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THE DEMAND FOR HOUSING

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We are grateful to the author for permission to carry this study on the housing market in "Title News". Here is an analysis focusing on important factors affecting the home building industry which deserves the attention of the members of our Association. By examining the characteristics of the housing demand for today and for tomorrow, the author, Dr. McKinley, has rendered a genuine service to all who are concerned with the future of housing.

This article was published in the May, 1956 issue of "Best's Life News" and we are also thankful for the permission of the publisher to carry it in "Title News." — Ed.

There are few questions in this country which are today debated with more heat and less light than is the outlook for home building. An apparently never-ending series of Congressional hearings and investigations continues to evoke a great variety of opinions, though not many facts, on the subject. Tremendous pressure is brought to bear on government agencies first to curb, then to stimulate, the housing industry. Some observers feel that housing needs will not be satisfied until every resident has his own little white cottage; others feel that we have already overmortgaged our futures. The political aspects of the question are of course played for all they are worth. It is truly unfortunate that in all this discussion so few attempts are made to analyze the facts—so far as they are known—and to produce objective estimates of what can reasonably be expected by way of housing demand during the next few years.

The answer to this question is not an easy one, nor is it likely that any single estimate will bring unanimous acceptance from the conflicting interests involved. The question is sufficiently important, however, and sufficiently amenable to analysis to deserve more careful study than it has received in the past.

The demand for housing is affected by two separate—though not entirely unrelated—forces. These two forces are income and population. Assuming that over the next five years the United States will remain prosperous and that incomes will continue to rise in much the same fashion as they have during the past five years, the estimates of housing demand developed in this article are not by any means *minimum* estimates. They are *estimates* of the volume of housing demand which will show itself in the marketplace, provided the economy as a whole remains prosperous during the period under consideration.

As background, let's look at the period 1950-55 — a prosperous period similar to that which we are assuming for the future — and find out where the demand for housing has come from since 1950. Having clearly in mind the factors which have contributed to housing demand in recent years, we will then be in a position to inquire into what is likely to happen to those factors in the future.

Housing demand arises from (a) the net increase in the number of households, (b) the wearing out or demolition of the existing housing stock, and (c) the need to raise the vacancy ratio to the point where the existing population can migrate from place to place, or, stated alternatively, the need to continue building up to the point where vacancies spread from older to newly-constructed housing.

The first of these factors is analyz-

ed in Table I. Column one of this table shows the average annual net increase in non-farm households in the United States during the period 1950-55. The demand for housing in this country is almost entirely non-farm. Although the volume of farm mortgage loans is substantial, these are almost entirely business loans, rather than residential construction loans. The series on housing starts against which we will measure demand, is also a non-farm series. Because of the steady migration off the farm, non-farm household formation is greater than total household formation. In the period 1950-55, non-farm household formation averaged 980,000 a year, whereas total household formation averaged only 835,000.

Households are formed either as family (i.e. related) groups, or as single persons or groups of unrelated persons living together. The first three items in the accompanying table refer to "family" households and the last two items to "individual" or "unrelated" households. During this six year period, there was an average annual net increase in family households of 680,000, and an average annual net increase of individual households of 300,000. This does not mean that families and individuals increased by these respective amounts. A "household" is by definition equal to an occupied dwelling unit. During the period 1950-55, part (530,000) of the increase in family households, came from a net increase in families themselves, but part also came from the undoubling of related groups previously living together. There was an annual undoubling of 95,000 sub-families—families related to the head of another family with whom they are living, such as a young married couple living with his or her parents. There was also an annual undoubling of 55,000 secondary families — families living in the same household with another family but not related to them.

The same process has been going on in the case of individual households. Of the total individual households formed each year, 145,000 has come from a net increase in the total number of persons not living in a family group, and 155,000 has come from an undoubling of such individuals who had previously been living together.

Of the total of 980,000 average annual non-farm household formation in the period 1950-55, 305,000 households a year have resulted from undoubling. This is an important fact because undoubling will not, and cannot, continue forever. When it is completed, household formation must depend entirely on the net increase in families and individuals themselves (which has average 675,000 annually in recent years). If the rate of undoubling of secondary families during the past six years is continued in the future, there will be no secondary families at all by the end of 1959! There are therefore definite limits to the volume of demand which we can expect to arise from undoubling in the future.

Replacement Needs

Thus far we have considered only one of the factors making up non-farm housing demand in recent years. Housing demand depends not only on household formation but also on replacement needs resulting from the wearing out or demolition of the existing housing stock. A need for home construction also arises when the vacancy ratio is so low as to allow insufficient mobility to the population. The first column of Table II shows the relative importance of these factors in total non-farm housing demand in recent years.

Our housing stock is continually wearing out or being demolished (by design or by accident), so that in an average year we must replace something like 100,000 - 150,000 housing units simply to maintain the existing stock. On the other hand, in many years there is an offsetting factor in the form of conversions of older structures from single to multi-unit dwellings. Conversions of single unit dwellings into multi-unit dwellings add to our housing stock just as the retirement of older homes subtracts from it. During World War II and the immediate post-war period,

conversions far exceeded demolitions so that the housing stock was able to increase by a greater amount than the volume of new residential construction. In the period 1950-55, however, there was probably a reverse conversion. Many of the units previously split up into multi-unit dwellings were retired or were returned to a single-family status. This reverse conversion acted like demolitions in reducing the existing housing stock, thus giving rise to an annual demand for housing from demolitions and conversions of about 180,000 a year from 1950 to 1955.

The final factor contributing to demand for housing in recent years has been the very low vacancy ratio. There has been a gradual rise in the vacancy ratio since 1952, but these vacancies have appeared mostly in rural areas, or very old housing, or in rental housing. Demand for new one to three family homes has remained strong so that, as far as builders are concerned, the rise in the vacancy ratio has been an interesting, but not a compelling, statistic. It will not be until the vacancies begin to appear in newly constructed homes that housing starts will be affected. When these vacancies do appear the effect on construction will be sharp and immediate. No one knows just how high the vacancy ratio can go before its effects spread to the new housing field, but it is obvious that that point was not reached in the period 1950-55. An average of 80,000 vacancies a year was added during these years without producing a significant effect on the new construction market and without raising the overall non-farm vacancy ratio above 2.8% at the end of 1955.

