLE NEWS 59 (Jan. 1932). The opinion was expressed that the grandfather clause as to the plant requirement would have a long-term effect only in the case of a corporation, and that an individual could not transfer the benefit of the clause.

82. See Clarke, *The Attack on the [Montana] Abstracters Law*, 13 TITLE NEWS 43, 45 (Dec. 1933). In discussing State *ex rel.* Freeman v. Abstracters Board of Examiners, 99 Mont. 564, 45 P.2d 668 (1935), then at the trial court level, the author observed that a decision on the constitutionality of the Montana plant requirement not only would be significant in other states with similar plant requirements, but "would also have a bearing on the endeavor of this association to have such a law enacted in other states." The Freeman case is considered *infra* notes 151 and 154 and accompanying text.

83. Sheridan, *Open Forum, Abstracters Section*, 17 TITLE NEWS 43, 45 (No. 2, circa Fall 1937).

84. *Ibid.*

85. Sheridan, *Report of Executive Secretary*, 16 TITLE NEWS 9 (No. 1, circa Fall 1936).

laws, but at no time exerted any pressure with respect thereto.⁸⁶ William Gill of Oklahoma City, Chairman of the Abstracters Section from 1934 to 1936, and President of the Association in 1937-1938, stated in 1937 that action on an abstracters' license bill was up to the state associations, and that the American Title Association "is not trying to force down your throat any kind of abstract bill. It is not our policy. It was not our policy when I was chairman of this [abstracters] section for two years."⁸⁷ At the end of his term of office as President, Mr. Gill, in discussing proper legislation for the abstracter, stated that the purpose of the Association was to gather facts, figures and general information to turn over to affiliated associations:

In other words, as I see our picture, one of its duties is to assist those affiliated organizations in reaching such decisions as to each in the respective jurisdiction of each seems warranted by the circumstances. The National Association leaves to each State Association the answer to the question "What is proper legislation?" Personally, I ask each State not having protective legislation, both for the public and the title industry, to give this important question serious consideration.⁸⁸

This position was reiterated by another Association officer in 1939.⁸⁹ The policy of state autonomy, national neutrality, was last set forth in 1957.⁹⁰

In 1937 the American Bar Association gave added impetus to the consideration of abstracters' license laws. R. L. Douglass of Oklahoma City, Chairman of the Committee on Standards for Abstracts of Title, urged abstracters' license laws requiring complete indexes compiled from the records and not from county indexes, a \$5,000 bond with no privity requirement, and a minimum five year limitation period. He said: "From observation I find the title business to be upon a more solid foundation in those

86. *Supra* note 83, at 45. Mr. Sheridan reviewed the situation in Indiana, Iowa, and Wisconsin.

87. Gill, *Open Forum, Abstracters Section*, 17 TITLE NEWS 43, 49 (No. 2, circa Fall 1937).

88. Gill, *Report of President*, 18 TITLE NEWS 5, 6 (No. 1, circa Fall 1938).

89. Dozier, *Report of Chairman of Abstracters Section*, 19 TITLE NEWS 4 (Nov. 1939): "The proper kind of legislation for the Abstracter is a problem that is many times asked of the National officers. However, in every such instance the Association has referred it back to the State organizations because it is a problem that can best be solved by the States, each of whom operate under different circumstances."

90. Wallace, McCarthy & Reppert, *Abstracters' Licensing Laws—A Panel*, 36 TITLE NEWS 9, 12 (Dec. 1957).

states having some type of protective legislation than in those states having no such legislation."⁹¹

It should not be assumed that the problem of abstracters' license laws has become a dead issue insofar as the American Title Association is concerned. At each of the 1941, 1951, and 1957 national conventions a principal topic on the program was a discussion of abstracters' license laws.⁹² It would be equally erroneous to assume that the issue is dead in the abstract states. In several states where legislation failed in 1929, later attempts were successful, although in other cases later attempts also proved unsuccessful. In Missouri, for example, bills were introduced and considered by the legislature in 1929,⁹³ 1931,⁹⁴ 1945,⁹⁵ 1947,⁹⁶ and 1957,⁹⁷ and in addi-

91. *Report of Committee on Standards for Abstracts of Title, Real Property Law Division, Proceedings Section of Real Property, Probate and Trust Law, 1937 ABA REP.*

In the 1938 report of the same committee, the 1937 Oklahoma act, *infra* note 186, is noticed, and there is a statement that laws are under consideration in Arkansas, Florida, Iowa, Kansas, New Jersey, New Mexico, and Texas. *Report of Committee on Standards for Abstracts of Title, Real Property Law Division, Proceedings Section of Real Property, Probate and Trust Law, 1938 ABA REP.* 56.

92. Cardon, Johnson & Dykins, *The Abstracters License Law in Operation [in Utah, Oklahoma, and Montana]*, 21 TITLE NEWS 16 (Jan. 1942); Wallace, Poirier, Knol & Williams, *A License Law for Abstracters [in Colorado, Montana, and Kansas]*, 31 TITLE NEWS 167 (No. 2, March 1952); Wallace, McCarthy & Reppert, *supra* note 90.

93. H.B. 430, and S.B. 531, 55th Mo. Gen. Assembly (1929). These bills were identical and were substantially the Model Act with the privity requirement put back into the bonding section; presumably the Missouri Title Association sponsored the bill. The Senate Judiciary Committee reported the bill unfavorably and the Senate Bill died. House amendments cut the House Bill down to a purely abstracters' bond act and the bill later died.

H.B. 567 and H.B. 803, both of which failed, were revenue measures licensing abstracters and other professions and occupations.

94. H.B. 253 and H.B. 301, 56th Mo. Gen. Assembly (1931). These bills were identical, were the Model Act as adapted to Missouri in 1929, *supra* note 93, and presumably were backed by the Missouri Title Association. One of the bills passed the House but died in the Senate.

95. S.B. 71, 63d Mo. Gen. Assembly (1945). This bill was prepared and sponsored by the Missouri Title Association. It departed from the Model Act in many details and in many ways was an improvement over the Model Act, but still had the basic structural fault of the Model Act in that the business unit and the individual were tied together in the licensing. The bill was favorably passed out of committee but was not brought to a vote because of almost certain defeat.

96. H.B. 184, 64th Mo. Gen. Assembly (1947). This bill was essentially the same as the Missouri Title Association bill of 1945, *supra* note 95, with one important difference, *viz.*, that a "complete set of abstract records" need not include recorder's records "destroyed or mutilated beyond legibility." The bill was reported unfavorably by committee and never came to a vote.

97. H.B. 548, 69th Mo. Gen. Assembly (1957). Much of this bill was the same as the Missouri Title Association bill of 1945, *supra* note 95, but the improvement in the 1947 bill with regard to destroyed or mutilated records, *supra* note 96, was omitted, and, incredible as it may seem, the bill omitted the require-

tion there was an abortive attempt to introduce similar legislation in 1959.⁹⁸ The Missouri experience in trying to adopt legislation no doubt has been duplicated in several other states.

Since 1929, no state has enacted an abstracters' license law essentially following the Model Act *as such*. Several states, however, have relied upon it indirectly. The Colorado act of 1929,⁹⁹ based on the Model Act, was the direct source of the 1941 Kansas act¹⁰⁰ and the 1953 Arkansas act.¹⁰¹ The Montana act of 1931,¹⁰² following the Model Act in part and departing therefrom in part, was the direct source of the 1937 Utah act¹⁰³ and the 1953 changes in the North Dakota act.¹⁰⁴ The Model Act still has significant influence on the draftsman of proposed legislation, in at least some cases because the draftsman does not know of improvements on the Model Act.

ment as to abstracters' financial responsibility. A new section provided that lawyers need not take the abstracters' examination. There was a significant innovation with respect to abstracters' certificates: § 3 required licensed abstracters to certify abstracts in a form of certificate prescribed by the abstracters' examining board, and § 6 required the board at its first meeting to prescribe the minimum form of certificate. This bill was referred to committee but never was reported out.

See Wallace, McCarthy & Reppert, *supra* note 90, at 14-16, where Arthur L. Reppert (President, American Title Association, 1961-1962) states the background of this act and discusses its principal features. Mr. Reppert has done much at both state and national levels to improve abstracting.

The Missouri Title Association for many years has been trying by various means to get a more widespread adoption of a uniform abstracters' certificate, but in June 1962 only twenty-three Missouri abstract companies were using the uniform certificate. The innovation in the 1957 bill was one effort to get a better certificate in use. On the basic problem of coverage in abstracters' certificates, see Loth, *Abstract Certificates [in Iowa]*, 37 TITLE NEWS 15 (Sept. 1958); Eckhardt, *Abstract Certificates—What They Should Cover [in Missouri]*, 37 TITLE NEWS 14 (Nov. 1958).

Cf. the following abstracter's certificate, "The above and foregoing are all that I find," quoted with others in Sheridan, *Me and My Crystal Ball*, 35 TITLE NEWS 49, 50 (Nov. 1956).

For an approach of The Missouri Bar to this problem, see the discussion of a proposed abstracters' certificate and bond act *supra* note 62; a Michigan act is quoted in the same note.

98. The 1957 bill, *supra* note 97, was redrafted by the Missouri Title Association several times in 1958-1959, but the final draft was not introduced because of opposition by the Real Property Committee of The Missouri Bar to certain of its provisions. See *supra* note 1.

In *Proceedings, Abstracters Section, ATA Mid-Winter Conference*, 41 TITLE NEWS 28, 29 (April 1962), it is erroneously stated that Missouri has a licensing law in effect, and that its presence does not seem to affect business. Missouri does not have any such law.

