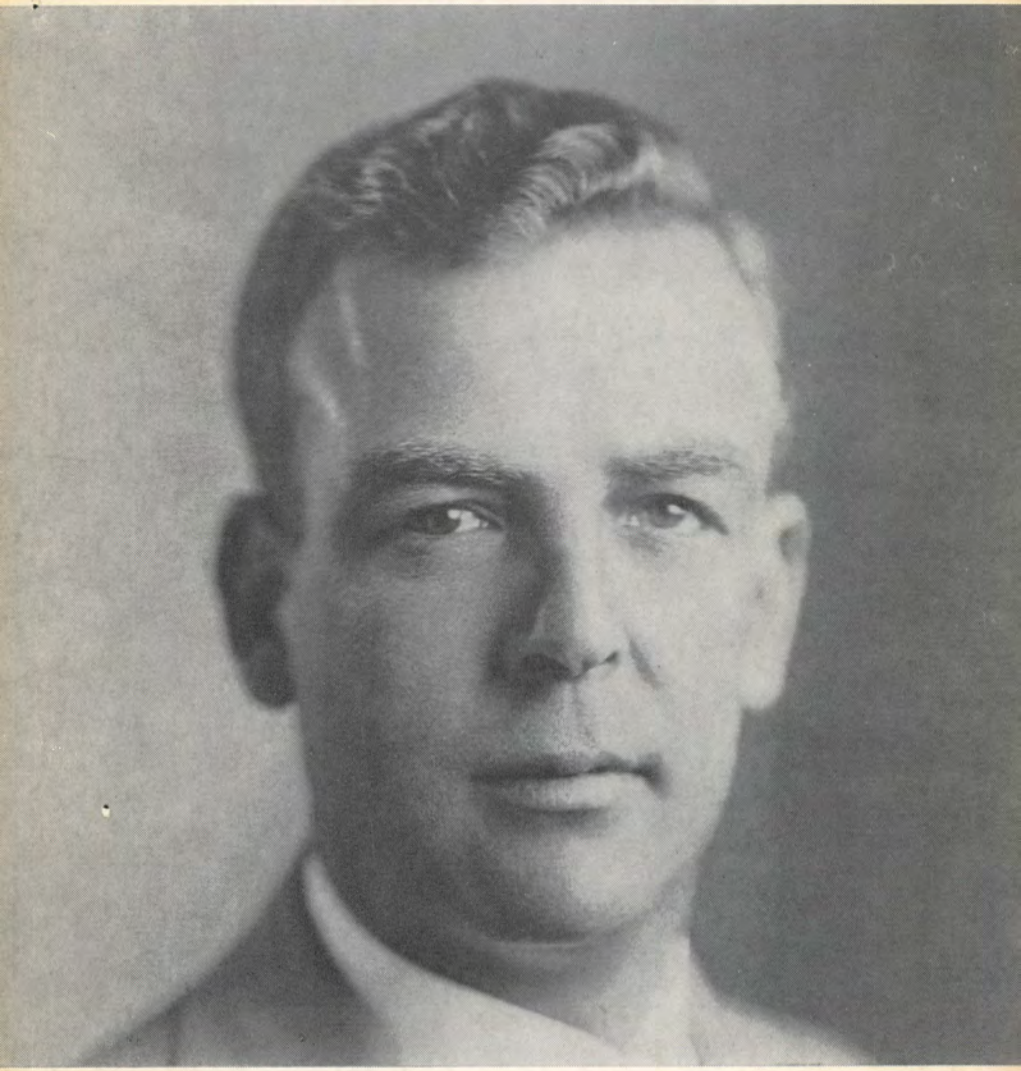
TITLE NEWS

THE OFFICIAL PUBLICATION OF THE
AMERICAN LAND TITLE ASSOCIATION ®



OCTOBER, 1965

PRESIDENT'S MESSAGE

October, 1965

Dear Friends in the Title Profession:

As this issue of *Title News* goes to press, the 59th Annual Convention is about to begin. Many of you will be in attendance in Chicago, and I will have the opportunity to meet and talk with you personally.

To those of you who for one reason or another cannot attend the Convention, I will wish to express my deep sense of gratitude and pleasure at being permitted to serve as President of the American Land Title Association.

In this my final message to you as President of the American Land Title Association, I pay tribute to the splendid titlemen and women who have worked so constructively and faithfully as officers and committee members, and to the ALTA staff for all of the assistance I have received during the past year.

Sincerely,

Joseph S. Knapp, Jr., President
American Land Title Association

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FEATURES

DEPARTMENTS

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ON THE COVER: It is fitting that the cover of this month's issue of Title News depicts an eternally vigorous and youthful past president of ALTA, for the Ice Breaker Reception Sunday evening, October 3, is dedicated to past presidents; and Mortimer Smith is being honored at the Annual Convention as an honorary member of the Association.

JAMES W. ROBINSON, *Editor*
FRANK H. EBERSOLE, *Assistant Editor and Manager of Advertising*

Mechanics' Lien Waivers and the Requirement of Consideration

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RULE THAT A MECHANIC'S LIEN CLAIM WAIVER MUST BE SUPPORTED BY CONSIDERATION

The general rule that the digests lay down is that the waiver of a mechanic's lien claim must be supported by consideration.[1] Examination of the decisions reveals that the rule is well supported by the authorities.[2] Surprisingly, however, the decisions seem to be totally devoid of any reasoning indicating why the pres-

[1] 36 AM. JUR. *Mechanics' Liens* § 200 (1941); 57 C.J.S. *Mechanics' Liens* § 223 (1948).

[2] Plunkett v. Winchester, 98 Ark. 160, 135 S.W. 860 (1911); Kelley v. Johnson, 251 Ill. 135, 95 N.E. 1068 (1911); McCorkle v. Lawson & Co., 259 S.W.2d 27 (Ky. 1953); Taylor v. Fuller, 162 Ky. 568, 172 S.W. 959 (1915); Colvin Lumber & Coal Co. v. J. & G. Corp., 260 Minn. 46, 109 N.W.2d 425 (1961); Home Supply Co. v. Ostrom, 164 Minn. 99, 204 N.W. 647 (1925); Abbott v. Nash, 35 Minn. 452, 29 N.W. 65 (1886); Giammarine v. J. W. Caldewey Constr. Co., 72 S.W.2d 159 (Mo. App. 1934); Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co. 101 N.E.2d 408 (C.P., Hamilton County, Ohio 1950); Eason Oil Co. v. M. A. Swatek & Co., 169 Okla. 170, 36 P.2d 504 (1934); Brimwood Homes, Inc. v. Knudsen Builders Supply Co., 385 P.2d 982 (Utah 1963).

ence of consideration is indispensable to the validity of a mechanic's lien waiver. [3]

The assumption seems warranted that the courts feel that they are applying some general principle of contract law. Thus, in Kelley v. Johnson, [4] the court said:

> Clearly, if a lien can be waived in the original contract, it can be subsequently waived, for a valuable consideration, as between the original parties. The right to modify a contract as between the original parties, so long as there are no intervening rights, involves the exercise of the same power as does execution of the original contract.

One immediately encounters, in consequence, two questions the courts have left unanswered, namely: (1) Does the waiver of a mechanic's lien call into play principles of contract law relating to consideration, or are we dealing, rather, with the voluntary extinguishment of a property right? (2) Even if considerations of contract law are relevant, is the waiver of a right, as distinguished from the formation of a valid contract, such a transaction as requires a consideration under the modern law of contracts, especially as it has been up-dated by the Uniform Commercial Code?

Important policy factors require that subcontractors and materialmen be bound by their waivers regardless of the presence or absence of consideration. [5] When a mortgage banker undertakes to disburse the proceeds of a construction loan, he must, of course, take steps to safeguard the priority of his mortgage lien against mechanics' liens that may arise during the course of construction. If he proceeds with due care he will disburse the funds in various stages as the building goes up. On big jobs disbursements are often made monthly during the year, often longer, so that construction goes forward. As each disbursement is made, the general contractor will demand lien waivers from each subcontractor and materialman he pays. Moreover, in some states he will demand from each subcontractor (plumber, electrician, and so on) an affidavit as to possible "sub-contractors" with whom the subcontractor has dealt. This last requirement is intended to elicit the possible presence of unpaid material suppliers, from whom the mortgage banker must also solicit waivers. [6] The resulting bundle of documents is apt to be formidable. One such file, taken by

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[3] In Abbott v. Nash, *supra* note 2, all the court said was: 'The writing which is claimed to waive or release plaintiff's lien right does not appear to be supported by any consideration, and is therefore ineffectual." The same court twice followed the general rule without offering any other reason that the precedent of the *Abbott* case. See Home Supply Co. v. Ostrom, *supra* note 2, and Colvin Lumber and Coal Co. v. J. & G. Corp., *supra* note 2. Many courts have given no reason at all for following the general rule except the authority of *Cyc.*, *C.J.*, and *C.J.S.* In Giammarine v. J. W. Caldewey Constr. Co., *supra* note 2, and in Easton Oil Co. v. M. A. Swatek & Co., *supra* note 2, for example, two courts followed the general rule solely on the authority of 40 C. J. *Mechanics' Liens* 314 (1926). In Connecticut Gen. Life Inc. Co. v. Birzer Bldg. Co., *supra* note 2, an Ohio court refused to follow an Ohio precedent, giving as its only reason that it preferred the rule set forth in *C.J.S.*

[4] *Supra* note 2. See also A. J. Yawger & Co. v. Joseph, 184 Ind. 228, 108 N.E. 774 (1915).

