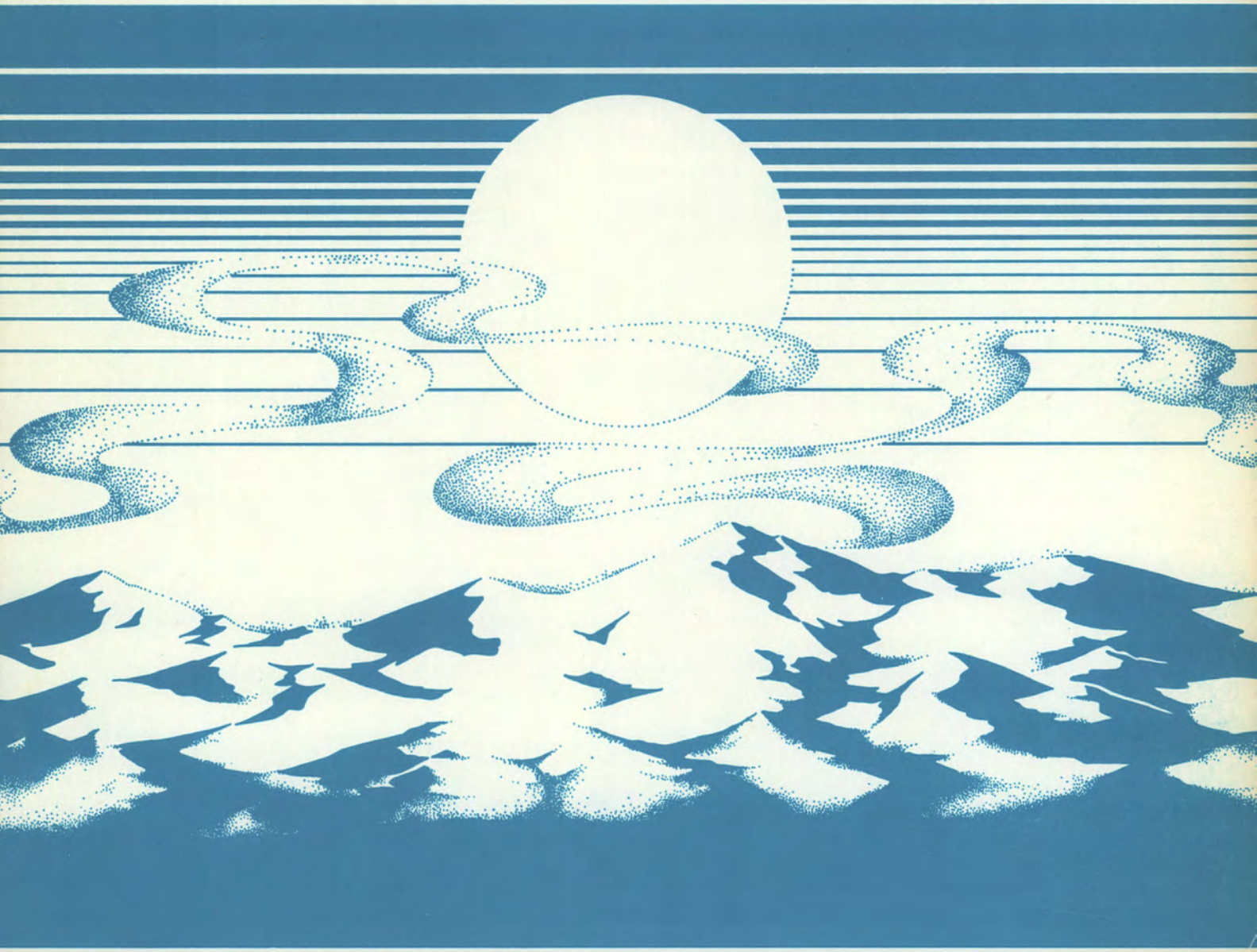
October 1981

TITLE NEWS



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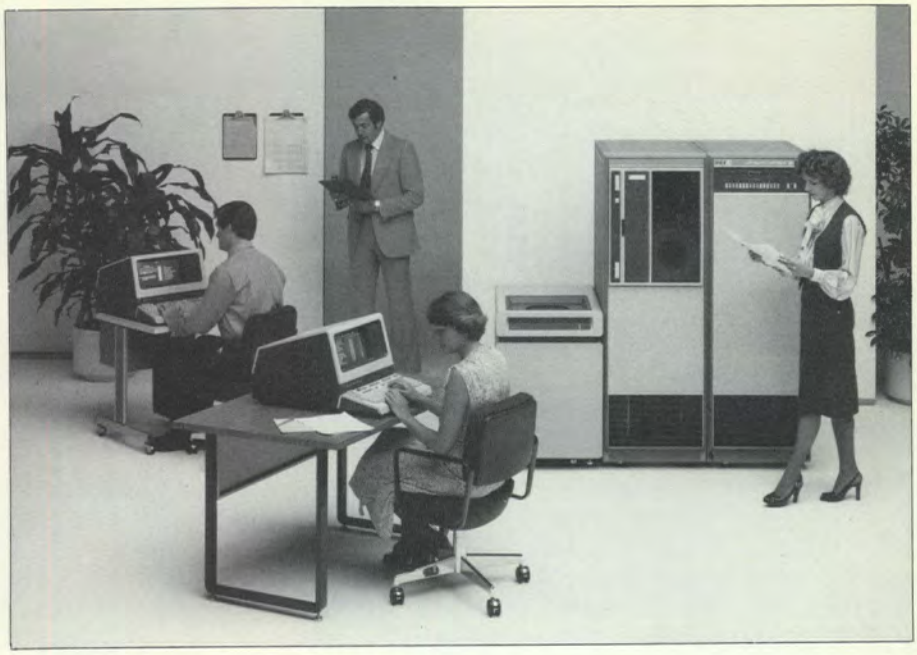

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Features

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In This Issue

John R. Weigel and Joseph M. Clayton Jr., Princeton, New Jersey, attorneys, discuss litigation involving oceanfront property owners and the public trust doctrine.

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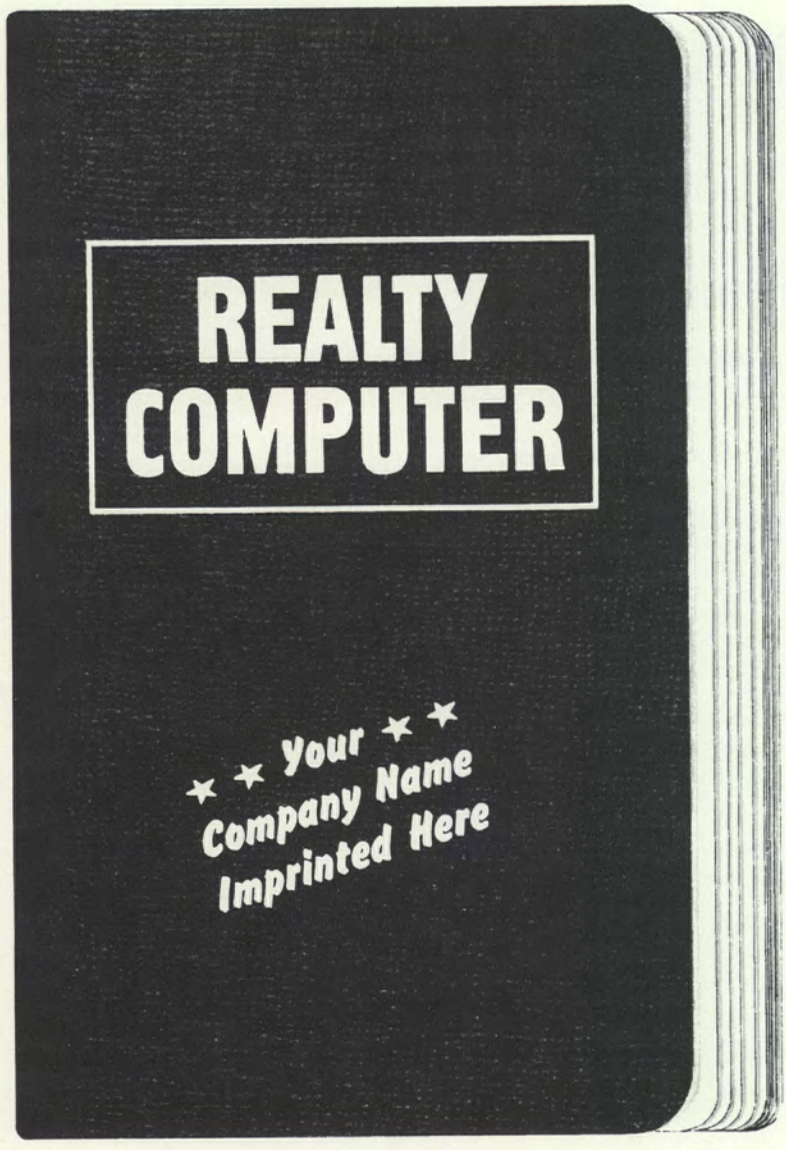

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A Message from the Chairman, Title Insurance and Underwriters Section

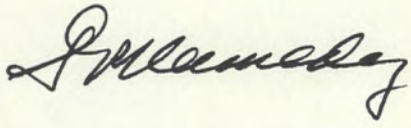
One of the more unpleasant aspects of being involved with a public company is the requirement that a written report be made to stockholders each quarter. Depending on the circumstances, this task is either stimulating or downright embarrassing, but always difficult. Reading past reports, which unfortunately must contain a plausible explanation of the past and an optimistic (but not too optimistic) estimate of the future, is a pleasant and humorous way to spend a lazy, rainy afternoon.

For example, how do you like this one? "There is a giant unfilled demand for new housing which remains unsatisfied because of the lack of reasonably priced mortgage funds." And what about, "When funds become available the volume of title transactions will grow to record levels." And isn't this one tiresome? "Costs are becoming even more difficult to control than in the past. Inflation is pushing all costs to record levels in spite of all efforts to contain them." And we always have to slip this one in, "The Federal Reserve Board in its effort to contain the inflationary pressures has continued to require high bank reserves and has continued to restrict the supply of money. Whether this approach can or will be successful is debatable."

My point is that I'm tired of *futures* and I'm ready for some *nows*. More understandable is the young employee who says, "Don't give me such a bright future. Let's talk about *now*."

Oh, not that there isn't much to be encouraged about in Washington these days—the new tax law, which was long overdue and supported by the American Land Title Association; the budget cuts, which should tend to reduce inflationary pressures, as has the Fed's insistence on high bank reserves and the controlled money supply. We are all confident that ultimately the real estate economy will right itself and all will be well with the world. The question is the matter of timing. When will the effect of the Deregulation Act be fully known? When will we again be able to predict with some degree of certainty the long-term interest rates? Will the savings bank and the savings and loan industries survive? The answers to these questions are difficult and present a giant challenge, not only to the administration and Congress, but also to the industries involved. Next year, without question, will present more complex problems for the title industry than any time since the early thirties. The future role of the title industry will probably be much different from its present role, and this may require individual title companies and abstracters to be more elastic and innovative than ever before to survive. This, of course, means that the American Land Title Association will have to be equally farsighted and elastic, exerting an increasingly stronger leadership role. I believe the association will successfully respond to the challenge.

In the meantime, remember, "There is a giant unfulfilled demand for new housing. . . ."



D.P. Kennedy

John R. Weigel and Joseph M. Clayton Jr.

Public Use Challenges Private Rights to Bay Head Ocean Beach

Are ocean beaches in private record ownership subject to the "public trust doctrine" and therefore open to general public use for water-related recreational activity?

In a test case prosecuted by New Jersey's public advocate, a trial court on June 1, 1981, held "no." *Virginia Matthews and Stanley C. Van Ness, Public Advocate* v. *Bay Head Improvement Association, et al.*, Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-23410-73. The public advocate, a statutorily created ombudsman with broad powers to institute and prosecute public interest litigation, has made a commitment to open up all of New Jersey's ocean beaches and intervened in the *Bay Head* case as a vehicle to accomplish this end.

The Borough of Bay Head is an affluent residential community of 1,336 in Ocean County, New Jersey, which was developed in the late nineteenth century as a result of the activities of the Bay Head Land Company and the Sea Shore Land Company. It borders the Atlantic Ocean and has a choice sandy beach which is approximately 6,600 feet in length and 50 feet in width. Imposing residences have been built on the adjoining upland, with the private record titles extending down, at least, to the mean high water line. Approximately 2,567 linear feet along the mean high water line are subject to various riparian grants issued by the state of New Jersey, commencing in 1895 and ending in the 1930s.

By their terms these riparian grants are absolute conveyances to the adjoining upland owners of submerged lands extending from the mean high water line approximately 1,000 feet into the Atlantic Ocean. The dry sand beach includes all of the area between the mean high water line and the sea wall and dune line. In 1904 an easement to construct a boardwalk along the ocean was given by the private property owners to the Borough of Bay Head. The boardwalk subsequently constructed was severely damaged by numerous storms over the years and only partially repaired. Today, the boardwalk exists over only a portion of the original easement.

The authors are law partners in Princeton, New Jersey, who are attorneys of record for several of the defendant oceanfront property owners in the Bay Head litigation. Weigel is general manager of the New Jersey LandTitle Insurance Rating Bureau and executive director of the New Jersey Land Title Insurance Association and Clayton is deputy manager and deputy director of those organizations, respectively.

