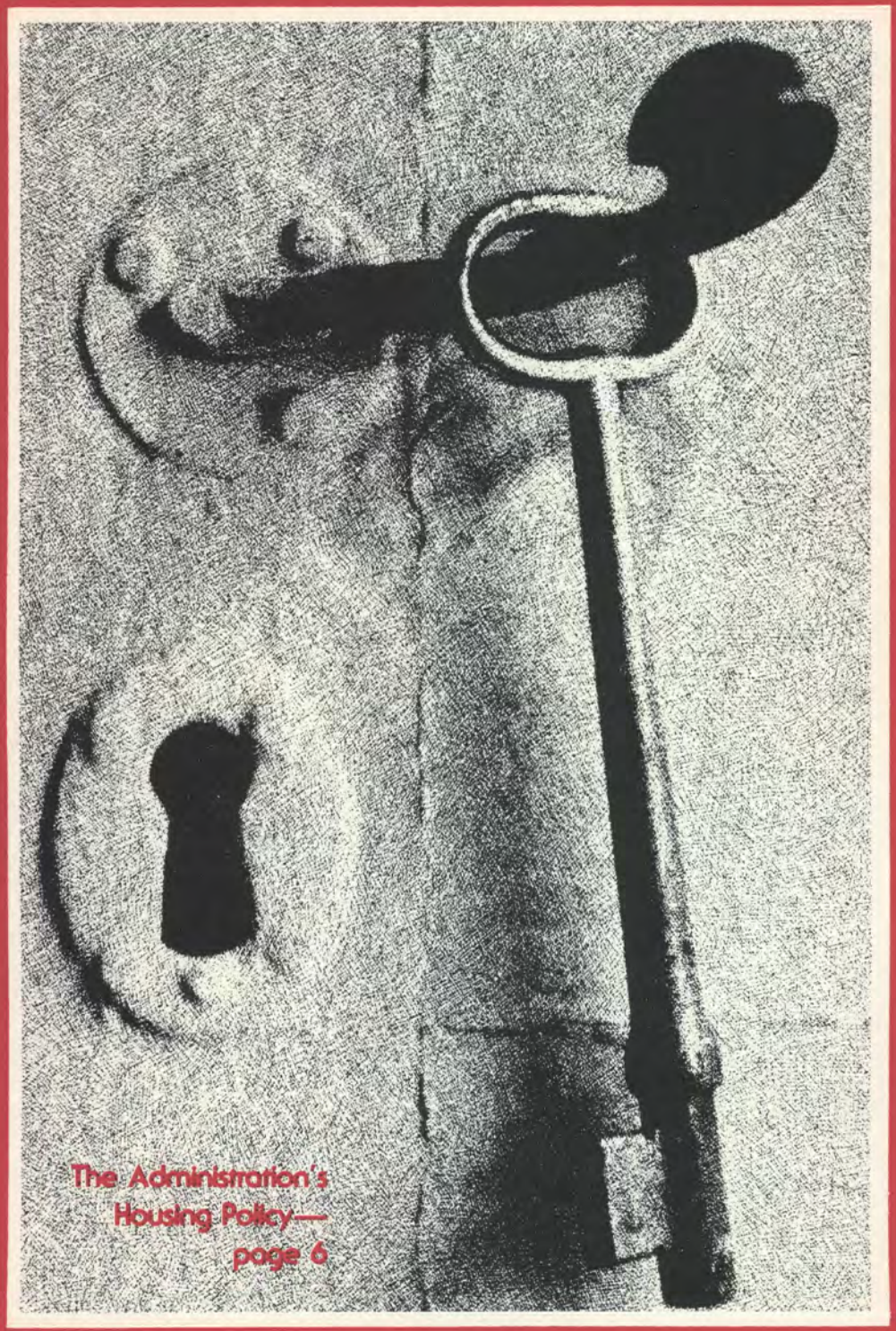
November 1982

TITLE NEWS



The Administration's Housing Policy— page 6

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TITLE NEWS

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A Message From The President-Elect

Recently, a group of titlemen were discussing the past and contemplating the future as titlemen sometimes do. The talk drifted to our former customers—the depository institutions more commonly called banks and savings and loans (let's just call them all banks). All agreed that given the Deregulation Act of 1980 and the general political climate, we could expect more and more deregulation. In short, banks will never be the same again.

I'm not complaining, you understand, but it makes me vaguely uneasy when everybody agrees "the banks will never be the same again." What do they mean they will never be the same again? They seem to infer that the new breed of deregulated banks will be better. I hope so—but what was wrong with the old banks? Sure, our banker friends are ecstatic about the new powers banks are getting.

True, the banks were limited by the Glass-Steigal Act, but was that all bad? Senator Carter Glass, the esteemed senator from Virginia, was the crusty, strong-willed old man who wrote the Glass-Steigal Act. (I have no idea who Steigal was, although I am told he was from Alabama.) The bill was passed in 1933 after the bank failures and had a very clear message to the bankers of the country at that time. The message, simply put: "Just be bankers—let the stockbrokers stockbroke; let the realtors realtor; let the insurers insure—you bankers just be bankers." Sure, that was 1933, and there have been a lot of changes. But is it really a bad message today? Maybe Congress should pay a little more attention to old Senator Glass.

Granted, times have changed, but why can't we concentrate on safety rather than growth?

- Why not require reserves to protect our deposits?
- Do we really care whether they have a holding company, a travel agency, a leasing company, and a computer expert all located in the biggest building in town?
- Do we really want bankers to be stockbrokers and stockbrokers to be bankers?
- Why should banks and savings and loans be growth companies?
- Do we really care whether the banks increase their profits every year so as to support the price of their stock and make stock options more fun?

Let's face it—most of us have different standards for measuring a bank, but most of us uniformly require that a bank be *safe*. I think I'm on the Senator Glass team—concentrate on being safe and dependable. I want my bank to keep my money safe, so that it will be there when I need it. Forget all the computers, fancy parties, special accounts, and the emerging countries and the Third World. Just lend money to the good guys at home.

Incidentally, safe or not, let's start lending on real estate, or is that too much to ask?

D. P. Kennedy

The Administration's Housing Policy: Present Objectives, Future Goals

by Lance Wilson

I shall discuss some of the problems currently facing housing—problems for both potential homebuyers and all the groups making up the housing industry. These problems are the high cost of new construction and the lack of affordability.

Of course, these problems reflect the national economy in general and are part of the overall situation that the President's economic recovery program is designed to combat. This program has begun to show results.

We have made significant progress in our fight against the twin economic enemies—inflation and high interest rates. Inflation now stands at an annual rate of 6.5 percent, down from its high of 13.5 percent just two years ago. The prime interest rate is down from 21 to approximately 12 percent, and the Federal Housing Administration (FHA)-insured single-family mortgage rate is now 12.5 percent—and we expect that rate to decline further.