99. *Infra* note 125.

100. *Infra* note 172.

101. *Infra* note 192.

102. *Infra* note 143.

103. *Infra* note 159.

104. *Infra* note 166.

B. *South Dakota, 1889-1929 (Bond), 1929-Date (Bond, Plant, and Personnel)*

It has been mentioned that the 1887 Nebraska act was essentially an abstracters' bond act.¹⁰⁵ It has also been noticed that the Dakota Territory act of 1889 was derived from the prior Nebraska Act, but added to the bond requirement a schedule of maximum fees.¹⁰⁶ The Dakota act required a bond, but liability was not limited by privity.¹⁰⁷ Except for changes in the fee schedule, the 1889 act remained virtually unchanged until 1929.¹⁰⁸ South Dakota did not adopt an abstract records requirement in 1895, when North Dakota amended its act, but waited until 1929.

In 1929 South Dakota adopted the Model Act almost verbatim.¹⁰⁹ The abstracters had hoped for a repeal of the maximum fee schedule,¹¹⁰ but were unsuccessful,¹¹¹ and the maximum fee schedule has continued in effect.¹¹²

The grandfather clause as to abstract records¹¹³ required active abstracting for one year prior to the effective date of the act (instead of two years as in the Model Act); in 1931 this period was increased to five years prior to July 1, 1929.¹¹⁴ In 1931, the man most active in getting South

105. *Supra* notes 15-17 and accompanying text.

106. Dakota Laws 1889, c. 1, §§ 1-8, as amended, S.D. REV. CODE §§ 10541-10547 (1919). See notes 22-23 *supra*.

107. In *Goldberg v. Sisseton Loan & Title Co.*, 24 S.D. 49, 123 N.W. 266 (1909), where a bonded abstracter omitted a *lis pendens* notice of action and levy of attachment, the court held it immaterial under the abstracters' bond statute whether the abstract was ordered and paid for by the vendor or by the plaintiff purchaser.

The same result, of course, could have been reached under the more liberal common law view, *e.g.*, *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779 (1899); *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (1890).

108. S.D. Laws 1917, c. 1, §§ 1-5, 7-9, makes some minor changes in wording but no significant changes in substance.

109. S.D. Laws 1929, c. 1, §§ 1-14.

On the South Dakota act see the following: *Bodley, Up From the Depths to Sublimity*, 8 TITLE NEWS 86 (Dec. 1929) (a detailed review, by the man principally responsible for the successful enactment of the South Dakota act, of the situation prior to the act and the groundwork for its introduction and passage); *Abstracters Section*, 9 TITLE NEWS 27, 30 (March 1930) (the steps that led to the enactment of the law, and early operations under the law); *Bodley, Report on Operation of License Law In South Dakota*, 11 TITLE NEWS 59 (Jan. 1932) (description of the actual operation under the Model Act for a period of more than two years).

110. *Abstracters' Law To Be Introduced in Several States*, 7 TITLE NEWS 5 (Dec. 1928).

111. S.D. Laws 1929, c. 1, § 15. The fee schedule was S.D. REV. CODE § 10545 (1919), which was omitted from the list of sections repealed.

112. Now S.D. CODE § 1.0201 (Supp. 1960), last revised upward in 1953.

113. S.D. Laws 1929, c. 1, § 11.

114. S.D. Laws 1931, c. 1, § 1. It would appear that the purpose was to exclude some "Johnny-come-latelies" who had entered abstracting early in 1928.

Dakota to adopt the Model Act expressed the opinion that the grandfather clause as to plant would be effective permanently only in the case of a corporation, that an individual abstracter could sell his business only to an abstracter with a plant, and that eventually this would result in the elimination of non-corporate abstracters without plants.¹¹⁵ The test case arose three years later. A certain individual abstracter without abstract records received a certificate of registration in 1929 under the grandfather clause. He died in January 1934, still without abstract records, and his widow and an employee incorporated to carry on the business. The corporation was denied a certificate of registration by the board. The case was deemed a "hard" one, because "it seemed as though the Board was depriving the widow of the advantages of the business built up by her husband in years past." In a trial court proceeding in mandamus, judgment was for the board: that denial of the certificate was proper. The decision was appealed to the Supreme Court of South Dakota.¹¹⁶ There is no report of any decision on appeal, but a year later *Title News* carried a cryptic note: "The case concerning the South Dakota Abstracters' law no longer bothers us."¹¹⁷ At the same time, *Title News* carried an equally cryptic note on a 1935 amendment which failed, though not disclosing the substance of the amendment.¹¹⁸ As noted below, the plant problem became moot in 1957 with the final elimination of the grandfather clause as to abstract records.

The important thing about this case, which never got to a definitive construction of the statute, is not the particular holding of the trial court,

115. Bodley, *Report on Operation of License Law In South Dakota*, 11 TITLE NEWS 59 (Jan. 1932).

116. Williams, *The Abstracters License Law in the [South Dakota] Courts*, 14 TITLE NEWS 29 (Jan. 1935). Mr. Williams includes quotations from an opinion by the trial judge. Mr. Williams concludes: "While there may be minor defects in the law as now enacted, we know that it is fundamentally sound, and we are confident that the Supreme Court will affirm the judgment of the lower court." *Supra*, at 31.

The decision in the trial court appears to have been on the construction of the statute and not upon any technical failure by the widow to show succession to her husband's estate, or the succession of the corporation to such interest as she had.

117. Sheridan, *Report of Executive Secretary*, 15 TITLE NEWS 6, 7 (Dec. 1935).

118. Gill (McCune), *Report of Legislative Committee*, 15 TITLE NEWS 33, 35 (Dec. 1935): "[South Dakota] abstracters fought off an abstracters bill which would have been disastrous, so John Sutherland, R. G. Williams and W. S. Gunderson tell us. (All of the so-called 'abstracters acts,' by the way, do not help the abstracters)."

It is likely that this was a bill relaxing the abstract records requirement and was related to the 1934 hardship case, *supra* note 116.

but rather that the case emphasizes that the statute is not explicit as to the status of an abstractor who gets the benefit of the grandfather clause relating to abstract records. Abstract records run the gamut from no records to complete records. A construction of the statute that the benefit of the grandfather clause cannot be transferred could render worthless a substantial but incomplete plant on the death or retirement of the individual initially licensed. The original proponents of the act probably did not intend this.

In the 1939 revision and codification of the laws of South Dakota, most of the substance of the 1929 act was retained, but there was extensive reorganization of the materials, redrafting, and amplification.¹¹⁹ Technically the act was much improved. The subject matter of the examination for the individual was specified,¹²⁰ but there remained the fundamental flaw of equating the individual to a particular area and business unit.

One fundamental change of substance in 1939 was the elimination of the grandfather clause as to abstract records, in that certificates of registration would be renewed after July 1, 1945, only upon satisfaction of the abstract records requirement. Subsequently, the deadline was extended from 1945 to 1949, then to 1953, and finally to 1957.¹²¹ This change is highly desirable; if new abstractors must have adequate abstract records, it is only proper that existing abstractors be required to have adequate records after a reasonable grace period.¹²²

In 1957 South Dakota adopted an act providing that no foreign insurance company shall issue a title insurance policy, certificate of title or other guarantee of title of South Dakota land unless the instrument is countersigned by a licensed abstractor.¹²³ This provision, of course, is not in the interest of lawyers.¹²⁴

119. S.D. CODE §§ 1.0101-0116, 1.0201 (1939).

120. S.D. CODE § 1.0105 (1939).

121. S.D. Laws 1945, c. 1, § 1; S.D. Laws 1949, c. 1, § 1; S.D. Laws 1953, c. 1 (now S.D. CODE § 1.0111 (Supp. 1960)).

122. In *Proceedings, Abstractors Section, ATA Mid-Winter Conference*, 41 TITLE NEWS 28, 29 (April 1962), it is briefly reported that the South Dakota abstractors' license act had raised the standards of abstracting.

123. S.D. Laws 1957, c. 159, § 1 (now S.D. CODE § 31.2218 (Supp. 1960)).

124. Legislation of this type is of real concern to title insurance companies where the only local abstractor has an exclusive contract with one title insurance company. See, e.g., Johnson, Ruummele, Smith, Lenecheck & Harbert, *One Abstractor in County Represents One Title Insurer under Exclusive Contract—What Do Other Insurers Do Who Want Business in the County?*, A Panel Discussion, 37 TITLE NEWS 3 (Feb. 1958).

C. Colorado, 1929-Date (Bond, Plant, and Personnel)

In 1929 Colorado enacted an abstracters' license act which embodied much of the substance of the Model Act although in extensively redrafted form and with some significant changes in substance.¹²⁵ Extensive revisions in 1949 made a further important change in substance, discussed below, and on the whole perfected the original act as to detail.¹²⁶

Regrettably, the abstracter's liability under the bond provisions is limited by privity (liable to "any person having a cause of action").¹²⁷ Insofar as individual competency is concerned, the 1929 act had a grandfather clause,¹²⁸ which was dropped when the law was revised in 1949.

One important difference between the Colorado act and the Model Act may have been the inadvertent result of redrafting, or may have been deliberate but unperfected in the redrafting, *viz.*, a significant start toward separating the licensing of the business unit and the personal examination of the individual abstracter. This was accomplished by providing for the

125. Colo. Laws 1929, c. 57, §§ 1-16, COLO. STAT. ANN. c. 2, §§ 1-16 (1935). See *Abstracters' Qualification Bill Passes in Colorado*, 8 TITLE NEWS 16 (April 1929), for the complete text of the act. The text of the act is also set out in White, *Abstracters' License Laws*, 19 TITLE NEWS 5 (Nov. 1939). See also Wagner, *Found: What the Abstract Business Needs*, 8 TITLE NEWS 85 (Dec. 1929), for a detailed statement on the enactment of the Colorado law and early operations under it.

