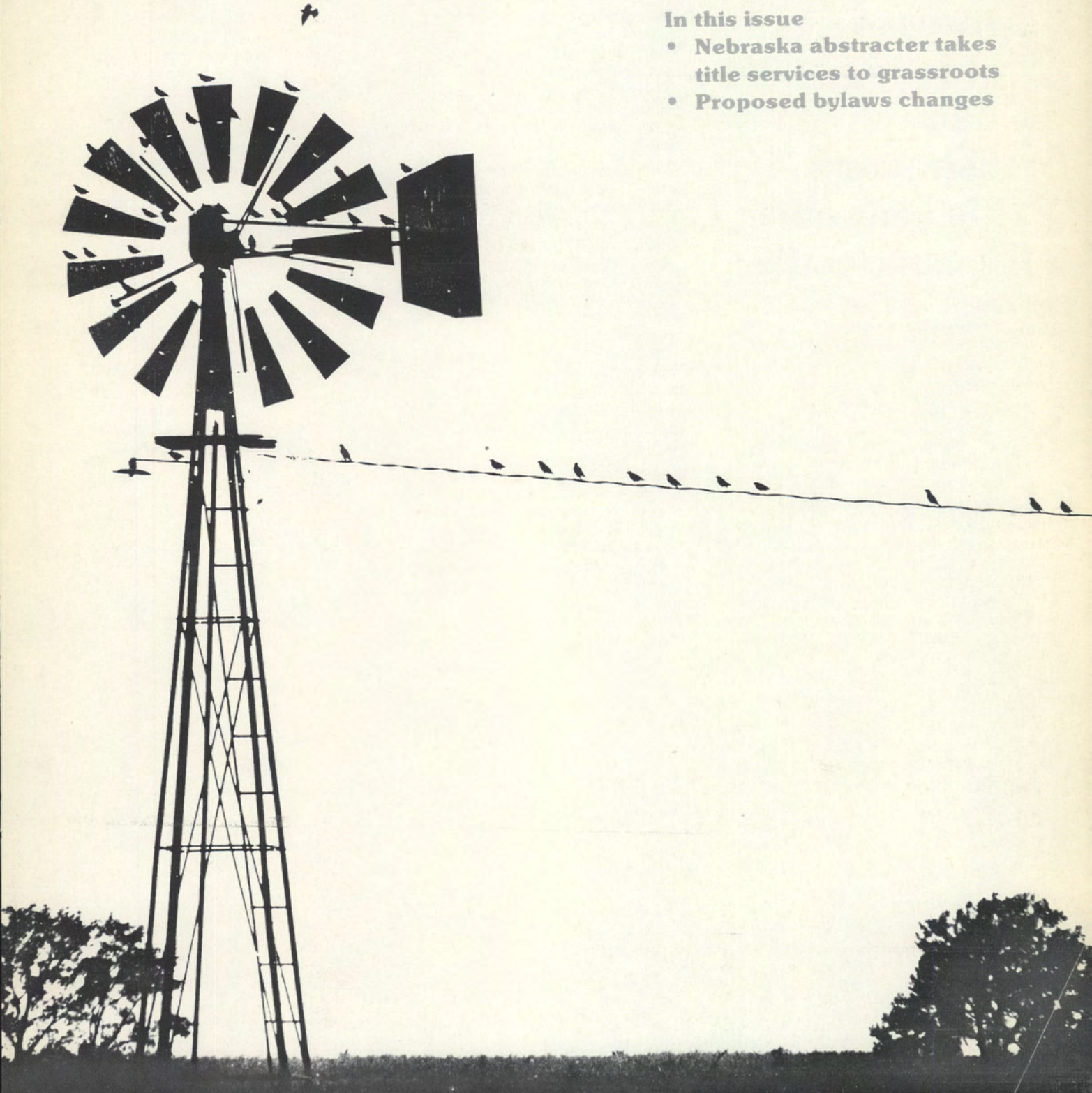
AUG
1977

Title News

In this issue

- Nebraska abstracter takes title services to grassroots
- Proposed bylaws changes



a message from the Chairman, Abstracters & Title Insurance Agents Section

This will be my last article as chairman of the Abstracters and Title Insurance Agents Section. The last two years have been a fascinating experience.

In such a short period of time, I can't qualify as an expert on all section matters. I do, however, see a few clouds on the distant horizon in one area.

Anyone stopping for a moment to consider the Association and its makeup will discover two facts. First, the bulk of the financial support, together with a great contribution of time by its officers, comes from the title insurance underwriters. Obviously any trade association has to have an adequate budget in order to perform even the most elementary functions. ALTA has long ago left grade school and now is operating at a graduate level requiring a substantial budget.

The other fact is that the majority of the membership comes from the abstracter-agent members. Just as necessary as dollars to the success of ALTA's mission is an active, involved representative membership. Numbers count — not only as concrete evidence that the title industry is alive, healthy and substantial but also to provide the population from which new leaders will emerge. If we are to attain the goals of this Association, these new leaders are critical to our well-being.

From the standpoint of political clout it would be nice to have a membership the size of the Realtors or Home Builders. We can't do that, but we do have the advantage of having members located in most county seats in the country. Most of us have been working with county officials for years, helping to elect these officials, and generally mixing in the politics of our communities so that the Association gains political savvy and knowledge far in excess of what our numbers would indicate.

In addition to the political advantage, we have to have as many of our members as possible involved in the affairs of their state and national association. We are too few in number to have qualified title people on the sidelines.

The clouds I referred to are forming over the need for participation of all our members. They are caused by the decisions of some underwriters to stop sending management people in their branch offices to title association meetings. While not a widespread situation, it does seem to be a conscious and growing policy with some companies. Carried to the extreme, we can see in the distant future a few national underwriters meeting in Bill McAuliffe's back yard for the Annual Convention.

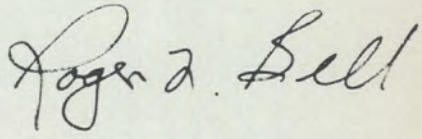
Some of the reasons expressed to me for cutting back on participation have been cost, proselyting of employes by competitors and the problems of "pecking order" within company hierarchy. The independent agents, abstracters and, I think, many insurers have faced these same problems and resolved them satisfactorily.

It seems to me that for the state associations and ALTA to remain alive and well, we have to maintain our membership, not only in numbers but in active participation.

Think about it, you chief executive officers. We believe the trend is in the wrong direction and should be reversed.

In closing, I would like to express my appreciation to the section members for having allowed me to represent them.

Sincerely,



Roger N. Bell

VOLUME 56, NUMBER 8

Title News

Features

Departments

On the cover is a scene typical of the part of the country where abstracter John Wozab works. Here, windmills pump water for livestock. This particular windmill has provided a resting spot for several dozen birds during the early morning hours of a summer day. Distance and sparse population are also typical of central Nebraska and can pose some inconveniences for an abstracter. Wozab has found a unique manner of dealing with these aspects of his area. For the story of Wozab and his mobile abstract business, turn to page 4. Photographs used with the Wozab story were taken by Harry Baumert, a news photographer now working for the Grand Island (Nebraska) *Independent*.

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

Abstracter takes title services to Nebraska grassroots

It was a cold fall day — warning that winter was preparing to creep up on the rolling hills of central Nebraska. An auction of farm land had just concluded. Potential buyers had traveled long distances to bid on the land up for sale. However, as the sun disappeared in the west, the only evidence of a business transaction or any sign of life, for that matter, were several parked cars and a van.

Inside the van was another story altogether. It was alive with activity. The purchase agreement on the land, located 15 miles from Ord, was being prepared for signing, to be followed by the deed. Inside, the sellers and buyers conversed in the warmth provided by a propane forced-air furnace. At his desk, the real estate agent and van owner, John J. Wozab, prepared the necessary documents.

Find a need, then fill it

It's in country like this where a unique silence falls over the hills and flat space at sundown and only a slight breeze and the whirring of a farm windmill can be heard.

Distance and sparse population. These are aspects that are essential to the idyllic quiet of the Nebraska countryside but which can pose problems for an abstracter or real estate agent. Wozab is both abstracter and real estate agent and he has learned to turn distance and sparse population around and make them work in his favor. The key to the turnabout is his van.

In a room a little larger than a walk-in closet, Wozab searches records in the Bartlett, Neb., courthouse. The county seat of Wheeler County, Bartlett has a population of 140 and is located 37 miles northeast of Wozab's home base.

Two years ago, after 38 years as a real estate agent and abstracter, Wozab began his career as an itinerant abstracter. The abstracter in the adjoining county died and residents in that area were hard pressed to find a way of filling their abstract needs — that is, until Wozab hit upon the idea of how to take the needed services to them.

Growth potential

In his furnished, air-conditioned and heated van, Wozab drives to the county seat where the service is to be performed, searches the title and returns to his van where he compiles and types the information. The van is equipped with an electric converter which permits the use of an electric typewriter, calculator or portable photocopy machine.

Wozab doesn't need a marketing study to tell him his mobile abstracting business is a success. The demand is there and he has the material to supply the demand. Probably one of the largest reasons for the smashing success of the "abstractmobile" lies in demography. Population in this area is very sparse and, according to Wozab, cannot support much competitive abstracting. Consequently, one abstracter usually services one county. When something happens to the community abstracter, residents have to look elsewhere for abstracting services.

In Wozab's home county, Valley County, population is approximately 5,685 with nearly half that number residing in Ord, the county seat. The 16 townships in Valley County measure 36 square miles each.

Illness or death of an abstracter are not the only instances where Wozab has been called upon to fill in. In a nearby county, the population depends on attorneys to do abstracts. At certain times during the year, Wozab said, the attorneys are so busy that they cannot handle all the title business. Again Wozab fills a need created by circumstances.

He said he believes his mobile service "can grow just as much as the individual would like and has time for." Currently, however, he must limit it to one day a week since he devotes the other four days of the week to working at the Wozab Agency which he recently sold.

The mobile abstract unit facilitates taking land title services to areas lacking an abstracter

He now works there on a commission basis and helps to train the new office staff so that they can successfully take the state examination required of all would-be abstracters. Wozab plans to "fade out of the picture" at the agency and phase in more time as a mobile abstracter until he is free to devote as much time as he pleases to it.

Wozab said that judging from his own experience and conversations with others, he believes a mobile abstract service such as his could become quite a valuable asset and is confident that it can be developed into a profitable venture not only in his present operating area, but by others in other parts of the state where such services are needed.

Considering the speed with which news of his service has raced throughout neighboring counties, it would appear that he is onto something with great possibilities.

Inquiries pour in

Although he said he has made no attempt at advertising, he has received requests for his mobile services from as far away as 100 miles. He has even had requests from understaffed and overworked metropolitan area abstracting concerns since his mobility allows him to arrive and set up more easily than conventional abstracters.

Parking has not yet proven to be a problem in these two years of mobile abstracting. Wozab pulls up to the front of the court house where he will search the records and leaves his vehicle there until his work is complete. Sometimes he will write the abstract in the van; other times he returns to Ord where he completes it and mails it to the customer.

Wozab limits his mobile abstracting to one day at present but he says the potential in the five-county area immediately surrounding Valley County is three days per week. Eventually he plans to travel to any point in the state where there is need for an abstracter.

Motor home to supplant van

To accommodate this expanded base of business, Wozab has plans to replace his van and will buy a motor home complete with kitchen, toilet facilities, furnace, generator, sleeping quarters and

(continued on page 6)

air-conditioning. The table in the dining area will double as a desk and dining table. The generator will power, among other appliances, the equipment he uses in abstracting. The conveniences of the motor home will allow Wozab and his wife Alyce, who assists him in his work, to remain on the road for weeks at a time.

As in the case of the farm land auction, Wozab has found his abstract office on wheels to be very handy for on-the-spot service away from home for any phase of a real estate transaction or sale — from the preparation of a listing agreement to the closing of the sale. He points out that this saves buyers and sellers from making a trip to the office when they live very far from Ord. This is especially true in the case of farm sales by auction and private treaty. The mobile service is especially useful where time is an important factor, he said.

The purchase of a motor home will offer the Wozabs convenience, more comfort and even greater flexibility

Wozab recently reached retirement age, but obviously is far from packing in his abstracting and real estate business. In country where distance and sparse population are factors to be reckoned with, this "senior citizen" is carrying on his business with remarkable panache.

Seated in the "abstractmobile", Wozab (center) discusses particulars with a customer while Mrs. Wozab does clerical work connected with the business transaction.

Editor's note: In accordance with Article X, Amendment Or Revision, ALTA ByLaws, the following proposed amendments to the ByLaws will be submitted for approval at the General Session Limited To Active Members, Saturday afternoon, October 15, during the 1977 ALTA Annual Convention in Washington, D.C.

The proposed amendments are published here to provide an opportunity for ALTA members to study them before the upcoming Convention. Strike-throughs indicate material proposed for deletion and underlines designate proposed additions.

Proposed bylaws changes to receive vote at annual convention

ARTICLE IV MEETINGS

Sec. 5. MEETINGS WITH AFFILIATED ASSOCIATIONS: The officers of this Association shall meet jointly with officers or delegates of affiliated associations ~~in attendance at an Annual Convention at a time designated in the convention program.~~ at the call of the President.

ARTICLE VII ELECTION OR APPOINTMENT OF OFFICERS, BOARD OF GOVERNORS AND COMMITTEES

Sec. 4. (a) OTHER COMMITTEES: The President within thirty days after election shall fill expired terms and vacancies, if any, in the Grievance Committee, the Title Insurance Forms Committee and the Title Insurance Accounting Committee and shall appoint all members of the Planning, Judiciary, Liaison Committee of the National Association of Insurance Commissioners, Membership and Organization, Legislative Reporting, Federal Legislative Action, Public Relations, ByLaws, Government Relations and Young Title People Committees, and such other committees as may have been authorized by the Board of Governors or by the members at any convention, each to consist of a Chairman and such number of members as he shall deem advisable, unless otherwise provided by these ByLaws.

(b) The Legislative Reporting Committee shall be composed of a Chairman and one member from each state or territory of the United States and the District of Columbia.

ARTICLE VIII DUTIES OF OFFICERS AND COMMITTEES

Sec. 9. THE JUDICIARY COMMITTEE shall ~~investigate and~~ report ~~at each Annual Convention~~ important decisions rendered in Federal and State Courts relating to the duties, liabilities and responsibilities of the abstracters and insurers of title to real property or liens and obligations thereon and other decisions relative to land titles.

Sec. 12. THE LEGISLATIVE REPORTING COMMITTEE shall ~~have power to act~~ report with regard to legislation affecting or relating to the interests of members and the title business. ~~generally. The committee shall report its activities at each Annual Convention.~~

~~Sec. 13. THE FEDERAL LEGISLATIVE ACTION COMMITTEE shall review such pending federal legislation and proposed changes in rules and regulations of federal departments and agencies which might affect the title industry as are submitted to it by the association staff for the purpose of advising the staff and shall report to the membership on such matters. The committee shall make recommendations to the Executive Committee when it concludes that action is needed by the Association to support or oppose pending legislation and shall participate in resulting needed action, when authorized by the Executive Committee, by either contacting directly or by arranging for contacts by other association members with Senators and Congressmen in congressional committee members, home areas, and by testifying before Congressional Committees if appropriate.~~

Sec. 13. THE FEDERAL LEGISLATIVE ACTION COMMITTEE shall review proposed federal legislation and proposed changes in rules and regulations of federal departments and agencies which might affect the title industry. The Committee shall make recommendations to the Executive Committee when it concludes that action is needed by the Association to propose, support or oppose any federal legislation, rules or regulations and shall participate in resulting needed action, when authorized by the Executive Committee, by either contacting directly or by arranging for contacts by others with Senators and Congressmen, Agencies and staff of Committees, and by testifying before Congressional Committees if appropriate. The Federal Legislative Action Committee shall inform the chairman of the Government Relations Committee of its recommendations to the Executive Committee and of its proposed plan of proceeding prior to reporting to the Executive Committee so that the activities of the various committees and sections of the Association may be coordinated.

~~Sec. 22. THE GOVERNMENT RELATIONS COMMITTEE shall plan and execute an educational program targeted at regulators, legislators and their staffs in order to (1) provide factual data relative to the title insurance industry and its place in the efficient transfer of ownership and interest in real property within the free enterprise system, and (2) encourage the maintenance of state regulation, and (3) the Committee may plan and execute a program of political education.~~

Sec. 22. THE GOVERNMENT RELATIONS COMMITTEE shall plan and execute an educational program targeted at public agencies, regulators, legislators and their staffs in order to (1) provide factual data relative to the title insurance industry and its place in the efficient transfer of ownership and interest in real property within the free enterprise system, and (2) encourage the maintenance of state regulation. The Committee shall coordinate through its membership the activities of the Association in support of the Federal Legislative Action Committee in obtaining needed action in proposing,

(continued on page 18)

so what's a TPS system?

☐ A. Tucson/Phoenix Sewage System
☐ B. Total Political Science System
☐ C. Title Plant Support System

If you chose answer A or B, you're in the wrong magazine. If you picked answer C, you're not only in the right place - you've come to the right people.

Orion's field-proven Title Plant Support System is now available for distribution, with exclusive and non-exclusive licenses available in most areas. Our TPS system is an integrated, multi-user automated title plant system providing storage and retrieval of records indexed by either legal description or by name.

It would take several pages to list all the great features of our TPS system, but lest you go away unimpressed, consider the following:

• ease of plant maintenance & update • built-in error checks • rapid retrieval • flexible output formats • multiple indexes • micrographics support capability • ease of expansion • ease of use • multiple users • plant sharing capabilities • general accounting & payroll functions •

Our TPS system is affordable and hassle-free. WHAT A SYSTEM!

