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1978

Title News

In this issue: State Association Develops Sound-Slide Show

a message from the President . . .

This will be my last message to the members as president. First, I want to express my sincere appreciation to you for the privilege of serving as your president this past year.

Although our Association and our industry have experienced a great number of challenges and changes in recent years, we are better equipped now than ever before to respond to them. We have become an industry of *action* rather than reaction.

At the upcoming Annual Convention in Boca Raton, Fla., which starts on Sept. 24, you will be brought up to date on the many current events that are taking place which affect the title industry and you personally, and what we are doing about them. We have an excellent program that you will find educational and interesting—including a special session this year just for the spouses. In addition, Doug and Doris Harden and their convention committees have arranged an outstanding social program. Please plan to attend. You won't regret it.

At the start of my four years "in the chairs," one of my objectives was to visit all of the affiliated state and regional title associations. I managed to hit about 90 percent of them and am only sorry that I was not able to get to know all of our members. However, Gloria and I have truly enjoyed meeting so many terrific title people.

We sincerely appreciate all of the warm hospitality that was extended to us everywhere. We were in Iowa on our 25th wedding anniversary and were feted royally by our many Iowa friends. And the members of the New Mexico Association helped me celebrate my becoming a "grandpa" for the first time. I could go on and on with the many pleasant memories.

But to sum it all up, it has been a memorable year that I would not have missed for anything. Thanks.

Sincerely,

C.J. McConville

VOLUME 57, NUMBER 9

Title News

Features

Departments

On the cover is a shot of the narrator in the Oregon Land Title Association's educational, sound-slide show on title insurance. The presentation uses a narrator-on-camera technique aimed at making the viewer feel that he's being talked with—not at.

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

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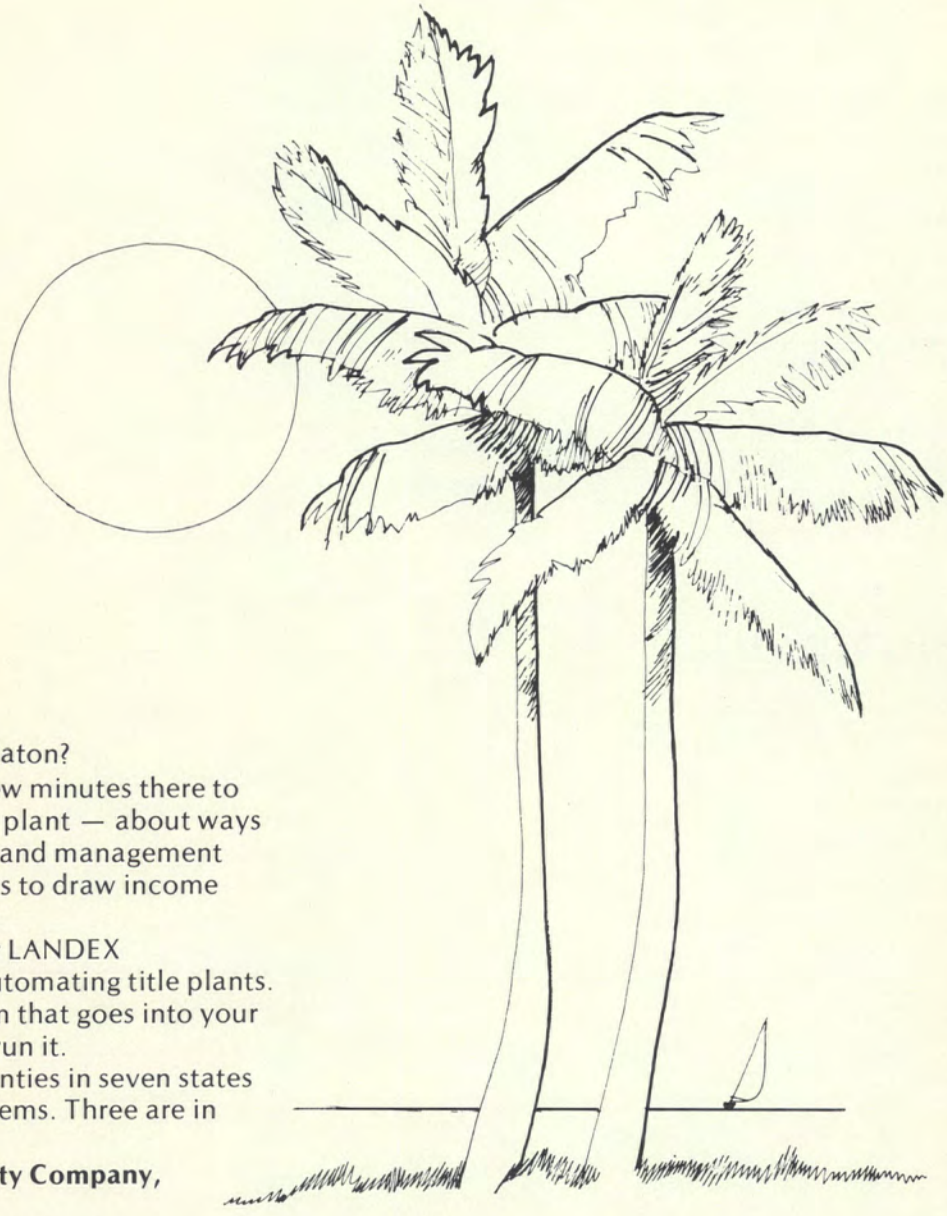

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State Association Presents a "Title Recital"

The Oregon Land Title Association has taken a creative approach in educating the homebuying public, Realtors and others regarding land title services in the state.

The association's public relations committee, working with a team of local creative professionals, has developed a 12-minute, sound-slide show explaining—in simplified language—what title insurance is.

The presentation, entitled *Title Recital,* also uses humor to cut through technical jargon and give a clear and concise overview of title insurance.

The three-person public relations committee, under the chairmanship of Ben Mushaney of Pioneer National Title Insurance Co. (PNTI), Oregon City, began work on developing the presentation in January. By mid-June, the finished product was in hand—in time to show at the joint OLTA-Washington Land Title Association convention. The total cost to produce it was $7,000.

Mushaney and his committee members—Fred Macy and Diane Kinkade of PNTI, Portland, and Warren Schumacher of SAFECO Title Insurance Co., Oregon City—met with the creative team approximately 30 times over the five-month period.

This escrow sequence is one of the show's highlights. Using strong graphics and studio lighting, it creates an easily understood "stakesholder" picture of the escrow function.

The meetings, which started as rap sessions on title insurance to acquaint the writer and producer with title insurance, turned out to be so enjoyable, Mushaney said, that the committee looked forward enthusiastically to each meeting.

The resulting script underwent a series of reviews and changes as directed by the OLTA title experts, and gradually evolved into the finished product.

The presentation has been kept short enough to maintain the viewer's interest as it explains what goes on in a title search, describes the function of escrow and emphasizes how title insurance protects a homebuyer's property rights.

"It's the first time heavy technical title information has been packaged like this," Mushaney said. He added that the material was developed in such a way that it can be shown anywhere in the country.

OLTA has shown the presentation locally to service clubs, community organizations and fraternal groups. In one particular showing to a segment of the homebuying public, Mushaney said the show received a standing ovation.

The creative team that developed the slide show was headed by Lindsey McGill of Spectrum Studios, Portland, and Timothy Leigh, creative director, Denny, Leigh, Ross & Wright, Portland.

According to McGill, the capability of the OLTA public relations committee made the creative job easy.

"We were able to produce a unique and effective communications tool here because the title people—Diane Kinkade in particular—got us down to the main points fast. OLTA did one of the best briefing jobs I've ever seen," McGill said.

To promote the show, OLTA has written about it in its newsletter.

A showing will be presented at the ALTA Annual Convention in Boca Raton, Fla., this month as part of an ALTA public relations workshop.

The slide package is available at a cost of $75. Requests to purchase it should be directed to OLTA Executive Secretary Gerald B. Gray, 321 S.W. 4th Ave., Portland, Ore. 97204.

This sequence of the show demonstrates that even lawyers would rather come to a title plant to do their research than try to find the right record in public files.

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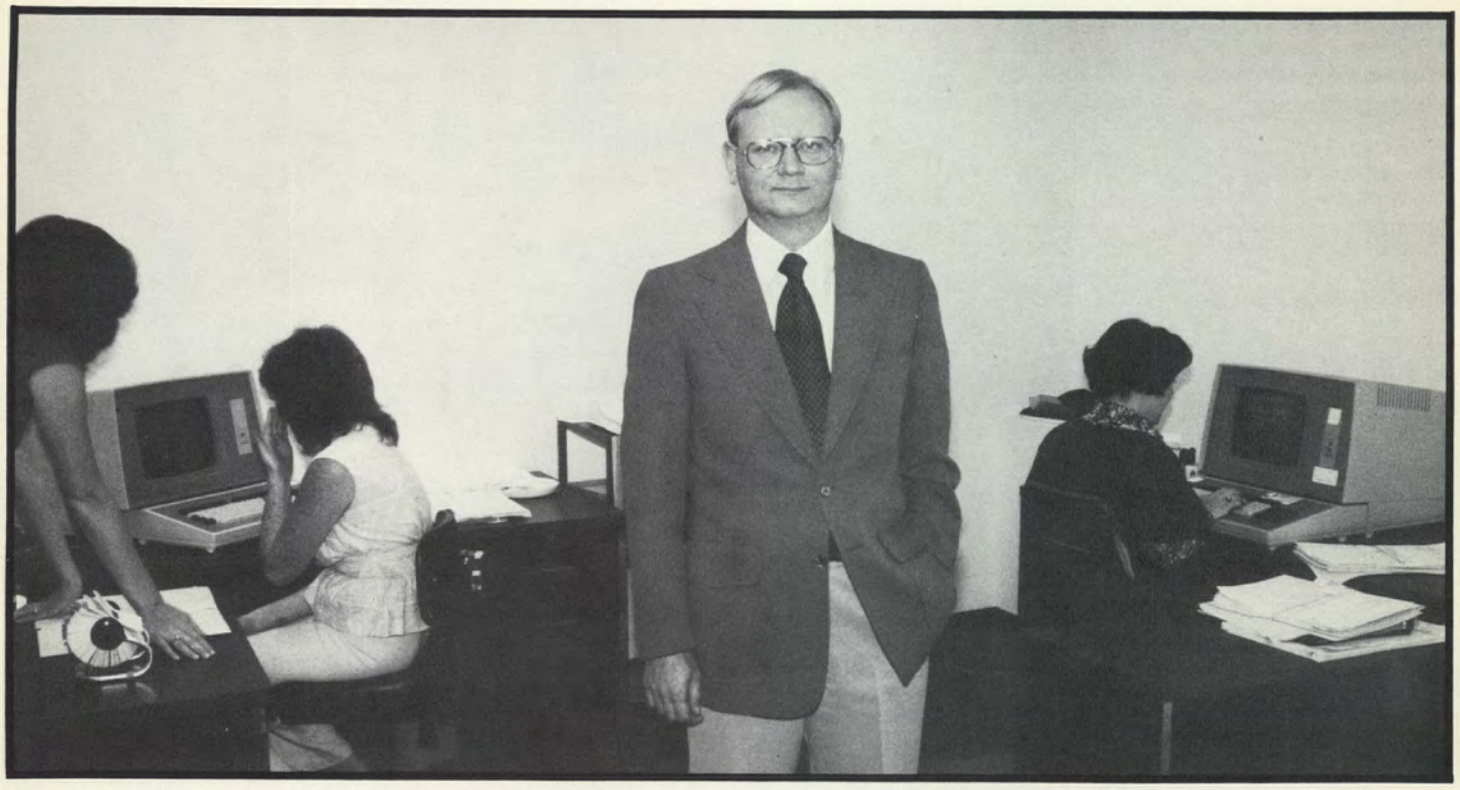

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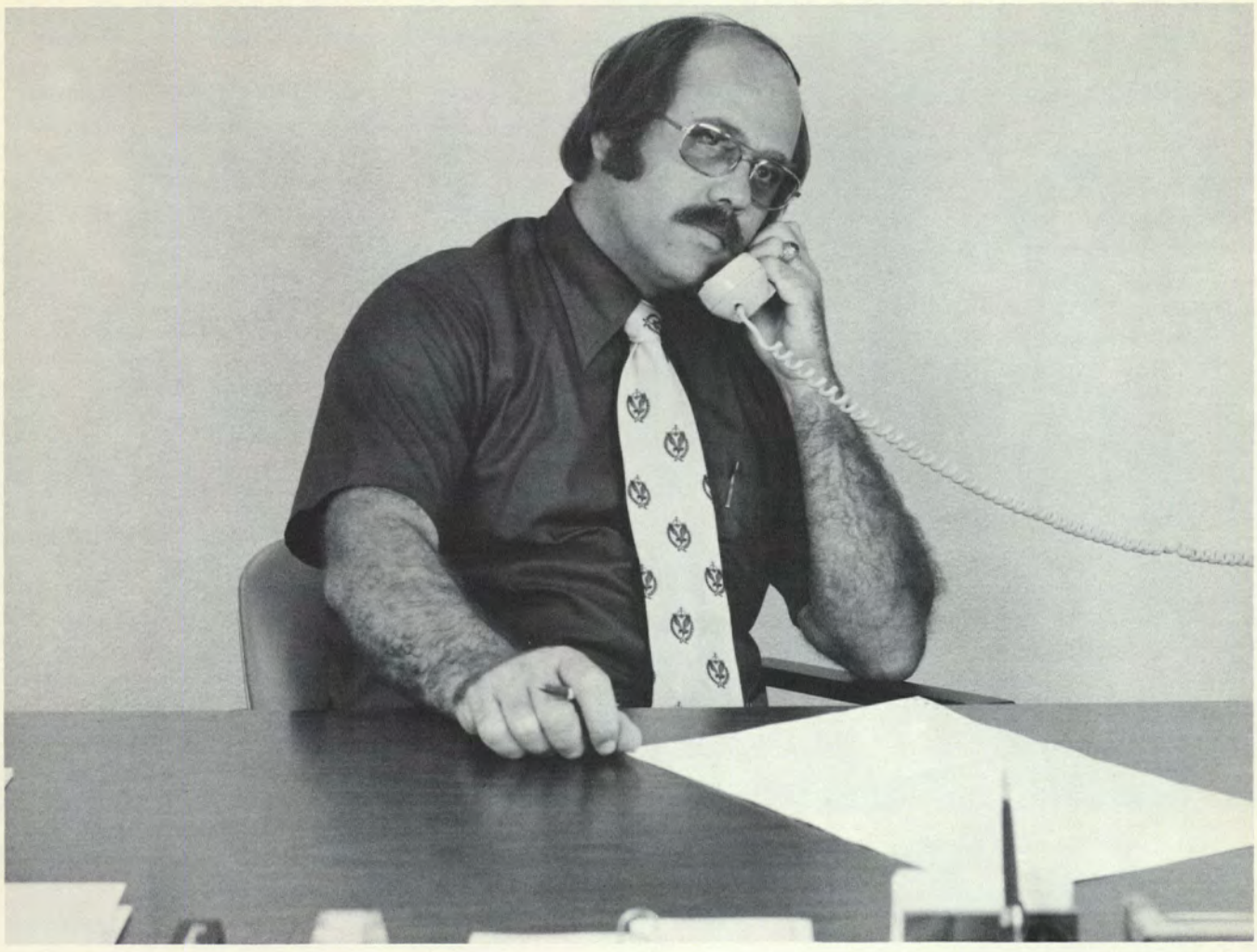

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If you would like the bottom line on how the Orion TPS System can improve the efficiency and profitability of your title company, call or write Wendel Green, at the Orion Corporation.

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ALTA Judiciary Committee reports court decisions

Editor's note: Ray E. Sweat, chairman of the ALTA Judiciary Committee, has submitted 101 cases which the committee judged would be of interest to *Title News* readers. The following represents the first 78 cases of the report. The balance of the cases will be published in future issues of *Title News* this year.

Public Records—Right to Inspect and Copy

Land Title Guarantee and Trust Co. v. Essex (1977), 52 Ohio App. 2d 56; (Motion to certify the record was overruled by the Supreme Court of Ohio, July 8, 1977.)

For years the title company had copied information from the recorder's records by means of camera equipment. In 1973 the recorder prohibited further use of such equipment and offered instead to produce and furnish copies of the information at a minimal charge.

The title company brought an action asking for permission to continue to copy the records by its own camera equipment. The defendant answered that (1) she had never denied plaintiff the right to inspect the records in question, (2) she did not at any time refuse to make a copy of the records for the plaintiff and (3) she charged plaintiff the same amount charged to all other members of the public. The trial court granted plaintiff's request. The recorder appealed.

The Court of Appeals referred to Revised Code 149.43 which provides: "All public records shall be open at all reasonable times for inspection. Upon request a person responsible for public records shall make copies available at cost, within a reasonable period of time" and said that there was no question that the recorder had allowed inspection of the records; the records were open. The only question was plaintiff's right to produce its own copies at its own cost. The court said, "We hold that the statutory right to inspect incorporates within its meaning the right to copy such records within reasonable limitation. . . . The remaining question concerns only the method of copying the material. We find no error in the lower court's decision which, in addition to the order permitting the record copying, orders that the process be allowed under reasonable rules made by the defendant, so that the public records may be safely preserved and the orderly administration of defendant's office be maintained."

Adverse Possession

Somon v. Murphy Fabrication and Erection Co. 232 S. E. 2d 524 (W. Va. 1977)

West Virginia law holds that one who seeks to assert title to land under the doctrine of adverse possession must prove that he has held said land for 10 years or more adversely or hostilely, with actual possession open and notorious; that possession has been exclusive, continuous and under claim of title or color of title.

In this case the Supreme Court of Appeals of West Virginia held that since the land was held by one covering a portion beyond his actual boundary line, but where he believed it to be his true line, such belief did not defeat his right to claim that he held such land adversely or hostilely under the doctrine of adverse possession.

Attachments

Marran v. Gorman 359A. 2d 694 (R.I. 1976)

In 1968 suit was commenced to recover defendants' alleged debt by issuing a complaint, summons and writ of attachment on defendants' real estate in accordance with statutory procedures then in force allowing prejudgement attachment without prior notice and opportunity to be heard. Defendants' motion to release their real estate from the attachment was granted by the trial justice and plaintiff's executor petitioned the appellate court for common law certiorari. The petition was granted and order releasing the attachment quashed.

The trial justice, in granting the motion to release the attachment, apparently relied upon the holding in *McClellan v. Commercial Credit Corp.*, 350 F. Supp. 1013 (D. R. I. 1972), in which a three-judge Federal District Court panel declared the Rhode Island prejudgement attachment procedure statute (since amended) unconstitutional as a violation of the 14th Amendment of the U.S. Constitution in light of the U.S. Supreme Court decision in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) decided on June 12, 1972. The Rhode Island Appellate Court made note to the effect that the holding in the U.S. District Court case, while not binding on it, was certainly entitled to its respect.

The court assumed without deciding that a prejudgement attachment of real estate imposed after the date of the Fuentes decision without prior notice and an opportunity to be heard would be unconstitutional. The decision in the instant case can be based solely on the resolution of whether the principles enunciated in Fuentes and its family of cases should be retroactively applied.