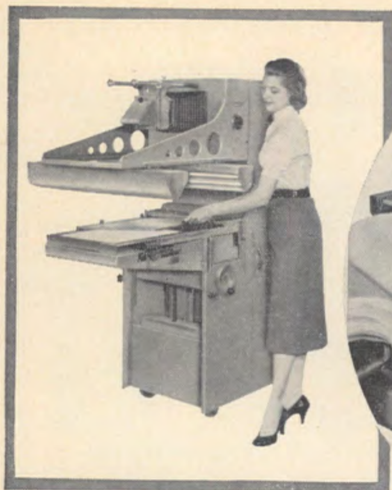
Census Reports

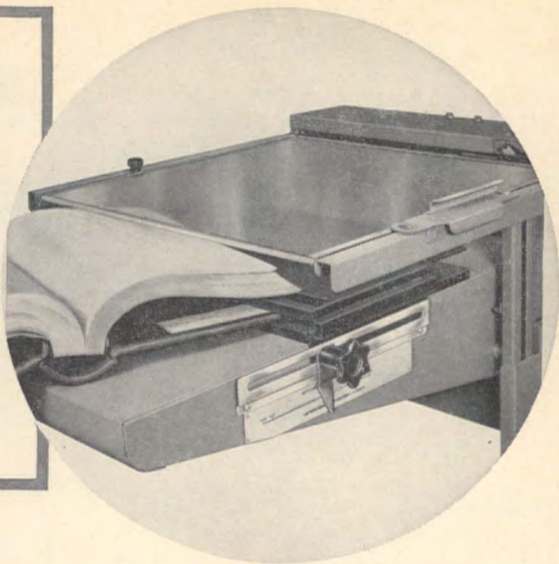
The 2.8% vacancy ratio at the end of 1955 is a personal estimate and differs somewhat in concept from the vacancy ratio reported earlier in 1955 by the Bureau of the Census. The Census reports that in the third quarter of 1955 the overall (farm and non-farm) vacancy ratio for the country was 2.3%. Although the Census does not report a non-farm vacancy ratio separately, it does indicate that the ratio in large cities is quite a bit lower than in rural areas. According to the Census definition, the non-farm ratio is less than 2.3%. The Census does not include in this ratio those houses which have been sold but are not yet occupied. These vacancies are obviously significant because, as the new occupants move in, vacancies will appear in their former dwelling units. After adjusting the Census vacancy ratio to put it on a non-farm basis, to include homes sold but not yet occupied, to include the vacancies occuring in the fourth quarter of 1955, and to allow for some underestimating in the Census figures because of sampling errors, I have arrived at the 2.8% non-farm vacancy estimate shown in Table II.

Now that we have examined the characteristics of housing demand in recent years, let's turn to the future and attempt to estimate the probable sustainable level of non-farm residential construction in the years 1956 - 60.

No Substantial Increase

Estimates for non-farm household formation over the next five years are shown in the last two columns of Table I. It should be obvious to anyone who has studied the age characteristics of our population that we cannot expect any substantial increase in the rate of family formation over the next five years. In 1960, there will actually be **fewer** men and women in their twenties (the age bracket which produces the most marriages) than there are today. Even though our population is growing in size, the group which is now moving up to marriageable age is unusually small, reflecting the low birth rates of the thirties. There will also be fewer men and women between ages 20 and 40 in 1960 than there are today. It is true that by 1960 the number of men and women in the 15 - 19 age group will be larger than today. Since many people get married before reaching age 20, we can expect a slight rise in family formation in the years 1959 - 60, and a portion of these increased marriages will result in demand for separate living quarters during those years.





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In addition to the fact that the group reaching marriageable age is likely to remain small in the next few years, it should be noted that we have already pushed the backlog of deferred marriages about as low as it is likely to go. The median age for first marriage for women has now fallen to 20.2 years, and for men to 22.7 years. That is, half of all women who ever marry, now do so by the time they are twenty years old. (In 1890, the median age of first marriage for women was 22.0 years; for men, 26.1 years.) Because of this early age of marriage, and other factors, only 17% of all women 14 years of age or older in non-farm areas are single. Only 12% over age 17 are single. This not only presents a rather grim prospect for eligible bachelors, but also gives little hope for a substantial increase in new-family demand for homes in the near future.

In estimating a small increase in family formation in 1956 - 58 and a somewhat larger increase in 1959 - 60, I have taken into account not only the increase in the 15 - 19 age group but also some possibility that continued prosperous conditions will encourage an increased marriage rate in the older age groups.

Net Increases

The net increase in non-farm individuals is also likely to rise quite slowly over the next five years. Non-farm individuals are those who do not live with any relatives. The net increase in this group is affected by a number of factors, the most important of which are the following: (a) The number of young people reaching the age when they might normally leave the family household to strike out for themselves. (b) The number of older people who are separated from their spouse, by death or other reason, and who wish to maintain independent living quarters. (c) The net increase in marriages, since many of these are formed from persons previously in the "unrelated individuals" group. The only one of these factors likely to cause a rise in the net increase in individuals is (b). The fact that more people are living to older ages, plus increased financial independence of older people, will probably lead to a gentle rise in the annual increase in non-farm individuals, such as that pictured in the last two columns of Table I.

As previously stated there is likely to be a decline in the next few years in household formation arising from the undoubling of families or individuals. The number of secondary families has already fallen to a very low level. Only 3.5% of all existing married couples are without their own household—the lowest percentage recorded since this figure was first calculated in 1910. The only large potential for undoubling appears to be among secondary individuals—and even here there has recently been a pronounced slowing down in the rate of undoubling.

The last two columns of Table I show the estimated household formation through undoubling during the next five years. It will be noted that the expected decline in the rate of undoubilng more than offsets the expected rise in families and individuals, so that non-farm household formation is estimated to average only 850,000 per year from 1956 - 58 and 830,000 per year from 1959 - 60.

In the 1950 - 55 period, conversions and demolitions increased housing demands by about 180,000 units a year. The experience of this period was quite different from that in earlier years. It has been estimated that from 1910 - 1940, net demand from conversions and demolitions probably did not exceed 60,000 units a year. From 1940 to 1950, the volume of conversions far exceeded the volume of demolitions so that demand for new construction was actually decreased by this factor. In the 1950 - 55 period, however, demolitions were higher than in previous years, and the conversion process acted in reverse, the tendency being to merge multi-family units into single family units.

During the next few years, demolitions are likely to remain relatively high. Extensive highway programs in developed areas will require the destruction of many dwelling

units. Urban renewal and slum clearance programs will continue to provide a moderate, but steady, addition to housing demand. And of course as the size of the housing stock grows, the number of units lost through natural causes increases.

Although demolitions will rise, it is unlikely that conversions will remain a plus factor. The unusual tendency to merge multi-units into single units in recent years has been principally a reflection of the prior extreme housing shortage, when many families were forced to occupy hastily converted quarters. Now that the rental market is easing, these cramped and inadequate accommodations are no longer rentable and landlords have been recombining the small units into normal apartment sizes. This process has now probably been largely completed, so that it may be expected that the usual procedure — that of converting large, older, single-family residences into apartments—will again become dominant.

The net of conversions and demolitions is therefore likely to provide less demand for new housing in the coming years than in the period 1950-55. I estimate that this factor will give rise to a need for something like 125,000 units per year from 1956-58, and 135,000 units a year from 1959-60.

The estimates of non-farm household formation and conversions and demolitions indicate a demand for non-farm residential construction in the period 1956-58 of about 975,000 units a year, and in the period 1959-60 of about 965,000 a year. From these fiigures should be subtracted the housing units automatically added to the non-farm housing stock as cities expand into previously rural areas. This gives a net demand of 950,000 units from 1956-58, and 945,000 from 1959-60.

Most observers feel that the present vacancy ratio is sufficiently low so that a substantial number of additional vacancies can be added to the non-farm housing stock before these vacancies begin to spread significantly to newly-constructed units. No one knows exactly what overall vacancy ratio will cause the impact of vacancies to be transmitted to the new housing market, but the recent vacancy ratio surveys by the Bureau of the Census are improving our ability to sense this point of impact. From personal observation of the housing market, considered in the light of the Census surveys, it appears that a ratio somewhere between 3.5 and 4.0% will begin to affect the new housing market significantly. I have therefore caluculated the level of non-farm residential construction which, according to my estimates of household formation and demolitions, will raise the non-farm vacancy ratio to between 3.5 and 4.0% by 1960.

The last column in Table II shows that, if non-farm residential construction is maintained at 1,100,000 units a year over the next five years, the non-farm vacancy ratio will be about 3.8% in 1960.

What conclusions can be drawn from this analysis which will prove useful to mortgage lenders, builders, and those in government whose particular interests and duties lie in the housing field? The analysis suggests the following points:

1. It is unlikely that the non-farm demand for housing will average over 1,100,000 units annually during the next five years, unless positive action is taken to increase the rate of demolitions.

2. The residential construction industry can remain prosperous in the 1956-60 period, but the output of the industry will constitute a declining proportion of gross national product. This is significant to economists, and to those in government who are concerned with the maintenance of stability and prosperity for the economy as a whole. It is also significant—with important qualifications depending on type of product, rate of product obsolescence, etc.—to industries closely associated with home building.