[5] It has been said that the mechanic's lien laws constitute one of the principal impediments to individual home ownership in this country. Stalling, *The Need for Special Simplified Mechanics' Lien Acts Applicable to Home Construction*, 5 LAW & CONTEMP. PROB. 592 (1938).

[6] D'Antonio Plumbing & Heating Co. v. Strollo, 172 N.E.2d 484 (Ohio App. 1959). Most of the litigation involves subcontractors rather than general contractors and a good deal of it involves material suppliers.

the writers at random, contained 166 documents. The burden of preparing this mass of papers is a heavy one. It entails substantial costs and expenses that are reflected in the contract price quoted for the job. How does the requirement of consideration for lien waivers affect this situation?

In the first place, the general contractor, traditionally undercapitalized, often lacks the funds to make the periodic payments to subcontractors. So as a progress payment is due, the general contractor goes to the subcontractors and solicits their lien waivers, often giving them post-dated checks in payment. The lien waivers recite payment of full consideration. Actually no payment has been made. *After* he has received disbursement from the mortgage lender, the general contractor has funds, deposits them in the bank, and the post-dated checks will clear. If, however, the general contractor diverts the funds received to another account that is more pressing, the checks will be dishonored, and the subcontractors who have given lien waivers reciting receipt of payment will nevertheless file mechanics' lien claims and seek to foreclose. Counsel must be retained to defend these suits. Sometimes the defense succeeds, sometimes it fails. If it fails, often as not it does so because the court finds that the waiver was given without actual receipt of consideration and must therefore be held void. This is an experience altogether too commonplace. Almost every mortgage banker has had such an experience.[7] Even if he is willing to run the risks involved in making disbursement to the general contractor in reliance on lien waivers instead of making disbursement directly to the subcontractors, the mortgage banker must exercise special care in scrutinizing this mass of documents, for under the usual rules of inquiry-notice any statement in any document indicating that the subcontractors remain unpaid may invalidate the entire mass of documents.[8]

To avoid the risk and trouble this situation tends to create, many mortgage bankers insist on disbursing directly to the subcontractors. That way they can be certain that the subcontractors ac-

[7] That mortgagees suffer losses because of Mechanic's Liens is attested to by the extensive annotation in 80 *A.L.R.*2d 179 (1961). Many cases discussed therein reveal that the mechanic's lien claimant has often contended successfully for priority of lien. Dishonored checks are commonplace in such situations. *E.g.*, Eason Oil v. M. A. Swatek & Co., 169 Okla. 170, 36 P.2d 504 (1934). Where the mortgagee has successfully contended for priority, the loss has often fallen on the mortgagor, who through some technical noncompliance with the rigid requirements of the mechanic's lien law has been compelled to pay to the subcontractor a bill he has already paid in good faith to the general contractor.

[8] Knowledge of a fact gives constructive notice of all material facts which further inquiry suggested by the fact would have disclosed. One learning of a fact is chargeable with notice of all that he would have learned if he had pursued his inquiry to the full extent to which it led. Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 Pac. 949 (1923). Lien waivers often contain crude and cryptic notations such as "Not to be used until funds are available for payment." Such statements may well put the mortgage lender on notice that the lien waivers are in fact not supported by consideration. This may well destroy the defense of estoppel, which has occasionally been invoked to protect the mortgage lender where consideration has been lacking. 65 A.L.R. 282, 317 (1930). The notion has occasionally been entertained that consideration is present because of the detriment suffered by the landowner or mortgagee in making payment to the general contractor. McLellan v. Mamernick, 118 N.W.2d 791 (Minn. 1962). This is a plausible theory but ignores the basic proposition that consideration has no place at all in the solution of the problem.

tually receive payment and that consideration is given for each lien waiver presented. When one considers the number of subcontractors involved in any substantial construction job, one can readily understand how much clerical help and floor space the mortgage banker must devote to this pointless ceremony. To what purpose? The subcontractor, an adult person of sound mind, has said, "I have waived my lien." Why should a court say such a waiver is valid only if paid for? Not one case of all those examined has offered one word of explanation. All that one finds is banal reiteration of the statement that consideration is necessary.

THE MECHANIC'S LIEN CLAIM AS A PROPERTY RIGHT—EXTINGUISHMENT WITHOUT CONSIDERATION

While it has occasionally been said that consensual liens are contract rights,[9] this view is manifestly inapplicable to mechanics' liens. They are purely the creature of statute.[10] True the general contractor has his in personam contract rights against the landowner, and the subcontractor has his in personam contract rights against the general contractor, but the lien itself is a property right in a specific tract of land.[11] The mechanic's lien claimant is universally required to file some notice of his claim[12] which is usually filed in the land records.[13] The mechanic's lien has all the earmarks of a property right in land.

The mortgage lien provides a useful analogy for scrutiny of the mechanics' lien. Like a mortgage, a mechanic's lien is a security interest in land and therefore a property right.[14] True, the mechanic's lien owes its existence to a statute while a mortgage lien is created by the voluntary act of the parties, but, apart from this difference, and particularly in states that follow the lien theory of mortgages,[15] they are quite s i m i l a r in many respects. They are enforced in many states through identical judicial foreclosure proceedings, and in many states an identical period of redemption follows the foreclosure sale.[16] Jurisdiction over defendants who cannot be served personally is obtained by publication[17] as in proceedings in rem or

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[9] Peck v. Jenness, 48 U.S. (7 How.) 611, 619 (1849).

[10] 36 Am. Jur. *Mechanics' Liens* § 123 (1941); 4 American Law of Property § 16.106F (Casner ed. 1952); 57 C.J.S. *Mechanics' Liens* § 1 (1948); 5 Tiffany, Real Property § 1575 (3rd ed. 1939).

[11] Armstrong v. U.S. 364 U.S. 40 (1960); Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d 844 (1963).

[12] 36 Am. Jur. *Mechanics' Liens* § 123 (1941); 57 C.J.S. *Mechanics' Liens* § 131 (1948); 5 Tiffany, Real Property § 1579 (3rd ed. 1939).

[13] 57 C.J.S. *Mechanics' Liens* § 138 (1948).

[14] In Re Pennsylvania Cent. Brewing Co., 135 F.2d 60, 63 (3rd Cir. 1943); In Re Pennsylvania Brewing Co., 114 F.2d 1010, 1013 (3rd Cir. 1940); Britton v. Western Iowa Co., 9 F.2d 488, 490 (8th Cir. 1925); In Re Lexington Applicance Co., 185 F.Supp. 235, 238 (D. Md. 1960); Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d 844 (1963); Hollingsworth v. Dow, 36 Mass. (19 Pick.) 228, 230 (1837); People v. Sheriff, 275 App. Div. 444, 90 N.Y.S. 2d 848, 850 (1949); Young v. J. A. Young Mach. & Supply Co., 203 Okla. 595, 224 P.2d 971, 973—74 (1950); National Cash Register Co. v. Stockyards Cash Market, 100 Okla. 150, 228 Pac. 778, 780 (1924); Creosoted Wood Block Paving Co. v. McKay, 211 S.W. 822, 823 (Tex. Civ. App. 1919); 73 C.J.S. *Property* § 1, at 139—40 (1951).

[15] See Osborne, Mortgages, 31 (1951).

[16] 57 C.J.S. *Mechanics' Liens* § 263 (1948); 5 Tiffany, Real Property § 1579 (3rd ed. 1939).

[17] 57 C.J.S. *Mechanics' Liens* § 287 (1948)

quasi in rem. Where a superior lien is foreclosed, a junior mechanic's lien claimant must be made a party because he has an interest in the property.[18] The conclusion is inescapable that, like a mortgage lien, the mechanic's lien is truly a property right.

Since the lien is a property right, it is interesting to speculate as to the propriety of applying the doctrine of consideration in considering the validity of waivers of mechanics' liens. If the mechanic's lien is a property right, only a brief glance at history is needed to assure us that its kindred in the family of real property rights, with their ancient feudal antecedents rooted in England's agricultural past, were c r e a t e d and extinguished for hundreds of years before the comparatively m o d e r n doctrine of consideration gained acceptance in the comparatively modern law of contracts. Contract law developed as England grew into a trading and manufacturing country and then had need for a law of contracts. Obviously property rights had been created and extinguished by deeds, g r a n t s, mortgages, leases and releases for hundreds of years without benefit of recourse to notions of consideration and the same is true today.[19]

Turning again to the analogous mortgage lien, we find that it is sometimes said that a mortgage requires c o n s i d e r a t i o n.[20] This, of course, is nonsense, for mortgages were well understood long before anyone heard of consideration.[21] A mortgage cannot exist without a *debt*. But to say that a mortgage cannot exist without a debt is far from saying that *consideration* is required for the creation of a valid mortgage. If A borrows $10,000 from B on an unsecured note in 1962, A can give a mortgage to B in 1963 as security for the note without a shred of consideration entering into the mortgage transaction.[22] In short, a mortgage need not be supported by consideration and the well-considered authorities so state.[23]

Since these formidable documents, deeds and mortgages, need not be supported by consideration, the rights they create can also be extinguished without the benefit of consideration. If A makes a gift of land to B, it is certainly an elementary proposition that B can make a deed of gift of the same land to A. And if A has given B a mortgage to secure A's antecedent debt, B can make a gift of the mortgage and note to A, and the mortgage will be destroyed by merger.[24] Gifts of choses in ac-

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[18] 36 AM. JUR. *Mechanics' Liens* § 250 (1941); 57 C.J.S. *Mechanics' Liens* § 284 (1948).

