OCT
1977

Title News

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

For some time it has been the policy of ALTA to be represented at all state and regional land title association meetings. It also is ALTA policy that the president of the national association, the president-elect and the chairmen of the sections perform that responsibility. The policy of attending state and regional meetings is aimed at keeping those associations up to date on the activities of ALTA as well as to aid in the maintenance of close liaison between the national and local associations. An aggregate of more than 40 of such meetings is attended by these officers each year.

As the "freshman" on the team of "ambassadors," 1977 has been my first year of carrying out this mission on behalf of ALTA. For both Claudia and me it has been one of the most satisfying and rewarding experiences of our lives. Our visits have taken us from states on the east coast to points as far west as Gregson, Montana and from states on the southern border of the U.S. to those on the northern border. Through it all we have been exceptionally impressed by many things.

The high quality and substance of the people we have met (or re-met) has reinforced our faith in the human race. It has become clear that our industry is well supplied with people who are dedicated to providing a valuable product at a fair price in a competent manner to a rapidly growing market. These same people are actively involved in the affairs of the communities in which they live and work, making important contributions to the continuing need for civic improvement and leadership. At the same time they are enjoying their families, their communities and their careers as title industry professionals.

It has been my view for many years that the title industry, which reaches into nearly every county in every state in the nation, is a "sleeping giant" with the power and ability for major achievements in the areas of local, state and federal legislation; involvement in the election of public officials, and improvement of the quality of life in our respective communities. The last 10 months of travel to your state and regional meetings has convinced me that my earlier judgment is correct: the potential is there.

However, the need still remains for this power and ability to be more fully utilized in achieving the political and economic objectives that our industry believes to be right. ALTA is rapidly learning how to marshal these strengths and cause them to serve the best interests of our industry as well as those of our customers and the public. The need for your help is growing. I am convinced you will give it.

Robert C. Bates

Robert C. Bates

VOLUME 56, NUMBER 10

Title News

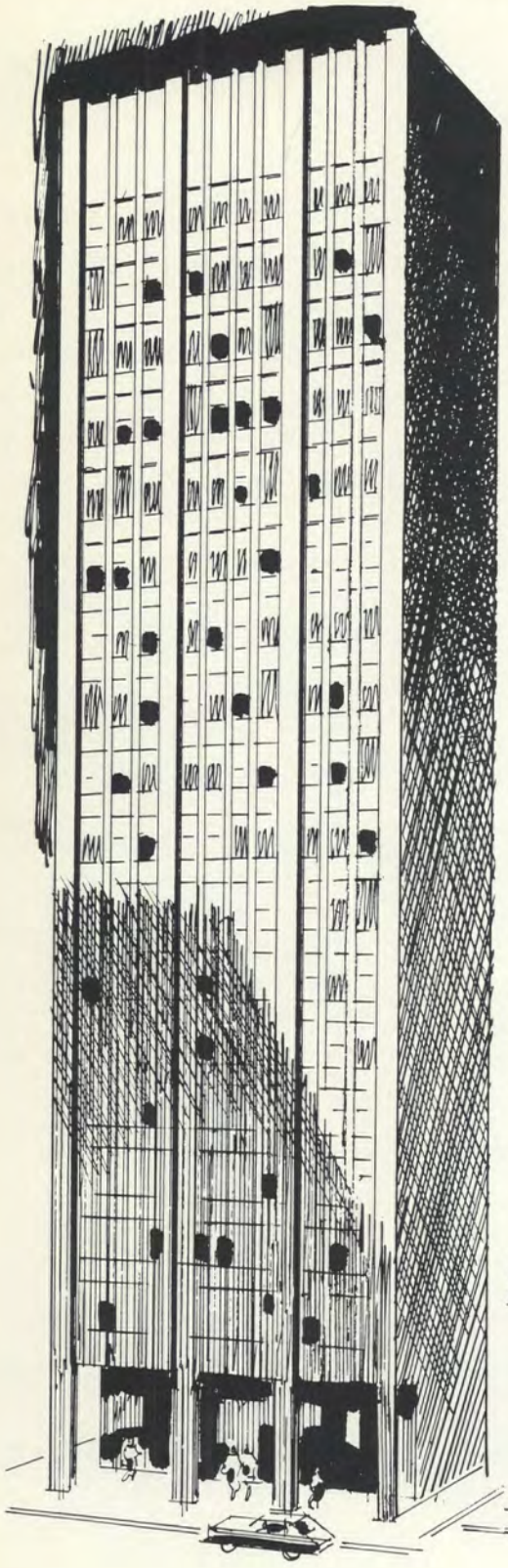
Features

Departments

On the cover: This simulated daguerreotype was taken from a photograph of Passamaquoddy Indian Chief Wallace Lewey. On file in the Smithsonian Institution National Anthropological Archives, Bureau of American Ethnology Collection, the photograph is catalogued as being taken after 1917. The name of the photographer was not recorded. Current Indian land claims of tribes including the Passamaquoddy are discussed in an article beginning on page 8.

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

Double your plant titles with half the worries



We know the trend toward decentralization has left the larger title companies seeing double. Suddenly, there are twice as many worries and costs as you gear up for that suburban office. But now there's help.

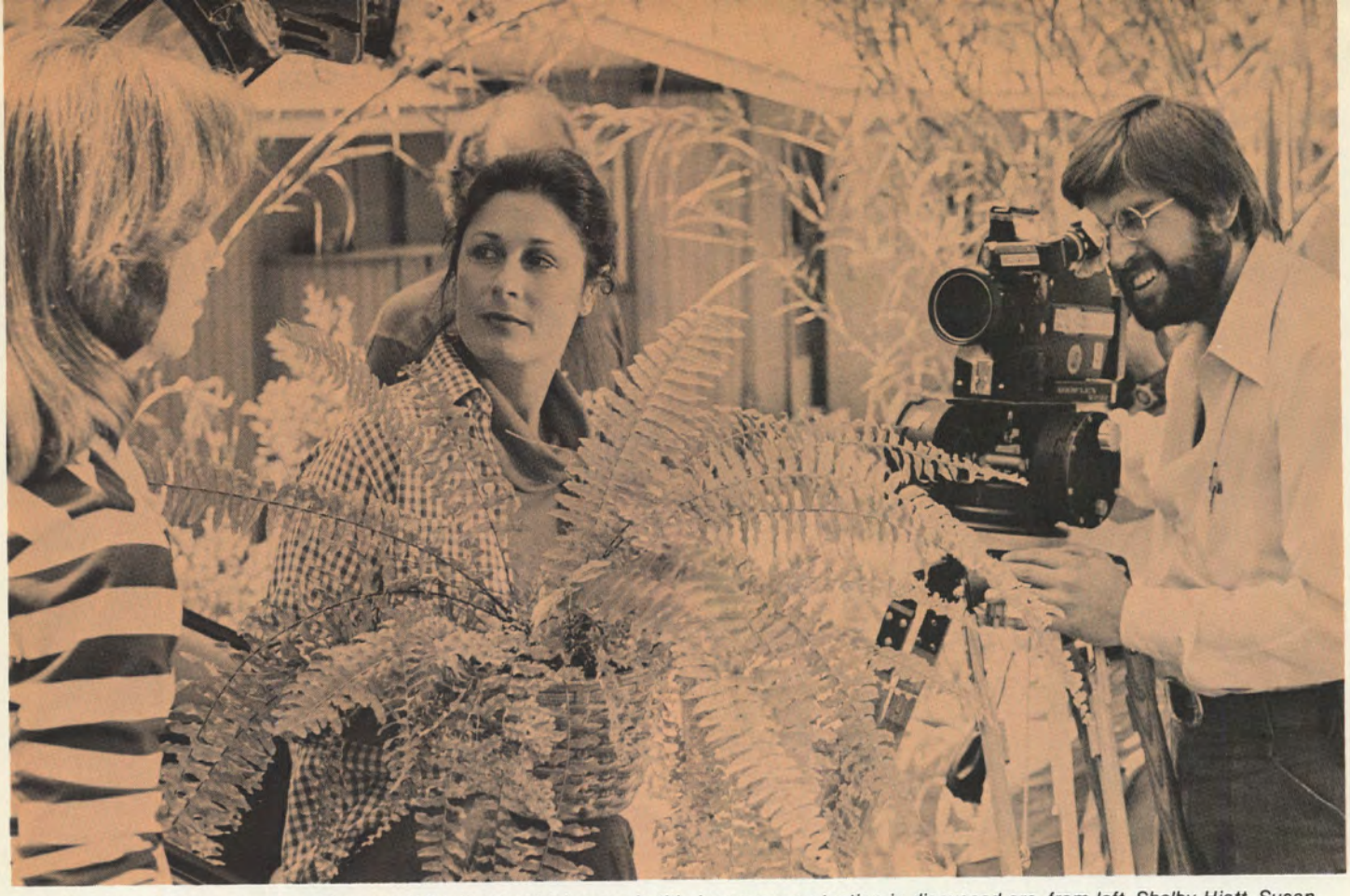
Apollo Microfilm can duplicate your entire plant records for about 40% less than anyone else. And that service includes 16mm or 35mm film packaging in cartridge or reels, plus indexing or labeling as required.

You'll also worry less about turnaround time. We use the most modern equipment and fastest film speed available to give you weekend service, if necessary.