In short, the President's economic recovery plan has begun to work. In accord with the President's plan, I would like to tell you about some of the things we are doing at the Department of Housing and Urban Development (HUD) to help homebuyers and the housing industry.

We are attempting, through a variety of legislative initiatives and regulatory adjustments, to make it easier to buy a home today and thus to stimulate recovery in the housing industry.

Actions to Stimulate Housing

To begin, let me assure you that FHA and the Government National Mortgage Corporation (GNMA) have both been reshaped and have emerged in healthy condition and with the Office of Management and Budget stamp of approval. FHA will be operating more now as a risk-taker, emphasizing the housing needs of first-time homebuyers and families with modest incomes. FHA will also be an innovator, insuring alternative mortgage instruments—shared-appreciation mortgages, variable-rate mortgages, growing-equity mortgages, and shared-equity mortgages, to list a few examples—in an effort to provide additional flexibility to mortgage-lending institutions. We intend also to insure manufactured housing under Title II.

To qualify more families in the market for homes for FHA-insured financing, we are giving the most liberal interpretations to our underwriting regulations:

- We are now accepting the Veterans Administration method of calculating residual income.
- We are requiring our appraisals to reflect the most recent conventional market valuations.
- For the first time, we are permitting a combination of builder interest buydowns and graduated-payment mortgages—a very effective method of reducing early-year monthly payments for homebuyers.
- We are encouraging negotiations of interest rates and discount points between buyers and lenders.

Lance Wilson, executive assistant to Department of Housing and Urban Development Secretary Samuel R. Pierce, meets with Sen. Richard Lugar (R-Ind.), chairman of the Senate Housing and Urban Affairs Subcommittee, at the ALTA Annual Convention in Boston. Wilson and Lugar spoke at the Monday, October 4, General Session. Wilson's convention remarks are printed on this and the facing page.

- The permissible total housing expense ratio has been raised from 35 to 38 percent of net effective income, and the acceptable ratio of total housing expense plus other recurring charges to net effective income has been raised from 50 to 53 percent. These changes will allow families who wish to do so to put a larger proportion of their income toward housing expenses than ever before.
- In April, we changed our condominium presale requirements from 70 to 51 percent. This change allows HUD to insure individual mortgages in proposed or converted HUD-held or HUD-insured properties when 51 percent of the value of the units sold to owners is approved by FHA.
- We have reduced much of the body of environmental protection standards and regulatory requirements for subdivisions to qualify for FHA insurance.

These are the actions we have taken, and, together with the decline in interest rates, the result has been a dramatic increase in the number of applications received for FHA mortgage insurance.

Actions to Stimulate New Construction

Besides making home purchase easier for potential buyers, we have taken several steps to encourage new construction activity.

Although the department has proposed a shift away from new construction in its assisted housing programs, HUD is genuinely committed to getting the projects built that are now in the subsidized construction pipeline. The department has used a mechanism called the *Financial Adjustment Factor* (FAF), which allows more realistic, market-related financing costs for new construction and substantial rehabilitation. HUD expects that, as a result of FAF adjustments made this year, approximately 70,000 housing units will eventually be made available for occupancy—units that would otherwise not have been built.

HUD has worked extensively with the Internal Revenue Service to liberalize the regulations governing tax-exempt mortgage revenue bond financing for single-family homes. Under the new regulations, more distressed areas will be able to qualify, and accounting procedures will be changed to increase the volume of the bonds to the full amount authorized by Congress. The department estimates that these changes alone will finance an additional 50,000 mortgages.

HUD has authorized the funding of 17,000 new units of Section 202 housing for the elderly and handicapped in FY 1983.

As mentioned previously in the area of assisted housing, the department is shifting its emphasis away from new construction because of the prohibitively high cost to the taxpayer—both in immediate dollar amounts and in terms of long-range inflationary influence. Instead, HUD has proposed legislation that, if enacted, will authorize a new and more efficient approach called the *Modified Certificate Program*.

The Modified Certificate Program, now being considered by Congress, would provide rental assistance to enable eligible families to lease existing housing units that meet HUD standards for safety and decency. Use of this program would give individual families greater choice in their selection of a place to live and would also encourage them to shop wisely and to negotiate rental agreements carefully. Under the proposed program, in excess of 100,000 certificates would be provided in FY 1983, of which 30,000 certificates would be allocated to state and local governments in the same proportion as a rental rehabilitation grant program HUD has also proposed.

The proposed rental rehabilitation program would be an incentive for improving and continuing to maintain some of our substandard housing stock. Funds would be granted to states and localities to finance the rehabilitation of approximately 30,000 units in FY 1983. Those units would then be available to the holders of certificates under the modified certificate program previously mentioned.

Pension-Fund Participation in Mortgage Finance

A problem critical to the housing issue is the current financial condition of many of our savings and loan institutions, which have been the traditional providers of mortgage financing.

When interest rates fall to more affordable levels, the question will be, Where will an adequate supply of mortgage money come from?

In that connection, we are attempting to attract increasing amounts of pension-fund assets to the mortgage market. As time passes, it is likely that pension-fund assets will prove to be the single most important potential source of mortgage funds. Those assets currently exceed $600 billion; two-thirds of that amount is held by private funds. HUD has taken a number of steps to encourage the investment of a larger share of that amount in sources of mortgage financing.

Secretary Pierce has been working with Labor Secretary Donovan to bring about changes in the regulations of the Employee Retirement Income Security Act. Present regulations exercise too severe a constraint on investment in residential mortgages by the funds. We have held two conferences with pension-fund managers to show that mortgages and mortgage-backed securities are sound investments and to explore ways of tapping this source of credit. We are trying to learn how to make mortgages and mortgage-backed securities more attractive investments. As a result of the earlier conference discussions, a new array of products is now being considered in the GNMA mortgage-backed securities program.

I cannot end this discussion of housing issues and the initiatives we are taking at HUD without mentioning a subject that I know directly concerns the title industry, namely, RESPA.

In regard to the continuing debate over RESPA, HUD has appreciated the comments and information that the American Land Title Association and many individual members have provided. Although the department proposed certain amendments to RESPA that were at variance with the association's position, Congress will have to consider and resolve the issue; however, HUD is not actively seeking passage of those amendments.

As you review the kind of HUD initiatives that I have mentioned, it should become clear to you that this is no "wait-and-see" administration. That is the key point I would like to leave with you: This administration is doing everything it can to help the real estate industry recover and lead the way back to a sound, sustained overall national economy.

Judiciary Committee Report

The following case briefs are the third and final installment in the 1982 ALTA Judiciary Committee Report, which was compiled by Judiciary Committee Chairman Ray E. Sweat and regional reporters.

