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NOTES

The Insured's Rights Against the Title Insurer

Title coverage is a type of protection relatively new to the business of insurance. It had its beginning in Philadelphia about seventy years ago and has grown in importance until the present time when in many parts of the country practically every transfer of real estate is accompanied by some form of title protection. Title insurance has been defined as "an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured 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."¹

While certain features of insurance policies may vary from one part of the country to another, the interests protected are essentially the same. The owner can obtain either a title guaranty or an owner's policy of title insurance. The guaranty insures record title and under its provisions the insurer will indemnify the owner against any loss that he may sustain because of a defect of record in his chain of title. The typical owner's policy sets forth the interest insured and the means by which it has been acquired in Schedule "A" and then in Schedule "B" lists those encumbrances and defects against which it will not insure.² This policy generally insures the marketability of the land and will indemnify the owner against any loss not specifically ex-

¹ Foehrenbach v. German American Title & Trust Co., 217 Pa. 331, 66 Atl. 561 (1907). Title insurance is defined in 1 COOLEY, INSURANCE 12 as a "contract to indemnify against loss through defects in the title to real estate or liens or incumbrances that may affect the title at the time the policy is issued."

² Some of the more common exceptions listed in Schedule "B" are rights of parties in possession other than the fee holder, questions of boundary of land or improvements dependent upon actual survey for determination, easements not of record,

cepted to in Schedule "B," whether the loss be caused by a matter of record or by a defect outside the record.³ Owner's insurance policies and guaranties operate prospectively in that they protect the insured against any loss he may incur in the future, even after selling the property, because of a defect existing when the insurance is issued. The benefits, however, do not accrue to any future owners of the land.

The mortgagee's policy protects the mortgagee in much the same manner as the owner is covered by his policy of title insurance.⁴ A mortgagee's policy under its terms travels with the mortgage and accords any assignee the same protection that it afforded the original mortgagee.

Frequently disputes arise between the insured and insurer as to the meaning of the contract. They raise important questions of what is a matter of record? Has a certain defect been excepted to in Schedule "B"? When must the insurer defend an attack on the title of the insured premises? What is the effect of the insured's withholding an important fact in his application for insurance? When has the insured suffered any loss? And what is the measure of damages? The purpose of this article is to summarize the case law covering these points to determine whether any general rules can be formulated.

I. BASES OF LIABILITY

A. *Defects in Record Title*

1. *Descriptions*

A title paper includes a legal description of the property insured. When it later appears that the insured does not own all this land, a right of action

taxes and future assessments not yet a lien, unfiled mechanic's liens, zoning regulations of the community in which the land is situated and encumbrances, defects or restrictions of record affecting the title.

³ In 21 OKLA. B.J. 275, George A. Fisher lists some of the defects upon which title companies have paid claims. They include claims based on 1) false personation of the true owner, 2) forged deeds, releases or wills, 3) conveyances altered before recording, 4) fraud, duress or coercion in securing essential signatures, 5) deeds delivered after the death of the grantor or grantee or without the consent of the grantor, 6) invalid, suppressed, undisclosed and erroneous interpretations of wills, 7) undisclosed or missing heirs, 8) deeds of persons of unsound mind, 9) deeds by minors, 10) deeds by secretly married persons, 11) homestead rights, 12) birth or adoption of children after the date of a will, 13) mistake in recording legal documents, 14) false representations in the appointment of guardians and administrators, 15) community property rights undisclosed of record, 16) liens for unpaid estate, gift, inheritance and income taxes, 17) want of jurisdiction over persons in a judicial proceeding, 18) tax titles invalid because of irregular proceedings, 19) destruction or mistakes of record which may later appear by the original paper, 20) errors in copying or indexing, 21) defective foreclosure of mortgages, 22) old unsettled estates or errors by administrators or executors insufficient to establish title by inheritance, 23) falsification of records, 24) unauthorized or fraudulent acknowledgements, 25) illegal acts of trustees, 26) unauthorized delivery of instruments by escrow agents.