So if you want to double your plant titles with half the worries, call Apollo. We're second to none.

APOLLO MICROFILM SERVICE, INC.

13321 Alondra Blvd., Suite K
Santa Fe Springs, CA 90670
(213) 921-9405



Preparing for a take in a scene of the new ALTA film in which owner's title insurance protection is discussed are, from left, Shelby Hiatt, Susan Bay and film director Joe Pipher.

A new ALTA film—from both sides of the camera

An index finger glides down a tract book column. Buttons are pushed and data materializes on a computer terminal screen. The camera moves from a close-up of a speeding computer printout to peer over the shoulder of a title company employee as he scans the screen of a microfilm reader.

This trip through land title evidencing is lifted from a scene in a new ALTA film scheduled for nationwide television distribution in January. Prints of the film also are available to ALTA members for purchase and local use.

Produced to increase public awareness of the home buyer benefits in the existing American system of land recordation and title insurance, *The American Way*—as the film is entitled—succeeds in communicating these benefits by focusing on the real estate purchase experience of a middle income family.

The 13½-minute, 16 mm, color, sound film was designed to support ALTA government relations objectives. It will be seen across the nation at a time when the Dept. of Housing and Urban Development (HUD) is studying different systems of land transfer as required under Section 13 of the Real Estate Settlement Procedures Act (RESPA). After completion of the study, HUD is slated to report to Congress on any real estate reforms it deems necessary.

The attractive, consumer-oriented film emphasizes the positive contributions of land recordation and title insurance in making a prompt, safe land transfer possible in the busy American real estate market. It points out that more than 60 per cent of American families own their homes under the existing land transfer system.

Mention is made of the fact that settlement services under the present system are paid for by people who use them, not by tax dollars, and that providers of these services compete for business as they work to eliminate risk for both home buyers and lenders.

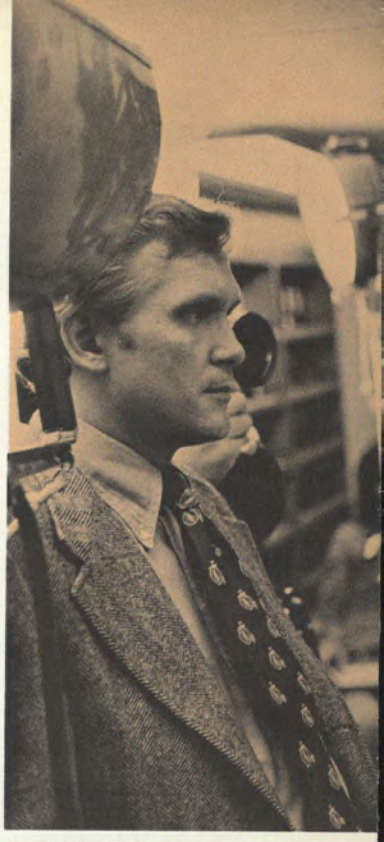
Featured in the film are Jim Reynolds, whose employer has transferred him four times in the past 10 years, and his wife and two children. The story centers on their purchase of a modest weekend house near a lake which they own jointly with another couple.

As their period of ownership continues, the Reynolds encounter memorable examples of the safeguards in land recordation and title insurance.

While en route to their weekend house one Friday evening, Jim's mind flashes back to the time the purchase of the lakeside house was almost thwarted when a title search

(continued)

Left, the film crew sets up for a scene showing children at play in a backyard, which helps to add to the consumer appeal of the film.



Right, Jim Scott and Sid Conrad (at right), both professional actors, rehearse a scene from the film where a title search shows a tax sale for a house about to be purchased.

Left, before shooting a scene at a lakeside house, crewman John Garcia takes a light reading from actor Jim Scott (center).

Above, Shelby Hiatt (left foreground) and Roilene Pierson portray mother and daughter in a scene at a lakeside house.

At right, conferring over a script change during the shooting of The American Way *at the old Ticor building in Los Angeles are, from left, cameraman Don Knight, ALTA Public Relations Committee member LeNore Plotkin, writer Jack Jones, ALTA Director of Public Affairs Gary Garrity and film director Joe Pipher*

Above, Vivian Mullins, a Ticor employe, explains the elements of a title examination she is about to perform on camera. Left to right is film director Joe Pipher and Ticor's Arlan Pischke. Below, in an early scene of the film, Shelby Hiatt receives a telephone call resulting in a family weekend at a lakeside. The camera looms to the left of the photo.

. . . both sides of the camera

of public records revealed a tax sale for the property. But, he remembers, his attorney worked out an agreement whereby the seller agreed to pay the back taxes so the lien could be removed and the tax sale cancelled. The Reynolds were then able to proceed with their real estate transaction.

Later on, the Reynolds learn of a neighbor at the lake who started to build a fence and was confronted with opposition from the adjoining property owner because of a boundary dispute relating to partitioning under the will of a previous owner.

Since the neighbor who was challenged was protected by owner's title insurance, the title company hired an attorney who successfully defended against the claim in court. The title company paid the legal fees to avert financial loss for its insured.

This incident, recounted by one of the Reynolds' neighbors at the lake, helps make the family even more aware of the importance of the owner's title insurance they obtained when they purchased their own real estate.

Filming took place in the Los Angeles area, with production by Corporate Productions, Inc. of Toluca Lake, Calif. Corporate Productions also filmed *1429 Maple Street* for ALTA in 1974—a film expected to reach a national television public service audience in the vicinity of 14 million by the end of 1977. In television public service use, stations donate air time free in the public interest.

One of the key locations for filming *The American Way* was the old Ticor Title Insurers building at 433 S. Spring St. in Los Angeles. A number of Ticor employes were filmed in title evidencing work and the location also served as an authentic simulation of a county courthouse setting.

The work at Ticor was coordinated through two employes of that company, ALTA Public Relations Committee member LeNore Plotkin and Arlan Pischke. ALTA Director of Public Affairs Gary L. Garrity served as technical advisor to the producer during all phases of the film-making.

Production of *The American Way* is an activity of the ALTA Public Relations Program. Besides Ms. Plotkin, members of the committee, which is chaired by Patrick McQuaid, are Randolph Farmer, Francis O'Connor, Edward Schmidt, James Robinson and Bill Thurman.

Price per print of ordering the film is $125 plus postage. Each member who orders the film will receive, at no additional charge, an outline of a speech for presentation to a local audience. A model speech ready for oral delivery in conjunction with the film screenings also is included in the package. Both the speech and outline are designed to provide additional specifics on land title protection and to increase overall impact.

Film orders should be on company letterhead and specify quantity of prints desired. The order should be addressed to ALTA, Room 705, 1828 L St., N.W., Washington, D.C. 20036.

Indian land claims: a perspective

Whatever one's view on the merits of the issues involved in the present Indian claims or how they ought to be resolved, the claims are of great significance politically, historically and in terms of their potential impact on the lives and economies of the land claim areas concerned.

Original news of this Indian litigation often prompted joking responses and substantial disbelief. However, following some preliminary success in court and an intensive review of history and precedent, a more sober and concerned reaction has surfaced.

In order to comprehend this concern and before summarizing the present status of the dispute, a brief review of the nature of the claims and the litigation history is appropriate.

One of the first orders of business of the first Congress after the Revolutionary War and the formation of the federal government was the passage of an act with the somewhat exotic title, "The Indian Non-Intercourse Act of 1790." This Act, with certain amendments over the years, remains as a part of the federal code today. It provided in relevant part (Act of July 22, 1790, Ch. 33, Section 4, 1 Stat. 138):

U.S. Library of Congress

Secretary of War, General Henry Knox

"No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

In other words, the language of the Act on its face appears to comprehend the approval of the federal government of any land transfers from an Indian tribe as a prerequisite to the validity of the transaction.

The Non-Intercourse Act was essentially drafted by the first Secretary of War, General Henry Knox. In writings to General Washington, Knox had expressed appreciation for Indian battle efforts on behalf of the colonies during the Revolutionary War and was concerned for their well-being following the war.

The intent of Congress in creating the Act—as subsequently interpreted by the Supreme Court—was to obligate the federal government to protect a "simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races" and to act "to forestall fraud," to "prevent the unfair, improvident or improper disposition by Indians of their lands."

The obligation to provide this sort of Indian protection was seen to arise from the Constitution which vests in the federal government—as opposed to the states—exclusive power and responsibility over Indian affairs.

As subsequently discussed by Chief Justice Marshall, the Indian tribes occupied a unique position which he denominated as "domestic dependent nations." As such, he suggested that their "relation to the United States resembles that of a ward to his guardian." In the time since Justice Marshall's opinion, numerous federal court opinions have referred to the federal government's guardian-like role vis-a-vis the Indians with the implication that it had a fiduciary's obligation to speak and act on behalf of the Indians' best interests.

The United States has performed this fiduciary's role with varying degrees of care and attention. In the years after the passage of the Non-Intercourse Act of 1790, this was particularly so with respect to Indian tribes remaining in the lands which had belonged to the 13 original colonies.

Those Eastern tribes—in land essentially east of the Mississippi—were largely ignored by the federal government and whatever was done for them or to them was done by the states concerned. On the other hand, the so-called Western Indians—generally west of the Mississippi—were traditionally conceived of as "federal Indians" and dealt with more or less exclusively by the federal government.

