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Report of the Special Committee of the Hennepin County Bar Association Appointed to Study Title Insurance

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BENCH AND BAR

REPORT OF THE SPECIAL COMMITTEE OF THE HENNEPIN COUNTY BAR ASSOCIATION APPOINTED TO STUDY TITLE INSURANCE

By SUMNER B. YOUNG, *Chairman*
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A SUMMARY*

THE committee have addressed themselves to the following questions: (1) Is the public in Minnesota getting an adequate policy of title insurance at a fair price? (2) How does the public fare elsewhere in these matters? And, in general, (3) What should be done about title insurance in Minnesota?

We have not attempted to pry into the private affairs of the Title Insurance Company of Minnesota, nor to accumulate any material going to show whether that corporation is, or is not, engaged in the practice of law; or whether it has, or has not, been doing other things of which we lawyers have a right to complain.

At the outset, we wish to express our appreciation to that Company for its helpful and frank attitude. It has furnished every bit of information requested, and its courtesy has been unfailing.

On our own part, we have attempted to conduct our investigation with tact and fairness; and we hope that our findings will be viewed by everybody as the work of unbiased minds, and that what we say here may help to bring about a fair and workable solution to the problems involved.

In order to understand title insurance and the questions arising under it, we must first survey this field, and touch, to some extent, on its historical development.

The literature on the subject is thin, and of rather doubtful quality. Much of it is controversial. That a subject of such great interest and importance has remained unexplored by most of our leading law reviews is unfortunate, but not altogether surprising. One reason for this may lie in the studied reticence of title insurance companies, which have, in general, been unwilling to furnish any information regarding their business, their losses, their financial stability, or their methods of competition. The doors have been locked to inquiring minds.

*Because of space limitations, it has been found necessary to omit portions of the report. The omissions consist principally of some of the quotations from other writers, the analysis of forms used outside of Minnesota and of the forms prepared by Mr. Rhodes, and all but one of the forms collected by the committee. This material is available in the complete report which is in the files of the committee. Reference is made in the footnotes to the articles of other writers on title insurance, cited by the committee. [Ed.]

It is safe to say that few lawyers have ever read a policy of title insurance from beginning to end; and a much safer guess to assert that very few laymen have ever done so, and that *they would never understand this type of document if they did.*

Nor are there many decided cases in courts of last resort which deal with the fundamentals of title insurance law. There are probably several causes: The comparative newness of title insurance, and the nature of the typical policy itself, which tends toward the incorporation of so many exceptions and conditions that the insured is, at the very outset of almost any controversy, likely to be outmaneuvered on technical grounds, and placed in an unenviable position. Another reason may be the old platitude that most titles are *actually* good anyway, even though the record thereof may be faulty.

Title insurance is a natural result of the defects inherent in our recording acts, and of the economic waste perpetuated by a system which requires the laborious examination of a whole chain of title by a lawyer each time title is transferred. In addition, there is some truth, at least, in the claim that the services of some title attorneys are unsatisfactory, and redress against them difficult to obtain.

These fundamentals must be faced. It is useless to "howl down" the truth. One of the duties of the legal profession is to consider what is best for the public in a given situation; and it cannot take a wholly selfish view bottomed on the idea that lawyers are traditionally entitled to prevail in certain fields of endeavor to the exclusion of all other persons. The legal profession must be prepared to demonstrate that its services really are superior, and that it gives to the public as much, or more, than some other competing service can. In the end, the public will get what it wants and deserves, and competition cannot be eliminated by a combination of noise, vituperation, anger and bad judgment.

It can be demonstrated that we lawyers can compete legitimately in the title field, although we may not be its only occupants, and this is the course which should be followed.

The need for this rational approach to the problem of competition in the business of producing opinions, or other documents evidencing land titles, has been voiced by persons other than those on this committee. In the American Bar Association Journal[1], Mr. Charles A. Beardsley, past President of the State Bar of California, discussed Lay Encroachments on the practice of law; and after pointing out that industrial accident litigation has been taken away from us, and that there is on foot a movement to take away all automobile litigation, he remarks that in California it is now lawful for title companies to pass upon land titles. He then proceeds to say: . . . *"lawful encroachments are much more serious than unlawful encroachments. . . . Unsatisfactory legal services were largely responsible for the title company encroachment and the industrial accident encroachment. . . ."*

Earlier in this same article, Mr. Beardsley says:

"The legal profession exists subject to the public will. Our rights were given to us for the benefit of the public, and they may be retained by us only so long as the public wishes us to retain them. What is lawfully ours

[1](1931) 17 Am. Bar Ass'n J. 189-93.

today, tomorrow will lawfully belong to some one else, if the public so decrees. . . ."

The merits of a rational approach (as well as a strong hint as to the remedies to be applied) are also suggested in the most scholarly and sensible discussion of the whole problem of land titles which we have found. This is contained in an article appearing in the Political Science Quarterly for September, 1929[2]. We recommend this article to all persons interested in this Report and affirm that it is well worth detailed study.

It proves (by a statistical survey) how expensive and how unwieldy public deed records are becoming in the United States, and points out the economic waste involved in repeated examinations of the same old chain of title set forth in the same old abstract, whenever title of land is transferred. Of private title companies, the learned author says that they issue (1) guaranteed abstracts, (2) certificates of how title is vested, which are forms of legal opinion for which the company has the same liability as a lawyer, and (3) title insurance policies.

His appraisal of title companies includes these observations: (a) That the concentration of many title examinations under one roof is better than scattered examinations by many different lawyers under many roofs, because certain chains can then be traced once and for all to certain points of time, and there will be no need to start each examination at entry number one on each and every abstract. He points out that (b) title insurance companies do not save the public the expense of maintaining voluminous public deed records, and then shrewdly observes that (c) the value of a policy of title insurance rests on the defects of the recording system, and that the title insurance business keeps emphasizing those defects, and is not constructive in spirit.

Passing to the consideration of the Torrens System, the following passage is self-explanatory:

"What concerns the economist is the cost and the product. Title-registration gives what neither the deeds-recording system nor any of the private forms of evidence resting upon it can: a product repeatedly available after one principal fee. . . ."