[19] A deed conveying fee simple title may be given without consideration. 16 AM. JUR. *Deeds* § 57 (1938); 3 AMERICAN LAW OF PROPERTY § 12.43 (Casner ed. 1952); 26 C.J.S. *Deeds* § 16 (1956); 2 PATTON TITLES § 340 (2d ed. 1957); 6 POWELL, REAL PROPERTY § 893 (1958); 4 TIFFANY, REAL PROPERTY § 984 (3rd ed. 1939). Easement grants do not require consideration. 28 C.J.S. *Easements* § 24. A life estate may be given away. 1 TIFFANY, REAL PROPERTY, § 59 (3rd ed. 1939). No consideration is required for the creation of future interests in land. 4 SIMES & SMITH, FUTURE INTEREST § 1866 (2d ed. 1956). In fact, in the majority of instances, future interests are created by donative conveyances. 3 RESTATEMENT, PROPERTY § 241, comment d (1940).

[20] See 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939) for some cases so holding.

[21] *Ibid.*

[22] 36 AM. JUR. *Mortgages* § 106 (1941); 59 C.J.S. *Mortgages* § 91 (1949); 3 POWELL, REAL PROPERTY § 444 (1952); 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939).

[23] AMERICAN LAW OF PROPERTY § 16.67 (Casner ed. 1952); 59 C.J.S. *Mortgages* § 87 (1949); 1 GLENN, MORTGAGES § 5.6 (1943); OSBORNE, MORTGAGES § 107 (1951); 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939).

[24] OSBORNE, MORTGAGES 759 (1951).

tion are universally recognized.[25] And it is perfectly obvious that, under the doctrine of executed gifts, a gift of a mortgage by the mortgagee to the mortgagor is of unquestioned validity.[26]

In the termination of property rights, it has never been thought that consideration is necessary. The authorities tell us that a contingent remainder may be released to the owner of the estate in possession or remainder,[27] a condition in a deed may be released,[28] a life estate may be released to the remainderman or reversioner,[29] and an easement may be extinguished by a release thereof.[30] Never has it been suggested that any of these transactions require consideration. One seeks in vain for authority that a vested remainder, contingent remainder, life estate, right of entry, possibility of reverter, or leasehold estate can be created or extinguished only if consideration is present. In short, the doctrine of consideration rarely intrudes into the solution of questions of property law, and historically, this is entirely as it should be.

We must now ask ourselves why, in legal theory, a consideration must exist for the valid extinguishment of a property right such as a mechanic's lien. To ask the question is to answer it. If the fee title to the land can pass or a mortgage lien be created or extinguished without consideration, then a mechanic's lien, which is certainly of no greater dignity, ought to be subject to the same rules. Since a mechanic's lien is a security interest, a property right in land, it is governed by rules of property law, not contract law, and no logical reason exists why the doctrine of consideration should be invoked.

All this is not to suggest the impropriety of superimposing contract theory upon property law. To the contrary, when this is done upon reflection and with the deliberate purpose of freeing property law from ancient fetters and introducing some practical contract considerations, this is a highly desirable evolutionary process that is taking place today. For example, where a tenant under a lease abandons the premises, the ancient property learning teaches us that since he is vested with his estate for years until its termination, the landlord may continue to collect rent for the balance of the term.[31] The better modern cases borrow from contract theory and teach us that the landlord has a duty to

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[25] Delivery by the creditor to the debtor of an executed satisfaction of an indebtedness constitutes a good gift of the chose in action. BROWN, PERSONAL PROPERTY 206 (2d ed. 1955). A good illustration is the rule that no consideration is necessary to support an agreement reducing rent where the reduced rent has been accepted and rent receipts have been given. 32 AM. JUR. *Landlord and Tenant* §§ 153, 439 (1941); 52 C.J.S. *Land'ord and Tenant* § 503 (1947); 1A CORBIN, CONTRACTS (1963) § 184.

[26] 37 AM. JUR. *Mortgages* § 1216 (1941); 5 TIFFANY, REAL PROPERTY § 1454 (3rd ed. 1939).

[27] 2 TIFFANY, REAL PROPERTY § 341 (3rd ed. 1939).

[28] 26 C.J.S. *Deeds* § 158 (1956); 1 TIFFANY, REAL PROPERTY § 204 (3rd ed. 1939).

[29] 1 AMERICAN LAW OF PROPERTY § 2.17 (Casner ed. 1952); 1 TIFFANY, REAL PROPERTY § 59 (3rd ed. 1939).

[30] 17 AM. JUR. *Easements* § 160 (1938); 2 AMERICAN LAW OF PROPERTY § 8.95 (Casner ed. 1952); 28 C.J.S. *Easements* § 61 (1941); 3 TIFFANY, REAL PROPERTY § 824 (3rd ed. 1939).

[31] 32 AM. JUR. *Landlord and Tenant* § 517 (1941); 1 AMERICAN LAW OF PROPERTY § 3.99 (Casner ed. 1952); 52 C.J.S. *Landlord and Tenant* § 497 (1947); 3 TIFFANY, REAL PROPERTY § 902 (3rd ed. 1939).

mitigate damages.[32] But this is far from saying that *all* contract law is applicable to *all* property law. Obviously an eclectic approach is indicated, so that those contract doctrines that promote justice can be incorporated into the body of property law and those that do not are not so incorporated. We thus have a workable formula for determining whether the doctrine of consideration should be applied to a voluntary waiver or release of property rights. Is justice promoted when this is done?

Whatever validity remains in the requirement of consideration where one is considering the formation of a legally enforceable contract, it is certainly relevant to inquire by what right this notion intrudes into questions of the validity of the release of a statutory lien, particularly the lien of a subcontractor who has no contractual relation whatever with the landowner. Conceptually the requirement is completely indefensible. One is therefore driven to probe into the unspoken policy factors that lie beneath the assertion that mechanics' lien waivers must be s u p p o r t e d by consideration. It seems almost certain that the unspoken theory holds to the view that the mortgage lender is better able to bear the loss, and, indeed, can recoup his loss by charging more i n t e r e s t on future loans, while the plumber, electrician, or mason is not so fortunately situated. The fallacy of this line of reasoning is o b v i o u s. The mortgage interest rate is made in the market place, and the misfortune of particular m o r t g a g e lenders have no impact upon it. Moreover, the ends of justice are not served by reaching into the pockets of the mortgage l e n d e r. One who furnishes lienable work or material but is not paid has a clear and simple statutory remedy, namely, to file his mechanic's lien claim immediately. When instead of doing so, he chooses to give the general contractor a lien waiver, his motives require inspection. Many general contractors work with the same crew of subcontractors on job after job. When the general contractor solicits a lien waiver from an unpaid subcontractor so that he can draw down the mortgage m o n e y, the subcontractor makes a clear and deliberate decision when he complies with the request. He has decided to trust the general contractor, knowing that if he does not do so, some other subcontractor may replace him on the next job. When the general contractor, under pressure from earlier and more impatient creditors, diverts the loan proceeds to other c h a n n e l s, the trusting subcontractor is disappointed and files his notice of lien. What claim does he have upon the chancellor's conscience? An adult person of sound mind has made a deliberate decision with full awareness of its implications.[33] To rescue him from

[32] 32 Am. Jur. *Landlord and Tenant* § 519 (1941); 1 American Law of Property § 3.99 (Casner ed. 1952); 52 C.J.S. *Landlord and Tenant* § 498 (1947); 3 Tiffany, Real Property § 902 (3rd ed. 1939).

[33] Pittsburgh Plate Glass Co. v. Art Center Apartments, 253 Mich. 501, 235 N.W. 234 (1931). In some parts of the country, for example, in Virginia, where the mechanic's lien law is unfavorable to mortgage lenders, it is customary for the general contractor to procure a waiver of mechanic's lien signed by all the subcontractors before any construction has begun. Nothing could more eloquently attest the confidence these subcontractors repose in the general contractor. These subcontractors would certainly be surprised to learn that many courts view this act of faith as an empty gesture.

the consequences of his bad judgment at the expense of a mortgage lender who has no part in his folly seems to the authors a far cry from justice.

THE REQUIREMENT OF CONSIDERATION VIEWED IN THE CONTEXT OF CONTRACT LAW

Even were it to be conceded (improperly, as the authors feel) that mechanics' liens can find some appropriate niche in the area of contract law, a brief glance at the doctrine of consideration in the perspective of history certainly seems in order. One must also inquire into the credentials and current status of the doctrine, into its applicability to waiver, and into the impact of the Uniform Commercial Code upon the problem.

The doctrine of consideration had its origin long after England had emerged from feudalism. The word "consideration," when used in connection with the law of contract, had not acquired a technical meaning in the earlier half of the sixteen century.[34] It was not until the latter half of that century that pleaders began using the word "consideration" to introduce the facts upon which they relied to make promises enforceable by assumpsit.[35] The very existence of the requirement of consideration in contract formation was in doubt until relatively modern times. As recently as 1765, Lord Mansfield, in *Pillans v. Van Mierop*,[36] propounded the view that consideration was only of evidentiary value and that therefore, if an agreement were in writing, whether under seal or not, consideration was unnecessary. A few years later, in 1778, *Pillans v. Van Mierop* was overruled in *Rann v. Hughes.*[37] Although the existence, in contract formation, of the requirement of consideration could not be questioned after *Rann v. Hughes*, the nature of this doctrine was not finally settled until the mid-nineteenth century. Lord Mansfield identified the doctrine of consideration with moral obligation.[38] The view that a merely moral obligation was a sufficient consideration grew and flourished.[39] It was an accepted view until authoritatively rejected in *Eastwood v. Kenyon*[40] in 1840. And since the first mechanic's lien law was enacted in 1791,[41] it is evident that the earliest mechanics' lien waivers were executed before the doctrine of consideration has become crystallized.