White, *supra*, very briefly discusses ten years of operations under the law. He states there have been no prosecutions under the law; that in one or two cases where aggrieved clients appealed to the board, the problems were worked out by arbitration; that there are no ill feelings between individual abstracters and the board; that there have been no license revocation proceedings, but the possibility of losing a license has had a deterrent effect; that the law has brought Colorado abstracters closer together and improved their professional status; and that the policy of the Colorado Title Association is not to seek amendments, but to let well enough alone. Mr. White also recounts the storm of protest over a drastic raise in prices on October 1, 1937, by abstracters in the greater Denver area. "I have always felt that had we not been organized and protected by law to the extent of being required to pass an examination and have a complete set of records, our raise in prices would not have withstood the storm." *Supra*, at 7.

Wallace, Poirier, Knol & Williams, *A License Law for Abstracters*, 31 TITLE NEWS 167, 171-172 (No. 2, March 1952), briefly describes some features of the Colorado law, and states: "It is our feeling it is adequate. The one thing we now might wish to consider is extending it to include the title insurance companies now operating in Colorado."

A discussion in 1958 by Hickman of several features of the Colorado law is cited at appropriate places *infra*.

126. Colo. Laws 1949, c. 99, §§ 1-9, as amended, COLO. REV. STAT. ANN. §§ 1-1-1 to -1-15 (1953). §§ 1-1-1, 1-1-2, 1-1-4, 1-1-6 to -1-8, the key sections of the act, are reprinted in Hickman, *Life with Colorado's Abstracters Law*, 38 TITLE NEWS 84, 85-86 (Jan. 1959).

127. Colo. Laws 1929, c. 57, § 6 (now COLO. REV. STAT. ANN. § 1-1-5 (1953)).

128. Colo. Laws 1929, c. 57, §§ 5, 8, COLO. STAT. ANN. c. 2, §§ 5, 8 (1935).

license fee for the business unit in one section¹²⁹ and a different and distinct examination fee for the individual in another section.¹³⁰ The distinction failed of perfection because there was no provision for licensing competent individuals as such. At the present time, however, it appears that non-management employees do take individual examinations, and that the Colorado Abstracters' Board of Examiners by rules, regulations, and actual practice may have filled the gaps in the law itself.¹³¹ The Colorado act may be considered a transition stage between the Model Act and the Montana act of 1931.¹³²

Insofar as abstract records are concerned, the 1929 Colorado act had no grandfather clause. In reporting in 1928 on the draft of this act, it was said: "There will be no saving or grandfather clause as pertaining to having a set of books, since there are no county indexes in this state and one to engage in the business has to have such equipment."¹³³ The 1929 Colorado act did not provide any machinery for examination of the abstract plant, but the 1949 amendment made elaborate provision for such examination as well as for special examination fees.¹³⁴

A significant change of policy was made in 1949 by adding a provision that a new abstract company must first get a certificate of convenience and necessity:

Applicants for the abstractor's licenses not licensed in a county as an abstractor prior to July 1, 1949, shall not be licensed without first obtaining a license as provided in this article, and in addition thereto there must be a finding by the abstractor's board of examiners that the present or future public convenience and necessity requires, or will require such a license.¹³⁵

The draftsmanship, however, is abominable ("shall not be licensed without first obtaining a license") and there is grave doubt as to either the wisdom

129. Colo. Laws 1929, c. 57, § 4, as revised, COLO. REV. STAT. ANN. § 1-1-4 (1953).

130. Colo. Laws 1929, c. 57, § 8, as revised, COLO. REV. STAT. ANN. § 1-1-7 (1953).

131. On examinations taken by individuals, see Hickman, *supra* note 126, at 87.

132. *Infra* note 143.

133. *Abstracters' Law to be Introduced in Several States*, 7 TITLE NEWS 5 (Dec. 1928).

One applauds this forthright approach. The same theory would have eliminated from the Model Act the grandfather clause as to abstract records, or at least would have dictated alternate clauses, one clause for use where there are no official tract indexes, the other for use where there are official tract indexes.

134. COLO. REV. STAT. ANN. § 1-1-7 (1953).

135. Colo. Laws 1949, c. 99, § 1 (now COLO. REV. STAT. ANN. § 1-1-1 (1953)).

of the provision (in the absence of a maximum fee schedule by law) or its constitutionality (for various reasons). In 1958 a trial court ruled that the Abstracters' Board of Examiners had acted arbitrarily and capriciously in failing to find that public convenience and necessity required a new abstracting plant; there is no reported appeal.¹³⁶

D. *Montana, 1915-1931 (Bond), 1931-Date (Bond, Plant, and Personnel)*

In 1915 Montana enacted an abstracters' bond act¹³⁷ which was almost identical with the Nebraska act of 1887,¹³⁸ and which was derived from the Nebraska act either directly or through the Idaho act of 1897.¹³⁹ Privity was not required for liability (liable to "any person").¹⁴⁰ In addition to the typical bond provisions, the act contained a negative provision as to abstracters' fees, as follows: "The compensation to be charged and received by abstracters of title shall be and remain a matter of contract between the parties."¹⁴¹

An attempt in 1929 to obtain a comprehensive abstracters' license law was unsuccessful.¹⁴² In 1931, however, Montana did adopt such a law, which has continued in effect with only a change in the grandfather clause

136. Hickman, *supra* note 126, at 87. Mr. Hickman gives no clue as to the name of the applicant or the county involved, but *Treat v. McDonough*, 367 P.2d 587 (Colo. 1961), may be another phase of the same case. In that case the plaintiff, who desired to engage in the abstract business, brought mandamus to compel the county clerk and recorder to permit him to copy without charge the "official" tract indices prepared and owned by the county, there being no private abstracter in the county. A divided appellate court ruled for the plaintiff, reversing the trial court. There was no discussion by the court of the "public convenience and necessity" provision of the abstracters' license law.

137. Mont. Laws 1915, c. 43, §§ 1-8, MONT. REV. CODES §§ 4139-4146 (1921). This act was sponsored by the Montana Title Association. Its provisions are reviewed in Dykins, *The Abstracters License Law In Operation*, 21 TITLE NEWS 18 (Jan. 1942).

138. *Supra* notes 15-17 and accompanying text.

139. *Supra* notes 19 and 20 and accompanying text.

140. Montana previously had rejected a strict privity requirement, holding that a lender can recover from an abstracter where the borrower, to the knowledge of the abstracter, orders and pays for the abstract for the use of the mortgage lender. *Western Loan & Sav. Co. v. Silver Bow Abstract Co.*, 31 Mont. 448, 78 Pac. 774 (1904).

141. Mont. Laws 1915, c. 43, § 3 (now MONT. REV. CODES ANN. § 66-2119 (1962 repl.)).

142. See *Abstracters' Law To Be Introduced in Several States*, 7 TITLE NEWS 5, 6 (Dec. 1928). The provisions of this proposed act are briefed in Huff, *Report of Legislative Committee of American Title Association*, 8 TITLE NEWS 22 (Dec. 1962).

On the groundwork for the 1931 bill, see *Montana Title Association Adopts Pretentious Program*, 9 TITLE NEWS 20 (May 1930).

as to abstract records.¹⁴³ Some provisions obviously were derived from the Model Act, but the points of departure from the Model Act were such that Montana became the first state to have a thoroughly well-conceived and workable abstracters' license act, one whose basic structure was and is sound.

The innovation of the Montana act was to make a sharp distinction between "registered abstracters" who qualify under a grandfather clause or by examination,¹⁴⁴ and a "certificate of authority" which is issued to the abstract company as a business unit, provided the abstract company is bonded, has adequate abstract records, and has a registered abstracter in charge of the business.¹⁴⁵ Both types of certificates are renewable annually, the certificate of the individual registered abstracter as a matter of course, and the certificate of authority of the business unit upon proof of compliance with the requirements of the act.¹⁴⁶ The importance of divorcing "registered abstracters" as individuals from abstract companies as business units with "certificates of authority" lies in the flexibility provided in case of changes of personnel, a problem discussed at length in the consideration of the Model Act.¹⁴⁷

The abstract records requirement, naturally, was a troublesome problem. The 1931 act exempted from the abstract records requirement those abstract companies which on March 1, 1931, held licenses under the 1915 abstracters' bond act,¹⁴⁸ and provided for the issuance to them of certificates

143. Mont. Laws 1931, c. 105, §§ 1-18, as amended, MONT. REV. CODES ANN. §§ 66-2101 to -2120 (1962 repl.). The grandfather clause as to abstract records was amended in 1939, and is discussed *infra* note 153 and accompanying text.

The Montana act has been thoroughly discussed by local Montana titlemen in two able speeches, one after ten years, the other after twenty years: Dykins, *The Abstracters License Law in Operation [in Montana]*, 21 TITLE NEWS 18 (Jan. 1942); and Wallace, Poirier, Knol & Williams, *A License Law for Abstracters*, 31 TITLE NEWS 167, 168-170 (No. 2, March 1952).

It is interesting to note that in Dykins, *supra* at 20, one of the values of the law which is stressed is the exclusion of contract abstracters bidding on federal title searches. On the other hand, Mr. Poirier, *supra* at 170, in discussing the virtues of the act, says: "Our twenty years' experience with the law in Montana has proven that it is not monopolistic, and I could cite you many concrete instances to disprove this theory."

