Title News

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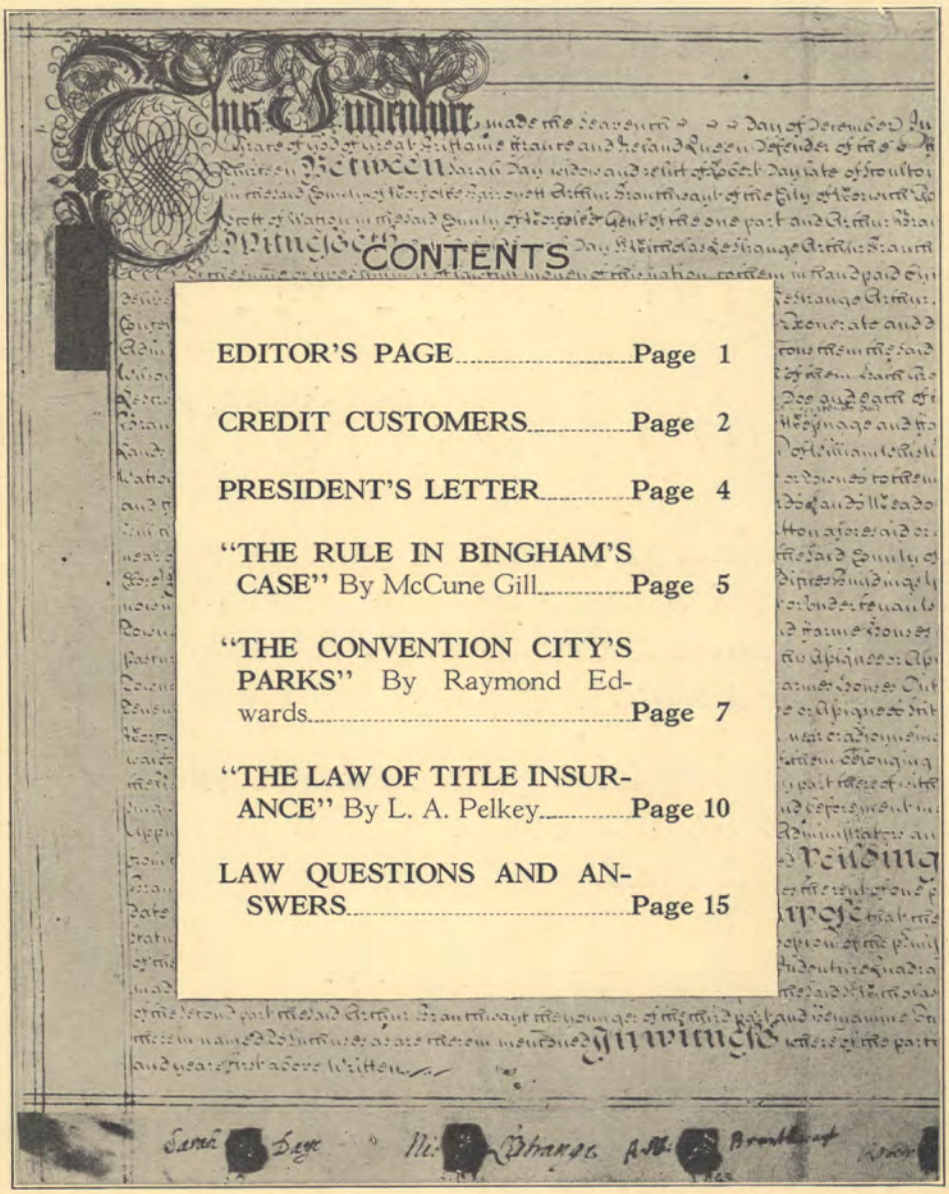

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What—

The Twenty-third Annual Convention
of the
American Title Association

Where—

SAN ANTONIO, TEXAS

When—

October 22 - 23 - 24 and 25

Make your plans NOW *to attend*

As a business proposition you cannot afford to miss it. Just a plain case of whether or not you want to make more money. Going there won't cost you—it's staying away that will.

As a pleasure trip, you couldn't plan a better one or be at any event where you could have such a good time.

The title folk of Texas will be our hosts.

REMEMBER—

Texas hospitality is a special brand

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TITLE NEWS

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Editor's Page

SOME interesting pioneering, history in fact, will take place within the next few weeks when the abstracters' license and examining boards will be appointed in two more states, and then start administration of the recently enacted laws in Colorado and South Dakota.

Such a law has been in effect in North Dakota for some few years, it being the first. With the abstract business actually a profession in three states, progress is certainly being made. It should be a law in every state and then our business will be on the same high plane as undertaking, selling real estate and barbering. Everybody with a misguided ambition cannot enter the sacred realms of those businesses without having some qualifications and permission to do so.

YOU will shortly hear from Jim Rohan and learn details of the special train enroute to the convention and the post convention trip to Old Mexico. If you are going to the convention, let him know as quickly as possible so arrangements for these features can be completed.

This year's convention is to be held in a place easily accessible to a great number of the members—more so than for a number of years. If you are looking for an excuse for staying away, it can't be the location. It will probably be the reason pictured in the lower right hand corner of this page. Mid-Winter Tourist rates will be in effect to San Antonio at these dates. They provide a minimum of expense, with stop-over privileges and diverse routes.

Those living in the Middle West can easily drive it, even in the abstracter's standard car—a several years old Ford. Splendid roads and a lot of the great open spaces to work in with a small amount of traffic will make driving a pleasure.

How can you stay away from the convention this year?

DID any of you ever have a county official try to keep you from using the records of his office? It doesn't happen often but now and then it bobs up. And why can he not compel you to work under his supervision and otherwise treat you as any other citizen? After all, how much actual right has the abstracter or title company employe around the various offices? It is largely a privilege of custom and moral status, *unless there is an abstracter's bond law* in a state. Only in those states has he a recognized and established right different from an individual. True, the records are public, but the official is the custodian of them and use of them is under his supervision and their care charged to him. But a bonding law gives an abstracter full rights to use them so long as he does not act arbitrary and misuse the privilege which none of them want to do, any more than the average official wants to prevent him.

Long have the abstracters fought regulation, bonding laws, and otherwise building any fences around their business. In this attitude, as usual in the case of all troubles, they have been the authors of their own affairs, and the establishers of the status of the business.

A bit of irony in this very matter has just come to attention. An abstracter in a certain state is having trouble with some of the county officials and they want to keep him from having access to the records in their offices. For years he has been one of the leaders in fighting the bond law. Now he is hot for it since it would help him in this case at hand.

WITH our authors this week: McCune Gill needs no mention. Any article by him is eagerly received

(Continued on page 14.)

