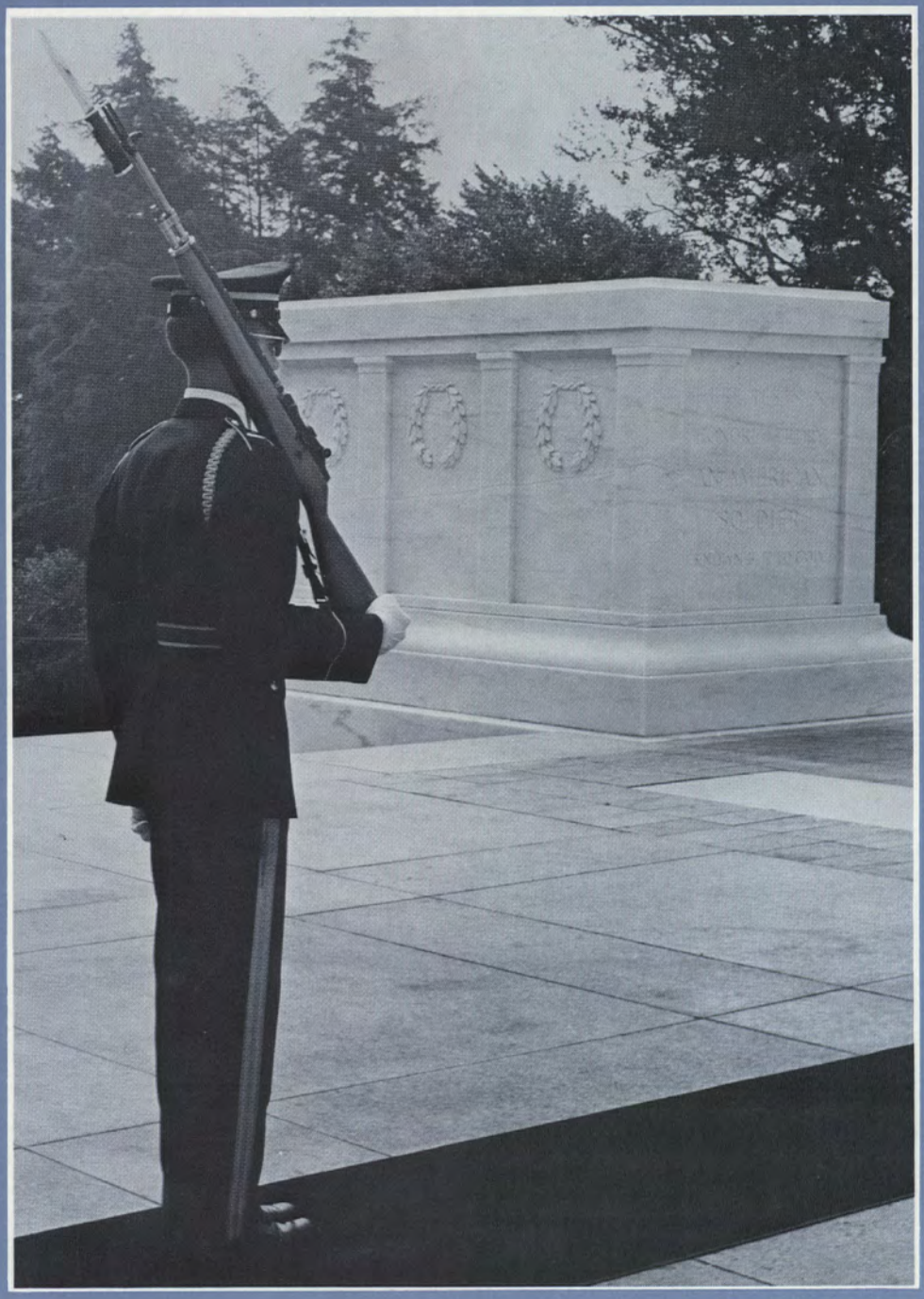
JULY
1977

Title News



a message from the Chairman, Title Insurance & Underwriters Section . . .

We may not recognize it; we may try to avoid it; we may try to deter it, but it continues to occur whether we like it or not. Constant and inevitable change is a fact of life.

The successful person, the successful business and the successful government must always learn to recognize change and deal with it effectively.

For many years, state and regional land title associations, along with the American Land Title Association, have been encouraging individuals and entities engaged in or associated with the title evidence business to become active, dues-paying members of those associations. A vigorous effort to increase the membership of those associations continues today. Many good reasons are offered as to why we should maintain memberships in regional, state and national land title associations and participate in their activities.

Potential members logically ask the soliciting association as well as themselves, "Why should I join and pay dues to your association?"

There are many common sense answers to that question. Some of them are as follows:

- State and national associations are doing a great deal in the business community and in state and federal legislative bodies to protect your interests. They need your personal and financial support.
- State and national association meetings provide a forum by which we can learn to make our businesses more efficient and profitable.
- State and national associations provide the opportunity for personal contact with title attorneys, counsels for life insurance companies, banks, mortgage bankers and others through which we can more fully utilize the business potential of our individual companies.
- State and national associations provide an opportunity to get away from our day-to-day business environment and draw new and improved perspectives on how to manage our businesses more effectively.
- State and national associations encourage the adherence to high standards of business ethics.

All of the above reasons are enough in themselves to justify membership in state and regional associations and in ALTA.

But, in my view, by far the most compelling reason for active, dues-paying membership is the fact that state, regional and national association memberships provide an invaluable background for learning to recognize and deal with inevitable change.

Today, ALTA is extremely effective in gathering relevant information regarding what is happening in Congress, in the courts, and in the executive branch of the federal government. It is equally effective in gathering information about what is happening in the housing and financial communities.

The ALTA staff has done a thorough job of keeping our industry up-to-date on consumer matters which are important to us all in evaluating changing market demands as well as legislation which might result. Our industry has in turn been able to anticipate change and deal with it successfully.

So, when the question is asked, "Why should I belong to ALTA?" or, "Why should I belong to my regional or state title association?", the answer is "To help assure the survival of the most flexible and effective land title evidence system in the world, as well as to reinforce the ability of our industry to grow and prosper."

Sincerely,

Robert C. Bates

Robert C. Bates

VOLUME 56, NUMBER 7

Title News

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On the cover: "Here rests in honored glory an American soldier known but to God" is the inscription on the Tomb of the Unknown Soldier who died in World War I. The tomb, located in Arlington National Cemetery near Washington, D.C., is flanked on either side by graves of a soldier who died in the Korean conflict and one who perished in World War II.

The tombs are guarded 24 hours a day in all weather and in all seasons by specially chosen members of the Army's 1st Battalion, 3rd Infantry. The changing of the guard is one of the more impressive and ceremonial events Washington has to offer to the visitor and will be one of the various sights available to ALTA members during the 1977 Annual Convention October 12-15.

The sentinel on the cover stands his watch until relieved. The changing of the guard occurs every hour on the hour in winter. In the summer, guards are changed every half-hour.

Title News is published by the American Land Title Association, 1828 L Street, N.W., Washington, D.C. 20036, **Maxine Stough, Managing Editor**

Excessive profits — by what measure?

