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THE LAW OF TITLE INSURANCE

L. A. PELKEY

THE business of insuring titles to property has had but a comparatively recent origin, for until 1874 there existed no legislative recognition, at least, of the existence of or need for this type of insurance. In that year a law was enacted in Pennsylvania defining and enumerating the powers of corporations which would be organized for the purpose of searching and examining titles.¹ However, as early as 1853 mention was made of the "Law Property Assurance and Trust Society," the purpose of which was the insurance of defective titles and guaranteeing repayment of loans and mortgages.²

The statutes of most of the states and even those of some of our territories, either by enabling or by regulatory provisions, give evidence of the growing importance being attached to work of insuring titles.³ Title insurance is written today practically entirely by corporations or associations having defined and limited powers and under strict regulation by the states in which they operate.⁴ Their facilities

¹ Act of April 29, 1874, P.L. 84. See 4 Purdon's Dig. (13th ed.) 4761 §1 note f, and 7 *ibid.* 7676. See Penn. Stats. note 4 *infra*. See 1 Beach, Law of Ins. §320 for text of the original act. The Real Estate Title and Trust Co., organized in Philadelphia in 1876, has been called the pioneer company organized for this purpose. Corporations to guarantee titles were organized in New York prior to any special act, for in 1883, the Title Guarantee and Trust Co. was organized, its purpose being to copy the records of real estate in the counties of New York and Kings and to examine and guarantee titles, but not until 1885 (Laws of N.Y. 1885 Ch. 538 p. 905; Comp. Laws 1909 §§170-184) was there any act regulating such organization. See History of Title Insurance in New York and Brooklyn, Title Guarantee & Investment Co., Lotus Press 1896, and 1 Joyce, Law of Ins. (2nd ed. 1917) §IXa.

² Francis' *Annals of Life Assurance*, p. 291. Joyce, Law of Ins. *ibid.*

³ Richards' *Ins. Law* (3rd ed.) §§466, 467.

⁴ Where no statutes covering the subject have been found the name of the state has been omitted. Most of the statutes here mentioned are regulatory: *Alabama*, §§7087-7095 Code of Ala. 1923. Act of Sept. 29, 1923; *Arizona*, §§3423 (11) and 3470 R.S. of Ariz. 1913; *Arkansas*, Ch. III §27 (8) Dig. Ins. Laws of Ark., or §1 (8) Act of March 25, 1921; *California*, §§594 and 602 Pol. Code, §§4535-4532 Civ. Code, and §339 Code Civ. Proc. Cf. §594 Pol. C. and §453 Civ. C.; *Florida*, §4185 (14) Rev. Gen'l Stats. of Fla. 1920; *Hawaii, Territory*, §§3417 (7), 3418 Stats. of Hawaii; *Georgia*, §2817 (14) Parks Anno. Code of Ga. (Vol. 8, 1922 suppl.), or Acts of 1917 pp. 56 and 61; *Idaho*, §4858 (1) Comp. Stats. of Ida. 1919, or §2961 (1) Rev. Code 1908; *Illinois*, Ch. 32 §§364 to 374 R.S. Ill. 1921 p. 966, or §§2578 to 2588 Ill. Stats. Anno. 1913; *Indiana*, §4874 Burns Anno. Ind. Stats. 1926 under topic of Voluntary Associations; *Kansas*, Art. 18 §17-1801 and Art. 20 §17-2002(7) R.S. of Kan. 1923; *Kentucky*, §§687 and

are becoming so great, due to their extensive and multiplied examinations of titles that it is becoming more and more difficult for the individual attorney to compete with them in this branch of legal work.⁵ Thus it should be of interest, to lawyers, at least, to know the extent of protection⁶ these companies actually afford their clients, and the duties and responsibilities imposed upon them by the courts. Generally these companies combine the business of conveyancing, abstracting and the examination of titles with that of insuring titles, and hence, in determining the liability, in any given case, of a company doing such a combined business, it devolves upon the attorney to determine in the first instance the nature of the contract upon which suit is brought, and the capacity in which such company was acting when it made such contract.

In matters of abstracting and conveyancing such companies bear no different relationship nor do they owe a greater duty or responsibility