When I am alone, and quite alone,
I play a game that is all my own;
I hide myself behind myself,
And then I try to find myself,
I hide myself in the closet where no one can see,
And then I start looking around for me.

The chief influence in keeping people from the State and National title conventions.

The guy behind the chair is many times more expensive than the total cost of all the meetings.

Credit or Give-away

Not only are abstract prices generally too low (a survey shows that a surprising number of abstracters have not increased their charges at all in twenty years while the majority have only made a negligible increase) but the pathetic thing is that the percentage of uncollected charges of abstracters is alarming. Next to discounts, commissions and price cutting evils, the subject of how to collect accounts is most in vogue whenever a group of abstracters meet together. Many are the inquiries directed to the association office, asking about the credit part of business and how it can be handled so abstracters can collect for the work they do. In the holding of regional meetings and during state conventions, this subject is frequently raised. Many times national association speakers at these meetings have had the following put to them—"Don't tell us how to make more money and increase our business without first telling us how to collect for what we do now."

Frankly, that is a terrible confession to make and certainly it is deplorable if one does not get paid for honest work. It is bad enough to get paid for all that is done at the price charged in the ordinary bit of title work.

From first impression one gets the idea that the two extremes exist—either the average abstracter has no idea at all about handling his credit business—at least does not practice it, or he goes the full limit in the opposite direction and conducts his business on the "cash on the barrel head" basis.

Both are wrong. In the first place a big portion of the business of the abstracter or title company comes from various agents, either those handling a sale, legal proceeding, or making a loan. Seldom, if any time, does the one ordering have any funds for advancing the expenses of the deal. Title charges, like his commission or fee, will be paid upon the consummation of the deal, or settlement. This makes the abstracter's business essentially one where the credit feature is quite an element.

It therefore stands to reason that credit should be extended to those deserving and withheld from those who have no right to it. An abstracter should establish credit customers, give them the privilege but be paid for his credit business the same as his cash. It should be no easier to get credit at an abstract office than a store. Likewise worthy customers should not be made to pay cash on delivery, or as some abstracters even run to the extreme, of making a deposit in advance with every order.

If you would ask the average agent or regular patron of abstract offices, he would probably tell you that abstracters are easy. Almost anyone can walk into an abstract office, order a lot of work, take it out with no more comment than "Well, I'll see you some day" or "I'll pay you one of these days when we close the deal." The abstracter usually stands meekly and says nothing.

Of course the average (and in fact the vast majority) of people who order a title job expect and do pay for it. There are many who never have any intention. Shoestring real estate, oil and other developers or operators pay their hotel, grocery, tire, gasoline and all other expenses, and not only work the abstracter for a cut price, but then never pay for it.

All abstracters receive orders by mail from out-of-town people or firms they never heard of. The general practice seems to be to do the work, send it on and then wait for the money. Some times the abstracter gets up enough nerve to send it express collect, or to some bank for collection. Both are rather unsatisfactory, but certainly better than to just send it on without any precaution. The last session of Congress amended the postal laws so that first class mail can be sent collect and the regulations for this will be published July 1st. This, by the way, is a title association measure and was initiated and sponsored by the title business. But why do the work and then trust upon some collection medium to get your money after your effort is expended when many times acceptance of the finished job is refused? Better, in such cases, advise whoever ordered it, the amount of the charge and ask remittance in advance.

Many abstracters extend credit to itinerant or free-lance brokers. This also is done without any investigation or questions asked about their worthiness, and then kept up for an unwarranted period. Nor is it always done with this class of customers. The next pain in the neck is when the account leaves town, or closes doors as broke. In every case the money for the abstract bill has been collected from the client—and pocketed.

Sad but true, many report their hardest accounts to "get in" are items charged to attorneys. The attorneys do not intentionally neglect the matter, they simply overlook or fail to collect for the abstracter. Many times they are disinterested as far as any connection is concerned with the man supposed to pay the bill. The purchaser brings the abstract to his attorney for examination. He finds that it has not been brought to date, so he just sends it down to the abstracter for continuation. Or maybe he has examined it and there are a lot of requirements. He just sends it back to the abstracter to bring to date again, fix the requirements and make additional needed entries. His client is not supposed to pay, but the deal is settled and the abstracter forgotten in the pay-off. It is true that attorneys are often very careless and just order it done when they might say "So-and-so is to pay for this, not me," and the abstracter might then have a chance to get in communication with the responsible party, get his consent and have an understanding about the bill or require payment before delivery to the attorney.

Do not forget that abstract bills are extremely hard to collect after the deal is cold.

Another element that enters into it is that when the deal is being closed and the various items being paid or held out, the one supposed to pay the abstract bill will say that he will look after that, and insist on its being left out of the deliberations and entrusted to his personal attention. This happens many times in settlement with attorneys, but not so much with loans and sales, because real estate men and loan brokers usually assume responsibility for expenses, especially when they incur them, and handle every item in the settlement.

But all these reasons and excuses are asinine. What, after all, is the real meat of the thing? Simply that the abstracter himself is to blame

in practically every case where he loses an account. He deserves to lose his pay because of his unbusiness-like tactics.

There are three principal reasons:

First: He is just naturally easy.

Second: He is a "timid soul" and just can't assert his rights.

Third: He disregards all credit knowledge and principles to keep his competitor from getting the job.

Nothing much need be said upon the first two, except that anyone afflicted with such a trait should for his own good and that of his family, immediately overcome them and begin operating upon a business basis.

A lot can be said upon the third. The majority of credit loses in the abstract business can be assigned to this one thing—the fear that if you do not take a job "questions asked" you will offend the customer and he will go to your competitor. Better that he should. If anyone is going to work for nothing, by all means let the other fellow do it. You can't make any money by working without pay.

Honestly, however, this is the prevailing cause of most account losses in the title business. There is a fear that if questions are asked, if credit principles are applied, if a deposit is required in cases where it need be, if payment is required before delivery, if credit is refused in any case, your competitor will get the job.

And worse yet, many abstracters let accounts run indefinitely, make no real effort to collect, and oftentimes charge off many accounts rather than run the risk of offending a "customer," for by so doing—he might go to the other company.

The title business should have a minimum of credit troubles, and any that exist are pure bunk. A cash basis is no more desirable than a loose credit one. The same principles should be installed as practiced by the grocer, laundry, ice company, clothier and any merchant.

In the first place, the idea should be dropped that work must be taken blindly to keep the competitor from getting it. The next thing is to collect for what you do charge up.

In getting upon a credit basis, the first thing to do is to get yourself "credit minded." That means, do not be afraid to talk to your customers about establishing and maintaining an account, and then when it is time to be paid, get paid. A great deal of business comes from certain agencies, real estate men, mortgage brokers, building and loan associations, the banks and the lawyers. It certainly is no job to have an understanding with all of these classes that the one ordering the work will be held responsible for the pay, that he must collect the title charges with his commission, taxes, insurance adjustments and other items in the settlement, and that accounts are to be paid monthly, when the deals are closed or upon some other arrangement.

