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IN early days when titles were simple, and lawyers too, opinions of titles were made by the lawyers based on searches which they personally made of the records. In those days there were no abstracts at all and it was when titles became more elaborate, so that searching became onerous, that the system of abstracting the records was invented. This was almost immediately taken up as an enterprise distinct in itself and entirely separate from the business of examining a title and giving an opinion thereon. This business, of course, was usually handled by persons or firms organized for that purpose only, whose sole business then was to compile abstracts showing the condition of the title. This abstract is then examined by a lawyer who renders his opinion based thereon. This system, which we shall later compare with a title policy, we have designated as the abstract-lawyer's opinion system. Sometimes abstract companies went into the business of examining the title and issuing certificates of title, which correspond to a lawyer's opinion of title. Others guaranteed the correctness of their opinions of title, which were known as guaranteed certificates of title. The final step in this process of evolution is the guaranty policy or title insurance policy. This first came into use in Philadelphia in 1876, since which time the business has spread all over the country and there are now more than 100 companies issuing title insurance policies. In New York City alone there are 6 such companies, and in San Francisco there are 3. In Chicago the first policies were written in 1888. The opening of this business in Chicago met with very strenuous opposition from the lawyers, because of course it meant the substantial elimination of one fairly lucrative branch of the business, namely, examining abstracts and rendering opinions of title. The financial interests were ready for the step, however, and it was the mortgage bankers of Chicago who first saw the great advantage of a title policy, having grown weary, undoubtedly, of the cumbersome abstract-lawyer's opinion system. And it has only been in recent years that the number of owner's policies exceeds that of the mortgage policies. That the institution of this business in Chicago was a step forward is best attested by the growth of the business, which has developed from a few policies a year in 1888 to over 150,000 policies in 1925, aggregating in insurance a total of over $500,000,000. Of this amount about $275,000,000 was written in owner's policies and about $225,000,000 in mortgage policies. The growth of the business in other cities, especially in New York, is equally as remarkable as it has been in Chicago.

That a business such as this has developed so rapidly must be due to some good reasons, and this leads us to a brief discussion of the differences between the abstract-lawyer's opinion, and guaranteed certificates and the title insurance policy.

The abstract-lawyer's opinion system is still in quite general use all over the country, so let us examine it first with a view of what protection it affords the owner of property. Under this method a purchaser of a title buys a title subject to two sources of error. First, the errors in the abstract itself, and secondly, the errors

of the attorney who examines the abstract. Now if the error is in the abstract, and there is mutuality or privity of contract between the abstracter and the person sustaining the loss (which is rarely the case) then there may be a recovery for the loss. If the loss is due to an error by the attorney this gives rise to an action against the attorney who will be liable for the loss only in the event of negligence or want of necessary skill and knowledge. Both of these remedies are difficult to obtain, as everyone knows, and especially a remedy which is predicated upon showing a want of skill and requisite knowledge to examine an abstract.

So that if an attorney in examining an abstract is confronted with the construction of a deed or will, and his opinion is wrong, what court will charge him with gross negligence, especially when the judge himself may be practicing law again after the next election? Another phase of this method is this: No lawyer wants to be sued for negligence in examining an abstract, and consequently for his own protection he raises all the questions he knows how to raise, making it necessary for the seller to demonstrate beyond all reasonable doubt the goodness of his title. And still another feature of this method is that one lawyer knows more or less than another about titles, depending upon what night law school he attended, so that if a title is transferred three or four times a year, as happened frequently in Chicago in the last years, and the abstract is examined by as many different lawyers, the second lawyer on the second examination raises more objections than did the lawyer who first examined it, and the third one raises still other objections, so that the confusion which results is often very embarrassing, not to speak of the loss of time involved in the process. Then again each lawyer charges a fee for the examination and so an unnecessary waste of money and time is added to the inadequacy of the protection afforded by this system, not to speak of other practical disadvantages which are experienced in this system.