3. The need for mortgage funds will continue to rise in coming years because of the increase in the price of the average home, and because of the growing size of the total housing

stock. But the increase in mortgage demand will be much less than in recent years.

4. Many lending institutions which have devoted a large proportion of their available funds to residential loans in recent years should be planning a shift in their operations to adapt future operations to the changing mortgage market. Mortgage lending in foreign countries is one example of an outlet which needs substantial development.

5. Finally, if the government is interested in encouraging the housing industry as well as in promoting the general welfare, it should concentrate less on new sources for loanable funds and ever easier and more unsound loan terms, and devote more of its efforts to discovering practical methods for increasing the rate of demolition of slums and out-worn structures. The problem in the next five years will not be a shortage of loanable funds, but an insufficiency of demand for new houses. The only way that the demand can be increased significantly above the 1,100,000 unit level is through a concerted effort to blot out the still existing large areas of totally inadequate housing found in many of our cities.

TABLE I

NON-FARM HOUSEHOLD FORMATION PER YEAR, 1950-60

	1950-55[a]	*1956-58*[b]	*1959-60*[b]
*Net increase in non-farm families (from causes other than undoubling of subfamilies	530,000	555,000	616,000
*Net undoubling of sub-families	95,000	30,000	5,000
*Net undoubling of second families	55,000	15,000	—
†Net increase in non-farm individuals	145,000	150,000	159,000
†Net undoubling of secondary individuals	155,000	100,000	50,000
	980,000	850,000	830,000

*The sum of these three items equals non-farm family households formed.
†The sum of these two items equals non-farm individual households formed.
[a]Estimates based on Census data.
[b]Forecast.

TABLE II

SUSTAINABLE LEVEL OF ANNUAL NON-FARM RESIDENTIAL CONSTRUCTION, 1956-60

	1950-55	*1956-58*	*1959-60*
Non-farm household formation	980,000	850,000	830,000
Net conversions (—) and demolitions (+)	180,000	125,000	135,000
Rise in non-farm vacancies	80,000	150,000	155,000
	1,240,000	1,125,000	1,120,000
Estimated transfer of existing units from farm to non-farm category	30,000	25,000	20,000
Annual non-farm construction	1,210,000	1,100,000	1,100,000
Non-farm housing stock,* end of period	45,500,000	48,440,000	50,410,000
Estimated "significant" non-farm vacancy ratio at end of period	2.8%	3.4%	3.8%

*Excluding trailers.

WHAT INVESTORS IN MORTGAGE LOANS ARE DEMANDING IN TITLE INSURANCE

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In the interest of realism, the title to this talk might better have been "What Investors in Mortgage Loans are Demanding **from Title Insurers**" than "What Investors in Mortgage Loans are Demanding **in Title Insurance.**" That is to say, investors in mortgage loans find it desirable, from time to time, to demand from title insurers insurance coverage which goes beyond the logical concept of title insurance and makes it difficult for the insurer to meet that demand.

What is Title Insurance, and what should it provide for the investor? Should it only set out the condition of the title to the property as it finds it and insure against loss resulting from a status of title other than that represented? Or should it in addition insure the investor against loss which might incidentally result from defects in title or claims against the property, known or unknown, at the time of insuring, as well as the ordinary risks of title insurance? What are the ordinary risks of Title Insurance?

The answer to these questions, so far as they can be answered, will be found in a review of the system of title recording which prevails in much the same form in most of the states of the United States, and its legal effect, and the methods which have been developed for the analysis of these records and the determination of the title status which, with facts outside the record, they establish.

First let us consider the recording system. Briefly speaking this system provides that private papers such as deeds, mortgages, deeds of trust, leases, agreements of sale, and numerous other types of documents relating to real estate may be filed in a public office for public reference. In addition public documents such as judgements, tax liens, public improvement liens and zoning ordinances may be so filed or otherwise made public records. The mere filing or recording of these documents would accomplish little if it were not for the ingenius doctrine of "constructive notice" which is a vital part of the effectiveness of the recording system.

When documents provided for by law are properly executed and filed or recorded all persons dealing with the property which they affect must take notice of them and are bound by their contents. Such instruments are said to give constructive notice. Likewise, a person dealing with the property may rely upon the effect of such documents, subject, as is frequently the case with legal rules, to exceptions. As a rule the validity of an instrument, as between the parties, is not affected by a failure to record it, but as to persons dealing with the property without notice of the right created by the unrecorded document, that right can be lost, if conflicting rights are acquired and are made a matter of record prior to the recording of the document which creates the prior right.

There are at least two important exceptions to the constructive notice rule; first, any one dealing with real property must take notice of the rights of persons in possession of the property under such rights, and second, any one dealing with real property is bound if he has actual notice of any adverse right in the property

whether the evidence of that right is or is not a matter of record. Therefore, the rights of a tenant in possession or the owner of encroaching improvements, if a right to encroach exists, or even a claim to the absolute ownership of the property by one in possession, will be preserved, even though they are not shown by the records. The same is true of the ownership of easements and rights of way. Under the second exception mentioned, if a purchaser or mortgage loan investor acquires his interest in the property with knowledge of an outstanding adverse interest, the adverse interest will prevail regardless of whether or not it is shown by the public records.

What I have said about the recording system and its limitations points up the fact that the status of title to real estate cannot be determined from the record alone nor from conditions upon the property and facts outside the record alone. I am inclined to the view that the hazards which result from difficulties created on the records are greater than those arising outside the record because it is easier to miss them and frequently more difficult to define them. So, the purchaser of or lender upon the security of real estate finds it necessary for his protection to examine the records affecting the title to the property with which he is dealing to determine the ownership of the many rights which can exist in a single parcel.

Early in the history of the recording system two serious difficulties confronted the layman in making this examination for himself. For one thing he found that the records were indexed, not with reference to the property, but only with reference to the names of the parties. Because, for instance, many deeds affecting different properties were executed by the same person, as the volume of records increased it was found difficult to locate in the records the documents necessary to show title to a specific property, but more important it was found that frequently documents which affected the title were overlooked. Then, as titles became more complicated, it was found that the layman could not understand and construe many of the complex legal documents which made up the title such as probate proceedings, including wills and testamentary trusts, other trusts, life estates created in deeds and similar matters. Naturally, the job of doing this was eventually turned over to the lawyer. His opinion on the title was required before the property was purchased or a loan was made upon its security. This brought about the development of the most prevalent form of title service used in most parts of the country. The abstract and lawyer's opinion procedure.

For the preparation of his opinion the attorney must make the necessary examination of the documents affecting the property found in the public records. He finds the same difficulty as the layman in locating the particular documents, and as a result the abstractor became an institution in the business of title examination. To simplify the task of locating the matters affecting the individual property the abstractor evolved the system of assembling together in his office from day to day as the documents were recorded or other matters appeared in the record, a record of all matters affecting every parcel of real estate in his county. This made it possible for him to quickly make them available and materially reduced the danger of missing some of them. Where the abstract system still prevails the abstractor furnishes for the examination of the lawyer or the title insurer a complete abstract of all documents affecting the property with a certificate that all record matters affecting the property are shown. On the basis of this abstract the attorney furnishes his opinion of the status of title.

Title insurance has its roots deeply embedded in the abstract and lawyer's opinion system of handling real estate transactions. It came about because of inherent inadequacies in the earlier procedure. Particularly in those areas where the insurer maintains its own title plant and does its own title examining, deals close much more expeditiously than in other areas. Another difficulty which

plagued the earlier procedure was the conflict in opinions of different lawyers on the same title. Then, even with the natural limitations existing on the insurance which the title insurer can give, its coverage is much broader than that provided by the lawyer's opinion. In addition, volume real estate security lenders found that the problem of examining and storing great numbers of abstracts many of which involved several volumes was almost insoluble except through title insurance. Title insurance was first issued in Philadelphia, Pennsylvania, in 1878. The first company in the West was formed in 1886, and issued its first policy in 1887.