Against this historical background, we arrive quickly in the present. The title of this article could easily be, "The Opening of Louise Sockabasin's Trunk and What Happened Thereafter." For, as rumor has it, it was in the trunk of an old Indian woman by the name of Louise Sockabasin, residing in a remote part of eastern Maine, that a second key part of the legal underpinning of today's claims was discovered in 1957 by the present-day chief of the Passamaquoddy tribe of Maine.

In the trunk under her bed, reportedly wrapped in straw, was a copy of a long ago forgotten treaty between that tribe and the Commonwealth of Massachusetts on Sept. 29, 1794—some four years following the passage of the Non-Intercourse Act.

Adapted from a speech presented before the U.S. Chamber of Commerce by ALTA Special Indian Research Counsel John C. Christie Jr.

At different times and degrees prior to that date, the Passamaquoddies had roamed over various portions of what is now the state of Maine. As the Indians would describe it in litigation, "since time immemorial," they had engaged in hunting, trapping, fishing and, to a more limited extent, growing crops on this land.

During the Revolutionary War, the Passamaquoddies had joined the colonists in the fight against the Crown in exchange for promises by John Allen, an agent of the Continental Congress, that the tribe would be given ammunition and protection. After the war and the formation of the federal government, Allen urged Congress to fulfill the promises. Congress responded by firing him.

In 1792, the Passamaquoddy tribe petitioned Massachusetts for land upon which to settle. In a response not unusual in modern times, the Commonwealth appointed a committee to study the problem—a committee which, incidentally, included John Allen, the former agent of Congress.

Then, in 1794, Massachusetts entered into an agreement with the tribe whereby the Indians relinquished whatever interest they might have, if any, in lands in Massachusetts in exchange for approximately 23,000 acres of land specifically reserved to them with the proviso that all pine trees fit for masts were reserved to the state for a reasonable compensation.

Pursuant to the 1820 Act of Separation, Maine became a state and thereby assumed all the pre-existing obligations Massachusetts owed to Indians within its boundaries.

Since the 1794 Treaty, Maine has enacted numerous laws which relate specifically to the tribe, including laws which provide for appropriation of necessities such as housing, health care, indigent relief, roads and water. In contrast, the United States has virtually ignored the tribe. Much of the land concerned has, over the years, by various grants and acquisitions largely found its way into private ownership, passing from owner to owner.

The significance of the 1794 Treaty belatedly rediscovered under Louise Sockabasin's bed can be seen in the context of the language of the Non-Intercourse Act. The Indians would argue in court that *if* that Act were applicable to the Passamaquoddies, and *if* they constituted a tribe within the meaning of the Act, the Act renders void the original relinquishment of land to the state and all subsequent reconveyances of that land down to the present—*unless* the requisite approval or acquiescence of the federal government were established.

The Indian chief who came upon Mrs. Sockabasin's treaty considered it important because he believed that the State of Maine had unjustly taken from the Indians some 6,000 of the 23,000 acres of land promised them by the state.

The treaty ultimately found its way to an attorney for the tribe who comprehended its larger significance in the context of the Non-Intercourse Act. With considerable research behind him, supported in large part by the Ford Foundation and the federal government's legal aid program, the attorney, on behalf of the Indians, filed a lawsuit in the United States District Court for the District of Maine on June 22, 1972 against the Secretary of Interior and the Attorney General of the United States seeking a judgment that the tribe was entitled to federal help on its behalf to prosecute a Non-Intercourse Act claim for the ultimate return of all of its original tribal or aboriginal land.

The land claim area involved represented 12.5 million acres of land and $25 billion in alleged back rents and damages for improper use of the land since 1794. This constituted approximately 58 per cent of the land

Author Christie

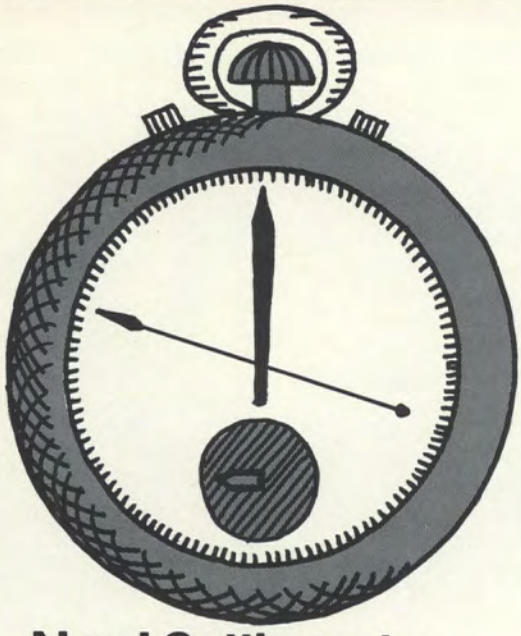
area of Maine, one-third of its population and over 100 of its cities and towns.

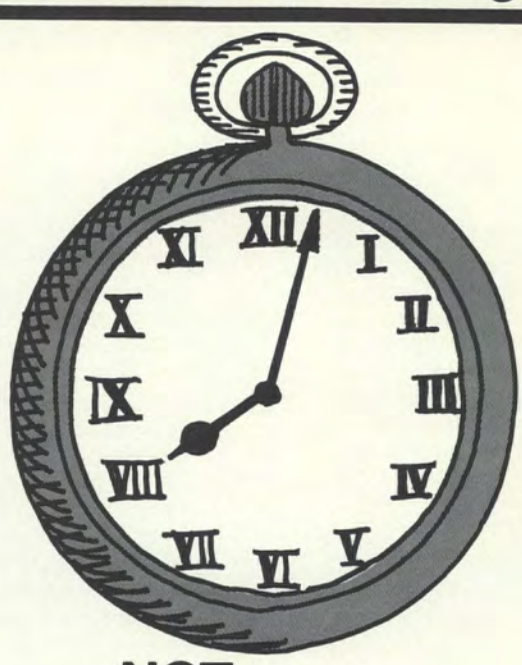
Defended quietly by the Justice Department and the attorney general of Maine, the case proceeded for several years through briefs and argument with little or no publicity or outside interest. Then on Jan. 20, 1975, the District Court held that the Non-Intercourse Act itself established a trust relationship between the United States and the Passamaquoddy tribe and that the United States acted improperly in refusing to prosecute the action against the state and private landowners solely on the grounds that such a relationship did not exist.

Almost exactly a year later, on Dec. 28, 1975, the Court of Appeals affirmed and no subsequent appeal was taken. In the wake of that decision the United States, through the departments of Interior and Justice, reconsidered its decision and announced its intention to participate

(continued on page 15)

Productivity Comes with Cost-Effective Closings!





Now! Settle up to 25 mortgages daily with fast-track Stop Watchers...

This *all-purpose* system runs a fast-track "decathlon." It includes *both* document preparation and word processing.

Turns out *ten* complete mortgage packages to *one* done manually. Each *error-free*... in about 22 minutes—*less* than a *letter* costs! At only a stenographer's salary, too.

...NOT Clock Watchers!

Clocks are too slow for The Lending Machine™. Its payload of paper processing means a faster payout. That's *cost-effective* closing output!

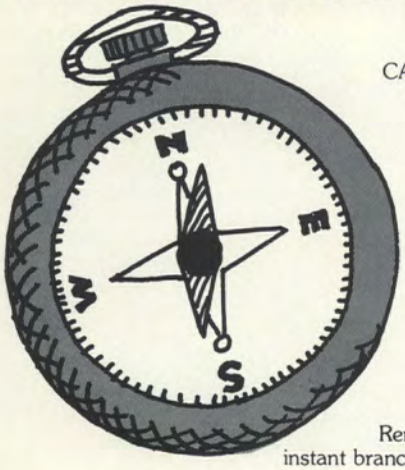
You may switch it to *any* type of loan. Type title binders, contracts. Even do your office accounting.

Stabilize your overhead with The Lending Machine™. It shirks work. Contact us for your free literature.

BOOST DAILY OUTPUT UP TO 10-FOLD, STABILIZE STAFF, OVERHEAD COSTS.

LENDING MACHINE®

DISPENSES MORTGAGE DOCUMENTS, REPORTS IN 1/10th THE TIME!



CALL **FREE**, TODAY:
1-(800)-241-1853

Remote terminals give instant branch-office response—

PCS INC.

Programmed Closing Systems, Inc.
Suite 102 • 1900 The Exchange
Atlanta, Georgia • 30339

A MEMBER OF **I•COM**
INTERNATIONAL COMPUTER SYSTEMS, INC.

Gentlemen:
We settle about _____ mortgage loans a month. Rush details about how your automatic, customized system prepares mortgage documents so quickly. Tell us how The Lending Machine™ shirks work.

Name _____ Title _____

Firm _____

Address _____

City _____ State _____ Zip _____

Phone ( ) _____

TIPAC trustees draft 1977 blueprint for action

Forty members of the Title Industry Political Action Committee (TIPAC) Board of Trustees and State Advisory Trustees emerged from a recent meeting in Chicago with an even clearer concept of the framework within which the Federal Election Commission (FEC) expects them to work.

In addition to hearing Commissioner Joan D. Aikens, vice chairman of the Federal Election Commission, speak on the 1974 Federal Election Campaign Act and its 1976 amendments, the group, recently expanded to include 49 state advisory trustees, developed a blueprint for political action in 1977.

