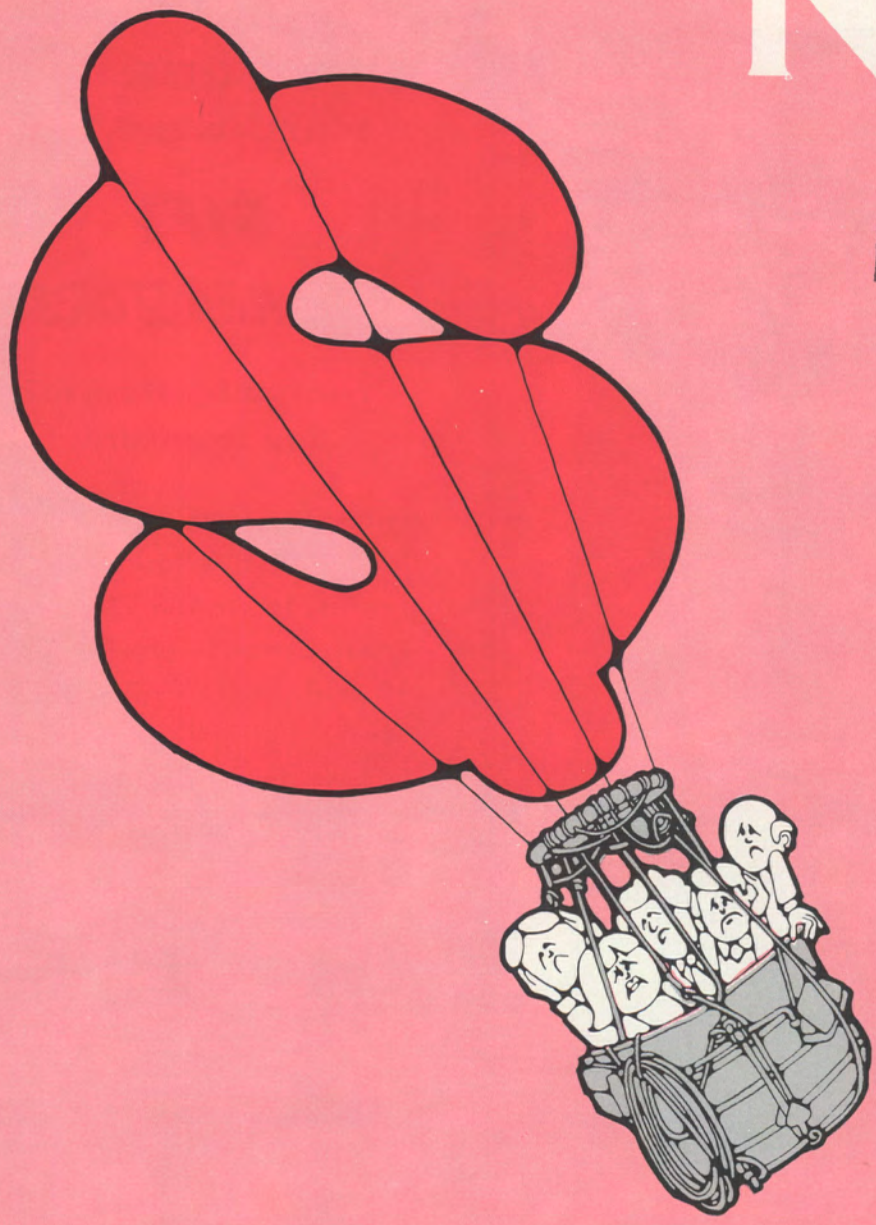
September 1981

TITLE NEWS



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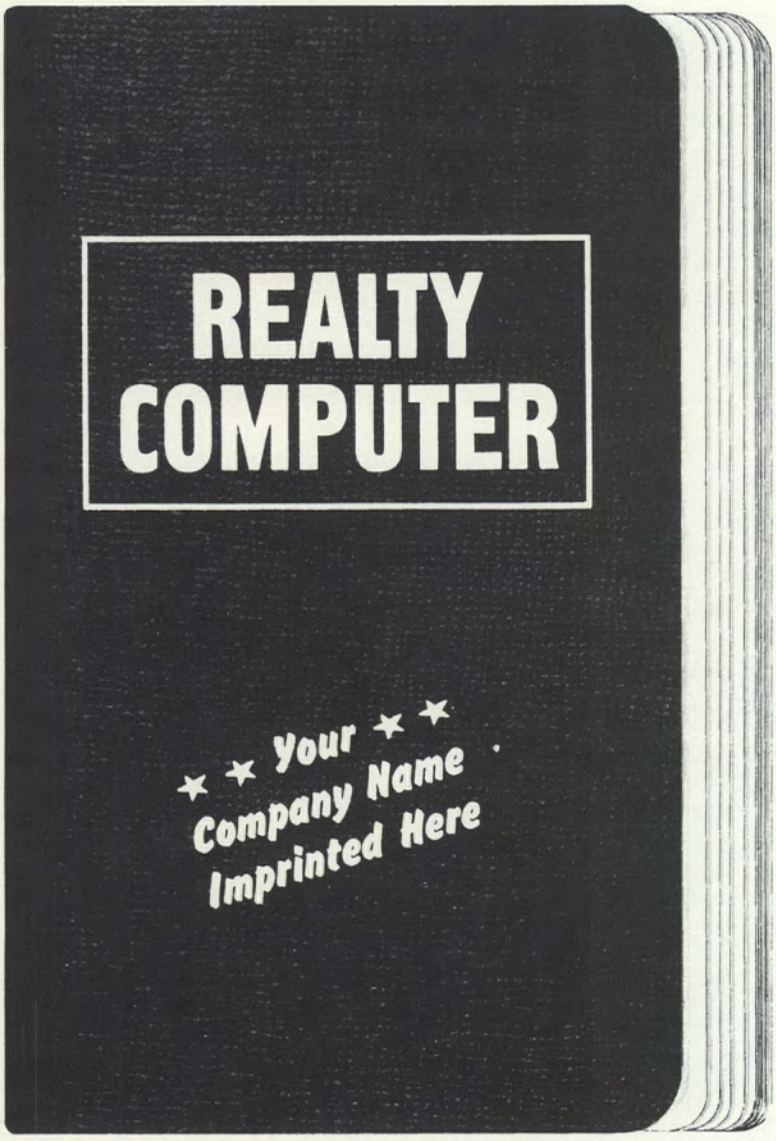

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TITLE NEWS

Volume 60, Number 9

Managing Editor: Maureen Whalen Stotland

Title News is published monthly by the American Land Title Association, 1828 L Street, N.W., Washington, D.C. 20036. Telephone (202) 296-3671.

Features

Departments

Front Cover

In this issue, Ray E. Sweat, senior vice president and chief underwriting counsel, Pioneer National Title Insurance Company, Los Angeles, compares two mortgage loan instruments, AMLs and ARMs. As committee chairman, Sweat also compiled the ALTA Judiciary Committee report, the second installment of which appears in this edition.

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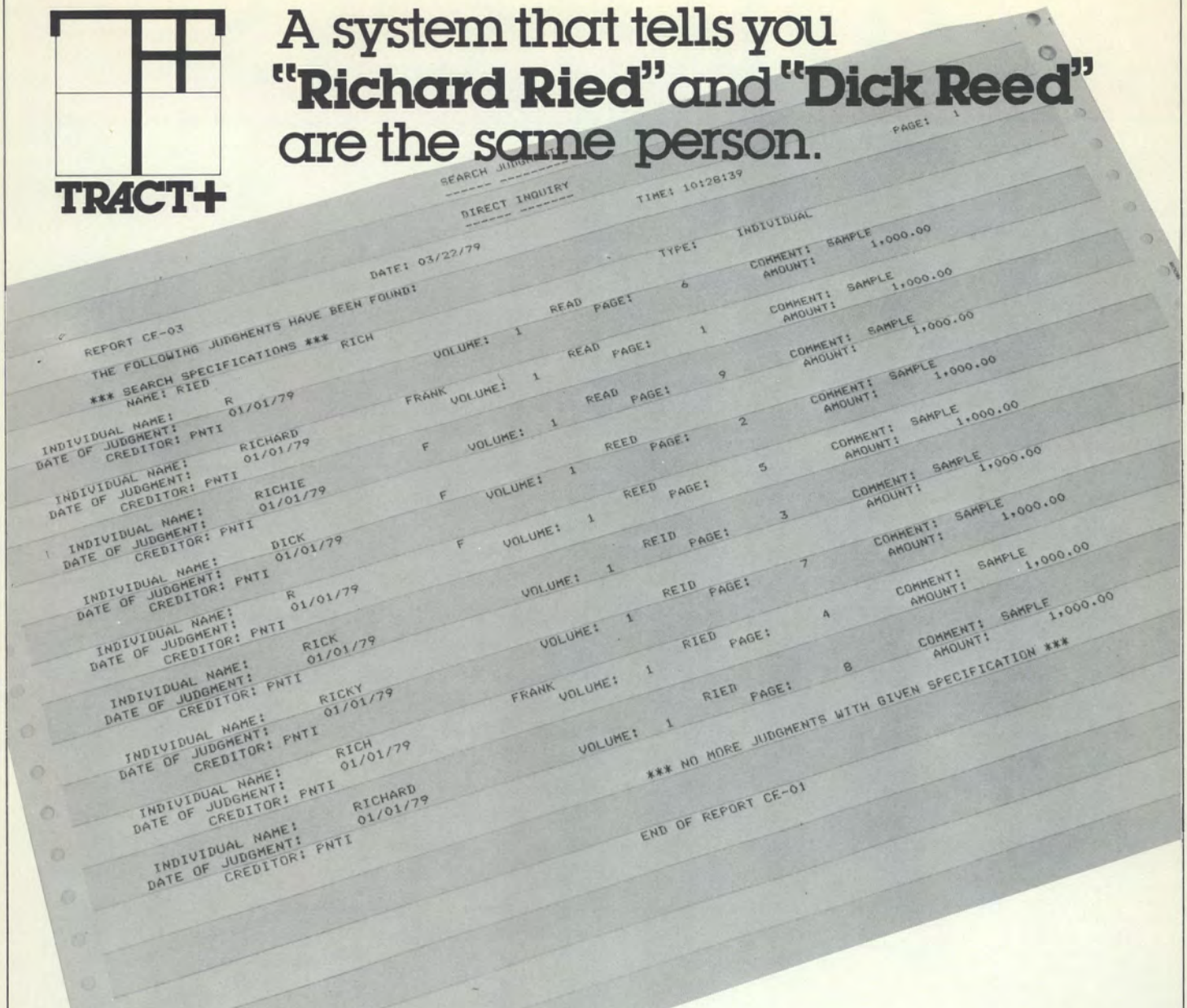

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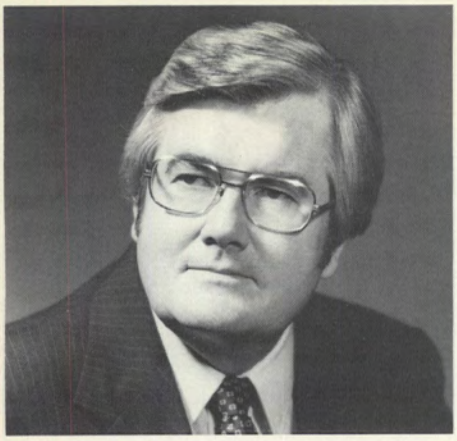


A Message From The Chairman, Abstracters and Title Insurance Agents Section

"We live in an age of progress—not steady and labored, but progress which advances by leaps and bounds, a progress which discards as archaic that which was modern yesterday. The practices of twenty, ten, five and sometimes even two years ago are no longer sufficient in themselves today. We must keep abreast of the times. We must not isolate ourselves in our business and insist upon the acceptance by the public of that which we wish to give them; rather, we must be prepared to give them what they want and when they want it. One means of doing just this is to maintain our interest—not a passive interest but an active interest—in our Association by attending all of its conventions, its regional meetings, by entering into discussions fully, frankly and enthusiastically, by working with other members wholeheartedly to discard and destroy that which is unwholesome, but, at the same time, keeping our minds free from prejudices and being willing to become convinced of the merits of this or that forward-looking proposal; to be ever alert to render a better and more complete service to our clients, to maintain a high degree of ethics with our clients and to maintain the same high degree of ethics and fairness to our competitors."

This was the address of W. S. Hutchinson, president of the New Mexico Land Title Association, at its 1929 annual convention, and was printed in the New Mexico Land Title Association "Titlegram." Even though these words were spoken 52 years ago, they are still very timely.

I especially like the phrase, "We must not isolate ourselves in our business and insist upon the acceptance by the public of that which we wish to give them; rather, we must be prepared to give them what they want and when they want it."

Tom McDonald

Thomas S. McDonald

Committees

Young Title People Committee

The Young Title People Committee has focused on "the improvement of relations between title industry and related industry groups." The committee has met as directed by the bylaws in a continuing effort to achieve some progress toward its stated objective.

Committee members established subcommittees with names of people to contact in various allied trade groups with the hope that the seeds of our future relationships might be planted.