Title Insurance—Negligence in Disbursing Funds

Dolan Title and Guaranty Corp. v. *Hartford Accident and Indemnity Co.*, 395 So. 2d 296 (Fla. 1981)

In 1973, John Arena was appointed guardian of his incompetent wife, Rosina. Two guardianship bonds were secured from Hartford by an attorney, Magyar, in order to seek court permission to sell the residence to parties represented by Magyar. Dolan Title acted as title company and closing agent.

At the closing, a check was delivered to John Arena. It was payable to John Arena individually. A court order, however, required half the proceeds to go to the guardianship. John Arena never deposited any of the proceeds into the guardianship. The personal representative and heirs of Rosina Arena brought suit against Hartford on its guardianship bonds. The suit was settled with a cash amount and assignment of the rights of the estate against Dolan to Hartford.

Hartford sued both Dolan and Magyar for negligence, further asserting claims based on subrogation and third-party beneficiaries. Dolan cross-claimed against Magyar. The trial court found no cause of action against Magyar by Hartford, since Hartford had not obtained an assignment of that right. Magyar and Dolan were found negligent, but since Dolan was negligent, it was not entitled to indemnification by Magyar. Dolan appealed.

The appellate court held that the misappropriation of funds by John Arena was not a foreseeable act. Therefore, Dolan was not negligent in issuing the check to John Arena. Since it was not negligent, Dolan's claim against Magyar for contribution was rendered moot.

Title Insurance—"Failure to Disclose Any Material Fact" in Policy No Defense Against Fact Which Is a Matter of Public Record

L. Smirlock Realty Corp. v. *The Title Guarantee Company*, 52 N.Y. 2d 179, 437 N.Y.S. 2d 57 (1981)

In this action on a policy of title insurance, the court had occasion to interpret the following standard policy provision:

"MISREPRESENTATION

Any untrue statement made by the insured, with respect to any material fact, or any suppression of or failure to disclose any material fact, or any untrue answer by the insured, to material inquiries before the issuance of this policy, shall void this policy."

The insured premises were improved by a warehouse and had access to and from three public streets, Carvel Place on the north and two streets on the east to which the loading docks had direct access. Carvel Street was of little value as an access route.

The plaintiff was aware of a condemnation in connection with Carvel Street but did not disclose it to the defendant insurer. The appellate division held that this knowledge concerned a material fact, the concealment of which was tantamount to a misrepresentation sufficient to permit the defendant to void its title policy.

The court of appeals reversed, holding that an insured under a policy of title insurance is under no duty to disclose a fact that is readily ascertainable by reference to the public records. Even an intentional failure to disclose a matter of public record will not result in a loss of title insurance protection.

Of course, an intentional failure by the insured to disclose material information not readily discernible from the public records will render the policy void.

The case was sent down for a trial on the issue of the plaintiff's damages.

Title Insurance—Loan Policy—Damages

Green v. *Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981)

A loan policy insuring a mortgage covering a 2,000-acre tract did not except from coverage a prior mortgage covering 33 acres of the lands in question. The prior mortgagee commenced foreclosure proceedings and served the junior mortgagee, the insured under the policy. Subsequently, the junior mortgagee acquired title to the entire tract by a deed in lieu of foreclosure, at which time the appraised value of the property exceeded the amount due on its mortgage loan by approximately $4 million. Thereafter, the foreclosure action proceeded to judgment. At the sheriff's sale, the junior encumbrancer successfully bid in for the 33-acre parcel and acquired title thereto upon payment of $140,000. Upon the failure of the title insurer to discharge the prior mortgage, the insured mortgagee instituted suit against the insurer.

The issue is whether a mortgage lender suffered loss or damage recoverable under a mortgagee title insurance policy because of an overlooked prior recorded encumbrance, where it is not shown that the mortgaged property was thereby reduced in value to less than the balance of the underlying debt or that, because of the prior lien, the lender failed to recover the full amount of the debt.

It was held that a title insurance policy is a contract of indemnity under which the insurer agrees to indemnify its insured against loss through defects of title to, or lien or encumbrances upon, realty in which the insured has an interest. The insured must show an actual loss before there can be a recovery. A mortgage lender's loss cannot be measured unless the underlying debt is not repaid and the security of the mortgage proves inadequate. The insured suffered no loss since the value of the property acquired by the deed in lieu of foreclosure exceeded the amount due on its loan.

Title Insurance—Owner's Policy

Summonte v. *First American Title Insurance Company*, 180 N.J. Super. 605, 436 A.2d 110 (Chan. Div. 1981)

An owner's policy insuring title to 16 lots did not except the lien of a judgment against a prior owner from coverage. Several lots were conveyed by the insured to third parties, before learning of the lien of the judgment. The insured requested the title insurer, which had acquired the judgment through an assignment, to remove its lien by payment or release so that marketable title to the remaining lots could be conveyed. The insurer refused to do so and instead demanded a conveyance of the remaining lots to it for a consideration equal to the sales prices set forth in outstanding purchase contracts with third parties.

The court held that the insured's properties, whether valued at the time of purchase or at some later time, are worth less than they would otherwise be by the amount due on the judgment. Consequently, the insured suffered a loss immediately upon the acquisition of title and that loss was an "actual" loss within the coverage under the policy. If a title insurer receives notice of a defect, it has an obligation to remove it within a reasonable time; upon its failure to do so, a claim is maintainable under an owner's policy of title insurance.

Absent any provision in the title policy relating to salvage, the title insurer could not demand a conveyance of the remaining lots for a price at which the insured had agreed to sell them to third parties.

Tortious Conduct—Punitive Damages or Conspiracy Action Allowed

Mancil Smith v. *Larry Welch, et al.*, Mo. App., 611 S.W. 2d 392 (1981)

This case was an appeal from the award of actual damages for loss of real estate commission plus punitive damages for tortious interference with the real estate listing. The decision was affirmed.

Mancil Smith had an exclusive real estate listing with defendants James and Betty Noble. During existence of the exclusive listing contract, defendant Welch brought Jacob Farris and his wife to the farm. Farris and his wife purchased the farm four days after the exclusive listing had expired. Evidence adduced at the trial showed that the other broker told the prospective purchasers and the Nobles to be quick about the pending sale and not to negotiate with Mancil Smith.

It was held that where the plaintiff's trial thereof was based on conspiracy, as distinguished from tortious interference with a contract, but the defendants' point on appeal failed to comply with the rule that the appellant state briefly and concisely what actions or rulings of the trial court were sought to be reviewed and where they are erroneous, there was nothing preserved for appellate review and viewed in its most favorable light, the plaintiff made a submissible case for punitive damages. The decision was affirmed.

Trespass—Cable Television Installation Is Exercise of Police Power, Not a "Taking"

Loretto v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, 440 N.Y.S. 2d 843 (1981); U.S. App. pending

In a class-action suit by owners of apartment buildings, damages were sought for the trespass by the defendant in the installation of cable-television equipment in their buildings.