After applying the factors considered by the U. S. Supreme Court when determining whether a decision establishing a new principle of law in a civil case will be applied retroactively, the court held that the rule of Fuentes was not applicable to the case at bar nor to any other civil action pending in Rhode Island courts which was instituted prior to the date of the Fuentes decision. The Fuentes principles are to be applied in a purely prospective sense. However, the court left open for future decision when and if necessary, the question whether the effective date of its prospectivity will be the date of the Fuentes opinion, the date of the McClellan opinion, the effective date of amendments to Rhode Island statutory law made in 1973 to provide conformity with the principles in the Fuentes opinion, or some other date.

Bankruptcy

In the matter of *Abingdon Realty Corp.*, 530 F. 2d 588 (4th Cir., 1976)

Bankruptcy judge ordered a sale of bankrupt's principal asset, an office building, and subsequently ordered delivery of a deed thereto. A fourth-class creditor appealed both orders but did not file a supersedeas bond, and the order itself did not provide for a stay. The Court of Appeals held that under these circumstances an appeal is moot, because a bona fide purchaser's title cannot be affected by the appeal.

Fidelity Mortgage Investors v. Camelia Builders, Inc. 550 F. 2d 47 (2d Circ., February 22, 1977)

"After a real estate investment trust petitioned for reorganization under Chapter XI of the Bankruptcy Act, general contractors for the construction of a condominium project on which the trust held a first deed of trust filed suit in state court to enforce their alleged prior materialmen's liens against the trust. The trust then moved in the bankruptcy court that the contractors be held in contempt for initiating the state court action without first securing permission from the bankruptcy court."

The court held that the contempt order premised on violation of the automatic stay provided by Bankruptcy Rule 11-44 in favor of the first deed of trust holder was proper.

The prior commencement of a lien foreclosure in a state court could not prevent the effect of the automatic stay. Rule 11-44 affects actions and proceedings brought or pending in both state and federal courts.

The fact that it was a deed of trust holder who filed the Chapter XI reorganization makes no difference. They had a sufficient property interest as mortgagee to be entitled to the protection of the automatic stay.

In the matter of Cuba Electric and Furniture Corp. (D. Puerto Rico 1977) 320 F. Supp. 689

This case concerned an appeal from a decision of bankruptcy referee lifting a stay of execution of a judgment of eviction. The District Court held that where the debtor in bankruptcy sold its lease agreement and improvements to a third party, which sale was consummated and approved by the bankruptcy court, there was divestiture by the court of jurisdiction over said property, and proceeds from sale do not revive the debtor's property rights sufficiently for the court to determine that there was identity between funds deposited and property rights in question. Therefore, the court affirmed the Bankruptcy Court lifting of a stay of the state court's judgment of eviction. To decide otherwise, the court stated, would oblige it "to exercise authority not sanctioned by the spirit of the bankruptcy court" and might "preclude the possibility of a viable reorganization.

In re Gerald Namenson, 555 F. 2d 1067 (1st Cir. 1977)

In this case, a fourth mortgagee claimed that the bankrupt's indebtedness to him was not dischargeable because the bankrupt forged his name to the fire insurance proceeds and used them to repair the building instead of allowing the mortgagee to exercise his rights as a co-payee of the fire insurance to insist that the check be used to pay off the mortgage. The Court of Appeals affirmed the District Court's findings for the mortgagee on the grounds that the bankrupt in forging

the check had obtained money from the mortgagee by false pretenses, and therefore the mortgagee's claim as an unsecured creditor was not discharged under Section 17(a)2 of the Bankruptcy Act.

In Re Romano, 426 F. Supp. 1123 (N.D. Ill. 1977)

The Romanos were owners of beneficial interests in Illinois land trusts. Aside from this, they owned no other interests in real property. In March 1976, they filed petitions seeking relief under Chapter XII of the Bankruptcy Act (11 U.S.C. §§801 et. seq.) relating to real property arrangements. Subsequently, in July of that year, Citizen's Bank and Trust Co., a creditor of the Romanos moved to dismiss the reorganization petitions on the ground that the Romanos were not eligible for such relief. The bankruptcy court thereupon dismissed the proceedings and this appeal followed.

The bank's argument in support of affirming the bankruptcy court's decision was based on the premise that for an individual to be eligible for a Chapter XII real property arrangement, he must be a qualified "debtor" within the meaning of section 406(b) of the Bankruptcy Act, (11 U.S.C. §806(b)). That section provides that a "debtor [is one who] could become bankrupt under Section 22, who files a petition under this chapter, and who is the *legal or equitable owner of real property or a chattel real which is security for any debt. . . .*" (emphasis by the court). The bank contended that the Romanos were not qualified debtors for Chapter XII purposes because "their sole interests in property were beneficial interests in land trusts which, under Illinois law, are considered personal property and not interests in realty (citing *Chicago Federal Savings and Loan Ass'n. v. Cacciatore,* 25 Ill. 2d. 535 (1962))." While recognizing Illinois' characterization of their interests as personal property, the Romanos countered that they were still qualified "debtors" within the meaning of Section 406(b); they argued that the "label Illinois places on their interests is not dispositive of whether, under a federal standard, they are the legal or equitable owners of real property."

The court noted that the issue before them, namely whether a beneficiary of an Illinois land trust is the legal or equitable owner of real property or a chattel real within the meaning of Chapter XII of the Bankruptcy Act §406(b) was a question of first impression, and one on which the bankruptcy courts have been in conflict. To resolve this issue, the court adopted a two-pronged analysis in which they first analyzed Illinois law to determine the nature of the ownership interest one has as a beneficiary of an Illinois land trust, and then the purpose and language of Section 406(b) to determine what types of debtors Congress intended to be eligible for Chapter XII reorganization relief.

With respect to Illinois law, the court observed that "[the] cases and the trust agreements involved in the present appeal demonstrate that Illinois has not merely placed a 'label' on the interests held by appellants but has also changed in a fundamental way the very nature of the interests themselves. While it is true that appellants receive the economic benefits from the real property, in all other respects, particularly in relation to a creditor holding a beneficial interest as security for a debt, personal property law and traditions apply to the beneficial interests." In so far as regards the meaning and purpose of Section 406(b) of the Bankruptcy Act, the court concluded that the use of the terms "legal or equitable owner of real property or a chattel real" was technical in nature and designed to make eligible for Chapter XII relief, those persons whose debts were governed by traditional real property laws. Continuing, the court said, "Chapter XII was designed for specific situations, and as such should not be expanded by a court where such an expansion is unwarranted by the statute's language . . . [Here], the Romanos' property is governed solely by personal property law and as such their interests are insufficient to sustain Chapter XII jurisdiction." The court therefore affirmed the decision of the bankruptcy court.

Construction Disbursement Escrow

Fidelity Federal Savings & Loan Ass'n. v. Pioneer National Title Insurance Co., 428 F. Supp. 1382 (S.D. Ill. 1977)

Loan agreements were concluded in July 1974 under which each plaintiff agreed to lend Galesburg Motor Lodge, Inc., (GML) the sum of $862,500 for construction of a Howard Johnson Motor Lodge. The loans were evidenced by promissory notes secured by mortgages upon the real estate involved and the proposed improvements. At about the same time, GML entered into a construction contract with Galesburg Construction Co. for the construction of the contemplated structure. In that same month, defendant entered into a construction and disbursing escrow agreement with plaintiffs and GML under which, GML, as owner convenanted to complete construction on or before Dec. 31, 1975, and defendant assumed certain obligations including that of escrowee and disbursing agent for funds for the contemplated construction. That agreement further provided that in the event the owner should fail to complete construction as contemplated, defendant might "either" complete the improvements substantially in accordance with the agreement "or, at its election," purchase the outstanding notes and mortgages from the plaintiffs.

Construction was halted in October 1975 when certain subcontractors and suppliers abandoned the project, and by December of that year, mechanic's liens aggregating in excess of $800,000 were filed against the premises. Thereafter, a discussion was had among agents of the plaintiffs, the prime contractor, and defendant which culminated in a determination by defendant to settle the outstanding lien claims and to complete construction. Accordingly, defendant entered into a contract with Galesburg Construction for completion of the project. Completion, as contemplated by the provisions of the latter contract, was substantially accomplished about Sept. 15, 1976.

In the interim, and specifically on April 21, 1976, plaintiffs filed a two count complaint. Count one alleged that the mortgage notes were unpaid and in default, and sought a judgment against defendant for the principal balance of said notes plus plaintiffs' accrued interest, expenses, and costs and attorneys' fees. The theory of that count was that defendant, under the construction and disbursing escrow agreement (CDE), became obligated upon GML's default, to either complete the structure "substantially" in accordance with the plans and specifications therefore, or to purchase the mortgage notes and mortgages from plaintiffs; that defendant breached the CDE agreement in certain particulars; that, implicitly, defendant became obligated upon the mortgage notes in the premises; and that plaintiffs were entitled "pursuant to the terms of the notes" to recover their costs, expenses, and attorneys' fees. Count two was the same, but added the allegation that defendant was a foreign corporation which had no assets "known to the plaintiffs" in Illinois, and that, therefore plaintiffs had no adequate remedy at law. The count sought a judgment requiring defendant to purchase the notes and mortgages for the amount remaining due thereunder, including "attorneys' fees, costs, charges, and disbursements."

Both sides filed cross-motions for summary judgment. Before ruling on either, the court put them in their proper context by noting that breach of contract was not the theory of either count of plaintiffs' complaint but rather, that alleged breaches of the CDE agreement by defendant would act "either to obligate defendant on the mortgage notes themselves, or to permit plaintiff to elect, under the CDE agreement, to compel defendant to purchase the mortgage notes." After so doing, the court found itself "constrained to agree with the defendant's conclusion that plaintiffs' motion for summary judgment [was] in fact, a device to defeat defendant's motion; not a serious assertion that plaintiffs were entitled to summary judgment." The plaintiffs' motion was therefore, summarily denied.

Turning to defendant's motion, the court held that they were entitled to summary judgment as a matter of law. The court observed that count one of plaintiffs' complaint could only be construed as an attempt by them to recover from the defendant upon the mortgage notes themselves; and that plaintiffs' attempt must fail since defendant was not a signatory of the mortgage notes, and since "it is a fundamental principle" that no person is liable upon a written instrument unless his signature appears thereon. Moreover, the court found that the only instrument to which defendant was a party was the CDE agreement, and that they did not assume any obligation as guarantor of the notes under that agreement. As to count two, the court noted that plaintiffs were not entitled to equitable relief since no viable basis was alleged therefor. It found the essence of this count to be a "demand for the payment of money enwrapped in the guise of their specific performance theory." The court also pointed out that plaintiffs ignored the existence of legal remedies available to them against GML and the other signatories on the notes and upon their security interest under their mortgages on the real estate. Finally, the court said that when defendant, under an agreement which gave it the right to elect between alternative methods of performance in the event of default of the owner, elected to complete the improvements, plaintiffs had no right to elect to enforce the alternate mode of performance.

Corporations

Cloverfields Improvement Association v. Seabreeze Properties, Inc. 32 Md. App. 421 Court of Special Appeals 362 A2d 675 (Md. 1977)

Proceeding for declaratory decree as to the ownership of property.

In April 1965, approximately four months after its corporate charter had been declared

forfeited, a corporation executed a deed and assignment unto the claimant, Cloverfield in which it purported to convey all of its right, title and interest in and to the annual maintenance fees which has been previously established in a subdivision. In July 1971, Seabreeze acquired a deed from the surviving directors of the corporation which executed the aforesaid deed and agreement which conveyed the remaining unsold lots in the development and the right to collect the annual maintenance fees. After Seabreeze made demand upon the lot owners for the payment of the annual fees, this action was brought.

Held that the purported post-forfeiture corporate deed and assignment was a nullity and consequently of no force and effect. The revival of the charter of the corporation in 1973 did not cure the 1965 deed and assignment in view of the specific provisions of Section 85(d) of the Corporations & Associations Article, which section states: "All real and personal property, rights and credits of the corporation at the time of its charter became void *and of which it was not divested prior to such revival* shall be vested in the corporation, after such revival, as fully as they were held by the corporation at the time its charter became void."

Since the surviving trustees had in 1971, validly conveyed and assigned the very property which the association thought it had acquired in 1965, the total effect of the revival in this case is naught. The act of revival cannot divest a bona fide purchaser of his title.

Covenants, Conditions and Restrictions

Diamond Bar Dev. Corp. v. Superior Court (1976) 60 Cal. App. 3d

This case involved a dispute between the developers of a residential subdivision and owners of lots in the subdivision. The dispute concerned the construction of a clause in the declaration of covenants, conditions and restrictions which provided that modification or termination could be affected "by written instrument duly executed by not less than 70 percent of the then owners . . ." of lots in the subdivision. The appellate court held that the developers were correct in construing the clause as reflecting the draftsman's intent that amendments could be effected only if consented to by persons owning at least 70 percent of the lots, and rejected the contention of the owners that the clause should have been construed to permit such amendments to be effected by 70 percent of the persons owning lots. The draftsman did not intend to permit amendments despite the opposition of the entities having the greatest economic interest in the project. Further, were the viewpoint of the lot owners to prevail, a purchaser of a lot in the subdivision who wished to determine the validity of an amendment to the covenants, conditions and restrictions would have to discover how many persons owned lots at the time the amendment was purportedly adopted. This number is subject to continual fluctuation.

Easements

Jordan v. Worthen (1977) 68 Cal. App. 3d 310

The plaintiffs were the owners of parcels of land created by the subdivision of a former ranch. The ranch was a dominant tenement served by a prescriptive easement over a road that had always been in the same location and had crossed defendants' property. The dominant tenement had originally been a family farming unit and although the road had at one time been used for transportation of forest wood products, livestock, orchard crops and other farm products, such uses had ceased many years ago. There was no evidence of abandonment by disuse or adverse use by the owners of the servient tenement. In the last 30 years the land in the area had followed a pattern of division into smaller parcels and a change from the original family farms to recreational areas with second homes, and defendants' property itself consisted of small parcels created from land previously owned by family farming units in which they had constructed second homes for recreational purposes with plans for ultimate retirement on the property.

The appellate court affirmed the trial court's granting of injunctive relief against any obstruction of the private road across defendants' lands by one of the defendants and quieted plaintiffs' title to the easement over the road. The court held, based on substantial evidence, that it was reasonably foreseeable that the ranch property would be divided into smaller land holdings or that the subsequent subdivision thereof was a normal development in that area. Accordingly, the change of use of the prescriptive easement from a commercial one, *i.e.*, for the transportation of forest wood products, livestock, orchard crops and other farm products, to a recreational use was permissible. The evidence also sustained the findings of the trial court that the subdivision of the dominant tenement did not increase the burden upon the servient tenements.

Berkley Development Corp. v. Hunter Hutzler 229 S.E. 2d 732 (W. Va. 1976)

The court held, "Where grantor conveyed land, which was surrounded by land retained by grantor and land of others, without expressly providing a means of ingress or egress, and where there was no other reasonable means of access to granted land, the law implied an easement in favor of grantee over retained portion of grantor's land, and sale of such residue land by the grantor did not extinguish this right to a way of necessity.

Eminent Domain

Stark v. Poudre School District R-1560 P. 2d 77 (1977) Colo. Sup. Ct. (en banc)

The Pouder School District commenced an eminent domain proceeding to acquire a nine acre tract of ground in the city of Fort Collins. Prior to the trial, a hearing was held to determine the propriety of presenting evidence to the commission concerning the probability of rezoning the property. The trial court ruled that the evidence was inadmissible. The Court of Appeals noted that the trial court had not used its considerable discretion in determining sufficiency of the evidence to establish a reasonable probability of a zoning change occurring within a reasonable time period.

Holding: Reversed. The rule is clear in this jurisdiction that the probability of rezoning may be considered by the commission insofar as it reasonably would be reflected in present market value. Totally speculative estimate of the future uses of property should not be reflected in the determination of the present value. Unless evidence of the likelihood of rezoning rises to a level of probability, it is inadmissible in a condemnation proceeding. Expert witnesses who were familiar with the property values as well as zoning history and practice in the area were qualified to give their opinions as to the probability of rezoning this particular property.

Environmental Law

Mount Vernon Preservation Society v. John Clements as New Hampshire Highway Commissioner, et al, 415 F. Supp. 144 (D. New Hampshire 1976)

The court refused to enjoin proposed reconstruction of a .85 section of highway through a town having a "quite and classical New England atmosphere," when such reconstruction would not affect traffic patterns or reasonable community growth and which would not affect noise air levels or air pollution and would not have a significant effect on the quality of human environment and the court held that an environmental impact statement was not required.

Essex County Preservation Association, et al v. Bruce Campbell as Commissioner, Massachusetts Department of Public Works, et al, 536 F. 2d 956 (1st Cir. 1976)

The court upheld the lower court's denial of a preliminary injunction on the grounds that the environmental impact statement was not necessarily fatally undermined by the participation of the state's design engineer in its preparation. The court also held that the violation of the Highway Acts Requirement of approval of a State Environmental "Action Plan" prior to federal funding was a mere technical noncompliance and since the trial court found that the environmental impact statement was comprehensive and well documented, it was not an abuse of discretion to refuse to grant an injunction.

Ogonquit Village Corp., et al v. R.M. Davis, Administrator Soil Conservation Service, et al, 553 F. 2d 243 (1st Cir. 1977)

An action was brought by the plaintiff against the service seeking equitable relief under the act on the theory that the environmental impact statement for reconstruction of a sand dune had been inadequate. The Court of Appeals upheld the District Court's granting of a summary judgment in the defendant's favor on the grounds that in the absence of pleading or proof suggesting conscious design to circumvent the requirements of the National Policy Act as would amount to bad faith, there is no remedy following completion of the project.

Escrows

Ransom Distributing Co. v. Lazy B., Ltd. 561 P. 2d 276 (1977) (Colo. CT. App., Div. III)

Judgment against an individual which was recorded thereby making it a lien against a subdivision lot owned by judgement debtor.

Trial court determined that if the judgement debtor would post a surety bond in the amount of judgment plus costs it would stay execution on the judgment pending motion for a new trial. Judgment debtor deposited into escrow with Stewart Title one and one-half times the amount of the judgment. Stewart then wrote a letter to the court acknowledging receipt of the funds in escrow and acknowledged that Stewart was bound to the judgment creditor for the amount of the original judgment and costs. The letter further indicated that this amount

would apply to the judgment which the judgment debtor had appealed. The judgment debtor then sold the lot and Stewart issued an owner's title insurance policy for $75,000 with no exception to the judgment. Judgment debtor was not successful on appeal and the trial court awarded the attorneys fees and costs incurred in the appeal. Stewart refused to satisfy the judgment because the bank in which the escrow funds had been deposited refused to release the escrow funds because the judgment debtor had assigned the escrow amount as collateral for a loan in the amount of $10,000.

