October, 1983

TITLE NEWS

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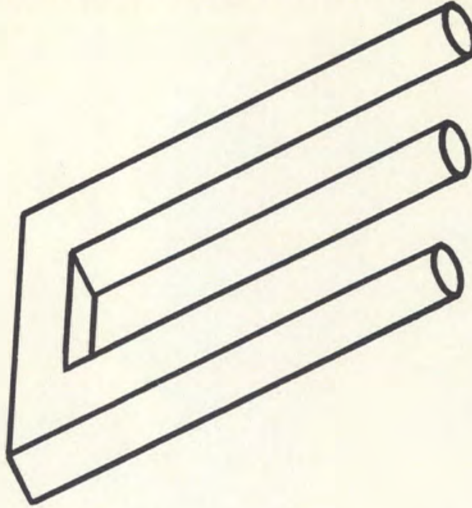

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Volume 62, Number 8

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Front Cover

D. P. Kennedy, left, is congratulated on his installation as ALTA president as Jack Rattikin, Jr., newly-elected president-elect of the Association, offers best wishes during the ALTA Annual Convention September 21-24 in Boca Raton, Florida. President Kennedy is president, First American Title Insurance Company, Santa Ana, California, and President-Elect Rattikin is president, Rattikin Title Company, Fort Worth, Texas. Other 1983-84 ALTA officers installed during the Convention are James L. Boren, Jr., president, Mid-South Title Insurance Corporation, Memphis, Tennessee, Finance Committee chairman; Richard P. Toft, president and chief executive officer, Chicago Title Insurance Company, Chicago, Illinois, treasurer; Gerald L. Ippel, president, Ticor Title Insurance Company, Los Angeles, California, Title Insurance and Underwriters Section chairman; John R. Cathey, president, The Bryan County Abstract Company, Durant, Oklahoma, Abstracters and Title Insurance Agents Section chairman; Joseph D. Burke, executive vice president, Commonwealth Land Title Insurance Company, Philadelphia, Pennsylvania, and Phillip B. Wert, manager, Johnson Abstract Company, Kokomo, Indiana, respective ALTA Executive Committee members-at-large from the two previously mentioned Sections; and Thomas S. McDonald, president, Lawyers Title Group, Inc., Sanford, Florida, immediate past president.

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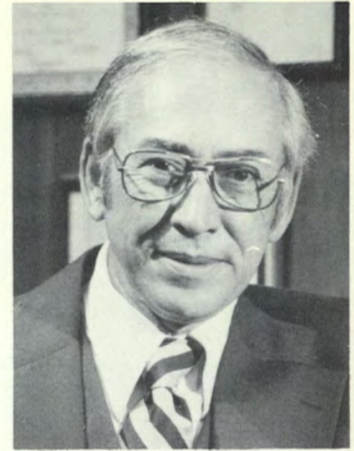
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A Message From The President

As this is written, members of Congress are returning to Washington after summer recess which, between junkets all over the world, hopefully included conversations with their constituents. Let's hope they are well rested because the coming session is going to be vitally important to our country and to our industry. (How many times have you had the politicians make similar statements when they are asking you for money?)

It is true, however, that this session will be tremendously important in that the full deregulation of the financial institutions of our country will be considered. Some people are bored and feel that the issue is merely a squabble between the big banks, the savings and loans, the insurance industry, the brokerage houses and that the outcome will really have little effect on the financial structure or, in particular, the title industry. Nothing could be further from the truth.

Everyone must agree that a stable banking system is at the heart of our economy. The legislation now before Congress will create the greatest structural changes in our financial systems since the Glass-Speigel Act of 1933. As we all know, interest rates are now in the process of total deregulation; and, by October of this year, there will be no regulation of interest rates of any kind. This in itself represents a frightening change in that none of us have lived in an unregulated interest atmosphere during our business lifetime and, therefore, have no idea of what to expect.

The legislation to be considered goes far beyond the subject of interest rates. What is now being suggested is that banks operate not only as financial institutions but as entrepreneurial institutions which may enter any business they desire as long as they do it under the guise of a holding company.

Sure, maybe some changes are needed. It is true that the Glass-Speigel Act was a bill enacted in direct response to the pressures and stresses created by the Great Depression. And it is true that possibly some of the 1933 provisions do not apply to today's marketplace, but many of them do. What worries me is that the lawyers are finding loopholes, and changes are occurring in the structure of the financial community without congressional investigation or approval.

The matter is too important. It shouldn't be left to drift aimlessly. What should be done? Why doesn't the Congress pass one of the moratorium bills now before it, all of which are designed to bring a stop to any changes until Congress, after due consideration, sets the guidelines?

ALTA has come out in favor of a moratorium in a letter written by 1982-83 President Tom McDonald. I am hopeful that the general membership will strongly support this action.

D.P. Kennedy

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Lien-Free Construction Through Direct Disbursement

By Allan R. Burke

Could title companies ever guarantee lien-free construction projects? Unfortunately, this imperfect world offers no perfect assurances. But a construction fund disbursement system, routinely used for more than 20 years in some quarters to handle "problem" loans, lately is attracting much attention as a general application method for reducing potential lien actions.

Known as "direct disbursement," the system replicates conventional methods in all but one respect—the general contractor is supplanted as disbursing agent by the title company. On projects where problems are anticipated, title companies often have undertaken this role so that control over the payment process—and thus the ability to directly satisfy potential lienants and collect their waivers—can be established.

But today, as lien actions (and their cost) proliferate, few would disagree that every project is potentially a "problem" project. For that reason, those with a stake in title protection—owners, lenders, sureties and title companies—are questioning traditional assumptions and taking a fresh look at direct disbursement and its possible application for mainstream construction projects.

Premises of the Conventional System. It should not be surprising that the conventional payment system—with the general contractor as disbursing agent—is proving cumbersome today. As is readily seen, the premises upon which the conventional method was originally founded no longer hold true.

Fifty years ago, most construction projects involved a single general contractor who performed the majority of the work with his own forces. Tradesmen and craftsmen were put directly on his payroll to perform the specialized building tasks. Since little work was subcontracted, the owner sensibly ended his responsibility once the general contractor was paid—and the general contractor naturally assumed the charge of making any second-tier payments.

These notions still govern construction fund disbursements even today—though they hardly comport with modern realities. General contractors today perform only a small portion of the actual construction, assigning most work to subcontractors able to execute the ultra-specialized building tasks demanded by modern technology.

It is therefore proper to ask: Does the conventional disbursement system—established at a time when most jobs involved a single general contractor—adequately serve today's highly subcontracted projects where the timely flow of funds is critical to success? And do conventional methods, which originally anticipated few subcontractors, adequately protect owners against the multitude of lien actions possible today?

Allan R. Burke is chairman of the American Subcontractors Association Payment Practices Committee. He is secretary/treasurer of the Levy Company, a large interior finishing concern with extensive exposure to direct disbursement in the Chicago area.

Problems of the Conventional System. Operating under a construction fund disbursement system held over from a bygone era has caused numerous problems—ultimately detrimental to all parties concerned. These difficulties arise because the conventional system:

- **Places a heavy reliance on the integrity of financially-interested parties.** That is to say, ideally the disbursing agent should be a neutral party simply passing along the approved funds the owner has earmarked for those improving the property. However, such a description does not fit the general contractor—for it is within his natural and understandable self-interest to maximize profit at the owner's expense. Simply put, the relationship between the owner and the general contractor—and between the general contractor and the subcontractors—is naturally adversarial. Yet, under the conventional disbursement system, the general contractor is assigned to "guard the chicken coop."

- **Inhibits communication among the various parties.** Because the owner does

not see payments through to the lower tiers, he is divorced from the oversight of those actually improving his property. Likewise, subcontractors and suppliers are inhibited from communicating with the owner—and are left with a single alternative: the mechanics' lien. The conventional disbursement method, by erecting barriers among parties, inhibits the kind of teamwork that is uniquely critical on today's highly subcontracted projects.

- **Impedes the flow of funds to those performing the construction.** Subcontractors cannot make payments to their laborers and suppliers contingent upon receipt of funds from the general contractor. With the general contractor in the way, subcontractor income under the conventional system is slower—a situation that impairs the ability to perform the work agreed upon. (This inherent character of the system also compels subcontractors to cover their cash flow with borrowed money, and to reflect these carrying costs in their bids.)