144. MONT. REV. CODES ANN. §§ 66-2107 to -2110 (1962 repl.).

145. MONT. REV. CODES ANN. § 66-2111. (1962 repl.).

146. In Poirier, *supra* note 143, at 171, it is stated in answer to a question from the floor that the prime reason for annual license renewal is to see that tract books are kept up to date.

147. This innovation is emphasized by both Dykins and Poirier, *supra* note 143, but in neither article is there any indication of the practical significance of this innovation.

148. *Supra* note 137.

of authority.¹⁴⁹ The annual renewal provision was on the same conditions as in the Model Act, section 7, *viz.*, payment of the fee plus proof that the "applicant has complied with the provisions of this act."¹⁵⁰ A fair and expected construction would be that the abstract companies qualifying under the grandfather clause as to abstract records were permanently exempted both as to existing plant and as to future plant; this certainly was the intention of the sponsors of the Model Act. The Supreme Court of Montana, however, construed the act as providing only a one year grace period to complete the abstract records:

As to those in business and then holding a certificate issued under the old [1915 abstracters' bond] law, they are entitled to a certificate for one year from the expiration of the current certificate, at the end of which they must comply with the requirements of the act or go out of business . . .¹⁵¹

As to new applicants for certificates of authority who did not have adequate abstract records, the 1931 act provided for a temporary one year certificate of authority as soon as the abstract records were half completed, with the privilege of renewal for one year, and one year only, upon good cause shown. In effect this allowed two years to complete the abstract records in the case of new abstract companies.¹⁵² In 1939 the law was amended to give abstract companies with incomplete records, operating under temporary certificates of authority issued on or before January 1,

149. Mont. Laws 1931, c. 105, § 12, as amended, MONT. REV. CODES ANN. § 66-2112 (1962 repl.).

150. Mont. Laws 1931, c. 105, § 11 (now MONT. REV. CODES ANN. § 66-2111 (1962 repl.)).

151. State *ex rel.* Freeman v. Abstracters Board of Examiners, 99 Mont. 564, 580, 45 P.2d 668, 672 (1935). This construction was not as directly in issue as if raised by an abstract company claiming more than one year benefit of the grandfather clause; the court was examining the classification of abstract companies with reference to plant requirements as a possible denial of equal protection of the law, on the complaint of one who subsequent to the act applied for a certificate of authority but had no abstract records. In the summary of the points made by counsel for the board, 99 Mont. at 565-568, this issue is not mentioned. In the summary of the points made by counsel for the plaintiff, 99 Mont. at 568-573, it is stated at 572: "From sections 12 and 18 it is apparent that the Act sets up four classifications of persons: . . . (2) those holding certificates of authority as of March 1, 1931, who need make no showing of success [*sic*, access] to a tract index to receive a certificate; . . ." The court rejected this construction of the exception and construed it as indicated in the text.

152. Mont. Laws 1931, c. 105, § 12, as amended, MONT. REV. CODES ANN. § 66-2112 (1962 repl.).

"Those who are making an honest effort to perfect a plant are permitted a temporary certificate on showing that they have their books half completed; this certificate may be renewed once, and once only." State *ex rel.* Freeman v. Abstracters Board of Examiners, *supra* note 151.

1939, through 1943 (almost five years) to complete their abstract records.¹⁵³ Under this law there was no provision for the issuance of temporary certificates of authority to new abstract companies with incomplete abstract records who desired to enter into abstracting after the effective date of the 1939 amendment.

The constitutionality of the requirement of abstract records as a condition precedent to engaging in abstracting was upheld in 1935 in the leading case of *State ex rel. Freeman v. Abstracters Board of Examiners*.¹⁵⁴ In that case an applicant for a certificate of authority to engage in abstracting did not have any abstract records of his own, but only access to the official records of the county clerk and recorder, and was denied the certificate of authority by the board. The trial court held the act unconstitutional, but was reversed on appeal. After reviewing the 1915 abstracters' bond act and the 1931 abstracters' license act, the court made an elaborate analysis of abstracting methods and why tract indexes are essential. The court did not determine whether abstracting is affected with a public interest (in the sense that the state could fix abstracting fees), but held that the abstract business may be regulated under the state's police power, and that the licensing provisions in question did not violate the due process clause. Further, the court found that the classification of abstracters with reference to abstract records was not violative of equal protection of law.

One can only speculate as to what conclusion the Supreme Court of Montana might have reached if the grandfather clause had been construed to exempt completely existing abstract companies from the abstract records requirement. Certainly an abstracters' license act is very vulnerable if it does not require all abstract companies to have adequate abstract records after a reasonable grace period.¹⁵⁵

153. Mont. Laws 1939, c. 82, § 1 (now MONT. REV. CODES ANN. § 66-2112 (1962 repl.)).

The 1939 amendment was a compromise which took care of one hardship case operating under a temporary certificate of authority, but which also eliminated any new temporary certificates of authority. Brewster, *Report of Legislative Committee*, 19 TITLE NEWS 18, 19 (Oct. 1939). Dykins, *The Abstracters License Law in Operation [in Montana]*, 21 TITLE NEWS 18, 19 (Jan. 1942), briefly discusses the 1939 amendment, and an attempt in 1941 to amend the law by excluding one county in order to license one person. The bill passed the house but was defeated in the senate.

154. *Supra* note 151. See Clarke, *The Attack on the [Montana] Abstracters Law*, 13 TITLE NEWS 43 (Dec. 1933), where the author gives some background not stated in the opinion, quotes extensively from the trial brief of the plaintiff, and discusses the constitutional issues.

155. *Cf.* Application of Richardson, 199 Okla. 406, 184 P.2d 642 (1947), *infra* note 188, where the Oklahoma abstract records requirement was held valid as to

E. *Utah, 1899-1937 (Bond), 1937-Date (Bond and Personnel)*

In 1899 Utah enacted an abstracters' bond act, the original source of which is unidentifiable.¹⁵⁶ It is not clear under this act whether the abstracter's liability depended upon privity. The bond was conditioned for "the faithful abstracting of records and the making of correct abstracts of title," and further provided for liability on the bond "to the person aggrieved." No reported case construes this provision. One problem was that most bonds had personal sureties, and many of the bonds were worthless.

There was a personal competency requirement in that in addition to providing bond the applicant must have been deemed by the board of county commissioners to be "a proper and competent person." The net effect was that a new group of political hacks was licensed every four years.¹⁵⁷ There were additional provisions making abstracts of title prima facie evidence under certain stated conditions.

In 1937, as the consequence of a one man campaign by L. B. Cardon, the 1899 act was repealed and replaced by an act virtually identical with the Montana act of 1931,¹⁵⁸ except that all provisions of the Montana act relating to abstract records were omitted.¹⁵⁹ Utah did not need an abstract records requirement because of the excellent public indexes in that state.¹⁶⁰ The act does not have any grandfather clause as to the examination for personal competency, but to persuade the governor to sign the bill there was a gentlemen's agreement that the first examination would be so easy that anyone could pass. Thus in Utah the abstract company as a business unit receives a "certificate of authority" on proof that an individual who is

new abstracters even though there was no records requirement whatsoever for existing abstracters.

156. Utah Laws 1899, at 54, UTAH REV. STAT. §§ 1-0-1—1-0-4 (1933).

For an excellent discussion of the practical operations under this law, see Cardon, Johnson & Dykins, *The Abstracters License Law in Operation*, 21 TITLE NEWS 16, 17 (Jan. 1942). Details in the text as to operations under this law are drawn from Mr. Cardon's discussion.

157. Cardon, *supra* note 156.

158. *Supra* note 143.

159. Utah Laws 1937, c. 1. §§ 2-20; Utah Code Ann. §§ 1-1-1—1-1-19 (1953).

The provisions of the Utah act are described briefly in Brewster, *Report of Legislative Committee*, 17 TITLE NEWS 12 (No. 1, circa Fall 1937). For an excellent discussion of the practical operation of this law during its first four years see Cardon, *supra* note 156. Details in the text as to the operation of this law are drawn from Mr. Cardon's discussion.

160. However, it is stated by Cardon, *supra* note 156, at 16: "The Commission set up gives due weight to the possession of or lack of a plant."

a "registered abstractor" is in charge of the business and on furnishing the required bond.¹⁶¹

The Utah act, by omitting the requirement of abstract records, most certainly does not tend to stifle competition. The only curb on new abstractors who are individually competent but are without records or have inadequate records is the difficulty in furnishing the bond. In some ways this frank approach to the problem is preferable to the Model Act's illusory requirement of records and consequent stifling of competition.

F. North Dakota, 1953-Date (Bond, Plant, and Personnel)

Reference has already been made to the Dakota Territory act of 1889, with its bond and maximum fee provisions, and to its adaption by the State of North Dakota, as well as to the addition by that State in 1895 of an abstract records requirement.¹⁶² It also has been noticed that the North Dakota Abstractors' License Act of 1925¹⁶³ became the Model Act of 1928,¹⁶⁴ and that the basic flaw in both acts was the lumping together of the licensing of the abstract company as a business unit with examination of the competency of an individual as an abstractor. The Montana act of 1931 corrected this flaw.¹⁶⁵

In 1953 North Dakota amended several sections of its 1925 act in an apparent attempt to adopt those provisions of the Montana act of 1931 which distinguish the individual "registered abstractor" from the business unit which gets a "certificate of authority."¹⁶⁶ Unfortunately, the draftsman of the amendments did not go far enough in effecting the divorce,¹⁶⁷ and

161. Cardon, *supra* note 156, was very favorable to the act. In *Proceedings, Abstractors Section, ATA Mid-Winter Conference*, 41 TITLE NEWS 28, 29 (April 1962), it is briefly reported that the Utah abstractors' license act had raised the standards of abstracting.