Stewart then filed a motion in the trial court in which it offered to deposit $15,000 in the Registry of Court to complete fulfillment of its obligation on the bound. The judgment creditor requested judgment against Stewart Title for the full amount of the original judgment plus all the assessed costs. Trial court held for Stewart and entered judgment pursuant to that order and Stewart then deposited the amount of the original judgment and costs in the Registry of the Court. In subsequent garnishment proceedings, Stewart denied having under its control any further assets of judgment debtor. In the letter to the trial court, Stewart acknowledged receipt of the one and one-half times the amount of the original judgment and costs and advised that the sum was received in escrow and was being held pending the disposition of an existing judgment in respect to the judgment debtor and creditor. While the letter stated that Stewart was bound to judgment creditor for the sum of $15,000, the Stewart letter further stated that they accepted no liability for any costs, charges, damages over and above those funds being held in escrow. It was clear that the entire amount was intended to protect Stewart from being exposed to any loss on the title policy due to the outstanding judgment. Stewart's counsel on appeal explained that the escrow was commonly one and one-half times the amount of judgment because litigation might continue for years and interest on the judgment and costs of appeal might accumulate. The appeal process caused the judgment against the judgment debtor to be increased. The court concluded that the amount of the surety bond was intended to be the full amount received in escrow by Stewart pending final outcome of the appeal.

Holding: Reversed. The plaintiff contended that Stewart incorrectly answered the interrogatories attached to the writ of garnishment in that they should have reported the $22,500 deposited in escrow in a bank as a credit of Vail's to which Stewart was entitled. The object of garnishment is to reach the assets or credits in the garnishee's hands; however, where, for valuable consideration, one has assumed the obligation of another, he may be held liable as a garnishee and it is not necessary that he physically possess the property of the debtor. One assumes the debts of another person if he promises to pay the debts in consideration of property or funds received from the debtor for the express purpose to pay the debt. Stewart agreed to issue their title insurance policy if the judgment debtor would escrow the one and one-half times the amount of the judgment for the express purpose of protecting the garnishee from possible payment of the judgment debtor's judgment lien. There being valuable consideration exchanged for its assumption of the judgment debt, Stewart is liable to the judgment creditor for the uncollected remainder of the judgment. This obligation created a right, credit or choice in action in which is required to be reported in the answer to the interrogatories. It is immaterial whether Stewart had the escrow funds in its control or possession and even though the judgment debtor himself may have alienated those funds, they were as far as the judgment creditor was concerned, subject to the exclusive control of Stewart.

Estoppel by Deed

Bernard H. Baumrin v. Francis F. Cournoyer, 414 F. Supp. 326 (D. Mass. 1976)

This was an action brought to quiet title in the U.S. District Court based on diversity of citizenship. The two theories on which the plaintiff brought the suit were adverse possession and estoppel by deed. The court found that the elements for adverse possession were not present. On the theory of estoppel by deed the court found that the deed of the plaintiff was only a quitclaim deed and therefore even though his predecessor in title had acquired the property after his deed to the present owner, a mere quitclaim deed is ineffectual by force of estoppel to pass to the grantee or those holding under him any title or right acquired by the grantor subject to execution of the quitclaim deed. On this point, the court followed the U.S. Supreme Court and

Massachusetts cases of *VanRensselaer v. Kearney*, 52 U.S. 297 (1850) and *Comstock v. Smith*, 30 Mass. 116 (1832).

Federal Tax Liens

Hinckley and Donovan v. William D. Paine, III, et al, The Exeter Banking Company v. Exeter Depot, Inc., et al, Indian Head National Bank of Portsmouth v. United States, et al, 424 F. Supp. 1013 (D. N.H. 1977)

This was an interpleader action presenting issues as to priority between federal and state tax liens. The District Court held that state liens for New Hampshire meal and room taxes did not become choate at the time of the collection by the operator but did become choate at time demands for payment were made by the state. Therefore, before the liens became choate, the state was neither a judgment lien creditor nor a holder of security interests and did not have priority over federal tax liens. *United States v. Equitable Life Insurance Society*, 384 U.S. 323.

Flood Insurance—Duty to Defend

Ladner & Co., Inc., v. Southern Guaranty Insurance Co. 347 So-2d 100 (Ala. 1977) Ala. Supreme Court

Ladner Construction Co. petitioned the Mobile City Commission to obtain a waiver of requirements for building on lots within the flood plain. The commission agreed to waive the flood control ordinance requirement only if Ladner agreed to provide flood insurance on the lots and to hold the city harmless, in the matter. Ladner purchased flood insurance from consecutive insurers, the second policy being with Appelle Southern Guaranty Insurance Co. The improvements were constructed and the properties were flooded on several occasions during a period spanning both insurance policies.

When Ladner Construction Co. was named as a defendant in the original action for damages caused by the floods, Ladner called on both insurers to defend the action. Both insurers denied coverage and Appellee Southern Guaranty sought to enjoin further proceedings pending a declaration of its rights under the policy. The trial court granted the injunction and later granted summary judgment to both insurers on the issues of their obligations to defend the suits and pay any judgment rendered therein.

Both coverage and the duty to defend had been denied by the insurers on the grounds the policies applied only to property damage ". . . caused by an occurrence . . . ," an occurrence being defined as ". . . an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*"

Because the hold-harmless agreement between Ladner and the city of Mobile cited Ladner's ". . . full knowledge that such building, structure or improvement probably will be inundated at some future time with resultant damages . . .", the insurers argued that the damage could not be classed as "unexpected or unintended from the standpoint of the insured," and was therefore not within the ambit of risk insured. The trial court agreed with this contention in granting summary judgment to both insurers.

The Supreme Court affirmed in part holding that the insurers had no duty to defend or pay judgments against Ladner under the present allegations of the plaintiff's complaint. But noting the liberal nature of pleading under the new rules of procedure and the fact that the plaintiff's theory of recovery could be changed as late as the trial stage, the Supreme Court pointed out that the claim may have potentially become one which was within the scope of the policies. For this reason the trial court's summary disposition of the matter was reversed in part and remanded, the Supreme Court stating that it had ". . . rejected the argument that the insurer's obligation to defend must be determined solely from the facts alleged in the complaint in the action against the insured."

Homestead

Katsivalis v. Serrano Reconveyance Co. (1977) 70 Cal. App. 3d 200

The plaintiff and her deceased husband held title to the subject property as joint tenants subject to two deeds of trust. Some years after having given her husband a general power of attorney, a declaration of homestead was recorded with respect to the subject property. Thereafter, the husband, pursuant to the power of attorney, executed a trust deed in behalf of plaintiff, and in which he also joined, in favor of defendant lender, the proceeds of which were used, in part, to refinance the existing encumbrances. Plaintiff brought this action to cancel the note and trust deed in favor of defendant.

The court first acknowledged the rule that a surviving joint tenant will take free of a deed of trust executed solely by the deceased joint tenant. However, the trial court properly found that plaintiff had ratified and approved the transaction and conferred upon her husband ostensible and apparent, as well as actual, authority to sign the note and deed of trust. Therefore, both joint tenants in effect joined in the execution of the note and deed of trust with the result that solely as a surviving joint tenant plaintiff could not defeat the acts which the courts found the husband was authorized to take on her behalf.

The principal issue revolved about plaintiff's rights under the declaration of homestead. The court concluded on this issue that the deed of trust executed by the husband as attorney-in-fact was invalid since the property it purported to encumber was subject to a homestead and the law regarding homesteads requires the homestead claimants to both personally execute and acknowledge the deed of trust, and the signature of the plaintiff's attorney-in-fact would not suffice. However, plaintiff would be unjustly enriched if the relief she prayed for—cancellation of the note and deed of trust—were unqualifiedly granted. The appellate court reasoned that although defendant's trust deed was invalid it nonetheless was subrogated to the rights of the prior trust deed holders whose liens had been discharged from the proceeds of defendant's loan. Defendant was entitled to an equitable lien to the extent of the various payments which would have been made under the old loan together with legal interest thereon from the time each payment would have fallen due. Defendant's loan was for an amount in excess of the amounts due under the prior encumbrances. The excess, the court stated, would be unsecured.

Plaintiff also asserted that the trial court committed error in awarding an equitable lien since the lender had an adequate remedy at law, namely, a right to indemnification from the title company. The appellate court responded that the argument must fail on two grounds. In the first place the existence of a legal remedy against one of several obligors cannot relieve another obligor of his equitable responsibility. In the second place the title company, if called upon to indemnify the lender is entitled to be subrogated to all of its rights against the borrower. The advantage of spreading losses arising from particular contingencies over many premium payers through the insurance device is well recognized in modern jurisprudence. There is no policy that necessitates burdening those premium payers with the costs of enriching a widow, destitute though she may be, who seeks to increase her equity in a homestead because of the mutual mistake of her husband and the lender and the latter's title insurer.

Husband and Wife

Uhrick v. Uhrick, 57 2nd. 508 362 NE 2d 1163 (Ind. 1977)

Under Indiana's old divorce law, it was provided that alimony could be awarded to a wife in the decree of divorce. Such a judgment could become a lien on the husband's property, but the statute by way of limitation, provided in part, "Such a judgment . . . shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly" (IC 1971, 32-1-12-17).

Then, in 1973, the old law was repealed and Indiana now has a more liberal "Dissolution of Marriage" Act (IC-1971, 31-1-11.5-1 et seq). This act specifically repealed the above alimony judgment lien limitation statute, (IC 1971, 32-1-12-17).

This left open the question of the effect as a lien of a dissolution decree providing for alimony payable in installments.

Savilla Uhrick sued her then husband F. Jay Uhrick for divorce in Allen County and the divorce was granted in 1969. The wife was awarded an alimony judgment of $40,500 payable in 122 monthly installments beginning in July 1969. The decree did not specifically make the judgment a lien on the husband's property.

The wife started *this* action in 1975 to have the unpaid balance of the alimony decree made a lien on Mr. Uhrick's real estate. The trial court found that no installments were either due or past due, though further installments would come due in the future. It held in favor of the husband, that such installments did not constitute a lien, in spite of the general lien statute concerning judgments (IC 1971, 34-1-45-2).

On the wife's apeal, the Indiana Court of Appeals affirmed. The court pointed out that for a money judgment to constitute a lien under the "general lien" statute "it must ordinarily be a final judgment for the payment of a definite and certain amount of money which may be collected by execution on property of the judgment debtor," citing C.J.S., Am Jur 2nd and I.L.E. generally.

The court pointed out that based primarily on the court's power for future modification of an award for child support in divorce decree, such an award is not a lien.

It finally pointed out that here, since nothing was presently due, the judgment was not "due and payable and subject to execution." In a footnote it expressly recognized that "Had there been payments due and owing so as to entitle the wife to execution, a different question would be presented."

There was a dissent by Judge Staton which pointed out that this rule requiring that the judgment be immediately subject to execution to be a lien could make *all* (not just alimony) judgments involving future payments wait until the execution characteristic comes into full bloom before becoming a lien, by which time the debtor's assets could be gone.

He also pointed out that the rule could require a wife to seek execution every time a payment under such a decree becomes due and unpaid.

At the moment it appears that the lien limitation statute has been resurrected by judicial decree and prudent insurers will have to try to determine, as best they can, the payment status of such alimony decrees before setting them up as liens, if the court does not make them a lien in the decree.

Karl J. Kirchberg v. Joan Paillot Feenstra, 430 F. Supp. 642 (E. D. La., 1977)

Husband and wife held title to certain community property in both of their names. The husband alone executed a mortgage on the property. Louisiana law provides that the husband may alienate community property without the consent and permission of the wife but that where title to community real property stands in the name of both husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written consent where she has made a declaration that her consent is required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records or the parish in which the property is situated.

In this case, the wife contended that the statute requiring her to file such a declaration to protect her property interest, when her husband need not, violated the Equal Protection and Due Process Clause of the 14th Amendment.

After reviewing leading U.S. Supreme Court decisions, the court found that the Louisiana Legislature was empowered to make laws to establish, protect and strengthen family life in the state and to provide for unequal treatment of the sexes if the unequal treatment had a fair and substantial relationship to the object of the legislation. Apparently, such a relationship existed because the court held that no violation of either clause of the 14th Amendment existed.

As a coincidence, the Supreme Court of Alabama on the day following the date of this opinion rendered its decision on the constitutionality of the Alabama legislative scheme which permitted a husband to convey his land without the signature of his wife as cograntor while denying the wife the power to alienate her land without the consent of the husband. In the Alabama case, the court found that the statute denied equal protection to married women in violation of the State Constitution. In this case, too, the court reviewed several U.S. Supreme Court decisions dealing with gender-related classifications, but, interestingly, did not mention the case relied on by the Louisiana court to support its decision.

Peddy v. Montgomery 345 So. 631 (Ala., 1977)

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 14th 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.

Indian Lands

Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., et al, Narragansett Tribe of Indians v. Dennis J. Murphy, 418 F. Supp. 798 (D. R.I. 1976)

These two consolidated cases consist of two actions brought by plaintiff to establish its right to possess certain parcels of land in Charleston, R.I. In this pretrial decision, the court first granted plaintiff's motions to strike defendant's defenses of estoppel, laches, statute of limitations on the grounds that these defenses could not overrule operation of federal law if the plaintiff established a violation of the Indian Nonintercourse Act. The court held the United States, as a trustee for the Indians, is not subject to these defenses. It further held that aboriginal title or Indian right of occupancy by itself is subject to protection by federal law, and it was not necessary for the tribe to be incorporated or federally recognized. It also denied a defendant's motion to join the United States as an indispensible party. On this point, it followed a similar holding in *Choctaw & Chicasaw Nation v. Seitz, 193 F. 2d 456.*

In a decision reported in the same case in F. Supp. 132, defendant Murphy who was director of the State Department of Natural Resources moved to dismiss on the grounds the action is barred by the 11th Amendment which preserves the common law doctrine of a sovereign immunity applicable for both federal and state governments. The court held that this case came within an exception to the rule of sovereign immunity recognized in the *United States v. Lee,* 106 U.S. 196 and reaffirmed in *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682. Such an action may be maintained when the taking of property was unconstitutional or in excess of statutory authority.

Mashpee Tribe v. New Seabury Corp., et al (D. Mass. 1977) 427 F. Supp. 899

This is an action brought by an Indian tribe seeking declaration of its right to possession of certain land on Cape Cod. The defendants moved to dismiss, and in a decision similar to the one in the Narragansett Tribe case above, the court denied the defendant's motion to dismiss on the grounds that the tribe was not federally recognized. It also held that the United States could not be compelled to join in the action and that the Commonwealth of Massachusetts was not an indispensible party.

Insurer—Duty to Defend

Chicago Title & Trust v. Hartford Fire Insurance Co., 424 F. Supp. 830 (N.D. Ill. 1976)

Action was brought against insurer for breach of policy in refusing, after notice, to defend plaintiff insured in two lawsuits filed in the federal court in Wisconsin. Hartford admitted to not defending Chicago Title (CTT), but contended that its inaction was proper. Hartford moved to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted, arguing that neither of the two complaints filed in Wisconsin contained allegations potentially within the coverage of the insurance agreement. In ruling on this motion, the court first examined the allegations of the two complaints and then compared them with the relevant terms of the Hartford policy to determine whether CTT could prove any facts under its complaint which could entitle it to relief. [*Conley v. Gibson,* 355 U.S. 41 (1950).]

In examining the complaints filed in Wisconsin, the court found them to be based upon similar operative facts. One case involved a commodities broker who alleged that a purported certified check signed by him was drawn on the bank where he maintained his checking account, and made payable to one Jack Walsh in the amount of $2.5 million. This check, an alleged forgery, was presented to CTT and deposited into an escrow from which disbursements were then made. It was alleged that CTT was negligent in accepting the forged check as it failed to determine whether the check and the purthe broker had $2.5 million in his account; or whether the broker's signature was authentic. The other lawsuit was premised upon the same forged check. In that suit, the plaintiff, who was employed by the broker as a solicitor, salesman, and customers' agent, alleged that CTT negligently accepted the forged check and processed it without making inquiry or investigation to determine its authenticity. The plaintiffs in both suits claimed that as a result of CTT's negligence, they sustained injury to their reputation, damage to their credit rating, humiliation and shame, and loss of employment.

Although both suits were ultimately dismissed for failure of the plaintiffs to comply with various court orders, CTT filed the instant action seeking to recover some $60,000 it was forced to expend in the defense of those actions. It claimed that both complaints alleged facts which brought group two (covering personal injuries caused by libel, slander, defamation or violation of right of privacy) of Hartford's personal injury indorsement into issue, thereby triggering Hartford's duty to defend. CTT noted that the two complaints alleged negligence on their part resulting in injury to reputation, humiliation, and a deprivation of public confidence; that while the complaints did not specifically utilize the terms "libel" or "slander," they did set forth precisely the damaging results of these offenses which must follow from publication or an utterance to third persons. CTT further stated that the complaints set forth facts such that the plaintiffs could have produced evidence showing publication and dissemination of

information by CTT, or others, at trial as a result of the alleged negligence.

The court and parties agreed that the issue for decision was whether the Wisconsin plaintiffs "alleged facts which brought their cases within, or potentially within, the coverage of Hartford's policy." Recognizing that the Wisconsin lawsuits were filed in federal court and that mere "notice" pleading was required, the court was nevertheless of the opinion that Hartford had no duty to defend CTT. The court found that the pleadings filed in the Wisconsin cases did not give notice of facts potentially within the terms of the policy. The court said "there were no allegations of the elements of the torts at issue . . ., rather [it was] alleged that CTT was negligent in its handling of a $2.5 million check. While it may be true that some of the injuries claimed correspond to those which would result from an action in liable or in slander, [we do] not feel that this is sufficient to involve Hartford's duty to defend CTT. Such a construction was clearly not intended by the parties and the court cannot read this policy provision with such a strained interpretation." Accordingly, Hartford's motion to dismiss was granted.

Joint Tenancy

In Re Estate of Olson, 87 Wn. 2d 855 557 P. 2d 302 (Wash., 1976)

The executor and the surviving joint tenant of a mortgagee are fighting over the ownership of the mortgagee's interest.

Held: In Washington, a community property state, a joint tenancy between a husband and wife cannot be created by the transferor, but requires a written expression by the marital community that title is accepted in joint tenancy.

Tenhet v. Boswell 133 Cal. Rptr. 10 554 P. 2d 330 (Cal. 1976)

Assertedly without plaintiff's knowledge or consent, her joint tenant leased a parcel of property held in joint tenancy for a period of 10 years with a provision granting the lessee an option to purchase. The lessor died some three months after execution of the lease, and plaintiff sought to establish her sole right to possession of the property as the surviving joint tenant. After an unsuccessful demand on the lessee to vacate the premises, plaintiff brought an action to have the lease declared invalid. The trial court sustained demurrers to the complaint and entered a judgment of dismissal.

The Supreme Court reversed and held that a lease is not so inherently inconsistent with joint tenancy as to create a severance. Thus, sole ownership of the property vested in plaintiff upon her joint tenant's death by operation of her right of survivorship. Under California statutes a joint tenancy must be expressly declared in the creating instrument, or a tenancy in common results. Inasmuch as the estate arises only upon express intent, and in many cases such intent will be the intent of the joint tenants themselves, the court declined to find a severance in circumstances which do not clearly and unambiguously establish that either of the joint tenants desired to terminate the estate. Accordingly, the lease did not operate to sever the joint tenancy. Further, by the very joint nature of joint tenancy the interest of the nonsurviving joint tenant extinguishes upon his death. And as the lease is valid only in so far as the interest of the lessor in the joint property is concerned, it follows that the lease of the joint tenancy property also expires when the lessor dies. The court concluded that the lease was no longer valid.