For more details and prices, contact

the Orion Corporation

(505) 292-1653
6400 Indian School Road NE, Suite 104
Albuquerque, New Mexico 87110

Sept. events aim at improved relations with Washington

In a move to educate federal officials on the differences between land recordation and land registration systems, the ALTA Government Relations Committee has planned three important events for September.

The first item in the series will be Capitol Hill visitations, scheduled for the afternoon of Sept. 14 and followed in the evening by a Federal reception. The third and final event is *Seminar '77,* set for the following day at the Hyatt Regency Hotel.

Director of Government Relations Mark E. Winter said that ALTA members are being requested to arrange meetings with their Congressmen and Senators for Sept. 14. Prior to going to the Hill, Winter said that members should first visit the ALTA office for organizational purposes.

Position papers on such important legislative topics as Indian land claims, lender-pay and the Torrens system will be available for ALTA members to distribute to members of Congress and their staff members.

More than 500 members of Congress and their staffs, federal agency personnel, consumer groups and affiliated trade associations will be invited to the Federal reception at the Washington Hilton Hotel.

ALTA members personally acquainted with a member of Congress or with anyone in the administration can offer valuable assistance in personalizing invitations extended to those people, Winter noted, and should contact the Government Relations Department.

Seminar '77 on Sept. 15 will focus on land registration versus land recordation with emphasis on the Torrens system. The second of such ALTA-sponsored educational programs, this year's seminar will feature a report on the ALTA Torrens study. Dr. Irving Plotkin and Blair Shick of Arthur D. Little, Inc., will explain their Torrens findings regarding cost, time involvement and inherent differences between recordation and registration.

White Papers, Volume II also will be available at the seminar. This latest volume discusses such topics as lender-pay, the effectiveness of state regulation, profitability in the title industry, the abstracting function in the real estate process and other subjects.

This year's seminar is very timely, Winter said, since HUD will be in the process of developing its research work regarding the establishment of demonstration land parcel recording systems as required under Section 13 of the Real Estate Settlement Procedures Act (RESPA). Nearly 250 Congressional staff, federal agency personnel, consumer and real estate-affiliated associations and media will be invited.

"It is important that we educate the federal officials on the differences between the recordation and registration system. Those of us who believe an improved system of land transfer with private title insurance is preferable to any system of land registration must speak out," Winter continued.

"This is the primary purpose of *Seminar '77* — to educate the policymakers and the public, and to expose the invalid premises upon which land registration is based," he said.

Nearly 250 Congressional staff, federal agency personnel, consumer and real estate-affiliated associations and media will be invited to *Seminar '77.*

ALTA members interested in participating in the September government relations events should contact Winter at the ALTA office.

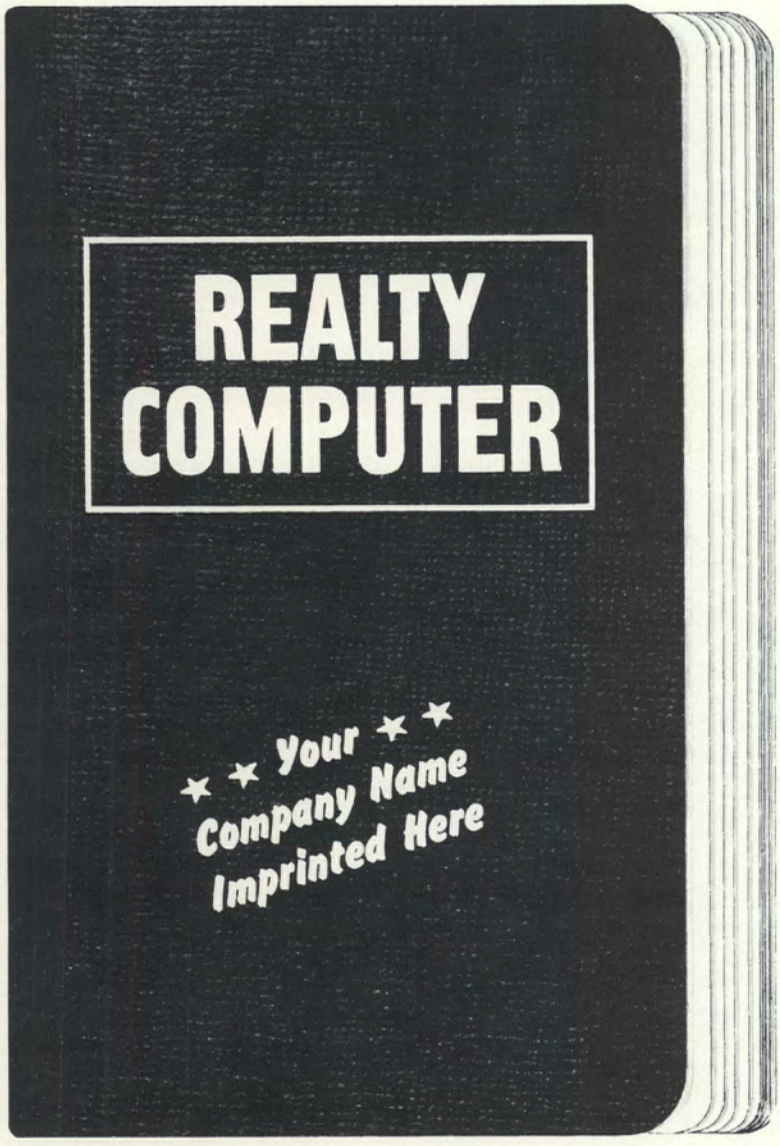
Dates to remember

Sept. 14, afternoon, Capitol Hill visitation

Sept. 14, evening, federal reception

Sept. 15, 9 a.m.-noon, *Seminar '77,* followed by luncheon

PUT YOUR NAME IN EVERY REALTOR'S POCKET!



YOUR
Hard-Working

GIFT FOR REALTORS!

Created by Realtors for Realtors

In addition to the conventional loan amortization payment tables, the latest 260-page ***Realty Computer*** provides over 30 real estate tables badly needed by real estate people in their daily transactions.

A quality edition that fits pocket or purse.

You owe yourself an appraisal of the ***REALTY COMPUTER*** — one of the finest professional fact-finders you have ever seen.

YOUR REAL ESTATE CLIENTELE WANTS IT!

Write today for your complimentary copy

(to Title Companies only)

PROFESSIONAL PUBLISHING CORPORATION

122 Paul Drive • San Rafael, California 94903 • (415) 472-1964

Popular misconceptions of the title industry

Editor's note: This is the final portion of Chapter Four of *The Title Industry: White Papers, Volume 1.* Reprints of chapters one, two and three appeared in the February, March and April issues of *Title News.* Parts one and two of Chapter Four were published in the June and July issues.

Manual for Approved Attorneys of a major title insurance company demonstrate how title insurance companies attempt to deal with minor technical defects:

"The Approved Attorney is expected to report in full all material objections to the title and to waive objections which are clearly technical and immaterial, provided they in no way affect the future marketability of the title. While the Title Company will not insure a fatally defective title any more than a life insurance company will insure the lives of persons afflicted with fatal diseases, the Title Company may insure against loss or damage resulting from particular defects, but it must be fully advised as to the applicable facts and law in order to properly weigh and evaluate the risk and the probability of attack.

"The possibility of an attack, or at least an unwarranted attack, is inherent in every title. The test should be the probability of attack rather than the remote possibility.

"In this connection, the Approved Attorney should remember that the Title Company does not expect him to pass on a business risk where the applicable law sheds doubt on the validity of the title, but the age of the defect and other surrounding facts may be such as to minimize the risk. Whenever such a risk appears in a title, a full statement of facts and an opinion thereon should be submitted to the Issuing Office of the Title Company for a decision.

"Likewise, if the Approved Attorney is in doubt as to the wisdom or advisability of passing a particular legal question, a full statement of the facts and an opinion on the law applicable thereto, supported by citations to statutes and court decisions, should be submitted for decision. Be sure, in such statement, to give all necessary information required for a proper disposition of the question involved, in order that the Company's Legal Department may have a true picture of the situation."

Misconception

Title insurance services are frequently concerned with nothing more than flyspecking or with minor technical defects in title that would never give rise to a title problem.

Facts

Title insurance companies make every effort to avoid flyspecking and to resolve quickly, safely and inexpensively any minor or technical problems that are discovered in the title.

No title is perfectly clear and an attorney who performs a title search and examination is likely to find minor problems in the title — problems which the attorney will feel obligated to make note of in his opinion or perhaps correct through an expensive and involved court action to quiet title. Title insurance companies are much more flexible in the issuance of title insurance policies and will frequently accept affidavits covering an outstanding minor title problem (*e.g.*, that the seller, John Jones, is not *the* John Jones against whom bankruptcy proceedings are pending) or will accept many flyspeck defects as business risks and issue a policy "insuring over" them, thus providing full protection to the prospective buyer or mortgage lender.

The following instructions contained in the Title Insurance

Misconception

There is no need for a home buyer to purchase an owner's title insurance policy if the lender making the mortgage loan has a lender's title insurance policy.

Facts

There are several reasons why a lender's title insurance policy issued to the mortgage lender does not obviate the need for the home buyer to obtain a title insurance policy covering his interest in the property.

First, the purpose of a lender's policy is to insure the lender that he has a valid first lien on the property. Thus, the coverage of a lender's policy is limited to the lender's interest in the property — the amount of his mortgage loan. In the event of a title claim or loss affecting the lender's security, the lender's title insurance policy will cover the amount of the lender's outstanding mortgage loan. The home owner, however, will not be insured by the lender's policy in the event there is a total failure of title or be protected against any financial loss affecting his equity in the property.

Second, as the outstanding balance of the mortgage loan is reduced over time, the amount of the coverage under the lender's policy is reduced, and, correspondingly, the amount of the owner's uninsured equity in the property will have increased. Of course, once the mortgage loan is paid off, there is no longer *any* coverage under the lender's title insurance policy.

Third, in the event a claim is made against the home owner's title, the home owner who does not have an owner's policy of title insurance will have to bear the costs of defending his title against the claim. The fact that a lender's policy may have been issued to the lender would not afford the home owner the protection given in an owner's policy, whereunder the title company will defray all of the costs of defending the owner

(continued on page 12)

against any claims against the title as insured.

Finally, there are many claims, liens and encumbrances that might affect the use or value of the property from the owner's standpoint that would not adversely affect the lender's security interest, and hence would not give rise to any claim under the lender's title insurance policy. For example, an undisclosed right-of-way across part of the land or an encroachment by a neighbor's fence might be of great concern to the owner of the property — and could be covered by an owner's title insurance policy — whereas such problems probably would not affect the value of the lender's security or his first lien on the property and, therefore, would not give rise to any claim under the lender's policy.

In summary, the lender's and the owner's interests in the property are so substantially different that it would be imprudent and incorrect for an owner to assume that his interest in the property is protected simply because the lender's first lien on the property is guaranteed by a policy of title insurance. For this reason, six states now require that the home buyer be given notice of his right to purchase owner's title insurance.

Misconception

A title insurance company will go back 60 years or more each time a search is performed even though the same company may have performed a search on the property at some earlier point in time.

Facts

No title insurance company performs unnecessary or useless work in searching a title since its charges to the home buyer will be the same no matter how much work is done. While the search on which a title insurance policy is based may cover a 60-year period (indeed, local law in some areas may require that a 60-year period be covered), this does not necessarily mean that a new search covering the entire 60-year period will be conducted each time the company issues a title insurance policy on the particular property. To the extent that the company has performed a search of the title on that property at some earlier point in time, it will generally not research the records that have already been examined unless it has some reason to believe that some fact or matter was not adequately resolved in the prior search. What the company will do is to bring down the title search from the date of its last search to the present time.

Thus, if a 60-year title search was performed on a particular parcel in 1970, the company will utilize the information developed in that earlier search and update it for the post-1970 period. The current purchaser will therefore be obtaining the benefits of a more than 60-year search, even though the title company will only have conducted a search covering several years in connection with the current transaction.

Moreover, in many areas of the country, a title insurance company that has never performed a search on the property in question may be able to obtain a "back-title" from another title insurance company that has performed a search on the property at some earlier point in time. While there may be some risk in relying on a previous title search performed by another company (since the search may have missed potential liens, claims or encumbrances that the company's own search would have revealed), by using another reputable company's previous title search the savings in costs realized by the company may outweigh the additional risks that the company may be incurring by not performing a full title search with its own trained personnel.

The fact that all title searches do not involve searching the records for a full 60-year period should not produce a misconception that all home buyers are charged for a

60-year search that, in some cases, is not really performed. The charges for title insurance services are based on an averaging of costs whereby the charges paid by all purchasers of title insurance services cover the total costs of rendering the services involved and a reasonable profit. (In fact, the profits earned by title insurance companies are generally below those earned by industry in general.) Thus, the charges made for title search and examination are not based on the costs of undertaking a 60-year search, but on the average costs of providing title searches and examinations in all of the transactions handled by the title insurance company.

Misconception

The title insurance industry has a stake in the present complexity of land title record keeping.

Facts

The belief that the title insurance industry has any "stake" in the complex and frequently chaotic state of land title information record keeping in many localities throughout the United States is not only totally unfounded, but irrational. On the contrary, the problems posed by the many different locations in which land title records are located, the difficulties of performing a title search from a grantor-grantee index, and the volume and complexity of liens, claims and encumbrances that are recognized in real property only result in increasing the title insurance industry's own costs of providing services and the number of title claims that must be defended against or satisfied.

The need for improvement and simplification of land title records are objectives that have been sought by the American Land Title Association and its members for many years. Among the many recommendations, activities and projects that have been made, undertaken or supported by the title insurance industry in furtherance of these objectives are:

- Support for the substitution of a tract index (that could greatly simplify title searching) in place

(continued on page 20)

ALTA Judiciary Committee reports court decisions

Editor's note: This is Part Three of the ALTA Judiciary Committee report submitted by Ray E. Sweat, chairman. Parts one and two appeared in the June and July issues of *Title News*.

Decedents Estates

Mincey et al. v. Mincey et al., Mincey et al. v. White, 233 Ga. 512, 212 S.E. 2d 345 (1975).

Both appeals involve actions for title to a 1/7th undivided share in land. The issues in both cases are identical but involve two separate tracts of land.

All parties claim through John W. Mincey who had seven children and who died intestate in 1904. One of his children, Luraville Mincey, predeceased him, dying intestate in 1902. Luraville was survived by a son, Paul Mincey.

The widow of John W. Mincey and the six children who survived him conveyed one of the tracts in question to W.B. Mincey and the other to J.L. Mincey. Both W.B. and J.L. Mincey were sons of John Mincey. The appellees in both cases claim title to the land through W.B. Mincey and J.L. Mincey.

The appellants, who were plaintiffs in the court below, are the widow and children of Paul Mincey and claim a 1/7th interest in the property, contending that Paul Mincey inherited the interest from John W. Mincey by right of representation through his mother, Luraville. Appellees, however, claim that Paul Mincey was an illegitimate child of Luraville, and, thus, under Code Section 113-904 could not inherit from his maternal grandfather. In support of their allegations appellees introduced into evidence the deposition of Charlie Raymond Waters, a relative of the Minceys, and Mrs. Ethel M. Gooch, a granddaughter of John W. Mincey. Mrs. I.O. Mincey White, who is the daughter of J.L. Mincey, introduced her own affidavit.

The trial court granted appellees motions for summary judgment, holding that under Code Section 113-904 illegitimates have no inheritable blood except by express statutory provision and although an illegitimate may inherit from his mother under Code Section 113-904, he cannot inherit from his maternal grandfather. Furthermore, the court held that the affidavit and depositions were admissible under Code Section 38-303 which permits pedigree to be proven through hearing testimony in the form of declarations of deceased relatives and general repute in the family. The court found that the evidence thus admitted established that Paul Mincey was illegitimate.

1. Code Section 113-904 (Ga. L 1816, Cobb 293; Ga. L. 1850, Cobb 299; Ga. L 1855-56, p. 288) provides: "Bastards have no inheritable blood, except that given to them by express law. They may inherit from their mother, and from each other, children of the same mother, in the same manner as if legitimate. Legitimate and illegitimate children of the same mother shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers, and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent."

Appellants claim that this statute did not bar Paul Mincey from inheriting a 1/7th interest in the land in question, and that he was entitled to his mother's share of John Mincey's estate. In effect, appellants contend that upon John Mincey's death an interest in the land descended to his daughter Luraville despite the fact that she predeceased her father. This question seems to be controlled by *Thigpen v. Thigpen,* 136 Ga. 541 (71 SE 790). In that case the court construed the language of Code Section 113-904 (formerly, Civil Code 1910, Section 3029) as barring an illegitimate from inheriting from his maternal grandfather. "The plaintiff brought suit to recover a distributive share in the estate of his maternal grandfather, who died subsequently to the date of the death of plaintiff's mother. It appeared from the evidence that the plaintiff was a bastard. Being such, he was not capable of inheriting from his grandfather; and consequently the court did not err in holding that he could not recover, and in directing a verdict accordingly. Civil Code (1910) Section 3029."