A discussion of costs follows, and is quite persuasive.

The article ends with the prediction that complete enlightenment as to the relative merits of existing systems, and as to what should be done to remedy existing defects, will come some day when a county or state considers a complete reorganization, in the interests of efficiency, of its land title systems.

It is safe to say, then, that all is not *perfection* in the system which we might designate as the "lawyer-abstract" system of evidencing good marketable title to real estate. However, it is not our purpose to catalogue its shortcomings or its merits here.

In short, it is the inherent defects of the recording acts, both legal and economic, plus the poor service given by some attorneys, plus the desire to have the correctness of an opinion on title backed by a corporation of sound financial strength, that gives rise to the demand for "something better."

Nobody can say truthfully that the *demand* is not legitimate, but it can

[2]The Problem of Land Titles, (1929) 44 Pol. Sci. Q., 421-434.

be demonstrated, easily enough, that the demand is *not being properly met,* and that title insurance is not the *ultimate* answer to the public's legitimate demand. There are plenty of things wrong over in the "other camp," and the lawyers not only can do much to remedy the defects in the recording acts, and to stimulate study of real estate law among their ranks, *but in the existence of the Torrens System,* they hold the top card in the whole pack, and can start playing it whenever they will take a good look at it and realize that they hold the ace of spades.

Title Insurance — General Considerations

Let us examine title insurance and its attributes.

It is a comparatively recent development, and flourishes best in the larger centers of population where real estate is valuable and frequently encumbered and transferred.

It is said[3] that as early as 1853 in the Commonwealth of Pennsylvania, a "Law Property Assurance and Trust Society" came into existence. Its purpose was to insure defective titles and to guarantee repayments on loans and mortgages[4].

The first legislation recognizing the need for title insurance is said to have been a Pennsylvania statute passed in 1874, and the first corporation organized under it is said to have been the "Real Estate Title Insurance Company of Philadelphia" formed in 1876.[5]

Richards' Insurance Law[6] says that title insurance companies are growing more numerous, and that 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.[7] Mr. Craig's article, above referred to,[8] states that "title insurance has extended in growth and importance over most parts of the United States and in some communities has become the only method of examination of titles to real property. . . ." A recent text-writer says that the reasons for this development are first, the greater protection to purchasers and mortgagees arising from an insurance policy backed by the resources of a strong company; and second, the greater efficiency in title searching.

Several definitions of title insurance have been laid down by various writers,[9] and there are also in existence a number of statutory definitions of title insurance.[10]

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[3]Francis, Annals of Life Insurance 291.

[4]See Pelkey, The Law of Title Insurance, (1928) 21 Law. & Bank. 74-85.

[5]See Craig, What is Title Insurance? (1932) 25 Law. & Bank. 134-138.

[6]2d ed., sec. 467.

[7]See Pelkey, The Law of Title Insurance, (1928) 21 Law. & Bank. 74-85.

[8]Supra, n. 5.

[9]See Pelkey, The Law of Title Insurance, (1928) 21 Law. & Bank. 74-85; Craig, What is Title Insurance? (1932) 25 Law. & Bank. 134-138; Crosby, Law of Title Insurance, (1932) 25 Law. & Bank. 271-283.

[10]California, Civil Code, sec. 453v, adopted in 1913; Missouri, Rev. Stat. 1929, art. 17, adopted April, 1927 (Title Insurance Act. See also sec. 6084 making Act applicable to foreign as well as domestic corporations); Montana, Code, sec. 6350; Nevada, Comp. Stat., 1929, sec. 3641.

EFFORTS OF TITLE COMPANIES TO CORRECT SHORTCOMINGS

We have made the statement that the legitimate demand of the public for "something better" is not being properly met by the title insurance companies, and that all is not as it should be in the insurance camp. Why do we believe this?

There are several excellent reasons; but before enumerating them, it is only fair to say that some of the drawbacks of title insurance policies are doubtless due to the fact that the title insurance business is a comparatively new field of insurance, and that it is still suffering from "growing pains." Furthermore, a serious diversion of energy has been caused by the need for overcoming undisciplined and unscrupulous competition, which, in time, will probably be eliminated, either through action taken from within the business itself or by legislation. Just *which* remedial action will occur in any particular locality depends very largely on the conduct of those particular title insurance companies which are actively engaged in business within that particular district, and on the temper of the public and of the legal profession within that territory.

When we complain of the many paragraphs of fine print, and of the numerous stipulations, exceptions and conditions found to be embodied in the less obvious parts of *some* policies of title insurance, we should temper our feelings with the realization that, given time, these "snares" will probably disappear by a process of natural evolution.[11]

During this formative period, a great deal of unscrupulous and destructive competition has taken place inside of the title insurance business itself.

Beyond question, it has retarded that progress which the better elements in the business have already advocated and undertaken.

Texas may be taken as an example of a state where "cut-throat" and undesirable competition finally brought about a situation which was curable only by legislation. The development of this condition of affairs doubtless was accelerated by a series of "booms" in Texas land and Texas oil. The present Texas title insurance law requires uniform policies of title insurance, uniform rates, deposits of assets with the insurance commissioner, and the setting aside of 5% of the annual premiums of title companies operating in that state, as a reserve. (The Texas law also contains certain provisions, as to the capitalization of title insurance companies, which are designed to prevent loose practices and fraud at the public's expense).[12]

There has been important title insurance legislation passed within the last few years, not only in Texas, but also in Pennsylvania and New York.[13]

[11]See Cline, What the Title Policy Should Contain, (1928) 21 Law. & Bank. 30-33; The American Title Association Standard Loan Policy of Title Insurance, (July, 1929) Title News 5-11; Report of Chairman of Title Insurance Section, (Nov. 1932) Title News 43.

[12]See Regulation by Legislation, (Dec., 1928) Title News, 51-52. See also Smith, Coinsurance and Reinsurance, (Dec., 1929) Title News 68-72; Rogers, Cost of Title Insurance, (1926) 19 Law. & Bank. 339-342.

[13]See Coudert, Imperfect Titles from Void Marriages, (1929) 22 Law. & Bank. 11, 14-20.