883c-1 to 883c-3 Ky. Stats. 1922; *Maine*, Ch. 53 §§145 to 155 p. 887 *et seq.* R.S. Me. 1916; *Massachusetts* §§47 (11), 48, 114 and 116 of Ch. 175, and §§46 and 47 of Ch. 221, of Gen'l Laws of Mass. 1921; *Michigan*, §9100 (130), 1922 Suppl. to Comp. Laws of Mich. 1915; *Minnesota*, §§3315(7) and 3703 to 3709 Gen'l Stats. of Minn. 1923; *Missouri*, §11800 R.S. Mo. 1919, this is a dis-enabling statute preventing trust companies not doing a title insurance business at the time of the passage of the act (Laws of Mo. 1915) from thereafter exercising that privilege; *Montana*, §§6345 to 6354 R.S. Mont. 1921; *Nebraska*, §7814(11) Comp. Stats. Neb. 1922; *Nevada*, §§1 to 12 Ch. 57 pp. 90 to 94 Stats. Nev. 1925; *New Hampshire*, Ch. 120 §2 N.H. Laws 1911 and Ch. 264 §2 P.L. of N.H. 1926 a dis-enabling statute to the same effect as the Missouri statute mentioned above in this note; *New Jersey*, §1 (VIII) P.L. 1902, p. 407, Vol. 2 Comp. Stats. of N.J. 1911, pp. 2838 to 2839, and §§1 to 6 Ch. 97 Laws 1923, §§221-47 to 221-52 Comp. Stats. of N.J. (1924 Suppl.), also Ch. 305 Laws 1926; *New Mexico*, §§433(7) and 2847 N.M. Stats. Anno 1915; *New York*, Ch. 28 Art. 5 Consol. Laws 1909, §§170 to 183. See N.Y. Ins. Law. Anno. 1927 ed., Banks Law Pub. Co.. As to the sources of the various N.Y. statutes relating to insurance see 2 Birdseye's Cum. and Gilb. Consol. Laws of N.Y. Annot. pp. 2510 *et seq.*, and 7 *ibid.* (1910-1913 cum. suppl.) pp. 1297 *et seq.*; *North Carolina*, §§6274, 6327(15), 6334(5), 6395 to 6397, and 7844 Consol. Stats. of N.C. 1919; *Ohio*, 710-168 to 710-171, and 9850 to 9855 Gen'l Code of Ohio 1921; *Oklahoma*, §§311 and 3404 R.L. 1910, and S.L. 1915 §16 now found in §§6666(8), 4194(7) and 6755 Comp. Stats. of Okla. 1921; *Oregon*, §§4681 to 4685 of Lord's Oregon Laws 1910 now §§6553 to 6557 and 6600 Ore. Laws (Olson's Comp.); *Pennsylvania*, §§1240, 5560, 5598(19), 6147, 6265, 6311 to 6334, 6340 and 11082 Penna. Stats. 1920; *South Dakota*, §§9386 and 9389 Rev. Code of S.D. 1919; *Utah*, §§1201 to 1207 Comp. Laws of Utah, 1917; *Vermont*, §5598 Gen'l Laws of Vt. 1917; *Virginia*, §4148i Gen'l Laws of Va. 1923. Cf. §4305; *Washington*, §§7128(12), 7129(4) and 7250 to 7258 Remington's Comp. Stats. of Wash. 1922; *West Virginia*, Ch. 54 §81a (15) p. 1204 and Ch. 54C §9(1) *et seq.* p. 1242 of W.Va. Code Anno. 1923; *Wisconsin*, §§180.19 to 180.20 Wis. Stats. 1925 now renumbered §§212.01 to 212.03 Wis. Stats. 1927 by Ch. 212 Laws 1927.

⁵ Richards' *Ins. Law* (3rd ed.) §467.

⁶ See *infra* note 42.

to their clients than do individuals engaged in that work.⁷ Their liability when acting in the capacity of insurers of titles is in no event affected by their liability as conveyancers, for the contracts under which they may be held liable as abstractors or examiners of titles are of an entirely different nature than those wherein they engage to insure title in an owner; for in the performance of the latter contracts the doctrine of skill and care have no application, and the question of negligence in the discovery of defects in title cannot arise. The guarantee is absolute, subject only to the conditions of the policy.⁸

In this connection it may be well to state that, aside from his duty to avoid any breach of confidence between himself and his client,⁹ the examiner or abstractor of titles is not liable except for negligence or want of necessary skill and knowledge.¹⁰ He does not warrant the titles he has examined or abstracted, nor is he a guarantor as to their perfection. The contract made by him when he examines or drafts the abstract of title is not one of indemnity, but a contract that he

⁷ *Ehmer v. Title Guarantee and Trust Co.* (1898) 156 N.Y. 10, 50 N.E. 420, wherein the court remarked: "The obligations and duties that the parties assumed toward each other were therefore similar in all respects to those growing out of the relation of attorney and client in transactions of the same character, and hence the case must be determined upon the same principles." See *Glyn v. Title Guarantee and Trust Co.* (1909) 117 N.Y. Supp. 424, 132 App. Div. 859 upon the point of relation of attorney and client. See *Whitaker v. Title Ins. and Trust Co.* (1921) 186 Cal. 432, 199 Pac. 528; also *Economy Bldg., and Loan Assn. v. West Jersey Title and Guaranty Co.* (1899), 64 N.J.L. 27, 44 Atl. 854, where it was held that the averment that defendant "carelessly omitted to certify to a previous incumbrance" established a complete right of action on the contract. See note 12 *infra*.

⁸ *Trenton Potteries Co. v. Title Guarantee and Trust Co.* (1900), 50 App. Div. 490, 64 N.Y. Supp. 116, 117, citing *Byrnes v. Palmer* (1897) 18 App. Div. 1, 45 N.Y. Supp. 479, and *Ehmer v. Title Guarantee and Trust Co.*, *supra*. The Ehmer case mentions a policy of title insurance given by the defendant company to the plaintiff, but the recovery was based wholly upon the negligence of one of the defendant's agents in making a mis-description of the property, and the court, though the policy is mentioned, disregards it in determining the defendant's liability.

⁹ *Valette v. Tedens* (1897), 122 Ill. 607, 14 N.E. 52, 3 Am. St. Rep. 502.

¹⁰ Of course, the loss suffered must be occasioned by reason of the defective abstract, or the abstractor cannot be charged with any liability. *Thomas v. Carson* (1896) 46 Nebr. 765, 65 N.Y. 899. See *Crook v. Chilvers* (1916), 90 Nebr. 684, 157 N.W. 617, Ann. Cas. 1918 E., 90, and the note p. 94. Also, since negligence is the ground of the liability of an abstractor, it follows that contributory negligence on the part of his client will defeat a recovery against him. *Roberts v. Sterling* (1887) 4 Mo. App. 593; *Roberts v. Leon Loan and Abstract Co.* (1884) 63 Ia. 76, 18 N.W. 702, again found in 69 Iowa 673, 29 N.W. 776. See also, *Davis v. Steeps* (1894), 87 Wis. 472, 58 N.W. 769, 23 L.R.A. 818, 41 Am. St. Rep. 51.

will skillfully do the work he contracts to do.¹¹ And ordinarily an examiner is liable only to the person employing him for any want of skill or diligence in the preparation of an abstract or certificate of title, and not to a third person who acts or relies on his certificate.¹² His liability though it may be based on negligence is essentially contractual¹³ and there must be privity of contract to create liability.¹⁴

Just what the purpose and nature of title insurance is can be readily perceived from a quotation from the leading case of *Foehrenbach v. German-American Title & Trust Co.*, per Potter J.:¹⁵ "The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be in such connection, that the premium is paid to, and accepted by, the company which issues the policy. Title insurance is not mere guess work, nor is it a wager.¹⁶ It is based upon careful examination of the muniments of title and the exercise of judg-

¹¹ *Wacek v. Frink* (1892) 51 Minn. 282, 53 N.W. 633, 38 Am. St. Rep. 502; *Walker v. Bowman* (1910) 27 Okla. 172, 111 Pac. 319, Ann. Cas. 1912B, 839, 30 L.R.A. (NS) 642.

