December 1983

TITLE NEWS

The White House, Congress and 1984

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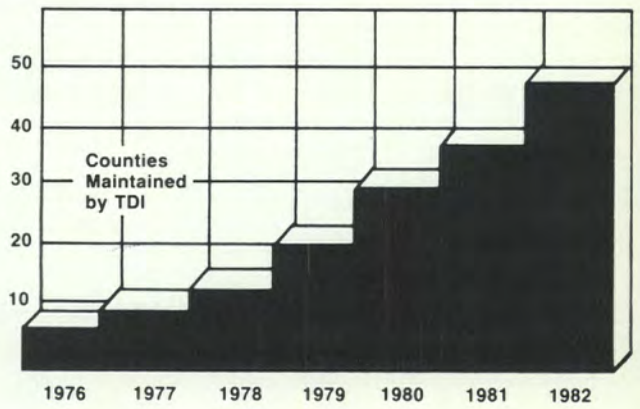

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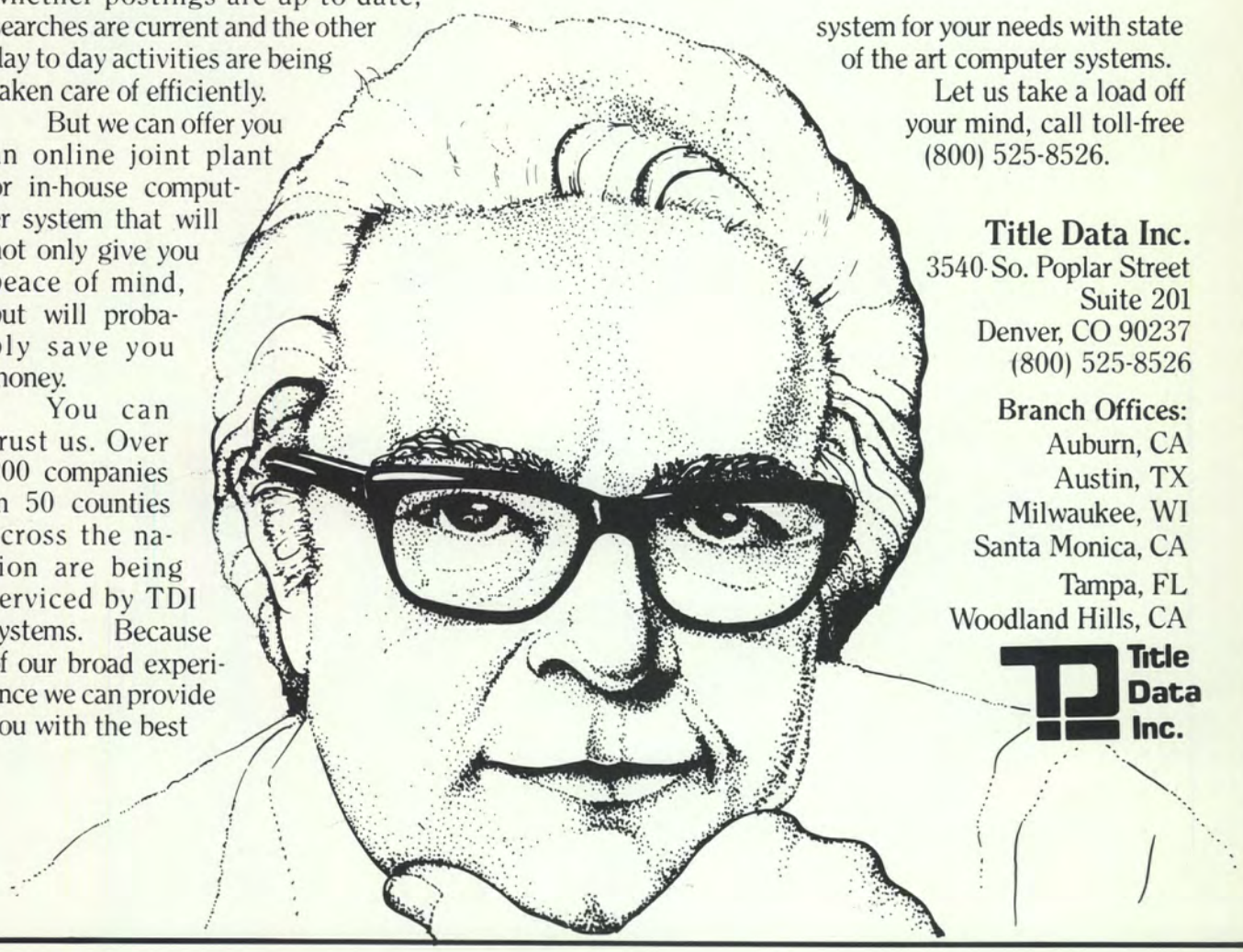

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TITLE NEWS

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Front Cover

What are the challenges that Ronald Reagan faces as a presidential candidate in the 1984 election? How is the race to determine the Democratic presidential contender shaping up? And, what is the election outlook regarding the makeup of Congress? Jack W. Germond, nationally-syndicated columnist who has covered politics from Washington since 1960, presents his analysis beginning on page 6.

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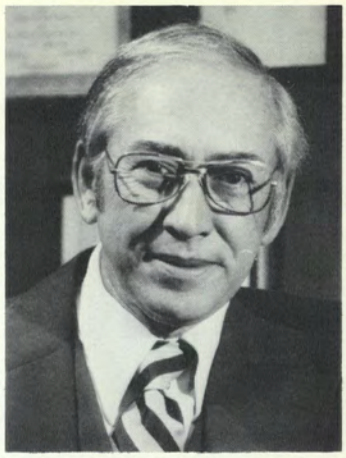

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A Message From The Chairman, Title Insurance & Underwriters Section

With as much lead time as is necessary to conform to publication deadlines, and with the knowledge that this is scheduled for publication in December, I suppose a holiday theme is in order. Be that as it may, it is difficult to get into a festive mood when the frost is not yet on the pumpkin. But, on behalf of the officers of the American Land Title Association, let me wish all of you the best for 1984.

Reflecting on 1983 and on the state title conventions I had the privilege of addressing, I would hope that in 1984, through the association of state officers, consideration be given to the situation faced by a number of state associations who cannot, because of their size and financial condition, serve their members to the same degree as the larger state associations. Programs offered by the larger state associations to their members are of great and intrinsic value, but with smaller groups such programs are not feasible either due to a lack of funds or a lack of time to develop them.

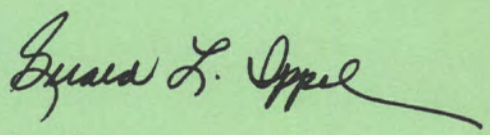
There are, I believe, several alternatives which might be considered by smaller state associations. There is a possibility of merging one or more small state associations in order to provide the financial resources necessary to carry out a program of common interest and benefit. We have some regional title associations which have been quite successful in serving members from several states.

Then, there is a possibility of neighboring states holding joint meetings and conventions. This idea has been used in a number of states and it has the advantage in that, while each state association retains its own identity, each state benefits from the economies of size by having one meeting site and a common program.

There may also be an advantage in the joint development and exchange of educational and training programs. Even though state laws differ, there is sufficient commonality within geographic areas from which training programs could be developed. There could be an enhancement of membership recruitment for all the states involved if meaningful and beneficial programs are devised. Perhaps even a greater utilization of individual salaried officers could occur. One state executive officer could provide staff support for the members of several associations.

There is a great deal of pride in individual state organizations, and rightly so. I do think, however, that a great deal can be gained if individual states identify mutual interests and objectives with adjoining states. The American Land Title Association could provide the vehicle to assist any organization that might be interested in this possibility. The important thing is to get some dialogue started to explore the possibilities.

I am a firm believer in strong state land title associations because I also believe that strong state land title associations make a strong American Land Title Association. The encouragement of cooperation among state associations to develop sustained and useful programs for their members should be a primary goal of the ALTA in 1984.



Gerald L. Ippel

Jack W. Germond

The White House, Congress and 1984

Before we look at where we go politically in this country, I think we should look briefly at where we have been, and where we are right now. And we should do that in terms of elections, because I don't think you can over-estimate political considerations in everything that happens in Congress and in the White House, no matter how small. You will see presidential staffs transported with glee by the smallest political stroke that the President has managed.

After the 1980 election there was much extravagant rhetoric, both by the politicians and by people like myself, about what had happened in the 1980 election—all the talk about the Reagan revolution. But the dimensions of that victory by Ronald Reagan were impressive enough so that we had a basic question before us: Was that an aberration or was it the first sign of a genuine transformation of American politics and the American electorate?

Three years later we don't have any clear answer, which is the usual thing in Washington. We are very slow getting answers. It is true that a couple of things have happened that are generally signs of real transformation. The first is this: we now have a consensus on lowering domestic spending. Everyone doesn't agree on how much, everyone doesn't agree on which programs to reduce. But in a general way, there is a solid consensus to reduce domestic spending, and certainly there is almost no one who is talking about substantial increases in domestic spending outside of one area, education.

We also have a very sound consensus for increasing defense spending. This is the first campaign in which Democratic candidates are not talking about absolute reductions in defense spending. If you recall, even Jimmy Carter, who changed his mind later, was promising in 1976, a cut in absolute dollars of 5 to 7 per cent. This time no one is taking that position. Even the most liberal Democratic candidate, who is probably Alan Cranston of California, is supporting an increase in defense spending of something above the 3 per cent after inflation that we have promised our NATO allies.

Jack W. Germond is a nationally syndicated columnist who has covered politics from Washington since 1960. He has been a newspaperman for more than 30 years and also serves as a political analyst for NBC Television's "Today" show.

On the other hand, despite these changes, there are things that argue that we are not undergoing a basic change in American politics. One obviously is that in the postmortems on the 1980 election, we found there was a great deal more rejection of Jimmy Carter than affirmation of Ronald Reagan. There was one interesting statistic. ABC News did a particularly good exit poll on election day in 1980. It had a sample of 11,250 people, which is monumental. They were all people who had just voted so they were an accurate sample.

One of the questions that they asked them was this: If the race, this election, had been between Jimmy Carter and John Anderson, if Ronald Reagan had

not been there as a third candidate, for whom would you have voted? And Anderson beat Carter by three or four points. These were Reagan voters saying they would have voted for Anderson, with whom they agreed on almost no issue, rather than vote for Carter. So the rejection of Carter was a major factor in that election. It was not as ideological as Reagan would have us believe, and as some of us thought at the time.

In the election results last year, the Democrats gained 26 seats in the House, seven governorships and showed increased strength although no net gain in Senate seats. That was a serious setback to the administration but not necessarily a final answer to the basic question of whether there has been a transformation of American politics.

Our experience is that the changes in our politics are almost always evolutionary rather than revolutionary, and we may see in three or four elections a continuation of this trend toward more defense spending, toward less domestic spending. We can't tell for sure right now, how fast that is going to move. We should have a somewhat more definite answer next year.

Campaign Overview

Let's look at the context of that campaign right now, and the world with which President Reagan is dealing.

There are two ways to accomplish change in American politics. You throw the rascals out, or you change the minds of the rascals who are still there.

And what happened in 1982 was both of those things. We replaced a lot of people, we changed the minds of some other people. The result is that the President no longer, as we have discovered this year, has a de facto majority in the House of Representatives. On the contrary, the House is very difficult for him to deal with on domestic questions. And secondly, he still has the same majority of the Senate, actually one vote larger now since the death of Senator Jackson, but it is a very skittish majority. They are less likely to go along.

What happened in 1981 was this: A great many Republican Senators voted for things that they didn't really subscribe to. They voted for a tax cut—which they didn't think was a good idea and thought went too far. They voted for bigger increases in defense spending than they knew in their hearts was correct. They were going along with a new President, with what they thought was the political tide for the moment. Then they saw last year that the survivors of the 1982 election, their colleagues, were the ones who showed some independence of President Reagan during the campaign. They had close races but they won by being independent of the President. And this would include Senators John Chaffee of Rhode Island, Bob Stafford of Vermont, Lowell Weiker of Connecticut, David Durenburger of Minnesota, and Jack Danforth of Missouri.

"With Reagan you know . . . where he stands on a great many issues . . . On the other hand, there is no reason to believe . . . that Ronald Reagan is going to have some kind of a boat ride this time."

All of them won fairly narrowly. They won principally because of their ability to establish an image with the electorate for independent decision making.

What their colleagues are looking at now is a situation in which it is quite possible that the Republicans will lose the Senate in 1984. The Democrats need to gain six seats or they need to gain only five, if they elect the President and the Vice President.

They are now ahead by any measure, and likely to win, in three states—North Carolina, against Senator Helms; in Texas where Senator Tower has stepped down; and in Tennessee where Senate Majority Leader Baker is retiring. Those seats are likely to be Democratic.

