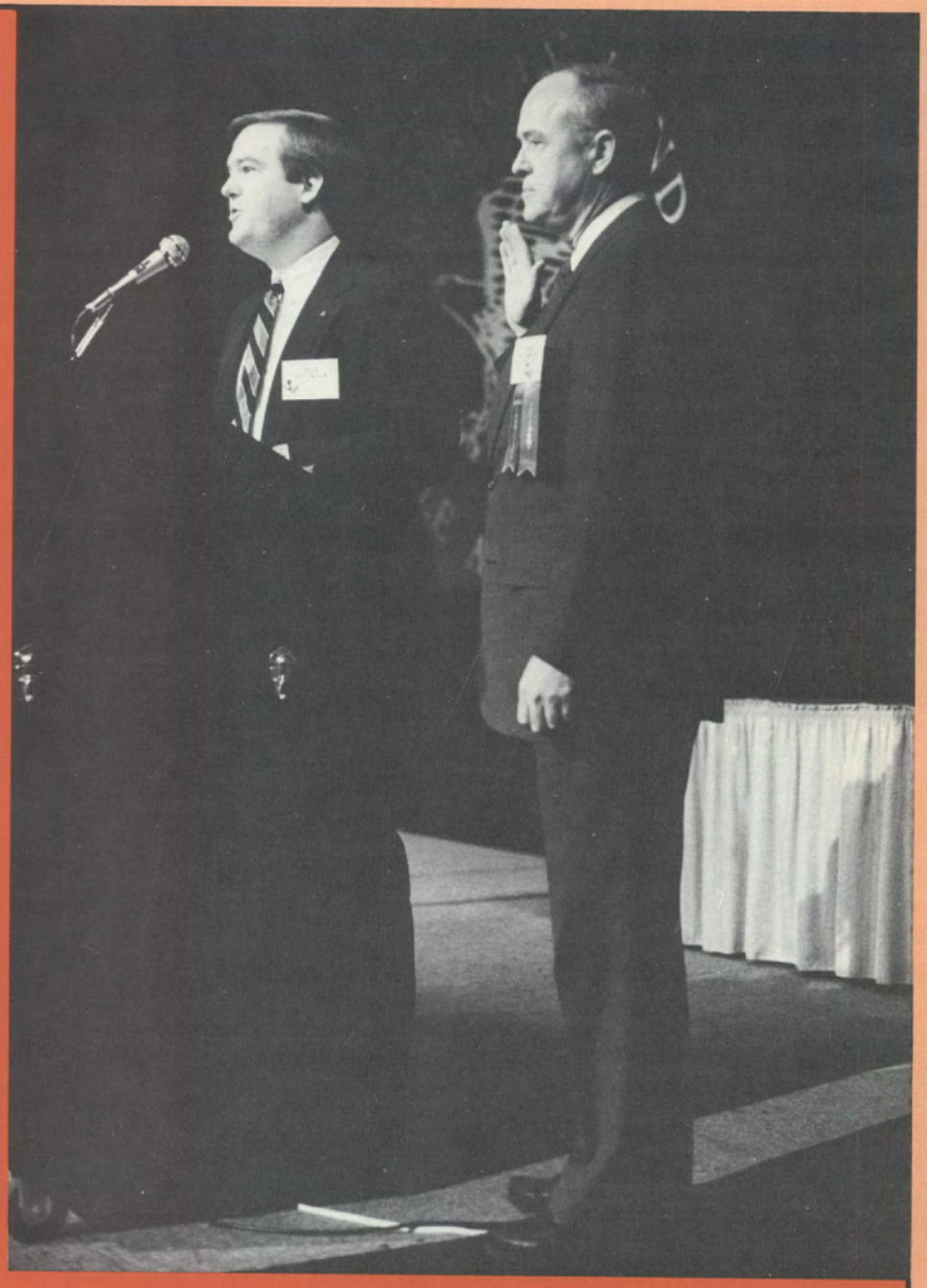
NOVEMBER 1984

Title News



Jack Rattikin, Jr., Installed as ALTA President

Time for a common commitment to cut the deficit.

A call to Ronald Reagan, Walter Mondale, the Members of Congress and candidates:

The Bipartisan Budget Coalition urges all the candidates to commit publicly before the November 1984 elections to a deficit reduction plan to be implemented in the first budget following inauguration.

This plan should cut the deficit--projected to be approximately 5% of GNP--to no more than 2% of GNP within three years and ensure that future budgets move steadily into balance.

Deficit estimates should be based on prudent economic growth and interest rate assumptions.

Because of our common concern, we are sending this message to all announced candidates for federal office. No candidiate should face the voters without commiting to a specific plan for reducing federal spending and deficits. Such a plan should

Uncontrolled spending and big deficits absorb the investment capital needed to create productive jobs and real income for tomorrow. Over the next few years, federal deficits will absorb 70% of our net savings, leaving only one-half to two-thirds the

IV. Elements of a Three-Part Program for Action--Entitlements, Defense, and Taxes

If any of the following areas is placed out of bounds, no fair, effective, or politically sustainable solution to the problem of runaway deficits is possible.

1. Entitlements and Other Non-Defense Programs. The broad-based non-means tested entitlement programs, principally Social Security, Medicare and pensions for the Civil Service and Military, have been growing at an astronomical 15% annually for 15 years. These are now about 40% of the budget. Built-in cost-of-living (indexing) escalators--that have overstated the true increase in the cost of living--drive program costs ever higher. But even this fiscal accounting is misleading. It fails to identify these programs' **$7 trillion** of unfunded liabilities--nearly four and one-half times our official debt--that we are quietly passing on to our children. After years of ducking and posturing, Congress and the

Specific Program. Any serious program to deal with the deficit will have to address each element of the three-part program.

The Bipartisan Budget Appeal has proposed:

A freeze of at least one year--preferably two--in cost-of-living adjustments (COLAs) for the large, non-means tested programs;

A cap on future COLA indexing (e.g., at 60% of the Consumer Price Index or at three percentage points less than the inflation rate);

Similar restraints on all other transfers, subsidies, and programs beyond those for the poor;

A multi-year defense buildup at a more moderate pace; and

Once spending cuts of the type and magnitude described above are assured, any revenue measures needed to reach the deficit reduction goal should mainly rely on consumption-oriented taxes in order to avoid weakening incentives to work, save, and invest.

The particular program, however, is less important than the fact that each part of the three-part program

I. The Stubborn Deficit Problem

We are now enjoying strong economic growth. Yet the federal deficit for fiscal 1985 is venturing into unmapped fiscal territory, toward $200 billion--despite the current recovery and the recent "down payment." **Our national government must now borrow more than one of every five dollars it spends.** Whichever reasonable assumptions are used, the problem will get worse rather than better in the years ahead unless something is done now. The recent deficit "down payment" action was a modest step in the right direction, though it relied too little on spending cuts and too much on tax increases--increases which burdened savings and investment.

It took us nearly 200 years to amass a trillion dollar debt. At the current pace we could double that in a mere five years, thus adding over $15,000 of debt in the name of each American family of four. Without new steps to cut expenditures and raise revenues, interest payments on the federal debt could rise to over $200 billion annually by the end of the decade. **This would be equivalent to more than a staggering $3,200 yearly cost for an average family of four!** Just to pay the interest. Not a penny of this for anything of value. Indeed debt service costs are primed to grow faster than any other segment of the budget--making future deficits self-generating and casting a shadow over our children's economic future.

Huge deficits have serious consequences:

- high interest rates
- weakened long-term growth
- an over-valued dollar
- record balance of payments deficits
- a crippled export sector
- stunted capital spending in industry
- agricultural recession
- a housing slump
- a growing international "debt bomb."

II. Decisive Action Needed Now

There will never be a better time to attack the problem. The current cyclical upturn should not distract us from confronting the long-term structural deficit. The strong 1984 recovery provides an ideal climate for making the tough but imperative fiscal policy choices. For example, if and when the current recovery slows, it will then be argued that it is politically and economically unwise to cut spending and increase taxes.

III. Principles to Guide Action

We the undersigned unite behind three basic principles:

1. Long-term Focus. Reforms must be large, structural, and permanent--in keeping with the size and duration of the problem. One-shot actions are not enough.

2. Principles of Need, Fairness, and Burden-Sharing. Wide and fair sharing of the needed reductions is essential. The poor must be protected. In all the budget reductions to date, the programs that have barely been touched are the very large non-means tested entitlements and programs that confer a large part of their benefits on middle and upper income groups and have the effect of subsidizing consumption. With debt service, these programs plus defense spending amount to over 80% of the budget.

3. Focus on Investment and Savings. The objective should be to increase savings and investment. Massive deficits rob the future by depleting savings and absorbing capital needed to build productive jobs, strengthen international competitiveness, provide for home ownership, and generate real income growth and a higher standard of living for all Americans. Cutting deficits by measures that would at the same time reduce savings and productive investment would make no long-term sense.

programs that heavily benefit the middle and upper classes. No spending program should be off-limits other than those essential to the poor.

2. Defense. The unprecedented peacetime defense build-up--from outlays of $136 billion in 1980 to $230 billion in 1984--responded to military weakness evident in the 1970s. Currently planned defense budget increases, however, should be scaled back from abnormal "catch-up" growth rates to a real growth rate closer to the sustainable growth capacity of the economy. A commitment to a multi-year, moderately increasing defense budget would allow a significant build-up. It would allow more explicit planning for that build-up and lead to deeper and more sustained public support.

3. Taxes. While spending cuts are absolutely our top priority, we must also face the unpleasant fact that current law taxes will generate receipts in a range of 19-20% of GNP; this compares to current spending commitments in a range of 24-25% of GNP. Thus, even with the strong spending restraints outlined above, there is a need to strengthen the federal tax base in order to achieve long-term fiscal balance. **Any tax increases should be tied to and exceeded by spending cuts.** To the extent that revenue is raised, it should be done in a way that enhances incentives for work, capital formation, savings, and economic growth.

entity could help achieve greater deficit reductions for next year and later. If such an entity is established, it should enjoy the strong approval and support of the House, Senate, and Administration. It should be initiated as soon as possible with results by January 1985, in time for the President to consider before submitting his budget and in time for consideration by the House of Representatives and Senate in their budget and appropriations processes.

☆ ☆ ☆

We, the undersigned organizations, commit to urging our members, supporters, customers, savers, suppliers, home builders and buyers to communicate support for a deficit reduction program that embodies the principles and elements discussed above to Ronald Reagan, Walter Mondale, the Members of Congress and candidates. We urge every American to do the same. We hope other organizations will join us.

THE BIPARTISAN BUDGET COALITION

DOWN WITH THE DEFICIT

The Bipartisan Budget Coalition

The Bipartisan Budget Appeal, an organization of over 600 former public officials and heads of law firms, investment banks, accounting firms, major corporations, universities, foundations, and other organizations. Founding Members of the Bipartisan Budget Appeal are:

The Hon. W. Michael Blumenthal
Secretary of the Treasury, 1977-79
The Hon. John B. Connally
Secretary of the Treasury, 1971-72
The Hon. C. Douglas Dillon
Secretary of the Treasury, 1961-65
The Hon. Henry H. Fowler
Secretary of the Treasury, 1965-68
The Hon. Peter G. Peterson
Secretary of Commerce, 1972-73
The Hon. William E. Simon
Secretary of the Treasury, 1974-76

The National Independent Dairy-Food Association, independent dairy processors of fluid milk and milk products.

Menswear Retailers of America, an organization of 9,000 retailers of men's and boy's clothing and furnishings.