162. *Supra* notes 22, 31.

163. *Supra* note 48.

164. *Supra* notes 53-54.

165. *Supra* notes 143-147.

166. N.D. Laws 1953, c. 264, §§ 1-9 (the complete North Dakota abstractors' license act as amended is now N.D. CENT. CODE ANN. §§ 43-01-01—43-01-22 (1960)).

Thus MONT. REV. CODES §§ 66-2107 to -2110 (1962 repl.), became N.D. CENT. CODE ANN. § 43-01-10 (1960), most of the latter taken verbatim from the former.

167. For example, there still is an awkward tie between the individual and the business unit in N.D. CENT. CODE ANN. §§ 43-01-10 and 43-01-14 (1960), although § 43-01-09, on the four requirements for engaging in the abstract business, is cleanly drafted. A complete redraft would have been much easier than trying to amend selected sections, but there undoubtedly were practical reasons for the piecemeal approach.

another state considering an abstracters' license law would do well to start drafting with the Montana law in view rather than the North Dakota law.

G. Kansas, 1889-1941 (Bond), 1941-Date (Bond and Personnel)

In 1889 Kansas adopted an abstracters' license act based upon a bond requirement.¹⁶⁸ Although the substance of the act may have been suggested by the Nebraska bond act of 1887¹⁶⁹ or the concurrent legislation in 1889 in the Dakotas,¹⁷⁰ the act was not a copy of either. Liability was based upon privity (liable to "any person or persons for whom he or they may compile, make or furnish abstracts of title"). In 1903 the act was amended to abolish the privity requirement (liable to "any person or persons"), and this has remained unchanged.¹⁷¹

In 1941 the abstracters' bond act of 1889 was replaced by an abstracters' license act,¹⁷² whose principal source appears to have been the 1929 Colorado act.¹⁷³ The new act requires that abstract companies, as business units, be bonded and that the applicant, partner or officer thereof be qualified by examination, subject to a grandfather clause. The license application of the business unit and the individual examination are tied together, but in view of the last part of the grandfather clause and the separate examination fee it may be possible to administer the act to permit the independent "licensing" of individuals as competent.¹⁷⁴ There is no abstract records requirement in the Kansas act.¹⁷⁵

168. Kan. Laws 1889, c. 1, §§ 1-4, as amended, KAN. GEN. STATE. §§ 67-243 to-246 (1935). See *Kansas Bonding Law*, 4 TITLE NEWS 2 (March 1925).

169. *Supra* note 15.

170. *Supra* note 22.

171. Kan. Laws 1903, c. 1, § 1, KAN. GEN. STAT. § 67-243 (1935) (substance unchanged by the 1941 Abstracters' License Act, and is now KAN. GEN. STAT. ANN. § 67-802 (1949)).

172. Kan. Laws 1941, c. 348, §§ 1-13. In Kan. Gen. Stat. Ann. (1949) the material is broken into two parts, that relating to the abstracters' board of examiners being included with the other statutes on state boards and commissions as §§ 74-3901 to -3903, and the balance under real property as §§ 67-801 to-810.

173. *Supra* note 125.

174. KAN. GEN. STAT. ANN. §§ 67-803, -805 (1949). § 67-803 in part provides: "and it shall be permissible but it shall not be necessary for any individual officer, member or employee of such firm, partnership, association or corporation to obtain such license."

175. Wallace, Poirier, Knol & Williams, *A License Law for Abstracters*, 31 TITLE NEWS 167, 168 (No. 2, March 1952), states that in 1951 thirty percent of Kansas abstracters had complete plants. He also states that in drawing the Kansas act a great deal was taken from Colorado, with some from Wyoming. "It is our feeling that we have raised the standards of abstracting considerably in Kansas."

Kansas has no maximum fee schedule for abstracters' fees, but in 1945 amended the bond section by adding a provision denying fees in a special type of case.¹⁷⁶ The additional clause in essence provides that where there is a public utility easement the abstracter need not show subsequent mortgages of the easement by the easement owner, and if the abstracter does show such encumbrances he may not charge therefor unless expressly requested in writing to show all such matters. This was apparently designed to correct a local abuse of padding abstracts with railroad and other public utility mortgages.

In 1953 Kansas adopted a provision which prohibits licensed abstracters and title insurance companies from splitting abstract charges or premium charges with certain designated persons, including lawyers (these being persons who are in a position to feed business to a particular abstractor or title insurer).¹⁷⁷ The section is elaborately drawn and includes provisions designed to prevent evasion.

H. *Oklahoma, 1899-1937 (Bond), 1937-Date (Bond and Plant)*

Oklahoma in 1899 adopted an abstracters' license act with a bond requirement. It is evident from the phraseology employed that the draftsman had in view not only the Kansas abstracters' bond act of 1889 but also the Dakota Territory act of 1889, although there also was independent drafting in the act.¹⁷⁸

Concerning the privity requirement for liability, the draftsman both abolished privity and codified privity, committing a cardinal sin of drafting by saying something once and then repeating it. It is first stated that the bond shall be conditioned for the payment of "all damages that may accrue

See Turner, *State Legislative Committee, Report of Chairman*, 36 TITLE NEWS 52, 53 (Nov. 1957), for a brief note on a 1957 Kansas bill adding a plant requirement, which failed.

Silvers, *Report of [Abstracters] Section Chairman*, 41 TITLE NEWS 74, 77-78 (Jan. 1962), states that abstracters like the Kansas law, but that the law should have a plant requirement; that the state association tried to get such a law for Kansas, and came close; and that other states should have plant requirements.

176. Kan. Laws 1945, c. 259, § 1; KAN. GEN. STAT. ANN. § 67-802 (1949).

177. Kan. Laws 1953, c. 298, § 1 (now KAN. GEN. STAT. ANN. § 67-811 (Supp. 1959)). See note 57 *supra* on the fee-splitting problem in the 1920's.

178. Okla. Laws 1899, c. 1, §§ 1-8. OKLA. REV. STAT. ANN. tit. 1 (1951) includes, as revised: the 1899 law as §§ 1-9; a law of 1909 as § 10; a law of 1915 as §§ 11-12; and a law of 1937 as §§ 13-18. These several sections have not been re-shuffled to bring them into logical order.

In *Proceedings, Abstracters Section, ATA Mid-Winter Conference*, 41 TITLE NEWS 28, 29 (April 1962), it is briefly reported that the Oklahoma abstracters' license act had raised the standards of abstracting.

to any person by reason of" the abstracter's errors. It is next stated that the principal and sureties shall be liable "to any person or persons for whom he or they may compile, make or furnish abstracts of title" for the abstracter's errors.¹⁷⁹ Consistency was achieved in 1910 by adding more words to the second statement of liability, *viz.*, "and to any person who may be misled to his damage by reason of" such errors.¹⁸⁰

In 1937 a special limitation statute was enacted, the period being extended to five years from the date of the abstract certificate for any abstract compiled thereafter.¹⁸¹

The 1899 act required a licensed abstracter "to furnish an abstract of title . . . when requested so to do and on payment of the fees hereafter provided for."¹⁸² Stronger measures evidently were needed, because in 1909 the law was amended to require abstracters to furnish abstracts to persons in the order of application, for fees not exceeding the maximum fees allowed by law. The 1909 act also declared abstracting to be a public utility, and made an abstracter who refused to furnish abstracts at lawful fees guilty of the crime of extortion as well as civilly liable.¹⁸³

The original 1899 act included a schedule of maximum fees; since 1899 several items have been added to the schedule, but there has been no increase in the amount of the fees.¹⁸⁴ Perhaps the shockingly low fee schedule caused the padding that led to several acts restricting the subject matter that an abstracter may include.¹⁸⁵

179. Okla. Laws 1899, c. 1, § 1. In *Sackett v. Rose*, 55 Okla. 398, 154 Pac. 1177 (1916), the court had occasion to construe this section in an action involving an abstracter's error which occurred in 1909 (before the 1910 clarifying amendment, which the court did not notice). The court held that the first statement of liability was not limited by the second, and hence neither the law of privity of contract nor the law of agency was pertinent.

180. OKLA. REV. LAWS § 1 (1910) (NOW OKLA. STAT. ANN. tit. 1, § 1 (1951)). See Mossman, *The Abstracter's Legal Liabilities [in Oklahoma]*, 41 TITLE NEWS 18 (June 1962).

181. Okla. Laws 1937, c. 37, § 6 (NOW OKLA. STAT. ANN. tit. 1, § 18 (1951)). The previous period had been three years from the date of certificate under the general statute of limitation. *Close v. Coates*, 187 Okla. 315, 102 P.2d 613 (1940).

182. Okla. Laws 1899, c. 1, § 2.

183. Okla. Laws 1909, c. 33, § 27, at p. 531 (NOW OKLA. STAT. ANN. tit. 1, § 10 (1951)).

184. Okla. Laws 1899, c. 1, § 6 (as revised, NOW OKLA. STAT. ANN. tit. 1, § 7 (1951)).

See also Okla. Laws 1915, c. 287, § 2 (NOW OKLA. STAT. ANN. tit. 1, § 12 (1951)), limiting abstracters to five cents per page for Indian treaties, etc., where such material is requested.

185. Okla. Laws 1915, c. 287, § 1 (NOW OKLA. STAT. ANN. tit. 1, § 11 (1951)) (matter prior to instrument conveying out government title); Okla. Laws 1917, c. 4, § 1 (NOW OKLA. STAT. ANN. tit. 1, § 7 (1951)) (certain changes in status of counties).