They are probably going to be running essentially even and perhaps ahead in three others—in Iowa against Senator Jepsen, in Minnesota against Senator Boschwitz and in Mississippi against Thad Cochran. There are two others, Senator Humphrey of New Hampshire, Senator Percy of Illinois, who are potentially vulnerable to the Democrats.

On the other hand, there are almost no Democrats who are likely to be beaten, and there are only one or two, Max Baucus of Montana, and perhaps Claiborne Pell of Rhode Island, who are even potentially vulnerable. So there is a realistic chance that President Reagan would be dealing in a second term with a Democratic House and a Democratic Senate.

There is a real irony in the Senate situation. A great many of us suspect that one of the reasons that Howard Baker is deciding not to run is that he is not looking forward to the prospect of being minority leader rather than majority leader. And by not running, he, of course, contributes to that possibility because he could have been re-elected. Almost no other Republican is capable right now of carrying Tennessee in that situation.

The Senate outcome depends to some degree on the shape and the effect of the Presidential campaign.

It is Presidential election voting that increases the turnout in Congressional and Senate races. As a general rule when you get larger turnouts, you get more Democratic voters.

On the other hand, a candidate as strong as Reagan was in 1980, brings new people into the electorate, ideological voters, a great many in his case, a great many fundamentalists, Protestants from the South who ordinarily have not voted, but voted in large numbers the last time around.

Reagan Strengths, Problems

The President has several strengths going into this campaign. One, obviously, is that there is some economic recovery. It is not even, it is not thorough going, it is not comforting to the 9.4 per cent who are unemployed, it is not satisfactory to the people who cannot buy houses. It is an uneven recovery, it is a split recovery. One segment of the country is doing pretty well, another is not doing so well. Nonetheless, it is better than it was in 1982.

Secondly, the President has the enormous advantages of incumbency. He can raise all the political money that he needs, for any reasonable campaign. As the incumbent he also can control the agenda of issues in a way that a non-incumbent cannot. The ability of a man in the White House to dominate the television news programs, night after night after night, is staggering and a great advantage.

Finally, and I think this is the most important, whatever you think of Reagan, and whatever you think of his stewardship, Reagan is a President who

" . . . we will have a new kind of political standard to apply to the Democrats in the 1984 campaign . . . one that helps the leading candidates, and . . . hurts dark horses."

has established in the public mind that he has very clear goals. The people like a President who has clear goals even sometimes when they don't agree with those goals.

One of the problems with Carter was that no one knew what he was trying to accomplish. With Reagan you know what he is trying to accomplish; you know where he stands on a great many issues. He may not know the fine print, he may not even know a lot of the large print, but he does know what he wants to accomplish.

On the other hand, there is no reason to believe the conventional wisdom in Washington that Ronald Reagan is going to have some kind of a boat ride this time. It is not true.

I think he has some very serious problems. The first of these is the flip side of the economy question. There is an old rule, a catch 22, in politics when it comes to economic issues.

When the economy is bad the President in power, and the party in power, are blamed for it, as the Republicans and Ronald Reagan were blamed for it in the 1982 election.

When the economy improves and becomes less of a frontburner issue, people don't give them as much credit as they have given them blame. They feel that they can move on to other issues and start voting on different questions. There is a substantial body of people in Washington now whose opinions I respect, political people in both parties, who believe it is quite possible that next year the campaign will be based not on the economy, but instead on national security questions.

The question will be: Are we better off in Beirut than we were four years ago? Are we better off in El Salvador than we were four years ago? The answer obviously, from the Democratic standpoint, is not hardly.

Secondly, I would think there is a problem for the President in this: Because he is a goal-oriented President, he has evoked real hostility in some groups. He has caused a very sharp polarization of the electorate. You see that obviously with blacks. You see it with Hispanics and you see it with working women who are heads of households. And there are more than 20 million of them, who are supporting themselves and children by working. They are adamantly hostile to the President.

There are other groups that are not as conspicuously polarized, but groups in which the President cannot count on the kind of support he had against Carter. And that is true generally of Jewish voters where he managed to get something around 40 per cent, a phenomenal figure for a Republican. He won't do that well among Jewish voters this time. He won't do as well among the elderly, because he has confirmed a lot of suspicions along the way that he really is sort of hostile to the Social Security System. And, although they have a compromise, he has not been very reassuring for voters 65 and older.

And finally, I think this is the most important, he is going to have a very difficult time getting the kind of vote he had in the blue collar community. Because of the continuing unemployment, and because the unemployment is so bad in places that are politically important.

Let me suggest something to you about the unemployment figures. We look at the national figure and it is 9.4 per cent. That is better than having it at 11 or 12 clearly. Nonetheless, in key states, many of the communities in those states—where he counted on getting Democratic votes to move over last time—have high unemployment. For example, in Illinois the rate statewide is only slightly above the national average. But in Peoria, for example, the home of Caterpillar, the unemployment rate is now 17 per cent. In Rockford it is 15 to 17 per cent. In Kankakee it is 15 per cent. In Decatur it is 15 to 17 per cent.

Finally, the final problem he faces in this campaign, is what you have all read about—the "fairness" issue. What the fairness issue means simply is this: people see Ronald Reagan as a friend of the rich, and the powerful, and as a President who is essentially indifferent to the poor and the disadvantaged. I would not argue one way or the other whether that is a correct assessment. I will tell you nonetheless, it is a real assessment. It is exactly the way people see him. It shows up in every poll.

It is also something that you cannot change with gestures. This business of going and talking to Hispanic groups and black groups, and trying to talk to women to close the so-called gender gap, that doesn't work. This is a result not of momentary impulses on the part of these groups in the electorate. It is a result of reaction to policies, and when the policies mitigate against such groups, they understand it after a while.

That is a very serious problem. It is the one his own managers think is the most serious.

Democrat Situation Changes

Having assessed Reagan as a vulnerable candidate, you then get to the problem of the Democrats who, of course, have to nominate someone, and their record in carrying this out hasn't been so encouraging of late.

There is one thing that is quite obvious. The Democratic campaign of 1984 is going to be quite different from those the Democrats experienced on the last two occasions where they had several candidates challenging for the nomination—in 1972, when they chose George McGovern and in 1976, when they chose Jimmy Carter. This time the rules of the party, and some changes in the election law, have made it far less likely that a long-odds candidate will be nominated. And it has put a far greater premium on the ability of candidates to raise money, and a far greater weight on the high rankings that candidates achieve early in the national opinion polls. That's what makes the money possible. That is what has put Walter Mondale and John Glenn in such a commanding position.

The Democrats are great for having reform commissions. They reform the rules every four years. The latest reform commission was intended to shorten the campaign. That hasn't worked, since the campaign has been going on already for eight or nine months. I have already been to New Hampshire seven or eight times, to Iowa seven or eight times. If

Continued on page 22

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ALTA Judiciary Committee Report: Part 3

Option—Condemnation Award

Spokane School District v. Parzybok, 96 Wn. 2d 95, 633 P.2d 1324 (1981)

el4

Shortly before the expiration of a lease with option to purchase, a school district condemned the property. The award was more than twice the option price. After citing many cases denying the right of an optionee to participate in the condemnation proceeding because he had no interest in the land, the court discussed cases where the land had increased in value after the option was granted; found that the option would have been exercised; and upheld an award to the optionee of the difference between the condemnation award and price set forth in the option.

Partnerships—Limited

This action was brought by a limited partner against the general partners on a note executed by the limited partnership. The partnership assets were insufficient to pay the obligation.

The court held that when partnership assets are insufficient to pay partnership debts, creditors may look to the general partners to satisfy the debts (Partnership Law Secs. 26 and 98 subd.1). An internal limitation on an individual general partner's ability to bind the partnership of which plaintiff had no knowledge was held not to be a defense. Judgment was rendered in favor of plaintiff. *Belgian Overseas Security Corp.* v. *Howard Kessler Co.* 88 AD 2d 559 N.Y. (1982)

Practice of Law Vested Exclusively in Judiciary

Hagan v. Kassler Escrow, Inc., 96 Wn.2d 443, 635 P.2d 730 (1981)

A registered escrow agent closed transactions in which the earnest money receipts specified were to be closed in the office of plaintiff's law firm. Plaintiff brought suit alleging the escrow agent was engaged in the unauthorized practice of law and sought to enjoin such practice. While the suit was pending, the legislature passed a statute authorizing escrow agents to select, prepare and complete certain real estate documents. The escrow agent, in reliance upon the statute, moved to dismiss the action.

Holding: The statute violated the separation of powers doctrine. The state constitution vested judicial powers in the supreme court. One of the inherent powers of the judiciary is the power to regulate the practice of law, and the statute impermissibly usurped the court's power.

Oil and Gas Lease

Stapleton v. Columbia Gas Trans. Corp., 2 Ohio App. 3d 15, 440 N.E.2d 575 (1981)

On March 12, 1930, Gillette granted a 99-year oil and gas lease to Chartiers Oil Company which provided that the lessors may have free gas for light and heat in the mansion house on the 98-acre tract, said covenant to run with the land. Columbia Gas is successor to Chartiers Oil. In 1945, Gillette conveyed to Hayden and Emogene Stapleton. In 1952, Stapletons began using free gas for their home. In 1958, Stapletons reconveyed 40 acres of the tract to Gillette, retaining oil, gas and mineral rights. In 1958, Stapletons conveyed 1.21 acres to John and Mattie Stapleton. John and Mattie Stapleton extended a gas line from the residence of Emogene and Hayden Stapleton and also began using free gas in their newly built home. In 1961, Hayden and Emogene Stapleton conveyed 50.14 acres to Ruggles excepting prior conveyances and excepting minerals, oil and gas. Ruggles received a tract including the dwelling which was originally receiving the free gas under the lease. In 1961, John and Mattie Stapleton reconveyed the 1.21 acre parcel to Hayden and Emogene Stapleton who kept using free gas.

Who is entitled to free gas?

Holding: By use of the term "in the mansion house," it is self evident that only one such house was to receive free gas. When Stapletons began the use of free gas in 1952, no other house was entitled to free gas. The 1959 extension of the gas line to a second house was unauthorized. The covenant of free gas runs with the land. Ruggles now owns the home established as the mansion house. Ruggles gets free gas. The exception in their deed to oil, gas and mineral rights did not except the free gas which covenant ran with ownership of the surface.

Presumption of Death—Effect of Revocation

Bass v. Carlson, 419 So. 2d 410, Fla. (1982)

John Carlson acquired title in his own name to a 40-acre tract of land during 1939. Carlson left his wife and children on the farm in 1948; in 1957, the county court entered an order of presumption of death pursuant to the statutes then in effect. The supposed heirs, Carlson's wife, Ida, the appellees and the appellants, entered into certain written and oral agreements providing for the distribution of portions of Carlson's property. In 1964, John Carlson returned home. The order of presumption of death was revoked in 1976. Later in the same year, Carlson conveyed the entire 40 acres to the appellants. This conveyance was contrary to the oral and written agreements that had been entered into by Ida Carlson, the appellees and the appellants. Appellees won a trial court determination setting aside the deeds to appellants.

The most important issue: Whether or not heirs were bound by agreement entered into upon presumption of death of decedent.

Holding: On appeal, the district court held that the oral agreement to divide the land among supposed heirs was entered into when the order of presumption of death of the owner was in force, but the supposed decedent reappeared, the presumption of death was revoked, and the estate of the supposed decedent no longer existed. Thus, the earlier agreements were voided since they were based on a mutual mistake of fact that the supposed decedent was dead and that the parties had an interest in land which they could convey. The case was reversed and remanded for an entry of judgment for the appellants.

Restrictive Covenants—Zoning Ordinances

This action was brought to compel the removal of a six-foot stockade fence around the neighbor's swimming pool because it

blocked plaintiff's view of a park. The development's restrictive covenants forbad stockade fences on all lots and fabricated fences on corner lots. On other lots, fabricated fences were permitted to a limited extent. The covenants provided an exception necessary to conform to zoning requirements for fences around swimming pools.

The town code required swimming pools to be protected by fences between four and six feet in height. The code does not prohibit the use of stockade fences.

The court reversed the lower court decision dismissing the complaint and directed the defendants to remove the stockade fence. Since defendant's lot is at a corner, the covenant restriction most eligible to yield to the town code is the one prohibiting fabricated fences on corner lots, for such fences are permissible on other lots while stockade fences are banned on all lots. Therefore, the defendants may meet their code obligations by installing a fabricated fence which is not a stockade fence. (*Reagan v. Tobin*, N.Y.L.J. 7/20/82 p. 12).

Probate

Bratanov v. Riemenschneider, 1 Ohio App. 3d 42, 439 N.E. 2d 434 (1980)

The inventory of the estate of Carl C. Bratanov was filed October 30, 1979 with the appraised value of the "mansion house" set at $31,000. Plaintiff filed her petition to purchase as surviving spouse at appraised value pursuant to R.C. 2113.38 (A). The son of the decedent claims the appraisement is manifestly inadequate, that such a sale would unconscionably prejudice the rights of the parties in interest.

