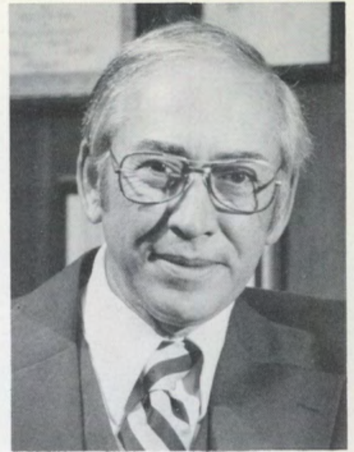
October 1982

TITLE NEWS

DO NOT REMOVE

Timesharing—
page 4

Can you afford a loss at today's real estate values?
NO?
Then let 30 years of title experience work for you!



R. "Joe" Cantrell
"A title agent for title people"

ERRORS AND OMISSIONS INSURANCE

Escrow Agents, — Loan Closers, — Realty Sale Closers, — Abstracters, — Title Searchers, — Title Examiners, — and Title Insurance Agents.

FEEL SAFE AND SECURE

DON'T TAKE A CHANCE

TitlePac **provides:**

The broadest coverage:
Very competitive rates:
Prompt and efficient service:
Coverage for prior acts:
Title experience and title knowledge:
Title people to settle claims:

SERVES ONLY THE TITLE AND ESCROW-CLOSING INDUSTRY

RJ CANTRELL AGENCY

2108 N. Country Club Road
P.O. Box 857
Muskogee, OK 74401
918-683-0166

Toll-free Number:
1-800-331-9759
(Except Alaska, Hawaii, and Oklahoma)

TITLE NEWS

Volume 61, Number 10

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

ASSOCIATION OFFICERS

President
Thomas S. McDonald
Lawyers Title Group, Inc.
Sanford, Florida

President-Elect
Donald P. Kennedy
First American Title Insurance Company
Santa Ana, California

Chairman, Finance Committee
James L. Boren Jr.
Mid-South Title Insurance Corporation
Memphis, Tennessee

Treasurer
Richard P. Toft
Chicago Title Insurance Company
Chicago, Illinois

Chairman, Abstracters and Title Insurance Agents Section
Jack Rattikin Jr.
Rattikin Title Company
Fort Worth, Texas

Chairman, Title Insurance and Underwriters Section
Gerald L. Ippel
Title Insurance and Trust Company
Los Angeles, California

Immediate Past President
Fred B. Fromhold
Commonwealth Land Title Insurance Company
Philadelphia, Pennsylvania

Executive Committee Members-at-Large
William H. Little
SAFECO Title Insurance Company
Los Angeles, California

Charles O. Hon III
The Title Guaranty & Trust Company of Chattanooga
Chattanooga, Tennessee

ASSOCIATION STAFF

Executive Vice President
William J. McAuliffe Jr.

Vice President—Public Affairs
Gary L. Garrity

Vice President—Government Relations
Mark E. Winter

Vice President—Administration
David R. McLaughlin

Director of Research
Richard W. McCarthy

Editor
Maureen Whalen Stotland

Editorial Assistant
Wendy G. Sibelman

General Counsel
William T. Finley Jr.
Pierson Semmes Crolius & Finley
Canal Square
1054 Thirty-first St., N.W.
Washington, D.C. 20007

Features

A Brief Guide to Timesharing 4

Judiciary Committee Report 8

Departments

Names in the News 18

Calendar of Meetings Back Cover

A Brief Guid

The following section was prepared from material submitted by Oscar H. Beasley, vice president—senior title counsel, First American Title Insurance Company, Santa Ana, California.

This glossary is an attempt to provide readers with working definitions of terms associated with typical timeshare projects. As the timesharing industry grows, developers and sellers of timeshare resort properties may create new types of agreements to suit their and their customers' needs.

There are two forms of timesharing: *ownership* and *nonownership*. Although both kinds offer a purchaser access to a unit of property for a period of time, there are distinct differences between the two forms.

Ownership

Ownership timeshare or *timeshare estate* involves a transfer of real property and is treated in much the same way as any real estate sale-and-purchase agreement. According to URETSA, the purchaser is entitled to occupy a unit or any of several units during a specified number of separate time periods over a certain minimum number of years, ". . . including renewal options, coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof."

Although the amount of occupancy time purchased may vary, most timeshare estates are in intervals of one week or multiples of weeks for a period of five years or more. Whatever period of time the buyer selects, he is purchasing an interest in real property and receiving title to that interest.

To date, two kinds of ownership timeshare arrangements have been used.

Interval ownership, the more popular timeshare ownership arrangement, is at first an estate for years: Individual buyers each own a particular unit during a certain period of time each year for a certain number of years. After the specified period of years of the contract has elapsed, every buyer of every time period in a given unit becomes a tenant in common in ownership of that unit. The undivided interest of each tenant in common is determined by the length of the occupancy time he originally purchased. At that time, the tenants in common may choose to continue as tenants in common, renew the estate, or sell the property.

Tenancy in common ownership, or *time span ownership* (TSO), is the second form of timeshare ownership used: Individual purchasers each receive an undivided interest in a selected unit based pro rata on the length of the time period purchased. The buyer does not actually own the unit; instead, he owns an interest in the unit as tenant in common with all other buyers. Unlike interval ownership, the TSO agreement

Because of increased consumer demand, more timeshare properties are being planned and marketed. Timesharing resort properties provides the middle class the opportunity to purchase a dream vacation at a favorite resort for an affordable price—by buying only one or two weeks a year. New marketing programs offer the added inducement of exchanging time in one property for time in another. Several organizations—Resorts Condominiums International and Interval International—offer exchanges to more than 30 countries.

The variety of timeshare agreements presents a challenge to title insurance companies. A company's ability to issue title insurance policies on timeshare projects depends on the category into which a particular project falls: Is the interest to be insured an actual real property interest, an exclusive right to occupy (perhaps also real property), a club membership, or something else?

With the original timeshare concept, purchasers had a common interest in the ownership of whatever was being timeshared—hotel room, apartment, or townhouse—coupled with some form of an exclusive right for them to occupy a specific time. For example, the general ownership of a condominium unit that was being timeshared would be a tenants-in-common relationship among the timesharers plus a tenants-in-common ownership of the undivided interest in the common area plus the exclusive right to occupy at a particular time.

Issuing a title insurance policy on the tenancy-in-common estate in a unit and its common area is no different from issuing title insurance on a condominium unit. If desired by the insured owner, the policy can insure the right of occupancy

Continued on page 6

o Timesharing

The following material was compiled by Wendy G. Sibelman, Title News *editorial assistant.*

Despite the prolonged economic recession, record-high unemployment, and a depressed housing market, timesharing resort properties continues to present middle-class vacationers with an appealing alternative to condominium purchases. Some 350,000 families enjoy the benefits of timeshare properties. In 1981, the timeshare industry collected $1.3 billion from new sales.

Bad Publicity Hurt Industry

A still-young and quickly expanding industry, timesharing is not without problems. During the 1960s and into the early 1970s, the recreational real estate market was plagued with bad publicity from fraud and misrepresentation. Although few developers and sellers of vacation homes and resort properties engaged in such activities, the unscrupulous practices of these few drew the attention of state and federal regulators concerned with consumer and environmental protection. The ensuing regulations covered all recreational real estate transactions—honest or not.

Industry Seeks Appropriate Regulations

Most developers, marketers, salespersons, and consumers agree that to avoid such blanket legislation and at the same time to deter fraud and misrepresentation, appropriate regulations are necessary to ensure the safe transfer of timeshare property.

The National TimeSharing Council (NTC) of the American Land Development Association (ALDA) promotes enactment of appropriate state timesharing legislation.

According to Gary Burnett, NTC/ALDA director of legal affairs, "NTC is concerned about the fraudulent practices and

Continued on page 7

itself does not grant the purchaser interest in a particular time period; a separate legal document divides the year into unit weeks.

Nonownership

Nonfee, nonownership, or *right-to-use timeshare* involves a purchase of time, rather than of property, and is treated in much the same way as leases. In nonownership timeshare agreements, no legal title to the property is transferred: The individual purchaser obtains only the right to use the property at a given time each year for a specified number of years. The NTC recognizes three kinds of right-to-use timeshare agreements:

- *Vacation lease*. Also called a *leasehold interest*, this agreement is basically a *leasehold estate*. The buyer purchases a right to use the property for a certain number of weeks over a specified number of years—usually between 10 and 40 years. Vacation leases may involve specific units or specific classes of accommodations. For example, a buyer may purchase time in a two-bedroom condominium, but may not always be given the same unit.

- *Vacation license*. The buyer purchases a privilege or license to use a property during specific time periods each year over the life of the vacation license contract. Vacation licenses differ from vacation leases only in that the latter may be sold for a profit, rented, or leased, while the former may not. The only transfer of a vacation license that may be made is a nonprofit sale.

- *Club membership*. This agreement is also called *vacation plan timeshare*. In this kind of agreement, the purchaser buys a certificate of membership in a club. He receives the right to use the club's facilities—including living unit and recreation areas—for a period of time each year for a limited number of years. The period of occupancy time may not be specified, and the buyer may have to make reservations a reasonable time in advance to assure his accommodations. The buyer is purchasing time in a specific type of unit, and the developer need not identify the exact timeshare unit. At the end of the contract period, the developer may resell the certificate to another party or renew the original buyer's certificate.