DEVELOPMENTS TO MEET DEMANDS OF LIFE INSURANCE COMPANIES

The most praiseworthy forms of title insurance policies so far produced by the title insurance business are those designed to protect the interests of mortgagees.

This has been due to two causes:

(1) The title insurance people believe that once the lender of mortgage money is "sold" on title insurance, the sale of title insurance will spread very rapidly;[14] and,

(2) The principal sources of mortgage money—insurance companies, banks, etc., are well able to look after their own interests; and they have demanded—and received—a form of policy that actually insures something worth insuring.

The story of the adoption of the so-called "L.I.C." (Life Insurance Company) and "A.T.A." (American Title Association) forms of *mortgagee's* policy is outlined in the July, 1929, Title News.[15]

After tracing the attempts which were made to draft a satisfactory policy by representatives of various title companies in Pennsylvania, New Jersey, New York and Northern California, the author states that the *lenders themselves* finally exerted pressure on the title insurance companies for the adoption of a uniform policy to cover their needs. The upshot was, that representatives of the Metropolitan Life Insurance Company, the Prudential Life Insurance Company, the Equitable Life Insurance Society of the United States, and the John Hancock Mutual Life Insurance Company, met together and drafted a form of Mortgagee's policy known as the "L. I. C." (Life Insurance Company) Standard Loan Policy of Title Insurance. Other life insurance companies soon adopted the practice of requiring this particular form of policy to be written by the title men when they bought protection from them.

However, this "L.I.C." policy did not meet with complete favor among the title insurance group. As the article says,—

"There were some questions and objections to the policy, both as to its language and form, but particularly in that it was not an inception and achievement of the title people themselves. It had not only been written for them, but worse yet, it had another's name!"

As a consequence, the article continues, at a convention of the Title Insurance Section of the American Title Association, a committee was appointed to deal with the situation. This committee met with the legal advisors of several life insurance companies, in New York City; and the "A.T.A." (American Title Association) form of mortgagee's policy was drafted.

This "A.T.A." form of policy is adapted both to full and to less-than-full coverage, as this same article demonstrates, . . . "because of the wording on the face of the policy which makes it possible to later except any of the elements not insured against by naming proper notations under Schedule 'B' or riders thereto. . . ."

This adaptability is something to be remembered when reading a mort-

[14]See Rogers, Cost of Title Insurance, (1926) 19 Law. & Bank. 339-342; Cline, What the Title Policy Should Contain, (1928) 21 Law. & Bank. 30-33.

[15]Pp. 5-11.

gagee's policy of title insurance, because one cannot be sure of *"full coverage"* merely by looking for the letters "A.T.A." in the upper corner of the first page of the policy. In fact, it is a pretty good rule to regard *any* policy of title insurance as a rather complicated document whose true meaning is not to be extracted by a casual glance.

It is the opinion of this Committee that the "L.I.C." and "A.T.A." forms of mortgagee's policy are the best forms of title insurance yet in common use; and that there is no pressing need for improvement. But these forms are available only to MORTGAGEES.

Efforts to Develop Uniform Owners' Policies

The policies available to OWNERS of real estate, as distinguished from those available to mortgagees, are not so satisfactory.

That the development of a good form of *owner's* policy should have lagged behind that of a satisfactory mortgagee's policy is not surprising. The title people were out to please the lenders first, and the owners never got together and "demanded their rights."[16] Furthermore, a layman has no more idea of the true nature of the average title insurance policy than the "Man-in-the-Moon." Does he know, for instance, that the risks of title insurance *end* (in point of time) where the risks of ordinary insurance *begin?* Does he know that an insurance company will insure a title that he can't force a buyer to take, because it is defective and unmarketable? Or has he any inkling of the fact that some policies insure only against risk of loss or damage arising from a few defects which may appear of record? (Even some lawyers are unaware of these things yet.)

However, an attempt has been made by progressive title insurance men to draft a Uniform Form of Owner's policy of Title Insurance.

Judging from the Committee's report,[17] the job undertaken by it has been one bordering on the thankless.

Common Defects in Owners' Policies

1. *Failure to Insure Marketability.*

What, then, in general, are the main defects in owners' policies of title insurance, and in the less progressive forms of policies designed to protect mortgagees?

This Committee believes that the very gravest defect is the failure to insure marketability of title.

No question has caused so much controversy among title men as this one.

Why?

Doubtless it is a kind of a "trade secret" that title insurance companies will insure UNMARKETABLE titles. Most lawyers don't know this, and

[16]Italics ours.

[17]Report of the committee on Uniform Owner's Policy of Title Insurance, (Nov. 1932) Title News, 44-45. See also Uniformity in Forms of Title Policies, (Jan. 1928) Title News, 4-7.

most laymen would give a very good imitation of the "Terrible Tempered Mr. Bang" (immortalized by Fontaine Fox), if they found it out after buying their policies.

Title companies do this because they want the business, and because the policy carefully *excludes* liability for unmarketability when they do it. And the public doesn't know the difference—yet.

A very frank discussion of this "trade secret" is found in Title News for January, 1928.[18] This article is entitled "Insuring Marketability," and is well worth reading.

In it, a former advocate of the practice of omitting protection against unmarketability from the title policy recants.

After demonstrating that a title may be good but still be *unmarketable*, he discusses the magnitude of the additional risk which title companies must take if policy forms are to be altered to give this additional protection. He states that experience in Pennsylvania has shown that losses caused to title insurance companies because of unmarketability have been slight, due, largely, to the fact that title companies in Pennsylvania have been very carefully managed; but he remarks that in New York, losses from unmarketability have exceeded those from any other policy risk.

There are too many stipulations, conditions and exceptions included in these policies, usually incorporated in the smaller print thereof.

We have already laid this defect at the door of incomplete development. And it is obvious that this fine print cannot disappear unless and until the title companies make up their minds to give full coverage, either as a regular practice, or as a separate transaction for a higher premium.

This committee has not undertaken to analyze every type of printed exception, stipulation or condition found in the policies we have examined, nor to demonstrate the particular vice or vices of each. Of course, some of them are necessary. Perhaps some of them, like Sir Galahad, are ". . . sans reproche." But there are too many of them, and they could be "thinned out" without leading the title companies to "wrack and ruin."