When addressing the questions of economic viability, excessive or non-excessive profits and reasonable prices for the title insurance industry or for a firm within the title industry, one must operate within a comparative framework. That is, one must attempt to compare the performance of the title industry with the performance of other industries.

In the area of performance, the usual aspect of similarity that is stressed is the degree of risk in the industry. Therefore, industries that have similar degrees of risk inherent in their operation should be rewarded at approximately the same rate. In economic analysis, the measure that is used to assess performance and hence reward is the rate of profits which is defined as the aggregate industry or firm profits measured relative to the value of that portion of society's assets invested in the enterprise(s).

Chairman Jensen

The key to correctly analysing the title industry is the choice of a proper measure of profits and of the asset base upon which to weigh that level of profits.

There are two investment measures that economists use to identify rate of return. They are total capital held by the firm and the net worth of the firm. Total capital is defined as the investment level of all funds permanently committed to the business (i.e., total assets less current liabilities) while net worth is the investment level of equity funds.

The use of the return on total capital is preferred to the return to net worth because the return to net worth encompasses not only the earning power of the company's assets but also the debt equity structure of the business or industry. Thus inter- and intra-industry variations in the rate of return to net worth can be the result of different capital structures (financing mixes) and not solely from earning power and uncertainty.

Since the return on total capital measures the return on all capital supplied and employed, it provides a measure of profitability that is not biased by differences in corporate financing policy.

In support of this principle, economist W.A. Paton stated the following in his classic study of corporate profitability.

"Of the various possible measures of earning power, that which expresses income from the standpoint of the entire capital of the business, regardless of the form of capitalization, is doubtless the most significant, particularly when comparisons among individual enterprises and between special groups or fields are desired. It is the rate of return realized on all the capital committed to the undertaking, as opposed to the earning power of the stockholders' equity, that indicates the degree of success attending the activity of the concern as an operating unit.*"

It is important to correctly define the income sources employed in the rate of return to total capital ratio. Since insurance underwriters use part of their underwriting revenues in investment activities, the income these investment activities generate must be included along with operating profits and realized and unrealized capital gains. Also, the interest paid on borrowed money (long term debt) is included as income so as to prevent various forms of capitalization from having an impact on the rate of return. That

*W.A. Paton, *Corporate Profits as Shown by Audit Reports,* National Bureau of Economic Research, New York, 1935, p. 18.

Research Director McCarthy

by John E. Jensen, Chairman
ALTA Research Committee
and
Richard W. McCarthy
Director of Research

is, in the absence of borrowing, the aforementioned interest would have been considered part of operating income.

For the past four years, using as the data base the National Association of Insurance Commissioners (NAIC) Form 9 annual financial statements of title insurance underwriters, the American Land Title Association has attempted to approximate an aggregate rate of return for the industry. However, a lack of uniformity in practices and requirements for financial reporting among the states results in some statistical inconsistencies. The major impact of these inconsistencies is to understate assets and thereby overstate the developed rates of return. The results of the NAIC Form 9 analysis indicate that the after tax rates of return on total capital for the industry are as illustrated in Figure 1.

Figure 1
After Tax Rates of Return on Total Capital
ALTA Underwriters

Year	Rate of Return on Total Capital (%)
1973	5.06
1974	1.82
1975	3.69
1976	6.02*

*Preliminary

The source of data in Figure 1 is NAIC Form 9 annual financial statement answers to questionnaires mailed from ALTA national headquarters directly to underwriting companies. An average of 85 per cent of all member title insurance underwriting companies of the ALTA have participated in this project annually since its inception.

In order to assess the adequacy of the aforementioned title industry rates of return we can compare them with statistics developed and published jointly in the *Quarterly Financial Report for Manufacturing Companies* by the Federal Trade Commission and Securities and Exchange Commission which presents the average rates of return on total capital earned by the private sector of the American economy. That data is contained in Figure 2.

Figure 2
After Tax Rates of Return on Total Capital
SEC-FTC Companies

Year	Rate of Return on Total Capital (%)*
1973	11.1
1974	12.6
1975	10.08
1976	Not Available

*Rate of return on total capital defined as net income after tax plus interest divided by net worth plus debt. Interest calculated assuming imbedded debt cost of 7 per cent.

A comparison of Tables one and two clearly indicates that, even when all sources of income are included and with no other knowledge of respective industries, the rate of return earned by the title insurance industry is dramatically below that earned by almost all American enterprises.

An important dimension in observing the variability of rate of return performance in the title insurance industry is the fact that profits are strongly affected by the vagaries of the overall level of real estate conveyancing activity over which the industry has no control. The overall level of policy volume achieved by the industry is determined almost completely by the level of real estate conveyancing.

At the same time, an extraordinarily high proportion of the industry's costs cannot be avoided even in years of abnormally low policy volume. In consequence, title insurance operations are subjected to an exceedingly high level of cyclical variation. This intrinsic risk is even further exacerbated by the industry's extreme sensitivity to the proportion of all real estate conveyancing activity accounted for by larger commercial properties, an area of business activity generally recognized by economists as being highly sensitive to changes in interest rates and one of the most volatile elements of the national income accounts. This high degree of risk should lead to a preliminary conclusion that the title insurance industry should earn a higher rate of return than the national averages published by the FTC-SEC study.

The American Land Title Association has developed a uniform financial reporting plan which, when fully implemented, will largely solve the problem of data inconsistencies. With the use of the ALTA Financial Reporting Plan a further insight into the apparent discrepancy between degree of risk and the rate of return in the title industry will be gained.

I would like to thank the members of the research committee, all of whom have worked especially hard this year. They are J.L. Butler, Lawyers Title Insurance Corp.;

(continued on page 15)

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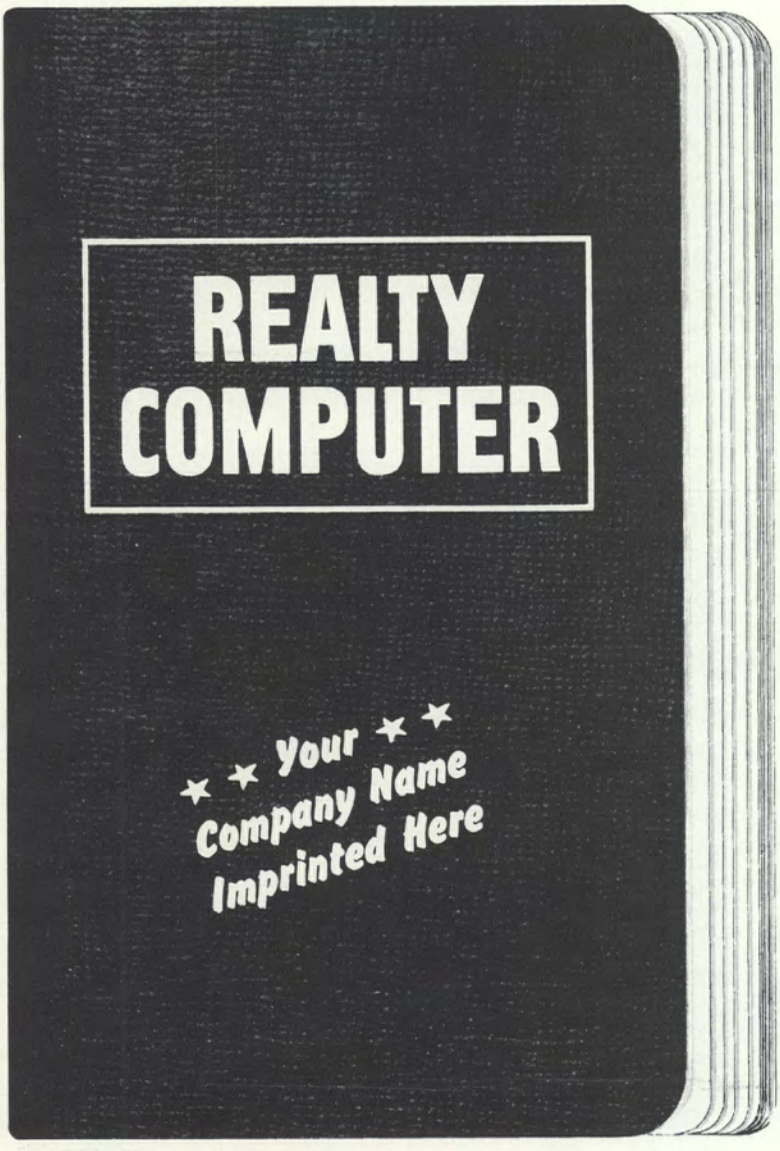