⁴ Life insurance companies and an increasing number of banks secure an even more

accrues on the policy. A description in a title policy said that the land had a frontage of 38' 5" on a certain street in Richmond, Virginia, with its beginning point established by a certain municipal ordinance.⁵ The ordinance actually specified the point of beginning as 5' 3" south of that fixed by the description thereby leaving the insured with a frontage of 32' 2". The court awarded judgment for the insured in his action against the title company and held that the plaintiff had a right to rely on the description in the policy even though he could have discovered the true beginning point of his property had he referred to the ordinance specified in the description. This case is representative of a line of cases which hold that mere reference in a title paper to an ordinance which affects the boundary line does not put the insured under any duty to examine the ordinance.⁶ These cases hold that the applicable ordinance provisions should have been disclosed by the title company.

When the deed conveying title to the insured grantee contains an erroneous description which incorporates more land than the grantor owned, the title company is liable to the new owner if the description in its guaranty incorporates this parcel to which the grantor never had title.⁷ Including the extra land in the description is a unilateral mistake and the court will not reform the insurance contract to conform with the true boundaries of the land. Reformation of the policy, however, will be granted against the title company when the description therein actually describes an adjacent parcel of land which the insured never intended to buy.⁸ The company is then liable for an outstanding mortgage on the land which the plaintiff really intended to purchase. So, also, the insurer is liable in damages to a plaintiff who relied on the description in his guaranty and built the rear wall of his building on the stated rear lot line, when it later developed that the owner of the adjacent property to the rear actually owned from one to two feet of what was stated to be plaintiff's land.⁹

The title company was held liable on its policy which insured title to eighty lots as designated on a plat which it said was duly recorded.¹⁰ This plat when closely examined by the insured showed that it was merely a drawing rather than a plat of survey, having no metes and bounds, courses

comprehensive policy called the American Title Association policy. In addition to matters covered in the owner's policy and the standard mortgagee's policy it protects the insured against survey encroachments, unfilled mechanic's liens and future tax assessments.

⁵ *Marandino v. Lawyer's Title Ins. Corp.*, 156 Va. 690, 159 S.E. 181 (1931).

⁶ *Miller v. Lawyer's Title Ins. Co.*, 112 F. Supp. 221 (E.D. Va. 1953).

⁷ *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (1927).

⁸ *Ehmer v. Title Guaranty & Trust Co.*, 156 N.Y. 10, 59 N.E. 420 (1898).

⁹ *Buquo v. Title Guaranty & Trust Co.*, 20 Tenn. App. 479, 100 S.W.2d 997 (1936).

¹⁰ *Miller v. Lawyer's Title Ins. Co.*, 112 F. Supp. 221 (E.D. Va. 1953).

and distances or scale of measurement. It was totally inadequate for establishing a starting point or a boundary line for the insured property. This the court found to be a defect of record covered by the policy.

2. *Easements*

A title company is liable for its failure to report a recorded easement affecting the insured property.¹¹ And where such recorded easement is not reported in the title paper, the insured has a right to rely on his policy which stated that there were no encumbrances on the land, even though some of the pipes which were the subject matter of the easement were above the ground and were seen by the plaintiff.¹²

3. *Restrictions*

Unless the title policy takes exception to any restrictions of record, the insurer will be liable for any expense incurred by the insured in having these restrictions construed by a court.¹³ Furthermore, to be sure of avoiding any liability because of restrictions, it is wise for the company to eliminate any ambiguity in its reference to them. In the case of *Leslie Apartments, Inc. v. Title Guaranty & Trust Co.* it was shown that Schedule "B" of the policy excepted certain "covenants, restrictions, reservations, easements and charges contained in, or imposed or reserved" by certain recorded instruments as modified by a certain agreement recorded "which modification permits the erection of apartment houses."¹⁴ The court agreed with the plaintiff's contention that the last clause excepted the modifying agreement from the list of covenants in Schedule "B" and, therefore, the company insured the right to build apartment houses. The plaintiff was awarded his expenses incurred in the declaratory judgment action to establish his right to build apartments under the modifying agreement. The insurance company is free from any liability based on the existence of restrictions when its policy states that "restrictive covenants, easements and agreements" exist and then lists the volume and page of the city records where they can be found.¹⁵ This mere statement of the incumbrance is sufficient to put the insured purchaser on notice as to its extent.