The defense was based on Executive Law Section 828, which bars landlords from interfering with the installation of cable-TV equipment to service their own tenants or merely to form a link in a chain servicing other buildings.

The court of appeals, in an extensive review of cases straddling the elusive regulation border at which a taking occurs, found this to be a valid exercise of the police power and not a taking of the kind that requires just compensation.

Trusts

Gillam v. *Gillam*, 66 Ohio App. 2d 55, 419 N.E. 2d 1121 (1979)

Where real property, which is held in trust, is sold under court order pursuant to a petition for a beneficial sale in accordance with R.C. 5303.21 (the disentailment statute), the sale results in a mere substitution of assets. The proceeds of the sale must be held by the trustee, just as the land was originally held, with the income payable to the beneficiaries in the same manner or order as was the income from the land, in accordance with the distribution set forth in the trust agreement.

Trusts—Spendthrift Provisions

First Northwestern Trust Co. v. *Internal Revenue Service*, 622 F.2d 387 (8th Cir. 1980)

C. A. Q. executed a trust agreement that established an irrevocable trust to provide for the necessary and ordinary living expenses of the P. L. Q. family and for the educational expenses of P. L. Q.'s children.

The agreement contained three significant clauses: a spendthrift provision prohibiting anyone from selling, assigning, or encumbering the trust assets or income not indicated in the trust agreement; a provision that the trust income alone was to be distributed to the beneficiaries; and a delegation to the trustee or sole discretion over the disbursement of the trust income.

Subsequently, P. L. Q. and his wife entered into agreements with the Internal Revenue Service, assigning portions of their income payments from the trust to satisfy federal tax liabilities, which agreement was approved by the South Dakota Circuit Court.

P. L. Q. filed a voluntary petition in bankruptcy, and a trustee in bankruptcy was appointed. The trustee in bankruptcy requested the trustee of the trust to pay him all the income, including portions assigned to IRS for distribution to the creditors of the bankrupt.

First Northwestern, as trustee of the P. L. Q. family trust, sought a declaratory judgment of the respective rights of the said trustee, the trustee in bankruptcy, the IRS, and the Q.s. The District Court held that the plaintiff as trustee of the trust had sole control over disbursement of the trust income, that P. L. Q. had no vested right in the trust income allowing him to transfer or assign any rights to the trust income, and that the trustee in bankruptcy had no rights to the trust income. The trustee in bankruptcy appealed.

On the issue of whether the South Dakota Circuit Court, by rendering the trust income assignable to the IRS, also rendered such trust income assignable to the bankruptcy trustee, the court ruled no. The income from a spendthrift trust is not immune from federal tax liens, notwithstanding any state laws or exemptions to the contrary. The court applied federal law to the IRS assignment and was not required to consider state law.

The federal bankruptcy laws defer to the authority of the individual states in determining which property is exempt. Section 70 (a) (5) of the Bankruptcy Act, 11 U.S.C. Section 110 (a) (5), states: "[u]pon bankruptcy of the beneficiary his equitable interest in the income and principal of the trust estate, being nonassignable and immune from judicial process under [state] law, does not pass to the trustee of the bankruptcy estate and title remains in the trustee of the spendthrift trust."

On the issue of whether the proceeds from the spendthrift trust are subject to execution under a judgment in bankruptcy, the court decided the beneficiaries of this spendthrift trust have no identifiable rights or interests in the income until income on the principal is actually earned and the trustee disburses such income. Therefore, until these two contingencies occur, the beneficiary does not possess "property" or a property interest within the normal meaning of the state's statute defining property that is subject to execution.

On the issue of whether the principles that operate to expose the process of a discretionary spendthrift trust to federal tax liens should similarly operate to expose those proceeds to the trustee in bankruptcy, the court also ruled the trustee in bankruptcy succeeds to those rights which prior to the time of the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process.

The district court's decision denying the trustee in bankruptcy's claims to the income of the P. L. Q. family trust was affirmed.

Usury—Penalties—Loss of Interest Already Paid

Waldorf v. *Zinberg*, 106 Mich. App. 159, 307 N.W. 2d 749 (1981)

The plaintiffs had executed a promissory note to the defendants secured with a second mortgage on their home. The note called for interest at the rate of 12 percent per annum. During the life of the note, the defendants paid $5,000 as interest, but made no payments against the principal. When the note matured, the plaintiffs argued that the interest rate was usurious and demanded that prior payments be credited against the principal.

The trial court held that interest already paid must be applied to the principal. The court of appeals affirmed, presenting a rather surprising interpretation of prior case law. The court carefully distinguished the holding of the supreme court in *Wright* v. *First National Bank of Monroe*, 297 Mich. 315, 297 N.W. 505 (1941), in which it was stated that "Usurious interest already freely and voluntarily paid by the buyer cannot be recovered, but usurious interest remaining due and payable may not be collected." The court of appeals held that this referred only to the case in which the borrower had voluntarily satisfied his entire obligation.

Vendor and Purchaser

Indoe v. *Dwyer*, 176 N.J. Super. 594, 424 A.2d 456 (1981)

A contract for the sale of residential real property contained a proviso that, except for price and financing terms, it was contingent upon approval by the respective attorneys for purchasers and sellers. The attorney for the purchasers notified the sellers that he was withholding his approval of the contract and that the purchasers would not proceed with the transaction. The attorney's disapproval was not based on price or financing terms.

The decision was that the parties to a contract for the sale of real property containing an attorney's approval clause are bound to abide by the opinion of either party's attorney with respect to the efficacy of the contract, limited only by the requirement that the attorney act in good faith. In exercising his judgment, the attorney's reasons for disapproving the contract are not subject to review or contradiction.

Stowers v. *Baron*, 65 Ohio App. 2d 283, 418 N.E. 2d 404 (1979)

Where a purchaser brings a lawsuit seeking specific performance, or in the alternative, damages, under a land contract, and the trial court dismisses the action but holds that the contract still remains in force, the doctrine of election of remedies does not preclude the purchaser from bringing a second lawsuit against the same parties for damages based on the same contract. The judgment entry of the first action determined no rights of the parties flowing from the contract, but merely maintained the status quo.

Vendor and Purchaser—Every Contract Implies That Neither Party Will Do Anything to Prevent Performance by the Other

Bass v. *Sevits*, 78 A.D. 2d 926, 433 N.Y.S. 2d 245 (1980)

The plaintiff contracted with the defendant to purchase property. The contract was conditioned on the plaintiff's obtaining a conventional mortgage to finance the purchase. The plaintiff was given the mortgage commitment, provided that certain repairs were made to the premises, the necessity of which had been acknowledged by the defendant at the time of the contract. The defendant refused to sign a prepared addendum that would have extended the closing time to permit the plaintiff to make the repairs at his own expense. This action was brought to recover the costs incurred in purchasing the supplies necessary for the repairs after the defendant denied the plaintiff access to the premises to make them.