The United States League of Savings Institutions, an organization of 3,500 savings and loan associations, savings banks, and cooperative banks, with combined assets of more than $900 billion.

The Small Business Legislative Council, a coalition of 84 national trade and professional associations whose membership consists primarily of small businesses.

Automotive Service Councils, Inc., an organization of 6,000 independent automotive repair shops including body, paint and service centers.

The Dealer Bank Association, a nonprofit organization of commercial banks which, through "dealer" divisions or departments underwrite, trade, or deal in a variety of public securities including federal, state and local government securities, money market instruments and foreign exchange.

The Retail Floorcovering Institute, an organization of 2,000 specialty floor covering retailers.

The American Bankers Association, an organization of 13,000 commercial bank and trust companies with combined assets of $1.9 trillion.

The American League of Financial Institutions, a trade association consisting of 75 Black, Hispanic, Asian-American and women's savings institutions with total assets in excess of $3.8 billion.

The National Small Business Association, an organization of 50,000 firms representing more than 500 kinds of business.

The Mortgage Insurance Companies of America, an organization representing the mortgage insurance industry, with members having over $175 billion of insurance in force on homeowners' mortgages made more affordable with low downpayment financing.

The Independent Media Producers Association, an organization representing individuals and firms engaged in producing audiovisual presentations.

The National Association of Realtors, a federation of 50 state associations of Realtors and 1,848 local real estate boards with 637,000 Realtors and Realtor-associates.

The Manufactured Housing Institute, the national trade association of manufactured home builders and their supplier companies, whose members produce 75% of the manufactured homes in the United States.

The National Association of Retail Druggists, an organization representing 30,000 independent retail pharmacists.

The American Land Title Association, a national trade association of the land title industry with approximately 2,000 members whose principal function is to insure the safe and efficient transfer of residential and commercial real estate.

The Specialty Advertising Association International, an association of suppliers, distributors and direct selling houses of specialty advertising.

The Mortgage Bankers Association of America, an association with 2,100 members, principally mortgage banking firms, commercial banks, savings institutions, and insurance companies which engage in the mortgage banking business.

The Independent Bankers Association of America, an association of 7,500 community banks across the United States.

The National Grange, the 117 year-old fraternal organization of rural families, promoting agriculture and numbering 425,000 members.

The National Association of Surety Bond Producers, an association with 430 members, principally insurance agents and brokers writing contract surety bonds.

The American Consulting Engineers Council, an association with 3,900 members, principally consulting engineering firms engaged in private practice.

The National Council of Savings Institutions, an association of 600 savings banks and savings and loan associations with over $400 billion in assets.

The Brick Institute of America, an association of over one hundred brick manufacturers representing eighty percent of the total brick production of the United States.

The American Institute of Architects, the 127 year-old professional association representing the nation's architects, with 43,000 members.

The National Association of Casualty and Surety Agents, an association with 305 members, principally agents handling fire, casualty and surety insurance.

United Bus Owners of America, individuals, fiirms and corporations actively engaged in the bus industry, especially those in intercity or interstate operations.

The National Association of Home Builders of the United States, an organization of 124,000 single and multi-family home builders, commercial builders, remodelers, architects, sub-contractors, and others associated with the building industry.

The National Forest Products Association, an association representing the forest products industry on national issues concerning the growing of timber and the manufacture, distribution, marketing and use of wood products.

The National Association for the Self-Employed, an organization of 350,000 self-employed and small independent businesspersons.

The American Bus Association, an organization of 3,000 privately-owned bus operating firms.

The National Association of Brick Distributors, distributors and dealers of structural clay products.

To contact the Bipartisan Budget Coalition, write to P.O. Box 5203, F.D.R. Station, New York, NY 10150.

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Title News

Volume 63, Number 9

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Front Cover

Jack Rattikin, Jr., right, Rattikin Title Company, Fort Worth, Texas, is installed by his son, Jack Rattikin, III, as the seventy-eighth president of ALTA during the Association's 1984 Annual Convention. The new president's father, the late Jack Rattikin, served as thirty-third ALTA president in 1939–40. Other newly-elected officers are listed below on this page.

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A Message from the President-Elect

Our national convention is now behind us and we look forward to the challenges of the future which will be addressed by the new administration of the American Land Title Association. During this past year, Don Kennedy has served us well. Thank you, Don, for a job well done. I am sure that Jack Rattikin will be equal to the task ahead, but he, as did his predecessors, will need the help of every member.

This is the height of the football season and I suppose "team effort" is an overworked cliche, but ALTA is a team effort and you all have made the varsity. We can only score, that is, accomplish our goals, by being a team. Our ALTA staff is a part of that team and each of our members is a player.

You know this Association is unique in that it is one of the few insurance trade associations where underwriter, abstracter, and agent come together under the same tent. I think that is what really gives our Association strength. We complement each other, just as a team of individual players complement each other. ALTA does not represent any single entity or group. The diversity of its membership, the differences in interests and points of view finally coalesce in a oneness, a singleness of purpose, a team if you will. This means we can design a policy of common interest which the majority of members can and will support, and it means that as a group we can be more effective. But, we are an organization which needs dissent to provide a focus of direction. We can't be a progressive, winning team without listening to pro and con, for or against, yes and no.

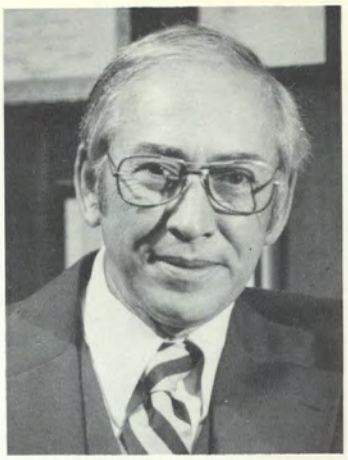
Although we need dissent, there is a distinct difference between dissent and dissension. The former describes one who has a difference of opinion, while the latter refers to partisan and contentious quarreling. Dissent is healthy, dissension is not.

We need unity of purpose which can only be achieved through free and open debate. We need unity of purpose which can only be obtained through expressions of both assent and dissent. We need unity of purpose brought about through understanding and appreciation of the needs and aspirations of the many, not the few.

We don't need dissension, we need harmony. We don't need dissension, we need good will. We don't need dissension, we need cooperation.

Our program for next year has to be founded on the basis that in unity there is firmness in our resolve, in unity there is an awareness of our responsibility. We have come a long distance together. Let us look forward to the future with the knowledge that we all pledge ourselves to attain the goals and objectives we have made and will make for this Association and this industry, that standing united we will solve the problems of tomorrow.

Gerald L. Ippel



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Leadership Abundant Quality Among ALTA Governors

Diverse backgrounds ranging from a military career to law degrees and graduate education in business—with a common characteristic of active leadership in shaping the title industry. These are the five members of the ALTA Board of Governors profiled in this issue of *Title News.*

They are John M. Bell, executive vice president, The Security Abstract & Title Company, Inc., Wichita, Kansas; Edward L. Coffey, executive vice president-western region operations, Ticor Title Insurance Company, Los Angeles; Bert V. Massey, II, secretary-treasurer, The Brown County Abstract Company, Inc., Brownwood, Texas; Richard L. Pollay, president and chief operating officer, Chicago Title Insurance Company, Chicago; and Rowan H. Taylor, president, Mississippi Valley Title Insurance Company, Jackson, Mississippi.

When asked if they cared to express particular views on title industry challenges and other matters, three of the governors did so.

John M. Bell

Bell

Governor Bell has served as secretary-treasurer of the Kansas Land Title Association since 1982 and was president of that organization in 1969. He was secretary of the abstracters board of examiners in his state in 1978-80 and in 1980 was active in lobbying efforts that helped preserve the board during a state government "sunset" review.

He received his bachelor's degree in business administration from the University of Missouri and served as a first lieutenant in the Air Force. Governor Bell has long been a leader in a wide variety of business and civic activities and recently was lauded in a Wichita *Eagle-Beacon* editorial in connection with his receipt of the Wichita Arts Council Recognition Award.

He has served as chairman of the selection committee for a county administrator in his home area, is a member of the Eastborough City Council, and is president of the Wichita Crime Commission. Governor Bell is listed in *Who's Who in the Mid West.*

Commenting on the major challenges that he sees facing ALTA, Governor Bell replied: "Will the abstracter-agent in medium to large size counties continue to be a viable entity? The efforts so far to contain controlled business have not gone very well."

Edward L. Coffey

Coffey

After his retirement from the Army with the rank of major, Governor Coffey spent four years as an insurance consultant with Metropolitan Life before joining Ticor Title Insurance in 1964. He began his title insurance career with the company in Ventura County, California, and served successively as examining supervisor in the East Bay Division, manager of title processing and manager of the Solano County office.

Governor Coffey was elected a vice president of the company in 1977 and was appointed manager of the North Coast Division in 1979. He was appointed Central Region manager in 1981 and was elected to his current position the following year.

Bert V. Massey, II

Massey

After receiving his law degree from the University of Texas and being admitted to the state bar, Governor Massey purchased an interest in Brown County Abstract Company nearly two years after joining the organization as an escrow officer—and joined with William G. Shaw in total acquisition of the concern some three years later. He works as an examiner, closer and as a private attorney—and is a partner in the law firm of Massey and Shaw, drafting real estate coveyancing and mortgage documents.

Governor Massey is a past president of the Texas Land Title Association and this year was selected as its "Title Man of the Year." He has served five years on the TLTA Rates, Rules and Forms Committee—which is responsible for the industry position at the annual state government title insurance rate hearing. He considers the continued growth in TLTA membership and financial strength to be the highlight of his impressive service to the state association.

Governor Massey is the founding trustee of Land Title Pack, the state title industry political action committee in Texas, and has served as chairman of its board of trustees since the beginning.

Asked what he views as the major challenge facing ALTA, he replied: "To broaden membership to include more independent agents and abstracters, particularly those located in smaller communities, and in so doing instill in the new and existing membership a sense of

Continued on page 26

The Relief Has Lasted Long Enough

By James Dunlavey

The decennium of the 1980s has already witnessed at least two examples of concern by the citizens of the United States, and therefore its Congress, with residual subjects from the "Great War", i.e., World War II.

In May, 1984, apparently in full realization that action was long overdue, Congress directed a full and complete discharge from active service of the United States military of that much decorated recruit, Sgt. Donald Duck (Believe it!).

On a more serious matter, and only after intense civilian demand for action from residents of the state of Hawaii, Congress and the military have begun, in mid-1984, an examination into the continued necessity of holding a Hawaiian Island (Kahoolawe, a small island off the western coast of Maui) for use by Canadian and United States forces as a land target for bombing and shelling. By act of Congress, early in the '40s, the island was designated a necessary area for the use of our allied forces for target practice, and the primary residents (a penal colony and a sheep ranch) were removed.

At various times since, the tiny island (six-by-13 miles) has been used by those forces, notwithstanding the apparent archaeological sites that remain there. Pursuant to the confiscation act, the island is to be returned to the (now) state of Hawaii in "reasonably safe" condition, once it is no longer needed for the bombing and shelling practices. Reason would seem to indicate that the predesignated time for termination has occurred.

The author is professor of business law at California State University, Chico, and is coordinator of the Business Law Program at Chico. For approximately 25 years prior to entering teaching, Professor Dunlavey was a practicing attorney in the San Francisco bay area, in part specializing in title company work. Another of Professor Dunlavey's articles appeared in Title News, Volume 60, Number 11, 1981.