2. *Not Assignable.*

Another question upon which title companies differ is whether or not policies of title insurance should be *assignable.*

Your Committee believes that the title insurance companies should be liberal in this regard.[19]

3. *Rates on Unknown Basis*

Now, what can be said about the rates charged for title insurance? Are they fair?

One thing is certain.

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[18](Jan. 1928) Title News, 10-15. See also Comments on Covering Marketability, (Jan. 1928) Title News 15-20; Craig, What is Title Insurance? (1932) 25 Law. & Bank. 134-138; (Dec. 1929) Title News, 51-52; (April, 1931) Title News, 8-15.

[19]See Cline, What the Title Policy Should Contain, (1928) 21 Law. & Bank. 30-33; Report of the Committee on the Uniform Owner's Policy of Title Insurance, (Nov. 1932) Title News, 44-45.

That thing is that no intelligent answer to this question can be given, because no sufficient data are available.

If there is any phase of their business more carefully guarded from outsiders by the title insurance people than their loss experiences, we would like to know it.

There also seems to be an idea afloat, in some quarters at least, that a good deal of their "overhead" disappears in carrying on a kind of civil war.[20]

It is true that a few progressive companies have begun to disclose their loss experiences, but the practice is exceptional, and the data are still far from adequate to serve as a sure indication of what a fair price for title insurance should be.

We can only present a few bits of information on rates, confess our helplessness, and let our readers draw their own conclusions.

One conclusion which we have been able to draw is that one possible method which a title company might use, in competing with attorneys, is to charge a nominal amount for the *"examination"* of title, and then recoup their losses by charging too much for *"insurance."*[21]

We believe that it costs a title company in the neighborhood of $25.00 to examine a title closely enough to insure it, and that the customary charges made to customers for "examination" have been less than that amount.

TITLE INSURANCE IN MINNESOTA

1. *Statutes.*

So much for the background against which our own problems must be projected.

How about conditions in Minnesota?

Our statutes already provide for minimum capitalization of title insurance companies, the setting aside of reserves, and for winding up title companies.[22]

The business is dominated, in Minnesota, by the Title Insurance Company of Minnesota. Other companies (not resident here, but which operate on a national basis) once operated in Minnesota to a limited extent. But at the present time, no other company is authorized to do a title insurance business in Minnesota. (It is possible, *but not probable*, that some of the foreign casualty companies doing business in this state may be legally authorized to write title insurance here by virtue of their qualification to do a general casualty business in Minnesota. It is rumored that one such company recently submitted a form of title policy to the Federal Land Bank in St. Paul, which that bank "turned down" as unsatisfactory.)

Its financial affairs are believed to be ably managed.

As the value of this Report depends very largely upon its frankness,

[20]See A Warning or What, (1932) 25 Law. & Bank. 296-97.

[21]See Rogers, Cost of Title Insurance, (1926) 19 Law. & Bank. 339-342; Crosby, Law of Title Insurance, (1932) 25 Law. & Bank. 271-283; (Dec. 1929) Title News, 62-67; (Nov. 1932) Title News, 36-39; (Jan. 6, 1931) Title Insurance Letter of the A. T. A., 3; Claims of the Past 12 Months—Causes and Means of Prevention, (Nov. 1932) Title News, 36-39.

[22]Mason's 1927 Minn. Stat., sec. 3703-3709 inc.

we hope our criticisms will be taken in good part. The fairness of our judgments is also vital, and we have been glad to give credit where credit is due.

2. *Policy Forms in Common Use.*

This Corporation issues three regular forms of policies at present: Form "A.T.A." (mortgagee's policy), Form "A" (Owners' Policy), and Form "L" (a "Limited Guaranty Policy").

3. *Preliminary Analysis of These Forms.*

The analysis of these three forms appearing below expresses the views of this Committee. A study of the forms themselves should supplement this outline if its full significance is to be understood.

Forms "A" and "L" are quite similar in their general outlines. Both policies are referred to as *Guaranty Policies.* The undertaking is to "guarantee, etc." The use of the word "guarantee" seems to be inappropriate. These policies would probably be construed to be Contracts of Indemnity as distinguished from Contracts of Guaranty.[23]

It will be noticed that the "A.T.A." form does not use the word "guaranty."

In both forms "A" and Form "L" the insurer undertakes at his own expense to defend actions against the insured based on claims covered by the policies. Each form protects the insured, his heirs, and devisees, but they are not assignable.

4. *Analysis of Form "L."*

The undertaking by the insurer, as stated on the first page of the policy, is as follows:

"This Guarantee Policy Witnesseth, That the TITLE INSURANCE COMPANY OF MINNESOTA, in consideration of the sum of One Dollar and other valuable considerations, to it in hand paid, doth hereby guarantee (John Doe) against all loss or damage not exceeding ..... Dollars which the said party guaranteed shall sustain by reason of defects in the title described in Schedule "A" No. I, to the real property described in Schedule "A" No. 2, *only as such defects appear from the face of the official records of the County* wherein the said real property is located, at the date hereof, *excepting* only such liens, incumbraces and other matters as are set forth in Schedule B, *subject* to the conditions and stipulations shown herein and made a part hereof."[24]

The following matter is printed under Schedule "B":

"Showing estates or defects in title, and liens, charges and incumbrances thereon, which do or may now exist, and against which the Company does not guarantee.

I. Exceptions shown in paragraph No. 4 of Conditions and Stipulations.

(Note: The Company issues, at reasonable rates, guarantee policies insuring title against the various defects included in paragraph No. 4 of Conditions and Stipulations.)"

Then follows a blank space adequate for writing in a large number of matters appearing of record.

The following parts of paragraph 4 of "Conditions and Stipulations," *excepted from the guaranty,* should be specifically noticed, viz:

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[23]As to the distinction between the use of those two words, see 28 C. J., p. 892, p. 1041; 82 C. J., p. 1060; 12 R. C. L., sec. 2 and 7.

[24]Italics ours.