Moreover, I wrote a letter to state and regional title associations to determine how receptive the local associations were to establishing liaison between us and their young members.

By the March 1980 Mid-Winter Conference, the committee had received letters from the Land Title Association of Colorado, the Oklahoma Land Title Association, and the Michigan Land Title Association.

The letter from the Land Title Association of Colorado indicated a continuous liaison with related trade groups for many years and listed the groups. The other two letters indicated a willingness to cooperate with the Young Title People Committee in establishing the desired relationships.

The committee regrets that the response to its letter was not greater, because the committee members feel that it is vital to our industry to establish a positive relationship with others in the real estate industry at the "local," as well as the national, level.

Subsequently, the committee communicated with the Colorado association in an effort to obtain more details, and Executive Manager Jesse B. Smith responded as follows:

> In the Denver area, the title companies are usually Associate Members of real estate organizations, home builder associations and real estate lender groups, with the state offices for the organizations located in Denver. A person whose firm is an Associate Member of one of these organizations is appointed as the liaison chairman with the group, then it is up to him to make the contact. Every now and then, we receive a request for a program and the chairman makes the arrangements, which is usually a panel of title people.
>
> The chairman of the Liaison Committee for County Clerks and Recorders, attends the twice a year meetings of the group. Our association furnishes the coffee and rolls for one of the coffee breaks, and has been called upon to present a panel of title people on the program.
>
> The chairman of the Liaison with the Commissioner of Insurance, attends the State Insurance Board meeting every month and reports any worthwhile information to the LTAC Board of Directors.
>
> The liaison committees do not meet on a regular basis with the other groups, other than to attend the monthly or annual meeting of the organization. We receive requests for literature now and then so we furnish some of the ALTA pamphlets that we keep on hand.

Now, the question is "How many of you state and regional associations are doing this in a steady year-in, year-out fashion?" If you are not, the committee thinks you should be and wants to know if there is any way it can help you.

Moreover, the committee is interested in each state or regional association having a Young Title People Committee to establish rapport with counterparts in allied professions. At present, the committee is attempting to obtain the names of the various state association executives with whom it would like you to establish contact.

The committee hopes that this information will provide a basis that will ultimately lead to young title people appearing on their programs and vice versa. This is already being done, but it should be done regularly.

The Young Title People Committee will continue to meet as provided in an effort to achieve its goals.

Phillip B. Wert, Chairman

Grievance Committee

The Grievance Committee considers and investigates complaints involving alleged misconduct by a member in his relations with the general public, another member of the association, or the association itself. It also considers and investigates alleged member violations of the code of ethics. The committee may initiate an investigation and become the complaining party to a grievance, or it may undertake an investigation based on a complaint by a member, an aggrieved party, or the association.

When a grievance is filed, it is processed in accordance with Article IX of the bylaws of the association. The complaint shall be in writing and filed at the principal office of the association. The complained-of member shall have 30 days in which to reply in writing, and he shall cooperate by disclosing all pertinent facts and records that are not privileged, which are necessary for the investigation. The committee may refer the complaint to the

complained-of member's affiliated association for investigation and report but can withdraw that referral if the investigation and report are not completed within three months.

The committee's report is presented in writing to the Executive Committee, with a copy to the complained-of member. Upon written request, the Board of Governors shall, before making a final decision, give the complained-of member an opportunity to appear in person and by counsel to be heard in support of his defense.

The Board of Governors shall review the committee's findings and recommendations. The board may find the complained-of member guilty of the charges and may censure, suspend, or expel him from the association upon a two-thirds vote of the whole Board of Governors. A copy of this decision in writing shall be furnished to the complainant and the complained-of member. This decision shall be final unless within 30 days the complained-of member files a written appeal in the principal office of the association. In that event, the decision shall be held in abeyance until the next ALTA Mid-Winter Conference or Annual Convention, whichever occurs first, at which time the decision can be upheld or reversed by a majority vote of the members present and voting.

For as long as anyone can remember, only one matter has ever been referred to the Grievance Committee. It occurred last year and was filed by a member of the general public. Basically, it was a difference of opinion between an insured and insurer as to the merits of claim. We are fortunate in having such a membership that grievances are rare; however, the mechanics of investigation and action are available, if complaints are made.

James E. O'Keefe, Chairman

Title Insurance Accounting Committee

The Title Insurance Accounting Committee was formed in the mid-1960s to review accounting practices and procedures used by the title insurance industry, to develop uniform accounting and reporting practices, and to confer with supervisory authorities to determine practices beneficial to the public. In the short period of its existence, the Accounting Committee has been called upon to work with state and federal regulatory agencies and national

accounting organizations to prevent action detrimental to the title industry and to develop acceptable accounting standards.

Some of the work the Accounting Committee has been involved in includes reviewing and assessing, with Dr. Irving Plotkin, senior economist at Arthur D. Little, Inc., HUD proposals to regulate settlement costs in metropolitan areas; HUD withdrew its proposals as a result of Plotkin's work. The committee and Plotkin also developed uniform statistical and uniform financial reporting plans, which were adopted by the association and have been used by many states to meet rate regulation requirements.

The Accounting Committee works with the NAIC Forms Committee to effect changes in the annual statement form to make it a more useful and meaningful financial statement.

The committee worked with the American Institute of Certified Public Accountants (AICPA) Insurance Companies Committee in developing Generally Accepted Accounting Principles for title insurance contained in the Statement of Position 80-1, issued by the AICPA and effective for accounting years beginning in 1981.

Currently, Accounting Committee members are working with the (A-1) Technical Subcommittee of the NAIC to draft discussion papers on statutory accounting practices for title insurance, which will ultimately result in the establishment of national uniform insurance accounting practices for the title insurance industry.

Accounting Committee members, together with NAIC Liaison Committee members, attend various meetings of the NAIC and its committees and subcommittees to provide information to those bodies when necessary and to advise the association and its membership of NAIC actions affecting them.

In addition to special meetings required of the committee or its subcommittees to address matters such as the foregoing, the Accounting Committee holds an annual meeting to which all interested industry accountants and sometimes their outside accountants are invited. These annual meetings provide a forum for discussion of accounting and significant state and federal regulatory matters and related problems of concern to the title industry nationwide. The broad background of information disseminated and knowledge gained at committee meetings has contributed significantly to the success of the committee in discharging its responsibilities to the association and its membership.

C. L. Coffman, Chairman

Committee on the Commission on Uniform Laws

This committee might be more accurately described as the "Committee on Proposed Uniform Laws." As such, its primary functions are to determine which proposed uniform laws will be of major concern to members of the association, to provide a vehicle by which the commissioners on uniform state laws may be made aware of the potential impact of various proposed uniform laws on the title

Continued on page 14

PSA Impact During

SGT. BRAXTON

During the adverse housing market conditions of 1981, the land title industry has been confronted by a peculiar challenge in the arena of public opinion.

Although forced to the sidelines by high mortgage interest rates, many homebuyers have remained well aware of land title services through the strong demand for housing that continues to exist. This awareness level has presented the industry with an excellent opportunity to build public acceptance and understanding for the future. Yet, poor economic conditions have mandated that programming for positive impact on public opinion be structured in line with limited resources.

How was the industry to make the most of this chance for improving favorable public awareness of its services before economic recovery arrives and homebuyers return to the market?

Enter the ALTA public relations program and its long-standing nationwide activity concentrating on radio and television public service messages that positively identify land title services in free air time donated by broadcasters in the public interest. Despite the recent Federal Communications Commission removal of all requirements for public affairs programming by stations, the ALTA broadcast messages have continued to reach an ever-changing national audience of millions all year long.

Both the excellent informational content and the high creative quality of ALTA television and radio offerings have become well known to many broadcasters over the years, resulting in admirable media credibility. This emphasis on superior production has brought the ALTA offerings a popular identity with broadcasters and listeners alike.

Providing a memorable example of the appeal generated by ALTA public service announcements are the award-winning adventures of Sgt. Braxton and Zing, the mythical retired Canadian Mountie and his retired lead dog who encounter land title problems in an amusing manner while seeking peaceful home ownership in the United States.

With four previous years of exposure and a discouraging slump in the housing market, 1981 furnished a setting for a severe test of the enduring popularity of the Braxton spots. Following development and release in the spring by ALTA Vice President—Public Affairs Gary Garrity, their writer-producer, this year's Braxton announcements passed with flying colors. Several examples of communication from broadcasters are especially illustrative.

In New Mexico, Jim Hawk joined KGRT, a 5,000-watt station located in Las Cruces, only to discover the station had no Braxton announcements in its library, as was the case at the station where he was previously employed. Remembering the spots were offered by ALTA but having no address for the association, Hawk contacted two land title companies in Las Cruces—Sterling Title Company and Las Cruces Abstract and Title Company—who provided Garrity's name and telephone number. Contact was made, and Hawk was immediately sent a pressing of the 1980 Braxton spots, which he aired until the 1981 adventures of the sergeant and his dog became available.

In Providence, Rhode Island, Hunt Blair of WBRU advised that a recent audience survey showed the Braxton announcements to be the all-time favorites among those broadcast by the station. He commented, "I'm happy to tell you the [Braxton] PSAs are a big hit with both our listeners and our programming staff."

And, in still another illustration, Paulette Ashton of Mutual Broadcasting System reported that the announcements have been accepted for public service airing by the network for the third year in a row. She said, "I always like the Sgt. Braxton spots."

During 1981, the Braxton adventures are being broadcast by more than 3,000 stations from coast to coast and in St. Croix, U.S. Virgin Islands. Repeated airing extends the cumulative audience well into the millions. Besides the sergeant and his dog, the spring radio package features separate PSAs by Doug Kershaw, country and western music star, and by James Keach, motion picture actor.

Production has been completed on a second 1981 ALTA radio public service offering, which is being distributed this fall and which repeats the award-winning "Home Buyer Alert" format introduced last year. Featured are adaptations of actual case histories from the files of ALTA member title companies, which are dramatized in soap opera style. Also included are radio spots featuring Betty Thomas and Rene Enriquez, stars of the critically acclaimed NBC television series, "Hill Street Blues." In 1980, the ALTA fall package was aired by some 2,000 stations.

Both the spring and fall radio packages emphasize the importance of owner's title insurance in homebuying and suggest writing ALTA for free information on the subject. ALTA's Gary Garrity also writes and produces the fall radio spots for the association.

Early this year, an ALTA television celebrity film announcement package was aired by more than 300 stations in 48 states and the District of Columbia. Featured in separate public service spots on owner's title insurance are Ron Carey of ABC's "Barney Miller"; Steve Kanaly of CBS's "Dallas"; and, in their first animated television film offering, Sgt. Braxton and Zing.

Production is under way on another ALTA celebrity film package planned for distribution at the beginning of 1982. Work is near completion on spots featuring Doug Kershaw and Sgt. Braxton and Zing, and reports indicate that Betty Thomas will film the third spot to complete the 1982 television package.

Impressive Market Slump

ZING

Among stations telecasting the 1981 celebrity package of the association are WDVM, Washington, D.C.; WCOV, Montgomery, Alabama; KIMO, Anchorage, Alaska; KNXV, Phoenix, Arizona; KTSF, San Francisco; WCTV, Tallahassee, Florida; WSB, Atlanta; KIKU, Honolulu; WRTV, Indianapolis; WIBW, Topeka, Kansas; WWL, New Orleans; WOAN, Portland, Maine; WMAR and WBFF, both in Baltimore; WILX, Lansing, Michigan; KBJR and KDLH, both in Duluth, Minnesota; KSNK and KNDL, both in St. Louis, Missouri; KRTV, Great Falls, Montana; KNTV, Las Vegas, Nevada; WNJV, Newark, New Jersey; KLKK, Albuquerque, New Mexico; WKBW, Buffalo, New York; WBTV and WCCB, both in Charlotte, North Carolina; KFYR, Bismarck, North Dakota; WHIO and WDTN, both in Dayton, Ohio; KGMC, Oklahoma City; WTAE and WPTT, both in Pittsburgh, Pennsylvania; WPRI, East Providence, Rhode Island; WCSC, Charleston, South Carolina; WPTY, Memphis, Tennessee; KXTX, Dallas; KSL and KSTV, both in Salt Lake City, Utah; WEZF, Burlington, and WGAX, South Burlington, Vermont; WTVZ, Norfolk, Virginia; and WLRE, Green Bay, Wisconsin.

Two 30-second television public service "minidramas" emphasizing owner's title insurance have been produced for 1981 release. The first, which shows a homeowner jolted from an afternoon nap by a workman breaking up his patio for construction of a water line, has been used by 35 stations in 25 states for a cumulative audience in excess of 30 million, according to an initial preliminary report. Additional use results still are to be received.

In the second "minidrama," which is being released this fall, a woman with the same last name poses as the only heir of a deceased homeowner, sells his property, and leaves town with the purchase money.

Continued on page 16

The camera moves in for a close-up of a harried homeowner aroused from an afternoon nap by a workman breaking up his patio to construct a water line. This scene is from an ALTA television public service "minidrama" emphasizing the importance of owner's title insurance.