In her remarks, Aikens pointed out that Section 441 (b) of the 1974 Federal Election Campaign Act, as amended in 1976, specifically permits trade associations to solicit executives, administration personnel and shareholders of member corporations.

Two important conditions imposed on political action committee solicitation are that the member corporations must separately and specifically approve the solicitation and may not authorize any other trade association to solicit during the same calendar year, according to the commissioner.

She emphasized the importance the FEC attaches to the various filing and fund-raising requirements applicable to trade associations, as outlined in the 1976 amendments of the Act.

"Some of these requirements you may consider trivial," she said. "However, the Commission approaches apparently insignificant provisions of the Act with a great deal of seriousness, always because provisions are not nearly as insignificant as they may appear," Aikens said.

"This should indicate to you both the need for familiarity with the law and strict adherence to its requirements," she said.

She discussed certain advisory opinions recently rendered by the FEC which, she said, illustrate the importance the FEC places on its requirement for corporate approval prior to any form of political action committee solicitation.

"The burden is placed on the trade association and its political action committee to insure that only those persons who may be legally solicited are, in fact, solicited even in a casual or social atmosphere such as a convention cocktail party," Aikens said.

In conclusion, the commissioner informed the group that in its annual report to Congress, the FEC recently had recommended a statutory change that would enable trade association political action committees to solicit executive and administrative personnel of member corporations until that approval is revoked by the member corporation. Such a

(continued on page 22)

Pictured **bottom row,** *left to right: Gerald L. Ippel, treasurer; Ralph C. Smith, vice chairman; James G. Schmidt, vice chairman; Francis E. O'Connor, chairman; Carl F. Elliott, North Dakota; Lem Putnam, Oregon; Larry Newland, California; Mark E. Winter, executive secretary and assistant treasurer; John Rasmus, U.S. League of Savings Associations; David R. McLaughlin, ALTA business manager.* **Second row,** *left to right: Edward A. Blaty, Michigan; George Russell, Idaho; Calvin F. Johnson, Illinois; Edward J. Eckart, Ohio; J.L. Boren Jr., Tennessee; Marvin H. New, Pennsylvania; John Wilke, Arizona; Charles Jones, Indiana; Joe Jenkins, Kansas; Louis Dutel Jr., Louisiana; Harold Wandesforde, Nevada; Harold Goubil, Alabama; Ray Frohn, Nebraska; William R. Barnes Jr., Missouri.* **Top row,** *left to right: Bruce Zeiser, Massachusetts and Rhode Island; Richard E. Yerger, Delaware; Dale Eggleston, Wyoming; Charles L. Forbes, West Virginia; Richard C. Mohler, Washington; Mel Kensinger, Colorado; Harrison H. Jones, Kentucky; John Warren, Oklahoma; Ernest H. Stanley, South Carolina; A.L. Winczewski, Minnesota; Nic S. Hoyer, Wisconsin; Trammel McIntyre, Georgia.*

Other state advisory trustees not pictured are: Harold Lightle, Alaska; E.A. Bowen Jr., Arkansas; Robert Houser, Connecticut; Samuel R. Gillman, District of Columbia; James Robinson, Florida; Allan K. Buchanan, Iowa; James F. Keenan, Maine; William C. Rogers Jr., Maryland; Rowan H. Taylor, Mississippi; Henry Keyes, New Hampshire; David Lasseter, New Jersey; Omar F. Tucker, New Mexico; James Pedowitz, New York; William B. Pittman, North Carolina; Carloss Morris and Hughes Butterworth, Texas; Floyd B. Jensen, Utah; Robert Dawson, Virginia.

Announcing LANDEX® II

Automated indexes for your title plant:
The basic system holds 3 million postings on line.
Can be expanded without limit.

Now, title managers who want a LANDEX system with greater on-line storage can enjoy a 600% increase in capacity at a price increase of less than 15%.

LANDEX is the minicomputer system that gives you on-line plant indexes. ("On-line" systems search your indexes the moment you request a search. "Batch" systems require that you wait for a run at a fixed hour — sometimes overnight.) On-line systems are costly to develop. Their development takes a long time. That's why title companies turn to LANDEX for an established product. LANDEX systems have been purchased or leased by seventeen firms in six states.

The first LANDEX II system is scheduled for delivery to Title Insurance and Trust Company in early spring, 1978.

LANDEX I, the original system that has served owners since 1973, is available at reduced prices, depending on the options you choose in equipment and programs to meet your firm's needs. A new resource for smaller plants!

It's a good time to plan.
May we tell you more?
Just write or call —

Donald E. Henley, President

INFORMATA INC

SPECIALISTS IN INFORMATION MANAGEMENT / 23241 VENTURA BLVD., WOODLAND HILLS, CA 91364 / (213) 346-9203

ALTA Judiciary Committee reports court decisions

Editor's note: This is the fifth and final part of the ALTA Judiciary Committee report submitted by Ray E. Sweat, chairman. Parts one, two, three and four appeared in the June, July, August and September issues of *Title News*.

Trusts

Faroq v. Cosner, 340 A2d 414, 27 Md. App. 341, (1975).

Father brought suit against his son and the son's former wife for the imposition of a resulting trust on two parcels of land which were conveyed by separate deeds to the defendants.

The testimony showed that as to one parcel, the purchase price was paid by the plaintiff who had negotiated and contracted to make the purchase which along with other testimony raised the presumption that where one purchases land, pays for it with his own money, and takes a conveyance in the name of another, a trust results in favor of the purchaser, unless there be circumstances rebutting that presumption. The lower court's finding of a resulting trust as to this parcel, was affirmed.

As to the second parcel, the testimony showed that the purchase price was provided by a mortgage executed by the defendants alone. It was further shown that the plaintiff made subsequent payments on part of the mortgage indebtedness. The Court of Special Appeals reversed the lower court's finding of a resulting trust on this property holding that the evidence of subsequent mortgage payments, if admissible, served at best to raise a presumption of advancement and since the purchase price was not paid by the plaintiff, there was no presumption of a trust.

Uniform commercial code

In the matter of Goldie v. Bauchet Properties, 15 Cal. 3d 307, 540 P. 2d 1 (1975).

Sometime after a packaging machine had been affixed to certain realty by one of the corporations owned by the seller, the seller sold the realty to defendant-lessors who leased the realty back to two corporations owned by the seller under an unrecorded lease which gave the lessors a security interest in the machine but which entitled the lessees to remove it on termination of the lease in the absence of default. Subsequently, plaintiff acquired an interest in the machine as security for a loan to the lessees and duly perfected such security interest. On the lessees' default in rent, plaintiff sued defendants for possession of the machine. The trial court gave judgment for the plaintiff on the ground that the machine was a trade fixture and that the security agreement had been perfected by filing and took precedence over the interest created by the unrecorded lease.

The Supreme Court reversed and remanded with directions to determine the nature of defendants' interest in the machine, under the view that such determination was necessary for disposition of the case and that, under the circumstances, the Supreme Court could not make the determination as a matter of law. The court agreed that since the packaging machine was bolted into the concrete floor, was removable without injury to the premises and was used for purposes of trade or manufacture, it was a trade fixture. If the lessors' interest in the packaging machine was not a security interest but an ownership interest derivative from the interest in the real property as owners and lessors under the express exclusionary provisions of section 9201, subdivision (1), subsection (c), the California Uniform Commercial Code should not govern and the rights and duties of the parties should be governed by the law of California relating to real property and fixtures. In such event the lessors should prevail since where trade fixtures removable by the tenant under the terms of a lease are later encumbered by a chattel mortgage given to a third party, the rights of the chattel mortgagee are derivative. He cannot assert a greater right against the lessor than can the lessees. Thus, if the tenant has lost his right to remove the fixtures, the right of the chattel mortgagee is similarly affected. If, however, the lessors have only a security interest in the packaging machine, then the Code should govern and the rights and duties of the parties should not be governed by the law of California relating to real property and fixtures. In such event, plaintiff's perfected security interest should prevail over the lessors' non-perfected security interest.

With respect to the lessors' contention that the parties' rights are to be determined by the general landlord-tenant law in existence prior to enactment of the California Uniform Commercial Code, the court held that the California draftsmen apparently intended Division 9 to govern the creation, perfection and priority of security interests in fixtures as against parties claiming interests in the fixtures themselves and not in the real property. Thus the Code governs as between one with a security interest in the fixture and anyone other than a real property claimant. But the rights of parties with claims in fixtures as against parties with claims in the real estate are left to real property law.

Usury-business loans

Metcoff v. Mutual Trust Life Insurance Co., 33 Ill. App. 3d 1059, 339 N.E. 2d 440 (1975).

Facts: William and Lawrence Metcoff and Eli and Celia Metcoff, their parents, borrowed a total of $246,000 from the Lake View Bank. The loan proceeds were used by William and Lawrence to purchase land for a real estate development, in which the parents did not participate. William and Lawrence gave their notes in an identical amount to their parents. Several years later, Eli and Celia borrowed $245,000 from Mutual Trust Life Insurance Company. The greatest portion ($210,000) of this loan was used to pay off the balance due on the loan made by the Lake View Bank. The remainder of the new loan was used to pay a mortgage broker's commission and taxes and surveys in connection with real estate held in a land trust, the beneficial interest in which was pledged by Eli and Celia to secure payment of the new loan. The new loan was not usurious when made, nor as extended for a period of three years. The loan was then extended for two additional periods of one year, at rates of interest which exceeded the legal rate for nonbusiness loans. At the expiration of this last period, Mutual refused to further extend the loan.