¹² *Zweigert v. Birdseye* (1894) 57 Mo. App. 462; *Thomas v. Guarantee Title and Trust Co.* (1910) 81 Oh. St. 432, 91 N.E. 183, 26 L.R.A. (N.S.) 1212, and note. See also, *Gallegos v. Ortiz* (1923) 28 N.M. 598, 216 Pac. 502. But see, *Brown v. Sims* (1899) 22 Ind. App. 317, 53 N.E. 779, 72 Am. St. Rep. 308, and *Dickle v. Nashville Abstract Co.* (1890) 89 Tenn. 431, 14 S.W. 896, 24 Am. St. Rep. 616.

The case of *Economy Bldg and Loan Assn. v. West Jersey Title Guaranty Co.* (1899), 64 N.J.L. 27, 44 Atl. 854, is illustrative of an exception to the general rule stated. In that case the defendant searched and certified as to the title of one of its clients and delivered its certificate to be used for the purpose of obtaining a loan from the plaintiff, and upon its strength the loan was duly made. In the suit that followed, the defendant contended that there was no privity shown between it and the plaintiff. The court held, however, that defendant was liable either upon the doctrine that there was a contract established through the agency of the borrower, or upon the ground that the contract between the defendant and the borrower was one for the benefit of the plaintiff upon which he had a right to sue.

¹³ *Equitable Bldg. and Loan Assn. v. Bank of Commerce and Trust Co.* (1907) 118 Tenn. 678, 102 S.W. 901, 12 L.R.A. (N.S.) 449 and note, 12 Ann. Cas. 407, and note. And the extent of his undertaking is to be determined from the contract or from the certificate which he appends to the abstract. *Crook v. Chilvers* (1916) 90 Nebr. 634, 157 N.W. 617, Ann. Cas. 1918E, 90. In this connection see also, *Whitaker v. Title Ins. and Trust Co.* (1921) 186 Cal. 432, 199 Pac. 528.

¹⁴ *National Savings Bank v. Ward* (1879) 100 U.S. 195, 25 L.ed. 621; *Kenyon v. Charlevoix Improvement Co.* (1903) 135 Mich. 103, 97 N.W. 407; *Equitable Bldg. and Loan Assn. v. Bank of Commerce and Trust Co.* note 13 *supra*.

¹⁵ (1907) 217 Pa. St. 331, 336-337, 66 Atl. 551, 553, 12 L.R.A. (N.S.) 465, 118 Am. St. Rep. 916.

¹⁶ To the same effect see *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468.

ment by skilled conveyancers. . . . A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured."¹⁷ This protection mentioned does not relate to matters that may arise during a specified term after the policy is issued, for the risks of title insurance end where those of other kinds begin. Insurance of this kind is designed to protect an insured owner or mortgagee from any loss through defects, liens, or incumbrances that may affect or burden his title at the time the policy is issued. It does not protect against any claim arising after the issuance of the policy.¹⁸ It follows then, as a general rule, that when the insured gets a good title the covenant of the insurer has been fulfilled, and there is no liability.¹⁹

Though Cooley in his work on insurance²⁰ gives perhaps the most simple definition of title insurance, yet, for completeness and accuracy, that of Joyce²¹ is undoubtedly the best. He defines it as "A contract whereby one agrees for a consideration to guarantee or protect another's title to real estate,²² or which insures against all loss or damage, not in excess of a specified sum, which assured may sustain by reason of existing defects or unmarketableness of title to a described estate, mortgage, or interest, or because of liens and incum-

¹⁷ Nor is the insurer a surety. *Minnesota Title Ins. and Trust Co. v. Drexel* (1895) 36 U.S. App. 50, 17 C.C.A. 56, 70 Fed. 194. This is important for in some States, laws applicable to surety companies do not apply to guaranty and indemnity companies. See note to §27i, Joyce, *Law of Ins.* (2nd ed. 1917). See note 31, *infra*.

¹⁸ See note 23 *infra*. See *Wheeler v. Real Estate Title Ins. and Trust Co.* (1894) 160 Pa. St. 408, 28 Atl. 849 discussed *infra*. Such a policy guarantees only the record title where it excepts from its terms the "tenure" of the present occupants, and liens and incumbrances, judicial proceedings, etc., not shown by any public record. *Bothin v. Calif. Title Ins. and Trust Co.* (1908) 153 Cal. 718, 96 Pac. 500; nor does it protect against defects or objections created by the act or privity of the insured himself, *Rosenblatt v. Louisville Title Co.* (1927) 218 Ky. 714, 292 S.W. 333.

¹⁹ *Trenton Potteries Co. v. Title Guarantee and Trust Co.* (1903) 176 N.Y. 65, 68 N.E. 132, 134, per Werner J., and *Foehrenbach v. German-American Title and Trust Co.*, *supra*, note 15, per Potter J.

²⁰ 1 Cooley, *Briefs on Ins.* (1905) p. 12. Frost's definition as set forth in his work on Guaranty Ins. §162, is somewhat more detailed than Cooley's but cannot compare favorably with Joyce's set forth above. 61 Cal. App. 232, 214 Pac. 667.