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Popular misconceptions of the title industry

This is Part Two of Chapter Four of *The Title Industry: White Papers, Volume 1.* Chapter Five and the remainder of Chapter Four will appear in future issues. Reprints of chapters one, two and three appeared in the February, March and April issues of *Title News.* Part One of Chapter Four was published in the June issue.

Misconception

Transferring title to real estate can be made as simple and as inexpensive as transferring title to an automobile.

Facts

The transfer of title to an automobile is relatively simple and inexpensive *not* because of the existence of automobile title registration laws, but because of the very limited number and types of interests that can be attached to automobiles or that must be considered when the owner attempts to transfer title to a purchaser. Basically, the only interests involved in an automobile are those of the owner and the lender.

In the case of real property, on the other hand, there may be dozens of persons and entities that have interests or rights in, or claims against, the property as well as numerous other persons or types of entities (including governmental authorities) that are permitted to establish claims against the property. Unlike an automobile, the person who occupies a parcel of real estate is only one of many parties whose interests, rights or claims in the property must be determined. There may be persons who have the right to use the property for certain purposes, and others who have the right to insist that the property not be used for certain purposes; persons who have a right to occupancy of the property, and others who have the right to be paid rental fees for the occupancy of others; persons who have the right to use of part of the land for a specific purpose (such as a driveway or a power line), and others — some of whom may be unborn — whose rights to ownership or use of the property will not commence until many years in the future; persons who have the right to use the surface of the property, and others who have rights to the minerals below or the air rights

above the surface. Literally scores of claimants and governmental entities have the right to enforce liens, claims, and encumbrances against the property arising for such diverse reasons as court judgments, unpaid taxes, welfare payments, unpaid claims of those who make improvements to the property, water and sewer assessments, etc.

Moreover, the nature of the documents and laws under which such claims may arise or be enforced are necessarily complex, and the determination of the scope and validity of any particular claim or interest in real property necessarily requires the judgment of experienced professionals.

The value of rights in land frequently is far in excess of the value of the most expensive automobile. Land does not wear out nor is it ultimately junked; it lasts forever. Because of this unique aspect of real property, a body of complex laws has evolved and continues to evolve to ensure that the ownership of each of those many kinds of rights can be described, preserved, transferred, inherited, devised, levied upon, leased, restricted, zoned, taxed, mortgaged and acquired by eminent domain.

While the simplification of land title records and transfers is a goal that is endorsed and pursued by the members of the American Land Title Association, it must be stressed that so long as society continues to recognize so many diverse interests and claims in real property — interests and claims that are not recognized in automobiles — it is impossible to expect that transferring title to real property can be made as simple or as inexpensive as transferring title to an automobile.

Misconception

Title insurance and other title related charges account for a substantial proportion of total settlement costs and these charges are a major financial hurdle for the purchasers of moderate priced homes.

Facts

• Title insurance and other title related charges account for a small percentage of the overall settlement costs that are incurred in the purchase of a home. Data developed by the Department of Housing and Urban Development and the Veterans Administration in their 1972 report on *Mortgage Settlement Costs* indicate that while total settlement costs paid in the 50,605 FHA and VA assisted transactions studied averaged $1,911, title related settlement costs (which included charges for title examination, title insurance, preparation of documents, closing fee, escrow fee, attorney fees and miscellaneous unclassified costs) averaged only $224 — *or 11.7 per cent of total settlement costs.** The overwhelming proportion of settlement costs is accounted for by such items as sales commissions, lender's charges, loan discount payments, prepaid items, recording fees and taxes — charges that are in no way related to title insurance or other title related charges. In some states, government imposed transfer taxes and recording fees alone may exceed total title related charges. For example, the HUD-VA figures indicate that of settlement costs that averaged $3,048 in Maryland, title related charges accounted for $367, whereas transfer taxes and recording fees amounted to $412 of this total.

*Based on data for the 50 states plus the District of Columbia presented in the tables on pages 39-40 of the HUD-VA report reprinted by the Senate Committee on Banking, Housing and Urban Affairs, 92nd Congress, 2nd Session, March, 1972.

• Not only are title related charges a small proportion of total settlement costs, but they represent an exceedingly small percentage of the sale price of the home. The tables on pages 37-38 of the HUD-VA report indicate that on the average title related charges amounted to only 1.21 per cent of the sale price of the house. While escalating interest rates, higher down payment requirements, inflation in the costs of labor and materials in housing construction, and higher taxes, maintenance and utility costs can be cited as prime reasons for the inability of many families to afford the costs of purchasing and maintaining a home, it can hardly be claimed that the costs of title related charges constitute a serious inhibition to home ownership.

Misconception

If a title search and examination is performed in connection with the sale of a house, there is no need for another title search and examination to be performed if the house is resold shortly thereafter.

Facts

The fact that a search and examination of the relevant title records were performed earlier in no way eliminates the need for a search and examination of title records to be performed when the house is subsequently transferred. During the intervening period the owner-seller may have created or suffered numerous claims, liens or encumbrances that could adversely affect the new buyer of the property. For example:

- The owner may have placed a second mortgage on the property.
- There may be outstanding mechanic's or materialmen's liens as a result of improvements made to the property.
- Rights-of-way, utility easements, or other encumbrances may have been created by the owner.
- Eminent domain rights may have been exercised with respect to part of the property (*e.g.*, in connection with the widening of a road).
- Various involuntary liens may have been placed on the property as a result of unpaid taxes or judgments, welfare claims, etc.
- The owner may have gone through bankruptcy or divorce proceedings since he purchased the property.
- The owner may have granted to other persons a lease, life tenancy or other estate less than a fee simple in the property.

Indeed, virtually all of the records that would have to be searched for a complete title search to be performed would have to be examined to bring the title up-to-date for the subsequent sale. The work involved in reviewing these records — whether any defects in title are discovered or not — may be almost the same as in the earlier search and examination.