The judgment was rendered in favor of the plaintiff on the ground that the defendant, by his own conduct, prevented performance by the plaintiff of the condition of the contract: obtaining a conventional mortgage. Every contract implies that neither party will do anything to prevent performance by the other party (*Patterson* v. *Meyerhoffer*, 204 N.Y. 96, 100), and a party who violates this rule, which is founded in fair dealing, may not rely on such failure to excuse his own nonperformance (*Matter of Heyliger*, 39 A.D. 698). The plaintiff was ready, willing, and able to perform but was prevented by the defendant's refusal of access.

Vendor and Purchaser—Installment Contract of Sale Distinguished from an Option

Leonard v. *Ickovic*, 79 A.D. 2d 603, 433 N.Y.S. 2d 499 (1980)

In an action to dissolve an alleged joint venture, the court found that the subject agreement was not an option contract but rather an agreement of purchase and sale. An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date, and the consideration is forfeited if the option is not effectively exercised (*Rottkamp* v. *Eger*, 74 Misc. 2d 858).

At bar, the parties agreed that the plaintiff would purchase and the defendant would sell certain property, although title was not to pass until the plaintiff had paid over the entire purchase, the payments to be made in installments. The plaintiff, having breached the agreement by failing to make an installment payment, was held not entitled to the return of any monies previously paid.

Vendor and Purchaser—Marketable Title

Belrose v. *Baker*, 426 A.2d 454 (N.H. 1981)

An easement granted to a public utility to bury natural gas lines within a 10-foot strip along the frontage of property does not render title to that property unmarketable. A marketable title is one that can be readily sold to a reasonable, prudent purchaser or mortgaged to a person of reasonable prudence, and the easement in this case does not constitute reasonable grounds for objecting to the title, because the intrusion is slight, the pipes are buried, and many municipalities have zoning setback requirements that exceed the 10 feet now in dispute.

Vendor and Purchaser—Marketable Title—Utility Easements

Madhaven v. *Sucher*, 105 Mich. App. 284, 306 N.W. 2d 481 (1981)

The purchaser of a residential home signed a sales agreement in which he agreed to take title subject to existing building and use restrictions, easements, and zoning ordinances, if any. The seller agreed that he would deliver the usual warranty deed conveying marketable title. At the time of closing, it was discovered that there was a utility easement that ran across the patio of the subject property. The purchaser refused to close, claiming unmarketable title, and filed suit seeking return of the earnest-money deposit. The trial court held for the purchaser on summary judgment, and the seller appealed.

The court of appeals affirmed and held that under the circumstances of the case, the purchaser was justified in refusing to close. The easement across the property was held to be such an encroachment as to render title unmarketable. It was held that the marketable-title provisions of the contract took precedence over the subject-to provisions. The court sought to distinguish the utility easement from the easements and restrictions that routinely encumber title in subdivided property based on the willingness of the title insurance company to insure over the easement.

Wills and Succession—Effect of Admission of Will in Foreign Jurisdiction

Estate of Roberg, 396 So. 2d 235 (Fla. 1981)

Georgia Roberg was the domiciliary personal representative for the estate of Ingvar Roberg in New York. Georgia Roberg filed a petition for ancillary letters of administration to administer real property located in Florida and served the petition on Maud Roberg as guardian of Brian Roberg. Maud Roberg opposed probate, alleging that the execution of the will was tainted by fraud, duress mistake, and undue influence. After the New York court rejected Maud's attack, the Florida court denied Maud's motion to deny admission of the will to probate in Florida. Maud appealed the decision as guardian of Brian Roberg, alleging that before a will can be submitted to ancillary administration, any will contest must be resolved.

The appellate court agreed; holding that admission of a will, which devised land in Florida, to probate in New York does not preclude challenge to the validity of the will for purposes of disposition of Florida real property where there has been a responsive challenge to the petition filed under the ancillary administration statute.

Wills and Succession—Heirs Are Determined by Statutes in Effect at Intestate's Death

Estate of Mooney v. *Mooney*, 395 So. 2d 608 (Fla. 1981)

Ray Alan Mooney was born on October 7, 1950. He was adopted by his stepfather in 1960. Ray's natural father died intestate in 1979. Ray then filed a petition for determination of heirs in which he sought to have himself determined by the court to be an heir. Elizabeth Mooney, Ray's mother and guardian of Donna Rae Mooney, filed an answer alleging that Ray could not be an intestate heir of his natural father. The probate court found Ray to be an heir of his natural father. Elizabeth Mooney appealed.

The appellate court reversed the probate court. The probate court applied the statutes relating to intestate succession that were in effect at the time of Ray's birth. The probate court felt that to apply the current statute, which prohibits adopted children from inheriting from their natural parents, would unconstitutionally deprive Ray of his right to a share in his father's estate. The appellate court, however, said a child's right to inherit from his natural father does not commence until the death of his father. It is at the death of the intestate that an heir's right to property vests. Therefore, the statutes in effect at the death of the intestate would determine who is an heir. Since the statute at the death of Ray's natural father prohibited him from being an heir, Ray was not entitled to a share in the distribution of his father's estate.

Zoning

J.E.D. Associates, Inc. v. *Town of Atkinson*, 432 A.2d 12 N.H. (1981)

A subdeveloper brought an action seeking to have zoning regulations, which required that the subdeveloper deed 7.5 percent of the total land area of the subdivision to the town or pay a cash equivalent, be declared unconstitutional.

The court held that the ordinance appeared to be an out-and-out plan of extortion, whereby the developers were required to pay for the privilege of using their land for valid and reasonable purposes, even though it satisfied all other requirements of the town's zoning and subdivision regulations.

The court pointed out that this exacting violated one of the basic principles of the state constitution and that private property enjoyed a specific protection under the bill of rights of the state constitution.

Zoning—Constitutionality—Definition of "Family"

Charter Township of Delta v. *Dinolfo*, 106 Mich. App. 1, 308 N.W. 2d 437 (1981)

A township zoning ordinance restricted residences to single-family dwellings. A family was defined as a group related by blood, marriage, and adoption (including foster children), together with not more than one additional person not related by blood. The defendants in the case were married couples, residing with their children, and living with six other unrelated adults. All were members of the Work of Christ Community, a nonprofit organization. The defendants sought a variance from the zoning ordinance, which was denied, and challenged the ordinance on constitutional grounds when the township sought enforcement.

The court of appeals rejected the constitutional challenge against the zoning ordinance, based on a rational-relationship test, finding that the ordinance was a legitimate guideline toward the permissible goal of enhancing family life. The court distinguished the holding of the Supreme Court in *Moore* v. *City of East Cleveland*, 431 U.S. 494, in which it was held that the term *family* could not be so narrowly defined as to exclude grandchildren from living with their grandparents.