Joint Ventures

Legum Furniture Corp. v. Levine, 217 Va. 782, 232 S.E. 2d 782 (1977)

The court, applying partnership principles, held that under a joint venture contract which spelled out the percentage of funds to be contributed by each joint venturer but was silent with respect to a return of these funds when the venture was terminated, each joint venturer was entitled to receive his pro rata share of money received by the joint venture until such time as all sums paid or advanced on behalf of the joint venturers had been fully paid and only then could the profits accrue to be divided as provided in the joint venture agreement.

Life Estates

Ramsey v. Cooper, 553 F. 2d 237 (1st Cir. 1977)

In this case a will had left a life estate in a furnished house and land to the defendant and the remainder to the plaintiff. The provisions of the will required that the defendant "keep said property in reasonably good repair and properly insured against fire loss." The defendant had insured the property for $20,000 despite the request by plaintiff's attorney that she insure the property for $25,000. The house burned down, and the $20,000 insurance proceeds plus the $16,200 for the sale of the house were placed in escrow pending a determination by the U.S. District Court as to the respective rights of the remainderment and the life tenant. The plaintiff moved for summary judgment on the grounds that the life estate had terminated as a matter of law, and he was entitled to the full proceeds. The District Court denied the motion on the grounds that the life estate had not terminated but held that the defendant was negligent in not insuring up to $25,000. On the basis of actuarial computations, the plaintiff was awarded $24,000 and the defendant was awarded $12,000. The Court of Appeals agreed that the failure to properly insure did not work a forfeiture but held that the life tenant was negligent not only by not insuring up to $25,000 but should have insured it at its present insurable value at the time of the fire and sent it back to the District Court for the redetermination of the damages.

Marketable Record Title Act

ITT Rayonier, Inc. v. Wadsworth 346 So.2d 1004 (Fla. 1977)

ITT Rayonier being in possession and claiming full fee title, instituted a quiet title suit in Federal District Court in response to instruments filed in 1971 by the defendants. The defendants claim, subject to the life estate of their mother, a vested three-fourths undivided remainder interest in land which had been the homestead of their father at the time of his death in 1935. In replying to questions propounded by the Fifth Circuit Court of Appeals, the Florida Supreme Court stated that the 1937 deed of homestead property by the widow as a mere life tenant to herself and one of the children did constitute a "valid root of title as the transaction was one which, whether partially ineffectual or not, purported to affect title and was therefore a title transaction as contemplated by Florida's Marketable Record Title Act." Further, the court defined "defects inherent in a muniment of title" as defects in the make up or constitution of the deed or other muniments of title on which such transmission depends and *not* to defects or failures in the transmission of title. Thus, a right or interest which predates the "root of title" to avoid extinguishment under the act must not only fall within one of the exceptions to the operation of the statute, but must also appear on the face, the make up, or in the construction of the instrument to avoid being extinguished by operation of the statute.

Marshlands and Wetlands

The Nature Conservancy v. Marchipongo Club, Inc., 419 F. Supp. 390 (1976)

The plaintiff sought damages and injunctive relief for alleged acts of trespass on its property by the defendants and its members and guests. The court concluded that a roadway which crossed the plaintiff's property in a north-south direction was neither a public nor a private easement and that the defendant and its members could not use the roadway without the plaintiff's permission. The court, however, went much further to hold that a grant to the plaintiff's predecessor in title of marsh and meadowlands was null and void, relying on an old 1888 Virginia statute providing that unappropriated marsh or meadowlands lying in the Eastern shore of Virginia, which was ungranted and which had been used as a common for fishing, fowling, or hunting, shall remain ungranted.

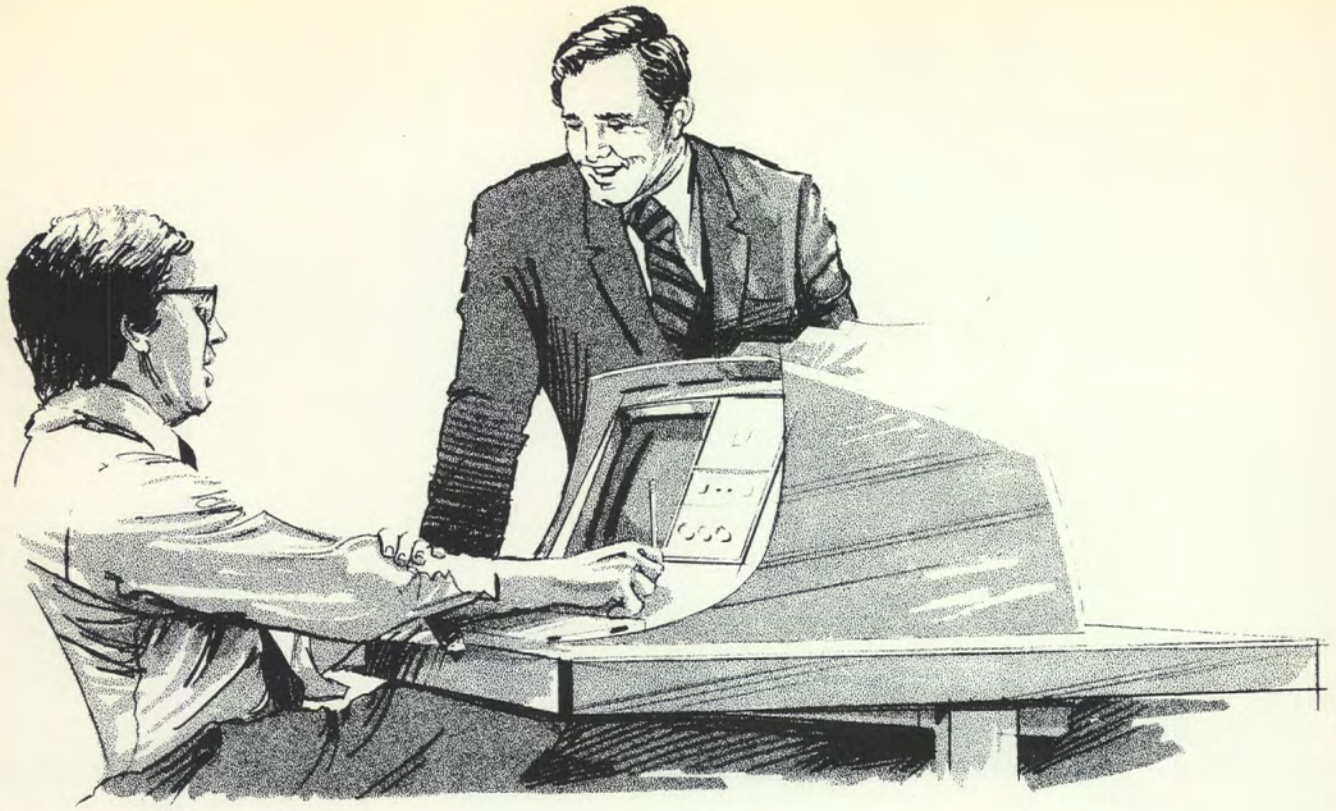
Massachusetts Business Trust

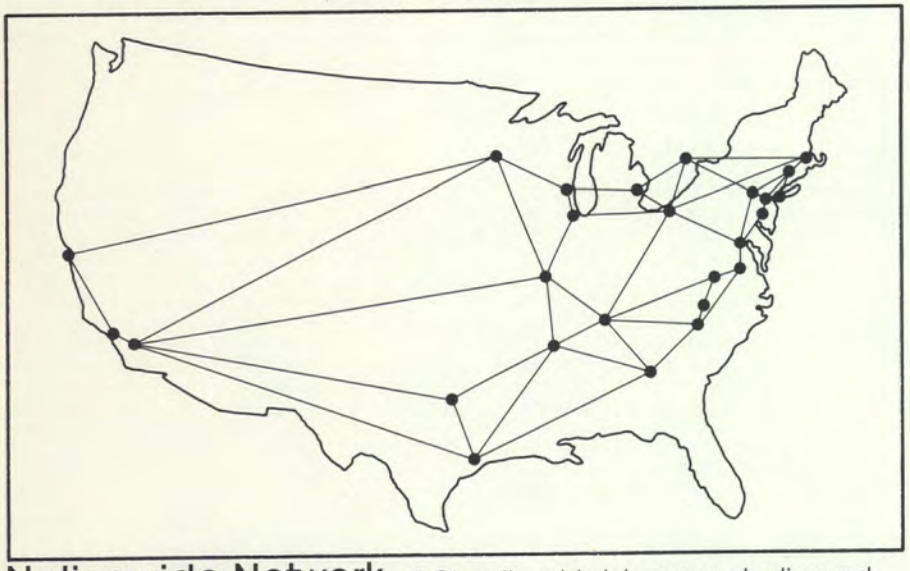
Heck v. A.P. Ross Enterprises, Inc., 414 F. Supp. 971 (N.D. Ill. 1976)

Suit was brought by trustees of a Massachusetts business trust to enforce rights under the Illinois Mortgage and Foreclosure Act. (Ill. Rev. Stat. ch. 95, pars. 23 et seq.). The relief sought was foreclosure of a first and second mortgage on real estate situated within the district of the court. Jurisdiction was claimed to exist under 28 U.S.C. §1332 (a)(1) because of diversity of citizenship, it being alleged that four of the plaintiffs were citizens of Massachusetts, four of New York, and one each of Indiana, Pennsylvania and Texas. It was further alleged that defendants were citizens of other states. On defendants' motion to dismiss for lack of diversity jurisdiction, the court held that "the citizenship of a business trust for the purpose of determining diversity depends on the citizenship of its individual shareholders;" and that since counsel for the trustees conceded that at least one beneficiary or shareholder of the business trust was a citizen of Illinois (as were defendants), complete diversity of citizenship did not exist and therefore federal diversity jurisdiction was lacking. Accordingly, defendants' motion to dismiss was granted.

Corcoran v. Brody, 347 So. 2d 689 (Fla. 1977)

Brody and seven other individuals brought suit as the trustees of the UMET Trust (formerly known as Unionamerica Mortgage & Equity Trust) to foreclose a mortgage on Florida real estate. The defendants filed a motion to dismiss the complaint on the ground that the trustees were not the proper parties to maintain the action. The defendants, relying upon *Willey v. W. J. Hoggson Corporation* 106 So. 408 (Fla. 1925), contended that since the note and mortgage involved in this litigation are payable to a





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business trust, any action on those instruments must be brought by all the members of the trust—not just the trustees. The court rejected this contention and observed that the general rule is that a business trust may by and through its trustees sue on behalf of the trust. The court stated that although Florida's Willey case is often cited as an exception to the general rule, the Willey case has been if not expressly overruled at least strictly confined by many subsequent Florida cases. The Florida courts recognize that a Massachusetts business trust is a separate legal entity for purposes of being sued, that a trustee can bring suit in his representative capacity to foreclose a note and mortgage payable solely to that trustee and that the trustees of a mortgagee business trust could maintain a suit to foreclose a mortgage payable to that Massachusetts business trust. The court stated that logic dictates that if a common law trust authorized to transact business in Florida is the real party in interest and could sue in its own name without joinder of the trustees, then certainly the UMET Trust (organized under the laws of California) and qualified pursuant to Chapter 609, Florida Statutes, is entitled to bring and maintain suit as the real party in interest.

Mechanic's Liens

Earp v. Vanderpool, 232 S.E. 2d 513 - W. Va. 1976

Action to enforce mechanic's lien. Appeal from judgment in favor of plaintiff.

Held: Detail necessary to establish sufficient description of improvements under statute relating to form of notice of mechanic's lien is subject to liberal construction and may be aided by detailed description of land.

Noone Electric Co. v. Frederick Mall Associates, 278 Md 54 359 A2d 91 (Md. 1976)

Two tenants of uncompleted stores in a shopping center complex, employed a general contractor to complete the premises which the tenants had leased from the owner of the shopping center. A subcontractor, who had not been paid by the general contractor, attempted to assert a mechanic's lien against the owner of the shopping center. The Court of Appeals affirmed the trial court's holding that the mechanic's lien could be asserted only against the tenant's leasehold interest. The contention by the subcontractor that it was entitled to its lien against the entire shopping center because its work involved the completion of the building, the shell of which had been constructed by the owner of the shopping center, was rejected by the court.

Mills v. Moore's Super Stores, 217 Va 276 227 S.E. 2d 719 (Va. 1976)

The court held that subcontractors of the assignee of a general contractor for the construction of a residence were entitled to a mechanic's lien against the property even though in their memoranda of lien they erroneously designated the assignee corporation rather than the individual general contractor. The court also found other liens were untimely filed, since the period had expired from the time the work was "otherwise terminated."

Matter of Phillips Construction Co., Inc., 434 F.Supp.26 (N.D. Ill. 1977)

In the context of a bankruptcy proceeding, a contractor (Jacobsen Bros.) claimed a mechanic's lien for labor, materials, and services provided the bankrupt under a contract for masonry work on homes within a single family housing project. The claim was filed with the recorder of deeds Jan. 4, 1974 for work completed Dec. 5, 1973. Although it noted that Jacobsen Bros. and the bankrupt were under a contract to perform masonry work on buildings being erected on a total of 72 lots, the claim stated only a listing of the legal description of the lots, the total amount owing, and that a claim was being filed against the property. The bankruptcy judge granted defendant Lawyers Title Insurance motion for summary judgment, and the cause came before the District Court for a review of that order.

On review, the court said that while the Illinois Mechanic's Lien Act grants a contractor a "blanket lien" where work is performed on multiple structures under a single contract and payment has not been forthcoming (S.H.A. ch. 82, §1), a contractor, in order to perfect this lien as against third parties, is required to record or commence an enforcement suit within four months from completion of the work (S.H.A. ch. 82, §7). Stating that it was necessary to determine when work is "completed" where multiple buildings are being constructed, the court found "the purpose of Section 7 [to be] crucial to this determination." And it found this purpose well delineated in *Schmidt v. Anderson,* 253 Ill. 29 (1911) where the State Supreme Court held "the purpose of requiring the claim to be filed within a stated time [was so] third persons dealing with the property [could] have notice of the existence, nature and character of the lien as well as the times when the material was furnished and labor performed, and thus be enabled to learn from the claim itself whether it was such as can be enforced." In order to effectuate this purpose, the *Anderson* court interpreted Section 7 of the Illinois Mechanic's Lien Act as requiring that claims filed against multiple properties specify both the amount due on each building and the date the work was completed on each property.

Relying on this language, the District Court observed that without apportionment, third parties could not determine whether an individual building was encumbered; and more importantly, if the date of completion for each property was not specified, the four month limitation period would be rendered useless. Additionally, the court pointed out that the requirements of Section 7, as interpreted by Anderson, permit the purchaser to pay the claim and obtain a release without fear of the future conduct of other owners, and permit future encumbrancers to loan money without fear after the four month period has expired.

Since the Jacobsen Bros. had not complied with the apportionment or dating requirements of Section 7 of the Mechanic's Lien Act as interpreted by the Illinois Supreme Court in *Schmidt v. Anderson,* supra, their lien asserted against third party creditors was invalid. Accordingly, the order of the bankruptcy judge, which granted Lawyers Title Insurance motion for summary judgment, and denied the validity of Jacobsen Bros.' mechanic's lien against all third party creditors, was affirmed.

Silverman v. Gossett, Supreme Court of Tennessee (1977), 553 S.W. 2d 581

Question: Constitutionality of the Tennessee mechanic's and materialmen's lien statutes authorizing liens by subcontractors and suppliers.

Held: Tennessee mechanic's lien statutes did not permit deprivation of sufficiently significant property rights of landowner without notice or hearing to offend either federal or state constitutional due process provisions and procedural provisions of such statutes met the due process standards under both constitutions.

Connolly Development, Inc., v. Superior Court, 132 Cal. Rptr. 477 553 P. 2d 637 (Cal. 1976)

A materialman brought an action against a property owner and a construction lender to foreclose a mechanic's lien and enforce a stop notice against the construction loan funds held by the lender. Defendants demurred on the ground that the mechanic's lien and stop notice procedures violated procedural due process requirements. After the trial court overruled defendants' demurrer they petitioned the lower appellate court for writs of mandate and prohibition by which they requested that the trial court be directed to dismiss the complaint or be restrained from proceeding further in the action. On a petition for hearing the Supreme Court of California denied defendants' petition.

The court, by a majority opinion, first concluded that the recording of the mechanic's lien and the filing of a stop notice constitute a taking of the landowner's property interest. The court pointed out with respect to the mechanic's lien that no one questions that the imposition of such a lien deprives the owner of a property interest and then concluded that this was a significant deprivation since it may severely hamper the owner of the property in his ability to sell or encumber that property. A deprivation need not reach the magnitude of a physical seizure of property in order to fall within the compass of the due process clause. As to the filing of a stop notice it is a form of garnishment, a form of seizure that constitutes a taking of property. The deprivation of property occasioned by the filing of the stop notice is not de minimis. When a stop notice is filed, the lender, threatened with personal liability if it disregards the notice, may divert credit needed to pay for future construction to comply with the stop notice claim. Thereby denied the money on which he relied to complete the project, the owner may be forced into default on the loan, and consequently lose his property.

The court then further reasoned that the imposition of a lien on the owner's property by the recording of a mechanic's lien or the filing of a stop notice attaching the construction loan funds constitutes state action. Not only is the mechanic's lien governed by detailed statutory provisions, but it becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts. The stop notice is equally subject to comprehensive statutory regulation. Although the stop notice attaches without filing or recordation before any state official, that lien is effective only because the state statute permits a suit to impose personal liability upon a lender or owner who disregards the notice.

The court concluded, however, that the mechanic's lien and stop notice laws comply with due process requirements. The court reasoned that when a creditor has an interest in the property seized, resolution of the due process question requires an accommodation of the interests of both creditor and debtor. The materialman has an interest in the property whose value has been enhanced by his labor and an interest in the construction loan account which has been set aside to pay his claim. In evaluating the com-

peting interests the court pointed out that an owner whose property is subject to a mechanic's lien suffers only a minor deprivation by reason of the lien since he retains possession and use of the land; the owner whose account is subject to a stop notice suffers only the encumbrance of the very funds he has previously allocated for the exclusive purpose of paying construction costs. Moreover, the owner enjoys a variety of measures by which he can protect himself against the impact of such a lien and which afford him the opportunity to take legal steps against any imposition of an improper lien. As to the worker whose labor has gone into the property he would suffer a major deprivation by the abolition of the lien. Without recourse to prevent the owner from the disposition of the property, or to bar the dissipation of loan funds allocated to the payment of construction costs, the worker would be left with only an unsecured and potentially uncollectible claim for compensation for labor that has enhanced the value of the property itself. Accordingly, the court held that the balance tipped in favor of the worker and the materialman and that the safeguards provided by state law to protect property owners against unjustified liens were sufficient to comply with due process requirements.