This decision appears to be sound. Under Georgia law the general rule is that bastards have no inheritable blood, and this rule is explicitly made subject only to express statutory exceptions. The only exception pertinent to this appeal is provided in Code Section 113-904 which permits illegitimate children to inherit "from their mother." Since Paul Mincey's mother predeceased her father, her estate did not include the realty in question. See *Morris v. First Nat. Bank of Atlanta,* 202 Ga. (1) (42 SE 2d 215). In order for Paul Mincey to have inherited the land in question, it would have been necessary for him to qualify as an heir of his grandfather and thus inherit directly from his grandfather by right of representation. See *Reed v. Norman,* 157 Ga. 183 (2b) (121 SE 310). However, there is not an express statutory exception which would permit an illegitimate child to inherit directly from his maternal grandfather. Consequently, if competent evidence established that Paul Mincey was an illegitimate child, he acquired no interest in the property in question upon the death of his grandfather, and appellants cannot recover.

2. We have carefully examined the affidavit and depositions in this record and conclude that they were properly admitted into the evidence and establish beyond doubt that Paul Mincey was an illegitimate child.

In her affidavit, Mrs. White testified that, "It was and is the general repute in the family that Luraville was never married," and also that her mother and father told her that Paul was illegitimate. The testimony of Mrs. Gooch is to the same effect. Furthermore, Mrs. Gooch testified that she knew from her own direct personal knowledge that her aunt, Luraville, was never married, and also that her mother and father told her that Paul was illegitimate. Mrs. Gooch was in her teens at the time of Paul's birth.

Mr. Waters testified that he was born in 1890 and that Paul Mincey was born about five years later; that he was related to the Minceys and that he had personal knowledge that he never knew Luraville Mincey to have had a husband or to have lived with a man as his wife or to have ever been married.

The testimony of Mrs. Gooch and Mr. Waters that they never knew Luraville Mincey to be married was admissible as direct evidence of the fact sought to be proven. Marriage may be proven by anyone in a position to know the facts. *Brown v. State,* 208 Ga. 304, 306 (66 SE 2d 745); *Sellers v. Page,* 127 Ga 633 (4) (56 SE 1011). The occasion of the deponents to know all of the facts and understand them at such a young age are matters which affect the weight to be accorded their testimony, but do not affect its admissibility.

Code Section 38-303 provides that, "Pedigree, including descent, relationship, birth, marriage, and death may be proved by either the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogy, inscriptions, 'family trees,' and similar evidence." The testimony of Mrs. White and of Mrs. Gooch that the reputation in the Mincey family was that Luraville was never married and that Paul was illegitimate, was clearly admissible pursuant to the above statute. The appellees offered no evidence to contradict this testimony.

3. Appellants contend that Paul Mincey may have been born of a common-law marriage, and that, therefore, the trial court erred in failing to consider the standard of such a marriage. In support of their contention appellants directed the court to *Simeonides v. Zervis,* 127 Ga App. 506, 508 (194 SE 2d 324): "Common-law marriage is recognized in Georgia . . ., and the Supreme Court has clearly stated the criteria for determining the existence of a common-law marriage." See *Brown v. State,* Supra.

It is clear from the language in that case that any inference or presumption of marriage arises only from proof of cohabitation. No such evidence relating to Luraville Mincey was introduced in the instant case. Since there was no evidence upon which a finding of a common-law marriage could have been predicated, the trial court did not err in failing to consider the standard set forth in the Simeonides case.

4. The uncontradicted evidence in the instant case indicates that Luraville Mincey was never married and that Paul Mincey was illegitimate. Nevertheless, appellants contend that this evidence was insufficient to rebut the presumption of Paul Mincey's legitimacy.

The presumption of legitimacy, provided by Code Section 74-101, arises only when a child is born in wedlock. Since there is no evidence in the record that Luraville Mincey was ever married, appellants cannot avail themselves the benefit of this statutory presumption.

There is an indication in a few Georgia cases, however, that in certain circumstances that fact of marriage may be assumed in order to raise the presumption of legitimacy. In *Gibson v. Mason,* 31 Ga. App. 584 (3) (121 SE 584), the court held, "filiation being established, the child is presumed to be legitimate until the contrary is shown; and this rule applies to every case where the question is at issue. If a former marriage is necessary to sustain the presumption, it will be assumed until contrary proof is given." Thus, under this rule, the fact of marriage, necessary to sustain the presumption of legitimacy, will be assumed only when an individual can establish the identity of his parents (filiation). In the instant case no proof was offered which would tend to prove Paul Mincey's paternity. In such circumstances no presumption arises that Paul Mincey was a legitimate child.

(*continued on page 14*)

The court did not err in holding that Paul Mincey was an illegitimate child and consequently incapable of inheriting from his maternal grandfather.

Judgment Affirmed.

Deeds

In the matter of Matney v. Cedar Land Farms, Inc., 216 Va. 932, 224 SE 2d 162 (1976)

A purchaser brought an action against his vendor on the grounds of fraud, alleging that deeds were void for uncertainty of description. The deed in question contained a direct reference to lot, block, and section, but the lot was not shown on an uncertified plat of subdivision but could be identified by extrinsic evidence. The court held that failure to comply with plat filing requirements did not inhibit the passage of title between the parties.

Perimeter Development Corporation v. Haynes, 234 Ga. 437, 216 S.E. 2d 581 (1975).

Laurie and Guylene Haynes filed an action to set aside several conveyances involving the same tract of land. The property was conveyed to Jack A. Blackwell and J. Allen Poole on April 3, 1972. Blackwell and Poole on January 2, 1973, sold the land to Perimeter Development Corporation which gave the Gwinnett County Bank a deed to secure debt. The trial court granted a summary judgment to the defendants Blackwell and Poole and denied to complainants' summary judgment. This court reversed the grant of summary judgment and held: "The trial court in granting the motion for summary judgment recognized that the evidence of the plaintiffs presented a question of fact as to whether the transaction was a loan or a sale, but then held that such testimony could not overcome the terms of the written instruments. Under the evidence adduced a fact question was presented as to whether the transaction was a sale or a loan. The plaintiffs never gave up possession of the premises, the third party who later purchased such land from Blackwell and Poole made no inquiry as to their interest in such land, and a fact question remained for the trier of fact as to the true nature of the transaction." *Haynes v. Blackwell,* 232 Ga. 430 (207 SE 2d 66).

When the remittitur was filed in the trial court, Perimeter and the Bank filed three affidavits and moved for a summary judgment for the first time. The affidavits denied any actual notice of any loan between the Haynes and Blackwell and Poole. The motion for summary judgment was denied and the appeal is from this judgment which was certified for immediate review. Held:

1. The appellants contend that since the record showed that the Haynes were in possession of the property under an expired lease agreement, they were relieved from inquiring into the nature of their possession. There is no merit in this contention.

In *Chandler v. Ga. Chemical Works,* 182 Ga. 419, 424 (185 SE 787) this court said: "Possession of land is notice of whatever right or title the occupant has.' Code of 1933, Section 85-408. In reference to this section it was said in *Hadaway v. Smedley,* 119 Ga. 264, 268 (46 SE 96): 'If it had been a new principle announced for the first time in that Code (of 1895), it might not have applied to some of the transactions in this case; but it is not a new principle and has always been the law in this State, as will be seen by reference to the opinion of Bleckley, C.J., in *Broome v. Davis,* 87 Ga. 587 (13 SE 749), from which this section of the Code was taken.'

The principle is also found in *Peck v. Land,* 2 Ga. 1 (2) (46 AD 368), the second headnote of which is: 'The possession of property, real or personal, remaining with the vendor after an absolute deed of conveyance, is an evidence of fraud.' (Italics ours.) In *Fleming v. Townsend,* 6 Ga. 103 (50 AD 318), it was held:

'Possession retained by the vendor, after an absolute sale of real or personal property, is prima facie evidence of fraud, which may be explained, and after the possession is proven, the burden of explaining it rests upon those who claim under the sale." In that case Judge Nisbet approved the holding of the lower court that 'The possession in the vendor was, under that Statute (27 Elizabeth), and also by the principles of the Common Law, independent of it, prima facie evidence of fraud.' While this case does not involve the question of defrauding creditors, yet the fundamental principles of notice implied from possession is at the core. The badge of fraud is there prima facie, and required one claiming under the grantee to determine by inquiry whether the badge was real or apparent. 'The burden of explaining it rests upon those who claim under the sale.' Or as was said in *Fleming v. Townsend,* supra: 'The onus of explanation, after possession is proven, is upon the grantee.' So it can be seen that from very early times deed and assignments of property, where the grantor remained in possession, were said to be affected with an infirmity that prevented them from being conclusive. The possession called for inquiry as to the right or title of the occupant in the present case, and opened the transaction to investigation. In such circumstances the grantee assumed the risk of a court declaring his contract void, in the absence of a satisfactory showing that the transaction was bona fide. In *Berry v. Williams,* 141 Ga. 642 (81 SE 881), it was held: '1. A deed absolute in form may be shown to have been made to secure a debt, where the maker remains in possession of the land. *Mercer v. Morgan,* 136 Ga. 632 (71 SE 1075). 2. Actual possession is notice to the world of the right or title of the occupant. *Mercer v. Morgan,* supra; *Bridger v. Exchange Bank,* 126 Ga. 821 (56 SE 97, 8 LRA (NS), 115 ASR 118); *Austin v. Southern Home etc., Asso.,* 122 Ga. 439 (50 SE 382).

3. Where the owner of land executes a deed of the character mentioned in the first note, and remains in possession of the land, and the grantee conveys the land to another who has not actual notice of the undisclosed agreement that the deed should operate as a security for debt, and who has made no inquiry of the occupant, the latter may pay or tender the amount of the debt to the first grantee and maintain an equitable action against the first grantee and the remote grantee for cancellation of both deeds as clouds upon his title, and to have the title decreed to be in him.' It will be noted that in that case there was 'actual possession' by the grantor. No other facts or circumstances are shown which would demand an inquiry, except the single fact of possession. We have undertaken to show such facts in the present case as an additional reason for a reversal of the judgment. See, to the same effect as in the last mentioned case: *Cogan v. Christie,* 48 Ga. 585; *Franklin v. Newsom,* 53 Ga. 580; *Broome v. Davis,* 87 Ga. 584, 587, supra; *Kent v. Simpson,* 142 Ga. 49 (82 SE 440); *Summerour v. Summerour,* 148 Ga. 499 (97 SE 71); *Waller v. Dunn,* 151 Ga. 181 (106 SE 93); *Sims v. Sims,* 162 Ga. 523 (134 SE 308).

"It is contended by the defendant, however, that the present case is not controlled by the foregoing cases, but is controlled by a line of decisions beginning with *Jay v. Whelchel,* 78 Ga. 786 (3 SE 906), and including *Malette v. Wright,* 120 Ga. 735 (48 SE 229); *Peabody v. Fletcher,* 150 Ga. 468, 479 (104 SE 448); *Johnson v. Hume,* 163 Ga. 867 (137 SE 56); *Rimes v. Floyd,* 168 Ga. 426, 428 (148 SE 86). We think it will be found that the case of *Jay v. Whelchel,* supra, and the cases following and based upon it, stand upon their special facts. If not, the older cases upon which section 85-408, supra, is founded must prevail. In *Bridger v. Exchange Bank,* 126 Ga. 821, 826 (56 SE 97, 8 LRA (NS) 463, 115 ASR 118), it was stated, as to the Malette case: 'The decision never intended to abrogate the general rule, but merely held that the facts of that case did not fall within it.' The two lines of cases have led to some very close decisions. It is worthwhile to note that Chief Justice Bleckley wrote the decisions in both *Jay v. Whelchel* and *Broome v. Davis,* from which latter the Code provision was taken. There is no conflict between the two decisions' ".

2. The appellants contend further that because the Haynes knew that the warranty deed and rental agreement were placed on the public record and knew that they would mislead innocent purchasers for value, they are estopped to attempt to set aside the conveyances even though they remained in possession of the land. There is no merit in this contention.

Code Section 38-116 provides: "In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury." *Jones v. Tri-State Elec. Corp.,* 212 Ga. 577 (94 SE 2d 497); *Tybrisa Co. v. Tybeeland, Inc.,* 220 Ga. 442 (139 SE 2d 302).

" 'Since the whole doctrine [of estoppel] is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence; otherwise no equity will arise in his favor.' 2 Pomeroy's Equity Jurisprudence (4 Ed.), Section 813." *Johnson v. Ellis* 172 Ga. 435 (5) (158 SE 39). Estoppels are not favored. Code Section 38-114; *Parker v. Crosby,* 150 Ga. 1 (102 SE 446); *Cobb County Rural Elec. Mem. Corp. v. Bd. of Lights* &c., 211 Ga. 535, 539 (87 SE 2d 80); *Travelodge Corp. v. Carwen Realty Co.,* 223 Ga. 821, 823 (1) (158 SE 2d 378); *Yancey v. Harris,* 234 Ga. 320.

3. Under the evidence adduced a fact question is presented as to whether the transaction was a sale or a loan.

Judgment affirmed.

Gunter, Justice, dissenting.

When this case was here before I dissented. See *Haynes v. Blackwell,* 232 Ga. 430 (207 SE 2d 66) (1974). The basis of my dissent there was that the record showed that the Haynes had conveyed the realty by warranty deed to Blackwell and Poole, Blackwell and Poole had conveyed the realty by warranty deed to Perimeter, and Perimeter had conveyed the realty by security deed to a lending institution. The action by the Haynes sought to set aside all three deeds, and they were not entitled to cancellation of the deeds if Perimeter and the lending institution were transferees for value without actual notice of the "secret equity" claimed by the Haynes in the realty.

(*continued*)

On the basis of that record, I thought that the only claim the Haynes could possibly have was one for damages for breach of contract against Blackwell and Poole, their immediate grantees in a recorded warranty deed that was claimed by the Haynes not to be, in fact, a valid warranty deed.

The Haynes had conveyed the realty in question to Blackwell and Poole by warranty deed that was recorded. Blackwell and Poole thereafter conveyed the realty by warranty deed to Perimeter, and Perimeter thereafter conveyed the realty by security deed to the lending institution. At the time the Haynes filed their complaint for the cancellation of all three deeds, they alleged that they had remained in possession of the realty since the execution and delivery of their purported warranty deed to Blackwell and Poole. Their contention was that they had the right to seek cancellation with respect to their immediate grantee, and that because of their possession of the realty, the two remote grantees were charged with notice of their claimed equitable interest in the realty.

It was my view then, and it is my view now, that the Haynes were estopped from procuring cancellation of the three deeds, because the two remote grantees, Perimeter and the lending institution, were transferees for value without actual notice of the "secret equity" claimed by the Haynes.

Retained possession of realty by a grantor in a recorded warranty deed does not constitute notice to a remote transferee for value of any equitable title retained by the grantor-possessor. Such possession constitutes notice of possessory rights under a lease or other possible agreement, but it does not constitute notice of retained equitable title.

Code Section 85-408 provides: Possession of land is notice, not only of whatever title the occupant has, but of whatever right he may have in the property. In *Malette v. Wright,* 120 Ga. 735, 741 (48 SE 229) (1904), this court said: "The provisions of the Civil Code, Section 3931 [now Code Ann. Section 85-408], can have no application to the case of a party who is endeavoring to avail himself of such possession in the face of his own warranty deed, spread on the record, as against an innocent purchaser for value and without notice. Such a possession remaining with the grantor and never surrendered is to be deemed to be held under his grantee, and is not adverse to his title. *Jay v. Whelchel,* 78 Ga. 789 . . . The execution of the deed and placing it upon the public records was a solemn publication to the world that the grantor had conveyed to the grantee the land therein described, and the grantor would be estopped from insisting that one who dealt with his grantee on the faith of the deed must take notice of his possession so as to make inquiry whether or not his deed really spoke the truth."

Code Section 29-111 provides: "The maker of a deed cannot subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped from denying his right to sell and convey." This rule is right, and it should be enforced in all real estate transactions. A grantor cannot convey his realty by warranty deed, property recorded in the public records, and retain possession and then claim, as against a transferee for value, that he really didn't convey the realty in the first place. I think he is estopped from prevailing in court on the basis of any such contention.

The record in the instant appeal shows clearly that Perimeter and the lending institution were transferees for value without notice of any equitable title allegedly retained by the Haynes when they conveyed their property to Blackwell and Poole by warranty deed. I therefore think that Perimeter and the lending institution were entitled to summary judgment in their favor, and I would reverse the judgment below.

I respectfully dissent.

Ingram, Justice, dissenting.

I joined the earlier opinion of the court in this case reported in 232 Ga. 430 (207 SE 2d 66), but cannot agree that the present appeal has been correctly decided in the majority opinion.

The first appeal was from the grant of a summary judgment to defendants Blackwell and Poole and a denial of a summary judgment to plaintiffs Haynes. The order of the trial court, reviewed in that appeal, expressly provided that the trial judge did not consider the consequences of a subsequent transfer of the land in question from Blackwell and Poole to Perimeter Development Corporation or the later conveyance of the land by security deed from Perimeter to the Gwinnett County Bank. Neither Perimeter nor the bank had filed any motions for summary judgment at that time.

We reversed the grant of summary judgment in favor of Poole and Blackwell, holding that an issue of fact remained as to whether the first conveyance on April 3, 1972, from the Haynes (the plaintiffs) to Blackwell and Poole, was a sale or a loan. The rights of Perimeter and the bank were not in issue in the first appeal. However, there is some language in this court's opinion in the first appeal which indicates that Perimeter and the bank took the land subject to any equity that the plaintiffs Haynes could present since the Haynes had remained in possession of the land after conveying it to Blackwell and Poole and no actual inquiry had been made of them as to any interest they might still claim in the land.

Upon the return of the case to the trial court following the first appeal, Perimeter and the bank moved for the first time for summary judgment and supported their motions by showing a complete absence of notice of any loan, real or otherwise, between the plaintiffs (Haynes) and Blackwell and Poole, to whom the plaintiffs transferred the land on April 3, 1972, by warranty deed.