There is good reason to believe that changes in the doctrine of consideration will continue to evolve. This doctrine was built up

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[34] 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 5 (1926).

[35] *Id.* at 6.

[36] 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

[37] 7 Term Rep. 350n4 Poro. Parl. Case 27, 191 Eng. Rep. 1014 (H.L. 1778). See Lorenzen *Causa and Consideration in The Law of Contracts*, 28 YALE L.J. 621, 636-37 (1919). It is not without significance that *Rann* v. *Hughes* caused not a ripple in mortgage circles. The firming up of the notion of consideration in contract law must have completely escaped the notice of the mortgage bankers, probably because they did not dream it had any application to their business.

[38] Hawkes v. Saunders, 1 Cowp. 289, 98 Eng. Rep. 1091 (1782). Although Lord Kenyon overruled the actual decision in *Hawkes v. Saunders* in Deeks v. Strutt, 5 Term Rep. 690, 101 Eng. Rep. 384 (K.B. 1794), he did not deny the sufficiency of a moral obligation to support a promise.

[39] 8 HOLDSWORTH, *op. cit. supra.* note 1, at 30.

[40] 11 A. & E. 438, 52 Rvsd. Rep. 400 (1840).

[41] 4 AMERICAN LAW OF PROPERTY § 16. 106F (Casner ed. 1952).

in the process of determining what promises should be enforced, and it is still building.[42] Such developments as the statutory abolition of the seal in many jurisdictions may well cause courts to revise their views as to what promises should be enforced. At common law, a contract right could be created or released by an instrument under seal without any consideration.[43] Now, many states have altered the common law of sealed instruments by legislation.[44] Such changes have created a gap in the law of contracts which previously provided a means by which, without consideration, an intentionally voluntary promise could be made binding or by which a contract right could be voluntarily extinguished.[45] Efforts to fill the gap have proven largely unsuccessful.[46] It is significant, however, that in some states in which the seal has been abolished, by statute, supplementary legislation has already been enacted providing that a written release shall be effective without consideration and that a promise in writing shall be enforceable in the absence of affirmative proof that there was no consideration for it.[47] In view of both the gap created by the statutory abolition of the seal and of the legislation already enacted in an attempt to fill that gap, it would seem reasonable to expect more such supplementary legislation in the future. It is also reasonable to expect that as the need becomes more apparent courts will also attempt to fill the gap.

Although the notion that the presence of consideration is necessary to the validity of a contract has been vigorously attacked, especially in modern times,[48] this is not the place to embark upon any prolonged discussion of this controversy. One may concede that some case can be made for such a requirement where the court is to be called upon and set in motion for the enforcement of the rights created by contract. However, where a party to a valid contract,

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[42] 1 CORBIN, CONTRACTS § 122, at 377-78 (1963).

[43] 10. *Id.* § 252; 1 WILLISTON, CONTRACTS § 219 (3rd ed. 1957).

[44] 1 CORBIN, *op. cit. supra* note 10, § 254; 1 WILLISTON, *op. cit. supra* note 11, § 219A. Learned Hand viewed this development as unfortunate. James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

[45] 1 WILLISTON, *op. cit. supra* note 11, § 219.

[46] *Id.* § 219.

[47] 1 CORBIN, *op. cit. supra* note 10, § 254. For examples of such legislation, see CAL. CIV. CODE § 1541, and comment thereon in 12 HASTINGS L.J. 377 (1961); MICH. STAT. ANN. § 26.978(1); N.Y. REAL PROPERTY LAW § 279(1). Also see the MODEL WRITTEN OBLIGATIONS ACT as adopted in Pennsylvania.

[48] Contracts were enforced at common law long before the doctrine of consideration was invented. 1 CORBIN, *op. cit. supra* note 10, § 252. Modern students of the doctrine of consideration have suggested that contracts should now be enforced even though they are not supported by consideration. Thus Markby states that it is impossible to apply the doctrine of consideration as a test of legal liabi ity with consistency and justice. MARKBY, ELEMENTS OF LAW 315 (6th ed. 1905). Salmond suggests that no ill results would occur if the doctrine of consideration were abolished. SALMOND, JURISPRUDENCE 374 (Manning 8th ed. 1930). Holdsworth concurs in Lord Mansfield's view that consideration should be treated simply as a piece of evidence. 8 HOLDSWORTH, *op. cit. supra* note 34, at 47. Lorenzen contends that the doctrine of consideration can only be explained historically and that there is no rational reason for it. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919). Llewellyn characterizes consideration as a "vast, sprawling field with parts of its roots hopelessly intertangled with other roots from other phases of our law." Llewellyn, *Common Law Reform of Consideration: Are There Measures?* 41 COLUM. L. REV. 863 (1941).

by his deliberate and voluntary act relinquishes a right or rights created by the contract, there is much less reason for insisting upon the presence of consideration.[49] It is difficult to comprehend why a party who is sui juris cannot voluntarily surrender a contract right without being paid, when he is at complete liberty under the law of gifts to give away uncounted millions in value of property without being paid one cent.

Principles of contract law do not require that all waivers be supported by consideration.[50] Consensual rights can sometimes be waived without consideration. For example, the right to declare a forfeiture of an installment contract for the sale of land is purely a right created by the contract, as distinguished from the right of rescission, which does not depend upon any provision in the contract.[51] If the purchaser defaults in payment, thereby giving the vendor the right to exercise his right of forfeiture, but thereafter offers payment which the vendor accepts, the contract right of forfeiture is thereby waived.[52] This doctrine is universally accepted. Every court in this country has held, in this context, that a contract right can be waived without payment of a penny of consideration. If consensual rights can be waived without consideration, then contract theory ought not preclude the waiver of a statutory right, such as a mechanic's lien claim, without consideration.

Furthermore, the Uniform Commercial Code illustrates that the requirement of consideration for a waiver is dying. Thus, section 1-107 "makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party."[53] Thus a court which follows the view that a mechanic's lien partakes somewhat of a contract right could reach the conclusion that a waiver thereof does not require consideration, basing its conclusion on the policy expressed in the Uniform Commercial Code. The reference to breach in the Code is inapplicable to lien waivers because the subcontractor's waiver runs in favor of a party (mortgagee or landowner) with whom he has no contract and because lien waivers do not relate to breach of contract.

Courts following the sounder view that a mechanic's lien claim is a property right rather than a contract right can also use the policy expressed in the Uniform Commercial Code as an additional

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[49] Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 820 (1941).

[50] According to Corbin, "In particular, if the question is asked whether a 'waiver' can be legally effective if it is not accompanied by a 'consideration' it cannot be answered without knowing what it is that is being 'waived' and what is the mode in which the 'waiver' is being attempted." CORBIN, *op. cit. supra* note 42, § 752.

[51] Realty Securities Corp. v. Johnson, 93 Fla. 46, 111 So. 532 (1927).

[52] Annot., 107 A.L.R. 345 (1937).

[53] UNIFORM COMMERCIAL CODE § 1-107 (Official Draft 1962). The Code makes other important modifications in the doctrine of consideration. Thus, section 2-205 "is intended to modify the former rule which required that 'firm offers' be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings." *Id.* § 2-205, comment 1. See also, *id.* § 2-209.

reason for correctly concluding that a waiver of lien does not require consideration. While the express provisions of the Code have only limited application to real property there are strong indications that the thinking found in the Code will spread far beyond its strict confines. As early as 1951, the Court of Appeals for the Third Circuit in the case of *Fairbanks Morse & Co.* v. *Consolidated Fisheries Co.*[54] drew upon a rule of law stated in the Code and said in a footnote, "we think provisions of the Uniform Commercial Code which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship." This point of view was approved in *Budget Plan, Inc.* v. *Savoy*[55] *decided* before the Code became effective in Massachusetts when the court cited and relied on section 2-403 of the Code and said: "Under which, if it were applicable, the result which we reach would seem to be required. In *Universal C.I.T. Credit Corp.* v. *Guaranty Bank and Trust Co.*[56] decided by Judge Wyzanski in the United States District Court for the District of Massachusetts on May 2, 1958, before the Code became effective, the court cited section 4-403 of the Code in support of the customer's right to stop payment under the present Massachusetts law and said: "And reference to this Code is appropriate because the Massachusetts court regards it less as novel enactment than as largely a restatement and clarification of existing law which has the approval of American scholars. . ."

In other words, if we accept the Code as a comprehensive, modern view of what is customary, just, and practical in business transactions, it would be unfair to deny dealers in real estate the benefits of this view. Moreover, in cases arising prior to the effective date of the Code the courts may well choose to apply the wisdom the Code affords.[57]

CONCLUSION

From both the standpoint of policy and concept, it is plain that the requirement of consideration is inapplicable to mechanics' lien waivers. From the standpoint of policy, it is clear that construction lending would be facilitated by abolition of the rule that a mechanic's lien waiver must be supported by consideration. It is also apparent that the cause of justice would be promoted by the abolition of this rule because the benefit that would accrue to the property owner and construction lender would not be accompanied by any real detriment or hardship to subcontractors, who are, after all, in the best possible position to determine which general contractors can be trusted. Indeed, material suppliers are considered the best source of credit information

[54] 190 F.2d 817, 822 (3rd Cir. 1951).