An now, with this superficial review of the development of title insurance we are ready to discuss the questions posed above. What is Title Insurance? In its original concept it was an attempt to simplify the abstract, lawyer's opinion system of title service and to provide insurance of the status of title as found by the insurer from the records and as shown in the title evidence. Originally in most parts of the country the insurance did not go beyond the record title. Standard exceptions excluded from the coverage many matters which are now included. One form of standard exception which was used in California policy forms for many years excluded all matters, including defects in title, not shown by the public records. This excluded from the coverage acts of incompetents, forgeries, defective legal proceedings and other similar matters which are now covered by ordinary standard policy forms.

In several important particulars title insurance differs from all other forms of insurance. As indicated it is inherently intended to insure only against loss which might result if the status of title as set forth in the policy does not exist. In other words against loss occasioned by happenings of the past. Its coverage is limited to no fixed period. The liability of the insurer continues indefinitely. It does not involve the payment of recurrent premiums, and this is important from the standpoint of insurance against loss from future events such as is protected against by life, fire and casualty insurance. All other forms of insurance insure against loss resulting from the future occurrences.

Until the advent of the LIC and ATA policy forms the broadening of the coverage of title insurance policies came along slowly by natural evolution. There was no great demand from the insured for broader coverage. However, from time to time claims were made for losses arising out of risks, which were not covered by the policy forms in use, but were inherent in all titles and could not be resolved by an examination of the record. These risks involved such things as forgeries, false impersonations, acts of minors and incompetents, and the construction of doubtful legal questions. When losses occurred because of these items, it was difficult for the title insurer to explain why the insured was not protected by the policy. There being no satisfactory answer to that question, the policy coverage was gradually extended so as to include insurance against these hidden defects. It was done both as a matter of fairness to the insured and as a matter of public relations. However, in this extension of coverage, there was no change in the approach of the title insurer as to the purpose of the product nor the manner in which that purpose should be accomplished. It was still the industry view that the function of title insurance was to set forth in the policy a statement of the condition of the title as shown by the record, insuring against loss which would result if the title was not as represented, and in addition insuring against loss which might result from the invalidity of any portion of that record by reason of hidden deficiencies.

In those places where title insurance was accepted as the principle form of title evidence, until the real estate boom which followed World War I, the limited coverage offered by title insurers was considered sufficient and satisfactory by both purchasers and lenders. Prior to that time real estate financing needs were pretty generally met in the local com-

munities in which the property was situated and lenders were sufficiently familiar with the local real estate conditions and practices, so as not to require the services of an independent agency to protect them against loss resulting from many of the risks which have been shifted to title insurers in recent years.

The growth of the country and demands for real estate credit during that period of great activity led many of the larger life insurance companies, seeking outlet for the investment of their funds, far afield from their home localities for real estate loans. At that time substantially all of the loan business of these companies was handled on the abstract and lawyer's opinion basis. As their volume of loans increased, the need for a more expeditious and less voluminous system of securing title protection was required. At the same time, title insurers were urging upon them the use of title insurance. However, these lenders urged that a broader title insurance coverage than was then being provided was necessary if they were to accept it for mortgage loans secured by property far from their home offices. As a result, a group of counsel for life insurance companies in the mid-twenties drafted a form of policy which they designed as the Life Insurance Company Standard Loan Policy, or LIC form. When required, title insurers commenced the use of that policy form and some life insurance company lenders then accepted title insurance in place of lawyer's opinions.

It was soon demonstrated that the LIC policy form was in some particulars unsatisfactory and in 1929, a committee of the American Title Association in collaboration with the group of life insurance counsel which had worked on the LIC form produced the American Title Association, A.T.A., Standard Loan Policy which, as you know, has come into general use for mortgage loans and has almost completely supplanted the LIC form. Institutional lenders now accept title insurance in this form not only in areas where title insurance has long been established, but in many other areas where the abstract-lawyer's opinion system still prevails for other types of real estate transactions.

The ATA policy form differs from the usual standard form particularly in that it eliminates standard exceptions which exclude from standard coverage forms risks such as rights of parties in possession, easements not of record, liens not of record and encroaching improvements.

In promulgating the ATA form, it was not the intent or expectation of the title insurance industry that it was departing from the theory discussed above upon which the business was founded. That is to say, that it was not intended that these additional hazards would be assumed by the title insurer upon a casualty basis. It was and is the practice to determine, as far as that status can be ascertained both as to record and non-record matters, the status of title, and to then insure against loss resulting from an incorrect statement in the title policy of that status. It was still the theory that the policy would have to show exceptions excluding from the coverage any known defects in the title of claims against the property.

When issuing standard policy forms which contain exceptions as to liens and other encumberances, adverse interests or claims which are not shown by the public records and conditions which would be shown by a survey, the title insurer does not inspect the property nor otherwise concern itself with things which do not appear from the record. In issuing the ATA policy, however, a complete investigation is made of all pertinent facts, whether shown by the record or not, which might affect the title. An inspection of the property is made to be sure that there are no easements which are not shown of record. If the property is improved or occupied, the rights of the occupant are determined. The question of the location of the improvements on the subject property and on adjoining properties with regard to boundary lines is considered. Any conditions, restrictions or reservations to which the property is subject are checked to determine that the improvements and occupancy

are in conformity with the restrictions and that there are no other violations.

When a broad coverage policy such as the A.T.A. is issued, the title insurer does not change the nature of its business. It broaders the coverage but it takes all steps available to it to place itself in the same position as it was when issuing a more limited coverage; that is, so far as possible, it determines the condition of the title as affected both by record and non-record matters and insures against loss resulting from a status of title other than that set up in the policy. It does not intend to insure against damage which the insured may suffer by the happening of future events incidental to title.

When the investor in mortgage loans demands coverage within the terms just outlined, the insurer has no difficulty in meeting the demand, even though it may involve risks which are concealed and are in a measure matters of chance. But, when the demand goes beyond that, the title insurer is being forced into a field of insurance which is justified neither by his charges nor his reserves as called for by the ordinary risks of title insurance.

To illustrate: let us consider the subject of title insurance protection against loss resulting from mechanic's and materialmen's liens. In California, a mechanic's lien is prior or superior to any lien on the property securing a loan unless the security instrument evidencing the loan is recorded in the office of the county recorder before the work of improvement upon which the labor or material is bestowed was commenced. The ATA policy form insures against loss or damage by reason of any such lien by the provision including in the coverage any satutory lien for labor or material which is prior to the lien upon the land of the security instrument of the lender.

The potential mechanic's lien upon property being improved, and the insurance against loss resulting therefrom contained in the A.T.A. policy, should offer no complications in issuing title insurance covering the lien of the security instrument. However, it is one of the most troublesome problems involved in title insurance affecting construction loans. It is the practice of all title insurers, I believe, to inspect property immediately following the recording of the security instrument which is to be insured. If no work is under construction, the policy issues as a routine matter. If work of improvement has commenced and the priority of mechanic's liens has been established there should be inserted in the title policy an exception showing that condition. In this event a question of credit between a lender and a borrower arises in which the title insurer should not be involved. It should not assume responsibility to pay losses which might result if mechanic's liens should be filed. This, however, is not the approach of the lender. As a rule it is urged that the loan cannot be made unless the title policy is issued clear of exception as to mechanics liens and in many instances such pressure is placed upon the title insurer that it is practically compelled to so issue the policy.