"Nothing contained in this policy shall be construed as a guaranty against loss or damage arising from any of the following circumstances: rights or claims of parties in possession; * * * ultra vires acts of corporations; * * * special assessments or special taxes; * * * the opening or location of any street, alley or way over or across the premises described; any exercise of the power of eminent domain; any exercise, or attempted exercise of governmental police power; * * * any cost and expense in satisfying or removing liens found to exist *upon the examination of the title* hereunder and at the date of this policy; * * *[25]

The parts omitted from the above quotation do not limit or qualify the quoted parts. They are not quoted here because they are not material to the comments about to be made.

This policy would indemnify the assured against outstanding interests *appearing of record*, if not excepted by Schedule "B," of which paragraph "4" of the Conditions is a part, such as an outstanding mortgage, deed or lease. They undertake to defend against an action brought to enforce such outstanding interest, and to indemnify the insured from any legal damage resulting therefrom to the amount stated in the policy. It does not insure against the matters usually urged by the advocates of title insurance, such as undisclosed defects in recorded instruments, forgery, etc.

The wording of the policy is such that the defects excepted under paragraph "4" of the policy are not insured against even though they appear of record. For example:

(a) The first circumstance excepted is "rights or claims of parties in possession." Such a party may have a right or claim which appears of record. No recourse arises against the insurance Company by reason of such rights, although any proper opinion of title would specifically refer to such recorded right.

(b) "Ultra vires acts of corporations." The ultra vires nature of the corporation's deed, mortgage, or release, may appear from the records but no liability is assumed by the insurer, and he need not call it to the attention of the insured.

(c) "Special assessments or special taxes." Such matters may be shown by the abstract, or the records and the insurer need not call it to the attention of the insured. It is not liable for such circumstances.

(d) "Any exercise of the power of eminent domain." An easement may exist by eminent domain proceeding appearing of record, but it is not insured against, even though not called to the insured's attention as it would be in an opinion on title.

(e) "Any cost and expense in satisfying or removing liens found to exist upon examination of the title hereunder and at the date of this policy." There is no provision for attaching a copy of the report on the title by their examiner. Literally construed, liens might not be specifically referred to in the policy, and still be excepted from the coverage.

Space forbids further elaboration on these exceptions. The same comment applies to the other "circumstances" quoted above from Paragraph "4" of the Conditions.

The real value of any policy form, *however carefully drawn*, depends

[25]Italics ours.

to a material degree on *the inegrity of the Company which issues it;* for what may be added to the printed form in the way of typewritten exceptions and exemptions from liability may nullify coverage; and the average layman is not sufficiently familiar with real estate law to protect himself.

Even where a policy of title insurance is candidly labelled "Limited," and attention is directed on the face of the policy to the fact that the Company will issue a broader policy at higher rates, *the chances are that the Assured is in no position to place a reasoned estimate either upon the extent or upon the value of the protection afforded, and that he is disposed to overestimate both.*

In our opinion, of all the policies submitted to us for examination, this is the most susceptible to abuse.

Its coverage is the most limited. The Company undertakes to defend actions brought by parties *appearing of record* to have claims, *except* those stated in Schedule "B," and in paragraph "4." In actual experience, such liability is insignificant. Furthermore, the number of exceptions which might be written into Schedule "B" is unlimited, and the average buyer would never understand the effect of the printed exceptions appearing in paragraph "4" of the Conditions and Stipulations.

5. *Analysis of Form "A."*

The undertaking by the insurer, under form "A," as stated on the first page of the policy, is as follows:

"This Guarantee Policy Witnesseth, That the TITLE INSURANCE COMPANY OF MINNESOTA, in consideration of the sum of One Dollar and other valuable considerations, to it in hand paid, doth hereby guarantee (John Doe), his heirs, or devisees, or any persons to whom this policy shall be transferred, with the consent of the Company indorsed hereon, against all loss or damage not exceeding ..... Dollars, which the said party guaranteed shall sustain by reason of defects in the title of the party guaranteed, as set forth in Schedule A, to the real estate or interest therein, described in Schedule A, or by reason of liens, or incumbrances affecting the same, at the date hereof, excepting only such liens, incumbrances and other matters as are set forth in Schedule B, subject to the conditions and stipulations shown herein and made a part hereof."

In our opinion, the effect of the above language is to indemnify the insured against losses arising out of an adverse interest in the title insured, except those stated in Schedule "B" and paragraph "4," of the conditions. It does not insure against a *defective record title,* if the insured has actual title. The insured may have no record title at all, or a very defective record title, yet he would have no recourse against the insurer, if he has actual title. To illustrate, a deed in the chain of title might be given by the sole heir of a deceased person whose estate has not been probated. A record title would require probating. Such defects are not covered by the policy.

Loss of opportunity to sell, lease, or mortgage, by reason of such defects, are not covered. The policy would cover losses arising out of *outstanding interests of record,* if not excepted by Schedule "B"; also losses arising out of forgery, alteration and other undisclosed defects in recorded instruments.

In our opinion, a literal construction of paragraph "4" of the Conditions relieves the insurer from liability arising out of the following circumstances, *even though they appear of record,* and a loss results therefrom; namely:

(a) Special assessments or special taxes.

(b) The *application* of any law affecting the premises or the use thereof, even though the same appears of record. Is not abatement proceedings the application of a law affecting the premises?

(c) The opening or location of any street, alley or way over or across the premises.

(d) Any exercise of the power of eminent domain.

(e) Any exercise of governmental police power.

(f) Any cost and expense in satisfying or removing liens found to exist upon the examination of the title "hereunder" and at the date of the policy, even though such liens be not specifically described in Schedule "B".

A proper opinion on title would make specific reference to each of the above matters if it appeared of record.

The insurer undertakes to defend actions brought against the insured founded on a claim of title *not excepted* therein, and to indemnify the insured for a loss of property interest to the amount stated in the policy, *except* as provided in Schedule "B" and paragraph "4" of the Conditions.

6. *Analysis of Form "A. T. A."*

(This is a form drawn and approved by The American Title Association, a national organization which can be regarded as the one which promotes the interests of the title insurance companies in the United States, although it numbers individual abstractors and title men among its members.)