Zoning—Vested Rights

Cesere v. *Windham*, 430 A.2d 1134 (N.H. 1981)

Equity Property filed an application to build a 50-unit, cluster condominium on a 19.4-acre tract in Windham, New Hampshire. While the town board was holding hearings and considering the application, the town changed the zoning ordinance. Thereafter, the town planning board approved the project despite the fact that it did not meet the requirements of the changed ordinance.

In a suit that followed, the superior court upheld the approval of the project.

On appeal, the supreme court reversed and held that a planning board may not

Continued on page 14

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The Errors and Omissions Committee needs to know your problems and needs to know anything you know that might help your fellow agents. Write Errors and Omissions Committee, Box 966, Bartlesville, Oklahoma 74005, or call 918/336–7528.

Peck Heads N.Y. LTA

The New York State Land Title Association held its 61st annual meeting September 12–15 at the Concord Hotel, Kiamesha Lake.

The following officers were elected: Gerald Peck, president; William A. Colavito, vice president—southern section; John C. McGuire, vice president—central section; Bajan Koepeczi-Deak, vice president—western section; and Edward Moskowitz, treasurer. Gary Seltzer was named chairman of the Title Insurance Section, and Thomas N. DeCaro was selected chairman of the Abstracters and Title Insurance Agents Section. John A. Albert is the executive vice president.

William J. McAuliffe Jr., ALTA executive vice president, was the national association representative.

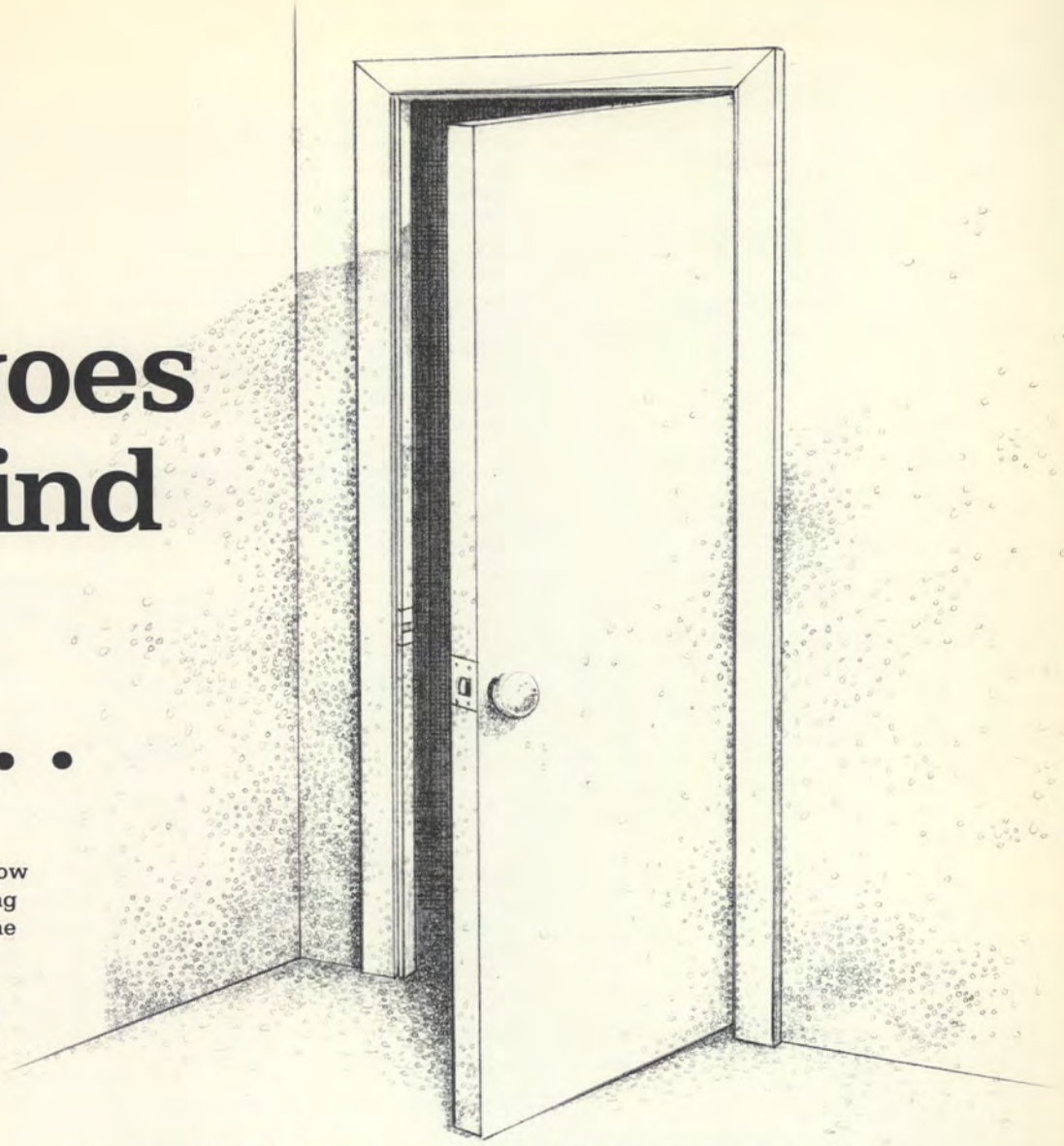
Ariz. Elects Shaylor

The Arizona Land Title Association held its 1982 annual meeting October 21–24 at Carefree.

Fred C. Shaylor (photo above) was elected president, A. M. "Bud" Clifford was elected first vice president, and Douglas D. Blair was elected secretary/treasurer.

Jack Rattikin Jr., ALTA Abstracters and Title Insurance Agents Section chairman, was the ALTA representative.

What goes on behind closed doors . . .



in the title industry? Do your customers really know? The brochures and visual aids listed below can be a tremendous help in advising the public and your customers on the important and valuable services provided by the title industry.

These materials may be obtained by writing the American Land Title Association.

Brochures and booklets

*(per hundred copies/shipping and/or postage additional)

House of Cards.