If any of these monthly accounts, or regular customers do not treat their credit account and privilege justly, let them know about it or quit doing their work if they fail to pay. Here is a chance for a little cooperative work among abstracters and title companies in the same place. All other businesses exchange credit information and maintain a credit list. It would be easy for those in our business. Some of the state associations maintain a credit or rather, a poor pay list and it certainly pays wherever done.

Those in the title business have a very good opportunity of knowing whether accounts are collected by the agent and then not paid for a long time. The closing or settlement of a deal usually reaches the abstracter's ears. Even if they do string out a long time, if warranted, the collection of title charges can wait when a considerable amount and it is known that the broker has no funds to pay the expenses until the deal is closed, or the lawyer is waiting for a judgment to be rendered or an estate closed. Sometimes the client has made a deposit or down payment, or paid the lawyer a retainer of expense advancement (they usually do) and then if too long, the abstracter has a right to ask for his fees.

Dealing with these agencies or brokers though is a simple matter and only requires an understanding and the application of business sense.

Then comes the treatment of the chance customer, or the stranger. If a seller or the one to pay the bill brings the abstract in, then there is no reason why he should have long time credit, if any. He can pay just as well one time as another. Certainly a stranger need not have an account opened unless there is special reason or it is found he is deserving. It is with these occasional customers that it is sometimes hard to collect once the deal is cold.

Some definite understanding should be had with the attorneys. This can be accomplished by a short conference and the lawyer being impressed with the fact that he will be expected to collect for and pay every item coming from him and charged to his account. If the lawyer is merely handling it for a client and the client himself or some other is to pay the bill, then the lawyer should so instruct the abstracter.

In any case where one party orders the work and says some one else is to pay for it, the abstracter should first get approval of the work and charge, and satisfy himself that he will be paid. It is surprising how many times abstracters will just proceed to run a charge on some one and then wonder why they have trouble collecting.

But one of the most common causes of failure to collect accounts is where some utter stranger or never before heard of firm in some other city will write in and order a job. As a rule many abstracters blindly proceed to get out the work and send it open hearted with a bill attached. This is especially true if the name is high sounding like "The Integrity Realty and Loan Co.," if it is located in some city in a well known office building, or uses fussy letter-heads.

Sometimes even in such cases papers are sent for recording and the abstracter will even advance the fees. He not only donates his work, but actual money to the cause.

There are several ways of handling these cases. One is to send the abstract to a bank or another title company in the client's city for collection. The other is to send it by express collect, and as will soon be available, by first class mail collect. The next and safest way is to estimate the amount of the charge and have a remittance sent for it before beginning the job and therefore, as is sometimes the case, having it refused C. O. D. and doing the work in vain.

But if you do not want to run the chances of offending by doing any of the above, it is comparatively easy to ascertain the credit standing of the one ordering the work. There are several sources of credit information, but undoubtedly the best one for title companies is to write to a title company in the city where the man lives.

The thing is easy. The title business must extend credit, as all others do. There should be a negligible amount of losses and there will be if proper precautions are used and the credit principles of others applied to ours.

Here again is a chance for profitable cooperation among title companies in the same locality.

The American Title Association

May 27, 1929.

To Each Member of the American Title Association:

Harry H. Culver, president of the National Association of Real Estate Boards, is "Up in the Air" but comes to earth from time to time in his travel by airplane to make personal contact with the various units of his organization. He is an advocate of the highest of business ideals, energetic and effective. Your president is earth bound without the means for air traveling, and, therefore, without the ability to make personal contact during his year of incumbrency with any great number of the members of his organization. It is necessary, therefore, in order that I may know something of the personal attitude of our members that I should develop some way of approximating the personal contact in order to ascertain the needs of our association members.

Great as the burden on me would be, I would be delighted if every reader of TITLE NEWS, a member of the American Title Association would write me and explain just what his idea of the aims and purpose of the national organization is or ought to be. This is the problem I am trying to think through and would like your help. Let me again assure each member that any officer of the American Title Association will be pleased to consider the problems of any individual member and to aid in every way possible in the solution of these problems. But we cannot do this unless we know the problem. Skilled in science as we are in this day, mental telepathy has not yet developed to the point where your mere thinking of your problems will be a manner of communication to your officers. So please take up your trusty typewriter or pen and let us hear from you.

We have important matters of interest to our membership which are reaching the concluding stages, and we hope to present to the convention at San Antonio some real messages of accomplishment as well as an expression of hopes for future accomplishments.

Sincerely Yours,

Edward C. Wyckoff,

President.

The Rule in Bingham's Case

By McCune Gill, St. Louis, Mo.

It is a dogma of the common law that a remainder to the "heirs" or "heirs of body" of a grantor or testator is void.

If the limitation is in a deed the grantor is held, notwithstanding the provisions of the instrument, to have retained an indefeasible fee-simple estate in reversion. This he can sell, encumber or devise, and it can be taken for his debts. If in a trust, the trust can be terminated by the grantor and the life tenant. The heirs or heirs of body take nothing as remaindermen or purchasers under the deed. If they take at all, it will be by descent from the grantor, and this only if he has not previously disposed of the property.

If the limitation is in a will the rule still applies and the heirs take by descent and not by purchase. The rule applies to both real and personal property, and to alternate as well as to simple remainders.

This rule may be called the Rule in Bingham's Case, because it was applied in that case as reported by Sir Edward Coke. It will be seen that it is very like the more famous Rule in Shelley's Case. Bingham's rule has to do with a remainder to the heirs of the grantor or testator; Shelley's to a remainder to the heirs of the life tenant.

The rule in Shelley's case has been abolished in many of the states; Bingham's continues to exist in all of them, in full force and vigor, to confound the writers and readers of conveyances and wills.

Let us consider the decisions of the English and American courts and the declarations of text-writers, in which this little-known, but very dangerous, rule has been stated and applied during the three centuries from 1598 to 1923.

1598.

Bingham's Case, 2 Coke's Reports, 90 b (Stroud dem. Albert v. Horsey, 76 Eng. Reports Reprint 611).

Robert Bingham, Senior, held the manor of Bingham's Melcum and conveyed it to the use of himself for life, and after his death to the use of his son, Robert, Junior, in tail, and in default of issue, to the use of the right heirs of Robert Bingham, Senior, the grantor. And it was resolved by the Court that when Robert Bingham, Senior, conveyed, he retained the fee as a reversion and not as a remainder (to his heirs). Hence, Horsey (of whom Bingham held) was not entitled to wardship, because a reversion was expectant on it and the reversion and not the estate tail was held of the lord, and the estate tail not being held of the lord was not subject to wardship, as it would have been if the subsequent interest had been a remainder.