This is not title insurance, but is simply a guarantee that all mechanics and materialman who supply labor or materials to the work of improvement will be paid. It is a protection that long has been furnished by a type of insurer or bonding company which conducts that type of insurance business and which makes charges commensurate with the risk and establishes reserves which can pay losses resulting therefrom. The hazard which is involved is one of relatively short duration and is assumed in sufficient volume so that a loss experience can be established and the risk can be measured and adequately rated. This permits the fixing of proper charges and the building of proper reserves. Likewise, the hazard of insuring against mechanic's lien losses, when conducted by companies who assume all types of casualty risks, is diluted by a diversification of risks. Do I need to suggest that the title insurer is not in a position in this respect to so diversify, and that it is playing with fire when it assumes this responsi-

bility without making adequate charges and establishing proper reserves? Is it not reasonably clear when you consider that a home development of only 50 homes involving a construction expenditure of say $10,000 per unit is a business operation involving total obligations of $500,000, that a title insurer with assets of $2,000,000 or $3,000,000, and many of them have less, is subjected to an extremely risky exposure when at the same time it is out on several such projects, as well as much larger ones, assuming responsibility for mechanic's liens? It might be added that the lender relying upon the title insurance policy for this type of protection, if it fairly looks the facts in the face, could experience some restless slumber as a result.

I have referred to the mechanics lien problem because it is one which involves such a great hazard when the title insurer departs from sound underwriting practices. There are numerous other situations where lenders are requiring coverage falling within the same category.

All of you here, I am sure, are familiar with California Land Title Association indorsement Form 100. The coverage of this form well illustrates the problem which I have been discussing. It assures the insured that there are no covenants, conditions or restrictions set forth in the policy under which the lien of the security instrument can be cut off, subordinated or otherwise disturbed, and that there are no existing violations on the land insured, of any enforceable covenants, conditions or restrictions. The title insurer can properly provide this coverage. It can reasonably be expected to determine the facts necessary to insure, but it is frequently found that there are restrictions a violation of which can cut off the lien of the security instrument. In many such cases, the owner of the reversionary right cannot be found or is a corporation which is defunct. What happens then? The lender urges that the loan cannot be made unless the title insurer insures against loss resulting from the right of reversion, and the borrower says to the insurer, if you don't insure your competitor will, and the answer is, what do you suppose? The insurer insures. There is some doubt, however, as to the soundness of the practice either from the standpoint of the lender or the insurer.

Indorsement number 100 also insures against loss resulting from any future violations on the land of covenants, conditions or restrictions. It is difficult to reconcile protection of this type with the theory of title insurance. It recognizes an encumbrance upon the property and the possibility of the encumbrance causing loss to the insured and obligates the title insurer to pay that loss. The balance of the coverage of indorsement form 100 is of similar character. It contains insurance against any loss which would be suffered if existing improvements, including lawns, shrubbery or trees, are damaged by the exercise by the owner of the easement of his right to use the easement if the improvements encroach upon such easement. What has this to do with title to the property?

Indorsement Form 100 was a product of the same procedure as the ATA Policy form. It came from a committee of title insurance representatives, working with our good friends from the life insurance companies. I participated in the discussions. I know that we of the title insurance industry who were responsible for the form recognized the fact that we were going outside our field in some of its coverage, but we wanted to go as far as possible in meeting the needs of lenders, so here we are.

Affirmative insurance is frequently asked against loss resulting from the existence of encroachments, either of improvements of the subject property upon adjoining property or improvements of the adjoining property upon the subject property. The title insurer can logically meet that demand provided the encroachment is so slight as in law to be considered as no encroachment. It is reasonable that it should make this decision. However, regardless of the extent of the encroachment, demand is frequently made that insurance be issued against loss resulting from

encroachments which can cause damage if an adverse claim is made. When such insurance is issued it is not title insurance but human temperament insurance because the incidence of loss depends upon whether the owner of the adverse right is a person of good will who will not stand on his rights.

Violation of setback requirements of restrictions are frequently found. This is another situation where the insurer can logically insure, if because of other violations in the vicinity of the property, or for other reasons, the restrictions are not legally enforceable. However insurance is frequently required where the restrictions are clearly enforceable and the title insurer is asked to insure against resulting loss so that the loan can close.

There are many other similar situations which arise. It is extremely difficult for the insurer to determine whether these borderline cases are title insurance or are merely a guarantee protecting the lender or insured against loss resulting from a known claim against the property. The title insurer should, and I believe does, make every effort to cover such cases where they can be covered. It would be shortsighted for him to do otherwise because his business depends, just as yours does, upon the closing of the loan wherever possible. However, a line eventually will have to be drawn against the tendency of the lender to feel that the title insurer should provide more and more protection against hazards involved in the making of his loans which go beyond the proper scope of title insurance.

Humorously speaking, I see no reason why the logic of the present tendency should not lead to the requirement that the title insurer should insure the lender against any loss which it might suffer should the obligation secured by the security instrument not be paid. There is no more inconsistency in such a requirement than there is in the demand that the title insurer should guarantee the lender that all obligations of the borrower for construction work upon the property will be paid although those obligations are a lien upon the property prior to the security instrument.

Under the abstract and lawyer's opinion system, many of the risks referred to above which, as I have said are really credit risks, are assumed by the lender. Under that system the lender is a self-insurer and I assume that the risk is taken into consideration in his cost of doing business. In many instances the work of the title insurer in making it possible to insure against such special risks is a duplication of the work of the inspectors of the lender, and the risk of loss on many of the matters is less to the lender than to an insurer because the lender or his servicing agent has control of the loan and can work out problems relating to it with less difficulty and less expense than the insurer. In the final analysis, this question of distribution of risk between the lender and the insurer may come down to a simple question of expense to the borrower in obtaining his financing. If the insurer is assuming risks, however nominal, which logically should be carried by the lender and which involve unnecessary expense by the insurers for investigation, legal opinions and other similar services, and for the setting up of proper reserves, the financing expense is increased. The question is, should the lender impose that increased expense upon the borrower, or is it a factor in the credit risk of the transaction which can more cheaply be assumed by the lender to the advantage of all parties involved in the transaction.

In concluding this discussion I would like to leave with you one thought relating to FHA and VA loans. Where title insurance ignores known defects and attempts in so doing to make marketable a title which in fact is not marketable it is possible that these government agencies, in case of foreclosure, may question its guarantee of payment on the loan on the theory that title does not conform to its regulations. There has been little or no experience to date, so far as I know, which justifies an opinion on this question. While the title company does not insure

against loss which might result from the possible resistance against payment of their obligations by these agencies, this question is a matter of concern to the industry.

While the tenor of this discussion may indicate to you an unwillingness on the part of the title industry to cooperate with you, I think you realize that that is not the fact. Such a position on our part would be self-destructive. Our self interest requires us to provide you with the greatest possible service and coverage. I believe that you recognize our willingness to do so. My purpose here is not to set up road blocks to service in the closing of your loans, but to emphasize to you the problems involved in the present tendency to shift to the title insurer so many of these problems involved in the closing of loans which, in fact, are not within the proper scope or field of title insurance.

THEORIES OF LIABILITY

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Sooner or later every title man faces the question, "Just what does a title insurance policy cover?" We all endeavor to answer that question as part of our job of selling title insurance. Many of us have also had to consider the reverse of that question: "To what claims does the issuance of a policy of title insurance expose the insurer?" or as it may be put, "On what theories may the insurer be sued upon a policy of title insurance?" I believe that a substantial part of the answer to these questions may be found in those opinions of court which indicate the thinking of the court and the rules by which various claims have been held either to have been within or without the scope of the policies sued upon. I would therefore, with your permission, discuss with you for the next thirty minutes the various theories that the courts have applied to the standard portions of title policies and examine in detail some of the cases on which those theories have been applied.

