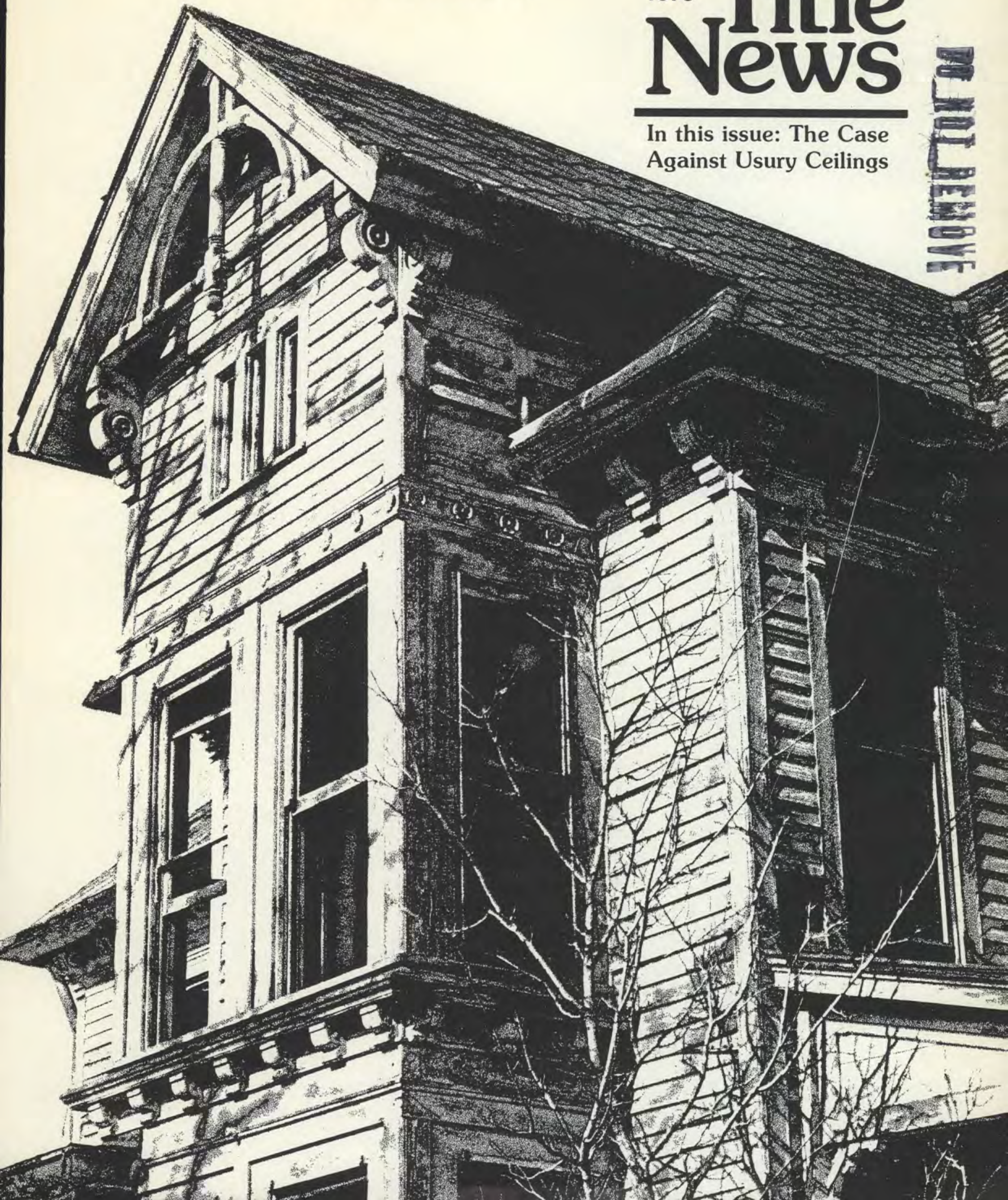
SEPT
1979

Title News

In this issue: The Case Against Usury Ceilings



a message from the President . . .

Four years. It doesn't seem possible that it has gone by so quickly. Helen and I were in our room at the Palmer House during the 1975 Convention in Chicago when John Warren visited us with an invitation to go through the "chairs." I remember John saying, among other things, that it would be an experience which I would never forget. How true that has proved to be.

Because this will be my last *Title News* message to you as president, I want to thank the officers with whom I served for their courtesy, advice and support during these four years. Special thanks to Bill McAuliffe and all the Washington staff for jobs well done and such patience with this neophyte.

We want to thank all of you who were present at the state conventions we attended—beginning with Tennessee in 1975 and ending in New York last month—who were so concerned with making "Craze" and me feel at home. Thanks for the wonderful warm hospitality on boat rides, barbeques, ice breakers, our wedding anniversary, banquets, tours and everything. Helen and I wish we could tell you each personally how very much you mean to us.

I have the following parting thoughts for you:

• I would say to the few in the Abstracters and Title Insurance Agents Section who believe we have no input on the national level—"Not True." I am afraid I talked more than I should have at ALTA committee meetings but, I was listened to and even solicited regarding the feelings of the Abstracters-Agents Section on every problem before us. The theme I saw at all these meetings is, "Let's decide what's good for the industry and then do it."

• I think there is no question that controlled business is the most serious problem facing the title business. The growth of such arrangements, particularly broker- and lender-owned title agencies, could very well destroy the title industry as we know it. If we really believe that the home buyer is better served with title evidence prepared by an independent title company, then I think it is incumbent upon all of us to see that the Association takes a firm stand against practices such as controlled business.

• ALTA is now responding to a wide variety of concerns including Indian claims, McCarran-Ferguson, RESPA, HUD, NAIC, unauthorized practice of law, controlled business and lender-pay. These Association activities require real effort and dedication by our staff, the general counsel's office and the membership of the pertinent committees. Without the dedication of these members and the willingness of their companies to allow their participation, we would be lost. Let us not become fainthearted in the years to come. We have to keep fighting the battle. I pointed out only one area, but the premise applies equally to all. Just a little loss of purpose and resolve in the unauthorized practice of law problem could result in an adverse court decision that would cause irreparable damage to the industry. As I said last year in Florida, let's be happy warriors but do not relax our vigilance for a moment.

It was an honor and a privilege to be your president. Please come to San Francisco for the Annual Convention. It will be a great program in an incomparable location. I've enjoyed this year so much, I may decide to try for a second term as president, and you wouldn't want to miss that!

Roger N. Bell

Roger N. Bell

Title News

VOLUME 58, NUMBER 9

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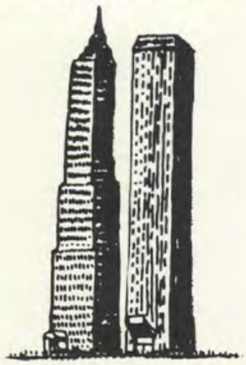
New York Law Journal
LAW JOURNAL SEMINARS-PRESS PRESENTS

REAL PROPERTY TITLE INSURANCE -1979
Its Role in Financing and Conveyancing

OCTOBER 18–19, 1979, HOLIDAY INN— FINANCIAL DISTRICT, SAN FRANCISCO
NOVEMBER 19–20, 1979, BILTMORE HOTEL, NEW YORK CITY

Title insurance is a critical aspect of every major commercial real estate transaction. Increasingly, it is becoming a requirement in the residential market. While abstract companies and Torrens registration systems continue to exist, increasingly they are being replaced by title insurance.

To adequately advise the client, the attorney must appreciate the distinctions between the various title insurers, underwritten title companies, and abstract companies so he can participate in the selection of the company. Additionally, he must be aware of the distinctions between the numerous forms of policies, reports and endorsements to select the appropriate coverage. Finally, an understanding of the insuring process and the claims procedures is necessary.



This program will provide a comprehensive review of all important aspects of title insurance from the points of view of the purchaser, the insured, and the lender. It will begin with an introduction to the industry, and will progress through the selling of title insurance, the counseling of the claimant and the insurer when problems arise and through the litigation process when necessary. The program will end with a thorough review of government regulation.

Special emphasis will be given to:

- Selection of the Insurer
- Disposing of Title Defects
- Negotiating Policy Coverages
- Claims Against a Title Insurer

PROGRAM SCHEDULE

FIRST DAY: 9:30 A.M. –5:30 P.M.
Morning Session: 9:30 A.M. –12:30 P.M.

AN INTRODUCTION TO THE TITLE INSURANCE INDUSTRY
Survey of the Methods of Guaranteeing Title
- Bar Guaranty Funds
- Abstractors and Abstract Companies
- Torrens Registration Systems

Survey of the Methods of Issuing Title Insurance
- Underwritten Title Companies
- Approved Attorneys and Agents

Title Insurance in Foreign Countries

THE BENEFITS AND PITFALLS OF STANDARD POLICY FORMS
American Land Title Association
New York Board of Title Underwriters
California Land Title Association
Texas State Board of Insurance
United States Government Policy

Afternoon Session 2:00 P.M. –5:30 P.M.

THE INSURER'S APPROACH — FROM SEARCH TO THE ISSUANCE OF INSURANCE
Title Search and Examination
Identifying Objections to Title and Means of Disposition
Negotiating Special Forms of Coverage
- Lis Pendens Problems
- Mechanics' Lien Coverage
- Personal Property Protection
- Usury Indorsements
- Zoning Protection

The Underwriting Decision — Analyzing the Risks
The Closing Letter

SPECIAL CONSIDERATIONS OF THE LENDER
How To Select the Insurer
Examining the Title Report for Problems
The Major Loan — Coinsurance and Reinsurance
Structuring the Multi-State Loan Closing
Problems of the Construction Lender
Leasehold Loan Coverage
Permanent Loan Coverage
Problems of Foreclosure

SECOND DAY: 9:30 A.M. –5:30 P.M.
Morning Session: 9:30 A.M. –12:30 P.M.

FROM COUNSELING TO SUIT — REPRESENTING THE INSURED
Developing the Facts
Negotiating the Claim with the Insurer
Preparing and Proving the Claim
Theories of Recovery

THE INSURER'S INITIAL RESPONSES TO THE CLAIM
Reservation of Rights
Declaratory Relief
Clearing the Insured's Title
Right of Subrogation

Afternoon Session: 2:00 P.M. –5:30 P.M.

DEFENDING THE INSURED WHILE AVOIDING BAD FAITH
The Mutual Duty of Cooperation
The Insurer's Duty of Defense
The Specter of Bad Faith
The Insurer's Defense
Conflicts of Interest

GOVERNMENT REGULATION OF TITLE INSURANCE
Control of Policy Provisions
Control of Pricing Provisions
Financial Requirements of the Insurer
Illegal Commissions and Rebates
Enforcement of Regulations

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By Richard W. McCarthy,
ALTA Director of Research

The Case Against Usury Ceilings

The Greek philosopher, Aristotle, argued that earning interest on loaned money was unnatural. The Italian theologian, Saint Thomas Aquinas, writing centuries later, continuously referred to "the Philosopher" (Aristotle) to buttress his harsh criticism of earning interest.

The condemnation of all interest persisted until Carolus Molinaeus published his treatise on money in 1546. For the first time, a distinction was drawn between loans advanced to consumers and those advanced to producers. Molinaeus contended that a loan made to a producer would be used to make a profit and therefore, the lender had a right to share in the profit through interest.

This distinction still exists in the United States in the form of usury laws which set a ceiling on the maximum amount of interest that a consumer may be required to pay, but set no ceiling on the interest rate charged to a business.

Not all states have usury laws, but the laws that do exist vary from state to state with respect to either the type and size of loan or the penalties for non-compliance.

In states with fixed usury ceilings where interest rates have reached the limit, a variety of negative events are taking place. These events are to the detriment of the mortgage market—to which the title insurance business is directly linked—and to the detriment of the very consumer that usury ceilings were designed to protect.

The standard arguments made in support of usury ceilings usually involve the following ideas:

- ". . . unsophisticated and unwary borrowers must be protected from 'unconscionable' transactions."[1] Kenneth Avio defines an unconscionable transaction to be one where the "borrower pays more for credit than he thinks he is paying."[2]
- Usury laws are needed to counterbalance the alleged monopoly power of lenders vis a vis single borrowers. As Douglas C. North and Roger L. Miller state, ". . . the persistence of legislation affecting the lending of money makes it clear that a widespread suspicion still lingers that the money lender possesses some unique, shady and monopolistic influence."[3]

At the time an interest ceiling is set, it is generally established at a level above the current market rate of interest. At that point, except where small consumer loans are concerned, the usury limit is completely ineffective because it is the supply and demand for various types of loans that determine the interest rate.

The real role of the interest rate—the price of borrowing money—is to allocate scarce funds between their alternative uses. Changes in either the demand for loans or the supply of loans will engender change in the interest rate charged which causes both borrowers and lenders to react to the new price.

However, when, due to inflation or changes in supply and/or demand, nominal market interest rates reach the usury limits, they no longer act as signals to lenders and borrowers. That is, once a usury ceiling is reached, interest rates no longer are useful for rationing credit.