It is believed that yet another "left-over" from the "great war" has served its purpose and should be terminated or required to undergo great surgery to relieve its oppressive provisions. Specifically, that archaic legislation is technically entitled the "Soldiers' and Sailors' Civil Relief Act of 1940."[1]

This article will identify the general provisions of the act, will isolate some of the many provisions which affect the title industry specifically (and still, in the 1980s), and concludes with a suggestion of repeal or amendment of the act.

The Act: Generally

As amended from time to time, the act provides for suspension of enforcement of civil liabilities, in those circumstances where it is applicable, against persons in the "military service" of the United States. For general examples of the provisions, a court may grant a stay of enforcement of obligations and liabilities incurred by a member of the protected class *prior* to his or her entry into the military service; military service persons are entitled to a stay or vacation of any civil judgment or order entered against them and against any attachments or garnishments of assets that might stem from such a judgment or order; any period of military service may not be included in computing periods of limitation for the bringing of an action or proceeding, or defending either, whether by or against the service persons or their heirs, executors, administrators or assigns; the military service period may not be included within any period for the redemption of property, real or personal, sold or forfeited to enforce any obligation, tax or assessment; maximum rates of interest which may be charged on incurred debt and rent charge obligations are imposed and regulated; and, real property foreclosures require an affirmative affidavit of non-military service before sale may be completed and/or

the proceedings may be stayed by the protected party (based on a proof, discussed *infra*) whether that sale be originating from a privately incurred contractual debt secured by a land security device or from a public debt creation such as real property taxes or assessments, etc.

The most often cited sections of the act provide that any action or proceeding in which a service person is involved as plaintiff or defendant *may*, in the discretion of the court, be stayed on its own motion, and *must* be stayed on the application of the service person, unless in the opinion of the court his or her ability to conduct or defend the case is not "materially affected by reason of his (or her) military service." The rights of the civilian litigants are to be considered as well under specific provisions of the act, but the burden of persuasion (and probably proof) is placed squarely on the civilian once the service person or his or her representative provides an indication that the military person is, indeed, *prima facie* entitled to the protection of the act.

As a practical matter, in all states and the federal court system, this provision of the act has led to the required filing, by any person seeking relief against one protected, of a non-military affidavit (similar to the title company documents required for foreclosures—discussed, *infra*) before any default matter may be acted upon. This practice, no less than in title practice, has, on many occasions, proved to be at least bothersome and sometimes fatal to the matter, inasmuch as most interested parties do not know whether or not the defaulting party is protected, and cannot or will not, pay the costs of determining the fact.

With these protections generally in mind, then, it should be obvious that it must be determined by any party connected with a "protected activity" just what manner of person is protected by the act; even this is not easy. For one "drafted" into the regular Army for full-time, military service, the answer may be relatively available; as mentioned previously, the act protects those "in the military service of the United States."[2] In only *some* states this has been interpreted to mean that the act does not apply to members of a national guard who are on full-time *state* active duty or in non-federal training status.[3]

These specific coverages and identifications are of little comfort to the title officer or interested party who may very well not know that it has been determined that certain officers of the Public Health Service are protected, that members of the Women's Reserve and WACS as well as SPARS are protected, that *any* American citizen serving with the forces of any nation "allied" with the United States in the prosecution of a "war" is protected, that any member of the enlisted reserve corps under orders to report for military service (whether "reported" or not) is provided protection under the act, or that one who is being "educated" under the supervision of the United States prior to induction into military service is blessed, etc., etc.

As previously mentioned, not only are these identifications little known to the persons charged with enforcements of the several actions or proceedings. The complexity multiplies when, even knowing of the several classifications of protected specie, a party is required to verify, under oath, that any foreclosed-upon debtor or defaulting party is not subject to the act. Though mercifully the criminal prosecutions for perjury are few, it is most often a felony to perjure oneself with a common penalty of one to 14 years—a sobering thought when one is asked to put pen to paper on the required affidavit.

To conclude a general discussion of the applications of the act, it is necessary to examine, very briefly, the purposes of the act. The act is valid under the "war powers" provisions of the Constitution, enabling provisions for the acts of Congress during the time of war. The act specifically provides for its own termination[4] but also contains a provision that it shall continue in effect until it is repealed or terminated by a subsequent act of Congress.[5] It is the latter that has prevailed.

Specifically, it is said that the act is designed to protect the rights of all persons who have become a part of the nation's defense, in the main to protect those "who have been *obligated* to drop their own affairs and take up the burdens of the nation."[6]

With this brief examination of the general provisions and applications of the act, the persons intended to be protected by the act, and an identification of the purposes for the act (Although the examination, here, is not intended in any way to be complete—that is left to the encyclopedias of the law), there remains for discussion the specific effects of the act to the title industry and the burden placed on this industry by the act, all of which, necessarily, finds itself a burden on the costs and charges that must be made to the community for the products supplied.

Specific Applications

Earlier, it was noted that the act does apply to (1) real property foreclosure proceeding, whether these proceedings are based upon a court order or are taking place pursuant to a contractually conferred power of sale or divestiture (The most relevant provisions of the act in this reference are certainly those which govern the rights of the parties to enforce mortgages, deeds of trust and installment contract sale provisions. The act provides for relief from these actions, contained generally at section 532), (2) tax or assessment enforcement proceedings (In these provisions of the act, military persons are protected with respect to the sale of their property for the enforcement of the collection of real property taxes or assessments on that property.[7]

For an example of application which is fraught with title problems, a tax sale of property conducted prior to the expiration of the period of redemption as extended by the act—the period of military service extends the period—is fatally defective and the purchaser acquires no title whatsoever[8]), and (3)

Continued on page 28

"... a tax sale of property conducted prior to the expiration of the period of redemption ... is fatally defective and the purchaser acquires no title whatsoever ..."

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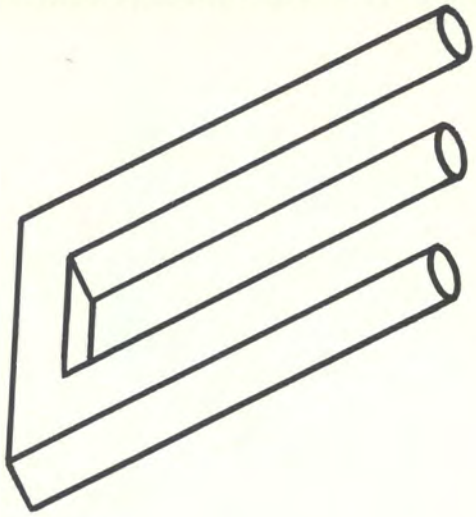

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Vice President-Administration Aids ALTA Operational Efficiency

Working as the hub of the wheel around which much ALTA activity revolves is Vice President-Administration David R. McLaughlin. Among the several areas of responsibility for this member of the Association executive staff are physical arrangements for meetings, office operations including data processing, and a variety of other assignments.

According to Association Executive Vice President Michael B. Goodin, "The role of David McLaughlin is an essential element contributing to the smooth, efficient operation of the ALTA national headquarters office on a day-to-day basis."

McLaughlin joined ALTA as business manager some 16 years ago. Besides accounting, he soon was assigned additional responsibilities as planner of physical arrangements for meetings. Today, he assists Goodin in the supervision of general office operations, which include support personnel, procurement of supplies and equipment, and membership services. As he puts it, McLaughlin strives to maintain the "efficient coordination of the Association's various departments and services for our members." Among the ongoing Association activities that he supports administratively are public relations, government affairs, research, and membership processing.

McLaughlin maintains the Land Title Institute financial and personnel records and organizational filings, prepares monthly financial statements and Federal Election Commission filings, and financial reports for the Title Industry Political Action Committee. He works with membership dues, and assists the Membership and Organization Committee in its effort to recruit new members and retain existing members for ALTA.

Recently, McLaughlin completed one of his major tasks of the year—extensive coordination of the physical arrangements for the ALTA Annual Convention in Reno, Nevada. Overall, advance work on meeting planning is a continuing process for him. Although the 1984 Annual Convention is now recent history, McLaughlin already is in the midst of planning the 1985 Mid-Winter Conference and is involved in site selection for the 1988 Annual Convention. McLaughlin closely examines the physical and financial attributes of numerous meeting packages before recommendations are referred to the ALTA Executive Committee for a final decision.

Internally, he is responsible for all financial and accounting activities of ALTA including preparation of financial analyses of conventions, conferences, and seminars; recording of cash receipts and disbursements; monthly preparation of bank reconciliations, payroll and tax deposits and the ALTA financial statement; preparation and filing of tax returns; maintenance of cash flow and coordination of disbursement order requests to insure availability of funds for payment of operational expenses; and the annual audit of ALTA records by an outside firm. In addition, he assists the Association treasurer and executive vice president in accounting of ALTA funds and investments.

In response to continuing growth in ALTA's various programs, McLaughlin has been assigned responsibility for implementing a new office computer system. In this and other responsibilities, he cites the important

Continued on page 28

ALTA Vice President-Administration David R. McLaughlin and Dorothy Harting work with financial records of the Association on the national headquarters office computer system.

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ALTA Judiciary Committee Report: Part III

Marketable Title Act

Toth v. Berks Title Ins. Co., 6 Ohio St. 3d 338 (1983)

Facts: Toth bought two parcels for $300,000 and purchased a title guarantee, which did not list any setback use restrictions. Toth contracted to sell one parcel for $85,000, to LaFatch, who contacted Chicago Title and requested a title guaranty. Chicago Title discovered certain setback use restrictions created in a 1924 deed and expressed again in a 1926 land plat. LaFatch withdrew from the purchase negotiations. Toth brought suit against Berks Title and was awarded money damages since the appraisals showed the land to be worth substantially less as restricted by the setback use restriction than if the land were not so restricted. The root of title of Toth is a 1928 deed, which contains no mention of the setback use restrictions. However, in June 17, 1966, a deed contained a note which referred to the setback use restrictions:

> Note: The above plat shows a building line 100 feet parallel and with the westerly line of Beck Road a building line of 60 feet parallel and with the northerly line of West Market Street for caption.

Issue: Whether this restriction in existence prior to the root of title was preserved by the reference in the 1966 deed.

Analysis: The only transactions to be considered within the 40-year chain of title period are the 1928 transfer with no restrictions, the 1966 transfer, which contains the above "note," and the 1974 transfer to Toth with no restrictions.

Next, the court discussed a general reference vs. a specific reference, since R.C. 5301.49 provides that "a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them. . . ." The court decided the "note" is a specific reference.

Insight: Any interest or defect that is referred to specifically in a muniment within the marketable record title of a parcel of property, as defined by R.C. 5301.48, is not extinguished by the Ohio Marketable Title Act.

Mechanics Liens

Takach v. Williams Homes, Inc., 6 Ohio St. 3d 357 (1983)

Facts: Williams Homes agreed to build a home for Takach. Takach selected a site. Upon completion Williams Homes would sell the house and lot to Takach for $110,170.00. Takach made a $5,000 down payment. Takach applied for a loan with Cardinal Federal. Cardinal Federal made a construction loan to Williams Homes in the sum of $80,000. Cardinal disbursed $68,999.20, however, never required Williams Homes to produce any evidence, assurance or affidavits for protection against mechanics' liens that it paid all of the subcontractors and materialmen from such funds prior to disbursement to Williams Homes. Williams Homes misapplied a significant portion of these funds (over $19,000) and became insolvent. Several mechanics liens were filed. Takach arranged to borrow additional funds and delivered same to Cardinal Federal with instructions to pay off the mechanics' liens.

Issue: Whether Cardinal Federal owed a duty to Takach in the disbursement of construction loan funds to Williams Homes.