Now let us examine a guaranteed certificate of title and see how it protects the owner of property who purchases property in reliance upon it. First, it must be borne in mind that a guaranteed certificate does not guarantee the title. It is simply a guarantee that the certificate is correct. This guarantee is practically a warranty, and any error in the certificate constitutes a breach of contract, and gives rise to an action for loss and damages. The breach of contract under a guaranteed certificate occurs at the time of the delivery of the certificate, for if it is erroneous, it is erroneous when issued, and consequently the statute of limitations begins to run from the time the certificate is delivered. To emphasize this point let us illustrate it in this way: Suppose there is a two-year limitation against actions on such certificates, and an error is discovered after two years, which results in loss to the holder of the certificate. He cannot recover on the certificate. Another deficiency in the guaranteed certificate is that since it is not a contract to indemnify against loss, only one cause of action can be brought on the certificate. Therefore, if there should happen to be several losses in connection with a title purchased in reliance upon a guaranteed certificate, no recovery could be had upon the successive losses. For instance, there are two errors in the certificate. The first is discovered soon after the certificate is delivered, and suit is brought and the loss is recovered in such suit. Then another error is discovered also causing a loss to the holder of the certificate. No action

will lie for this loss. These things, we think, prove the insufficiency of a guaranteed certificate of title.

Now we are coming to a title insurance policy, and at the outset we will cite you the most complete judicial definition we have found of such a contract from the case of Foehrenbach vs. German-American Title and Trust Company, 217 Pa. St. 231:

"Title insurance is not mere guesswork nor is it a wager. It is based upon careful examination of the muniments of title and the exercise of judgment by skilled conveyancers. The quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make the opinion good, in case it should be mistaken and loss should result in consequence to the insured. It must be borne in mind that the real subject of insurance is not the concrete thing, but the interest which the one to be indemnified has in the concrete thing. When an applicant applies to an insurance company for a policy covering a fee title to a particular estate or interest, it is for the company then, to examine the evidence of his title, and to say whether or not it would assume the risk of making good to him the injury which would result, in case his claim of title to the entire interest should prove defective. And when a policy is issued insuring the title, the company thereby says to the insured: You are, in our judgment, the owner in fee of the entire interest in this property and we will back our opinion by agreeing to hold you harmless, up to the amount of the policy, in case for any reason our judgment in this respect should prove to be mistaken. The risks of title insurance end, where the risks of other kinds of insurance begin. Title insurance is designed to protect the insured, and save him harmless from any loss arising through defects, liens or incumbrances that may be in existence, affecting the title when the policy is issued. It does not protect against any claims arising after the issuance of the policy.

"Insurance carries with it the idea of protection against some risk. If there were no risk, there would be no cause for insurance. The underlying principle of insurance is the contribution of small sums by a large number of insured, to a common fund from which to indemnify those who actually suffer the loss, which might have fallen upon any of them."

An analysis of a policy will show its superiority to a lawyer's opinion or a guaranteed certificate.

First, it is strictly an insurance contract, by which the insurer assumes a risk, and if a loss is suffered the insurer agrees to compensate the insured in a specified amount for a state premium, in the manner and subject to the conditions of the policy. The property as such is not insured, but the title to or an interest or estate in the property is insured.

As to what interest a person has in property, is wholly a matter of opinion, and therefore a title policy constitutes really the opinion of the title company reenforced with its agreement to insure its opinion. The difference between a title policy and a guaranteed certificate is that a policy is a contract to pay loss, and therefore as often as a loss is sustained, an action lies on the policy. And again, the statute of limitations does not begin to run against the policy until a loss is suffered, because it is only when a loss is suffered that an action will lie on the policy. Of course, in action on a policy questions of mutuality of contract or skill or negli-

gence have no place; they do not constitute defenses at all. One feature of a title policy should be noticed and it is unusual as compared to other insurance, and that is that it insures only against risks prior to the issuance of the policy, i. e., defects, liens and encumbrances in the title prior to the date of the policy. No liability accrues for defects which arise after the issuance of the policy. In other words, it is the title or estate or interest of the insured in real estate at the time of the issuance of the policy which is the subject matter of the policy.