The terms explained in this glossary are based on definitions contained in both the National Conference of Commissioners on Uniform State Laws' model Uniform Real Estate Time-Share Act (URETSA) and the National TimeSharing Council (NTC: formerly called the Resort TimeSharing Council) and the National Association of Real Estate License Law Officials' (NARELLO) Model Time-Share Ownership Act.

Timesharing and Title Insurance—
from page 4

included with the ownership of the property. The policy should contain a Schedule B exception, which would except the rights of the other cotenants and exclude any insurance that a cotenant would occupy only when he was supposed to occupy and that he would leave the condominium clean and neat.

Title insurance can be given only when the company can determine that the condominium declaration or other creative documents specifically establish the condominium itself and the right to a specified period of occupancy by whatever means desired. Even when the document clearly establishes the occupancy period, it is necessary to have a Schedule B, excepting from coverage the failure of the parties (occupants) to comply with the terms and conditions of the declaration or agreement. The exclusive right to occupy, given in conjunction with the tenancy interest, is determined by many companies to be the same legal concept as a leasehold interest. The occupancy is not considered a leasehold, and the right is more appurtenant to the fee ownership and exists in concert with the other interests.

There are many kinds of tenancy-in-common ownership agreements for timeshare units. In one type used during the past few years, title insurance has been issued on a revolving term for years: Each timeshare owner's term of ownership revolves into existence so that he may have the occupancy once each year. The previous owner's term ceases at the precise moment that the current owner's share commences. The term can be any length, but it usually lasts one or two weeks.

Most of these agreements limit the period for revolving terms to operate to perhaps 50 years, leaving the remainder of the estate after the 50 years to be held as tenants-in-common by all the holders of the revolving term for years. Title insurance can be issued to cover either the revolving term and the fee remainder or both. The same Schedule B exceptions involving failure to comply with the terms and conditions of the agreement or the rights of occupancy of others should also be used with the revolving term so that the title insurance company is not insuring that the owners will always abide by their agreements.

The timeshare is not restricted to the use of a condominium but can consist of a single building or project. The whole project, then, is owned by each of the timesharers as tenants-in-common with each of the other timesharers, but each timeshare owner has a right to a certain period of occupancy. You may be talking about not one unit and perhaps 50 sharers, but about 100 units and 50,000 sharers. The policy issued for the condominium timeshare reflects both the tenancy-in-common ownership and the undivided interest that each unit owner has in the common or recreational areas with each other unit owner. The common or recreational area interests must be held as tenants-in-common and not allowed to be split off from the unit ownership.

The taking of a tenants-in-common interest in a whole project, such as a hotel or a recreation facility, should be insured by a title insurance company in the same manner as any other tenants-in-common interest. The project timeshare must contain, coupled with the tenants-in-common interest, provisions for a right of occupancy within the project, the right being only a right to occupy some unit for some period either specified and set aside or on request. The possibility of insuring the right to occupy along with the tenants-in-common interest depends on the creating document and the particular

The Kilochan Castle in Ayrshire, Scotland, offers timesharers a taste of European elegance. Photo courtesy of Interval International.

state's regulatory authorities. If the right to occupy can be determined to be appurtenant and established as a property interest, then the insurance can be given. Again, the insurance policy should contain a Schedule B exception concerning the failure to comply with the terms and conditions of the document and excluding the rights of other parties to possession of the property.

The exceptions are also used to exclude the rights that may arise from a subsequent-to-the-date-of-insurance judgment or a tax lien filed against a cotenant. There is a possibility that federal tax liens, state tax liens in some jurisdictions, and judgments in some jurisdictions against cotenants could create a right in the taxing authority or judgment creditor to cause the sale of all the timeshares so that the creditor can receive the funds that represent the interest of the debtor-cotenant. Presumably, the creditor taxing authority or judgment creditor could receive only the amount of money that the interest of the debtor-timesharer realized, and the remaining funds would be split among the other timesharers.

Not all timeshare interests presently being marketed involve interest in real property, because the timeshare purchased does not involve actual ownership or leasing of real property. In some timeshare estates now being established, the real property is owned by a club or by another similar organization. Club membership gives the individual the right to occupy some unit within the project for a specific period, such as one week, but only as a member of the club. Club members have the rights to occupy as declared by the club charter. Some clubs own properties in many parts of the country or throughout the world, and club membership permits individuals to select a different location each year.

Title insurance problems for timeshares are just beginning, and each new timeshare agreement may request us to insure "new" types of interest that are not historically insurable. As new forms of timesharing appear, issuing title insurance should follow the present guidelines pertaining to real property and should carefully avoid the obvious pitfalls of insuring that to be real property that is not enforceable by real property rules. Recording systems may directly affect both lenders' and owners' priorities since they may not be applicable to something that is personal property or perhaps less.

*Timesharing Legislation—
from page 5*

misrepresentations that go on in timesharing because they hurt our honest developers who are trying to do business with as much integrity as anybody else. It is the minority [of developers] who are creating a lot of the consumer problems." To prevent consumer difficulties and to promote a favorable image of the timesharing industry, Burnett counsels state agencies and developers on timeshare legislation.

States Respond to Industry and Consumers

During the 1970s, both state and federal regulators responded to the industry's needs with various measures. Timeshare regulations vary from state to state partly because of different state real estate laws. To date, nine states have passed legislation that specifically addresses timesharing (see accompanying chart). Other states regulate timesharing under existing statutes, such as subdivision, land sales, real estate licensing, consumer protection, and securities acts.

Both California and New Hampshire amended existing laws to cover timesharing. In California, timesharing was incorporated into the state's subdivided land statute. Burnett says that the California legislation is the most comprehensive to date and can be used as a guide by other states considering legislation. In New Hampshire, the land sales and condominium act was amended to address timesharing.

Continued on page 14

State Legislation Designed to Regulate Timesharing

State	Law—Date	Regulated Under	Administering Authority
Arizona	H.B. 2346 Approved and Filed 4/14/82	Section 1, Title 32 Chapter 20, Arizona Revised Statutes amended by adding Article 9	Arizona Real Estate Department
California	S.B. 1736 Passed 7/11/80 Signed 7/17/80 Effective 1/1/81	New timesharing law amended subdivided land section of the Business and Professions Code	Department of Real Estate
Florida	CS/HB 1068 Effective 7/1/81	New timesharing law: Florida Real Estate Timeshare Act, Chapter 71 Florida Statutes	Division of Florida Land Sales and Condominiums in the Department of Business Regulation
Hawaii	Legislation Signed 5/30/80 Effective 6/30/80 Amendment signed 4/81 Effective 1/1/82	New timesharing law: Chapter 514E, Hawaii Revised Statutes	Department of Regulatory Agencies
Nebraska	Nebraska Timesharing Act Signed 3/26/80 Effective 1/1/81	New timesharing law: Section 76-1701 of Nebraska Code	Nebraska Real Estate Commission
New Hampshire	Legislation Effective 9/10/77	New timesharing law amended Land Sales Full Disclosure Act and Condominium Act	Consumer Protection Division of Agriculture Office
South Carolina	Legislation Signed 8/1/79 Effective 10/1/79 Amendments effective 6/15/81	New timesharing law: Chapter 32 of Title 27-32-10	Real Estate Commission and Agriculture Office
Tennessee	H.B. 815 Signed 5/19/81 Effective 5/19/81	New timesharing law: Chapter 372 of Tennessee Code Annotated (62-1302) unless already registered under other statute	Tennessee Real Estate Commission
Virginia	S.B. 684 Effective 7/1/81	New timesharing law: Title 55, Chapter 21, Virginia Real Estate Timeshare Act	Virginia Real Estate Commission

Source: National TimeSharing Council, Washington, D. C.

Judiciary Committee Report

The following case briefs are the second installment in the 1982 ALTA Judiciary Committee Report, which was compiled by Judiciary Committee Chairman Ray E. Sweat and regional reporters. The final installment will appear in the November issue of Title News.

Mortgages—Due-on-Sale Clause

Great Northern Savings Company v. *Ingarra*, 66 Ohio St. 2d 503, 423 N.E. 2d 128 (1981)

The mortgagors borrowed $230,000 from the lender to build a 20-unit apartment building.

Paragraph 7 of the mortgage read as follows: "He [Grantor] will not sell, transfer or dispose of the above described premises without first obtaining the written consent of the Grantee [GNS]. If there shall be any change in the ownership of the premises covered hereby, or any part thereof, without the written consent of the Grantee, the entire principal indebtedness secured hereby, and all accrued interest thereon shall become due and payable at the election of the Grantee, the foreclosure proceedings may be instituted hereon, or the Grantee may elect to increase the interest rate on the outstanding principal indebtedness secured hereby to a rate not to exceed 2% per annum above the rate stated in the note secured hereby and Grantor hereby waives notice of such interest rate increase and consents to the same."