Two blocks inland, New Jersey Route 35 parallels the ocean. Perpendicular to the ocean are 12 public streets which end at points in proximity to the dry sand beach. There are no public beaches in the Borough of Bay Head. There are no off-street public parking facilities for beach users in proximity to the beach, nor are there public dressing facilities, showers, rest rooms, or eating establishments.

In 1910, some of the Bay Head property owners formed an association known as the Bay Head Improvement Association (BHIA), which was converted to a non-profit corporation in 1932. In the early 1930s, local property owners wanted to institute some form of control over the use of the beach as a result of an influx of non-residents onto the private beach at about that time. Since the summer of 1933 the BHIA has annually controlled and limited access to the Bay Head beach during the period from June 15 through September 15. Control has been effected by placing guards at the street ends and limiting use of the beach to badge holders. Residents of Bay Head, both permanent and temporary, are eligible to purchase badges. From 1933 to 1950, the BHIA acquired title to the land from the street ends to the mean high water line and also acquired various other dry sand parcels.

The BHIA has a form of lease which it asks oceanfront property owners to execute. The lease form generally provides that in consideration of the BHIA policing and maintaining the beach during the summer season the property owner leases

the beach to the BHIA until the lease is revoked by either party on written notice. Just prior to the commencement of the litigation, 36 of the 82 oceanfront property owners had executed such leases with the BHIA.

The BHIA has designated certain areas for swimming where a lifeguard is stationed. The BHIA either owns or has leases to these designated bathing areas. The BHIA is a voluntary organization; some oceanfront property owners have chosen to belong, and others have chosen not to. Those oceanfront property owners who have not executed leases with the BHIA are free to use their beaches as they see fit and can exclude others, including badge holders, from their beaches.

This suit was originally filed in April 1974 by the Borough of Point Pleasant, an adjoining municipality suing on behalf of its residents who were denied access to the beach, against the Borough of Bay Head and the BHIA. Shortly thereafter, the court dismissed the claim against the Borough of Bay Head, and Virginia Matthews, a resident of the Borough of Point Pleasant who had been denied a Bay Head beach badge, was added as a plaintiff-intervenor. Late in 1974, the public advocate was granted permission to file a complaint in intervention. Subsequently, the court ordered the plaintiffs to join as defendants the owners of all of the 82 parcels that border the Atlantic Ocean. After completion of certain discovery all parties felt the matter was ripe for summary judgment and the case came before Superior Court Judge Harold Kaplan, sitting in Toms River, on cross motions for summary judgment.

Public Advocate Arguments

The public advocate advanced the following essential arguments:

The BHIA's refusal to issue beach badges to nonresidents of Bay Head violates "the public right to use the beach."

"The right to exclude the general public from one's oceanfront property in Bay Head is a permitted and essential attribute of private ownership and could never be considered such discrimination as to be regulated by the state . . ."

The public trust doctrine makes tidal resources "common property" to be used and enjoyed by all citizens, and it is "a paramount and legally enforceable right."

While New Jersey has long recognized that the public trust doctrine is applicable to our tidewaters and their beds below the mean high water line, the doctrine should be extended to include "dry sand beach" in private record ownership. There exists a "public easement" for access to tidal resources "which cannot be impaired by public or private entities." The cases of *Borough of Neptune City* v. *Borough of Avon-by-the-Sea*, 61 N.J. 296; 294 A.2d 47 (1972) and *Van Ness* v. *Deal*, 78 N.J. 174; 393 A.2d 571 (1978) have extended the traditional public trust purposes of commerce, navigation and fishing to encompass water-related recreational uses as well and applied the public trust doctrine to municipally owned dry sand beaches and their integral beach facilities.

A "parallel ruling is warranted" as to private beaches because the tidal waters cannot be enjoyed by the public unless the beach itself is made available for general public recreational use. Beach property is "unique" because of its "proximity to tidal waters"; it is a finite resource which is in ever-increasing demand; the Bay Head beach "is advantageously situated and eminently suitable for public uses and access to the water without intrusion upon or interference with the legitimate and purely residential uses of the individually-named defendants."

* * *

"Private property rights are not absolute. They may be forced to yield where there is a public use and paramount public rights are being denied." *State* v. *Schmid*, 84 N.J. 535; 423 A.2d 615 (1980) is authority for a "public user" argument that is applicable to the Bay Head beach. "The primary use of the dry sand beach in Bay Head during the summer is public beach recreation and access to the ocean. This has been so since 1928. Over the ensuing years, the BHIA has fostered and accommodated such a use by cleaning the beach, hiring lifeguards and advertising its beach badges in annual brochures. This is the very use which the non-resident public seeks to enjoy in concert with the public of Bay Head. Since the use already exists, it apparently is not in discord with any private uses of the beach."

The BHIA cannot avoid this "public use" by any self-serving characterization given the organization—"the pertinent inquiry here is not the internal organization of the entity owning or controlling the beach, but rather the nature of its use." BHIA badge holders are the public, and they "are no less the public simply because they are only one segment of the larger public community." The existing "public use" mandates "against discrimination with regard to that larger public." The BHIA cannot deny "the public purposes of its beach activities" since its certificate of incorporation and its constitution and bylaws expressly provide that it is a nonprofit civic organization "incorporated to benefit the public of Bay Head."

The "public use has pertained to the entire beach irrespective of leases." The leases were initiated "by the BHIA in order to lend credence to its selectivity in beach users, not as a tool for expanding beach areas used. The sporadic history of such agreements, and checkerboard pattern of properties leased, highlight the unassailable fact that leases do not now, and never have, defined where and if BHIA badge holders may use the beach." Since the BHIA "controls and maintains the beach," it "must be inferred that the public user is coextensive" with the entire Bay Head beach.

* * *

The BHIA in its management of the ocean beach in Bay Head is a surrogate for the borough. The Borough Council gave "approval of its [BHIA's] concept plan for the control of the beach." "From 1934 until this suit was filed in 1974, the BHIA was afforded and made substantial use of an office in the Borough Hall, which was rent-free . . . the Mayor of Bay Head was an *ex-officio* officer of the BHIA, and in the past various BHIA officers have simultaneously served on the Borough Council."

The borough appropriated a modest amount annually (between $300 and $1,000) to the BHIA from 1926 until the late 1960s; from 1962 to 1968 the beach was covered by the borough's blanket public liability insurance policy. The BHIA beach police assist the borough police in regulating traffic during the summer season on the streets leading to the beach. In 1955 the BHIA beach police were put under the jurisdiction of the Bay Head chief of police. "The Borough and BHIA have over the years often combined efforts and resources on specific projects to protect and maintain the beach and boardwalk." The BHIA is the "functional equivalent" of the Borough of Bay Head, and, therefore, the holdings of *Borough of Neptune City* v. *Borough of Avon-by-the-Sea, supra*, and *Van Ness* v. *Deal, supra*, are applicable to the Bay Head beach as fully as if that beach were, in fact, municipally owned.

* * *

The individual defendants who are riparian grantees of the state of New Jersey have no right "to exclude members of the public from the trust areas conveyed . . . so long as the waters remain, as here, natural tidal areas." The "public's right to use the waters inures in the state in its sovereign capacity" and not in its proprietary capacity. "The public's right to use the water is legally consistent with title to the ocean bed in a private owner." It is not disputed that the riparian grants convey a fee simple title "to submerged ocean beds to the grantees, their heirs and assigns." However, the grants "by their terms neither expressly nor impliedly afford the grant holder a right to deny public access to the waters so long as they remain undisturbed."

* * *

"Numerous acts and conducts in this case manifest an intent to dedicate the beach in Bay Head for public recreation and access to the adjacent ocean." The early land holders "indicated this in the maps they filed plotting land divisions and streets. They left open a strip of beach along the ocean for free public passage." The use actually made of the beach and the manner of control by the BHIA support a finding that the Bay Head beach has been dedicated to public use. "In short, over the years, the various private owners of the upland have manifested by their cooperation with the BHIA and its provisions for public enjoyment of the beach their intent to dedicate their dry sand areas to such uses."

* * *

Continued on page 9

"The right of the public to a greater enjoyment of beach facilities, while important and of ever-increasing interest, is at best an unexpressed penumbral right, not rising to a constitutional level, but to be weighted in context with the right of those who seek to bar unlimited invasion."

The ALTA Judiciary Committee Supplement

The following cases are the third and final installment of the annual Judiciary Committee Supplement submitted by Committee Chairman Ray E. Sweat.

Title

Roe v. *Doe*, 246 Ga. 138 (1980)

The property involved in this litigation was owned by Paul Jones, who in November 1962 entered a long-term lease in which the lessee was to remove the existing structure and build a multistory hotel and motel. The lease provided that Paul Jones would join in any mortgage for both interim and permanent financing necessary for the constructing of the hotel and would agree that the title of the owner was to be subordinated to any such mortgages.

The lease also provided that the leaser would furnish Jones and his wife a penthouse apartment, at no charge, for the remainder of his or her natural life.

A deed to secure debt in the amount of $2,600,000 was subsequently executed by the lessee, and Paul Jones joined in the execution of the mortgage "in order that title may be conveyed to the mortgagee." Subsequently, a second deed to secure debt in the amount of $900,000 was executed by the lessee, and Paul Jones again subordinated his title to the loan. These two loans were eventually consolidated into a single indebtedness and were ultimately foreclosed and the property purchased by the lender at the foreclosure sale.

Mr. and Mrs. Jones continued to occupy the penthouse apartment after the foreclosure, and it was for this reason that this ejection action was started.

Jones alleged that he had reserved a life estate for himself and his wife in the original lease. The court disagreed and said that the lessee agreed to furnish an apartment to the Joneses and therefore, it was a grant from the lessee (the holder of the estate for years).

The court said that when Jones subordinated his interest in the property to the security deeds that were foreclosed, the subsequent foreclosure extinguished any interest that he had in the property. The court said, however, that Mrs. Jones never subordinated her interest in the property and therefore retained a life estate in the property.

The court ruling appeared to fly in the face of its determination that the interest held by Mr. and Mrs. Jones was a grant by the lessee. If this were true, they would have been subtenants. Mrs. Jones never owned any interest in the property other than the life estate. When the mortgage was foreclosed, the mortgagee acquired both the lessee's interest and the fee simple title, which had been subordinated by Jones. Jones had never conveyed any interest in the fee to his wife, and her only interest was acquired through the lessee. It would thus appear that Mrs. Jones was a sublessee, whose interest would have ceased on termination of the primary lease.

The court rejected this argument and said that the lessee who had only an estate for years could grant a life estate to the property. The conclusion of the court was certainly clear, but its reasoning in arriving at this conclusion was not. This decision was certainly a departure from what the law had been previously and requires that persons carefully examine such transactions.

Title Insurance—Unambiguous Exclusionary Clause

Brokers Title Co. v. *St. Paul Fire and Marine Insurance Co.*, 610 F.2d 1174 (3d Cir. 1979)

Brokers Title Insurance Co., a Pennsylvania corporation, served as the Philadelphia agent for Title Guarantee Co., a Maryland corporation. To protect itself against liability for negligent acts, Brokers contracted with St. Paul Fire and Marine Insurance Co. for an "errors and omissions" insurance policy. During the term of that policy, Brokers issued a title report and policy on certain real estate. At the closing, Brokers received money from the grantors of the property with which to satisfy outstanding tax liens. Brokers then negligently delivered the money to an unintended recipient. Before the error was discovered, the real estate was sold at a tax sale. The grantees sued both Brokers and Title Guarantee for loss of the real estate under the title insurance policy. Judgment was entered against both parties.

Brokers instituted the present action to recover from St. Paul under the "errors and omissions" policy. In defense, St. Paul asserted that the plaintiff's action was not protected by the policy because of an exclusionary clause that stated that claims arising out of any mishandling of funds were not covered by the policy. The district court, in applying the rule of *Hionis* v. *Northern Mutual Insurance Co.*, 230 Pa. Super. 511, 327 A.2d 363 (1974), held that because Brokers' representative neither had the exclusion explained to him nor manifested an independent understanding of the clause, the provision should be construed in favor of the insured. On appeal, St. Paul averred that *Hionis* should not apply to those instances in which the exclusionary clause was unambiguous, the parties were of equal bargaining power, and the party claiming misunderstanding made no outward manifestation to that effect. Finding that the exclusionary provision did not, in and of itself, evidence an adhesion contract, the court proceeded to interpret the insurance policy according to standard Pennsylvania contract law principles. In so doing, the court asserted that absent knowledge by one party of the other's subjective misunderstanding, an objective manifestation of assent to the terms will bind the parties thereto. Hence, as interpreted by the circuit court, the *Hionis* rule, which places the burden of proving knowledge and understanding by the insured on the insurer, applies only to those instances in which the ambiguous exclusionary clause is at issue. Accordingly, the decision of the district court was reversed.

In a sharply worded dissent, Judge Garth stated that although *Hionis* concerned an ambiguous exclusionary clause, the Pennsylvania Superior Court did not find that fact definitive. The dissent quoted excerpts from *Hionis* in which it was stated that insofar as insurance contracts have been viewed as contracts of adhesion, exclusionary clauses should be construed against the insurer. Principally on that basis, the dissent would have affirmed the district court's judgment against the appellant.

Title Insurance

Brown v. *St. Paul Title Insurance Corp.*, 634 F.2d 1103 (8th Cir. 1980)

In March 1974, Citizens Mortgage Investment Trust became the primary construction lender for a development called Lake St. Louis Estates. Citizens advanced more than $10 million to pay off prior construction lenders and also agreed to make further advances up to a maximum of $17 million subject to conditions set forth in the loan agreement. The loan was secured by a deed of trust and a first-lien mortgage on the property of the Lake St. Louis Development.