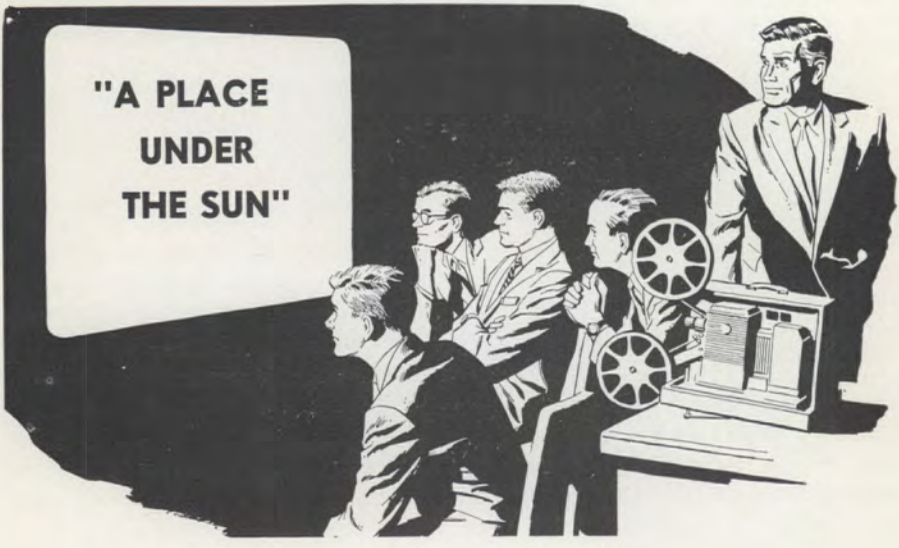
[55] 336 Mass. 322, 145 N.E.2d 710 (1957).

[56] 161 F. Supp. 790 (D.C. Mass. 1958). The court cited Budget Plan, Inc. v. Savoy, *supra* note 29, and Malcom, *The Uniform Commercial Code: Review, Assessment, Prospect*, 15 BUS. LAW. 348, 360 (1959).

[57] See, for example, Schroeder v. Benz, 9 Ill. 2d 589, 138 N.E.2d 496 (1956), where the court applied the policy of a statute that was enacted after the occurrence of the transaction in question.

on general contractors. From the standpoint of concept, the better view is that a mechanic's lien claim is a property right, and since property rights can be extinguished without consideration, it is plain that the requirement of consideration is inapplicable to mechanic's lien waivers. Even if a mechanic's lien claim is to be regarded as a contract right, there is no conceptual barrier to the abolition of the rule that a mechanic's lien waiver must be supported by consideration. Principles of contract law do not require that all waivers be supported by consideration. Finally, a court confronted with a precedent based on the rule that a mechanic's lien waiver must be supported by consideration could use the policy of the Uniform Commercial Code to rid the books of this precedent. It could do so whether it regarded a mechanic's lien claim as a property right or as a contract right. It would be justified in doing so not only because of the respect which the policy of the Code commands, but also because the ever increasing volume of construction lending necessitates a modern rule that serves the ends of justice and that is sound from the standpoint of policy and concept.

ALTA MOVIE



A POWERFUL SALESMAN

Does A Bankruptcy Affect Your Non-Scheduled Real Estate?

by EARL J. SACHS,
Vice President, Title Insurance and Trust Company

SEVERAL weeks ago a seller who was in escrow called our company to inquire why the preliminary title report on the land he was selling vested title in the following manner:

> "John Jones in trust for the trustee to be appointed upon the reopening of the bankruptcy proceedings had in the matter of John Jones, a bankrupt, and for the creditors of said bankrupt, District Court, Southern District Central Division, California Case No. 00000."

Mr. Jones stated, he could not understand our position because he had been adjudged a bankrupt several years ago, a trustee had been appointed and discharged, and, as far as he was concerned, the bankruptcy problem was a thing of the past.

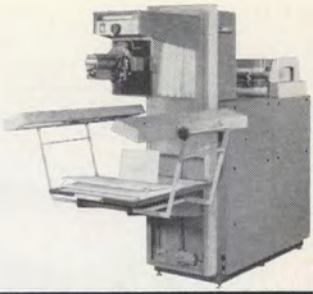
When we inquired of John Jones, the seller, whether the property in question was scheduled in his original petition for bankruptcy, his answer was "Oh-no, that was a very valuable parcel of real estate that I had hidden away and I did not show it in my schedule because I wished to keep it for a rainy day."

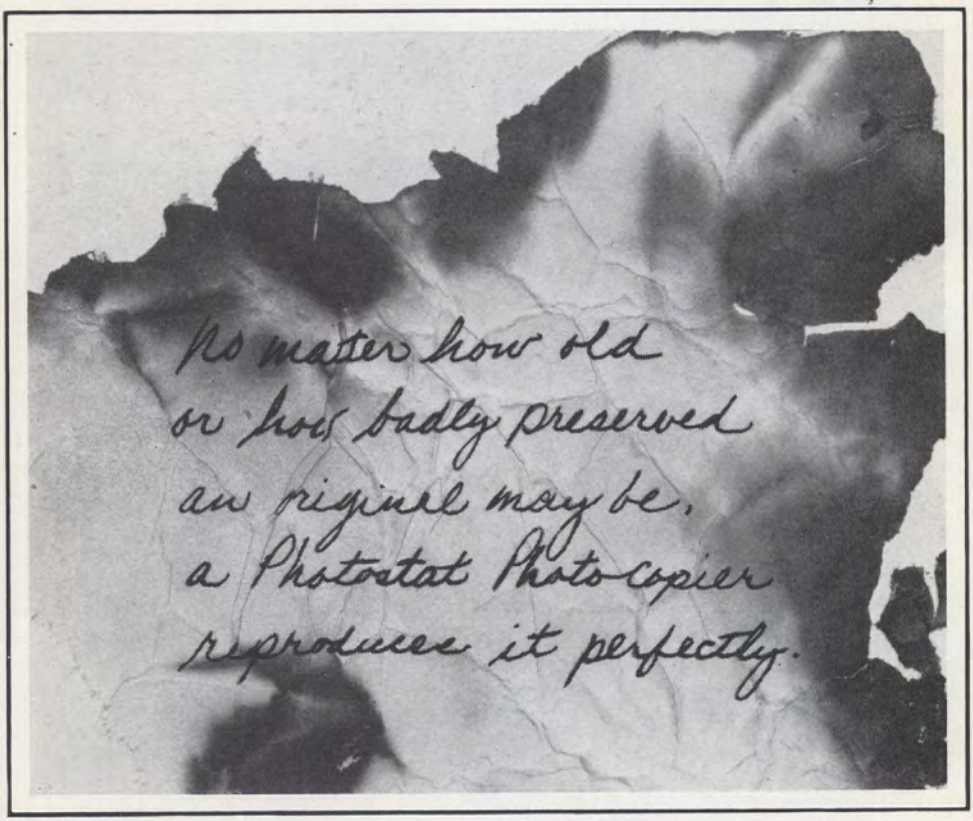
At this point it was necessary to inform Mr. Jones that property owned by the bankrupt at the time of filing the petition and not scheduled as an asset of the estate remains subject to the jurisdiction of the bankruptcy court even after discharge of the trustee for the purpose of paying any claims not fully paid. The proceedings may be reopened and a new trustee appointed to administer such non-scheduled property.

It is obvious Mr. Jones did not know that our company, in searching the title, has a record of all bankruptcy proceedings in Los Angeles County since California was admitted to the Union, and, we examine the proceedings involving sellers to see if the property under search was owned by the bankrupt prior to discharge, and if so, that it was listed as an asset of the estate.

On property which has not been properly scheduled, we require that the bankruptcy proceedings be reopened and a new trustee be appointed to administer on such property.

The moral of this story is that "if any builder has the misfortune to have to petition the bankruptcy and to be adjudicated a bankrupt, be sure to list all your assets so that you will not incur the extra expense of reopening the original bankruptcy proceedings."





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AMERICAN LAND TITLE ASSOCIATION

State Association

CORNER

CONDON NAMED PRESIDENT IN ILLINOIS

ABOVE: (top) Frank E. Condon 1965-66 ILTA President, presents plaque of appreciation to Charles B. Roe, Immediate Past President.

BOTTOM: Mrs. and Mr. William J. McAuliffe, Jr. McAuliffe is the newly appointed Executive Vice President of the ALTA

LEFT: Frank O'Connor, extreme right, a mmbr of ALTA's Public Relations Committee, has a round table discussion with some Illinois titlemen.

LEFT: Seated left to right: Sarah E. Ridgley, Charles B. Roe, Frank E. Condon, Marjorie R. Bennett. Standing, left to right: John R. Echols, Francis E. O'Connor, J. Raymond Donlan, Charles R. Best, Richard Febuary.

The ALTA was represented by George Garber, Chairman of the Title Insurance Section.

ABOVE: (Left to Right) Frances E. Elfstrand, Mr. and Mrs. G. Allan Julin, Jr., Mrs. Paul W. Goodrich, Mr. and Mrs. William McAuliffe, Jr., Paul W. Goodrich.