Because of cost overruns and other cash needs, the mortgagors elected to sell the apartment project and discussed the potential sales with the lender's officers.

The project was sold on a land sales contract.

The bank undertook to assert Paragraph 7 and collect an additional 2 percent above the rate stated in the note. The court held that the due-on-sale clause will not be enforced when the lender has encouraged the sale and was aware of all the negotiations and was, thus, estopped to enforce the due-on-sale clause in its mortgage.

First National Bank of Lincoln v. *Brown*, 90 Ill. App. 3d 215, 412 N.E. 2d 1078 (1980)

On July 1, 1977, three individuals executed a note in the amount of $270,000 secured by a mortgage on restaurant property. The note contained a due-on-sale clause providing that the unpaid balance of principal and interest "shall, at the option of the Payee, become due and payable if the premises or any part thereof shall be conveyed, assigned or otherwise disposed of by the undersigned."

Thirty-five days after the mortgage was executed, the three individuals conveyed the property to a trustee. The beneficiaries of this trust were two of the three individuals, the third party having withdrawn from the restaurant business.

In December 1977, the remaining two individuals furnished the mortgagee bank a balance sheet showing that they were the two remaining owners. The bank, nevertheless, continued to accept the monthly payments on the mortgage loan until December 1978.

The bank did not attempt to invoke the due-on-sale clause until February 1979.

The court held that the bank was barred by the defenses of estoppel and laches.

The due-on-sale clause gave the mortgagee an option to accelerate the loan; this option had to be exercised within a reasonable period of time.

Sonny Arnold Inc. v. *Sentry Six Savings Association*, 615 S.W. 2d 333 (Texas 1981)

The plaintiff executed a deed of trust to the defendant that contained an acceleration clause effective on a sale of the security at the defendant's option. It further provided that such option should not apply in case of "sales or transfers when the transferee's creditworthiness and management ability are satisfactory to the Lender and the transferee has executed, prior to the sale or transfer, a written assumption agreement containing such terms as lender may require, including, if required by Lender, an increase in the rate of interest payable under the note."

The plaintiff's note bore interest at the rate of 9.75 percent per annum. The plaintiff secured a prospective buyer and then notified the defendant, who would agree to an assumption only upon increase of the interest rate to 10.5 percent. The plaintiff subsequently sold the property without the consent of defendant or the execution of an assumption agreement. A copy of the deed was delivered to the defendant who accelerated the note and prepared to foreclose. The plaintiff then secured an injunction.

The court recognized that the question of whether the due-on-sale clause constituted an invalid restraint on alienation was a question of first impression in Texas. After reviewing diverse authorities from other jurisdictions, the court held that the clause was contracted for by the parties, was not unreasonable, and was valid and enforceable.

The provision was only an indirect restraint, not invalid as a restraint on alienation of property interest. The court stated that the fact that the lender might be motivated to consent to a conveyance only upon an interest-rate increase did not render the security instrument any less legal. The court further pointed out that the clause made no mention of impairment of security and should be enforced according to its terms as a clear and unequivocal contractual provision.

Mills v. *Nashua Federal Savings & Loan Association*, 433 A.2d 1312 (N.H. 1981)

If a mortgage contains the FHLBB and FNMA Paragraph 17 due-on-sale clause, the clause may be enforced by the mortgagee upon transfer of the property by the mortgagor because the clause does not prevent the transfer and is therefore not an unreasonable restraint against alienation. A due-on-sale clause, however, will not be enforced if such enforcement would amount to "unconscionable or inequitable conduct" by the lender, or in the case of transfers to a spouse who becomes a co-owner, transfers to a spouse arising from a divorce proceeding or settlement, or transfers to an inter vivos trust of which the mortgagor is a beneficiary.

Mortgages—Due-on-Sale Clause—Federal Savings and Loan

First Federal Savings & Loan Association of Rochester v. *Jenkins*, 109 Misc. 2d 715, 441 N.Y.S. 2d 373 (1981)

In this decision of first impression in New York, the trial court upheld the validity of a due-on-sale clause tested under federal law.

The due-on-sale clause has been under attack in the courts of many jurisdictions and its exercise was restricted by 13 state legislatures. The notion that the lender should not "unreasonably" withhold consent to assumption of the mortgage by a "qualified" buyer of a home, while historically less than completely justified, has been grounded on the rationale that the clause unduly restricts alienability and, due to the unequal bargaining strength of the parties, upon the "adhesion" nature of the loan agreement. In a society in which a home changes hands every seven years or so, and in the face of fluctuating, uncertain interest rates, one may differ as to whether the inclusion of such a clause indicates commendable foresight or deplorable rapacity. The threat that the restriction of the due-on-sale clause currently poses to the stability of lenders with numerous outstanding low-interest mortgages has prompted Congress to consider federal legislation preempting the state restrictions on the exercise of the clause. Despite misgivings about interference in the regulation of matters essentially of state concern, experience with the federal usury preemption law points to the distinct possibility of eventual acceptance if such federal legislation is enacted.

The Jenkins were the borrowers who attempted to challenge the foreclosure of the mortgage, by First Federal, for failure to obtain prior written approval to the sale of the property. They challenged the due-on-sale clause as unconscionable, in restraint of trade and their right of alienation, and contrary to public policy.

The court relied on Paragraph 17 in the mortgage illustrative of the FHLBB regulations authorizing associations to include due-on-sale clauses in their loan instruments and cited *Conference of Federal Savings & Loan Assoc.* v. *Stein*, 604 F.2d 1256 (9th Cir. 1979), on appeal from California, and other federal decisions in support. It also pointed out that New York courts have generally upheld due-on-sale clauses under state law and that the New York legislature has obliquely recognized their validity (Real Property Law 254-a).

Mortgage—Foreclosure

Metropolitan Life Insurance Co. v. *Foote*, 95 Mich. App. 199, 290 N.W. 2d 158 (1980)

A mortgage covering four separate parcels of land contained a provision that, at the option of the mortgagee, the premises might be sold en masse. A judicial foreclosure was had, and the premises sold as a unit. The defendant contended that the sale violated statutory provisions requiring mortgaged parcels to be sold individually when this can be done without injury to the parties, the determination by the court of a fixed minimum price, and the redemption of individual parcels at their sales price.

The court held for the defendant mortgagee. The unambiguous provision for sale en masse was contained in the mortgage contract between the parties. The court found that such a provision did not violate Michigan public policy and should be given effect in the absence of a showing of bad faith on the part of the mortgagee.

Mortgages—Foreclosure—Dragnet Clause Binding on Grantee of Mortgagor

State Bank of Albany v. *Fioravanti et al.*, 51 N.Y. 2d 638, 435 N.Y.S. 2d 947 (1980)

In 1966, the first two defendants executed to the plaintiff their bond in the sum of $2,500 secured by a mortgage on property in Caroga. The mortgage, which was duly recorded, contained a provision that it secured not only the bond but also any and all further loans, subject only to the limitation that the amount secured at any time should be the original principal amount.

In 1973, these mortgagors executed a note to the plaintiff secured by a parcel in Amsterdam. After the foreclosure of this mortgage, there was a deficiency in excess of $3,000.

In the meantime, the Caroga parcel had been conveyed to the third defendant, who had assumed the mortgage, and the note had been paid in full. This action was brought to foreclose the 1966 mortgage on the Caroga property to the extent of $2,500, under the dragnet clause.

In a 4–3 decision, the court of appeals affirmed a judgment granting the plaintiff's motion for summary judgment.

Mortgage—Foreclosure—Notice to Debtor

Lido International, Inc., v. *Lambeth*, 611 S.W. 2d 622 (Texas 1981)

The plaintiff, who had purchased property from the defendant, paid $50,000 cash and executed a deed of trust to secure a note for $300,000. The deed of trust specifically provided that any notice required was to be sent to a Dallas address. The plaintiff had to return to Iran and alleged that he left an Iranian address and another Dallas address with the defendant, together with nine post-dated checks. The first check was dishonored because the plaintiff's lessee defaulted and did not deposit the rent in the plaintiff's bank account. The defendant immediately foreclosed, sending notices as specified in the deed of trust.

The trial court held for the defendant on summary judgment, and the court of civil appeals affirmed.

The supreme court reversed and remanded, holding that the defendant failed to establish as a matter of law that the notice was given at the most recent address in compliance with Article 3810, Vernon's Annotated Civil Statutes.

This case raises perplexing questions on proof of notice. It would seem that the foreclosing party has to negate that his records contain addresses subsequent to the execution of the deed of trust and that the party foreclosed might have to show that such records do contain such subsequent addresses.

Mortgage—Foreclosure—Statutory Notice

Martinez v. *Beasley*, 616 S.W. 2d 689 (Texas 1981)

Whether actually received or not, one certified letter addressed and mailed to a husband and wife at the address where they actually reside is sufficient statutory notice of the trustee's intent to foreclose under Article 3810 of the Revised Civil Statutes of Texas. A separate letter does not have to be addressed and mailed to each spouse.

Mortgage—Foreclosure—Termination of Junior Leases

Prudential Insurance Company v. *Bull Market, Inc.*, 66 Ohio Misc. 9, 420 N.E. 2d 140 (1979)

The owner lessor mortgaged to Prudential and thereafter leased the premises to Bull Market, Inc. Prudential then foreclosed and sought to oust the lessee.

