

## Opinion No. 37-1705

July 8, 1937

**BY:** FRANK H. PATTON, Attorney General

**TO:** Mr. Claude Gamble County Clerk Clovis, New Mexico

{\*137} As Chairman of the Legislative Committee of the County Clerks' and Treasurers' Association, you have submitted to this office the following questions, and I herewith make this attempt to the best of my ability to comply with your request.

I presume that it is your plan to have these questions and answers mimeographed and distributed to the various county officials.

The questions, together with the answers, are herewith set forth:

1. "Should a Chattel Mortgage or a Sales Contract be filed and indexed, if it is not properly acknowledged?"

The answer is in the negative. See Section 118-119 of 1929 Compilation.

2. "Should a Bill of Sale be filed as a Chattel Mortgage?"

A bill of sale is different from a chattel mortgage in that it conveys absolute title. It should not be filed or recorded unless properly acknowledged.

3. "Should a copy of a Chattel Mortgage be filed without the accompanying of the Original in order that the Clerk might make comparison?"

I find no authority for a comparison by the county clerk. If the copy is properly acknowledged, it is my belief that it should be accepted for filing or recording.

4. "Should a Sales Contract be acknowledged by the Seller and the Purchaser?"

The answer is in the affirmative. See Section 21-301 of 1929 Compilation.

5. "If a Chattel Mortgage filed should be lost or misplaced after it has been properly indexed, what would be the consequences?"

The county clerk is not concerned with this question as it is a matter entirely between the parties affected by the instrument, unless, of course, there is some negligence or misfeasance upon the part of the clerk. Then there might possibly be an action for damages or a removal proceeding instituted through the office of the District Attorney.

6. "Should an assignment of a Chattel Mortgage if filed after the Mortgage itself, be given a new number or should it be attached to the Original Chattel Mortgage?"

We have no statute covering this question, but it is my belief that the better practice would be to attach the assignment to the original chattel mortgage.

7. "Where you have several Partial Releases, pertaining to one Chattel Mortgage and do not have necessary space on the margin of the Chattel Mortgage Index to show them all, what procedure should we follow?"

{\*138} This is a question which is only applicable to efficiency and administration. It is not a legal question. However, I would suggest a slip of heavy paper pasted on the chattel mortgage index. The proper form of release or discharge of chattel mortgages and of partial releases is set out in Section 6, Chapter 54, Laws of 1935. Apparently, a marginal release is no longer valid.

8. "Should a copy of an instrument, pertaining to real estate be accepted for recording?"

We have no statute covering this question, but it is my belief that the answer should be in the negative.

9. "Should the Clerk permit Probate Files to be sent out of the County when requested by attorneys?"

I see no objection upon proper receipt being taken from responsible attorneys.

10. "Should the Clerk make Certified copies of a copy of Birth and Death Certificates when requested?"

Original Birth and Death Certificates are kept on file in the office of the Director of Public Health and Section 11 of Chapter 39, Laws of 1937, provides that certified copies shall only be made from such originals.

11. "Should a Clerk permit a Will to be removed from his office after such has been filed but has not been admitted?"

I would answer this question in the negative and suggest that a certified copy be withdrawn instead.

12. "Should a Lis Pendens be recorded or filed, if recorded what disposition should be made of same when the case is settled?"

A lis pendens should be filed and not recorded. (Section 105-1101, 1929 Compilation). It can only be cancelled by a court order, such cancellation to show by endorsement upon the filed notice. (Section 105-1102, 1929 Compilation).

13. "How should outstanding obligations against the County be taken care of if they should come in after the close of the Fiscal year?"

Under the Bateman Act, obligations of the counties must be paid from revenues available for expenses during the calendar year or current year, and debts not so paid are null and void. (Section 33-4241, 1929 Compilation). However, moneys later collected and which belong to such current year in which the void indebtedness accrued, may be distributed pro rata among the creditors. (Section 33-4244, 1929 Compilation). The current year is from January 1st to December 31st of each year.