- **Encourages disputes and subsequent lien actions as payments are delayed.** Again, because of the nature of the system, the subcontractor has little recourse but to exercise his lien rights should funds be withheld.

- **Affords the owner, lender and insurers little or no control over the disbursement of funds.** A lump sum monthly progress payment is simply put in the hands of the general contractor, leaving the owner and other parties to only hope that monies will be passed along to those for whom payments are earmarked. Under the conventional system, owners and other parties are at risk for actions over which they have little control: the conduct of the general contractor as disbursing agent.

- **Operates on the theory of "group punishment."** The non-performance of the general contractor or a single subcontractor can delay the payment of every organization on the project. Likewise, the final payment of every subcontractor is withheld even months or years after an individual organization's work is done until the owner accepts the completed building. Such a situation discourages timely performance by individual subcontractors, since their own payments are contingent upon the performance of the group anyway.

Given these inherent difficulties, it is relevant to speculate: In bygone days, the handling of subcontractor payments by the general contractor was a small and easily-dealt-with matter. But today, as projects are highly subcontracted, is the general contractor—who is hired for his construction skills, and not his money management abilities—the best, or even a competent, disbursing agent?

"... the system enables title companies to help assure lien-free construction and thus reduce litigation expenses ..."

Direct Disbursement. The need is clear: modern realities require a construction disbursement system that restores owner control over the payment process for protection against lien actions; encourages communications among the various parties; speeds the flow of funds to those actually performing the work; and preserves the ability of the general contractor to coordinate the activities of subcontractors and suppliers.

An answer that many suggest is direct disbursement because this system affords the owner and his agents complete control over payments, demands communication and teamwork between parties, eliminates barriers to the prompt flow of funds, and retains the general contractor's traditional approving authority and role as the central coordinator of construction activities.

Simply put, direct disbursement involves these steps:

- Prior to the start of the project the owner, lender, title company and general contractor meet and execute a disbursing agreement outlining their respective rights and responsibilities in the funding process.

- An escrow is established into which funds are placed to meet each monthly construction draw.

- Under the disbursing agreement, the title company agrees to administer the escrow and serve as disbursing agent. A fee is charged to the owner for this service (title companies have set prices above cost to make a profit, or at cost to offer a service that could attract business). The title company is never called upon to disburse above the escrowed amount, or to guarantee completion of the project. The company is held harmless against the actions of others, such as owner or lender failure to escrow sufficient funds, or contractor failure to supply waivers.

- Once work is under way, subcontractors apply to the general contractor for payment. The general contractor in turn approves amounts and requisitions the owner by line item for payment—just as he does under the conventional system.

- The owner approves or amends the requisition and instructs the lender to place sufficient funds in escrow to cover that monthly draw.

- The title company disburses funds up to the amount escrowed directly to all contractors, subcontractors and major suppliers. (Whether or not lower-tier subcontractors and suppliers are paid directly is left to the judgement of the title company, depending upon the significance of the work or the contract amount.)

- In exchange for payment, lien waivers must be submitted directly to the title company.

- A monthly summary of disbursement is sent by the title company to the owner, lender and general contractor.

Essentially, direct disbursement retains the best feature of the conventional payment system—the requisition process—but discards its worst feature—the draw process. Matters go up the same pipeline they do now, but are routed down non-stop.

The Construction Disbursing Agreement. The key document of the direct disbursement system is the "construction disbursing agreement." At the outset, it should be noted that this document in no way affects, overrides or supersedes the usual contracts between owner and general contractor, and general contractor and subcontractor. For the sake of practicality, only the owner, lender, title company and general contractor are party to the construction disbursing agreement (at the time of its execution prior to the start of the project, subcontractors and suppliers are largely undetermined). Typically, the responsibilities of the four parties would include provision:

- FOR THE OWNER to place sufficient funds in the construction escrow each month; to forward additional funds if necessary; to furnish the title company with pertinent documents such as the list of subcontractors and suppliers; and (in the case of the owner/developer) to execute requisitions for reimbursable services along with valid lien waivers.

- FOR THE LENDER to lend the owner the funds needed for payments;

and to furnish the title company with any independent inspection reports.

• FOR THE GENERAL CONTRACTOR to comply with the terms of the general contract; to furnish the title company with pertinent documents such as the list of subcontractors and suppliers; to execute requisitions and submit valid lien waivers for his own portion of the work; and to notify subcontractors and suppliers when payments are available for pickup from the title company.

• FOR THE TITLE COMPANY to act as disbursing agent; to disburse only up to the amount escrowed; to notify the general contractor when payments are available; to collect lien waivers; to maintain proper records and furnish parties the monthly disbursement summary; to provide title insurance; and to hold other parties harmless for failure to disburse escrowed funds as agreed.

The Benefits of Direct Disbursement. In addition to offering the passive benefits of avoiding problems experienced with the conventional payment system, direct disbursement also provides positive advantages not now being enjoyed. For the various parties in particular, it may be suggested that with direct disbursement:

• The owner will enjoy lower prices as contractors anticipate prompt payment and reduced carrying costs; faster completions as they come to expect payment on performance; elimination of front-end loading by the general contractor (initial requisitions are inflated); firsthand collection of lien waivers; and, of course, a lien-free building.

• Lenders and insurers are in a position to help assure a lien-free building; to eliminate any diversion of funds by the general contractor to other projects; and to preserve their priority lien position.

• General contractors completely retain their traditional approving authority and ability to control the activities of subcontractors and suppliers. In addition, general contractors benefit from substantially reduced overhead (another saving passed along to the owner) and receive accounting help from the title company. This enables the general contractor to compete for projects on the basis of his construction skills, rather than money management abilities. His payments are not held up by the nonperformance of subcontractors. And, some general contractors who have used direct disbursement report that they are sometimes extended lower bond premiums, and that their organizations are more readily accepted outside the home area since a respected title company stands behind them—and since the integrity of disbursements are assured.

• Subcontractors and suppliers will of course enjoy prompt progress and final payments (not held up by the nonperformance of others) and release of retainage at the completion of individual line items.

While statistical documentation of these benefits is limited, given the relatively limited use of direct disbursement nationwide, a survey of major Chicago-area subcontractors and suppliers is instructive. Direct disbursement is frequently used in Chicago, and the 56 subcontractor respondents there reported that:

• 72 per cent give lower prices on direct disbursement projects (an average 4½ per cent lower)

• 81 per cent give a higher completion priority

• 82 per cent offer faster punch list action

• 56 per cent get better performance from their suppliers and lower-tier subcontractors

Supplier firms responding to the survey also reported that 66 per cent give faster service to subcontractors when the project is disbursed direct, and 56 per cent offer lower prices. Clearly, all these cited benefits—lower prices, faster completions, better supplier service—redound to the benefit of all parties.

Promoting Direct Disbursement. Why should title companies encourage the use of direct disbursement? Because the system enables title companies to help assure lien-free construction and thus reduce litigation expenses, and because the prospect of fewer lien actions is a feature that can be sold to owners and lenders in securing new business.

Experience shows when direct disbursement is used, it is most often the lender who insists—since it is his funds, and his lien priority, that are at stake. This then suggests perhaps a starting point for promoting direct disbursement. After all, of the parties with whom title companies work, it is the lender who is in the strongest position to insist the others accede to his wishes in the handling of funds.

The argument for direct disbursement can really be summed up in this question: Suppose the industry sat down to devise a disbursement system to meet the needs of today, forgetting all the traditions behind it. Wouldn't direct disbursement, rather than the conventional payment system, come closest to the method devised?