The question was, what effect does the foreclosure have on the tenant's rights?

The majority rule was that foreclosure has no effect on lessee rights if the lessee is not joined in the foreclosure proceedings.

The minority rule was that the lease terminates with foreclosure of the mortgagor's interest, whether the lessee was joined in the foreclosure proceedings, because the lessee is not in privity with the final owner, that is, the foreclosing mortgagee.

Ohio follows the minority rule but recognizes that a prior mortgagee may, by its conduct, or by silent acquiescence, subordinate its interest to that of a subsequent lessee of the mortgagor.

Mortgages—HUD-Held Mortgage Is Superior to Subsequent Taxes and Tax Deed Holder

Long Beach Housing Authority v. *Lew Chew Soon Corp.*, 107 Misc. 2d 1037, 436 N.Y.S. 2d 539 (1980)

This was a motion by a claimant in a condemnation proceeding to compel the condemnor to make an offer and an advance payment pursuant to Eminent Domain Procedure Law Sections 303 and 304.

An assignment of a defaulted FHA-insured mortgage was made to HUD and recorded on June 28, 1974.

On July 1, 1974, the second half of the county taxes became a lien against the property and subsequently resulted in a tax deed to the claimant.

Before the delivery of the tax deed, the government commenced a foreclosure action without notice or service of process on the tax lien purchaser even though it had actual notice of the tax lien. A referee's deed was obtained by the government, which was thereafter conveyed to the petitioner/condemnor.

The court held that the first-in-time-is-the-first-in-right rule governed the priority of liens in this case, and since the guarantee of the mortgage indebtedness and the actual assignment to the government instrumentality occurred before the lien of local taxes became fixed, the petitioner whose title derived from the government must prevail. The simple failure to give notice to the tax lien purchaser could not cloak that person with any greater rights than it originally possessed, and any attempt to do so on procedural grounds must fail as an unconstitutional attempt to divest the government of its superior rights.

Mortgages—Insurance

495 Corp. v. *New Jersey Insurance Underwriting Association*, 86 N.J. 159, 430 A.2d 203 (1981)

A fire insurance policy issued to the fee owner contained the standard mortgage clause, which protected the interest of a first mortgagee and a second mortgagee. The latter took title to the property in satisfaction of its mortgage, but it neither canceled the mortgage and note nor notified the insurance company of the change of ownership of the property. Thereafter, the building was damaged by fire and vandalism. When presented with a claim for these losses, the insurance company refused payment on the ground that when the mortgagee accepted the deed, it no longer had an insurable interest under the policy.

The court held that a mortgagee acquiring title to property is entitled under the standard mortgage clause to receive insurance proceeds for the full amount of any loss occurring after it acquired title by deed in lieu of foreclosure, subject only to the policy limit and the rights of superior mortgagees.

Mortgages—Mechanics' Liens

S & S Ceiling & Partition Co. v. *Calvon Corp.*, 410 N.E. 2d 777 (1979)

This case was a suit between a takeout lender and a mechanics' lien holder. The takeout lender apparently put its loan on currently with the construction loan but did not raise its subrogation rights.

The lower court held that mere recording of a future-advances mortgage before the attachment of a mechanics' lien does not entitle the lien arising from the mortgage priority over the mechanics' lien as a matter of law for the mortgagee disclaims priority under applicable statute and shows neither obligatory nature of advances under mortgage nor that any advances were made prior to attachment of the mechanics' lien.

The court of appeals reversed the lower court and remanded for further proceedings.

The court cited *Wayne Building and Loan Association* v. *Yarborough*, 228 N.E. 2d 841 (1967), and stated a mortgage contemplating advances for construction on the mortgaged premises must obligate the mortgagee to disburse definite and certain sums, under definite conditions, or in a particular manner, in order to achieve priority over a valid mechanics' lien, even though the mechanics' lien becomes effective subsequent to recording of the mortgage, where the funds are not disbursed pursuant to R.C. 1311.14. If the mortgage is not one for obligatory future advances, any disbursement made subsequent to attachment of the mechanics' lien is subsequent in priority to the mechanics' lien.

The court pointed out that a mortgage for future advances in Ohio may also achieve a degree of priority over later mechanics' liens by compliance with R.C. 5301.232 (open-end statute).

Mortgages—Purchase Money

Sarmiento v. *Stockton, Whatley, Davin and Co.*, 399 So. 2d 1057 (Fla. 1981)

The appellant obtained a final judgment against Turner and recorded the judgment the same day Turner subsequently purchased real property from a third party, executing a note and mortgage in favor of the appellee, from whom Turner obtained the purchase money. Turner sold the property to Faulkner, who defaulted on the mortgage. The appellee filed a foreclosure action against Faulkner, the appellant, and others. The appellant contended his prior judgment was superior to the appellee's mortgage. Summary judgment was entered for the appellee.

On appeal, the appellant argued that the mortgage was not a true purchase-money mortgage since the mortgage was not executed in favor of the vendor. The appellate court disagreed, holding that as long as the mortgage is given in conjunction with the purchase and given as security for a part of the purchase price, the mortgage is a purchase-money mortgage. This is true even if the money is advanced by a third party and the mortgage is executed in his favor.

Mortgages—Limitation of Actions—Joint Obligors

Campbell v. *Campbell*, 102 Mich. App. 462, 301 N.W. 2d 896 (1980)

The parties to a divorce owned property subject to a mortgage to the husband's parents. The mortgage was more than 20 years old, and the only payment that had

been made was a $5 payment made by the husband to his parents for the purpose of tolling the 15-year period of limitations. The wife knew nothing about the payment. The judgment of divorce allowed the husband to purchase his wife's interest in the property for a fixed sum, less any mortgage liens. The question before the court was whether there was a valid mortgage as regards the wife or whether the period of limitations had expired.

The court of appeals, interpreting the Michigan joint obligor statute, M.C.L.A. 600.5825; M.S.A. 27A.5825, held that the $5 payment by the husband would not stop the running of the period of limitations as regards the wife unless she acquiesced in that payment. The mortgage was held not to constitute a valid lien as regards the wife, and the husband could not set it off in making a purchase of his exwife's interest.

Mortgages—Partnership Property—Unauthorized Conveyance by Partner

Stroebel-Polasky Co. v. *Slachta*, 106 Mich. App. 538, 308 N.W. 2d 273 (1981)

One of two partners executed a mortgage on partnership property as security for his personal debt. The mortgagee foreclosed. The question before the court of appeals was what effect that mortgage had on the title to the property. The court observed that the Michigan Partnership Act prohibits a single partner from assigning the rights of both partners in the partnership property. It was held, however, that the mortgage was sufficient as to the interest that the partner could in fact transfer, that is, his own interest in the partnership. The mortgagee stood in the position of the mortgaging partner, and its interest was subordinate to the other debts of the partnership.

Navigable Waters—Public Trust

Thomas v. *Sanders*, 65 Ohio App. 2d 5, 412 N.E. 2d 1224 (1979)

Sandusky Bay is part of Lake Erie. Title to Lake Erie is held by the state of Ohio in trust for the people. Land that was reclaimed from the waters of Sandusky Bay for use by the littoral owner in aid of navigation is still part of the trust estate; title to said land cannot thereafter be held by private persons to the exclusion of the beneficiaries of the trust estate; nor can the city or state abdicate the trust so as to leave the reclaimed soil in the control of private persons.

Notice—Service by Certified Mail

Mitchell v. *Mitchell*, 64 Ohio St. 2d 49, 413 N.E. 2d 1182 (1980)

Civ. R. 4.3 (B) (1) does not require that delivery of service of process by certified mail be restricted to the defendant or to a person authorized by appointment or by law to receive service of process for the defendant. Service by certified mail under the civil rules is consistent with due process standards where it is reasonably calculated to give interested parties notice of a pending action. Accordingly, certified mail service is valid when the envelope is delivered to a person other than the defendant at the defendant's address.

In accordance with this decision the Ohio Real Property Section has recommended a revision of Ohio Title Standard 9.1. In Ohio, the title examiner will require that the return receipt be signed and be a part of the court file; this is normally sufficient without further inquiry as to the identity of the signor or his relationship to the defendant. It will be presumed, in the absence of circumstances that create a reasonable doubt in the mind of the examiner, that the delivery was made to an appropriate person at a properaddress.

Notice—Service by Ordinary Mail

In re Foreclosure of Liens, 62 Ohio St. 2d 333, 405 N.E. 2d 1030 (1980)

Due process requires that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. This case holds that the in rem tax-sale proceedings under R.C. 5721.18 (B) provide a notice mechanism (ordinary mail where the taxpayer's name and address appear on the general tax list) reasonably calculated to give interested parties notice of a pending action.

In this case, the sale was no good. The treasurer had the owner's residence address in his records but instead sent the notice to the property address, which was used exclusively for rental purposes. The owner never received notice.