²¹ Joyce, *Law of Ins.* (2nd ed. 1917) §13, quoting Richards on Ins. (3rd ed.) §465 and many of the cases discussed in this article, and also citing *In re Hogan* (1899) 8 N.D. 301, 78 N.W. 1051, 45 L.R.A. 166, 73 Am. St. Rep. 759, 28 Ins. Law. J. 520.

²² §594(4) Pol. C. of California enables the insurance of personal property titles as well as those of real property. See opinions of attorney general 4894.

branches charging the same, as of the date of the policy,²³ with certain exceptions; or by reason of defects in the title of a mortgagor in the mortgaged estate, or mortgage interest." Such a policy is very much in the nature of a covenant of warranty or of a covenant against incumbrances.²⁴

A policy of title insurance is primarily one of *indemnity* for loss or damage suffered by the insured;²⁵ for the insured cannot make such a contract one of profit to him.²⁶ And to recover under such a policy a mere possibility of a future loss will not suffice. Mere proof of a defect in a title or of unmarketability will not establish a right to recover thereunder; there must be a further showing that an actual and positive loss or damage has been incurred by the insured.²⁷ In *Banes v. New Jersey Title Guarantee & Trust Co.*²⁸ the plaintiff acquired a part interest in a mortgage and obtained from the defendant a policy insuring him against any loss or damage which he might

²³ Since policies may, on consent of the insurer, be assigned, as an added precaution, the Chicago Title and Trust Co. in that part of its policies containing the list of conditions and stipulations, provides that "In assenting to assignment no liability is assumed by the company for defects or incumbrances created subsequent to the date of this policy."

²⁴ *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468. See *Barton v. West Jersey Title Guaranty Co.* (1899) 64 N.J.L. 24, 44 Atl. 871.

²⁵ Joyce, *Law of Ins.* (2nd ed. 1917) §271; 1 Cooley, *Briefs on Ins.* (1905) p. 88. *Minnesota Title Ins. and Trust Co. v. Drexel* (1895) 36 U.S. App. 50, 17 C.C.A. 56, 70 Fed. 194; *Purcell v. Land Title Guarantee Co.* (1902), 94 Mo. App. 5, 67 S.W. 726; *Wheeler v. Equitable Trust Co.* (1903) 206 Pa. St. 428, 55 Atl. 1065; *Banes v. New Jersey Title Guarantee and Trust Co.* (1906) 74 C.C.A. 127, 142 Fed. 957; *Pallister v. Title Ins. Co. of N.Y.* (1908) 61 Misc. 490, 115 N.Y. Supp. 545; *Bothin v. Calif. Title Ins. and Trust Co.* (1908) 153 Cal. 718, 96 Pac. 500; *Foehrenbach v. German-American Title and Trust Co.*, *supra*.

In *German-American Title and Trust Co. v. Citizens Trust and Surety Co.* (1899), 190 Pa. St. 247, 42 Atl. 682, a bond guaranteed the completion of certain buildings under a contract. Advances had been made for building operations, the consideration being the conveyance of ground rents on the land to be improved. The principle of indemnity was applied limiting the damages to the actual loss in the value of the ground rents; the loss being the difference in the market value of the ground rents if the buildings had been completed, and their value with the buildings in their incompleting state. And only the person named as the insured in a policy can sue thereon, *Bothin v. Calif. Title Ins. and Trust Co.*, *supra*.

²⁶ *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468.

²⁷ Under proper allegations such losses may be proven as are naturally and legally the consequences presumably resulting from the injury. *Glyn v. Title Guarantee and Trust Co.* (1909) 132 App. Div. 859, 117 N.Y. Supp. 424. And see *Taylor v. N.J. Title Guarantee and Trust Co.* (1902) 68 N.J.L. 74, 52 Atl. 281.

²⁸ (1906) 74 C.C.A. 127, 142 Fed. 957.

sustain by reason of existing defects in his interest. A receiver was appointed for the estate of the decedent under which the plaintiff's assignors were remaindermen, who thereupon collected the amount due under that part of the mortgage held by the plaintiff and satisfied the same to that extent. Plaintiff contended that the legal title to that portion of the mortgage in which he had an interest having been transferred, his interest in the mortgage had been impaired. It was held, however, that by the payment to the receiver, the plaintiff's right in the mortgage was simply transferred to the funds in the hands of the receiver; and further, that no evidence having been produced to show that that fund had been impaired the action failed for lack of any showing of loss or damage.²⁹ Also in *Wheeler v. Equitable Trust Co.*,³⁰ wherein the insurer's contract to indemnify the plaintiff, a mortgagee, against loss or damage, also embodied an apparent "guaranty" to complete certain buildings (the subject of the mortgage) according to plans mentioned, it was held that the contract was entire and one wholly of indemnity, and not two contracts, one of indemnity and one of guaranty,³¹ and that plaintiff could not show that the houses were not built in accordance with the plans or specifications, without proof of some actual loss.

²⁹ See *Pallister v. Title Ins. Co. of N.Y.* (1908), 61 Misc. 490, 115 N.Y. Supp. 545, where the court upheld the contention by the defendant company that the plaintiff had suffered no loss or damage by reason of the omission of certain assessments not found in the schedule of exceptions attached to the policy. In that case the plaintiff contracted for the purchase of certain property subject to all taxes and assessments then existing as liens thereon, and thereafter applied for and received a policy insuring his title, excepting certain liens and assessments. Plaintiff was unable to sell his right in the property due to the disclosure of outstanding unpaid assessments which were not contained in the policy's schedule of excepted incumbrances. The court held—in a decision which will surely never be noted for strength—that since, under the original contract of purchase the plaintiff would have been obliged to take title, regardless of the number of tax and assessment liens against the property, the failure of the defendant to discover these unknown assessments occasioned the plaintiff no loss; and that since the policy was one of strict indemnity the insured could not recover (if at all) until he had paid the assessments. But see *contra* the strong case of *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468.