A wheelchair serves as a mobile platform for the camera man during this "take" of an ALTA television public service "minidrama" illustrating the need for owner's title insurance. In the scene, a woman with the same last name poses as the only heir of a deceased homeowner and sells his property before leaving town with the purchase money.

Understanding the Adjustables

Editor's note: The following comparison was prepared by Ray E. Sweat, senior vice president and chief underwriting counsel, Pioneer National Title Insurance Company, Los Angeles, and covers adjustable mortgage loan instruments approved by the Federal Home Loan Bank Board for use by federal savings and loan associations and federal mutual savings banks—and adjustable rate mortgage approved by the Comptroller of the Currency for use by national banks.

***

Adjustable Mortgage Loans and Adjustable Rate Mortgages

Adjustable mortgage loan (AML), an approved investment for federal savings and loan associations and federal mutual savings banks, is a product of the Federal Home Loan Bank Board (FHLBB) acting pursuant to its plenary and exclusive authority to regulate all aspects of the operations of federal associations as set forth in Section 5(a) of the Home Owners' Loan Act of 1933.

Adjustable rate mortgage (ARM) is an authorized investment for national banks under regulations promulgated by the Office of the Comptroller of Currency, Treasury, pursuant to its rule-making authority contained in 12 U.S.C. 93(a) and 12 U.S.C. 371(8).

Federal Savings and Loan Association and Federal Mutual Savings Bank

The variable rate mortgage (VRM) and renegotiable rate mortgage (RRM) as envisioned by FHLBB have been phased out over a 90-day period beginning April 30, 1981, in favor of the AML.

The AML is very flexible and has no limitations on periodic and aggregate adjustment of interest rates. An adjustment to reflect a change in interest rate may be made in:

(1) The amount of payment,

(2) The outstanding principal loan balance,

(3) The term of loan providing that it does not exceed 40 years, or

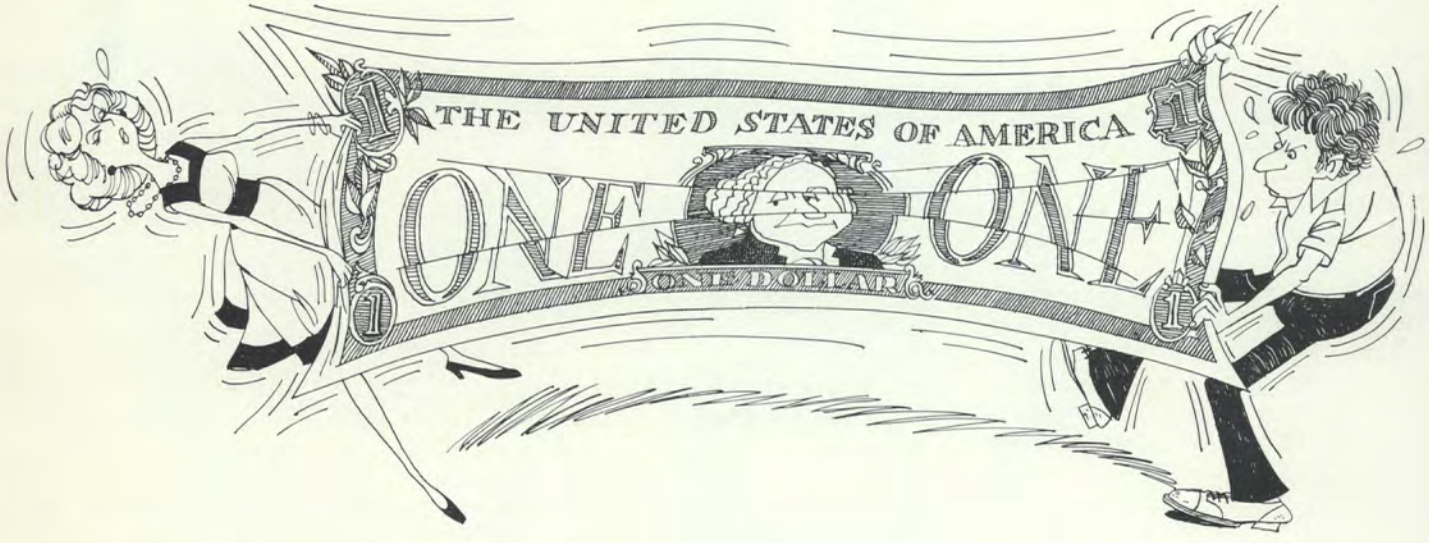
(4) A combination of (1), (2) or (3).

Although there are no restrictions on the amount by which payment, principal or term may be adjusted, except the 40-year limitation on term, other principal adjustments are permissible only if the amount of payment is sufficient to fully amortize the loan, and is adjusted at least every five years to a level sufficient to amortize the principal at the then-existing interest rate over the then-remaining term of the loan.

Although the regulations do not require "caps" or maximum limitations, FHLBB say they believe competition will demand that an AML contain a variety of payment caps and rate adjustment limitations. This will be a matter of contract between the borrower and lender.

The indices that trigger a change in interest rate must be readily verifiable by the borrower and may not be controlled by the lender. Some acceptable indices include:

- The FHLBB's National Average Mortgage Rate Indices (currently used for RRM);
- The FHLBB's average cost of funds to Federal Savings Loan Insurance Corporation (FSLIC), insured institutions either for all FHLBB districts (currently used in VRM) or for a particular district or districts;
- The three- or six-month treasury bill rates; or
- The monthly average yield on treasury securities with maturity of one, two, three or five years;
- Any other interest rate index readily verifiable by the bor-



The ALTA Judiciary Committee Supplement

This second installment of the annual Judiciary Committee Supplement presents 33 of the 128 cases submitted this year by Committee Chairman Ray E. Sweat.

Mechanic's Liens

Lafayette Tennis Club v. *C. W. Ellison et al.*, 406 N.E. 2d 1211 (Ind. 1980)

In Indiana, a mechanic's lien claimant, after properly filing his claim for a lien, need not take action to foreclose it for a period of a year after its filing, unless required by the owner or other interested party, to bring matters to a head.

IC 32-8-3-10 is the statute in the mechanic's lien law that gives the owner the right to force the lien claimant into court, or lose the lien, if he does not file to foreclose within 30 days of receipt of the notice.

It provides as follows: "The owner of property upon which a mechanic's lien has been taken, or any person or corporation having an interest therein, including mortgages and lienholders, may notify, in writing, the owner or holder of the lien to commence suit thereon and if he fails to commence such suit within thirty (30) days after receiving such notice, the lien shall be null and void, but nothing contained herein shall prevent the claim from being collected as other claims are collected by law.

Any person who has given such notice by registered or certified mail to the holder of the lien at the address given in the notice of lien recorded may file an affidavit of service of said notice to commence suit with the recorder of the county in which said real estate is situated, which affidavit shall state the facts of said notice and that more than thirty (30) days have passed and no suit for foreclosure of said lien is pending and no unsatisfied judgment has been rendered on said lien; and it shall be the duty of the recorder to record said affidavit in the miscellaneous record book of his office and to certify on the face of the record of any such lien that the same is fully released and the real estate described in said lien shall thereupon be released from the lien thereof."

In this case, the defendant was engaged by the founders of the tennis club to construct (be the principal contractor for) the facility, by contract dated April 7, 1973. The defendant's construction began on April 11, 1973, but problems developed. The defendant contended that the work was substantially complete on September 11, 1973. He filed a lien notice in the amount of $80,000 on September 12, 1973. On October 19, 1973, another contractor, A & B Construction, filed its own claim in the amount of $10,954.90. No contention regarding the timeliness or propriety of either filing was made an issue in this case.

On November 19, 1973, the president of the tennis club sent a letter to Ellison, which read, in part: "In spite of repeated efforts on our part to obtain an itemized statement from you for the work, including extras which you claim to have been done by you on our property, we seem to be unable to get one.

Please file suit on your Mechanic's Lien which you filed in order that the matter may be brought to a head." This was sent by regular, not certified or registered mail.

No action to foreclose was commenced by Ellison within the 30 days, but on July 18, 1974, A & B Construction, Inc., filed suit to foreclose its lien and named the club and Ellison and others as defendants. Ellison answered the complaint and also filed a cross claim seeking judgment against the founders or owners of the club (with whom Ellison had contracted) and to foreclose its lien. These owners (cross defendants) filed an answer to the Ellison cross claim alleging the filing of the Ellison lien, their notice to Ellison on November 19, 1973, to commence suit to foreclose and that no such suit was filed until June 14, 1974, when the cross claim was filed by Ellison, and that Ellison thereby lost his lien.

Ellison moved to strike this part of the answer, and on April 29, 1975, the court granted that motion. The trial was held on September 10, 1975, and, among other things, the lower court found for Ellison and allowed him to foreclose his lien.

Appeal was made by the club and its originators (owners). The issue was whether Ellison lost his lien by failure within 30 days of receipt of the notice to foreclose to commence such an action.

The court noted that no affidavit concerning the lien was subsequently filed by the club or its owners and that the notice given was not made by registered or certified mail.

The court of appeals, in affirming the trial court, said that Indiana decisions had established twin principles applicable to court construction of mechanic's lien laws. First, those provisions of such law relating to the creation, existence, or persons entitled to claim a lien are to be strictly construed since lien rights are created in derogation of the common law. Second, the provisions of such law relating to enforcement of the lien, once it has attached, should be liberally construed to effect the remedial purposes of the statute.

The court, acknowledging that "all are presumed to know the law," still held that the notice must contain some alert to the consequences of noncompliance.

The court, admitting that the statute was ambiguous as to whether the notice had to state that failure to file within 30 days would result in forfeiture of the lien, stated that, on the other hand, "the remedial purpose of the statute, which dictates a liberal construction concerning enforcement of a lien, would dictate that [the statute] should not be treated as intended to create a trap for the unwary."

Accordingly, the court held that the letter of November 19, 1973, was insufficient to constitute the notice required by IC 32-8-3-10.

So, to be sure that the notice to commence suit within 30 days will be effective to result

in forfeiture of the lien in the event the lien claimant fails to comply, it is suggested that the owner or other interested party be certain not only that such notice is sent by registered or certified mail (which the court said might of itself "be deemed some indication to a reasonably prudent person that the contained communication imparted some official or legally significant information") and contains fair warning (perhaps tracking or closely following the statute) indicating that failure to comply with the notice shall make the lien null and void (result in forfeiture of the lien).

Just to be sure, it would probably be prudent for the owner to follow up with a recorded affidavit in the event of noncompliance by the lien claimant.

Mechanic's Lien—Substantial Compliance with Licensure Requirement

Michigan Roofing et al. v. *Duffy Road Prop.*, 282 N.W. 2d 809 (Mich. App. 1979)

Will a contractor be denied a mechanic's lien when he begins construction site examination without a license (under the Residential Builders Act, MCL 338.1501 et seq.; MSA 18.86 (101) et seq.) but becomes licensed before starting construction? The court of appeals said the lien was good. Substantial compliance with the act is sufficient. In this case, the contractor was unlicensed for only 13 days of a 40-month project.

Mechanic's Liens—Priority

Gerrity Co. Inc. v. *Laconia Savings Bank*, 414 A.2d 1278 (N.H. 1980)

Chouinard received a construction loan from the bank. Contrary to their agreement, the bank made a $6,000 payment to discharge a previous mortgage and a $2,000 payment to complete the purchase of the property, both out of construction funds. Although the bank knew otherwise, it obtained an affidavit from Chouinard that the $2,000 payment had been used to pay off contractors and suppliers. Gerrity then supplied materials, for which it was not paid, and it filed a lien. Chouinard went into bankruptcy, and the bank foreclosed. Gerrity brought this suit against the bank, claiming a prior lien.

Under New Hampshire statutes, mechanic's liens are prior to liens of construction loans, except as to those amounts disbursed to subcontractors and suppliers of labor and materials. The court held, under N.H. RSA 447:12-a (Supp. 1979), that the plaintiff's lien was entitled to priority over the bank's payments, even though the money had been used for construction expense, since they were made under the construction loan agreement. The bank could not benefit from the affidavit as to the $2,000 advance because it knew the money was used against the purchase price of the land, not for materials.

Mechanics Lien's—Contract with a Lessee

Kazmier v. *Thom*, 63 Ohio App. 2d 29 (1978)

In this case, the controversy involved a mechanic's lien filed by virtue of a contract between a contractor and a lessee. O'Loughlin leased the realty at 5601 Monroe Street to Hugh Thom, Country Squires Industries. The lessees placed a chain link fence around the realty and installed dog kennel runs. The work was done by plaintiff contractors pursuant to a contract between the plaintiffs and the leasee, Hugh Thom.

The fencing and dog runs were not paid for. The plaintiffs filed their mechanic's liens with the Lucas County recorder against the realty owned by O'Loughlin. The liens were filed against O'Loughlin and not against the leasehold interest of Thom. The plaintiffs had no contract with O'Loughlin.

The court of appeals decided that the plaintiffs' mechanic's liens could attach only to the interest of the lessee, Hugh Thom, the only defendant with whom the plaintiffs had a contract. The lien is only against the lessee's interest. The contractors have no right to file or to claim a mechanic's lien on the interest of the lessor in such realty.