4. *Outstanding Encumbrances*

A title company is liable on its contract when it fails to report a valid mortgage on the premises insured.¹⁶ And when through its own negligence,

¹¹ *Beaullieu v. Atlanta Title & Trust Co.*, 60 Ga. App. 400, 4 S.E.2d 78 (1939).

¹² *Overholtzer v. Northern Counties Title Insurance Co.*, 116 Cal. App.2d 113, 253 P.2d 116 (1953).

¹³ *Leslie Apartments Inc. v. Title Guaranty & Trust Co.*, 42 N.Y. S.2d 686 (1943).

¹⁴ *Ibid.*

¹⁵ *M.R.M. Realty Co. v. Title Guaranty & Trust Co.*, 270 N.Y. 120, 200 N.E. 666 (1936).

¹⁶ *Ehmer v. Title Guaranty & Trust Co.*, 156 N.Y. 10, 50 N.E. 420, (1898).

the company insures the title to land other than that actually purchased by the insured, the policy will be reformed to cover the proper premises and it will be subject to any valid lien thereon.¹⁷ However, there is no need for the company to mention any mortgage disclosed by its examination which is improperly recorded.¹⁸ The insurer is an independent contractor, and so any notice to it of this lien is not notice to the insured mortgagee. The insured mortgage is prior to the improperly recorded one and the company will be free from any liability on its policy.

If the quality of the interest is less than that insured in the policy, the title company is liable. A title company was readily held liable for the unmarketability of land on which an undivided 2/35 interest in the property was outstanding.¹⁹ In another case liability was based on Schedule "A" of a policy which stated that the insured was the owner in fee simple of land and derived it through the will of his mother.²⁰ In a partition action several years later it was established that the insured had received only an undivided 1/2 interest by the will. The court disregarded the company's argument that the plaintiff had lost nothing because he never had more than a 1/2 interest and awarded him damages for his loss.

Outstanding timber deeds on timber producing land which are unreported in the mortgagee's policy are the basis of liability by the title company when the mortgaged land upon foreclosure is insufficient security to cover the mortgage because of timber removed under these deeds.²¹ But even when there is a total failure of the mortgage security because of a defect in the chain of title, the insured cannot recover the full value of the mortgage unless the value of the property without the defect is at least equal to the amount of the mortgage.²²

A *lis pendens* affecting the insured land, while a proceeding of record, is not a basis of liability to the insurer though unreported in the title paper when the company knew that the action could not be maintained and when it was in fact defeated.²³ In a California case the title company guaranteed title to be good subject to certain legal proceedings which in the opinion of

¹⁷ *Ibid.*

¹⁸ *Rice v. Taylor*, 220 Cal. 629, 32 P.2d 381 (1934).

¹⁹ *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 172 N.Y. Supp. 243 (1918).

²⁰ *Foehrenbach v. German-American Title & Trust Co.*, 217 Pa. 331, 66 Atl. 561 (1907).

²¹ *First Carolina Joint Stock Land Bank of Columbia v. New York Title & Mortgage Co.*, 172 S.C. 435, 174 S.E. 402 (1934).

²² *First National Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703 (1939).

²³ *Sala v. Security Title Ins. & Guaranty Co.*, 27 Cal. App.2d 693, 81 P.2d 578 (1938).

the insurer's attorneys confirmed the insured's title but the conclusiveness of which the company did not insure.²⁴ When the plaintiff's title failed because of these proceedings and he sued the title company, the court entered judgment for the defendant holding that the language of the policy stating the remark to be only an opinion was unequivocal and the result of the legal proceedings was not insured.