It is at this point that a situation is created where a false signal—in that relatively easy credit (credit at an interest rate lower than the market dictates) causes borrowers—the

(continued)

demanders of credit—to wish to avail themselves of more credit than lenders are willing and capable of supplying at the ceiling interest rate. This excess demand for credit, which is defined as the difference between the demand and the supply, will have to be rationed in other, often unfair and inefficient, ways.

The inability of interest rates to rise to their equilibrium level in the locale where they have reached the usury limit will cause some lenders to shift their portfolio toward unregulated loans and/or states. This action will exacerbate the excess demand for the loans upon which interest is regulated. At the same time, borrowers, seeing the low interest rates in the regulated state, may attempt to borrow in that locale which further increases the demand.

For example, if a usury limit on mortgages exists in Maryland but not in neighboring Virginia or the District of Columbia, potential home buyers will use this information when deciding where to purchase a house. At the same time, lenders will attempt to shift funds to the District of Columbia and Virginia.

In New York, Kohn, Carlo and Kaye found that state-chartered savings and loan associations had 66.9 percent of their assets invested in one- and two-family homes in 1967. However, by the end of 1974, this percentage had declined to 47.4 percent. Coincidentally, it was during the period of 1966-1975 that the New York usury ceiling was below market rates of interest.[4]

It is also interesting to note that usury laws may have an anti-competitive result. Larger lenders who are better able to quickly shift future loans from an area where interest is at the ceiling to areas where it is not will be in a position to grow in relation to the smaller lenders who are unable to shift areas and consequently are forced to accept reduced earnings.

Ironically, areas with no usury ceilings experience an influx of potential loans thus reducing interest rates in those areas. Therefore, borrowers in the unregulated area benefit from the increased availability of funds that have left the ceiling area.

When the interest rate reaches its ceiling and therefore cannot effectively ration credit, forms of

non-interest credit-rationing will occur.

Firstly, lenders can use the loan contract to ration credit. Banks, faced with a usury ceiling, can either lower costs, reduce risk or increase the actual interest rate by varying the collateral required on the loan, reducing the length of maturity of the loan, requiring compensating balances or by reducing total loan-related costs.[5]

Interest rates, for the same type of loan, vary due to the perceived risk inherent in making the loan. Thus, a riskier loan—the degree of risk being determined by criteria such as the income of the borrower—will normally entail a higher rate of interest. When interest rates reach their legislated ceiling, the ability to charge a risk premium vanishes. Lenders can overcome this inability to "cover" the risk by requiring increased collateral on the loan—thus reducing the risk of loss by default. In the housing market this often takes the form of requiring higher down payments especially in areas where lenders feel that the value of the property may decline.

Banks also may require compensating balances to issue a loan. These balances can be used to reduce risk and/or increase the effective yield of the loan.[6] Requiring compensating balances will constrain the ability of low and middle income persons to borrow money.

A third avenue that lending institutions use to circumvent usury ceilings is to shorten the maturity of loans. This has the effect of reducing the risk on a loan. As John Ostas states, shortening the maturity ". . . protects the lenders against default costs as quick debt retirement implies rapidly falling loan balances relative to collateral property value."[7-8] However, shortening the maturity on a loan has the effect of increasing the monthly principle payments. This also can push low and middle income people out of the market.

A fourth method of non-interest rate loan contract rationing is for lenders to reduce their costs or handling charges per dollar of loan. As North and Miller point out, "It frequently costs as much to handle a small loan as a large one; therefore, the "load" factor, or handling charge, is necessarily a higher percentage of a small loan than a large loan."[9] Thus, faced with the inability to charge an interest rate differential to reflect the higher cost per loan dollar on small loans, banks will find that large loans have become more "profitable" in relation to small loans because costs per dollar are lower on the large ones. This shift toward larger loans reduces the availability of credit to the small borrower.

A final way to circumvent the usury ceiling is the assessment of points at the initiation of a loan to raise the effective yield of the loan. Since points have the effect of increasing "closing costs" on loans (especially mortgages) they increase the required initial funds and thus force otherwise worthy borrowers out of the market because they lack the initial cash.

In summation, usury ceilings may cause banks to require more collateral, more (or higher) compensating balances, shorter maturities and points, pre-payment penalties and/or higher late fees. All of the above will act against those who the usury laws have been implemented to protect—i.e. the small, lower and middle income borrower.

Non-interest rationing may also take the form of using the characteristics of the borrower to ration credit. As Robert Keheler indicates, there are four borrower characteristics that relate to the risk of default.[10] They are the borrower's income or wealth, the size and stability of the borrower, the location of the borrower and the length of the borrower-lender relationship.

As North and Miller state, with usury ceilings preventing interest rate differentials being used to cover risk, ". . . they (lenders) will attempt to eliminate the riskier loans; and since empirically the risk of default on loans is inversely related to the income of the borrower, the refusal

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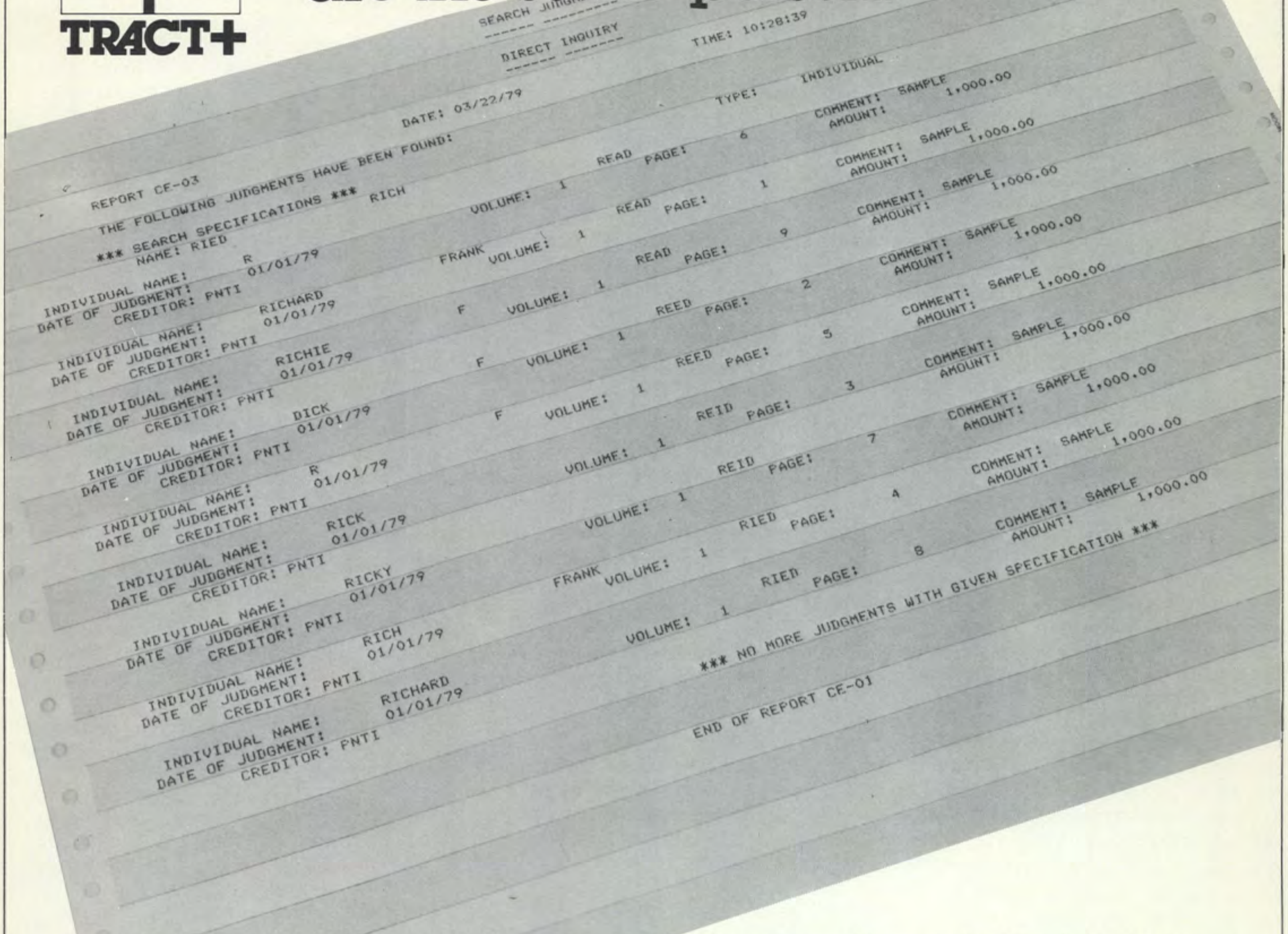

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ALTA Judiciary Committee Reports Court Decisions

Following is the second Judiciary Committee supplement to *Title News*, representing 31 cases of the 100 submitted this year for publication by ALTA Judiciary Committee Chairman Ray E. Sweat. The balance of the report will be presented in another supplement. The first 40 cases appeared in the June issue of *Title News*.

Homestead

In the matter of Estate of Endres, 345 So.2d 793 (DCA 4th 1977)

Edward Endres died March 29, 1971, leaving a widow and two grandchildren. In his will, he devised his homestead to his widow and, according to the court, did so in violation of the 1968 Florida Constitution which was the controlling law at the time of the death of Mr. Endres.

Article X, Section 4(c) of the Florida Constitution provides that the "homestead shall not be subject to devise if the owner is survived by a spouse or minor children." The court reasoned that since the homestead was not subject to devise it passed by intestate succession giving the grandchildren of the decedent simultaneously with the death of Mr. Endres a fee simple interest in the property subject to the life estate of his widow. This was in accordance with the then existing 731.27 of Florida statutes (1971). Having reached this conclusion, the 4th District Court of Appeals takes note of the unfortunate fact that their decision conflicts with the Florida Supreme Court in *In re Estate of McCartney*, 299 So2d 5 (Fla. 1974) and, notwithstanding the admonitions of *Hoffman v. Jones,* 280 So2d 431 (Fla. 1973), felt compelled by their determination and held that the vested property rights of Endres' grandchildren could not be divested.

Alderman, judge, dissents from the above opinion and states that the court ought to be governed by McCartney, *supra,* as the case is virtually indistinguishable from that sub judice.

Endres, *supra,* was appealed by writ of certiorari. This was granted by the Supreme Court several weeks ago. The Supreme Court in apparent controvention of its rules for certiorari also proceeded at that time to reverse the 4th District Court of Appeals and reinstated its opinion in the case of in *Re Estate of McCartney,* 299 So 2d 5 (Fla. 1974).

It was concluded that homestead property shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.

Harold S. Sanders and Eleanor Sanders, Plaintiffs and Respondents v. Donn E. Cassity, Trustee, Defendant and Appellant, Supreme Court of Utah, No. 15515, Oct. 13, 1978

Leoda Dunham (hereafter referred to as "Dunham") owned an undivided one-half interest in certain described real property together with two of the defendants. On May 14, 1971, the defendants, by and through their trustee (hereafter referred to as "appellant") obtained a judgment against Dunham for $11,549.43 plus costs of suit. An execution was issued Aug. 1, 1972, whereby the sheriff was directed to levy upon the property of Dunham. Sale was noticed for Sept. 13, 1972. On Sept. 11, 1972, two days prior to the sale, Dunham signed a declaration of homestead in the amount of $4,600 and asserted the value of the property to be $3,600. The document was recorded with the Summit County Recorder. No sale was held.

On Nov. 29, 1972, Dunham conveyed her interest in the property to Sanders, reserving a life estate for herself. In November, 1976, appellant again issued a writ of execution upon all non-exempt personal and real property belonging to Dunham in an attempt to satisfy the judgment. A sheriff's sale was held on Dec. 7, 1976, and appellant bid the entire amount of his judgment for the property in the belief that he was acquiring the interest previously conveyed to Sanders.

Sanders instituted a quiet title action against all the parties and the trial court granted their motion for summary judgment.

At issue was when a declaration of homestead must be made in order to protect a judgment debtor from judgment lien, execution, or forced sale and whether or not the grantee of land, on which a homestead is claimed, acquires title exempt from the claims of the grantors' creditors?

It was held that a declaration of homestead may be made at any time after judgment and before sale in order to claim the protection of the homestead statute (U.C.A. 28-1). The claimant need not have made the declaration prior to the docketing of the judgment.

With regard to the second issue, the court held that property which is beyond the reach of the creditor due to a homestead exemption in the debtor will still be protected once the property is conveyed to another.

The trial court found that the value of the conveyed one-half interest in the subject property was less than the statutory exemption, and that appellant produced no evidence of record to show the value exceeded the amount declared, therefore, the entire interest passed to Sanders, free and clear of any lien represented by appellants judgment.

Implied Warranty

Witty v. Schramm, 62 Ill. App. 3d 185 (1978)

The plaintiffs purchased a vacant lot from defendants. When plaintiffs excavated for a basement and footings, sub-surface water bubbled up and filled the excavation. The plaintiffs brought an action for damages and rescission, alleging breach of an implied warranty of habitability. The trial court granted defendants' motion to dismiss. Plaintiffs appealed.