To protect its interest in the real estate, Citizens purchased a title insurance policy from St. Paul Title Insurance Corp. (title insurer), which included the standard exclusion for any defects, liens, or encumbrances "created, suffered, assumed or agreed to by the insured claimant." Originally, the title insurance policy coverage was equal to the amount of Citizens' initial advance, but the coverage was to be periodically increased as Citizens made subsequent advances pursuant to a disbursement agreement with the title insurer. The disbursement procedure called for a "draw request" issued by the developer to Citizens certifying that certain work had been satisfactorily completed and requesting that specific contractors and suppliers be paid for services or materials furnished. Citizens would review the request, and if it was approved it would transfer funds to a construction escrow account maintained by the title insurer. The latter would then make disbursements directly to the contractors and suppliers. This method for disbursements necessarily caused a delay between the date of the draw request and the date the funds would be disbursed to the proper persons. By the time a draw request was paid, additional work would be completed on the project that was not covered by the latest draw request. Under the disbursement agreement, the title insurer was required to issue an endorsement moving the effective date of coverage up to the date the funds were actually disbursed.

On July 16, 1974, the developer issued a draw request to Citizens. On July 29, 1974, Citizens transferred funds for the draw request of July 16 to the title insurer, which disbursed them to the persons designated. Soon after this last disbursement, the developer failed to make an interest payment on the construction loan and was notified by Citizens of the default. No additional funds were advanced for the project after July 29, 1974. Efforts to work out an arrangement with the developer failed, and foreclosure proceedings were initiated in November 1974.

In November and December 1974, mechanic's liens were filed by two subcontractors, which liens represented, in part, work and materials supplied between July 16, 1974, the date of the last draw request, and July 30, 1974, the date of the title insurer's last endorsement to the policy. Citizens called on the title insurer to discharge the liens and to defend Citizens' priority pursuant to its title insurance policy, but the title insurer took the position that it was under no obligation to defend the priority of Citizens' lien because Citizens had stopped funding the project after the developer's default and had not given St. Paul the money to pay for the work completed after the last draw request, but prior to the default. Citizens settled with the subcontractors and commenced the suit against the title insurer, alleging that the refusal to discharge was a breach of the title insurance policy and that the breach was vexatious and without just cause. The district court held for Citizens. The Eighth Circuit Court in this appeal reversed.

The question was, If a lender refused to transfer funds to pay off liens arising after the date of the last draw request, although created before the developer's default, were these liens created or suffered by the insured lender and therefore excluded from title policy coverage? The court said yes. In this case, the mechanic's liens did not arise because the title insurer improperly or erroneously disbursed loan funds. Several days would pass between the date the draw request was made and the date the funds were transferred to the title insurer for disbursement, and since work on the development continued during this period, additional debts would be covered by a subsequent draw request. Although Citizens was under no obligation to continue funding the project after the developer's default, the parties contemplated that Citizens would provide adequate funds to pay for work completed before the default. Mechanic's liens attributable to work performed in the lag time between the draw request and the disbursement of the funds were created or suffered as a result of Citizens' failure to furnish the funds necessary to cover the cost of improvements made during this period. Therefore, such liens were expressly excluded from coverage of the title insurance policy.

Capital Indemnity Corp. v. *Freedom House Development Corp.*, 487 F. Supp. 839 (Mass. 1980)

The issuer of performance bonds on a federally funded housing project that failed brought suit against multiple defendants, including the project title insurer and the Department of Housing and Urban Development (HUD) as construction loan insurer. The court held that the insurer was not liable to the plaintiff for negligent misrepresentation arising from title defects because the plaintiff was not in privity of contract with the title insurer. The court quoted Justice Cardozo in *Ultramares Corp.* v. *Touche*, 255 N.Y. 170 N.E. 441 (1931), where he held that allowing claimants to impute a public representation from the issuance of a title insurance policy not only would open an unforeseeable fount of claims but also would make title insurers limitlessly "liable to purchasers who may wish to benefit of a policy without payment of a premium." In ruling on the title insurer's motion for summary judgment against HUD, however, the court held that the insurer could not rely on the policy requirement that all notices of claims be in writing and that oral notice was sufficient unless the insurer was prejudiced by failure to give written notice. The court also stated that it could not hold as a matter of law that five months was a reasonable time to cure a title defect and held that this was a question of fact that should await the trial on the merits.

Garton v. *Title Insurance and Trust Co.*, 106 Cal. App. 3d 365: modified 107 Cal. App. 530a (1980)

In this case, the plaintiff purchasers appealed from a judgment of dismissal with prejudice in favor of defendants Title Insurance, and Hunter, a notary public and Title Insurance's employee. The trial court sustained the defendant's demurrer. The appellate court reversed and remanded.

The plaintiffs alleged that they had agreed to purchase two parcels of real property described by metes and bounds that fell within two county assessor's parcels. A predecessor in title had reserved the minerals under a portion of parcel two, which was the subject of a separate assessor's parcel. Title Insurance issued four preliminary title reports, the first three of which described parcel one and quite properly did not reflect any reservation to the title. The fourth preliminary title report described the subject parcel two and reflected the recorded mineral reservation. The plaintiffs, however, alleged that they did not receive the fourth preliminary title report, which was instead sent to their brokers, whose salesperson misrepresented the contents of that report to the plaintiffs. As part of the purchase of the property, the plaintiffs executed a note secured by a deed of trust that failed to except the mineral reservation. The defect was discovered prior to the close of escrow. Hunter and Title Insurance, it was alleged, appended an exception to the description setting forth the mineral reservation without the knowledge, consent, or permission of the plaintiffs. Further, Hunter, as notary public, added the plaintiffs' acknowledgment to the deed of trust as altered, such acknowledgment being false

since the plaintiffs did not appear before Hunter to acknowledge their signatures on the altered deed of trust. The plaintiffs were prevented from using the property in the manner they had planned because of the reservation of the minerals.

In their first, second, and third causes of action, the plaintiffs asserted liability against the defendants Title Insurance and Hunter for the fraud, deceit, and/or misrepresentation of a real estate salesperson on an agency theory. The defendants argued that the first three causes of action were insufficient because no agency relationship existed between them and the salesperson. The court held that whether the normal business practice is that a real estate brokerage firm contracts with a title insurance company for services rather than being its agent was of no avail to the defendants. The fact that the salesperson was employed by a realty company did not preclude the possibility that for the particular transactions in question the salesperson was acting as agent or employee of Title Insurance as well, nor did the claim that the salesperson was acting as the agent of the plaintiffs preclude that possibility. The test on demurrer was not whether the allegations were likely to be proved but whether the allegations precluded liability.

In the fifth cause of action, the plaintiffs asserted liability against the defendants for falsely taking the acknowledgment of the deed of trust, without which the transaction could not have been completed. The plaintiffs contended that they were ignorant of the mineral reservation and that had Hunter and Title Insurance required their presence to take the acknkowledgment, the plaintiffs would have discovered the reservation and thereby could have prevented the closing of the transaction. The defendants contended that there could be no liability for the false acknowledgments, since the plaintiffs conceded that the signatures on the deed of trust were theirs. The appellate court disagreed, stating that the deed of trust that was acknowledged and recorded was not the deed of trust that was executed by the plaintiffs. The addition of the exception for the reservation of mineral rights in the deed of trust was a material alteration of the instrument that had been executed. By falsely taking the acknowledgment of this altered document, Hunter breached his duty as a notary. This was true whether Hunter intentionally took the acknowledgment with knowledge that the document had been altered or did so negligently. By taking the false acknowledgment and recording the altered deed of trust, the defendants deprived the plaintiffs of the opportunity to learn the true facts of the transaction. As a result, the plaintiffs received less than that for which they had bargained. Further, it being alleged that Hunter was the agent and employee of Title Insurance, the latter, as Hunter's employer, might be held liable for the improper taking of the acknowledgment.

The plaintiffs further asserted liability against the defendants as title abstractors, title insurers, and escrow holders.

As against the defendant as title abstractor, the court held that a cause of action was stated. An abstractor must report all matters that could affect his client's interest and that are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made. If, as was alleged by the plaintiffs, the defendants were requested and agreed to undertake to search the title of both parcels subject to the agreements of sale, then it would be a breach of that agreement and/or negligence for them to search the title of only a portion of the property by abstracting only one of the assessor's parcels. The contracts of sale specifically described the subject properties by metes and bounds, and a diligent title searcher should have discovered by reference to the precise legal description of the parcels that the parties were in error in describing both parcels as being within one parcel number.

The defendants also argued that even if they were negligent in failing to list the mineral reservation in the first three preliminary title reports that negligence was not the proximate cause of injury to the plaintiffs. The question was whether the belated discovery of the reservation of mineral rights and its inclusion in the fourth preliminary title report precluded liability for the earlier failure to discover and report that defect. A title searcher may be held liable only for those damages that are proximately caused by his failure to perform the search properly. The plaintiffs alleged that they did not see the fourth preliminary title report that had been sent to the realty company. The plaintiffs alleged that they relied on their inspection of the initial preliminary title report and the salesperson's representations as to the other reports in completing the transaction. As a consequence, there were possible intervening causes of the plaintiffs' damages. The proximate cause is generaly held to be a question of fact for the trier of fact to determine based on the evidence. Although the possible intervening causes might support a finding that the defendants' failure to find and disclose the mineral reservation in the first three preliminary title reports was not the proximate cause of the plaintiffs' damages, none of the possibilities precludes, as a matter of law, liability for that negligence.

As to the defendants' liability as a title insurer, the plaintiffs did not contend that the defendants were liable under the policy of title insurance issued on the property, the policy containing an exception of the reserved mineral rights; rather, the plaintiffs complained that the defendants failed to find and list the reservation on the preliminary title report and should be held liable for such failure. The court held that the obligation of a title insurer in performing a title search incident to the preparation of a preliminary title report is identical to that of a title abstractor.

With respect to the defendants' liability of an escrow holder, the court held that a breach of duty was alleged when the defendants failed to inform the plaintiffs that the land to be purchased was subject to a reservation of mineral rights; the defendants prepared the deed of trust, which the plaintiffs executed without placing an exception for the mineral rights therein so that the plaintiffs did not discover the reservation when they executed the deed of trust. When the defendants discovered their error, they failed to inform the plaintiffs of the error but rather altered the deed of trust and took a false acknowledgment so that the plaintiffs were prevented from learning of the reservation of mineral rights. The court further agreed that if the defendants had informed the plaintiffs of the mineral rights, placed an exception in the original deed of trust, or informed the plaintiffs when it was discovered that the deed of trust as executed was incorrect, they would have discovered the reservation in time to prevent the closing of the escrow.

In the ninth cause of action, the plaintiffs sought injunctive relief in the form of an order that the defendants obtain a release of the mineral rights. The court concluded, however, that the plaintiffs were not entitled to such relief and that the demurrer was properly sustained as to that cause of action. The court pointed out that nothing that the defendants did or did not do in any way caused the land to be subject to the mineral interest. Since the acts or omissions of the defendants did not cause the land to be subject to the mineral interest, the cost of removing that interest was not a proper measure of the plaintiffs' damages.

Title Insurance—Right of Access

Title and Trust Co. of Florida v. *Barrows*, 381 So. 2d 1088 (Fla. 1979)

The circuit court in this case awarded the money damage for breach to a title insurance policy. The court held that the insured was denied access to his property because during the spring and fall of each year the dedicated right of way was covered by high tide water. The district court of appeal reversed, holding that the policy insured against the lack of a right of access to and from the land but did not insure against defects in the physical condition of the land or infirmities in the legal right of access not shown by the public records.

Title Insurance—Materiality of Facts Not Disclosed by the Insured—Negligent Search

L. Smirlock Realty v. *Title Guarantee Co.*, 421 N.Y.S. 2d 232 (1979)

When a proposed insured has knowledge of a defect, even one that might not be material to the risk involved in issuing a title policy but would lead to discovery of a material fact, and fails to disclose it he may lose protection of the policy. So ruled the New York Appellate Division, Second Department, holding that materiality is not limited to the suppressed fact alone but extends to any other information that might have been revealed upon inquiry following the disclosure. The court thus applied to a title insurance policy the rule that the court of appeals had applied to life insurance policies (see *Jenkins* v. *John Hancock Mutual Life Insurance Co.*, 257 N.Y. 289).

In 1969, Smirlock purchased property, a small portion of which, with two of the three access streets, had been condemned two years earlier. Smirlock ultimately lost the property through a mortgage foreclosure. In 1975, Smirlock sued for damages on the policy and for negligence, arguing that the loss of access had destroyed the value of the property.

Smirlock had been established by a group of investors whose attorney, Gerald Tucker, had formed the corporation and become one of the stockholders. Tucker was active in the negotiations for purchase. He had been informed by the vendor that part of the property had been condemned and that full information would be provided at the closing. During the closing, in the presence of the insurer's closer, Tucker had a discussion with one of the vendor's principals, who outlined on a sketch of the property a condemned parcel that did not affect the property or access to it. The title policy issued after closing had no exception for the condemned parcel or for the condemned access; the insurer's searchers simply failed to find the records of the publicly filed condemnations.

The policy contained a misrepresentation clause voiding coverage for failure to disclose a material fact. The clause had been seemingly adopted in response to the holding in *Empire Development Co.* v. *Title Guaranty and Trust Co.* 255 N.Y. 53 that knowledge of a defect does not bar recovery.