1620.

Cownden v. Clerke, Hobart 31 (80 Eng. Reprint 180).

The testator devised to "John Cownden, my son, but if he shall die without issue, then unto the right heirs male and posterity of me and my name forever." The question was whether the limitation to the heirs male, etc., took effect by way of reversion or remainder. Held, that it is a reversion, for this is a positive rule that a man cannot raise a fee simple to his own right heirs by the name of heirs, as a purchase, neither by conveyance of land, nor by use, nor by devise.

1628.

Coke on Littleton, 22 b.

If a man make a lease for life, the remainder to his own right heirs, this remainder is void, and he has the reversion in him * * * being the same as a gift to a man "and" his heirs * * * so that he may give the lands to whom he will. So it is if a man make a lease for life the remainder to the heirs male of his own body, this is a void remainder; for the donor cannot make his own right heir a purchaser.

1651.

Pibus v. Mitford, 1 Ventris 372 (86 Eng. Reprint 239).

One Michael Mitford conveyed to the use of his heirs male begotten of his second wife. The Judge says:

"I agree that a man cannot, either by conveyance at the common law, by limitation of uses, or devise, make his right heir a purchaser. When Michael covenanted to stand seized to the use of his heirs male, etc., he shall retain the land as parcel of his ancient use and the heir cannot take as heir male of the body by purchase."

1711.

Tipping v. Pigot, 1 Peere Williams 358 (24 Eng. Repr. 425).

This was a marriage settlement to a person to the use of his wife and children, remainder to the right heirs of the husband. There being no issue, it was held that if the estate were to move from the husband the remainder to the right heirs of the husband would be the old reversion.

1740.

Godolphin v. Abingdon, 2 Atkyns 57 (26 Eng. Repr. 432).

This was a limitation to the grantor for life, then to his wife for life, then to his son in tail, remainder to the grantor's own right heirs. "It will be absurd to say" (declares the Lord Chancellor) "that by a conveyance, or by use, or by devise, the last limitation shall make the right heirs purchasers, for it will be but a reversion, as it is a positive rule that a man cannot raise a fee simple in his own right heirs, as a purchase, by any form of conveyance whatsoever."

1772.

Fearne Contingent Remainders 51.

A limitation to the right heirs of the grantor will continue in himself as the reversion of the fee; the limitation to the right heirs of the grantor is void, as a remainder. An express limitation of the use during the life of the grantor will not make his right heirs purchasers.

1787.

Hargraves Law Tracts, 571.

It is a positive rule of our law that a man cannot raise a fee simple in his own right heirs as purchasers, either by legal conveyance, by conveyance to uses, or by devise. By this is meant that where the ancestor by any sort of conveyance appoints that his heirs shall, by gift from him, come to that very inheritance which the law of descent throws upon the heirs, it is construed as a vain attempt to give that to the heirs which the law itself vests in them.

1808.

Cruise, Digest Real Property.

An ultimate limitation to the right heirs of the grantor of an estate is void and it will continue in him as his old reversion though expressly limited from him. Where there is a remainder to the use of the grantor's own right heirs it has been held that this is a reversion in the grantor, to grant or charge, and would descend from him to his heir, and that the limitation to his right heirs was void.

1810.

Doe dem. Cholmondeley v. Maxey, 12 East 589 (104 Eng. Reprint 230).

The Hon. Albemarle Bertie in his will set up various life tenancies and remainders with ultimate remainder to his (the testator's) own right heirs forever. The Court said:

"An ultimate remainder to a person's own right heirs looks to nobody in particular and is generally considered

as merely leaving the remainder in the testator for the purpose of descent."

1833.

English Inheritance Act, 3 & 4 Wm. IV 106-3.

This act abolished (in England) the Rule in Bingham's Case, as follows:

"When any land shall have been limited * * * to the heirs of the person who shall thereby have conveyed the same land, such (heirs) shall be considered to have acquired the same as purchasers, by virtue of such assurance, and shall not be considered to be entitled thereto as (heirs of the) former estate or part thereof."

That is, they take by purchase and not by descent. But this English statute did not, of course, abolish the rule in the United States.

1855.

Harris v. McLaran, 30 Miss. 533.

This was a deed of gift of certain slaves from John Thurman to a trustee for his daugther, Eliza Thurman McLaran, during her life and after her death to her children, but if none, then the slaves shall return to my (the donor's) lawful heirs. The daughter and husband conveyed back to Thurman, and he to the daughter and her husband jointly. The daughter then died without issue. The collateral heirs (nephews and niece) of Thurman claimed the slaves. The Court says:

"An ultimate limitation to the lawful heirs of the grantor will continue in him as his old reversion and not vest as a remainder, although the freehold be expressly limited away from him. The remainder is void and the heirs take (if at all) by descent and not by purchase, because a disposition by the law is stronger than one by men. And the principle is as applicable to gifts of chattels personal as to devises of real property."

Hence, the collateral heirs took nothing, the title being vested in McLaran, the daughter's husband. And this is so, even though the life tenant is also the only heir of the grantor.

1860.

Loring v. Eliot, 16 Gray (Mass.) 568.

This was a conveyance in trust by a single woman for the use of herself for her life, and after her decease to her children, and in case she should die without issue then the trustee was to transfer the property to her (the settlor's) heirs at law. The settlor died without issue and left a will devising the property to persons other than her heirs at law. It was held that the reversion continued in her, and she could lawfully devise it, and the claimants under her will (and not her heirs) were entitled to a conveyance from the trustee.

1860.

Washburn on Real Property, Sec. 1525.

At common law, if a man seized of an estate should limit it to one for life, with remainder to his own (the grantor's) right heirs, it would be competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion. And where he made the limitation to his own heirs by will they took as reversioners and not as purchasers.

1861.

King v. Dunham, 31 Ga. 743.

Sarah A. Anderson, a single woman, about to be married, conveyed land and slaves to trustees for herself and intended husband, Thomas K. Dunham, during their natural lives, and after the death of the survivor to the use of their issue, and in default of issue then in trust for "the heirs of said Sarah Anderson and not to the heirs of the intended husband, Thomas K. Dunham." The wife, after the marriage, attempted to modify the trust by changing the final remainder so as to make the husband (and not her heirs) the remainderman. The Court says:

"There is no necessity to resort to the rule in Shelley's case; a reversion took effect in the grantor and would have passed to her heirs at law (by descent); in this view, Mrs. Dunham had a perfect right to consent to the reformation of the settlement."

1883.

Alexander v. De Kermel, 81 Ky. 345.