At the 58th Annual Convention of the Illinois Land Title Association, June 9-10-11 at the Drake Hotel, Frank E. Condon, President of the Grundy County Title and Abstract Company, Morris, Illinois, was elected to serve as Association President. Also elected were J. Raymond Donlan, Vice President; Sarah E. Ridgley, Treasurer and Marjorie R. Bennett, Secretary.

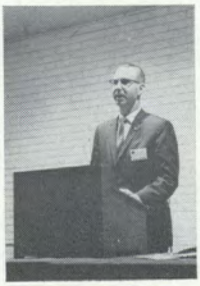
Representing the ALTA was George B. Garber, Chairman of the Title Insurance Section. On hand to meet the Illinois members were Mr. and Mrs. William J. McAuliffe, Jr. Mr. McAuliffe was appointed, effective July 1, 1965, as Executive Vice President of the American Land Title Association.

High on the list for discussion at the Illinois convention was the forthcoming Annual Convention of the American Land Title Association scheduled for Chicago, October 3-6, 1965.

Paul W. Goodrich

BELOW: Don B. Nichols, George E. Harbert, Hartzell Givens, members of the ILTA Legislative Committee. Not present for picture, J. Mack Tarpley and Charles B. Roe.

PIONEER TITLEMAN HONORED IN IOWA



At the 1965 Annual Convention of the Iowa Land Title Association in Okoboji, Iowa, the following officers were elected:

President—C. H. Taylor, Guthrie Center

First Vice President—H. W. Ouren, Harlan

Secretary-Treasurer — Allen K. Buchanan, Algona

Past President—M. V. Henderson, Jr., West Union

Regional Vice President—John D. Swinehart, Waterloo

Regional Vice President — Dorothea Brindley, Washington

Regional Vice President — Jennie Quinn, Spencer

Regional Vice President—Richard Rubow, Eldora

Regional Vice President—Harold Boe, Onawa

Regional Vice President—E. W. Johnson, Des Moines

TOP: Alvin R. Robin, chairman of ALTA's Abstracters Section, presents a Certificate of Appreciation to Hugh H. Shepard.

CENTER: Pioneer titleman, Hugh Shepard, exchanges pleasantries with retiring President, M. V. Henderson.

BOTTOM: The American Land Title Association was represented by Alvin R. Robin.

Representing the American Land Title Association was Alvin R. Robin, Chairman of the Abstracters Section. On behalf of the ALTA, Mr. Robin presented a beautiful hand lettered plaque to a distinguished Iowa titleman. The plaque was worded as follows:

In recognition of his lifetime service and dedication to the Land Title Evidencing Profession;

And with gratitude for his outstanding contribution as the first Treasurer of the American Association of Titlemen, parent organization of the American Land Title Association,

This Certificate of Appreciation is presented to:

HUGH H. SHEPARD

the only surviving Charter Member of the

AMERICAN LAND TITLE ASSOCIATION

Presented this 3rd day of May, 1965, on the occasion of the Annual Convention of the Iowa Land Title Association,

OKOBOJI, IOWA

Witness the hands and seals of the Secretary and the Chairman of the Abstracters Section of the American Land Title Association:

_____ *Secretary*

_____ *Chairman, Abstracters Section*

NEW OFFICERS FOR NEW JERSEY

THE New Jersey Land Title Insurance Association, at its 43rd annual meeting at Seaview Country Club at Absecon, N.J., on Friday June 18th, 1965, elected the following officers for the ensuing year:

President — Clarence G. Ledogar, Senior Title Officer, Chelsea Title and Guaranty Company, Atlantic City, New Jersey

First Vice President—Lloyd Ludwig, Vice President, New Jersey Realty Title Insurance Company, Hackensack, New Jersey

Second Vice President—Robert F. Meyer, Senior Title Officer, Chelsea Title and Guaranty Company, Atlantic City, New Jersey

Treasurer—John E. Lewellen, Secretary, West Jersey Title and Guaranty Company, Camden, New Jersey

Executive Secretary — Emil E. Kusala, Title Officer, Central Guaranty Mortgage and Title Company, Rutherford, New Jersey

The retiring President was William J. Stillman, Vice President of Lawyers-Clinton Title Insurance Company in Newark, New Jersey.

MONTANA-WYOMING JOINT CONVENTION

TOP: Elected officers pose for the ALTA camera.

CENTER: Donna Herbold entertains at the Annual Banquet.

BOTTOM: ALTA Vice President, Don B. Nichols, was the banquet speaker.

MEMBERS of the Montana Land Title Association and the Wyoming Land Title Association met in a joint convention June 11-12-13 at Jackson Lake Lodge, Wyoming. Seventy attended from Montana, while thirty Wyoming members were present.

Elected to serve as WLTA officers for 1965-1966 were:

President, Lorin Guild
Vice President, James J. Christensen
Secretary, Frances Rossman

Members of the Montana Land Title Association re-elected all current officers; C. J. (BUD) HERBOLD, President; F. B. WEED, Vice President; J. L. CADY, Secretary.

National Vice President DON B. NICHOLS represented the ALTA as the Banquet speaker. He reminded his listeners that the ALTA has a personality and a character in much the same way as a human being does.

"Personality", said Nichols, "is what people think you are. Character is what you really are."

Nichols urged the titlemen and women present to support the public relations program being carried out by the American Land Title Association.

MICHIGAN ELECTS HATFIELD

Clarence Burton (center), retiring MLTA President, visits with Milton Dridwood, (left) and Hugh A. Loree (right).

THE Michigan Land Title Association held its 64th Annual Convention in Hidden Valley, Gaylord, Michigan, June 20-23. Elected to serve as President for the ensuing year was REID J. HATFIELD, President of Calhoun County Abstract Company, Battle Creek. Earl B. Morden of Huron County Abstract Company was elected Secretary. Other officers include Richard W. Lovely, Vice President and H. Max Marquart, Treasurer.

As always is the case with the Michigan Convention, lively social events sparkled the four day affair, with golf during the day and parties in the evening.

ALTA was represented by its National President, Joseph S. Knapp, Jr., whose nostalgic review of the early days of the Association was well received by the Michigan members.

Also on hand was Don B. Nichols, ALTA's Vice President, to tell the members about "The Daily Trials and Tribulations of a Small Abstracter".

CENTER: Don B. Nichols discusses "Trials and Tribulations of a Small Abstracter."

BOTTOM: ALTA National President, Joseph S. Knapp, Jr.

MARGARET DANA

Consumer Relations Counsel
Triple Creek Farm
R.D. #1
Doylestown, Pa. 18901
Sept. 10, 1965

Mr. James W. Robinson
Secretary and Director of Public Relations
American Land Title Association
1725 Eye Street N.W.
Washington, D.C. 20006

Dear Mr. Robinson:

I am so pleased with the response I am getting to the story I told of the "Seven Traps for The Unwary", and your leaflet, in my column for the week of Aug. 29th. I enclose a copy as it appeared in the Chicago's American, and the same column has since been featured in the Houston Post, Detroit Free Press, Miami Herald, Philadelphia Bulletin. I also used some of the excellent material you sent under the title "The Common Denominator". This is so well done, I would like to thank the writer, but I can find no author's name. Will you thank him for me, please?

I have already sent out all the leaflets you mailed me, and the requests are only beginning from several of the papers. Could you send me about 300 more? I don't have office room to store too many leaflet supplies at one time, but as the requests develop, perhaps you will keep me supplied.

I think this leaflet may save a lot of people trouble and lost money. The eagerness with which both men and women have reached for it certainly shows it is needed and very welcome. I thank you and your Association for cooperating in helping me provide dependable and practical information for consumers where it is of great help.

Cordially,
Mrs. Margaret Dana

UTAH SUPREME COURT RULES ON USURY LAW

Reprinted from Utah Title News

"This is an action commenced by the plaintiff (National American Life Insurance Company, successor to Continental Republic Life Insurance Company) to collect a promissory note and to foreclose a mortgage on a country club. The defendant Bayou Country Club counter-claimed asserting the loan was usurious and claiming forfeiture of unpaid interest, treble the amount of an alleged discount, treble the amount of sums paid allocable to interest, and an attorney's fee.

"The record discloses the Bayou Country Club was a newly incorporated corporation organized for profit. . . . After acquiring land southeast of Salt Lake City, and starting construction thereon, the corporation ran out of money. Thereafter the officers and organizers of the Bayou Company asked one . . . . . Nelson, president of the bank where the new club has its account, to find a lender who would loan them money to complete their building project. Nelson induced the Continental Republic Life Insurance Co. to make a loan, and a $65,000 note was executed by the Bayou Company. Nelson arranged the closing of the transaction. . . . Continental Republic made its check in the amount of $65,000 payable to Bayou and to McGhie Abstract Company. . . . The Bayou Company received the sum of $50,000 cash. It further shows that plaintiff admitted the sum of $15,000 had been received by plaintiff in consideration for making the loan. . . . $500 of the $15,000 had been used for an insurance policy on the life of the president of the (Defendant) company.

It is the claim of the plaintiff that the $14,500 was used to pay an outstanding note owed by Bayou to Nelson in the amount of $15,000 . . . supported by the record which states that this note was marked . . . "September 6, 1961. To whom it may concern: The Bayou Country Club is indebted to me personally, in the amount of $15,000." Signed . . . Nelson. This cancelled note was delivered by Nelson to McGhie Abstract Co. . . . who gave Nelson its check in the amount of $15,000

. . . and held the remaining $50,000 for Bayou's account. Bayou subsequently defaulted on the loan, after which Continental Republic commenced this action . . . at a pretrial the District Court Ruled that as a matter of law, plaintiff had violated the usury laws of Utah . . . awarding plaintiff judgment of $65,293.81 plus attorney's fee and costs, and awarding Defendant judgment for $51,390.81 together with attorney's fee. Plaintiff, after offsetting defendant's judgment would receive $14,903 which sum included the attorney's fee.