Although the plaintiffs were barred from asserting mechanic's lien rights against O'Loughlin, the lessor, they were not barred from an action to obtain a money judgment against O'Loughlin on the applicable principles of quasi contract.

Mechanic's Lien

M. J. Kelly Co. v. *Haendiges*, 58 Ohio St. 2d 505, 391 N.E. 2d 723 (1979)

As a prerequisite to a valid mechanic's lien, a subcontractor must file with the contractor, but not with the owner (unless requested) the statement required by Ohio Rev. Code § 1311.04. Three justices dissented, saying the statute was designed to protect the owner only if he availed himself of it by requiring an affidavit from the contractor, which the owner here had not done.

Minerals—Off Shore Oil Leases, Injunction

Conservation Law Foundation of New England, Inc. et al. v. *Andrus*, 617 F.2d 296 (1 Cir. 1979)

This was an action to enjoin the sale of oil and gas leases on the outer continental shelf off the coast of New England, scheduled for November 6, 1979. The United States District Court for the District of Massachusetts had denied the motion for preliminary injunction, which was reported in 481 F.Supp. 685. On the plaintiff's motion for an injunction pending appeal, the court held that because the plaintiffs did not show a probability that the sales would violate the Outer Continental Shelf Lands Act or the National Environmental Policy Act, and because the Secretary of the Interior reserved substantial powers to deal with environmental concerns even after the sale of oil and gas leases, the plaintiffs did not show a probability of the success on the merits or irreparable injury so as to entitle them to an injunction pending appeal.

This decision was the latest chapter in this matter, which has received considerable media attention. The court of appeals in another case involving the same area reported in 594 F.2d 872 had denied a plaintiff's motion for preliminary injunction for a sale of these leases scheduled for January 31, 1978.

Minerals—Oil and Gas Lease

Superior Oil Co. v. *Devon Corp.*, 604 F.2d 1063 (8th Cir. 1979)

The plaintiffs in this action sought injunctive relief, an accounting, and a decree quieting title to a leasehold arising out of an oil and gas lease that had been executed in 1949. This lease covered 3,440 acres in Banner County, Nebraska, and ran from H. C. Olsen and V. R. Olsen to Superior Oil Company. The lease had a primary term of 10 years, and by its terms would continue, "as long thereafter as oil gas . . . or any of the products covered by this lease is or can be produced." It was recorded in the office of the register of deeds in Banner County, and during its primary term oil was discovered and produced. No affidavit of production was filed with the register of deeds.

After 1962, there was no further drilling by Superior or its assignees on the tracts covered by the Superior lease. In 1976, the successors of the original lessors, referred to as the Schuler-Olsens, executed oil and gas leases to Christiansen on certain tracts that were subject to the Superior lease. Christiansen had a title search performed before entering into the lease, which indicated that the term of the Superior lease had elapsed and there was no affidavit of production of record, which under Nebraska statutory law would have given notice to the public of the existence and continuing validity of the Superior lease.

The controversy was between the Schuler-Olsens and the successors of Superior and centered on the implied covenant to develop further, which is incorporated in every oil and gas lease, after production is obtained and the life of the lease has been extended by reason thereof. Cancellation of a lease generally requires that the lessor give notice of the breach of the implied covenant to develop and demand compliance with the terms of the implied covenant.

The issue was whether a lessee on an oil and gas lease waives his right to notice of his breach of the implied covenant to develop and demand that the covenant be complied with if an unreasonable time has passed without further development by the lessee. The court's opinion was no.

The only circumstance under which notice and demand are waived is when the lessee indicates to the lessor, by words or conduct, that he will not commence further development of the lease despite demand by the lessor. The mere passage of a period of time deemed to be unreasonable should not waive the notice and demand requirement, because a lessor retains the right to test the reasonableness of delay by giving notice and demanding development.

The case was remanded to determine whether Christiansen had actual or constructive notice of the plaintiffs' lease based on actual physical possession by the plaintiffs.

Minerals—Indiana's Mineral Lapse Statute

Short v. *Texaco*, 406 N.E. 2d 625 (Ind. 1980)

In this case, the Indiana Supreme Court upheld the constitutionality of Indiana's mineral lease statute I.C. 32-5-11-1 and 32-5-11-8, thus reversing the trial court's finding that the act was unconstitutional or improper on grounds of due process, equal protection, and the guarantee of just compensation for property taken by the state.

This act puts an end to interests in coal, oil, gas, or other minerals that have not been used for 20 years. The "use" of a mineral interest that continues it in force includes actual production; payment of rents, royalties, or taxes; or the filing of a claim in the dormant mineral interest record in the recorder's office. The act granted the owners of such interests a two-year grace period after its effective date in which to file a claim and preserve the interest.

The trial court held the entire statute unconstitutional because, among other things, it determined that due process required the divestiture of the vested mineral interest to be preceded by a due process notice and an opportunity to be heard.

The act does not in fact provide for any adjudicatory process by a court or administrative agency, but the supreme court held that this did not make the act invalid, because of the two-year grace period, during which owners of mineral interests could protect themselves by filing their claim.

The court found that the act was not a taking of an interest by the state without just compensation because the state did not take the interest itself, but only extinguished it after offering time and a procedure by which the owner of the mineral interest could protect himself against such extinguishment. The court found no violation of the "equal protection" clause because of a public policy concerning mineral interests, whereby they should be either exploited or abandoned promptly. The court found that by this act, the Indiana legislature recognized that minerals often exist in strata and formations that do not necessarily coincide with surface ownership and it is often necessary to "assemble" such interests (from several owners of the surface area) to render the extraction of the minerals safe and profitable. The court also found that the legislature discovered that only those developers who met the statute's criteria would be likely to assemble the interests and actually produce the minerals. The court concluded that the separate classification of interests so held is rationally related to the legitimate objectives of the legislation and is not, therefore, contrary to either state or federal "equal protection."

Minerals—Michigan's Dormant Minerals Act

Wagner v. *Dooley*, 90 Mich. App. 759, 282 N.W. 2d 469 (1979)

The Michigan Court of Appeals again upheld the constitutionality of the Dormant Minerals Act (MCL 554.291 et seq.; MSA 26.1163(1) et seq.). It determined the act applicable to oil and gas interests not held by surface owners, regardless of whether separation came by mineral lease or deed reservation. The act conclusively presumes abandoned any such interest not revived at least every 20 years in one of five ways: getting a drilling permit, starting production, recording a transaction involving the interest, storing gas underground, or recording notice of the interest. The court also held that it must be the specific person holding the interest who performs the action to keep the interest alive. It is insufficient if the action is accomplished by someone else. In this case, the surface owners rerecorded the deed containing the mineral reservation. The purpose was to restore records lost in a courthouse fire. Although notice of the subsurface rights appeared as of record within the required 20 years, oil and gas rights were deemed abandoned because their owner had not recorded the notice. Other mineral rights were unaffected.

Minerals—Oil and Gas Lease

Beer v. *Griffith*, 61 Ohio St. 2d 119, 399 N.E. 2d 1227 (1980)

The lessor under an oil and gas lease and transferee of working interests in related drilling operations sued the lessee to cancel leases and for damages.

An oil and gas lease contains an implied covenant to develop the leased property, but failure to do so does not forfeit the lease unless that was specified as a condition of forfeiture or, as here, the lessee is insolvent so that the remedy in damages is inadequate. The lease was canceled except for one well, which was operating.

Blausey v. *Stein*, 61 Ohio St. 2d 264, 400 N.E. 2d 408 (1980)

An owner of land subject to an oil and gas lease brought an action against the lessee to quiet title and recover damages. The Supreme Court of Ohio held that an oil and gas lease that is to continue as long as oil or gas is found in paying quantities does not terminate because the profit is small or because the lessee makes a profit only by charging nothing for his labor. The lessor could not complain of not receiving royalties when she refused to sign a division order by which the purchaser would pay her share to her.

Mortgages and Deeds of Trust—Foreclosure and Due Process

Warren v. *Government National Mortgage Association*, 611 F.2d 1229 (8th Cir. 1980)

The plaintiff and her husband owned a residence in Kansas City, Missouri, which they had purchased in 1966 from the Department of Housing and Urban Development (HUD). They executed a note, secured by a deed of trust to the Federal National Mortgage Association (FNMA). Thereafter, FNMA was converted into Government National Mortgage Association (GNMA), a private corporation wholly owned by the federal government. The plaintiff's note and deed of trust were transferred and assigned to GNMA. The deed of trust included a power of sale clause, which in the event of default permitted the trustee to initiate a nonjudicial foreclosure sale in accordance with Missouri statutory procedures. In September 1970, a private attorney retained by GNMA mailed a letter first class, not registered or certified receipt, to the plaintiff and her husband, notifying them that GNMA deemed the payments on the note to be in default and had elected to declare the entire principal due. Demand was made for payment of the entire balance, but no mention of the threat of foreclosure by trustee's sale was made. The plaintiff never responded to the letter. Thereafter, GNMA foreclosed against the plaintiff, having caused the trustee to advertise in a newspaper used almost exclusively for legal notices, and a public sale was conducted in compliance with the power of sale clause in the deed of trust. The plaintiff was notified by letter after the sale had been made, and demand was made for possession on or before October 26, 1970. The plaintiff did not surrender the premises, so GNMA brought an action for unlawful detainer in the Missouri Magistrate's Court and ultimately secured possession of the property by writ of restitution.

The issue was whether GNMA's foreclosure action pursuant to the contractual power of sale clause contained in the deed of trust was a denial of the mortgagor's Fifth Amendment due process rights to notice and hearing prior to the foreclosure sale. The court said no.

The plaintiff argued that since the form of the deed of trust was specifically approved by HUD regulations, this sufficiently implicates the federal government to impose Fifth Amendment due process standards upon it. The due process clause of the Fifth Amendment applies to the federal government, not to private action. The standard is that there must exist a "sufficiently close nexus between the government and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the government itself." GNMA is a corporate entity, wholly owned by the federal government operating under federal government authority, but mortgage foreclosures through power of sale agreements are not in and of themselves powers of a governmental nature.

The foreclosure was conducted by the successor-trustee strictly in accordance with the Missouri law pursuant to his position as a contractually appointed trustee and not as an employee. The only direct government involvement in the relations with the mortgagor or the grantor of the deed of trust are the HUD regulations. In the view of the court, it is insufficient to conclude that the power of sale foreclosure methods were those of the federal government itself. Therefore, the plaintiff had no recognizable constitutional claim under the Fifth Amendment.

Mortgages and Deeds of Trust—Acknowledgment

Farm Bureau Finance Company v. *Carney*, 100 Idaho 745, 605 P.2d 509 (1980)

In an action brought by Farm Bureau Finance Company to foreclose a deed of trust, the beneficiary of a "later recorded" deed of trust claimed priority under the theory that the certificate of acknowledgment on the Farm Bureau trust deed was defective. This led to the argued conclusion that the instrument was not entitled to recordation and therefore provided no constructive notice. The acknowledgment followed the statutorily prescribed form, except that certain blank spaces had not been completed, the most important of which would have otherwise identified those parties who executed the instrument and who personally appeared before the notary. The deed of trust contained the grantors' names and signatures. The Idaho court held that the validity of the acknowledgment, and consequently the issue of whether the instrument provided constructive notice, did not rise or fall solely on the sufficiency of the certificate on its face but further depended on whether the notary properly discharged his duties. In this regard, the court noted that as public officers, notaries are presumed to have done so. The court held that omission of the acknowledger's name in the blank in the certificate did not render the certificate ineffective, nor could it by itself overcome the presumption of proper discharge of notarial duties, if the acknowledger's name could be ascertained from other sources, such as from the face of the instrument.

Mortgages and Deeds of Trust—Foreclosure—Personal Property Must Be Specified in Pleadings and Judgment to Be Included in Sale

South Shore Federal Savings and Loan v. *Mikarp Realty*, 100 Misc. 2d 196, 418 N.Y.S. 2d 727 (1978)

The plaintiff, who had a mortgage on real property and a chattel mortgage on personal property owned by the defendant, brought this foreclosure action on the real property mortgage in which it failed to specify any particular personality in the pleadings or judgment of foreclosure. At the sale, the mortgagee bid the full amount due. The court held that by so doing it extinguished both the real property and the chattel mortgages. Where a mortgagee bids at the foreclosure sale the full amount of the mortgage indebtedness, the mortgage indebtedness is extinguished.

If one intends to foreclose on personal property, the personal property must be specified so that the rights of others may be considered (*Statewide Savings and Loan Association* v. *Canoe Hill*, 54 A.D. 2d 1018). Further, the execution of a chattel mortgage negates an intent to include the personal property items within the lien of the real property mortgage.

A motion to vacate the judgment of foreclosure and sale was denied.

Mortgages and Deeds of Trust

MGIC Fin. Corp. v. *H. A. Briggs Co.*, 24 Wash. App. 1, 600 P.2d 573 (1979): petition for review denied 92 Wash. 2d 1038

Briggs executed a note to MGIC for $1.42 million secured by a deed of trust executed by it and by Enterprise on several parcels of land. The note was also guaranteed by Kassuba. Enterprise conveyed one parcel to Davis for $8,000. Davis did not assume the obligation secured by the deed of trust.