Is reappraisal required in the event an adversary proceeding should show the presence of fraud, collusion or the manifest inadequacy of the price fixed in the inventory?

Holding: Under R.C. 2113.38, purchase by a surviving spouse of the "mansion house" at appraised value contemplates an adversary-type proceeding in which defendants—heirs, devisees, legatees, lienholders, etc.—are given the opportunity to show the presence of fraud, collusion, or manifest inadequacy of price. If such a showing is made, the court shall order a reappraisal. The adversary proceeding permits defendant to order an independent appraisal.

Perpetuities—Irrevocable Option to Purchase

Plaintiffs and defendants were owners of contiguous parcels of land wherein defendant granted an irrevocable option to purchase a 20-foot strip abutting plaintiff's parcel. Defendants retained the right to terminate the option by notice in the event they received a bona fide offer to purchase their entire parcel. The option was granted to plaintiff "its successors and assigns" and was made binding upon the heirs, executors, administrators, successor and assigns of the parties hereto.

In plaintiff's action to enforce the option, defendants contended that the option was unenforceable on three grounds: (1) that the power of alienation was suspended for a period longer than that permitted by EPTL 9-1.1 (a)(2); (2) that the rule against remoteness in vesting set forth in EPTL 9-1.1 (b) was violated; and (3) that the option constituted an illegal restraint on the free alienability of property.

The court held that the option violated the statutory rule against remoteness of vesting set forth in EPTL 9-1.1 (g) and dismissed the complaint. The New York rule is intended to include a purchase option creating an interest which may vest beyond the permissible period of lives in being and a term of 21 years. (*Buffalo Seminary v. McCarthy*, 86 AD 2d 435 N.Y. (1982)

RICO—Forfeiture of Real Property

In *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), U.S. App.Pndg., defendant was convicted in the district court under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for the possession and sale of methaqualone. Defendant appealed both his conviction and the district court's order forfeiting certain properties. The government also challenged the district court's denial of its motion to correct the forfeiture order.

The indictment of defendant sought forfeiture of six parcels of California real estate under RICO. Defendant conceded that each of the parcels was acquired with the proceeds of his racketeering activity. Although the jury returned a special verdict forfeiting all six properties, the district court's judgment order forfeited only four of the properties, excluding from its order an income producing property containing a market and pharmacy, and an unimproved lot. After defendant petitioned the district court to remove its restraining order on the properties that had not been forfeited, the government responded with a motion to correct the forfeiture order to include the market and pharmacy. When the district court denied this motion, the government filed its appeal of that denial.

On appeal, the government did not challenge the district court's decision against forfeiture of the unimproved lot and conceded that a residential property was not subject to forfeiture. Defendant did not challenge the order in so far as it forfeited a night club. After affirming defendant's conviction, the court turned to the issue of the propriety of the forfeiture of two income producing commercial properties in the context of defendant's appeal. The court held that RICO requires forfeiture of "any interest in . . . any enterprise" acquired through the investment of "income derived . . . from a pattern of racketeering activity." The mere ownership by defendant of the two pieces of commercial real estate constituted an "interest in any enterprise." Examining both the language and the legislative history of RICO, the court found that Congress intended "interest in any enterprise" to include ownership of income-producing commercial real estate since it was in this type of property that organized crime had invested extensively.

As to denial of the government's motion to amend the forfeiture order to include the market and pharmacy, the court held that the forfeiture provisions were mandatory, leaving no discretion in the district court. Accordingly, upon the jury's determination that defendant had violated RICO and that his interest in the market had been acquired or maintained in violation of RICO, the forfeiture provisions were triggered and the district court was obliged to order forfeiture. The district court's denial of the government's motion was reversed.

In the course of determining that mere ownership of the real estate constituted an "interest in any enterprise," the court also stated that it was undisputed that defendant used the racketeering income to acquire the properties, and that the tenants were engaged in interstate commerce.

The dissenting opinion pointed out that the fact that defendant acquired property with in-

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.

come from racketeering activity did not by itself warrant forfeiture of that property. Defendant's property interest was not properly forfeited unless it could fairly be characterized as an interest in an "enterprise." Some of the properties housed active businesses and it was not suggested that those tenants were involved with defendant in a RICO "enterprise" since defendant was not associated with them in any way. Neither did defendant's property interest afford him a source of influence over the tenant businesses. Defendant's relationship with any of the businesses was only that of landlord and tenant. The dissent disagreed that the mere purchase of real estate using racketeering income constituted an enterprise, pointing out the anomaly that while income from racketeering activity would not itself be subject to forfeiture, any assets or income traceable to that income would be so subject. Furthermore, Congress would not have established rules for the investment of racketeering income if it intended by the use of the term, "enterprise," to comprehend that very activity and thereby to subject a forfeiture of the investment made. This was not to suggest that the activity of investment in real estate may never constitute an enterprise within the meaning of RICO. An owner or lessor may have such a relationship to the business carried on as to assume the character of an ongoing business concern. However, the evidence presented in this case showed nothing more than an ordinary arm's-length, lessor-lessee relationship and as such was insufficient to support a finding that defendant was such an investor. Nor did defendant's ownership constitute part of an ongoing real estate development scheme.

RICO—Preliminary Injunction

In *United States v. Veon*, 538 F.Supp. 237 (E. D. Calif. 1982), defendant Veon and 18 others were indicted for possession of a controlled substance with intent to distribute, possession, and conspiracy in violation of the Controlled Substances Act. This act is directed to continuing criminal enterprises and is commonly known by the initials CCE.

In connection with the allegation of a continuing criminal conspiracy, the indictment alleged that certain real and personal property owned by the defendant was subject to criminal forfeiture under CCE. The government sought an order restraining defendant Veon's transfer of certain interests in substantial real property. The question before the court was as to how and under what circumstances such orders are granted.

The court held that any court having jurisdiction over a defendant charged with a violation of CCE may issue an ex parte temporary restraining order governing property alleged to be forfeitable in the indictment. Prior to extending that order to a preliminary injunction, which would continue to trial, the government must prove, at a timely hearing and by a preponderance of the evidence, that it is likely to prove beyond a reasonable doubt that the defendant is guilty of a violation of the CCE and the property that it seeks to restrain is forfeitable under this statute. Such proof must be made at a hearing governed by the federal rules of evidence. Having so established the ground rules, the court set a hearing on the preliminary injunction.

Right of First Refusal—Counter Offer

Northwest Television v. Gross Seattle, 96 Wn.2d 104, 634 P.2d 837 (1981) Amended 96 Wn.2d 973, 640 P.2d 710 (1981)

Lease contained a right of first refusal. Lessor notified lessees that it had received a $90,000 offer subject to the sale of purchaser's home within 90 days of acceptance of offer. Two days later, lessee made offer to purchase for $90,000 subject to the sale of the home of the principal stockholder of lessee within 90 days of acceptance of offer. Lessor argued that this was a material variation of the offer, but the court compared it to obtaining financing within 90 days. It imposed upon the lessee the obligation to pay interest from the date it would have been entitled to possession rather than an obligation to pay rent.

The dissent thought the lesee's offer to be a counter offer because it was conditioned upon the sale of a different parcel of land not owned by the lessee, making it a materially different offer.

Special Assessments

Wymer v. City of Columbus, 2 Ohio App. 3d 147, 440 N.E.2d 1370 (1981)

On April 7, 1972, plaintiff purchased a parcel of real estate at 838 Bryden Road, Columbus, which parcel had an existing sidewalk. Plaintiff had no knowledge that the city had installed the sidewalk. On April 16, 1973, the city council passed an ordinance for the construction costs of the sidewalk. On August 7, 1975, the city certified the special assessment to the county auditor for collection.

Is the lien of assessment enforceable?

Holding: R.C. 727.34 provides that the lien of an assessment or any installment thereof shall continue for two years from the date of passage of a municipal ordinance under R.C. 727.25, which authorizes the legislative authority of a municipal corporation to make assessments upon lots and lands. Thus, the city had two years within which to certify the special assessment to the auditor following passage of the ordinance and it was not too late.

Special Estate Tax Lien—Foreclosure without Recording

In *United States v. Vohland*, 675 F.2d 1071 (9th Cir. 1982) the United States sued to foreclosure an unrecorded special estate tax lien against property which defendants had purchased without notice of the lien. Defendants' title to the real property was derived from the estate of the decedent. The executor was not discharged from personal liability for the estate tax.

The court held there was no statutory requirement that special estate tax liens be recorded; nor did the statute condition the lien's enforceability against transferees upon recording. The court stated that 26 U.S.C. Section 6324 provides purchasers considerable, though not complete, protection. Upon transfer of non-probate property to a purchaser, the property is divested of the lien, so that a purchaser of such property is fully protected. Property that was part of the probate estate is divested of the lien when it is transferred to a subsequent purchaser, but only if the estate's executor has been discharged from personal liability. Defendants' property was probate property, but the executor was not discharged from personal liability for payment of the estate tax and therefore defendants were not protected and the lien created by the statute survived the transfer.

The court also concluded that the recording requirements expressly imposed upon the general tax lien, 26 U.S.C., Section 6323 (f), under the Federal Tax Lien Act of 1966 was not applicable to the special estate tax lien as a prerequisite to its enforcement against subsequent transferees.

Further, court concluded that enforcement of the government's unrecorded lien against a bona fide purchaser for value without notice did not violate the due process clause of the Fifth Amendment. The means employed to collect the tax were not unnessary or inappropriate to the proposed end nor unreasonably harsh or oppressive when viewed in light of the expected benefit, nor did they arbitrarily ignore the recognized right to enjoy or to convey individual property. Thus, a purchaser of probate property may avoid risks of loss either by establishing that the executor or administrator has been released or by securing a certificate of discharge of the lien. Further accommodation of the purchaser is not constitutionally required.

The court additionally noted that the property was not taken summarily in that the only action taken by the government to enforce the lien against defendants was this litigation and that only after notice and hearing was a foreclosure sale ordered.

Specific Performance—Option to Convey Indeterminate Easement

In Scott v. Stoulil, 138 Cal. App.3d 786, 188 Cal. Rptr. 289 (1982), the owner of a 6½-acre parcel of property purchased an adjoining 1½-acre parcel to afford access to a street, but later sold that 1½-acre parcel to defendants, providing in the escrow instructions that the owner reserved an option to repurchase ingress and egress along the northwest boundary to the southwest boundary "as may be required by the city of Los Angeles for future development of 6.5 acres . . . " parcel. The option was to remain in effect not later than two years from close of escrow. The purchase price of the easement was to be pro-rated on the present purchase price plus taxes and interest and any other expenses paid. The owner then sold the 6½-acre parcel to the plaintiff and assigned the option to him. Plaintiff sought to exercise the option and his attorney timely notified defendants that $6,500 was being held in trust for purchase of the easement. Further, he stated that he had ascertained that an easement 30 feet in width would be required for the future development of plaintiff's property. Defendants refused to convey and plaintiff filed this suit for specific performance and declaratory relief.

The trial court found the option agreement ambiguous and too uncertain for specific performance in that it did not specify the nature, area, price or location of the ingress and egress right to be acquired. The phrase " as may be required by the city of Los Angeles for future development" was held to be ambiguous, indefinite and uncertain. The appellate court reversed with directions to the trial court to enter a new and different judgment, awarding specific performance to plaintiff and ordering defendants to convey to plaintiff an easement along the northwest boundary of their property, in accordance with the terms of the option agreement, the width of which is to conform to the requirements of the city of Los Angeles to allow development of plaintiff's 6½-acre parcel. Furthermore, the judgment was also to provide that defendants' duty to convey the easement shall be conditional upon plaintiff having ascertained its dimensions within a reasonable period of time from the date of the judgment.

The appellate court held that the option agreement was sufficiently certain to support the remedy of specific performance since, even though there was a subjective element, in that "future development" was left to the choice of the owner of the 6½-acre parcel, once the choice of development was made, the city's objective requirements for such development would determine the precise dimensions of the easement. It was clear that the indeterminate nature of the city regulations were exactly what the owner bargained for in the option agreement. It was only by reserving an easement for an indeterminate amount of land that the owner could achieve his purpose of providing access for future development. It was precisely this indeterminacy which was of value to him as it afforded flexibility to comply with the requirements of the future. The width of the easement was indeterminate at the time of the option but would be made determinate by reference to an objective standard in the future. Were the owner unable to reserve an indeterminate easement to insure access to his property, he would have had to retain the entire 1½-acres to protect his access to the larger property. The law does not encourage such an unproductive use of land.