5. Taxes

Taxes which are a valid encumbrance upon the land, unless excepted to, are a defect of record covered by a title paper.²⁵ In some states when a special tax assessment is levied on property, the owner has a specified number of days during which he can file an objection. If no objection is made, the levy becomes absolute and has the binding force of a judgment lien. The failure of the insurer to take exception to this encumbrance was held to be a ground of liability.²⁶ The insurer however, is under no duty to inform the owner of a special drainage assessment which could only become a lien on the land by future court action.²⁷ In the case of *District Title Insurance Co. v. United States* the federal government was the purchaser of some acreage in Maryland.²⁸ Before accepting title the government required the title company in its paper to show that all taxes and assessments both general and special had been paid. At the time the land was purchased, the property was classified by the state of Maryland as "small acreage." Under the state law special taxes on property with such a classification can only be paid for the current year. After the government entered into possession, this land was reclassified as "subdivision" property. Under such a classification all the special taxes for future years could be paid in one lump sum. The court found no breach of contract by the insurer, since the reclassification of the land occurred after the effective date of the policy and only by this new classification were future taxes payable.

B. Defects Not of Record

Encroachments of structures of neighboring land onto the property insured do not appear of record. It therefore follows that a title guaranty, which only guaranties record title, does not protect against loss that may be caused by encroachments. Likewise a policy which takes exception to such overlap protects the insurer against loss. However, a policy which

²⁴ Whitaker v. Title Ins. & Trust Co., 186 Cal. 432, 199 Pac. 528 (1921).

²⁵ Atlanta Title & Trust Co. v. Allied Mortgage Co., 60 Ga. App. 114, 3 S.E.2d 127 (1939).

²⁶ *Ibid.*

²⁷ McFaw Land Co. v. Kansas City Title & Trust Co., 357 Mo. 797, 211 S.W.2d 44 (1948).

²⁸ District Title Ins. Co. v. United States, 169 F.2d 308 (D.C. Cir. 1948).

excepted to any variation between the record boundary line and any stoops belonging to the adjoining premises but insured the marketability of the title, was found to be grounds for liability when it was shown that a stoop encroached 1' 9" and by being there for twenty years had acquired the right to support.²⁹ Interests held adversely by parties not in the record chain of title fall outside the protection afforded by a title guaranty.³⁰ By the same token a deed out of a person not in the chain of title is outside the record.³¹ A policy which excluded in its coverage "tenancy of the present occupants," was found not to except adverse possessors.³² The court construed the word "tenancy" as meaning the interest which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. This term, the court said, does not include a party who is in actual adverse possession at the time the policy is issued. It further stated that the defendant could have escaped liability by changing one word in its policy and excepting "rights of present occupants."

Title policies generally insure the owner of a good and marketable title. This is a title which a reasonable purchaser, well informed as to the facts and their legal bearing, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept.³³ The marketability of a title can be impaired by matters of record such as restrictions³⁴ and outstanding undivided interests in the land³⁵ or by factors outside the record such as encroachments by structures on adjoining property³⁶ or failure by the subdivider to grade the street and furnish a necessary bond in accordance with a municipal ordinance.³⁷ Restrictions which might ordinarily be a grounds for liability if not excepted to because they affect marketability, no longer influence the marketability of the title when the party having the right to enforce the restrictions has waived it.³⁸ In the case of *Hocking v. Title Ins. & Trust Co.* the subdivider violated an ordinance by failing to grade the streets or furnish a bond before recording the

²⁹ *Glyn v. Title Guaranty & Trust Co.*, 117 N.Y. Supp. 424 (1909).

³⁰ *Bothin v. California Title Ins. & Trust Co.*, 153 Cal. 918, 96 Pac. 500 (1908).

³¹ *Ibid.*

³² *Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N.W. 706 (1897).

³³ *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951).

³⁴ *M.R.M. Realty Co. v. Title Guaranty & Trust Co.*, 270 N.Y. 120, 200 N.E. 666 (1936).

³⁵ *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 172 N.Y. Supp. 243 (1918).

³⁶ *Glyn v. Title Guaranty & Trust Co.*, 117 N.Y. Supp. 424 (1909).

³⁷ *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951).