MGIC brought foreclosure action on the other parcels, although it was aware of the Davis interest. In exchange for a deed to the other parcels and without Davis's consent, MGIC relieved Briggs and Kassuba of liability on the debt. Three years later, MGIC amended its complaint, naming Davis as defendant, and seeking foreclosure against the Davis tract.

The court held that the discharge of Briggs and Kassuba deprived Davis of his subrogation rights against them. On equitable principle, the court must protect subrogation rights of junior interest holders, and in this case Davis was released from the burden of losing his land to satisfy a debt from which the debtor had been released.

Partition—Where Divorce Judgment Denies Exclusive Possession of Marital Premises, Partition Will Lie

Schecter v. *Schecter*, 73 A.D. 2d 614, 422 N.Y.S. 2d 133 (1979)

This action was brought for the partition of the marital residence following a judgment of divorce. The judgment had specifically denied the wife's request for exclusive possession of the marital home and denied the husband's request for a direction that the property be sold. The judge had recommended that the parties voluntarily sell the property. Thereafter, the husband commenced the instant action, claiming that the divorce judgment had converted the tenancy by the entirety into a tenancy in common.

The defendant-wife claimed the plaintiff was not entitled to the relief sought absent a modification of the divorce judgment, in reliance on *Ripp* v. *Ripp*, 38 A.D. 2d 65, aff'd. 32 N.Y. 2d 755. In that case, however, the judgment had awarded the wife exclusive possession of the marital home.

The court held that under the facts in this case, the partition of the property would not interfere with any judicially created right of occupancy or compromise the integrity of the judgment of divorce.

The judgment of partition and sale was affirmed.

Partition

Paul v. *Prior*, 404 A.2d 105 (Vt. 1979)

A stipulation that the parties were entitled to partition is a waiver of any claim under the statute of limitations.

Under 12 V.S.A. §5161, a claim for partition exists wherever there are tenants in common and is a continuing right. If tenants are satisfied with that status, there is no compulsion to change it by resort to legal remedy.

In a statutory action for partition, the parties filed a stipulation that they were tenants in common of the real estate in question and that commissioners might be appointed to make partition. There was no pleading of the statute of frauds. Subsequent to making an appointment, the trial court dismissed the action as barred by the statute of limitations.

In reversing, the court held that where parties stipulate to partition, there is a waiver of any claim under the statute of limitations. Further, the court held that under 12 V.S.A. §5161, a claim for partition exists wherever there are tenancies in common and is a continuing right. If tenants in common are satisfied with that status, there is no compulsion to change it by resort to legal remedy. Each has the same right, and the limitation runs only against a tenant in common who has been excluded from possession as of the time of such exclusion.

Public Utilities

Bonner v. *City of Brighton*, 91 Mich. App. 546, 283 N.W. 2d 793 (1979)

The plaintiff owned five rental homes in the city, which contained numerous violations of the building code. While the houses were all vacant, the city shut off water service to the houses. This was done to enforce the municipal building code, the premises being considered uninhabitable unless corrections were effected. The plaintiff sued, seeking both restoration of water service and damages. The lower court held for the city, and the plaintiff appealed.

The court held that the plaintiff was entitled to have the water service restored. Service of this nature could not be disconnected because of a collateral liability not associated with the particular service. The housing regulations of the city contained adequate provisions for their own enforcement. The plaintiff was not, however, entitled to damages because he made no showing that discontinuing the water service rendered the houses uninhabitable or prevented him from making them inhabitable.

Real Estate Brokers—Commission

Christo v. *Ramada Inns, Inc.*, 609 F.2d 1058 (3d Cir. 1979)

The broker, seeking an award of brokerage fees, instituted an action in district court against the Knights of Columbus, vendor of a motel, and Ramada Inns, Inc., franchisor of Airport Inc., the purchaser in fact. At the trial, the plaintiff advanced two theories of recovery. First, the broker alleged that he had presented the vendor with a ready, willing, and able buyer. Second, he alleged that he was the efficient procuring cause of the sale of the motel to Airport Inc. A jury returned a general verdict in favor of the plaintiff and against both defendants. The defendants appealed.

At issue was whether the evidence at trial was legally sufficient to support the jury's verdict.

Stating that a jury's verdict must not be based on speculation, the circuit judge propounded three principles of Pennsylvania brokerage law by which to test the sufficiency of the evidence.

First, ". . . a broker cannot recover a commission, even though he brought the buyer and seller together, unless he can prove a contract of employment [between] himself and the buyer (or seller) . . ." (*Axilbund* v. *McAllister*, 407 Pa. 46,55, 180 A.2d 244,249 (1962)). Second, "[a] broker earns his commission when he produces a purchaser who is ready, willing and able to contract at the terms fixed by the vendor-principal, notwithstanding the refusal of the principal to sign the agreement of sale" (*Simon* v. *H. K. Porter Co.*, 407 Pa. 359, 362, 180 A.2d 227, 229, (1962)) or if price and fixed terms have not been set by the vendor-principal, "When [the broker] produces for his principal a satisfactory purchaser who contracts in writing with the principal for the purchase of the property, at a price satisfactory to the owner" (*Matuszewski* v. *Grisius*, 118 Pa. Super. 196, 198, 180 A. 130, 131 (1935)). Third, ". . . the mere fact that the broker has carried on negotiations with a prospective buyer (or seller) does not entitle the broker to a commission unless his efforts constituted 'the efficient procuring cause of the sale.' " (*Axilbund* v. *McAllister* 407 Pa. at 55, 180 A.2d at 249).

Noting that the broker had failed to prove all three of the aforementioned requirements in conjunction with either theory of recovery, the circuit court reversed the judgment and remanded the case to the district court for entry of judgment n.o.v. in favor of both defendants.

Recording—Indexing by Block and Lot, Constructive Notice, Mortgage Assignments

Andy Associates, Inc., v. *Bankers Trust Co.*, 49 N.Y. 2d 18, 424 N.Y.S. 2d 139 (1979)

Applying "the recording act in such a way as to effect its underlying purpose," the New York Court of Appeals has declined to extend the rule, limiting constructive notice to instruments recorded in the direct chain of title and shown by the grantor-grantee index, in favor of a purchaser with access to a tract recording system. The property was in New York City, which has a "block and lot" index, pursuant to Section 328 of the Real Property Law and Section 1052-24.0 of the city's administrative code.

The court in so doing modified the rule in *Bacon* v. *Van Schoonhoven*, 87 N.Y. 446 (1878) that a purchaser may rely on a satisfaction by an assignee of a mortgage, whether or not the assignment is for collateral security, and of the similar provisions of Section 321.1 (b) of the Real Property Law, permitting a purchaser to rely on the satisfaction by the last recorded assignee. Referring to "the even more fundamental rule that a satisfaction entered by one who was without authority to do so cannot serve to insulate a subsequent purchaser from prior claims, when the existence of such claims was apparent from the face of the record," the court required a purchaser, confronted with a recorded satisfaction by the assignee of the mortgage, to satisfy himself that the record is clear of any suggestion that the assignment may have been given as collateral security.

The facts were that the owner in 1951 leased the property for a term of 21 years and took a large security deposit. To secure repayment of the deposit, the owner gave the tenant a note and a mortgage that prohibited assignment except in conjunction with assignment of the lease or to the owner as security for performance of the lease covenants. The tenant assigned the mortgage to the owner as such security. These documents were recorded.

By various assignments, Andy Associates, Inc., became tenant and assignee of the mortgage, but an intermediate assignee had failed to record its assignment of mortgage, causing a gap in that chain of title. The owner also assigned the mortgage to a transferee of his title, but the assignment was outright, not as collateral security. In 1973, the current owner, for unclear reasons, recorded a "satisfaction" of the mortgage. Relying on this "satisfaction," Bankers Trust took a mortgage in 1974. In 1976, Andy foreclosed to recover the security deposit.

Bankers argued that Andy's interest derived from an unrecorded instrument. In upholding priority of Andy's interest, the court of appeals stated that its interest "was apparent on the face of the record at the time" Bankers took the mortgage.

It will be recalled that in *Buffalo Academy of Sacred Heart* v. *Boehm Bros.*, 267 N.Y. 242 (1935), the court of appeals refused to accept the argument that a covenant by a subdivider in a deed to one lot, restricting use of his remaining lots, gave constructive notice to subsequent purchasers of these remaining lots: "To so claim goes contrary to the well-settled principle that a purchaser takes with notice from the record only of incumbrances in his direct chain of title" (p. 250).

In *Andy*, the court noted that the restrictive clause in the mortgage itself gave notice of the owner's limited interest, notwithstanding that his assignment was outright; there were thus dual interests in the mortgage from its very inception that had to be noted.

Where block and lot indexing is used, the court reasoned, application of the rule that a purchaser is only chargeable with notice of conveyances in his direct chain of title, a judicial response to the situation where the purchaser had to rely on grantor-grantee indexing, would not be logical and was not warranted.

The court touched only in passing on the question of constructive notice of his rights by a tenant's possession, although it does seem that under this rule it could have reached the same conclusion even if the recording had been under the conventional

grantor-grantee index system. Nevertheless, because of the court's strong arguments, it is clear that the chain of title exclusionary rule should not be relied on in a tract indexing system and that an examination must always be made of the underlying mortgage to ensure that a satisfaction by an assignee can be accepted.

Subdivisions—Lot Split; California Environmental Quality Act

Kennedy v. *City of Hayward*, 105 Cal. App. 3d 953, 165 Cal.Rptr. 132 (1980)

The owner of a contiguous lot filed a petition for a writ of mandate against the city to require it to set aside an order of its planning commission approving a lot split application. The real parties in interest are the developer and two purchasers from the developer of one of the parcels created by the lot split. The developer filed an application for a tentative parcel map dividing a lot into four separate lots pursuant to the city's real estate subdivision regulation. Approval of the map was a project subject to the California Environmental Quality Act (CEQA). The city's senior planner determined that the proposed lot split would not have a significant effect on the environment and therefore was not subject to CEQA. Under the applicable provisions of the city subdivision ordinance, the planner's determination could have become final without any action by the planning commission or a notice or hearing to anyone. The senior planner, however, sent the lot split application to the commission for its consideration and approval. Although neither the city nor the commission was required by law to provide notice of the pending application, a copy of the application was provided to a homeowners' association, to which the plaintiff belonged. The tentative parcel map was approved by the commission at a regular meeting. Although general notice of the commission meeting was given to various members of the public, no specific notice of the lot split application was given. A representative of the homeowners' association was present at the hearing. No notice of the meeting, however, was given to the plaintiff. No appeal was filed from the commission's decision to approve the lot split application. Immediately after the appeal period expired, the developer sold one of the lots to two purchasers.

The appellate court reversed the judgment denying the plaintiff's petition for writ of mandate and following *Horn* v. *County of Ventura* 24 Cal. 3d 605 (1979) concluded that land use decisions that substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property within the context of procedural due process. Thus, whenever approval of a tentative subdivision map constitutes a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to reasonable notice and an opportunity to be heard before the approval. The plaintiff, as an adjacent owner, was deprived of his significant property interest without due process. The city determined that the lot split was exempted from CEQA, and once this determination of threshhold exemption was made, no further action by the local agency was required under CEQA. Further, under the applicable provisions of the city's subdivision ordinance, the senior planner's environmental determination and his subsequent lot split approval could have become final without any action by the planning commission. The notice that was furnished did not guarantee an affected landowner a meaningful predeprivation hearing. The notice to the homeowners' association and the presence of one of its representatives at the hearing was insufficient notice to the plaintiff. A directly affected owner is entitled to a hearing that focuses on his particular concerns and the general feasibility and desirability of the project.

Subdivisions

P. H. English, Inc., v. *Koster*, 61 Ohio St. 2d 17, 399 N.E. 2d 72 (1980)

The purpose of Ohio Rev. Code §711.10, which provides that subdivison plats are deemed approved if not endorsed "approved" or "disapproved" within 30 days of filing, is to require prompt action on the filings. Therefore, county commissioners may not extend the time by requiring a preliminary filing with 30 days to act on the final filing, and disapproval of the preliminary filing does not act as disapproval of the final filing without endorsement on one or the other. Three judges dissented.

Subrogation

State of Ohio Dept. of Taxation v. *Jones*, 61 Ohio St. 2d 99, 399 N.E. 2d 1215 (1980)

A mortgagee who takes a second mortgage and uses the funds to discharge his own first mortgage and three intervening liens, but who fails to find a later-recorded tax lien, cannot be subrogated to the rights of the prior lienholders and so receive priority over the state. The mortgagee caused his own problems by delaying recording the second mortgage.

Two judges argued that the mortgagee should be subrogated to the rights of the intervening liens but not the first mortgage.

Surety

Continental Bank and Trust Co. v. *American Bonding Co.*, 605 F.2d 1049 (8th Cir. 1979)

This was an action against a surety seeking recovery on bonds guaranteeing the principal's completion of improvements on a land development project. Leisure Lake subdivision was to be developed as a residential area and campsite. The promoters planned to use land-holding trusts to purchase the property, naming the original landowners as "first" beneficiaries and themselves as "final" beneficiaries. Continental Bank and Trust agreed to act as trustee, holding legal title and collecting payments from subdivision lot buyers.