The undertaking by the insurer, as stated on the first page of the policy, is as follows:

"TITLE INSURANCE COMPANY OF MINNESOTA, DOES HEREBY INSURE (John Doe) the owner of the indebtedness secured by the mortgage or deed of trust described in Schedule A, herein called said indebtedness, and each successor in interest in ownership thereof, and also any such owner who acquires the land described in Schedule A in satisfaction of said indebtedness as provided in the conditions and stipulations hereof, herein called the Insured, against loss or damage not exceeding .....Dollars, which the Insured shall sustain by reason of any defect in the execution of said mortgage or deed of trust or by reason of the invalidity of the lien thereof, or by reason of title to the land described in said Schedule A being vested at the date hereof, or any statutory lien for labor or material which may have gained or hereafter may gain priority over the lien of said mortgage or deed of trust, other than defects, liens, encumbrances and other matters set forth in Schedule B, or by reason of the priority thereto of any lien or encumbrance at the date hereof except as shown by Schedule B, all subject, however, to the conditions and stipulations hereto annexed, which conditions and stipulations together with said Schedules A and B are hereby made a part of this Policy.

"Subject to the provisions of Schedule B and the conditions and stipulations hereof, the Company further insures that, at the date hereof, any assignments shown by Schedule A, whether recorded or not, are good and valid and vest title to said mortgage or deed of trust in the insured free and clear of all liens."

The Minnesota company will issue this form of policy to mortgagees. They do not issue it to property owners. Certain large financial institutions of the country, using title insurance, have insisted on this form in

connection with their business, and the title companies will issue it. It is free of "weasel" clauses and provisos. It uses the word "insurance" instead of the word "guaranty." The only exceptions to its coverage as stated on the face of the policy are those set forth in Schedule B. Since the insured is usually an experienced business concern, able to read and understand its policies, the use of exceptions cannot be abused as against such holders. It insures the marketability of the title; it accrues to the benefit of an assignee of the mortgagee-insured without the consent of the insurer or payment of additional premium. It guarantees the validity of the mortgage as a lien and the validity of all assignments thereof against mechanics' liens, whether or not of record, unless excepted in Schedule "B" and the Conditions. It does not except rights of persons in possession. The conditions are much more favorable to the insured than those contained in policies "L" and "A" referred to above. They contain the usual provisions requiring the insurer to defend actions, and giving them certain options in case of claims being made, which are usual in such policies and fair. It requires notice of adverse claims to be given the insured at once, and in case of court proceedings, within 10 days after receipt of process.

None of the matters excepted in paragraph "4" of the Conditions and Stipulations contained in policies "A" and "L" (discussed above) are contained in form "A. T. A."

This confirms our opinion that such exceptions have no place in an adequate form of title policy.

Such misleading items as paragraph "4" should be omitted from our forms, and prices adjusted accordingly.

Mortgagees have a keener interest than owners possess in protection against the risk of loss or damage arising from the rights of persons in possession of the premises.

An owner or prospective purchaser of land can, and usually does, inspect the premises himself. It is questionable whether either will pay for insurance against the risks of loss occasioned by rights of occupants.

Mortgagees often live at a distance, and are in a position to make the applicant for a loan shoulder the increased cost of full protection to himself.

We have already pointed out, in our account of the development of form "A. T. A." earlier in this Report, that this type of policy is so worded as to be adaptable to "less-than-full coverage."

The draftsmanship is not perfect, by any means.

The Travelers Insurance Company, of Hartford, Conn., finds both forms "A. T. A." and "L. I. C." objectionable.

Forms "A" and "L" exhibit defects which are found in many policies —lack of protection from loss due to unmarketability and lack of easy assignability.

7. Special Forms Not in Common Use.

Occasionally, our local company issues an "L. I. C." policy.

The Title Insurance Company of Minnesota has begun to do business with the Travelers Insurance Company of Hartford, Conn., on the basis of certain policy forms drawn by Mr. James E. Rhodes, 2nd., one of its attorneys at Hartford.

Mr. Rhodes began this job at the request of the American Title Association's Committee on Standard Policies.

His ideas were regarded as unorthodox.

He therefore developed a set of forms for his company's own use, and he tells us that Mr. E. B. Southworth, of our local Title company, gave him friendly encouragement and support.

These forms have many praiseworthy features, and represent an important development in the title insurance field.[26]

The decision of the Title Insurance Company of Minnesota to issue these policies to the Travelers Insurance Company has not been applauded by other title companies, and we have it on good authority that some title companies have even exerted a little pressure at conventions and elsewhere to persuade Mr. Southworth and his company to be more conventional. This gives one some faint idea of the difficulties which beset those few leaders in the title insurance business who realize that changes must be made and are trying to produce those changes from within the business itself.

General Impressions

We have marshalled many facts. But, are we "missing the woods because of the trees"?

Laying details aside for the moment, our general impressions are these:

1. In the matter of Owners' policies, the public fares better outside of Minnesota than it does here at home.

2. As to Mortgagees' policies, there is little difference.

3. No sufficient data are available to serve as a basis for an intelligent comparison of rates.

4. There is a tremendous need for improvement in policy forms of all types, but particularly Owners' forms.

5. Rates should be based on scientific principles everywhere. The American Title Association should bring about a pooling of data on losses and risks before legislatures begin enacting standard forms and standard rates. Failing this cooperative step, rates may be set up which will be inadequate.

6. Progress has been altogether too slow.

7. The public will express its resentment in harsh ways when the facts become generally known.

We are not alone, in expressing these thoughts. We are in close agreement with Mr. Glenn A. Schaefer, of Los Angeles, California, who reached many of these same conclusions as early as 1927, when he read a paper entitled, The Future of Title Insurance, before the Detroit Convention of The American Title Association.[27]

[26]One of these forms is printed in the appendix to this summary, pp. 371-374. The full Report includes a memorandum by Mr. Rhodes, a discussion of it by the committee, and an analysis of his forms. The full Report also includes at this point a survey of forms in use in other states. Copies of the policies are appended to the Report. [Ed.]

[27](Oct. 1927) Title News, 88-91, 103.