The American Subcontractors Association has published a new manual which explains the "direct disbursement" payment system in detail. Complimentary copies are available to ALTA members by writing:

Direct Disbursement Manual
ASA
8401 Corporate Drive
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Five Title Insurance Executives-Counsel Faculty Members for Fall PLI Seminars

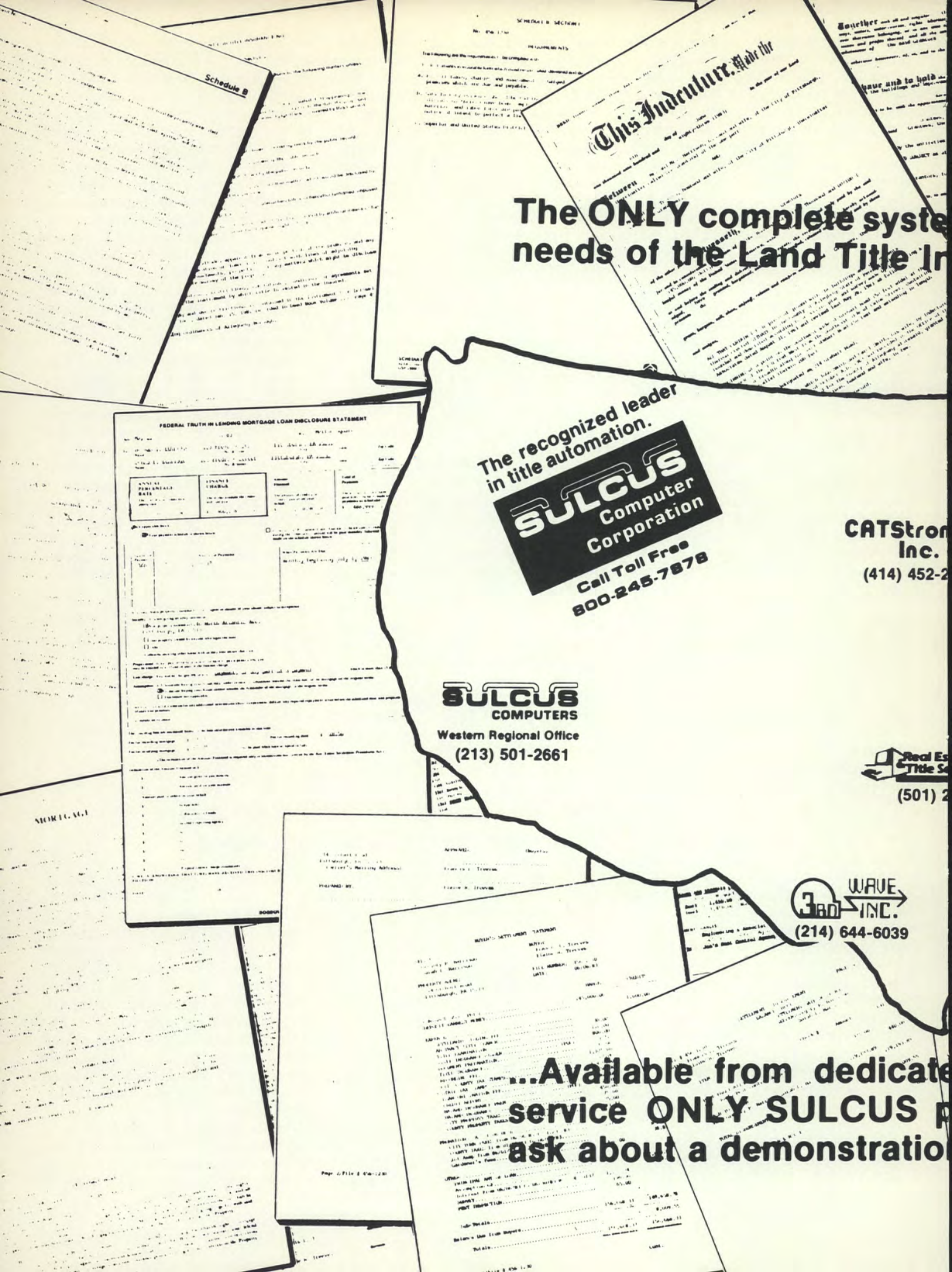
Five title insurance company executives and counsel will be among faculty members for three fall, 1983, seminars, "Title Insurance in Current Transactions," offered by the Practicing Law Institute.

The seminars will be held in New York City October 27-28, in Chicago November 14-15, and in Los Angeles December 5-6.

Faculty Chairman James M. Pedowitz, a former title insurance company executive and counsel who currently is with Rosenman Colin Freund Lewis & Cohen, New York City, reported that the title industry members are:

Oscar H. Beasley, vice president and senior title counsel, First American Title Insurance Company (Los Angeles only); Marvin C. Bowling, Jr., executive vice president—law and corporate affairs, Lawyers Title Insurance Corporation; Hugh A. Brodkey, vice president and associate title counsel, Chicago Title Insurance Company (New York and Chicago only); Bernard M. Rifkin, first vice president and chief counsel, The Title Guarantee Company (New York City only); and Ray E. Sweat, senior vice president and chief underwriting counsel, Ticor Title Insurance Company (Los Angeles only).

Fee for the seminar including course handbook is $275. Details are available from Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019.



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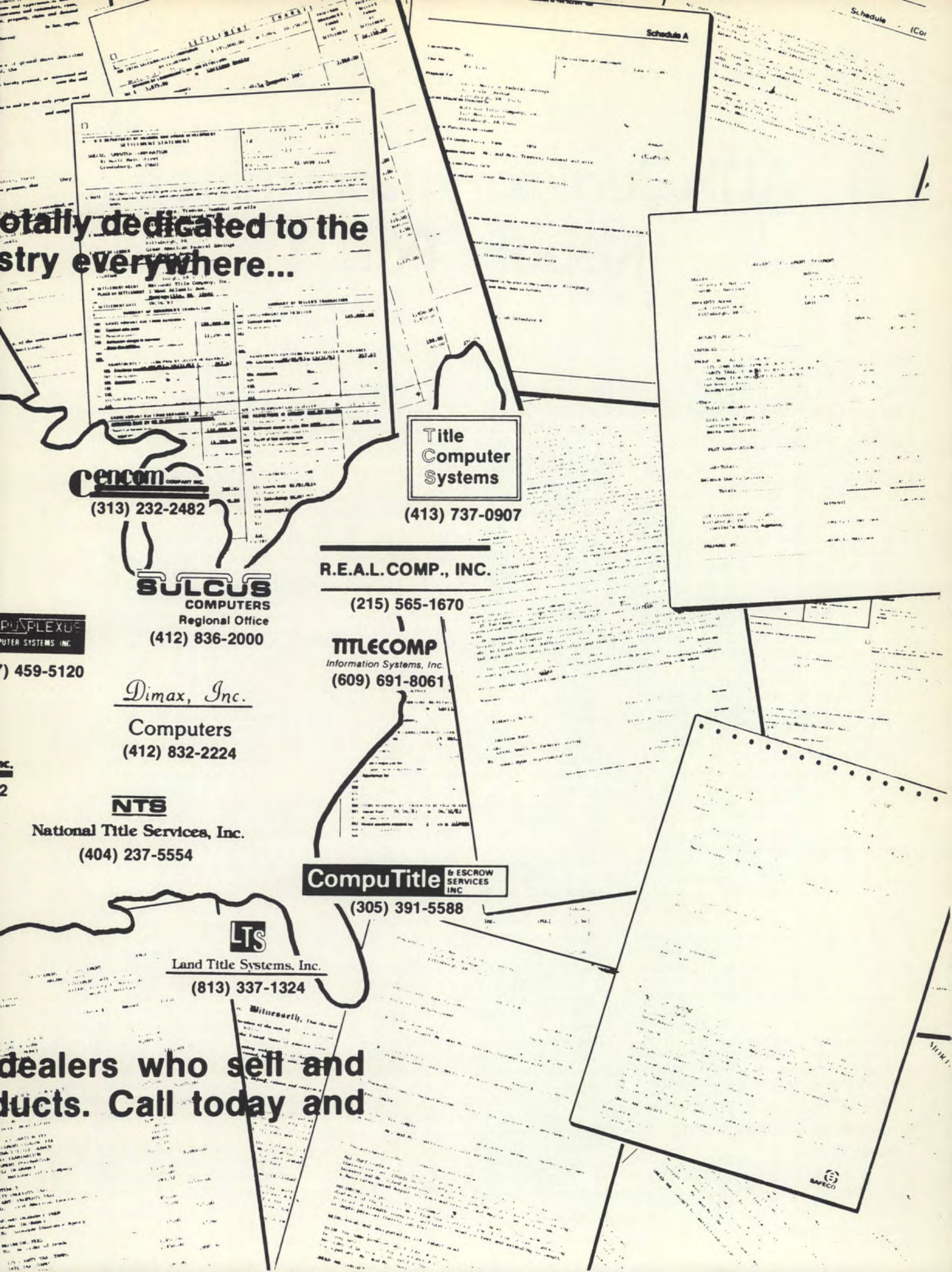

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ALTA Judiciary Committee Report: Part 1

Accretion and Reliction

Gillian v. Knighton, 420 So. 2d 924 (Fla. 1982)

The parties own adjacent lots on a navigable, fresh water lake in Highlands County, Florida. Their lots lie in separate subdivisions and the southern boundary of the Gillians' lot is the northern boundary of the Knightons' lot. This common boundary is also the boundary between the two subdivisions. Both lots have experienced accretion and reliction since the subdivisions were first platted. In 1978, the Knightons began removing vegetation and building their own dock in an area south of a straight line extension of their upland boundary. The Gillians filed a suit for declaratory and injunctive relief, stating that the additional land should be equitably apportioned in accordance with the parties' existing lake frontage. The trial judge determined that the parties acquired title to the additional lands by a straight line prolongation of the common boundary between the lots.