Nevertheless, the trial court denied the motions for summary judgment filed by Perimeter and the bank because of the dicta in this court's opinion in the first appeal. I would reverse the judgment in the present appeal because I believe it is erroneous and the issue presented was not decided in the first appeal. In my opinion, the question presented is controlled by the principles stated in *Malette v. Wright,* 120 Ga. 735, 741 (48 SE 229), and an application of the provisions of Code Section 37-111. The record in this appeal makes it quite clear to me that Perimeter and the bank are transferees for value without actual or constructive notice of any equitable interest which the plaintiffs Haynes now claim they retained when they conveyed this property by warranty deed to Blackwell and Poole on April 3, 1972. Thus, under my view, the law requires that Perimeter and the bank be granted summary judgments in their favor.

Dower

Dickson v. Industrial National Bank of Rhode Island — R.I. —, 348 A 2d 26 (1975)

Husband died testate owning several parcels of real estate estimated, in aggregate, to have a substantial fair market value over and above encumbrances. The widow signified her non-acceptance of the testamentary provisions made for her in lieu of dower,

(*continued on page 17*)





Left to right: **Herschel H. Johnson, Norman Evilsizer, Thomas J. Watson, Stanley E. Levine, James P. Gillen, Gary Seltzer**

Names in the News...

James P. Gillen and **Gary Seltzer** have been named vice presidents of Commonwealth Land Title Insurance Co. Gillen, who is with the Pittsburgh office of Commonwealth, is a 23-year veteran of the title industry. Seltzer, a past vice president of the New York State Land Title Association, has been in the title business for 21 years and is with the company's New York division.

Commonwealth also has announced the promotion of **Stanley E. Levine** as assistant vice president. Levine is with the company's New York division.

Herschel H. Johnson has been elected an assistant vice president of Lawyers Title Insurance Corp. He joined Lawyers Title in 1971 and was transferred from Albuquerque to Dallas in 1974 to become Southwest regional sales manager.

Other Lawyers Title appointments include the promotion of **Bernard F. Goldberg Jr.** to manager of the Washington, D.C., branch office. The new assistant manager of the D.C. office is **Maija F. Eksteins.** Goldberg has been with Lawyers Title for 5 years, and in 1974 was selected as one of the first analysts in the company's Improved Methods program. Eksteins, a long-time underwriter and assistant secretary of the company, has been associated with Lawyers Title in the Washington area for over 15 years. Also, **Robert S. DeLangie** has been named manager of the Fort Lauderdale branch office. He is a 25-year veteran of the title industry and most recently was manager of the Denver office of Lawyers Title.

USLIFE Title Insurance Co. of New York has named **Thomas J. Watson Jr.** vice president, marketing — a new position. Watson has served USLIFE since 1973 and has been resident vice president of the Capital district and vice president of the Mid-Atlantic region.

Title Insurance Company of Minnesota announced that **Norman Evilsizer** has joined the company's Midwest region as assistant vice president. He will be responsible for agency acquisition, underwriting and other regional matters, particularly in the Dakotas. He has been in the title business since 1963.

A. Terry Bowers has been appointed business development representative for the Berks Title Insurance Co. Bowers comes to this newly created position from the Pennsylvania Manufacturers Association Insurance Co., where he was claims manager.

The Title Guarantee Co. of Baltimore stockholders have elected **H. Grant Hathaway** and **Robert E. Voelkel Jr.** directors of the company. The board of directors elected **Robert G. Smith** vice president and treasurer, and **John W. Phillips** assistant vice president.

Hathaway is president of The Equitable Trust Co. and The Equitable Bancorporation. Voelkel is president of the Mercantile Bankshares Corp. and the Mercantile Safe Deposit & Trust Co. Smith has served Title Guarantee since 1935 in the accounting and treasury departments. Phillips joined the company in 1973 as senior examiner and manager of the Towson, Md., office.

After 15 years of service at the Mortgage Bankers Association of America, Executive Vice President **Oliver H. Jones** has submitted his resignation to take effect October 26. Jones plans to return to private consulting.

John J. Meehan, acting fiscal agent in New York for the Federal National Mortgage Association has been appointed vice president and fiscal agent. He will, however, continue in his office in New York City and will report directly to Robert Bennett, FNMA's executive vice president and chief financial officer.

Judiciary—(*continued from page 15*)

and, upon petition of the coexecutors, the Probate Court, following the statute, assigned the widow dower by setting off separate parcels of her husband's real estate. The widow appealed to the Superior Court where a judgment was entered apparently merely affirming her entitlement to dower.

The widow appealed, assigning as error the lower court's refusal to award her dower in a lump sum of money, and the coexecutors appealed on the ground that the judgment was deficient in not determining an appropriate manner for designating the dower interest.

The appellate court denied and dismissed the widow's appeal and sustained in part the coexecutors' appeal.

In assigning dower, the court lacks jurisdiction to act otherwise than as prescribed by statute, and, absent some reason to act otherwise, according to legislative preference for a metes and bounds division. Since the evidence in this case indicates that such division is impracticable, this leaves the statutory alternatives of awarding the widow a third part of the rents and profits from all the real estate for life or setting apart for her one or more of the parcels in which she is dowable to the exclusion of the others.

A statute providing that, in cases of sales of real estate ordered sold by any court, a widow entitled to dower may in the discretion of the court be entitled by order of the court on her petition to receive the present value of her dower right out of the proceeds of the sale was not available to support the widow's contention in this case since that statute is intended to apply only to sales made pursuant to judicial orders in proceedings separate and distinct from those designed to set off dower, as, for example, where land is ordered sold to pay taxes or debts of a deceased husband's estate.

Easements

Johnson v. Robinson, 338 A 2d 88; 26 MD. App. 568, (1975).

Appellant contracted to sell a portion of her land to the appellee, which portion contained the only frontage on a public road. The contract, which provided for monthly payments over a period of years, was silent as to access for the remaining land of the appellant. After the total purchase price was paid, the appellee demanded a deed which was reluctantly given after some discussion of the appellant's problem as to access. The deed did not contain any reservation of an easement for the benefit of the remaining land of the grantor. Subsequently, the appellant brought suit claiming an easement or right of way across the land of the appellee.

The Court of Special Appeals held for the appellant reasoning that even though an easement was not in existence at the time of the grant which would give rise to an implied reservation under existing case law, the grantee's actual knowledge of the grantor's dilemma prior to the settlement, supplanted the notice generated by physical use of an easement. When the appellee realized that the land would be encumbered by a way of necessity, he could have declined to proceed and demanded the return of the purchase price, just as would have been his right had there been an express easement encumbering the land.

Upon remand, the chancellor was directed to decree a way of necessity.

Marshall v. Georgia Power Company, (134 Ga. App. 479) 214 S.E. 2d 728, (1975).

In 1925 a predecessor of Georgia Power Company was granted an easement to construct, maintain and operate transmission lines on property now owned by R.E. Marshall. This agreement contained the following rights: "It is understood and agreed that the Company, its successors and assigns, has at all times the right to trim or remove such trees and underbrush upon or adjacent to the land covered by this easement as would in the judgment of the company interfere with or endanger said line or lines or the operation thereof when erected; hereby agree to pay the fair market price for any growing crops or fruit trees or timber at any time damaged, cut or destroyed."

After obtaining the property in 1968, Marshall began growing a crop of Arizona Cypress for sale as Christmas trees. On March 18, 1974, agents of Georgia Power Company allegedly entered into lands to which it held the easement and destroyed the Christmas trees, which were four to nine feet tall and ready for marketing, valued at approximately $2,250.

(*continued on page 22*)

ALTA action...

A lead article in the August issue of *Better Homes and Gardens* is focused on the subject of the Real Estate Settlement Procedures Act (RESPA) and closing costs. It includes the following sentences:

"Most lenders will require title insurance to protect their interests. Be sure to buy an 'owner's' policy as well, to cover your own interests; it costs just a few dollars extra when you combine owner's with lender's insurance."

Input for the article was furnished by the ALTA Public Relations Committee and staff through contact between ALTA Director of Public Affairs Gary Garrity and Margaret Daly, money management editor for the magazine. *Better Homes and Gardens* has a national monthly circulation of 8 million.

Members of the Public Relations Committee are Chairman Patrick McQuaid of Title Insurance Co. of Minnesota; H. Randolph Farmer of Lawyers Title Insurance Corp.; Francis E. O'Connor of Chicago Title and Trust Co.; LeNore Plotkin of Ticor; James W. Robinson of American Title Insurance Co.; Edward S. Schmidt of Commonwealth Land Title Insurance Co., and Bill Thurman of Gracy Title Co.

ALTA representatives met July 19 with Housing and Urban Development's Reid Patterson concerning HUD's dissatisfaction with services of title insurance companies in connection with property purchases from HUD. ALTA representatives were Robert C. Bates, Marvin C. Bowling Jr., Fred B. Fromhold and ALTA Director of Public Affairs Gary L. Garrity.

The Federal Legislative Action Committee met July 8 in the ALTA Washington, D.C. office to consider legislation developed by the ALTA Indian Land Claims Committee. ALTA staff members attending were Executive Vice President William J. McAuliffe Jr. and Director of Government Relations Mark E. Winter.

ALTA Executive Vice President William J. McAuliffe Jr. attended the New York Land Title Association annual convention July 18-21 at the Playboy Resort in McAfee, N.J.

The ALTA Public Relations Committee met in the ALTA Washington office July 27. The primary agenda item was discussion of recommendations for the 1978 ALTA public relations program.

Executive Vice President William J. McAuliffe Jr. and Director of Research Richard W. McCarthy will attend the Title Insurance Accounting Committee meeting August 28-31 at Sea Island, Ga.

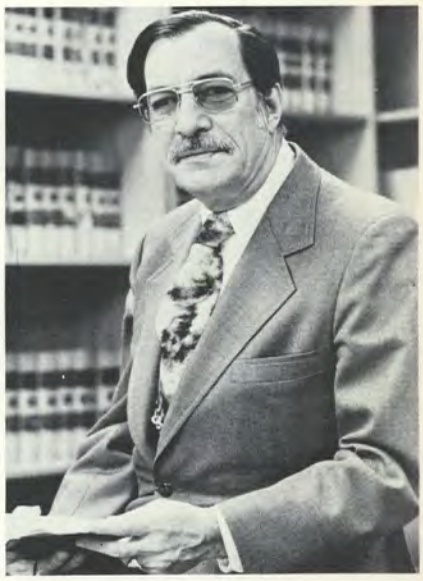
Indian land claims examined at NELTA meeting

Two panel discussions, one on Indian land claims and the second entitled "Condo-Sense for the Conveyancer," highlighted the recent New England Land Title Association annual convention in Bretton Woods, New Hampshire.

Serving as moderator for the discussion on condominiums was James M. Pedowitz, Eastern Regional Counsel of Pioneer National Title Insurance Co. (PNTI). Lawrence F. Scofield Jr., PNTI Eastern Regional Claims Counsel, moderated the Indian claims panel.

Heading the slate of new NELTA officers is T. Raymond Pearson, president. Walter H. Anthrop and Frank J. Sheehy are vice presidents. Stephan C. Wilson and Mitchell Krock were elected secretary and treasurer, respectively.

Newly elected president sets goals for PLTA



The executive vice president of Industrial Valley Title Insurance Co. was elected president of the Pennsylvania Land Title Association at the group's June 5 convention in Hershey.

Marvin H. New will take office October 1 with a two-fold objective. One goal is to establish an educational program for employes of the title insurance industry. Secondly, it is his aim to clarify the appointment of agents, thus enabling the industry to have an agency system that will be able to better serve the homebuyers and lending institutions.

The meeting was attended by approximately 200 persons.

Bylaws—(*concluded*)

supporting or opposing federal legislation or rules or regulations affecting the land title evidencing business.

The Committee, at the request of an affiliated regional or state association, shall provide assistance in the development of programs targeted at consumers, state agencies, regulators, legislators and their staffs in support of the land title evidencing industry.

The Committee may plan and execute a program of political education.

Can any EDP service company build a computerized plant?

NO! A COMPUTER AND PROGRAMS ARE NOT ENOUGH.

KNOWLEDGE AND UNDERSTANDING OF THE LAND TITLE INDUSTRY, ARE NECESSARY.

TITLE DATA SPECIALIZES IN COMPUTERIZED TITLE PLANTS. BEFORE BUILDING YOUR PLANT, THEY—

- ESTABLISH WHICH DOCUMENTS YOUR PLANT REQUIRES.
- IDENTIFY THE VARIOUS LAND DESCRIPTIONS.
- PREPARE LISTING OF SUBDIVISIONS WITH VALID LOTS AND BLOCKS.
- RESEARCH LAND PROBLEM AREAS IN POSTING AND SEARCHING.

FOR MORE INFORMATION PLEASE CONTACT

STANLEY DUNIN, PRESIDENT
TITLE DATA, INC.
23241 VENTURA BLVD.
WOODLAND HILLS, CA 91364
(213) 887-1027

Judiciary panel reports recent court decisions

ALTA Judiciary Committee Chairman Ray E. Sweat advises of two recent cases of interest reported by members of the committee, Harold G. Goubil (Alabama reporter) and Henry W. Keyes (New Hampshire reporter). Case summaries as reported are as follows.

Peddy v. Montgomery, Alabama Supreme Court (Filed April 22, 1977; Rehearing Denied May 20, 1977) Ala. 345 So. 2d 63

FACTS: The purchaser appeals from a summary judgment in favor of the seller denying specific performance of contract for sale of real estate owned by wife in which husband did not join.

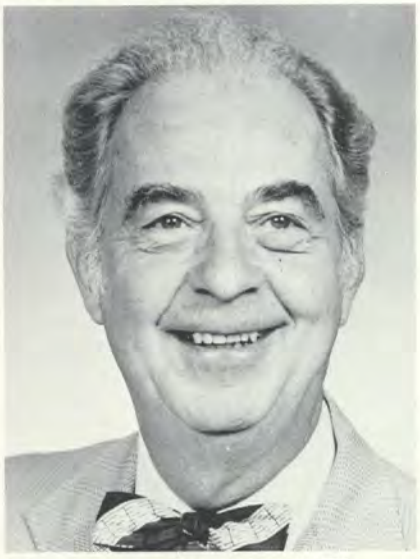
ISSUE: Is the Alabama statute requiring husband's joinder to enable wife to alienate her lands in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I of the Alabama Constitution?

HELD: Yes. Reversed and remanded. Six justices concurring. The majority opinion was written by Janie L. Shores, the lone female member of the Supreme Court which held that denying a wife the right to dispose of her land without the approval of her husband is to deny to a married woman rights which are freely exercised by every other adult male or female person in Alabama. This cannot be justified on legal presumption that all married women are capable of dealing with their land without the guidance of their husband. It is an ancient myth to believe that married women are presumed to be more needful of protection of their interest than other adults, male or female. The right of a married woman to dispose of her lands is a fundamental right to equality. Two judges dissented, basing their dissent on separation of powers doctrine and concern that majority decision will lead to the unconstitutionality of every law regulating marital property rights which treats husband and wife differently from single persons.

Russell et al vs. Hixon et al, New Hampshire Supreme Court, January 31, 1977 369 A. 2d 192

The case disposes of some interesting questions relative to merger of a contract into a deed but finally, in the last paragraph, talks about whether or not Section 7507:7-a (Supplement 75 New Hampshire Revised Statutes Annotated) on Comparative Negligence applies to an action for the negligent examination of title to real estate or whether the rule of contributory negligence continues in force in cases where bodily injury or physical damage to property does not result from the tort. The Appeals Court agreed with the Trial Court that the comparative negligence statute did apply to the negligent examination of title to real estate. (Committee Member Keys questions whether or not comparative negligence has any application in contracts.)

Smith retires from Lawyers Title after 50 years



A former member of the ALTA Board of Governors who has been with Lawyers Title Insurance Corp. for 50 years retired from the company at the end of July and joined the Glenn Justice Mortgage Co., Inc. of Dallas, effective August 1.

He is E. Gordon Smith, a former Lawyers Title senior vice president, who is credited with founding the first joint title plant — a concept estimated to have saved the industry millions of dollars.

At the Glenn Justice Mortgage Co., Smith is senior vice president in investor relations.

White papers—(*concluded*)

of the cumbersome and inefficient grantor-grantee indices that are presently used in many areas of the country.

- Recommendation and support for the centralization of all records affecting land titles in a single location, in place of the system that exists in many areas, including the District of Columbia, whereby land title records may be located in a dozen or more different offices or buildings.
- Support of the work, initiated under the American Bar Foundation, to develop a universal land identifier system that will be compatible for application to land title records and other land-related records (such as land use, ecology, etc.).
- Cooperation with the National Conference of Commissioners on Uniform State Laws to develop a Uniform Land Transactions Code, the purpose of which is "to simplify, clarify and modernize the law governing real estate transactions."
- Cooperation with the American Bar Association in the development of the Uniform Probate Code, which greatly simplifies the transfer of real property in a decedent's estate.
- Support of Section 13 of the Real Estate Settlement Procedures Act of 1974, which provides for the establishment on a demonstration basis of model land recordation systems "to facilitate and simplify land transfers and mortgage transactions."
- Support of, and participation in, the April, 1975, meeting of the North American Conference on Modernization of Land Data Systems, one of a series of conferences designed to deal with the problems of developing land data record systems that will enable those who need such information, including government entities and private industry, to obtain the data more quickly and efficiently.