Much confusion exists because of the current year and the budget or fiscal year.

In payments on indebtedness of state departments, the state auditor keeps his books open for about ten days after July 1st to allow time for all outstanding bills to be presented. I suggest the same rule could be followed to great advantage in the counties.

14. "Who collects the Justice of the Peace fines and what disposition should be made of them?"

The Justices of the Peace should collect their own fines and report must be made quarterly to the Board of County Commissioners. (Section 79-219, 1929 Compilation). The State Constitution by Section 4, Article XII, provides that all fines and forfeitures collected under general laws shall go into the current school fund of the State. The County Commissioners should, therefore, see that these fines are paid to the State Treasurer for this purpose.

15. "Please give us a definite procedure in handling Justice of the Peace, District and Foreign Judgments. Can an execution be issued on a foreign Judgment?"

It is my belief that an execution should not issue on a foreign judgment. Suit should be filed on the foreign judgment and then execution may issue on such judgment given in the New Mexico court.

{\*139} 16. (a) "To eliminate to a great extent getting files misplaced or lost, can a clerk invoke a rule requiring everyone desiring any files to get same from the clerk or his deputies and not permit them to get papers from Chattel Mortgage files and District Court and Probate files without the above assistance?"

My answer is in the affirmative.

(b) "Is there any law or precedent placing a time limit on the length of time Court files may remain in the possession of the one who withdraws same?"

My answer is in the negative. This may be done, in my belief, by rule of court.

(c) "Can any penalty be assigned by authorized agent to individuals failing to return such Court papers?"

None of which I have any knowledge.

(d) "Is it the duty of the District Court or the Clerk to prescribe rules for the proper custody of such papers?"

The clerk should run his office.

(e) "If a District Court or Probate File is lost or misplaced, what would be the consequences?"

This depends. If loss is occasioned by gross incompetency, gross negligence, misfeasance or malfeasance of the clerk, he might be subjected to a removal from office proceeding. Or if damage results to any one having an interest in the matter, the clerk might be liable for damages.

(f) "Are all of the papers filed in the Probate Court to be recorded? (Such is the practice in some counties)."

My answer is in the negative. I see no reason for recording unless required by statute.

17. "What disposition is to be made of the fees collected by the Clerk of the Court, other than those paid to a reporter, when assuming the duties of a U. S. Commissioner?"

I am unable to answer this question, as I know nothing of the requirements of the United States Commissioner. This is beyond my sphere of jurisdiction.

18. "Is it permissible to charge 25c extra each, for the acknowledgments of Marriage License Applications? (Such is the practice in many of the Counties in this State.)"

For issuing a marriage license, recording and indexing it, the clerk may charge a fee of \$ 1.00; and for recording and indexing a marriage certificate, the clerk may charge a fee of \$ 1.00. If the application for the license is acknowledged before the clerk, he may charge 25c for each acknowledgment. If acknowledged before a justice of the peace or other officer than the clerk, then, of course, he should only charge the \$ 1.00 fee. (Section 87-119, 1929 Compilation).

19. "Is there a time limit as to the time when a marriage license must be returned, if so when?"

There is no time limit.

20. "Is it necessary that the Marriage Ceremony be performed in the County in which the license is issued?"

The answer is in the affirmative, and we have so held a number of times.

21. "Should the consent of the parents or guardian when sent in as a separate instrument be acknowledged before a Notary Public or witnesses?"

The answer is in the affirmative. (Section 87-103, 1929 Compilation).

22. "What is the correct seal to be used for marriage applications and also the license?"

The Seal of the County Clerk.

23. "It is the generally accepted custom that acknowledgments cannot be taken on Sunday, if so how does this affect Marriage License Applications when issued on Sunday?"

It is my belief an acknowledgment may be taken on Sunday, as our laws do not prevent it.

24. "Is a plea or a plea and abatement a dilatory action? (some counties {*\*140*} charge \$ 2.00 for all dilatory actions filed in District Court, is this proper).?"