Misconception

Title insurance is nothing more than lawyer's malpractice insurance.

Facts

In a number of areas of the country, title insurance companies provide a full range of title related services directly to home buyers and sellers through company personnel rather than through independent attorneys. Since private attorneys do not perform the title search and examination in these areas, it can hardly be alleged that the functions performed by title insurance companies are designed to simply insure against the malpractice of attorneys.

But even in those areas of the country where title insurance policies may be written on the basis of a search and examination of title records performed by a local attorney, the title insurance company does not rubber stamp the work of the attorney and issue a title policy without performing any services. Frequently the certification by the attorney discloses a number of matters of record which have to be reviewed by the officers of the title insurance company to determine whether insurance should be issued to cover these matters. The approved attorney has no power to bind the title company as to such matters as mechanic's liens, railroad titles, mineral rights, tax sales, riparian rights, etc.

Furthermore, the protection afforded by a title insurance policy goes far beyond the risks that may be incurred by a home buyer as a result of the error or negligence of the attorney who performs the search and examination. Among the many title risks insured against by a policy of title insurance that would not be covered by the attorney's malpractice insurance (since the potential claim would not have arisen as a result of the attorney's mistake or negligence) are:

- Mistakes in interpretation of wills or other legal documents.
- Impersonation of the real owner.
- Forged deeds, releases, etc.
- Instruments executed under a fabricated or an expired power of attorney.
- Deeds delivered after the death of the grantor or grantee or without the consent of the grantor.
- Undisclosed or missing heirs.
- Wills not probated.
- Deeds and mortgages by persons of unsound mind, by minors, or by persons supposedly single but actually married.
- Birth or adoption of children after the date of a will.
- Mistakes in recording of legal documents.
- Want of jurisdiction over persons in judicial proceedings affecting the title.
- Errors in indexing of public records.
- Falsification of records.
- Confusion arising from similarity of names.
- Title passing through a foreclosure sale where the requirements of the applicable foreclosure statutes have not been strictly complied with.

Finally, to establish a claim against an attorney for malpractice, an injured home owner might have to bring suit against the attorney. A policy of title insurance, on the

(continued on page 15)

ALTA Judiciary Committee reports court decisions

The following is Part Two of the ALTA Judiciary Committee Report, 79 cases selected by the committee and submitted by Ray E. Sweat, chairman. Part One appeared in the June issue of *Title News*. The remaining cases will be published in succeeding issues of the magazine.

Condominium

Marside Incorporated v. Moseley, 347 A 2d 884, 29 Md. App. 366 (1975)

Court of Special Appeals granted certiorari to review an interpretation of Section 11-110(f) of the Real Property Article relating to the enforcement of a lien against a condominium unit arising from assessments permitted by the Horizontal Property Act, to maintain the common elements.

The purchaser, at a constable's sale of a Unit filed an action of forcible entry and detainer to obtain possession of the property. The District Court issued a Warrant of Restitution. This was appealed by the unit owner to the Circuit Court which ruled that the constable's deed was a nullity, since it concluded that the only remedy for the enforcement of a condominium lien under the statute was by foreclosure in the manner of a mortgage foreclosure. Judgment vacated and case remanded for a new trial. Court stated that Section 11-110(f) permits enforcement of a condominium lien in the same manner as a mortgage foreclosure, but does not require it. The language of the Section is permissive, not mandatory, indicating that the legislative intent was to provide an additional procedure for collection but not to restrict recovery to that procedure alone. The Court stated that it could not see how Section 11-110(f) was relevant at all in view of the fact that there had been no assertion of the lien nor evidence to indicate that the council of co-owners had perfected their lien by compliance with Section 11-110(d) of the Act which requires recordation of a statement of lien within two years after the date the assessment becomes due before the assessment becomes a lien on the unit on which it is assessed.

Nargiz v. Henlopen Developers, 351 A 2d 564. (Del. 1976)

Action based on a contract for the sale of a condominium unit. The plaintiff, an individual seeks to terminate his obligations as purchaser under the contract and to recover his deposit. Plaintiff claims the right to rescind the contract under the Interstate Land Sales Act. The defendant contends that the Act was not enacted to regulate condominium projects and that a condominium unit is not a "lot" subject to the Act.

Summary judgment granted for the defendant.

Under the Delaware Unit Property Act, no real property qualifies as a condominium regime unless and until a proper declamation and declaration plan are filed for record showing, inter alia, a description of the land and buildings and common elements. The plan must depict the building as it actually exists, not merely as it is proposed to be erected, since only after a building has been substantially completed can the accuracy of the declaration plan be attested under oath as required by the statute. Since the subject matter of a contract to purchase an existing condominium unit necessarily consisted of improved land, the contract was not governed by the Interstate Land Sales Act and the purchaser was not entitled to rescind the contract by reason of the failure to receive a printed property report as required by the Act.

Stevens Construction Corp., et al., v. Draper Hall, Inc., et al. decided in Wisconsin Supreme Court, filed June 14, 1976.

Plaintiff entered into a contract with Defendant to construct Draper Hall in January, 1971 and commenced construction in July, 1971. In October, 1971 Defendant complied with the Wisconsin Unit Ownership Act. Plaintiff completed the Condominium in February, 1973, gave notice of intent to file a lien and filed a lien in March, 1973 and thereafter made an amended filing in May, 1973 describing Draper Hall as a 35-unit Condominium.

The lender recorded its mortgage in October, 1971 and released from its mortgage in accordance with its terms, eight units which were sold. Plaintiff commenced foreclosure of its mechanic lien in April, 1973, naming the lender, owners of the sold units and others. Lender cross-complained to foreclose its mortgage on the remaining 27 units alleging priority under the Wisconsin Statute.

Can Plaintiff look to the eight sold units for the full satisfaction of his claim?

No, the lien must be apportioned over the 35 units since the Condominium Declaration was filed prior to the filing of Plaintiff's foreclosure action and *lis pendens* and under Wisconsin Unit Ownership Act, Section 703.09(2), a lien on two or more units must be apportioned.

(E.D. McGillicuddy Constr. Co. vs. Knoll Recreation Asso. (1973) 31 Cal App 3d 891, 107 Cal Rptr 899, decided in 1973 which refused to fraction the lien despite similar statutory provisions in Civil Code Sec. 1357.)

(See also 68 ALR 3d 1300 for related matters).

Constitutional Law

D'Ercole v. D'Ercole, 407 F Supp. 1377 (D Mass. 1975).

In this case an estranged wife brought a declaratory and injunctive action against her husband relating to the constitutionality of the common law concept that in property held in Tenancy by the Entirety the husband has the right to possession during his lifetime. The court entered judgment for the defendant holding that Tenancy by the Entirety although male oriented is but one option open to married persons taking title to real estate, and is therefore a constitutionally permissible classification. In this case the court followed in its reasoning—*Klein v. Mayo* F. Supp. 583 (1973), affirmed 416 U.S. 953.

Wiley v. Copeland, 349 A 2d 211. (Del. 1975)

A motion to quash a sequestration order was denied by the Court of Chancery and the movant appealed. Supreme Court held that the sequestration statute empowering a court of chancery to seize a nonresident's property having sites in Delaware, to compel his appearance in a pending action is not unconstitutional as denying due process because of failure to require notice before the sequestration order issues.