ALTA Government Relations Committee Chairman Philip B. Branson (left) and W.W. Fritz, Oregon executive assistant insurance commissioner are pictured at the Oregon Land Title Association convention which both addressed.

Staff versatility plus spirit equals good customer service

In the midst of a busy day at Citadel Abstract Corp., The Bronx, N.Y., recently, an employe assigned to handling applications unexpectedly left her desk and hurried from the office.

She returned about an hour later, quickly typed some work, then left again.

When she reappeared at her desk after the second departure, Citadel President Robert J. Klapper inquired about the unusual activity.

The employe said a lawyer client had discovered at closing that he overlooked requesting a survey inspection of premises, and ordering a certificate of occupancy. And it seemed the lender was refusing to provide the mortgage without satisfaction of those requisites.

So the Citadel employe hurried to the local building department to obtain the certificate, pulled a copy of the survey from the title company plant, inspected the premises and typed the report before rushing same to the attorney so the closing could be completed.

According to Klapper, New York agent for USLIFE Title Insurance Co. of New York, this versatility and *esprit de corps* in 10 veteran employes is the key to service that makes Citadel an effective competitor in a challenging market.

"Everybody — including the typist — is a reader, recorder, and closer," Klapper remarked. "Together, we call ourselves the 'over the hill gang.'"

The variety of problems encountered and the demand for prompt, excellent service weigh against organizing Citadel as a company of vertical experts, Klapper said. So the company was developed around a nucleus of experienced title professionals who can handle a wide range of situations and back each other up in various duties.

Recognizing the importance of continuity, Citadel is using the "over the hill gang" to develop a "farm team" of promising young employes including law students and others. The younger staff members who adapt well to the widespread responsibilities at Citadel have an opportunity to evolve into an impressively versatile group of title professionals in the future.

State government figures address OLTA convention

A lengthy speaker roster at the recent Oregon Land Title Association annual convention included such figures as the state deputy real estate commissioner, the executive assistant insurance commissioner and chief counsel of the Oregon Department of Justice's anti-trust division.

Elected to serve as association officers for the 1977-78 term were President David D. Gilley, vice president and state manager for SAFECO Title Insurance Co., Portland, and Vice President Stuart Wylde of The Abstract and Title Co., LaGrande.

Voted executive committee members-at-large were Richard L. Benson, vice president and manager, Clackamas County operations, Pioneer National Title Insurance Co., Oregon City and John W. Kelley, vice president and manager, Deschutes County Title Co., Bend.

Honorary membership recipients recognized at the meeting are Helen M. Hossack, Jack L. Pottenger and Gerald B. Gray. Pottenger and Gray are both past OLTA presidents.

South Dakota association elects officers

Glen Rhodes of Security Land & Abstract Co. in Sturgis was elected president of the South Dakota Land Title Association at the group's annual convention in Pierre recently.

First and second vice presidents respectively are Max Gruenwald of The Consolidated Abstract Co., Inc. in Milbank and Olga Selland of Sanborn County Abstract Co. in Woonsocket.

Member-at-large is Wayne Roe of Lyman County Title Co., Inc., in Kennebec. Elected secretary treasurer was Harold H. Schuler of Hughes County Abstract Co. in Pierre.

Judiciary—(*continued*)

Georgia Power Company refused Marshall's request for payment. Marshall then sued Georgia Power Company for $2,250 as damages for the value of the trees. Marshall also sued for $300, "which sum represents the reasonable cost of removing debris caused by defendant and in rectifying the other damage caused by defendant" (Par. 7 of plaintiff's complaint).

Defendant answered, contending it had a right to remove the trees which were grown on the easement without its permission, and sought a judgment on the pleadings.

A motion for summary judgment was granted in favor of defendant, and plaintiff appeals.
Held:

1. Timber is technically known as green wood 20 years or more in age. *Dickinson v. Jones,* 36 Ga. 97, 104. Plaintiff does not contend the Christmas trees are fruit trees or timber, but that they are a growing crop.

2. Under the authority of *Adcock v. Berry,* 194 Ga. 243 (2b), 21 SE 2d 605, the word "crops" includes and embraces the fruits and products of all plants, trees and shrubs (Code Section 85-1902), but not the tree or shrub itself. Under the contract, plaintiff could not sue for the value of the trees cut down, as the contract does not provide for payment of same.

3. The specific language in the easement provides that the electric company has authority to "trim or remove such trees and underbrush . . . as would in the judgment of the company interfere with or endanger said line or lines or the operation of same when erected," and an agreement to pay the fair market value of "growing crops or fruit trees or timber at any time damaged." The latter language applies to its entry upon or adjacent to the easement, and not merely the right to trim all trees and underbrush at will, but such as would "interfere with or endanger said line or lines."

4. Plaintiff may be entitled to damages which the law presumes to flow from any tortious act for a trespass upon his rights even though the defendant had a right of general entry upon the property. See *Weimer v. Cauble,* 214 Ga. 634, 636 (106 SE 2d 781); *Tedder v. Stiles,* 16 Ga. 1, 2 (6). Nominal damages are always allowed for any invasion of a property right whether or not actual damages result therefrom. *Swift v. Broyles,* 115 Ga. 885 (42 SE 277). And the law presumes and infers some damage from the invasion of a property right. *Price v. High Shoals Mfg. Co.,* 132 Ga. 246 (64 SE 87); *Williams v. Harris,* 207 Ga. 576, 579 (2) (63 SE 2d 386).

5. Under the present posture of the case, unquestionably Georgia Power Company had the right to go upon the lands to trim the trees, when in its judgment they could constitute a hazard to its electric transmission lines. And under the authorities previously cited, Marshall had no legal right to compensation for his trees because they are not within the legal definition of "timber," or "growing crops," and Marshall has not contended nor offered proof that the trees removed or trimmed were fruit trees.

6. But the Georgia Power Company did not have the right to damage plaintiff's other lands in going to the lands over which it had an easement, and Marshall plainly alleged in his complaint that the cost of removing debris left by said Georgia Power Company, "and rectifying other damage caused by defendant" amounted to $300.

7. In summary judgment cases the record, including pleadings and evidence, is construed most favorably toward the party opposing such motion, and most unfavorably towards the movant. See *Holland v. Sanfax Corp.,* 106 Ga. App. 1, 4-5 (126 SE 2d 442); *McCarty v. National Life etc. Ins. Co.,* 107 Ga. App. 178, 179 (129 SE 2d 408). And, of course, under the Civil Practice Act, if notice is given by the complaint of matter which may constitute a cause of action, a favorable construction of the pleadings toward complainant is required. *Harper v. DeFreitas,* 117 Ga. App. 236 (1) (160 SE 2d 260); *Hunter v. A-1 Bonding Service,* 118 Ga. App. 498, 501 (164 SE 2d 246).

8. In order to obtain a summary judgment it was incumbent upon the movant to show that there was no issue for determination by a jury. Georgia Power Company remained completely silent as to the $300 damages alleged to other property. We are not advised as to the full extent of damage but in oral argument it was contended that certain fences were cut by Georgia Power Company. The record does not show whether fences were cut by Georgia Power Company, but that can await the trial before the jury. No right on Georgia Power Company's part to cut fences of plaintiff, or otherwise damage his other property, is shown by the contract between the parties. While the easement grants the right of entry, it does not provide for the indiscriminate violation of plaintiff's property rights in so doing.

Judgment reversed in part and affirmed in part.

Eminent domain

Richard R. Vazza v. Bruce Campbell, et al, 520 F 2d 848 (1st. Cir. 1975).

In this case the land owner sought to challenge the constitutionality of the Massachusetts eminent domain statute on the grounds that he was entitled to a judicial determination of the fair value of the property before losing possession. The court held in line with previous U.S. Supreme Court pronouncements on the subject that this case presented a wholly insubstantial claim.

Business Ventures Inc. v. Iowa City, Iowa Sup. 75, 234 NW 2nd 376

City instituted proceeding to acquire landowner's property by eminent domain. The District Court rendered judgment awarding landowner damages of $47,750, and the city appealed. The Supreme Court held that city's objections, to evidence regarding value of landowner's property absent restrictive zoning ordinance, were not preserved for review; that record, coupled with fact that city, which was condemning authority, was also zoning authority whose zoning ordinance so restricted landowner's property as to decrease its value, justified trial court in permitting landowner's collateral attack on the zoning ordinance; that jury instruction, which permitted jury to consider the highest and best use of landowner's property without regard to zoning in determining landowner's damages, became the law of the case, and thus jury was entitled to hear expert opinion regarding value of landowner's property without the alleged illegal zoning restraint; and that city had waived objections to admission of evidence of comparable sales of land.

Affirmed.

Environmental impact statements

In the matter of Cummington Preservation Committee v. Federal Aviation Administration et al., 524 F 2d 241 (1st Circ. 1975).

The Court found the District Court (Mass.) findings as to the adequacy of an environmental impact statement concerning the construction of a radar facility, not clearly erroneous and affirmed its judgment denying an injunction as to the construction of such a facility.

In the matter of Essex County Preservation Association v. Campbell, 399 F. Supp. 208 (D Mass. 1975).

The court refused to enjoin a highway widening project because no irreparable harm was shown by violation of the National Environmental Policy Act procedural requirements.

In the matter of City of Boston v. Coleman, 397 F. Supp. 698 (D Mass. 1975)

The Court did hold that the approval of a lay-out plan for airport runways by the Federal Aviation Administration can only be conditional until the environmental impact statement has been prepared.

In the matter of R.I. Committee on Energy v. General Services Administration, 397F Supp. 41 (D R.I. 1975).

The Court first decided that the transfer of surplus Federal Agency property could be enjoined until the preparation of an environmental impact statement but in a later decision filed August 24, 1976 not yet reported the Court revised its earlier decision to the effect that a declaratory judgment not an injunction should be entered declaring that an environmental impact statement must be prepared before the sale is consummated or else the sale is illegal. This case involved the sale of a former naval auxiliary landing field in Charleston, Rhode Island to Narragansett Electric Company for a nuclear power plant.

Estates

Long v. Long, 45 Ohio St. 2d 165, 343 N.E. 2d 100, (1976).

"The unique issue in this case concerns the nature of the interest remaining in the grantor after the creation by deed of a fee tail estate which was conveyed to 'Jesse S. Long and the other children of his body begotten, and their heirs and assigns forever'."

The Supreme Court gives an extremely good discussion of the difference between a possibility of reverter and a reversion and the history of each. A reversion is the residue of an estate left in the grantor to commence in possession after the termination of some particular estate transferred by him. It is a vested right arising when a person having a vested estate transfers to another a lesser vested estate. It is vested because there is no condition precedent to the taking effect in possession other than the termination of the preceding estates. A reversion is historically distinguishable from a possibility of reverter in that a reversion arises when the estate transferred is of a lesser quantum than the transferor owns. A possibility of reverter arises when the estate conveyed is of the same quantum as the transferor owns.

Federal housing

Druker v. City of Boston, 410 F. Supp. 1314 (D Mass. 1976).

This was an action brought by an owner of a federally financed housing development to declare invalid rents established by local rent control board. The Court found the local

(*continued on page 24*)

The wisdom of Big Brother, III

by Richard L. Lesher
President
Chamber of Commerce
of the United States

In 1775, a harassed New England merchant complained: "Men of war, cutters, marines with their bayonets fixed, judges of the admiralty, collectors, comptrollers, searchers, tide waiters, land waiters, with a whole catalogue of pimps, are sent hither not to protect our trade but to distress it."

Such a state of affairs was obviously intolerable, so we threw out King George and his "swarms of officers."

And now? Well . . .

Pity the poor Navaho Indian who was ordered by the government to install a two-way intercom in his mine . . . even though he works it alone.

He's as perplexed as the Portland employer who was told that 15 per cent of his two secretaries and one bookkeeper must be of minority extraction. Fifteen per cent of three people!

Then there's the small businessman who was fined for having too many fire extinguishers. That's right, too many.

In Chicago, they confiscated a batch of rubber squeeze toys . . . for squeaking too loudly.

The head of a meatpacking operation recalls being ordered by one federal agency to put an opening in a conveyor line, and being ordered to close it by another federal agency. "We have been told by various federal agencies," he says, "to provide smooth and rough floors in the same area, salt and not salt the same area, paint and not paint the same area, and so on."

Those are just the petty frustrations. Get into the excesses of the environmental protection movement and you make the big time.

The snail darter — a small fish — has stalled a $116 million dam in Tennessee.

The Furbish lousewort — a useless weed — blocks a $600 million hydroelectric project in Maine.

The soft-shelled clam has halted a $2 billion nuclear power plant in New Hampshire.

And a $3.5 billion coal-fired power plant in Utah was sacrificed on the altar of the black-footed ferret and the kangaroo rat.

Doesn't it boggle your mind — four major energy facilities being held up for petty reasons while the President reminds us of the energy crisis?

So far, no one in the bureaucracy has tried to make his horse a consul . . . but I expect it soon.

I had a letter the other day from a writer who asked me to explain the contradictions of the government. He said, "I understand there is a move to legalize marijuana while at the same time they are outlawing saccharin!"

This bizarre behavior is certainly reminiscent of the eccentricities of history's mad kings and emperors. And yet it occurs — with increasing frequency — right here in the democratic, middle-class U.S.A.

Estimates of the total consumer cost of government red tape vary widely. But the educated guesses usually run between $700 and $2,000 a year, for each and every man, woman and child in the country.

Who — I would like to know — is "protecting" the consumer from this?

In the words of Bert Lance, director of the President's Office of Management and Budget, "We consistently talk about 'wages' and 'prices' being the causes of inflation. (But) the most serious perpetrator of all is government itself."

controls invalid on the grounds that they frustrated the purposes and objectives of the National Housing Act and thereby created an impermissible conflict between the federal and local regulatory systems.

Federal property

Williams v. Hathaway, 400 F. Supp. 122 (D Mass. 1975).

This case has only a tangential connection with real property law but may interest some of the membership. This was a declaratory judgment action in which the court held that the Department of the Interior had the right to prohibit nude bathing on a remote piece of Federal land within the Cape Cod National Seashore. The court held that the regulation did not violate any constitutional rights and was justified in view of the environmental problems such as dune damage, litter, sanitation and destruction of plant life, and in light of parking and trespassing problems. Furthermore, the beach was classified in the Master Plan for the Seashore as a "natural environment area" which was not intended to accommodate large numbers of bathers. The case has been affirmed by the Court of Appeals but has not yet been reported in the Federal Reporter.

Indian lands

Joint Tribal Council of Passamaquoddy Tribe, et al v. Morton, 528 F 2d 370 (1st. Circ. 1975).

This was a declaratory judgment action brought by an Indian Tribal Council and its tribal governors to determine the applicability of the Indian Non-intercourse Act 25 USCA 177. The plaintiffs claimed that the State of Maine had divested the tribe of its land without permission of the federal government as required by the Act. The Court upheld the Maine federal district court's findings in 388 F Supp. 649 that the Passamaquoddy Tribe, although not recognized by any treaty was within the language of the Non-intercourse Act and that by the enactment of his Act a trust relationship had been established by the federal government and the tribe which had not been terminated. The possible consequences of this case are far reaching because it concerns title to over 6,000 acres of land in Maine and it is the first of several cases to be instituted on this point including ones in Rhode Island and Massachusetts.

Judgment

Clarence M. Bull, Inc., v. Goldman, 353 A 2d 661, 30 Md. App. 665, (1976).

On December 4, 1974, a judgment creditor filed a bill of complaint seeking a judicial sale of real property to satisfy a judgment against Joyce Building Company. The Goldmans were the then owners of the property.

On April 19, 1973, Joyce, as seller, executed a contract of sale to the Goldmans. The seller, later acquired title to the property on August 7, 1973. The creditor secured its judgment against Joyce on July 31, 1974 and on September 16, 1974, Joyce conveyed the property to the Goldmans.

The Court held that regardless of whether equitable title passed when the contract was executed or when the seller obtained title, the purchasers held equitable title to the real property before the entry of the judgment. Their equitable interest was not affected by the subsequent judgment against the seller.

In the matter of Becker v. Lindsey, 16 Cal. 3d 188, 545 P. 2d 260 (1976).

Plaintiff attached defendant's real property. Subsequent to the attachment but prior to any judgment, defendant's wife recorded a declaration of homestead on the attached property. Thereafter the court entered a money judgment for the plaintiff and issued a writ of execution pursuant to which a levy was made.

The Supreme Court affirmed the trial court's order quashing the writ of execution and setting aside the levy concluding that a declaration of homestead recorded before judgment defeats a prior attachment lien.

Landlord and tenant

Ucci v. Mancini — R.I. —, 344 A 2d 367 (1975).

A lease of real estate for ten years beginning July 1, 1963 provided, among other things, for monthly payments of rent and gave lessee an option to purchase at any time during the balance of the term after July 1, 1968. Rent was paid through March, 1968. The April, 1968 payment was tendered but refused by lessor, and, on May 7, 1968, lessor sent notice to lessee that, because of violation of several provisions of the lease, the lease was terminated, and the lessee was to vacate the premises on or before June 1, 1968. One specified violation was the failure to provide lessor with a copy of the requisite insurance policy. It was conceded, that at this time, lessee had failed to purchase the necessary insurance policy. Lessee did not vacate the premises, and on August 19, 1968 notified lessor that she desired to exercise her option to purchase the property. Lessor did not acknowledge this attempted exercise of the option and continued to refuse acceptance of the rent.

Subsequently, in November, 1968 lessee in a court trial was successful in evicting a third party from possession of the premises. Lessor, although present at this trial, did not question lessee's right to bring the proceeding. Again in November, 1968, lessor entered the premises and removed a sign that had been placed there by lessee, telling her that the lease did not allow such a sign. In December, 1968 lessor complained that the location of the Christmas trees that lessee was selling created a traffic hazard.