³⁸ *M.R.M. Realty Co. v. Title Guaranty & Trust Co.*, 270 N.Y. 120, 200 N.E. 666 (1936).

subdivision map with the city council and county recorder.³⁹ The city council violated the ordinance by accepting the map and the county recorder violated a statute by accepting it for record. When the plaintiff, a purchaser of two unimproved lots, attempted to build on them, the city refused to grant a building permit because the subdivider had failed to comply with the ordinance. The defendant issued a policy in which it protected the owner against any loss which she might sustain (1) by reason of title to the lots not being vested in her in fee simple, (2) by reason of the unmarketability of her title (3) or by reason of any defect, lien or encumbrance on such title. The policy did not insure against "... any governmental acts or regulations restricting, regulating or prohibiting the occupancy or use of said land or any building or structure thereon." The court rejected the plaintiff's contention that she does not have a fee simple to the lots and that whatever title she may have is defective by reason of the absence of bond. It pointed out that one can hold perfect title to land that is valueless. Under the recording statute acceptance of the subdivision map by the recorder constituted such map as a public record, reference to which in the plaintiff's deed furnished her with a legally marketable title whether or not a purchaser was available.

II. DEFENSE OF THE INSURER

A. *Conditions Precedent to Suit Against the Title Company as Stipulated in the Policy*

Most title policies contain a provision that the title company will defend at its own costs any attack on the title of the insured. If the insured refuses to permit the company to defend such a suit, the company is thereby relieved of liability on its policy.⁴⁰ But where the title company is dilatory in defending the insured's title, the insured may properly defend on his own without thereby discharging the company from liability under the policy.⁴¹ The insurer has breached its policy when it refuses or fails to defend an attack after proper notice or in the alternative fails to indemnify the insured.⁴²

The provisions in policies which accord the company the right to defend any attack on the insured title generally authorize a defense to a final determination in the highest court of the jurisdiction.⁴³ The company's con-

³⁹ *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951).

⁴⁰ *Atlanta Title & Trust Co. v. Fulkalb*, 56 Ga. App. 742, 193 S.E. 796 (1937).

⁴¹ *Fidelity Union Casualty Co. v. Wilkinson*, 94 S.W.2d 763 (Tex. App. 1936); *Leslie Apartments, Inc. v. Title Guaranty & Trust Co.*, 42 N.Y.S.2d 686 (1943).

⁴² *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal. App.2d 113, 253 P.2d 116 (1953); *Buquo v. Title Guaranty & Trust Co.*, 20 Tenn. App. 479, 100 S.W.2d 997 (1936).

⁴³ *Sala v. Security Title Ins. & Guaranty Co.*, 27 Cal. App.2d 693, 81 P.2d 578 (1938). However, such a provision does not apply in a case where the land is held

tractual obligation has been met when it brings any adverse litigation to a successful conclusion in favor of the insured.⁴⁴ The case of *Montemarano v. Home Title Ins. Co.*⁴⁵ is somewhat contra to this view. In that case the defendant company admitted the validity of an outstanding claim against the land and cured the defect at no expense to the owner. But even though the defect was cured, the plaintiff was unable to obtain a purchaser willing to pay as much for the property as a purchaser who refused to buy at the time the adverse claim was existent. The parties by stipulation agreed what the damages would be to the owner if they were more than nominal. The court held that more than nominal damages were incurred even though title was cleared and entered judgment in the stipulated amount for the plaintiff because there was a real loss to him.

Sometimes when a purchaser buys several parcels of land, he will request one title policy to cover all the lots.⁴⁶ When some of the lots are purchased before others, but the buyer and insurance company agreed that the title protection would cover each parcel only until the date the deed to it was recorded, the company is relieved of liability for a tax lien imposed after the lot was recorded but before the effective date of the policy.⁴⁷

B. *Fraud*

Most title insurance contracts provide that the suppression of a material fact when the policy is obtained will void the policy. Thus, knowledge by the insured mortgagee of the mortgagor's weak financial position, and concealment of this information from the company was held to be a valid defense to an action on the policy when the mortgage was declared invalid as a preferred lien in a bankruptcy proceeding under the bankruptcy act.⁴⁸ When title is guaranteed in a trustee, the insurer is not liable to the trustee when he is removed from this capacity for fraud committed while serving as trustee.⁴⁹ Yet knowledge by the insured of a valid encumbrance on his land obtained through the search of an independent abstractor may not be a valid defense to his suit against the title company for loss occasioned by that encumbrance when the company did not take exception to it in the

by another party in actual adverse possession and the insured has lost it absolutely by reason of a defect in the insured title. See *Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N.W. 706 (1897).