The most important question which the appellate court addressed concerned apportioning accreted and relicted lands between adjacent waterfront property owners.

The appellate court stated that many methods for apportioning these lands may be used, but no method is proper or improper. The appellate court, relying on *Johnson v. McCowen*, 348 So. 2d 357 (Fla. 1st DCA 1977), held that the method which achieves the most equitable apportionment of the lands formed by accretion or reliction should be used by the trial judge. Since the appellate court was unable to determine whether or not this method was used by the trial judge, the decision of the trial court was reversed. The appellate court did not preclude the trial judge from locating the boundary in the same place as he had done in the final judgment appealed from, if he found that the straight line method which he used was the most equitable means of apportionment of this property.

Accretion—Indian Lands, Choice of Law

In *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), the United States, in its capacity as trustee for the Colorado River Indians, commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel of the Colorado River. In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was then the Territory of Arizona. The boundaries of the reservation were subsequently modified or redefined by executive orders. The reservation extended westward to, and some places beyond, the Colorado River, which formed the boundary between California and Arizona. Over the years the river carved out various channels through the Palo Verde Valley. The 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam. Following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1919 the course of the river had formed a bend or loop known as the "Olive Lake Bend" or the 1919 channel. The 1919 channel was westward of the 1908 channel. In 1920, with the authorization of the United States Department of the Interior, a cut-off channel was constructed across the neck of this bend with the result that the 1921 channel had formed following a course to the east of both the 1908 channel and the westerly 1919 channel. The 1921 channel was also east of the present river. California and Arizona fixed the boundary between the states in a Boundary Pact which was approved by Congress. The Pact did not affect property claims or titles.

Various private individuals who had acquired lands in the Olive Lake region as well as an irrigation district and the State of California were named as defendants in this quiet title action. The Indians contended that the reservation extended to the median line of the 1919 westerly channel and that, because the Olive Lake Cut had effected an avulsive change in the course of the river, their title to this land was never lost.

The appellate court first held that since the Colorado River formed the boundary between two states federal law controlled the determination of title and that federal law adopted state law to give content to the federal law. The court further held that the law of California, rather than that of Arizona, governed since the subject lands were part of California before adoption of the Pact. Furthermore, defendants, who claim title under the laws of California, have been in possession of the land since well before the Pact. Moreover, the claim of the Indians is not prejudiced by application of California law as it appears that Arizona law employs the same law as that of California.

Defendants contended that under California law the Indians would not have obtained title to any accretions which were artificially caused by the building of the dam. Thus, defendants requested a new trial in order to prove that the subject lands were deposited on the Arizona side of the river as a result of artificial accretions. The appellate court first examined the federal and the common law rule which state that land formed by a process of accretion belongs to the upland owner. Thus, if a river forming the boundary between the property of two upland owners changes its course by a gradual process of erosion from one bank and accretion to the other, the boundary moves with the river. However, sudden or avulsive changes in a river's course do not alter the boundaries, which remain in the abandoned river bed.

Defendants' view of California law was that the boundary of property did not change were accretions were artificially caused. Consequently, the western boundary of the reservation should be determined not by the river's westerly 1919 channel, but rather by the 1908 channel which the river followed before the closure of the dam. The appellate court disagreed and held that the California courts would not apply the "last natural channel" rule in this case. The court reasoned that the artificial accretion exception applies only to state sovereign lands to prevent their loss to an upland owner. The artificial accretion exception was only applied by the California courts in cases involving tidelands owned by the state and is inapplicable as to the status of accretions between private landowners. The California rule of decision is thus identical to the federal law doctrine applied by the district court.

Defendants further challenged the district court's determination that the executive orders which established the Reservation conveyed to the Indians title to the easterly half

of the bed of the Colorado River and, therefore, title to lands east of the median line of the abandoned 1919 westerly channel. The appellate court ruled against the Indians on this issue relying on the case of *Montana v. United States* (1980) 450 U.S. 544, 101 S.Ct. 1245, 67 L. Ed. 2d 493, wherein the Supreme Court reaffirmed the presumption against conveyances by the United States of lands beneath navigable waters during a state's territorial period, the reason being that, as a general principle, the United States holds such lands in trust for future states, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. The *Montana* decision forecloses any argument that Congress intended to convey lands underlying navigable waters unless an express reference to the bed beneath the waters can be found in the grants establishing the reservation. An implied conveyance cannot be upheld on the grounds that the navigable water lay wholly within the boundaries of a reservation or that treaties creating the reservation contain a right of exclusive tribal occupancy. The court reviewed the various official documents defining the reservation's western boundary including an executive order which established the metes and bounds of the reservation and which set as part of the western boundary "a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning." The court concluded that this did not comply with *Montana's* requirement that Congress' intent be expressed in clear and especial words or definitely declared or otherwise made very plain.

Even though the documents establishing the reservation did not convey the river bed, this did not end the court's analysis under *Montana*. The establishment of an Indian reservation can be an appropriate public purpose justifying Congressional conveyance of a river bed if sufficient public exigency existed to prompt Congress to depart from the equal footing doctrine. However, the Colorado River Indians did not prove that they depended heavily on the Colorado River for their survival. The court thus held that the eastern half of the river bed was not conveyed by the United States to the Indians as part of the reservation.

The Indians raised the issue of aboriginal title on rehearing and the court thought it of sufficient import to allow the parties to address it on remand and for the district court to also determine the correct boundary of the reservation.

Accretion—Tideland, Choice of Law

In *California, Ex Rel., State Lands Com'n v. U.S., —U.S.—*, 102 S. Ct. 2432, 73 L. Ed. 2d 1, *reh. den.* S. Ct. 14, 103 S. Ct. 250, (1982), an original action was filed in the Supreme Court of the United States by California to quiet title to ocean front land created through artificial accretion to land owned by the United States on the coast of Californai. The Court held that the United States, as upland owner, had title to the accretion, even though under California law, where an accretion is caused by construction of artificial works on the water, the boundary does not move but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced. The Court held that federal law governed the dispute over accretions to ocean front land where title rests with, or was derived from, the federal government.

This was not a case where federal law borrowed state law as the applicable federal rule for deciding the substantive legal issue. Looking to the Submerged Lands Act, which withheld from the grant to the stated all "accretions" to coastal lands acquired or reserved by the United States, the Court concluded that borrowing for federal law purposes a state rule that would divest federal ownership was foreclosed. Furthermore, it has long been settled under federal law that the right to future accretions is an inherent and essential attribute to the littoral or riparian owner.

The Court also concluded that only land underneath inland waters was included in the initial grant to the states under the equalfooting doctrine and hence California could not properly claim that title to the land in question was vested in California by that doctrine and confirmed by the Submerged Lands Act. The Submerged Lands Act does not apply to the gradual process by which sand accumulated along the shore, although caused by a jetty.

Adverse Possession

Pittman v. Simmons, 408 So. 2d 1384 Miss. (1982)

Simmons sued Pittman to remove a cloud on title to a certain strip of land and for injunctive relief. In his answer, Pittman relied on his warranty deed showing that he owned the property and did not specifically plead adverse possession. Pittman did aver, however, that he had built a fence around the property and used it for the past twenty-five years. The trial court allowed Mrs. Pittman to testify as to her open, hostile, continuous, and notorious use of the property. However, the trial court ruled in favor of Simmons, holding that adverse possession was not pled and therefore it was waived as a defense.