Lessee brought action for specific performance of the option to purchase. The trial justice found that the option was an integral part of the lease; that lessee had breached the lease by her failure to insure the premises. He ruled that lessee was a trespasser during the period of May 7 to June, 1968. But in determining her status from that point on, he found that lessor's conduct was clearly at odds with his termination of the lease, and, consequently, held that lessor by his later actions recognized lessee as a lessee, and that, therefore, the option was properly exercised. The lessor appealed.

Hold: Lessor's appeal sustained and judgment appealed from vacated and case remanded with direction to enter judgment for lessor.

The lease had terminated, and, since it was found that the option to purchase was an integral part of the lease, the option was exercisable only so long as the lease was operative. Assuming that the breach was later waived, lessee failed to prove that the lease was in effect at the time she notified lessor of her intention to purchase the property.

A concurring opinion based the result on the finality of the termination of the lease. Cases (including a Rhode Island case) finding revival of leases by waiver of completed termination appear to rest on subsequent conduct of an inequitable nature.

Two justices dissented, agreeing that the trial justice had applied the correct rule of law.

White v. RCA Service Company, Iowa Sup. 75, 234 NW 2d 153.

Action to eject tenant from leased premises. The District Court entered judgment for tenant, and landlord appealed. The Supreme Court held that tenant complied with provisions of option to renew lease, requiring that tenant give written notice of exercise of option by certified mail to landlord on or before February 1, 1971, where tenant sent notice to landlord by mail postmarked January 29, 1971, which was received by landlord on February 4, 1971, since notice of the exercise of the option was complete upon tenant's placing its letter in the mail on January 29, 1971.

Affirmed.

Limited partnership

In the matter of Evans v. Galardi, 16 Cal. 3d 300, 546 P. 2d 313 (1976).

Plaintiff recovered a money judgment against two individuals, the defendants. Defendant judgment debtors were the sole limited partners in a limited partnership and also owned all of the stock of the sole corporate general partner. The limited partnership held title to a motel and in enforcement of his judgment plaintiff obtained a writ of execution and instructed the sheriff to place a keeper in that motel in order to collect the judgment. The limited partnership filed a third party claim in effect asserting that its property was not available in satisfaction of defendants' indebtedness. The limited partnership's third party claim was sustained and the trial court entered a judgment on the claim declaring that at the time of levy of the writ, the title to the motel was vested in the limited partnership.

The Supreme Court affirmed and held that under the Uniform Limited Partnership Act a limited partner has no property interest in the specific partnership assets by virtue of his status as a limited partner, and such assets are not available to satisfy a judgment against a limited partner in his individual capacity even where defendants were entitled to 100 per cent of the net partnership profits. The Uniform Limited Partnership Act does not distinguish between the rights and obligations of limited partners or their relationship with the firm depending upon the extent of their ownership interest.

Plaintiff is not remediless. Under the Uniform Limited Partnership Act a creditor of limited partners may satisfy his claim from the debtors' partnership interest through the use of a so-called charging order which has replaced levy of execution as the remedy for reaching such interests even where the partnership is owned entirely by the judgment debtors. This is the conclusion where the partnership is a viable business organization and the creditor does not show that he will be unable to secure satisfaction of his judgment by use of a charging order or by levy of execution against the debtors' other personally owned property.

(*continued*)

Mechanics' lien

Urban Systems Development Corp. v. NCNB Mortgage Corp., 513 F. 2d 1304 (4th Cir. 1975).

Construction lender refused to make further disbursements to owner-borrower after a mechanic's lien to which subsequent advances would have been subordinate, was filed by a subcontractor. Dispute erupted between owner and general contractor over their respective obligations and the owner fired the general contractor. General contractor brought suit against the construction lender, asserting that the undisbursed funds constituted a trust for the benefit of the general contractor. Rejecting the theory advanced by some California cases, the court held that such theory could not be applied to benefit the general contractor in a case where (1) the monies to be disbursed had not been segregated in a separate fund; (2) the construction lender undertook no obligation to see to the proper application of disbursements by the owners, and (3) the project had not been completed.

Barry Properties, Inc., v. Fich Bros. Roofing Company, 353 A 2d 222, 277 Md. 15, (1976).

Subcontractor brought an action against an owner of property, to enforce a mechanics' lien. The owner contended that the imposition of a lien upon his property, without notice and an opportunity for a prior hearing, as the Maryland statute authorizes, deprives the owner of his property without procedural due process in contravention of Article 23 of the Maryland Declaration of Rights and of the Fourteenth Amendment of the United States Constitution.

The Court stated that preliminarily, before determining if Maryland's mechanic's lien statute meets the requirements of due process, we must ascertain whether two prerequisites to the applicability of these constitutional provisions exist. First, in order for the due process clauses of Article 23 and the Fourteenth Amendment to apply, there must be "state action." It is clear that mechanics' liens involve state action since they are created, regulated and enforced by the State.

The second preliminary issue is, does the imposition of a lien under the Maryland statute, constitute a "significant taking of property?" The Court, after a discussion of four Supreme Court cases: *Sniadach v. Family Finance Corp.*, 395 US 337; *Fuentes v. Shevin,* 407 US 67; *Mitchell v. W.T. Grant Co.*, 416 US 600 and *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 US 601, concluded that because it allows prejudgment seizures without notice, a prior hearing or other sufficient safeguards and cannot be justified under the extraordinary circumstances exception mentioned in the Sniadach and Fuentes cases, the Maryland mechanics' lien law is incompatible with the due process clauses of Article 23 and the Fourteenth Amendment. The Court next concluded that the mechanics' lien statute was severable so that it was possible to delete the aspect of the statute which renders it unconstitutional, that is, its taking of property without providing sufficient safeguards, while preserving enough to have a law capable of fulfilling the principal legislative intent. The Court then stated that "this can be accomplished by excising that portion of the statute which purports to create a lien from the time work is performed or materials furnished, to the time a lien is established by judicial determination in a proceeding sufficient with respect to due process. We, therefore, hold that under the current statute there can be no existing lien on property until and unless the claimant prevails either in a suit to enforce the claimed lien or in some appropriate proceeding providing notice and a hearing. What the claimant, be he a general contractor or subcontractor, possesses up to that point in time is a chose in action. Under this ruling, we believe, the statute continues to effectuate the primary legislative intent, yet the owner is not deprived of a significant property interest without due process since the owner's interest is not impinged upon until after he is provided with notice and an opportunity for a hearing. It follows that Section 9-107(b), to the extent that it grants mechanics' liens priority over any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building but prior to the time the lien is established by a judicial determination, is also null and void."

In the matter of South Bay Engineering Corp. v. Citizens Sav. & Loan Assn., 51 Cal. App. 3d 453 (1975).

An engineering company was engaged by the property owners to make aerial topographic maps and studies for possible subdivision of certain property. Thereafter, the property owners received a loan from defendant savings and loan association secured by a first deed of trust on the property, which was subsequently foreclosed. Some time later, the engineering company filed a mechanic's lien on the real property and brought this action to foreclose the lien. Plaintiff had placed its engineering stakes and aerial markers on the property prior to the creation and recordation of defendant's trust deed. In holding for defendant lender the appellate court stated that the issue was whether the placing of the markers and stakes constituted work on the ground of a type that would give plaintiff's later recorded mechanic's lien priority over defendant's earlier recorded deed of trust and concluded that the markers and stakes were only devices to assist plaintiff in preparing its plans, and were not themselves a "work of improvement" or a "site improvement" entitling plaintiff to a mechanic's lien. Until some grading or clearing of the property was commenced, the nonvisible work of preparing plans and engineering studies did not provide the basis for giving plaintiff's lien priority over defendant's recorded deed of trust even though plaintiff left its marking devices on the property. Those devices did not improve or alter the ground.

G & B Contractors, Inc. v. Coronet Developers, Inc., 134 Ga. App. 916, 216 S.E. 2d 705 (1975).

Plaintiff, a subcontractor, brought a suit to foreclose its lien for labor and materials against the general contractor and the owner of the real estate in the State Court of Cobb County within 12 months from the time the debt became due, as required by Code Ann. Section 67-2002 (3). This suit was dismissed for lack of jurisdiction and venue. Plaintiff later, but more than twelve months from the time the debt was due but within six months after the dismissal of the prior suit, renewed the foreclosure suit in the Fulton Superior Court and also sought a general judgment against the defendant property owner for the reasonable value of the labor and materials used in the improvements in the defendant's property. The trial court dismissed the complaint. **Held:**

1. *Chamblee Lumber Co. v. Crichton,* 136 Ga. 391 (71 SE 673) holds that the renewal statute, Code Ann. Section 3-808, has no application to a suit to foreclose the lien of a materialman. The decision controls here. Since foreclosure was commenced more than twelve months after the date the debt became due, plaintiff was barred from foreclosing its lien. The trial court correctly dismissed Count 1 of the complaint.

2. In Count 2, the plaintiff alleged that the defendant accepted the work and improvements placed on its real estate by the plaintiff and, therefore, plaintiff is entitled to recover the reasonable value of the services performed. It is admitted by plaintiff that there is no privity of contract between itself and the defendant owner. "Where a materialman seeks to foreclose his lien against real estate which has been improved with material furnished by him to a contractor for such purpose, he cannot recover a general verdict and judgment against the owner of the land for the value of the material furnished . . . for the simple reason that he is not a party to the contract for the purchase of the material." *Gignilliat v. West Lumber Co.*, 80 Ga. App. 652 (56 SE 2d 841). The case of *Conway v. Housing Authority,* 102 Ga. App. 333 (116 SE 2d 331), is distinguishable from this in that Conway the owner procured a subcontractor engaged in performing work for the general contractor to perform additional work. This factor is not present here. Accordingly, the trial court properly dismissed Count 2 of the complaint.

Judgment affirmed.

Allied Asphalt Company v. Cumbie, 134 Ga. App. 960, 216 S.E. 2d 659 (1975).

Did the complaint seeking foreclosure of a materialman's lien upon real estate under Code Ann. Section 67-2002 satisfy the requirement of suing the person with whom the debt was contracted within twelve months from the date the debt became due? That is the principal question presented in this appeal. It arises because the complaint as originally filed did not contain a prayer for judgment in personam against the contractor. After plaintiff had amended in this respect, defendant owners moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Upon this motion being granted, plaintiff materialman has brought this appeal.

Having satisfied the statutory requirement of filing for record its claim of lien within three months after furnishing labor and material for construction of roads and streets in the improvement of designated lands, plaintiff materialman filed suit in the superior court within 12 months of the date the debt became due. As amended, the defendants were the subcontractor to whom plaintiff supplied the paving materials, and the owners. As originally filed, the complaint alleged, inter alia, that plaintiff entered into a contract with defendant C.L. Cumbie, a subcontractor to install asphalt paving on described realty of defendant owner; that plaintiff completed the work pursuant to the contract but had not been paid; that plaintiff filed a lien against the real estate pursuant to Code Ann. Section 67-2002; and that plaintiff was entitled to an in rem judgment against the land described in the lien in the amount of $16,561.28. Plaintiff's prayer concluded, "Wherefore, Plaintiff demands a judgment in rem against the real estate . . . and that the Plaintiff have such other and further relief as is deemed just in the premises." Subsequently — but after expiration of the 12-month period within which an in personam action must be initiated — plaintiff

(*continued on page 26*)

amended the complaint to add a prayer "for a money judgment in personam" against the co-defendant with whom plaintiff had contracted. Thereupon a motion to dismiss the complaint for failure to state a claim pursuant to Code Ann. Section 81A-112 (b) (6) was filed in behalf of defendant owners. The instant appeal is from the grant of that motion dismissing the "complaint and all amendments thereto."

Held:

1. It is essential and imperative that statutory requirements be satisfied in order to have a valid foreclosure of a materialman's lien. See *D. H. Overmyer Warehouse Co. v. W. C. Caye & Co., Inc.,* 116 Ga. App. 128, 157 SE 2d 68, where our late beloved Judge Eberhardt in his erudite fashion related the history of Georgia's lien laws. The applicable statute states plainly that "To make good the liens . . . they must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective . . ." Code Ann. Section 67-2002.

To be entitled to a lien, plaintiff must have filed for record his claim of lien within three months after materials were furnished; and an action for recovery of the amount of the claim must be commenced within 12 months from the time it became due. Code Ann. Section 67-2002(3); *Eubank v. Barber-Colman Co.,* 115 Ga. App. 217, 219 (2b), 154 SE 2d 638. While the latter requirement may be satisfied by concurrently suing the contractor or owner when seeking to enforce the lien (*Cheshire v. Engelhart,* 82 Ga. App. 458 (2) (61 SE 2d 434,) the commencement of an in personam action within the time specified is a prerequisite to the foreclosure of a materialman's lien. "One of the conditions precedent to the foreclosure of the liens specified in Code Ann. Section 67-2001 is that suit must be brought by the laborer or materialman against the person with whom the debt was contracted, either the owner or the contractor, as the case may be, within 12 months from the time the debt became due. (Cits.)" *Jordan Co. v. Adkins,* 105 Ga. App. 157(1) (123 SE 2d 731).

2. Relying upon *Murray Chevrolet Co. v. Godwin,* 129 Ga. App. 153 (199 SE 2d 117), defendant owners argue that plaintiff's "in personam prayer amendment" does not relate back to the filing of the complaint; and accordingly the motion to dismiss was properly granted since plaintiff had failed to commence an in personam action against the party with whom it contracted within the requisite 12 month period. Plaintiff, on the other hand, replies that the amendment does relate back to the filing of the complaint so that the commencement of an in personam action should be deemed timely.

In our view, plaintiff's original complaint, without the amendment, was sufficient to withstand the motion to dismiss for failure to state a claim upon which relief can be granted. Accordingly, we deem it unnecessary to consider whether plaintiff's amendment relates back to the filing of the original petition.

Code Ann. Section 81A-154 (c) provides, in part: "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." This procedural provision "makes it clear that the demand for judgment is no part of the claimant's cause of action." 2A Moore's Federal Practice Section 8.18, p. 1803.

"Inasmuch as the demand for relief does not constitute part of the pleader's claim for relief, a failure to demand the appropriate relief will not result in a dismissal. The question is not whether plaintiff has asked for the proper remedy but whether he is entitled to any remedy." Wright & Miller, Federal Practice & Procedure: Civil Section 2664, p. 108. Here plaintiff's complaint set forth a claim for in personam relief against defendant subcontractor; and the failure to demand such relief among the prayers is of no consequence.

Having commenced the in personam action within the required 12 months period, plaintiff fulfilled the condition precedent to the assertion of its lien. The trial court erred in dismissing the complaint.

Judgment reversed.

Amcon, Inc. et al. v. Southern Pipe & Supply Company, Inc., 134 Ga. App. 655, 215 S.E. 2d 712 (1975)

Stolz, Judge.

The defendant general contractor appeals from the denial of its motion to dismiss the plaintiff materialman's complaint based on materials furnished defendant's subcontractor in construction of a public works job for DeKalb Sewerage Treatment Plants for $5,119.27.

On May 8, 1973, within the 90-day period specified in Code Ann. Section 23-1708, the plaintiff's attorneys sent the following letter to Mr. H.F. Cameron, DeKalb County Water Department, P.O. Box 1987, Decatur, Georgia.

Dear Mr. Cameron:

We represent Southern Pipe & Supply Company, Inc., which is owed $3,192.72 for invoices against Alright Trades, 2572 Lawrenceville Highway, Decatur, Georgia, who is a subcontractor on the DeKalb Sewage Treatment Plants, 4800 Buford Highway and 3592 Flat Shoals Road. The general contractor is Amcon, Inc., Box 48107, Atlanta, Georgia.

This notice is given pursuant to Georgia Code, Section 23-1708.

Please be governed accordingly.

Sincerely yours,
ARNALL, GOLDEN & GREGORY
H. Fred Gober

HFG/rac
cc: Amcon, Inc.
Alright Trades
Sam Davidson
Curtis Dyer

On August 14, 1973, after other correspondence, the plaintiff's attorney advised the defendant bonding company's surety claims supervisor that "the total amount owed our client as of July 9 is $5,119.27," the amount ultimately sued for by the plaintiff.

The sole issue for determination is the sufficiency of the notice contained in the plaintiff's attorney's letter of May 8, 1973. **Held:**

In *Porter-Lite Corp. v. Warren Scott Const. Co.,* 126 Ga. App. 436 (3) 191 SE 2d 95, this court noted that our statute (Code Ann. Sections 23-1704 through 23-1708) is derived from the Miller Act, found in 40 U.S.C. Sections 270a through 270d, and that this court would look to decisions of the federal courts construing the noted provisions of the Miller Act.

In *Fleisher Engineering etc., Co. v. United States,* 311 U.S. 15, (61 S.Ct. 81, 85 L.Ed. 12), the United States Supreme Court, construing notice provisions in a "Miller Act" case, stated, "In short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character that statute must be liberally construed so as to accomplish its purpose." The court went on to hold that the notice sent by ordinary mail was sufficient notwithstanding the statutory language directing that such be sent by registered mail. "We think the teaching of the cases which have dealt most soundly with questions regarding the sufficiency of notice when it is required to be given by Section 270b (a) may be fairly summarized as follows: The giving of the written notice specified by the statute is a condition precedent to the right of a supplier to sue on the payment bond; the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill." *Boden v. United States,* 239 F 2d 572 (1), 577. Essentially these same requirements were noted by this court in Porter-Lite, supra, p. 443, as well as the principle of liberal construction of the statute.