The court held that the taking of the portion of the property itself had no or little effect on the utility of the property or its value. The court also held that Tucker's discussion in the presence of the insurer's closer was irrelevant to the issue, since it concerned neither the property to be insured nor access to it. It found that Tucker had received knowledge of the taking of the property, but not of the closing of the access streets, some time before the closing. It concluded, however, that disclosure of this taking would have inevitably led to discovery of the street closings, because of the manner in which the condemnation had been recorded and that, as a matter of law, "no title insurance company with knowledge of the facts would have insured ingress and egress over streets already condemned for an urban renewal project."

The court gave short shrift to the argument that Tucker's knowledge could not be imputed to Smirlock because of his being only a minority stockholder, and not one of its officers. "Evidence," it said, "of any agency relationship between Tucker and plaintiff is abundant. . . . The record reveals no relevant conduct of the corporation in which Tucker was not an active participant. . . . By all relevant criteria, he was the plaintiff's agent and his knowledge is imputed to it."

The court held the question of negligence to be moot. The insurer had issued a certificate of title prior to the policy, which provided for it to be null and void upon delivery of the policy, and the policy itself contained the standard condition merging all rights and causes of actions in the policy. "The contract of a title search is separate and distinct from the contract of insurance. . . . Where, as here, the certificate of title has merged in the subsequently issued title insurance policy, any action for damages arising out of the search—whether sounding in tort or contract—is foreclosed."

Title Insurance—Actual Loss Only

Grumberger v. *Iseson*, 429 N.Y.S. 2d 209 (1980)

The plaintiff-mortgagee brought an action for declaratory judgment against his title insurer. The policy had insured the mortgage as a third mortgage; it was in fact a fourth mortgage. During the period when this issue was being litigated, the second mortgagee foreclosed his second mortgage. The plaintiff was represented at the foreclosure sale.

The purchase price resulted in a deficiency to the holder of the second mortgage, so there was no surplus money available for the third and fourth mortgagees.

In dismissing the cause of action against the title insurer, the court held that title insurance is an indemnity contract that provides reimbursement for actual loss only. No loss occurred to the plaintiff from a defect in title.

Title Insurance—Establishing Loss—Price at Foreclosure Sale

Grunberger v. *Iseson*, 429 N.Y.S. 2d 209 (1980)

In establishing "loss" under a title insurance policy, a foreclosure sale, not alleged to be fraudulent, establishes the amount available for distribution to lienors. "The market price, which theoretically could be found to differ from the actual sale price . . . is irrelevant to actual loss within the terms of an indemnity policy," so said the Appellate Division, First Department, in holding for the title insurer, Security Title and Guaranty Company, in an action against it by its insured mortgagee (Grunberger).

In the report of title to its insured, Security had listed four existing prior mortgages. At the closing, the third mortgage was omitted as an exception from the policy as satisfied, and the fourth mortgage (held by Iseson) was omitted on a determination by Security that it was subordinate to the insured mortgage. Grunberger's mortgage was, thus, insured by Security as being junior only to the first two mortgages.

Grunberger commenced foreclosure proceedings, naming Iseson as a junior lienholder. The court, however, determined that the Iseson mortgage was superior to the Grunberger (insured) mortgage. The second mortgagee thereafter also foreclosed its mortgage, and the property was eventually sold at public sale for an amount that was sufficient to pay the first mortgage and only part of the second.

Since "the kind of loss contemplated by [the] policy is that . . . sustained when, 'because of a defect in the title, the insured was bound to pay something to make it good,' " the court said, "there was no damage to plaintiff within the terms of the policy" when the loss was due to the inadequacy of the security, not to the title defect. Had the insured's title been as its title policy insured it to be, clearly, there would still not have been sufficient funds from the sale to reduce his indebtedness, and he still would have suffered the same loss.

Title Insurance

National Mfg. Corp. v. *American Title Ins. Co.*, 261 S.E. 2d 844 (N.C. 1980)

A mortgage corporation brought an action on a title insurance policy for losses allegedly suffered by reason of invalidity of the lien under a deed of trust executed by a lessee. The trial court entered summary judgment in favor of the title insurer, and the mortgage corporation appealed. The court of appeals, 41 N.C. App. 613, 255 S.E. 2d 622, reversed, and the insurer appealed. The supreme court held that where policy of title insurance insured the lien under the deed of trust on the subject property, "all as of [specific date and time] the effective date of this policy," and the policy specifically excluded from coverage defects "attaching or created subsequent to the date hereof," the policy insured only that on the effective date of the policy the fee simple title was vested in particular individuals, and that a subordination agreement executed by holders of fee simple title, and

deed of trust executed by lessee, were sufficient on such date to give the mortgage corporation a first lien on the property. The policy did not insure against subsequent breach of the subordination agreement that invalidated the lien.

Reversed.

Title Insurance—Vendors Not Third-Party Beneficiaries Under Title Insurance Policy Even Though Sellers Gave Warranty of Title

Logan v. *Gans*, 419 A.2d 772 (Pa. 1980)

The issue was, Are vendors third-party beneficiaries where vendors gave warranty of title to purchasers where title policy did not indicate vendors were within contemplation of contracting parties as persons entitled to benefit of policy?

Mr. and Mrs. Logan sold land to Gans, although Gans was still $5,000 short of the purchase price, and the deed was delivered on Gans's promise to pay the balance in monthly installments of $400. Gans defaulted after one payment. The Logans brought suit to recover the balance plus interest. Gans counterclaimed that he did not have title to the land and claimed damages for breach of the deed warranty. The Logans counterclaimed against Commonwealth Land Title Insurance Co., claiming they were third-party beneficiaries of the contract of title insurance that that company had issued to Gans. The lower court sustained Commonwealth's demurrer that the Logans' complaint failed to state a cause of action against it. The Logans appealed.

The court affirmed. The court stated the case law: "To be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by *one* of the parties to the contract and the *third person* that the latter should be a beneficiary, but *both parties* to *the contract* must so intend and must indicate that intention in the contract; in other words, a promisor cannot be held liable to an alleged beneficiary of a contract unless the latter was within his contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking; the obligation to the third party must be created, and must affirmatively appear, in the contract itself."

The court found: "A careful reading of this policy fails to disclose any indication that the plaintiff sellers were in any way within the contemplation of the contracting parties as persons being insured or entitled to the benefits of the policy. We find nothing to impose on the insuror any obligation to the plaintiffs. Plaintiffs offer the argument that because they as sellers were compelled to clear any defects in the title to the property they were conveying to make it marketable before the buyers were compelled to accept a deed, that the insurer was serving both parties to the transaction, thus entitling them to the benefits of the insurance."

Finally, the court said: "Furthermore, our study of plaintiffs' complaint against Commonwealth fails to disclose a claim based on the policy of insurance under consideration. Although they allege they were third party beneficiaries to said contract of insurance, this is a mere conclusion."

Truth in Lending

Murphy v. *Ford Motor Credit Co.*, 629 F.2d 556 (8th Cir. 1980)

In March 1978, Murphy purchased a Lincoln automobile from Hilltop Lincoln Mercury. He made a downpayment of $1,300 and financed the balance by signing a retail installment loan contract with Hilltop. It was understood that the actual financing would be arranged through Ford Motor Co. The installment sales agreement contained a section on the back of the instrument that provided that the buyer shall obtain and maintain at his own expense insurance protecting the interest of the buyer and the seller against loss, damage, or destruction of the property and that the buyer assigns to the seller any monies payable under such insurance, including returned or unearned premiums. The proceeds from such insurance would be applied toward replacement of the property or payment of the indebtedness at the sole discretion of the seller.

The issue was whether a clause requiring the assignment of returned or unearned insurance premiums creates a security interest that is required to be disclosed pursuant to the Truth-in-Lending Act.

The court said yes. The assignment creates an "interest" in favor of the lender albeit "incidental." The purpose of the assignment is to secure payment or performance of the debtor's obligation, however small the amount of the unearned or returned premiums might be. The application of the proceeds of the insurance, whether in the form of an indemnity or returned or unearned premiums, places the assignment well within the definition of a security interest under regulation Z of the Truth-in-Lending Act. While state law may be a factor in determining whether a security interest has been created, an interest may nevertheless be a security interest for the purposes of the Truth-in-Lending Act, even though it is not an enforceable security interest under state commercial law.

Franklin v. *Community Federal Savings and Loan Association*, 629 F.2d 514 (8th Cir. 1980)

This case was an action brought under the Truth-in-Lending Act, contending that the mortgagee failed to make certain disclosures in connection with the issuance of a real estate mortgage loan. This case was submitted upon stipulated facts, and the federal district court held for the mortgagee. The circuit court reversed.

The issue was whether a disclosure that a mortgage covers "*all* after-acquired property," when in fact it covers only real estate, fixtures, and attachments to the mortgaged real estate, is a violation of the Truth-in-Lending Act. The opinion was yes. Under Missouri law, an after-acquired property clause contained in a mortgage extends only to other real estate or fixtures and attachments to the mortgaged real estate. A statement in a truth-in-lending disclosure that such a clause applies to all after-acquired property fails to describe clearly the security interest or the property to which it will attach. That failure violates the Truth-in-Lending Act. The court said yes. In *Ford Motor Credit Co.* v. *Milhollin*, U.S. 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980), the United States Supreme Court noted that "delinquency charges are understood to be 'the compensation a creditor receives on a precomputed contract for the debtor's delay in making timely installment payments.' " The increase in interest rate in the instant case is such compensation. The Federal Reserve staff has expressed the opinion that a similar charge on open-end accounts in default is a bona fide late payment charge that is levied as a result of an unanticipated delinquency. Some district courts have held that an increase in the interest rate on a loan balance unpaid at maturity is a default, delinquency, or similar charge within the meaning of the Truth-in-Lending Act. An increase in interest due to delinquency can fairly be described as a charge levied by the creditor because of the debtor's late payment, and the failure to disclose the increase is a violation of the Truth-in-Lending Act.

The issue was whether a mortgage insurance premium, which is a prepaid portion of the finance charge, would be unearned in the event of prepayment of the loan in full and whether failure to disclose that this portion is unearned would be a violation of the Truth-in-Lending Act. The opinion was yes. The full year's premium is not earned simply because it is paid to the insurer in one lump sum. The credit contract does not provide for a rebate of this charge if the loan is prepaid during the first year. Because prepayment in full of the obligation during the first year would result in a portion of the prepaid finance charge being unearned, the mortgagee should have disclosed the method of computing that portion and should have disclosed the absence of a provision for rebate of that portion.

Collinwood Shale, Brick and Supply Co. v. *Bindler*, 60 Ohio App. 2d 91, 395 N.E. 2d 907 (1978)

A home improvement lender is required by the Truth-in-Lending Act to disclose to the borrower the potential of mechanic's liens of subcontractors. A general statement that a lien may result does not satisfy the requirement. The lender and its assignee must indemnify the borrower for any resulting loss.

DeSimone v. *Warwick Federal and Savings & Loan Assn.*, 482 F.Supp. 1190 (R.I. 1980)

Mortgagors brought action against a savings and loan association, alleging that the association violated federal regulations by raising interest rates during the term of the loan and by failing to give written notice at the time of such increase that the mortgagors could repay the entire amount of the loan. On motion for summary judgment, the court held that the savings and loan's raising of interest rates pursuant to loan contracts executed in 1960 and 1964 did not violate the then-applicable regulations of the Federal Home Loan Bank Board, and the mortgagors' complaint did not state a cause of action under federal common law. It should be noted, however, that the regulations have been amended since 1969 to require disclosure of escalation clauses.

UCC Financing Statements

In re Toppo, 474 F.Supp. 48 (Pa. 1979)

Two creditors, First National Bank of Pennsylvania and General Electric Credit Corp., each claimed a superior security interest in the same collateral. After the bankruptcy judge entered an order of distribution, the creditors appealed.

According to UCC 9-312(5)(a), security agreements are perfected by filing financing statements. At issue in the present case was whether the time stamped on the statement or the number assigned thereto by the prothonotary determined the order of filing. The court concluded that the time stamped determined the order of filing. Consequently, Judge Knox held that General Electric Credit Corp. had a superior interest in all property covered by its description of collateral contained in its financing statement.

Vendor and Purchaser—Jury Trial

Owens-Illinois, Inc., v. *Lake Shore Land Co., Inc.*, 610 F.2d 1185 (3rd Cir. 1979)

The plaintiff instituted a suit for declaratory judgment by which it sought to establish its right under an option agreement to compel the defendant's conveyance of certain realty. The defendant, asserting that its answer contained certain legal issues, requested a jury trial. After the district court ruled against the defendant on that issue, among others, the defendant appealed.

The circuit court queried as to whether the action was a counterpart of a common law suit in equity. In that instance, there is no right to a jury. Noting that there was no claim for damages or any other legal remedy in the complaint but that the complaint centered on the defendant's obligation to convey title to the plaintiff at a certain time in the future, the court found that the defendant was not entitled to a jury trial. In reaching its conclusion, the court explained that the plaintiff chose a declaratory judgment action only because the right to specific performance had not ripened at the time the action was filed. Insofar as an action for specific performance without a claim for damages is purely equitable, a declaratory judgment action centering on facts that would give rise to the remedy of specific performance is equitable in nature. There is no right to a jury trial in equity.