Eli and Celia then brought an action for damages under Section 6 of the usury statute (Ch. 74, par. 6, Ill. Rev. Stat., 1969) against Mutual. Mutual then brought a separate action to foreclose its lien on the pledged collateral. These two suits were then consolidated. Thereafter, the trial court granted the Metcoff's motion for summary judgment and awarded them damages in the amount of $87,220.18, being twice the amount of interest charged them under the second and third extensions.

Issue: Did the loan as extended fall within the "business loan" exception to the general usury provisions?

Held: It did not.

Opinion: The so-called "business loan" exception to the general usury provisions provides that it is lawful to charge any rate or amount of interest with respect to the following type of transaction: "(c) Any business loan to a business association or co-partnership or to a person owning and operating a business as sole proprietor or to any persons owning and operating a business as joint venturers, or to any limited partnership, or to any trustee owning and operating a business or whose beneficiaries own and operate a business, transacted solely for the purpose of carrying on or acquiring the business of such business association, co-partnership, joint venture, limited partnership, trustee, beneficiaries, or persons;***." Ill. Rev. Stat., 1969, ch. 74, par 4(c). We do not agree, however, that viewing the dealings of Eli and Celia Metcoff brings the Mutual Loan and its extensions within the exemption of section 4(c), because the exemption applies only in cases where a loan is made to a specified type of business person or entity solely for the purpose of carrying on or acquiring the business of such person or entity.

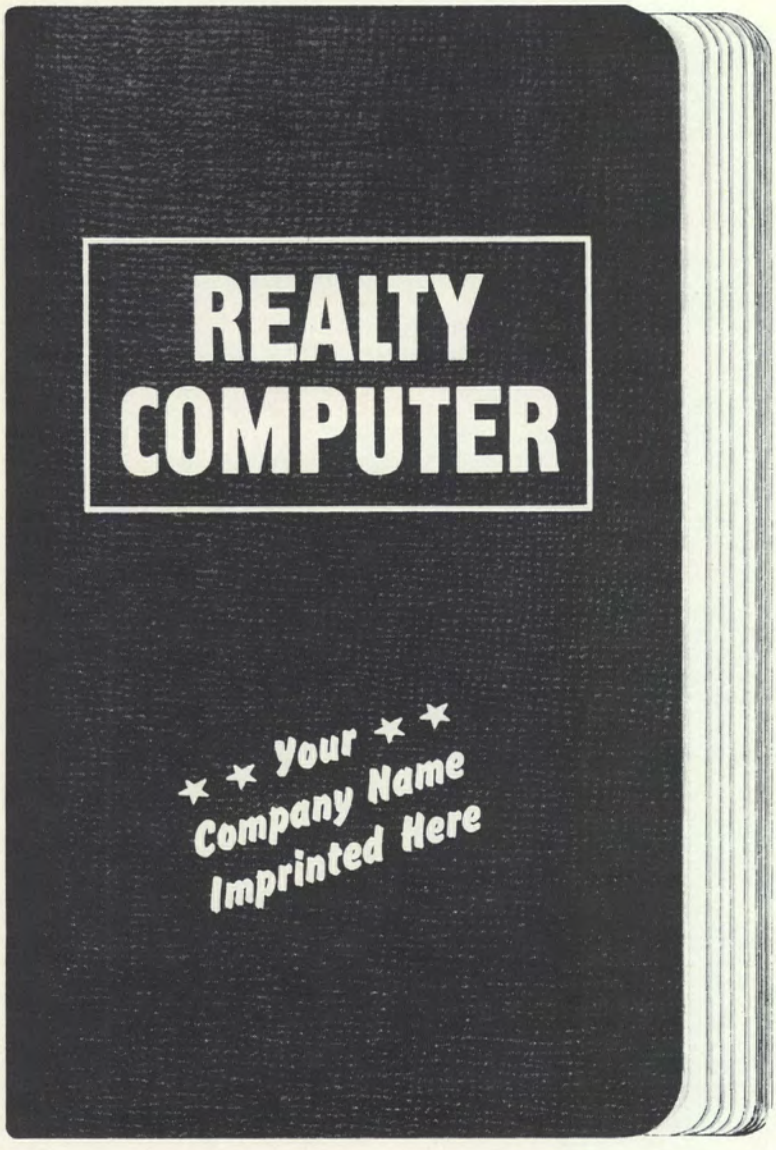
The proceeds of the Lake View loans were ultimately used by the two sons to acquire land for their business of developing that land, a business in which their parents had no part.

It follows that the Mutual loan and the extensions thereof were loans made by Mutual to the parents to enable the parents to discharge their personal liability on the non-business or personal loans made to them by Lake View; and in fact the proceeds of the original Mutual loan were so used. As such, the Mutual loan and the three extensions thereof were not "business loans" within the exceptions provided in section 4(c) and the interest charged by written contract in the last two of the three extensions was usurious.

Mutual also challenges the judgment against it on the grounds that a legend stating "This is a business loan for business purposes" appears on a letter of direction from Eli and Celia Metcoff to their land trustee, the Harris Bank, in connection with the third extension of the Mutual loan, and that this document raises genuine issues of material fact. The record raises an issue as to whether plaintiffs signed this letter of direction at a time when it bore the business loan legend; however, this issue is not material to the resolution of this case. Having decided that neither the Lake View loan nor the Mutual loan and the extensions thereof were within the statutory exception, the appearance of this legend on a letter of direction to plaintiff's own land trustee would not alter our conclusion. No argument may be made that Mutual relied on this notation, as there is no contention that the statement was made to anyone other than to Eli and Celia Metcoff's own land trustee. This notation was not made to the lender, did not state the nature of the borrower's business, and did not allege a need for business funds or state that the proceeds of the loan would be used solely to acquire or carry on their business. The facts of this case do not raise the issue of whether a representation by a borrower made to a lender that a loan is a business loan within the meaning of the statutes of Illinois respecting interest, would estop said borrower from asserting that the transaction did not in fact fall under the business loan exemption. Therefore, the existence of this letter of direction does not raise a genuine issue of material fact.

(Continued on page 21)

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

Indians—*(continued)*

in the litigation—this time on the side of the Indians—and rather enthusiastically indicated its considerable confidence in the merits of the Indian claims.

It was at this point that the potential repercussions of the Indian claims began to become recognized beyond merely those persons directly involved in the litigation. The issuance of a $1 million bond issue to finance work on a waste treatment plant in Millinocket, Maine was suddenly suspended when legal counsel could not render an unqualified opinion because of the pending claim.

The same fate occurred with respect to the issuance of $27 million in bonds by the Maine Municipal Bond Bank on behalf of Maine towns and schools.

The inability to be assured that the tax base upon which repayment of the bonds would be secured accounted for these problems inasmuch as potential Indian ownership of the land might well render the land ultimately tax exempt.

Land transactions came to a standstill unless buyers and lenders were willing to accept the risk since sellers could not provide evidence of good title free and clear of adverse Indian claims.

All this led Rep. William S. Cohen (R-Maine) to state to his House colleagues, ". . . the very pendency of the suit threatens to bring the State of Maine to its knees. . . . Local municipalities in the disputed land areas will have difficulty issuing bonds to finance capital construction programs; banks will no longer finance home loans and mortgages; investment and commercial development will be terminated, and the flow of federal dollars into various government programs may be restricted."

In the meantime, claims involving different tribes and different claim areas began to spring up elsewhere. The Wampanoags claimed 13,000 acres in the Cape Cod area of Mashpee and a smaller amount on the island of Martha's Vineyard; the Narragansetts of Rhode Island, 3,200 acres of Charlestown; two different Connecticut tribes, 1,200 acres of Kent and 800 acres of Ledyard, and the Oneidas in upper New York State, 300,000 acres of Oneida County land.

In early July this year, the solicitor of the Department of Interior asked the Department of Justice to bring actions on behalf of other Indian tribes to recover land in New York State. The department agreed. The tribes and land areas are St. Regis Mohawk, 10,500 acres; the Cayugas, 62,000 acres, and the Oneidas, 200,000 acres.

The suits will seek ejectment and damages against all persons claiming an interest in these lands. Rumors and talks involving Indian claims have also been circulated in South Carolina and other parts of Connecticut and New York.

All of these claims in effect allege that at some time after passage of the Non-Intercourse Act in 1790, lands in which the Indians previously had an interest were transferred in some fashion from them without approval of the federal government—a transfer that is therefore void.

In an escalating war of counterclaims and counters to the counterclaims, the defendant landowners have asked for damages representing all of the improvements to the lands over the years if they should belong to the Indians and the Indians have responded with damage claims for trespass, use and

(continued on page 16)

Indians—*(continued)*

occupancy as well as injury to the land.

The actual dimensions of potential claims are as yet unknown and difficult to predict because of the extensive historical work which must be accomplished before an educated judgment can be reached.

The natural reaction from lawyers as well as laymen to discussion of this Indian litigation consistently is, "Well, how about the statute of limitations? Reliance on the soundness of real estate transactions for 200 years through thousands of conveyances without any questions being raised by the Indians, the United States or anyone else should count for something. And why can the Indians re-open this issue at this point in time?"