Title insurance as a business has since its inception become of age in the courts, at least in the sense that title insurance is now recognized as a field or type of insurance and of the insurance business.[1] This implies an interesting corollary to the effect that, contrary to the attitude of many applicants, a title insurance company is not a public utility; a title insurance company is not bound to insure every title declared by the courts to be marketable. An insurer has, as an insurance company, the right to select its own risks.[2]

The rule that a title insurance company has the right to select its own risks would appear to have one significant qualification; where the company has issued an owner's policy and subsequently is asked to insure the title to the proposed mortgagee. In a New York case,[3] the title company issued an owner's policy in which it insured the owner as to an estate in fee simple but raised the following exception: "Restrictive covenants in instrument recorded in liber 211 of conveyances, at page 13, in the Office of the Register of the County of New York." Ten years later the same company, faced with a mortgagee application, raised exception that the title was not in fee simple but on condition, the condition being expressed and set forth in the instrument excepted in owner's policy. The assured owner was put to considerable expense to clear the title for the

mortgagee. The Court held such expenses to be a proper claim within the title insurance policy. The Court said, "Here the defendant is in the same position as if the mortgage loan had failed by reason of a defect against which it had insured. For a loss so sustained, the plaintiff may recover."

In accord with the general law of insurance, before a valid insurance contract or policy may be written, the applicant or prospective assured must have an insurable interest in the subject matter of the insurance. It would appear that, as to Pennsylvania companies, insurable interest is no real problem in the light of our current statute[4] under which we operate, which reads in part: "Such insurances to be made for the benefit of owners of real estate, mortgagees, and others interested in real estate." The statute read in the light of the rule that the title insured is the estate described in the policy would indicate that the problem of insurable interest will ordinarily be resolved upon examination of the title to be insured.

Some of us have been concerned whether or not the shareholders of a corporation have, for title insurance purposes, an insurable interest in real estate owned by the corporation. The problem arises when a corporation is acquired by way of stock transfer. The new shareholders often want to be assured that the corporation's title to its real estate is good. Their reason for seeking such insurance is perfectly clear; their insurable interest is not so clear. As to property insurance generally, shareholders are found to have an insurable interest in property owned by their corporation[5] but I have found no case applying that rule to title insurance. Observe that the insurable interest, if there is one, probably arises on the date of the stock transfer. Understandably, a policy dated that day is highly desirable from the shareholder's point of view. The problem of drafting proper exceptions for such a policy is, fortunately, not within the scope of this paper.

Fundamental to considering theories of liability is the inquiry, "What is a title insurance policy in the eyes of the law?" and, secondly: "How is that policy construed?"

> "A contract of title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specified amount against loss through defects of title to real estate, wherein the latter has an interest, either as a purchaser or otherwise; a contract to indemnify against loss through defects in title to real estate or liens or encumbrances thereon."[6]

This definition is generally in accord with cases in several jurisdictions including Pennsylvania.[7]

Further, the courts have held that a policy of title insurance is neither a wagering contract[8] nor a suretyship contract.[9]

Fundamental to the consideration of every indemnity contract, which is to say every title insurance policy, are the inquiries first: "As of what date is the contract effective?" and secondly: "As of what date, if any, is the contract of indemnity terminated?"

It would seem as if a mortgagee policy poses no real problem as to effective date. Mortgagee policies are regularly issued only after recordation of the mortgage and the recording statutes protect the mortgagee's title so-called from the date of recordation of the mortgage, with certain very narrow exceptions. The mortgagee's interest is ordinarily terminated according to rules of law, and with it, ordinarily, policy liability. One can, however, dream up extreme cases in which insurer's liability may well survive satisfaction of an insured mortgage. We have no law on that point.

As to owners, however, the problem is somewhat different. In the case of owner's insurance, we may have an owner seeking to insure his already existing title. That problem has been rather fully considered by the New York state courts and I think that the result reached there is probably completely applicable to all other jurisdictions in this country. The question was first raised in the Trenton Pot-

teries Co. case in 1903.[10] In that case Trenton Potteries Co. was taking title to five tracts of ground to be insured. Titles to four were acquired, but the title to the fifth was acquired at a later date after curative proceedings were had. After the title to the fifth tract was acquired, a single policy was written and dated as of the final acquisition. Subsequently it developed that a lien has been filed after the date of acquisition, but prior to the date of the policy, against one of the earlier acquired tracts. In that case the title company avoided liability by showing mutual mistake in the dating of the policy as to the first four acquired tracts. However, due to certain unfortunate language in the opinion in that case, the thought arose that owner's title insurance was in no case effective as to liens, defects and charges attaching or arising after the date of acquisition of ownership.

In 1916, the Empire Development Co. case[11] came before the Appellate Division of the New York State Supreme Court. In that case the agreement of sale provided that the vendee should take title subject to all liens arising after a certain date. Subsequently, title was acquired and owner's policy issued. Between the date of the agreement of sale and the issuance of title insurance a lien had attached which the vendee had by agreement of sale agreed to pay. Having paid the lien, the then assured owner attempted to recover from the title insurance company.

The title company defended that it had insured and the vendee had received performance according to the agreement of the sale and consequently the title company was not liable for the vendee had suffered no loss, having received the title which he had agreed to buy. The Appellate Division of the Supreme Court in its opinion in 1916 decided that the title company was not liable inasmuch as this was a lien which the vendee had by his agreemnt of sale covenanted to pay.

That same year the same court in another case commented, "The validity or effect of title insurance issued after the purchase of property is not free from doubt," and in that case by-passed that particular question to decide the case on other grounds.

Two years later, in 1918, the Empire Development Co. case came before the New York Court of Appeals[12] where the question was resolved. The Court said:

> "There is then no fundamental objection to definition between the parties to an insurance contract of the loss which they intend to cover, so long as it is made in good faith, and not as merely the cover of a wager. The courts will not interfere. Their function is limited to a construction of the contract."

The Court then went on to opine that the term "loss" in the insurance policy was construed to mean any diminution of the value of the owner's interest in the property as of the date of the policy.

The reports do not indicate whether or not the policy in this case by its provisions excepted acts and encumbrances done or suffered by the assured; apparently not. Current forms of policies except those items and probably would preclude recovery on this same set of facts were it to come up today. However, query whether or not our provision as to acts and encumbrances done or suffered by the assured would be or will subsequently be held to be effective as against liability incurred by an assured owner by reason of a warranty of the assured title. I have found no case on point.

This line of cases raises interesting problems as to the scope of a shareholder's policy, issued as of the time of a stock transfer, where the owner corporation had been in business or in title for some time preceding the stock transfer. It seeems as if we might be in the position of insuring the shareholders against acts and tax liabilities of their own corporation.

Being policies of insurance, title policies are subject to the same rules of constructions as other insurance policies.[13] Policies will be construed most favorably to the assured[14] in accordance with the common under-

standing of the words used.[15] All ambiguities in the language of the policy must be construed in favor of the assured. Conversely, all exceptions and reservations in a policy must be strictly construed against the insurer.[16] Times does not permit exploration of cases on specific exceptions in policies. The Pennsylvania courts have held that if the general language does not apply or becomes meaningless or inoperative in a policy, as construed in view of the subject matter, the clauses will be ignored in determining liability.[17]

The estate or interest insured is that estate or interest specified in the policy, not the estate or interest with which the assured is actually vested[18] and if, at the time of the issuance of the policy, the estate or interest insured is not that of which the assured is actually vested liability arises at that time. At that point the only question is the measure of damages.[19] The Pennsylvania Supreme Court has put it this way:[20]

> "When the insured gets a bad title, or the policy has been otherwise breached, the covenant of the insurer has not been fulfilled, and there is a liability. A liability having attached, the only thing that remains is to ascertain its extent in terms of dollars."