At issue was whether or not there is an implied warranty of habitability with respect to a vacant lot.

It was held that there is not. The opinion read, "It is abundantly clear to us that there is not and should not be applicable to a vacant lot of land an implied warranty of habitability. To hold otherwise could well lead to the opening of Pandora's box and the escape of the evils contained therein. Should a vendor of a vacant lot by implication be charged with warranting that there is no subsurface water, or that there is a certain amount of subsurface water, or that the soil is of a certain texture or consistency? We believe not. What may be a defect in one instance may be a desirable feature or benefit in another."

Indians

Omaha Indian Tribe, Treaty of 1854, etc. v. Wilson, 575 F.2d 620 (8th Cir. 1978)

On March 16, 1854, the Omaha Indian Tribe entered into a treaty with the United States in which 2,900 acres of land located in an area known as Blackbird Bend, Nebraska, were reserved by the tribe. The treaty ceded to the United States all other land west of the "centre of the main channel of said Missouri River . . . ."

At that time the Omaha Indian Reservation was established on the reserved land situated on the west side of the Missouri River. By 1923 the river had moved two miles to the west of the original boundary line so that much of the reserved land was now situated on the east side of the river in Iowa.

As a result of this, the Omaha Indian Tribe, in 1975 sought equitable relief asserting its right to the 2,900 acres of land now situated in Iowa. Throughout this litigation the United States served as trustee of the reservation lands. Defendants are occupants and their predecessors, the state of Iowa and the State Conservation Commission.

After a lengthy trial, the District Court found that the plaintiffs had failed to prove the river movements were controlled by the doctrine of avulsion and that the river had changed by reason of erosion of the reservation land and accretion to Iowa riparian land. Thus, the reservation boundary had shifted with the movements of the river and title was quieted in the defendant landowners.

At issue was whether or not the boundary of the reservation remained at its original 1854 location despite the significant changes in the location of the Missouri River since that time.

It was held that under federal law, 25 U.S.C. Section 194, in disputes over the right of property in which an Indian is a party on one side, and a white person on the other, when the Indian shows previous possession or ownership there is a presumption of title in him and the white person has the burden of proof. Therefore, the trial court erred in requiring the tribe to prove the movement of the river was brought by avulsion.

The cause was remanded with directions to enter judgment quieting title in the trust lands. A writ of certiorari was filed July 28, 1978 (No. 78-160).

Mashpee Tribe v. Town of Mashpee, et al., 447 F. Supp. 940 (D. Mass. 1978)

An action was instituted to remove possession of tribal lands allegedly alienated in violation of the Indian Non-Intercourse Act of 1790. After a jury verdict in favor of the defendants, the Massachusetts Federal Court held that the answer of the jury that plaintiff group was not a tribe for purposes of the Indian Non-Intercourse Act when the suit was instituted in 1976, was fully supported by evidence of circumstances at that time; and that answers to the jury as to tribal status at other times reflected neither such lack of compliance with or understanding of instructions nor such internal constituency as to vitiate the answer as to 1976, the critical date. Hence, the plaintiff was precluded from maintaining an action to recover possession of the lands.

Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978)

Upon a finding of abuse by the husband, plaintiff-wife was granted a divorce by the Oglala Sioux Tribal Court and awarded approximately one-half of the land accumulated through the couple's joint efforts during 32 years of marriage. Both husband and wife were members of the Oglala Sioux Tribe and land accumulated by the couple was held in trust by the United States.

The wife was unable to enforce this decree in her favor because it was alleged that the tribal court lacked authority to award trust land holdings.

At issue was whether or not the tribal court has authority to award trust land holdings in divorce proceedings and whether the court forbids involuntary alienation of allotments held in trust.

An order granting partial summary judgment in favor of plaintiff was affirmed and the case was remanded. In the absence of congressional legislation, a tribe has retained authority to regulate marital relationships of its members. This power extends to making provision for the care and maintenance of the spouse and children, and absent an exempting of property from the power of the court, the court has authority to award it as part of the settlement proceedings.

The purpose of the Allotment Act is to protect the Indian from overreaching. Thus, the secretary of interior is required to approve alienations of land. However, this is not to be construed as negativing a valid disposition decree by a competent tribunal, since to do so would be inimical to tribal self-government in the regulation of the marital relationship.

Armstrong v. Maple Leaf apartments, Ltd., 436 F. Supp. 1125 (U.S.D.C., N.D. Okl. 19)

An Indian vendor of land brought action to set aside a deed on the ground that the conveyance had not complied with a statute requiring that certain conveyances of land by members of the five civilized tribes be approved by the county court.

The vendor, a one-half blood member of one of the five civilized tribes, had received more than fair market value for the land. She brought the claim eight years later, subsequent to construction of a shopping center and apartment complex on the land.

The court held that it would be a denial of due process to strictly apply a statute requiring such sales of land to be approved by the county court where the real property is located. The general validity of the act is unquestionable but it may be held unconstitutional and unenforceable when it operates to deprive one of a protected right.

The object and purpose of the acts and statutes regarding restrictions on alienation of Indian lands owned by members of the five civilized tribes is to place the Indian on equal footing with non-Indians in the sense of business acumen and to insure that transactions concerning their restricted lands are at an arm's length. This creates a rebuttable presumption that the Indian grantor was incompetent and that the consideration was unfair and that the Indian was cheated. In this case, the evidence that the Indian received fair market value for the land and acted with the advice of an attorney was sufficient to rebut the presumption.

The act requiring the transfer of land by members of the five civilized tribes to be approved by the county court did not comply with due process in that there was no reasonable means by which the purchaser could have acquired notice of knowledge of the statute since it was never codified in the U.S. Code.

Where the Indian vendor of land who sought to have the deed set aside because of failure to comply with a statute remained silent with regard to her claim while observing substantial improvements being made to the property, and where Indian vendor had not been incompetent at time of conveyance, the Indian vendor had not sought to do equity and could not obtain equitable relief in the form of cancellation of instrument as she was possessed of unclean hands.

The basic premise of the doctrine of laches is that where, by virtue of lapse in time, it would be inequitable for a party to enforce his legal right when such lapse of time has resulted in prejudice to defendant. In this case, the Indian vendor waited approximately eight years before bringing action for cancellation of the deed was guilty of laches because, in the interim, purchaser's assignees had made substantial improvements, therefore the Indian vendor should not be able to set aside the conveyance.

Insurance

Norman v. Insurance Company of North America, 239 S.E. 2d 902 (1978)

A general liability insurer wrote a letter to its insured prior to undertaking the defense in a damage action against him and sufficiently informed the insured that it was proceeding under full reservation of rights because the subject of the suit did not appear to fall within the coverage of the policy.

The court concluded that the insurer was not estopped to deny coverage on the theory that the insured was not properly advised of the meaning of the reservation of rights defense and was not informed of insurer's position under such reservation.

Joint Tenancy

Lancellotti v. Lancellotti, — R.I. —, 377A. 2d 1315 (1977)

Mr. and Mrs. Lancellotti had owned their home as joint tenants since 1931, and that was the only real estate either of them owned. In 1960, they executed a joint will. Mr. Lancellotti died in 1966, but the joint will was not probated until 1974, approximately eight years later.

In 1973, approximately seven years after the death of her husband and prior to the probating of the joint will, Mrs. Lancellotti conveyed the real estate, apparently as a gift, to one of her sons, Enrico, who was unmarried, had lived most of his life with his parents and had taken care of his mother after his father's death.

Other Lancellotti children brought action against their brother, Enrico, and their mother, seeking to enjoin the transfer, sale or mortgage of the real estate, and asking that the conveyance to Enrico be declared null and void and that the real estate be held in trust in accordance with the terms and conditions of the joint will. The trial judge granted the plaintiffs' prayers for relief, and, on appeal, the judgment entered was affirmed by a divided court.

The joint will contained contractural language and provided, so far as the disposition of real estate was concerned, as follows:

"THIRD: the survivor shall take, under this will, a life estate in all the real estate of which the one, who dies first, is seized at the time of such death: provided, however, that all the real estate now owned by the testators as joint tenants, shall upon the death of one, go to the survivor, it being the intention of the testators that the right of survivorship in such property shall take precedence over the provisions of this will.

"At the death of the survivor and the termination of said life estate the remainder shall (go) as follows per stirpes, in fee.

"FOURTH: All of our estate, personal or real, and of every nature and description, in equal shares, per stirpes, to the following children . . . ." (names nine children including Enrico)

Clause FIFTH in the will provided for sale or encumbering devised real or personal estate by the executor during the life of the life tenant under certain circumstances of need of the life tenant and provided for monthly distribution of income to the life tenant, if practicable.

The trial court found, and the appellate court agreed, that, despite the apparent clarity of Clause THIRD of the will providing for a life estate in the survivor with the exception of jointly held property, the language was ambiguous when the will is read in its entirety; that the true dispository intent of the testators was that the survivor receive a life estate in all the property with the remainder passing to the children; that Mrs. Lancellotti had no right to make the conveyance to Enrico presumably because she was bound by the mutual promises she made with her husband to retain the real estate for her life so that, upon her death, it would pass by the will to the children equally. In arriving at this conclusion supportive testimony was introduced over objection, and the court called particular attention to Clause FIFTH of the will in support of its view. The court further held that the execution of the will setting up the contractural obligation for disposition of the real estate in a manner inconsistent with the joint tenancy effectively severed the joint tenancy.

The defendants had contended that real estate held as joint tenants was by clear, unambiguous language excluded from the operation of the will; that the will operated on only their individual and separate estates; so that on Mr. Lancellotti's death Mrs. Lancellotti had a fee simple estate which she had a right to convey. A lengthy dissenting opinion, in which one other of the five justices joined, supported this position.

Reporter's note: This case is unsettling not only because of the rather startling construction given to the will, but also in pointing up uncertainties in taking a conveyance from what appears of record to be a surviving joint tenant.

Judgment Nunc Pro Tunc

In the Matter of the Estate of Frank W. Kimball, Deceased 583 P. 2d 1274, Supreme Court, State of Wyoming (1978)

Mr. Kimball died testate March 1, 1949, devising all his real property in the following manner:

"FOURTH: I give, devise and bequeath unto my wife, Anne H. Kimball, all of the real property of which I may die siezed (sic) or possessed, to be hers during the term of her natural life, and upon her death to revert to my son, Edward H. Kimball, in fee simple, it being my intention that my wife, Anne H. Kimball, receive all income from said real property during her life time.

"FIFTH: Should my son, Edward H. Kimball, predecease my wife, then all of my real property shall belong to my wife in fee simple."

The decree of distribution provided that the property of the estate be distributed in accordance with the terms of the last will and testament of the deceased, as follows but failed to pick up paragraph 5.

The son, Edward H. Kimball died Dec. 7, 1975.

At question was whether or not the court can enter a *nunc pro tunc* entry correcting the 1949 decree of distribution in 1977.

It was held that clerical errors may be corrected by virtue of an order *nunc pro tunc* at anytime, however, a judicial error would now be beyond the jurisdiction of the court to correct. This was a clerical error rather than a judicial error and the decree of distribution incorporated by reference the devise contained in the will.

Jurisdiction

Roth v. U.S. Dept. of Transp., 572 F.2d 183 (8th Circ. 1978)

Landowners affected by the acquisition of property rights for an interstate highway appeal from a denial of injunctive relief under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. §4601 et. seq.) to prevent the procurement of their property by the Missouri State Highway Commissioner.

At issue was whether or not there may be judicial review of actions under the Uniform Relocation Assistance Act.

It was held that no subject matter jurisdiction existed in district court to entertain a private cause of action for equitable or legal relief under the Act. Without subject matter jurisdiction there is no jurisdiction to hear the appeal of the denial of an injunction.

Marketable Record Title Act

City of Miami v. St. Joe Paper Co., et al. Supreme Court of Florida, July Term, 1978; Case No. 51775 364 So 2449

In 1898, Henry M. Flagler conveyed to the Florida East Coast Hotel Corp. portions of the mainland north of the Miami River and adjacent to Biscayne Bay containing 14 acres, together with the riparian rights and submerged lands appertaining thereto. By special act of the Florida Legislature on June 2, 1919, the state of Florida granted to the city of Miami all submerged lands and riparian rights to and which included the mouth of the Miami River. In 1944, St. Joe Paper Co. recorded a warranty deed from Florida East Coast Hotel Corp. which conveyed all of the lands with which we are concerned. Petitioner has attacked the constitutionality of Florida Statutes, Chapter 712, The Marketable Record Title Act. Also involved in this case is the question of whether an interloping or wild deed could constitute a root of title.

The court held that The Marketable Record Title Act is constitutional. Furthermore, the city is not an agency of the state and does not stand in the place of the state in the application of the provisions of The Marketable Record Title Act. The court also ruled that a wild or interloping deed may constitute a root of title.