Improvement of the lots was to proceed as sales were made to lot purchasers. A loan was arranged with Continental to finance the improvements, but disbursements were limited to the "maximum borrowing base," a figure tied to the percentage of revenue from lot sales. To make the property more attractive to prospective purchasers, the promoters decided to obtain improvement bonds for certain major improvements. Although all the improvements in the subdivision were to be financed with the loan proceeds from Continental, only certain improvements were to be bonded. The bonds were issued by American Bonding Co. without a "set-aside" letter, which would have required the developers to designate certain of the loan funds for construction of the bonded improvements. Allocation of the loan funds was to be made as the promoters saw fit "for developing and promoting the sale of lots."

Systems Leisure Property, Inc., was named as principal on the bond and Continental and a corporation created by the promoters were the obligees. The bond agreement incorporated five construction contracts in which Systems undertook "to complete as soon as possible" the "necessary" water system, lake construction, sewer system, comfort stations, road systems, swimming pool, and pavilion for the property.

$700,000 of the loan proceeds had been disbursed in 1973 when the promoters realized that the lot sales were not going as planned because prospective buyers were unwilling to purchase before the improvements were completed. Funds for the construction of all the improvements were no longer available, having been tied to revenue from lot buyers. Shortly after September 1973, refinance negotiations had completely broken down. No work was resumed on the improvements, the subcontractors filed mechanic's liens, and in February 1975 Continental notified American Bonding that Systems was in default. American Bonding denied liability on the bonds, claiming that it was entitled to assert the same defenses against Continental, the lender on the underlying construction contract, as Systems, the principal on the bond, would have been able to assert.

The issue was whether Continental had given sufficient consideration to the underlying construction contract. The court said yes.

American Bonding Co. argued that since Continental was required to take the proceeds from subdivision lot sales under the land trust agreement, this was a preexisting

duty, and no new consideration was given for the construction contract. The court held that under the trust agreement only Continental was to benefit from collection of the sales proceeds, whereas tied into the construction contract was an agreement that Systems would receive a commission on the sales, and this was sufficient consideration.

The issue was whether Continental's refusal to release job funds for the subdivision improvements in effect caused the noncompletion, thereby exonerating American Bonding from liability on the bonds with respect to Continental. The court ruled no. Continental had no contractual duty, implied or expressed, under the loan, bond, or construction agreement to pay Systems directly for any purpose.

By deciding to stop selling lots, Walker, a promoter, was directly responsible for the unavailability of further funds under the loan commitment that limited disbursements to the maximum base formula. Such default would not extinguish the surety's liability to Continental, since if two or more obligees are named in the bond, each has a separate right to recover thereon in the event of a breach. Therefore, Continental Bank's right to enforce the bonding agreement could not be defeated by Walker's acts.

American contended that the work undertaken by Systems was materially increased in scope without its consent after the bonds had been issued, and therefore its liability should be discharged. The court, however, held that the testimony did not indicate any alteration in the nature of the work or increases in the scope of System's undertaking.

American's arguments that the construction contracts entered into by Systems were too vague and indefinite to be enforced were rejected by the court, since any indefiniteness can be cleared by the subsequent conduct of the parties. In this case, once an indefinite promise had been partly or wholly performed, the contract became sufficiently clear and binding on all the parties.

Taxation—Federal Estate Tax Lien

United States v. *Silverman*, 621 F.2d 961 (9th Cir. 1980)

The United States sought to reduce its estate tax assessment to judgment. The United States filed a claim against the probate estate in the probate court within the statutory six years of the assessment. The appellate court held that in view of the manner in which the California probate code treats the filing of a claim against a probate estate for the purposes of applying California's own statutes of limitation, the United States did not by filing the claim begin "a proceeding in court" within the Internal Revenue statute allowing collection of a tax by "a proceeding in court" if begun within six years after the assessment. The court also held, however, that the statute of limitations had been suspended while the assets of the taxpayer were in the control and custody of the probate court. The fact that the United States could have initiated suit to obtain judgment against the personal representative of the decedent's estate in California immediately after assessment of the estate taxes did not render inapplicable the suspension of the running of the statute of limitations. Both commencement of the suit and levying on the property ought to be available before it can be said that the collection procedures are unhindered for purposes of suspensions of the statute of limitations; however, suspension should not exist when the bar to the levy is insubstantial, and the presence of assets of the decedent, substantial in value in relation to the total value of the decedent's estate, is not subject to custody and control of the probate court. The appellate court reversed the judgment of the district court and remanded the case to it to determine whether under the enunciated principles the United States was entitled to prevail in its effort to reduce its assessments to judgment.

Taxation—Real Property, Condominiums

The 400 Condominium Association v. *Tully*, 79 Ill. App. 3d 686, 398 N.E. 2d 951 (1979)

A parcel of land improved with an apartment building was submitted to the Condominium Property Act of the state of Illinois by a declaration recorded in 1973. The condominium as so created consisted of 938 residential units, 17 commercial units, and common elements. An existing garage was made a portion of the common elements. The declaration provided that this garage was to be leased to a third party who would rent parking spaces.

For the tax year 1974, a real estate tax was assessed and levied against each unit, and a separate tax was assessed and levied against the garage on the ground that it generated revenue from the lease.

This action was brought to enjoin taxing officials from taxing the garage separately from the condominium units. The trial court entered summary judgment in favor of the defendant taxing officials.

Two questions were at issue. Did the separate assessment of the garage violate the statutory prohibition against separate taxation of the units and common elements? Did the court have equity jurisdiction to enjoin assessment of the tax on the garage? The court held that the separate assessment violated the statutory provision. The court did have equity jurisdiction to enjoin the assessment.

Section 10 of the Illinois Condominium Act provides: "Real property taxes . . . shall be assessed against and levied on each unit and the owner's corresponding percentage of ownership in the common elements as a tract, and not upon the property as a whole."

The word "shall" in Section 10, said the court, indicated the legislative intent that the tax must be imposed on each unit and its corresponding percentage of ownership in the common elements.

The defendants argued that the garage came within the statutory definition of a unit and thus could not be part of the common elements. The court said, however, that the statutory definitions of what is included and excluded in the units and common elements could be supplemented by the declaration.

The court also said that, absent statutory language, production of income did not make a particular area a unit under the Illinois act.

Furthermore, to treat the garage as a unit would have the effect of a partition of the common elements. Section 8 of the act prohibits partition of the common elements.

The general rule in Illinois that the taxpayer's ony remedy was payment of the tax under protest did not apply because the tax in this case was unauthorized by law. This was an independent ground for equitable relief and did not depend on the inadequacy of the remedy at law.

Taxation—Real Property

State ex rel. Swetland v. *Kinney*, 62 Ohio St. 2d 23, 402 N.E. 2d 542 (1980)

The reduction of taxes on homesteads provided by Ohio Rev. Code §319.301(B) is constitutional. The "uniform rule" requirement of Section 2, Article XII, of the Ohio constitution applies to valuation and percentage of fair market value subject to tax, but the tax rate is subject only to equal protection requirements. Three judges dissented.

Taxation—Property Tax Refund

General Electric Co. v. *DeCourey*, 60 Ohio St. 2d 68, 397 N.E. 2d 397 (1979)

Absent statutory authority, no interest is payable on a refund of illegally or erroneously assessed real estate taxes. There is no denial of equal protection in the legislature's distinction between these and other taxes where interest is payable. One justice dissented on the ground that the taxing authority is unjustly enriched.

Taxation—Foreclosure of Liens

In re Foreclosure of Liens, 62 Ohio St. 2d 333 (1980)

In this case, the court discussed R.C. 5721.18 (B), which established an in rem action for delinquent tax foreclosures. The

concern of title underwriters has been whether the notice provisions satisfy the standards for notice required by the due process clause.

The statute provides that a complaint shall contain the name and address of the last known owner of the parcel if the same appears on the general tax list.

"(1) Within thirty days after the filing of a complaint, the clerk of court where such complaint was filed shall cause a notice of foreclosure . . . to be published once a week for three consecutive weeks in a newspaper of general circulation in the country . . . within thirty days after the filing of a complaint, the clerk shall also cause a copy of a notice . . . to be mailed by ordinary mail with postage prepaid to each person named in the complaint as being the last known owner of a parcel included therein. The notice shall be sent to the address of such person, as set forth in the complaint, and the clerk shall enter the fact of such mailing upon the appearance docket. In the event the name and address of the last known owner of a parcel included in a complaint is not set forth therein, the county auditor shall file an affidavit with the clerk of court stating that the name and address of the last known owner of such parcel does not appear on the general tax list."

The court determined that the notice provisions of R.C. 5721.18 (B) are "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," which is the test set out in *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306.

Even though the appellant lost his facial challenge to the statute, the factual situation was that the county treasurer had notice of the taxpayer's residence address, but the notice was sent to another property address, which property was used for investment purposes only. Thus the court did not believe that notice mailed to a former residence now used as investment property was "reasonably calculated" to reach the taxpayer. The notice was insufficient under these facts and did not conform with the minimal standards required by due process.

Tenants by the Entirety

Wienke v. *Lynch*, 407 N.E. 2d 280 (Ind. 1980)

A husband was barred by laches from quieting title against the subsequent grantees of a deed to property held by the husband and wife as tenants by the entirety where only the wife signed the deed conveying the property to the grantors of the defendants.

Walter and Elsie Wienke were married on September 4, 1960. On September 9, 1960, each conveyed separately owned real estate through a straw man to themselves as tenants by the entirety. On July 17, 1972, Elsie conveyed the property she had previously owned alone to Colonial Discount Corporation, by warranty deed and for a valuable consideration. Walter objected to the sale but showed up for the closing. He was told that he was not needed and had to wait outside the closing room. He never signed the deed. Colonial, as owner, made improvements to the real estate, and the court found that Walter was aware of this. On May 23, 1974, Colonial conveyed this real estate to the defendants (Danny L. Lynch and Glenda S. Lynch), who borrowed from the Kissell Company and gave that company a mortgage on the real estate. From July 1972, either Colonial or the Lynches paid the taxes on the real estate, and Walter did not. In May 1975, Walter filed dissolution of marriage proceedings against Elsie and was advised by his lawyer that he still had an interest in the real estate. The property settlement reached by the parties, and approved by the decree dissolving the marriage, was silent concerning this real estate.

Walter filed suit to quiet title against the Lynches and the Kissell Company on May 12, 1977, or nearly five years after the doubtful conveyance.

In the circumstances, the court had no difficulty in agreeing with Walter that the attempted separate conveyance by one tenant by the entireties without joinder by the other was ineffective but went on to say that "a finding that the conveyance is ineffective does not lead to the conclusion that the underlying legal interest [of the nonconveying spouse] is immune from equitable defenses of laches and acquiescence." The court pointed out that "The doctrines of laches and acquiescence are directed at the *actions*, not the legal interests of the parties against whom they are raised" [emphasis added].

Morgan v. *Cincinnati Insurance Co.*, 282 N.W. 2d 829 (Mich. App. 1979)

A husband and wife were living apart. A divorce was pending. The couple owned an insured house as tenants by the entireties, which the husband set on fire. Despite the wife's innocence, her recovery from the insurer was held barred by the husband's attempted fraud on the insurer. The court of appeals invited the supreme court to review this apparently harsh result of the common law indivisibility of such an estate.

Michaels v. *Hartzell*, 425 N.Y.S. 2d 474 (1980)

The lessee's action was brought to compel specific performance of an option to purchase premises owned by defendants as tenants by the entirety and occupied by the plaintiff under a long-term lease signed only by the defendant husband. A handwritten option to purchase clause was in the margin of the lease when the husband initialed the page.

A lower court judgment granting specific performance against the defendant wife was reversed on the ground that she neither signed the option nor authorized her husband in writing to do so in her behalf (Gen. Oblig. Law #5-703 subd 2). There was no evidence of any participation by the wife in transactions or negotiations pertaining to the property. She never met with the plaintiff, and made no representation, and performed no act on which the plaintiff relied. Under the circumstances, it could not be said that there was "both an occasion and duty to speak" or that "the omission to speak, upon opportunity being presented, was intentional or in negligent disregard of the plain dictates of conscience and justice" (*Thompson* v. *Simpson*, 128 N.Y. 270, 291 *et al.*).

Cull v. *Vadnais*, 406 A.2d 1241 (R.I. 1979)

A husband and wife owned real estate as tenants by the entirety. In an action brought against the husband only, the plaintiffs' motion to attach the real estate was granted and the defendant appealed.

Two issues were raised on appeal, both of which had become moot since the lower court had proceeded to hear the case on its merits and entered judgment for the plaintiffs. But the appellate court decided that the issues were so important that it would not wait for a future date before rendering an opinion. The first issue was whether orders granting prejudgment attachments can be appealed. The court held that they could not. The second issue was whether real estate held in tenancy by the entirety is exempt from prejudgment attachment in an action brought against only one spouse.