Some interesting cases have arisen in this field on the question as to whether a title policy is a mere wager and therefore void, but it has been definitely settled that title insurance is not a wager and that the owner of a title has an insurable interest. Thus it is said in Empire Development Co. vs. Title Guarantee & Trust Co., 225 N. Y. 53:

"May the owner of land insure his existing title? Or, because it is either good or bad, because in either event his situation is unchanged, because an insurance contract is said to be a contract of indemnity, is such a transaction an idle ceremony? Is the legitimate business of title insurance companies restricted practically to those cases where an intending purchaser or mortgagee completes the transaction in reliance upon the insurance contract?

"As a help to our decision we must examine the purpose and object of the contract. To a layman a search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown. To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained, is the very purpose for which the owner seeks insurance. In no sense is the contract a mere wager."

So far we have talked principally on the legal aspects of title policies and now we want to draw your attention to the practical advantages. We have summarized these advantages in six paragraphs.

(1) It frees the real estate owner or lender of money from all worry or possible loss, because of a defective title resulting from a faulty examination of the public records, and from expense of defending title against claims—whether frivolous or made in good faith. If the title is attacked, the company defends at its own cost, and no matter what the outcome, the owner has incurred no financial loss for costs and attorneys' fees, and the worry of long and expensive law suits.

(2) It gives absolute security against loss resulting from errors of judgment on legal questions involved in the title.

(3) It insures against loss resulting from defects which because they are not in the public records cannot be discovered from an examination of the same, and which we have designated as "unknown risks."

(4) It obviates much of the loss frequently resulting from rumors affecting the validity of titles to which real estate is susceptible. Such rumors, and technical defects in titles which we call fly specks, frequently give rise to cases involving the validity of titles, and resulting in long drawn out and expensive litigation, commenced by disreputable and unscrupulous claimants and lawyers for the sole purpose of creating nuisance values, i. e., with the hope of compelling the owner to settle—in short a sort of real estate title piracy. Title insurance companies, however, provide in the policy that they will at their own expense "defend the insured in all actions or proceedings founded

on a claim of title or incumbrance prior in date to the policy insured against."

(5) Another advantage of a policy is that usually it guarantees the title for all time to come. In this respect this insurance is unique in that it runs indefinitely in the future and there is a payment only of one premium. The right of assignment is usually given.

(6) As an additional protection to policy holders, title companies are under the supervision of the several state insurance departments, and must make ample deposits with the various states in which they do business.

Let us turn our attention briefly to the agreement to defend and what it means to a policy holder. By the way, the fact that a policy agrees to defend the holder in case his title is attacked, constitutes the great difference between it and the lawyer's opinion or a guaranteed certificate. Now let us note the importance of this difference. Consider the purchase of real estate relying upon a lawyer. You have bought a title relying on such an opinion. You are sued in a petition for dower. You defend the suit yourself and pay all costs and attorneys' fees. If you defeat the dower suit you have no cause of action against the attorney, since you sustained no loss. So even if you win you lose. If you actually lose your dower suit, then you must sue the attorney, prove a difficult case and if you win this suit you get a judgment against the lawyer. If he has money perhaps you can collect it, but if he charges for examining abstracts at the prevalent rates he won't have any money. Again it is a case of you win, you lose.

Now the guaranteed certificate of title is much the same. If your title is attacked, you must defend it yourself, pay your own costs and attorney's fees. If you win the suit you have lost your costs and attorney's fees, and if you lose the title suit you have a remedy against the company if it is the first loss, if the statute of limitations has not run, and if the company is solvent.

And now how is it under the title insurance system? Your title is attacked. The company has agreed to defend. You notify the company and it defends you in the suit. You have no costs to pay, no attorney's fees—nothing. If the suit is won your title is cleared. If the suit is lost you receive a check for the loss up to the full amount of the policy. So you see a policy is not merely an agreement to pay a loss with a lot of red tape before the loss is paid. It is also an agreement to defend you, and we think that is where a title policy is of the the greatest practical value.