³⁰ (1903) 206 Pa. St. 428, 55 Atl. 1065.

³¹ The distinction between contracts of indemnity and those of guaranty is elementary. It was very important in this case that the contract was held to have been one of indemnity only, for, had the contract been construed as being divisible and one part thereof a contract of guaranty, plaintiff, although he had lost nothing, would have had a right to recover. A contract of title insurance is not one of guaranty. See also, *Equity Trust Co. v. Aetna Indemnity Co.* (1909) 168 Fed. 433.

And it follows from the very terms of such contracts that the loss or damage, if any, must be by reason of incumbrances against which the insurer agreed to be bound.³² Thus in *Wheeler v. Real Estate Title Ins. & Trust Co.*,³³ due to the fact that a building was then in process of erection on the premises, the policy excepted from its scope, liability for "unmarketability by reason of the possibility of mechanics' liens and municipal liens," but by express provision this limitation on its liability was not to extend to "actual losses by reason of such liens."³⁴ The policy was executed in 1888, and the work for which claims were filed was not done until 1891. It was very properly held that the "possibility" of liens within the meaning of the exception was a present possibility, and that such claims not having been a charge on the property at the date of the policy they could create no cause of action under it, the intent of the parties being to insure against liens, the rights to which were already inchoate at the date of the policy.

The term "loss" is relative³⁵ and what the word means is to be measured by the standard accepted between the parties.³⁶ Thus in *Foehrenbach v. German-American Title & Trust Co.*,³⁷ plaintiff was insured as to his title in certain property which seemed, under the terms of a will, to vest entirely in himself. In an action of partition it was judicially determined that the will gave him no rights but that he took merely as an heir of the deceased devisee under the will, lessening his interest in the property one-half. Action being brought on the policy, it was contended in defense that the insured had lost nothing because he never did, in fact, have title to the entire interest, and that

³² *Broadway Realty Co. v. Lawyers' Title Ins. and Trust Co.* (1916) 171 App. Div. 792, 157 N.Y. Supp. 1088, reversed in 226 N.Y. 335, 123 N.E. 754; *Taylor v. N.J. Title Guarantee etc. Co.* (1902) 68 N.J.L. 74, 52 Atl. 281. In *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468, the term "loss or damage" was construed to cover the payment by the insured of assessments against the property, which had not been excepted from the policy due to the insured's promise to pay the same and have them canceled; but it was further held that under the circumstances the defendant was entitled to a reformation of the policy to relieve it from the purposely omitted assessment.

³³ (1894) 160 Pa. St. 408, 28 Atl. 849.

³⁴ The reason for the insurer doing this was that the insured was a mortgagee and that the security was such that both the liens and the mortgage indebtedness could have complete satisfaction therefrom; however, the existence of the liens were a possible obstacle to a sale by the insured of his interest and this risk the insurer was unwilling to assume.

³⁵ *Foehrenbach v. German-American Title and Trust Co.* (1907) 217 Pa. St. 331, 66 Atl. 561, 12 L.R.A. (N.S.) 465.

³⁶ *Ehmer v. Title Guarantee and Trust Co.* (1898) 156 N.Y. 10, 50 N.E. 420; *Empire Development Co. v. Title Guarantee and Trust Co.* (1918) 225 N.Y. 53, 121 N.E. 468. See also *Kentucky Title Co. v. Hail* (1927) 219 Ky. 256, 292 S.W. 817.

³⁷ Note 35, *supra*.

therefore he could not be said to have lost that which he had never owned.³⁸ The court admitted the logic of this argument but also pointed out that that had been the very reason why the insurance had been procured; and it was held that the estate or interest of the insured which was covered by the policy having been that of an owner in fee of the entire property, any defect in title which reduced his interest below that point was that much loss or damage for which he was entitled to be indemnified.

There can be no sound reason for any distinction to be made between the rights of a present or a prospective owner who apply for title insurance, to recover on their contracts. Relief of mind to an owner, obtained through that means, is as desirable as the same assurance to a mortgagee or to one intending to purchase. The only purpose an owner or mortgagee has in seeking insurance of this kind is to avoid a possible claim against himself, and to remove all fear of uncertainty in the validity of his title or interest. To say, then, that when a defect subsequently develops he has lost nothing—because he never had anything—and, therefore, can recover nothing, is to misinterpret and ignore the original intention of both the insured and the insurer. Such a contract should be enforced as was done in the *Foehrenbach* and the *Empire Development Co.* cases. Decisions to the contrary, as in the *Pallister* case, if universal, would restrict the business of title insurance companies to those cases only where an intending purchaser or mortgagee would demand this form of assurance as to the quality of his prospective interest.

The amount recoverable in any given case depends wholly upon the terms of the contract and upon the facts surrounding and determining the loss. Ordinarily liability cannot exceed the amount specified in the policy,³⁹ nor, in keeping with its nature—as a contract of strict

³⁸ Contentions similar to this were also made in the cases of *Pallister v. Title Ins. Co. of N.Y.* and *Empire Development Co. v. Title Guarantee and Trust Co.* note 29, *supra*. In *Minnesota Title Ins. and Trust Co. v. Drexel* (note 25, *supra*) it was contended that an insured mortgagee who had bid in and purchased the mortgaged property on the foreclosure sale for the full amount of his mortgage debt, thereby himself assumed the burden of paying off certain mechanics' liens which were in existence prior to but not excepted from the terms of the policy. A condition of the policy provided that payment or satisfaction of the mortgage indebtedness, except by foreclosure, should annul the policy. The court, overruling defendant's contention, pointed out that the case fell directly within the exception mentioned in the condition, and held that the mortgagee had a right to look to the defendant for the extinguishment of all liens upon the property which existed at the date of the policy, and to gauge his bid on the assumption that the insurer would discharge its obligation in that regard.