The court further held that obtaining the requirements of the city of Los Angeles was not a condition precedent to the exercise of the option and the fact that the plaintiff specified that he required an easement 30 feet in width without having determined the city's requirements did not mean that he was not conforming to the terms of the option, since obtaining the city's requirements was not a precedent to the exercise of the option.

Nor was the remedy of specific performance unjust because plaintiff never obtained the requirements of the city of Los Angeles before trial. To do so would require an expenditure of both time and money on the property as a condition precedent to the exercise of his option.

Specific Performance

Dell v. Bradburn, 2 Ohio App.3d 139, 440 N.E.2d 1359 (1981)

Appellee accepted appellant's counter offer of purchase of a residence and adjacent building at 548 and 556 Mohawk Street, Columbus, Ohio. The sales contract stated: "The seller to accept a land contract for 80 per cent of the purchase price to be paid in monthly installments amortized on a 30-year schedule for a period of 10 years with a balloon payment at the end of 10 years with right to prepay without penalty." Buyer now wants to pay the entire sum in cash immediately instead of using a land contract. Seller refuses full payment.

Is buyer entitled to specific performance?

Holding: A writ of specific performance of a real estate purchase contract will be granted when a provision in the real estate purchase agreement permits full payment of the amount due without a prepayment penalty and the vendee tenders the entire amount due.

Statute of Limitations—Action to Set Aside Deed

Troup v. Troup, et al., 248 Ga. 662, 285 S.E. 2d 19 (1981)

After the death of her father, appellant went to live with her mother in the family home. Appellant's brothers and sisters were all married and lived elsewhere.

In 1958, appellant's mother conveyed the home and farm to appellant. In 1960, the brothers and sisters filed an action on behalf of their mother to have the conveyance to appellant set aside. This suit was dismissed on the motion of the mother, who stated that she had not authorized the action which had been brought on her behalf and that the action was simply a scheme to coerce she and appellant into dividing the property with the other children.

In 1980, after the death of the mother, appellant's brothers and sisters filed another action to set aside the conveyance on the ground that it had been procured by fraud. Appellant filed a motion for summary judgment, raising, among other defenses, the statute of limitations. It is from a denial of that motion that appellant appealed.

The court found that since "No one can be an heir of a living person, and before the death of the ancestor an expectant heir has no interest or estate in property which he may subsequently inherit," the appellant's brothers and sisters could not have maintained an action in their own right, prior to their mother's death, to have the conveyance set aside.

However, the court pointed out that the action brought by appellees was based upon fraud and that the applicable period of limita-

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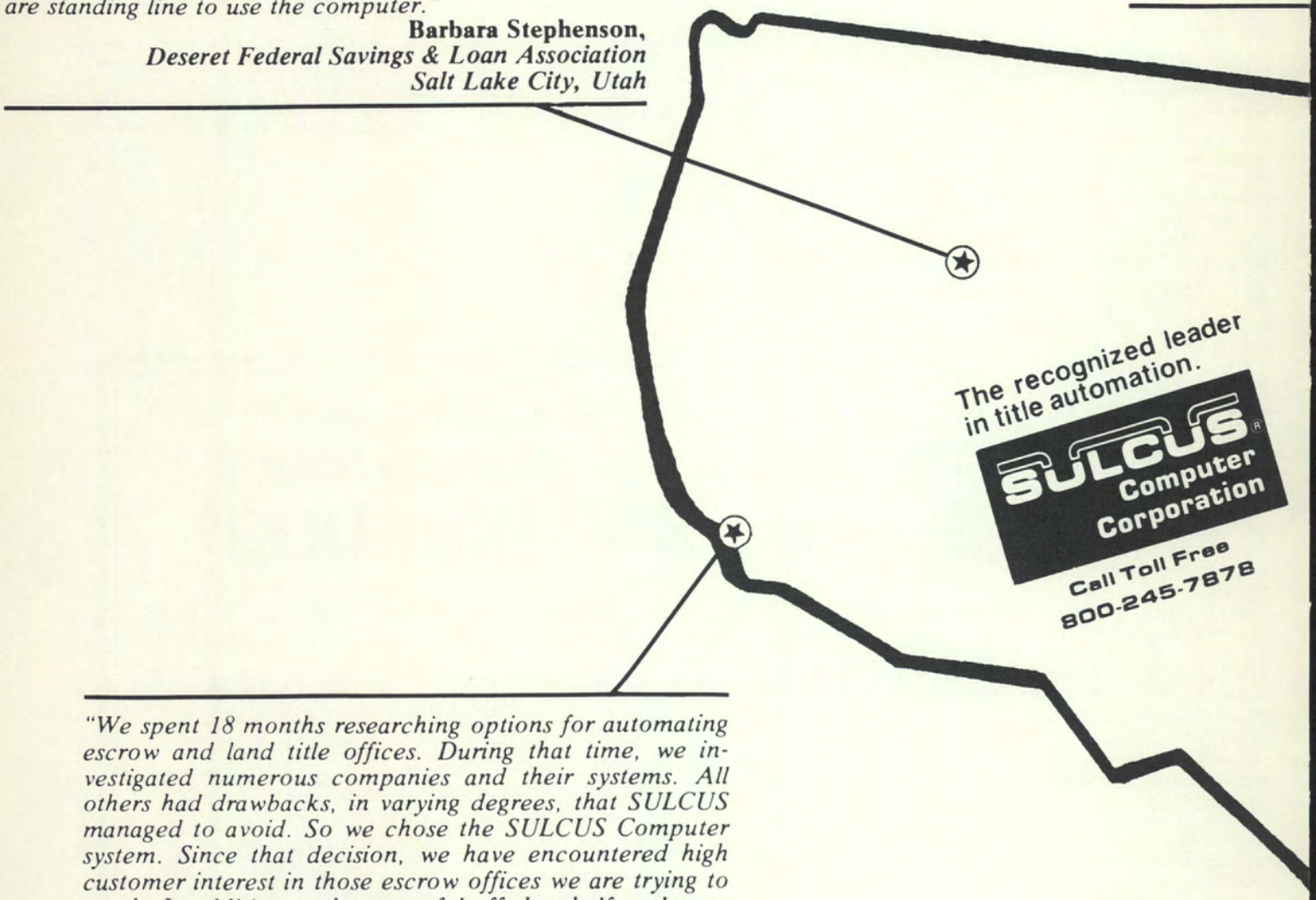

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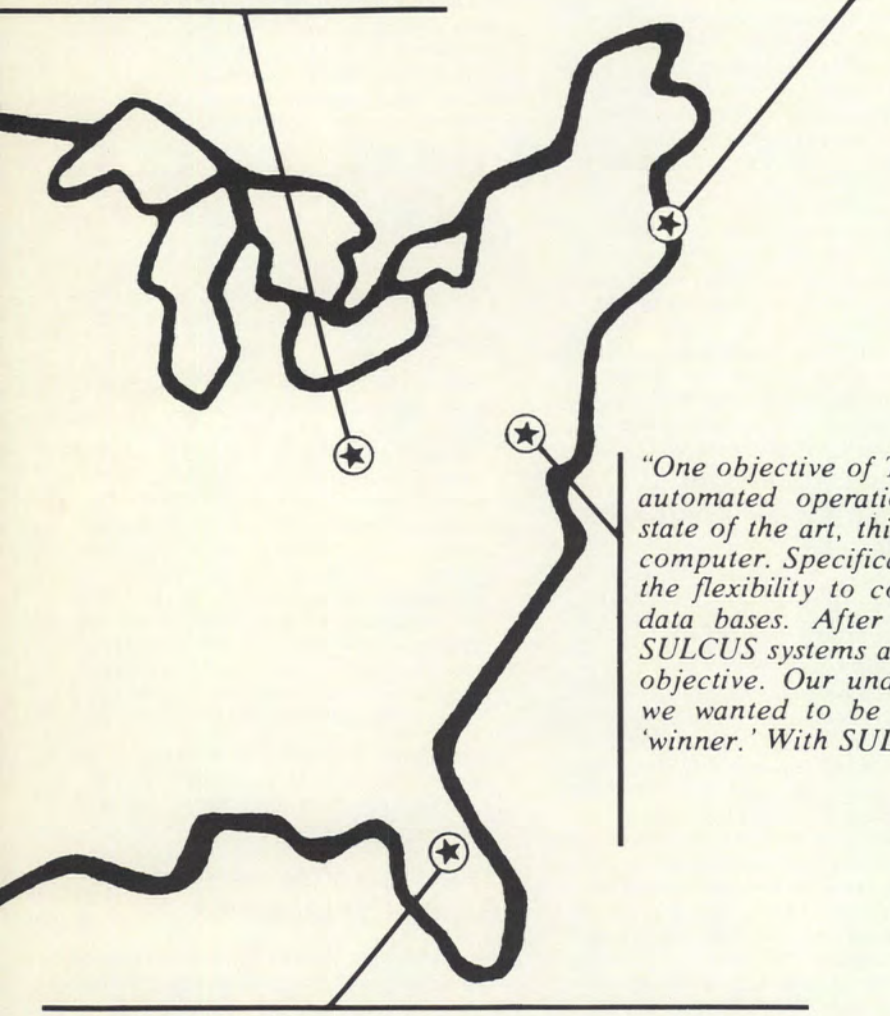

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tion was seven years from the date of discovery of the fraud.

Although appellees could not have maintained an action in their own behalf during that period, they made no allegation that their mother lacked the mental capacity to act in her own behalf during the period. Not only did the mother fail to act, she filed a verified motion to dismiss the earlier action brought by appellees. Therefore, the court found that the proper party having the capacity to bring an action failed to do so, and the period of limitation had run. The court found that the lower court's denial of appellant's motion for summary judgment was in error.

Tidelands—Public Trust

In *City of Los Angeles v. Venice Peninsula Properties* 31 Cal. 3d 288, 644 P. 2d 792, 182 Cal. Rptr. 599 (1982) U.S. App. Pndg., a city wishing to dredge a lagoon, construct sea walls and make other improvements without exercising its power of eminent domain filed an action for declaratory relief and to quiet title in the lagoon against the owners of specified lots, which consisted entirely of waterways. The city alleged that the public owned an easement in the lagoon for commerce, navigation, fishing and other purposes. The state was also joined as a defendant.

At issue was the applicability of the public trust doctrine to tidelands to which the state and federal government never held the fee title. The subject tidelands were originally acquired by private persons by rancho grant from the Mexican government prior to the time California was ceded to the United States. Then, pursuant to federal statutes, in conformance with the Treaty of Guadalupe Hidalgo, they were patented by the federal government under confirmatory proceedings to the then owners.

First, the court had to consider defendants' allegations that the trust doctrine did not apply to their property as it was determined in the confirmatory proceedings that the subject property was not tidelands. Since the supreme court found an inconsistency between the terms of the patent and the opinion of the general land office commissioner, whose approval was required prior to issuance of the patent, as to whether or not an "inner bay" shown on the patent was an arm of the sea, the trial court was justified in admitting evidence on that issue. The trial court found as a fact that the property was tidelands and this could not be overturned as it was supported by overwhelming evidence.

The court then turned to the primary issue of whether the tidelands trust applies to lands granted by Mexico and later patented to owners by the federal government. By majority opinion, the court held that the tidelands were subject to the public trust since, when California was ceded by Mexico, the title of the then owners was subject to the interest of the public in the tidelands. That interest was acquired by the United States under the Act of 1851, which provided that all land in California, including tidelands, which had belonged to Mexico and was not patented to private parties became the property of the United States upon annexation. The court rejected defendants' assertion that the tidelands trust is an incident of the fee title and thus, since the federal government never acquired title, there was no interest to which the state could succeed; holding that, upon annexation of California, the federal government succeeded to the ownership of the public's rights in the tidelands contained in ranchos which had been conveyed by Mexico.

The next question was whether such public rights were relinquished by issuance of the confirmatory patents by the federal government to the Mexican grantees. The court held that they were not, since even though the government failed to reserve the public's right when the patents were issued, the right to exclude the public from tidelands was not a normal incident of title. The federal government thus retained an interest in the tidelands at issue which was acquired by California upon admission to statehood.

In support of its opinion that the confirmatory patent did not transfer the public rights to defendants' predecessors, the court reasoned that what was involved was sovereign rights to property. Since tidelands are not held by the government in its proprietary capacity but in trust for the benefit of the public, they may not be alienated at will; thus, when tidelands are conveyed into private hands they ordinarily remain subject to the public interest even though the grant is purportedly in fee. Numerous cases which stand for the proposition that patents issued under the act of 1851 passed the interest of the federal government to the grantee were distinguished on the ground that those cases only dealt with the issue of whether title to the tidelands had passed and did not purport to state that the title so conveyed was not subject to the rights of the public.