Suggested Procedure in Minnesota

Now, then, what shall be done about title insurance in Minnesota?

The time when policies of title insurance will circulate instead of abstracts, as in California today, is not, we believe, close upon us. And until such time as a satisfactory form of policy insuring against loss or damage from unmarketability is in general use in Minnesota, there will be little likelihood of public acceptance of such a system.

To some, this might seem to be a good argument for standing aloof, with the hope of postponing the time when satisfactory policies shall come into general use.

But let's stick to realities. Title insurance (properly conducted) is a legitimate business, and is with us to stay. It will grow and not decline. And it is our plain and traditional duty to the public to see that they can buy policies of title insurance worthy of the name.

When the principal risk involved in the ownership of land (loss or damage because of unmarketability of title) remains uninsured, and policies in other respects fall short of reasonable standards of candor and coverage, the title insurance business really consists in selling *services* (either directly or indirectly), and the amount of *real insurance* sold is very small; and it is really *an incidental matter.*

Therefore, in the transition period between the selling of indifferent or inferior policies and the selling of good ones, the best way to compare the merits of the title insurance business with those of the lawyer-abstract system is to see whether one is as capable as the other of producing a reliable opinion at a fair price.

The accumulations of "unrecorded" information possessed by a title insurance company surpass those of general practitioners. Their experience is greater. But it is doubtful whether their opinions on title (directly or indirectly furnished to the customer) are superior to those which our specialists can render.

The opinion underlying the policy can be matched in cost.

The buyer, however, has no proper idea of the real worth of the insurance which the title company adds. It is possible to bill him a nominal charge for "examination" and recoup on the charge for "insurance." Or it is possible to sell him a form of policy like form "L" for the same price as an attorney's opinion, or even at a "shaded" price.

Form "L" perpetuates "cut-throat" competition between our specialists and the Title Insurance Company of Minnesota. Its elimination would do much to clear the air.

The general adoption of more liberal policies such as those of the Rhodes type, *or improvements on them,* would place the emphasis upon the selling of *insurance,* not services; and it would be a "good break" for the public, besides.

It would put title insurance in a different price-class than attorneys' opinions, *where it belongs.* When no such distinction exists, there is something radically wrong.

The value of any opinion on title, whether it is used to serve as the basis for a policy of title insurance or not, can be increased very materially

by a resolute revision of our Minnesota recording acts. Our authority for this statement is Mr. R. G. Patton, whose knowledge of real estate law is, in our opinion, unsurpassed in the Northwest.

Mr. Southworth tells us that his company recommended certain changes in our recording acts long ago, but failed to receive the coöperation of the Bar.

We suggest forming a committee made up of members from both camps, under Mr. Patton's leadership, expenses to be shared equally. It would be an exercise in coöperation (if nothing else), and some worthwhile legislation probably would emerge.

Since our specialists in real property law are not increasing in numbers, and general practitioners are finding competition more burdensome as time goes on, it would be a discouraging outlook if the picture "faded out" here.

But it doesn't.

In our exclusive prerogative to administer the Torrens System (a privilege which is not likely to be taken from us) lies our greatest asset. By using it, we can offer the public material advantages over policies of title insurance, and our ability to compete with title companies, no matter how excellent their policies become, is for all time preserved.

Here in Minnesota, we should begin using it, and should be quick to strengthen and improve it when the need arises.

The title insurance business knows that the Torrens System is the only one which can continue to offer it serious competition. Their policy, therefore, is to attack it systematically.[28]

Examples of anti-Torrens propaganda may be found in several issues of Title News.

In the February, 1930, number[29] the Torrens Law is roundly damned, and the fallacious proposition advanced that the holder of a Torrens Certificate must look to the guaranty fund for protection if anything goes wrong. The fact is, that his title is an adjudicated title, and rests on the sovereign power of the state. The Torrens Law would be entirely effective and constitutional without any guaranty fund provision in it. That fund exists merely to compensate those few unfortunates who on rare occasions lose interests in the land through the operation of the Torrens Law because they have, for some excusable reason, failed to appear and litigate their rights, or have lost them through some mistake not their own or ascribable to their neglect.

The statement that the Torrens Proceeding is no more effective than an action to quiet title is likewise incorrect.

In the April, 1930, issue of the same publication,[30] comment is made concerning the decision of the supreme court of Illinois in the case of *Eliason v. Wilborn*,[31] which is a very strong case upholding the validity of

[28]See (Jan. 29, 1931) News Letter No. 3, p. 5; (March 18, 1931) Letter to Members, p. 1. These are publications of the American Title Association.

[29]Pp. 7-11.

[30]Pp. 14-18.

[31](1929) 335 Ill. 352, 167 N. E. 101.

a Torrens Certificate. The author of the article severely criticises the Court because it . . . "considered the theory of indefeasibility more vital than the protection from fraud."

A cartoon accompanying this article is very bitter.

It represents the Torrens System in the guise of a rooster perched on a garden fence. "The American Home Owner," poor soul, is seeding and raking the garden, which is labelled "Constitutional Immunities;" and Mr. Rooster is looking eagerly at the seeded ground, with knowing air.

Personally, we believe that the "American Home Owner" is better off with a Torrens Certificate representing a title purged of defects as far as possible, than he is with a policy of title insurance agreeing to compensate him for possible loss from outstanding defects.

We also believe that statutory rates and statutory forms will become as general in the title insurance business as in the fire insurance field. To enact an unsatisfactory form in Minnesota would be a fundamental error. To delay the development of satisfactory forms until such time as outside competition and unfair practices within the business bring about an acute situation, such as developed some years ago in Texas, would also be a fundamental error. Legislation would then be improvised, not planned.

There is no present need for legislation in Minnesota, for the indications are that satisfactory policy forms will be developed naturally, and with the cooperation of both the industry and the Bar.

A profitable field, as yet untouched in Minnesota, might be exploited by our local company, if it developed a simple and inexpensive form of policy to supplement an attorney's opinion, or to be sold along with an Abstract of Title. Such a policy should contain no statement of the state of any title, but should simply insure the holder against loss or damage by reason of the "collapse" of any legal presumption or item of prima facie evidence legally arising from the record as appearing in the office of the register of deeds. No examination of title would be necessary before issuing such a policy, and the risk involved does not appear to be very great.

