AFFIDAVITS: Army officers above the rank of lieutenant, and Navy officers above the rank of ensign, are authorized to take affidavits to a divorce petition of persons engaged in the military service of the United States outside of this State.

FILED
97

February 5, 1947

2/11

Honorable Sam Wilcox
Judge of the Circuit Court
St. Joseph, Missouri

Dear Sir:

This will acknowledge your recent request, based on the following facts:

> "A question has arisen with us as to whether or not military officers can take affidavits to divorce petitions of men in military service in foreign countries.
>
> "The only provision we find referable to affidavits and acknowledgments of such military officers are those found in Section 1948, R.S.M. 1939 under the heading of 'Depositions' and Section 3410-3411, Session Acts 1939, under the heading of 'Conveyances.'
>
> "We find that originally in the Session Acts of 191 at page 291 these two provisions were both included in an act entitled 'Depositions.' We are not able to find any direct authority for the taking of affidavits or acknowledgments other than as referred to under these headings of 'Depositions' and 'Conveyances.'
>
> "Thinking perhaps that you had had occasion to consider this matter or know of some provision which would clarify it is the occasion for writing you.

"Would you be kind enough to let us know your opinion as to whether or not these Session Acts are broad enough to permit the taking of affidavits by such military officers other than pertaining to depositions and conveyances.

"If you know of any other authority for the taking of such affidavits in divorce petitions by military officers we would be pleased to have you give it to us. Any opinion, or information, you have in this matter would be greatly approciated by us."

The only authorization to take affidavits of persons engaged in the military service of the United States when on duty outside of this country is contained in Sections 1948, 3410 and 3411, Mo. R.S. 1939. The revised statutes place Section 1948 under the general heading of "Depositions," and Sections 3410 and 3411 under "Conveyances." We think this revision has somewhat confused the original intent and purpose of these sections, and for that reason we have examined the original bill, Senate Bill No. 642, as it is set out in the Session Acts of 1919, page 291, same being as follows:

"(S. B. 642.)

"DEPOSITIONS: Providing for Taking Affidavits and Depositions of Persons Engaged in Military Service.

"AN ACT providing for the taking of affidavits and depositions without this state of persons engaged in military service of the United States.

"SECTION

1. Oath, affirmations and commissions to take depositions of persons in military service.

2. Acknowledgments to deeds by persons in military service.

3. Authority of officers to take affidavits and acknowledgments of persons in military service and certificate of authority.

4. Emergency.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. Oath, affirmations and commissions to take depositions of persons in military service. - Oaths, affirmations and commissions to take the deposition of any person without this state engaged in the military service of the United States may be executed before and by an officer in the said service above the rank of lieutenant; and of any person engaged in the naval service of the United States before any officer in that service above the rank of ensign; and affidavits and depositions of such persons so taken, if otherwise taken in accordance with law, shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions.

"Sec. 2. Acknowledgments to deeds by persons in military service. - The deed of any person without this state for the conveyance of real estate within this state, or for any other purpose, powers of attorneys, and other instruments requiring acknowledgments, may, if such person is engaged in the military service of the United States, be acknowledged before any officer in said service above the rank of lieutenant, and if such person is engaged in the naval service of the United States before any officer above the rank of ensign; and deeds, powers of attorney, and other instruments so acknowledged may be used and recorded in this state in the

same manner as if taken before any officer now authorized by the laws of this state to take such acknowledgments.

"Sec. 3. Authority of officers to take affidavits and acknowledgments of persons in military service and certificate of authority. - For the purpose aforesaid, the officers above named shall have the same power and authority to administer oaths and affirmations and take depositions, affidavits and acknowledgments of persons in the military or naval service of the United States in accordance with provisions of sections 1 and 2 of this act, as officers now authorized by the laws of this state for like purposes. The certificates of the officers referred to in sections 1 and 2 of their rank shall be prima facie evidence thereof.

"Sec. 4. Emergency. - The fact that a large number of persons from Missouri are now engaged in the military and naval service of the United States creates an emergency within the Constitution, and, therefore, this act shall take effect and be in force from the date of its passage.

"Approved May 26, 1919."