Title Insurance—Abstracter Liability

Anderson v. Title Insurance Company, 103 Idaho 875, 633 P. 2d 82 (1982)

Plaintiffs acquired a parcel of property by deed and the title was insured by the defendant insurance company. Prior to the issuance of the policy, a preliminary report had been given to plaintiff's counsel. Many years after this acquisition, the Idaho Fish and Game Department apprised plaintiffs of the existence of a prior recorded conveyance which had granted to the state fee title to land paralleling a stream which passed through the property. This conveyance had not been excepted from the title insurance policy. Defendant insurance company tendered the amount of the policy to plaintiffs but this tender was refused and suit was brought alleging, among other things, negligence for failure to report the state's interest.

Was the title insurance company liable under the abstracter's negligence doctrine for damages claimed in excess of the face amount of the title insurance policy?

Holding: Plaintiffs argued that since under current practice parties to real estate transactions rely on preliminary title reports and title insurance policies, rather than an abstract of title, the insurer should have the same obligation as an abstracter and be liable in tort for errors or omissions. However, the Idaho Supreme Court noted that (1) the policy did not purport to be anything other than a title policy and (2) the fee charged was for an insurance policy, not an examination of title, thereby distinguishing *Banville v Schmidt*, 122 Cal. Rptr. 126 (App. 1974). The court concluded its opinion by stating that it declined to hold that Title Insurance Company was impliedly acting as an abstracter and refused to impose the liabilities of an abstracter upon it merely because it issued a preliminary title report.

Title Insurance-Liability for Misstated Interest

Rudolph v. Title & Trust Company of Florida, 402 So. 2d 1275 Fla. (1981), Pet. for Rev. Den., 412 So. 2d 470 (1982)

Title company insured purchasers of leasehold estates in condominium units. The title policy inadvertently misstated the interest insured. Rather than a leasehold estate, the policy insured a fee simple estate. The purchasers were not induced to purchase the property by the title insurance policies. A class action suit was brought by the purchasers seeking damages for breach of the title policy. The trial court directed a verdict at the close of evidence in favor of the title company. The purchasers appealed this decision.

Absent reliance, can title company be liable for misstatement of interest insured under its policy?

Holding: The appellate court affirmed the trial court's decision stating:

> "Appellants were not induced to purchase their properties by the title insurance they later obtained. The purpose of the insurance is to indemnify an insured against loss through defects of title to purchase property. . . . Appellants' claims were not predicated upon defects in title, but upon the failure of the title insurance company to produce fee simple title. The title insurance company had no obligation to produce or indemnify a fee simple title and was therefore entitled to a directed verdict."

In so holding, the appellate court noted that the policy excluded loss by reason of the original 99-year lease from the fee owner to the insureds' lessor.

Title Insurance—Insurer's Right of Subrogation

Defendant, homeowner and his wife applied to a bank to refinance their mortgage. The bank ordered title insurance. Defendants were in arrears in the payment of real estate taxes. The title search disclosed certain of these open taxes, which were disposed of at the closing. Other open taxes were discovered at a later date.

The mortgage lender called upon plaintiff title insurer to dispose of these prior tax liens under the terms of the title policy. Plaintiff then sought recoupment as subrogee of the insured lender in this action.

The court turned to R.P.L. Sec. 254, which interprets the standard mortgage clauses. It provides that a mortgagor's covenant to pay all taxes, assessments or water rates means "mortgagor will pay all taxes assessments and water rates which may be assessed or become liens on said premises—." It held that the covenant in defendant's mortgage excluded pre-existing liens.

Therefore payment by a mortgagee (or in this instance by plaintiff as subrogee) must be considered voluntary. (*Chicago Title Insurance Co. v. Heskestads*, NYLJ 2/22/82 p. 17)

Title Insurance—Insurer Payment of Taxes for Insured

Plaintiff title insurer failed to report certain open taxes when it insured a mortgage lender. It paid these taxes on demand of the lender and brought this action based on subrogation against defendant purchaser-mortgagor. The defense was that plaintiff also insured the fee.

The court held that plaintiff cannot be regarded as a volunteer in paying the taxes due by defendant. That its contract with the bank required that it make the payment is irrelevant, for it is subrogated to the rights of the bank which was in turn subrogated to the rights of the taxing authorities against defendant, and the bank's interest in the premises which secured its mortgage gave it an interest sufficient to take it out of the classification of a volunteer. Plaintiff will be entitled to judgment unless defendant establishes that he was in fact an insured under the policy. (*Chicago Title Insurance Co. v. Heskestad*, N.Y.L.J. 7/6/82 p. 6).

Title Insurance—Mortgage in Default

This action against a title insurer on the ground that the duty of the insurer with knowledge of default in the mortgage (from the lending institutions letter under RPL 274-a) was to disclose said default to the plaintiff and refuse issuance of a title policy unless the default was vacated.

Plaintiff alleged that the fact that the mortgage was in default went to marketability which the policy insured.

Defendant insurer alleged that it fully reported all defects, liens and encumbrances of record affecting title including this mortgage and the open tax and excluded from coverage of the policy any damages suffered by the plaintiff by reason of the mortgage and open tax items.

Defendant maintains that whether a mortgage on a property is "in default" is not within the scope of the title examination. As stated, in Warren's Weed, New York Real Property, Title Ins. section 1.02: "The searchers, ordinarily, has no duty to go outside the chain of title and his failure to do so is not negligence."

The cause of action against the insurer was dismissed. (*Gluchowski v. Rozanski*, NYLJ 6/11/82)

Title Insurance—Limitation of Public Expenditure

In *Orange County Foundation v. Irvine Co.*, 139 Cal. App. 3d 195, 188 Cal. Rptr. 552 (1983), a taxpayers' association brought an action against a company seeking to set aside a settlement agreement between the company and the state of California under which the company relinquished its claims to certain islands in return for a payment of money. The taxpayers alleged the islands were always tidelands and submerged lands protected by a public trust in which the company had no disputable interest and that the company knew it had no legal claim to them.

The appellate court reversed the summary judgment for the company and held there was a triable issue of fact as to whether the company knew the islands it was claiming were tidelands legally belonging to the state, in which case its claim to title was in bad faith and its relinquishment of that knowingly unfounded claim was inadequate consideration to support the state's obligation to pay money to the company. Thus, public monies paid to compromise an invalid real property title claim, known to be baseless by the claimant, is not an expenditure for a public purpose, and constitutes a prohibited gift of public funds. Further, the constitutional bar to such gifts transcends the public policy favoring settlement of disputed claims, and permits the state to recoup such disbursements.

The taxpayers' association also sued a title insurance company to recover under a policy it had issued to the state in connection with the settlement agreement. By an endorsement to the policy in favor of the state, the title insurer agreed to be liable under the policy if a final judgment declared the disputed islands were always tidelands legally belonging to the state in which event the title insurer's liability shall be 90 per cent of the full amount of this policy. Coverage was for five years. The appellate court reversed the summary

judgment for the title insurer, which had relied on a two-year statute of limitations, the court holding that the statute does not begin to run until there is a loss or damage recoverable against the title insurer and this could not occur until a determination has been made that the islands were tidelands and concluded that there has not yet been such a finding. The court also perceived no reason why the title insurer may not be made a party to the lawsuit which itself was asking for a declaratory final judgment upon which the insurer's liability was based.

The taxpayers' association also sought an injunction requiring the attorney general and controller of the state to recover the money allegedly owed to the state by the company and the title insurer. The court affirmed the sustaining of the demurrers by the state, of the attorney general and the controller on the basis that the taxpayers' association could not require the state to prosecute a suit against the company or the title insurer, because only by proving the case against those defendants could the taxpayers prove the state's duty to bring suit. The taxpayers' appropriate remedy was to proceed as a private attorney general, and it was not prejudiced by sustaining the demurrers because, if it obtains judgment against either the company or the title insurer on behalf of the state, the state is duty bound to attempt to enforce the judgment.

Title Insurance—Survey Coverage

U.S. Life Title Insurance Company of Dallas v. Hutsell, 164 Ga., App. 443, 296 S.E. 2d 760 (1982)

In 1974, appellee Hutsell purchased two adjacent tracts of land. Prior to the closing of the sale, the seller had provided a survey of the property which disclosed that the tracts had a combined area of 6.12 acres. Appellant, through its agent, issued a title binder on the property. The binder contained an exclusion relating to risks which would be detectable by an acceptable, certified survey. However, the words "see attached plat and surveyor's report," appeared as a typed addendum. In the letter transmitting the binder to appellee the agent stated, "you will also note that the survey has been insured." The policy when issued contained an exclusion for "any discrepancies, conflicts in boundary lines, shortages in area, encroachments, overlapping of improvements or other boundary or location disputes."

Appellee discovered, after the sale, that the property contained less than four acres and sued to recover under the title policy. In the original litigation, appellant was granted summary judgment based upon the exclusion for shortages in area contained in the policy and the agent's lack of authority to amend the policy.

The case originally appeared before the court on an appeal by Hutsell from the order granting summary judgment, *Hutsell v. U.S. Life Title Insurance Company*, 157 Ga. App. 845, 278 S.E. 2d 730 (1981). In the initial appeal, U.S. Life Title Insurance Company argued that its agent, pursuant to the terms of his agency contract, was not authorized to amend the policy by letter. The court, after considering all the facts and circumstances, found that the evidence did not demand a finding that Hutsell was uninsured as to matters of survey. The court found that there was question of fact as to whether appellant's agent did have authority to amend and did amend the policy and, therefore, reversed and remanded. On retrial, the jury returned a verdict of $25,000 for appellee from which appellant now appeals.

Does a title insurance policy, which provides coverage as to matters of survey, also include coverage for loss resulting from discrepancies in the actual area of the insured property and that shown on the insured survey?

Holding: Appellant contended that the quality of appellee's title had not been affected by the shortage in area. It was asserted that such coverage could not be characterized as a defect or encumbrance, but rather a casualty risk, which, as a matter of law, is outside the scope of coverage authorized for title insurance.

While the court found that coverage as to matters of survey are not clearly within the statutory definition of title insurance, it concluded that survey defects, including shortage of area, "may be sufficiently related to the standard notions of title defect or encumbrance as to be a risk allowed by title insurance."

The court was particularly pursuaded by the fact that providing coverage as to matters of survey is apparently a standard practice in the industry. Courts in other jurisdictions apparently had no difficulty in concluding that survey insurance is a permissible title insurance risk. Therefore, the decision of the lower court was affirmed.

Trusts

Pizel v. Pizel, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982)

Charles Pizel undertook on May 23, 1962, to plan his estate and upon the advice of his attorney executed a document entitled "Charles Pizel Revocable Trust." That document provided that Charles Pizel was the settlor; the trustees were Charles Pizel, Wilfred J. Pizel and Allen D. Pizel, the latter two being nephews of Charles Pizel. It purported to establish a trust, the res being 1,760 acres of real property. On the same day, Charles Pizel executed a deed wherein the said 1,760 acres were purportedly conveyed by Charles Pizel to the three trustees as trustees of the "Charles Pizel Revocable Trust." The deed and trust agreement remained in the attorney's hands until the date of Charles Pizel's death; neither were filed with the local register of deeds until after his death.

On the same day that Charles Pizel executed the above deed and trust agreement, he also executed his last will and testament. In Article V of the will, he devised and bequeathed all his personal property and realty not otherwise disposed of in the will to all of his nieces and nephews, except Wilfred J. Pizel and Allen D. Pizel, who had received certain personal property in other articles of the will. The trust agreement was not mentioned in the will.

On June 10, 1975, Charles Pizel signed a document along with Wilfred J. Pizel, Allen D. Pizel and Herbert Pizel entitled "First Amendment to the Charles Pizel Revocable Trust," which provided for Herbert Pizel to be added as a trustee along with the other two, in effect, removing himself as a trustee and appointing Herbert in his stead. There were no other significant changes.

On that same day, Charles Pizel also executed a new deed containing the same 1,760 acres described in the trust instrument, this deed purporting to convey the property to Wilfred J. Pizel, Allen D. Pizel, and Herbert Pizel, "Trustees of the Charles Pizel Revocable Trust." This deed was signed by Charles Pizel, individually as grantor, but was not signed by Allen D. Pizel and Wilfred J. Pizel. This deed and the "First Amendment to the Charles Pizel Revocable Trust" were likewise placed with the attorneys for Charles Pizel and neither was filed prior to the death of Charles Pizel.

On January 11, 1979, Charles Pizel executed a "codicil" to his last will and testament, but there were only minor changes, and the residuary clause of the will was not altered.

At all times after May 23, 1962, Charles Pizel continued to operate his farming business on the 1,760 acres involved as an individual. In any business dealings involving the subject property, he signed only as an individual rather than as a representative of the trust. Neither had any of the three nephews named as trustees of the trust acted in any capacity as trustee. Each also expressed his belief that Charles Pizel intended that no trust exist prior to his death.

Shortly after Charles Pizel's death, his attorney filed the original trust instrument and deed, and the amendment to the trust, in the register of deed's office.