It often happens that in title suits the expense of litigation exceeds the value of the property involved. In the notorius Streeter litigation in Chicago this was actually the fact. One of those suits involved two lots in Chicago near the lake front, of which Streeter, being fond of the lake front and North East winds, surreptitiously and in the night took possession, claiming title. The owner had a policy and notified us of the claim. Suit was commenced by us in 1911 and after almost innumerable hearings before a master in chancery over a span of seven years, a decree was entered in 1918 under which Streeter was evicted, his house demolished and possession taken by the true owner whom we had guaranteed. The cost of this litigation far exceeded the value of those two lots, and they were indeed very valuable lots. The litigation did not cost the holder of the policy one cent. But imagine the owner's plight without a policy. In such a situation a donation of the lots to Streeter would have been economy. This case more forcibly than any other we know of,

illustrates what this agreement to defend means to a property owner.

We desire to elaborate a little more on one or two of the other advantages enumerated above.

Let us now focus our attention on the subject of risks. What risks does a guaranty company take in issuing its policies? There are two kinds of risks in every title guaranteed, the known risk and the unknown risk. By the known risk we mean a defect in the title which is discovered in the examination but which is thought inconsequential and against which the title is insured. Of course we assume that there is no perfect title, and that every title has its defects, and it is these defects which constitute what we call known risks. In guaranteeing against such known defects the company takes the risk that the defect is not of such consequence as to result in loss to the owner of the title. If the company's conclusions are wrong and a loss is suffered by the insured the company is obviously liable. For instance, the company is called upon to guarantee a title, and in the chain of title there appears an unreleased mortgage 35 years old. There are various circumstances such as several conveyances since the making of the mortgage, together with other evidence presented to the company that the mortgage has been paid, and thereupon the company guarantees the title free and clear of this mortgage. This is a known risk. But if prior to the running of the statute of limitations the mortgagor shall have made a new promise to pay, this will toll the running of the statute even as against the grantees of the mortgagor and the mortgage will be enforceable against the property guaranteed. The company is liable.

This guaranteeing against known risks has become quite a fine art and has proved to be of great advantage in facilitating the marketing of real estate. In many cases the company for an additional premium takes additional risks, and many times by securing the company against loss a policy is procured insuring a title which would otherwise be wholly unmarketable without first having gone through a dry cleaning process in the courts. Of course, such a thing is absolutely foreign to the abstract-lawyer's opinion system or guaranteed-certificate-of-title system.

Now as to the unknown risks—these are many. They may be divided into two classes. First, defects, liens and encumbrances that are overlooked, and therefore not known to the company at the time the policy issues; and second, those which cannot be discovered from a mere examination of the title. This second kind of unknown risk comprises a large class of pitfalls.

We have time to notice only the most familiar of them. Thus, the insanity of a grantor gives rise to an action by his guardian to set aside the deed, upon the return of consideration. The loss here would arise where the property had increased greatly in value. Insanity might not appear of record.

And so if a grantor in the chain of title is a minor a similar situation arises.

And so if a deed is forged, of course, the grantee gets no title and in fact no matter how many deeds are made after the forgery, no title passes under them. In this case the guarantee company is liable for the loss of the title where it has guaranteed a grantee in a forged deed.

Similarly, if a deed in the chain of title is not delivered, no title passes, and the company is liable. An instance of this might interest you. We speak of a case in the Illinois Su-

preme Court reports, Weber V. Christen 121 Ill. 91.

Christen and wife, in January, 1884, executed two deeds to Herman and Bruno Weber, nephews of Mrs. Christen. They had no knowledge of it at the time, but when, sometime afterwards, they were informed of the execution of the deeds they expressed their assent. One of the nephews was a minor. The deeds were properly recorded by Christen the day after their execution, and shortly afterwards taken by him from the Recorder's office and kept by him until his death, in March, 1885, and from that time on till the suit was begun they remained in the exclusive possession and control of Mrs. Christen.

The nephews brought an action of ejectment against her.

From her evidence it appeared that the object in making the deeds was to put the property beyond the reach of Christen's creditors. The court held that, although Christen's purpose was to make the public record show title in his wife's nephews without parting with the title himself, owing to the facts, and to the control of the deed by the grantor after it was recorded, there was no intention to part with the deeds or the estate in the land, and that, therefore, the deeds never took effect for want of delivery. If the company had guaranteed the grantees' title, it would have been liable, even though this defect in title did not appear of record.