Screamer Mountain Development, Inc. v. Garner, (234 Ga 590) 216 S.E.2d 801 (1975).

In September, 1972, McMurry, McMurry & Garner Construction Company purchased three lots from Screamer Mountain Development, Inc. In July, 1973 the plaintiff, John R. Garner III purchased said lots from McMurry, McMurry & Garner Construction Company. The plaintiff in the present action seeks a refund of the purchase price from Screamer Mountain Development, (Ga. L. 1972, pp. 638, 652; Code Ann. Sections 84-6118) as well as interest, attorney fees, etc.

The defendant filed a motion to dismiss in which it was alleged that the complaint failed to state a claim. In support of such motion, the defendant contends that the aforesaid Act of 1972 is unconstitutional and that the provisions of such Act do not extend beyond the original purchaser.

1. The Act of 1972, supra, is not subject to the defendant's purported constitutional attacks. Such Act in no way sought to interfere with any existing contracts. The Act, which became effective July 1, 1972 (see Ga. L. 1968, pp. 1364, 1365, as amended; Code Ann. Sections 102-111), does not violate the constitutional provision which prevents the enactment of legislation impairing the obligations of a contract.

2. The complaint shows that the defendant's corporation was engaged in activities prohibited by the Georgia Land Sales Act of 1972, supra, in that it was engaged in the sale of more than 150 subdivision lots in a subdivision described as Screamer Mountain, and that the developer had not met the requirements of such Act.

The problem, however, is not that the defendant was allegedly operating in violation of such act but whether the provisions of Section 20 of such Act (Code Ann. Sections 84-6118) supra, are applicable to a party who obtains a lot from an original purchaser in such a subdivision so as to permit a recovery from the subdivider by a successor owner.

As was said by the trial court "The statute does not address itself to the specific question of whether or not a subsequent purchaser may avail himself of the benefit of the Act. Nor has any legislative history, appellate decision, rule or regulation of the Secretary of State, or opinion by the Attorney General, shed light on this ultimate question." In overruling the motion to dismiss the trial court relied upon a similar enactment by the State of Florida which specifically defined a purchaser to "be a person who acquires or attempts to acquire or succeeds to an interest in land." Fla. Statutes Ann. Section 478.012(2) (d).

The appellee cites similar statutes from other states which also include in the definition of purchaser those who succeed to an interest in land. In 1971 the General Assembly adopted the "Out-of-State Land Sales Act." Ga. L. 1971, p. 856 (Code Ann. Ch. 84-58). In that Act the General Assembly expressly defined "purchaser" as "a person who acquires an interest in any lot, parcel or unit in a subdivision." Code Ann. Sections 84-5801 (5).

The Interstate Land Sales Full Disclosure Act (Public Laws 90-448, 15 USCA Section 1701 (9) provides; " 'Purchaser' means an actual or prospective purchaser or lessee of any lot in a subdivision."

Except as to false statements or misrepresentations (Section 15) (Code Ann. Sections 84-9985) the provisions of such Act are not applicable to offers or dispositions of an interest in land "by a purchaser of subdivided lands for his own account in a single or isolated transaction." Code Ann. Sections 84-6102 (a).

When the failure of the General Assembly to expressly include the successor owners of subdivided lots in its definition of "purchaser," after having done so in other similar

legislation, is considered with the provisions of Section 20 of such Act, supra (Code Ann. Section 84-6118) which section permits the purchaser to rescind the contract and "receive the sum of all money paid by him" or to maintain an action to recover actual damages incurred by such purchaser, and the provisions which exclude sales "by a purchaser of subdivided lands for his own account . . ." scheme of such legislation is such as to include subsequent purchasers of subdivided land within the ambit of such Act.

Accordingly, the judgment of the trial court overruling the motion to dismiss the complaint for failure to state a claim must be reversed.

Judgment reversed.

Contracts

In the matter of T. Nevil Ingram, Inc., v. Lunsford, 216 Va. 785, 224, S.E.2d 129 (1976).

Property was owned by vendor and his wife as tenants by the entireties and the sales contract was not signed by the wife. The court held that the contract could not be specifically enforced and was void insofar as purporting to affect the wife's title, however, the court concluded that the contract did retain validity between the contract vendor and his vendee as a foundation for an action at law to recover damages for breach of contract.

Miller, et al., v. Reynolds, 216 Va 852, 223 S.E. 2d 883 (1976).

Involved a land contract agreement providing that the sale was contingent upon a building permit and percolation test for septic system. In allowing rescission of the contract, the court held that the pertinent provision of the contract did not merge in the deed due to the fact that there was a mutual mistake, a material one, affecting the substance of the contract and that the equities of the case required rescission.

Hansen v. Chapin, Iowa Sup. 75, 232 NW 2d 506.

Action was brought by purchaser and his wife against vendors for specific enforcement of installment contract for purchase of real estate. The District Court dismissed action, and plaintiffs appealed. The Supreme Court held that evidence did not support finding that vendors' acceptance of three $100 payments from purchaser subsequent to notice of forfeiture constituted waiver of vendors' right to proceed under forfeiture notice, and that evidence did not support finding that vendors had actual or constructive notice of interests of purchaser's wife so as to require vendors to serve notice of forfeiture on wife.

Affirmed.

Alodex Corporation v. Brawner, 134 Ga. App. 630, 215 S.E. 2d 527 (1975)

Plaintiff brought suit for the recovery of the $5,000 earnest money paid to defendants under a contract for sale of real estate. The contract, which was attached to the complaint, provided in a special stipulation: "It is hereby understood that the $5,000.00 earnest money described herein will be refunded to Purchaser if suitable financing cannot be arranged sixty days prior to the closing date of January 10, 1972, in which event the above contract will become null and void. Should Purchaser not comply with the terms of this contract after obtaining suitable financing, the above described earnest money shall be forfeited to the Seller as full liquidated damages and Purchaser shall have no further obligation to Seller under this contract." The complaint alleged that plaintiff could not obtain suitable financing within the specified time frame; that plaintiff demanded the return of the earnest money, which demand had been refused by defendants.

Defendants, while admitting the written contract alleged that the plaintiff through its agent entered into an oral novation which superseded the written agreement and which provided that in addition to the $5,000 the plaintiff would pay to the defendants an additional sum of $2,000 as earnest money for an extension of time to close the transaction and that all the special stipulations in the written contract would be disregarded. The defendants also counterclaimed for the additional $2,000 earnest money which had not been paid. Plaintiff's motion for summary judgment as to its claim and the counterclaim was denied. The trial court certified the denial for review. Held:

1. We need not reach other questions presented for the contract is null and void as it is lacking in mutuality. The condition "obtaining suitable financing" made the contract contingent upon an event which may or may not happen at the pleasure of the buyer. Until that contingency had occurred no obligation arose. *F & C Investment Co. v. Jones,* 210 Ga. 635 (81 SE 2d 828); *McLendon v. McCarthy,* 125 Ga. App. 76 (186 SE 2d 452).