Kittrell v. Clark. First District Court of Appeal, 1978, Case No. EE-419.

In 1903, appellee's grandfather executed a deed reserving certain mineral rights. The reservations disappeared from subsequent conveyances, including the 1914 deed relied on by appellant as his root of title. Appellee's grandfather died in 1919 and his Will, devising all his property to his wife, was probated. Appellant acquired title in 1957 and sued to quiet title in 1976. The court held that the probate and recording of the will in 1919 was a title transaction within the meaning of Section 712.01(3) even though there was no description, inventory or mention in the will or probate proceedings of the special property in question . . . Since the probate of the estate was a title transaction recorded subsequent to Kittrell's root of title, the mineral rights were preserved from extinguishment by Section 712.03(4).

A motion has been made to the district court to certify this as a matter of great public interest in order to perfect an appeal to the Supreme Court of Florida.

Mechanic's Liens

United of Florida, Inc. v. Illini Federal Savings & Loan Association, 341 So2d 793 (DCA 2d 1977)

The owners of Horizon-DeSoto Lakes, a large condominium complex filed their notice of commencement as required by F.S.A. §713.13. Subsequently, United installed the plumbing and on-site utilities for the project. Within one year from the filing of the notice, four of the condominium units were sold to purchasers who executed mortgages in favor of Urban Shelter Savings, Inc. More than one year after the notice of commencement was filed, Urban assigned these mortgages to Illini Federal Savings & Loan Association. Subsequent to this assignment of the mortgages, United filed its claim of lien against the project.

F.S.A. §713.13(5) which provides for the notice of commencement states: "Unless otherwise provided in the notice of commencement or a new or amended notice of commencement, any notice of commencement . . . shall not be effective as to any person acquiring title or any interest in real property from the owner or under him after one year from the date of recording the notice of commencement."

Illini Federal Savings & Loan Association contended that the notice of commencement was rendered ineffective as to them as the assignment to them occurred more than one year after the notice of commencement was recorded and any priority dispute must be determined as though there were no notice of commencement filed. To bolster their argument they refer to F.S.A. §713.07(2) which provides that in the event a notice of commencement is not filed, a mechanic's lien does not attach until it is recorded and since United recorded its claim subsequent to the assignment, Illini Federal Savings & Loan Association should acquire priority over the claim of lien filed by United.

The court disagreed with this reasoning stating that a mortgage is not an interest in real property. Consequently, the assignee of a mortgage could not thereby acquire "an interest in real property" as specified in F.S.A. §713.13(5). The court went on to explain that Florida is a lien theory state. F.S.A. §697.02 provides in part that: "A mortgage shall be held to be a specific lien on the property . . . and not a conveyance of the legal title or of the right of possession.

Similarly, the Florida Supreme Court has held that a mortgage does not create an interest in real property but is rather a chose in action creating a lien on the property e.g. *Shavers v. Duval County,* 73 So2d 684 (Fla. 1945); *Waldock v. Iba,* 153 So. 915 (Fla. 1934). Likewise, 2 Boyer, *Florida Real Estate Transactions,* §32.01 states: ". . . in Florida, the mortgage does nothing more than create a lien upon the land of the mortgagor. . . ."

The court relied on the Supreme Court decision in *Garrett v. Fernauld,* 57 So2d 671 (Fla. 1912) which stated: "An assignment of a mortgage lien is not a 'conveyance' or a transfer of any interest in land covered by the mortgage, but is only an assignment or transfer of the lien created by the mortgage."

The court reasoned that the words "interest in real property" have a precise meaning and since they are not otherwise defined in the Mechanic's Lien Act, should be given their proper and ordinary meaning and not a new and expanded definition which would include mortgages. Had the legislature intended mortgages to be considered an "interest in real property" in 713.13(5), it would have so stated either in the definition of the Mechanic's Lien Act or referred specifically to mortgages in that section.

Finally, even if one were to accept the contention that a mortgage is an interest in real property for the purposes of the Mechanic's Lien Act, an assignee of the mortgagee could not be said to stand in a better position than his assignor who in this case had a mortgage inferior to that of the claim of lien filed by United.

The conclusion is that a mortgage is not "an interest in real property" under the Mechanic's Lien Act and any mortgagee or assignee of a mortgagee will take subject to any claims of lien filed within the claim period under the Mechanic's Lien Act if a notice of commencement has been recorded prior to their mortgage and the claim of lien is not otherwise barred by limitations.

Loyola Federal Savings and Loan v. Herndon Lumber and Millwork, Inc. 241 S.E. 2d 752 (1978)

In this case, it was held that a trustee in a deed of trust was not an "owner" within the meaning of the Virginia mechanic's lien statute and the failure to name the trustee in the memorandum of mechanic's lien did not render the lien invalid.

Pic Construction Co., Inc. v. First Union National Bank of North Carolina 241 S.E. 2d 804 (1978)

This involved a contractor who, in filing a memorandum of mechanic's lien on five lots, failed to apportion in his memo the work performed or materials furnished by it on each lot.

The court held that when the contractor released one lot from the memorandum without reducing the amount claimed, then this resulted in a release of the four remaining lots.

Mineral Rights

Geothermal Kinetics, Inc., v. Union Oil Co. (1977) 75 Cal. App. 3d 56

The plaintiff brought an action to quiet title to geothermal resources existing beneath the surface. In 1951, the deed from the owners of the property to plaintiff's predecessor in interest was of "all minerals in, on or under" the property. Plaintiff obtained a mineral lease from that grantee. The surface estate was thereafter conveyed and in 1963 leased to defendants the right to "drill for, produce, extract, remove and sell steam and steam power and extractable minerals from, and utilize, process, convert and otherwise treat such steam and steam power upon, said land, and to extract any extractable minerals." Defendants rely solely on their interest in the surface estate for the right to the geothermal resources.

The appellate court affirmed the judgment in favor of the plaintiff and held that absent a showing of specific intent, a general grant of a mineral estate is intended to convey commercially valuable underground resources not necessary for the enjoyment of the surface estate and would involve resources distinct from the surface soil. The court also observed that as a general rule the grant of a reservation of all minerals includes all minerals found on the premises whether or not known to exist. In view of the foregoing, the court concluded that the rights to the geothermal resources were part of the 1951 mineral grant.

Board of Trustees of the town of Taloga v. Hadson Ohio Oil, et al., 574 P.2d 1038 (Okl. 1978)

Consolidated actions were brought to quiet title to minerals in and under streets and alleys of the town of Taloga. The Supreme Court held that the fee title to streets, sidewalks and alleys is in the abutting property owners. It further ruled that since in Taloga, the United States was a dedicator, the fee to the center of the street or alley passed to each grantee settler as successor owners and absent congressional intent to the contrary, Oklahoma statute governing titles to streets and alleys applies to a federal townsite grant.

James C. Ellis v. Arkansas Louisiana Gas Co., 450 F. Supp. 412 (U.S.D.C., Okl. 19)

A surface landowner brought action against a gas company to recover damages and injunctive relief for allegedly unauthorized use of an underground strata for storage of natural gas. It was held that the surface owners, rather than the owners of the mineral interest had the right to convey gas storage rights but that the gas company may obtain gas storage rights by prescription.

The mineral severance instrument gave to mineral interest owners all the oil, gas and other minerals that might be produced, and gave them the right of ingress and egress at all times for mining, drilling and exploration. When the instrument says nothing about injection, storage or occupation, it should not be inferred that the parties intended that the mineral interest owner have injection, storage or occupation rights on the land, therefore the surface owner has the right to convey gas storage rights.

Chicago and Northwestern Transportation Company v. Pedersen 80 Wis. 2nd 566, 259 N.W. 2nd 316 (1977)

Suit was brought by claimed owners of severed mineral rights against the Register of Deeds for Bayfield County and all other registers of deeds in the state to have section 700.30 of Wisconsin statute, which provided that severed mineral rights owners or long term lessees of mineral rights must register mineral rights within three years, and pay yearly registration fees, or else the rights revert to the surface owner, declared unconstitutional.

Plaintiffs contended that the forfeiture provisions of the statute denied them substantive due process by an unreasonable use of the police power, because their mineral rights reverted to the surface owners, if the mineral rights were not registered or taxes were not paid on them.

The court noted that the statute violated the rule that the legislature cannot take private property from one person for the private use of another. The attorney general argued that the private use here is so intimately connected with the public necessity of clearing up uncertainty over mineral right ownership that there is a quasi-public use so as to justify the legislative taking of property for that purpose.

The court questioned whether the purpose of clearing up mineral title uncertainty was so important that the reversion of mineral rights to the surface owner became a quasi-public use.

The court held that the procedures whereby a reversion would occur without a hearing or notice of a hearing being given to the severed mineral rights owners, and without compensation having been paid to them was entirely lacking in substantive and procedural due process and therefore held the enforcement provisions of the statute unconstitutional, and the entire statute invalid, since the statute was not viable without enforcement procedures.

Mortgages

Eldridge v. Burns (1978) 76 Cal. App. 3d 396

Plaintiffs, the purchasers of some 750 acres of land, sought a decree compelling the sellers-purchase money beneficiaries, the trustee under the deed of trust, and a bank holding a collateral assignment of the purchase money note, to partially reconvey to them a portion of the land under the provisions of a release clause contained in the deed of trust. The beneficiaries reacquired title to 600 of the acres at a trustee sale subject to plaintiffs' lis pendens.

The defendants sold the property to plaintiffs for the agreed sum of $2,050,000, plus an assumption of assessments for sewer and water in the approximate amount of $400,000. At close of escrow, $600,000 was paid and 150 acres were conveyed to the plaintiffs free and clear of any lien of the deed of trust. The balance of $1,450,000 was evidenced by a promissory note. It was secured by the remaining 600 acres and was payable in 10 annual installments.

The deed of trust contained provisions requiring the purchaser to pay all taxes and assessments when due; and to further pay all of the indebtedness when due. In addition, it contained a release provision allowing the property owner to release acreage at the rate of one acre per every $3,000 paid upon the promissory note and gave the purchaser the right to select said acreage so long as the buyer selected property that was "contiguous" to the 150 acres that the purchaser acquired free and clear at the close of escrow and provided, further, that the remaining land, which would be subject of the deed of trust would have the right of ingress and egress to a public highway meeting official requirements.

Plaintiffs failed to pay taxes and assessments due commencing Dec. 10, 1970, and continuing until the date of the trial. Plaintiffs, however, paid the installments of principal falling due in the years 1969, 1970, 1971, 1972 and 1973, in the aggregate sum of $725,000 together with accrued interest.

On Feb. 9, 1974, the plaintiffs made a formal demand for a reconveyance of 241 acres, representing the acreage to be released at $3,000 per acre for the principal payments made on the note. Defendant beneficiaries made a counter offer in the form of a conditional request for reconveyance to the trustee under the deed of trust requiring that the taxes and assessments be brought current and a means of access be reserved for the benefit of the remaining lands.

This was unsatisfactory to the plaintiffs and they thereafter failed to rectify a default in the payment of the installment of the principal and interest due March 15, 1974. Thereupon, the beneficiaries elected to foreclose. The plaintiffs, when they made their demand on Feb. 9, 1974, had paid in a total of $725,000, one-half of the balance of the original unpaid purchase price of $1,450,000, $290,000 prior to any default, and $435,000 after the alleged default in payment of taxes and assessments, and had also paid all the interest on the unpaid balances through March 15, 1973.

Plaintiffs contended that they were entitled to secure a release of the property, measured by the amount of principal paid in on the loan, despite the fact that prior to their request they were in default in the payment of taxes and assessments, and that immediately following the request for a release, they defaulted in the payment of the 1974 installment in principal and interest and the sellers declared the entire unpaid balance due. The sellers contended that it was necessary that there be no default at the time of the request for release because the promise to release and the promise to pay taxes, assessments and principal and interest are mutually dependent. The sellers also contended that the partial release clause was invalid due to the uncertainty of reconveying parcels that are "contiguous" to the remaining acreage.

The appellate court first concluded that release rights which have accrued before default are not lost by a subsequent default. A release clause if otherwise valid, entitles the buyer who makes a payment in accordance with its terms, to either the land, or at least to the return of the payment made if a reconveyance is refused; and that such rights are not lost by the buyer's subsequent default in payments on the purchase price. In fact, if the release clause contains no provisions specifying a particular time at which payments may be made, the subsequent default in the payment of principal will not preclude the buyer's entitlement to a partial reconveyance. Thus, in this matter, plaintiffs were entitled to a reconveyance of acreage equivalent to the payments before the default, or a return of those payments if a release was not forthcoming. Further, since the release clause did not contain a provision specifying a particular time at which payments may be made and did not expressly preclude partial reconveyances if the buyer was in default, the plaintiffs would be entitled to the entire 241 acres demanded. These rights in the plaintiffs could not be forefeited as would be the case if the defendant beneficiaries were permitted to foreclose on the 600 acres.