A corollary to this rule is that title insurance covers only those defects in title which are in existence at the time the assured acquires his interest[21] or, as we have seen, the date the policy is issued.[22]

Observe that liability is predicated, not upon notice to the assured, but upon the contractual provisions of a policy. It is true that notice to the assured is vital to the existence of conveyancer's liability but the courts have steadfastly sought to maintain the distinction between conveyancer's liability, predicated upon negligence, and insurer's liability which is predicated upon the contract of insurance.

In the Fifth Mutual Building Society case[23] it was vigorously argued that the assured mortgagee sustains a loss only at such time as it develops that the mortgage debt cannot or has not been realized in full out of the mortgaged property. Nevertheless, the court applied this theory and held the title insurer liable on a mortgage policy as of the date that the prior lien, and resultant loss, were discovered. The Court there said:

> "The reduction in value of the lien which he accepted on the faith of the insurance company's policy established a loss to the extent of the resulting reduction in value of the mortgage secured thereby. All that remained was to liquidate the loss by proving by competent testimony what that latter reduction amounted to."

Two years later, in 1937, in Narberth Building & Loan Assoc. v. Bryn Mawr Trust Co.,[24] the same theory was applied in favor of a mortgagee, the court saying:

> "When the assured asserted its loss and made demand for payment, that loss was required to be determined as of the date of the demand."

The Court, however, took pains to point out that the sale by way of foreclosure on the mortgage does not give rise to the loss, but the issuance of the policy insuring a defective title is the occasion of the loss.

So much for the mortgagee, but where does this theory put us with respect to an owner's policy?

As to owners' policies, the principle that the policy may be breached on issuance had been laid down in the Foehrenbach case[25] in 1907. In that case, the Court said, "Actual loss, of course, must precede the right of compensation. But that is measured by the standard accepted as between the parties."

The Foehrenbach case was followed in 1920 by the Pennsylvania Laundry Co. case[26] in which there was an outstanding easement over a portion of city property. There the Court on the precedent of the Foehrenbach case said:

> "The plaintiff was the owner of this property at the time the policy issued, the defendant covenanted for a valuable consideration to indemnify it against defects in title or encumbrances which might impair its value and

> the deprivation of the right to use a part of the property for the purposes which the plaintiff contemplated was a loss for which the plaintiff is entitled to be indemnified."

The Court went on to say that the mere value of the strip of ground taken was not the proper measure of damages; that the removal or loss of this strip of ground would diminish the value of the rest of the property and add to the cost of the contemplated construction. The Court closed its opinion with the following gem: "Anything which renders it necessary to spend more money in using a lot impairs the value of the land." The measure of damages was not particularly conjectural on the facts before the Court. Observe, however, that valuation was made on the basis of the intended use of the land at the time the defect was discovered.

In Kentucky Title Co. v. Hail,[27] the Title Co. issued its owner's policy knowing of, but not raising exception to, an adverse conveyance of a portion of the premises described in assured's deed. The policy did not insure accuracy of description and expressly excepted loss by reason of deficiency. The Court was quick to see a breach of the policy and went on to measure the loss, not by what was presumably paid for the worthless title, but by what the assured lost by reason of the fact that he could not sell that portion of the land as to which he had no title. This was established by appraisal of the market value of the outstanding tract.

The Pennsylvania Laundry Co. case rule that valuation of loss is measured according to the intended use of the premises was followed by the Tennessee Court in Buquo v. Title Guaranty & Trust Co.[28] and recently was espoused by the California Courts in Overholtzer et al. v. Northern Counties Title Ins. Co.[29]

In the Overholtzer case the title company issued an owner's policy after failing to discover a certain recorded easement, constituting a cloud on the insured premises. The easement was as to a pipe line, discovered by the assured owner after issuance of the policy. The pipe line had been constructed before the assured purchased the property and, although it was supposed to be underground, it was in fact exposed in several places. The assured owner, however, could not recall having seen the pipe line before making the purchase. Upon discovery of the pipe line, after certain incidental litigation, the assured owners sued the title company. Again the Court, quick to acknowledge a breach of the title policy, was faced with the problem of assessment of damages in terms of dollars and cents. The Court, citing California cases, spoke as follows:

> "The measure of damages here is the depreciation in the market value caused by the existence of the easement (as of what time will hereafter be discussed).
>
> . . . "Here the policy does not fix the date when liability accrues, nor does the policy provide how damages are to be computed. Obviously, diminution of market value caused by the easement is not a fixed nor computable sum. The evidence in the instant case demonstrates how difficult the ascertainment of that item may be.
>
> . . . "It seems quite apparent to us that liability should be measured by diminution in the value of the property caused by the defect, measured by the use to which the property is then being devoted. When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. The policy necessarily looks to the future. It speaks of the future. The present policy is against loss the insured 'shall sustain' by reason of a defect in title. The insured when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should

be re-imbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid."

The Pennsylvania Laundry Co. case, the Buquo case and the Overholtzer case seem to have given rise to the thought that title insurance issued to an owner can in some way insure the owner's right to use the insured premises for a particular use or for a particular purpose. It appears to me from a review of the cases that those cases can be understood only to extend to the valuation of the property, in case of a title loss; the valuation in such case being according to the owner's use or intended use of the property at the time the defect in title was discovered.

It is my understanding that title insurance companies generally are being requested to insure the owner's right to use the premises in a particular manner; particularly as to the right to erect certain specified buildings on the property.

Companies erecting super markets, shopping centers and service stations seem most anxious to purchase use insurance. Title insurance has traditionally included insurance against the existence of restrictions or has insured the accuracy of a report of the terms and language of such restrictions as may have been found to exist but it seems to me that use insurance involves more than this. Flat use insurance would seem to embrace public rights and private rights against the insured use. This implies that the premises are so zoned as to be available for the use and, possibly more important, that the use will not constitute a nuisance in the neighborhood; both of which matters are far removed from the existence or terms of equitable covenants or restrictions in the title so insured. In the light of our title insurance statutes and in the light of the cases reviewed, I have neither found authority for title insurance companies to issue that type of coverage nor have found any case in which a title insurance company has been sued on that type of insurance. Clearly there is an economic need for such insurance, but I do not think title insurers now have the right or corporate power to issue use insurance incident to a policy of title insurance.