In 1937 Oklahoma adopted an abstract records requirement for abstract companies entering into the business thereafter, but exempted those companies engaged in abstracting on the effective date of the act.¹⁸⁶ The specific requirement was that the new abstracter "shall have for use in such business an independent set of abstract books or other system of indexes compiled from the instruments of record affecting real estate in the office of the County Clerk, and not copied from the indexes in said office, showing in a sufficiently comprehensive form all instruments," etc.¹⁸⁷ In *Application of Richardson*¹⁸⁸ the constitutionality of the act was upheld.

Oklahoma has no requirement with reference to an examination to determine the competency of the individual abstracter.

The Oklahoma title insurance law, adopted in 1957, provided that every title insurance policy or certificate of title issued by a title insurance company must be countersigned by a licensed abstracter.¹⁸⁹ This section

186. Okla. Laws 1937, c. 37, §§ 1-5 (now OKLA. STAT. ANN. tit. 1, §§ 13-17 (1951)). The entire act is quoted in Cardon, Johnson & Dykins, *The Abstracters License Law in Operation*, 21 TITLE NEWS 16, 17-18 (Jan. 1942). The act is briefly discussed in *Report of Committee on Standards for Abstracts of Title, Real Property Law Division, Proceedings Section of Real Property, Probate and Trust Law*, 1938 ABA REP. 56.

The act was sponsored by the Oklahoma Title Association. Brewster, *Report of Legislative Committee*, 17 TITLE NEWS 12, 13 (No. 1, circa Fall 1937). It is stated by Wetzel, *Legislation Affecting Abstracters*, 17 TITLE NEWS 31 (No. 1, circa Fall 1937), that a Mr. Ballard of the Home Owners Loan Corporation, Oklahoma City, drafted the bill.

In 1939 the Oklahoma Title Association saved the act from repeal. Brewster, *Report of the Legislative Committee*, 19 TITLE NEWS 18, 20 (Oct. 1939).

187. The requirement of this section is grossly misinterpreted in TITLE INSURANCE COMPANIES AND ABSTRACTERS (Roberts ed. 1961). See *supra* note 8, where the matter is discussed in detail.

188. 199 Okla. 406, 184 P.2d 642 (1947). The application was filed in 1945 for a certificate of authority for Oklahoma County (which includes Oklahoma City), but there was no proof of compliance with the abstract records requirement. The several constitutional objections to the act were advanced. The majority opinion pointed out that there was "no showing in the record that the expense of making a set of abstract books in accordance with the provisions of section 13 is prohibitive, although in [certain counties with extensive records] such expense might prevent qualified persons from engaging in the business of abstracting." The court did not indicate what its view might have been on a showing of prohibitive expense. One judge dissented.

In evaluating the *Richardson* case it should be kept in mind that in Oklahoma the abstracting business is a public utility, the abstracter is under a duty to furnish abstracts, and fees are regulated. The case is not necessarily persuasive in a state where these conditions are absent.

Cf. State *ex rel.* Freeman v. Abstracters Board of Examiners, *supra* note 151, upholding the constitutionality of the Montana act. The Montana act as construed required all abstracters, existing and new, to satisfy fully the abstract records requirement, but with a short grace period for existing abstracters.

189. Okla. Laws 1957, at 407, § 5001 (C) (now OKLA. STAT. ANN. tit. 36, § 5001 (C) (1958)).

was promptly amended to provide an alternative of countersigning by a lawyer licensed to practice in Oklahoma, and to provide that title insurance can be issued only after examination of an abstract of title prepared by a licensed abstracter.¹⁹⁰

I. *Arkansas, 1953-Date (Bond and Personnel)*

In 1927 Arkansas adopted an abstracters' bond act, the basic purpose of which was to give abstracters access to the public records; the bond was solely for the protection of public records and not for the benefit of persons injured by errors in abstracting.¹⁹¹ There was and is no exception in this act as to lawyers who do abstracting.

In 1953 Arkansas adopted an abstracters' license act with bond and individual competency requirements.¹⁹² Internal evidence clearly shows that this act was drawn from the Colorado act in its original 1929 form rather than its 1949 amended form.¹⁹³ As in the parent act, privity is required for liability on the bond (liable to "any person having a course of action").¹⁹⁴ The act has the basic flaw of tying together the licensing of the business unit and the examination of the individual.

As to innovations, under the Arkansas act an abstracters' license is required either to engage in abstracting or to act as agent for a title in-

190. Okla. Laws 1959, at 138, § 1 (now OKLA. STAT. ANN. tit. 36, § 5001 (C) (Supp. 1961)).

191. Ark. Laws 1927, c. 175, §§ 1-9 (now ARK. STAT. ANN. §§ 71-101 to -109 (1957 repl.)). This material is entirely separate and distinct from the 1953 abstracters' license act which, as §§ 71-110 to -124 immediately follows.

The Circuit Clerk and ex officio Recorder of Boone Co., Ark., who had an interest in a private abstract company, refused to let another abstracter have access to the official records for the purpose of copying the same. In January 1927, in a mandamus proceeding, the trial judge held for the Circuit Clerk, and there was a notice of appeal to the Supreme Court of Arkansas. 6 TITLE NEWS 15 (Feb. 1927). The 1927 act made the problem moot.

Arkansas Abstracters Now Protected by Bond Law, 6 TITLE NEWS 20 (Sept. 1927), reprints the full text of the act. This article is in error in stating that the ruling which precipitated the act was by the Arkansas Supreme Court; it was a circuit court decision.

192. Ark. Laws 1953, c. 101, §§ 1-15 (now ARK. STAT. ANN. §§ 71-110 to -124 (1957 repl.)). This material is separate and distinct from the nine preceding sections discussed *supra* note 191.

193. *Supra* note 125. This probably was not a result of deliberate choice, but rather resulted from the fact that the draftsman had before him Colo. Stat. Ann. (1935), did not have the supplement, and did not have available the session laws. Colo. Rev. Stat. (1953), incorporating the 1949 amendments, was not published until 1954 and of course was not available to the Arkansas draftsman.

194. ARK. STAT. ANN. § 71-115 (1957 repl.).

insurance company, unless the abstractor or agent is a licensed lawyer.¹⁹⁵ This blanket exemption of lawyers resolves an issue that has prompted lawyers in other states to oppose proposed abstractors' licensing acts. It should be noted, however, that in Arkansas a blanket exemption is relatively easy, for the abstractors' licensing act has no requirement as to abstract records.

The original draft of the 1953 Arkansas act required abstract records, as did the Colorado act,¹⁹⁶ but this provision was deleted before final passage.¹⁹⁷ Consequently, Arkansas is among those states whose abstractors' license acts do not have any requirement as to abstract records.

J. Minnesota, 1957-Date (*Bond and Personnel*)

In 1885 Minnesota enacted an abstractors' bond act applicable to those abstractors who were permitted to use a portion of the county building for the purpose of making abstracts of title, the bond under the present wording of the act being conditioned "for the faithful performance of his duties as such abstractor and that he will handle all public records with care and charge no greater fee for abstracts of title than is or may be allowed by law to registers of deeds for like services."¹⁹⁸

In 1957 Minnesota adopted an abstractors' license act.¹⁹⁹ This act has no obvious antecedents, has no abstract records requirement, has a somewhat illusory individual examination requirement, and is essentially an abstractors' bond act, optional with the abstractor.

195. ARK. STAT. ANN. § 71-110 (1957 repl.).

As a matter of construction, it would seem that a lawyer does not have to satisfy the bond requirement, because the bond requirement is a condition precedent to the issuance of an abstractor's license and a lawyer does not have to have an abstractor's license.

196. COLO. STAT. ANN. c. 2, § 7 (1935).

197. See compiler's note to ARK. STAT. ANN. § 71-123 (1957 repl.). This section, dealing with the abstract records requirement in counties where there is no licensed abstractor, and depending as it does upon the deleted material, becomes meaningless. The deleted material was the first sentence in § 71-116; the remaining material in § 71-116 on access to public records obviously had not been reviewed with reference to § 71-102, enacted in 1927, on the same subject.

198. Minn. Laws 1885, c. 116, § 1 (as revised in wording but without change in substance, now MINN. STAT. ANN. § 386.18 (1947)). See the note to this section in the 1961 Supp., indicating an erroneous citation to this section in a 1959 act intended to repeal a different law. See State *ex rel.* Cole v. Rachac, 37 Minn. 372, 35 N.W. 7 (1887), for the reason behind the initial 1885 legislation.

199. Minn. Laws 1957, c. 871, §§ 1-17 (now MINN. STAT. ANN. §§ 386.61-76 (Supp. 1961)).

An abstractors' license act had been defeated in Minnesota in 1945.

The important item of course is the bond, its size and its terms. In fact

Under the 1957 act, licensed abstracters are called "registered abstracters."²⁰⁰ The act does not prohibit abstracting by unregistered abstracters, but only forbids an unregistered abstracter from advertising or representing that his abstracts are by a "registered, licensed, bonded or official abstracter."²⁰¹ In Minnesota, where official tract indexes are authorized,²⁰² it may be that this limited sanction is sufficient, but in states where the only tract indexes are owned by private abstracters, where many counties have only one abstracter, and where it would be very expensive for a new abstracter to start an abstract business, the sanction of the Minnesota act would be insufficient to bring many of the abstracters under the licensing law. On the other hand, the Minnesota approach has one real advantage in that it avoids many of the problems of validity under state and federal constitutions.²⁰³

The composition of the abstracters' board of examiners is worth noting, in that there are five members (instead of the usual three), four of whom must be abstracters and one of whom must be a lawyer.²⁰⁴ The board is expressly prohibited from fixing abstracters' fees.²⁰⁵

The personal competency of applicants for registration as abstracters is determined by examination, and the applicant must show "he is qualified by experience, education or training to qualify as being capable of performing the duties of an abstracter whose work will be for the use and protection of the public."²⁰⁶ As drafted, this latter requirement apparently

attorneys who successfully opposed passage of a bill for such an act in Minnesota (1945), H.F. 713 S.B. 743, contended that the only legitimate scope of such legislation is to provide for an adequate bond and a fair scale of charges. It would appear that additional provisions may do more harm than good.