The Indian lawyers won an early and certainly psychologically important victory in this particular area. In Federal District Courts in Rhode Island and Connecticut, the defendant landowners responded to the Indian claims with defenses based upon state statutes of limitation and adverse possession.

The plaintiff Indians quickly moved to strike those defenses. In litigation terms that is to say, "Even if the defendants could prove they had such a defense, it would be legally insufficient."

Both federal courts granted the motion made by the Indians and the defenses were thrown out. The basis for these decisions was that the real party in interest in the litigation—whether actually a party to the case or not—was the United States, again due to its peculiar trust relationship with the Indians, and that such state-created defenses do not lie as against the United States because it, as the sovereign power, is immune.

As of this date, the pending litigation moves forward. Generally, both sides are engaged in conducting extensive historical research on the Non-Intercourse Act and the history of the tribes involved. Numerous critical issues remain to be litigated. Examples of such issues include:

- Does the Act apply to Eastern tribes?
- Did the United States in one form or another approve or acquiesce in the transfers?
- Was the tribe a tribe at the time of the original transfer?
- Is the tribe presently constituted so as to properly claim?
- Did the tribe actually have an interest in the land at the time of the transfer or had it in fact been previously lost or abandoned?

It is not my purpose to suggest how these issues will or should be resolved if the litigation proceeds its course. However, I would suggest that litigation does not appear to be a fair process for a resolution of these claims and that legislative settlement would be far preferable. It should be one that provides for an equitable resolution by the federal government of legitimate claims and which removes present day landowners and their land from the case.

I say this first, because it is apparent to all who have been involved that continued litigation will be *very* expensive and *very* protracted. According to the Justice Department, this is "potentially the most complex litigation ever brought in the federal courts with social and economic impact without precedent and incredible litigation costs."

(continued on page 19)









Top row, left to right: Grady Smith, Albert R. Riggs, John J. Hibbits, Edward I. Lack, Michael F. Frederick Jr., James P. Ramsey III; second row, left to right: Jerry L. Morris, John W. Hooker Jr., Len B. Cooke Jr., T.W. Clowdus, J. Patrick Gillen, Jim W. Jones; bottom row, left to right: James A. Long, David D. Hargis, Vivian Howard, David H. Hubert.






Names in the News...

Michael F. Frederick Jr. has been named vice president and Pennsylvania state manager of First American Title Insurance Co. He has been in the title business for 18 years.

Vivian Howard, supervisor of the agency accounting division at American Title Insurance Co. of Miami, Fla., has been voted "Woman of the Year" by the Hialeah-Lakes Chapter of the National Business Women's Association. The goals of the association are to elevate the social and business standards of women.

Howard, as Chapter Woman of the Year, will automatically be a candidate for the national "Woman of the Year" designation. She joined American Title in 1963 as a secretary, and progressed to her present position through various departments of the company.

American Title Insurance Co. has announced the establishment of three new national regions. Three recently appointed vice presidents have been placed in charge of the new divisions as regional managers. **Jim W. Jones** will direct the Virginia-West Virginia-North Carolina region from the Richmond, Va., regional office; **T. W. Clowdus** will head the Alabama region from the Birmingham office, and **David H. Hubert** will manage the Georgia-South Carolina region from American Title's Atlanta office.

In other American Title personnel changes, **James A. Long** has been appointed vice president-Florida branch administration. He will assume his new position at the company's Miami headquarters. **Len B. Cooke Jr.,** a 25-year veteran of the title industry, has been named vice president and Long Island sales manager for American Title. **Jerry L. Morris** has been promoted to vice president and manager of the Jacksonville, Fla., office and **Grady Smith,** manager of the Orlando, Fla., branch office, has been appointed as a vice president of the company.

The manager of American Title Insurance Co.'s New York division has been elected president of the Connecticut Board of Title Underwriters. He is **Albert R. Riggs,** a company vice president, who has been a member of the Connecticut board since 1967.

Edward I Lack, vice president and director of the lawyers division of American Title, has been named chairman of the newly established section on economics and management of law practice of the Florida Bar.

J. Patrick Gillen has been appointed a vice president of Commonwealth Land Title Insurance Co. A 23-year member of the title industry, Gillen is affiliated with the company's Pittsburgh office.

Commonwealth recently announced the following appointments. **David D. Hargis,** a former U.S. Representative from Kansas and **John W. Hooker Jr.** have been named assistant vice presidents and branch managers. Hargis is with the Sarasota, Fla., office while Hooker is associated with the West Palm Beach, Fla., office. **John J. Hibbits** and **James P. Ramsey III** of the Paterson, N.J., and Pittsburgh offices respectively also were promoted to the position of assistant vice president.

ALTA action...

Members of the ALTA Public Relations Committee for years have observed that monthly "Home Buyer Clinic" columns distributed by the Association have remarkably long life before they become outdated. Even with this knowledge, it was impressive to note that the East San Diego *Press* recently published one of the columns entitled, "Lender Needs Protection Too," explaining lender's title insurance, which was sent to suburban and rural newspapers seven years ago under the byline of Thomas J. Holstein when he was ALTA president.

The columns still are sent out under the bylines of ALTA officers and staff as an activity of the Association Public Relations Program. They generate an average of well over 100 clippings each.

Members of the ALTA Public Relations Committee are Chairman Patrick McQuaid, Randolph Farmer, Francis O'Connor, LeNore Plotkin, James Robinson, Edward Schmidt and Bill Thurman.

450 attend joint meeting of four state associations

Highlights of the recent joint convention of land title associations of Colorado, Idaho, Utah and Wyoming include a speaker-filled roster and election of officers for each of the four groups. Approximately 450 persons attended the event at Jackson, Wyo.

Officers elected for the 1977-78 term of the Land Title Association of Colorado are Jack H. Johns of Englewood, president; Luella Eller of Ft. Collins, first vice president; Emil V. Rackay Jr. of Denver, second vice president, and George A. Fix of Wray, secretary treasurer.

Elected president of the Idaho Land Title Association was Tod Kiblen of Moscow. Robert Black of Pocatello was voted vice president of the Southeastern District; Holden Mitchell of Coeur d'Alene, vice president of the Panhandle District; Dennis Wetherell of Mountain Home, vice president of the Southwestern District, and Lois Jepson of Jerome, secretary treasurer.

Lewis S. Livingston will serve as president of the Utah Land Title Association. Elected first and second vice presidents respectively were Alfred J. Newman and Wallace E. Buchanan. Michael J. Jensen is executive secretary.

The Wyoming Land Title Association will be led by Edwin R. Adams of Pinedale who was elected president. Gary Schmidt of Rawlins is the new vice president and Frances Rossman of Newcastle was elected secretary treasurer.

Chairman of the ALTA Title Insurance and Underwriters Section Robert C. Bates was one speaker who addressed the gathering.

Indians—*(concluded)*

The judge in the Massachusetts case, Judge Skinner of Boston, recently indicated a belief that the trial itself of the Massachusetts case alone may last several years with appeals to both the Court of Appeals and Supreme Court a foregone conclusion.

Very considerable amounts of time and effort remain in each of the cases presently filed before a trial commences. Apart from attorneys' fees and other costs usually related to complex litigation, enormous costs are required in the historical research required. As these costs escalate, the individual defendant landowners and state and local governments upon whom this burden falls will be increasingly hard pressed to defend.

I also would suggest litigation against private landowners is a poor vehicle with which to fairly resolve issues which are in many respects essentially political. In addition to the time and expense to which I referred, the ancient nature of the facts and documents inherently a part of most of the essential issues to be tried makes it less than certain that one could ever establish in a court of law precisely what did or did not occur. Moreover, there appears to be a basic injustice in forcing current landowners to defend themselves against ancient claims that are in no sense based upon any wrongdoing on their part. To the extent that there may be any legal or moral basis to the Indian claims, they deserve to be addressed or remedied by the federal government which ought to bear the burden of having failed to act over the years.

Finally, merely the pendency or even hint of litigation—however it might ultimately be resolved—causes substantial uncertainty with respect to the marketability and taxability of affected land.

In fact, merely the presence of a lawyer and several Indians reviewing ancient documents at the county courthouse has caused adverse economic circumstances in some communities.

The public and private economic and emotional concerns which this has already created in Maine and elsewhere will only increase as the claims and the litigation continue. These concerns will have an increasingly damaging effect on the individuals and companies whose property is threatened or who might be liable for damages even if the ultimate result in litigation is favorable. All of this works a heavy social cost as well because of the strain placed in the interim on relations with Indians who live in the affected areas.

For these reasons, attention has increasingly centered on Washington and the possibility of a legislative settlement of the claims upon a broad basis. Earlier this year, President Carter appointed Justice William Gunter, recently retired from the Georgia Supreme Court, as his special representative to study the Maine and Massachusetts cases and to make recommendations as to a potential solution.

Since that time, Judge Gunter has been engaged in substantial discussions with various of the interested parties and has very recently delivered a recommendation for a legislative settlement of the Maine litigation to the President.

Judge Gunter has an unenviable task. All sides in the litigation exude confidence that they will prevail. The involvement of different tribes, public officials and landowners on each side from case to case increases the number of parties who have to be dealt with and whose positions have to be considered. Moreover, there appears to be practical political considerations which place limitations upon what the Carter Administration and Congress would be willing to commit to a legislative solution to the problem.