Analysis: There are two contracts, a purchase loan and a construction contract. The code section does not distinguish between contracts. The duty not to make disbursements without obtaining affidavits is to anyone who could be injured by a failure to comply with the statute.

Pursuant to R.C. 1311.011 (B) (4), a lending institution has a statutory duty to require an original contractor to provide affidavits for protection against mechanics' liens prior to the disbursement of any funds to the contractor. This duty is owed to one, having a loan commitment from the same lending institution for the subject home, who might be damaged by such wrongful disbursement.

Insight: What result would have occurred if

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.

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; William M. Heard, Jr.; Robert J. Whisman; John K. Graham; E. A. Bowen, Jr.; Abraham Resisa; Fred Gabler; Russell D. Webb; Leo W. Haymans; George P. Daniels; Ted W. Morris, Jr.; Louis G. Shushan.

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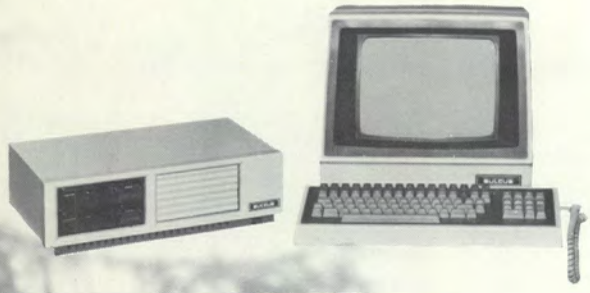

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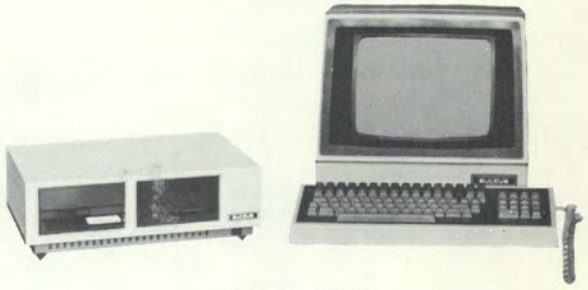

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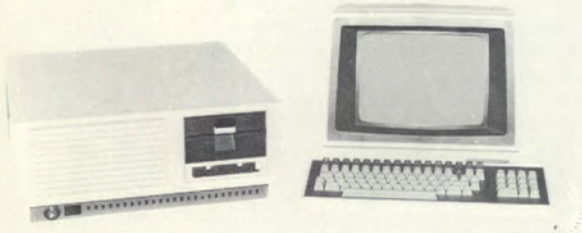

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Takach had a loan commitment with some other lender?

Mechanics Lien—Priority

Murray v. Chulak, 250 Ga. 765; (300 SE2d 493)

Murray entered into a contract to provide architectural services on various projects to be developed by Partiss. Under the agreement, Partiss was to provide Murray office space, expenses of personnel, an annual salary and a 5 per cent partnership interest or stock interest in the projects.

Partiss entered negotiations with a lender to finance the acquisition and development of what was known as the Delk Road Property. Murray prepared architectural plans for the project, which were submitted to the lender as part of the loan application. Subsequently, Partiss acquired the property and executed three security deeds, each securing separate parcels of the property. Murray continued to provide architectural services for over a year, at which time he terminated his relationship with Partiss. Murray filed an action against Partiss to recover the value of his services and to establish a lien against the property. During the pendancy of this litigation, the lenders, who were not parties, foreclosed on their security deeds and the property was sold. Subsequently, purchase money security deeds, given in conjunction with these sales, also were foreclosed and the property again sold. Thereafter, Murray obtained a judgment against Partiss and a special lien against the property. Murray notified the property owners of his intention to levy on the property, and the property owners brought this action to set aside Murray's judgment and lien.

Issue: Does an architects lien, for work performed at the request of one not the owner of the property, have priority over a subsequent deed to secure debt?

Analysis: Murray argues that his lien dates from the time he began work on the property, which was prior to the date of the loan and, therefore, has priority. The court points out that, while this is normally the case, Partiss at the time the work was performed did not yet own the property and that a stranger may not order work done upon real estate and charge the true owner. For this reason, the court finds that the lien did not attach until Partiss subsequently acquired title. Since the lenders security deed was a purchase money security deed, it has priority over liens against the purchaser.

The court also finds that, since Partiss orally agreed to give Murray a 5 per cent interest in the project, Murray was a part owner and thus was not entitled to a lien on the property.

Mechanics Lien—Priority

Palmer v. Forrest, Mackey & Associates, Inc., 251 Ga. 304; 304 SE2d 704 (1983)

A Realtor sold a subdivision lot to a builder and the builder obtained a construction loan from the lender. The lender duly recorded the security deed securing its loan, but failed to record the deed conveying title from the Realtor to the builder.

Subsequently, Palmer contracted with the builder to construct a house on the property and made a substantial cash down payment. Palmer obtained a commitment from the lender to provide financing of the balance of the purchase price. Neither the developer nor the lender informed Palmer of the outstanding construction loan.

Prior to completion of the house, the builder informed Palmer that he was filing for bankruptcy and offered to sell Palmer the partially completed house, subject to the outstanding construction loan. This was the first that Palmer knew of the existence of the construction loan.

Palmer filed suit claiming an equitable lien against the Realtor who was still the record title holder. Subsequently, the Realtor executed and recorded a quit-claim deed to the builder and at the same time the lender instituted foreclosure proceedings. Palmer added the lender and builder as defendants and several materialmen were allowed to intervene in the litigation.

Palmer and the materialmen appealed from motions for summary judgment in favor of the lender.

Issues: 1. Did the lender's security deed have priority over the equitable lien of Palmer?; 2. Did the lender's security deed have priority over the materialmen's liens?

Analysis: Palmer argued that his equitable lien attached when he made the cash down payment to the builder and that the lender's security deed, although recorded prior to that time, did not become effective until the later recording of the quit-claim deed to the builder.

The court found that, at all times, Palmer believed that the builder owned the property. If he had examined title to the property, he would have found that the builder was not the owner of record and would have been put on notice not to contract with the builder.

The court found that it was Palmer's failure to check title and not the lender's failure to record the original deed which enabled the builder to inflict the injury, and, therefore, sustained the grant of summary judgment in favor of the lender.

The materialmen raised the same argument raised by Palmer, that the lender's interest did not attach until the recording of the quit-claim deed from the Realtor to the builder that occurred after their lien rights had attached.

The court did an about face and said that the materialmen were not in the same position as was Palmer. In the court's view, because a builder often constructs a house under a contract with the owner the builder's possession of the property did not give notice of the builder's ownership of the lot.

The court found that, because the lender's security deed was not in the chain of title, it was as if it were not recorded for the purpose of giving constructive notice.

Insight: This case is particularly interesting in light of the court's earlier decision in *Murray v. Chulok*. In this case, the court held that a stranger may not order work done upon real estate and charge the true owners.

Here the court did not hold the materialmen to the same duty as the purchaser to examine the status of title, the theory being that, since a builder often contracts with the true owner, finding title in someone other than the builder would not have constituted notice. But, in light of the Murray decision, it would seem that finding title in someone other than the builder would have put the materialmen on notice that they might be dealing with a stranger to title and, therefore, their liens might not attach. An inquiry of the builder's authority would have revealed that the title was in fact in the builder and the outstanding security deed would have been discovered.

Mineral Leases—Development

Ionno v. Glen-Gery Corp., 2 Ohio St. 3d 131 (1983)

Facts: Menges, lessors, executed a coal and clay lease to NATCO Corporation, lessee. NATCO assigned the lease to Glen-Gery. Ionno succeeded to the rights of Menges under the lease, having acquired title to the real estate October 18, 1980. Lessee was granted the right to mine coal and clay and was obligated to pay lessor a royalty on the product mined of $300 per year for two years, thereafter $600 per year. Lessees have made all the payments but never undertook any mining activity or operations. Appellees brought this action seeking cancellation of the mineral lease for non performance.

Issue: Whether lessee's violation of its obligation in the nature of an implied covenant to develop the land shall result in forfeiture.

Analysis: An annual advance payment which is credited against future royalties under the terms of a mineral lease does not relieve the lessee of his obligation to reasonably develop the land. Although the payment of annual minimum royalties will not necessarily preclude a claim of forfeiture based upon an implied covenant to reasonably develop the land, lessor has the burden of proving damages are inadequate before such forfeiture may be declared.

Insight: No evidence was before the court on the issue of damages. The remedy sought was forfeiture. Since the Ohio Supreme Court reversed the finding of a forfeiture made by the court of appeals, the parties are back in the trial court on the issue of damages.

Mortgage—Dragnet Clause

Whiteway Finance Company, Inc. v. Green, 434 So. 2d 1351 (Miss. 1983)

In 1974, Percy Lee Geen executed an installment note secured by a deed of trust to Delta Loans, Inc., the predecessor in title to Whiteway Finance Company. The deed of trust was properly recorded. It contained a dragnet clause which provided that subsequent loans made to the grantor before the deed of trust was cancelled of record would be secured by the deed of trust. Percy Lee Green then conveyed the property to his father, Washington Green, Jr., before the 1974 loan was fully paid and satisfied. In 1976, Percy Lee Green, though not in title, executed a second installment note secured by a deed of trust on the same property to Delta, covering the amount of the remaining balance of the 1974 loan, plus finance charges and an additional amount; however, the original deed of trust was not satisfied and cancelled of record. When payments on the 1976 loan became delinquent, Whiteway Finance Company instituted foreclosure proceedings under the dragnet clause of the 1974 deed of trust.

The chancellor found that the debt secured

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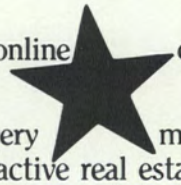

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by the 1974 instrument was paid in full and ordered the deed of trust cancelled.

The issue was whether a dragnet clause in a deed of trust is enforceable even though the debt has been satisfied but the deed of trust has not been satisfied and cancelled.

The rule of law is that a dragnet clause is enforceable until satisfied of record.

The Mississippi Supreme Court noted that the principle is well established that dragnet clauses are enforceable in Mississippi and held that, no matter what transpired between Percy Lee Green and the finance company in computing the amount of the 1976 loan, the proceeds from that loan were secured by the 1974 deed of trust through the dragnet clause until the prior instrument was satisfied of record. The case was reversed and rendered.

Chairman's comment: A mortgage may secure advances made before the mortgagor acquires title to the property under the doctrine of after acquired title, but, as to later advances, the borrower normally must be the owner at the date of advance. I believe this case turns on relationship of the parties and the language in the dragnet clause.

Mortgages, Absence of Seal

Monroe Park v. Metropolitan Life Insurance Company, 457 A.2d 734 (Del. Supr. 1983)

Metropolitan Life Insurance Company, assignee of a mortgage, brought an action at law for mortgage foreclosure by writ of "scire facias sur mortgage" against the defendant, Monroe Park. The mortgage did not bear the seal of the mortgagor. The superior court accepted the argument of the defendant that the absence of a seal is a technical defect which does *not* affect the enforceability of a mortgage in an action at law for mortgage foreclosure. Summary judgment was entered in favor of the plaintiff. On appeal to the Supreme Court of Delaware, the decision below was reversed.

The issue was whether a mortgage which fails to bear the seal of the mortgagor is enforceable at law in an action of "scire facias sur mortgage."

Pursuant to Delaware law, 25 Del.C. Section 2101(a), a mortgage must be under seal of the mortgagor if it is to be enforceable at law in an action of mortgage foreclosure. The supreme court rejected the argument of the plaintiff and the superior court that such an omission was merely technical, but instead determined that it was a defect in the execution of the instrument. Only a court of equity may disregard such a requirement and enforce a mortgage brought by a bill in equity; a court of law may not.