The issue: Whether any trust, in fact, existed at the time of the death of Charles Pizel, and whether a subsequent recording of documents by a decedent's attorney would cause a trust to spring into being. The appellees' argument was that the subject real estate passed to them as devisees under the will since there was no valid enforceable trust.

Holding: The court cited *Shumway v. Shumway*, 141 Kan. 835, 44 P.2d 247 (1935) as authority regarding the requisites for a valid inter vivos trust, quoting *Jennings v. Jennings*, 211 Kan. 515, 507 P.2d 241 (1973) as reaffirming the law of *Shumway*:

> "An express trust implies the cooperation of three persons: (1) A settlor, or a person who creates or establishes a trust; (2) a trustee, or person who takes and holds legal title to the trust property for the benefit of another; and (3) a *cestui que trust*, or the person for whose benefit a trust is created." 211 Kan. 515, Syl. Sec. 3.

Shumway also enunciated the essential elements of an express trust, reaffirmed in *In re Estate of Ingram*, 212 Kan. 218, 510 P.2d 597 (1973):

> "The essential elements of an express trust are (1) an explicit declaration and intention to create a trust, (2) definite property or subject matter of the trust, and (3) the acceptance and handling of the subject matter by the trustee as a trust."

The first element is that of an explicit declaration and intent to create a present trust. The court states that "[t]hat the issue of trust intent cannot be resolved solely from a self-serving declaration in the trust instrument, but instead must be viewed and decided in light of all the attending facts and

circumstances." At all times Charles Pizel operated the farming concern on the subject property in his own name. He filed tax returns thereon in his own name rather than in the name of the trust, and neither were the deeds nor trust instruments ever recorded prior to his death. Also, no business of any kind was ever conducted in the name of the "Charles Pizel Revocable Trust."

The second element for a valid trust is that there must be a present transfer of the subject property to the trustee. In this case, deeds were signed that purported to transfer the property but they were never delivered to the other trustees and Charles Pizel retained at all times the right to demand the return of the deeds from his attorneys to himself. At no times did Charles Pizel indicate by his words or acts his intention to immediately divest himself of title, and to vest it in another. Furthermore, he in fact demanded and accepted a return of the original deed from his attorney, substituting a different deed in its place.

The third and final requirement for a valid inter vivos trust is that the named trustee must accept the trust property and deal with it as a trustee, for the benefit of the *cestue que trust*. There is no evidence that anyone other than Charles Pizel dealt with the realty in any capacity. Charles Pizel continued to operate and occupy the property as an individual, for his own benefit. Even after the amendment whereby he removed himself as trustee and placed nephew Herbert as trustee in his place, Charles still managed the property personally and in his own name. The nephew trustees also testified that at no time did they ever do any act as trustee under the trust.

Thus, the court upheld the trial court's decision that no valid trust existed and therefore the subject property passed under Charles Pizel's will.

Trusts—Trustee's Duty of Loyalty

Home Federal Savings and Loan Association of Chicago v. Zarkin, 89 Ill. 2d 232, 432 N.E. 2d 841 (1982)

In March, 1976, Karen and Leon Zarkin conveyed their residence property to Devon National Bank as trustee under an Illinois land trust with the Zarkins as beneficiaries. Under this form of trust, as recognized in Illinois, the trustee holds both legal and equitable title to the real estate. The beneficiary retains full management of the property and a power to direct the trustee. The interest of the beneficiary is personal property.

Devon as trustee, pursuant to the direction of the Zarkins, executed a first mortgage on the property in favor of Home Federal Savings and Loan Association. In August, 1977, the Zarkins borrowed $14,000 from Devon. To secure this loan, the Zarkins assigned their beneficial interest in the land trust to Devon. Thereafter, Home Federal brought suit to foreclose its first mortgage. A decree of foreclosure was entered finding that $63,254.50 was due on the Home Federal mortgage and $14,626.25 was due to Devon, which amount was subordinate to the amount due Home Federal. At the foreclosure sale, Home Federal bid the amount of its judgment, plus costs.

Eight days prior to the expiration of the redemption period, Devon, without notifying the Zarkins, purchased the certificate of sale from Home Federal. The Zarkins then filed a petition alleging that the purchase of the certificate amounted to a redemption and further that Devon's action was a breach of its fiduciary duty to the Zarkins. The trial court denied the petition and the appellate court affirmed that decision. The supreme court reversed and remanded.

What was the effect of the trustee's purchase during the redemption period of the certificate of sale covering the trust property?

Holding: The supreme court held that the same duty of loyalty was applicable to the relations between the trustee and the beneficiary of a land trust as existed with respect to other forms of trusts. Devon argued that, since the trustee's powers are limited under an Illinois land trust agreement to act only upon direction of the beneficiaries, the trustee had no duties other than set forth in the trust agreement. The court disagreed; the obligation of loyalty arose from the relationship of trustee and beneficiary, and not from the trust instrument. Devon also argued that the general rule, prohibiting a trustee purchasing the trust property for its own account at a private sale, should not be applied to a case where the trustee acquired property through a public foreclosure sale brought by a third party. The court, however, refused to follow the minority rule approving such action.

The court concluded that Devon had an equitable lien on the property for the amount it paid Home Federal for the certificate, plus interest.

With respect to the loan by Devon to the Zarkins and the assignment of the beneficial interest, the court remanded the cause to the circuit court. The burden of proving the fairness of the loan and assignment, and disclosure to and consent by the Zarkins, was placed upon Devon.

The *Zarkin* decision created a serious impediment to widely used financing involving loans by a land trustee to a beneficiary of that land trust and secured either by assignment of the beneficial interest or by mortgage of the trust real estate. The Illinois legislature responded quickly. By an act approved August 6, 1982, Public Act 82-891, the legislature provided that if a debt is secured by a security interest in a beneficial interest in a land trust, or by a mortgage on land trust property, neither the validity or enforceability of the debt, security interest or mortgage is affected by the fact that the trustee and creditor are the same person. This act purports to apply to all such debts, security interests and mortgages, whenever created. *Query*, whether the retroactive application of the act will be approved by Illinois courts.

Trespass—Injury to Real Property

This action was brought for damages resulting from landfill of the defendant washing into a small pond jointly owned and used by the parties, discoloring the water and preventing its use. Plaintiff sued to recover the cost of removing the silt and for other damages.

The issue in the court of appeals was the proof of damages required. Defendant attacked the award for the cost of removing the silt. Referring to the long-established rule that the proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration. (*Hartshorn v. Chaddock*, 135 N.Y. 116) defendant urged that plaintiff failed to present both measures of value, having presented only the cost of restoration.

Not so, said the court. The plaintiff is required to establish the measure of damages under only one measure. The burden then falls upon the defendant to prove that a lesser amount than that claimed by the plaintiff will sufficiently compensate for the loss. (*Peoples' Gas & Elec. Co. v. State of New York*, 189 App. Div. 424, affd., 231 N.Y. 520.) Judgment was directed accordingly. (*Jenkins v. Etlinger*, 55 N.Y. 2d 35 1982)

Usury—Loans to Individual Stockholders

In Schneider v. Phelps, the court of appeals enunciated a new test as to whether a loan transaction was or was not usurious—the purpose—of—loan test.

In this Appellate Division, Fourth Department, case, the plaintiffs made a loan which if made to individuals, per se, would be usurious and unenforceable. Here the loan was part of a recapitalization plan for the corporation. The loan was made by checks to the individual defendants in separate amounts proportional to the stockholdings of these defendants in the corporation. The books of the corporation, under control of plaintiffs' agent, showed the corporation's obligation on these notes as "loans from officers," i.e., from the individual defendants, not plaintiffs. The loan was held usurious and a judgment dismissing the complaint was affirmed. (*Schneider v. Phelps* 41 NY 2d 238 1982)

Usury—Purpose of Loan

The borrower alleges he informed the lender that he needed the loan to defray medical expenses incurred by his wife. The loan at 24 per cent interest was made to a viable on-going corporation owned by the borrower. Borrower executed a mortgage on his home and guaranteed the loan. In a foreclosure action, defendant pleaded the defense of usury.

By a divided court, the Appellate Division, Second Department, reversed a summary judgment in favor of the plaintiff, holding there was an issue of fact. The law is clear that the usury defense is unavailable to a corporation and to the individual guarantor of a corporate debt (General Obligations Law, Sec. 5-521; *General Phoenix Corp. v. Cabot*, 300 NY 87, 95; *Arrow Sav. & Loan Assn. v. Wilmikwil Corp.*, 35 AD 2d 840). An exception to the rule exists, however, when the corporate form is used to conceal what is actually a usurious loan made to an individual to discharge his personal obligations (*Schneider v. Phelps*, 41 NY 2d 238). Where a loan is in fact made to the individual parties, though in form to the corporation to hide the fact that an illegal rate of interest is being exacted, the courts will pierce the corporate veil (*Jenkins v. Moyse*, 254 NY 319: *Buoninfante v. Hoffman*, 48 AD 2d 678; *Shapiro v. Weissman*, 7 AD 2d 752).

The case was sent back for trial. (*Kaye v. Keret*, 89 A.D. 2d 885 NY 1982)

Vendor and Purchaser—Covenants in Contract

This was an action to recover damages sustained by the plaintiffs because the well on the property they purchased from the defendants did not yield the quantity of water per minute warranted in the contract. The first cause of action was based on fraudulent representations. The second cause of action was for breach of contract.

The affirmative defense alleges the merger provision of the contract that none of the warranties were to survive the closing of title.

After holding that the merger clause could not be invoked to defeat the first cause of action based on fraud, it considered whether the defense was viable as to the second cause of action. It pointed out an exception to the general merger rule. Covenants in the contract which are collateral and not connected with the title, possession or quantity of land have been constantly held to survive the delivery of the deed. (*Sage v. Truslow*, 88 N.Y. 240 et al)

The covenant as to water was clearly collateral and was in the realm of an executory agreement which would survive in any event. The affirmative defense was likewise legally insufficient to defeat the second cause of action and was dismissed (*Gallo v. Epp*, NYLJ 7/28 1982)

Rights of Owners—Land Beneath "Artificial" or "Man-Made" Lakes

Black v. Williams, 417 So. 2d 911 Miss. (1982)

Mrs. Williams owned 110.9 acres of land beneath a drainage district lake. Mr. Black subsequently acquired title to property adjoining Mrs. Williams; 14.4 acres of which formed a portion of the lake bed. The boundary between Mrs. Williams and Mr. Black was marked by posts; however, over the objections of Mrs. Williams, Mr. Black claimed the right to use the portion of the lake over her land. The trial court granted Mrs. Williams an injunction preventing Mr. Black from using that portion of the lake.

On appeal, the Mississippi Supreme Court noted that the rights of owners of land beneath "artificial" or "man-made" lakes had never been addressed in the court. The court, adopting the majority rule existing in other jurisdictions, held that owners of the fee in land beneath such a lake, absent a statute, covenant or agreement to the contrary, have exclusive control over their respective portions of the water. The court concluded that Mr. Black had no right to travel or make any entry on the lake beyond the boundaries of his own land. The case was affirmed. (There are other cases in other jurisdictions to the contrary.)

Wills—Election

In *Estate of Kennedy*, 135 Cal. App. 3d 676, 185 Cal. Rptr. 540 (1982), decedent wife died testate. Certain properties stood in the name of the decedent and her husband as joint tenants. Paragraph third of the will declared that all properties standing in the name of the husband alone or in the name of the decedent and the husband as joint tenants were in reality community property. Paragraph fourth bequeathed to the husband all of the assets of the husband's business in certain terms personal to him, decedent relinquishing any community property rights she might have. Paragraph fifth bequeathed to the daughter all the silver and oil paintings, including any community property interest the husband might have therein, and expressly required him to waive all other benefits under the will if he asserted his community property interest in the silver and oil paintings. Paragraph sixth bequeathed the entire residue of the estate, including her undivided half interest in all community assets, to her daughter.

The question presented was whether paragraph sixth did in fact bequeath half the joint tenancy property to the daughter and whether it would thwart decedent's clearly manifested intent if the husband were allowed both to take the specific bequest in paragraph fourth and assert his right as survivor to all the joint tenancy property. The dispute was between the daughter, claiming under paragraph sixth, and the personal representative of the estate of the husband who died after the decedent.

The husband's personal representative first argued that paragraph sixth did not in fact purport to give half the joint tenancy property to the daughter as the provision referred expressly to the entire residue of the decedent's estate, including her undivided half interest in all community assets. The court stated that, while a construction that indicates only an intent to dispose of decedent's separate property and community property of which she had a rightful power of testamentary disposition is to be preferred, this must give way when the other provisions of the will clearly show an intent to dispose of the joint tenancy property as well. Thus, in paragraph third of the will, decedent unequivocally declared that all property standing in the name of the husband and all property standing in the name of the husband and wife as joint tenants was their community property. Paragraphs fourth and fifth disposed of the decedent's community property interest in various personal property. Therefore, when paragraph sixth referred to the entire residue of decedent's estate including her half interest in all community assets, it necessarily included the joint tenancy property which decedent had identified as community property in paragraph third.