"Justification for the granting of summary judgment will depend largely upon whether or not the record will support the District Court's finding that the alleged note of $15,000 from Bayou to Nelson was not a bona fide obligation, but a sham to delude attention from the real principle involved in the case.

"We believe and hold that the record supports the lower court in its findings of fact as here stated: The defendant Bayou Co. did not at any time have knowledge that Nelson was to receive any part of the $15,000. Nelson, upon instructions from plaintiff, and as agent of plaintiff, procured from McGhie Abstract a check for $15,000. Nelson then returned to his bank and upon the instruction of the president of Continental Republic deposited the check . . . $12,500 to the account of plaintiff . . . and $2,000 to the account of Nelson. (The remaining $500 was a life insurance policy premium.) Nelson was instructed by plaintiff to procure the $15,000 from defendant at the time the loan was closed. The court further found as a fact that plaintiff at no time denied the charge that it had demanded and received the $14,500 as a consideration for making the loan to defendant. The $14,500 paid by defendant to plaintiff was 22.31% of the entire loan. Upon such examination we find there was no unresolved fact question which constituted a triable issue.

"The violation of the law resulted in the making of the agreement to exact and pay usurious interest and not in the performance of the agreement. The test to be applied in any case is whether there was an expressed intention to charge a rate of interest greater than is allowed by law, and this is determined as of the date of its inception. Whether interest in excess of the allowed rate is charged will be determined by the amount the borrower actually receives.

"Having in mind the purpose of the usury statute, we subscribe to the view that the borrower is not *particeps criminis* with the lender in a usurious transaction. We agree with plaintiff that payments may be allotted by the lender to principal rather than to interest, but such cannot legally be done when the object is to make invalid the penalty clause of the usury statute. In this case it appears that the intention of the plaintiff was to pervert the usury statute. The plaintiff took the $14,500 as consideration for making the loan and said sum can only be considered as additional interest because the sum was never credited to defendant as principal, and the sum of $65,000 has been claimed by plaintiff at all times in these proceedings."

ELECTS EXEC. V. P.

The Pennsylvania Land Title Association, organized in 1921, has recently elected its first Executive Vice President.

Lawrence A. Davis, Jr., made this announcement at the last regular meeting at the Presidential Hotel in Philadelphia.

Mr. Davis stated that Mr. Zerfing is highly qualified to fulfill the duties of the new office.

Mr. Zerfing began his career in 1916 with the West Philadelphia Title and Trust Company. Later, after serving in the U. S. Marines, he joined the Real Estate Title Insurance and Trust Company as Title Examiner. He became President of the Land Title Insurance Company in 1953. Later, this firm merged with the Commonwealth Land Title Insurance Company and he became the Executive Vice President, from which position he retired recently. He is a graduate of Temple University Law School and is associated with the law firm of Fell and Spalding.

ZERFING

Mr. Zerfing was also named Manager of the Pennsylvania Title Insurance Rating Bureau.

OFFER TO PURCHASE

Thomas E. Colleton, Chairman of the Board of Lawyers-Clinton Title Insurance Company of New Jersey has announced the receipt of a firm offer from Mr. Elwood W. Kirkman, Chairman of the Board of Chelsea Title and Guaranty Company of Atlantic City, to purchase for cash the outstanding 120,000 shares of stock of Lawyers-Clinton Title Insurance Company of New Jersey at $27.00 per share for a total of $3,240,000. Lawyers-Clinton will become a Division of Chelsea Title and Guaranty Company but it will continue to operate under its own name and at its present location as a separate and distinct unit.

Lawyers-Clinton Title Insurance Co. of N.J. is to indemnify Chelsea Title against pending income taxes and title claims. The offer is conditioned on the deposit for sale of at least 80% of the outstanding shares of Lawyers-Clinton Title Insurance Company of New Jersey before November 1, 1965. Payment for the shares will be made by Manufacturers — Hanover Trust Company, 350 Park Ave., New York City.

All present personnel of Lawyers Clinton will be retained and continue to work under the direction of George W. Piche, who will continue as President of Lawyers-Clinton Division and Max

Schwartz who will continue as Vice President and Title Officer. Mr. Colleton will become Vice Chairman of the Board of Chelsea Title and several Directors of Lawyers-Clinton will be elected to the Board of Chelsea Title.

Mr. Colleton has been President of Lawyers-Clinton since 1941. This Company resulted from a merger of Clinton Title & Mortgage Guaranty Company and Lawyers-Title Guaranty Company of New Jersey. The main office of Lawyers-Clinton is in Newark. In addition to its branch office in Hackensack it is represented by six agencies in Freehold, Paterson, Morristown, Toms River, Trenton and New Brunswick.

Chelsea Title is a New Jersey based company headed by Mr. Elwood W. Kirkman, Chairman of the Board and Mr. Paul Burgess, President. Both of them have been associated with the company since its formation forty-four years ago. Mr. Kirkman is President of the Boardwalk National Bank of Atlantic City, President of Atlantic City Expressway and of the Seaview Country Club.

PROMOTIONS AT COMMONWEALTH

JOHN B. WALTZ, President of Commonwealth Land Title Insurance Company, Philadelphia, Pennsylvania, has announced the promotion of Henry R. McFadden to Title Officer and J. Walter Gallagher, Jr. and Dominic J. Malatesta to Assistant Title Officers.

Mr. McFadden, Title Officer, is engaged in the Company's Business Development Department. He has been with the company for 14 years, having had previous settlement assignments at the main office, the West Philadelphia branch, and the Germantown branch.

Mr. Gallagher, Assistant Title Officer, has had wide settlement experience, over 17 years of service with the company, and has been manager of the Norristown branch office for the past year. He graduated from Upper Moreland High School and attended Temple University.

Mr. Malatesta, Assistant Title Officer, has been the manager of the Castor Avenue office since July 1964. He joined the Auditing Department of the Company in 1946 and subsequently was transferred to settlement work at the Castor Avenue office. He is a graduate of Central High School and the Pierce Business School.

Mr. Waltz also announce the promotion of five officers of Commonwealth Lawyers Abstract Company,

McFADDEN

MALATESTA

GALLAGHER

a wholly owned subsidiary in Hackensack, New Jersey, to officerships in Commonwealth Land Title Insurance Company.

Harold P. Cook, Jr. and Allen Meccia were elected to Vice President. At the same time Alan G. Winters and Charles L. Selser were appointed to Assistant Vice President and Title Officer, while Dominic Cuccinello was promoted to Assistant Title Officer.

JOINS TITLE INSURANCE CO. AS EXECUTIVE V. P.

A longtime Pacific Northwest real estate executive, J. W. "Bill" Kelley, has joined the Title Insurance Company in Portland, Oregon as an officer. In announcing Kelley's association, Title Insurance Company President Fred McMahon said that Kelley will serve in the Escrow Department as an assistant vice president.

Kelley has discontinued his real estate firm, John L. Kelley and Sons, which handled numerous diversified property transactions in Oregon and Washington in the past twenty years including many farms, apartments and business and industrial locations. He is active in a number of professional real estate organizations and is a member of the Portland Realty Board, Society of Real Estate Appraisers and the American Right of Way Association.

KELLEY

GRAND OPENING CEREMONIES AND PROMOTIONS AT T. I.

More than 1,000 persons attended grand opening ceremonies of the new $1.5 million Pioneer Title Insurance Company building at 309 South Third Street, Las Vegas.

Ribbon-cutting ceremonies were presided over by Lt. Governor Paul Laxalt of Nevada, assisted by other dignitaries.

The new four-story building houses Pioneer Title's new headquarters. Other offices will be leased out. A reception climaxed opening day ceremonies.

The ultra-modern new building, which has ample first floor parking, has 70,000 square feet of space and is equipped with the latest in air-conditioning along with Thermo-Pane windows to provide both summer and winter insulation.

The appointment of Richard A. Cecchettini as manager of Merced County Operations for Title Insurance and Trust Company, has been announced by Hal Labrie, Vice President and Central Valley Division Manager.

Formerly manager of the escrow department for the title firm's Sacramento County Operations, Cecchettini is a native of Sacramento and attended schools in that city. He graduated from the University of California at Berkeley in 1955 with a Bachelor of Arts degree in History. He served with the United States Army in Germany from 1956 to 1958.

Cecchettini joined the title company in Sacramento County in

1958 as a tax searcher, and has served as an escrow officer, branch escrow office manager, and in November, 1964, assumed the managership of the Sacramento Main Office Escrow Department.

The promotion of Charles F. Dorsey to the managership of San Luis Obispo County Operations for Title Insurance and Trust Company, has been announced by Allen C. McGurk, Vice President and Southern Division Manager.

Dorsey, formerly Assistant Manager, assumes the position recently held by Richard C. Mohler who has been promoted to the managership of the San Joaquin County Operations for the company.

Dorsey is native of Salt Lake City, Utah, and traveled extensively as a member of an Army family. He attended Yokohama American High School in Japan, Sophia University, Tokyo, Santa Ana Junior College and Fullerton Junior College where he received an Associate of Arts degree.