On appeal, the Mississippi Supreme Court held that even though Pittman based his defense principally upon his deed, the defense of adverse possession was raised sufficiently in the answer. The Court found the evidence overwhelming that the Pittmans had established title by adverse possession. The case was reversed and rendered.

Adverse Possession—Statutory Period

Montieth v. Twin Falls United Methodist Church, 68 Ohio App. 2d 219, 428 N.E. 2d 870 (1980)

In May, 1946, plaintiffs purchased a strip of land in Munroe Falls, Ohio, from Vern Gaylord. Plaintiffs believed the disputed strip of land which abuts their eastern boundary belonged to them. In reality, the strip is part of a large recorded tract purchased by defendants in 1968 from Stanley Gaylord and claimed openly by them since 1969. Since 1946, plaintiffs have been spraying and harvesting an apple tree and a cherry tree on the disputed property. They planted a few pine tree seedlings in 1947, and additional seedlings during this period, selling some as Christmas trees. Plaintiffs built a pig pen in 1950 and raised pigs for a year. They replaced the pig pen with a fenced garden, maintained off and on from 1951 through 1974. Plaintiffs used the strip for a Girl Scout camping expedition. They built a shed partly on the strip. Defendants ordered a survey in 1969 and have paid the taxes, paid a sewer assessment, mowed part of the strip for semi-annual flea markets. In 1974 they graded it, including plaintiffs' garden. Both litigants seek title to the entire disputed strip of land.

Had plaintiffs established the 21-year period required by R.C. 2304.04 which statute sets out adverse possession requirements?

The court found that planting seedlings, spraying trees and picking fruit does not amount to acts of open, notorious and hostile posssession. Thus, the statute of limitations did not begin to run until 1950 when the

Report Published in Installments

The accompanying cases and others published in additional issues of* Title News *constitute the most recent report of the ALTA Judiciary Committee. In addition to Chairman Ray E. Sweat, the following served as members of the committee during preparation of the report. Robert W. Acker; Nicholas J. Lazos, Esquire; Bernard M. Rifkin; Moses K. Rosenberg, Esquire; Hugh D. Reams, Jr.; Gordon Granger; Edward A. Blaty; Richard J. Pozdol; Donald P. Waddick; Abraham Resisa; Jerrel L. Guerino; John S. Thorton, Jr.; William M. Heard, Jr.; Bradley J. London; Marion W. Faddis; E. A. Bowen, Jr.; Fred Gabler; William J. Murray, Esquire; Leo W. Haymans; George P. Daniels; Ted W. Morris; Kenneth Makinney; Robert C. Mitchell; William W. Laiblin; William H. Keyes; Harold F. McLeran, Esquire; Roy H. Worthington; Charles I. Tucker; Joseph V. Bologna, Esquire; Daniel Murray, Esquire; Timothy J. Whitsitt; Gary F. Casaly; J. William Yogus; Edward W. Simonet, Jr.; Bobby L. Covington; Arthur N. Nystrom; Glenn F. Kenney; David J. Stuczynski, Esquire; Harold W. Wandesforde; James V. Lombardo; P. C. Templeton; John A. Albert; Jack L. Donnell; H. G. Ruemmele; John W. Myers; Dale Astle; Larry Feagans; Sidney D. Kline, Jr., Esquire; Pickett M. Greig; Marion L. Powell, Esquire; Ernest G. Carlsen; Phil B. Gardner; Ralph T. Rawlins; Craig S. Larson; Sheldon Bowers; Hugh D. Reams, Jr.; Charles C. Gleiser; Eugene J. Ouchie; Roy P. Hill, Jr.

pig pen was built. And it was tolled in 1969 by the unequivocal acts of defendants, in ordering a survey; and in 1970 by giving plaintiffs notice of defendants' claim. The garden continued at the permission of defendants. In Ohio, claimants must show some actual exclusive act of possession so open, notorious and hostile that it constitutes in law, notice to the real owner; and such possession must continue for the statutory 21-year period.

The court discussed "color of title" which is a term of art, not an element of adverse possession. The term is used as a general basis for a claim to property; a reason for justification for an assertion of ownership. "Color of title" goes to, or is one of several aspects contemplated in the definition of hostile and adverse. These plaintiffs fell short, establishing 19 or 20 years of possession, but not the required 21.

Adverse Possession—Permissive Inception

In this action to recover real property to a strip of land defendant claimed title by adverse possession, having maintained a garden and cut the grass on the parcel in question. Plaintiff offered proof that permission had been granted to defendant's predecessor to maintain the garden.

A judgment in favor of the plaintiff was affirmed. When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him (*Hinkley v State of New York*, 235 N.Y. 309,317). The evidence did not establish the assertion of this right by the defendant (*Shandaken Reformed Church v Leone*, 87 AD 2d 950, N.Y. 1982).

Artificial Accretion

Williamson v. Crawford, _ 109 Mich. App. 460, 310 N.W. 2d 419 (1981)

While it has been established in Michigan that land formed by accretion belongs to adjacent riparian owners, there had previously been no Michigan authority on the question of whether property created by filling done by a third party should be treated the same as natural alluvion property. The court of appeals applied the general rule established in other jurisdictions that such artificially created lands belonged to the owner of the riparian property to which they are contiguous.

Bankruptcy—Discharge

In an action in subrogation by a guarantor against defendant debtor, the latter interposed the defense of a discharge in bankruptcy. Plaintiff moved for summary judgment, alleging that defendant had failed to schedule plaintiff as one of his creditors in the bankruptcy proceeding. Defendant failed to prove that plaintiff had notice or actual knowledge of the bankruptcy.

Summary judgment was granted to the plaintiff. A discharge in bankruptcy is ineffective unless there is "due scheduling" or "notice or actual knowledge" by the creditor of the bankruptcy proceeding. (*State of New York, Higher Education Services Corporation v. Blewett*, 87 AD 2d 907 N.Y. 1982)

Bankruptcy—Receivership

Matter of First Colonial Corporation of America v. American Benefit Life Insurance Company, 693 F. 2d 447 5th Cir. _ U.S. App. Pndg. (1982)

First Colonial Corporation of America was adjudged an involuntary bankrupt and all timely claims were satisfied. American Benefit Life Insurance Company, disputed majority shareholder of First Colonial, petitioned a state district court to appoint a temporary receiver and the trustee petitioned a federal district court for appointment of a receiver. In January of 1981, American Benefit moved for delivery of the residual assets to James J. Zito, in his capacity as temporary receiver for First Colonial as appointed by the state court. After a hearing, the bankruptcy judge directed the trustee to surrender to Zito, all First Colonial assets. The trustee appealed to the district court, which held that since the administration of the trustee in bankruptcy was complete the only issue remaining was the identity of the party entitled to the surplus assets and that the broad discretion accorded the bankruptcy judge extended to directing delivery of the surplus assets to a receiver appointed by a state court. The court then dismissed the trustee's petition for appointment of a federal receiver whereupon the trustee appealed.

The issues on appeal were:

(1) Whether a shareholder of bankrupt corporation has standing to request the bankruptcy judge to recognize a temporary receiver appointed by a state district court for the purpose of preserving the debtor's residual assets at the completion of the administration of the estate by the trustee.

(2) Whether a bankruptcy court has authority to recognize a state court receivership for purpose of preserving the debtor's residual assets.

The appeals court in an earlier decision held that American Beneficial, as a shareholder, had a valid interest in the disposition of the residual assets so the court had no problem in deciding the standing issue in favor of American Beneficial. The court also stated that the trustee's authority and responsibility for protecting the estate does not extend to a dispute over the validity of the claims of those purporting to own surplus assets after completion of the bankruptcy proceeding.

As to the power of the bankruptcy court to turn the proceeds over to a receiver appointed by a state court, the appeals court found this to be within the bankruptcy court's discretion, to be exercised in the interests of the parties, the estate and the proceeding. The court noted that it is outside the scope of bankruptcy to decide conflicting claims of stockholders or as to who is entitled to assets of a dissolved corporation. Finding that the bankruptcy court had properly exercised the discretionary power, the appeals court affirmed the dismissal of the petition for a federal receiver.