Fees of district court clerks are prescribed by Section 34-343 of 1929 Compilation.

The clerk should charge a regular docket fee, plus any tax imposed, (like the Supreme Court Building tax), and thereafter no fee is charged for filing any pleading. There is no fee for a plea or a plea in abatement.

25. "What action should the Clerk take, when notice of injuries are filed under the Workmen's Compensation act?"

See Section 7, Chapter 92, Laws of 1937, where all duties of the clerk are specifically outlined therein. It is unnecessary to copy these provisions here.

26. "Is an instrument valid and proper when signed by executor and Notary Public under carbon paper? Should same be admitted to record?"

I suppose reference is made to what is commonly called a "duplicate original". If this is true, the duplicate is in fact an original and should be recorded.

27. "Is it the Clerk's duty to see that all deeds of conveyance have the proper amount of Internal Revenue stamps on them?"

The answer is in the negative.

28. "Is the Clerk responsible for collection for advertisement in the newspaper in Probate and District Court cases?"

The answer is in the negative. I suppose reference is made to advertisements and legal notices inserted by attorneys in various cases.

29. "Should a will be recorded before it has been admitted?"

A will is filed and not recorded before being admitted to probate. (Section 154-201, 1929 Compilation). After probate, or being approved and allowed, it should be recorded. (Section 154-222, 1929 Compilation).

30. "Is it compulsory that the County Treasurer make distribution of receipts and monthly report to the Bureau of Public Health, if so why?"

If reference is made to the County Health Fund created by Chapter 132, Laws of 1935, then such funds should be remitted to the State Treasurer as provided by Section 6, Chapter 131, Laws of 1935.

31. "Are you compelled to take the face value of the 1935 tax sale Certificates?"

It is my belief that the answer should be in the affirmative, although I am not sure I understand this question.

32. "In order to determine classification of counties, is the valuation taken before exemptions are taken off or after?"

Classification of counties is fixed and governed by the **assessed** valuation, as finally fixed for the preceding year. (Section 33-3219, 1929 Compilation). The **assessed** valuation would not, in my opinion, include exempted property.

33. "Is there any postal regulation or law prohibiting the mailing of delinquent tax notices on post cards, and providing that this information should be enclosed in envelopes?"

Under Section 141-402 of the 1929 Compilation, tax notices may be forwarded by letter or postcard.

34. "After the period of redemption is over on property covered by tax sale certificates and property has been deeded to the state, can not this property be carried on tax rolls in the name of the State, thereby segregating this information and making a saving in notices of taxes due and delinquent?"

It is my belief this should be answered in the affirmative.

35. "Is it asking too much to request the Attorney General to furnish a concise manual of the laws pertaining to each office and when {\*141} each officer is sworn in, he must sign a receipt to the County Clerk for a copy of same?"

This can be done if the legislature will impose the duty upon the Attorney General and make an appropriation for the printing, publishing and preparation of the same. My office is not in a position to undertake this task under present conditions. However, a very complete manual can be purchased by the counties at this time from Mr. William Blaine of Raton, New Mexico, and I believe at a reasonable cost.

36. "How many amended complaints would an attorney be permitted to file in any one case in a civil action, before there would be an additional charge?"

A party may amend his pleadings at least once as a matter of course. Other amendments are discretionary with the court. I find no law requiring any additional fee.

37. "Under Chapter 222, of the 1937 Special Session laws of the State of New Mexico, Section 11, provided for the payment of Supervisors for the new created wind erosion districts. Since such was perfected after the last Budget hearing and there being no provisions set out in the 1937-38 budget for the payment for such Supervisors, just how are the Supervisors to be reimbursed for their services rendered under this act for the 26th Fiscal Year?"

It may be possible to secure a revision of the budget under Chapter 233 of the Laws of 1937. Such revision, however, must not result in increasing the **total** of the budgets of the county. All facts and request for such revision should be submitted to the State Comptroller.

The above and foregoing answers to your questions will, I trust, prove of some value to the county officials throughout the State.