The supreme court also rejected arguments that the seal requirement for mortgages was eliminated because of changes to statutory law which no longer require deeds to be under seal and because there has been a merger of law and equity in the enforcement of mortgages. The court said that the state legislature has not changed its requirement that a mortgage be under seal notwithstanding changes made regarding deeds, and such will be the law of Delaware until the state legislature acts.

In addition, there has been no merger of law courts and equity courts, which today are separate and distinct. The end result is that the law court may not apply equitable doctrines.

Insight: The decision of the Delaware Supreme Court proceeds from a very strict reading and application of Delaware law. This result is particularly harsh on a foreclosing mortgagee since under Delaware law one is not permitted to pursue concurrently actions at law by scire facias and actions by bill in equity. Rather, one must elect one or the other. With this in mind, a very careful review of the statutory requirements for mortgages must be made since an omission is not likely to be treated as merely technical.

Mortgages—Environmental Protection—Liens for Cleanup—Priority

Kessler v. Tarrats, 191 N.J. Super. 273, 466 A.2d 581 (Chan. Div. 1983)

The Spill Compensation and Control Act provides for state control of the transfer and storage of hazardous substances. If the responsible party does not remove substances that become injurious to the environment or the public, the state may do so. In the event the state performs the cleanup, the act provides that any expenditures made by

the state shall constitute a first priority claim and lien paramount to all other claims and liens. The plaintiff, assignee of a mortgage executed and recorded prior to the effective date of the Act, having obtained the assignment after the effective date of the act, brought an action to foreclose the mortgage and joined the state as defendant. The state moved for a summary judgment that its lien for cleanup costs filed after the mortgage was prior to plaintiff's mortgage and real estate taxes.

The issue was whether the priority of the state's lien was invalid on the constitutional grounds of impairment of right to contract, denial of due process and taking without payment of just compensation.

The court held that the super priority lien provision of the act was a valid exercise of the police power and did not violate plaintiffs constitutional rights in that plaintiff's rights were acquired after the date of the act, no notice need be given to lien holders before abatement of toxic waste occurs and collection efforts against the discharger must be brought through the courts. The lien provision, being prior to all other liens, necessarily means those liens established prior to the effective date of the act. Therefore, the state's lien had priority over plaintiff's mortgage and municipal real estate taxes.

Mortgages—Foreclosure

Jeffery v. Seven Seventeen Corporation, 461 A.2d 1009 (Del. Supr. 1983)

Mortgagor, Jeffery, breached the terms of his mortgage to the lender, Seven Seventeen Corporation, by failing to pay several years of city and county real estate taxes. The lender gave written notice of its decision to exercise its option as contained in the mortgage to accelerate the entire debt then outstanding and also stated that foreclosure would be commenced if payment of this debt was not made within the next 15 days. Negotiations to revoke this notice on the part of Jeffery's attorney failed and no expression of agreement to pay the accelerated debt or the delinquent taxes was made. Lender accelerated the debt and filed a suit in mortgage foreclosure. A week later, Jeffery paid all delinquent real estate taxes. The Superior Court of Delaware denied Jeffery's cross motion for summary judgment and granted summary judgment in favor of lender. Jeffery appealed this decision to the Supreme Court of Delaware. The decision on appeal was affirmed.

The first issue was whether payment of all delinquent real estate taxes after lender has accelerated the debt and commenced a mortgage foreclosure action can bar the acceleration of the debt and foreclosure proceedings. The second issue was whether the payment of all delinquent real estate taxes within the 15-day grace period set forth in lender's letter equitably estopped lender from foreclosing its mortgage.

The supreme court held that a lender may accelerate the entire debt due upon a default in payment of taxes provided the mortgage instrument so provides. Payment of delinquent taxes must be made *before not after* the commencement of foreclosure. Payment made after this event is no bar to acceleration of debt or foreclosure.

The court also held that Jeffery failed to establish equitable estoppel, citing that he was aware of the terms of the acceleration clause and knowingly failed to take advantage of the 15-day grace period provided by lender for repayment of the acceleration debt. Court of Delaware denied Jeffery's cross motion for summary judgment and granted summary judgment in favor of lender. Jeffery appealed this decision to the Supreme Court of Delaware. The decision on appeal was affirmed.

The issues were as follows:

First, can payment of all delinquent real estate taxes after lender has accelerated the debt and commenced a mortgage foreclosure action bar the acceleration of the debt and foreclosure proceedings?

Second, did the payment of all delinquent real estate taxes within the 15-day grace period set forth in lender's letter equitably estop lender from foreclosing its mortgage?

The supreme court held that a lender may accelerate the entire debt due upon a default in payment of taxes provided the mortgage instrument so provides. Payment of delinquent taxes must be made *before not after* the commencement of foreclosure. Payment made after this event is no bar to acceleration of debt or foreclosure.

The court also held that Jeffery failed to establish equitable estoppel, citing that he

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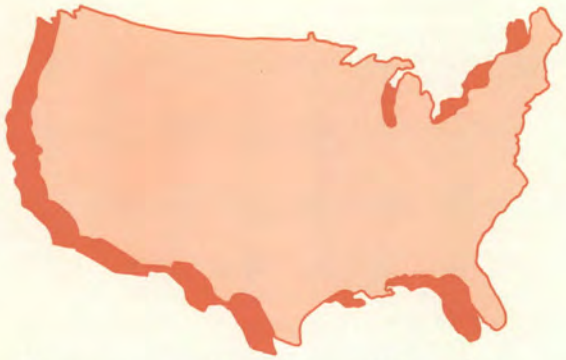

Around the Nation

Rattikin Addresses NYSLTA Convention

Jack Rattikin, Jr., Rattikin Title Company, speaking as ALTA president-elect, presented an update on national activity of the Association during the sixty-third annual convention of the New York State Land Title Association.

According to NYSLTA Executive Vice President **John A. Albert**, the convention program also included these commentaries: "Recent Developments of Interest to Conveyancers," a panel featuring **Leonard H. Feder**, Commonwealth Land Title Insurance Company, **Harry Gold**, USLIFE Title Insurance Company, and **Frank E. Sprower**, National Attorneys' Title Insurance Company; "The Economic Outlook in Our Industry," by **William L.K. Schwarz**, economist, Manufacturers Hanover Trust Company; "The Gains Tax on Real Property in New York—an Update," by **Bernard M. Rifkin**, The Title Guarantee Company; and "Unconscionability—A New Wave in Consumerism," by **Thomas P. Moonan** of Harris, Beach, Wilcox, Rubin and Levey.

Newly-elected NYSLTA officers are **William A. Colavito**, Chicago Title Insurance Company, president; **Richared Marcus**, Commonwealth Land Title Insurance Company, vice president-southern section; **John C. McGuire**, Monroe Abstract & Title Corporation, vice president-central section; **Owen Mangan**, Ticor Title Guarantee Company, vice president-western section; **Edward M. Norton**, National Attorneys Title Insurance Company, treasurer; **Peter E. Becker**, Security Title & Guaranty Company, chairman-title insurance section; **Marvin C. Baron**, Carle Place Service Corporation, chairman-abstracters and title insurance agents section; and **Harold A. Kleinfeld**, Nationwide Abstract Corporation, vice chairman-abstracters and title insurance agents section. **Albert** was re-elected executive vice president.

DLTA Elects Bobo; Honors C. V. Jones

Bruce S. (Scotty) Bobo, Lauderdale Abstract Company, was elected president of the Dixie Land Title Association at the organization's annual convention, according to **Marguerite Bridges**, Fulton Title & Abstract Company, Inc., DLTA executive director.

Other new officers are **John R. Johnson**, Lawyers Title Insurance Corporation, president-elect; **Annette Howard Gambel**, Commonwealth Land Title Insurance Company, secretary-treasurer; **Sharron Pridgen**, Mississippi Valley Title Insurance Company, finance chairman; **Larry Giardina**, Title Insurance Company, director at large; **Martha B. Ferguson**, Cahaba Title, director, Alabama; **James R. McDonnold**, National Attorneys Title Insurance Company, director, Georgia; **William C. Smith**, Mississippi Valley Title Insurance

Dixie Land Title Association Past President William M. Heard, right, presents the DLTA "Title Person of the Year" plaque to Robert V. Jones, another former president of the association. Shown in the other photograph are DLTA 1984-1985 officers and directors; from left, Scotty Bobo, president; John R. Johnson, president-elect; Sharron Pridgen, finance chairman; Annette Howard Gamble, secretary-treasurer; Martha B. Ferguson, director, Alabama; Larry Giardina, director at large; James R. McDonald, director, Georgia; and William C. Smith, director, Mississippi.

Company, director, Mississippi; and **Joseph R. Santoli**, Chicago Title Insurance Company, past president.

Featured speakers were ALTA Senior Vice President **William J. McAuliffe, Jr.**; **Burton Goldstein**, Information America, who evaluated the present and future roles of automation in the title industry; **Tom Wilson**, land surveyor and executive director for the Georgia State Board of Registration, who fielded questions concerning land surveys; and **John R. Brannen**, Chicago Title Insurance Company, who analyzed the history of the title business in Georgia.

Robert V. Jones, Jr., Lawyers Title Insurance Corporation and DLTA past president was named "Title Person of the Year".

Howard L. Stillwell, Jr., Chicago Title Insurance Company, was convention chairman.

MLTA Hears Ippel; Elects S. J. Tierney

ALTA President-Elect **Gerald L. Ippel**, Ticor Title Insurance Company, was the featured speaker at the Minnesota Land Title Association Annual Convention. He addressed attendees regarding the potential impact of financial institutions deregulation on the title industry.

Outgoing Kansas Land Title Association President E. Jay Deines, left, presents gavel to incoming President Roy Worthington at the annual banquet.

Other speakers included **Michael Chamberlain**, North American Mortgage Corporation, who spoke on, "Lender Needs of a Title Company," and Attorney **Kent Tupper**, who discussed, "Indian Lands and Claims."

Newly-elected MLTA officers are **Steven J. Tierney**, Chicago Title Insurance Company, president; **Charles Enger**, Enger Abstract Company, Inc., president-elect; **A.L. Winczewski, Jr.**, Chicago Title Insurance Company, re-elected secretary-treasurer; **Martin Sathre**, Sathre Abstractors, Inc., immediate past president; and **A.L. Winczewski, Sr.**, Winona County Abstract Co., Inc., **Kenneth Danielson**, Kandiyohi County Abstract & Title, and **Ronald Gandrud**, Title Insurance Company of Minnesota, directors.

Also present at the convention as an honored guest was newly-elected Iowa Land Title Association President **Donald J. Conlon**, Abeln Abstract Company.

KLTA Introduces Concurrent Panels

Two concurrent panels for different member segments highlighted a program format change at the Kansas Land Title Association convention

The panels were entitled: "Problems of Metropolitan Area Agents," moderated by **Jeffrey H. Otto**, and "Problems of Small Counties," moderated by **George Burket, III**. Panelists included KLTA members **Don Gregory**, **Dan Hannah**, **Roger Hannaford**, and **Joyce Messerly**.

According to KLTA Secretary-Treasurer **John M. Bell**, both sessions were successful and "produced requests for needs that the state association will address in the coming year."

D.P. Kennedy, First American Title Insurance Company, addressed a general session as ALTA president. TIPAC Chairman **Roger N. Bell**, an ALTA past president and Kansas title man, provided an update on the national activity of the political action committee.