Plaintiffs, however, were not entitled to specific enforcement of the partial release clause due to the uncertainty surrounding the word "contiguous." But the fact that the release clause is not sufficiently certain for specific performance does not mean that the clause is invalid. On the strength of such a clause, the buyer may be entitled to restitution or damages. Accordingly, the release agreement was not invalid because of uncertainty.

However, the sellers were entitled to be relieved from specific performance of the release agreement because it would not be just or reasonable to specifically enforce it. This conclusion rested on the fact that the plaintiffs' request for release of 241 acres was unfair to the sellers since the bulk of the acreage selected for release consisted of most of the developable lands for residential homesites, release of the 241 acres would cut off access to the existing water and sewer lines on the remaining property, the property selected for release consisted of all the remaining property bordering on the sole access road thereby leaving the seller with 359 acres consisting primarily of steep slopes and canyon with very little developable area for residential homesites, and where the market value of the remaining security would be substantially less than the balance of the purchase price plus interest due on the outstanding promissory note.

In light of the foregoing, the court on appeal reversed the trial court which had held that the plaintiffs were not entitled to a release of the property while they were in default of payment of taxes and assessments on the property and had further denied any equitable relief.

The appellate court viewed the equities in the case as follows: The first charge against the property was for taxes and assessments accrued and outstanding against the entire property on Feb. 9, 1974, when the buyers made their demand, at the rates and with penalties and interest thereon ultimately found payable to the taxing authorities. The second charge against the property were accrued rights of the buyers under the release clause. These must be measured by 241 acres, or the consideration of $725,000 paid on account of the principal of the loan. From such accrued rights there must be deducted, however, the sums indicated as a first charge.

The court then concluded that if the seller elects to pay the $725,000 as so reduced by the total amount of the taxes and assessments and interest due as of Feb. 9, 1974, together with the interest on that balance on that date, the sale may stand upon payment of that sum, and title to the 600 acres may be quieted in the sellers. As an alternative, the court, unless the parties agree otherwise, may order the sale under the deed of trust to be set aside and order a resale of the property. In that event, after the payment of all accrued taxes and assessments and other necessary costs attendant to the maintenance of the property and the sale, the balance of the proceeds shall be divided in the proportion of 241/600 to the buyers and 359/600 to the sellers.

The sellers may not be forced to accept 359 acres designated by the buyers or by the court, the buyers having indicated a willingness to accept the 241 acres so determined. Nevertheless, the sellers, if they consider a sale for the benefit of both unfeasible, or are not prepared to make a restitution as suggested above, may elect to accept such a designation.

Vicente Pinero Schroeder, et al v. Federal National Mortgage Association, 574 F. 2d 1117 (1st Cir. 1978)

The Court of Appeals affirmed the decision in the Rhode Island Federal Court (432 F. Supp. 114) (reported in 1977) which held that the plaintiffs had not been deprived of their homestead right without due process of law. The appeal was dismissed on the grounds that it was filed too late.

Ellie G. Ricker and Elizabeth Ricker v. United States of America 434 F. Supp. 1251 (D. Maine 1976)

The Maine Federal Court entered final judgment in this matter which was reported in the 1977 report (417 F. Supp. 133). The court previously had said that the foreclosure was unconstitutional since there was only newspaper notice to the mortgagors. The court now entered final judgment providing that its holding should have no retrospective application and no effect with respect to any title or real estate other than that described in the final judgment.

Levine v. Stein, 560 Fed. 2d 1175 (1977)

The plaintiff brought action to have foreclosure sales declared illegal on the ground that the Virginia statutes involving foreclosure were repugnant to the 14th Amendment.

The Fourth Circuit Court of Appeals held that the Virginia statutes which provide that a deed of trust shall be construed to allow the trustee, upon default, to take possession of the property, to sell it at public auction, and to render an accounting of the sale to the commissioner of accounts did not involve sufficient state action to come under 14th Amendment scrutiny.

Mid-state Homes, Inc. v. Donnelly, 574 P.2d 1036 (Okl. 1978)

This mortgage foreclosure action arises from construction by a builder of a house on property owned by the mortgagors. A principal portion of the contract price was paid by the mortgagors by executing a non-negotiable note, secured by a real estate mortgage, to the builder. The builder assigned the note and mortgage to Mid-state Homes, Inc. (mortgagee).

The mortgagors became dissatisfied with the construction of the house and with the builder's efforts to repair various defects and stopped making monthly payments. The mortgagee brought foreclosure action and the mortgagors made the builder a party through a third party petition. The mortgagors sought recovery against the builder for actual and punitive damages and against the mortgagee for lack of consideration and fraud and cancellation of the note and release of the mortgage. The trial court found a lack of consideration for the note and mortgage resulting from faulty construction of the house and entered judgment, effectively cancelling the note and releasing the mortgage.

The issues presented to the court on appeal were that the trial court had no power to cancel the note and release the mortgage and that the evidence presented at trial did not support the decision of the trial court.

On appeal, the court held that the trial judge, sitting as a court of equity in a foreclosure action has the equitable power to see to it that the party invoking its relief shall have dealt fairly, before relief is given. The court further held that although the mortgagors lived in the house for a substantial length of time prior to the suit, they necessarily made improvements without knowing of the problems. The defects were of such a nature as to require time to develop. The court found there was such a poorly constructed house as to be a material breach of the construction contract with the consideration given for the note and mortgage failing in a material respect. After reciting the defects reflected from the record, the court specifically found that the trial court's findings were not against the clear weight of the evidence. The decision of the trial court was affirmed.

Garfinkle v. Superior Court (1978) 21 Cal. 3d 268

Petitioners purchased a family residence subject to a deed of trust in favor of the bank. The deed of trust contained a standard due-on-sale clause which provided that the bank could accelerate the balance due on the loan if the trustors sold the property without the written consent of the bank. The deed of trust also contained a power of sale. The bank offered to let the petitioners assume the loan at an increased rate of interest in return for the bank's agreement not to accelerate the balance due but the petitioners refused to assume the loan under these terms.

Thereafter, the bank notified both the trustor-grantors and the petitioners that it had accelerated the loan and that the entire balance was due and payable. The bank subsequently recorded its notice of default as required by Civil Code §2924. The trustors and the petitioners received actual notice of the bank's notice of default. The petitioners then brought a declaratory relief action challenging both the constitutionality of California's nonjudicial foreclosure procedure and the validity of the automatic enforcement of the due-on-sale clause. After the trial court sustained the bank's general demurrer without leave to amend as to the constitutional challenge petitioners filed their writ of mandate.

The Supreme Court denied the petition and held that the nonjudicial foreclosure procedure constitutes private, not state, action and was therefore exempt from the due process constraints of both the federal and state constitutions. The power of sale is not a creature of statute but originates in contract between the lender and the trustor as embodied in the deed of trust. The California statutes did not authorize or compel inclusion of the power of sale in the deed of trust or provide for such a power of sale when one has not been included by the parties, nor do the statutes compel exercise of the power of sale. The statutes merely regulate the exercise of the power of sale once the choice has been made by the lender to foreclose the deed of trust in that manner. Nor does the state encourage nonjudicial foreclosures by acknowledging the legal validity of the title transferred thereby.

Mere recognition of the legal effect of the private arrangements of the lender and the trustor is not sufficient to convert the acts of the lender or trustee into the acts of the state for 14th Amendment purposes. Nor has the state encouraged or facilitated nonjudicial foreclosure by enacting comprehensive and detailed regulations governing that process.

These statutory regulations were enacted primarily for the benefit of the trustor. For the greatest part, they limit the lenders' otherwise unrestricted exercise of the contractual power of sale upon default by the trustor. Thus it cannot realistically be claimed that the state, by acting to protect the debtor, has thereby become the partner of the creditor so that the creditor's actions are converted into the actions of the state. Nor does the nonjudicial foreclosure procedure involve significant acts of the county recorder whose duties are merely ministerial in nature. Other than these ministerial acts by the county recorder there is no participation or intervention by any state official or judicial officer prior to the trustee's sale and the vesting of title in the purchaser.

Mortgages—Due-On-Sale

Wellenkamp v. Bank of America (1978) 21 Cal. ed 943

A real property purchaser sought an injunction against automatic enforcement by the seller's lender of the due-on-sale clause contained in the seller's deed of trust and promissory note, and also sought a declaration that such automatic exercise of the clause, without any showing of impairment of security, constituted an unreasonable restraint on alienation.

After first pointing out that where a complaint for declaratory relief presents an actual controversy, the court should declare the rights of the parties, whether or not the facts alleged established that the plaintiff is entitled to a favorable declaration, and it was therefore error to sustain defendant's general demurrer the Supreme Court proceeded to test the sufficiency of the complaint by a determination of the merits and a majority held that an institutional lender cannot enforce a due-on-sale clause in the promissory note or deed of trust unless the lender can demonstrate that enforcement is reasonably necessary to prevent impairment of the security or risk of default.

Only unreasonable restraints against alienation are forbidden and in this determination the court considers not only whether the restraint was necessary to prevent impairment to the lender's security, but also the effect that enforcement of the restraint would have on alienation. A direct relationship exists between the justification for enforcement of a particular restraint on the one hand, and the quantum of restraint, the actual practical effect upon alienation which would result from enforcement, on the other. Thus, the greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that enforcement.

The court then proceeded to consider the quantum of restraint imposed by enforcement of the due-on-sale clause after transfer of the property by outright sale. The term "outright sale" was defined as including any sale by the trustor of property wherein legal title (and usually possession) is transferred. The restraint on alienation was clear in times of inflation, when money is "tight" and funds available for real estate loans are in short supply and new financing may be difficult, if not impossible to obtain. The same result may occur when interest rates and the transactional costs of obtaining new financing are high, making it economically unfeasible for the buyer to acquire a new loan. In such circumstances, if the lender is unwilling to permit assumption of the existing loan, and instead elects to enforce the due-on-sale clause, transfer of the property may be prohibited entirely because the buyer will be unable to substitute a new loan for the loan being called due, and the seller will not receive an amount from the buyer sufficient to discharge that loan, particularly when the balance due is substantial.

Against this effect on alienation must be measured the factors advanced in justification. The legitimate interests of the lender which pertain to protection against impairment to the lender's security, include preservation of the security from waste or depreciation and protection against the "moral risks" of having to resort to the security upon default by an uncreditworthy buyer. The court concluded that the transfer of legal title in an outright sale does not necessarily increase the risk to the lender that waste or default will occur. Thus, the buyer in an outright sale, in order to pay off the seller's equity, may make a large downpayment on the property, thereby creating an equity interest in the property in him which is sufficient to provide an adequate incentive not to commit waste or permit the property to depreciate. Moreover, the buyer in such an outright sale may be at least as good, if not a better credit risk than the original borrower-seller. Although circumstances may arise in which the interest of the lender may justify the enforcement of a due-on-sale clause in the event of an outright sale, the mere fact of sale is not in itself sufficient to warrant enforcement of the clause, and the restraint on alienation resulting therefrom, in the absence of a showing by the lender that such circumstances exist.

The court further rejected the lender's contention that its interest in maintaining its loan portfolio at current rates justifies the restraint imposed by exercise of a due-on-sale clause upon transfer of title in an outright sale. The clause was not legitimately designed to protect against this kind of business risk but rather to protect against impairment to the lender's security that is shown to result from a transfer of title. Economic risks such as those caused by an inflationary economy are among the general risks inherent in every lending transaction.

Mortgage—Foreclosure

Good Fund, Ltd., 1972 v. Church, 579 P2d 1174, _____Colo. App. _____, (1978)

Plaintiffs appeal from order dismissing complaint seeking injunction prohibiting defendants from pursuing foreclosure on deed of trust. Affirmed.

Plaintiffs purchased a parcel of real estate from defendant, giving back a non-recourse promissory note secured by a deed of trust to the public trustee naming defendant as beneficiary.

Upon learning that the property was contaminated by radioactive particles and was unsuitable for intended development purposes, plaintiff defaulted. Church commenced foreclosure proceedings. Plaintiff filed suit in Federal District Court for recision.

Following a hearing and authorization pursuant to Rule 120, C.R.C.P., a sale was held by the public trustee at which Church, as holder of the note and beneficiary of the deed of trust, tendered the note's outstanding balance as the successful bid.

Prior to the expiration of the redemption period following the sale, plaintiff sought an injunction prohibiting defendant from pursuing the foreclosure. Defendant's motion to dismiss was granted, the court ruling, *inter alia,* that the defendant's production of the non-recourse promissory note instead of cash did not render the sale defective.

At issue was whether the statutory requirement that payment at a foreclosure sale be made in cash is satisfied by the tender of the outstanding balance due on the note secured by the deed of trust.

The holding followed the maxim that the law does not require the performance of idle ceremonies and that it is not necessary for the holder of a note and beneficiary of the securing deed of trust who bids at a foreclosure sale to tender cash, as the cash would be immediately returned upon surrender of the note and deed of trust. The entry of a credit against the debt upon surrender of the note, for the amount of the bid, is deemed the equivalent of cash and satisfies the requirements of the statute that payment be made in cash or certified or cashiers check.