PATTON, LAND TITLES § 27, n.44 (Supp. 1950, 1952). The substance of this note is included in § 44, n.54 (2d ed. 1957), but in generalized form omitting the detailed reference to Minnesota.

200. MINN. STAT. ANN. § 386.61 (2) (Supp. 1961).

An unnecessary source of confusion to the non-Minnesota lawyer is the use of the phrase "whether registered or not" in §§ 386.61 (2), -.62, -.66, -.67, -.71, and -.72. The tendency is to read this phrase as applying to abstracters, but in fact it refers to registered titles under the Torrens system.

201. MINN. STAT. ANN. § 386.62 (Supp. 1961).

202. MINN. STAT. ANN. § 386.05 (1947).

203. See State *ex rel.* Freeman v. Abstracters Board of Examiners, *supra* note 151, and Application of Richardson, *supra* note 188, where abstracters' license acts were held constitutional insofar as the requirement of abstract records was concerned.

204. MINN. STAT. ANN. § 386.63 (1) (Supp. 1961).

205. MINN. STAT. ANN. § 386.63 (3) (Supp. 1961).

206. MINN. STAT. ANN. § 386.65 (1) (Supp. 1961).

is a part of the overall examination requirement, and is not an independent requirement applicable to those exempted from examination by the grandfather clause. The grandfather clause exempts from the examination requirement persons actively engaged in abstracting for at least two years prior to and on the effective date of the act, a standard provision.²⁰⁷ An additional exemption from examination is found in what might be called a grandfather and grandson clause, which permits an applicant to use any five years of active abstracting (as I construe the section, whether before or after the effective date of the act, and whether continuous or discontinuous) as a basis for exemption.²⁰⁸ It is this provision that prompted the observation above that the examination requirement may be largely illusory, in that apprentice abstracters may often have the five years of experience before there is occasion to apply for registration.

Whether lawyers who do abstracting are exempted from the requirements of the act is questionable. One section provides: "Nothing herein shall limit or abridge the rights of a duly licensed attorney at law in his practice in the State of Minnesota,"²⁰⁹ but this may cover only normal law practice, such as title examination, and may not cover abstracting, which is not the practice of law but which is an activity in which lawyers have traditionally engaged.

The Minnesota act has the undesirable feature of tying together the qualification of the business unit and the qualification of the individual, but there is a separate fee for the individual examination which may make it possible as a practical matter to have separate registrations of the business unit and the individual.²¹⁰

The abstracters' liability under the bond requirement is not based upon privity (liable for injury "to any person").²¹¹ The amount of the bond is \$10,000 outstate and \$25,000 in counties of over 200,000 inhabitants (Hennepin Co., Minneapolis; Ramsey Co., St. Paul; and St. Louis Co., Duluth). This section has the desirable modern alternatives to a bond, *viz.*, insurance or deposit of cash or securities.²¹²

207. MINN. STAT. ANN. § 386.65 (2) (Supp. 1961).

208. MINN. STAT. ANN. § 386.65 (3) (Supp. 1961).

209. MINN. STAT. ANN. § 386.75 (Supp. 1961).

210. MINN. STAT. ANN. § 386.68 (Supp. 1961).

211. MINN. STAT. ANN. § 386.66 (Supp. 1961).

212. The deposit of securities may be undesirable as a practical matter because they will have to remain on deposit until limitation bars the abstractor's liability on all outstanding abstractor's certificates. See note 216 *infra* and accompanying text.

The provision requiring a seal for a registered abstracter includes a requirement that the signatures of persons authorized to sign certificates on abstracts must be filed with the board.²¹³ The undesirable side effects of such a requirement have been discussed previously.²¹⁴

The Minnesota act is not one to be copied verbatim by another state, but does have features worthy of careful study in any state preparing an abstracters' license law.

K. Oregon, 1923-Date (*No Privity*)

In 1923, Oregon, in very explicit terms, abolished the privity requirement for an abstracter's liability, making the abstracter liable to any person injured "regardless of whether the abstract of title was ordered by the person so damaged," but with a saving provision that nothing in the statute "shall be construed to prevent the maker of any abstract of title to land from limiting in the certificate to the abstract his liability thereunder to any person named in such certificate, but such limitation of liability must be expressly set forth in the certificate."²¹⁵ Oregon, however, has never adopted an abstracters' bond act.

In 1929 the Model Act was introduced in Oregon, but was not adopted. The proposed act permitted the deposit of securities in lieu of a bond, an innovation at that time, but as was sagely observed in *Title News* in reviewing the proposed act, there are several practical objections to a deposit of securities by an abstracter. In addition to tying up the securities and possible difficulties in making substitutions, a very serious objection is that in case of dissolution of the abstract company the securities must remain on deposit until the abstracter's liability is barred by limitation as to all outstanding abstracter's certificates. Depending upon local law, this may be a period of five or ten years, or may not have been determined; if the limitation runs from the date of injury rather than the date of certificate, the period may be for an uncertain but very long period. A deposit of securities by a title insurance company with substantial reserves and long potential business life is not the same as a deposit by an individual abstracter. However, in my opinion, the alternative ought to be made avail-

213. MINN. STAT. ANN. § 386.67 (Supp. 1961).

214. *Supra* p.

215. Ore. LAWS 1923, c. 67, § 1 (with immaterial changes in wording, now ORE. REV. STAT. § 30.750 (1961 repl.)). See *Oregon Law Prescribing Liability of Abstracters*, 2 TITLE NEWS 5 (March 1923).

able to the abstracter; whether he should avail himself of the alternative is another matter.²¹⁶

L. *Hawaii, 1929-Date (Personnel)*

In 1929 Hawaii adopted a license law concerned solely with the character and competency of individual abstracters, and without any provisions relating to bonds or abstract records.²¹⁷ Applicants for a license must be of good moral character and must pass an examination; there is no grandfather clause. A lawyer who acts as a title examiner and gives a legal opinion as to title need not be licensed as an abstracter, but apparently a lawyer who acts as an abstracter must be licensed. The composition of the board of examiners is unique in that the board is not composed of abstracters but of the judge of the land court, the registrar of conveyances and the attorney general.

The wording of the act appears to be original, but the Model Act in 1928 may have provided the impetus for legislation in Hawaii.

VI. TO BE OR NOT TO BE LICENSED

It is beyond the scope of this study to consider at any length the question whether the "abstract" states generally should adopt abstracters' license laws. The question cannot be answered or even intelligently discussed in a vacuum, but only in terms of the particular local situation and the specific legislation that one may reasonably expect to see adopted. The preceding analysis of the several statutes makes it clear that an abstracters' license law may include any one or more of the three basic components of such laws, and in any combination. The specific provisions as to each basic component vary as to desirability, the plant requirement in particular varying from highly desirable to highly objectionable. The question must be considered from two different, and sometimes conflicting, points of view—the interest of the general public, and the interest of abstracters.

From the point of view of the general public it would be desirable if all abstracters were financially responsible, had adequate plants, were professionally competent, had regulated fees, and were liable to anyone relying

216. *Abstracters' Law To Be Introduced in Several States*, 7 TITLE NEWS 5 (Dec. 1928).

217. Hawaii Laws 1929, c. 146, §§ 1-5 (now HAWAII REV. LAWS, §§ 163-1 to -4 (1955)).

on the abstract to his damage, with limitation running from the date of injury. As a practical matter, this ideal is unattainable, and it becomes a matter of balancing the potential for good against the potential for evil in the particular proposal. As a rule this will turn upon an analysis of the plant requirement and its related grandfather clause: Will the proposed act tend to bring all plants up to an adequate level, or will it tend to create a monopoly and perpetuate an inadequate plant?

Further, from the public point of view, will the act be so stringent that in some counties no one will provide abstracting services? Inferior abstract service is better than no abstract service at all. The problem is not the same as with legal and medical services, because one can drive to a lawyer or doctor in the next county, but abstracting necessarily must be done locally.

The question from the point of view of the abstracter is really two or more questions, because abstracters fall into several groups, each with different interests at stake. A majority of abstracters can and do meet the minimum requirements any licensing act might impose, *viz.*, they are financially responsible (frequently by insuring the risk), have adequate plants, and are managed by competent personnel. They would like a license act in order to improve their weaker fellows, and to give the industry the prestige and status they think will come with licensing. They are sincere in believing there will be improvement both as to personnel and as to plant, and minimize or ignore the monopolistic tendency of some acts.

On the other hand, many in the upper group of abstracters fear that any regulatory legislation will open the door to other regulation they do not desire, such as a schedule of maximum fees. They are not opposed to an abstracters' board of examiners composed of high-grade abstracters, but do fear what a board of political hacks might do (the political climate of course will vary from state to state and from time to time).

Those abstracters who could not meet some or all of the basic requirements have a vital interest in defeating any license act, unless by grandfather clauses or otherwise their continuance in business is assured. This group is not represented in published discussions of the question because many of them are not active in or even members of their state and national associations.