In the case sub judice, the notice was sent to the prime contractor, albeit a copy; no claim is made that it was not sent within the statutory period; it stated the name of the party to whom the materials were furnished or supplied. The discrepancy between the amount stated in the first letter and the amount ultimately sought, obviously takes into consideration materials furnished between May 8, 1973 (date of the first letter) and July 9.

In view of the remedial nature of the statute, whose purpose is to provide notice of a claim sufficient to place the general contractor and its bondsman in a position to protect themselves, we hold that this variance, which was corrected five months prior to suit being filed, does not work a forfeiture of the claim.

"In the case before us, although the tenor of the letters could have been more explicit, we believe that they were clearly designed to and did inform the prime contractor that his supplier was looking to him for payment of the subcontractor's bill." *United States v. Freethy,* 469, F 2d 1348 (3), 1351.

Judgment affirmed.

Mortgages

Northrip v. Federal National Mortgage Association, 572 F 2d 23 (1975).

In *Northrip,* the Sixth Circuit Court of Appeals reversed the District Court's finding of unconstitutionality of Michigan's statutes allowing mortgage foreclosure by advertisement.

These statutes allow foreclosure and sale of a real estate mortgage upon advertisement in a newspaper in the county where the property is located. The mortgagor has six months (or one year if more than ⅓ of the debt has been paid) to redeem the property from the sale. The District Court (in its opinion at 372 F. Supp. 594 (1974) held that the lack of right to a hearing prior to foreclosure resulted in a violation of 14th Amendment due process, and that the mere existence of the statute provided the required state action.

The Court of Appeals rejected the District Court's finding, stating that the statute merely regulated the common law power of sale foreclosure, and did not create it. In addition, the court rejected the argument that the acts of the Federal National Mortgage Association constituted actions of the state.

Gardner Plumbing v. Cottrill, 44 Ohio St. 2d 111, 338 N.E. 2d 757 (1975).

The question here concerned the disbursement of mortgage funds by the mortgagee in a construction loan and if the mortgagee was negligent in the disbursement was it liable to the mortgagor on an agency theory?

The Ohio Supreme Court said: "To hold appellant, the mortgagee, liable on an agency theory for negligently disbursing the funds of the mortgage, appelles, the mortgagors, must

(*continued*)

establish by competent evidence that such a relationship existed, the burden of proving the agency being upon the party who asserts it."

Hughes, et al. Trustees v. Beltway Homes, Inc., 347 A 2d 837, 276 Md. 382, (1975).

Purchaser moved to set aside an order ratifying a foreclosure sale on the ground that the dwelling had been advertised to contain four bedrooms where, in fact, it had only three bedrooms. The purchaser's action was not taken until over three months after the sale had been ratified. Maryland Rule 625a gives the courts revisory power over judgments entered more than 30 days previously only in case of fraud, mistake or irregularity. The chancellor denied the motion, however, the Court of Special Appeals, 26 Md. App. 146, reversed holding that under Rule 625, an exception exists for equity cases not heard upon their merits. The Court of Appeals reversed the Court of Special Appeals and stated that there is no exception to the rule for equity cases not heard upon their merits. The facts in this case do not fit within fraud, mistake or irregularity, therefore, the purchaser at the foreclosure sale must fail in its attempt to set aside the ratification of the sale. The Court also noted that the purchaser had not proceeded with diligence.

Garland, Trustee v. Hill, 346 A 2d 711, (1975).

After a sale of land at a mortgage foreclosure sale was reported to the court, the mortgagor filed exceptions to the proposed ratification. The exceptions were denied and from an order ratifying the sale, an appeal was filed. Affirmed on appeal.

The issue raised by the appellant included an argument that the sales price does not support a conclusion that the sale was fairly made and that the proceedings were improper in that the foreclosure case should have been docketed and placed under the supervision of the court as the first act of the assignee.

At the time of the sale, the balance due on the mortgage was in excess of $286,000.00 and the mortgagee bid in the property for $25,000.00. The suit was not docketed by the assignee until one week after the first insertion of the advertisement relating to the proposed assignee's sale.

As to the first argument, the Court of Special Appeals noted that the discrepancy between the value of the property and the sales price at the foreclosure was so significant as to shock the conscience of the Court. However, in this case, at the time of the hearing on the exceptions, the mortgagee, through his assignee, offered to waive his right to any deficiency judgment against the mortgagor. Before the order denying the exceptions and ratifying the sale, the mortgagee placed in the proceeding a "Waiver of Deficiency" in which he waived his right to a deficiency judgment. The Court held that the waiver actually raised the real purchase price to equal the total amount due, including interest, plus the costs of foreclosure, therefore, the overall amount for which the mortgagor received credit, was considered the actual sale price, which resulted in a figure which did not shock the conscience of the Court.

As to the second argument the Court noted that Maryland Rule W74 a 2 (a), as it existed at the time of the foreclosure sale, commanded that before a sale, the property must be advertised, however, it did not specifically require that the advertising await the commencement, by docketing the foreclosure suit, therefore, it was permissible to advertise a foreclosure sale prior to the filing of the suit. The Court also noted that this rule was changed, effective July 1, 1975 to provide that no sale shall be advertised before the action is instituted.

In the matter of Wong v. Beneficial Sav. & Loan Assn., 56 Cal. App. 3d 286 (1976).

Plaintiffs purchased an apartment complex and assumed the indebtedness of the previous owner who had constructed the complex of eight fourplexes and had subdivided the property into eight parcels. The previous owner had encumbered each parcel with a deed of trust containing a dragnet or other indebtedness clause for the purpose of making each deed of trust security for all eight loans and securing each loan with all eight deeds of trust. Plaintiffs tendered an amount sufficient to redeem four out of the eight deeds of trust which defendant lender refused to accept. Ultimately, all eight parcels were sold at trustee's sales and plaintiffs thereafter brought this action for damages for defendant's alleged wrongful refusal to accept their tender.

The appellate court affirmed the judgment entered by the trial court in favor of defendant. The court discussed the reluctance of courts to enforce dragnet clauses absent a showing that the parties intended or reasonable intended the other indebtedness to be secured by the trust deed. Two tests to ascertain the intention of the parties are (1) the relationship of the loans and (2) the reliance on the security. The court held with respect to the relationship of the loans test that plaintiffs could not have been misled as to the singleness of the complex since they physically walked through it before they purchased it as a single unit in one transaction. As to defendant's reliance, the court pointed out that there was but a single transaction and the parcels as to which plaintiffs had made no tender would lose their value if the parking facilities and swimming pool located on the parcels plaintiffs were interested in were unavailable to them.

In addition, relief from dragnet clauses involves principles of equity and plaintiffs were not entitled to equitable relief since defendant had offered to accept the tender if plaintiffs would give an easement to the parking lot and swimming pool for the benefit of the remaining rear lots and plaintiffs had refused. The absence of such an easement would have a devastating effect on the remaining lots.

Miller v. Pacific First Federal, 86 Wn. 2d 401; 545 Pac. 2d 546, (1976).

The promissory note, which was secured by a real estate mortgage, provided that the loan was personal to the borrower and that if title should pass, or if the property be sold on contract or if the property be vacated, the lender would declare the entire balance payable, or at its option, consent to such change and increase the interest rate of the loan. The property was sold on contract and the lender increased the rate by one-half of one per cent. The borrower argues that the court should not allow the rate increase because there was no increase in risk and because such increase is a penalty.

Held: The increase is allowed. Some jurisdictions uphold "due on sale" clauses and some do not, but those that do will not enforce them when unconscionable or inequitable. However, this case involves only the increase of interest rate, it does not restrain transfer, but since the sale price is affected by the interest rate, it affects the profit to be made by the borrower and the interest rate clause is enforceable except in situations where it would be inequitable. The increased interest rate was neither a measure of damages nor a penalty, but a method of adjustment to changed conditions.

Garland v. Hill, 357 A 2d 374, (1976).

Mortgagor filed exceptions to the ratification of a mortgage foreclosure sale, at which the mortgagee brought in the property on the grounds of inadequacy of purchase price. Court of Special Appeals affirmed the order ratifying the sale in *Garland v. Hill,* 28 Md. App. 622. Court of Appeals granted certiorari limited to the question, "whether an inadequate purchase price can be made adequate by the mortgagee's waiver of his right to claim a deficiency decree against the mortgagor" and affirmed the decision of the Court of Special Appeals.

Bob Parrott, Inc. v. First Palmetto Bank et al., 133 Ga. App. 447, 211 SE 2 401, (1974).

This appeal involves two questions: (1) determination of priority to the proceeds of a loan deed foreclosure sale; and (2) the right of a holder of a subordinate loan deed to sue in assumpsit for money had and received seeking payment of the surplus arising from the foreclosure sale conducted under the terms of the superior security instrument.

For convenience we will refer to the First Palmetto Bank, grantee in the first loan deed and holder of the surplus, as "Bank." Appellant, Bob Parrott, Inc., grantee in both a second and third loan deed, will be denominated as "Subordinated Lender." All three loan deeds covered a single parcel of realty. The first loan deed did not contain an "open-end" clause commonly called the "dragnet" provision. We note this omission because banking institutions in Georgia generally use the "open-end" agreement for the purpose of retaining priority for subsequent advancements between borrower and lender. See Code Ann. Section 67-1316; *Wylly v. Screven,* 98 GA 213 (2) (25 SE 435); *Bowen v. Kicklighter,* 124 Ga. App. 82 (183 SE 2d 10).

On February 6, 1973, the date on which the first loan deed was foreclosed, the amount owing on the prior obligation was $37,543.56. Subordinated Lender, holder of second and third loan deeds, bid $1.01 higher than the Bank's offer and thus as the highest bidder at the public sale acquired the property. The amount of this best bid resulted in a surplus of $4,291.76 remaining in the Bank's possession in excess of the initial obligation specifically secured by the foreclosed instrument. Immediately upon completion of the foreclosure sale the Subordinated Lender made written demand for payment of this surplus. The Bank refused to surrender the surplus, claiming it was entitled to these funds because the borrower owed it this amount upon two promissory notes representing loans which had no reference to the property and were not mentioned in the foreclosed security deed. The Bank's bid at the sale had been for an amount which covered the sums due under the first security instrument plus these independent unsecured debts.

The Subordinated Lender then brought this action for money had and received, claiming all surplus proceeds above the amount specifically secured. The Bank claimed it had priority on the basis that it had these funds in its possession and therefore was entitled to apply it as an offset to satisfy the borrower's other obligations to it. After establishing these facts through depositions and affidavits, each party sought summary judgment. The trial court granted the Bank's motion and denied that of the Subordinated Lender in a single order. This appeal is from the judgment granting the Bank's motion.

1. "(W)here the deed (to secure debt) identifies a particular debt, it cannot be extended to cover other debts except by a new agreement between the parties, subject to the rules

(*continued on page 28*)

governing recording and priorities". *Pindar, Ga. Real Est. Law,* 795, Section 21-31. The author's statement is based upon the ruling by this court in *Troup Co. v. Speer,* 23 Ca. App. 750 (99 SE 541). Accordingly, the priority possessed under the foreclosed first loan debt is expressly limited to the specific obligation that was thereby secured, in the absence of an "open-end" clause.

2. The holder of a subordinate loan deed may claim surplus funds accruing from the foreclosure of the first loan. *East Atlanta Bank v. Limbert,* 191 Ga. 486 (12 SE 2d 865). The Supreme Court's ruling in the Limbert case is stated to be on the theory that the money stands for the land and therefore "such surplus funds retain the character of real estate in so far as junior lienholders whose liens were divested by the sale are concerned."

3. The obligation of making proper distribution of the proceeds was placed upon the Bank. *Holland v. Sterling,* 214 Ga. 583, 585 (105 SE 2d 894). The funds are to be applied first to costs incurred in the sale, attorney fees, and principal plus interest of the secured indebtedness. "any surplus remaining after these items must generally be paid over to the grantor or his assignee. Mere knowledge of the existence of other claims will not justify him in withholding payment unless such claimants file appropriate proceedings to subject the funds in his hands." *Pindar, supra,* 833, Section 21-88.

Thus, the surplus funds here could have been applied by the Bank to the other debts owing to it excepting for the claim and notification thereof made by the Subordinated Lender. Under the authorities herein-before cited it is clear that the Subordinated Lender had priority over the Bank as to the surplus proceeds on the basis that these funds were substituted for the land when the foreclosure divested the liens of the second and third loan deeds held by Subordinated Lender and the independent debts were not included in the foreclosed security instrument.

4. Did the Subordinated Lender adopt a proper remedy in suing for money had and received? In his brief, able counsel for the Bank has pointed out this specific question has not heretofore been decided in Georgia. Previous adjudications have involved garnishment. See *Columbus Plumbing etc. Co. v. Home Federal etc. Assn.,* 104 Ga. App. 36 (121 SE 2d 62) and *Elder Building Supply Co. v. Wall,* 114 Ga. App. 117 (150 SE 2d 350).

The equitable nature of the legal remedy of assumpsit makes it clear that such procedure is proper. We deem it appropriate to quote from the opinion by the late Judge (later Justice) Quillian in *Fain v. Neal,* 97 Ga. App. 497, 498 (103 SE 2d 437): "In *Haupt v. Horovitz,* 31 Ga. App. 203 (1) (120 SE 425) it is well stated;' "An action for money had and received lies in all cases where another has received money which the plaintiff, ex aequo et bono, is entitled to recover and which the defendant is not entitled in good conscience to retain." (Cits.) In such an action "The law implies a promise on the part of any person who has received the money of another to pay that person on demand. The reception of money by one and the demand by the other makes all the privity that is necessary to maintain this action." (Cits.) "It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner." (Cits.)' " See also 58 C.J.S. 919, Money Received Section 8b, stating that "Any surplus arising on the sale of a security for a debt may be recovered in an action for money had and received by the person entitled thereto, whether the original debtor or subsequent mortgagee, and a junior mortgagee, after refusal of the senior mortgagee to deliver over surplus proceeds, may forego his lien and rely wholly on the action for money received."

5. The trial court erred in granting judgment for the Bank.

Judgment reversed.

Rockmart Bank v. Doster, 233 Ga. 748, 213 SE 2 645, (1975).

Nichols, Chief Justice.

This is an appeal from an order affirming a special master's report recommending that the cancellation of record of a security deed be removed.

Charles Doster purchased land at a foreclosure sale and claims title by virtue of a deed under power of sale contained in a senior security deed. After the sale the holder of the security deed caused it to be canceled of record. Doster brought this action in the Superior Court of Polk County under the provision of Code Ann. Section 37-1411 et seq., asking that the cancellation be removed. It is his position that the security deed is a muniment of his title and that its cancellation of record constitutes a cloud thereon. The appellant Rockmart Bank is the holder of a junior security deed which it obtained from the equitable owner of the property prior to foreclosure under the power contained in the senior security deed. In opposition to the removal of the cancellation the bank filed defenses and a motion to dismiss for failure to state a claim, alleging in substance that there was no power of sale authorizing the foreclosure sale and that the sale and Doster's deed under power of sale are void. It is the bank's position that the senior security deed having been satisfied, its own security deed now constitutes the senior lien on the property.

The case was referred to a special master. The recorded instruments placed in evidence show that Ralph F. Greene granted a security deed containing a power of sale to the predecessor of the Georgia International Life Insurance Company. Greene later conveyed the subject property by warranty deed to Joseph and Janet Centenni. Greene, the insurance company, and the Centennis then executed an "Assumption Agreement" whereby the Centennis agreed to assume the indebtedness underlying the company's security deed. Under the agreement the Centennis expressly authorized the company to exercise the power of sale contained in the security deed upon the lapse of a described insurance policy, any such lapse constituting a default on the underlying indebtedness. After the agreement was executed, the Centennis granted a security deed to the Rockmart Bank subject to the insurance company's security deed.

The insurance company then foreclosed and conveyed the property to Doster by deed under power of sale. Doster's deed recited that it was conveyed by the company as attorney in fact for the Centennis under the power of sale contained in the security deed it held from Greene. The evidence showed that the proceeds of the sale were applied to fully satisfy the indebtedness underlying the company's security deed. The bank then garnisheed the company for the balance of the proceeds in partial satisfaction of the bank's security deed. After the sale was held and after Doster's deed under power was executed, the insurance company caused its security deed to be canceled of record.

The special master recommended that the cancellation be removed. The trial court overruled the bank's motion to dismiss, overruled its exceptions to the special master's report, and affirmed the report. The bank appeals from these rulings upon a certificate of immediate review.

The assumption agreement shows on its face the authority given by the Centennis, the equitable owners, to the insurance company to sell the property under the power contained in its security deed from Greene. The conveyance to Doster must be treated as valid until set aside in a proper proceeding for that purpose. *Burgess v. Simmons,* 207 Ga. 291, 299, 61 SE 2d 410; *Fraser v. Rummele,* 195 Ga 839 (3), 25 SE 2d 662; *Williams v. Williams Co.,* 122 Ga. 178, 181, 50 SE 52. The sale, unchallenged in a proper proceeding, divested the bank of its junior encumbrance on the property. *Mutual Loan & Banking Co. v. Haas,* 100 Ga. 111, 27 SE 980. The bank therefore has no standing to complain as to the relief sought by appellee.

Judgment affirmed.

Georgia Loan & Trust Company v. Dyer et al., 233 Ga. 957, 213 SE 2 864 (1975).