This promotional folder emphasises the importance of owner's title insurance $17.00*

Protecting Your Home Ownership

A comprehensive booklet which traces the emergence of title evidencing and discusses home buyer need for owner's title insurance $24.00*

Land Title Insurance — Consumer Protection Since 1876

Tells the story of the origin in 1876 in Philadelphia. $15.00*

Closing Costs and Your Purchase of a Home

A guidebook for homebuyer use in learning about local closing costs. This booklet offers general pointers on purchasing a home and discusses typical settlement sheet items including land title services. $25.00*

Things You Should Know About Homebuying and Land Title Protection

This brochure includes a concise explanation of land title industry operational methods and why they are important to the public. $17.00*

The Importance of the Abstract in Your Community

An effectively illustrated booklet that uses art work from the award-winning ALTA film, "A Place Under the Sun" to tell about land title defects and the role of the abstract in land title protection. . . $30.00*

Blueprint for Homebuying

This illustrated booklet contains consumer guidelines on important aspects of homebuying. It explains the roles of various professionals including the broker, attorney and titleperson. $35.00*

ALTA full-length 16mm color sound films

A Place Under The Sun (21 minutes)

Animated film tells the story of land title evidencing $140.00

1429 Maple Street (13½ minutes)

Live footage film tells the story of a house, the families owning it, and the title problems they encounter. $130.00

The American Way (13½ minutes)

Live footage film emphasizes that this country has an effective land transfer system including land recordation and title insurance. $130.00

The Land We Love (13½ minutes)

Live footage documentary shows the work of diversely located title professionals and emphasizes that excellence in title services is available from coast to coast. $105.00

Miscellaneous

ALTA decals . . . . . $ 3.00
ALTA plaque $2.75

Judiciary Committee Report—from page 11

approve a project that violates the provisions of the zoning ordinance. Although the application was under consideration long before the ordinance was amended, final approval did not come until after the amendment. The amendment governs that unless prior to the amendment the applicant has acquired a vested right to complete the project.

Vested rights are acquired by some expenditures that are directly related to the actual construction of the project.

Categorical Index to 1982 Judiciary Committee Report (S—September; O—October; N—November)

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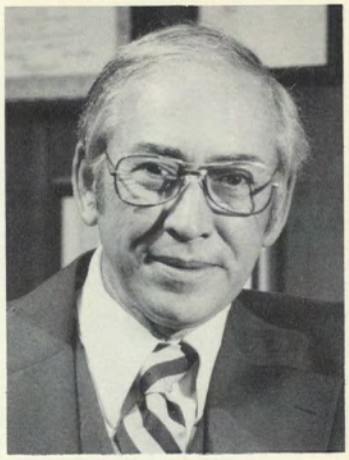

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Names In The News . . .

T. Jack Stone was named president of American First Land Title Insurance Company. The owner of Holiday Properties, Inc., Stone was also vice president of marketing for Provident Life & Accident Insurance Company and agency manager for National Life Insurance Company.

Other officers appointed include **David Steed,** vice president and treasurer; and **Jeffrey Noble,** vice president, secretary, and general counsel.

Gary C. Kidd was appointed manager of Transamerica Title Insurance Company's northwest division, which includes Washington/Alaska and Oregon. Kidd has served as Washington/Alaska vice president since April 1982. He joined Transamerica in 1970.

Transamerica Title promoted **Jesse Dale Hedrick** to vice president–division manager of the company's Texas operations. Hedrick joined Transamerica Title in 1981 and most recently served as assistant division manager of Texas operations.

Charles E. Ault was appointed Kenai County manager for Alaska Title Guaranty Agency, Inc. Ault oversees business and personnel development and production and quality control. Before assuming this position, he was chief title officer for Transamerica Title's Fresno, California, office.

Michael J. Starrett was named manager of Lawyers Title Insurance Corporation's national division office in Chicago. Starrett joined the company in 1971 as title attorney in the Indianapolis office. He was named senior title attorney in 1973, branch counsel in 1975, and Indiana state counsel in 1976. Two years later, Starrett transferred to national headquarters in Richmond, Virginia, when he was elected assistant counsel. He was promoted to associate counsel in 1981.

Lawyers Title of El Paso, Texas, announced the following officer appointments: **Deborah Hanson,** assistant vice president; **Sandy Swift,** assistant vice president; **Cynthia Bilbe,** corporate secretary; and **Lana Woten,** assistant treasurer.

Hanson, a 10-year veteran of the land title industry, joined Lawyers Title in 1976. She supervises all aspects of title insurance issuance.

Swift joined Lawyers Title five years ago and oversees all data processing. In 1982, the Texas Land Title Association honored her as the young title person for Region 5.

Bilbe joined the company in 1976 and is an administrative assistant to the president and vice president and a commercial/industrial escrow officer.

Before joining Lawyers Title as controller in 1978, Woten was acting director of business affairs for the San Diego State University Foundation. She represents Lawyers Title as a 1982–83 advisor for junior achievement.

Joseph T. Hartman was named assistant vice president at Commonwealth Relocation Services, Inc. Hartman joined Commonwealth in 1972 and has 10 years experience in the relocation industry.

John A. Connelly was named national marketing representative at Commonwealth Relocation. Before joining the company in 1981, Connelly was manager of Paul Reinke Realty in Somerdale, New Jersey.

Terrell R. Johnson was named assistant vice president at Commonwealth Relocation. An eight-year veteran of the employee relocation industry, Johnson has been a Commonwealth employee since 1974.

Edson N. Burton Jr. was appointed assistant vice president and state manager for Pioneer National Title Insurance Company's Detroit, Michigan, and Columbus, Ohio, offices. Burton is also in charge of agency operations for two Ticor Title Service Centers in Detroit and Columbus. He joined Pioneer in 1978.

Ernest J. Essad Jr. was elected vice president/assistant title counsel of Pioneer's Detroit office. In his new position, Essad evaluates commercial closings and claims. Before his election, he was a trust administrator at Detroit Bank & Trust Company.

Sharon J. Oscar was appointed associate title counsel for Pioneer. Oscar is responsible for all matters relating to title insurance and claims against title. Before her appointment, Oscar was a vice president for the company.

G. Elwood Steckler was elected vice president and state manager at Pioneer's Indianapolis office. Steckler manages direct and agency operations in Indiana and Kentucky. He joined the company in 1973 and was Marion County manager before assuming his new position.

Stephen D. Merkle was named vice president and state manager at Pioneer's St. Petersburg, Florida, office. Merkle oversees Pinellas, Palm Beach, and Dade County operations. Before assuming his new position, Merkle was an agency representative. He joined Pioneer in 1977.

Janie S. Olson was promoted to area branch manager I at Pioneer's Dallas,

Steckler

Merkle

Oscar

Loosemore

Pahl

Armbruster


Reese


Miller


Anthony


Stanley


Whitney


Wylie

Oregon, operations. Olson directs the county title and escrow office. She joined the company in 1970 and was a title officer in Polk County before her new appointment.

J. Kent Loosemore was promoted to vice president and state manager at Pioneer's Milwaukee office. In his new position, Loosemore oversees all direct operations and agency operations in Wisconsin, Minnesota, North Dakota, South Dakota, and Iowa. He joined the company in 1973 and most recently was a division manager for the Indianapolis office.

Kurt G. Pahl was promoted to vice president in charge of claims for Ticor Title Insurers. In his new position, Pahl oversees nationwide claims administration and manages related assets. He joined the company in 1971 as vice president and director of finance. Before that, Pahl was president of Reporting Terminals, Inc., in New York City.

Sharon Yarber was appointed associate title counsel at Ticor Title Service. Yarber handles underwriting for commercial and industrial customers and represents the company in the Los Angeles legal community. Before her new assignment, Yarber was associate title counsel for Title Insurance and Trust Company.