And so if after the making of a deed the name of the grantee was inserted in a blank space left therefor, the deed would be void and no title would pass.

And so if a grantor designates himself as a bachelor and he is in fact married, there would be an outstanding right of dower and possibly homestead.

A deed made by an attorney-in-fact whose power was fabricated, or under a power of attorney after the death of the principal passes no title.

Identity of persons in the chain of title—Thus a deed may be made by a person by the same name (but having no interest whatever in the title) as the holder of the title. This would not constitute a forgery, of course, but no title would pass. These unknown risks are to Guaranty Companies what air pockets are to aviators. You never know when you are going to get bumped.

Against all of these a title policy protects the insured, whereas a lawyer's opinion or a guaranteed certificate of title affords absolutely no protection. In this respect the gap between them and a title policy is great.

We have proceeded so far as though we were pleading a cause on behalf of policies as against lawyer's opinions and guaranteed certificates, but that has not been the purpose. How could we better describe a guarantee policy and its practical operation than by comparing it, as we have done, with something with which you are probably more familiar? Nor have we exhausted the comparison by any means. But to continue might weary you, and hence we hasten to the close, and now turn to make some observations in reference to the habitat of title insurance companies. They flourish most in large cities, and this because of the great complexities of titles. Such complexities, of course, come from the vast traffic in titles; from conditions, such as party walls, subways, basements under public streets, and a multiplicity of other things which are never, or hardly ever, found in smaller communities. Then too in large cities purchasers of real estate are dealing with persons who are total strangers to them, and they demand insurance to protect against forgery. 'nsanity, judgments,

title piracy and other risks such as we have mentioned. In smaller communities a purchaser almost always knows his seller and his wife and children and all about him, probably meets him in church every Sunday and they go to the same movies, and the element of risk in dealing with strangers is entirely missing. Another source of much trouble in titles in large cities is of course the construction of long and intricate wills and deeds in trust involving contingent remainders, perpetuities and such other major diseases of the law. In large cities, where there are many wealthy men, such wills occur frequently and policies are demanded on titles coming under such wills.

The Chicago Title and Trust Company uses seventeen forms of policies designed to guarantee the various estates in real estate. The most common forms are, of course, the Owner's policy and the Mortgage policy. The Owner's policy guarantees the owner of real estate in his own title. The policy is assignable and in the event of the death of the party guaranteed, his rights do by the express terms of the policy vest in his heirs or devisees. The premium on this policy is paid only once and the policy remains in force forever.

There is another form of Owner's policy very commonly used by subdividors. By this form of policy the Company guarantees a purchaser of real estate against defects in the title of the party from whom he has purchased or is about to purchase the real estate. The great demand for this policy has fully demonstrated the fact that to both buyer and seller of real estate this form of policy has proven invaluable—to the former because he is assured of the exact date of the title of the party from whom he intends to purchase, and to the latter because it affords him the best and most convincing means to satisfy a purchaser of the state of a title he desires to convey.

There are various forms of Mortgage policies in use to cover the various forms of mortgages in use. Our Form "C" for instance guarantees the trustee named in a certain trust deed for the use and benefit of the owner of the indebtedness described in such trust deed against defects in the title of the maker of such trust deed.

Form "G" which is a very commonly used form, guarantees the legal holder of the indebtedness described in a certain trust deed in cases where the Company itself has been designated as trustee.

There is another Owner's policy used in cases where the title is owned by a corporation. This form is called "A Corporation" Form. By this form of policy the Company guarantees a corporation owning real estate in its own title.

Will You "Due" It?

If the payment of dues is any indication, most of our members are prosperous this year. There are many, however, who have overlooked paying their dues, which were payable July 1, 1926.

Second statements are being prepared and will be mailed shortly to delinquent members. Please save the Association this expense.

Heigh ho! Richard Roe!
Why did you break the closes so,
Which the bishop demised to poor
John Doe?
Good Mr. Doe had done you no harm
When you ejected him out of his farm;
Fie on you, naughty Richard Roe,
How could you break the closes so?

—*Sir F. Pollock in the Queen's Remembrancer* (*vol.* 1, *p.* 100).