Not only is substantial unanimity among abstracters not attainable on the question of abstracters' license acts, but there is the further problem of satisfying the views of the bar. Lawyers, of course, are interested solely

in the public good,²¹⁸ and the public good requires that an abstracters' license law in no way adversely affect lawyers in the practice of law as such nor in other matters related to the practice of law.

Most of the papers and articles in favor of abstracters' license laws have already been cited at appropriate places in connection with the Model Act or some particular state act. A few of the items previously cited are bare statements of fact, but most include opinions. Additional papers and articles for and against abstracters' license laws are cited below.²¹⁹

218. Consider, for example, the number of statutes abolishing the privity requirement with respect to a title examiner's liability. Typical is EREHWON REV. STAT. ANN. § 1.010 (1987).

219. Brewster, *Report of Legislative Committee*, 17 TITLE NEWS 12, 13 (No. 1, circa Fall 1937), states with regard to a Wisconsin bill pending in 1937:

A bill licensing and regulating abstracting was introduced in Wisconsin, but was opposed by a large percentage of the lawyers and a few abstracters in the State. At the present writing its fate was uncertain, but it was going down fast. The bill would seem to have lodged very broad powers in the board set up to regulate the business under the act. This fact and the enlargement of the liability of the abstractor almost to that of an insurer of title created sufficient opposition to kill the bill.

Taylor, Miller & Goetzinger, *Panel, Raising Ourselves by Our Bootstraps*, 28 TITLE NEWS 45, 46 (Feb. 1949), gives a somewhat fanciful description as to how a bond law creates a professional man from non-professional material.

Wallace, Poirier, Knol & Williams, *A License Law for Abstracters*, 31 TITLE NEWS 167, 170-171 (No. 2, March 1952), states briefly (and not necessarily as Mr. Knol's personal views) several objections to abstracters' license laws.

Turner, *State Legislative Committee—Report of Chairman*, 36 TITLE NEWS 52, 53 (Nov. 1957), states:

It has always been an interesting speculation as to how far the state might go in regulating abstracters, once the gate has been opened via an abstractor's license law. This is illustrated by a bill introduced in the Colorado legislature (although not passed) which provided that abstracters should not be required to show zoning and building codes in the abstract.

Wallace, McCarthy & Reppert, *Abstracters' Licensing Laws—A Panel*, 36 TITLE NEWS 9 (Dec. 1957). Marvin W. Wallace, at pp. 9-12, states the argument in favor of abstracters' license laws, particularly the plant requirement, from the point of view of benefit to the general public. Jerry W. McCarthy, at p. 13, states several reasons why Michigan abstracters do not want such a law: in part because it is not needed to protect the public, and in part because of unsatisfactory experience with other licensing boards in Michigan. Arthur L. Reppert (President, American Title Association, 1961-1962), at pp. 14-16, discusses attempts in Missouri since 1929 to get an abstracters' license law, the attitudes of Missouri abstracters toward such a law, and some of the practical problems which need to be considered in drafting such legislation. Mr. Reppert himself favors such legislation.

Warren, *Abstracter Licensing and Plant Laws*, 41 TITLE NEWS 96 (Jan. 1962), presents for consideration (but not necessarily as Mr. Warren's personal views) seven objections to abstracters' license laws from the point of view of the general public and seven objections from the point of view of abstracters. These fourteen objections are submitted as matters for consideration in determining whether to enact such legislation, and objections to be satisfactorily met in drafting new legislation or amending existing legislation.

Proceedings, Abstracters Section, ATA Mid-Winter Conference, 41 TITLE NEWS 28, 29 (April 1962), states that there was full agreement by representatives from

It is worthy of note that the articulate title men in those states with abstracters' license laws unanimously favor such laws. It must be recognized, however, that these are among the best men in their profession and the ones least likely to be hurt by the laws; some of the less articulate abstracters in those states might well hold a contrary opinion.

VII. CONCLUSION

Most title men have thought of abstracters' license laws as an invention circa 1928, springing forth full grown as did Athena from Zeus' head. The fact is that the oldest abstracters' license law based upon a bond requirement is now seventy-six years old, and that eight states enacted abstracters' bond acts prior to 1900.²²⁰ The plant requirement was introduced seventy-two years ago, in 1891, and two states had plant requirements before 1900. The only real innovation in the 1920's was the additional requirement of competent personnel, competency to be determined by examination, this in turn creating the need for more elaborate administrative machinery, an abstracters' board of examiners to administer the examination.

A state today which has under consideration the revision of existing legislation affecting abstracters or the adoption of new legislation should start with the basic framework of the Montana act of 1931. That act, insofar as licensing or certification is concerned, completely separates the individual abstracter from the abstract company as a business unit, the former being certified as to personal competency, the latter being authorized to engage in the abstract business upon satisfaction of certain conditions precedent.

In drawing grandfather clauses, the draftsman must keep clearly in view the fundamental distinction between exempting individuals from an examination requirement, and exempting abstract companies from a plant requirement. The former is inherently self-limiting as to time, and within a relatively short period will leave the examination requirement unhindered. The latter may often be not self-limiting but perpetual, and will tend to lower the standards of the industry. Furthermore, insofar as abstract companies are to have the benefit of a grandfather clause as to plant, the problem

Oklahoma, South Dakota and Utah that their abstracters' license laws had raised the standards of abstracting in those states.

220. In 1930 the Wyoming act of 1891 was said to be fourteen or fifteen years old, Graham, *Chairman's Address (Abstracters Section)*, 10 TITLE NEWS 19, 20 (Jan. 1931).

of continuation of the benefit to successor abstract companies must be faced squarely and not avoided.

Serious consideration should be given to the problem of abstracters' certificates. The abolition of the privity requirement and the best financial responsibility provisions are worthless if the abstracter's certificate is deficient as to matters certified. There is a practical limit to what local title examiners can do in rejecting abstracts with deficient coverage, and legislation is the only effective solution.

An abstracters' license law must take lawyers into account with reference to all three basic requirements—bond, plant, and personal competency. If either an abstracters' license law or a title insurance law places any restriction upon those who may be issuing agents for title insurance policies, lawyers must not be excluded.

In drafting an abstracters' license law, the local law and local conditions must be taken into account, and an existing abstracters' license law in another state should not be followed slavishly. For example, if under the local law the issuance of certificates of title is the practice of law and the issuance of such certificates by abstracters is unlawful but tolerated by the bar, it would be ill-advised to mention certificates of title in an abstracters' license act.²²¹ Again, the presence or absence of an official tract index is significant in drafting a plant requirement. So also, if a state has counties which cannot produce enough business to support a private abstract plant, special provision must be made for such counties. Finally, abstracters' license laws are very vulnerable from the constitutional point of view, and any draft of proposed legislation should be reviewed by a lawyer well-versed in this field; several provisions in existing legislation are patently unconstitutional, and it thus is not enough to follow existing legislation.

To the extent that state title associations under the leadership of the most competent and best equipped local abstracters are unable to "coerce" the incompetent and poorly equipped abstracters to raise themselves to minimum standards on a "voluntary" basis, advancement of the industry itself and protection of the public can be achieved only through legislation.

Chronological listing of legislation concerning abstracters:

Nebraska, 1887-date (bond), discussed at note 15 et seq.

Kansas, 1889-1941 (bond), discussed at note 168 et seq. See also 1941

Kansas act.

221. Wilkin, *What is an Abstracters "Certificate of Title?"*, 7 *TITLE NEWS* 12 (Aug. 1928).

- North Dakota*, 1889-1895 (bond), discussed at note 22 et seq. See also 1895, 1925, and 1953 North Dakota acts.
- South Dakota*, 1889-1929 (bond), discussed at notes 22, 106-108. See also 1929 South Dakota act.
- Wyoming*, 1891-date (bond and plant), discussed at note 39.
- North Dakota*, 1895-1925 (plant added to bond), discussed at note 31 et seq. See also 1889, 1925, and 1953 North Dakota acts.
- Idaho*, 1897-date (bond), discussed at notes 19-20.
- Oklahoma*, 1899-1937 (bond), discussed at note 178 et seq. See also 1937 Oklahoma act.
- Utah*, 1899-1937 (bond), discussed at note 156. See also 1937 Utah act.
- Montana*, 1915-1931 (bond), discussed at note 137 et seq. See also 1931 Montana act.
- New Mexico*, 1921-date (bond), discussed at note 41 et seq.
- Oregon*, 1923-date (privity requirement abolished), discussed at notes 215-216.
- North Dakota*, 1925-1953 (personnel added to bond and plant), discussed at note 48 et seq. See also 1889, 1895, and 1953 North Dakota acts.
- Model Act*, 1928 (bond, plant, and personnel), discussed at note 49 et seq.
- South Dakota*, 1929-date (plant and personnel added to bond), discussed at note 109 et seq. See also 1889 South Dakota act.
- Colorado*, 1929-date (bond, plant, and personnel), discussed at note 125 et seq.
- Hawaii*, 1929-date (personnel), discussed at note 217.
- Montana*, 1931-date (plant and personnel added to bond), discussed at note 143 et seq. See also 1915 Montana act.
- Oklahoma*, 1937-date (plant added to bond), discussed at note 186 et seq. See also 1899 Oklahoma act.
- Utah*, 1937-date (personnel added to bond), discussed at note 159 et seq. See also 1899 Utah act.
- Kansas*, 1941-date (personnel added to bond), discussed at note 172 et seq. See also 1889 Kansas act.
- Arkansas*, 1953-date (bond and personnel), discussed at note 192 et seq.
- North Dakota*, 1953-date (requirements separated), discussed at notes 166-167. See also 1889, 1895, and 1925 North Dakota acts.
- Minnesota*, 1957-date (bond and personnel), discussed at note 199 et seq.