Oil and Gas—Dormant Minerals Act—Constitutionality

Van Slooten v. *Larsen*, 410 Mich. 21, 299 N.W. 2d 704 (1980)

The question before the court was the constitutionality of the Dormant Minerals Act (M.C.I.A. 554.291, M.S.A. 26.1163(1), et seq.) as applied to oil and gas interests created before the passage of the act in 1963. A narrow majority of the Michigan Supreme Court, in a carefully reasoned opinion, held that the statute was not unconstitutional as either an impairment of contract or deprivation of property without due process, analogizing the act to the recording acts. The court also analyzed the public purposes served by the act in light of recent concerns about development of energy resources and found that there was a reasonable relationship of the act to those purposes.

In *Short* v. *Texaco, Inc.*, 406 N.E. 2d 625 (1980) the Indiana Supreme Court reversed the trial court, which had held the Indiana Mineral Lapse Act (Indiana Code Sections 32-5-11-1 through 32-5-11-8) unconstitutional. On appeal the U.S. Supreme Court affirmed the Indiana Supreme Court (50 LAW WEEK 4117, Jan. 12, 1982).

In *Wilson* v. *Bishop*, 412 N.E. 2d 522 (1980), the Illinois Supreme Court found the Illinois Dormant Mineral Interests Act (Illinois Rev. Stat. 1975, Chapter 30, pp. 197–198) unconstitutional.

In 1977, the Wisconsin Supreme Court held its state statute (W.S.A. 700.30 and W.S.A. 893.075) violative of due process and unconstitutional (*Chicago & N.W. Transp. Co.* v. *Pedersen*, 259 N.W. 2d 316).

Oil and Gas—Estoppel by Deed

Scarmardo v. *Potter*, 613 S.W. 2d 756 (Texas 1981)

Grantor Potter brought suit for title and possession of a reserved one-eighth mineral interest. Potter owned the property subject to a prior reservation of a one-half mineral interest. No mention was made of the prior reservation. Scarmardo conveyed to Easterling, reserving a one-eighth mineral interest and excepting the prior one-half mineral interest. Potter leased his interest to Jordan, and Scarmardo leased his interest to Amalgamated.

The supreme court, relying on the rule of *Duhig* v. *Peavey-Moore Lumber Company*, 114 S.W. 2d 878 (Texas 1940), held that Potter had breached his warranty in the deed to Scarmardo since such deed proportioned to convey seven-eighths mineral interest when he owned only a one-half interest. He was, therefore, estopped from claiming his one-eighth reservation by the warranty in the deed.

Omitted Heir

Sirls v. *Jordan*, 625 S.W. 2d 106 (Ky. 1981)

The Sirls were bona fide purchasers of real property from some of the heirs of the deceased former owner. The Sirls acquired title by warranty deed from all the heirs identified in an affidavit prepared in accordance with K.R.S. 32.120.

K.R.S. 32.080 provides as follows: "No deed conveying any title to or interest in real property, or lease of oil, gas, coal or mineral right and privilege, for a longer time than five (5) years, nor any agreement in consideration of marriage, shall be good against a purchaser for a valuable consideration without notice thereof, or any creditor, unless the deed is acknowledged by the party who executes it, or is proved and lodged for record in the proper office, as prescribed by law."

Jordan, an omitted heir, filed an action for partition.

The court held the affidavit would not protect an innocent purchaser relying thereon as against omitted heirs and that this would be the case until the legislature saw fit to make the affidavit conclusive proof of ownership and protect innocent purchaser relying thereon.

Reporter's comment: Could the legislature constitutionally deprive omitted heirs of their property? This case certainly demonstrates the utility of title insurance.

Public Lands—Access to Private Land Within National Forests

Montana Wilderness Association v. *U.S. Forest Service,* 655 F.2d 951 (9th Cir. 1981)

The defendant railroad owned timberland located within the Gallatin National Forest in Montana. This land was originally acquired by its predecessor, the Northern Pacific Railroad, under the Northern Pacific Land Grant Act of 1864. The act granted odd-numbered square sections of land to the railroad. To harvest its timber, the defendant acquired a permit from the defendant U.S. Forest Service, allowing it to construct an access road across National Forest land. The plaintiffs, having contested the granting of the permit, filed suit, seeking declaratory and injunctive relief. The sole issue on appeal was whether the defendant railroad had a right of access across federal land to its inholdings of timberland.

The court affirmed the grant of partial summary judgment to the defendant railroad but declined to decide the issue of access under the 1864 land grant. The basis of the appellate court's decision was the Alaska National Interest Lands Conservation Act, Public Law No. 96-487, 94 Stat. 2371 (1980). The question was whether Section 1323 of the act applied to only Alaska or to the country as a whole. The court distinguished subsection (b) from subsection (a) of Section 1323 and pointed out that under the former the obligation of the secretary of interior to provide access to nonfederally owned land surrounded by public lands managed by the secretary under the Federal Land Policy and Management Act of 1976 was limited by statutory definition to public lands in Alaska. The term *National Forest System* in subsection (a), however, was not specifically defined in the act. Section 1323 (a) provides: "Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest system as the Secretary deems adequate to secure to the owner the reasonable use and enjoinment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System."

The court concluded, on the strength of subsequent legislative history attending the Colorado Wilderness Act where it was disclosed that a House-Senate Committee deleted a section pertaining to access to nonfederally owned lands within the National Forest Wilderness areas in Colorado because similar language had already been passed by Congress in Section 1323 of the Alaska National Interest Lands Conservation Act, that Section 1323 (a) was not limited in its application to the state of Alaska but, rather, has nationwide application. Accordingly, the defendant railroad had an assured right of access to its land in Montana pursuant to the grant of access in Section 1323 (a).

Quiet Title Action—Tax Sale Invalid

Village of Climax Springs v. *Jno. P. Camp, et al.*, Mo. App., 609 S.W. 2d 733

An appeal by the village from summary judgment in favor of the landowner in the city's action to quiet title to a tract of land was reversed and remanded.

The land involved was in a tax sale and was bought by a landowner from the purchasers at the tax sale. The land was shown on the original plat as a city park. The defendants claimed ownership by virtue of the tax sale and the fact that the plaintiff had assessed and collected taxes on the city park for 1965 through 1978 whereby the trial court found an abandonment by the city.

A long line of cases in Missouri was cited by the appellate court to the effect that the city was not estopped from claiming title to the property because, among other acts, it had assessed and collected taxes on it. The court held that assessing and collecting taxes does not alone constitute an abandonment of the property or prohibit a city from claiming title to it. The decision was reversed and remanded for further proceedings in the trial court.

Railroad

Zorbist v. *Culp,* 95 2d 556, 627 P.2d 1308 (1981)

This was a suit by a subservient landowner to quiet title to an abandoned railroad right-of-way across his property.

The landowner's predecessors granted a right-of-way for the purpose of running and operating a railroad, providing that if the grantee shall, at any time, fail to use the right-of-way for the purposes of running and operating a railroad for a continuous period of 12 months, the right-of-way granted shall cease and revert to the grantor.

A railroad was constructed and operated until a date in 1970 when the railroad ceased to run freight or passenger trains on the branch line that crossed the landowner's property.

The Interstate Commerce Commission approved the abandonment of the line effective July 1, 1971.

The defendants, who were railroad buffs, purchased a portion of the branch line, including that part over the landowner's property, and in May 1972 began to operate a weekend and summer excursion train.

The original grantee railroad continued some operations in the meantime, such as inspection, some maintenance, and the operation of work trains to dismantle and pick up tracks.

The Washington courts had considerable problems with the question presented. A majority of the supreme court held that the question was not whether the tracks were used for railroad purposes but rather were they used to run and operate a railroad over the right-of-way, since the extent and duration of the easement must be determined from the terms of the grant.

The court held that the railroad's failure to operate freight or passenger trains over the right-of-way for a 12-month period resulted in abandonment of the right-of-way and that the activities conducted did not amount to "running and operating a railroad."

Right of First Refusal

Robroy Land Co. v. *Prather,* 95 Wash. 2d 66, 622 P.2d 367 (1980)

The assignee of a right of first refusal (without a termination date) sought to upset the sale of the property to a third person. The issue was whether the rule against perpetuities or the rules against restraints on alienation invalidate such agreement.

The court refused to follow the "majority" according to Annot. 40 A.L.R. 3d, 920 (1971), finding that unlike an option that creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether he be willing to part with ownership, a preemption does not give to the preemptioner the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption, at the stipulated price. Upon receiving such an offer, the preemptioner may elect whether he will buy. If he decides not to buy, then the owner of the property may sell to anyone. The right of first refusal is in gross and did not create an interest in land at the time of its inception. An interest arises upon the election to purchase, and, consequently, the rules against perpetuities are not applicable until such election. The marketability of the property was not fettered by the right of first refusal, and, consequently, there was no restraint or alienation.

Statute of Frauds—Oral Revocation of Inter Vivos Trust

Gabel v. *Manetto*, 177 N.J. Super. 460, 427 A.2d 71 (App. Div. 1981)

A settlor executed a trust agreement relating to real property owned by him. The trust agreement provided that after his death, the property was to be sold and the proceeds distributed to his children. After the settlor's death, his daughter brought an action seeking either that the property be partitioned or that the property be sold and distributed pursuant to the trust. The defendants answered that the trust had been revoked orally in the settlor's lifetime.