³⁹ But in *Quigley v. St. Paul Title Ins. and Trust Co.* (1895) 60 Minn. 275, 62 N.W. 287, where under the terms of the policy, the insurer had the option, in case

indemnity—can recovery under it be for more than the actual loss.⁴⁰ However, this would not preclude the parties from fixing the measure of damages as between themselves in case of a loss, and the courts will hold the parties bound by any provisions purporting to do this.⁴¹ The policies themselves generally define what shall constitute a loss, and their more common provisions, either as conditions precedent, or as exceptions from liability, declare a loss to arise where the insured has been evicted under a paramount title or under a judgment of a competent court; where in such a court the existence of a lien or incumbrance has been declared to exist; where, on a sale or an attempted sale, the property proves to be unmarketable from a defect in title; or where, because of some defect, a mortgage loan has failed.⁴²

of suit against the property insured, to defend the same or pay the claim, it was held that the limitation in the policy as to the extent of the insurance, did not apply where the insurer did in fact undertake the defense of such a suit but failed to exercise proper care in its conduct, allowing the period of redemption to expire without notifying the insured as to its intention so to do. The insurer was held liable for the total loss sustained by the insured which was held to be the value of the property at the time of its sale upon foreclosure. In *Equity Trust Co. v. Aetna Indemnity Co.* (1909) 168 Fed. 433, plaintiff contracted to insure the title of certain mortgages who furnished money to be used in building sixty-two houses on land owned by the builder, and also the titles of purchasers of such houses, protecting them from defaults of the owner in the building operations and from liens. The owner, with defendant as surety, executed a bond to plaintiff to indemnify it against any policies it might issue, including any sums it might advance for material and labor for the completion of the buildings. Defendant knew that plaintiff was to handle and pay out the fund used in the entire building operations, and that sub-contracts had been let for parts of the work covering all of the houses. It was held that defendant's liability was not restricted to losses incurred by plaintiff on the particular houses the owners of which had received policies from defendant, but extended to the entire operation which it had contracted to see completed.

⁴⁰ See cases cited in note 25 *supra*.

⁴¹ See *De Wyckoff v. Fidelity Union Trust Co.* (1922) 97 N.J.L. 233, 116 Atl. 714.

⁴² The Chicago Title and Trust Co. by its policy, obligates itself to do two things for the protection of the insured: (1) defend suits against the title at its own expense, and (2) to pay adverse judgments therein rendered. Its policy expressly exempts the insurer from any liability for any loss occasioned by the refusal of any party to carry out any contract to purchase, lease, or loan money, on the estate or interest guaranteed. The policy of the Title Guarantee & Trust Co. of New York (see Richards, *Ins. Law*, 3rd ed. §465) has a further obligation incorporated in its list of stipulations, to the effect that if the insured contracts to sell or if he negotiates a loan, and the title is refused, the insurer will test the validity of the title in court, at its own expense, and, if defeated, will either pay damages because of such refusal, take the property at the contract price where the insured has contracted to sell it, or to make the loan where he has negotiated a loan. The policy of the Illinois company mentioned above seems to insure against nothing that is not of record. See note 18 *supra*.

The rights of the parties respecting the loss recoverable are determined as of the date the cause of action arises.⁴³ Thus where the insured contracted for the sale of the property and performance was refused by the vendee because of absence of title in the insured vendor, it was held that the measure of the loss or damage was the value of the property affected as of the date of the contract of sale by the insured and that it was not to be measured by its value as of the time of the making of the guarantee.⁴⁴

Contracts of title insurance are to be construed by the same rules which govern ordinary insurance contracts.⁴⁵ There must, of course, be no question as to whether the contract is one of insurance before such rules of interpretation will apply.⁴⁶ Thus in *Purcell v. Land*

⁴³ *Purcell v. Land Title Guarantee Co.* (1902) 94 Mo. App. 5, 67 S.W. 726. where it was stated that title insurance was not intended to indemnify merely against incumbrances, but rather against the assertion of such or other claims against the property. See also *Quigley v. St. Paul Title Ins. and Trust Co.* (1895) 60 Minn. 275, 62 N.W. 287.

In California, by statute, the cause of action is not deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party. §339 Code Civ. Proc.

⁴⁴ *Flockhart Foundry Co. v. Fidelity Union Trust Co.* (1926) N.J., 132 Atl. 493. The measure of damages is not what an insured has paid for property lost through defects but rather its market value at date of loss; not the cost price but the selling price governs. *Kentucky Title Co. v. Hail*, (1927) 219 Ky. 256, 292 S.W. 817.

⁴⁵ See Joyce, *Law of Ins.* (2nd ed. 1917) §206c. *Minnesota Title Ins. Co. v. Drexel* (1895) 36 U.S. App. 59, 17 C.C.A. 56, 70 Fed. 194; *Trenton Potteries Co. v. Title Guarantee and Trust Co.* (1900) 50 App. Div. 490, 64 N.Y. Supp. 116. See *Barton v. West Jersey Title Guaranty Co.* (1899) 64 N.J.L. 24, 44 Atl. 871, holding that an action on a policy of title insurance to be subject to the same rules of pleading as though the action were brought on a covenant of warranty. See also, *Wheeler v. Real Estate Title Ins. and Trust Co.* (1894) 160 Pa. St. 408, 28 Atl. 849; and *Place v. St. Paul Title Ins. and Trust Co.* (1897) 67 Minn. 126, 69 N.W. 706, 64 Am. St. Rep. 404.

⁴⁶ *Purcell v. Land Title Guarantee Co.* (1902) 94 Mo. App. 5, 67 S.W. 726. And in *Title Ins. and Trust Co. v. City of Los Angeles* (1923) 61 Cal. App. 232, 214 Pac. 667, a certificate by a title insurance company stating that after examination of the records, the company "hereby guarantees" the title to the property mentioned to be in a certain party, was held to be a contract of title insurance.