Boundaries

DeRoche v. Winski, 409 So. 2d 41 (Fla. 1981)

Allen sold the southeastern portion of a tract of land that he owned and inadvertently placed the boundary markers of two corners 15 feet to the east of the actual corners. Smith bought the property in 1957 and erected a fence, a hedge and a garage along what was delineated as his west boundary. Allen, and later his successors in title, including the appellees, used a 15-foot strip running parallel to and just west of this west boundary line. In 1978, Smith sold the property to the appellants, who discovered the error. They immediately moved their west boundary 15 feet west, erecting a fence that barricaded the appellees' driveway. Appellees brought an action to enjoin the appellants from maintaining this fence. The trial court entered judgment for the appellees on the basis of adverse possession.

On appeal, the Second District Court of Appeals affirmed the trial court's decision, but not on the basis of adverse possession. The appellate court said the appellees did not qualify under either of two tests for adverse possession provided by Sections 95.16 and 95.18, Florida Statutes. The appellees neither had paper title nor had they paid the taxes on the property.

The appellate court affirmed the judgment on the basis of a doctrine which is sometimes called "boundary by agreement." The appellate court held that when a common grantor of adjacent parcels of property has established a dividing line between them with the knowledge and consent of the grantees of the respective parcels, and the grantees go into possession and observe that boundary line by acquiescence and recognition for an extended period of time, that line becomes binding between those grantees and their successors in interest and cannot be changed except by the agreement of the parties.

Conditions, Covenants and Restrictions

In *Springmeyer v. City Of South Lake Tahoe*, 132 Cal. App. 3d 375, 183 Cal. Rptr. 43 (1982), plaintiff brought a quiet title action against the city alleging to be the owner in fee simple of a one-third interest in the subject property which had been conveyed to the city (by her trustee, in her behalf) by deed containing an automatic reversion. The habendum clause in the deed provided that the land was to be used for "government office purposes." There were two conditions of reversion declared. First, if the city failed to build and occupy one or more office buildings for city office purposes, by a specified date, the property was automatically to revert to the grantors. Second, if subsequent to compliance with that condition, the real property ceased to be used for "government office purposes," an automatic reversion was to occur. The first condition was not in issue as the city had complied and was using the property for various basic municipal government purposes. However, the city had allowed buildings and other structures to be built upon the property for use by the county. Plaintiff then commenced this action alleging a violation of the second condition, which, in the view of the plaintiff, required defendant city to utilize the property solely for municipal government purposes. Defendant's general demurrer was sustained and a judgement of dismissal entered.

On appeal, in response the plaintiff's conten-

tion that a demurrer is an inappropriate prodecure by which to test the meaning of "government office purposes" since it precludes use of extrinsic evidence of the grantors' intentions—the court first held that such evidence may not be used to clarify a latent ambiguity in the terms of a reversion condition. It is for the courts to independently determine from the face of the deed whether it requires reversion.

To survive a demurrer, the deed must show a clear intention to allow a reversion upon the particular contingency which is alleged to have occurred. The reason for this is that the law views reversion as an anomalous doctrine, an exception to the general aversion to forfeiture. Reversion is a drastic remedy for imposing the grantor's restrictions upon the use of the real property. Its all-or-nothing character has an inherent potential for working inequity, since it provides no occasion for comparison of the severity of the remedy with the gravity of the breach. Accordingly, to minimize the potential for inequity, the law requires clear expression of the grantor's intent in the deed.

As to the reversion language in the deed, the court noted that the first condition unmistakably contemplated use of the property for city government purposes—"Grantee will construct or will cause to be constructed on the hereinabove described real property, one or more office buildings which shall contain office space for the use and occupancy of various basic municipal government departments, services and offices, including by way of example and without limitation, grantee's building, planning, and recreation departments and city manager. . . . " However, in the second condition, the grantors did not use the words, "municipal government," but rather that the reversion occurs when the property "ceases to be . . . used for government purposes." The trial court determined that this meant any government office—state, county, or city. The appellate court held that the deed was susceptible of this reading since it displays the grantors' command of words of narrower governmental import ("city," "municipal") implying a deliberate use of "government" in its broader sense.

The court acknowledged that the deed could also be read in context, as the plaintiff averred, but a showing of latent ambiguity was insufficient to survive a demurrer, since, if the language in the deed will bear a reasonable construction which avoids a reversion, that construction must be adopted.

The court also affirmed on an alternate ground. Accepting plaintiff's construction raised another ambiguity, whether exclusivity of city use should be read into the condition. In this context, the court substituted, "city government office," in the deed where, "government office," occurred. The habendum clause, as so interpreted, did not provide plaintiff with a right of reversion, even if the purposes declared are exclusive. Further, the transformation of the second condition was also of no avail as it would then read, "(i)f . . . said real property at any time ceases to be and is no longer used for city government office purposes, then the title to said real property shall automatically revert to the grantors . . . . " Reasonably read, this produces an automatic reversion only if the properties are no longer used for any city government purposes, a condition not alleged. The judgment of dismissal was affirmed.

Condominiums—Association has Standing to Sue

Siller v. Hartz Mountain Associates, 184 N.J. Super. 450, 446 A.2d 551 (Chan Div. 1981), affirmed 184 N.J. Super. 442, 446 A.2d 547 (App. Div. 1982).

Owners of five residence units at a condominium development brought an action seeking a variety of relief against the developer. The complaint included allegations that the developer built the premises and the common elements in a defective and improper manner and in breach of express and implied warranties. By consent, the condominium association was joined as a plaintiff-intervenor and then undertook to settle, on behalf of all unit owners, the claims against the developer.

Does the condominium association have the standing to assert the cause of action and to settle the claims?

The Condominium Act provides a mechanism by which the common interests of unit owners will be protected and advanced. This mechanism is the association which, granted responsibility to conduct all activities of common interest to the unit owners, has authority

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to act in behalf of all unit owners with respect to common elements. The statutory scheme requires that the statute be liberally construed to include the assertion and settlement of claims on behalf of unit owners against the developer with respect to common elements. To deprive the association of the right to act on behalf of all unit owners in such matters would leave the responsibility for and authority over the common elements fragmented and thus make vindication of the common rights highly uncertain, difficult and burdensome.

Condominiums—Covenants

Prestwick Landowners' Assn. v. Underhill, 69 Ohio App. 2d 45, 429 N.E. 2d 1191 (1980)

The Underhills purchased a lot in Prestwick Condominium in May of 1977. In July, they submitted plans for shrubbery and a fence to enclose a portion of their back yard. The condominium units are 134 parcels of real estate, each being about 100 by 130 feet. The common areas are the streets and three strips of land. Underhills submitted their plans for shrubbery and a fence to the "architectural committee" as required in the condominium declaration. The committee found the Underhills' plans to be "informal" and rejected them. The standard for fences is established as follows: "harmony of structural design and location in relation to surrounding structures and topography." The Underhills ignored the committee and built their fence, and the landowners association sought an injunction. In fact, there were no two fences alike in the entire development. The policy of the "architectural committee" was to consider each and every request for a fence on its individual merits. Thus, the Underhills had no written or *de facto* guidelines at all in submitting their plans.

Will the fence be enjoined?

Holding: Covenants requiring consent before construction are valid so long as there is a general building plan in effect and the plan sets reasonable parameters for the exercise of consent. However, in this case the committee had no guidelines. There is too great a possibility here that the consent restriction can be exercised in an arbitrary, capricious and unreasonable manner.

Covenant Against Encumbrances—Damages

Stockman v. Yanesh, 68 Ohio St. 2d- 63, 428 N.E. 2d 417 (1981)

Appellants, the Stockmans, entered into an oral agreement to purchase a house from appellees, Yanesh. According to the agreement, the Stockmans were to assume a $75,000 mortgage, pay $30,000 in cash, and give a $30,000 promissory note payable in 90 days and give $15,000 worth of sportsware. The warranty deed executed the same day provided that there were no liens and encumbrances on the property. The Stockmans learned that, in addition to the mortgage, there was a judgment lien and two tax liens on record. Appellants claimed for damages and recission. Appellees, Yanesh, intended to pay the encumbrances out of the $30,000 promissory note, being part of the proceeds of the sale, but stated that the Stockmans had failed to timely complete the sale. By the time the claims came on for trial, the home had been re-sold to a third party, all of the encumbrances had been removed and the entire sale price had been paid to Yanesh.