This case essentially involves a dispute over the priority of two security deeds allegedly covering the same property. The plaintiff, Georgia Loan & Trust Company, brought an equitable action in the Superior Court of Union County seeking a temporary and permanent injunction against defendant Dyer to prevent him from foreclosing his security deed and a declaratory judgment that the Dyer security deed is invalid and not entitled to record. If plaintiff is successful, a security deed held by it purportedly describing property covered by the Dyer security deed, would constitute a first lien on the property described therein.

Plaintiff challenges the validity of the Dyer security deed on several grounds. First, it is contended that the description therein is so vague, general and indefinite that it is insufficient as a matter of law. Secondly, plaintiff contends that the Dyer security deed was not properly attested, and finally, that it is void for lack of consideration.

The trial court conducted an interlocutory hearing and thereafter issued its order denying all of the relief sought by plaintiff. This order of the trial court was certified for immediate review and plaintiff brought the case here on appeal.

We reach first plaintiff's contention that the Dyer security deed is void for lack of a sufficient legal description. The property is described in the Dyer security deed as follows: "¾ acres, more or less, of Lot of Land #304 in the 9th District and 1st Section of Union County, Georgia, and being described as follows: Beginning at a point where his property joins the Comer Saxon property on U.S. Highway #19 & 129: Thence an Eastern direction with the Saxon line to an iron pin: Thence in a South direction to the Pruitt Circle: Thence in a West direction with Pruitt Circle and U.S. #19 & 129 to the place of Beginning."

We believe the description in this security deed is not so insufficient that it must be held void as a matter of law. "If there is enough in the writing evidencing . . . the creation of a lien on real . . . property to afford a key which, aided by extrinsic evidence, will make certain that which is apparently uncertain, then the description of the property is sufficient." *Arrendale v. Dockins,* 166 Ga. 62, 66, 143 SE 570, 572. See also *Union Central Life Ins. Co. v. Smith,* 184 Ga. 158, 162, 190 SE 651.

(continued)

Although the description in the present security deed makes no reference to a plat, the evidence considered by the trial court at the interlocutory hearing shows that a plat and other documentary evidence in existence at the time the security deed was executed could be resorted to in order to ascertain the specific boundaries of the land conveyed by the deed. This is sufficient to save an imperfect description from being regarded as insufficient as a matter of law. See *Prudential Ins. Co. v. Hill,* 170 Ga. 600 (2,3), 153 SE 516; *Plantation Land Co. v. Bradshaw,* 232 Ga. 435, 440, 207 SE 2d 49; and, *Pindar, Georgia Real Estate Law,* 468, Section 13-54. We concur with the trial court's determination that the description contained in the Dyer security deed is not legally insufficient.

The remaining two issues in the case, i.e., whether it is invalid for lack of consideration, cannot be finally adjudicated in this appeal. There is sufficient evidence in the transcript to authorize the trial court's denial of interlocutory relief to plaintiff and its judgment will be affirmed. *Holland Pecan Co. v. Brown,* 177 Ga. 525, 170 SE 357. However, the affirmance of the trial court's judgment must be with direction that it be considered only an interlocutory judgment since it is not conclusive between the parties on the final trial. See *Bradley v. Roberts,* 233 Ga. 114, 210 SE 2d 236; and, *Fox v. Avis Rent-A-Car Systems, Inc.,* 223 Ga. 571, 573, 156 SE 2d 910.

Judgment affirmed with direction.

First National Bank of Elberton v. Osborne, 233 Ga. 602, 212 SE 2d 785, (1975).

First National Bank of Elberton appeals from an order granting the motion of Fletcher D. Osborne for judgment on the pleadings as to the first count of its complaint against Osborne. Certificate for immediate review was signed by the trial judge.

The complaint of the bank was in two counts. The first count, as amended, alleged that: On November 8, 1973, Osborne executed and delivered to it a promissory note for $400,000. On the same date Osborne executed and delivered to the bank three deeds to secure debt and assigned an option to real estate to secure this sum. "At the time of the execution of the above described note, security deeds and assignment, the defendant promised to and agreed with the plaintiff that, when called upon by the plaintiff, he would execute additional security deeds on real estate that defendant then owned in Hart County, Georgia, to the extent that the plaintiff later determined the above described note was not sufficiently secured by the real estate described in the above described security deeds and assignment. The plaintiff would not have taken the above described note, security deeds and assignment except on the faith of the promise and agreement referred to above." Since November 8, 1973, the bank has determined that the real estate described in the deeds to secure debt and assignment has a value of $236,670. On March 8, 1974, the bank requested Osborne by letter to give additional security in the amount of $285,000 and he has failed to do so. Osborne's failure to abide by the terms of his promise and agreement constitutes a fraud on his part upon the bank in that his original design was fraudulent as he made the promise and agreement with intent to induce the bank to accept the note, security deeds, and assignment and with the intent of not living up to the promise and agreement, knowing that the bank would not have sufficient collateral to secure its note. Osborne being in default on the note, the bank has declared the entire indebtedness due and payable and is proceeding to foreclose under the power of sale provided in each of the three deeds to secure debt. The promise and agreement entered into between the parties on November 8, 1973, "expressing an intention" on Osborne's part to give additional real estate as security for his debt created an equitable lien on his described real estate in Hart County which was owned by him on that date.

Count 1 prayed that the court decree that the bank have an equitable lien on real estate of Osborne in Hart County, as described in the complaint, to the extent of $285,000; and that the court order the interest of Osborne in the described real estate sold and the proceeds applied on the demand of the bank.

The second count of the complaint sought reimbursement of attorney fees paid by the bank in connection with the note and security deeds referred to in the first count.

Osborne filed an answer and a counter-claim, which were later amended. One defense was the Statute of Frauds. The bank filed responses to the answer and counter-claim, and the amendments thereof. Osborne filed a motion for judgment on the pleadings.

The amended order the trial judge granted Osborne's motion for judgment on the pleadings as to Count 1 of the bank's complaint, and dismissed Count 1; it was further ordered that the lis pendens placed upon Osborne's property in Hart County be removed by the bank.

1. The bank asserts the court erred in granting Osborne's motion for judgment on the pleadings as to Count 1 of the complaint, since the motion was addressed to the entire complaint.

Code Ann Section 81A-112 (c) (Ga. L. 1966, pp 609, 622; 1967, pp 226, 231; 1968, pp 1104, 1106; 1972, pp 689, 692, 693) provides in part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156."

It is obvious from this section that a motion for judgment on the pleadings is closely related to a motion for summary judgment. In motions for summary judgment the trial judge is given statutory authority to enter judgment as to some issues and leave other issues pending. Code Ann. Section 81A-156(d) (Ga. L. 1966, pp. 609, 660; 1967, pp. 226, 238).

In the interest of saving time of litigation it is practical for a trial judge to enter judgment on the pleadings as to one count of a complaint, if such count is subject to the motion, even though the movant may not be entitled to a judgment as to both counts.

While the trial judge in the present case might properly have denied the general motion for judgment on the pleadings because one count of the complaint was good, we find no error in his considering the motion for judgment on the pleadings as it applied to each count. It is beyond question that count one was the "heart" of the complaint.

2. The trial judge in his order construed the complaint of the bank to allege an oral agreement to provide additional security in the form of security deeds to real property, and held that the alleged agreement violated the Statute of Frauds and was unenforceable. The bank asserts that the court erred in concluding that the promise was not in writing.

The bank's complaint had attached thereto copies of the note and security deeds evidencing the indebtedness of Osborne. No copy of a written agreement such as that alleged in the complaint is attached, and there is no allegation that the agreement was in writing. One of the verified defenses filed by the defendant was that the plaintiff was not entitled to any relief by reason of the Statute of Frauds. The plaintiff's responses did not treat this defense of the Statute of Frauds. Thus, the only reasonable construction of the pleadings concerning the agreement is that it was oral.

The bank placed this same construction on certain allegations of Osborne in his defense. In paragraphs of his fourth defense, which are incorporated in his sixth defense, Osborne alleged that the bank "agreed" to certain consideration to Osborne for the note to the bank in addition to the sum stated in the note. The bank moved to strike the sixth defense on the ground that Osborne thereby "attempts to engraft additional consideration upon plaintiff's note and security deeds which are otherwise complete on their face as to consideration and make no reference to any oral agreement as being giving a partial consideration therefor." (Emphasis supplied.)

The trial judge did not err in construing the pleadings to show only an oral agreement between the parties.

3. The alleged oral agreement of Osborne is unenforceable because it is an oral contract to make deeds to land, and because it attempts to engraft an additional obligation on the maker of written instruments which are complete and unambiguous. See: *Stonecypher v. Georgia Power Co.* 183 Ga. 498, 189 SE 13; *Jones v. Central Builders c.,* 217 Ga. 190(3), 121 SE 2d 633; *Awtrey v. Awtrey,* 225 Ga. 666, 171 SE 2d 126; *Stone Mountain R. v. Stone Mountain Assn.,* 230 Ga. 800, 809, 199 SE 2d 216.

Since the alleged promise of Osborne to give additional security deeds to property owned by him in Hart County was unenforceable, the bank had no right to a lien on this property, and no proper basis for entering a lis pendens on property on which the lien was claimed.

The trial judge did not err in dismissing Count 1 of the complaint and ordering removal of lis pendens.

Judgment affirmed.

Hood Oil Company v. Moss, 134 Ga. App. 477, 214 SE 2d 726, (1975).

Following the foreclosure of a loan deed on real property in Butts County, Georgia, an application for confirmation of the sale was filed as Case No. 923 in Butts Superior Court. On October 16, 1969, an order of confirmation was entered by the court. On January 20, 1970, a motion to open default was filed in that case with plea and answer attached.

Following the confirmation order, the applicant for confirmation filed a petition seeking a deficiency judgment, which was styled as Case No. 941, the exact date of filing not being shown by the record. Thereafter, it seems that Case No. 923 and Case No. 941 were treated as one case.

Thereafter, on August 20, 1974, a hearing was held in Case No. 923. It appears that the court treated this as a hearing also in Case No. 941. The court determined and found that the property involved was advertised for sale on the first Tuesday in August, but was not actually sold until the first Tuesday in September. He held that the order of confirmation of the sale dated October 16, 1969, in Case No. 923, was therefore null and void and that same should be set aside, and he entered this order in Case No. 941 so declaring. The court also provided in his judgment that a true copy of this judgment be inserted in Case No. 923.

Following this order, plaintiff filed a motion for new trial, which he styled as Case No. 923. This motion for new trial was denied on October 11, 1974, and plaintiff appeals. **Held:**

(*continued on page 30*)

Home builders testify before senate panel

The National Association of Home Builders has voiced the position that any restructuring of the country's financial institutions should assure an adequate supply of mortgage credit at stable and affordable interest rates for home-buyers.

A builder from Pawtucket, R.I., Roland Ferland, in his testimony before the Senate Committee on Banking, Housing and Urban Affairs, stated the NAHB's point-by-point position on financial reforms as follows:

- A minimum of a 5½-year extension of Regulation Q which authorizes a differential between interest rates paid by thrift institutions and banks, with at least a one-quarter per cent higher level for the former.
- Nationwide authority for all financial institutions to offer negotiable order of withdrawal (NOW) accounts or draft accounts for credit unions, with interest only allowed on such accounts where authorized by the state law.
- A limited expansion of the powers of Federal Savings and Loans to make consumer loans within an overall authorization to invest no more than 20 per cent of their assets in non-residential investments.
- Authorization for mutual savings banks to convert from state charters to a federal charter.

Seven bills are under consideration by the committee, two for which Ferland expressed full support. One would permit HUD-approved mortgagees to service loans sold to the Federal Home Loan Mortgage Corp. The second would provide for a two-year extension on the conversion of savings and loans from the mutual to stock form of organization on a limited experimental basis.

Judiciary—(*concluded*)

1. There is no magic in mere nomenclature, hence the pleading, styled "motion for new trial" will be treated as an attack upon the order of August 20, 1974, on the grounds therein stated. See *Girtman v. Girtman,* 191 Ga. 173, 180(4), 11 SE 2d 782. Particularly is this so as the order of August 20, 1974, was incorporated by reference and ordered inserted in Case No. 923 although styled in Case No. 941, occurring after an evidentiary hearing in a case styled as No. 923.

2. The motion to open default shows it was predicated upon non-amendable defects appearing on the face of the record, although said motion did not pray that the judgment of confirmation be vacated or set aside or declared null and void.

3. The situation is somewhat confused because Case No. 923 and Case No. 941 were never ordered consolidated, and yet a judgment was entered which affected both cases. An order of consolidation would have simplified the matter. Nevertheless, it appears that the appeal is in both cases, and it is clear that the appeal is from the order of August 20, 1974, which order declared the confirmation to be null and void because the property was not sold on the date it was advertised to be sold.

4. A sale under a power contained in a loan deed must be strictly construed, inasmuch as the authority of law for same is in derogation of the common law. See Code Ann. Section 37-607; *Oliver v. Wayne,* 183 Ga. 316(2), 188 SE 535; *Cook v. Howard,* 134 Ga. App. 721, 215 SE 2d 690 and cases cited therein.

5. The sale itself must be held on the date it is advertised to be sold. Code Ann. Section 37-607; *Smith v. Taylor,* 120 Ga. App. 389, 390, 170 SE 2d 752. When by undisputed facts it appeared to the court that the sale took place on a date other than as advertised, the court did not err in granting the judgment declaring the order of confirmation null and void, and this is so whether his judgment be considered a judgment on the pleadings, summary judgment or judgment vacating and setting aside for a non-amendable defect appearing on the face of the record. See in this connection *Lamas v. Baldwin,* 128 Ga. App. 715, 717, 197 SE 2d 779.

6. A judgment which is correct for any reason will be affirmed. *Sims TV, Inc. v. Fireman's Fund Ins. Co.,* 108 Ga. App. 41, 43, 131 SE 2d 790; *Lee v. Porter,* 63 Ga. 345-346; *Jernigan v. Collier,* 134 Ga. App. 137, 213 SE 2d 495.

Judgment affirmed.

Oil and gas

Rayl v. East Ohio Gas Co., 46 Ohio App. 2d 167, decided 1973, Reported 1976, 348 N.E. 2d 385.

This case involves the construction of an instrument designated "Supplemental Gas Storage Agreement," whether it is an oil and gas lease or actually a gas storage agreement.

The court discusses both pointing out that the distinction between an oil and gas lease and a gas storage agreement is that the former involves the exploitation of minerals under the surface of the owner's land while the latter is simply a rental agreement for the use of lessor's land. The former involves expenditures of great sums of money on a gamble that oil and gas will be found, and the law protects the investing discoverer. Gas storage agreements do not have these attendant risks, and do not warrant the extension of the "locator or discoverer's rights" principle. The lessor as well as the lessee may terminate a tenancy at will.

The court also discusses the above sentence and the common law rule: a tenancy at the will of one party is a tenancy at the will of the other saying this rule has been approved and followed by the majority of courts in this country and even though text writers have felt that American courts have been misled by a dictum in Lord Coke's commentary on Littleton (Co. Litt. 55A) the fact remains that the principle was adopted by Kent and Blackstone and is followed by the majority of American courts.

(A motion to certify this case was overruled by the Supreme Court of Ohio).

This case was decided in 1973 but not published until 1976.

Branson sees housing future as bright

The supply and demand for single-family housing will continue to remain strong, Philip B. Branson, Ticor senior vice president and chairman of the ALTA Government Relations Committee, predicted in a recent speech before the Long Beach, Calif., Board of Realtors.

"The home owner knows that investment in real property is his best hedge against inflation, now and in the future," he said.

Branson said he expects the current escalated prices to moderate and equal the normal inflation rate soon.

"One of the key elements in the future of the single-family home is the fact that right now, today, government agencies and financial institutions have on the drawing boards a multitude of new methods of financing so that tomorrow's home owner can afford the monthly cost of shelter. The graduated payment in variable rate mortgage, the reverse annuity and deferred interest are some examples. What is important is we will be seeing new and different types of financing," Branson said.

Brochures and booklets

Land Title Insurance—Consumer Protection Since 1876

Tells the story of the origin in 1876 in Philadelphia. A timely folder at $9 per hundred.

Closing Costs and Your Purchase of a Home

A guidebook for homebuyer use in learning about local closing costs. This booklet offers general pointers on purchasing a home and discusses typical settlement sheet items including land title services. $18 per hundred.

Things You Should Know About Homebuying and Land Title Protection

This folder is designed to fit a standard business-size envelope. It includes a concise explanation of land title industry operational methods and why they are important to the public. Narration provides answers to misinformed criticism of the industry. $7 per 100.

Tell your story more effectively with these ALTA aids

Lincoln Lost His Home . . . Because of Defective Land Titles

A memorable example of the need for land title protection is described in this folder. $7 per 100.

The Importance of the Abstract in Your Community

An effectively illustrated booklet that uses art work from the award-winning ALTA film, "A Place Under the Sun" to tell about land title defects and the role of the abstract in land title protection. Room for imprinting on the back cover. $23 per 100.

American Land Title Association Answers Some Important Questions About the Title to Your Home.

This booklet includes the story of the land title industry. $23 per 100.

Blueprint for Homebuying

This illustrated booklet contains consumer guidelines on important aspects of homebuying. It explains the roles of various professionals including the broker, attorney and titleperson. $24 per 100.

ALTA full-length films

Blueprint for Homebuying

This colorful, animated 16 mm sound film is 14 minutes long and offers guidance on home selection, financing and settlement. It is the basis for the popular booklet by the same title. $95 per print.

A Place Under the Sun

Award-winning, 21-minute, animated, 16 mm color sound film tells the story of the land title industry and its services. $135 per print.

Calendar of Meetings

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

1828 L Street, N.W.
Washington, D.C. 20036