Nonetheless, I am hopeful that Judge Gunter's recommendations will contribute to an equitable legislative resolution of the claims and in this fashion spare the nation the need to wage Indian wars once more —even if this time the battle grounds would be the quiet halls of the federal courts.

CMAC gets nod From FHLMC

Commonwealth Mortgage Assurance Co. (CMAC) has been approved as a qualified private mortgage insurer by the Federal Home Loan Mortgage Corp. This allows mortgage lenders to use CMAC's insurance on loans originated for sale to the Federal Home Loan Mortgage Corp.

CMAC began business in Pennsylvania in April and was recently admitted to the state of Delaware. The company is a subsidiary of Commonwealth Land Title Insurance Co.

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.

High court upholds 1974 opinion about recording and use of names

ALTA Judiciary Committee Chairman Ray E. Sweat advises of a recent case of interest reported by committee member Henry W. Keyes (New Hampshire reporter). The case summary, as reported, follows.

Secretary of the Commonwealth v. City Clerk of Lowell, Supreme Judicial Court of Massachusetts, August 7, 1977, 1977 Advance Sheets pp. 1674-1700.

Civil action reserved and reported to the full court. Majority opinion by Braucher, J.: summarizes the case: "In 1974 the Attorney General issued three opinions with respect to the recording and use of names. [Citations.] Those opinions asserted and elaborated a common law principle that people may select or change their names freely if there is no fraudulent intent. The defendants, city and town clerks, refused to follow those opinions and that principle in recording births and marriages, asserting a power to determine people's surnames according to customary rules, regardless of the desires of the people concerned. The responsible state officials, particularly the Registrar of Vital Records and Statistics (Registrar), brought this action to settle the controversy. We hold that the Attorney General is right and the city and town clerks are wrong, and order that the rights of the parties be declared accordingly."

"Quirico, J. (dissenting, with whom Liacos, J., joins). I readily recognize and acknowledge, as does the court in its opinion, that at common law a person (a) "may change his name at will, without resort to legal proceedings, by merely adopting another name, provided that this is done for an honest purpose" (*Merolevitz, petitioner,* 320 Mass. 448, 450 1946, and (b) has the "freedom of choice to assume a name which he deems more appropriate and advantageous to him than his family name in his present circumstances, if the change is not motivated by fraudulent intent" *Rusconi, petitioner,* 341 Mass. 167, 169-170 (1960). However, in my opinion, this common law right cannot and does not override or render unenforceable the statutory mandate for the making and keeping of the many important public records involved in this case, nor does it give the persons to whom those records relate the right or option to determine and dictate, at their discretion, the names and other information required by statute to be entered on those records.

". . . There is ample room in our system of law for both the kind of vital records which the legislature intended and the exercise of the 'freedom of choice' which would permit any person to indulge his desire for a different name for himself or his children outside the sphere of vital records. Neither the legal prescription on the contents of vital records, nor the individual freedom of choice of names, need exclude the other."

Comment: Rehearing at request of Brookline Town Clerk was denied. Some legislation appears essential to require filing change of name in records of municipalities, state bureau of vital statistics or registries of probate or deeds. The ideal might be a national center for all vital statistics.

Judiciary—*(continued)*

Wills

In the matter of Papen, et al., v. Papen, 216 Va. 879, 224 S.E. 2d 153 (1976).

The testator's ex-wife appealed from a lower court decree which ruled that the testator's will in favor of the ex-wife had been revoked upon divorce. In affirming, the Supreme Court held that the statute which revoked provisions in a will in favor of a divorced spouse applied to a will executed prior to and a divorce obtained prior to the effective date of the statute, thus giving a retroactive effect to the statute.

In the matter of Walker v. Clements, et al., 216 Va. 562, 221 SE 2d 138 (1976).

Involved a will which provided that real estate and property belonging to the testatrix were to go to her brother "to use as he sees fit" and that, at his death, "whatever was left" was to be divided equally between a sister and a nephew or the one that was left. The court held that this created only a life estate in the brother instead of a fee simple.

In Re Estate of Crozier, Iowa Sup. 75, 232 NW 2nd 554.

Decedent's brother petitioned for admission of decedent's lost will to probate. The District Court granted petition, and defendant other heirs at law and administrators of estate appealed. The Supreme Court held that evidence supported finding that presumption that such will had been revoked by decedent had been rebutted.

Affirmed.

In Re Estate of Spencer, Iowa Sup. 75, 232 NW 2nd 491.

Appeal was taken from order of the District Court construing trust provisions of separate wills of wife and husband, both deceased. The Supreme Court held that, under wife's will empowering husband to dispose of real estate by will or deed by granting life estate to four named children, with remainder to their children, husband validly by will established trust to carry out life estate granted to the children, but provision in his will that trust could continue for life of any of children or great grandchildren or any other descendants who were alive at time of his death, plus 21 years, was invalid; that remainder interest should vest in bodily issue of children in per stirpes shares, not per capita; and that anticontest clause in husband's will did not bar any party from litigating issues as to construction of wife's will and the exercise of power of appointment.

Affirmed in part and reversed in part.

In the matter of Estate of Chapman, Iowa Sup. 76, 239 NW 2nd 869.

Petition was brought to set aside a will which had been jointly executed by the testator and his wife, and to admit to probate a later instrument executed by the testator after the death of his wife. The District Court found that the earlier wills were joint and mutual, and refused probate of the later will. Appeal was taken, and the Supreme Court held that the wills were mutual; that the promises of the testator and his wife to dispose of their property in a manner satisfactory to each was good consideration to support the contract; that the will executed by the testator after his wife's death had effectively revoked the will which he had jointly and mutually executed with his wife, and was entitled to probate; and that, in view of the fact that the later will violated the terms of the testator's contract with his wife, the property owned by testator at the time of his death was impressed with a trust in favor of the beneficiaries under the joint and mutual will.

Reversed and remanded with instructions.

Leidy Chemicals Foundation, Inc., v. First National Bank of Maryland, 351 A 2d 129, 276 Md. 689 (1976).

Trustee brought an equity proceeding for a judicial construction of a trust agreement and the will of a beneficiary under the trust. The trust agreement which was executed in 1933, provided for the payment of income to a certain beneficiary for life, with distribution of the corpus by the Trustees, free of the trust, to those persons and corporations which the beneficiary, by his Last Will & Testament may expressly appoint and if the beneficiary, by a Last Will & Testament, does not so expressly appoint, the Trustees shall distribute the trust estate, free of the trust, to the persons then living who would have had a right to receive the same as the heirs and distributees of the beneficiary had he at that time died intestate owning the same, owing no debts and domiciled in Maryland.

The beneficiary's will which was executed on September 3, 1970, provided for a devise and bequest of all the rest and residue of the estate, "which I may own or have the right to dispose of at the time of my death".

The trustee, subsequent to the death of the beneficiary, being uncertain whether his will contained a valid exercise of the power of testamentary appointment, instituted these proceeding.

Held that the testamentary power of appointment was not validly exercised, since the general language used by the beneficiary testator did not specifically refer to the power. The Court quoted Section 4-407 of the Estates & Trusts Article, which is applicable to wills executed on or after January 1, 1970 and provides as follows: *Subject to the terms of the*

(continued on page 22)

Judiciary—*(concluded)*

instrument creating the power, a residuary clause in a will exercises a power of appointment held by the testator if, and only if, (1) an intent to exercise the power is expressly indicated in the will or (2) the instrument creating such power of appointment fails to provide for disposition of the subject matter of the power upon its non-exercise.

Willoner v. Davis, 353 A 2d 267, 30 Md. App. 444, (1976).

Testator died in 1973, leaving a widow, three natural children by a prior marriage and an adopted son who is the natural child of the widow. By the terms of the will, which was executed prior to the adoption decree, one-third of the residuary estate was devised to the widow, provided that she survive the testator by 30 days, one-fourth of the residuary estate was devised to each of the two daughters and the remaining one-sixth of the residuary estate was to be divided equally among the testator's three sisters. The widow survived the testator by more than 30 days so that the bequest to her became effective. The will contained further provisions concerning distribution of the residuary estate in the event that the widow did not survive by 30 days including a devise of a percentage of the residuary estate to the individual who was later adopted.

The personal representative determined that the adopted son was a pretermitted child within the meaning of Section 3-01 of the probate statutes and proposed to distribute the estate accordingly. The two natural daughters disagreed with this determination and filed a petition seeking a declaration that the adopted son was not entitled to share in the proceeds of the estate as a pretermitted child.

The statute, Section 3-301 of Article 93 provided: No will shall be revoked by the subsequent birth, adoption or legitimation of a child by the testator except under the circumstances referred to in Section 4-105(c). (Not applicable in this case). Such child, or issue (if any, who survive the testator) of any such child who does not survive the testator, shall, however, be entitled to a share in the estate to be determined and paid in accordance with sections 3-302 and 3-303, if: (a) The will contains a legacy for a child of the testator but makes no provision for a person who becomes a child of the testator subsequent to the execution of the will; (b) Such child was born, adopted or legitimated subsequent to the execution of the will; (c) Such child or his issue, survives the testator; and (d) The will does not expressly state that such child, or issue, should be omitted.