He joined the title company in April, 1957 in its Santa Ana Office and served as a searcher, examiner, and customer relations representative. He was promoted to the position of Assistant County Manager in August, 1963. He has been active in Kiwanis, Y.M.C.A. and the Economic Development Committee of San Luis Obispo.

The promotion of Richard C. Mohler, Vice President, as Manager of San Joaquin County Operations for Title Insurance and Trust Company, has been announced by Hal Labrie, Vice President and Central Valley Division Manager.

Mohler, formerly Manager of San Luis Obispo County Operations for the company, is a native of Los Angeles, attended elementary schools in Ohio, and upon return to California, graduated from East Bakersfield High School. He received an Associate of Arts degree from Bakersfield College in 1950, majoring in Business Administration. He served in the United States Army during the Korean War.

He joined the title company in the Kern County Office, Bakersfield, in March, 1954, as a poster. Other positions in which he served include tax and title searcher, title officer and unit supervisor. He transferred to the Home Office in Los Angeles, in May, 1961, as a senior analyst in the Systems and Research Department and also served as Personnel Qualifications Analyst. In June of 1963 he was appointed Assistant Manager of the San Luis Obispo County Office and in July, 1963, he was promoted to County Manager. He was elected a Vice President in August, 1963.

PROMOTION FOR CHILTON

Carloss Morris, President of Stewart Title Guaranty Co., has announced the promotion of George Chilton to the National Offices of the title insurance firm

CHILTON

in Houston.

Mr. Chilton, who was Manager of the Beaumont District Office, will be working on Development of National Agents and Accounts. He is a Vice President of Stewart Title Guaranty Co.

He was succeeded at Beaumont by Bert B. Corkill, who has been a Branch Manager at Corpus Christi.

JOINS WESTERN STATES

Robert C. McAuliffe has joined Western States Title Insurance Company, Salt Lake City, Utah, as Vice President and member of the Board of Directors. He comes to Western States Title directly from Security Title, where he served for 13 years in an executive and managerial capacity.

The addition of Mr. McAuliffe is a further development in Western States Title's program of building a staff of widely experienced and highly competent personnel in order to provide customers with the best possible escrow and title insurance service.

Mr. McAuliffe entered the title and abstract field 16 years ago in California, doing plant posting. From then on he progressed through various phases of the business, including examining, escrow and branch management. In 1953 he came to Salt Lake City and was employed by Security Title where he worked continuously until joining Western.

McAULIFFE

Long prominent in title insurance business organization, Bob McAuliffe has served as Secretary-Treasurer and President of the Salt Lake County Title Association, during which time he was instrumental in forming the Utah Land Title Association. He held the office of Executive Secretary during the formative years of this statewide organization, and later served as President. He is an active member today. On a national scale, Bob has been a member of several committees of the American Land Title Association, and is currently on the Legislative Committee of that group.

NEW GENERAL MANAGER

Home Title Company, the Houston branch of Dallas Title Co., is now under the direction of a new General Manager, P. M. "Monty" Bowers. The appointment became effective July 15, 1965.

Bowers also serves as a Vice President of Dallas Title Co., and is a Director of National Title and Abstract Co.

In addition to his background in the title industry, Bowers has wide experience in related fields, having worked for four years as a builder, eight years in mortgage banking, and recently in land development and real estate as developer-owner and President of Lochwood Meadows, Inc., in Dallas. He also still serves as Vice President of the Cothrum-Murray Co., and Executive Vice President of W. H. Cothrum & Co. in Dallas.

Bowers was graduated from Southern Methodist University

with a BBA degree in banking and finance, with a minor in real estate. He is a member of the SMU Alumni Association and the Delta Chi Alumni Association.

SUBSIDIARY DISSOLVED CONTINUES AS BRANCH

Mr. John B. Waltz, President of Commonwealth Land Title Insurance Company, Philadelphia, said the Land Title Company, Miami, Florida, a wholly owned subsidiary, was dissolved July 30, 1965. At the same time he announced the operating heads of that company have received officer appointments in Commonwealth Land Title Insurance Company. James M. Feaster was elected Vice President and John D. White was appointed Title Officer. The business will be continued as a branch of the parent company at the same location, 3001 Ponce DeLeon Boulevard, Miami, Florida.

GENERAL AMERICA BUYS WASHINGTON FIRM

WHARTON T. Funk, known to ALTA members for years as "CHUM" and, more recently, as "Admiral of the ALTA Fleet," has announced that on July 30, every one of the 3,500 shares of stock of the Seattle-based company of which he is president was sold to the General America Corporation. The Washington Company is Lawyers' Title Insurance Corporation; not related in any way to the company of the same name with home offices in Richmond, Virginia.

It was reported that the purchase price, before consideration of a special dividend to stockholders, totaled $2,800,000. It is anticipated that the firm will continue operations in Washington under the same name.

Last year the General America Corporation, by merger acquired the Financial Corporation of America, a holding company whose principal asset was 100% of the stocks of Security Title Insurance Company, Los Angeles, California.

"Chum" Funk is well known to ALTA members. He served as chairman of the Legislative Committee for two years and as chairman of the Resolutions Committee at an Annual Association Convention.

Mr. Funk attended his first ALTA Convention in 1951 and hasn't missed one since!

RAY POTTER ON ABA COMMITTEE

AT the recent Annual Convention of the American Bar Association, held in Miami Beach, Ray L. Potter, Vice President and Chief Title Officer of Burton Abstract and Title Company, Detroit, Michigan, was elected a Vice Chairman of the Real Property,

FUNK

Probate and Trust Law Section, and the Director of the Real Property Division.

NEW YORK TRANSACTION SETS RECORD

THE largest single mortgage loan ever made, $250,900,000, to build the world's largest housing development, was granted on Thursday, July 15, 1965 by the New York State Housing Finance Agency, a public authority established by the State in 1960, to build Co-op City, a 15,500-apartment cooperative in the Bronx.

Co-op City is sponsored by the United Housing Foundation, a non-profit developer of middle-income cooperative housing. In charge of the development is Abraham E. Kazan, President of the United Housing Foundation.

The quarter-billion-dollar transaction was co-insured by six title companies. The Title Guarantee Company and Chicago Title Insurance Company, Home Title Division, were the lead companies and the share of the insurance of each company amounted to $91,578,500. The other insurers were Inter-County Title Guaranty and Mortgage Company, American Title Insurance Company (Guaranteed Title Division) and Lawyers Title Insurance Corporation (Va.) each $20,072,000 and Security Title & Guaranty Co. $7,527,000.

There are 60 companies scattered throughout the United States participating in the excess reinsurance in varying amounts. Title Insurance and Trust Company, California, alone assumed over one hundred million dollars in secondary and tertiary reinsurance.

It is considered a tribute to the title insurance industry in the United States that it was able to completely absorb this very substantial underwriting.

The record mortgage exceeds the assessed valuation of all the buildings in the Rockefeller Center complex. It would be enough to purchase the Empire State Building several times over.

The quarter-billion-dollar transaction took place at the offices of the Morgan Guaranty Trust Company, 23 Wall Street.

To prevent any last-minute hitch when the checks were to change hands, the participants spent most of Wednesday going through the entire procedure. They made sure all the papers were in order and all the legal technicalities resolved. The documents were then placed in the Morgan Guaranty vaults to wait for the closing.

The record mortgage closing was the keystone of a complex series of financial transactions, all contingent on the loan agreement being concluded.

To raise funds for the first advance on the loan, the Housing

BELOW: (Left to Right) Harold Ostroff, Director, United Housing Foundation; Edward F. Healey, Vice President and Asst. Chief Counsel, Chicago Title Insurance Company, Home Title Division; Coverly Fischer, Divisional Vice President, Chicago Title Insurance Company, Home Title Division; Abraham E. Kazan, President, United Housing Foundation; Herman Berniker, President, The Title Guarantee Company; Aime C. Bettex, First Vice President, The Title Guarantee Company; Milton Altman, Counsel, United Housing Foundation.

Finance Agency sold $50 million in short-term notes to private investors. From this sum, the Agency advanced $14,800,635 to the Riverbay Corporation, the nonprofit housing company set up to build Co-op City.

In turn, the housing company clinched the purchase of the 300-acre tract in the East Bronx on which they will build. 297 acres had been privately owned and 3 acres had been held by New York City. Ninety acres will be given to the City, which will build schools, parks, roads, and other public improvements.

MEETING TIMETABLE

OCTOBER 3, 4, 5, 6, 1965

ANNUAL CONVENTION

American Land Title Association
Sheraton-Chicago Hotel
Chicago, Illinois

OCTOBER 17, 18, 19, 1965

Nebraska Title Association
Prom Town House Motor Inn, Omaha

OCTOBER 21, 22, 23, 1965

Florida Land Title Association
Fort Harrison Hotel, Clearwater

OCTOBER 22, 23, 1965

Land Title Association of Arizona
Pioneer Hotel, Tucson

OCTOBER 24, 25, 26, 1965

Ohio Title Association
The Christopher Inn, Columbus

OCTOBER 28, 29, 30, 1965

Wisconsin Title Association
Hotel Sterlingworth, Elkhorn

NOVEMBER 7, 8, 9, 1965

Indiana Land Title Association
Claypool Hotel, Indianapolis

FUTURE ALTA CONVENTIONS

1966—Miami Beach
1967—Denver
1968—Portland, Oregon

FUTURE MID-WINTER CONFERENCES

1966—Chandler, Arizona
1967—Washington, D.C.

American Land Title Association