Other presentations included, "Current Status of Controlled Business Legislation in the State of Missouri," by neighboring Missouri Land Title Association Past President **Sam Sherwood, Jr.**; "How to Get Along Better With Customers and Clients," by **Dr. Don Hackett**; "Characteristics to Attract New Industry to Rural Areas," by **J. Dale Peier**; "Land Mortgages with a Short-Term Lender vs. a Long-Term Lender," by **Sam Tanner**; "Water Rights Income and Estate Planning," by **Charles M. Landson**; and a panel, "Title Losses: Types and How to Handle Them," with **John E. Kerwin**, moderator, and **Wendell D. Winkler** and **Vera Sutton**, panelists.

At the annual banquet, another Kansan, 1963-1964 ALTA President **Clem Silvers**, F.S. Allen Abstract Company, was presented the KLTA "Title Person of the Year" award by **Roger Bell** in recognition of his long and dedicated service to the industry.

Newly-elected KLTA officers are **Roy H. Worthington**, Charlson and Wilson Bonded Abstracters, Inc., president, and **Barbara Gould**, Ford County Title Company, Inc., vice president. **John Bell**, The Security Title & Abstract Company, Inc., was re-elected secretary-treasurer.

Diggins Elected President of ILTA

Donald R. Diggins, LaGrange Title, Inc., was elected president of the Indiana Land Title Association at the association's seventy-seventh annual convention.

Other newly-elected officers are **Robert J. Ewbank**, Ewbank Land Title, Inc., first vice president; **Merrill A. Check**, Johnson County Land Title, Inc., second vice president; and **G. Elwood Steckler**, Ticor Title Insurance Company, secretary-treasurer.

Featured speakers at the convention were ALTA Abstracters and Title Insurance Agents Section Chairman **John R. Cathey**, The Bryan County Abstract Company; **Chris Mass**, who spoke on computers in the title industry; and **Mike Vance**, who discussed creative thinking.

Shown here are newly-elected officers of Minnesota Land Title Association; from left, Martin Sathre, immediate past president; Tony Winczewski, Jr., secretary-treasurer; Charles Enger, president-elect; Kenneth Danielson, director; Ronald Gandrud, director; Steven J. Tierney, president; and Tony Winczewski, Sr., director.

New Receives High Honor from PLTA

Marvin H. New, Commonwealth Land Title Insurance Company, was designated as, "Distinguished Titleman, 1984," at the sixty-

Newly-elected officers of the Palmetto Land Title Association are, from left, Anne Mixson, president; Patricia Quattlebaum, president-elect; Marilyn Livingston, treasurer; and Joby C. Castine, secretary. Shown in the other photograph at right are the PLTA Players in costume for a title skit. Front row, from left, are Joby C. Castine, Cheryl Steele, Nancy K. Hallman, Ginger M. Gross, and Thomas B. Pollard. Second row, from left, are Patricia Quattlebaum, Charles Hedgepath, John Taylor, Georgianna Coates, Joseph Roof, Rose Roberts, and David E. Mellichamp.

third annual convention of the Pennsylvania Land Title Association.

New was recognized for his dedication and involvement in title insurance industry affairs, both on the state and national level, as reflected by his service on numerous ALTA and PLTA committees throughout his career.

Newly-elected PLTA officers are **Robert Freiss**, Lawyers Title Insurance Corporation, president; **Earle Andrews**, Industrial Valley Title Insurance Company, vice-president; **Michael Frederick**, First American Title Insurance Company, treasurer; and **Gerald Shelpman**, Commonwealth, secretary.

Palmetto Title Drama 'Back to Sovereign'

Members of the Palmetto Land Title Association added a new dimension to evidencing back to sovereign, donning medieval costumes for an original skit, "Quest for the Holy Title," during their annual convention, according to **Joby C. Castine**, Chicago Title Insurance Company, newly-elected secretary of the organization.

On the serious side, members of the South Carolina association heard an update on ALTA activity from **John R. Cathey**, The Bryan County Abstract Company, chairman of the national Association Abstracters and Title Insurance Agents Section, and participated in two seminars—one on mechanics' lien problems, narrated by **Frederick A. Gertz**, attorney, and the other on legal problems related to title insurance, moderated by Chicago Title's **Hugh A. Brodkey**.

Anne Mixson, Commonwealth Land Title Insurance Company, was installed as new president of the association. Other newly-elected officers include **Patricia Quattlebaum**, South Carolina Title Insurance Company, president-elect; and **Marilyn Livingston**, Lawyers Title Insurance Corporation, treasurer.

Certiorari Denied In Bay Head Case

At the opening of its new term on October 1, 1984, the United States Supreme Court denied the Bay Head Improvement Association's petition for certiorari in *Bay Head Improvement Association v. Virginia Matthews and Stanley C. Van Ness, Public Advocate of the State of New Jersey*, No. A-982 (83-1799), it was reported by New Jersey Land Title Association Executive Director **John R. Weigel**, Esquire.

For a discussion of the issues in this beach access case, see *Title News*, Volume 60, Number 10 (October, 1981) and Volume 63, Number 5 (May, 1984).

The effect of the denial of certiorari is to leave standing the Supreme Court of New Jersey decision (95 N.J. 306 (1984), 471 A.2d 355). Using the public trust doctrine, New Jersey's highest court held that private property is "not immune" from a "possible" right of access to the ocean waters and is not "immune" from the "possibility" that the dry sand beach itself may be used for recreational purposes by the general public incidental to the use and enjoyment of the ocean waters.

On October 1, 1984, the United States Supreme Court agreed to again try to clarify the elusive question of when governmental land use regulations constitute an unlawful taking of private property without just

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Newly elected Pennsylvania Land Title Association officers are, from left, Michael Frederick, Robert Freiss, Earle Andrews, and Gerald Shelpman. In the other photograph is Marvin H. New, PLTA's "Distinguished Titleman, 1984," who was so designated at the recent convention of the organization.

Names in the News

Jeffrey E. Davis has been appointed executive vice president of Southern Title Insurance Company in Knoxville, Tennessee. Southern Title, Knoxville, also announced the appointments of **Eugene R. McCullough** and **Donald E. Partington** to vice president and assistant general counsel of the legal staff. **Partington** remains vice president and assistant general counsel of Fidelity National Title, Scottsdale, Arizona, Southern Title's parent company.

Fred Ehler has joined Chicago Title Insurance Company as resident vice president and manager of the company's Houston, Texas, title operations.

Chicago Title also announces the following promotions: **Paul Sands**, resident vice president and area manager, Cleveland, Ohio; **Vernon S. Evans**, resident vice president and branch manager, Santa Ana, California; **Walter Church**, resident vice president and manager, San Antonio, Texas; **Anthony J. Circello**, sales manager and remains vice president, Elmhurst, New York; **Joan M. Hickman**, assistant vice president and manager, Cook County satellite operations, Chicago; **James Aprile**, assistant vice president and area manager, Indianapolis, Indiana; **Daniel P. Ryan**, assistant vice president and branch manager, Boston; **Brian Gray**, assistant vice president, Denver, Colorado; **Charles Evans**, sales manager, central Florida, Daytona Beach, Florida; **Michael D. Troutt**, agency operations officer, Mt. Vernon, Illinois; **Linda H. Pease**, title operations officer and manager, Hillside, Illinois; **Barbara Cukierski**, title operations officer, Title and Escrow division I, Chicago; **Beth Goodman Nyhan**, manager, professional training, Chicago; **Louis Cerpa**, branch manager, Brooklyn, New York.

The following individuals have been named managers of their respective Chicago Title offices: **Ruth Arrington**, Daytona Beach, Florida; **Carol Maiorano**, Elmhurst, New York; **Gladys Orlando**, Winter Park, Florida; **C. Lawrence Plank**, Merritt Island, Florida; and **Ronald Skraban**, Delray Beach, Florida.

Craig Harper has been named senior vice president of Columbian National Title of Kansas City, Inc., in Kansas City, Missouri.

Fidelity National Title Insurance Company, Scottsdale, Arizona, announced the appointment of **Larry J. Dahl**, formerly vice president, to director of agency operations. **Dahl** is a director of the Land Title Association of Arizona.

Ray Rosenburg has been named county manager and vice president of Fidelity National Title Insurance Company for Los Angeles County. **Rosenburg** replaces **Anthony Rapoza**, who has been appointed director of Fidelity's newly established Lenders Division.

Title Insurance Company of Minnesota announced the election of **Harvey A. Pollack**, manager of the Milwaukee/Waukesha branch office, to vice president.

Bonnie S. McCoid has joined Fidelity National Title Agency of Maricopa, Inc., as escrow manager.

Lawyers Title Insurance Corporation announces the appointment of **W. Riker Purcell**, assistant counsel-claims, Richmond, Virginia. **Robert F. Agel**, Freehold, New Jersey; **Mary E. Bowen**, Summit, New Jersey; **John F. Jackson**, Pensacola, Florida; and **Roland K. Foreman**, West Palm Beach, Florida, have been named branch managers of their respective offices.

Davis

Ehler

Sands

V. Evans

Church

C. Evans

Pease

Harper

Rosenburg

Pollack

Purcell

Jackson

Foreman

GOVERNORS—continued from page 9

unity of purpose and dedication to the preservation of the integrity of the industry in the face of constant efforts to erode independent title evidencing by financial institutions, Realtors, builders, non-bank banks, state legislators and regulators, and Congress."

Governor Massey added, "I appreciate very much the opportunity to serve as a member of the ALTA Board of Governors, for it has given me a much broader insight into the activities

of the Association, and the opportunity to meet and work with those who devote their time and talents to the furtherance of the goals of the Association. I particularly appreciated 1983-84 ALTA President Don Kennedy's efforts to include the Board of Governors in more of the decision-making process, rather than relying solely upon the Executive Committee. I feel that the political efforts of the Association through TIPAC, and individual members contacting their United States Senators and Congressmen, is essential to the survival of our industry."

Richard L. Pollay

Pollay

In addition to his demanding and challenging career at Chicago Title, where he currently is in charge of title operations, Governor Pollay along the way has managed to serve in a variety of business, professional and civic leadership positions.

These include the chair of the American Bar Association Real Property Section Significant Decisions Committee, the chair of the ALTA Research Committee, the presidency of the New York Board of Title Underwriters, the vice presidency of the New York State Land Title Association and membership on the Planning Committee of Downtown Lower Manhattan Association, Inc. Also, he is a director of the American Red Cross Mid-America Chapter and a trustee of Hull House Association.

Governor Pollay joined Chicago Title as an examiner trainee in 1956. Subsequently, he served in the corporate law division, as division vice president and Florida-Caribbean Division manager, as vice president in charge of the New York-New Jersey Division of the Eastern Region, and as senior vice president and manager of the Eastern Region. Last year, he was elected to the combined board of directors of Chicago Title Insurance and Chicago Title and Trust Company.

Governor Pollay received his law degree from the University of Chicago and his master's degree in business policy from Columbia University.

Rowan H. Taylor

Taylor

Some two years after joining Mississippi Valley Title Insurance Corporation in its abstract department in 1946, Governor Taylor attended his first ALTA Annual Convention and reports he has missed few since that time. Sub-

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NAREE Contest Winners Announced After Judges Complete Work in ALTA Office

A group of distinguished media and communications professionals recently assembled in the ALTA Washington office to serve as judges in the 1984 National Association of Real Estate Editors Real Estate and Home News Writing Contest.

After receiving their instructions from Contest Chairman Gary Garrity, ALTA's vice president-public affairs, the panel began work on judging 70 entries and later reached final decisions on winners in six categories.