"It seems to be well settled that these contracts are essentially those of insurance where the companies engage in the business for profit and where the terms of the contract itself closely resemble the essential elements of an insurance contract, so that the rights and liabilities of the parties are governed by the rules of construction applicable to insurance rather than by the rule of *strictissimi juris*, which determines the rights of ordinary guarantors or sureties without pecuniary consideration." Joyce, *Law of Ins.* (2nd ed. 1917) §§339 and 339g.

A contract to indemnify against loss through defects in title to real estate is an insurance contract. *Hager v. Kentucky Title Co.* (1905) 119 Ky. 850, 85 S.W. 183.

*Title Guarantee Co.*⁴⁷ a certificate of title which recited that "said guarantor shall not be liable for damages" to exceed a certain sum, and would defend as to every claim "adverse to the title hereby guaranteed," and had further provisions respecting partial losses of the property and the rights of subrogation in case "the guarantor shall at any time pay any claim under this certificate and guaranty," was held to be a contract of title insurance, and was not rendered a mere guaranty of the correctness of the certificate⁴⁸ by the additional provision wherein the company guaranteed the certificate to be correct.⁴⁹

The whole contract of insurance must be taken into consideration when it is being construed, and the intention of the parties determined therefrom, and the circumstances surrounding the making of the contract can be shown to clear up doubts as to this intention.⁵⁰ But under the rule that all prior negotiations are to be considered merged in the written contract, it was held in *Banes v. New Jersey Title Guarantee & Trust Co.*,⁵¹ that parol evidence was properly excluded when offered to show the circumstances under which a policy was issued and that it was intended by the parties to insure title in the insured but not against diminution of his estate or interest.⁵² And the rule applicable to insurance agents generally, as to the power of waiver of conditions, applies as well to agents of title insurance companies. Accordingly, where the insurer's agent told insured that a certain incumbrance, pointed out to him by the insured, amounted to nothing and needed no attention, and this was relied upon by the insured, this was held to be a waiver by the insurer of a condition in the policy requiring notice of any adverse claims.⁵³

⁴⁷ *Supra* note 46.

⁴⁸ In California, by statute (§453v, Civ. Code) a policy of title insurance is declared to be any written instrument purporting to show the title to real property, or information relative thereto, which shall in express terms purport to insure or guarantee such title or the correctness of such information. Cf. *Whitaker v. Title Ins. and Trust Co.* (1921) 186 Cal. 432, 199 Pac. 528.

⁴⁹ Such certificate was declared to be, in effect, only a corollary of the guaranty of title.

⁵⁰ See *Trenton Potteries Co. v. Title Guarantee and Trust Co.* (1903) 176 N.Y. 65, 68 N.E. 132, in which a single policy insured the title to five separate properties, against loss through defects in title existing at the date of the policy. Action having been brought on the policy for a loss resulting from a defect existing prior to the date of the policy, it was held permissible to show that the issuance of the policy had been postponed until title to the fifth parcel had been perfected by a legal proceeding, and that in executing the policy the date thereof, was, by mistake, fixed as that of the date on which the deed to the last tract was obtained by the insured; reformation was allowed.

⁵¹ (1906) 74 C.C.A. 125, 142 Fed. 957.

⁵² See *Whitaker v. Title Ins. & Trust Co.* (1921) 186 Cal. 432, 199 Pac. 528, and *Kentucky Title Co. v. Hail* (1927) 219 Ky. 256, 292 S.W. 817.

⁵³ *Purcell v. Land Title Guarantee Co.* (1902) 94 Mo. App. 5, 67 S.W. 726.

Likewise as to warranties and conditions, the general principles of insurance law are applicable.⁵⁴ For example, following the general doctrine of warranties as to insurance applications, it was held in *Stensgaard v. St. Paul Real Estate Insurance Company*,⁵⁵ that where the policy provided that an untrue answer to any question contained in the application should avoid the policy, the answers amounted, in effect, to a warranty, and that thus the matter of their materiality was not open. Again, in a very recent case, where the policy provided that any untrue statement by the insured, or suppression of a material fact should avoid the policy, it was held that the suppression by the insured of the fact that his grantor, at the time of executing the deed to the insured, was of unsound mind and that the deed was fraudulently procured, voided the policy.⁵⁶ By statute, in some states, all statements, in the absence of fraud, are deemed to be representations merely and not warranties, thus changing the nature and consequently the effect, in those jurisdictions, of false statements in insurance applications.⁵⁷ A warranty may, of course, be waived, and such was the holding in *Quigley v. St. Paul Title Insurance and Trust Company*,⁵⁸ wherein the insured falsely (but apparently not wilfully) stated in his application that there were no incumbrances against the property when in truth there existed certain mechanics' liens thereon. It appeared from a recital in the policy⁵⁹ that defendant had full knowledge of the existence of the said liens. Applying a well-known principle of law, applicable to contracts of insurance, the court held that by issuing the policy knowing the war-

⁵⁴ *Stensgaard v. St. Paul Real Estate Title Ins. Co.* (1892) 50 Minn. 429, 52 N.W. 910, 17 L.R.A. 575. See 3 Cooley, *Briefs on Ins.* (1905) p. 2446.

⁵⁵ *Ibid.* In this case one of the questions in the application was as to the last price paid for the property, and the answer was "\$11,000." It appeared that though the deed recited a consideration of that amount, the transaction was really a trade of mining stock of little or no value and \$3,000 in cash. It was held that the question called for the actual and not the nominal price, and the answer being false and its materiality not being open to question, it amounted to a warranty and voided the policy.