The court held that under the statute allowing the issuance of a writ to attach "real estate, or the right, title and interest of any defendant therein," a spouse's interest in real estate held by the entirety is legally sufficient to sustain prejudgment attachment, notwithstanding the fact that under Rhode Island law such interest is not subject to levy and sale on execution.

rower and beyond the control of the lender.

The loan may be prepaid at any time in whole or in part without a prepayment penalty.

The regulation preempts all state laws that would directly or indirectly prevent a federal association or federal savings bank from making, purchasing or participating in an AML. State laws prohibiting the charging of interest on interest are expressly preempted. The interest on interest preemption permits negative amortization.

Decreases are mandatory; increases optional, but the lender can be contractually bound to make the increase. Notice of an adjustment in payment must be given at least 30 but not more than 45 days prior to payment adjustment.

A prescribed disclosure notice must be given to the applicant borrower at the time of the receipt of an application or upon request.

National Banks

The Office of the Comptroller of Currency, by regulation effective March 27, 1981, provides for ARM lending by national banks.

An ARM loan is any loan made to finance or refinance the purchase of and secured by a lien on a one-to-four-family dwelling including a condominium unit, cooperative housing unit or a mobile home, where such loan is made pursuant to an agreement intended to enable the lender to adjust the rate of interest from time to time.

As used in the regulation, an ARM also includes a fixed-rate mortgage that implicitly permits rate adjustment by having the note mature on demand or at the end of an interval shorter than a term of the amortization schedule unless the bank has made no promise to refinance the loan. This special type of ARM has certain

Comparison of regulated features of adjustable mortgage loan by Federal Home Loan Bank Board and adjustable rate mortgage by Office of the Comptroller of Currency.

The Federal Home Loan Bank Board acted pursuant to its plenary and exclusive authority to regulate all aspects of the operations of federal associations as set forth in Section 5 (a) of the Home Owners' Loan Act of 1933.

The Office of the Comptroller of Currency says it acted pursuant to rule-making authority contained in 12 U.S.C. 93(a) and 12 U.S.C. 371(8).

	Adjustable Mortgage Loan (AML) 12 CFR Part 545. 46 Fed. Reg. 24148, April 30, 1981	Adjustable Rate Mortgage (ARM) 12 CFR Part 29. 46 Fed. Reg. 18932, March 27, 1981
Definition	AML is a loan for any allowable purpose that permits adjustment of the interest rate implemented through changes in amount of payment, addition to principal, lengthening the term or a combination of the above. (Sec. 545.6-4a(b))	ARM is a loan made to finance or refinance the purchase of and secured by a lien on a one-to-four-family dwelling including condominium, cooperative or mobile homes which permits the lender to adjust the rate of interest. (Sec. 29.2)
Authorization	Associations making, purchasing or participating or otherwise dealing in loans may use AML. (Sec. 545.6-4 (a))	National banks may make or purchase residential mortgage loans which carry an interest rate subject to periodic adjustment. (Sec. 29.1)
Effective	April 30, 1981	March 27, 1981
Transition	VRM and RRM loans phased out over a 90-day period beginning April 30, 1981. (Sec. 545.6-4a (g))	Nonconforming loans may be made for a period of 120 days. (Sec. 29.10)
Index	For the purpose of adjusting the interest rate, an association may use any interest rate index that is readily verifiable by the borrower and beyond the control of the lender, including without limitation thereto: (1) The national average mortgage contract rate for major lenders on the purchase of previously occupied homes (2) The average cost of funds to FSLIC-insured savings and loan associations, either for all Federal Home Loan Bank districts or for a particular district or districts (3) The monthly average of weekly auction rates on U.S. Treasury bills with a maturity of three months or six months (4) The monthly average yield on U.S. Treasury securities adjusted to a constant maturity of one, two, three or five years (Sec. 545.6-4a (c))	Changes in the interest rate must be linked to changes in an index specified in the loan documents. That index must be one of the following: (1) The monthly average contract interest rate charged by all lenders on mortgage loans for previously occupied homes (2) The monthly average yield on U.S. Treasury securities adjusted to a constant maturity of three years (3) The monthly average of weekly average auction rates on U.S. Treasury bills with a maturity of six months (Sec. 29.4(2))
"Caps" (1) Prescribed by regulation	Increases optional; decreases mandatory (Sec. 545.6-4a (f))	Increases optional; decreases mandatory (Sec. 29.5 (c) (1))
(a) Rate adjustment	No limit on frequency and magnitude if notice given (Sec. 545.6-4a (b) (1))	1 percent six months; 5 percent any one change (Sec. 29.5 (b))
(b) Payment adjustment	At least every five years and must amortize at the then-existing rate over then-remaining term of loan (Sec. 545.6-4a (b) (2))	At least every five years to amortize at the then-interest rate over the remainder of the original term; negative amortization cannot exceed 1 per cent of principal at beginning times number of six-month periods included in interval between payment changes and never more than 10 percent (Sec. 39.5 (d) (2))
(c) Term adjustment	40 years maximum (Sec. 545.6-4a (b))	30 years maximum (Sec. 29.5 (d) (2))

(d) Balance adjustment	See payment adjustment	See payment adjustment
(2) Contracted by the parties	Payment caps and rate change limitations may be established by competition among lenders or negotiated by parties (Sec. 545.6-4a (f))	Banks may establish minimum rate change limitations and minimum increments of interest rate changes (Sec. 39.5 (c) (3))
Notice to borrower of adjustment	Contents prescribed; 30-45 days (Sec. 545.6-4a (e))	Contents prescribed; 30-45 days (Sec. 29.8 (b))
Prepayment in whole or part without penalty	Permitted (Sec. 545.6-4a (b) (4))	Permitted (Sec. 29.6)
Disclosure	Form and content prescribed (Sec. 545.6-4a (f))	Form and content prescribed (Sec. 29.8)
Negative amortization	Interest on interest laws preempted (Sec. 545.6-4a (a) (2))	Interest on interest laws preempted (Sec. 29.5 (d) (1))
Due on sale	Preemption permitted under other regulations (Sec. 545.8-3 (f))	Preemption attempted (Sec. 29.7)

special notice requirements and will not be further pursued in this article.

The regulations provide for a transition period of 120 days from March 27, 1981, during which nonconforming loans may be made.

The regulations provide that one of the following indices must be used for rate adjustment:

- The monthly average interest rate charged by all lenders on mortgage loans for previously occupied homes as published by FHLBB in its Journal
- The monthly average yield on U.S. Treasury securities adjusted to a constant maturity of three years as published in the Federal Reserve *Bulletin* and made available by the Federal Reserve in Statistical Release G. 13 (415) during the first week of each month
- The monthly average of weekly auction rates on U.S. Treasury bills with a maturity of six months as published in the Federal Reserve *Bulletin* and made available by the Federal Reserve in Statistical Release G. 13 (415) during the first week of each month

Interest rate adjustments upwards in ARM may not exceed 1 percent each six months and in no event may any one interest rate change exceed 5 percent. The bank may decrease the rate of interest on a ARM in any amount at any time. Notice to the borrower of rate adjustment is prescribed and must be given at least 30 days and no more than 45 days before any interest rate change may take effect.

The regulations preempt the state law as to interest on interest which would permit negative amortization, but only if the payment is adjusted at least every five years to a level sufficient to amortize the outstanding principal at the then-interest rate over the then remainder of the original loan term, which may not exceed 30 years.

The Office of the Comptroller of Currency also undertakes to preempt the state law as to the validity or enforceability of "due-on-sale" clauses and provides that if the national bank permits assumption that it may "reset" the interest rate and any other loan term as of the date of assumption.

Decreases are mandatory, increases are optional, and a loan may be prepaid in whole or in part without penalty after notification of the first adjustment.

Certain disclosures must be made at the earlier of the date on which the bank provides written information on mortgage loans or provides a loan application.

New Policy Offered

The R.J. Cantrell Agency now offers errors and omissions protection for escrow agents and closers in all states except Alaska. The coverage is under a separate policy from our TitlePac program and is available at rates and with deductibles that we believe you will find acceptable.

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Committees—
from page 7

insurance industry, to make recommendations to the association with respect to such laws, and to provide advisors to drafting committees that are working on selected proposed laws.

A brief description of the purpose of the National Conference of Commissioners on Uniform State Laws may further an understanding of the committee's work. The conference was organized in 1892 to promote uniformity by voluntary action of each state government. Its stated object is "to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable." If the conference decides to accept a subject as appropriate for uniform legislation, a special committee is appointed to prepare a draft. The drafting committee will then invite various interested groups to participate in the drafting process. A draft act must be discussed and considered, section by section, by no fewer than two annual meetings before the conference may decide whether to promulgate the draft as a uniform act. Occasionally, an act will be designated in a "model act," if uniformity is not deemed to be necessary but a state desires legislation on the particular subject.

As can be seen, the drafting sessions on specific acts provide the best opportunity to raise questions that might concern title insurers before the act is completed by the draftsmen. Even if we are unsuccessful in obtaining the exact desired wording in the act itself, we have a further opportunity to suggest clarification in the official "comments" prepared by the draftsmen. In the past, ALTA advisors have worked with drafting committees in connection with the Uniform Land Transactions Act, Uniform Simplification of Land Transfers Act, Uniform Condominium Act, Uniform Planned Community Act, and Model Real Estate Time-Share Act. Currently, Hugh Brodkey is serving as an advisor on the Model Real Estate Cooperative Act, and I have just been appointed as an advisor on the Marital Property Act.

Of course, the ALTA advisor is only one of many, and advice furnished is not necessarily followed. Frequently, however, there is a community of interest with other advisors.

After an act is approved by the commissioners, the committee has to decide whether to recommend it to ALTA for endorsement by the association. In making its recommendations, the committee must weigh the relative merits of the proposed law against the existing law (or lack thereof) in the various states. For example, a favorable construction lien article in the Uniform Simplification of Land Transfers Act was instrumental in the favorable attitude expressed toward that act. The lack of any legislation on the subject of time shares encouraged us to recommend the Model Real Estate Time-Share Act to ALTA.

As was indicated, two of the proposed acts that appear to be of the greatest current concern are the Model Real Estate Cooperative Act and Marital Property Act. With respect to the former, we have been concerned with the need to clearly characterize the "cooperative interest" of unit owners as either real or personal property. The most recent draft, which will be voted on by the conference in August 1981, gives the developer the option of making such interest realty.

During the next year, we will have to consider the potential effect of the Marital Property Act. One of the underlying approaches of this act is the introduction of community property concepts into law of any state enacting this legislation. I believe our chief purpose should be to do everything we can to encourage the adoption of language protecting bona fide purchasers—regardless of the marital status of the vendor.

John Goode, Chairman

Planning Committee

Although the Planning Committee has been in existence for some time, it has been reactivated only during the past four or five years. The committee meets once or twice a year and consists of the president, president-elect, past president, chairman of the Abstracters and Title Insurance Agents Section, and chairman of the Finance Committee.

The bylaws provide that the Planning Committee shall study ways and means for improving the operations and methods of the association and the furtherance of a closer relationship between it and the membership. All recommendations are submitted to the Executive Committee for consideration.

The primary purpose of the committee is to take a good look at where the association is going and how it is going to get there. With this in mind, we have attempted to keep the agenda in line with futuristically viewing the activities of the association. There are sundry areas of

consideration, not the least of which is the formulation of a long-range plan to finance ALTA programs in the future so that the association's services are maintained at an effective level. In line with this objective, it was recommended at the last Planning Committee meeting to commence the ALTA fiscal year on April 1, because by that time the association would know how much dues income it would have available.

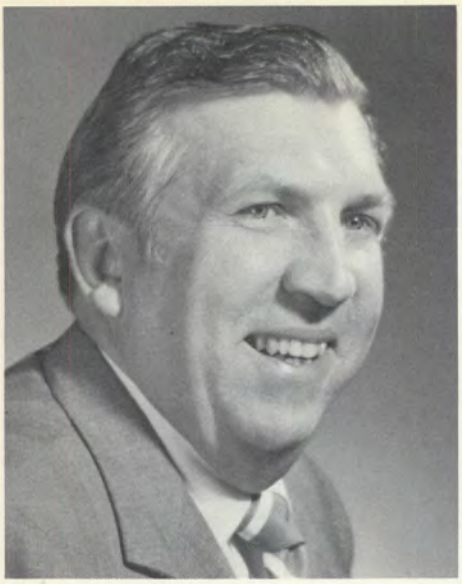
The Planning Committee would more than welcome any topics that the members feel should be given consideration down the road.

Fred B. Fromhold, Chairman

Wetlands Committee

The ALTA Wetlands Committee, established three years ago, works to educate and assist ALTA member companies by advising them of the existence of potential wetland problems and, in some instances, by providing helpful information where a problem has already occurred. Many jurisdictions throughout the United States have embarked upon plans that include the claiming of ownership or the reclaiming of previously alleged, improperly conveyed property. Such property is known under the general terminology of wetlands.

The continued increase in population and in recreational time available for the population has led these jurisdictions to lay claim to lands for public use. Various claims have, in fact, appeared to distort what was thought to be established law over many decades.