2. The defendants in their counterclaim rely on the alleged subsequent oral agreement. However, a contract for the sale of land, to be enforceable, must be in writing unless the case falls within an exception to the Statute of Frauds. Code Section 20-401, 20-402. The defendants contend that they have partially performed the oral contract by withholding the property off the market which takes the contract out of the Statute of Frauds. Code Section 20-402 (3). This has no merit. Mere non-action is not performance, either partial or complete, and will not, therefore, take a parol contract out of the Statute of Frauds. *Augusta So. R. Co. v. Smith & Kilby Co.,* 106 Ga 864 (2) (33 SE 28). While an oral contract within the Statute of Frauds may be taken out by part performance where one party performs some act essential to the performance which results in loss to him and benefit to the other, the mere fact that one party attempts performance which results in no loss to one or benefit to the other is not sufficient to take the contract out of the statute. *Yarborough v. Hiflier Mfg. Co.,* 63 Ga. App. 725 (2) (12 SE 2d 133). There is no evidence or suggestion that the defendants occasioned a loss as the result of their performance in holding the property off the market or benefited plaintiff. Thus, the parol contract is unenforceable. Plaintiff has shown it is entitled to judgment as a matter of law on its claim and on the counterclaim. We reverse with direction to grant the plaintiff's motion for summary judgment.

Judgment reversed with direction.

Covenants, conditions and restrictions

In the matter of Anthony v. Brea Glenbrook Club, (1976), 58 Cal. App. 3d 506.

The deeds to every lot in a subdivision project enumerated various restrictions and affirmative burdens imposed upon the purchasers. Pursuant to the terms of these restrictions all lot owners were required to be members of defendant club, a nonprofit corporate homeowners' association consisting of all homeowners in the subdivision. Further, pursuant to the restrictions all lot owners were required to pay membership dues and assessments in amounts determined by the directors of the club. Membership into the club could not be severed from the ownership of any parcel in the development and an owner could not avoid liability for fees by nonutilization of the club's

facilities. The club had power to enforce collection of dues and assessments by placing liens on the property of delinquent members and bringing suit against them. Defendant club owned and operated a recreational area located on an individual parcel of land within the subdivision and consisting primarily of a clubhouse, swimming pool and grounds. Plaintiffs, homeowners in the subdivision project, filed an action for declaratory relief that mandatory membership in the club constituted an illegal cloud on the title of their respective properties. Plaintiffs requested that the membership requirement be abolished on the ground that it was not a covenant running with the land.

The appellate court affirmed the trial court's judgment that the covenant in the deed was enforceable as a covenant running with the land since the restriction requiring mandatory membership in the homeowners' association was a direct and mutual benefit to all parcels of land located within the subdivision. In addition, even if the covenant did not fulfill the technical requirements for a covenant running with the land it would be enforceable as an equitable servitude.

Metius v. Julio, 342 A 2d 348; 27 Md. App. 491 (1975).

Appeal from an order of the Circuit Court dismissing a bill of complaint for injunctive relief sought to prohibit construction of apartment buildings alleged to be in violation of an agreement which created restrictions on the land, which provided, among other things, that the land be developed with buildings not more than three stories in height. This agreement was reached as consideration for the dismissal of a zoning appeal by neighboring property owners.

The topography of the property is such that it slopes from north to south. Eight buildings were erected on the northernmost part of the property, each building containing 12 Units, four on each of three floors. Subsequently, six additional buildings were erected on the sloping ground each building containing 14 apartments, four units on each of three floors to which access is achieved by an entrance on the north side of the building and two units on a terrace level to which access is obtained by an entrance on the south side of the building. The two terrace units in each building are predominantly below grade, in that the ceilings of the terrace units are only four and one-half feet above grade.

The plaintiffs contended that the words, "three stories in height," when given their ordinary meaning, are clear and unambiguous. They contended that because the terrace levels are to be used for dwelling purposes, the buildings are more than three stories in height. The owners asserted that the building code, in effect in Baltimore County when the agreement was executed and which became a part of the agreement, defines "height" as follows: "When expressed in stories the height shall be taken as the number of stories in the building including any story where the ceiling is six feet or more above the grade.

Affirmed by the Court of Special Appeals because sound policy favors the free and unrestricted use of land by its legal holder, whenever the language employed to express a restriction is ambiguous, the agreement is to be construed strictly against the party seeking to enforce it and all doubts must be resolved in favor of the free and unrestricted use of property. The height restriction does not limit the buildings to "three stories" but rather to "three stories in height." The meaning of this phrase is ambiguous. The restriction is construed as meaning that the construction of a building containing three stories above ground plus a partially underground level having a ceiling less than six feet above grade, is not prohibited.

Mortgage insurance subsidiary formed

Commonwealth Mortgage Assurance Co. (CMAC), a mortgage insurance subsidiary, has been formed by Commonwealth Land Title Insurance Co. of Philadelphia to insure residential lenders against losses due to default by borrowers on a first mortgage loan.

Nicholas C. Bogard, president of CMAC, said the company was formed "to meet an increasing need for private mortgage insurance. With housing costs continuing to rise faster than individual incomes, potential homebuyers are experiencing increased difficulty in accumulating the traditional 20-25% downpayment. To accommodate this segment of the homebuying market, lenders are granting more mortgages with downpayments of 5 to 15%.

ALTA action...

In recent months, ALTA public relations activity has resulted in favorable exposure for the land title industry across the nation in a variety of local newspapers and financial publications. Association Director of Public Affairs Gary L. Garrity reports the following developments.

A news release quoting ALTA President Philip D. McCulloch on federal income tax deductible closing costs, which points out that land title services are only a small part of the bottom line on settlement sheets, has been published by dailies in at least 11 states and the District of Columbia. Among these are the Washington (D.C.) *Star;* Camden (N.J.) *Courier-Post;* Miami *Herald;* Birmingham (Ala.) *News;* Chicago *Tribune;* San Diego *Tribune;* San Francisco *Examiner;* and Sacramento *Union.*

All or part of a three-part series in which ALTA Executive Vice President William J. McAuliffe Jr. defines title insurance has been published by dailies in at least 12 states and Puerto Rico. These include the Atlantic City (N.J.) *Press;* Ft. Lauderdale *News;* Knoxville (Tenn.) *Journal;* Mt. Clemens (Mich.) *Macomb Daily;* Green Bay (Wis.) *Press-Gazette;* Austin (Tex.) *American-Statesman;* Ft. Worth (Tex.) *Star-Telegram;* Las Vegas *Sun;* and San Jose *News.*

Executive Vice President McAuliffe bylined an article appearing in a recent issue of *American Banker* that focused on the nation's 300 largest savings and loan associations. The article reminds of the great importance of title insurance in out-of-town real estate lending and in the secondary mortgage market.

Director of Public Affairs Garrity recently assisted Kathryn Welling, writer for *Barron's,* the financial newspaper, in development of an article that concludes prospects are bright for the title insurance industry. During work on the article, the writer contacted a number of title insurance executives.

A 13 per cent increase in title insurer gross income for 1977 was forecast for 1977 by ALTA President Philip D. McCulloch in a June press release distributed to news media across the country.

The increase, which means revenues will approach $875 million, was based on first quarter estimates from the 20 largest title insurers. The information was compiled by the ALTA Research Committee and ALTA Director of Research Richard W. McCarthy.