⁵⁶ *Rosenblatt v. Louisville Title Co.* (1927) 218 Ky. 714, 292 S.W. 333. To the same effect see *Clarke v. Massachusetts Title Ins. Co.* (1921) 237 Mass. 155, 129 N.E. 376.

⁵⁷ As to whether statements in guaranty contracts generally are representations or warranties see 3 Joyce, *Law of Ins.* (2nd ed. 1917) §2002a (e). See also Richards, *Ins. Law* (3rd ed.) pp. 683-685, for list of statutes changing nature of false statements from warranties to representations.

⁵⁸ (1895) 60 Minn. 275, 62 N.W. 287.

⁵⁹ This recital was an incorporation by reference of a recorded agreement between the mortgagor of the property and a third person which purported to give said third person a mechanic's or material-man's lien upon the property insured:

ranted representations to be false, the defendant waived them, and that it could not be heard to say that it intended to issue and deliver, not a valid policy, but a worthless contract.⁶⁰

Where there are conditions to be performed before a right of action accrues under a policy of title insurance the courts will give them full effect, unless it can be shown either that the conditions were not intended to apply,⁶¹ as where, if interpreted literally, the insured would be required to perpetrate a fraud,⁶² or that they were waived. Thus where recovery on a policy was conditioned upon the actual eviction of the insured from the premises, it was held, in *Barton v. West Jersey Title Guaranty Company*,⁶³ that a complaint which averred that a lawful right and title to part of the property was claimed by a third party and that plaintiff was evicted under an adverse title was bad on demurrer in that it failed to describe an entry or disturbance by paramount title. Though this may be a rather far-fetched decision, it shows the extent to which courts will go in upholding reasonable conditions. Further, where a condition provides as to the manner in which losses under the policy shall be ascertained, there must be a specific averment in the complaint setting out that the loss was consequent upon one or more of certain causes of loss against which the policy guaran-

⁶⁰ To the same effect see *McLoughlin v. Bridgeport Land & Title Co.* (1923) 99 Conn. 134, 121 Atl. 175.

⁶¹ For example, where an insured, by total absence of title was at no time able to acquire possession, the condition requiring the showing of an eviction to entitle him to recover under the policy was held not to apply. *Place v. St. Paul Title Ins. & Trust Co.*, quoted infra note 62; *Kentucky Title Co. v. Hail* (1927) 219 Ky. 256, 292 S.W. 817. So, also, the fact that one surrenders the possession of property, the title to which has been insured, upon the rendition of an adverse decree, without waiting to be expelled from the property does not deprive him of his right of action against the insurer. *Foehrenbach v. German-American Title & Trust Co.* (1907) 217 Pa. St. 331, 66 Atl. 551, 12 L.R.A. (NS) 465, 118 Am. St. Rep. 916. See 4 Joyce, *Law of Ins.* (2nd ed. 1917) §2822.

⁶² In *Place v. St. Paul Title Ins. & Trust Co.* (1897) 67 Minn. 126, 69 N.W. 709, one of the conditions of the policy delivered to the plaintiff mortgagees was to the effect that no right of action should accrue unless there had been an actual eviction under an adverse title insured against, or unless the insured had contracted to sell the property and the title had been declared, by a court of last resort, defective or incumbered by a matter insured against. When the policy was delivered the mortgagors were neither the owners nor were they in possession of the property, but the same was then owned and in the occupancy of others. It was held that the condition did not apply to a case of this kind where the insured never acquired either possession or a saleable title (see note 61); and that to require the insured to go through the form of complying with the aforementioned conditions would be to require him to perpetuate a fraud upon an innocent party and upon the court in which action might be brought.

⁶³ (1899) 64 N.J.L. 24, 44 Atl. 871.

teed indemnity.⁶⁴ In a quite recent case⁶⁵ the owner of property, the title to which was insured to his mortgagee, was given an owner's certificate, reciting that he had paid the premium for such a policy and in the certificate it was stipulated that if the mortgage should be paid off and satisfied while plaintiff was the owner, then a new policy would be executed in his name; it was held that the plaintiff could not sue on the policy issued to the mortgagee before fulfillment of the conditions mentioned.

As touched upon herein previously⁶⁶ a policy of title insurance will be reformed, upon a proper showing, to conform with the intention of the parties. The general rules respecting reformation of instruments generally apply, so that, where the mistake complained of was not mutual but was solely that of the insurer, reformation will not be decreed.⁶⁷

In conclusion, it must be said that, except perhaps in the question of insurable interest and loss, when apparent owner desires to insure his title—touched upon in the *Empire Development Company* case—there seems to be no reason to expect that the courts will need to re-state or devise new rules governing insurances of this kind. The rules now governing other contracts of insurance, as to fraud, waiver, warranties, conditions, discharge, etc., are ample in determining the rights and liabilities of the parties.

⁶⁴ *Taylor v. New Jersey Title Guarantee & Trust Co.* (1902) 68 N.J.L. 74. 52 Atl. 281.

⁶⁵ *Cherry v. Peoples Trust Co.* (1925) 282 Pa. St. 52, 127 Atl. 320. In *Fox Chase Bank v. Wayne Junction Trust Co.* (1917) 258 Pa. St. 272, 101 Atl. 979, under a policy indemnifying a mortgagee from loss by reason of the filing of certain mechanics' liens, a provision requiring the insurer to notify the insured of any action or proceeding founded upon any lien, was held not to refer to the filing of the lien but to the proceedings for its enforcement.

⁶⁶ See notes 32 and 50 *supra*.

⁶⁷ *Kentucky Title Co. v. Hail* (1927) 219 Ky. 256, 292 S.W. 817. See also, *Trenton Potteries Co. v. Title Guarantee & Trust Co.* (1903) 176 N.Y. 65, 68 N.E. 132; *Elmer v. Title Guarantee & Trust Co.* (1898) 156 N.Y. 10, 50 N.E. 420.