Vendor and Purchaser—Marketable Title

Staley v. *Stephens*, 404 N.E. 2d 633 (Ind. 1980)

Suit was filed by the sellers of real estate against the buyers to force the buyers to complete the contract for the purchase of a home. The agreement was that the buyers were to receive at closing an abstract disclosing marketable title to the real estate. When originally subdivided, the lots were encumbered by restrictive covenants that, inter alia, provided for a 10-foot side set back line. The subject real estate was formed in a replatting of one of the original lots in the subdivision. In the replatting, the set back requirements of the zoning ordinance of the town of New Haven were incorporated by reference into the restrictions affecting the replatted lots. This zoning ordinance required an 8.5-foot side set back line.

The contract called for a survey, which disclosed that the house was only 8.4 feet from the side line, in violation of both the New Haven zoning ordinance (by one-tenth of a foot) and the original subdivision restrictions.

When they learned of the defect, the buyers required the sellers to obtain waivers of this side line violation from other affected landowners. The sellers refused, and the buyers determined that the title was unacceptable and refused to complete the purchase.

The county bar association had adopted marketability title standards for its members, which indicated that a violation of said set back lines in restrictive covenants would be waived as to residential property (which this was) if the violation had existed for at least two years prior to the date of examination of the title. This violation had existed for more than two years. The contract between the parties had not incorporated this marketability standard. The court found that this bar association standard had no legal effect in this case.

The court, in holding for the buyers, said: ". . . . it is evident that although the title defect is small (between one-tenth of a foot and one foot six tenths, depending upon which restrictive covenant would be found controlling) it is nonetheless a cloud on the title that may expose Buyers to the possibility of litigation due to the remedies available to other landowners in the subdivision. Even though a damage recovery may be nominal, Buyers would still incur the cost of defending against any litigation. Absent waivers from all landowners holding the Buyers harmless, the possibility of litigation on the matter will not end until the running of the twenty year statute of limitations."

This seems to say, then, that unles a side set back line violation has existed for the full 20-year period of the statute of limitations, it will render title to the real estate unmarketable unless the violation is waived by the other landowners affected, or unless the parties have specifically agreed to accept some different title standard.

Vendor and Purchaser—Oral Extension of Cancellation Date Not Barred by the Statute of Frauds

Avendanio v. *Marcantonio*, 427 N.Y.S. 2d 512 (1980)

The purchasers brought this action to rescind a contract for the sale of real property and for refund of the down payment.

The contract contained, in addition to the usual clauses, including a prohibition against oral modification, a provision that if a survey, title search, or other investigation were to reveal facts materially affecting marketability of title to the premises, the plaintiffs would have a right to cancel the contract by sending notice by certified mail to the defendant, at his office address, postmarked not later than September 30, 1976.

As the cancellation date approached, it became apparent that the survey would not be ready until some time in October. The Plaintiffs' attorney notified the defendant of this development, and the defendant orally authorized an extension of the cancellation period until after the survey was completed.

The court held that extending the time within which the plaintiffs could cancel the contract was not an oral executory modification barred by Gen. Oblig. Law 15-301. The statute was not concerned with an oral waiver of a condition subsequent, such as a contingency date in a contract for the sale of real property. Judgment was granted in favor of the plaintiffs.

Vendor and Purchaser—One Who Took Subject to Zoning Ordinances Cannot Avoid Contract Calling for "Insurable Title"

Kirkwall Corp. v. *Sessa*, 48 N.Y. 2d 709, 397 N.E. 2d 1172 (1979)

The plaintiff and the defendant entered into a contract for the sale of certain property bounded by streets on three sides. Before execution of the contract, the village in which the property was located had amended its zoning ordinances, which had the effect of limiting vehicular access to the property. Shortly before the closing date, the village erected a barrier across one of the streets adjacent to the property.

On the closing date, the plaintiff refused to accept title and commenced this action to recover a $30,000 deposit paid to the defendant. The plaintiff alleged that under the contract, the defendant had breached his obligation to supply insurable title since, before the closing date, a title insurance company had informed the plaintiff that it would not insure ingress and egress in the area where the barrier had been erected.

The appellate division concluded that the seller should have returned the down payment, since the seller had failed to provide insurable title.

The court of appeals reversed. Having agreed to take subject to existing ordinances, the plaintiff could not then argue that the defendant's promise to provide insurable title was in some way violated solely because of the title insurance company's refusal to insure that very right of ingress and egress, which was limited by the ordinances.

Vendor and Purchaser—Lease with Option to Purchase

Duane Sales, Inc. v. *Carmel*, 49 N.Y. 2d 862 (1980)

This action was brought for specific performance of an option to purchase certain real property contained in a lease. The option gave the plaintiff lessee the right to "purchase the property at the same terms and conditions as offered by any bona fide purchaser."

Through a broker, the landlord negotiated a contract for the sale of the property to a third party. The proposed contract agreed that a certain broker had negotiated the sale, and the purchaser agreed to pay the brokerage commission and indemnify the seller against liability and expenses arising from a claim for a brokerage commission.

The plaintiff chose to exercise his option but excluded the provision with respect to the brokerage.

The court held that the plaintiff did not accept "at the same terms and conditions as offered" as required in the lease. Nothing in the option provision permitted the optionee to accept only those terms and conditions of an offer deemed material and beneficial to the landlord (cf. *Camden Co.* v. *Princess Props. Int.*, 38 N.Y. 2d 961). The complaint was dismissed.

Vendor and Purchaser—Options—Holder of a Right of First Refusal of a Portion of a Larger Parcel Held to Have a Right of First Refusal of the Larger Parcel

Capalongo v. *Giles*, 102 Misc. 2d 1060, 425 N.Y.S. 2d 225 (1980)

The plaintiffs held an option of first refusal of a smaller triangular parcel in a 123-acre tract owned by defendant Giles. The latter sold the entire tract to other defendants, who had knowledge of the plaintiffs' option.

This action was brought, inter alia, to rescind the conveyance and to direct defendant Giles to convey the 123-acre tract to the palintiffs, who had given notice of the exercise of the option to purchase the 123-acre tract on the same terms as the grantees.

After discussing cases with which it did not agree, the court held that where an owner does have an offer from a third party to purchase a piece on which he has given a first-refusal option, but on terms that specify inclusion of the piece in a larger parcel, he thereupon has a duty to offer the whole parcel to the option holder on the same terms. Judgment was rendered in favor of the plaintiff.

Vendor and Purchaser—Utah Uniform Real Estate Contract—Notice of Default to Lender

Wiscombe v. *Lockhart Co.*, 608 P.2d 236 (Utah 1980)

On January 1, 1976, Beardall purchased, by uniform real estate contract, certain real property located in Utah County from Wiscombe. The contract called for annual payments of $15,000 and an initial payment of $15,000 made at the time of execution. The $15,000 payment due on January 1, 1977, was not received by Wiscombe. By notice of default dated January 31, 1977, and served on Beardall on February 2, 1977, Wiscombe gave Beardall five days in which to remedy his default or the contract would be forfeited. Beardall did not do so and quit the premises on or before February 7, 1977.

Unknown to Wiscombe, Beardall had on November 5, 1976, executed and delivered to Lockhart a promissory note secured in part by an assignment of contract whereby Beardall assigned to Lockhart all his rights, title, and interest in and to the uniform real estate contract of January 1, 1976. Lockhart subsequently recorded the assignment.

Wiscombe first became aware of the existence of the assignment by way of an abstractor's letter (dated February 14, 1977) he had ordered prepared on the property. Shortly after learning about the assignment, Wiscombe's attorney wrote to Lockhart demanding that the assignment be removed from the title to the subject real property. On March 2, 1977, Lockhart tendered Wiscombe $15,000 representing the payment due on January 1, 1977, under the contract in question, together with a tender of such additional costs and attorney's fees as had been incurred by Wiscombe. By letter dated March 7, 1977, Wiscombe rejected Lockhart's tender. Lockhart refused to remove the assignment, and so Wiscombe brought suit against Lockhart for slander of title and to quiet title in Wiscombe.

The district court quieted title in Wiscombe but dismissed the claim for slander of the title.

Is a seller who elects to declare a uniform real estate contract forfeited under its terms required to give notice to a lender who has taken an assignment of the contract from the contract buyer to secure its loan?

The Utah Supreme Court affirmed the district court's decision. Citing an earlier case (*Jeffs* v. *Citizen's Finance Co.*, 319 P. 2d 858 (Utah 1958), the court went on to say that ". . . . in our opinion, it is no answer to say that giving notice to the Seller, either actual or constructive, places the burden on him to seek out one with whom he had no dealing and volunteer facts so that the assignee of a real estate contract securing a loan may elect whether to perform the real estate contract or not. Such notice at best would alert the seller to the fact that upon performances by the purchaser or his assignee, the seller would have a duty to execute a conveyance.

"Requiring diligence on the part of one holding a real estate contract securing the loan, under a sort of pledge, to seek out and determine the status of its assignor's contractual rights and obligations by way of request . . . or otherwise . . . does not seem to us to place an unreasonable burden on the lender who desires to protect the consideration for which the contract was assigned or pledged."

Vendor and Purchaser—Rescission—Mutual Mistake as to Acreage

Shavell v. *Thurber*, 414 A.2d 1152 (Vt. 1980)

Appellants sought rescission or reformation of the real estate sales agreement or set-off against amounts owed to the appellee on the grounds of mutual mistake, failure of consideration, and fraud in the inducement.

The appellee then brought an action to foreclose the appellants' mortgage and the two actions were consolidated. The lower court dismissed the appellants' action.

While the deed was silent as to acreage, the individual from whom the appellee had obtained title represented that the tract covered about 180 acres. After execution of the present contract, a surveyor examined the property, found a significant shrinkage in acreage, and advised the appellants of it. One of the real estate agents acting on behalf of the appellants indicated that they would nonetheless be willing to complete the sale if the seller could locate all the boundaries. Both parties inspected the property, at which time the boundaries were marked. Such boundary marks were undisputed.

Six years later, the appellants, while attempting to sell the land, had another survey conducted, which revealed that the actual acreage was only 71.3.

A contract for the sale of land entered into under a mutual mistake regarding a material fact affecting the subject matter and relied on may be avoided by the injured party. If the disparity between actual and estimated quantity of the land was unreasonable and was relied on by mutual mistake, the injured party is entitled to relief by way of rescission. The court held that the appellants had not at the time of the sale relied on the representation that the tract consisted of 180 acres. Further, the purchaser had inspected the land and its boundaries and indicated that location of those boundaries, and not the acreage, was the principal concern of the other purchasers. As the buyers entered into the transaction knowingly, the court affirmed the lower court's dismissal of the appellants' action.

Waters

Grigger v. *City of North Royalton,* 59 Ohio Misc. 103, 394 N.E. 2d 353 (1977)

A municipality may not collect water in a storm sewer system and discharge it, through a natural ditch, on to private land. The landowner may not be prosecuted for blocking the flow.

Wills—Probate of an Estate as a Title Transaction Under Marketable Title Act

Kittrell v. *Clark,* 383 So. 2d 909 (Fla. 1980)

The case of *Kittrell* v. *Clark,* 363 So. 2d 373 (Fla. 1978) held that a probate of the estate of a former party in interest within 30 years after recording of a root title preserves the prior interest from extinguishment even though there is no description, inventory, or mention of the property in the probate procedure of the deceased's prior owner. In the supreme court case shown here, there was a per curiam finding by four justices that the court was without jurisdiction, and certiorari was denied. One justice wrote a strong dissent, joined by two other justices.

Wills

Matter of Estate of Garwood, 400 N.E. 2d 758 (Ind. 1980)

In this case, the will of Martha Ellen Garwood, deceased, was admitted to probate on June 5, 1970. It evidently contained a power to sell real estate without application to or approval of a court. Pursuant to that will, Paul J. Garwood, a son of the decedent, and Lawrence Sommers, a son-in-law of the decedent, were appointed coexecutors of the will on the date of admission of the will to probate.

Evidently some, but not all, of the heirs at some point had met to talk about disposition of this real estate and had orally agreed that Paul Garwood should be allowed to purchase the real estate if he outbid his brother Dean Garwood, who was also interested in it. This agreement was never reduced to writing, and two or more of the heirs had not even been present at the meeting.

Thereafter, in November 1970, a contract was entered into between Paul Garwood and Lawrence Sommers as co-personal representatives, as sellers, and Paul Garwood, individually, as buyer, for the sale and purchase of this real estate for $92,001. Paul Garwood signed the contract in both capacities (coseller and buyer).

Dean Garwood filed a petition to set aside the contract. After considerable legal maneuvering, the court removed Paul Garwood as a coexecutor on April 25, 1973, Lawrence Sommers resigned as coexecutor on September 7, 1973, and the court appointed Paul D. Ewin as administrator C.T.A. This personal representative filed a petition to determine the rights of possession and title to the real estate.

On December 13, 1974, the heirs who had not been present at the heirs meeting to determine disposition of the real estate and who had not agreed to the decision of those who had attended, filed their objections to the contract.

On May 14, 1975, a special judge of the probate court heard the petitions and objections and entered judgment allowing the contract and finding it to be valid and enforceable, and deed was ordered.

On appeal, the court of appeals dismissed the appeal (affirmed) on a procedural basis without reaching the merits.

On further appeal, the Indiana Supreme Court reversed and held that "it has been the settled law of Indiana since its beginning that a probate personal representative of the deceased is a trustee of the estate assets and will not be permitted to purchase the property himself as an individual from himself as the personal representative, citing Indiana Supreme Court cases decided in 1859 and in 1871 in support." These cases indicate that this result is to be reached even in the "innocent" sale, where no fraud or bad intent on the part of the personal representative is involved.