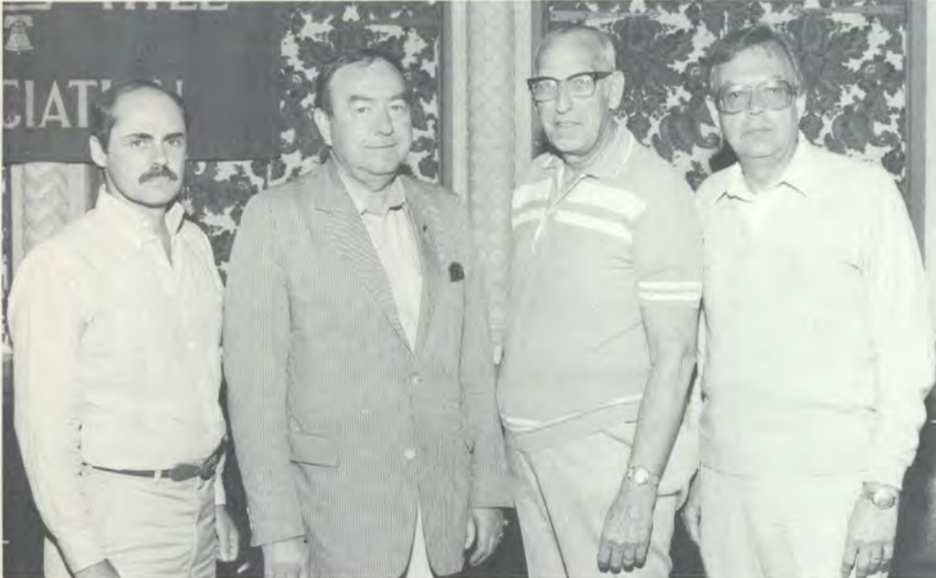
What is the measure of damages due to the Stockmans on their claim of breach of covenant?

Conversion

Collins v. Intervest, Inc., 418 So. 2d 1030 (Fla. 1982)

The appellants brought an action for conversion against the appellee, Intervest, alleging that Intervest trespassed upon the appellants' land and removed large amounts of soil and fill material without the appellants' knowledge or consent. Appellants alleged that Intervest placed the soil upon nearby parcels of land owned by a second appellee, Real Estate Technology, Inc. A third party appellee subsequently foreclosed on a mortgage from Real Estate Technology, Inc. on these lands, and eventually sold the property

Lasseter Elected PLTA President



New officers of the Pennsylvania Land Title Association elected at their annual convention in Hershey, Pennsylvania, are, from left, secretary, Michael Fredrick, First American Title Insurance Company; president, David Lasseter, Stewart Title Guaranty Company; vice president, Robert Freiss, Lawyers Title Insurance Corporation; and treasurer, Earle Andrews, Industrial Valley Title Insurance Company. In the lower photograph, members of the PLTA Public Relations Committee discuss a display of their activities with 1982-83 ALTA President Tom McDonald, right, a principal speaker at the PLTA convention. Committee members shown from left are Richard Burroughs, Title Insurance Corporation of Pennsylvania; Edward Schmidt, Pennsylvania Land Title Institute; and Marvin New, Commonwealth Land Title Insurance Company.

to a fourth appellee. Appellants alleged that all of the appellees knew of the illegal removal of the soil and fill material from the appellants' land by Intervest. The trial court granted the appellees' motion to dismiss on the grounds that conversion was not a proper remedy for a plaintiff to recover dirt which had been severed from his land and affixed to another's land. The trial court relied on *Hatfield v. Spears* 380 So 2262, an Alabama Supreme Court decision.

Can conversion action be brought to recover dirt severed and affixed to another's land?

Holding: On appeal, the Second District Court of Appeal reversed the trial court decision. The district court of appeal held that an action for conversion will lie for soil wrongfully severed from its original bed, removed and placed on other land. The district court of appeal failed to accept the distinction made by Alabama court that once severed soil becomes incorporated into other realty, the soil is no longer personal property and cannot be the subject of an action for conversion. The district court of appeal agreed that the incorporation of the severed soil into the new real property might make the task of assessing damages difficult, but such difficulty should not deprive the plaintiff of an otherwise viable cause of action.

Deed Descriptions—Evidence

Cohan v. Thurston, 223 Va., 523, 292 S.E. 2d 45 (1982)

Francis H. Cohan and wife acquired Lot 1 in 1956 by deed description referring to the lot per recorded plat, said lot as shown on the recorded plat including a strip of land partially separated from the remainder and larger portion of the lot by a boat basin. Plaintiff Cohan filed an action in ejectment against defendants Thurston, *et al*, claiming title to this strip of land. Defendant contended that the deed description to Cohan was ambiguous, and in order to clarify the ambiguity introduced extrinsic evidence in the form of testimony from the surveyor and developer to explain the intent of the parties as to the plat and deed conveyance. The trial court ruled that the plat was ambiguous, and that the deed description was, therefore, ambiguous, permitting the admission of extrinsic evidence to explain the intention of the parties. The plaintiff appealed.

Holding: Reversed. The Supreme Court of Virginia ruled that, while extrinsic evidence may be admitted to explain a document *where there is an ambiguity on the face of an instrument*, in this case there is no ambiguity on the face of the plat in that no line separated the strip of land from the remainder of Lot 1, and that points in boundary lines or points of curvature denoted by a surveyor's symbol for a point do not indicate or denote division lines.

Deeds—Delivery

Havens v. Schoen, 108 Mich. App. 758, 310 N.W. 2d 870 (1981).

Plaintiff brought an action to set aside a deed or to impose a constructive trust on property as to which she had executed a quit claim deed to her daughter. The deed was recorded, but upon recording was returned to the grantor who continued to enjoy the benefits of the property and pay all expenses attributable thereto.

The recording of a deed creates a presumption of delivery, a necessary element to convey title to property. The effect of this presumption is to place upon the other party the burden of proving the contrary. One who relies on the deed has the burden of proof of delivery and requisite intent.

A carefully reasoned dissent was filed by Judge MacKenzie, analyzing Michigan case law on the subject of delivery of deeds. The dissent points out that the grantee daughter predeceased plaintiff who had executed the deed in contemplation of her own death, and characterized the plaintiff's testimony as self-serving and an effort to eradicate an unintended result of an act fully intended.

Deeds of Trust—Dragnet Clause

Trapp v. Tidwell, 418 So. 2d 786 (Miss. 1982)

Tidwell executed a promissory note in favor of the First Mississippi Bank of Commerce (FMBC) secured by a deed of trust on certain property. While the note was still current, FMBC instituted foreclosure proceedings under a dragnet clause contained in the deed of trust to recover losses suffered due to fraudulent and tortious action taken by Tidwell while serving as an officer of the bank. Tidwell sought and obtained a temporary injunction enjoining FMBC from conducting the foreclosure sale. Subsequently, FMBC's motion-to dissolve the injunction was denied when the chancellor held that the dragnet clause applied only to those sums which were contracted for by Tidwell. On appeal, FMBC contended that the dragnet clause contained in the deed of trust also operated to secure claims of FMBC which arose as a result of Tidwell's fraudulent actions. FMBC further contended the chancellor erred in allowing Tidwell to collaterally attack a final judgment of the Circuit Court of Alcorn County by permitting Tidwell to testify regarding a default judgment previously rendered against him which the lower court in the instant case then declared invalid.

Relying on *Williams v. Life Insurance Company of Georgia*, 367 So. 2d 922 (Miss. 1979),

Continued on page 19

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Names In The News . . .

Ticor Title Insurance Company has named to the position of executive vice president and manager of its new regions, **Billy F. Vaughn**, Dallas, Texas, southwestern region, and **William T. Seitz**, New York, northeastern region.

Other appointments with Ticor Title Insurance are: **Wayne Trapp**, Nashville, Tennessee, agency manager for that state; **Hilary A. Kruce** to associate title counsel, Dallas, Texas; **Thomas J. Toboluki** to senior associate title counsel, Milwaukee, Wisconsin; and **A. Trip Wingfield**, Atlanta, Georgia, to sales manager for that state.