Serving as judges were Pete Early, staff writer, *The Washington Post*; Douglas Ripley Hotch, senior editor, *Nation's Business*; Joe Lastelic, news media representative, American Petroleum Institute and former Washington bureau chief, *The Kansas City Star*; Lynn March, director of public relations, Federal Home Loan Mortgage Corporation; Mark Miller, senior news editor, *Broadcasting Magazine*; and Alan Schaertel, business reporter, Associated Press Radio Network.

Awards as determined by the judges, which were announced this month are, by category:

Best Real Estate Section: First—Don DeBat, real estate editor, *Chicago Sun-Times*; second—J. William Broadway, home and garden editor, *Atlanta Journal and Constitution*; third—Dick Turpin, real estate editor, *The Los Angeles Times.*

Best Real Estate Feature (newspapers, general circulation): First—Don DeBat; second—Roger Showley, staff writer, *The San Diego Union.*

Best Real Estate Investigative Analysis (newspapers, general circulation): First—Wayne Markham, home and design editor, *The Miami Herald*; second—Elizabeth Whitney, business editor, *The St. Petersburg Times*; third—Don DeBat and Les Hausner, assistant real estate editor, *Chicago Sun-Times.*

Best Consumer-Oriented Story (newspapers, general circulation): First—Don DeBat; second—Lew Sichelman, syndicated columnist; third—Susan Denley, homes and real estate editor, *The St. Petersburg Times.*

Best Real Estate Story in a Magazine: First—Jane Lehman, associate editor, *Changing Times*; second—Dan McLeister, senior editor, *Professional Builder*; third—Penelope Lemov, business editor, *Builder.*

Best Real Estate Series in Radio: First—Brian F. Banmiller, president, The Banmiller Company; second—Edith Lank, columnist; third—Bill Gabriel, producer-commentator, Cedar Street, Inc.

This distinguished group of media and communications professionals recently assembled in the ALTA Washington office for the judging of 70 entries in the 1984 National Association of Real Estate Editors Real Estate and Home News Writing Contest. Shown receiving their instructions from Contest Chairman Gary Garrity, right, ALTA's vice president-public affairs, are the following judges, who are, from left, Mark Miller, senior news editor, ***Broadcasting Magazine****; Alan Schaertel, business reporter, Associated Press Radio Network; Lynn March, director of public relations, Federal Home Loan Mortgage Corporation; Douglas Ripley Hotch, senior editor,* ***Nation's Business****; and Pete Early, staff writer,* ***The Washington Post****. Not pictured is an additional judge, Joe Lastelic, news media representative, American Petroleum Institute, and former Washington bureau chief,* ***The Kansas City Star****.*

GOVERNORS—continued from page 27

sequently, he has worked in every facet of the company's operations in rising to its presidency.

He was one of the founding members of the Dixie Land Title Association and served as its second president. Governor Taylor was the first recipient of the DLTA "Title Person of the Year" award.

Governor Taylor holds law and master's in business administration degrees, attending Mississippi State University, Mississippi College and the Jackson School of Law. He currently is the president of the board of trustees of the Jackson Municipal Separate School District. Among his many activities, he has served as president of United Way, Metropolitan Board of YMCA, Jackson Junior Bar Association, Jackson Symphony Orchestra Association, and the Jackson Chamber of Commerce.

He is a member of the board of directors of First National Bank, Lamar Life Insurance Company, Invesat Corporation, Minnesota Title Financial Corporation, and St. Dominic's Hospital.

Governor Taylor finds two major challenges facing ALTA and its members. The first is demands from outside groups, which, he said, "force us into unprofitable operations." He characterized the second challenge as "unsound underwriting practices" and "exorbitant commissions," and said the only hope for relief here may be extensive regulation.

RELIEF ACT—continued from page 11

to levies of judgments upon the property of those protected. It is in these instances that the title industry faces, on more than a few occasions each day, the possibility that what it is about to insure to a purchaser may in fact be subject to an error or omission, with a *nunc pro tunc* impact on the coverage provided, which obviously relates to money in either costs or judgments, or both.

The act, additionally, covers and regulates any recissions and/or terminations of installment contracts attempted by the creditors and their trustees or agents against a protected service person. NOTE: the act does not regulate the purchase or other financial commitment of the service person *after* he or she has entered the service, only those prior to entry (although the default protections are still accorded in court proceedings in many instances).

The act applies to both equitable and legal ownerships, which has led to many problems involving the involuntary trustee of service person property—a fact learned only long after insurance on a sale may have been issued.

A condition precedent to any court relief from the sale and other action being addressed here is certainly that the protected person must not only show that he or she is protected by the act, but also must show that the military service has interrupted his or her ability to meet their obligation, and, that this ability continues to be materially affected by their military service.

With exceptions that almost drown the provision, the act does provide that before foreclosure may be made, a court order must be obtained. As one of the exceptions, it is here that the non-military affidavit, usually required to be executed by the beneficiary of the indebtedness, comes into play[9]—it is also at this time that the penalties for perjury are so paramount in the minds of many. While a sale made without compliance with the exception requiring the affidavit is not void, it remains (does the sale) voidable at the option of the service person for so long as he or she remains covered by the act, and is subject to being overturned upon application and proof of noncompliance.

It is also at this proceeding time that the act seems now, in the 1980s, to be so obsolete and needless. In this age of a "peacetime army," literally some 40 years after termination of the purpose of the act, with a military entirely of volunteers, it certainly would seem time for elimination or cleansing of the act to provide the means to civilians to ask that obligations be met and the shield (if a sword) of the act terminated.

One other instance of application of the act is noteworthy. The act contains provisions in protection of the service person who has leased real property;[10] the act bars evictions without court orders having been obtained, not only protecting the service person *but also his or her dependents.* Even if a court order is attempted, the act specifically requires that the court hearing the matter act in a "just" manner and as "justice may require."[11] Rather uniquely, the act does provide that the protected person may terminate upon proper notice at any time.

Finally, it must be mentioned, again, that the protected person in any foreclosure proceeding may apply to stay the sale for so long as "justice" requires it.[12] As mentioned, the grant of the stay, as a practical matter throughout the states, seems to be all but certain, except on those occasions when the creditor can prove that the service person's ability to pay is not materially impaired by the service commitments.[13] When this realization is coupled with the "tolling" of the time for redemption equal to the length of the service commitment, it all would seem to be too complex and unnecessary for the current times.

Time for Termination

The Soldiers' and Sailors' Civil Relief Act of 1940 has served its purpose, and well. The act is no less a required subject for investigation, termination or modification than is the subject of Donald Duck's discharge after 40 years of service or the plight of Kahoolawe.

Its purpose has been accomplished—to "protect the rights of those . . . who have been *obligated* to drop their own affairs and take up the burdens of the nation." Technically, the act should have terminated when the "war" which allowed for its passage was officially terminated. The expense, prejudice and burden were worth every bit of it, but: "The relief has lasted long enough."

1. **50 USCS App ## 501 et seq.**
2. **50 USCS App # 510, 50 USCS App # 511, subd (1).**
3. **See, for example, 22 Ops Atty Gen 15, Calif.**
4. **50 USCS App # 584.**
5. **50 USCS App # 464.**
6. **See *U.S. v Sullivan*, D.C. Conn., 270 F.Supp. 236, affirmed C.A., 398 F.2d 672.**
7. **50 USCS App # 560.**
8. ***Day v Jones*, 112 Utah 286.**
9. **50 USCS App # 532(3).**
10. **50 USCS App # 530(1).**
11. **50 USCS App # 530(2).**
12. **50 USCS App # 531.**
13. **See *Pacific Greyhound Lines v Superior Court of the City and County of San Francisco*, 28 C2d 61.**

ADMINISTRATION—continued from page 13

contributions of his assistant, Dorothy Harting.

As ALTA continues to expand capability and services, the operational wheels will turn efficiently at the national headquarters office—with McLaughlin utilizing his years of experience to help make the Association a more efficient organization.

CERTIORARI—continued from page 25

compensation. *Williamson County v. Hamilton Bank* (84-4) is an appeal by a Tennessee county of a federal court ruling that its retroactive rezoning of a 250-acre parcel of land is such a "taking." A federal jury awarded $350,000 in damages to a developer who had invested several million dollars in preparations to build housing on the site. The new zoning restrictions made the plans impossible

to complete. Williamson County is arguing that the possibility of large damage awards will discourage government from imposing needed land use controls.

JUDICIARY—continued from page 22

was aware of the terms of the acceleration clause and knowingly failed to take advantage of the 15-day grace period provided by lender for repayment of the acceleration debt.

Issues of promissory estoppel and unconscionability were not addressed by the supreme court though raised on appeal by Jeffery because these issues were not raised at the trial level as required by Delaware procedural law and were therefore barred on appeal. Failure to raise these issues at the trial level constituted a waiver of these defenses.

Insight: It is interesting to note that the case does not mention whether there was any attempt by the lender to provide Jeffery written notice of default for failure to pay taxes with a grace period to cure the default and therefore avoid acceleration of the debt. Presumably, the mortgage instrument did not so provide. According to the facts of the case, the first notice to Jeffery from lender was that the debt was accelerated because of his default. His only ability to cure at this point was not payment of the delinquent taxes but repayment of the entire debt due.

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Mortgages, Priorities

Guarantee Bank v. Magness Construction Co., 462 A.2d 405 (Del. Supr. 1983)

Magness sold its leasehold interest in two parcels of land to Murray. It was agreed that Magness would help finance this purchase by taking back a leasehold purchase money mortgage on Parcel II, which mortgage would be extended to cover Parcel I one year after closing. It was also agreed that Magness would subordinate its purchase money mortgage to the lien of a later mortgage to be obtained by Murray or Commercial Investments Corporation (C.I.C.). C.I.C. then took title in place of Murray. C.I.C. gave Magness the mortgage on Parcel II, which was recorded. However, with regard to subordination, the mortgage clause confined itself to a later mortgage created by mortgagor, i.e., C.I.C.

Thereafter, a mortgage was given by C.I.C. to Guarantee Bank (Guarantee) covering Parcels I and II to secure a note made by Murray. This mortgage was recorded one day before Magness' mortgage was to be extended to Parcel I. C.I.C. refused to execute the mortgage extension in favor of Magness, thus prompting this action. Guarantee was impleaded on the issue of mortgage lien priorities. Magness and Guarantee, while disputing the priority issue, agreed to a foreclosure of the property.

A court of chancery held that Magness held a first lien on Parcel II and Guarantee held a first lien on Parcel I. Both parties appealed to the Supreme Court of Delaware which affirmed the decision below.

The issues were as follows:

(1) Does an agreement to extend a mortgage to another parcel of land which is executory by its terms constitute an equitable mortgage?

(2) Will Guarantee's mortgage on Parcel I, recorded prior in time to Magness' proposed extension mortgage on Parcel I, have lien priority, even though Guarantee actually knew of the other mortgage?

(3) Will the court follow the unambiguous terms of an automatic subordination clause if they run contra to the terms of a prior agreement?

With regard to the first issue, the Delaware Supreme Court found that the promise of C.I.C. to extend the Magness mortgage to Parcel I was executory at the time C.I.C. gave a mortgage to Guarantee and therefore was incapable of specific performance. Accordingly, at that point in time, no right to an equitable mortgage on Parcel I existed in favor of Magness.

Concerning the second issue, the court stated that Delaware is a pure "race" state, so that the only test to be applied in determining the priorities of two or more liens is who was first to record. One's knowledge of another lien is irrelevant. Because Guarantee recorded first on Parcel I, it had priority over the Magness mortgage as to Parcel I.