The court also cited *I Henry's Probate Law and Practice Fifth Edition,* published 1946, in support and stated that the 1953 probate code did not provide for a change of this principle. Since the court discussed only IC 21-1-9-1, 2, and 3 relating to the settlement of conflicts between heirs as to the distribution and found that there was no true family agreement in this case, as contemplated by those sections, it is evident that IC 29-1-15-16 was not pressed upon the court, but the underlined statement is very broad and sweeping.

It is interesting to note that *Henry's Probate Law and Practice* may be taking a slightly different view in its Seventh Edition, Volume 1B, Section 18, p. 735, wherein it states: "The executor or administrator, being a Trustee of the estate of his decedent, cannot acquire property of the estate, either directly or indirectly, at his own sale or that of another *without making a statutory disclosure,"* [emphasis added].

The inference of the underlined portion is that if such a disclosure is made, the personal representative can acquire the decedent's real estate at his own sale, and the language of the statute itself suggests this.

Moore v. *Harvey,* 406 N.E. 2d 354 (Ind. 1980)

In this case, the court of appeals, finding no other evidence of a contract to make an irrevocable will, was left only with the language of the will itself to determine whether the parties contracted for it.

The preamble to their joint will (the court found that it was clearly a joint will) read as follows: "We Landis M. Moore and Carrie M. Moore, husband and wife, of Hamilton County, Indiana, having mutually agreed to make the devises and bequests hereinafter set out, and in consideration of the testamentary disposition of our property hereinafter made, thereby [sic] make, declare and publish this, our joint will."

The court said that: "The language in the preamble expresses a present agreement to effect a certain disposition after their deaths, but does not expressly state an agreement that the presently agreed disposition is forever binding."

The court said that the language did not require the trial court to find that the preamble "clearly, definitely, convincingly, unequivocally and satisfactorily establishes a valid and enforceable implied contract of non revocability."

Wisler v. *McCormack,* 406 N.E. 2d 361 (Ind. 1980)

In this case, the only language in the will or elsewhere suggesting an irrevocable will was the words: "*We* give and devise . . . ," "*We* give and bequeath . . . ," "Upon the death of the survivor of *us*, . . . ," "all of the rest and residue of *our* property . . . ," and (both parties, husband and wife) ". . . do make, publish and declare this instrument to be *jointly as well as severally our* last will and testament." [emphasis added].

The court found that such language did not create a will irrevocable by the survivor and did not establish sufficient evidence of a contract in view of the fact that the will contained "no specific recital that it is contractual."

Thus the court upheld the right of the widow, by subsequent will revoking all former wills, to make a disposition of the property covered by the joint will in a manner different from that provided in the joint will.

Wills—Subdivision Control

In re Estate of Sophia Sayewich, 413 A.2d 581 (N.H. 1980)

The will of the decedent devised parcels 2, 3, and 4 to different children, the plaintiffs, and "the remainder of my land, including all the land not shown on the plan as Parcel No. 1" to a son, or should he fail to survive her, to his children, the defendants. The will referred to a plan that was not recorded. It showed abutters correctly but courses and distances insufficient to achieve the area owned by the testatrix.

The plaintiffs contended that the devises were void for lack of subdivision approval. The trial court found and held that subdivision approval was not required and that all property passed according to the distances depicted on the plan.

On the plaintiffs' exceptions, the supreme court held that since the devises did not fall within the statutory definition of subdivision (N.H. RSA 36:1 VIII), they were valid, although the devisees would have to comply with local subdivision regulations to develop or transfer their property. The court suggested that should the subdivision restrictions prevent development, the devisees could petition the court to declare them tenants in common of the entire tract, partition by sale, and distribute proceeds in proportions to the value of the parcels. Furthermore, after recognizing the rule that "abuttals are generally given preference over distance," the court held that since the record indicated that the testatrix was aware of the error in the plan, her intent was decisive.

It may be appropriate to remind attorneys reviewing abstracts of property in New Hampshire that from July 27, 1969, to July 3, 1970, a transfer in violation of the subdivision control chapter was void (Acts 1969 c. 185 sec. 1; 1970 c.2. sec. 1); furthermore, "the description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from . . penalties" (N.H. RSA 36:27). A person has to die to circumvent the statute.

Wills—Power of Sale

Montgomery v. *Hinton,* 45 N.C. App. 271, 262 S.E. 2d 697 (1980)

Article II of will devised real estate to Thomas Hinton. Article IV appointed the executor and provided: "By way of illustration and not limitation and in addition to all powers otherwise granted by law, I hereby grant to my Executrix [sic] and any successor hereunder all the powers set forth in North Carolina General Stautes, Section 32-27, and these powers are hereby incorporated by reference and made a part of this instrument."

The executor contended that the powers referred to in G.S. 32-27 gave him the power to sell real estate specifically devised to Thomas Hinton without a court order even if the sale were not necessary to carry out the purpose of the will or to create assets for payment of debts. The parties stipulated that the sale was not to create assets to pay debts of the estate.

The court rules that the executor did not "hold" the property nor was it at his "disposal" under G.S. 32-27. Therefore, the executor could not sell the real estate without court order.

Wills—Executors and Administrators

Bilang v. *Benson,* 62 Ohio App. 2d 134, 405 N.E. 2d 311 (1978)

An administrator of an estate does not breach a contract to sell realty by selling it to another when the contract was made before he had the heirs' permission to sell and specified that it was subject to the approval of the probate court, which was never obtained. The contract vendee does not have standing to object to the administrator's statement that the price paid was the highest obtainable even though it was less than he contracted to pay.

Zoning

Cicerella v. *Jerusalem Township Board of Zoning Appeals,* 59 Ohio App. 2d 31, 392 N.E. 2d 574 (1978)

A nonconforming use is different under the zoning ordinance from a nonconforming building, so that restrictions on restoration that apply to a nonconforming building do not apply to repair of damage to a conforming building used in a prohibited way.

G.S.T. v. *City of Avon Lake,* 59 Ohio App. 2d 84, 392 N.E. 2d 901 (1978)

When a zoning classification has been held invalid, it is not the court's duty to determine a valid classification. Attorney fees may be awarded for legal proceedings resulting from the defendant city's failure to follow the declaratory judgment.

Hulligan v. *Columbia Township Board of Zoning Appeals,* 59 Ohio App. 2d 105, 392 N.E. 2d 1272 (1978)

Approval must be obtained from both the Environmental Protection Agency and the local zoning authority to establish a sanitary landfill.

Zoning—Mandamus

Gates Mills Inv. Co. v. *Vil. of Pepper Pike,* 59 Ohio App. 2d 155, 392 N.E. 2d 1316 (1978)

The owner of land in the center strip of a boulevard, who sought to construct single-family residences on sublots, brought a declaratory judgment action for declaration of invalidity of ordinance lot size requirements as applied to his land. The defendant's motion for summary judgment was granted, and the plaintiff appealed.

The court held that a declaratory judgment action is proper in a zoning case only when administrative remedies have been exhausted or are shown to be an onerous or vain act. An act is not onerous simply because there may be delays; mandamus to compel a variance is the proper remedy. An act is not vain because officials have indicated opposition. Summary judgment is not proper; dismissal is.

Zoning—Variance

Zurow v. *City of Cleveland,* 61 Ohio App. 2d 14, 399 N.E. 2d 92 (1978).

A zoning variance may not be granted without specific findings that the difficulty in conforming is inherent in and is peculiar to the premises, that refusal of the variance will deprive the owner of substantial rights, and that granting the variance will not be contrary to the purpose and intent of the zoning code. The court pointed out that witnesses in an administrative hearing should be sworn. If they are not, there is no valid evidence to make a record; however, the failure to object waives the requirement.

Zoning—Mandamus

State ex rel. Westchester Estates, Inc. v. *Bacon,* 61 Ohio St. 2d 42, 399 N.E. 2d 81 (1980)

A subdivision developer brought action in mandamus to compel a zoning inspector to issue zoning certificates for town houses on property in a planned unit development, pursuant to a previous court decision. The

trial court issued the writ, and, on appeal, the court of appeals affirmed. The supreme court held that neither the doctrine of res judicata nor the doctrine of collateral estoppel was sufficient to place a clear legal duty on the zoning inspector to issue the certificate for town houses, where there had been a change of facts. Since the prior court decision, instead of a 43-acre tract devoted to 312 town houses, the applicant had changed the plan to 14 acres of town houses and 28 acres of single-family residences, thus precluding mandamus.

Zoning—Variance

City of Parma v. *Hudgeons,* 61 Ohio App. 2d 148, 400 N.E. 2d 913 (1979)

The city brought action seeking an injunction against the continued use of residentially zoned property for commercial purposes. The trial court granted summary judgment in favor of the property owner, and the city appealed. The court of appeals held that where record established that board of zoning appeals, which had exclusive jurisdiction in hearing and granting of variances, granted a variance without requiring the applicant to make the requisite showing of "unnecessary hardship," such deficiency rendered order granting the variance voidable and not void; thus, the city could not challenge order for the first time 22 years later, but it would be strictly enforced, and uses added since the order must be terminated.

Zoning

Union Oil Co. v. *Worthingon,* 62 Ohio St. 2d 263, 405 N.E. 2d 277 (1980)

When a zoning ordinance is held unconstitutional in a declaratory judgment action, the trial court should give the zoning authority a fixed time to rezone. If the zoning authority fails to rezone in a constitutionally permissible way, the owner should be given permission to build as he wishes.

Categorical Index To 1981 Judiciary Committee Report

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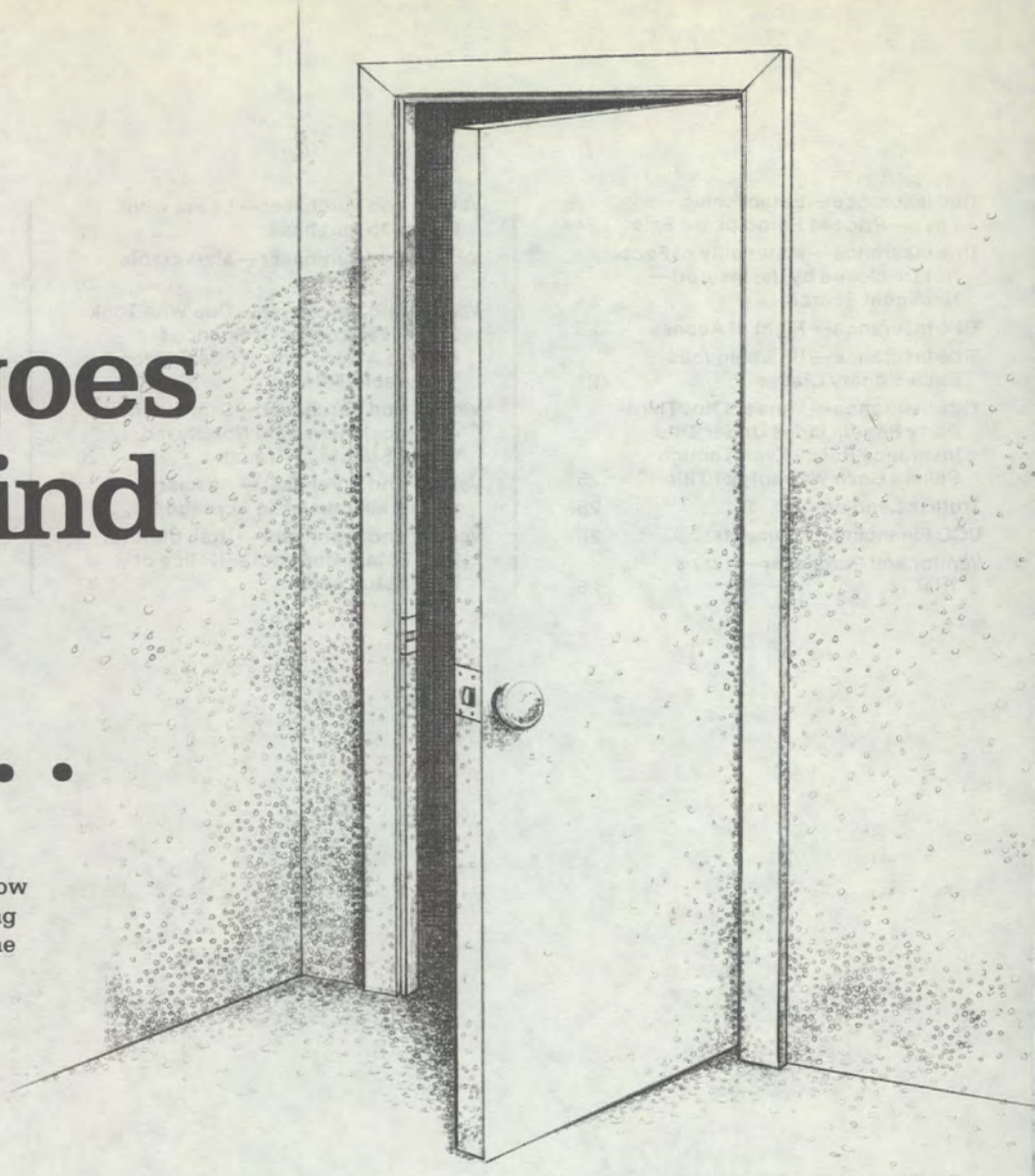

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Bay Head Beach—
from page 8

"The public has an easement right to use the dry sand ocean beach in Bay Head for ocean-related recreation and access to ocean waters." Years ago "the New Jersey shore was open to all comers . . . there is evidence in this case from which to infer public uses of the beach in Bay Head long before the BHIA instigated its beach control scheme . . . it would seem that the early grantors intended, or at least were cognizant of, the public uses of the beach" and "had essentially vacated the beach to such purposes."