Ticor Title Insurance of California has named, in that state, **Nicki Beard** to sales manager/vice president, Walnut Creek office; **Tony Psihopaidas** to sales manager, Auburn office; **Arvid G. Erickson**, Walnut Creek, to state manager for northern California; and **Richard M. Blumenthal** to assistant vice president/associate title counsel, San Francisco office.

American Title Insurance Company has named the following regional managers to senior regional vice president: **John R. Aycock**, central region; **Clarence R. Castel**, northeast region; **William B. Moeser**, western region; and **James R. Simpson**, southwest region.

M. Leanne Lachman, president and chief executive officer of Real Estate Research Corporation, has been elected to the board of directors of Chicago Title Insurance Company and Chicago Title and Trust Company.

E. Russell Sherman, Los Angeles, California, western regional manager, **Michael A. Lewis**, New York City, northeastern regional manager, and **Frank C. Casurella**, Atlanta, Georgia, southeastern Atlantic regional manager for Chicago Title Insurance Company, have been elected senior vice presidents. **William L. McKenna** has been appointed resident vice president and manager, Los Angeles County, California, operations for the company.

Barbara J. Harms, Chicago, Illinois, has been elected vice president and director of corporate communications and advertising for Chicago Title and Trust Company.

Edward P. Locher, Philadelphia, Pennsylvania, treasurer of Commonwealth Land Title Insurance Company and its subsidiaries, has been named senior vice president of the company. **Gail Smith** has been promoted to accounts manager—national title services in the Chicago office of Commonwealth.

First American Title Insurance Company has named **Royce Johnson** vice president—administration, Santa Ana, California.

First American Title Insurance Company of New York has announced the election of **Thomas C. Lupia**, vice president of operations, to the concern's board of directors.

Lawyers Title Insurance Corporation

Vaughn

Seitz

Aycock

Castel

Moeser

Simpson

Lachman

Sherman

Lewis

Casurella

McKenna

Harms

Locher

Johnson

Lupia

Burdette

Martin

Riddle

announces the following appointments in their Richmond, Virginia, office: **Gary W. Burdette**, vice president—field systems support group; **Robert L. Martin**, assistant vice president—personnel; and **Judy Noel Riddle**, regulatory counsel.

Tracy J. Robin, Tampa, Florida, and **Lloyd R. Miley**, Polk County, Florida, have been appointed branch managers of those offices, respectively.

William L. Robinson, Jr., has joined Title Insurance Company of Minnesota as assistant counsel in the company's Chicago national accounts office.

Michael A. Pollack has been named president of Houston Title Company, Houston, Texas.

American Title Company, Houston, Texas, has named to the position of vice president and area manager **Richard S. Adams**, Galleria office, and **Dan Liane**, Champions area office.

Robin

Miley

Robinson

Pollack

JUDICIARY—continued from page 17

the Mississippi Supreme Court construed the dragnet clause contained in the deed of trust more strongly against FMBC as the draftor of the deed and held the dragnet clause did not attach to an unliquidated claim or tort. The Court found the instant case to be clearly distinguishable from *Newton County Bank, Lorin Branch Office v. Jones*, 299 So. 2d 215 (Miss. 1974), because Tidwell only served as an instrument in approving the extension of several fraudulent debts and was not, himself, a party to the contracts. Since these debts were unliquidated claims or torts, they were, therefore, not included within the parameters of the dragnet clause.

Finally, the Court held the chancellor had properly allowed testimony as to a previous default judgment in an effort to determine whether that obligation should have been included under the dragnet clause of the deed of trust in issue. The case was affirmed.

Due-on-Sale—Wellenkamp Applicable to Non-Institutional Lenders

In *Dawn Investment Co. v. Superior Court* 30 Cal. 3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982), petitioners had sold a 16-unit apartment house to the Becks, taking a note for $34,000, secured by a second deed of trust on the property (both of which contained due-on-sale clauses). Thereafter, the Becks transferred the real property to certain real parties in interest, taking back an all-inclusive deed of trust to secure an indebtedness of $445,000. Petitioner-beneficiaries refused to accept installment payments on the note and notified the other parties of their election to accelerate under the due-on-sale provisions contained in the note and deed of trust. The trial court granted a preliminary injunction preventing the foreclosure under the power of sale contained in the second deed of trust and the beneficiaries petitioned the supreme court for a writ of mandate compelling vacation of the injunction.

The court held that the rule, barring enforcement of a due-on-sale clause by an institutional lender unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or that the risk of default is equally applicable to private lenders, is immaterial whether the real property involved is residential or commercial.

Petitioners sought to distinguish the rule of *Wellenkamp v. Bank of America* (1978) 21 Cal. 3d 943 on a number of grounds, to no avail. First it was urged that private lenders, unlike institutional lenders, lacked the resources to determine whether the sale will endanger the security. The court responded that many private lenders deal through brokers, and to that extent credit information would ordinarily be available on the same basis as to institutional investors. It was next urged that private financing is ordinarily short-term and that the quantum of restraint resulting from enforcement of the due-on-sale clause is less than that resulting from enforcement when the financing is long-term. The court stated, however, that, nevertheless, enforcement of the clause when the financing is short-term may still result in a significant restraint on alienation because it may require search for other financial sources during periods of tight money. It was further urged that private lenders, unlike institutional lenders, may not spread the risk of loss over numerous loans and therefore should be permitted to automatically enforce the due-on-sale clause. The court stated that inability to spread the risk of loss exists whether or not the property is sold. The court also stated that the business risk of borrowing short-term and lending long-term is not ordinarily a concern to private investors, and thus the entire discussion in *Wellenkamp*, including the portion relating to economic projections, had little, if any, relevance to private lenders. Accordingly, the fact that the private lender, unlike the institutional lender, is not in the business of making loans and is ordinarily not in the position to make projections of economic conditions was not relevant and this distinction drawn by the court in *Wellenkamp* to reject justification of the foreclosure could not be used to support foreclosure by a private lender.

As to the nature of the property the court saw no reason to distinguish between residential and investment property. The court observed that the statute prohibiting restraints on alienation does not contain any language warranting an exemption for investment property. Furthermore, measuring the quantum of restraint, it is apparent that enforcement of the due-on-sale clause in periods of tight money may preclude sale or require reduction of sale price of investment property just as it does with residential property. The fact that an investor ordinarily sells for business reasons rather than personal ones and is in a better position to defer a sale during periods of tight money indicates actually that the quantum of restraint, if anything, is greater for investment property and therefore constitutes an unreasonable restraint on alienation. Nor do the investor's business considerations furnish justification for the restraint. Whether the property is residential or investment, the new purchaser may make a substantial down payment, and there is no substantial reason to assume that he is a worse credit risk than his seller. Moreover, the income potential of investment property tends to reduce the importance of the purchaser's credit worthiness. Furthermore, there was no reason to assume that the management ability of a purchaser who invests his funds and time in the property and its management will impair the security or increase the risk of default.

Thus, the court discharged the alternative writ and denied the peremptory writ.

(To be continued in the November, 1983, Title News)

Bollum Elected CLTA President

Robert H. Bollum, president of Land Title Insurance Company of San Diego, was elected 1983-84 president of the California Land Title Association at the annual convention of that organization in Newport Beach, California.

Also elected to office were William H. Little, president, SAFECO Title Insurance Company, Los Angeles, to CLTA first vice president; Joseph D. Gottwald, president, California Counties Title Company of South Pasadena, second vice president; and William D. Klimback, executive vice president, southern California operations, Ticor Title Insurance Company of California, treasurer.

Calendar of Meetings

October 2–5
New York State Land Title Association
Sky Top Lodge
Sky Top, Pennsylvania

October 6–8
Wisconsin Land Title Association
Paper Valley Hotel and Conference Center
Appleton, Wisconsin

October 14-16
Palmetto Land Title Association
Hilton Head Holiday Inn
Hilton Head Island, South Carolina

October 20-22
Land Title Association of Arizona
Sheraton Tucson El Conquistador
Tucson, Arizona

November 9–12
Florida Land Title Association
Hyatt Palm Beaches
West Palm Beach, Florida