1. People v. N.Y. Title & Mortgage Co. (1932) 178 NE 661, 346 Ill. 278 Wilson v. Louisville Title Co. (1932) 51 SW2d 971, 244 Ky. 683.
2. Title Guaranty & Trust Co. v. Rudershausen (1917) 164 NY Supp. 15.
3. Holly Hotel Co. v. Title Guaranty & Trust Co. (1933) 264 NY Supp. 3, 147 Misc. 861, affirmed 264 NY Supp. 7, 239 App. Div. 773.
4. Act of May 17, 1921, P. L. 682, sec. 685, added by Act of July 1, 1937, P. L. 2540, sec. 1; 40 P.S. 895 (B).
5. Appleman on Insurance Law and Practice, sec. 2145.
6. Appleman on Insurance Law and Practice, sec. 5201, citing: Beaullieu v. Atlanta Title & Trust Co. (1939) 4 SE2d 78, 60 GA. App. 400; Title Insurance & Trust Co. v. City of Los Angeles (1923) 214 Pac. 667, 61 Cal. App. 232; State v. Hogan (1899) 78 NW 1051, 8 N.D. 301, 45 LRA 166, 73 Am. St. Rep. 759.
7. In re: Gordon (1935) 176 A. 494, 317 Pa. 161.
8. Empire Devt. Co. v. Title Guaranty & Trust Co. (1916) 157 NY 68, 171 App. Div. 116 reversed (1918) 121 NE 468, 225 NY 53.
9. Gauler v. Solicitor's Loan & Trust Co. (1891) 9 Pa. C. C. 634.
10. Trenton Potteries Co. v. Title Guaranty & Trust Co. (1903) 68 N.E. 132, 176 NY 65, affirming 74 NY Supp. 170, 68 App. Div. 636.
11. Empire Devt. Co. v. Title Guaranty & Trust Co. (1916) 157 N.Y. 68, 171 App. Div. 116.
12. Empire Devt. Co. v. Title Guaranty & Trust Co. (1918) 121 NE 468, 225 N.Y. 53.
13. Wheeler v. Real Estate Title Ins. & Trust Co. (1894) 28 A. 849, 160 Pa. 408.
14. Ladner on Conveyancing in Pennsylvania (2nd ed.) sec. 207-A (b) citing Hess v. Merion Title & Trust Co. (1935) 177 A. 53, 317 Pa. 501.
15. Marandino v. Lawyers Title Ins. Corp. (1931) 159 SE 181, 156 Va. 696.
16. Coast Mutual Bldg. & Loan Assn. v. Security Title Ins. & Guaranty Co. (1930) 57 Pac. 2d 1932, 14 Cal. App. 2d 225; National Holding Co. v. Title Ins. & Trust Co. (1941) 113 Pac. 2d 906, 45 Cal. App. 2d 215.
17. Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Central Trust & Savings Co. (1917) 99 A. 910, 255 Pa. 322.
18. Title Ins. & Trust Co. v. City of Los Angeles (1923) 214 Pac. 667, 61 Cal. App. 232; Foehrenbach v. German-American Title & Trust Co. (1907) 66 A. 516, 217 Pa. 331, 12 LRA NS 465, 118 Am. St. Rep. 916.

19. In re: Gordon (1935) 176 A. 494, 317 Pa. 161; Narberth Bldg. & Loan Assn. v. Bryn Mawr Trust Co. (1937) 190 A. 149, 126 Pa. Super. 74.

20. In re: Gordon, supra.

21. Trenton Potteries Co. v. Title Guaranty & Trust Co. (1903) 68 N.E. 132, 176 N. Y. 65, affirming 74 N.Y. Supp. 170, 68 App. Div. 636; Mayers v. Van Schaick (1935) 197 NE 296, 268 NY 320, affirmed 277 NY Supp. 142, 243 App. Div. 523.

22. Empire Devt. Co. v. Title Guaranty & Trust Co. (1918) 121 NE 468, 225 NY 53.

23. In Re: Gordon (1935) 176 A. 494, 317 Pa. 161.

24. Narberth Bldg. & Loan Assn. v. Bryn Mawr Trust Co. (1937) 190 A. 149, 126 Pa. Super. 74.

25. Foehrenbach v. German-American Title & Trust Co. (1907) 66 A. 561, 217 Pa. 331, 12 LRA NS 465, 118 Am. St. Rep. 916.

26. Pennsylvania Laundry Co. v. Land Title & Trust Co. (1920) 74 Pa. Super. 329.

27. Kentucky Title Co. v. Hail (1937) 252 SW 817.

28. Buquo v . Title Guaranty & Trust Co. (1936) 100 SW 2d 997, 20 Tenn. App. 479.

29. Overholtzer et al. v. Northern Counties Title Ins. Co. (1953) 253 P2d 116, 116 Cal. App. 2d 113.

PHOTOGRAPHY IN ABSTRACTING, PROS AND CONS

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I am going to discuss certain phases of "Photography," and in doing so point out what a wonderful improvement photography has made in the Abstracting profession, especially in enabling the Abstracter to have a complete set of records in the office—a set of records that is accurate beyond a question of a doubt; but also pointing out a few of the pit-falls we might encounter by an over-use of photography.

With a Typewriter

Remembering back a few years (they say that is a definite sign of old age, when you start reminiscing) I sat in the Court House day after day knocking out "copies" of the records on 5 x 8 cards, trying to complete our office files on all deeds, mortgages, patents and miscellaneous books. What a tiresome and endless job that was. At times it was possible to write 100 such cards per day; some days would fall short of that number by quite a lot, but let's say there was an average of 75 cards per day, or approximately 8 days to complete a book. An endless job of beating the old typewriter for 8 hours, with very little variation in the day's work.

Now, with the development of "Microfilm" one can go to the Court House in the morning and by quitting time can have 5 or 6 books completed with 100% accuracy, and the tedious task of comparing has been totally eliminated. The speed that this modern way of living has developed is astounding.

Then, when photography, along the lines above mentioned, seemed to be a God-send to the Abstracter, someone had a wild idea that there was oil in our great State of Montana, and the Oil Companies started leasing up all parts of the state. Sure enough, when they got around to the actual drilling, they struck oil. The sudden boom for the Abstracter was something out of this world, as far as most of us was concerned, and so the word "Photography" again entered into the picture. The Oil Companies wanted VERBATIM abstracts, and the quickest way and best way to give them Verbatim abstracts was by photography. They were happy to accept the photographs, neatly compiled in chronological order, with the Abstracter's Certificate attached. So photography had once again come through for us.

Meaning of the Word

Now we are going wild over photography, and instead of abstracting for the general public, we are preparing a photograph of our records pertaining to a specific piece or parcel of land, and attaching our Certificate thereto and charging for an abstract.

At this point let's stop and see what the word "ABSTRACT" means. In the first place Mr. Webster, who apparently spent years tracing the meanings of words in the American language, says: "Abstract — That which comprises or concentrates in itself the essential qualities of a larger thing or several things; a summary or an epitome." In the second place, Mr. Warvelle, who has compiled several books (very good books, I might add, and books that a lot of our younger people who are just starting to abstract should read) says: "Abstracts defined: An abstract may be defined as a condensed history of the title to land, consisting of a synopsis or summary of the material or operative portions of all of the various instruments of conveyance which in any manner affect said land, or the title thereto . . . "

Certainly now, when we put a photograph of an instrument in with several other photographs of instruments, all affecting a specific parcel of land, chronologically in order, with our Certificate attached, we are not abstracting, are we?

I started abstracting some 20 years ago, and at that time we were showing instruments pretty much in full, due largely as I remember, to the request of the Federal Land Bank examiners. The abstracts were not verbatim, but they did have much superfluous material in them. Then approximately 10 years ago, the idea of "streamlining" came along, and we found that we could make more money, with less exertion, and still give the examiners all they actually needed to examine a title; we were "ABSTRACTING" in the true sense of the word.

Looking Ahead

During all that time we were teaching the girls and young men in the office to actually abstract an instrument, Probate Case or a Foreclosure Action (Foreclosure actions were far more prevalent in the 1930's as we all well remember). Each sheet in the abstract had to be typed, and the typist was learning something every time a sheet was completed. Through the actual typing of the instruments, etc., together with an explanation, they were gradually learning the why and wherefore of "Abstracting."

Now, apparently, all we need in the office is someone who understands the operations of a camera, so that we can grind out the photographs to sell to John Q. Public. How are the ones new to the abstracting profession going to learn to actually abstract, when all they have to do is snap a shutter, develop the picture of the instrument and put it in the so-called abstract? Are they going to learn the essential parts of a Deed, Mortgage or Probate Case by merely taking a picture?

To summarize my thoughts briefly let me say that I feel that microfilm records for the office and photographs for the verbatim abstracts for the oil companies are a real step forward, BUT let's give the general public a real honest-to-goodness "ABSTRACT," one that we can be proud to sign our names to as Registered Abstracters, and at the same time educate the newcomers to our profession so that they can truly carry on the fine standards of the Montana Title Association.

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