One Thomas B. Alexander conveyed a lot to a trustee for grantor's own use during life and to his issue in fee; if none, the two half brothers; but if they die before grantor without issue "said property shall go to the heirs of the grantor." The half brother died before the grantor, who devised to De Kermel. The grantor's heirs claim title. The Court decides in favor of De Kermel, because the deed created a reversion in Thomas B. Alexander, the grantor, which is a devisable estate; and, further, holds that the rule is not affected by the abolishment of the rule in Shelley's case.

1890.

Miller v. Fleming, 18 Dist. Columbia 139.

Edward Owen conveyed to a trustee for the use of Owen's intended wife for life, free from the control, etc., of Owen, remainder to her children, but if none, then to the use of the right heirs of the settlor, "their heirs and assigns as tenants in common." The husband died and devised all his property to a grandson. The settlor's right heirs sued the grandson. The Court decided in favor of the grandson, because "if one grants a life estate to another and limits a remainder to his own heirs, the limitation to his heirs is simply void, because he cannot convey to his heirs by deed, either immediately or by way of remainder." And this applies even though the conveyance be to a trustee and not of a legal estate.

1899.

Hobbie v. Ogden, 178 Ill. 357.

Here we have a trust deed carving out an equitable life estate for the grantor's divorced wife; the trustee, "upon the death of the wife, to convey the property to the grantor, Albert G. Hobbie or his heirs." The grantor died in 1868 and his wife in 1895. The grantor left a will and the contention was between his devisees and his heirs. The Court held that the heirs must lose, because there was no remainder, but the reversion continued in the grantor and passed to his devisees.

1900.

Akers v. Clark, 184 Ill. 136.

William Clark conveyed land to his wife, Mary J. Clark, "during her natural life, and, at her death, to revert back to my heirs." William Clark devised the land to one of his children, and the others sued, on the theory that they were remaindermen under the deed and hence could not be barred by Clark's will. The Court, however, denied this plea on the ground that the grantor could have no heirs until after his death, and the result is the same as though the limitation to "my heirs" were omitted from the deed, and that the grantor could grant away the reversion, or dispose of the fee absolutely, by will or deed, and that hence the devise to the daughter passed the entire estate in reversion.

1906.

Robinson v. Blankinship, 116 Tenn. 394.

Here the deed was to Mrs. M. A. Blankinship during her life or widowhood, with remainder to the grantor if he survived her, or to his heirs at law if she survived him. She did survive him and the question arose as to whether the remainder to the grantor's heirs was valid or not. The Court approves the rule that a remainder to the heirs of the grantor, although designated as a remainder, is not a remainder at all, but is an estate, which continues in the grantor as the reversion in fee. And the Court holds that, although the rule in Shelley's case was abolished in Tennessee by statute, such statute was confined to a case where a remainder is limited to the heirs or heirs of the body of a person to whom a life estate is given. And that there has never been a statute in that state affecting the other common-law rule as to the grantor's heirs.

1919.

Docter v. Hughes, 225 N. Y. 305.

This was a conveyance to a trustee to pay the grantor certain profits, and upon grantor's death to convey to the

heirs at law of grantor. The interest of one of grantor's daughters was levied upon by her creditor during grantor's life. Hence the question as to whether the daughter had a remainder in fee or the grantor a reversion in fee. The Court held that the grantor had the fee reversion and that the remainder was void, and that this rule is not affected by the statute abrogating the rule in Shelley's case; and that a man cannot, "either by conveyance at common law, or by limitation of uses, or devise, make his right heir a purchaser; that the heirs have a mere expectancy or hope of succession," which may be barred by deed or will; and that, in the absence of statute in the state abolishing the rule, it persists to the present time.

1920.

Tiffany on Real Property, Sec. 130.

If, after creating a smaller estate by will, the testator attempts to create an estate in favor of his heirs, exactly similar to that which the latter would take by descent, the devise (to the heirs) in nugatory. The heirs have, as the representatives of the ancestor, an estate in reversion and they cannot, by his will, be given this same estate by way of remainder. And, for similar reasons, in case the grantor in a conveyance attempts, after creating a particular estate in favor of another, to limit, by the same instrument, a fee-simple estate in favor of the persons who would take such estate by descent from him, such limitation is invalid and he is regarded as himself having the reversion in fee simple.

1923.

Stephens v. Moore, 298 Mo. 215.

This case is based upon a deed to a trustee to manage the property and pay the profits to the grantor yearly. The eleventh clause reads: "Upon my death this trust shall terminate and the trust (estate) shall pass to and vest in my legal heirs, or as may be directed in my will." The grantor brought suit during his lifetime and sought to revoke the trust, although the deed contained no power of revocation. The Court says:

"It is the generally accepted rule that where there is a grant to one for life with the remainder to the heirs of the grantor, there is, in fact, no remainder, for the limitation, though denominated a remainder, continues in the grantor as his old reversion and does not devolve upon his heirs as purchasers (as it would if it were a remainder), but as his heirs."

Hence the revocation was upheld.

San Antonio's Parks

Have Title Facts Interesting to Convention Visitors

San Antonio, the winter playground of the world, is excelled by none and equalled by few in its park system. This is a "large" statement, but I say it advisedly and feel that the facts I give you in this talk will prove its truth. Such is true beyond question considering the size of our city.

Our city has forty-eight parks. Their total size amounts to 600.16 acres. The largest is Brackenridge Park, which with Koehler Park forming an integral part of it, comprises 320 acres. San Pedro Park with its annex contains 65.05 acres. Everybody knows these two parks, knows their countless beauty spots, their varied enticements, their perennial interest, but there are few who have any conception of the park system of San Antonio as a whole —of the size, location and facilities of the two score and more other parks within the six-mile square limits of this city. Here is a list showing the names and areas of the various parks:

Names	Acreage
Alamo Plaza Park	1.73
Brackenridge Park	305.39
Cassiano Park (Zarzamora and Tampico Streets)	6.00
Collins Garden Park	8.38
Central Park on W. 24th Street and Morales Street	.72
Crockett Square	5.32
E. Crockett Park (Colored Playground, Walton)	1.00
Dewey Park (intersection of Jones Avenue, Josephine Street, E. Dewey Place)	.04
Elmendorf Lake and Park	29.60
East End Park	4.15
Euclid Park on Ruiz and 20th Streets	.70
Five Points (intersection of N. Flores and Laurel Streets)	.29
Florida Park on Labor and S. Presa Streets)	.29
Franklin Square	2.09
Hicks Park at Hicks Avenue and S. Presa Street	.15
E. Houston Street and Elm Street	.04
Hay Market	.20
Jones Park, West End on Lake and Texas	.25
Koehler Park	14.30
LaSalle Park on LaFayette St.	.21
Mahncke Park	43.00
Main Plaza	.46
Madison Square	5.57
Maverick Square	3.03
Market Hall Square	.30
Milam Square	3.54
Military Plaza (City Hall)	.50
Moses Park on Goliad Street	.23
Paschal Square	.85
Park on Turner and Pershing Avenue	.61
Park on S. Presa and Callahan Avenue	.04
Park on S. Presa and Eager Street	.05
Park on Victoria and Peach	.02
Park on Sixth and Elm	.05
Park on N. New Braunfels Ave.	2.50
Park on Woodlawn Avenue	1.20
Romana Plaza	.23
Roosevelt Avenue Park	14.01
San Pedro Springs Park	46.05
San Pedro Springs Park, (Annex)	19.00
Smith and Buena Vista (Playground)	.56
South Heights Park	4.16
Pittman-Sullivan Park on S. New Braunfels Avenue	6.66
Travis Park	2.56
Washington Square	2.05
West End Lake and Park	62.00
Park, Richmond and Main Ave.	.04
Park, Warren, San Pedro and Poplar Avenues	.04
Total Acreage	600.16

If you have not been "sight seeing" in your own city recently, take this little booklet as a guide and see for yourself what I have not time to tell you. Drive out to West End Lake and you will see the possibilities and some of the realiti of this park and pleasure-ground, consisting of 62 acres, donated to the city less than five years ago (in 1918). Then go south and on West Commerce Street you will again only see for the future its full development of Elmendorf Lake and Park of approximately 30 acres—this, too, only recently donated to the city (March 24, 1917). Returning to the heart of the city you will pass on Buena Vista Street a municipal playground which was given to the city in 1915. At the market house is the market house square and plaza, and also what is now known as Milam Square, but which is shown on the earliest city map—in 1849—as a "city cemetery," and on a city map of 1883 as an "old cemetery." In this locality we will see that the earliest city authorities saw the advantages of parks and withheld from sale of city lands, which was made in the early fifties, two tracts of ground. These are known as Washington Square, one block south of the market house, and Franklin Square, just west of Laredo Street on Lakeview Avenue. You will

then pass Military Plaza with the city hall its center, and Main Plaza with the courthouse on the south. Finally you will reach Alamo Plaza with the unobtrusive Alamo, seemingly trying to make itself as inconspicuous as possible, but more important than all the city halls and courthouses in the state. Then to the south, out Alamo and Garden Streets you will find Roosevelt Park of 14 acres—a rock pit made into a community playground with its camping place for picnics and its swimming pool in the San Antonio River. Going to the eastern part of the city you pass the Denver Heights Park and come to the Pittman-Sullivan Park on South New Braunfels Avenue about four blocks south of East Commerce Street. Here you will also see an old rock pit transformed into a beauty spot with its sunken garden and beautiful shrubbery, useful also with its facilities as another community playground. This property has within the last three of four years been developed into what is now a most beautiful park. It was named from two young men who as aviators were killed in France in the late war and who were residents of that section of the city. In East End is another park. On East Crockett Street is a well-equipped playground for the colored children. Back in the heart of the city we have Travis Park, Maverick Square at Avenue C and 10th Street, Madison Square, over five acres, fronting west on Richmond between Camden and Dallas Streets, and, a little farther out, Crockett Square, commonly called "Twin Parks," intersected by Main Avenue between Cypress and Laurel Streets. You go to San Pedro Springs Park, where the Canary Islanders first reached San Antonio, and you now find, in addition to its old charms, new athletic grounds and the splendid new swimming pool. By then returning out River Avenue way, you pass Mahncke Park of 43 acres, just now being developed. And then you come to the largest and most beautiful—Brackenridge. Nature blessed this spot but man has done himself proud in its improvement. My short time only allows me to mention features—the zoo, the burros for children, Alpine drive, lily pond and tea garden, sunken garden, Mexican village, municipal polo field and race track, target range, free camping grounds, playground and picnic ground, facilities for band concerts and motion pictures, a swimming pool that meets the wants of everyone from little wading toddlers to high-diving dare-devils, a nursery from which thousands of plants and trees are distributed each year, varied athletic facilities, the chief of which is the golf course and the new municipal clubhouse. Most of the things that I have mentioned have been added to the park, but above all these are the driveways through its natural scenery—the gift of mother Nature, which man can never adequately describe, much less pretend to imitate.

The foregoing facts should prove the statement made at the outset, "San Antonio is excelled by none and equaled by few in its park system." If not, the data I now wish to give you should at least show the parks of our city, in their title and history, to be absolutely unique, with traditions all their own.

Sunken Garden—Brackenridge Park, San Antonio.

It is interesting to note that the city on San Antonio acquired title to some of the property now in our parks from the Spanish government just a few years after the first settlement was founded.

Let me digress a moment to call your attention to this ancient grant. It was in the year 1733, or 1734, that the King of Spain, under the great seal of the kingdom, issued a title to the city of San Antonio, then called San Fernando, of about eight leagues of land. This important parchment was preserved in the archives of Bexar for at least a century, having been seen as late as the year 1834. About that time it finally disappeared, and has evidently been lost or destroyed. In the suit of Lewis vs. City of San Antonio, decided in the Supreme Court in 1851 and its decision reported in 7 Texas, pages 288 to 322, it was proved on the trial that this document was sewed into a book with the other papers relating to the foundation of the municipality, among such papers being one relating to the introduction, at the royal expense, of fifteen families from the Canary Islands, who were the first settlers of the town. In 1829, when the people were aroused by what they deemed a fraud on their rights by Balmaceda, then delegate to the Congress of Coahuila and Texas, in procuring a decree of the Congress granting two leagues of land to the town, these two leagues being within the eight leagues originally granted by the king, the corporate authorities instituted a search for the deed and found it. Thereafter a distinction was made between the land covered by the two-league grant and the land without, the latter being called the ejidos. After the overthrow of the Mexican government and the establishment of the Republic, the state granted, or issued patents on, nearly all the lands within the ejidos, although an act of the Texas Congress in 1837 was claimed by the city as confirming its title to all this land. This resulted in several suits, and it was in one of these suits, Lewis vs. City of San Antonio, which I have already mentioned, that the title of the city was finally established by the Supreme Court. The history of the original royal grant was brought out in the evidence in that suit and thus preserved. Also the metes and bounds of this grant were clearly established therein by proof of competent witnesses. Its existence and location have since remained unquestioned.

Among the most prominent parks owned by the city as part of this grant are Franklin Square, Market Plaza, Market House Square, Washington Square, Milam Park, Pittman-Sullivan Park, and the northwestern portion of Brackenridge Park.