Mountain Stone Co. v. H.W. Hammond Co., et al., 564 P. 2d 958 (Colo. 1977)

Facts: H.W. Hammond Co. was the record owner of property upon which a restaurant was constructed. The principal contractor engaged the lien claimants as subcontractors. In connection with construction, the owner followed procedure whereby the principal contractor was paid upon receipt of labor, material releases executed by all subcontractors and laborers who had performed work or supplied materials for the structure up through the date of payment. Pursuant to that procedure the lien claimants executed a labor and material release which acknowledged receipt of payment in full for any and all materials, supplies, labor or equipment furnished by the subcontractor on the project listed therein and releasing any and all claims thereon through a certain date. Following the execution of the release, the contractor was paid by the owner and the lien claimants were paid by checks drawn on the account of the contractor. However, the contractor stopped payment on the checks and litigation followed. Trial court ruled that the mechanic's lien statutes were enacted to protect claimants who contributed labor and materials to the construction of improvements upon land and that, therefore, as between two innocent parties, the land owners should suffer any loss where there is no evidence of negligence on the part of the lien claimants.

Holding: Modified and affirmed. The subcontractors, having executed a release which they knew or should have known the land owners would rely upon in making payment to the contractor, are now estopped to assert their lien rights. Furthermore, the lien release need not specify the amount a lien claimant has been paid.

Note: The Court cited *McLellan v. Hamernick*, 264 Minn. 345, 118 N.W. 2d 791 (1962) as follows: "The owner of the property was entitled to protect himself from liens against his property by requiring lien waivers before he paid the balance due the contractor. If those furnishing labor and material were willing to execute such lien waivers, relying upon the contractor's promise to pay them, they should not be heard to complain after the homeowner has altered his position in reliance upon such waivers. Any other rule would render the lien waivers valueless." The court viewed Section 38-22-123 C.R.S. 1973 as totally inapplicable to the facts of this case because the land owners paid the contractor after the lien releases were secured and thus the payment may not be deemed as made to avoid "any anticipated lien."

Cox v. Bankers Trust Co., 570 P. 2d 6 (Colo. 1977)

Facts: Mechanic's lien claimant filed a mechanic's lien in a timely fashion on a condominium project. A deed of trust in favor of Bankers Trust was recorded after construction commenced. The claimant supplied materials until June, 1974. All construction ceased on July 8, 1974 with the result that construction on the project was never completed. Steinback filed his mechanic's lien statement in Sept. 1974. It was stipulated that by the terms of C.R.S. 38-22-109, Subsection 7 (1973, as amended) the project was deemed to have been completed three months after discontinuance of all labor and provision of materials, being in this case on Oct. 8, 1974. Several lis pendens were filed by various mechanic's lien claimants within the statutory period for foreclosure of mechanic's liens. The claimant in question who was not named in any of the lis pendens nor made a party in any of the actions moved and was granted leave to intervene in the consolidated action on May 27, 1975, nearly eight months after completion of the project. Bankers Trust objected to the entrance of the claimant into the lawsuit on the basis that it was not timely. The trial court ruled that the intervention had been timely, decreed foreclosure and concluded that the lien had priority over the deed of trust.

Holding: Reversed. C.R.S. 38-22-110 (1973, as amended) provides that the mechanic's lien claimant must file a lis pendens or be joined in an action to enforce a mechanic's lien within the six month statutory period. The statutory period requires that commencement of a foreclosure action be filed within six months after completion of the project or in the event of abandonment, three months after discontinuance of all labor or provision of materials. The mechanic's lien claimant in question was not joined in either action nor did he commence his own action within six months after completion. Nor did he seek to intervene in an existing suit until May 27, 1975 which was more than six months after completion of the project on Oct. 8, 1974 and after the filing of his lien in September 1974. The fact that other claimants could have made the claimant a party to their action does not expand the time in which he must take affirmative action if he wishes to enforce his lien.

Bankers Trust Co. v. El Paso Pre-Cast Co., 560 P.2d 457 (Colo. 1977)

Facts: This case represented a number of cases consolidated on appeal concerning a priority dispute between Bankers Trust Co. of New York, beneficiary of a deed of trust, and the holders of several mechanic's liens on the same property. The trial court found that Bankers interest was junior to the interest of all but one of the mechanic's lien claimants. Bankers, however, alleged that Colorado mechanic's lien law deprives construction lenders like itself of property without due process of law. Bankers alleged that since lien statements are filed ex parte, without prior hearing, and contain conclusory allegations of entitlement to a lien and furthermore that the lien may be extended indefinitely by filing an affidavit stating that the improvements have not been completed, that the result is a taking of the property in violation of the due process clause in the 14th Amendment to the Constitution of the United States. The taking results from the deed of trust beneficiary losing its priority of its interest as well as the inability to sell the loan, even at a reduced price. The trial court found the mechanic's lien statute constitutional.

Holding: Affirmed. The court found no deprivation of constitutional dimensions and, therefore, no due process violation based upon the fact that the lender may in fact find a willing buyer. Although difficult, once a buyer is found there is nothing to prevent the lender from making a sale. The court further reasoned that since Bankers did not own the property subject to the liens but merely a first deed of trust, at most the filings of mechanic's liens make it possible that after a hearing Bankers would lose its priority. Thus, only after proper notice and hearing could Bankers suffer a constitutionally signification deprivation.

The court concluded its discussion of the constitutionality question by stating as follows: "To require the full penalty of due process protections before filing the lien statement would impair the notice function of the lien statements. In the interval between the time of the work, the furnishing of materials or services giving rise to the lien claim and the hearing on the lien, prospective purchasers would have no notice of the potential lien. The very deprivation complained of by Bankers, the difficulty in alienating property against which a lien has been filed, indicates the effectiveness and importance of the notice function of lien statements."

Mortgages

Portland Savings Bank v. Landry, Supreme Judicial Court of Maine (1977), 372 A. 2d 573

On Sept. 21, 1972, defendant executed a conventional real estate mortgage in favor of the plaintiff securing a promissory note of $17,100.

On Oct. 1, 1975, legislature enacted an alternate procedure for the foreclosure of real estate mortgages reducing the redemption period from one year to 90 days.

Plaintiff, on Oct. 14, 1975, instituted a civil action authorized under the newly enacted statute.

Question: Can the foreclosure be conducted under the new statute with a 90-day redemption period?

Held: Where the conventional real estate mortgage was executed prior to the effective date of 1975 statute which provided alternative procedures for the foreclosure of real estate mortgages and where the mortgage did not contain language permitting foreclosure under any legal method existing at the time the mortgage became in default, attempted foreclosure by the mortgagee under the new statute which authorizes mortgagee to sell the property unless the debt is paid within 90 days of the date of the judgment that a breach exists was constitutionally impermissible in that the law in effect when the mortgage was executed became part of the contract and allowed one year for redemption and that the redemption provisions of the 1975 act pertaining to the foreclosure of a real estate mortgage was

unconstitutional when applied to mortgages which were executed prior to the effective date of the act.

Medovoi v. American Savings and Loan Assn., 133 Cal. Rptr. 63, 62 Cal. App. 3d 317 (Cal. 1976)

Title to the property, a six-unit apartment complex, was subject to a first deed of trust in favor of defendant lender which contained a due-on-sale clause which expressly permitted the trust deed beneficiary to accelerate or call due and payable the entire remaining principal balance secured thereby should the property subject to the security interest be sold or otherwise transferred without the prior written consent of the beneficiary. Title was transferred through a series of conveyances and one Witter acquired the title of record and assumed the first trust deed obligation and also assumed or took subject to a note secured by a second trust deed in favor of Master. Defendant lender had consented to the assumption of the first trust deed by each of the holders of record title to the property on the payment of the nominal title transfer fee and without any increase in interest rate. However, after Witter acquired the property defendant lender's policy with respect to the assumption of existing first trust deed obligations changed. As the result of increasing interest rates, defendant began to require transferees to assume the obligation at the then prevailing interest rate and to pay an additional assumption fee.

Witter defaulted on the second trust deed obligation; Master foreclosed and acquired title by trustee's deed but did not notify defendant that foreclosure had been completed. Defendant permitted Master to bring the first trust deed loan current and to maintain monthly payments thereon to protect the security interest without entering into an assumption agreement.

Plaintiffs purchased the property from Master through the efforts of a broker. It was made known to plaintiffs that defendant might require them to assume the note and first trust deed at a higher interest rate. The sale was consummated by the plaintiffs giving Master a note secured by a second deed of trust encumbering the subject property and by giving a note secured by a third deed of trust to the broker. At the suggestion of the broker and Master plaintiffs agreed with Master that plaintiffs should pay Master, which would in turn make payments on the first trust deed to defendant. One of the reasons for this agreement was to prevent defendant from learning of the transfer of title to plaintiffs.

Master did not inform defendant that it had acquired title to the property from Witter, and it did not respond to written requests from defendant relating to the status of the title. From February 1968 through March 1969 defendant accepted checks sent by Master in payment on the first trust deed in the belief that Master as holder of the second deed of trust was continuing to make interim payments during foreclosure proceedings. On March 1969 defendant learned for the first time that Master had completed foreclosure and transferred title to the property to plaintiffs. It thereupon sent an assumption application form to plaintiffs who advised defendant that they were willing to assume the loan. Plaintiffs, however, failed to accept the terms of the assumption proposed by defendant. Defendant continued to accept monthly checks from Master during April, May and June 1969 because plaintiffs advised defendant that they wished to arrange to assume the note and first deed of trust. However, since plaintiffs procrastinated, defendant by letter in June 1969 notified both Witter as the last assuming owner and plaintiffs as holders of record title that it elected to accelerate the balance due on its first deed of trust pursuant to the due-on-sale clause therein contained. Defendant thereafter refused to accept any further monthly payments and rejected two tenders by Master of the monthly payment due on July 1, 1969 on the grounds that this amount was insufficient to constitute payment of the full principal balance which had been declared due and payable.

Defendant commenced trustee's sale proceedings but by agreement permitted Master to foreclose on the property under its second deed of trust. Following the foreclosure, the property was sold to third persons who assumed the note and deed of trust in favor of defendant. Plaintiffs brought this suit seeking to restrain defendant from foreclosing but after Master had foreclosed they continued this action against the lender and its trustee under the deed of trust for wrongful foreclosure. Defendant lender filed a cross-complaint against plaintiffs for fraud contending that plaintiffs' failure to inform defendant lender of their purchase of the property constituted intentional fraud for which defendant was entitled to damages.

The court held, that under the facts, defendant as the holder of the first trust deed had not waived its rights under its due-on-sale clause by accepting payments with knowledge of the transfer of ownership to plaintiffs. Waiver is the intentional relinquishment of a known right after knowledge of the facts. The evidence disclosed that all payments on the first trust deed between February 1968 and March 10, 1969 were made to defendant by Master on Master's check. Defendant accepted those payments in the belief that they were being made by a foreclosing second trust deed holder. Defendant did not know that those payments were being made on behalf of plaintiffs. On March 10, 1969 defendant first learned that plaintiffs held record title. Defendant thereafter advised plaintiffs that they would be required to enter into a formal assumption or, in the alternative, defendant would accelerate the principal balance. Defendant accepted monthly checks from Master for the months of April, May and June 1969 because it was advised by plaintiffs that they wished to assume the note and first trust deed. The trial court found that defendant in so doing did not intend to waive its right to accelerate the principal balance but intended merely to provide for plaintiffs a period of time for negotiation of the terms of assumption. The trial court further found that during the period between April and June 1969 defendant at all times intended to accelerate if plaintiffs failed to assume. This and other evidence supported the trial court's finding that defendant at all times intended to retain its rights under the due-on-sale clause.

Further, even if the evidence clearly established the existence of an express consent by defendant to Witter to encumber the property, no waiver of the right to accelerate on a further transfer of the property could be implied therefrom. Plaintiffs cannot take advantage of any earlier waiver by defendant of its right to accelerate the debt since such provisions are enforceable at defendant's option, depending upon this evaluation of the transferee in the surrounding circumstances. Moreover, the due-on-sale clause expressly provided that consent by the beneficiary to one transfer shall not be deemed to be a waiver of the right to require its consent to future or successive transfers of the property.

The appellate court further held that the due-on-sale clause in defendant's first deed of trust was not rendered invalid and unenforceable as an unlawful restraint of alienation inasmuch as such clauses generally were enforceable based on sound business reasons on the part of a lender in desiring to know the character of its borrower and in desiring to take advantage of change in ownership or a change in interest rates.

With respect to defendant lender's cross-complaint for fraud the appellate court concluded that there was no authority to impose upon plaintiffs, as transferees or vendees of the property, any affirmative duty to inform defendant of the purchase and, accordingly, plaintiffs could not breach such a duty by concealment. Substantial evidence supported the trial court's further determination that, even assuming misrepresentation by plaintiffs, the purchasers did not entertain the requisite intent to induce defendant to rely to its detriment. Plaintiffs' conduct was passive; it was defendant that initiated inquiry as to status of title and failed to follow-up with further investigation. There was also a lack of clear and convincing evidence to support the inference that defendant's reliance upon the plaintiffs' denial of ownership was either justified or detrimental. It was incumbent upon defendant to show not only actual reliance, but also that it was reasonable for the defendant to accept plaintiffs' denial without independent inquiry. There was little justification for reliance under the circumstances of this case since defendant was in a business intimately involved with real property transactions and had both the knowledge and access to public records which would disclose the status of title. Accordingly, the appellate court affirmed the trial court's judgment denying plaintiffs damages and denying defendant lender recovery on its cross-complaint.

Wellenkamp v. Bank of America, 137 Cal. Rptr., 488 68 Cal. App. 3d 835 (Cal. 1977)

Plaintiff brought an action for declaratory relief and alleged that she had purchased the real property from predecessors in interest and obtained a grant deed from them subject to a deed of trust securing a promissory note executed by the predecessors in favor of defendant. The deed of trust contained a due-on-sale clause. Upon learning of the outright transfer defendant caused to be executed and delivered to plaintiff a notice of default and election to sell under the deed of trust wherein the sole breach recited was the defendant's decision to exercise its option to accelerate the due date because of the sale to plaintiff of the property. Defendant made no contention that the sale to the plaintiff endangered its security interest in the property but instead relies upon the right to an automatic enforcement of the due-on-sale clause.

The appellate court affirmed the judgment of dismissal and held that the due-on-sale clause was automatically enforceable without a showing of need to protect the lender's security interest, and that the clause did constitute an unreasonable restraint on alienation. The court reasoned that it is the relationship between the justification for a particular restraint on alienation and the quantum of restraint involved which must govern any consideration of the enforcement of a "due-on" clause in a deed of trust in particular circumstances. To the degree that enforcement of

the clause would result in an increased quantum of actual restraint and alienation in the particular case, a greater justification for such enforcement from the standpoint of the lender's legitimate interest will be required in order to warrant enforcement. In the case of an outright sale, acceleration of the due date has substantial justification in the creditor's interest in maintaining the direct responsibility of the parties on whose credit the loan was made, yet the restraint was slight, since the buyer is placed in the same position as other buyers of property who must borrow to finance their purchase of property, and in such situations automatic enforcement of the acceleration of the due date will be approved.

Mobley v. Brundidge Banking Co., Inc., 347 So. 2d 1347 (Ala. 1977)

Appellant Mobley is the holder of a junior mortgage on property foreclosed by defendant-appellee, Brundidge Banking Company (BBC), the assignee of the senior mortgagee. BBC had previously loaned money to the mortgagors and to secure the debts had taken two other mortgages from them on separate parcels of land. When the assignment of the third mortgage was made to BBC, BBC received actual notice of the existence of the junior mortgagee, but had no specific knowledge of his identity.

All three mortgages held by BBC were foreclosed and the three parcels offered for sale and bid separately. BBC was the highest bidder at the foreclosure sale. The sale however, was made in the aggregate; BBC paying an amount roughly the sum of the three debts.

Mobley brought this action of general assumpsit under the common count for money had and received claiming that the excess of the amount bid for the parcel covered by his junior lien over the amount paid by BBC for the assignment of the relevant mortgage was a surplus which should be applied to the satisfaction of his junior mortgage before it is used to satisfy any indebtedness secured by the other two mortgages held by BBC.

The trial court held for defendant BBC, saying that the manner of the sale of the three parcels for a single price, the lack of evidence of a market value of the parcel covered by plaintiff's mortgage, and the failure of the plaintiff to require a separate sale of the parcels after a marshalling of assets, necessiated such a judgment for defendant.

On appeal, the Supreme Court agreed with the trial court that a senior mortgagee is not protected in making optional advances under a future advance clause after the senior mortgagee has actual notice of the junior lien, whether or not the actual identity of the junior lienholder is known.

But the Supreme Court reversed the trial court's interpretation of *Vines v. Wilcutt*, 212 Ala. 150, So. Zd. 29 (1924) that the junior mortgagee is required to demand a separate sale for each of the parcels before he can lay a claim to any surplus over the amount of indebtedness of the senior mortgagee.

The court held that *Vines v. Wilcutt* was inapposite because the mortgagors had never sold the third tract in separate parcels. Here, there were three parcels and three mortgages and none of the mortgaged parcels was further divided and sold. No marshalling of assets or demand for separate sale was therefore required of the junior mortgagee in order to protect his interest in the surplus from the foreclosure sale. The Vines holding is applicable only where the mortgagor has made successive sales of distinct parcels of the mortgaged land to different persons and that portion retained by the mortgagor is insufficient to cover the indebtedness at the foreclosure sale.

Having thus distinguished the Vines case, the Supreme Court held that foreclosure does not preclude the junior mortgagee from bringing an action against the senior mortgagee for money had and received in order to determine whether a surplus exists for the benefit of the junior mortgagee.

The junior mortgagee has only to prove the existence of a surplus as a sum certain (or as capable of being reduced to such) and the amount of his mortgage debt.

United States v. Marshall, 431 F. Supp. 888 (N.D. Ill. 1977)

Plaintiff, United States of America, brought suit to foreclose certain mortgages which were executed as security for a Small Business Administration (SBA) loan to defendants. Plaintiff later moved for summary judgment and in its prayer for relief sought, in addition to foreclosure of the mortgage, an order that defendants "be barred and foreclosed of all right, title, and interest, and statutory right and equity of redemption, in and to said real . . . property." The court held that as the government's motion was supported by the affidavit of a loan specialist for the SBA, which affidavit was uncontested by defendant, summary judgment as to liability would be granted for the government. The court further held, however, that defendants' right of redemption in the property could not be defeated.

As to this latter issue, the court acknowledged that a conflict existed in that both the promissory note and the mortgage provided that the signatories waived all rights of redemption while on the other hand, under Illinois law, the right of redemption cannot be waived either under a security agreement or a mortgage—even by express stipulation of the parties. In deciding whether the language of the instruments or Illinois law should govern, the court noted that "while it [was] clear that the applicable law [for] the case is federal, the issue [was] whether [or not to] adopt Illinois law as the federal rule. . . . "

To answer this question, the court adopted a balancing test in which they weighed the intent of the parties, the interest of the federal government, and the interest of the state. After careful analysis, the court concluded "that [the] stronger policy considerations indicate that we should adopt the Illinois law. . . ." The court reasoned that the interest of Illinois in protecting debtors' redemption rights did not conflict with federal policy underlying the Small Business Act, and that allowing a right of redemption would encourage the policy of helping small businessmen to survive foreclosure, a policy more important than the need for uniform application of the SBA program.