⁴⁴ *Sala v. Security Title Ins. & Guaranty Co.*, 27 Cal. App.2d 693, 81 P.2d 578 (1938). Likewise there is no liability when the title company clears the defect. *Hilfer v. United States Mortgage & Title Guaranty Co. of New Jersey*, 14 N.J. Super. 456, 82 A.2d 463 (1951).

⁴⁵ 258 N.Y. 478, 180 N.E. 241 (1932).

⁴⁶ *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 74 N.Y. Supp. 170 (1902).

⁴⁷ *Ibid.*

⁴⁸ *First National Bank and Trust Co. v. New York Title Ins. Co.*, 12 N.Y.S.2d 703 (1939).

⁴⁹ *Taussig v. Chicago Title & Trust Co.*, 171 F.2d 553 (7th Cir. 1948).

policy.⁵⁰ The courts state that the title company made its own search and should be bound by what it could have found in the record.⁵¹ They feel that the owner's whole purpose in obtaining insurance was to protect itself against any error that the independent abstractor might have made. And while the policy required the insured to notify the company about defects, failure of the plaintiff to notify it of the encumbrance was held immaterial because the defendant had notice through its own search.

A mortgagee has no right to recover on a policy when he takes the mortgage in bad faith to defraud persons who might deal with him as mortgagee, by offering what purported to be a real mortgage, but what was in fact nothing more than a pretended mortgage.⁵²

C. *Defects Excepted in the Policy*

An item against which a title company will not insure will appear in the list of exceptions in schedule "B" of the policy. The courts seem to construe the exceptions strictly in a close case, so in order to avoid liability it is wise for the title company to use as broad language as possible to cover the defect.⁵³ The term "rights of tenants in possession" has been construed not to include adverse possessors⁵⁴ but "rights or claims of parties in possession" has been held to include tenants.⁵⁵ A policy which took exception to "any discrepancies in area and boundaries which a correct survey would show" was held not to include an attack on the title to part of the land which the vendor claimed was conveyed through a mutual mistake.⁵⁶ The insurer was held not liable for the refusal of a city to grant a building permit because the subdivider failed to comply with certain ordinances when the policy did not insure against "any governmental acts . . . restricting the occupancy or use of said land or any building or structure thereon."⁵⁷ And a statement that title was free and clear of all encumbrances except for restrictions recorded in a certain volume and page of the public records meant

⁵⁰ First Carolina Joint Stock Land Bank of Columbia v. New York Title & Mortgage Co., 172 S.C. 435, 174 S.E. 402 (1934); *Maggio v. Abstract Title & Mortgage Corp.*, 98 N.Y.S.2d 1011 (1950).

⁵¹ First Carolina Joint Stock Land Bank of Columbia v. New York Title & Mortgage Co., 172 S.C. 435, 174 S.E. 402 (1934); *Maggio v. Abstract Title & Mortgage Corp.*, 98 N.Y.S.2d 1011 (1950); *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (1927).

⁵² *Clarke v. Massachusetts Title Ins. Co.*, 237 Mass. 155, 129 N.E. 376 (1921).

⁵³ *Leslie Apartments, Inc. v. Title Guarantee & Trust Co.*, 42 N.Y.S.2d 686 (1943); *Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N.W. 706 (1897).

⁵⁴ *Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N.W. 706 (1897).

⁵⁵ *Alabama Title & Trust Co. v. Millsap*, 71 F.2d 518 (5th Cir. 1934).

⁵⁶ *Chanoux v. Title Ins. Co.*, 258 S.W.2d 866 (Tex. App. 1953).