The title to a part of San Pedro Springs, together with all of Crockett Square, is of exceptional interest. A tract of land was granted by the government to one Rodriguez, one of the parties who constructed the upper labor ditch. However, he failed to fulfill the conditions of his grant (failing, it seems, to keep up his fences), and the land was confiscated. It was then granted to one Arocha, but in the war between Spain and Mexico he took the Mexican side, was captured by the Spanish, executed, and the land again confiscated. The property was then sold to other parties and later acquired by one George Antonio Nixon. By a deed from Nixon dated October 16, 1838, Alfred Shelby claimed the property and sold it to Sam Maverick on December 5, 1846. In 1860, Maverick sued the city because it was claiming the property and about to sell part of it. A compromise was effected between Maverick and the city. However, the deed from Nixon to Shelby appears to have been a forgery, and the heirs of Nixon brought suit against Maverick and recovered the property. Then the

city sued the Nixon heirs and the matter ended in a compromise, by the terms of which the city, in return for a quitclaim of the remaining portion comprising practically all of Tobin Hill, received two tracts, one being described in the ordinance as "the land comprising San Pedro Park (the southern part below the middle or main head spring of San Pedro Creek)" and the other as "an oblong square" (Crockett Square). As late as 1907 the city title to San Pedro Park was further quieted by decree of court in a suit instituted by the Flores heirs who claimed part of the property under a Spanish grant made in 1778.

As a result of recent litigation over Madison Square, attention has been called to the conditions attached to the gift of that park to the city. I quote from the deed from Paschal and Lewis, dated July 26, 1858: "The undersigned hereby agree and declare that block No. 18, in the plan of the upper San Antonio, south of the public square, as well as said public square, shall be perpetually dedicated to the use of the public to be used as a common or public square, but subject to be burthened with the erection of a public fountain on each of said blocks and to the enclosure of a space of fifty feet in each direction around said fountains to be under the control of the public authorities."

Both Main Plaza and Military Plaza have also an interesting history. Certain parts of Military Plaza, in particular, were at one time claimed by squatters, and the history of their removal may be found in the official records. Some of these claimants appear to have lived on the plaza so long that the city was compelled to buy them out. Others were removed by litigation. As early as 1852 the City brought suit against certain Mexicans to recover the title and possession of a part of this plaza, and I quote part of the facts alleged in one of these suits: "That said public square (being Military Plaza, claimed by the city as a public square common since its foundation) so destined for public use, extended from the public buildings on the north now occupied as clerk's office, etc., to the lower buildings on the south known as Flores buildings, and on the west by other buildings of Flores and others, and on the east by the Catholic church enclosure and others; that the space within said enclosure has always been known and used as a public square except at occasional intervals when individuals were permitted to reside there temporarily by the authorities in time of danger and invasion of the Indians." Similar statements were alleged in a suit brought about the same time against a party who had erected upon Main Plaza a one-story frame building and was using it as a carpenter shop, the city also prevailing in this suit. The pleadings set forth that at the foundation of the city, about the year 1732, the King of Spain, through the vice royalty of Mexico, caused the town to be laid off and established on the San Antonio River, where the city on San Antonio is now situated, commonly called the town of San Fernando, and in the plan of said town, two plazas or squares were dedicated to the use of the public, one as a main plaza or square, and the other as a military plaza or square.

On June 1, 1871, the city purchased from the Catholic Church (title being made by C. M. Dubuis, Roman Catholic Bishop of the State of Texas) what was designated as the "Galera" property, the deed containing this provision, "it being understood that the property hereby conveyed is so conveyed on condition that it shall be dedicated to the public use as an open space and be made a part of, and one with the plazas above and below it, now known as the Alamo Plaza and the Plaza de Valero." On the property so purchased was a building which judging from its name was presumably used as a store room, but which from old maps showing the property of the former Mission of San Antonio de Valero (now the Alamo) was the carcel or prison. At this point in the old days was the entrance to the Mission property. This building was located approximately at the northern end of the southern park on Alamo Plaza. The part of Alamo Plaza north of this building was then known as Plaza del Alamo, and the part to the south as Plaza de Valero.

Some of the park property of the city has been bought and paid for, but most of it has from time to time been donated. Another interesting point is that many of the older subdivisions of the city when laid out contained park ground dedicated to the public, such as South Heights, East End and Lakeview, but in the later additions the reverse has been the rule. However, in Collins Gardens there was conveyed to the city, in 1919 a tract of 8.38 acres, extending from Somerset Road west across the addition. Let us hope more may follow.

Many large tracts have been given to the city and some of these lately. Mahncke Park was conveyed by the Water Works Company and George W. Brackenridge in 1905, some of the restrictions being that no part of same at any time shall be used for any other purpose than a public park. Elmendorf Lake and Park were conveyed to the city in 1917 by the Lakeview Townsite Company, on condition that the city would rebuild the dam at the foot of Elmendorf Lake and beautify the property by planting trees and flowers, laying out walks, and so forth. West End Lake Park was acquired in 1918 from Julia W. Anderson and the University of Cincinnati with various requirements concerning the improvement of the lake and the roadway around it.

We have 600 acres of parks, and a population of 180,000. That gives us one acre to each 300 of the population. Should we not somehow determine that this ration shall be maintained? Within our thirty-six square miles of city territory there are still large tracts that are practically in a state of nature, and relatively cheap. Can we not, either by acquisition, dedication or donation, add to our park area at least as rapidly as the city adds to its population.

I can not close this talk without again referring to Brackenridge Park. As it is beautiful so is its history interesting. The original donation of the largest portion of this park was made in 1899 by the Water Works Company acting through George W. Brackenridge. In 1915, the part thereof known as Koehler Park, containing 14 acres, was conveyed to the city, and in 1917 an additional donation of about 35 acres was made by Mr. Brackenridge. Bexar County has also contributed to the park, conveying some ten acres to the city 1917. A small portion of the park has been purchased from property owners, part of the property purchased being the ground necessary to open additional entrances to the park. Also some property has been donated in connection with the roadway along the river. And, as above stated, a part of this park has been owned by the city since the grant from the King of Spain. A peculiarity of the restrictions attached to the property given to the city, which the course of events has reduced to matters of mere historical interest, is that in the deeds from the Water Works Company and Mr. Brackenridge it is expressly provided that beer or intoxicating liquor of any kind shall never be sold upon said premises and that if such should occur, the title would be forfeited to the State of Texas, for the benefit of the University of Texas, while in the deed from Mrs. Koehler, the city is expressly required to issue permits to sell malt liquors and non-intoxicating drinks on said premises so long as it is not in violation of any laws of the State of Texas.

The Law of Title Insurance

By L. A. Pelkey, Milwaukee, Wis.