The court, of course, recognized that a decedent cannot bequeath half of any joint tenancy property because, upon decedent's death, the husband became the sole owner of all the joint tenancy property by right of survivorship. However, if the decedent for whatever reason more or less believed she could make such disposition and clearly intended to give half of the joint tenancy property to the daughter, she could force the husband to an election. In order to accept the benefits of the will, i.e., the property bequeathed to him in paragraph fourth, the husband must accept the will in its entirety, including the disposition of joint tenancy property. If, contrary to her intention, he asserts his right to all the joint tenancy property by right of survivorship, he must give up the other benefits to him in the will.

The will need not expressly require such an election; it is sufficient if the intent of the testatrix would be thwarted by recognizing the husband's right of survivorship to all the joint tenancy property in addition to the bequest to him in the will. The clear and manifest implication from the will was that the husband's right of survivorship to all joint tenancy property was inconsistent with the will thus requiring an election.

Wills—Interested Witness

Rogers v. Helmes, 69 Ohio St. 2d 323, 432 N.E. 2d 186 (1982)

Anna Grofer died August 9, 1977, survived by four adult children. On December 14, 1977, an undated writing purporting to be her last will and testament was admitted to probate and Carol Grofer Helmes was appointed executrix. The writing was witnessed by Robert Grofer, Carol Grofer Helmes and her husband, Stephen Helmes. By will, decedent devised to Carol Grofer Helmes two homes and their contents, and some stock. Carol and Stephen Helmes testified as to the execution of the purported will. The third witness died prior to the death of Anna Grofer.

Can an interested witness be a competent witness to a will? Can a devise or bequest made to an interested supernumerary witness who later testifies as one of two witnesses to prove execution of the will be valid?

Holding: Interested witnesses to a written will are competent witnesses thereto if they otherwise meet the test of competency set out in R.C. 2317.01.

A devise or bequest made in a written will to an interested supernumerary witness is not void (R.C. 2107.15 construed).

Section 2317.01, R.C. states that all persons are competent witnesses except those of unsound mind and children under 10 who appear incapable of receiving just impressions of the facts, or of relating them truly. Disinterestedness is not an element of competency. If a witness is not one of two essential witnesses to the execution of a will, the voiding provision of R.C. 2107.15 may not be invoked.

Had Carol Grofer Helmes been one of only two witnesses, in other words—had there been no third witness, her bequest would be void. The witness is then competent to testify to the execution of the will. If she would have been entitled to a share in case the will were not established, she would take so much of that share that does not exceed the bequest.

Zoning

Wright v. Mayor and Commissioners of Jackson, 421 So. 2d 1219 Miss. (1982)

The owner of certain property filed a rezoning application with the Jackson Zoning Committee and the city planning board, both of which recommended that the application be denied. The Jackson City Council disagreed and voted to adopt an ordinance rezoning the subject property. The Circuit Court of the First Judicial District of Hinds County affirmed the city council's action. Neighboring landowners who objected to the rezoning appealed the circuit court's decision.

On appeal, the Mississippi Supreme Court

held that the applicant seeking the rezoning had not met the requisite burden of proof. Citing *City of Oxford v. Inman*, 405 So. 2d 111 Miss. (1981), the court found that in order to justify a rezoning, the burden of proof is upon the applicant to show either: (1) that there was a mistake in the original zoning, or (2) that the character of the neighborhood had changed substantially and that there was a public need for rezoning the property. The court further found that the applicant must prove the requisite elements by clear and convincing evidence. *City of New Albany v. Ray*, 417 So. 2d 550 Miss. (1982). The court concluded that because the applicant had failed to meet this burden, the order of rezoning granted below was reversed.

(This concludes the 1983 Report of the ALTA Judiciary Committee.)

Ticor Changes Agency Structure

Pioneer Title Company of California, Inc., has been formed to take over agency responsibility for Ticor Title Insurance Company's operations in the northern California counties of Alameda, Contra Costa, Sacramento, Placer and Yolo, according to an announcement from those two concerns.

Under terms of an agreement, Ticor Title Insurance has transferred 60 per cent ownership of its operations in those counties to Pioneer Title, according to Winston V. Morrow, president of Ticor and chief executive officer of Ticor Title Insurance, and Dan R. Wentzel, president of Pioneer.

Besides the five county title plants, Pioneer will manage 26 branch offices. The announcement reports that the five-county operation presently generates gross premiums of about $1 million per month, which ranks Pioneer among the top three agencies in the western United States.

Miami Herald Writer Wins ALTA Award

Wayne Markham, center, Miami Herald real estate writer, is congratulated by National Association of Realtors president Donald Treadwell, left, and 1982-83 ALTA Public Relations Committee Chairman Randy Farmer after winning first place in the ALTA-sponsored Consumer Information Category of the Realtor Association Real Estate Journalism Achievement Competition. President Treadwell is president of Treadwell Real Estate, Southgate, Mich., and Chairman Farmer is vice president and director of public relations and advertising, Lawyers Title Insurance Corporation, Richmond, Va.

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they have shortened the campaign, they haven't told my wife about it.

The campaign instead is longer because of other things and principally this necessity to raise money. You simply cannot legislate political self-interests.

What we do have is a shortening, a compression, of the period in which the votes for delegates will be counted. We have a 13-week window between next March 13 and June 5, in which they will have all the caucuses and the primaries, except for those in Iowa and New Hampshire, which in deference to their tradition where given exceptions and are outside of this so-called window.

What this has caused is a rush of other states to get up early in the process. And the reason they want to do that is they want to be able to get the media attention and the political candidates' attention in a way they wouldn't get if they held their caucuses or their primaries later, when they think things will be settled.

So what we have in the three weeks between the Iowa caucuses, as now scheduled February 27, and the Illinois primary of March 20, is delegate election action in 22 states. There will be nine in one week.

What this means is we will have a new kind of political standard to apply to the Democrats in the 1984 campaign. And it is one that helps the leading candidates, and it is one that hurts dark horses. In the previous campaigns the Democrats were in this kind of situation: It was possible for an outsider like McGovern or like Carter to make a breakthrough early in the game and—you have all heard this cliche many times—they would "exceed expectations." That's what happened with Carter in both Iowa and New Hampshire; that's what happened with McGovern in New Hampshire. McGovern didn't win in New Hampshire, he finished second, but he exceeded the expectations; therefore, he was perceived as the winner.

But they had time to take their instant celebrity—being on the cover of *Time* magazine and all over the network news—to raise money and go on to build momentum in other primaries where they finished off their opposition. Carter, for example, finally nailed down the nomination by coming to Florida two weeks after the New Hampshire primary and defeating Wallace here and then by winning in Wisconsin and, the third week in April, in Pennsylvania.

George McGovern, after that strong showing in New Hampshire, made his real breakthrough and finally disposed of Muskie for all practical purposes in Wisconsin, and that was a month later.

That is not possible this year. There are too many contests. They are jammed together. In those days, the number of delegates you won didn't count; what counted was this perception of a candidate as the winner—the one who was exceeding expectations. When you have 22 primaries and caucuses in a three-week period, it is going to be quite different.

The political community and the press and people who make their living doing this as I do, are simply incapable of deciding who is exceeding expectations and who is not exceeding expectations when there are 22 different states being heard from, with all sorts of mixed results. We wouldn't even have time to set up the expectations, let alone to say who had exceeded them. So the result is something very curious. We are going to have to have perceptions that are based on reality, and that is a very dangerous thing in politics. The reality will be the delegate counts. People will keep tables of delegate counts.

When you turn on NBC News, what I am sure you are going to see every week will be little tables, Mondale, Glenn, so forth, each of the candidates, how many delegates they have accumulated. We are going to have to deal with the real world, in spite of ourselves.

This is an advantage to the leading candidates for some obvious reasons. They are already well known, both Mondale and Glenn. They have the money and the staff, so that they can compete. They have important local supporters to prop them up—if they start to waver. By the end of the year, Fritz Mondale will have raised 9 to 10 million dollars and John Glenn 6 or 7 million.

None of the other candidates will have any substantial amount of money. Most of them will be in debt, and they are already mortgaging the federal money they will get the first of the year. If you are in debt, you cannot compete.

There are a couple of complicating factors I should mention, and one is that in this reform the Democrats put in what they call a 20 per cent threshold requirement in most states, which says that if you don't get 20 per cent of the votes in the primary or caucus, you don't get any of the delegates. You get no share at all, if you get 15 or 18 per cent.

It doesn't take very high mathematics to figure out that when you have six, seven, or eight candidates, a lot of people aren't going to get 20 per cent. You are going to eliminate a lot of people very early because they won't even be on those charts.

The second thing is—and I think this is perhaps more important—the Federal Election Commission now has in effect, and it was not in effect in 1976, what is known as a 10 per cent rule. This says that a candidate who goes two successive primary dates or caucus dates and gets less than 10 per cent of the vote loses his eligibility for federal matching money. The rule was put in largely to discourage Lyndon LaRouche, the socialist candidate who ran in the Democratic primaries in 1980.

But it is going to wipe out a great many of these candidates, perhaps three or four of them, right after Iowa and New Hampshire. Again, when you have seven or eight candidates, there aren't even enough 10 per cents to go around for all of them.

And some of them are going to be eliminated. There are ways for them to reclaim that eligibility for federal matching money, but as a practical matter that won't happen. It would be a devastating blow to their credibility to lose it, and it is going to happen to some of them.

The pecking order right now shakes down this way: Mondale is a clear favorite, at the moment. He has superior organization, he has more money. He has a great deal of skill as a politician. What he doesn't have is any ability to cause any spontaneous combustion in the electorate. He is Hubert Humphrey's protege, but he is not Hubert Humphrey. John Glenn has an adequate organization, barely enough money and he is a candidate who causes a great deal of excitement in the electorate. People will go and listen to Glenn, and hang on to every word. Even when they don't agree with him they are interested in him. He has genuine celebrity, which is rare. It makes up for organizational and financial disadvantages.

Mondale's strength is his ability to enlist the constituencies of the Democratic party—blacks and labor and teachers. These are what are now called special interests. But that is also his weakness. The fact is that Fritz Mondale is seen by a great many American voters as an old-fashioned politician who is a captive of the special interests. I don't think it is a

fair assessment of him, but I think it is there nonetheless. It is like the question of Reagan's view on the fairness issue. It doesn't really matter whether it is true or not, it is real.

Glenn's strength is his ability to increase the universe of voters. He can get people who are not political activists to participate. That has been his record in Ohio. It seems to be his appeal right now.

On the other hand, his problem quite clearly is that people are skeptical, political people particularly, about his ability as a candidate. They just do not know whether he can hit a curve ball or not, and you don't find that out about a presidential candidate until you get in a presidential campaign. It is a very intense situation, there is a lot of pressure.

Glenn's history, in everything he has ever done, is that he rises to the occasion because he is a very disciplined person. And he may rise to the occasion here. We just don't know yet.

The other candidates: Alan Cranston has identification on the peace issue, which is obviously not the greatest thing in the world in the wake of the Korean airliner disaster.

Gary Hart has tried to base his campaign on appealing to a new generation of Democrats, bringing new people into the process. He hasn't had much success. He has no issue identification. There is a block of voters who are interested in trying to get a new generation of leaders in both parties. Unfortunately for Hart, it is not a large enough block to make much of an impression in public opinion polls, and so far, in the primary or caucus states.

There are the two southern candidates. Fritz Hollings of South Carolina has become something of a cult figure. Everybody likes him because he has got a very waspish tongue, and he is funny, he is smart, he has this incredible mush-mouth accent. He is a very charming, bright fellow. On the other hand, he is not somebody who travels well politically and he has not been able to get any financial support outside of his own state. Reubin Askew is a very highly respected politician—as you know, he was governor of Florida for eight years. He has the same problem. He does not have strength outside of his state. We have passed the point where being a regional candidate can be a plus. We elected our first Roman Catholic in 1960, so it is no longer an issue. We elected our first southerner in 1976, so that is no longer an issue. It is in no sense a plus anymore. You cannot put together a regional block behind a candidate, and both Hollings and Askew are discovering that. George McGovern is now a candidate and needs to be mentioned, and I will mention him but there is nothing else to say.

To sum up, I would say that the Democrats do not have a candidate without flaws, a candidate with whom they are totally comfortable.

It is likely to be either Mondale or Glenn—if I had to bet right now, I would bet only a point or two, Glenn rather than Mondale, but it is very close.

On the other hand, the Democrats this time peculiarly have no issues of emotion to divide them. They are all on the same side of the emotional issues. They are all on the same side of the freeze issue, the abortion issue, the Equal Rights Amendment. There are no civil rights issues to divide them as there were in the past. There is no Viet Nam war issue. There is nothing of that kind. So there is a chance for reasonable amity in the Democratic party.