Ellie G. Ricker and Elizabeth Ricker v. United States of America, et al, 417 F. Supp. 133 (D. Maine 1976)

The Rickers, mortgagors of a farm, brought action against the government seeking money damages and nullification of a foreclosure sale under a Farmers Home Administration Mortgage. The court held that the mortgagors were not entitled to damages, but that FHA had deprived mortgagors of due process rights by a foreclosure and sale of farm without opportunity for hearing and that the government's quitclaim deed of the purchase passed no interest to the purchasers since they were not bona fide purchasers under Maine law. Summary judgment was granted to the Rickers. This case is a clear application of a doctrine requiring due process for debtors first laid down in *Fuentes v. Shevin*, 407 U.S. 67. In this case the only notice given the Rickers was newspaper notice, and it illustrates the fact that mortgagees, when foreclosing, should be careful to give actual notice of the impending foreclosure.

Vincent Pinero Schroeder and Maria J. Rodriguez v. Federal National Mortgage Association, 432 F. Supp. 114 (D. Puerto Rico 1977)

The plaintiffs who were purchasers of a home alleged that their homestead interest in property was unduly taken in contravention of federal due process of law. The plaintiffs had purchased this home subject to a mortgage in which the original mortgagors had expressly renounced their rights to the homestead property and a deed of purchase to the plaintiffs stated that a specific amount of the purchase price was reserved to "satisfy in its day the original mortgage of the property with the same terms and conditions established in the mortgage deed." The defendant instituted mortgage foreclosure proceedings in the Commonwealth's courts. A third party purchased the property and from the money obtained in the judicial sale, the plaintiffs requested the money pertaining to the homestead alleging that they had a right to homestead which was not subject to waiver.

The plaintiffs' constitutional claims had already been litigated in the Commonwealth courts which held against the plaintiffs and stated that the buyer of a mortgage of property has no better right than its predecessor in title when the right to homestead has legally been renounced. The court, in denying plaintiffs' claim for relief, stated that they would be bound by the state court's determination of whether a property or liberty right had been abridged. Thus, we see when there is a claim for abridgment of rights established by state law, a federal court will consider itself bound by a state court's determination of whether such rights constitute an abridgment of due process.

Joaquin Encarnacion Hernandez, et al v. Prudential Mortgage Corp., et al, 553 F. 2d 241 (1st CCA 1977)

In this action the mortgagors, who had acquired a home through a federal subsidy, challenged the foreclosure on the grounds that the defendant had not followed the steps recommended by the HUD Handbook carrying out the foreclosure proceedings. The District Court denied relief, and the Court of Appeals affirmed holding that the handbook was not intended to impose prerequisites to actions to foreclose mortgages granted under federal subsidy programs. The court based its opinion on a memorandum issued by HUD's assistant secretary for housing management which stated that the requirements in the handbook are not intended as legal prerequisites for foreclosure actions since foreclosures are governed by the terms of mortgage instructions and applicable state laws.

Kimbell Foods, Inc. v. Republic National Bank of Dallas, 557 F. 2d 491 (5th CCA 1977)

Plaintiff established a lien by an instrument which provided for future advances. The Small Business Administration (SBA) acquired a lien that had been established subsequent to the establishment of plain-

tiff's lien but prior to the date of plaintiff's advance. The question before the court was whether plaintiff's subsequent advance took priority over the intervening lien acquired by the SBA.

The court held that under the law of Texas the SBA would not acquire priority. Nevertheless, the SBA urged the court to bestow upon its lien the overriding priority enjoyed by the sovereign in collecting taxes and debts of insolvents. The court agreed that the priority of the SBA loan would be tested under federal and not state law. However, under federal law the court refused to extend to the SBA the benefit of the "choateness" rule previously adopted by the U.S. Supreme Court in dealing with tax liens and insolvency situations. The court stated that as a quasi-commercial lender SBA(USA) did not require, and should not be accorded, the special priority which it compells as a sovereign.

It should be noted that this case involves competing liens on personal property perfected under the Uniform Commercial Code and the court specifically limits its decision to these facts. Nevertheless, it seems likely that the court's very thorough analysis of the "choateness" rule would be applied to competing real property liens as well.

Northridge Bank v. Lakeshore Commercial Finance Corp., 48 Ill. App. 3d 82 365 N.E. 2d 382 (Ill. 1977)

On Sept. 16, 1974, Howard Bloom executed a mortgage in favor of Lakeshore Commercial Finance Corp. This mortgage recited that it secured the principal sum of $30,000, but also contained the following additional language: "This mortgage is given to secure the following note, or other obligation or obligations, hereinafter called the debt instrument: *To secure all obligations of mortgagor to mortgagee.* The mortgaged property *shall also be security for any additional and subsequent advances by the mortgagee to the morgagor, and all other obligations due from, or guaranteed by, the mortgagor to the mortgagee, at any time prior to the satisfaction of this mortgage.*" (Emphasis supplied.)

A further clause in the printed form of mortgage which was intended to place an upper limit on the outstanding indebtedness had been crossed out.

On Oct. 4, 1974, Bloom executed another mortgage on the same property to the Northridge Bank. This mortgage stated that it was given to "secure the payment of a certain promissory note executed by said mortgagor," but nowhere on the face of the Northridge mortgage was there a description of the amount of indebtedness.

Northridge recorded its mortgage at 9:28 a.m. Oct. 25, 1974. On the same date, at 3:07 p.m. the Lakeshore mortgage was recorded.

Since the real estate in question was insufficient to satisfy both encumbrances, the parties entered into an agreement whereby the property was sold, both mortgages were released and this declaratory judgment action commenced by Northridge to determine the rights of the parties in the proceeds of sale. Both Northridge and Lakeshore alleged that the mortgage of the other failed to state the amount of the debt secured or facts by which the amount could be ascertained, and therefore was insufficient to impart constructive notice. The trial court entered judgment on the pleadings in favor of Northridge.

Issue: Which mortgagee had a superior interest in the fund?

Held: Northridge had the superior interest.

Opinion: Both of the documents in issue fail to state the amount of the indebtedness secured. In *Bullock v. Battenhousen* (1883), 108 Ill. 28, our Supreme Court held that a trust deed which failed to state the amount of indebtedness secured was insufficient under the recording laws to impart constructive notice, and said, at page 37: "The policy though not the letter, of our statutes requires, in all cases, a statement upon the record of the amount secured. Thus, in Section 11, Chapter 30, Rev. Stat. 1874, page 274 (now Ill. Rev. Stat. 1975, ch 30, par. 10), the form of mortgage there given requires the mortgage to 'recite the nature and amount of indebtedness.'"

Lakeshore argues that its mortgage states on its face the amount of the indebtedness. The Lakeshore document initially states that it secures a debt of $30,000. Other language in the form used describes that debt in much broader terms. The language allows Lakeshore to make an unlimited amount of future advances under the same instrument, and language which would set a ceiling on the amount of any future advances has been deleted. Thus, the mortgage executed in favor of Lakeshore not only fails to state the amount of the present indebtedness, it also is completely open-ended as to future indebtedness. It is impossible, from a reading of the Lakeshore mortgage, to ascertain the amount of indebtedness secured thereby.

While we agree with Northridge's assertion that both of the documents are legally insufficient to impart constructive notice of the amounts of their respective liens, we do not believe it is necessary to resort to the doctrine of equitable mortgages to resolve this case. Our recording statute (Ill. Rev. Stat. 1973, ch. 30, par. 29) provides ample authority for our conclusion that Northridge has a superior interest in the escrow fund.

Section 30 of "An Act concerning conveyances" (Ill. Rev. Stat. 1973, ch. 30, par. 29) provides: "All deeds, mortgages and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.

Bloom's mortgage in favor of Lakeshore was executed on Sept. 16, 1974, but was not recorded until 3:07 p.m. on Oct. 25, 1974. In the interim, another mortgage was executed by Bloom in favor of Northridge on Oct. 4, 1974, which was recorded at 9:28 a.m. on Oct. 25. Thus Lakeshore is a "prior purchaser" who failed to duly record its instrument, while Northridge, the "subsequent" purchaser was completely without constructive notice due entirely to Lakeshore's failure to promptly record. In addition, Northridge duly recorded its mortgage. Had Lakeshore promptly recorded even its defective mortgage, this dispute may never have arisen, for although Northridge would still have been without constructive notice, there is no way of knowing whether the presence of the Lakeshore mortgage on the record would have caused Northridge to exercise caution in extending credit to Bloom.

Our decision here is in accord with the Illinois Supreme Court's 1853 decision in *Kennedy v. Northup* (1853), 15 Ill. 148, where an interest in land was created, but not recorded until 32 years later. In the interim, another interest in the same land was created and duly recorded. The case turned upon the court's construction of the term "subsequent purchaser." The court held for the party whose interest in the land was created later in time, but recorded first in time, stating: "By the fault of someone the land had been twice sold, from which someone must suffer; and is it not right, is it not in harmony with every principle of law, that he who is in fault, in not notifying the world by recording his deed, shall suffer the loss which has resulted from such negligence?" (15 Ill. 148, 157.)

Bellingham First Federal Savings and Loan Assn. v. Garrison, 87 Wn. 2d 437 553 P. 2d 1090 (Wash. 1976)

The mortgagee, acting under a "due on sale clause" accelerated the debt and started foreclosure after sale of the mortgaged land to a person with a poor credit history.

Held: Some jurisdictions hold a "due on sale" clause in a mortgage as a reasonable restraint on alienation. Other jurisdictions consider such clauses as unreasonable restraints on alienation unless the transfer increases the risk of the lender-mortgagee. Washington opted for the latter view.

Brown v. Federal National Mortgage Association, 359 A2d 661 (Dec. 1976)

Foreclosure action begun by scire facias sur mortgage in the Superior Court which entered an order of confirmation following sale of the property.

The appeal is by the record title holder, at the time of the commencement of the action, who contends that the procedure followed by the court, deprived him of due process of law.

On May 25, 1970, Parker held record title to the property and gave a mortgage thereon as security for a loan. The following day, Parker conveyed the property to Brown, subject to the mortgage, which mortgage was later assigned to FNMA. Brown made the mortgage payments until April, 1974, but thereafter, no payments were made. On November 6, 1974, plaintiff, FNMA, began a foreclosure action, naming only Parker as defendant. Parker did not appear and a default judgment was entered. The sheriff sold the property on April 8, 1975 and a confirmation hearing was scheduled for May 9, 1977; however, on April 28, 1977, the Superior Court entered an order, on Brown's petition, permitting him to intervene in the proceeding and directing that a hearing on the merits of the case be held. On May 5, an order was entered which provided that the confirmation of the sale was stayed until further order of court. The court was advised that Brown's challenge to the default judgment and subsequent sale, rested upon the contention that he had been a necessary party to the commencement of the scire facias sur mortgage so that he should have been named in the original complaint.

On May 15, the court advised counsel that Brown was a proper party but not a necessary one and that if he had any challenge to the default judgment or to the confirmation of the sale (other than the contention that he should have been named in the complaint), he should file it within four days in support of a further stay of confirmation. On May 19, Parker entered an appearance alleging that she had never purchased the property, had never executed the mortgage and had never sold the property to Brown. The following day Brown moved to set aside the sale alleging fraud, mistake and forgery. Since the last motion came after the four-day deadline pre-

viously set by the court, the court denied it, vacated the stay and confirmed the sale.

The Supreme Court reversed the remanded the case.

Mortgage foreclosures in the Superior Court are governed by 10 Del. C. Sec. 5061 which provides in part as follows: Upon breach of the condition of a mortgage . . . the mortgagee . . . may . . . sue out of the Superior Court . . . a writ of scire facias upon such mortgage directed to the sheriff of the county, commanding him to make known to the mortgagor his heirs, executors or administrators, that he or they, appear before the court to show cause, if there is any, wherefore the mortgaged premises ought not to be seized and taken in execution for payment of the mortgage money. . . .

Brown argued that the statute is unconstitutional because it authorizes a foreclosure without provision for notice thereof to the record owner of title. He contended that such omission violated his right to due process.

The Supreme Court held that Brown was entitled to notice and an opportunity to be heard before he was deprived of legal title to the property. The court stated that since neither 10 Del. C. Sec. 5061 nor any other statute requires that notice of a foreclosure action be given to the record title holder, it follows that there is a constitutional deficiency which requires correction. In the absence of a statutory procedure it is necessary for the Superior Court to promptly provide for such notice by rule or general order as part of foreclosure proceedings commenced on or after May 24, 1976, so that constitutional standards are met. Any holdings to the contrary in prior decisions, are expressly overruled by this opinion which is applicable to this case and all foreclosure proceedings beginning after the date hereof.

It is apparent that Brown, the record title holder, had a due process right to notice of the foreclosure proceeding. He should have been named a party at the beginning of the action but it does not follow that dismissal is required because he was not. He is now a party to the action and nothing which occurred prior to his appearance, including entry of the default, may, for due process reasons, be applied against him. He may have had sufficient time between the date when he was permitted to intervene and the date of the confirmation order to at least notify the court of the defense he wanted to make but given the entry of a default (which could not bind him), the successive deadlines he faced and particularly, the allegations of Parker's motion, we conclude that justice requires a remand with full opportunity for exploration of the issues. Read together, the Parker and Brown motions raise serious questions of fraud and forgery in the sale of the property and execution of the mortgage.

On Motion For Reargument. The plaintiff moved for reargument on several grounds, particularly as to the impact of the opinion on past land transactions. Brown does not oppose a ruling which gives the opinion only prospective effect.

The court held that to the extent that plaintiff seeks modification or reversal of that part of the opinion which holds that a terretenant is entitled to notice and an opportunity to be heard before he is deprived of legal title, the motion was denied based on current constitutional concepts. The court emphasized that the opinion does not affect the traditional relationship between a mortgagee and a non-assuming transferee of title. It is directed entirely to procedural due process and not to property rights, except as they may be affected by the failure to comply with constitutional procedures. No special procedures are required, they need only meet the requisite standards of notice and an opportunity to be had. In pending cases that may be accomplished by joining a terre-tenant as a party under Superior Court Rule 19.

Federal National Mortgage Assn. v. Gregory, 426 F. Supp. 282 (E.D. Ill. 1977)

In February 1970, defendant Elizabeth Simmons Gregory executed a promissory note in the amount of $12,700 to A.L. Grootemaat & Sons, Inc. The note was secured by a purchase money mortgage in the same amount, and provided, inter alia, that in the event of a default in payment of principal or interest, the mortgagee or its assignees could declare all sums then owing immediately due and payable and sell the mortgaged premises at a public auction. In March of that year, the mortgagee assigned the note and mortgage to the plaintiff in what the court called an "arms length transaction between unrelated and non-connected corporate entities." The court also noted that the plaintiff-assignee appeared to have taken the note and mortgage in good faith and without notice of any defenses.

When Mrs. Gregory ceased making payments on the note in January 1973, plaintiff filed a motion for summary judgment against her, declaring the entire balance on the note to be due and payable. Plaintiff's motion was based on its contention that it was a holder in due course of the note accompanying the mortgage, that the defendants had raised no defense to which it was subject in such a capacity, and that the judgment should therefore be entered in its favor.

In response, defendant pointed out that the pleadings presented a disputed issue of fraud allegedly perpetrated against her at the time she signed the note and mortgage. Her third party complaint asserted that the third party defendants (Federal Housing Administration, et al.) induced her to sign those instruments by fraudulently representing to her that all repairs had been completed or that sufficient funds had been escrowed to complete the repairs on the premises she was purchasing. It was further alleged that the third party defendants fraudulently induced Mrs. Gregory's minor daughter to sign an FHA certificate stating her mother found the requisite repairs satisfactorily completed. In the defendant's view, allegations of fraud, which include the assignor (Grootemaat & Sons, Inc., was one of the third party defendants), place an affirmative duty on the plaintiff-assignee to make inquiries about the original transaction before it can satisfy the good faith and lack of notice requirements for a holder in due course. The third party defendants moved to dismiss the third party plaintiff's complaint for failure to state a claim on which relief could be granted.

As to plaintiff Federal National's motion for summary judgment, the court was of the opinion that it should be granted since it found plaintiff to be a holder in due course, and since the defense of fraud in the inducement raised by Mrs. Gregory is ineffective against a party enjoying such status (cf. official UCC comment (7) to Wis. Stat. 403.305 (2) (c)). The court based its findings on the fact that plaintiff filed affidavits made by its senior loan representative and by the assignor's vice president which showed that the instruments were assigned to plaintiff "as the result of an arms length transaction between unrelated and non-connected corporate entities" and that plaintiff took them in good faith and without notice of any defense by any person. There was no claim by defendant that the affiants were incompetent to testify in court to these facts. Moreover, the court found nothing in the record to indicate that plaintiff ever saw the FHA certificate purportedly signed by Mrs. Gregory's daughter.

With respect to the third party defendants' motion to dismiss, the court was of the opinion that it too should be granted. The court noted that claims for damages flowing from fraudulent misrepresentation by the FHA or its agents fall under the Federal Tort Claims Act which required the third party plaintiff here to present her claims to an "appropriate federal agency" before pursuing them in federal court. (28 U.S.C. §2675 (a)). Since Mrs. Gregory did not suggest that she had previously done so, the court dismissed her complaint without prejudice.

Herbst v. First Federal Savings and Loan Assn of Madison, 538 F. 2d 1279 (CA7, 1976)

Different plaintiffs separately brought seven parallel actions against defendant savings and loan association claiming violations of the federal Truth in Lending Act, 15 U.S.C. §1640 (a)(1). Each complaint alleged that the plaintiff therein executed a mortgage and mortgage note in favor of defendant. The notes, in accordance with permission granted by Wis. Stat. §215.21, contained a clause giving the lender an option to increase the stipulated rate of interest provided at least four months' written notice was given to the borrower and certain other conditions met.

On various dates in September 1973, plaintiffs received from defendant, letters stating that as of Feb. 1, 1974, the interest rate on their notes would be increased pursuant to the above clause. The interest rates were increased on Feb. 1, 1974 to the rate specified in the notice and that rate remained in effect until the time suit was brought. Defendant did not show or deliver to plaintiffs a disclosure form reflecting the terms of the loan at any time on or prior to the February date. It was this latter action of defendant which formed the basis of these suits as each plaintiff alleged a violation of that section of the Truth in Lending Act which makes any creditor who fails to disclose to the borrower, certain information in connection with a consumer credit transaction, "before the credit is extended," liable in damages.

The District Court for the Western District of Wisconsin dismissed the complaints for failure to state a cause of action and these appeals followed. On appeal, as it had below, defendant argued that none of the provisions of the act applied to any part of the transactions in question; that, nevertheless, the disclosures actually made met the requirements of the act and regulations; and that if defendant did not have a duty to disclose under the act and if it had violated that duty, the violation occurred no later than September 1973, and therefore none of the actions were filed within the one-year limit.

Confining itself to a discussion of whether "defendant's failure to make full disclosure at the time it invoked the variable rate provision" constituted a violation of the statute or regulations, the court observed that "no provision of the statute nor any provision of the regulation [dealt] directly with the legal

significance of a variable rate provision in a loan; and that only the Federal Reserve Board interpretation embodied in 12 C.F.R. §226.810 [specifically covered this] matter."