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 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 protection[6] 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 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 abstracters 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 abstracter 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 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

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[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 I 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 I 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, §§453s-453z 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 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 and 3703 to 3709 Gen'l Stats. of Minn. 1923; *Missouri*, §11800 R. S. Mo. 1919, this is a disenabling 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. 534-s-92 Laws 1927.

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

[6] See *infra* note 42.

[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] *Vallette* 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.

[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 obtain-

be based on negligence is essentially contractual[13] 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 judgment 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 insurance[20] gives perhaps the most simple definition of title insurance, yet, for completeness and accuracy, that of Joyce[21] 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 incumbrances 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 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.

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ing 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. 684, 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.

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

17Nor 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.*

18See 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 *Fochrenbach* v. *German-American Title and Trust Co., supra,* note 15, per Potter J.

20Cooley, *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. "Title Ins. and Trust Co. v. City of Los Angeles (1923)." 61 Cal. App. 232, 214 Pac. 667.

21Joyce, *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.

23Since 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.

25Joyce, *Law of Ins.* (2nd ed. 1917) §27i; 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 incompleted 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.

27Under 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.

29See *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 defendent 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.

31The 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

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 in 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 relative[35] 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 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 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]

The rights of the parties respecting

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.

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.

34The 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.

37Note 35, *supra.*

38Contentions 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.

39But 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 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.

40See cases cited in note 25 *supra.*

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

42The 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 men-

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 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 certificate[48] 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]

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 policy[59] 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 warranted 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

tioned above seems to insure against nothing that is not of record. See note 18 *supra*.

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.

45See Joyce, *Law of Ins.* (2nd ed. 1917) §206c. *Minnesota Title Ins. Co.* v. *Drexel* (1895) 36 U. S. App. 50, 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.

47*Supra* note 46.

48In 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.

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

50See *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.

52See *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.

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.

57As 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.

59This 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.

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

61For 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.

62In *Place* v. *St. Paul Title Ins. & Trust Co.* (1897) 67 Minn. 126, 69 N. W. 706, one of the

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 guaranteed indemnity.[64] In a quite recent case[65] 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 previously[66] 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 an 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.

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 not 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.

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 insured to notify the insurer 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.

EDITOR'S PAGE.

(Continued from page 1.)

—the only trouble is he cannot write enough. The one in this issue is one of his best.

L. A. Pelkey is an attorney of Milwaukee, Wis., and has written a splendid treatise on the law governing title insurance. It first appeared in the MARQUETTE LAW REVIEW and is reprinted with the generous permission of the author and that publication.

Raymond Edwards is attorney for the Stewart Title Guaranty Co. in San Antonio, Tex. He will be one of our convention hosts this year, and after you meet him there you will have made the acquaintance of one of the finest fellows in the world.

LAW QUESTIONS AND THE COURTS' ANSWERS

Compiled from Recent Court Decisions by

McCUNE GILL

Vice-President and Attorney
Title Insurance Corporation of St. Louis,
St. Louis, Mo.

What becomes of corporation's property after forfeiture of charter?

In some states it passes to officers, directors and stockholders as trustees and in others continues in corporation, for purpose of winding up its affairs by sale or mortgage. Dechutes v. Lara, 270 Pac. 913 (Oregon).

Is construction of sewer by city an acceptance of street dedication?

Yes. Hendrickson v. Astoria, 270 Pac. 924 (Oregon).

How long can mechanic's liens be filed after completion of building?

This varies; it is ninety days in California. Gavahl v. Thompson, 270 Pac. 965.

Is divorce necessary to dissolve marriage between tribal Indians?

No; mere separation is sufficient if it is the tribal custom. Unusee v. McKinney, 270 Pac. 1096 (Oklahoma).

Can title through heirs be overthrown by later discovered will?

It can in most states (another reason for title insurance). In re Robinson, 270 Pac. 1020 (Washington).

Is sale for general taxes superior to special assessments?

Not superior to drainage assessments not then due. Baldwin v. Frisbie, 270 Pac. 1025 (Washington).

Can true consideration be shown if deed recites $1.00?

Yes. Snyder v. Ryan, 270 Pac. 1072 (Wyoming).

Is deed "to be without effect until death" of grantor, good after his death?

No; it is void as an attempted testamentary disposition. Nobell v. Town, 271 Pac. 420 (Oklahoma); Hayes v. Moffett, 271 Pac. 433 (Montana).

Does grant of mineral rights give right to use surface?

In some states it gives right, by implication, to use part of surface for drills, houses, etc., necessary for mining. Campbell v. Schrack, 10 S. W. 2nd 165 (Texas).

Is equity suit that has been dismissed, a cloud on title?

Held that it is, because it is actual notice of the claim, in Texas. Hexter v. Pratt, 10 S. W. 2nd 692.

Is loss of court files a defect in title through commissioner's deed?

Held not a defect as regularity is presumed unless proven otherwise, and such a title is marketable. Wolverton v. Baynham, 10 S. W. 2nd 837 (Kentucky).

What is effect of deed conveying "Lot 1 containing 40 acres," if lot 1 contains 80 acres?

The deed conveys the entire 80 acres. Turner v. Rice, 10 S. W. 2nd 885 (Arkansas).

Does clause authorizing "amendment" of restrictions, by ¾ of owners give right to abolish them?

No. Couch v. Southern, 10 S. W. 2nd 973 (Texas).

Is will written by testator on typewriter good without witnesses?

Held void because not a "holographic" will even though signed with ink. Adams v. Beaumont, 10 S. W. 2nd 1106 (Kentucky).

Can partition suit include count to try title?

Yes. Montgomery v. Huff, 11 S. W. 2nd 237 (Texas).

Does tenancy by entirety apply to personal property?

Generally it does in states where such tenancies exist. Zahner v. Voelker, 11 S. W. 2nd 63 (Missouri).

Should deed recorded after grantor's death be passed?

No; it might be void because delivered after grantor's death. Griffith v. Sands, 271 Pac. 191 (Colorado).

Does sale for general taxes bar irrigation assessments?

Not where Irrigation District is not party to the tax suit. District v. Hawkins, 271 Pac. 195 (Oregon).

Can coal company condemn private way for switch over another's land?

It can in Wyoming and the fee title, and not merely an easement, passes to company. Meyer v. Colorado, 271 Pac. 213.

Can irrigation company collect repair charges from settlers for repairs to unsold lands?

Yes; the repairs need not be to ditches serving lands already sold. Bench v. Sullivan, 271 Pac. 22 (Wyoming).

Is foreclosure of vendor's lien barred by limitation?

Not where fraud was practiced by vendee on vendor. Posey v. Brixey, 271 Pac. 230 (Oklahoma).

Does omission of one junior encumbrancer from foreclosure suit affect validity of suit as to others?

No. State v. Wood, 271 Pac. 5 (Idaho).

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