Industry income level for 1976 was approximately $770 million.

Thomas E. Horak, chairman of the ALTA Committee on Improvement of Land Title Records spoke in Norristown, Pa., at the June Modernization of Land Records Seminar sponsored by the Pennsylvania Recorders of Deeds Association.

His presentation was one of five viewpoints heard at the day-long event. Others included a viewpoint from the Pennsylvania Bar Association, the Pennsylvania Department of Community Affairs and the Pennsylvania Society of Land Surveyors.

The ALTA Government Relations Torrens Subcommittee met in Chicago in June to review the Arthur D. Little, Inc., working drafts on the Torrens study. The drafts reviewed in June deal with the three most prominent Torrens jurisdictions — Cook County, Illinois; Suffolk County, Massachusetts, and Ramsey and Hennepin counties, Minnesota.

Members of the subcommittee are John E. Jensen, Philip B. Branson and Thomas E. Horak.

The Title Industry Political Action Committee (TIPAC) Board of Trustees has expanded its advisory board to include a minimum of one ALTA representative from each state.

The Board and the state advisory trustees held an organizational meeting on July 19 to discuss TIPAC's solicitation procedures for 1977.

A list of the state advisory trustees will be part of the TIPAC solicitation mailing.

The second ALTA seminar in Washington, D.C. has been set for Sept. 15. This year's seminar will focus on the value of the present land recordation system as compared with a registration system.

Congressional staff, federal agency personnel and consumer representatives will be among the guests.

Computerized settlements reduce costs

Michael L. Sellers, an Atlanta attorney, became so frustrated with traditional real estate settlement procedures that he designed a computer system for preparation of settlement documents, for any FHA, VA, or conventional settlement, with 100 per cent accuracy, and, in less than 25 minutes, completing the entire process. This system is being sold nationally by Programmed Closing Systems, Inc. The system is specifically designed to reduce settlement preparation time and costs for title companies, lending associations, attorneys and other real estate settlement practitioners. The system also features inexpensive typewriter/terminal capabilities for multiple office operations.

Through a combination of computer programs and word processing techniques, PCS has reduced the tedious preparation of settlement documents from hours to minutes, built in a new degree of accuracy in data handling, and created a permanent record of the entire settlement that can be recalled for modification or addition of settlement information.

Five years ago, Mr. Sellers had only the conviction that such a system was possible, given the hardware that could store and manipulate information in a series of programmed steps. At the time, he was a partner in a law firm that specialized in real estate settlements. Its 18 attorneys represented two local savings and loan associations and settled for practically every mortgage banker in Atlanta. Despite seasonal and economic fluctuations in the volume of business, the firm had to staff for peak periods and was often overstaffed during slack periods. Therefore, unnecessary overhead continually reduced profits. Mr. Sellers' concept of a computerized settlement system would stabilize the cost related to document preparation, regardless of volume fluctuations.

Despite the countless combinations of documents, the differing regulations in each state and the varying requirements of lenders, PCS was founded upon the conviction that settlement documents could be totally prepared on a computer. It took PCS two years to perfect a total real estate settlement system — one that would prepare title commitments and policies, compute and type settlement documents, produce a trial balance of receipts and disbursements, type checks, and provide a total trust account reconciliation.

Utilizing a typewriter keyboard, the operator enters settlement information into the system as it is gathered. Data that is to be repeated on several documents, (names, address, legal descriptions of properties, etc.) is typed only once by the operator. All calculations, such as the annual percentage rate, tax escrows and prorations, insurance escrows, closing costs and prepaid items are computed automatically from data input. A computer printout is used by the operator to verify the accuracy of all information entered.

When all of the information has been entered and its accuracy verified, the operator may begin the printing of forms. After selecting a particular document to be prepared, the operator inserts the form into the machine, presses a control and the computer automatically calculates and types the form. The settlement statement, for example, is computer-produced in 26 seconds, a fraction of the 20 to 25 minutes required to manually calculate and type this form. Documents can be printed in any sequence and as many times as necessary. Paper work for the entire settlement is completed in 15 to 25 minutes — depending on the number of documents required.

The PCS System is so complete and automatic, any of your employees can be fully trained in a matter of days. The system is programmed to automatically perform all calculations and display the correct information on any document required. Each PCS system is custom designed to meet the specific requirements and documents of each individual company. Should the requirements or documents change, the operator has the ability to modify the system without reprogramming. This feature is invaluable to the PCS customer because it provides the ability to modify or add to his existing system without additional programming expenses or costly time delays.

Since the installation of the first two systems, one at Columbia Real Estate Title Company, Washington, D.C., and one at American Title Company, Dallas, Texas, in August 1976, PCS has successfully installed 57 additional systems in 19 states. As part of PCS's overall corporate structure, several customer service offices are being strategically located in Maryland, Texas and California.

The management of PCS consists of Michael Sellers, president; Randall Jackson, vice president-marketing; Kris Srinivasa, vice president-systems research and development, and Cathy Oberleitner, secretary-treasurer.

Two Programmed Closing Systems officials discuss settlement sheet preparation.

Programmed Closing Systems, Inc.
Suite 102, 1900 The Exchange • Atlanta, Ga.
Call toll free: 1-800-241-1853




Several appointments have been announced by Continental Title Insurance Co., a division of Industrial Valley Bank and Trust Co. (IVB). **LeRoy D. Schoch,** former executive vice president, has been named Continental Title's president. Prior to joining the company in 1976, Schoch was a senior vice president with another IVB affiliate, Industrial Valley Title Co. Another former IVT employe, **William K. Boyle,** will assume the treasurer's position at Continental Title.

Three new members of the board of directors of Continental Title are **John B. Canuso, Philip A. Chiusano** and **Walter N. Read.**

Canuso is president of the Canetic Corp., a construction organization, and is past president of the Home Builders League of South Jersey.

Chiusano serves as a director of the Home Builders League of South Jersey, the New Jersey Builders Association, the National Association of Homebuilders and Chiusano Bros., Inc. He is currently chairman of the Legal Action Committee of the Home Builders League.

Read, an attorney, is secretary of the New Jersey Bar Association and a delegate to the Judicial Conference for the Third Circuit.

Baron L. Bartlett has joined Peninsular Title Insurance Co.'s home office in Jacksonville, Fla., in the capacity of vice president-legal. Bartlett was formerly vice president-regional counsel of AMI Title Insurance Co.

USLIFE Title Insurance Co. of Dallas has announced the election




First row, left to right: William K. Boyle, Robert G. Rove, Pamela L. Crane, LeRoy D. Schoch. Second row, left to right: Medio J. Osmi, J.W. Bartram, David E. Wicker, Robert L. Haley.

Names in the News...

of **Ervin W. Beal** to the position of executive vice president. Beal, a 35-year veteran of the industry, also will continue as a director and secretary-treasurer of the company.

Robert G. Rove has been named vice president, secretary and general counsel of Minnesota Title Financial Corp. Prior to joining the Minnesota corporation, Rove was a member of the Committee on the Administration of Justice, State Bar of California for five years.

It was also announced that **David E. Wicker** has joined Title Insurance Company of Minnesota as state manager for Tennessee and North Carolina. Wicker, who has been in the title business for 15 years, is affiliated with the Dixie, Tennessee and Carolinas Land Title Associations.