Further, plaintiff's argument that the note was not the equivalent of cash because the property securing it was of only nominal value due to the contamination was rejected. The court stated that the trustee, in conducting the sale, is under no duty to ascertain that the underlying security is of more than nominal value.

Mortgages—Right of Redemption

Emerick v. Greene, 575 P2d 441, _____ Colo. App. _____ (1978)

Defendants appeal grant of summary judgment for plaintiffs in quiet title action. Affirmed.

Plaintiff, Emerick, was the purchaser of certain real property at a sale held by the Internal Revenue Service for taxes owed by the owner. After Emerick received a "Certificate of Sale of Seized Property," but before a deed was issued, a foreclosure proceeding was commenced upon a deed of trust securing the property, which was of record prior to the tax liens. Emerick was named and served as a defendant.

While the foreclosure action was pending, Emerick received a quit claim deed to the property from the IRS. Thereafter a decree of foreclosure was entered in the action on the deed of trust, and sale by the sheriff ordered and held. Defendant Greene received a Certificate of Purchase.

No redemption was made by any of the defendants in the foreclosure action within the statutory period. At the end of that period, Greene became entitled to a Sheriff's Deed. However, no deed was issued within nine months as required by Sec. 38-39-111, C.R.S. 1973, although one issued after this period had expired. No action was brought to foreclose the lien created by the Certificate of Purchase within the period allowed by statute.

Summary judgment was entered for Emerick in his action to quiet title in his name, from which defendant Foster, successor in interest to Greene, appeals.

ISSUE:

At issue was determination of the relative rights of the holder of a Certificate of Purchase upon a sale or foreclosure of a deed of trust, where no deed was issued or action to foreclose the lien created by the certificate brought within the statutory periods, and the successor in interest of the mortgagor of the property, through a tax lien foreclosure sale.

It was held that the issuance of a Certificate of Purchase at a foreclosure sale is not the equivalent of a conveyance of title. Upon the expiration of the redemption period, the holder of the certiticate must either obtain a deed within nine months, or initiate a separate foreclosure action within 15 months. If this is not done, a conclusive statutory presumption arises that the lien has been paid and is discharged.

No action having been taken to divest the grantor of the deed of trust, or mortgagor, of his interest, title remains vested in him, or those entitled under him. A sheriff's deed issued beyond the statutory period conveys no interest so title remains vested in Emerick, as the successor in interest to the mortgagor pursuant to his purchase of the property upon the foreclosure of the federal tax liens.

Mortgages—Subrogation

Rock River Lumber Corp. v. Universal Mortgage Corp., 82 Wis. 2d 235, 262 N.W. 2d 114 (Wis. 1978)

Under the general term "conventional subrogation," a lender will be granted subrogation where money is advanced in reliance on a justifiable expectation that he will have security equivalent to that which his advances have discharged, provided no innocent third parties will suffer. Equity will treat such a transaction as a tantamount to an assignment of the original security. This principle is applied in consolidated actions for foreclosure of a real estate mortgage and of construction liens on the property.

To secure a loan used to finance the construction of buildings on lots it had purchased, the owner mortgaged the property to a savings and loan corporation. That mortgage was promptly recorded prior to the filing of any lien claims and thus had priority under Sec. 215.21, Stats. After the visible commencement in place of the work of improvement, the owner refinanced its debt by obtaining a loan from the mortgagee plaintiff, which was similarly secured. The proceeds of this loan were used to pay the debt of the savings and loan corporation in full and that mortgage was satisfied. Plaintiff's mortgage was recorded some three months later.

Because the visible commencement of work of improvement preceded the recording of plaintiff's mortgage, various unpaid subcontracts and materialmen claimed they were entitled to priority over it. While the trial court determined the lien claimants had valid liens, it held plaintiff was entitled to priority because it was subrogated to the priority of the earlier mortgage. The Supreme Court affirms.

Although "conventional subrogation" has been said to rest on contract, it is a doctrine of equity, and is applied or denied on equitable principles, the object being to do substantial justice independent of form or contract relation between the parties. Hence, subrogation arises, not as a direct legal consequence of the contract of the parties, but rather as a matter of doing justice after a balancing of the equities—the agreement being merely a consideration, albeit important in determining whether subrogation is appropriate. Thus, in some circumstances despite a definite agreement for subrogation, it will be denied where it would lead to an uncontemplated and inequitable result. This situation did not obtain here. The trial court based, based on credible evidence, had found plaintiff's mortgage was executed in substitution for the existing mortgage; the loan from plaintiff to the owner was executed under a definite agreement for security in the form of a first mortgage, coupled with the owner's representations that the proceeds of the new loan would be applied to satisfy the earlier one, as they were. This was confirmed by explicit testimony to that effect and by a covenant in plaintiff's mortgage, that the mortgagor held title free and clear of all encumbrances.

Plaintiff's omission promptly to record its mortgage did not result in forfeiting its right to subrogation. As the evidence disclosed, the earlier mortgage had been on record prior to the filing of lien claims and was therefore entitled to priority under the statute, and all but one lien claimant first provided labor and materials while the earlier mortgage was in existence.

Mortgages and Liens

Girard Acceptance Corp. v. Wallace, 76 N.J. 434, 388 A. 2d 582 (1978)

The defendants became indebted to plaintiff's assignor for purchase of an automobile secured by installment sale and security agreement and collaterally secured by real estate mortgage.

At issue was whether or not the mortage is good under the Secondary Mortgage Loan Act?

It was held that a real property mortgage may not be taken as additional security under the Retail Installment Sales Act. A mortgage on real estate given by the retail installment buyer in connection with the financing of an automobile is null and void and will be ordered discharged of record.

of loans to the lowest income groups will offer the easiest course. . . . The predictable outcome, therefore, is that loans will be made only to the higher income groups and the would-be borrower whose income is low will face a closed door."[11] Thus, usury laws, by removing the ability to charge higher interest for a higher perceived risk, reduce the ability of lower income persons to borrow.

Furthermore, banks faced with usury ceilings will tend to lend only to large, well established businesses and to individuals who borrow large amounts because large firms are considered less of a risk than smaller firms. As Greer states, ". . . small loan borrowers are typically among the highest risk . . . while those who borrow larger amounts are typically among the lower risk."[12]

This has implications for industrial market structure in that large, well established businesses are not constrained from borrowing during usury law-related credit crunches. Therefore, when interest rates are at their ceiling, only large corporations are able to borrow, thus they can innovate and grow while small firms which cannot borrow cannot innovate and expand. It can be concluded, therefore, that usury laws may contribute to increasing industrial concentration as smaller firms are forced out of their industry because they cannot innovate to remain competitive. Anderson and Ostas point out that bank lending to large businesses generally increases greatly as a proportion of total business during a tight money period.[13]

Banks can reduce information costs and thus increase profitability with a constant interest rate by lending to local persons or establishments with whom it has enjoyed a long relationship. Thus, new ventures and first time borrowers will have trouble receiving loans during usury ceiling-related credit crunches. As Blitz and Long state, "It is the less risky borrowers with some collateral—the landed gentry, land speculators, the middle size business firms and so forth—who are most likely to derive the greatest benefits from usury control."[14]

Usury laws also affect the residential construction industry. Robins investigated the relationship between "unduly low" usury ceilings and the level of single family home building for 77 standard metropolitan statistical areas (SMSAs) in 1970 and concluded that "in SMSAs where statutory rates lie below market rates, the level of single family homebuilding is, on average, 28 percent lower than SMSAs where statutory rates exceed market rates. In addition, the results indicate that the lower the statutory rate is, relative to market rates, the more restrictive will be the influence of the usury ceiling. Specifically, if found that in areas where the ceiling acts to restrict homebuilding, a one percentage point increase in the statutory rate will lead to about a 16 percent increase in single family housing starts."[15]

Ostas found that for each 100 basis points difference between market rates and usury ceilings, there was between an 11 percent and 19 percent decline in housing starts[16] while France found that for each 100 basis point difference between market rates and usury ceilings there was a 23 percent decline in lending activity on new and existing single family homes.[17]

Therefore, usury limits not only reduce the availability of credit, they also affect the level of housing starts. Thus these limits cause an excess demand for housing which is eventually reduced by housing prices increasing to a level where demand and supply are equilibriated. Again, it is the low and middle income groups who suffer in that not only are they unable to borrow to buy a house but now the prices of the houses force them out of the market.

In addition, if a bank uses points to increase its effective yield, the future seller will add these costs into the home's selling price thus increasing required down payments and the points on the inflated price—these again will push the lower income persons out of the housing market.

In conclusion, lower income, first time borrowers will be non-price rationed out of the market because lenders, faced with interest rate ceilings, will attempt to cut risks and/or costs while housing prices will simultaneously rise due to decreased building activity. This, together with the adding in of points paid in the past, will make home buying possible only for persons in upper income groups. Usury ceilings do not achieve their desired results. Presently, some groups and individuals advocate floating interest ceilings. In as much as some of the floating ceilings are tied to non-market determined indicators such as the discount rate and the federal funds rate, these floating rates, when they become effective, will do the same harm as fixed rates. If they do not become effective, they are merely an exercise in redundant regulation. Therefore, there is no rationale for floating usury ceilings.

FOOTNOTES

[1]Kenneth L. Avio, "An Economic Rationale for Statuatory Interest Rate Ceilings," *Quarterly Review of Economics and Business,* XIII, No. 3 (Autumn 1978), p. 62.

[2]It appears that the Truth in Lending Legislation has greatly reduced the applicability of this argument.

[3]Douglas C. North and Roger LeRoy Miller, "The Economics of Usury Loans," *The Economics of Public Issues,* 4th ed., (New York: Harper & Row, 1978), p. 57.

[4]Ernest Kohn, Corman J. Carlo and Bernard Kaye, "The Impact of New York's Usury Ceiling on Local Mortgage Lending Activity," New York State Banking Department, January 1976.

[5]See Robert E. Keleher, "State Usury Loans: A Survey and Application To the Tennessee Experience," January 1978 (unpublished), for an excellent discussion on contract-related forms of rationing.

[6]See Joseph E. Burns, "Compensating Balance Requirements Integral to Bank Lending," *Business Review,* Federal Reserve Bank of Dallas, February 1972, for a discussion of this point.

[7]James Ostas, "Effects of Usury Ceilings in the Mortgage Market," *Journal of Finance,* XXXI, No. 3 (June 1976), p. 823.

[8]As Keheler, op. cit., correctly states, the argument depends on the yield income being upward sloping which may not be the case when interest rates are high.

[9]North and Miller, op. cit., p. 58.

[10]Keleher, op. cit., pp. 25-35.

[11]North and Miller, op. cit., p. 59.

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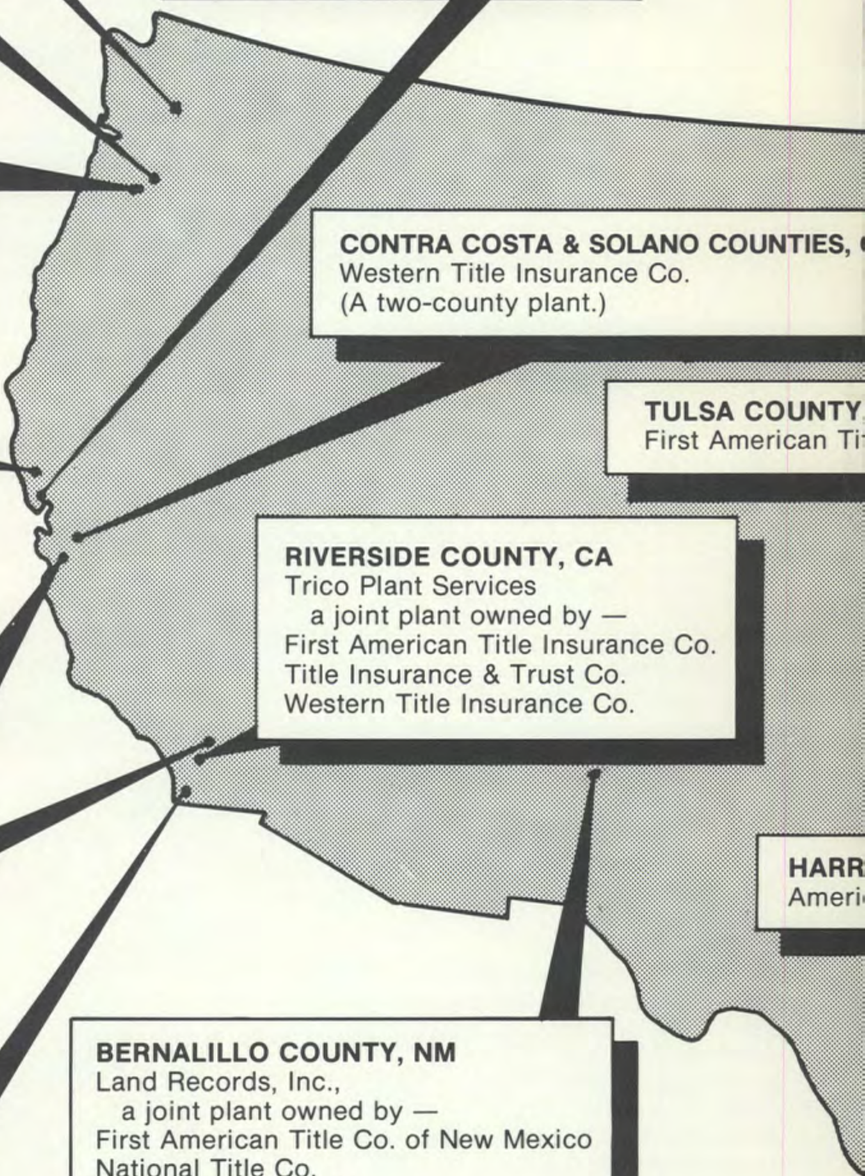