Nola Logan was appointed advisory escrow officer at Ticor Title Service's Rosemead, California, office. Logan trains escrow personnel in the Los Angeles area and audits escrow files. Before assuming her new position, Logan was junior escrow officer for Title Insurance and Trust's Reno, Nevada, office.

James C. Pratt and **C. William Griffin** were elected to the board of directors of Ticor Mortgage Insurance Company.

Pratt is executive vice president, sales and marketing, for the company. He integrates national sales and marketing efforts and implements new programs and services.

Griffin is executive vice president, securities, and oversees all secondary marketing activities. He also manages Ticor Securities Company and Ticor Investment Securities Company.

William Reese III was promoted to vice president and county manager of Title Insurance and Trust Company's Contra Costa County, California, office. In his new position, Reese manages title and escrow services. Before his promotion, Reese was title operations manager at the company's Bakersfield office.

Paul E. Flores was named assistant title counsel at Title Insurance and Trust Company's Rosemead, California, office. Flores opens, reviews, and handles claims and also monitors litigation. Before joining the company, he was staff counsel for California Land Title Company.

David S. Miller was named vice president for Title Insurance and Trust. He is a major account manager at the company's Century City, California, office. Miller oversees business development and customer relations in the Century City area. Before joining the company, he was president of Mortgage Consultants Company.

Debbie L. Armbruster was named vice president of Title Insurance and Trust. Armbruster is a major account manager in the Century City office. Before joining the company, she was a loan consultant at Merit Mortgage.

Denise Anthony was named vice president of Title Insurance and Trust and performs the same duties as Armbruster and Miller at the company's Century City office. She oversees business development and customer relations in the Beverly Hills area. Anthony joined the company earlier this year. Before that, she was an account executive with American Title Company.

Carol M. Stanley was elected vice president, major account manager, of Title Insurance and Trust's Encino, California, office. In her new position, Stanley oversees business development and customer relations. Before her election, she was an account manager at the company's Woodland Hills office.

Richard E. Wylie also was elected vice president, major account manager, of the Encino office. He markets Ticor's services and assists industrial, commercial, and investment customers. Before his election, Wylie was sales manager of the Reno, Nevada, office. He has also served as senior account manager of the company's Beverly Hills office.

Pamela D. Rice was appointed major account manager at Title Insurance and Trust's Encino office. She directs sales activities in the east San Fernando Valley and Palmdale/Lancaster areas. Before joining Ticor, Rice was a loan broker with The Pacific Group in Santa Monica.

Lucille K. Wilson was named advisory escrow officer at Title Insurance and Trust's San Francisco office. Before joining the company, Wilson was assistant vice president/county manager at First American Title.

Richard M. Soto was named escrow operations manager of Title Insurance and Trust's San Francisco office. He oversees new business development as well as order processing by company personnel. Before joining the company, Soto was senior vice president, escrow operations/auditor, for Universal Title Corporation.

Patrick N. Whitney was promoted to title operations manager of Title Insurance and Trust's Bakersfield, California, office. Whitney supervises all title department personnel, is responsible for customer service, and participates in marketing activities. Whitney joined the company in 1975 as a title officer; before his promotion, he was an assistant vice president.

Systems-Equipment Profile. . .

Computerized Closing Package User Reports Sought in Study

by John Haviland

New technology is headed in many directions within the title industry —promising us everything from push-button title plants to the latest in computerized closing packages. Although the title offices of the future basically will be the ones we have now, these systems and equipment innovations will make things faster, easier, and—hopefully—less expensive.

Thus far in its history, the industry has made it past the era of the pen and the typewriter with little difficulty. But we now face head-on ergonomics—the science of adapting systems, equipment, and environment to human skills and requirements. The high-speed, high-technology systems are here. Many of us not presently using them will be doing so in the near future. It's as though the typewriter had just been invented—only this time it's a high-speed, high-technology piece of equipment.

This has brought the industry to exciting times, which also can be confusing. In order to help it all make more sense and perhaps become less costly, the ALTA Abstracters and Title Insurance Agents Section Land Title Systems Committee is working on the following activities:

- Publishing periodic user questionnaires on systems and equipment in *Title News*, and publishing analyses in future issues of the magazine that are based on questionnaire responses from members of the association
- Developing a reference service on systems and equipment, to be available to ALTA members
- Developing a reference manual organized by application categories for software and related hardware systems

Accompanying this message on the opposite page is the first user questionnaire—which is devoted to computerized closing packages. This application of equipment already has proved its worth in the title industry. Those of us who presently have these closing systems can be of great help to those who are considering such a step—and we can learn from fellow users—by sharing our experience through completing and sending in this brief questionnaire.

Needless to say, this sharing of information will only work if you participate. So please complete the questionnaire and return it to me as soon as possible—no later than January 17, 1983—so the compilation and analysis can begin. If you have thoughts on systems or equipment that should be covered in future questionnaires, or wish to provide any other comments to the committee, please enclose them with your questionnaire return.

Should you wish to contact any member of the committee, our names and addresses are as follows:

John Haviland, Chairman
South Ridge Abstract & Title Co.
Box 1070
Sebring, Florida 33870

Alfred Holland
Paragould Abstract Company
Box 335
Paragould, Arkansas 72450

Dennis Johnson
Stewart Title Guaranty Company
Box 2029
Houston, Texas 77001

Richard Johnson
Nebraska Title Company
300 South Twelfth Street
Lincoln, Nebraska 68508

C. A. Long
The Title Company
Box 31
Eureka, Kansas 67045

Richard Oliver
Smith Abstract & Title, Inc.
Box 153
Green Bay, Wisconsin 54305

The author is chairman of the ALTA Abstracters and Title Insurance Agents Section Land Title Systems Committee and president of South Ridge Abstract & Title Co., Sebring, Florida.

Title Systems–Equipment User Questionnaire

As a service to ALTA members, the association Abstracter-Agent Section Land Title Systems Committee is compiling user information on different types of title industry systems and equipment. If you have user experience with the category listed below, please complete this brief questionnaire and return it—*by January 17, 1983*—to Committee Chairman John Haviland, South Ridge Abstract & Title Co., Post Office Box 1070, Sebring, Florida 33870. Use additional sheets as necessary. Please include copies of any product/system literature with your questionnaire. An analysis, based on user questionnaires that are returned, will be published in a future issue of *Title News*.

Category for this questionnaire: computerized closing packages

1. Name of software system:

2. Type of computer used:

3. Basic features of your closing system:

4. Specific functions that you tailored into your closing system:

5. Name and address of vendor of system:

6. Existing or projected savings in time and cost (please specify; this can be expressed as a percentage)

7. Advantages and disadvantages of system (please include any recommendations and general comments)

Calendar of Meetings

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

American
Land Title
Association

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