After reviewing the regulations, the court found the implication "inescapable" that if a transaction is not to be considered "a new transaction," it is not subject to the [act's] disclosure requirements; and that a "subsequent change in the annual percentage rate" was not "a new transaction." Therefore, defendant was not required to make a new disclosure when it invoked the variable rate provision, provided it had satisfied the conditions stated in 12 C.F.R. §226.810. And the court found that the conditions had been satisfied: When the initial extensions of credit were made, defendant met the first condition by disclosing that the rate of interest was prospectively subject to change and the conditions under which this could be accomplished; and when the variable rate provision was invoked, defendant met the remaining conditions when the change in rate was in accordance with the initial disclosure. The court also disposed of plaintiffs' contention that defendant's disclosure at the time credit was initially extended was defective, by stating that although the manner and form in which the variable rate provision was disclosed did not conform to the requirements set forth in the statute and implementing regulations thereafter enacted and promulgated, a rule of substantial, rather than strict compliance was to be adopted. The judgment of the District Court was therefore affirmed.

Rowe v. Tucker, 560 P. 2d 843 (Colo. 1977)

Defendant Two Brothers Mining Corp. brought a foreclosure action seeking sale by the public trustee of a one-half interest in a mining property. The action was then begun by the plaintiff to enjoin a foreclosure sale pending the determination of the amount required to be paid by him to cure default. However, during the pendency of the proceeding of the foreclosure, sale was held. The funds were deposited into court awaiting resolution of the controversy. The Two Brothers principal contention was that plaintiff failed to redeem within the statutory redemption period. He claims that period to be 75 days rather than six months. Prior to 1965, the redemption period following all foreclosures was six months. That period was shortened to 75 days as to certain classes of property. The applicable redemption statute is now Section 38-39-102 C.R.S. 1973 which provides that with respect to agricultural real estate, a deed of trust upon one or more parcels of real estate which were agricultural real estate, upon the date of execution of such deed of trust, may be redeemed within six months by the owner of the premises for the sum for which the property was sold. The statute further states that "agricultural real estate" means for the purposes of this action, any parcel of real estate which has not been platted as a subdivision, in whole or in part or which is not a part of any platted subdivision. Therefore, the question was whether or not mining property is agricultural real estate for the purposes of this statute. The trial court determined that mining property in this instance was "agricultural" as it was not subdivided.

Affirmed. Mining property is not ordinarily considered to be agricultural. However, it is apparent for redemption purposes that the legislature sought only to distinguish undeveloped rural lands from developed urbanized property and the statutory definition here places both agriculture and mining property in the same category. The character of the property rather than its use is therefore the material factor in ascertaining the period of redemption. There was no evidence to show that the property was any platted subdivision or a part of a platted subdivision.

Municipal Ordinance

Wilson v. Cincinnati, 46 Ohio 2d 138 (Ohio 1977)

A Cincinnati ordinance provided that every owner of residential property prior to entering into a contract of sale should tender to the prospective buyer and obtain his receipt therefore a certificate of housing inspection. The director of buildings and inspections to issue the certificate within 14 days after gaining access to the structures upon the realty, when the owner applies in writing and agrees to a time during which the property will be available for inspection; a criminal penalty being imposed on the owner for failure to tender the certificate.

A declaratory judgment action was filed asserting that the ordinance was unconstitutional. The Ohio Supreme Court held the ordinance unconstitutional and enjoined its enforcement saying: "From an examination of (the ordinance) it can be seen that the homeowner, prior to entering into a contract for the sale of the property is required to tender to the prospective buyer a certificate of housing inspection. The failure to so comply . . . renders the seller subject to (a) criminal penalty. . . . A critical aspect of the legislation, however, is that the seller can obtain the certificate only by agreeing to a time when an inspector is permitted access to the property.

"Obviously the seller is faced with a serious dilemma. Either he must consent to a warrantless search or face the possibility of a criminal penalty.

"Generally a search to which an individual consents meets the Fourth Amendment requirements. . . . Thus it may be represented that because the seller arranges for the inspection, including a proper time, he consents to the search. However, a valid consent involves a waiver of constitutional rights and cannot be lightly inferred; hence, it must be 'voluntary and uncoerced, either physically or psychologically'. . . . "

"In the case before us the coercion represented by the sole alternative of possible criminal prosecution clearly negates any 'consent' which may be inferred from the allowance of the inspection and therefore, the validity of such searches upon the basis of consent is not sustainable."

A somewhat similar case involving an ordinance of the city of Euclid, Ohio, is *Hanna v. Drobnick* (U.S. Court of Appeals, Sixth Cir.) 514 Fed. Reporter 2d 393, which held that building inspectors of a city could not be held liable under a statute somewhat similar to the one above by reason of their alleged unconstitutional searches of homes under a building inspection ordinance.

Name

Secretary of the Commonwealth v. City Clerk of Lowell, 77 Mass. 1674 366 NE 2d 717 (Mass. 1977)

"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."

Oil, Gas and Other Minerals

West Virginia Department of Highways v. Farmer, 226 S.E. 2d 717 (W.Va. 1976)

The state instituted action in eminent domain for the purpose of obtaining sand and gravel—intervenor claiming to be owners of nine-tenths of the oil, gas and other minerals and that intervenor should be paid nine-tenths of the award for the sand and gravel.

The court held other minerals to be an ambiguity and that, therefore, accepted rules of construction must be applied and therefore applied the rule of "Ejusdem Generis", which means of the same kind or class and that the enumeration of oil and gas makes meaningless the term "other minerals" except for minerals which are of the same class or nature, that is, petroleum products.

Oil and Gas

Rousselot v. Spanier, 131 Cal. Rptr. 438 60 Cal. App. 3d 238 (Cal. 1976)

A deed of certain described real property excepted and reserved oil and gas rights to expire in 20 years or later if production continued in paying quantities. After the expiration of the 20 years without production, plaintiffs acquired the oil and gas in the real

property from the grantee's successors and brought this action against the grantor's successors for a judgment declaring that the defendants no longer had any interest in the oil and gas. The trial court granted defendants' motion for a summary judgment on the ground that the interest received by plaintiffs' predecessors was an interest in violation of the rule against perpetuities.

On appeal from the judgment declaring that plaintiffs had no right or interest in the oil and gas and quieting defendants' title therein against any claim by plaintiffs the appellate court reversed. The court held that the oil and gas interest is a profit a prendre, which is an interest in real property in the nature of an incorporeal hereditament essentially indistinguishable from easements. The effect of the deed was to give the grantee a fee simple estate in the real property subject to an incorporeal or nonpossessory interest to be enjoyed by the grantor for a determinable period. The interest granted to the grantee was a present possessory interest. When the grantor's interest ceases because oil and gas are no longer found in paying quantities, the grantees are left with their estate free of that burden. The expiration of the profit a prendre does not create a new estate in the grantee in violation of the rule against perpetuities. The profit a prendre was extinguished upon the expiration of the 20-year period without production in paying quantities and the grantee held the title to the real estate free of that profit.

Partition

Boyd v. Boyd, 32 Md. App. 411, 361 A2d 146 (Md. 1976)

Appeal from a decree in a partition proceeding, that a 190-acre farm be sold pursuant to the judicial sales rule of the Maryland Rules of Procedure, the court having determined that the property was not subject to partition in kind. The appellant contends that the decree was clearly erroneous and that the court should have appointed commissioners to investigate the matter of division of the property as prayed in her answer. Affirmed.

The Maryland Rules relating to partition provide that if it appears that the property cannot be divided without loss or injury to the parties interested, the court may decree its sale and divide the money resulting from the sale among the parties according to their respective rights. If the court shall determine that a sale rather than partition is proper, such sale shall be conducted in the manner provided by the judicial sales rules.

From the language of the rules it can be seen the determination of whether property shall be partitioned in kind or be sold in lieu of partition, is for the court to determine. Here, the chancellor was presented with substantial evidence that partition would work to the detriment of both parties. He did not clearly err in ordering that the land be sold rather than subjected to partition.

Quiet Title

Council Bluffs Savings Bank v. Simmons, 243 NW 2nd 634 (Iowa 1976)

Defendants appealed from a judgment of the District Court quieting title to real estate in plaintiff. The Supreme Court held that the evidence established that the plaintiff had proven his title by clear and convincing proof of adverse possession for 15 years, notwithstanding fact that defendant had paid taxes on the land for 13 of those years.

Affirmed.

Pearson v. City of Guttenberg, 245 NW 2nd 519 (Iowa 1976)

Homeowners brought action seeking to quiet their asserted titles to certain residential property and seeking to extinguish city's right to strip of land lying between their homes and ordinary high water mark of river. The District Court entered judgment in favor of city, and homeowners appealed. The Supreme Court held that provision in homeowners' chain of title instruments referring to recorded plat in describing property referred to original 1848 plat which designated disputed strip of land as land dedicated for public use as street and public landing, rather than 1905 plat which omitted street; that even if 1905 plat was incorporated in homeowners' deeds, plat would not have entitled homeowners to portion of disputed land between rim of high bank and water's edge; that city was estopped from claiming title to portion of disputed strip of land which had originally been designated as public street, but which city had abandoned; that evidence failed to establish homeowners' right to portion of disputed strip along river's edge as against city; that fact that homeowners prayed for more relief than they were entitled to did not preclude award of portion of relief sought.

The Clinton National Bank, as Conservator of Hilda Schuster v. The City of Camanche, 251 NW 2nd 248 (Iowa 1977)

Appeal was taken from decree of the District Court, enjoining municipal utilization of land located between plaintiffs' residential property and the Mississippi River. The Supreme Court held that where property owners, acting in good faith and under claim of right, upon city's nonuser of platted street for more than a century, expended time, labor and money in improving their front yard to and including retaining wall at top of river bank and notoriously used and occupied same for more than 30 years before city evidenced any claim of municipal right thereto, and since construction of municipal park reaching to property owners' front doorstep would clearly have an adverse effect on the enjoyment and value of their residential property, city was estopped from asserting right to use land down to the retaining wall as a city park, but where maintenance and improvement by property owners extended only to the retaining wall and no one was even prevented from using the beach, occasionally utilized by fishermen and children, property owners' superior and paramount right extended only to the riverward side of the retaining wall; and that no reversible error resulted from trial judge's effecting a sua sponte evidential view of the premises.

Affirmed in part, modified in part, and remanded with directions.

Railroad Easement

Energy Transportation Systems v. Union Pacific Railroad Co., 435 F. Supp. 313 (D. Wyo. 1977)

This controversy involves conflicting claims to the subsurface lands subject to a railroad right of way pursuant to act of July 1, 1862, 12 STAT 489, as amended by act of July 2, 1864 13 STAT 356. (Pacific Railroad Acts).

The court held that by the said act, an easement was granted and not a fee. That the servient estate was separated from the surface grant; that the servient estate retained by the United States then passed to the subsequent patentee under the Homestead Act of 1862, such servient estate being subject to the reasonable use of the surface by the railroad, therefore the plaintiff as successor in interest could place a pipeline beneath the railroad right of way.

This decision seems to conflict with previous cases as to the disposition of the servient estate as separated from the surface grant. Cases are still pending as to grants under the Railroad Act of March 3, 1875, 18 STAT 432, 43 U.S.C. Section 934.

Real Estate Brokers

Brady v. Hoeppner, 558 P. 2d 1009 (Colo. 1977)

Facts: Brady was in possession of and operating a bowling establishment under a purchase contract. The contract provided that the contract was not assignable without the prior written consent of seller, which consent was not to be unreasonably withheld. Brady never obtained consent to assign the contract but nevertheless entered into an exclusive sales listing with Melrose to sell the property. Melrose knew of Brady's limited interest in the property. The listing agreement described Brady as a contract buyer instead of an owner. Brady negotiated a sale but Hoeppner, the seller, refused to consent. Melrose intervened as a third party plaintiff to recover commission for the sale. The trial court determined that the consent to the assignment was not unreasonably withheld and the attempted sale was void. Melrose was not entitled to recover a real estate commission under the listing agreement but was entitled to recover the reasonable value of his services. The court determined that 10 percent of the cash downpayment was fair compensation.

Holding: Reversed. Melrose did not produce a qualified buyer ready, willing and able to buy the property. The real estate broker is not entitled to commission when no sale is completed as provided in the listing agreement. Where a sale fails because of a defect of title or a contingency of which the broker knew when he was employed, the broker is not entitled to a commission. Neither is there anything in the record to justify an award for the reasonable value of Melrose's services. The only contract before the court is a listing agreement and there is no evidence of any implied contract. Either the plaintiff was liable for a commission or he was not liable at all since there was no evidence that the plaintiff either expressly or impliedly promised to pay the broker the fair value of any services and he received nothing of value from any services rendered.

Lemler v. Real Estate Commission, 558 P 2d 591 (Colo. 1976)

Facts: Plaintiff Lemler contracted with defendant Damar for the design, construction and sale of a residence to be constructed by Damar on land owned by the plaintiffs. Damar, now defunct, held a corporate real estate brokers license pursuant to Section 12-61-103 (7) C.R.S. 1973. Damar defaulted on its obligations to plaintiffs and plaintiffs recovered a judgment in fraud by default against Damar in the amount of $2,000. Being unsuccessful in their efforts to collect the judgment, plaintiff joined the Colorado Real Estate Commission as a party defendant and applied to the court for an order directing payment of the judgment from the

(continued on page 30)

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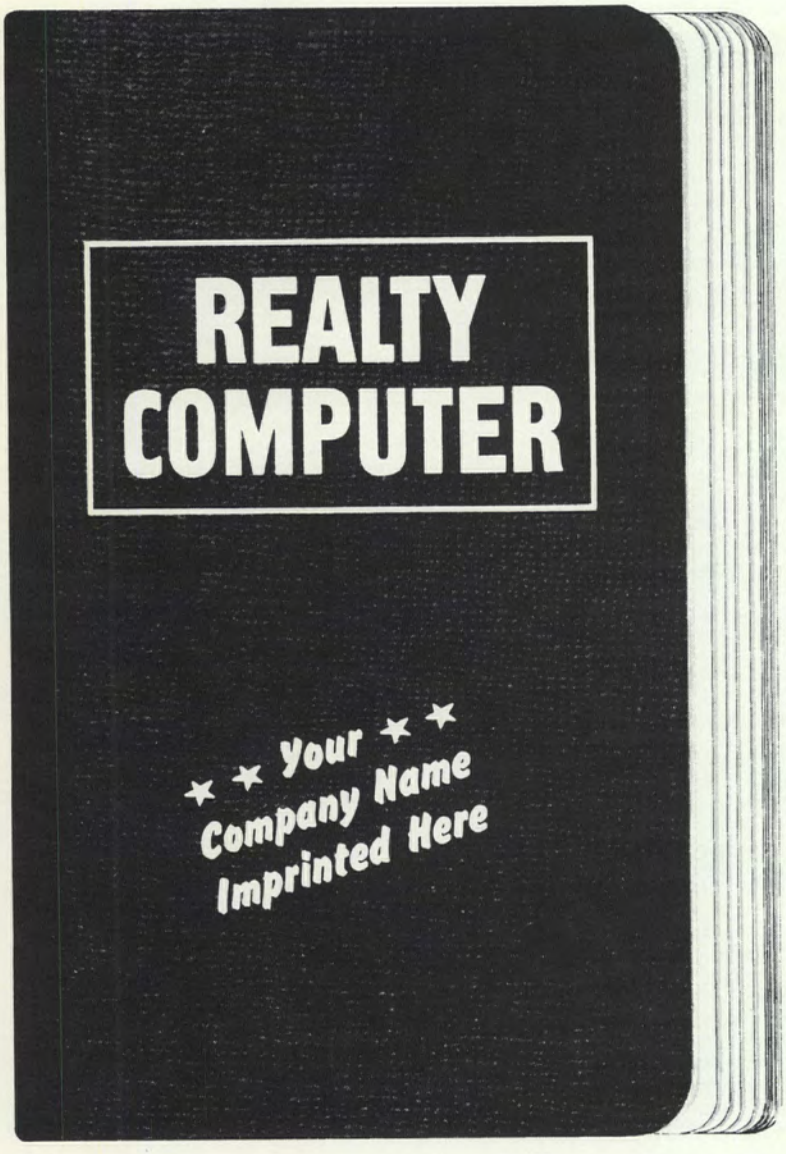

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Names in the News...


Robert B. Holmes


James J.D. Lynch


Byron Powell


David Lasseter

The Ticor Board of Directors has announced its intention to elect **Robert B. Holmes,** 46, president upon the retirement of **Richard H. Howlett** in January, 1979.

Presently executive vice president and chief financial officer of the company, Holmes joined Ticor in January, 1977, having previously served as a general partner in the investment banking firm of Lazard Freres & Co., New York.

In related action, the board of directors of two principal Ticor subsidiaries, Title Insurance and Trust Co. and Pioneer National Title Insurance Co., elected Howlett chairman of the boards, filling vacancies created by the recent death of James D. Macneil. Howlett will serve as chairman of the title insurance operations in addition to his present duties as president of the parent company.

A 30-year title industry veteran, **William B. Moeser,** has been appointed vice president and western regional manager at American Title Insurance Co.'s new western office in San Diego.

Moeser's responsibilities will focus on the development of improved business programs and operations throughout the region. Currently serving California and Arizona, the region will expand later this year to include Hawaii, Nevada, New Mexico, Utah, Colorado and Wyoming.

Commonwealth Land Title Insurance Co. has announced that **James J.D. Lynch Jr.** has been appointed corporate secretary.


Brenda Mortensen


T.L. Liedecke

Lynch, who has been with Commonwealth since 1968 when he joined the legal department, serves on the ALTA Committee on the Commission on Uniform Laws and the ALTA Committee on Railroad Titles.

He has co-authored several books on title insurance, among them being *Truth in Lending, Riparian Title in Pennsylvania* and *Pennsylvania Title Insurance Theory and Practice.*

In addition to his new position, he will continue as assistant counsel and reinsurance administrator for the company.

Named national accounts manager for Commonwealth in Texas is **T.L. Liedecke** who will be in charge of coordinating commercial business on a nationwide scale.

Liedecke formerly was with another national title insurance underwriter as national accounts representative.

The company also announced the names of two new assistant vice presidents and a branch manager for a new office in Washington, Pa.

Frederick Clark, a 30-year Commonwealth employee who works in the Rhode Island office, and **John O'Rourke** of Bellevue, Wash., were appointed assistant vice presidents. **Charles J. Keffer Jr.,** assistant vice president, will head the company's new Washington, Pa., branch office.

Gabriel A. Ivan, who joined Lawyers Title Insurance Corp. seven years ago, has been elected associate counsel for the company and assigned to the home office in Richmond, Va.


William B. Moeser


Warren R. Strouse


Tracy Hall


Gabriel A. Ivan

Elected California state counsel and assistant Alabama state counsel for Lawyers Title, respectively, are **Richard J. Morra** of Los Angeles and **William V. Dillard** of Birmingham.

Names of managers for the Medford, Ore., and Howell, Mich., branch offices of Lawyers Title also were announced. **Kenneth W. Pond** will manage the Medford office and **William T. Shaw** was elected to head the Howell operation.

Byron Powell, who has been with Chicago Title and Trust Co. since 1960, has been elected vice president.