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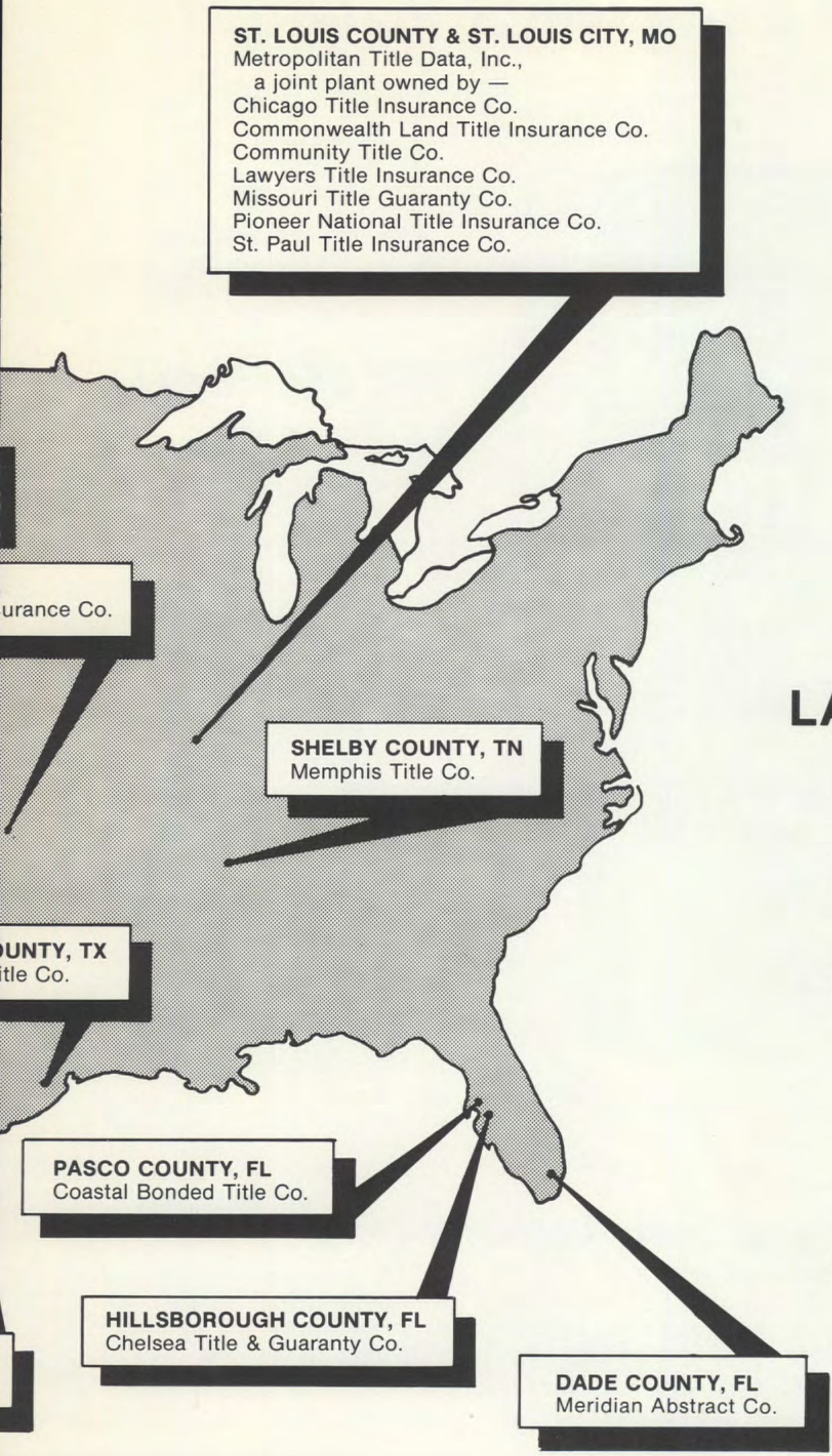

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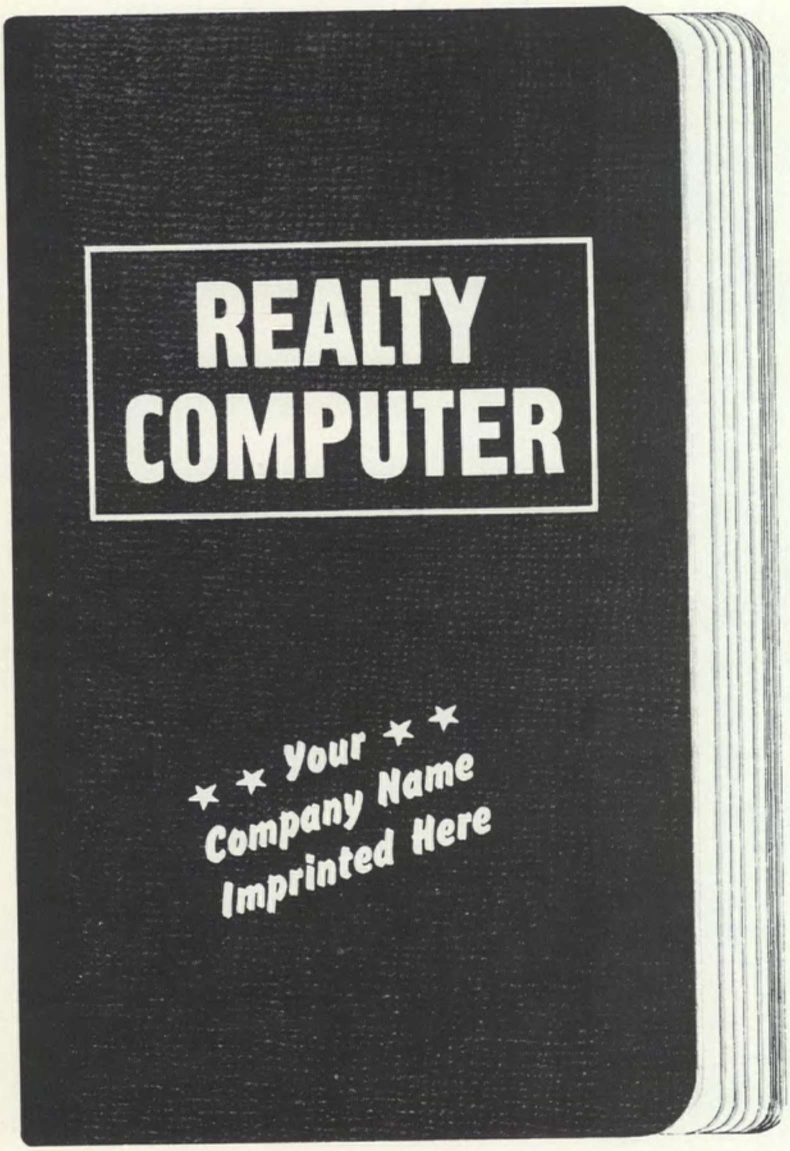

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Commonwealth Launches New Campaign

Commonwealth Land Title Insurance Co. based a recently launched business development campaign on the premise that a large customer group—other real estate professionals—faces the same problem of consumer misunderstanding as does the title insurance industry.

Entitled "See the Pros," this unique campaign informs potential homebuyers about the role of real estate professionals such as the broker, the lawyer and mortgage lender. It grew from the belief that misconceptions exist about the nature of real estate transactions and consequently about the roles of the experts involved.

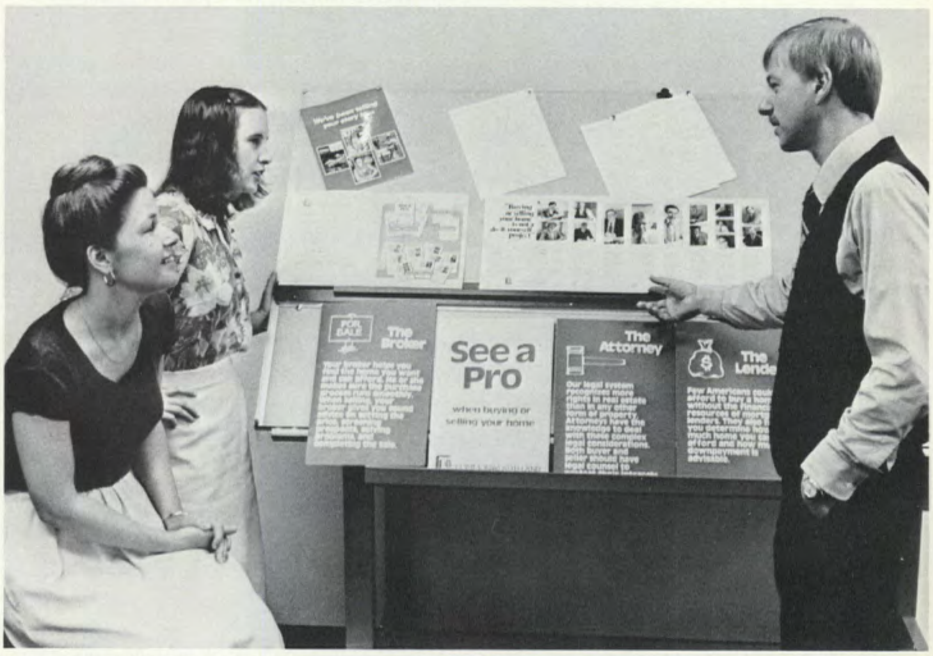
"See the Pros" messages reach potential homebuyers through advertisements in major national magazines such as *Time* and *Newsweek,* through board displays in Commonwealth offices, press releases and articles distributed to local and regional publications throughout the nation.

Reference to the company name in the advertisements and board displays appears only once and then at the bottom of the material. The messages obviously focus on describing and selling the services of other real estate professionals while pointing out the gravity and complexity of real estate transactions, suggesting to consumers the importance of consulting these experts.

Just as essential as the informational segment of the campaign is mailing of a brochure and business reply card to the customer group. The brochure details the informational campaign under the headline, "We've Been Telling Your Story in *U.S. News & World Report, Sports Illustrated, Time* and *Newsweek"* and it showcases full-page advertisements printed in those magazines as well as other aspects of the campaign. The recipients may use the business reply cards to request that a company sales representative call on them.

Phrases in advertisements and articles appeal to the common sense and experience of the consumer. For example, one such phrase notes, "The home, which is normally a family's largest single investment is also almost always its best protected investment, thanks to the services provided by the family lawyer."

(continued)



Commonwealth Title Advertising Manager Robert Schramm reviews the company's "See the Pros" campaign with Commonwealth Advertising Assistants Barbara Welch (seated) and Joyce Burns.

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For as little as under $410.00 per month, the system pictured above can be at work in <u>your</u> office, making you ponder how easy and how perfected posting and searching can really be! And the performance specifications are amazing. . . .

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Photos courtesy of DIGITAL EQUIPMENT

Commonwealth—*(concluded)*

But, at the same time, the ads compare the knowledge of the pro with what homebuyers might assume they can do themselves: "With real estate values having risen so greatly over the past decade, there is a temptation for a family to think about saving considerable amounts in commission money by selling its own home."

Such acknowledgment of the problems that confront the consumer are followed by examples of the broker's expertise: "He knows what kinds of information prospective homebuyers want—information about taxes, financing and sources of mortgage money . . . market prices. He can give them that data with authority."

Before distribution of the consumer-directed pieces, Commonwealth sent press releases announcing the new campaign to the press nationwide, and thoroughly acquainted company sales representatives with the particulars of the program.

According to Commonwealth Advertising Manager Robert Schramm, the strategy is geared to the local markets. Since it is primarily the service of the local company representative that attracts or fails to attract customers, business development and generation of sales are best accomplished at the local level, Schramm said. "Therefore, it is important that any sales campaign support the efforts of the local company representative. Because of this, the press releases, articles, brochures and business reply cards are distributed by, or in the name of, the local managers."

Newspapers and magazines which have picked up the press releases and articles quote the local company representative. The customer reply cards are returned to local managers' offices.

Meanwhile, the full page ads in major magazines reinforce and strengthen all the local programs, Schramm said.

