PROBATE COURT: Records may be photostated and bound in book. Judge entitled to fee.

October 5, 1938

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Honorable Glendy B. Arnold
Judge of the Probate Court
St. Louis, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "I should like to have the opinion of your office upon the following question:
>
> "Under the statutes we are required to make a copy, to be a permanent record, of all wills, inventories, settlements and proofs of publication of notices which are filed in this Court in the progress of the administration of estates. This requirement is laid down by Sections 71, 77, 213 and 545 of the 1929 Revised Statutes of Missouri. Certain fees are charged for the making of these permanent records in accordance with Section 11782 of the Revised Statutes.
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> "The convenience and efficiency of this office would be greatly served in the event that we could make photographic copies of these instruments and bind them in book form as the permanent record. We desire to know if this procedure would comply with the requirements of the above Sections and whether we would be entitled to charge the fees provided for by Section 11782 if this method of recording was adopted."

Section 71, R. S. Mo. 1929, provides as follows:

> "The inventory, appraisement and affidavits shall be filed in the office of the clerk of the probate court within thirty days after letters granted, which shall be duly recorded by the clerk in a well-bound book to be kept by him for that purpose."

Section 77, R. S. Mo. 1929, provides as follows:

> "The clerk of said court shall carefully file and preserve such affidavits in his office, and shall record the same in a book to be kept by him for that purpose."

Section 213, R. S. Mo. 1929, reads as follows:

> "The clerk of the probate court shall provide well-bound books, and enter therein the accounts and settlements of all executors and administrators made in said court, in such manner as to form a complete record of all such accounts settled in that court."

Section 545, R. S. Mo. 1929, states that:

> "All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

The propriety of photographic recording has never been passed upon by the courts of Missouri although we have a statute which provides that when books or records are required to be rebound or transcribed into new books that photographic copies shall be deemed transcribing. However, the question has been before the courts of other jurisdiction.

The practice of filing photostatic copies of wills in probate courts has been approved in the Irish Free State.

In Lennon v. Gray, 1931 Irish Reports, page 374, the High Court of Ireland states:

> "Speaking on behalf of the Principal Registry in the Irish Free State, we believe that the system is satisfactory, so far as we are concerned, if it is carried out properly from the photostatic point of view."

In People ex rel. Armknecht v. Haas, 311 Ill. 164, 142 N. E. 549, it appeared that the Supreme Court of Illinois had before it a statute which provided as follows:

> "'Every recorder shall, as soon as practicable after the filing of any instrument in writing in his office, entitled to be recorded, record the same at length in the order of time of its reception, in well-bound books to be provided for that purpose.'"

The petitioners sought a mandamus to compel the recorder of deeds to copy a deed in writing in a well-bound book. It was alleged that the deed had been presented to the recorder, who made a photographic copy of it, added it to other similar copies, and then bound them in book form. The court held that the photographic record complied with the provisions of the statute. We quote at length from the opinion because of the similarity of the two cases:

> "'To record means to transcribe; to write an authentic account of; to preserve the memory of, by written or other characters; to enter in a book for the purpose of preserving

authentic and correct evidence of the thing recorded. Whatever the method used for recording, it is a record of the things recorded as long as it is a true and correct copy. The object of recording a deed is to give it perpetuity and publicity, and the two main requirements of a public record is that it shall be accurate and durable. * * * * * * * * * * * * * * * While the language used in sections 9 and 17 indicates that the legislature had in mind that the books would be bound before the instrument was copied, there is nothing in the statute which forbids the copying of the instruments on separate sheets and then binding these sheets into book form. Whatever method is used, it all comes to this: The record of the instrument from the time it is filed until it is recorded in a well-bound book is the entry book and the original instrument; after it is recorded in a well-bound book, and the book and page where the instrument is recorded are known, and the certificate of the recorder has been indorsed on the original instrument, the record is the page or pages in the book bearing the copy of the instrument. The recorder of deeds of Cook county is a county officer named in the Constitution. Every such officer not only has the authority, but is required by law, to exercise an intelligent discretion in the performance of his official duties. The law requires him to record certain instruments in a well-bound book, but it does not require him to record them by any particular method. As long as the method adopted by him is accurate and durable, he has performed his duty. While the courts can compel him to record instruments entitled to be recorded in well-bound books, they have

> no right to compel him to record them in any particular way. No argument is needed to demonstrate that photography is a much more accurate process of making a copy of an instrument than any other known method. It will show the instrument exactly as it is. The requirement of accuracy is fully complied with by this method. The record shows that prints properly made are as permanent as the paper on which they are made, and so the requirement of permanency is met. We are satisfied that no other known method of recording instruments is as accurate as the photographic method, that no practicable method excels it in permanency, and that in counties where the volume of instruments recorded is large, as it is in Cook county, no other method is as speedy and inexpensive. There being nothing in the law forbidding the recording of instruments by the photographic process, we hold that the recorder of deeds of Cook county has not abused the discretion with which he is clothed in recording the deed of petitioners as he has recorded it. This act complies with the requirements of the statute, and the instrument is legally recorded.'"

In Bennington v. Booth, 140 Atl. 157, the Vermont Supreme Court had before it the question of the propriety of photostatic recording under a statute which provided that the clerk should "record at length in books to be furnished by the town."

The court held at page 158:

> "* * * The statute does not require the use of any particular method of recording. Gen. Laws, section 3951. Any method, not otherwise unlawful, whereby

a record is produced which has all the characteristics required by law, may be used. New times have brought new methods, and, with the above limitation, the choice of the process is but the 'choice of the pen'-- a detail with which we will not attempt to interfere. See People ex rel. Armknecht v. Haas, 311 Ill. 164, 142 N. E. 549.

"The case shows that the photostatic copies are all legible. That some are more easily read than others has no effect upon their validity. Records made with pen and ink are well known to differ in that respect. They have perpetuity Not, to be sure, in the absolute sense of the word, for no one can believe that any of our paper records will last forever. But they have that attribute no less than it is possessed by records kept by a town clerk in handwriting or typewriting. * * * * * * * * * * * * *

"* * * If, within the meaning of the statute, the photostatic records are books, they lack nothing required by Gen. Laws, Section 3951. That they are books after they are bound is perfectly apparent. Before this has been done they are like the records considered in Munford v. Wardwell, 6 Wall. 423, 18 L. ed. 756. There it was held that the law requiring grants of lands to be registered or recorded in some book of record was complied with so far as the 'book' was concerned when the records were made on loose sheets, although those sheets were not actually bound into volumes until some later date. There can be no doubt that when the statute,

> which is now Gen. Laws, section 3951, was enacted, the Legislature contemplated the use of a blank book into which records could be copied. No other way was then known. The object of this statute, however, was to provide for the making of records; not for the use of some particular kind of book. It would, we think, be placing the emphasis on a comparatively inconsequential matter to hold that these photostatic records are invalid because they are made on sheets which are destined to be bound rather than on sheets which are already bound. While they are accumulating until numerous enough to be bound the sheets of photostatic records, within the meaning of our statute, constitute the current book of records."

While we may have seemed prolix in our quotations still the facts are so apposite and the reasoning so cogent that we have felt that the entire matter should be included.

The only thing that might militate against the legality of photostatic recording is Section 3260, R. S. Mo. 1929, which provides as follows:

> "Wherever the statute authorizes books or records to be rebound, or their contents transcribed into new books, or new indexes to be made, the making of photographic copies of said books, records or indexes shall be deemed transcribing and the binding together of such photographic copies shall be deemed rebinding of such records within the meaning of this chapter."

It might be argued that since the Legislature in this statute provided that photostatic copies would be sufficient transcription when it was necessary to transcribe or rebind records that when they omitted such provision

from the statutes dealing with recording in the first instance that they intended that the copies should be placed in the records in pen and ink or on the typewriter.

Section 3260, supra, is in pari materia with Sections 71, 77, 213 and 545, supra, because they are consistent statutes relating to the same subject matter. Sales v. Barber Asphalt Paving Company, 66 S. W. 979, 166 Mo. 671. It is a rule of statutory construction that where two acts in pari materia are construed together and one contains provisions omitted from the other, the omitted provision will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purposes of the act. 59 C. J. 1050; People v. Cowen, 119 N. E. 335, 283 Ill. 308.

Therefore, the fact that Section 3260, supra, allows photostats to be made of records strengthens the holding that photostatic recordings are proper and legal.

CONCLUSION

It is, therefore, the opinion of this department that the records required to be kept by the Probate Court by Sections 71, 77, 213 and 545, R. S. Mo. 1929, may be photostatic copies which may be bound into books and the fees allowed by Section 11782, R. S. Mo. 1929, may be claimed.

Respectfully submitted

ARTHUR O'KEEFE
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APPROVED:

J. E. TAYLOR
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