And secondly, and this is the final point I would make, they have genuine purpose and unity in their reaction to Reagan. Ronald Reagan has frightened the Democratic party to death. They are wondering about the same question that I raised at the beginning: Was he an aberration or the beginning for a transformation? They are going to do their very best to have him defined as just an aberration.

(Adapted from a commentary presented during the 1983 ALTA Annual Convention.)

ALTA Abstracter-Agent Section Schedules 1984 Education Seminar for April 6-7

The ALTA Abstracters and Title Insurance Agents Section Education Committee has scheduled an Education Seminar for Friday and Saturday, April 6 and 7, 1984, at the Henry VIII Inn and Lodge, which is located near the St. Louis, Missouri, airport.

Committee Chairman Carleton L. Hubbard, who is president of Stewart Title of Glenwood Springs, Glenwood Springs, Colorado, said the seminar will be held from 1 to 5 p.m. on the first day and from 8:30 a.m. to 1 p.m. on the second day to better accommodate travel schedules.

Chairman Hubbard said planning for the seminar program is under way, and that more details will be announced later. He said panel and round table discussions will be included in the program format. The following subjects presently are being considered as possibilities for the program:

—Closing procedures and the unauthorized practice of law

—Use of small computer systems in the title business

—State regulations and real estate laws

—ALTA title insurance forms

—Conversion from abstracting to title insurance

—Conducting a title industry educational seminar

—ALTA activities and services (question-and-answer session)

Plans also call for feedback from seminar participants.

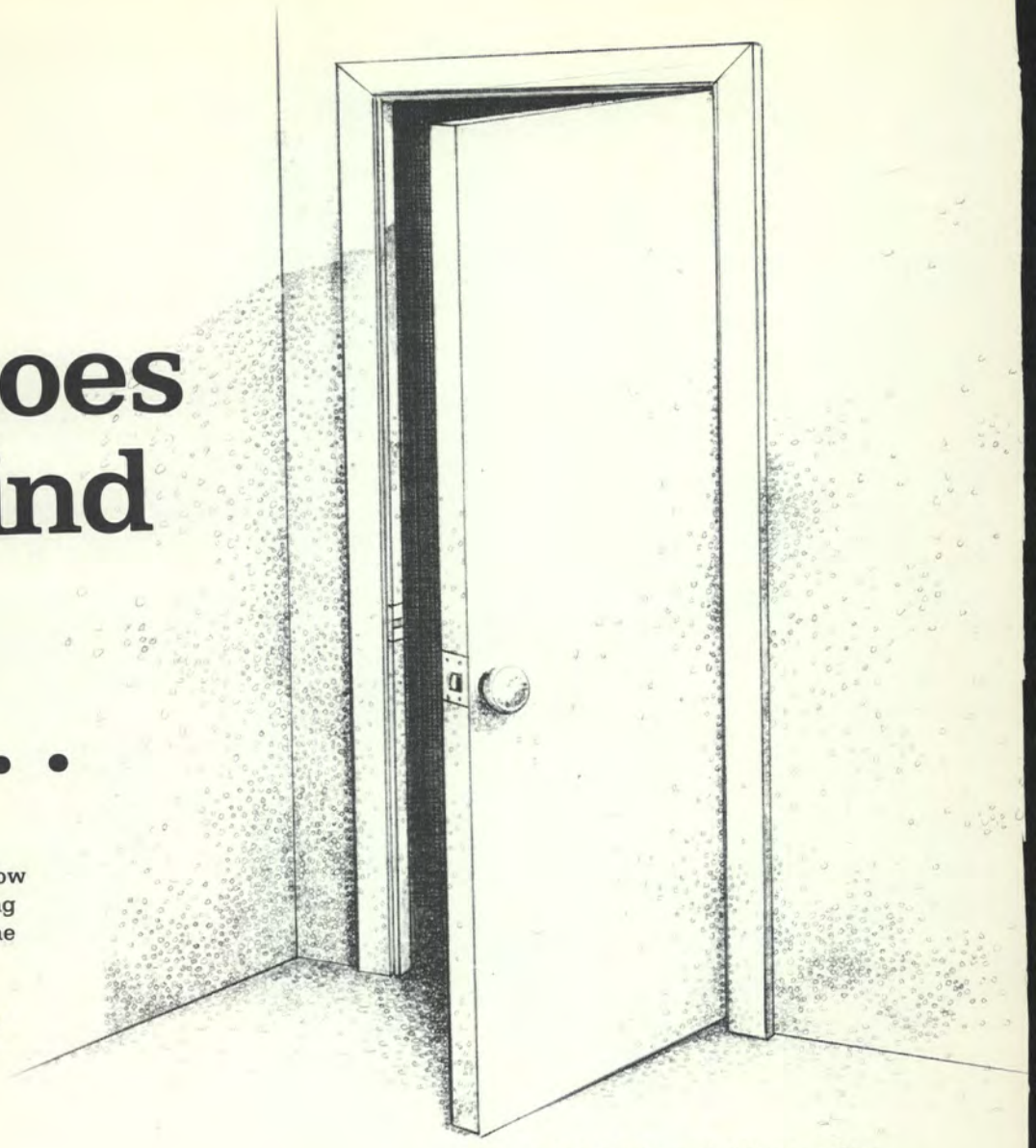
A block of single sleeping rooms has been reserved by ALTA at the hotel for the nights of April 5 and 6. Seminar participants may contact the hotel (4960 North Lindbergh, Bridgeton MO 63044, telephone 314-731-2777) and reserve individual rooms from this block as needed. The hotel will release all rooms not reserved by March 15, 1984.

Allen Retires; First Employee of ATIC

The first employee of American Title Insurance Company, Bernice T. Allen, retired September 30, 1983, after 47 years of service. Ms. Allen began as the only employee of American Title when the concern was a law firm and rose to the position of vice president.

At a farewell luncheon in her honor, Frank B. Glover, American Title's president, described her as "a shining example of loyalty and executive competence."

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 $22*

Protecting Your Home Ownership

A comprehensive booklet which traces the emergence of title evidencing and discusses home buyer need for owner's title insurance $30*

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. $30*

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. $22*

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. . . $35*

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. $40*

ALTA full-length 16mm color sound films

A Place Under The Sun (21 minutes)

Animated film tells the story of land title evidencing $155

1429 Maple Street (13½ minutes)

Live footage film tells the story of a house, the families owning it, and the title problems they encounter. $140

The American Way (13½ minutes)

Live footage film emphasizes that this country has an effective land transfer system including land recordation and title insurance. $140

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. $115

Miscellaneous

ALTA decals $3
ALTA plaque $3

1983 Index to Title News

Names In The News . . .

American Guaranty Title Company, Oklahoma City, Oklahoma, has announced the promotion of **Jackie Hatton**, director of the escrow closing division, and **Mitchell A. Chesney**, director of state agency operations, to senior vice president. **Tressa Whinery** has been promoted to assistant vice president and manager of state agency operations.

The board of directors of Mid-South Title Insurance Corporation has elected **Lois J. Hodge**, personnel manager, to senior vice president.

Charles R. Curtis has been appointed title officer and branch manager, Jenkintown, Pennsylvania, for Industrial Valley Title Insurance Company. **Henry Woyshner** has been appointed assistant title officer and branch manager, Newtown, Pennsylvania.

Commonwealth Land Title Insurance Company has promoted **George P. Gentekos** to assistant vice president, Stamford, Connecticut; **Barbara Richardson** to advisory title officer, San Diego, California; **Mary C. Carroll** to title officer, Paterson, New Jersey; **Karen L. Doty** to assistant title officer, Summit, New Jersey; and **Nanci Reese** to sales representative, Lancaster, Pennsylvania.

Reese

Haines

O'Brien

Werner

Prince

Donohoe

Pilskaln

Schefstad

Carpi

Persaud

Rosenfeld

Comerford

J. Michael Faine has been promoted to director of marketing for Houston Title Company, Houston, Texas.

Chicago Title and Trust Company announces the following appointments: **Robert T. Haines**, general counsel and senior vice president of Chicago Title and Trust and Chicago Title Insurance Company; **Lloyd E. O'Brien**, vice president and director of information systems; and **Raymond J. Werner**, vice president and associate general counsel.

Chicago Title Insurance Company has appointed **Alan N. Prince**, Gulf Central region manager, to senior vice president, Dallas, Texas.

Appointed to the position of resident vice president and division manager with Chicago Title, Chicago, Illinois, are **Edward Andersen**, **Theodore Lewis**, **Robert Rogers**, **William Touhill**, and **Donald Willson**.

Leonard C. Donohoe has been named associate general counsel and manager of corporate claims and litigation department.

Chicago Title also announces the following appointments: **Hank Farrell**, assistant vice president, commercial/industrial sales and remains manager commercial/industrial sales, San Francisco, California; **John Ford**, assistant vice president and remains branch manager, New Haven, Connecticut; **Michael Kaprove**, assistant vice president, sales, Hartford, Connecticut; **Mark Parkinson**, assistant vice president and remains residential sales manager, Chicago, Illi-

nois; **Chris A. Savaiano**, assistant vice president and remains commercial/industrial sales manager, Chicago, Illinois; and **Peter R. Wilkens**, assistant vice president, sales, New York, New York.

Appointed to the position of office counsel with the company are **Randy Kadlec** and **John Prendiville**, Chicago, Illinois, and **Edward Weissberg**, New York, New York.

Barbara Kostka, **Rosemary Lee**, and **Linda Pease** have been appointed title operations officer and division supervisor, Chicago, Illinois, office. **Eileen Preston** has been appointed title operations officer and manager title plant production, Chicago, Illinois. Appointed to the position of title officer with the company are **Corbett Q. Durham**, Cincinnati, Ohio, and **Donald Nelson**, Elmhurst, New York. Appointed assistant title officer are **Richard A. Lindgren**, **Mary Schmuttenmaer**, **Patricia Towns**, Chicago, Illinois and **Carla Aspengren** in the Cincinnati, Ohio, office.

Harold Pilskaln, Jr., has been appointed vice president and counsel, national accounts, of First American Title Insurance Company, Boston, Massachusetts.

Steven R. Schefstad, Winter Haven, Florida, and **Janice E. Carpi**, Dallas, Texas, have been named senior title attorney with Lawyers Title Insurance Corporation. **Frederick R. Persaud** has been appointed assistant branch manager, Miami, Florida.

Harold E. Rosenfeld has been promoted vice president and counsel—claims supervisor with American Title Insurance Company. **Thomas M. Comerford** has joined American Title as vice president and director of marketing.

Hallman Installed As Palmetto President

Nancy K. Hallman was installed as president of the Palmetto Land Title Association at the 1983 convention of the organization. She is manager and counsel with Chicago Title Insurance Company, Columbia, South Carolina.

Anne D. Mixson was elected president-elect of the association; she is also South Carolina state manager, AMIC Title Insurance Company, Columbia. A former secretary of PLTA, she received the J. Lee McDonald annual award at the convention for outstanding service in the title industry.

Also elected were Patricia A. Quattlebaum, vice president, South Carolina Title Insurance Company, to secretary and Laura M. Hulst, validating officer, Title Insurance Company of Minnesota, Columbia, to treasurer.

Elected to the board of directors for the association were John S. Taylor, Robinson, McFadden, Moore, Pope, Williams, Taylor and Brailsford, P.A., Columbia; David E. Mellichamp, Mellichamp and Associates, Inc., Columbia; and Charles E. Hedgepath, assistant vice president and assistant title counsel, Ticor Title Insurance Company, Columbia.

Seventh Edition

The seventh edition of *Real Estate Law*, by Robert Kratovil and Ray Werner, has been published by Prentice Hall, Inc.

Kratovil, a retired Chicago Title Insurance Company vice president, now is a professor of law at John Marshall University. Werner is vice president and associate general counsel with Chicago Title.

Land Title Industry Education Seminar—1984

Presented by the Education Committee, ALTA Abstracters and Title Insurance Agents Section

1 to 5 p.m. Friday, April 6
8:30 a.m. to 1 p.m. Saturday, April 7
Henry VIII Inn and Lodge
4690 North Lindbergh, Bridgeton, MO 63044
(near St. Louis Airport)

Toll-free telephone: 800-392-1660 (Missouri)
800-325-1588 (Out-of-State)

Contact hotel directly to confirm your reservation; single sleeping rooms available at $46.00 per night, doubles $52.00 per night.
Hotel will release all rooms not reserved by March 15, 1984.

Calendar of Meetings

1984

March 28-30
ALTA Mid-Winter Conference
Capital Hilton Hotel
Washington, D.C.

October 14-17
ALTA Annual Convention
MGM Grand Hotel
Reno, Nevada