APPENDIX

"RHODES" FORM OF OWNER'S POLICY[32]

PART I. SERVICE AND INDEMNITY PROVISIONS

The.....Company, hereinafter referred to as the Company, for value received, hereby agrees with the Assured, named in Paragraph 1 of Schedule A, attached hereto, and hereinafter referred to as the Assured:

1. To investigate, upon notice to the Company as provided in Paragraph 1 of the Stipulations attached hereto, any claim of title, lien or encumbrance, adverse to the title of the Assured to the property described in Paragraph 2 of Schedule A, attached hereto, subject to the exceptions and exemptions from liability listed in Schedule B, attached hereto, existing at the effective

[32]See n. 26.

date of this policy, and to serve the Assured by such settlement of any claim, or by such action to test the validity of any such claim, as may be deemed expedient by the Company.

2. To defend, upon notice to the Company as provided in said Paragraph 1 of the Stipulations attached hereto, in the name of or on behalf of the Assured any suit or suits or legal proceedings which may be brought against the Assured, or in which the Assured may be involved as a party in interest, in which it is attempted to assert or establish any claim of title, lien or encumbrance, adverse to the title of the Assured to the property described in Paragraph 2 of Schedule A, attached hereto, subject to the exceptions and exemptions from liability listed in Schedule B, attached hereto, existing at the effective date of this policy, however or in whatever way any such claim may arise or be asserted.

3. To pay all expenses incurred by the Company for investigation of claims, settlement of claims or suits, and prosecution or defense of suits, under the provisions of Paragraphs 1 and 2, above, and all costs taxed against the Assured in any legal proceedings defended by the Company under the provisions of Paragraph 2, above.

4. To indemnify the Assured within the limit of liability specified herein for any loss or losses sustained by reason of the successful assertion of any such claim of adverse title, lien or encumbrance.

The Company assumes no liability under this policy on account of any claim made or suit or other legal proceeding brought under any allegation of adverse title, or lien, or encumbrance, which may come within the scope of any exception from coverage listed under Schedule B, attached hereto.

The total limit of liability of the Company under this Policy for the payment of claims and of indemnity to the Assured hereunder shall be ..... ($.....) Dollars.

This policy is written subject to the Stipulations attached hereto and made a part hereof.

The effective date of this policy is ..... 19..... ...

IN WITNESS WHEREOF, The .... Company has caused this policy to be signed by its President and Secretary, at ....., this ..... day of ....., A.D. 19.... .

....

Secretary President

PART II. DESCRIPTIVE AND RESERVATORY PROVISIONS

SCHEDULE A.

1. The name of the Assured hereunder, and the interest of the Assured in the property which is the subject of this insurance, are as follows:—

2. The description of the property the title to which is insured hereunder is as follows:—

SCHEDULE B.

The Company assumes no liability hereunder for defects in the title to

said property, or liens or encumbrances upon it, arising from the following causes:

1. Defects, liens or encumbrances created by the Assured, or known to the Assured at the effective date of this policy, and not made known to the Company.

2. Exercise of the rights of eminent domain, or the consequences of the exercise and enforcements or attempted enforcement of governmental police powers over the property described herein.

3. Taxes and assessments as follows:—

4. Building restrictions, and limitations on the use of the property, of record, as follows:—

(Here list any other exceptions and exemptions.)

PART III. ADMINISTRATIVE PROVISIONS
STIPULATIONS

(*Owner's Policy*)

1. Upon notice of any claim adverse to the title of the Assured as insured hereunder, or any claim of lien or encumbrance, which alleged claim is not subject to the exceptions listed in Schedule B, the Assured shall give the Company, at its Home Office, immediate notice of such claim, together with all available information regarding such claim. The Assured shall also give the Company, at its Home Office, immediate notice of any suit or suits or other legal proceedings which may be brought alleging adverse title, or lien or encumbrance, in which the Assured may be joined as a party, upon service of process upon the Assured, or legal notice to the Assured, and shall forward immediately to the Company, at its Home Office, all process or notice or notices which may have been served upon the Assured in such suits or other proceedings which may be brought to establish adverse title or lien. The Assured shall also render to the Company all necessary assistance in the investigation of claims and the defense of suits or proceedings. In the absence of notice as aforesaid, the Company is relieved from all liability with respect to such claim or demand; provided, however, that failure to notify shall not prejudice the claim of the Assured, if such Assured shall not be a party to such action or proceeding; nor be served with process therein, nor have any knowledge thereof, nor in any case unless the Company shall be actually prejudiced by such failure.

2. Upon notice of allegation of adverse title or lien or encumbrance, or at any time thereafter during the pendency of any claim or proceedings to establish such adverse title or lien or encumbrance, the Company may, at its election, pay the Assured the full amount of its total limit of liability under this policy for the payment of claims and indemnity to the Assured, in which event the Company shall then be relieved and discharged from all further liability under this policy and the Assured shall surrender this policy to the Company.

3. Whenever the Company shall have settled a claim or paid a judgment under this policy, all right of subrogation to the extent of the amount

paid in settlement shall vest in the Company unaffected by any act of the Assured.

4. A statement in writing of any loss or damage for which it may be claimed that the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been ascertained, and no right of action shall accrue against the Company under this policy until thirty days after such statement shall have been furnished, and no recovery shall be had under this policy unless action shall be commenced within one year after the expiration of said last mentioned period of thirty days. A failure to furnish such statement of loss or damage, and to commence such action within the time hereinbefore specified, shall be a conclusive bar against the maintenance of any action under this policy.

5. All payments of claims and indemnity to the Assured under this policy shall reduce the total limit of liability hereunder for the payment of claims and indemnity to the Assured by the amount of each payment made, and no payment can be demanded without production of the policy for endorsement upon it or such payment. In event of loss or destruction of the policy, indemnity shall be furnished to the satisfaction of the Company.

6. No assignment of this policy shall bind the Company unless formal consent to said assignment is given by the Company and endorsed hereon.