Two 15-year veterans of the title insurance business have assumed new positions at Commonwealth Land Title Insurance Co. **Robert L. Haley** who is with the Salem, Ore., office has been named assistant vice president, and **James P. Delaney Jr.** has been appointed records officer.

Commonwealth Land Title Insurance Co. also has announced the following promotions: **Leonard Feder,** who is with the New York division of the company, has been promoted to the position of vice president. He has 13 years experience in the title field. **Pamela L. Crane** of the company's Philadelphia headquarters has been promoted to the position of assistant controller. **Medio J. Osmi** will manage the branch office in Drexel Hill, Pa., and will also be a closing officer there. **Patrick J. Carroll** of the Patterson, N.J., office has been named title officer. Carroll also teaches a course in title insurance underwriting at Upsala College Institute of Real Estate.

Thomas F. Heden has been appointed vice president and National Title Service area manager for Pioneer National Title Insurance Co.'s New York City office. Heden will be responsible for coordinating National Title Service orders within New England, New York, eastern Pennsylvania, the mid-Atlantic states and the District of Columbia.

J.W. "Bill" Bartram, chairman of the ALTA Organization and Claims Committee and a past president of the Texas Land Title Association, has assumed the position of senior vice president of Louisville Title Co. of Houston, a division of Commonwealth Land Title Insurance Co. Bartram, who was Title Man of the Year in 1968, has opened the new downtown Houston commercial closing division of Louisville Title.

Estes voted president at Arkansas meeting

L.D. Estes, president of Southwest Title Co. in Texarkana, is the new president of the Arkansas Land Title Association.

Other officers announced after the group's recent annual convention are Vice President Gay Harp, secretary and assistant manager of Bronson Abstract Co. in Fayetteville; Secretary-Treasurer Melvin Orender, escrow officer for Beach Abstract & Guaranty Co., Little Rock, and Board Member Roy Linton of Marion County Abstract Co., Yellville.

St. Paul adds two companies and realigns business

The St. Paul Companies, Inc., recently announced the addition of two title companies to its group and named Vice President Thomas D. Jones to the position of the chief executive officer for all title insurance operations.

Commercial Standard Title Insurance Co., operating primarily in California and Texas, and The First California Title Companies, based in San Diego, Calif., and operating in 11 major California counties, are the new additions.

Commercial Standard, previously owned by U.S. Financial, Inc., has been renamed St. Paul Title Company of the South and conducts business in 13 states. Its corporate headquarters are in Atlanta, Ga.

The St. Paul title companies' operations have been organized into four divisions, each with its own chief operating officer. The officers report directly to Jones who earlier this year also was named chairman of the board of the title companies.

Chief operating officer for the division headquartered in San Diego, which includes the recently acquired California branch offices, is Dirk Broekema Jr., former Commercial Standard president. The southeast division, headquartered in Atlanta, will be directed by Richard B. Zorn. Robert L. Smith will be in charge of a division including operations in the Northeast and Michigan. The fourth division, based in Dallas, Texas, will be directed by Fred H. Benson Jr. and includes the Midwest, the Southwest and West, excluding California.

Little Rock firm marks centennial

Beach Abstract and Guaranty Co. of Little Rock, Arkansas in May celebrated its 100th year of business, according to E.A. Bowen Jr., president. The company employs 38 persons; does its abstract work exclusively in Pulaski County, and performs real estate closings and title insurance statewide.

Founder of the 100-year-old company was A.D. Beach, a native of New York who came to Little Rock for his health and took over the work of surveying, searching titles and abstracting which the late J. Fairfax Loughborough had been performing for fellow lawyers.

Iowa elects officers at annual convention

The Iowa Land Title Association slate of newly elected officers is headed by President Wayne T. Harmening of Carroll. Also elected at the recent annual convention in Des Moines was President-Elect George Hoyt of Cherokee.

Regional vice presidents elected are Joyce Wiltse of Manchester; Ellen Folker of Wapello and Tom Brennan of Sioux City.

Wayne T. Harmening of Carroll, recently elected Iowa Land Title Association president, is pictured with ILTA immediate past president Geraldine H. Brown at the group's recent convention in Des Moines.

Evergreen state title group holds convention

Harold J. Stadshaug

Washington Land Title Association President elected at the WLTA convention in Spokane recently is Harold J. Stadshaug. He is vice president and manager of SAFECO Title Insurance Co. in Yakima. Vice President is George A. Finney who is vice president and county manager of Pioneer National Title Insurance Co. in Everett.

Included in the three-day program was a speech on Indian land claims, delivered by Oscar H. Beasley, a member of the ALTA Committee on Indian Land Claims, and a report from Washington Insurance Commissioner Dick Marquardt.

White papers—(*concluded*)

other hand, will not only satisfy any valid claims against the insured title without the necessity for such a suit, but will even pay for the costs of any legal defense necessitated by an attack on the home owner's title.

Research—(*concluded*)

Richard A. Cecchettini, Pioneer National Title Insurance Co.; Victor W. Gillett, Stewart Title & Trust of Phoenix; LeRoy F. King, Commonwealth Land Title Insurance Co., and M. David Olson, Transamerica Title Insurance Co.

Calendar of Meetings

July 18-21, 1977
New York Land Title Association
Playboy Resort, Great Gorge
McAfee, New Jersey

July 28-30, 1977
Colorado, Idaho, Utah and Wyoming
Land Title Associations
Ramada Snow King Inn
Jackson, Wyoming

July 31-August 3, 1977
Society of Real Estate Appraisers
International Conference
Disneyland Hotel
Anaheim, California

August 11-13, 1977
Montana Land Title Association
Fairmont Hot Springs Resort
Butte, Montana

August 12-14, 1977
Kansas and Missouri Land Title
Associations
Crown Center Hotel
Kansas City, Missouri

August 25-27, 1977
Minnesota Land Title Association
Holiday Inn
Moorhead, Minnesota

September 7-10, 1977
Dixie Land Title Association
Coliseum Ramada Inn
Jackson, Mississippi

September 8-10, 1977
North Dakota Land Title Association
Grand Forks, North Dakota

September 11-13, 1977
Indiana Land Title Association
Hyatt Regency
Indianapolis, Indiana

September 11-13, 1977
Ohio Land Title Association
Saw Mill Creek
Huron, Ohio

September 22-23, 1977
Wisconsin Land Title Association
Telemark Lodge
Cable, Wisconsin

September 24-25, 1977
Carolinas Land Title Association
Wrightsville Beach, North Carolina

September 29-30, 1977
Nebraska Land Title Association
Ramada Inn West
Omaha, Nebraska

October 12-15, 1977
ALTA Annual Convention
Washington Hilton
Washington, D.C.

November 10-12, 1977
Florida Land Title Association
Sonesta Beach Hotel and Tennis Club
Key Biscayne
Miami, Florida

November 30, 1977
Louisiana Land Title Association
Royal Orleans Hotel
New Orleans, Louisiana

March 7-10, 1978
ALTA Mid-Winter Conference
Hyatt Regency Hotel
Phoenix, Arizona

American
Land Title
Association

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