On the third issue, the court stated that subordination clauses must be strictly construed. Only the terms contained in the mortgage would be applied when such terms were unambiguous. Accordingly, in reviewing the terms of the mortgage, the court noted that Magness was required under certain circumstances to subordinate its mortgage on Parcel II to mortgages created by the mortgagor, that is C.I.C. Since the note given to Guarantee was given by Murray, the court found this subordination provision inapplicable; therefore, Magness did not have to subordinate its mortgage on Parcel II to the Guarantee mortgage.

Insight: It is curious to note that the agreement to sell the leasehold estate was entered into between Magness and Murray, but that title was taken by C.I.C. at the time of settlement. Moreover, Murray later gave his note to Guarantee, which was subsequently secured by a mortgage given, not by Murray, but by C.I.C. It would appear that C.I.C. gave the leasehold interest it obtained as security for a note it did not create and was not obligated to pay. Although Magness raised the issue that the Guarantee mortgage failed because it had no consideration, the issue was presented from the standpoint of antecedent debt. The court responded by finding consideration in the form of forebearance by Guarantee in exercising its legal rights and in extending credit on the note. There appears to have been no argument raised with respect to the fact that this was consideration running between the maker of the note, Murray, and Guarantee only. This would appear to be irrelevant on the issue of whether consideration was received by the mortgagor, C.I.C., from Guarantee for the mortgage.

Nowhere are there facts demonstrating that C.I.C., the purchaser and owner of the leasehold estate, received anything in return for or in consideration of its giving a mortgage on this property to secure an antecedent indebtedness of Murray. There may be other facts unreported by the publisher which adequately explain why this issue was not addressed. However, one cannot help but wonder and question the omission of this important issue.

Mortgages, Right to Foreclose

Jeffery v. Seven Seventeen Corporation, 461 A.2d 1009 (Del. Supr. 1983)

Mortgagor, Jeffery, breached the terms of his mortgage to the lender, Seven Seventeen Corporation, by failing to pay several years of city and county real estate taxes. The lender gave written notice of its decision to exercise its option as contained in the mortgage to accelerate the entire debt then outstanding and also stated that foreclosure would be commenced if payment of this debt was not made within the next 15 days. Negotiations to revoke this notice on the part of Jeffery's attorney failed and no expression of agreement to pay the accelerated debt or the delinquent taxes was made. Lender accelerated the debt and filed a suit in mortgage foreclosure. A week later, Jeffery paid all delinquent real estate taxes.

Mortgages—Reacquired Property—Reattachment of Liens

Webb vs. Verville, 434 So.2d 360 (Fla. 4th DCA 1983)

Appellee homeowner defaulted and allowed his real estate to be foreclosed by the mortgage lender. Appellee owner then repurchased the property, allowing the mortgage to remain in default, regaining title by paying off the senior mortgage prior to issuance of the certificate of title to the senior lender. Junior mortgage lenders named in the foreclosure action appealed the order of the circuit court.

The issue was whether a defaulting homeowner may allow his real estate to be foreclosed by a mortgage lender, to whom a certificate of sale is issued, and later repurchase the property from the lender prior to the issuance of the certificate of title, defeating other junior mortgage lenders named in the foreclosure.

On appeal, the fourth District Court of Appeals reversed and remanded the trial court, holding that the homeowner could not utilize a foreclosure proceeding to repurchase the real estate before the certificate of title is issued so as to defeat other junior mortgage lenders. However, the court indicated that had the certificate of title been issued to the mortgagee before the sale back to the

defaulting owner, in light of *County of Pinellas vs. Clearwater Federal Savings & Loan Association, 214 So.2d 525 (Fla. 2nd DCA 1968)*, the reacquisition of the property by the same owner would not be determinative.

Chairman's comment: See California Mortgage Foreclosure, pages 91 to 94 inclusive, published by Professional Education Systems, Inc., P.O. Box 1208, 3410 Sky Park Blvd., Eau Claire, Wisconsin 54701.

Notice—Due Diligence

Sizemore v. Smith, 6 Ohio St. 3d 330 (1983)

Sizemore was injured in an automobile accident on June 18, 1976, being struck by an automobile driven by Vernon Smith. At the time of the accident, Smith lived at 2700 Oxford-Melville Road in Oxford, Ohio. In September, 1976, he moved to his current address, 2510 Minton Road, Hamilton, Ohio. Both addresses are in Butler County. In attempting to serve Smith pursuant to Civ. R. 4.1 at the former address, Sizemore's lawyer learned that the postal service returned the service of process as not deliverable as addressed, with no forwarding address. On March 16, 1978, the attorney filed an affidavit setting forth that service could not be made since Smith's residence was unknown and could not with reasonable diligence be ascertained. Service was made by publication in the Hamilton *Journal News* once a week for six consecutive weeks. The attorney for Sizemore contacted Sizemore and the United State Post Office but did nothing more.

The issue was whether service is good.

The minimal efforts of counsel in talking with his own client, who did not know Smith, and checking the Post Office 20 months after the accident, which forwards mail for only one year per postal regulations, does not add up to reasonable diligence. Service is not good. The court suggests a check of the telephone book, a call to the telephone company. Other sources include the city directory, a credit bureau, county records such as auto title or the board of elections or an inquiry of former neighbors. These examples are not a mandatory checklist. They exemplify reasonable diligence. The court found no proof of concealment on the part of Smith. He was not hiding. He did not leave the community or state. He merely moved.

Insight: Foreclosure attorneys, title people—watch service by publication carefully. Just stating that a diligent effort was made is not sufficient. Some real effort must be made to achieve service and find these people before resorting to publication.

Partnership—Foreclosure—When Partner Also Secured Creditor

Westminster Properties, Inc. v. Atlanta Associates 250 Ga. App. 841; (301 SE 2d 636)

Atlanta Associates, a limited partnership, was formed in 1970, with Westminster Properties, Inc. (Westminster) as one of the limited partners. The partnership executed a security deed to Westminster in 1973, secured by an exculpated note in the amount of $630,000.

In 1975, Westminster, by amendment to the agreement, became a general partner. This amendment provided that capital contributions of the new limited partners were to be used to repay the Westminster security deed and Westminster agreed to lend the partnership up to $45,000 per year for operating expenses. By subsequent amendment, Westminster agreed to make an additional loan for operating expenses.

Subsequently, the partnership filed a petition under Chapter XII of the Bankruptcy Act. Westminster refused to consent and the petition was dismissed, based upon Bankruptcy Rule 12-8, which requires the consent of all general partners.

Westminster began advertising for foreclosure of its security deed and the partnership sued to enjoin the foreclosure.

Both parties filed motions for summary judgment and both motions were denied by the trial court. Both sides appealed.

The issue was whether a partner's fiduciary duties as partner prevail over its rights as secured creditor where the two conflict.

The court found that a partnership which gives security to a partner for a loan cannot enforce the partnership duties owed it by the secured partner when they impair the secured partners rights. The court finds the intent of the partners to be controlling and that partners may make any agreement between themselves so long as it is not in violation of any statute, the common law, or public policy.

In the instant case, the court found that, since amendments to the partnership agreement specified that certain capital contributions were to be used to retire the debt to Westminster, the security deed became a part of the partnership agreement and established the rights of the partners, including the right to foreclose.

The court also found that the foreclosure did not violate the provision of the Limited Partnership Act (OCGA § 14-9-70 (2)), which prohibits a general partner from making it impossible to carry on the ordinary business of the partnership without the written consent of the partners, because the partners had given their consent by joining in the partnership agreement.

The court reversed the denial of Westminster's motion for summary judgment on this issue.

Chairman's Comment: Loan from partners to their partnerships is governed by Sec. 13 of the Uniform Limited Partnership Act and Sec. 40 of the Uniform Partnership Act. Georgia has the Uniform Limited Partnership Act but not the Uniform Partnership Act.

Restraint on Alienation

Colen v. Patterson, 436 So.2d 182 (Fla. 2nd DCA 1983)

A cloud on title to real estate was alleged to consist of an agreement between appellees and appellant's assignor, which was recorded by the appellant. The agreement was characterized by appellant as an option and by the appellees as a first right of refusal. The agreement read in pertinent part:

> For and in consideration of $10 and other good and valuable considerations, receipt of which is hereby acknowledged, I, , hereby grant unto Knapp, trustee, first right of refusal for purchase of Cobb Building for the total consideration of $675,000, paying $175,000 down and balance in the form of wrap around purchase money mortgage at current interest rates prevailing at time of closing on a 25-year amortization schedule.

From the trial court's finding that the agreement was invalid and unenforceable, this appeal was taken.

The issue was whether the agreement constituted unreasonable restraint on alienation and was invalid and unenforceable.

The Second District Court of Appeals affirmed the trial court's finding that such an agreement constituted an unreasonable restraint on alienation due to its indefinite duration and the fixed price contained in the agreement.

Rule Against Perpetuities

North Bay Council, Inc. Boy Scouts of America v. Elizabeth C. Grinnell, 123 N.H. 321 461A2 2114 (1983)

In deed to a third party, grantor reserved a preemptive right upon any future sales of the property. Plaintiff attempted to sell the property and the defendant, a successor in interest to the original grantor, attempted to exercise the preemptive right.

The issue was whether this preemptive right be invalid due to the rule against perpetuities.

If strictly applied, the rule against perpetuities would invalidate the preemptive right, but New Hampshire does not so "remorselessly apply" the rule. Court will assume that the reserving party's life is the presumed life in being during which the interest must vest. Preemptive right would therefore become void 21 years after grantor died.

To be continued in the December, 1984, *Title News*

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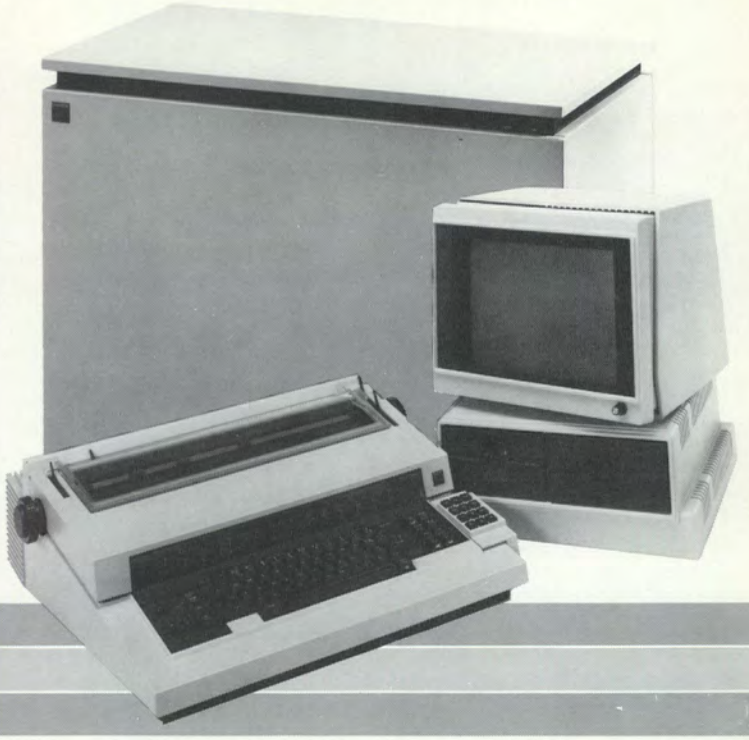

We're on a roll.

SYNTREX

Calendar of Meetings

November 1-3
Arizona Land Title Association
Doubletree Hotel
Tucson, Arizona

November 14-17
Florida Land Title Association
Marriott Inn
Orlando, Florida

December 8
Louisiana Land Title Association
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