Although still in its initial phase, the outlook for the campaign's effectiveness is good, Schramm reported. "The program is already in operation in more than 50 branch offices nationwide and initial press coverage has been good. More than 20,000 brochures have been distributed and reply cards are being returned, tallied and followed up. The expectation is that this momentum will continue into the future, long-term phases of the campaign," he said.

Actual measurement of the program's effectiveness is planned. Besides being a means of generating new business, the reply cards are one tool the company will use to measure the success of the campaign.

Another means is tallying the amount of press coverage through the use of a clip service. This will enable them to estimate the number of people reached. Still another measure will be whether or not business from current customers increases.

At present, this latter measure has been judged by what Schramm calls an "eyeball analysis of sales trends and gut feeling of the local managers." But, he added, more sophisticated trend analysis is scheduled in future phases of the program.

With respect to the program's cost, Schramm said that considering the numerous processes involved in the campaign and the considerable participation by company representatives, the program is "surprisingly cost effective."

Colorado Meets, Elects Officers

The Land Title Association of Colorado enjoyed its most well attended annual convention in recent years this summer, with 143 members registered.

Elected president of LTAC at the convention was Emil V. Rackay Jr. from Chicago Title Insurance Co., Denver. Other elected officers include George A. Fix of Yuma County Abstract Co., Wray, as first vice president and Jack W. Brockman of Security Title Guaranty Co., Lakewood, as second vice president. The new secretary-treasurer of LTAC is Nicholas J. Copeland from Montrose County Abstract Co., Montrose.

Speakers at the meeting included Roger N. Bell, ALTA president, who addressed the industry's image and RESPA. Colorado Commissioner of Insurance, J. Richard Barnes, spoke on regulation of the title industry. Also, A Title Industry Political Action Committee (TIPAC) slide presentation was shown, accompanied with comments from the TIPAC Advisory Trustee, Mel Kensinger.

Names in the News...

Gerald Lawhun *Janet Alpert*

Lawyers Title Insurance Corp., announced the election of two new officers, several new state and branch managers and an assistant counsel.

Gerald L. Lawhun was elected senior vice president—operations and transferred from Los Angeles to the company's headquarters in Richmond, Va. With Lawyers Title since 1956, Lawhun most recently served as vice president and California state manager. He is a past president of the California Land Title Association and was a member of its board of governors.

Jane A. Alpert was elected vice president and director—national divisions. Alpert, who works out of the Richmond, Va., headquarters office, succeeds H. Drewry Kerr Jr., retired this July. Alpert joined Lawyers Title in 1969. She is an associate member of the National Association of Corporate Real Estate Executives.

John F. Shelley Jr. was elected Pennsylvania state manager. Shelley has worked 32 years in the title insurance industry in his native Pittsburgh. He is the president of the Pennsylvania Land Title Association, a director and trustee of the Pennsylvania Land Institute and treasurer of the Greater Pittsburgh Board of Realtors. He is also a past president of the Mortgage Bankers Association of Pittsburgh.

Succeeding Shelley as Pittsburgh branch manager is **Richard E. Moran.** Moran has served as an analyst in Lawyers Title Improved Methods Program, an innovation to expand skills within the company.

Elected branch manager of Lawyers Title Columbus, Ohio office is **Alan J. Doak.** Doak joined the company in 1973.

In Roswell, N.M., the newly elected branch manager is **Randall Cox** who just recently joined Lawyers Title. Previously, he was owner of Curry Clovis County Abstract Co., Clovis, N.M.

William F. Pearce Jr. was elected assistant branch counsel for Lawyers Title in Atlanta, Ga. Pearce joined Lawyers Title in 1978.

Columbian National Title Insurance Co., Topeka, Kan., announced that **Robert S. Findlay Jr.** was appointed senior vice president—operations, a newly created position at Columbian Title. Findlay is a 33-year veteran of the title insurance industry.

John Shelley Jr. *Robert Findlay Jr.*

Two promotions were announced at Industrial Valley Title Insurance Co. (IVT), Philadelphia, Pa. **Joseph T. Mulqueeney** was promoted to vice president of the company's national division, and **Richard A. Angelo** was promoted to assistant vice president and title officer of the national division.

As vice president, Mulqueeney is responsible for the solicitation and servicing of IVT agents on a national level. He has been with the company since 1968.

Angelo, in his position as assistant vice president and title officer, is responsible for servicing agents and handling legal questions and claims for the national division of IVT agency operations.

IVT's national division is located in Philadelphia with the company's headquarters.

Richard Angelo *Joseph Mulqueeney*

Henry P. Ritz was promoted to an assistant vice president of Transamerica Title Insurance Co. With this appointment, he has management control of the company's Oregon operations. Ritz has been with Transamerica since 1961, most recently serving as a regional manager in northern California.

Clarence R. Castel was named manager of the Northeast region for American Title Insurance Co. The Miami, Fla., firm's northeast region operations cover the states of New York, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Castel, also a vice president of American Title, continues to work out of the company's New York city office. Along with his extensive experience in the title insurance industry, Castel has experience in commercial banking.

Henry Ritz *Clarence Castel*

Commonwealth Land Title Insurance Co. announced the appointment of two officers to its Doylestown, Pa., branch and one to its New Brunswick, N.J., branch. **Mendelsohn H. Price** was appointed assistant vice president and title plant manager for the Doylestown office. Price has 17 years experience in the title industry. Also at Doylestown, **Alan Frick** was appointed a title officer for the company. **Thomas Mulligan** was appointed a title officer and manager of Commonwealth's New Brunswick office.

Names in the News *(concluded)*

At the Boston office of Pioneer Title Insurance Co. (PNTI), **John R. Leggat** was appointed National Title Service account manager. In his new position, Leggat is responsible for sales and service of all national title accounts in the states of Maine, Massachusetts, New Hampshire and Vermont. He comes to PNTI with six years of title insurance experience.

Stewart Title Guaranty Co., Houston, Texas, announced the recent election of eight senior vice presidents and four vice presidents. The eight newly elected senior vice presidents are **Glenn H. Clements,** manager of the Houston-Galveston district and chairman of the board of Stewart Title of Lubbock; **M. Max Crisp,** secretary-treasurer for Stewart Information Services Corp., Stewart Title Guaranty Co. and Stewart Title; **Victor W. Gillett Jr.,** national marketing director ; **James R. Kletke,** manager of Texas agency operations for the company; **Edward Macleod,** director of Stewart Title's National Commercial Division in Dallas; **Patrick O'Neill,** manager of the company's Amarillo district and its Amarillo office; **William H. Perry Jr.,** president of Jagoe Abstract Company in Denton, Texas, a Stewart Title subsidiary, and **W. Michael Wigley,** manager of Dallas County operations and vice chairman of the board of directors, Stewart Title of Lubbock.

The four newly elected vice presidents of Stewart Title are **Robert Burns,** escrow coordinator for national marketing; **Riley C. Floyd,** branch office coordinator for the company's Houston office; **Cyrus Richards III,** president of Stewart Title of Rockport, Texas; and **Stephen O. Robison,** division manager for the Houston office.

At Title Insurance Co., Mobile, Ala., **Gail Walker Webster** was elected to assistant vice president. Webster has been with the Mobile firm since 1968. As assistant vice president, she will assist the customer relations program and supervise the production area.

Meetings for Title Professionals

ALTA members who attend the 1979 ALTA Annual Convention in San Francisco Oct. 14-17 may want to extend their stay in the Golden Gate City by several days and catch the New York Law Journal Seminars-Press meeting on title insurance Oct. 18-19. The two-day seminar, entitled "Real Property Title Insurance 1979, Its Role in Financing and Conveyancing," will be held at the Holiday Inn-Financial District, 750 Kearny St.

The program will present a comprehensive review of important aspects of title insurance from the points of view of the purchaser, the insured and the lender.

The faculty, which includes title people and lawyers, will progress through the selling of title insurance, the counseling of the claimant and the insurer when problems arise and through litigation. The program will conclude with a thorough review of government regulation.

For those who find an east coast meeting more convenient to attend, the seminar will be presented again Nov. 19-20 at the Biltmore Hotel in New York City.

Conference registration fees of $225 cover the cost of course materials. Further information may be obtained by contacting the Law Journal Seminars-Press at 212-964-9400.

Another October seminar, this one sponsored by the American Bar Association at the Hyatt Regency Hotel in Dearborn, Mich., is entitled "Title Insurance—What *Every* Lawyer Should Know." It is scheduled for Oct. 19.

Although registration is limited to members of the ABA Real Property, Probate and Trust Law Section, any ABA member can join the section at the door of the seminar room.

The program will be chaired by James M. Pedowitz of Marshall, Bratter, Greene, Allison and Tucker of New York City. The faculty includes other lawyers as well as title professionals.

Industrial Valley Title Insurance Co. (IVT), Philadelphia, Pa., plans a seminar Oct. 25 which is aimed at the real estate broker.

Gene Dabe, general manager, consulting division, The Fortune Companies, will discuss real estate sales management in the 80's.

To attend IVT's seventh annual brokers seminar in Philadelphia, contact Richard F. Bennett at IVT (215-561-3200) for registration information.

Meeting Post Mortems

The Maryland State Bar Association's Real Property, Planning and Zoning Section presented at its convention this summer a panel discussion entitled "Title Insurance: Everything You Should Have Known at Your Last Settlement, But Were Afraid to Ask."

The panel featured representatives from two title companies and three lawyers. It was designed to educate settlement attorneys on title insurance and its purpose.

The panelists gave instructions on how an attorney conducting a settlement should obtain title insurance and explained what title insurance does and does not do.

A back-to-basics seminar in LeFlore County, Okla., this summer drew an attendance of 30 persons ranging from abstracters to a county clerk and representatives from an Arkansas firm specializing in searching oil titles.

The day-long program was designed to provoke questions from the attendees and was organized by First American Title Insurance Co. Regional Vice President Nathan Jarnigan of Oklahoma City and Frank James of Poteau Abstract Co., LeFlore County. Jarnigan moderated the program which featured Bob Luttrull of Pioneer Abstract and Title Co., Muskogee, and attorney Bill Kellough of Tulsa.

Luttrull used his office's training program which covers steps beginning with order for work, writing the order, running the chain, making the instruments and closing the abstract. Kellough answered legal questions.

Usury—*(concluded)*

[12]D. Greer, "Rate Ceilings, Market Structure and the Supply of Finance Company Personal Loans," *Journal of Finance,* December 1974, p. 1380.

[12]Paul Anderson and James Ostas, "Private Credit Rationing," *New England Economic Review,* Federal Reserve Bank of Boston, May/June 1977, p. 33.

[14]Rudolph Blitz and Millard F. Long, "The Economics of Usury Regulation," *Journal of Political Economy,* December 1965, p. 613.

[15]Philip K. Robbins, "The Effects of Usury Ceilings on Homebuilding," *Journal of Finance,* December 1974, p. 229.

[16]Ostas, op. cit., p. 831.

[17]Charles F. France, "Pennsylvania's Floating Usury Ceiling: An Economic Evaluation," Working Paper No. 1, Federal Home Loan Bank Board of Pittsburgh, August 1975.

Industry Report Proves Popular

The ALTA Research Committee's 1979 special report on the title insurance industry is now in its second printing.

The six-page report with graphs and charts includes exposes on the ALTA financial and statistical plans, profits and claims data.

Industry members have found the report useful in education of state regulators and in the comparison of data from their own companies with industry data.

Copies are available at a cost of $2 each, post paid, by contacting the ALTA Research Department.

Three Form NYC Title Company

Three title professionals, George Metzger, Jud Klein and Philip O'Hara, have joined to establish LTIC Assoc. Inc., in New York City. The new firm, with offices at 41 E. 42nd St., provides full title insurance services and issues title insurance policies of Lawyers Title Insurance Corp., Richmond, Va.

Metzger and Klein were formerly with Title Guarantee Co. in New York City, Metzger as a vice president and Klein as senior vice president and assistant chief counsel. O'Hara owns and operates title insurance agencies in Brooklyn and Garden City.

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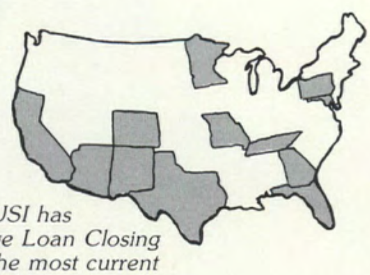

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October 6-10, 1979
American Bankers Association
New Orleans, Louisiana

October 7-9, 1979
Nevada Land Title Association
Stockmen's Motor Hotel
Elko, Nevada

October 14-17, 1979
ALTA Annual Convention
Hyatt Regency San Francisco
San Francisco, California

Calendar of Meetings

October 28-November 2, 1979
U.S. League of Savings Associations
Chicago, Illinois

November 15-17, 1979
Florida Land Title Association
Bahia Mar Hotel & Yachting Club
Ft. Lauderdale, Florida

December 5, 1979
Louisiana Land Title Association
Royal Orleans
New Orleans, Louisiana

December 6-7, 1979
National Title Underwriters Association
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