* * *

The decision of the United States Supreme Court in *Prune Yard Shopping Center* v. *Robins*, _____ U.S. _____, 100 S.Ct. 2034, 64 L.Ed. 2d 741 (1980) is authority for the proposition that the relief requested by the public advocate does not result in the taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Paragraph 20 of the New Jersey Constitution.

The extension of the public trust doctrine to private ocean beaches would not constitute a "sudden change in state law, unpredictable in terms of the relevant precedents" within the meaning of Mr. Justice Stewart in his concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 88 S.Ct. 438, 442 (1967). In the *Bay Head* case the defendants "would continue to have the right to recreate on the unimproved beach in common with the public. They would retain title, and thus the interest and value in proximity to the ocean." Under both state and federal law the impact on the private property owner "must rise to the level of substantial destruction to the beneficial use or value of the property" before there is an unconstitutional taking.

"Defendants have to demonstrate that the right to exclude others is so essential to the use or economic value of their property that the State-authorized limitation of it amounted to a taking." "Despite a technical physical invasion, the defendants would retain title to the beach, they would continue to have a right to their present recreational use of the beach, in common with the public, and, significantly, their rights in and benefit from exclusive and private uses of their improved residential areas would in no manner be disturbed." The defendants "have not and cannot make the requisite showing that limiting their right to exclude others from the undeveloped beach areas of Bay Head, in order to accommodate and prevent injury to the public right of access to the Atlantic Ocean and ocean-related recreation, results in such an impact on the beneficial use or economic value of their upland properties that it would amount to an unconstitutional taking."

BHIA-Defendant Arguments

The BHIA and the individual defendants presented the following arguments to the court:

From the summer of 1933 to date control has been exercised over the Bay Head beach and the general public has been excluded from the beach during the period from June 15 and September 15 each year. Whatever public use occurred prior to 1933 was permissive and sporadic and did not create an implied dedication of the beach to public use in accordance with the law as set forth in *Beach Realty Co.* v. *Wildwood*, 105 N.J.L. 317; 144 A.720 (E. & A. 1928). The development maps on file in the Ocean County Clerk's Office do not indicate that any dedication was intended, showing only the word "beach."

Virtually all of the privately owned residential parcels along the ocean were conveyed by metes and bounds descriptions running to the high water line with no reference to any public way. *Murphy* v. *Point Pleasant*, 123 N.J.L. 88; 8 A.2d 116 (Sup.Ct. 1939), affirmed 124 N.J.L. 565; 12 A.2d 891 (E. &. A. 1940) is controlling. In that case, a similar map was filed by the Point Pleasant Land Company on which the strip of beach was not marked out into lots but was shown on the map without any designation. The successors to the interests of the Point Pleasant Land Company exercised ownership rights over the beach for the next three decades, and the court found "nothing about the maps which conclusively indicates a dedication." 123 N.J.L. at 90.

* * *

No prescriptive right of an easement exists in the general public for the use of the Bay Head beach for recreational purposes. The law is well established in New Jersey that one cannot successfully contend for title by adverse possession where that possession is as a member of the public, in common with all others exercising and enjoying the privilege of use and occupancy, for the reason that such possession and use is lacking the necessary element of exclusiveness. *Delucca* v. *Melin*, 103 N.J.L. 140; 134 A.735 (E. & A. 1926). Generally, the unorganized public cannot acquire rights by prescription. *Mihalczo* v. *Borough of Woodmont*, 400 A.2d 270 (Conn. 1978).

New Jersey's highest court has held that the public cannot prescribe since a right that a man claims merely as one of the public does not lie in grant. Prescription is viewed as a personal right, belonging to one or a few persons by particular designation. *Albright* v. *Cortright*, 64 N.J.L. 330; 45 A.634 (E. & A. 1899). Also, the kind of casual use which may have been made by the public of the Bay Head beach prior to 1933 is not the kind of hostile, visible, open and notorious use that gives rise to a prescriptive right. Where such use has

been considered by New Jersey courts, it generally has been characterized as "permissive" and "casual." *Mihalczo* v. *Woodmont, supra; Beach Realty Co.* v. *Wildwood, supra; Spiegle* v. *Beach Haven*, 116 N.J. Super. 148; 281 A.2d 377 (App. Div. 1971).

Finally, the operations of the BHIA since 1933, acting under leases in many instances from individual property owners, clearly constitute an interruption of any adverse use sufficient to stop the running of the prescriptive period.

* * *

The public advocate's reliance on *State* v. *Schmid, supra*, and *Prune Yard* v. *Robins, supra*, to support a "public user" argument applicable to the Bay Head beach is misplaced. *Schmid* involved the question of the extent to which Princeton University could exclude from its property an individual who wished to distribute and sell political material. The New Jersey Supreme Court held that the state constitution's guarantee of free speech could be extended to private property and enforced against private entities in certain limited circumstances. The supreme court examined Princeton University's charter and regulations and concluded that one of the university's overriding educational goals was "the pursuit of truth" through "free inquiry" and "free expression," and to this end the university itself endorsed "the educational value of an open campus and the full exposure of the college community to the 'outside world' . . ." 84 N.J. at 564-565. It further found nothing in Schmid's literature which offended university policies. It concluded that Princeton University had established itself as a place where public participation in free inquiry and expression was invited and encouraged, and, thus, Schmid could not be excluded by the university without violating his state constitutional guarantee of free speech.

The Bay Head beach is not Princeton University. There has been no invitation by individual property owners to the general public to come and use the beach. The issue here is not the constitutionally protected right of free speech. (NOTE: On May 18, 1981, the United States Supreme Court granted review in *Schmid* (Case No. 80-1576), 49 U.S. Law Week 3853.)

Prune Yard involved a privately owned shopping center on approximately 21 acres, of which 5 were devoted to parking and 16 were occupied by walkways, plazas, sidewalks and buildings that contained more than 65 specialty shops, 10 restaurants and a movie theatre. The appellees were high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of Prune Yard's central court yard and distributed pamphlets and asked passersby to sign petitions which were to be sent to the President and members of Congress.

Soon after the appellees began soliciting signatures, a security guard informed them that they would have to leave because their activities violated Prune Yard's regulations which prohibited any visitors or tenants from engaging in any "publicly expressive activity, including the circulation of petitions." From the record, it appeared that this policy had been strictly enforced in a nondiscriminatory fashion by the shopping center.

Appellees left the premises when requested to do so and later filed a law suit in the California Supreme Court seeking to enjoin the appellants from denying them access to the shopping center for the purpose of circulating their petitions. The trial court held that the appellees were not entitled under either the federal or California constitutions to exercise their asserted rights on the shopping center property. The California Supreme Court reversed, holding that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 23 Cal. 3d 899, 910 (1979). The United States Supreme Court held that the state of California is not prevented from exercising its police powers or its sovereign right to adopt in its own constitution individual liberties which are more expansive than those conferred by the federal Constitution. The United States Supreme Court found in *Prune Yard* that the requirement that the appellants permit the appellees to exercise their state-protected rights of free expression and petition on shopping center property "clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause" since "there is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." 64 L.Ed. 2d 752.

The court went on to note that Prune Yard was free to restrict expressive activity by adopting time, place and manner regulations that would minimize any interference with its commercial functions. The United States Supreme Court stated that "the shopping center by the choice of its owners is not limited to the personal use of appellants" but "it is instead a business establishment that is open to the public to come and go as they please." Id., page 756. Again, the *Bay Head* case is clearly distinguishable because there is no implied invitation by the individual property owners to the general public to use the beach.

* * *

The public trust doctrine has never before been applied in New Jersey to privately owned beach property. In *Borough of Neptune City* v. *Avon-by-the-Sea, supra*, and *Van Ness* v. *Deal, supra*, the New Jersey Supreme Court used the public trust doctrine as the basis for holding that a municipality may not discriminate in respect to the use of municipal beaches between residents and nonresidents. The holdings were expressly limited to municipally owned beaches.

Municipalities are subdivisions of government created by the legislature, and there is a rationale for treating municipally owned beaches in a different manner from privately owned beaches. Municipalities possess both the financial resources and the regulatory authority to address the burden of public beach operation.

For more than 300 years, property along New Jersey's tidal waterways has been routinely bought and sold by its private owners. There are no common law public rights in upland private property. The common law public rights that have been recognized by New Jersey courts inhere in the "common property," i.e., the tidewater and land naturally flowed by the mean high tide, which are held by the state in its sovereign capacity for the benefit of the general public. *Arnold* v. *Mundy*, 6 N.J.L. 1; 10 A.D. 356 (Sup. Ct. 1821).

* * *

An essential element of private property is the legal right to exclude others from enjoying it. When this right is taken or destroyed by government, a compensable taking has occurred. *Kaiser Aetna* v. *United States*, 444 U.S. 164; 62 L.Ed. 2d 332 (1979). *Kaiser Aetna* involved an attempt by the federal government to make a privately owned navigable tidal pond open to the public. The pond was improved by the owner as part of a larger development and opened to the seas. The government contended that the private owners could not exclude members of the public because "the public enjoys a federally-protected right of navigation over the navigable waters of the United States" and the pond, as improved, was unquestionably navigable. 62 L.Ed. 2d at 340. The

Continued on page 12

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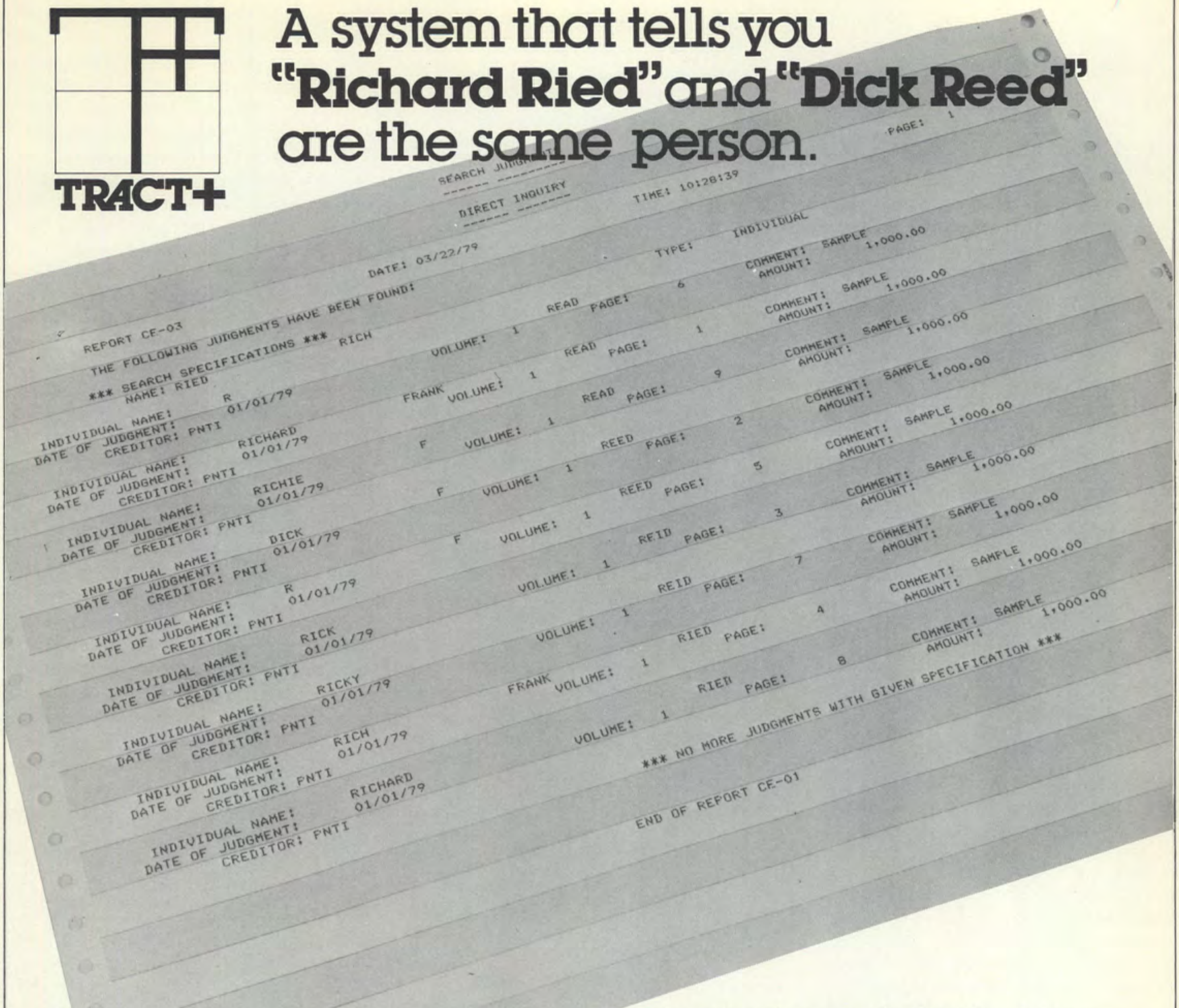
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Bay Head Beach—
from page 10

United States Supreme Court held that the government could not force the property owner to open the pond to the public. In analyzing condemnation cases involving the federal navigational servitude, the Court pointed out:

> *"But none of these cases ever doubted that when the government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest." 62 L.Ed. 2d at 345.*

This is important because "the interest of the petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water." 62 L.Ed. 2d at 346.