The court held that an express inter vivos trust of real property may be revoked orally. The revocation of a trust interest in real estate is not an assignment, grant, or surrender of that interest to which the statute of frauds is applicable.

Statute of Limitations—Pleadings

Samuel M. Scott, et al., v. *Harold Gibbons, et al.*, Mo. App., 611 S.W. 2d 387

This case was an action for damages arising from the purchase and sale of real estate.

The Scotts entered into a contract to buy a 1.23-acre parcel of land from the defendants, the Gibbonses, for $18,750. The transaction closed on November 26, 1965, and Guaranty Land Title issued its certificate of title insurance. Thereafter, it was discovered that the Gibbonses' predecessor in title, Dickinson, had by quit claim deed recorded on September 13, 1954, conveyed a 0.61-acre portion of the 1.23-acre tract to the city of Kirkwood. The Scotts discovered the discrepancy during summer 1975 and in November 1975 filed against the real estate agent, the Gibbonses, and Guaranty Land Title.

The original petition failed to plead properly a cause of action in fraudulent misrepresentation as it failed to allege that the defendants had knowledge of the misrepresentation. The plaintiffs voluntarily filed a first, a second, and a third amended petition. The last petition contained two counts of misrepresentation and negligence against the Gibbonses and Guaranty Land Title and two similar counts against the realtor. The Gibbonses filed a motion to dismiss, and the defendant realtor filed a motion for summary judgment based on the five-year statute of limitations [516.120(5) R.S. Mo. (1978)]. These were sustained by trial court without prejudice, and the plaintiff was given 30 days to replead. The plaintiffs filed their fourth amended petition against only the defendants Gibbonses and Guaranty Land Title, alleging only a count for breach of warranty. A motion to dismiss by Gibbons based on the 10-year statute [516.110 R.S. Mo. (1978)] was sustained because the trial court did not allow the fourth amended petition to relate back to the original petition filed within four days of the 10-year statute-of-limitations period.

The court held that the motions as to the third amended petition should not have been sustained because the five-year statute-of-limitations period should have commenced at the time the fraud was discovered. When the plaintiffs filed the fourth amended petition, however, they abandoned their right to challenge the trial court's ruling as to the third amended petition. The court affirmed as to this.

The trial court erred, however, in not holding that the fourth amended petition asserted claims that arose from the same transaction as the original petition and, therefore, the 10-year statute of limitation had not run. The court reversed as to this.

Taxation—Educational Institution Exemption

Ladies Literary Club v. *City of Grand Rapids*, 409 Mich. 748, 298 N.W. 2d 422 (1980)

The Ladies Literary Club claimed exemption from real property taxation. The club provided a small library for public use and offered a wide range of classes and lectures, in addition to participating in public service and charitable activities. The club enjoyed federal tax-exempt status under Section 501(c)(3) of the IRC. The supreme court, overruling the court of appeals, and over the dissent of three members of the court, held the club not exempt from tax. The court narrowly read the "educational" exemption in the statute, holding that the activities of the club were not "educational." The basis for the decision was the fact that the activities of the club did not reduce the educational burden of the state of Michigan. The court did not regard continuing-education and adult-enrichment courses as equivalent, for tax purposes, to more traditional state-sponsored curricula.

Taxation—Income Approach to Value

Caf Investment Company v. *Saginaw Township*, 410 Mich. 428, 302 N.W. 2d 164 (1981)

The question before the supreme court was whether commercial property subject to a preexisting, long-term lease should be assessed based on the rents provided for in the actual lease or whether it should be based on "market" rents that a new tenant would be required to pay.

The court clearly held that economic income, for the purposes of appraisal, means nothing other than actual income and that it was improper for the assessor and the tax tribunal to base the assessment on hypothetical "market" rents. The argument raised by the taxing authority was that a landlord and tenant could, by setting an artificially low rent, maintain the tax assessment at an artificially low level. The court dismissed such a possibility, noting that the alleged tax benefit to a landlord of an artificially low rent was more than offset by the losses inherent in an artificially low rent.

Taxation—Personal Property of Nonresidents

Department of Revenue v. *Markham*, 396 So. 2d 1120 (Fla. 1981)

A declaratory action was brought by William Markham, as property appraiser, to determine if household goods of nonresidents were subject to ad valorem taxation. The trial court determined that such property was not taxable. The department

Continued on page 15

When the market turns, you have only two choices.

Add staff or automate.

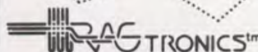
The recognized leader in title automation.

Call Toll Free:

1-800-245-7878

SULCUS COMPUTERS™

Now Available in hard drive



Bank & Trust Building Greensburg, PA 15601
Courthouse Square (412) 836-2000

Timesharing Legislation—
from page 7

Another option states have is to adopt administrative regulations. In 1976, Florida adopted administrative regulations that specifically addressed timesharing. Since then, Florida has passed timesharing legislation.

States may also declare timesharing subject to existing acts, or timesharing may automatically be covered under such acts. Several states regulate timesharing under securities acts that cover all real estate transactions.

Although states do regulate under existing law, NTC recommends enactment of legislation designed exclusively for timesharing. Burnett says that such legislation is important because "timesharing is so unique in its legal structure and the peculiarities of title conveyancing that statutes specifically addressing these issues are required." Twelve states—Colorado, Illinois, Michigan, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, South Dakota, Washington, and Wisconsin—are studying timesharing legislation that may be passed within the next year or two.

Model Acts Adopted

In 1979, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Real Estate Time Share Act (URETSA), which provided for a seven-day rescission period and a guaranty of quality in any timeshare purchase. The act also defined management responsibilities in timesharing and proposed ways in which timesharers should be involved in management decisions.

The NTC and the National Association of Real Estate License Law Officials (NARELLO) organized a joint committee in 1979 to draft a model timesharing act to guide state agencies considering legislation. The resulting Model Time-Share Ownership Act provided for disclosure to and protection for the consumer. It required issuance of a public offering statement to the timeshare purchaser and provided that timeshare projects register with state agencies. The act included a three-day rescission period and a nondisturbance clause.

In August 1982, the NTC Board of Governors met in Orlando, Florida, to amend the model act. The meeting was called in reaction to a recent Florida timeshare bankruptcy case in which a federal judge issued a ruling denying protection under bankruptcy laws to right-to-use timesharers. The

The Casa Ybel Beach and Racquet Club on Sanibel Island, Florida, offers direct views of the Gulf of Mexico.

"Timesharing is so unique in its legal structure and the peculiarities of title conveyancing that statutes specifically addressing these issues are required."

NTC also drafted an amendment to the 1978 Federal Bankruptcy Statute that provides exclusive protection for right-to-use timesharers in the event of a developer's bankruptcy. The amendment should be introduced in Congress in the near future.

The updated Model Timesharing Act includes a rescission period of five days, monitoring of timeshare project advertising by state agencies, and required compliance with licensing provisions. The new act also holds that in right-to-use timeshare transfers, title to the timesharing property be held in trust to prevent the developer from placing further encumbrances or liens on it. Such action would give lenders and consumers financial recourse in the event of foreclosure and would subordinate any other creditors in a foreclosure settlement.

Carl Berry, NTC chairman and president of California Resorts in San Francisco, says, "The new act should meet with widespread approval by state officials. It goes beyond disclosure; in effect, it is a compliance act." The NTC hopes that states will amend their present legislation, or draft new legislation, to include provisions of the amended model act.

Federal Agencies Affect Industry

There are three federal agencies whose actions affect the timesharing industry: the Federal Trade Commission (FTC), the Department of Housing and Urban Development (HUD), and the Securities and Exchange Commission (SEC).

A consumer-oriented agency, the FTC is the most active federal agency regarding timesharing. The FTC distributes a bulletin to consumers that explains timesharing and warns about potential risks and problems in timeshare purchasing.

In 1975, the FTC announced plans for investigating the timeshare market. The agency's stated purpose was to discover if timeshare practitioners "have been or are now engaged in unfair methods of competition or unfair or deceptive acts or practices." Since then, the FTC has issued only one formal complaint against a timeshare program. In 1981, the agency took prompt action against a developer/marketer that was grossly misrepresenting its timeshare program in violation of the FTC act. The program involved 12 projects. Among the practices that the FTC ordered prohibited were misrepresenting planned improvements to the projects, falsely portraying exchange privileges, and circulating misleading promotional materials.

HUD's Office of Interstate Land Sales Registration (OILSR) has jurisdiction over the Interstate Land Sales Full Disclosure Act (ILSFDA). The act prohibits interstate commerce from the sale or lease of "any lot in a subdivision" unless the transaction is registered with OILSR. Although the act seems particularly applicable to timesharing because timeshare transfers usually involve interstate commerce, the act contains a provision that exempts most timeshare programs.

Continued on page 17

Judiciary Committee Report— from page 13

of revenue appealed to the First District Court of Appeal, which affirmed the trial court. The department of revenue petitioned for certiorari, which was granted.

The supreme court quashed the opinion of the court of appeal and remanded the case with orders to dismiss the complaint. The supreme court held that the appraiser lacked standing in his capacity as citizen, taxpayer, and appraiser and that the suit presented no genuine controversy affecting nonresidents.