The committee has endeavored to further these objectives, in part by providing articles for ALTA *Title News*. These articles have particularly described either a present problem or court decision, or, in some instances, showed the results of a challenge by a city or a state to the ownership of certain lands.

An example of such articles is the one entitled, "The City of Eureka—the Research, the Cost—the Defense by the Title Insurer—the Expense to the City," which graphically lists the problems of and costs to both the title industry and municipality and the smallness of return in the particular case. Wetland problems are increasing and are applicable to all areas of the country and all types of wetlands.

The committee is now discussing the regrading of the minimal standards for land title surveys adopted by the ALTA and the American Congress on Surveying and Mapping.

Oscar H. Beasley, Chairman

Retirement Announced

L. Wayne (Barney) Lee has announced that he is taking an early retirement from his position of president of the Land Title Dawson Abstract Company in Sandusky, Michigan.

Robert J. Jay, representing the majority stock interest, has assumed management of the company. Jay is an attorney, has been in the land title business since 1948, and was president of Land Title Abstract Company, Port Huron, since 1960. His 33 years of experience include serving as president of Michigan Land Title Association (1960–62) and president of the American Land Title Association (1974–75).

PSA—
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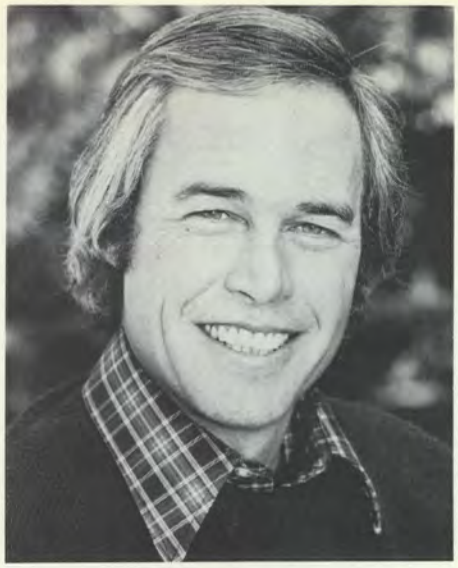
A 60-second "minidrama" produced for regular distribution last year has been placed in a 1981 monthly cable television satellite showing that reaches more than three million homes per exposure.

Early in 1981, an ALTA television public service slide announcement package was distributed that calls attention to the need for owner's title insurance in condominium unit ownership. This offering has been aired by 57 stations in 31 states with a cumulative audience of more than 61 million. Among stations using the slide package are WTTV, Indianapolis; WBFF, Baltimore; WCPO, Cincinnati, Ohio; KOCO, Oklahoma City; KOOL, Oakland, California; WKTV, Utica, New York; WJTV, Jackson, Mississippi; KTBC and KTVV, both in Austin, Texas; KLVX and KLAS, both in Las Vegas, Nevada; CHAU, Quebec, Canada; WMFE, Orlando, Florida; CCTV, Columbia, South Carolina; WQRF, Rockford, Illinois; and KIKU, Honolulu.

ALTA's new quarter-hour television public service film, "The Land We Love," is approaching a cumulative national audience of 30 million for 1981—the first full year of distribution for this offering. The film focuses on actual experiences in the working lives of three land title professionals—Susan Smith, an attorney in Bath, Maine, who recommends owner's title insurance to her homebuyer clients; Tom Hart, an abstracter and title insurance agent in Westmoreland, Kansas; and Erich Everbach, vice president for a large title insurer based in Los Angeles.

The ALTA public relations program is developed and carried out under the leadership of the association's Public Relations Committee, which presently consists of Chairman Bill Thurman, Dick Best, Randy Farmer, Jim Kramer, Jim Robinson, and Ed Schmidt.

Looking to the future, ALTA has established a solid foundation of media acceptance through its successful broadcast public service activity. This will benefit members of the association throughout the nation in coming years as ALTA messages continue to be offered in the intense competition for free public service air time. As the following comments from broadcasters airing the spring 1981 ALTA radio spots demonstrate, the association's public service messages have become welcome additions to programming that are awaited with anticipation from coast to coast.



STEVE KANALY

RON CAREY

. . . featured in ALTA television celebrity announcements

Michael Bayliss, KLUX, Baton Rouge, Louisiana—"Excellent, unique."

Gary Avey, KHSL, Chico, California—"Good, effective, entertaining spots!"

Bill Simmons, KSKY, Dallas—"Good copy."

Martha McNally, WPOW, Staten Island, New York—"Good with Braxton—as usual."

Marilyn Butler, WLVX, Minneapolis—"Good, amusing spots."

Danny Mac, WKRO, Cairo, Illinois—"Very good, our listeners and even the guys here at the station enjoy Sgt. Braxton and Zing."

Russ Roberts, KHLO, Hilo, Hawaii—"Sgt. Braxton and Zing are fantastic! Listener response is good . . . keep the good sergeant coming."

Carey Goin, WJSR, Birmingham, Alabama—"Sgt. Braxton is a legend in our area!"

David Cooper, WNTS, Indianapolis—"Innovative—real attention-getters."

Mark Persky, WBLM, Lewiston, Maine—"Great! We love the sarge and Zing."

J. Bruce Armstrong, WKIS, Orlando, Florida—"Good stuff."

Bob Robinson, WFGW, Black Mountain, North Carolina—"Your spots are a welcome relief from the 'ordinary' sounds that, I feel, get little attention."

Loy Engelhardt, KINO, Winslow, Arizona—"Good to have Sgt. Braxton back."

Ames Crosby, KTRX, Tarkio, Missouri—"Best PSAs available . . . we've been waiting for these . . . we've had requests for Sgt. Braxton."

Jeff Legan, WMOA, Marietta, Ohio—"Sgt. Braxton is one of the best public service campaigns I've ever heard."

Allan Ford, WTMT, Bloomfield, Connecticut—"Excellent!"

Glenn Hiatt, KATL, Miles City, Montana—"Very well done!"

R. J. Keith, WKPR, Kalamazoo, Michigan—"Sgt. Braxton and Zing are excellent. . . . More episodes with Braxton will be received gladly."

Stan Schwieger, KRNY, Kearney, Nebraska—"The Sgt. Braxton spots were excellent—again!"

Mike Strub, WNBI, Park Falls, Wisconsin—"Excellent! We've gotten great positive reactions."

Dick Evans Sr., WYZZ, Wilkes-Barre, Pennsylvania—"Very good. We've used these before."

Bruce Milner, WZZZ, West Point, Georgia—"We're glad Sgt. Braxton and Zing are back!"

Melissa Frank, KFAY, Fayetteville, Arkansas—"I love Sgt. Braxton and Zing!"

Judiciary Committee Issues Update

Gordon Granger, senior vice president and national counsel, Stewart Title Guaranty Company in Houston, the Fifth Circuit Court of Appeals reporter, reported *Durrett* v. *Washington National Insurance Company*, 621 F.2d 201, last year. This was a unanimous decision holding that a Texas trust deed sale to a third-party purchaser of real property for $115,400, which was worth $200,000, could be set aside under Section 67 (d)(2) of the Bankruptcy Act, which provides that "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of the bankruptcy petition is fraudulent . . . as to creditors existing at the time of such transfer or obligation if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to an actual intent."

The case *Abramson* v. *Lakewood Bank and Trust Company*, also reported by Granger and called to Judiciary Committee Chairman Ray E. Sweat's attention by Robert T. Haines, vice president of Chicago Title Insurance Company, decided by the Fifth Circuit Court of Appeals on June 10, 1981, and reported at 647 F.2d 547, holds that a trust deed executed in August 1975 and recorded August 5, 1975, for $74,000 on 73 acres in Kaufman County, Texas, which was foreclosed August 3, 1976, with a balance then due of approximately $71,000, by trust deed sale to the beneficiary through beneficiary's agent for $65,000, was also fraudulent under Section 67 (d)(2) of the Bankruptcy Act. The debtor filed a petition in Chapter XI on February 24, 1977, and the trustee filed to set the sale aside in March 1978.

The district court granted summary judgment for the mortgagee and refused to set aside the transfer on the theory that there was only one "transfer" within the meaning of the Bankruptcy Act and that the date of recording of the deed of trust was at the latest August 5, 1975, some 18 months prior to bankruptcy. The trustee appealed.

The Fifth Circuit Court of Appeals reversed the district court and set aside the foreclosure sale as fraudulent transfer under the Bankruptcy Act. Judge Clark offered a strong dissent, stating that, despite *Durrett*, the court was wrong in holding that a foreclosure sale is a transfer within the meaning of Section 67 (d)(2). Judge Clark said a foreclosure sale by the mortgagee is not a transfer by the debtor under Section 67 (d)(2) of the Bankruptcy Act.

Section 67 (d)(2) of the Bankruptcy Act has been replaced by Section 548 (2)(A) and Section 548 (B)(i) of the Bankruptcy Code, which provide that the trustee may avoid any transfer of an interest of a debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of filing of the petition if the debtor received less than a reasonably equivalent value in exchange for such transfer or obligation and was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

Names In The News . . .

Reeder

Staib

Young

Simpson

USLIFE Title Insurance Company of New York announced the appointment of **Douglas C. Staib** to vice president-manager of the company's Suffolk County office in Riverhead. Staib will be responsible for managing overall operations in the company's Riverhead office.

Title Insurance and Trust Company (TI), Concord, California, announced the appointment of **Alfred L. Harrell** to the position of major account manager. Harrell will be responsible for marketing the company's services to multicounty realtors and developers. TI is a subsidiary of Ticor, a diversified financial services management company with nationwide operations.

Larry A. Jack was named chief-title-officer of Transamerica Title Insurance Company's San Antonio office. Before assuming his new position, Jack was in private law practice, as well as a closer and examiner.

Transamerica's San Antonio office announced the appointment of **Len Wheeler** to branch manager. Wheeler was formerly county manager in Denton, Texas, and escrow officer in Dallas.

Charles W. Murchio was named chief title officer of Transamerica's Albuquerque office.

Transamerica also announced the appointment of **Dolores Ann Walker** to senior escrow officer of the company's Vallejo, California, office. Transamerica Title is a subsidiary of Transamerica Corporation, a diversified service organization based in San Francisco.

Philip M. Champagne was appointed division and state counsel for Commonwealth Land Title Insurance Company's Rhode Island title operation. Before joining Commonwealth, Champagne managed the Roger Williams Title Search Company.

Commonwealth also announced the appointment of **Thomas M. Reeder** to vice president and manager of the Miami office. Reeder succeeds **Jack Day,** who will remain with the Miami office as vice president in charge of special projects.

Jack

VanBuskirk

Shirley Ann Young was appointed southwestern regional counsel at American Title Insurance Company's regional Miami office. Young will oversee the administration of regional claims settlements and adjustments, as well as other real estate title insurance underwriting and legal matters.

American Title also announced the appointment of **James R. Simpson** to vice president and southwest regional manager. Formerly assistant vice president and agency administrator, Simpson will now focus on the expansion and improved servicing of the company's agency operations throughout the Southwest.

Ticor announced the election of **Robert A. Sena** to treasurer. Sena will continue as treasurer of Title Insurance and Trust Company and Pioneer National Title Insurance Company, both Ticor subsidiaries.

Sena has worked in the title industry since 1952, when he joined Union Title Insurance and Trust Company, San Diego, as an accountant.

Edward L. Coffey, former North Coast Division manager, has been named Central Region manager for the Ticor Title Insurers. Coffey, who has been with the company 17 years, will be responsible for all company operations and agency relations in 19 states.

Lawyers Title Insurance Corporation, Richmond, Virginia, announced the election of **Scott A. VanBuskirk** to assistant state counsel. VanBuskirk has been with Lawyers Title since 1974, when he served as title examiner in the Indianapolis office.

Lawyers Title also announced the appointments of three new branch office managers. **Richard E. Moran** was appointed branch manager of the corporation's Indianapolis office. He was formerly manager of the Pittsburgh, Pennsylvania, office. **Robert M. Brodeur** was appointed manager of the Howell, Michigan, office. Brodeur succeeds **William T. Shaw,** former branch office manager in Howell, who will manage Lawyers Title's Lansing, Michigan, branch office.

Dolores I. Graf, of Lawyers Title's Pittsburgh, Pennsylvania, branch office, has been named assistant branch counsel.

A title insurance industry veteran of more than 28 years, Graf joined Lawyers Title in Pittsburgh as an abstracter in 1952.

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Calendar of Meetings

September 13-15
Indiana Land Title Association
Merrillville Holiday Inn
Merrillville, Indiana

September 18-19
Dixie Land Title Association
Broadwater Beach Hotel
Biloxi, Mississippi

September 17-19
North Dakota Land Title Association
Kirkwood Motor Inn
Bismarck, North Dakota

September 20-23
American Land Title Association
The Broadmoor
Colorado Springs, Colorado

October 2-4
Palmetto (South Carolina) Land Title Association
Hilton Head Island, South Carolina

October 15-16
Wisconsin Land Title Association
Pioneer Inn of Lake Winnebago
Oshkosh, Wisconsin

November 11-14
Florida Land Title Association
Hotel Royal Plaza
Lake Buena Vista, Florida

American
Land Title
Association

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