⁵⁷ *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951).

that the policy took exception to all that was contained in the restrictions referred to.⁵⁸

III. DAMAGES

A. *When the Insured Suffers Damage*

There is much inconsistency in the decisions as to the exact time at which the insured has suffered any loss thereby giving him a right of action under his policy. The older view was that the action did not accrue until the insured was evicted by the holder of a superior title.⁵⁹ More modern cases do away with the need for any eviction. The mere existence of an encumbrance at the time the policy is delivered⁶⁰ or when the insured property is purchased is sufficient to give the insured rights against the title company.⁶¹ And even where the contract required eviction as a condition precedent to suit upon the policy, the court ignored this provision when the plaintiff never obtained title to certain insured land and never was in possession because "the law will not force a person to do a vain thing."⁶² Most policies contain a provision requiring that the insured report his loss within a certain number of days from the time it occurs.

A strict construction of the modern trend would frequently cause an inequitable result to the insured, because the encumbrance might exist without his knowledge and the stated period of time might run out before he discovers it. A very recent case squarely on this point held that the plaintiff's loss does not occur until after he learns of the defect.⁶³

B. *Measure of Damages*

When the insurer refuses to defend an action or to clear the defect in some other way, most courts feel that the insured has a legitimate right to undertake the defense himself and assess the expense of maintaining the suit as part of his loss under the policy.⁶⁴ The reasoning of these cases is that

⁵⁸ M.R.M. Realty Co. v. Title Guarantee & Trust Co., 270 N.Y. 120, 200 N.E. 666 (1936).

⁵⁹ Purcell v. Land Title Guaranty Co., 94 Mo. App. 5, 67 S.W. 726 (1902).

⁶⁰ Narberth Building & Loan Ass'n v. Bryn Mawr Title Co., 126 Pa. St. 74, 190 Atl. 149 (1937); Overholtzer v. Northern Counties Title Ins. Co., 116 Cal. App.2d 113, 253 P.2d 116 (1953).

⁶¹ Murphy v. United States Title Guaranty Co., 104 Misc. 607, 172 N.Y. Supp. 243, (1918).

⁶² Kentucky Title Co. v. Hail, 219 Ky. 256, 292 S.W. 817 (1927).

⁶³ Miller v. Lawyers Title Ins. Co., 112 F. Supp. 221 (E.D. Va. 1953).

⁶⁴ Overholtzer v. Northern Counties Title Ins. Co., 116 Cal. App.2d 113, 253 P.2d 116 (1953); Fidelity Union Casualty Co. v. Wilkinson, 94 S.W.2d 763 (Tex. App. 1936); Buquo v. Title Guaranty & Trust Co., 20 Tenn. App. 479, 100 S.W.2d 997 (1936). The *Buquo* case states in dicta that the insured is entitled to recover the reasonable and necessary expenses incurred in his defense including reasonable attorney's fees, stenographic fees, witnesses fees and costs.

under the contract the company agreed to defend the title and interest of the insured in the property and to defray the necessary expenses involved, and as a corollary, in refusing to defend any action affecting the title agreed to become liable for all necessary expenses incurred by the insured.⁶⁵ The insurer has been held liable for attorneys' fees of the insured even when the policy specifically precluded liability for such expenses, when the company refused to take an action on its own.⁶⁶

The mortgagee is entitled to indemnification for any failure of his security because of a defect in title.⁶⁷ In the event of a total failure of title to the mortgaged premises, the value of the property insured must at least be equal to the amount due on the mortgage before he can recover the entire amount of the debt.⁶⁸ Where an insured mortgagee was required to pay a valid tax lien of \$1479.03 on the property because of the mortgagor's insolvency, the title company was held liable because the lien was of record when it issued its policy.⁶⁹ The defendant's argument that the mortgagee suffered no loss because it acquired a \$14,000 mortgage for \$8,400 and sold it for \$10,000 was rejected. The court held that the plaintiff was entitled to receive the full \$10,000 intact.