Taxation—Trade Fixtures

Michigan National Bank—Lansing v. *City of Lansing,* 96 Mich. App. 551, 293 N.W. 2d 626 (1980)

Certain property of the plaintiff, being vault doors, night-depository equipment, drive-up teller window equipment, and remote transaction systems, was assessed by the defendant city for taxation as real estate. The plaintiff contended that this equipment was the personal property of a bank and, as such, exempt from taxation under the general property tax act.

The court held for the defendant. The equipment could be taxed as real estate. It had been physically annexed and integrated into the buildings, use of which depended on having these items made a part of them. This operated to establish an intention to make them part of the realty. Also, this equipment could be taxed as real estate even when it was installed in a leased building. While the equipment might be trade fixtures as between landlord and tenant, as to third parties it was part of the realty.

Taxation—Valuation of Real Property

Cannon v. *Cohoctah Township,* 92 Mich. App. 445, 285 N.W. 2d 323 (1980)

One part of the plaintiff's agricultural property was assessed at a higher rate than the other, on the theory that since it fronted on a highway it might some day be used for commercial purposes. The plaintiff contended that this method violates the statutory provision requiring assessment at the true cash value of the property.

The court held for the plaintiff. Since the land was agricultural, it must be assessed as such. Possible future use cannot be taken into consideration.

Taxes—Sale—Notice

Turner v. *Spera,* 433 A.2d 307 (Vt. 1981)

The plaintiff owner appealed the sale of his real estate by the town tax collector, claiming the tax collector gave insufficient statutory notice of the sale. The tax collector sold the property because of the plaintiff's chronic delinquency in paying his real estate taxes. 32 V.S.A. Section 5252(2) requires publication of a tax sale by three consecutive advertisements in the local newspaper. The tax collector published the ad for two consecutive weeks but, in addition, provided notice by registered mail, first-class mail, and posting in a public place. The lower court held that the plaintiff's claim of insufficient statutory notice was barred by the one-year statute of limitations. The court affirmed, holding that the tax collector's failure to publish for three consecutive weeks, when he provided other forms of notice exceeding the statutory requirements, was of insufficient magnitude to negate a tax sale.

Tax Sales—Failure to Give Personal Notice of Sale Where Parcel Is Assessed to "Owner Unknown" Not Unconstitutional

Lily Dale Assembly, Inc., v. *County of Chatauqua*, 72 A.D. 2d 950, 422 N.Y.S. 2d 239; affirmed 437 N.Y.S. 2d 967; U.S. cert. denied (1981)

This action was brought pursuant to R.P.A.P. Article 15 to determine claims to unoccupied real property conveyed to the plaintiff in 1910. The defendant claimed title as a result of a 1977 tax deed. The plaintiff corporation contended that the sale, regular in all other respects, was void because it did not receive prior written notice as required by subdivision 4 of Section 1002 of the Real Property Tax Law that provides that before publishing notice of the intended sale of tax parcels, the county treasurer shall "cause notice of such tax sale to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll, of each parcel to be sold." Such notice was not sent because the assessors did not know who owned the property.

The vacant parcel in question was added for the first time to the tax roll in 1974 and listed as "owner unknown." The taxes were not paid, and in 1975 the county bought the lot, conveying it to the defendant in 1977.

Sustaining the defendant's tax title, the court concluded that assessors are charged with ascertaining by "diligent inquiry" the names of the owners of all real property in the district (R.P.T.L. Section 500). Once identified, each parcel of property is placed upon the assessment roll with its assessment listed. The tax is levied against the real property, not the owner, so it is the identification of the property on the roll that is important. An error or omission in identifying the owner does not invalidate the proceeding. No constitutional due process requirement mandates personal service. R.P.T.L. Section 1002 subdivision 4 provides only that notice be sent to the owner or occupant "as shown on the assessment roll."

Tenants in Common—Landowner Liability

Merritt v. *Nickelson*, 407 Mich. 544, 287 N.W. 2d 178 (1980)

The defendants, mother and son, owned real estate as tenants in common. The son was operating a drag strip on the property. An accident that occurred during a race caused the death of a spectator. The plaintiff brought an action for damages and recovered against both defendants, who appealed.

The court reversed as to the mother. The decedent was an invitee, as to whom the son was liable for injuries caused by dangerous conditions either known or that might have been discovered with reasonable care. Personal liability is, however, conditioned upon having possession and control over the land. Unless the plaintiff could establish that the mother had some interest in the business or other control of the premises, there could be no recovery against her.

Title Insurance—Agents' Authority

Hutsell v. *U.S. Life Title Insurance Co.*, 157 Ga. App. 845, 278 S.E. 2d 730 (1981)

The title insurer's agent wrote an owner's policy insuring the plaintiff's title to two tracts of land that should have contained 6.12 acres but contained less than 4 acres.

The policy was executed by the president, attested to by the senior vice president, secretary, and treasurer, and signed by the agent as "authorized signature."

The conditions and stipulations in the policy provided that no amendment of or endorsement to the policy could be made except by writing, endorsed hereon or attached hereto, signed by either the president, the vice president, the secretary, the assistant secretary, or a validating officer or an authorized signatory of the company.

The agent's contract provided that the agent had no authority to amend any company policy without signatures of the company officials, nor authority to change, to alter, or to amend the terms of any title policy forms supplied by the company, nor in any way to bind the company by reputation, promise, or otherwise except in accordance with the terms and conditions of the title policy issued on company forms.

Under Schedule B, the policy excluded any discrepancies, conflicts in boundary lines, shortage in area, encroachments, overlapping of improvements, or other boundary or location disputes and any roadway or easement similar or dissimilar on, under or over, across said property or any part thereof not shown by the public records.

In a letter transmitting the policy, the agent stated that under the owner's policy, both tracts of property were insured in the amount of the purchase price and that the survey had been insured.

The insured moved for summary judgment, which was granted by the trial

When the market turns, be ready for the stampede!

Take stock of the market and sign up as a SULCUS System 5000 dealer now, before the stampede. Analysts predict a market turnaround close on the heels of the drop in interest rates. Will you be ready?

For a SULCUS dealer, recovery will be a bonanza. Automated plants, computerized closings, productivity, "turnkey" set-up and support. All let the SULCUS dealer steer his land title and legal customers to the newest, most complete, and finest in land title automation ...that doesn't cost the ranch.

You can become a SULCUS dealer. You needn't know about computers. We do! All the knowledge you need, you have. We award dealerships only to professionals in the legal and land title industries. We supply the expertise; you provide the industry know-how.

Call now to talk about your SULCUS dealership.

SULCUS COMPUTERS

Call toll free—800-245-7878.

The recognized leader in title automation.

TRAGTRONICS
Bank & Trust Building Courthouse Square
Greensburg, PA 15601 (412) 836-2000

court. On appeal, the trial court was reversed. The court carefully studied the language in the agency contract, title policy, and letter and concluded there was a discrepancy in the title policy and letter and held against the title insurer.

Title Insurance—Equitable Relief Denied Where Houses Built on Wrong Plot

Micelli v. *Riley*, 79 A.D. 2d 165, 436 N.Y.S. 2d 72 (1981)

This action was brought to eject five defendants whose homes were built upon or encroached on the plaintiff's one-acre plot. The plaintiff acquired the plot in question in 1951 for $450. Her deed was recorded on March 31, 1955. The defendants' developer acquired a deed to the same plot from the same grantor, which was recorded on August 8, 1955. In 1969 and 1970, less than 10 years before commencement of the action, the defendants' homes were built and sold to them.

The lower court, in an effort to ensure equity, awarded the plaintiff the options to either sell the property to the defendants at a sum equal to twice the value of any one acre of undeveloped land in the vicinity or be put in possession upon payment of the market value of the improvements with reimbursement of taxes paid by the defendants for the preceding six years.

The Appellate Division, Second Department, noting that the plaintiff had recorded her deed, continued to pay her taxes, and had been unaware of the improvements being made, granted unconditionally to the plaintiff's executrix the right of possession to the plot in question.

It stated that the question upon which this case must finally turn is whether equity will compel such a property owner—one who has complied with all notice requirements and who is entirely innocent of any inequitable conduct—to reach an accommodation with a trespasser simply because the trespasser himself has acted in good faith and in ignorance of the owner's rights and would suffer substantial loss if forced to surrender his wrongful possession of the land. A fee owner may not be so compelled for, plainly, were it otherwise, property rights and rights of title would be rendered uncertain.

Reporter's note: The title company settled the case, and all five defendants have deeds to their homes.

Mid-South Scholarship

Mid-South Title Insurance Corporation announced that Irma W. Merrill, a 1982 Princeton University graduate, received this year's Vanderbilt Law School scholarship.

Merrill is the 22nd recipient of the award, which is funded by Mid-South but given in the name of the Memphis and Shelby County Bar Association. A bar-association committee selects the winner, who must be a first-year Vanderbilt Law School student from the Memphis area.