Since joining the company as an examining attorney, he has held various positions including title unit manager, trust officer and assistant vice president.

Stewart Title Guaranty Co. has promoted **H. David Lasseter** to senior vice president. A 15-year title industry veteran, Lasseter is northeast region manager for Stewart Title and is president of the New Jersey Land Title Association.

Warren R. Strouse has been named senior title officer in charge of underwriting practices for First American Title Insurance Co.'s Pennsylvania office in King of Prussia.

Mary Frederick and **Fredric Watkins** were named assistant title officers and managers of Industrial Valley Title Insurance Co.'s West Chester and Exton (Pennsylvania) offices, respectively.

(continued on page 28)

American Title Establishes New Division

George Shave

James White

American Title Insurance Co.'s six regional offices as well as its branches, agents and subsidiary companies will be organized under the direction of a new corporate operations division to provide improved service.

The company's national operations have been divided into two zones, each to be headed by a zone vice president, according to Frank B. Glover, chairman of the board and president.

James H. White, who recently joined the company and who has been in the land title industry for 25 years, will supervise business in states east of the Mississippi River plus Louisiana.

George W. Shave, former director of the agency and lawyers division, will direct operations in states west of the Mississippi River. He has been with American Title since 1972.

The agency and lawyers division has been consolidated into the operations division.

Black Selected Idaho President

Robert Black, American Land Title Co., Inc. in Pocatello, was elected president of the Idaho Land Title Association for 1978-79 at the group's annual convention.

In addition, conventioneers elected three regional vice presidents. They are Ted Strohmaier of Nez Perce County Title Co., Lewiston, Panhandle District vice president; Michael K. Ferrin of The Bingham Title & Trust Co., Blackfoot, Southeastern District vice president, and Dennis Wetherell of Guaranty Title, Inc., Mountain Home, Southwestern District vice president.

Security Title and Guaranty Co. (New York) has announced the following staff promotions. **Richard T. Mendler** has been elected first vice president. He has been with the company for 25 years. **Walter Kraus** was elected to the position of regional vice president in Nassau and Suffolk counties. He has been in the title business for more than 30 years.

Also named was **Paul Holmes** as assistant vice president. He will assume branch manager duties for the company's Mineola office.

Laurence E. Calinda has been appointed Title Insurance and Trust Co.'s (TI) Alameda County (California) manager and elected vice president. In his new position, Calinda will be responsible for coordinating all sales and service activities in the seven title and escrow offices in the county.

Brenda R. Mortensen has been promoted to area account manager for the Central Valley office of TI. She will supervise operations and area account activities in the Pruneyard territorial region.

Edward Brouillard has been appointed technical training and advisory title officer in the Santa Clara County division office of Title Insurance & Trust Co. (TI). In his new capacity, Brouillard will work to increase the technical knowledge of TI personnel, including the training of new employees and the re-training of current personnel.

Tracy L. Hall was appointed regional underwriter of Commonwealth Mortgage Assurance Co. She will work out of the Houston, Texas, office where she also will be branch manager.

Conventioneers Hear from Indians, Commissioners

The legal counsel for the Yakima Indians was among speakers to address the joint convention of the Washington Land Title Association and the Oregon Land Title Association.

The 325 registrants also heard from insurance commissioners of both states, the president of the Georgia Business and Industry Association and ALTA Title Insurance and Underwriters Section Chairman Robert C. Bates.

Stuart Wylde, vice president, The Abstract and Title Co., LaGrande, was elected president of OLTA. Vice president is Ida M. Berg, Portland.

WLTA's new president is George A. Finney, Pioneer National Title Insurance Co., Seattle. Vern L. Arnold, was elected vice president.

Californians Choose Balocca Top Officer

Louis A. Balocca

Elected president of the California Land Title Association at its 71st annual convention in San Diego was Louis A. Balocca of California Land Title Co., Los Angeles.

Other new officers include David Porter, Title Insurance & Trust Co., Los Angeles, first vice president; Steven R. Walker, Western Title Insurance Co., San Francisco, second vice president, and Darrel E. Pierce, Inter-County Title Co., Placerville, treasurer.

Speakers addressing the convention included California Association of Realtors President Donald A. Wiedmann and Robert C. Bates, chairman of ALTA Title Insurance and Underwriters Section.

New Office Opens

Security Land Title Co., Omaha, Neb., has opened an office in Sarpy County.

Blaty Elected MLTA President

Out-going Michigan President Robert J. Wilson Jr. receives a certificate of appreciation from in-coming President Edward A. Blaty (right).

Edward A. Blaty, of Lawyers Title Insurance Corp., was elected president of the Michigan Land Title Association at the association's recent convention at Mackinac Island. Carl B. Babcock, Iosco County Abstract Office, will serve as vice president.

Among this year's speakers was C.J. McConville, president of the American Land Title Association.

Company Opens New Offices In Florida

American Title Insurance Co., Miami, Fla., has announced the opening of two branch offices in two of the state's fastest developing areas—one in the South Dade area, the other in Boca Raton.

Carlton North, who will manage the Boca Raton office, said Boca Raton is Florida's 20th largest city with population growing at an average of eight percent yearly.

Manager of the South Dade office Martha Bustillo said that nearly 25 percent of Florida's total housing units are in Dade County and that future projection for continued extensive growth there is excellent.

Colorado Votes Eller 1978-79 President

Luella Eller, manager of the Record Title Insurance Agency in Ft. Collins, was elected 1978-79 president of the Land Title Association of Colorado at its annual convention.

Emil V. Rackay Jr., Chicago Title Insurance Co., Denver, and George A. Fix, Yuma County Abstract Co., Wray, were elected first and second vice presidents, respectively.

Pennsylvanians Elect Officers, Hear Speakers

Newly elected president of the Pennsylvania Land Title Association is John F. Shelley Jr., manager, Pittsburgh office of Lawyers Title Insurance Corp. He will assume his presidential duties in October. Other officers elected at the recent PLTA annual convention are Joseph D. Burke, vice president; Frank T. Finch, treasurer, and F. Victor Westermaier Jr., secretary.

A highlight of the convention was the announcement of the incorporation of the Pennsylvania Land Title Institute to certify land title professionals.

ALTA representatives who spoke at the meeting included President C.J. McConville and Executive Vice President William J. McAuliffe Jr.

Schmidt To Lead Wyoming Association

The new officer roster for the Wyoming Land Title Association's coming year is headed by Gary Schmidt of the Carbon County Title Co., Rawlins, who was elected president at the annual convention in Newcastle.

Sixty persons were registered for the meeting, which featured a roster of speakers including ALTA Chairman of the Title Insurance and Underwriters Section Robert C. Bates.

Other officers elected were Kerry Christensen, Laramie, vice president, and Frances Rossman, Newcastle, secretary-treasurer.

ALTA action...

The ALTA Government Relations Committee met in Chicago to finalize plans for this year's federal seminar, entitled "The RESPA Experience."

Realtors, lenders, consumer advocates, HUD officials and title industry executives will participate in the Oct. 19 seminar in Washington, D.C.

Ticor President Richard H. Howlett is chairman of the committee. Members are Robert C. Bates, Roger N. Bell, J.L. Boren Jr., Philip B. Branson, Robert C. Dawson, Erich E. Everbach, Thomas E. Horak, John E. Jensen, James W. Robinson and Edward S. Schmidt.

Arkansas Meets, Elects Harp President

Gay Harp, executive vice president of Bronson Abstract Co., Inc., in Fayetteville, was elected president for the coming year of the Arkansas Land Title Association at the group's annual convention.

TIPAC Check Presented

Donald J. Griffin, vice president of Chicago Title and Trust Co. (CT & T) presents a Title Industry Political Action Committee (TIPAC) check to Rep. Henry Hyde (R-Ill.), (left). This is one of the many contributions made through TIPAC to campaigns of Congressional candidates from both parties.

Judiciary Report—*(continued)*

state recovery fund. Trial court denied recovery.

Holding: Affirmed. The erection of a residence on land owned by the plaintiffs was not an act for which a real estate brokers license is required so as to prevent recovery for fraud from the real estate recovery fund under 12-61-301 (1) C.R.S. 1973.

Real Estate Contracts

Carpenter v. Winn, 566 P. 2d 370 (Colo. 1976)

Facts: The Carpenters entered into an installment land contract for the sale and purchase of the lot for $10,989.14 to be paid in monthly installments of $163, such payments to be credited first to interest at 8 percent per annum and then to principal. The defendant was to convey the property in fee simple by warranty deed provided the plaintiffs first made the payments agreed to in the contract. Plaintiffs made 43 monthly payments, thereby reducing the principal to $9,631.24 by Oct. 31, 1975. On that date plaintiffs tendered the remaining unpaid principal and demanded a deed. Defendant refused the tender instead demanding that plaintiffs pay her the total principal plus $3,950.79 which represented the total remaining interest which would have been paid over the term of the contract.

Holding: A purchaser cannot compel a vendor to accept tender of payments prior to the time they become due. Vendor's right not to accept early payment may be waived by contractual provision and when there is such a waiver any prepayment penalty or premium must be specifically provided for in the contract. In the absence of such a contractual provision, however, there is no right to prepay.

Snow v. Trabits, Ala. 347 So. 2d 395 (Ala. 1977)

Facts: Suit based upon an action for the specific performance of a contract to sell land. This was the second appeal in the case. The question raised in the trial court was whether Mrs. Trabits' husband had signed the contract as simply a witness or as Mrs. Trabits' husband, thereby evidencing his assent to the conveyance.

The original appeal was from a judgment ordering specific performance in favor of plaintiff Snow and against Trabits. On remand the trial court granted Trabits' motion for summary judgment.

Issue: Whether the vendor's husband had properly signed a contract of sale, for the sale of the wife's-vendor's property, thereby evidencing his assent to the conveyance as required under Title 34, Section 73, Code of Alabama (Revised 1958).

Holding: Neither the trial court, nor the parties, had the benefit of the court's opinion in the Peddy case (*Peddy v. Montgomery,* 345 So. 2d 631, 1977). The court held that Title 34, Section 73 of the Code of Alabama, Recompiled 1958, was no longer applicable. Title 34, Section 73, reads in part, "The wife, if a husband be of sound mind, and has not abandoned her, or be not a nonresident of the state, or be not imprisoned under a conviction for crime for a period of two years or more, cannot alienate or mortgage her lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land."

The court, in Peddy held that a married woman's contract for the sale of *her* property is not void for failure to have her husband's signature evidencing his assent to the conveyance. The court held, in the instant case, that the Peddy decision renders moot the question raised here as to whether Mr. Trabits signed as a witness or signed to evidence his assent to the conveyance. The court held that the husband's signature is no longer necessary to validate a wife's contract to convey land owned by her.

The court held Mrs. Trabits (Vendors) contract for the sale of her land was not void because of failure to comply with Title 34, Section 73.

Reversed and remanded based upon other grounds.

Waskey v. Thomas, 235 S.E. 2d 346 (Va. 1977)

A contract vendee in an installment land contract, while in the process of making purchase installments to his vendor, was entitled to rescind the contract when he learned that the land held by his vendor was held by him and his wife as tenants by the entireties and one of the tenants did not sign the contract.

Restraints on Alienation

Seagate Condominium Association, Inc. v. Duffy, 330 So. 2d 484 (Fla. 1976)

A condominium declaration was amended to prohibit the leasing of units except in special situations for limited periods. The unit owner who objected to this amendment received notice but did not attend the association meeting which considered the amendment and did not return a proxy ballot or voice objection until after the amendment was passed by an affirmative vote of 96 percent of the unit owners. The court in upholding the condominium's leasing prohibition observed that the ancient rule against restraints on alienation prohibited only unlimited or absolute restraints and not those restraints which met the test of reasonableness when the attendant circumstances were considered. The court observed that the unique problems which arise from condominium living result in the necessity for a greater degree of control over and limitation upon the rights of the individual owner than might be tolerated given more traditional forms of property ownership. The court pointed out the legislature has, by statutory enactment, recognized the need for and permitted restrictions upon the use, occupancy and transfer of condominium units. Further, the restriction on alienation is reasonable in that it is neither unlimited nor unreasonable. It is not unlimited as it prohibits only a specific form of alienation, *i.e.,* leasing; under general but not unlimited circumstances, *i.e.,* the condominium association will consider its suspension in special situations to avoid hardship for a limited period of time and the prohibition itself may be terminated at any time by the unit owners in exercise of their amendatory powers. Additionally, the restraint is reasonable given the unique problems associated with condominium living and the avowed objective of inhibiting transciency in the tourist oriented setting of south Florida promoting in its stead both a continuity of ownership and the residential character of the community.

Restrictions

Howard Bennett and Lillian L. Bennett v. The Charles Corp. et al., 226 S.E. 2d 559 (W.Va. 1976)

Plaintiffs, owners of a house within a subdivided tract sought to enjoin defendants from converting remaining lots in tract into cemetery and for using them for other than residential purposes.

Held: "That despite oral promise made to plaintiffs that tract would be developed in the future as residential housing subdivision, where neither deed nor plat nor any other writing evidenced negative easement against

use of tract as cemetery, statute of frauds requirement precluded relief sought.

Rule Against Perpetuities

In Re Estate of Grove, 138 Cal. Rptr. 684 70 Cal. App. 3d 355 (Cal. 1977)

Decedent had three sisters, one niece and one nephew, and the niece and nephew each had two children. Decedent's will created a trust, which provided in part, that the net income was to be divided upon the death of one sister between the two remaining sisters and the decedent's nephew. The will then provided that upon the death of the two sisters and the nephew the income was to be distributed in equal shares to the children of the nephew and niece (grand nephews and grand nieces). The will provided that this applies only to living grand nephews or grant nieces of the decedent. When all the income beneficiaries, except the grand nephews and grand nieces, died the trust was to terminate and the estate distributed in equal shares among all the grand nephews and grand nieces providing the youngest of the grand nephews or grand nieces reached the age of 50 years. Decedent and her three sisters died and the niece, who stood to gain from an intestacy or the reinstatement of an earlier will, petitioned the probate court seeking entitlement to distribution of the decedent's estate contending that the will violated the rule against perpetuities, thereby rendering the gift invalid.

Although the residuary clause of the will was held by the probate court to have violated the rule against perpetuities the court reformed the will in order to carry out the intent of the decedent so as to avoid a violation of the rule against perpetuities and thereby avoid intestacy. The appellate court affirmed. The court first pointed out that in testing a trust agreement for violation of the rule against perpetuities its validity is to be judged as of the date of its conception. Accordingly, the validity of an interest in a testamentary trust is to be determined as of the time of the testator's death. If, at the time of the creation of the interest, there exist even a bare possibility that the interest in question may not vest within the prescribed period, the rule has been violated. Further, with regard to the validity of class gifts, the law is that if the possession of a testamentary gift to a class is postponed to a future time, the class includes all persons within the class at the time to which possession is postponed. The will in question contained a class gift to grand nephews and grand nieces, the extent of which was to be determined at a future date, *i.e.*, when the youngest of the class members reaches the age of fifty years. On its face, the class gift violated the rule against perpetuities since a grand nephew or grand niece may not have been born at the time of the decedent's death, the date of the creation of the testamentary trust and as of which time the lives are measured. Such afterborn grand nephew or grand niece would not take their interest until the youngest reached the age of 50 years and this would be more than 21 years after some life in being at the time of decedent's death.

To avoid the harsh result of invalidation of the will and to give meaning to the intent of the testatrix the probate court was justified in reforming the will under the general rules relative to interpretation of wills and the special provisions laid down by statute which adopts the common law doctrine of cy pres and expands its application from the charitable field to instruments in general. Accordingly, the court construed the provision in the will that the gift applied only to living grand nephews or grand nieces of the decedent as including only those grand nephews and grand nieces who were living at the time of the death of the decedent. The will thus did not violate the rule against perpetuities.

Statute of Frauds

Central Investment Co. v. Prudential Insurance Co. of America, 540 F. 2d 16 (1st CCA, 1976)

The plaintiff lessor brought action against the defendant lessee to enforce an alleged oral lease on the grounds of satisfactory compliance with the statute of frauds. The lessor's president and an employee of the lessee had had discussions concerning the extension of a previous lease on the property. These discussions were embodied in a letter forwarded to the lessee. The employee of the lessee in what is known as a "top sheet" had recommended approval of a lease, but the vice president of sales of the lessee who had authority to approve the lease had not given his approval in writing. Judgment was entered for the plaintiff in the District Court after a jury verdict, but the Court of Appeals reversed on the grounds that the "top sheet" was not a note or memorandum evidencing existence of an alleged oral lease sufficient to satisfy the Rhode Island Statute of Frauds. The court held that where a plaintiff has authorized an agent only to negotiate with a third party and where the agent testified he concluded negotiations but did not purport to bind the principal and where the only writing by the agent clearly indicates a need for approval by his superior, it contravenes Rhode Island's Statute of Frauds.

Streets

Laverne L. Goss and James L. Nielsen v. Efford Johnson and George Collins Jr., 243 NW 2nd 590 (Iowa, 1976)

Action was brought to prevent representatives of an unincorporated association of homeowners in rural subdivision from barricading entrances to certain streets in the subdivision from county highway, to prevent outside traffic from using streets as shortcut to state highway. The District Court required defendants to remove barricades and restrained them from interfering with use of the streets, and defendants appealed.

The Supreme Court held that certain deeds from the subdividers with respect to two of the lots in the subdivision granted residents in the subdivision right-of-way over the streets in question, including their entrances from county road; and that the residents of the subdivision were not entitled to impede the use of the common easements, even when acting for a majority of the members of homeowners association.

Affirmed.

Company Sold

The Real Estate Title Co., Inc., in Tampa, Fla., has been purchased by American Title Insurance Co., Miami.

The Tampa firm, which has been an exclusive agent of American Title since 1951 and employs a staff of 36, becomes American Title's 21st branch office in the state.

Calendar of Meetings

September 20-22, 1978
Nebraska Land Title Association
Lincoln Hilton
Lincoln, Nebraska

September 24-27, 1978
ALTA Annual Convention
Boca Raton Hotel & Club
Boca Raton, Florida

October 11-13, 1978
Dixie Land Title Association
Holiday Inn—Callaway Gardens
Pine Mountain, Georgia

October 11-14, 1978
Florida Land Title Association
Colony Beach & Tennis Resort
Sarasota, Florida

October 13-15, 1978
Palmetto Land Title Association
Palmetto Dunes Hyatt
Hilton Head Island, South Carolina

October 19-20, 1978
Nevada Land Title Association
Hyatt Lake Tahoe
Incline Village, Nevada

October 21-25, 1978
American Bankers Association
Annual Convention
Honolulu, Hawaii

October 25-27, 1978
Land Title Association of Arizona
Skyline Country Club
Tucson, Arizona

October 29-November 2, 1978
U.S. League of Savings Associations
Annual Convention
Dallas, Texas

October 29-November 1, 1978
Mortgage Bankers Association
Annual Convention
Atlanta, Georgia

November 10-16, 1978
National Association of Realtors
Annual Convention
Honolulu, Hawaii

December 6, 1978
Louisiana Land Title Association
Royal Orleans Hotel
New Orleans, Louisiana

American
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Association

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