Under New Jersey law, no public right to use of private shorefront property presently exists. The creation of such a right by the judiciary would involve it in an exercise of power of eminent domain, a power properly belonging to the legislative branch of government. Moreover, an uncompensated "judicial" taking, brought about by a sudden and unpredictable change in state law, raises a serious federal question under the Fifth and Fourteenth Amendments. See Mr. Justice Stewart's concurring opinion in *Hughes* v. *Washington, supra,* 296-297.

The destruction of an individual private beachfront property owner's "right to exclude," and the creation of public rights in such private property through an unprecedented application of the public trust doctrine, would constitute a "taking" of property, in the constitutional sense, for which just compensation must be paid. *Kaiser Aetna* v. *United States, supra.*

* * *

In no sense is the BHIA a "surrogate" for the Borough of Bay Head. The BHIA is a voluntary organization; membership is not required and numerous Bay Head shorefront property owners have chosen not to join. The BHIA has no ability to raise taxes nor to compel any course of action by the shorefront property owners.

* * *

The broad question raised by this litigation is:

> *Are additional beaches needed now to accommodate the requirements of the general public for swimming, sunbathing and other water-related recreational activities and, if so, how are those additional beaches to be provided?*

Essentially, these are political questions which properly must be addressed by the people's elected representatives in the Congress of the United States and the legislature of New Jersey. These legislative bodies, rather than the courts, bear the responsibility for establishing the priorities, programs, and funding which are necessary to properly manage our coastal areas and provide the general public with adequate water-related recreational facilities. These legislative bodies, rather than the courts, have the trained staff and the means to thoroughly and comprehensibly study the needs of our citizens and to meet those needs through well-conceived and well-coordinated legislative action. The executive branch of the federal and state governments can then take over to see that those programs which are adopted are reasonably and fully implemented.

It makes no sense for the courts to venture into these areas of clear legislative and executive responsibility, particularly so where, as here, both the federal and state governments have already adopted and are implementing comprehensive coastal zone management programs which include the subject matter of open beaches. Absent a violation of due process or other specific guarantee, the courts must not substitute their social and economic beliefs for that of the legislature. *Vornado, Inc.* v. *Hyland,* 77 N.J. 347; 390 A.2d 606 (1978); 16 Am. Jur. 2d, Constitutional Law §316, pages 842-843.

The judiciary should refrain from any further expansion of the public trust doctrine at the expense of long-established and universally recognized private property rights. The expansion of the public trust doctrine in the fashion suggested by the public advocate would do irreparable damage to traditional private property law concepts, destroying the fundamental "right to exclude," and burdening beachfront property owners with a servitude that did not exist of record, and of which a present property owner could have had no notice, record or otherwise, at the time he purchased. The courts should not embark on such a course, particularly so where, as here, there is no demonstrated compelling public need.

(NOTE: The defendants were able to put in the record statistics developed by the United States Army Corps of Engineers and the state of New Jersey indicating that of the state's 123.8 miles of Atlantic Ocean front land 13.4 percent is federally owned , 9.3 percent is state owned, 51 percent is municipally owned, and only 26.3 percent is privately owned. Statistics were also available from the state of New Jersey indicating that developing swimming facilities in New Jersey are able on any given day to accommodate 63.09 percent of the state's 1980 population of 7,335,808. The "Statewide Comprehensive Outdoor Recreation Plan" prepared by the New Jersey Department of Environmental Protection rather convincingly demonstrated that the lack of low-cost public transportation is the principal limiting factor in the utilization of existing public beach facilities.)

(In 1977, the legislatively created New Jersey Beach Access Study Commission filed its report which is known as the "Public Access to Oceanfront Beaches, A Report to the Governor and the Legislature of New Jersey." The commission made certain recommendations, including the adopting of comprehensive beach management legislation "to clearly articulate the rights and responsibilities of individual beach owners, property owners and municipalities." As of the spring of 1981, the New Jersey legislature has not adopted legislation proposed by the Beach Access Study Commission.)

Court Holdings

In his June 1, 1981, opinion, Judge Kaplan accepted all of the defendants' basic arguments. Among the court's holdings are the following:

"The Public Trust Doctrine cannot be applied to the privately owned beach property in Bay Head. Both the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Paragraph 20, of the New Jersey Constitution forbid the taking of private property without just compensation first made to owners.

"The record before me clearly supports a determination that there has been no dedication of beach area express or implied to the public use since the creation of the BHIA (Bay Head Improvement Association) in 1932, nor can such dedication be inferred from any map filed in the Ocean County clerk's office.

"A plenary hearing will be necessary, however, as to the issue of an implied dedication arising from a claim of oceanfront owners acquiescence to the public use prior to 1932.

"The public advocate alleges a public use prior to 1932. I am unable to understand from the record whether reliance is solely on such public use as to constitute an implied dedication by these property owners or whether reliance is upon the English doctrine of customary use. As to the doctrine of customary use I do not find any decisions in our courts to support a

finding that such a doctrine exists in New Jersey property law.

"The record does not support the contention of the public advocate of a prescriptive easement arising from the acts or conduct of the BHIA and the ocean front property owners from 1932 to date . . . A plenary hearing will be necessary, however, with respect to the public advocate's allegation of a prescriptive easement arising from activities which may have occurred prior to 1932 when the BHIA undertook its plan of control.

"The record does not warrant a finding that the BHIA should be deemed to be an arm of the Borough of Bay Head . . .

"The right to exclude the general public from one's oceanfront property in Bay Head is a permitted and essential attribute of private ownership and could never be considered such discrimination as to be regulated by the state . . . The record does not suggest that BHIA management and supervision of the beach areas in its control is conducted as a commercial enterprise for profit. The right to discriminate in its selection of users of its limited facilities is equally available to this association.

"The public advocate maintains that public use of the dry beach areas eastward of the residences maintained by these oceanfront property owners, separated as they are by dunes, stone seawalls, etc., can be accomplished without substantial impairment of property rights. There is no merit to this contention. Such usage would amount to a physical intrusion onto private property. A judicial extension of the public trust doctrine based on this supposition would not be mere regulation but would constitute a physical invasion of private property and require the exercise of the power of eminent domain, a function of the state legislature."

The attempt to "characterize public use of private beachfront property as a basic fundamental right similar to that addressed in *State* v. *Schmid* is misplaced . . . The right of the public to a greater enjoyment of beach facilities, while important and of ever-increasing interest, is, at best, an unexpressed penumbral right, not rising to a constitutional level, but to be weighted in context with the right of those who seek to bar unlimited invasion.

"A fair accommodation of the legitimate private property interests and the important rights of the public do not mandate the course the public advocate urges upon the court. It is more properly a matter for legislative consideration and action."

Because of the conclusions reached by the court, it is "unnecessary to consider whether any public right to the use of ocean waters bordering on the Borough of Bay Head is extinguished by the riparian grants held by some of the oceanfront property owners."

The public advocate is intent on obtaining a prompt judicial review of the trial-level decision. Accordingly, the public advocate has recently agreed to abandon the pre-1932 issues of prescription and implied dedication so that the judgment which has been entered would be "final" and subject to a right of appeal. It is anticipated that the *Bay Head* case will reach the Supreme Court of New Jersey and, possibly, the United States Supreme Court.

Michigan Elects Officers

The Michigan Land Title Association held its 80th annual convention June 28–30, 1981, at the Grand Traverse Hilton, Acme, Michigan.

The officers elected for the current year are Carl B. Babcock, president; John J. Roney Jr., vice president; E. Lee Wittmer, secretary; and Lowell P. Elowsky, treasurer. Newly elected directors include Hugh A. Loree, Edward A. Blaty, and David F. Upton.

MLTA passed a resolution extending honorary membership to Earle Graves, past president, upon his recent retirement from Guaranty Title Company.

Guest speakers at the convention included James L. Boren, ALTA president; M. Kisor Jr., senior vice president and chief investments officer, Detroit Bank and Trust Company; and William J. McAuliffe, ALTA executive vice president.

Oregon Association Meets

The Oregon Land Title Association held its 74th annual convention June 22–24 at the Ashland Hills Inn, Ashland, Oregon.

Newly elected officers are Henry P. Ritz, president; Roy F. Elliston, vice president; and C. H. Jack McGirr, executive-secretary–treasurer. Robert L. Fitchard, a long-time member of OLTA, was elected an honorary member.

Among the speakers featured at the convention were Ben (Kip) Lombard, Oregon state representative; Lem Putnam, Oregon state manager of Pioneer National Title Insurance Company; and Louis P. Scherzer, senior executive vice president of Benjamin Franklin Federal Savings and Loan Association.

Minnesota LTA Meets

The Minnesota Land Title Association held its 73rd annual convention August 13–15 at the Holiday Inn, Grand Rapids, Minnesota.

Louise Larson of Larson Abstract Company, Little Falls, was elected president. Larke Huntley of Itasca County Abstract Company, Grand Rapids, was elected vice-president, and A. L. Winczewski of Winona County Abstract Company, Winona, was reelected secretary-treasurer. Dale Kutter of Chicago Title Insurance Company, Edina, was elected to a two-year term, and Charles Enger of Enger Abstract Company, Austin, was elected to a three-year term on the Board of Directors.

Featured speakers at the convention included chairman of the ALTA Title Insurance and Underwriters Section, Donald P. Kennedy, and vice president of the Title Insurance Company of Minnesota, Ronald G. Gandrud.

Names In The News . . .

Title Insurance and Trust Company announced the elections of four vice presidents. **John R. Mathena** was elected vice president for the company's Shasta County, California, operation. Mathena has served as assistant vice president and area/county/district manager for TI's Shasta County offices since 1968.

R. Jonathan Pena was elected vice president for TI's Placer County, California, operation. Pena has been assistant vice president and Placer County manager for TI since January 1979.

George L. Piazza was elected vice president. Piazza, who is area manager of TI's Lassen and Plumas counties, California, operations, is responsible for coordinating all TI's title insurance and escrow marketing services in his area. He is in the company's Susanville office.

Larry F. Escalera was elected vice president of TI's Imperial County, California, operation. A 20-year veteran of TI, Escalera has held a variety of increasingly responsible positions in the company. He has served as assistant vice president and Imperial County manager since October 1980.

Lawrence A. Newland was appointed senior vice president and manager, western region, for Title Insurance and Trust. In his new position, Newland is responsible for operations in California, Arizona, and Nevada. Newland started his career with TI as a business development representative in 1961.

Title Insurance also announced the promotion of **William Bredl** to area manager and assistant vice president for the Los Gatos-Cupertino-Campbell area. In his new position, Bredl is responsible for all operations, marketing, and administration in his area. Formerly, Bredl was senior escrow officer and manager of TI's Campbell office.

LeRoy E. Green was appointed manager of TI's Santa Clara County, California, operation.

Title Insurance and Trust Company is a subsidiary of Ticor, a diversified financial services management company with nationwide operations.

Edna Q. Hardin was named special projects officer of Transamerica Title Insurance Company's Portland, Oregon, office. Hardin handles escrows for commercial real estate transactions from Transamerica's Orbanco Building branch.

Before assuming her new position, Hardin spent 10 years with the Pioneer National Title Insurance Company. She also formulated and instructed escrow classes at Professional Careers, Inc., a real estate training school.

Transamerica also announced that **William S. Matthews** was named assistant manager of the company's Anchorage, Alaska, office. Matthews began his Transamerica career in 1979 as business development officer in Anchorage.

Commonwealth Land Title Insurance Company appointed **Wayne Levins** vice president and Florida state manager. A 25-year veteran of the Florida land title industry, Levins last served as senior vice president and director of underwriting for a Florida-based title insurer. He is also immediate past president of the Florida Land Title Association.

Jeffrey A. Rimer was appointed agency representative and closing officer for Commonwealth. Rimer has been employed by Commonwealth since 1967, most recently as manager of the company's Ambler and Harleysville office. In his new position, he is responsible for servicing and developing agency and approved attorney accounts in eastern Pennsylvania, Delaware, and Maryland.

Commonwealth also announced the appointment of **John G. Keidel** as manager of the company's Philadelphia National Title Service Division office. Keidel, who has been with Commonwealth for 30 years, also serves as assistant vice president.

Gloria M. Kirking, district manager with American Title Insurance Company, was named the Wisconsin Builder's Association associate member of the year. Kirking is the first woman to receive the award in the association's history.

Fern Bell has been appointed marketing director for American Title Insurance Company. Before assuming this position, Bell spent 18 years with another title office.

American Title Insurance Company is a national real estate title insurance company based in Miami, Florida. It is a subsidiary of The Continental Corporation—the nation's 12th largest diversified financial company.

Charles V. Jordan, of New York, N.Y., was appointed branch counsel for Lawyers Title Insurance Corporation. Jordan joined Lawyers Title in 1978 as a title attorney. He was elected senior title attorney in 1979 and assistant branch counsel in 1980.

Lawyers Title also announced the appointment of **Edward C. Spalding Jr.** as manager of the company's West Palm Beach, Florida, branch office. Spalding joined Lawyers Title in 1975 as a sales representative.

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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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Calendar of Meetings

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

November 5- 7
Land Title Association of Arizona
Carefree Inn and Resort
Carefree, Arizona

November 11-14
Florida Land Title Association
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