ALTA Treasurer C. J. McConville, right, talks with producer-host Wendell Webb during a September taping session for "Financial Enterprise," a weekly 30-minute show appearing in more than 40 states over the Public Broadcasting System television network. McConville, president of Title Insurance Company of Minnesota and an ALTA past president, was interviewed on the subject of title insurance by Webb and two guest panelists—one a mortgage banker and the other a Realtor.

Timesharing Legislation—
from page 14

Nevertheless, NTC Legal Affairs Director Gary Burnett says that "There could conceivably arise instances where a particular type of timeshare offering could fall under OILSR control. In fact, OILSR began to show an increased interest in timeshare offerings in 1981." Where this interest will lead future timeshare legislation is yet to be determined.

As was mentioned earlier, several states cover timesharing under their securities acts. These states define a security as an investment in a "valuable benefit" and define the use of a timeshare property as a "valuable benefit." The SEC, however, has not issued any clear policy statement on whether a timeshare may be a security.

Because the definitions of a security differ from state to state, timeshare practitioners should examine their state's securities laws to see whether their timeshare projects could be considered securities. Some developers avoid securities regulations by drafting their timeshare contracts to restrict purchasers from reselling or leasing the timeshare at a profit. This precaution assures that purchasers are acquiring the timeshare for personal use, rather than as an investment. Thus, in most states, the timeshare cannot be interpreted as a security.

In the future, SEC may indeed exercise some kind of jurisdiction over timesharing. The agency may also decide to continue with its present policy of withholding an opinion on the matter. Whatever its decision, current legislation may need updating to comply with the agency's policy. For now, careful developers can in most cases avoid the expensive registration fees mandatory under securities laws.

Looking to the future, NTC officials report that other federal agencies may become involved in regulating timeshares. Those agencies include the Federal Emergency Management Agency, the Environmental Protection Agency, the Federal Home Loan Bank Board, the Internal Revenue Service, the Federal Reserve Board, and the Department of Energy.

The Barclay House, the first urban timeshare project built in Washington, D.C., has 27 units owned primarily by businesses.

For more information on timeshare regulation, write the National TimeSharing Council of the American Land Development Association at 1000 16th St., N.W., Washington, D.C. 20036.

PLEASE

Help your Errors and Omissions Committee help you—We need to know:

What problems you have had
What successes in finding E&O coverage you have had
Whom you are insured with—Are you happy with coverage and cost?

Write to Errors and Omissions Committee
Box 966
Bartlesville, Oklahoma 74005
Or phone 918/336-7528

Mayor Greets MLTA

The Minnesota Land Title Association held its 1982 convention at the Sheraton Ritz in Minneapolis August 12–14.

Larke L. Huntley was elected president, and Martin R. Sathre was named president-elect. A. L. Winczewski was reelected secretary-treasurer.

The Honorable Donald M. Fraser, mayor of Minneapolis, welcomed the delegates to the city, and ALTA President-Elect Thomas S. McDonald was the national association representative.

Title Company Purchase

American Land Title Co., Inc., Omaha, Nebraska, purchased The Title Guaranty Company of Council Bluffs, Iowa.

American Land Title's Council Bluffs office is now located at The Title Guaranty Company's office. Complete abstracting and other title services are available.

Mark Wingert is general manager, and Carol Feller is office manager of the Council Bluffs operation.

Names In The News . . .

Benefield

Whitty

Wayne Johnston was named manager of Transamerica Title Insurance Company's Yuma and Mohave, Arizona, counties operations. He supervises five branch offices in the territory. Johnston joined Transamerica in 1972 as a title chainer. He has also served as an office manager and a business development officer in west Phoenix.

American Title Company announced that **Raymond H. Benefield** was appointed president and chief executive officer for the company. Benefield also serves as Texas state manager for Pioneer National Title Insurance Company, American's underwriter and parent. He is a 20-year veteran of the title insurance industry.

American Title also announced that **Ronald J. Whitty** was appointed vice president of the company. Whitty continues as company treasurer.

Mark R. Arnesen was promoted to associate counsel of First American Title Insurance Company. Arnesen joined the firm in 1979 as assistant corporate counsel.

William L. Thiss was promoted to assistant vice president/plant systems for First American. A 20-year veteran of the title industry, Thiss supervises computerization of title plants in the northwest region of the United States. He also assists in maintaining and improving plant systems throughout the country. Before his promotion, Thiss was assistant manager and plant operations manager in Seattle, Washington. He joined First American in 1975.

Ronald L. Buxton was appointed assistant secretary in the information systems section of First American. He continues in his previous position as information systems manager, a position he has held since joining the company in 1977.

Hubert A. Mitchell was named vice president and regional counsel of First American's mid-Atlantic region. Before joining First American, Mitchell was senior associate title counsel for a multistate division of another national title firm. He began his title career in 1961 as a title officer.

Timothy E. Pfaff joined the Title Insurance Company of Minnesota as a national account executive for the company's north central regional office. Pfaff is responsible for business development and national customer relations. He has held a variety of positions in examination and commercial sales and has five years of experience in the title insurance industry.

Tony Hipp, an assistant vice president at Minnesota Title's midwestern regional office in Minneapolis, was appointed national account executive for the company's southwestern region. Hipp is responsible for business development and national customer relations. A six-year veteran of the title industry, Hipp joined Minnesota Title four years ago.

Sullivan

Thiss

Diane Sullivan, supervisor of the final policy production department in Minnesota Title's Hennepin County, Minnesota, branch, was promoted to commercial account executive in the company's midwestern region. Sullivan develops commercial accounts in the eight-state region. She has five years experience in the title insurance industry.

Commonwealth Land Title Insurance Company opened a new branch office in Palm Beach Gardens, Florida. **Linda J. Duvall** was appointed branch manager. A 14-year veteran of the title insurance industry, Duvall previously managed the company's Delray Beach office.

Pfaff

Mitchell

Samuel Carlisi was named branch manager of Commonwealth's Mercer County, New Jersey, office. Before assuming his new position, Carlisi was a branch manager for another title insurer. He has more than 10 years experience in New Jersey's title insurance market.

Allen Meccia was named divisional manager for Commonwealth. Meccia has served as Commonwealth's vice president and Hackensack, New Jersey, branch manager since joining the company in 1963. In his new position, he supervises title operations for both the Hackensack and Paterson branch offices.

James K. Weston was elected vice president and regional counsel for the Chicago central region of Chicago Title Insurance Company. Weston, who joined the company in 1967, has responsibilities in underwriting and claims.

Susan Crump was promoted to county manager of Universal Title Company's Pinellas County, Florida, operations. Crump joined Universal as an escrow closer in January 1982. Before that, she was an employee of St. Paul Title Insurance Company.

Lawrence E. Lawn was appointed New York state counsel for Lawyers Title Insurance Corporation. Lawn joined Lawyers Title's Bloomfield, New Jersey, office in 1978 as a title attorney. He has worked in the title insurance business in New York and New Jersey for 11 years.

Weston

Hipp

Sharing can save you

a bundle

Having TDI set up and maintain a joint plant system can be a viable alternative to your own computer system.

Not only does it offer the benefits of automation at a fraction of the cost, but our research has shown that some joint plant groups are realizing a savings of over $100,000 a year as compared to operating their own manual plants.

With TDI's joint plant system everything is taken care of by our staff. TDI personnel set up and run the plant and will even arrange to get the source documents. Yet with all this service you maintain control.

Plus with TDI's service, open-order information is kept confidential to each participating company, while insuring that each company gets the same high-quality service. All this at considerable savings as compared to maintaining your own plant—and as the number of companies sharing the plant increases—the cost to each decreases.

TDI's effective plant maintenance system provides:

- **Two-level, current, accurate and convenient microfiche indices to your title plant.**
- **Or a single-level online index accessible through your own terminals.**
- **Low-cost capture of essential document data with high accuracy resulting from extensive subdivision and section validity checks.**
- **Automatic updating on open orders with daily fallout reports.**
- **A variety of searching aids such as arbing in acreage descriptions.**
- **Control of requirements and services by participating companies.**

With over forty counties under maintenance in ten states, TDI has the background and expertise in the title insurance industry that you can depend on.

If forming a joint plant sounds interesting, call TDI toll free at (800) 525-8526, or contact one of our branch offices.

Title Data Inc.
1835 24th Street
Santa Monica, CA 90404
(213) 829-7425

3540 So. Poplar Street
Suite 201
Denver, CO 80237

901 North 9th Street
Milwaukee, WI 53233
(414) 276-2128

11899 Edgewood Rd.
Auburn, CA 95603
(916) 823-8620

100 No. Interegional
Suite 3700
Austin, TX 78701
(512) 478-0998

A Titleman's Search System
Developed by
LAND RECORDS SYSTEMS, INC.

Automate Your Title Plant for
Less Than $20,000

For complete information, write or call

Bruce S. Bobo
P.O. Box 523
Tuscumbia, Alabama 35645
205/381-9912

Calendar of Meetings

November 10–14
Florida Land Title Association
Hyatt House
Sarasota, Florida

December 1
Louisiana Land Title Association
Royal Orleans
New Orleans, Louisiana

American
Land Title
Association

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

BULK RATE
U.S. POSTAGE
PAID
Silver Spring, Md.
Permit No. 550