Authority for a consideration of the original act is found in a number of cases in this State, and in the case of State ex rel. Klein v. Hughes et al., 173 S.W. (2d) 877, l.c. 879, the court said:

"Relator answers that if respondents had looked behind the face of the statute at its underlying history, the fact would be indisputable that the first alternative is the one to be adopted. And it cannot be denied that one of the accepted canons of statutory construction permits and often requires an examination of the historical development of the legislation, including changes

> therein and related statutes. Grimes v. Reynolds, 94 Mo. App. 576, 584, 68 S.W. 588, 590, 184 Mo. 679, 688, 83 S.W. 1132; State ex rel. Columbia Nat'l Bank v. Davis, 314 Mo. 373, 388, 284 S.W. 464, 470 (7); Rust v. Missouri Dental Board, 348 Mo. 616, 623 (1), 155 S.W. 2d 80, 83 (1)."

The index and underlined portions of the original act, supra, are not a part of the title to this act, and it is this addition, plus the separation of the sections in the revision of 1919, that brings about the confusion or ambiguity in their intent or meaning. The Missouri Supreme Court has held that in construing an act such additions are to be ignored. In the case of Ex parte Lockhart, 171 S.W. (2d) 660, l.c. 663, the court said:

> "In his reply brief, petitioner says: 'It will be noted that both the index of Chapter 45 and the title of Section 8395 merely entitle it "Local Regulations," yet under Subsection (c) thereof it purports to authorize occupation taxes, etc., which are not expressed in the title,' and, therefore, that Section is unconstitutional because Article IV, Section 28, of the Missouri Constitution, Mo. R.S.A. Const., is violated.
>
> "The petitioner has evidently confused the catch words prefixed by the compiler of our Session Acts, which are not parts of the title in a constitution sense, (State ex inf. Crain v. Moore, 339 Mo. 492, 99 S.W. 2d 17) with the title to the act found in Laws of Missouri, 1935, p. 294, which reads: 'An Act to * * * *'"

The court has also held that the arranging of acts in the statute by the revision session does not operate to change the original intent and meaning. In the case of State ex rel. Sharp v. Knight, 26 S.W. (2d) 1011, l.c. 1015, the court said:

> "The question now to be determined is as to what effect upon the situation was

had when in 1879 the Legislature, for convenience in arrangement and codification, placed the change of venue statute in the chapter dealing with the General Code of Civil Procedure.

"We held in the case of Burrell Collins Brokerage Co. v. New York Cent. Ry. Co. (Mo. App.) 219 S.W. 105, that sections 1754, 1765, 1766 and 1767, covering the bringing of suits against corporations and service thereon, appearing in the General Code of Civil Procedure, which Code does not apply to suits in justice courts but to those in circuit courts, were applicable to suits before justices for the reason that prior to the revision of 1909 these sections appeared under the chapter dealing with private corporations and not in the one dealing with the Code of Civil Procedure, but were placed in the Code in the revision of 1909 as a matter of convenience and codification, citing State ex rel. v. Gantt, 274 Mo. 490, 505, 203 S.W. 964. The holding in that case as well as the Gantt Case is authority for the proposition that the mere arrangement or codification of the statutes by the Legislature, which under our Constitution now takes place every ten years, does not change the applicability of a particular statute as it stood when it was enacted. * * * *"

The true title to the act is, "AN ACT providing for the taking of affidavits and depositions without this state of persons engaged in military service of the United States." This title, we think, is very clear and definitely states that the act was intended to cover all affidavits and all depositions, and not limit the affidavits to those connected with the taking of depositions. In the case of Graves v. Purcell, 85 S.W. (2d) 543, l.c. 547, the court said:

"In determining the true meaning and scope of constitutional or statutory

> provisions, the intent and purpose of the lawmakers is of primary importance. This court has consistently held that the intent and purpose of the framers of our organic law in providing that 'no bill shall contain more than one subject which shall be clearly expressed in its title' was to limit the subject-matter of the bill to one general subject and to afford reasonably definite information to the members of the General Assembly and the people as to the subject-matter dealt with by the bill. City of Kansas v. Payne, 71 Mo. 159, loc. cit. 162; State ex rel. v. Walker, 326 Mo. 1233, 34 S.W. (2d) 124, loc. cit. 131. * * * *"

In construing the words in Section 1 of the act, wherein it states: "Oaths, affirmations and commissions to take the deposition * * * and affidavits and depositions of such persons so taken * * * shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions," (underscoring ours) we have concluded that they embrace affidavits of any character, except those concerning real estate conveyances and other instruments relating thereto which are provided for in Section 2 of the act.