The question of what is the plaintiff's real loss when the title to his real estate fails is muddled in hopeless confusion. Some cases state that it is the amount of the money which the insured paid for the land.⁷⁰ This seems to be the rule when there is breach of the covenant of seisin.⁷¹ However, the purchaser of land at a defective foreclosure sale has suffered no damage under his policy when the original owner was awarded repossession, upon being reimbursed by the owner for his title expenses, attorney's fees, court costs and the purchase price of the land.⁷² Some courts look to the date that the property was purchased in determining the measure of damages.

⁶⁵ Fidelity Union Casualty Co. v. Wilkinson, 94 S.W.2d 763 (Tex. App. 1936).

⁶⁶ Leslie Apartments, Inc. v. Title Guarantee & Trust Co., 42 N.Y.S.2d 686 (1943). The reason for this holding is that in clearing the title the insured discharged a legal obligation of the insurer.

⁶⁷ Fidelity Union Casualty Co. v. Wilkinson, 94 S.W.2d 763 (Tex. App. 1936).

⁶⁸ First National Bank & Trust Co. of Port Chester v. New York Title Co., 12 N.Y.S.2d 703 (1939).

⁶⁹ Atlanta Title & Trust Co. v. Allied Mortgage Co., 64 Ga. App. 68, 12 S.E.2d 147 (1940).

⁷⁰ Ehmer v. Title Guarantee & Trust Co., 156 N.Y. 10, 50 N.E. 420 (1898).

⁷¹ Murphy v. United States Title Guaranty Co., 104 Misc. 607, 172 N.Y. Supp. 243 (1918).

⁷² Kantrowitz v. Title Guarantee & Trust Co., 17 N.Y. S.2d 726, *aff'd* 21 N.Y.S.2d 391 (1940). In dicta the court said that had it held the defect in the foreclosure action to be one of publication only and then ordered a resale after the cancellation of the deed, the plaintiff might have a cause of action for any amount in excess of the original purchase price that she might have paid.

They state that it is the difference between the value of the property when purchased as it was with the encroachment, and its value as it would have been had there been no such encroachment.⁷³ Another case dealing with a failure of title to certain acreage stated that the damages are measured by the present market value rather than any proportionate part of the purchase price.⁷⁴ The property cost \$9 per front foot and was selling for \$15 per foot of frontage at the time of suit. The court allowed damages based on the latter figure. A very recent California case looks to the date of the discovery of the defect as the crucial one and holds that damages are to be computed by the extent to which the encumbrance interferes with the use to which the property has been put at the date the incumbrance has been discovered.⁷⁵ Other cases give no help at all in determining the crucial date at which damages should be assessed but merely say that the plaintiff's damages are the difference between the value of the property encumbered and unencumbered.⁷⁶

The case of *Buquo v. Title Guaranty & Trust Co.* enunciates some liberal rules in determining the damages for property lost because of an incorrect description in a title guaranty.⁷⁷ It states that the measure of damages for the loss of farm property is the value of the land. In city property used for building purposes it is the value of the land plus any additional expenditures rendered necessary by the defect which in that case were found to be the cost of removing a wall which encroached on the neighboring land, the cost of rebuilding it on the plaintiff's land and depreciation of the materials used in the wall.

The measure of damages once liability on a title policy or guaranty has been established is one of the most unsettled aspects of the law of title insurance. The cases seem to be decided, each on its individual facts, with little regard for the decisions of other courts. It is hoped that future courts will follow a policy rendering greater uniformity to the decisions. Such a practice will have the desirable effect of eliminating much of the uncertainty and confusion so prevalent in this phase of title law.

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⁷³ *Glyn v. Title Guarantee & Trust Co.*, 117 N.Y. Supp. 424 (1909).

⁷⁴ *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (1927).

⁷⁵ *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal. App.2d 113, 253 P.2d 116 (1953).

⁷⁶ *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 172 N.Y. Supp. 243 (1918); *Montemarano v. Home Title Ins. Co.*, 258 N.Y. 478, 180 N.E. 241 (1932).

⁷⁷ *Buquo v. Title Guaranty & Trust Co.*, 20 Tenn. App. 479, 100 S.W.2d 997 (1936).