The Court concluded that it did not read the statute as necessitating that a person who becomes a child of the testator subsequent to the execution of a will must receive a bequest, specifically as a child, in order for the statute to be satisfied. The contingent bequest to such person fully meets the legislative intent so that the adopted son in this case was not entitled to a share in the estate as a pretermitted child.

Stephens v. Citizens & Southern National Bank et al., 233 Ga. 612, 212 SE 2 792, (1975)

Appellees, as trustees under the will of Allen A. Stevens, filed an action for declaratory relief to determine the legal responsibilities of Gertrude Jessop Stevens, alleged to be the life tenant, for repairs to certain property devised to her under the terms of her deceased husband's will. One of the defendants, Alice Stevens Fillingame, is the daughter and only child of the decedent and Gertrude Jessop Stevens and has a remainder interest in the property. After a hearing the trial judge concluded that the will devised to the defendant Gertrude Jessop Stevens a life estate in said property, that the trust created under the will was for the benefit of his child or children and not for the benefit of the wife and that the life tenant has the duty to make the necessary repairs to maintain the property. Mrs. Stevens appeals from this judgment dated September 13, 1974.

1. Appellant's first and third enumerations of error contend that the trial court erred in holding that the trust created in the testator's will did not apply to appellant and that she was responsible for repairs to the eight acres and home place.

The third item of the will provides that appellant shall have a life estate in the property and home place with the remainder interest to testator's child or children. The remainder interest was made subject to a trust set up in the fifth item of the will which provides in part that "The share of my estate to be held in trust for my child or children, including the property in which my wife, Gertrude Jessop Stevens, has a life estate in the event that said life estate shall terminate by her death, I give, devise and bequeath to Robert M. Hitch, and the Citizens & Southern National Bank, a national banking association of Savannah, Georgia, as trustees . . ." In the sixth item of the will the trustees were given the power to sell and give good title to all of his property save his home place and the land on which it sits.

The conflicting portion of the will is contained in the seventh item. After giving repetitive powers of private sale, the testator provided that "The power of private sale shall not include the power to sell my home property at Sunbury, Liberty County, Georgia, mentioned in item third of this my last will and testament. I desire that my Executors and Trustees shall hold this property as a home for my wife first and then for my child or children, whenever my wife's interest in such property should terminate. However, realizing that this wish and desire on my part may become impractical or undesirable with the passage of time I authorize my Executors and Trustees to sell said property upon a petition and order obtained in the Superior Court of Liberty County, Georgia, the proceeds thereof to be subject to the same trusts and limitations as are hereinbefore more specifically set forth. The Judge of the Court, I am sure, will understand and appreciate my wishes and at the time give weight to the changes which may arise with the passage of years."

The appellant contends that since the third and seventh item of the will are in conflict the latter provision should prevail under Code Section 113-407. While it is true that if two provisions of a will are in irreconcilable conflict the latter will prevail, this rule is invoked only when it is impossible to construe the two provisions together. If it is possible, any inconsistent provisions of a will will be resolved before any provision is destroyed. *Frost v. Dixon,* 204 Ga. 268, 49 SE 2d 664; *Rigdon v. Cooper,* 203 Ga. 547, 47 SE 2d 633.

Taking the will as a whole, we conclude that the testator clearly manifested his intention to keep the life estate granted in item third of the will separate from that property under the trust until after the death of the life tenant. The provision for sale in the seventh item of the will was merely to provide for a manner of sale in the event that retention of the home place and property was no longer economically feasible.

2. The appellant further contends that the trial court was not authorized to order that she "make the necessary repairs and to maintain the property." A life tenant is required to exercise ordinary care for the preservation and protection of the property. Code Section 85-604.

The appellees in their complaint prayed in part as follows: "That the court determine what repairs are the legal responsibility of the life tenant, Defendant Stevens, in this case;" and "that the court direct the parties hereto to take action appropriate" to its adjudication of the prayers of the petition.

It is clear from the above that the question was before the court and that the trial judge did not err in including the relief prayed for in his order.

Judgment affirmed.

TIPAC—*(concluded)*

development would alleviate the administrative burden of contacting member corporations annually to obtain solicitation approval.

TIPAC Executive Secretary Mark E. Winter said that TIPAC had already sent a letter to Chairman of the Senate Rules and Administration Committee, Sen. Howard W. Cannon (D-Nev.), urging that the Federal Election Campaign Act be amended to reflect the Commission's recommendations.

Aikens recommended that TIPAC should continue to work with the Senate committee to resolve a number of the more cumbersome requirements now in effect.

She emphasized that there have been more legislative, judicial and administrative actions in the area of federal election campaign financing in the past three years than in the previous 150. She also pointed out that the 1976 amendments to the 1974 Act represent the first time any reference has been made specifically to trade associations and the manner in which they may establish and administer political action committees.

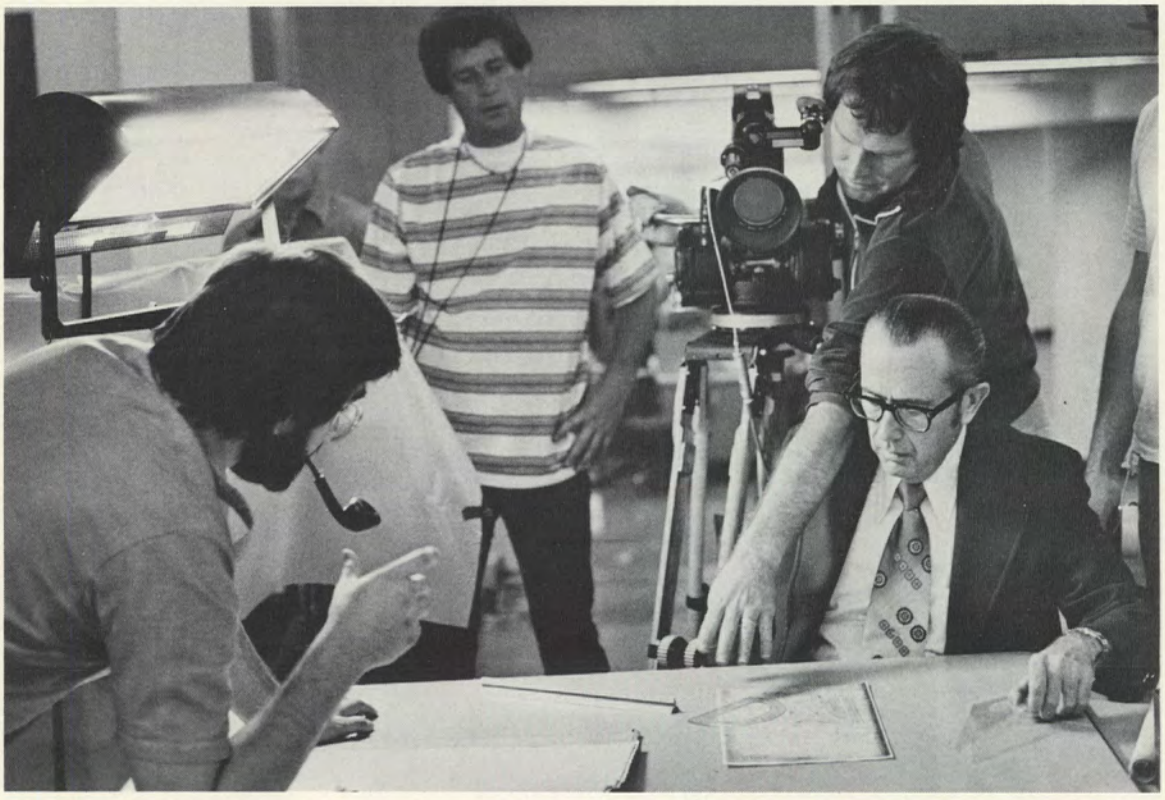
The role of the state advisory trustees was defined at the meeting as including but not limited to the following items:

- Securing of permission to solicit from title companies in their respective states
- Playing of a major role as fund-raisers for TIPAC
- Gathering of political intelligence in their state's Congressional districts regarding candidates' election prospects
- Recommending of candidates for federal office qualified to receive financial support

Since the meeting, the initial 1977 TIPAC solicitation was mailed to administrative and executive personnel of those corporations which had given permission to solicit.

Additional TIPAC solicitation brochures may be obtained by contacting the ALTA Washington office.

This New ALTA Film Will Get Your Story Across



With the federal government looking at different methods of land transfer, it's about time somebody put in a good word for the existing system of recordation and title protection.

Somebody has. In producing "The American Way," ALTA has created an appealing 16 mm color sound film that emphasizes the public importance of land records and title service. This 13½-minute film is designed to impress consumers and opinion leaders while countering misinformation.

Prints are available to ALTA members for $125 each plus postage. Those ordering will receive—at no additional charge—a model speech and a speech outline for developing local presentations to accompany film showings. Just write the ALTA Washington office.

Don't miss this opportunity to get your story across. Better public understanding today will influence the shape of your industry tomorrow.

American Land Title Association
1828 L Street, N.W.
Washington, D.C. 20036

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

November 3-5, 1977
Arizona Land Title Association
The Wigwam
Litchfield Park, Arizona

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

Calendar of Meetings

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

April 21-22, 1978
Oklahoma Land Title Association
Hilton Inn West
Oklahoma City, Oklahoma

April 27-29, 1978
Texas Land Title Association
Houston Oaks Hotel
Houston, Texas

American
Land Title
Association

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