Section 3 of the act not only refers to Section 2, but as originally enacted refers to both Sections 1 and 2. We think the authorization and powers of a military officer, as provided by Section 3, to take affidavits, oaths, affirmations, acknowledgments and depositions is broad enough to and does include affidavits to divorce petitions. Reading the three sections of the bill as originally enacted together with the title, it seems apparent that the Legislature intended to vest army officers above the rank of lieutenant and navy officers above the rank of ensign with sufficient power to take oaths, affirmations, acknowledgments and affidavits in any case where they are necessary, in addition to the taking of depositions.

The separation of these sections and the addition of explanatory indexes or unofficial titles tends to confuse the real intent of the Legislature and at first blush seems to limit them to depositions and conveyances, but upon a

consideration of the definition of an affidavit, and the distinction between an affidavit and a deposition as stated in 2 C.J.S., Section 1 (Affidavits), the revision session may not have been far wrong in placing Section 1 of the act under the general heading of "Depositions" in the Revised Statutes. 2 C.J.S., Section 1, page 922, provides:

> "At common law, generally, an affidavit is defined as being a declaration in writing, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath, or in words to the same effect. * *
>
> "Ordinarily, in legal terminology, affidavits are distinguished from depositions in that they are taken ex parte, voluntarily, without notice to the adverse party, and without opportunity for cross-examination. So, although ordinarily a deposition may be used in place of an affidavit, the converse of the proposition does not follow unless a statute so provides. However, when and to the extent that affidavits are included in the term 'deposition' used in its generic sense, the terms 'affidavit' and 'deposition' may be employed synonymously. * * *"

In 1 Am. Jur., Sections 2 and 3 (Affidavits), page 934, it is stated:

> "An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. It is made without notice to the adverse party and without opportunity to cross-examine. In fact, the statutes frequently define an affidavit as 'a written declaration under oath, made without notice to the adverse party.'
>
> "In common parlance, the terms 'affidavit' and 'deposition' are often used synonymously; there is, however, a well-defined distinction between them which is generally

> recognized. A deposition, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in response to interrogatories, oral or written, with an opportunity for cross-examination. An affidavit is a voluntary statement made ex parte, without notice to the adverse party or an opportunity to cross-examine. Depositions, on the other hand, are taken only after notice, whereby the adverse party is given an opportunity to cross-examine the witness concerning the subject-matter. Moreover, the giving of a deposition may be compelled, so that it is not, in all instances at least, a voluntary statement."

Based upon these definitions and distinctions, it seems that a deposition occupies a position of greater import than does an affidavit. As a matter of argument in support of our conclusion, it could be said that a construction of this act denying the power of a military officer to take an affidavit to a divorce petition, but allowing him the power to take depositions or evidence in the case, would seem rather inconsistent.

It will also be noted that Section 1515, R.S. Mo. 1939, requiring the affidavit to a divorce petition, does not order or direct that the affidavit be made before or taken by any particular officer. In this connection Section 1085, R.S. Mo. 1939, provides:

> "Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

We have also considered the case of Kumpe v. Gee (Texas), 187 S.W. (2d) 932, in which the court was construing the

application of notarial powers granted army officers under Section 1586, Title 10, U.S.C.A., and naval officers under Section 217a-1, Title 34, U.S.C.A. The court ruled that an affidavit to a divorce proceeding taken under the powers given officers by Congress was insufficient, but Texas did not have statutes granting power to officers to take the affidavits, as does Missouri, and we think that case would not be applicable.

Conclusion.

It is therefore the opinion of this department that Sections 1948, 3410 and 3411, R.S. Mo. 1939, authorize and empower army officers above the rank of lieutenant and navy officers above the rank of ensign to take the affidavit to a divorce petition of persons engaged in the military service of the United States outside of this State.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml