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Richard L. McCandless

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1957 PENNSYLVANIA ACT REQUIRING NOTICE OF SEVERANCE OF COAL OR RIGHT OF SUPPORT IN CERTAIN INSTRUMENTS

It is a well recognized principle in Pennsylvania land law that there can be three separate estates in land—namely: the surface, the minerals and the right of support.[1] Where one individual owns both the surface and the minerals, there can be no such estate as the right of support,[2] but a deed of severance, either of the surface or the minerals, first brings into existence this estate,[3] which is also referred to as the "third estate".[4]

If the deeds to the grantee or his predecessors in title contained no express waivers or other words which would indicate a contrary intent, the owners of the mineral estate owed a servitude of support to the superincumbent strata,[5] consequently, the owner of the surface could recover his losses, caused by subsidence of the surface due to the removal of the coal, from the owner of the minerals. However, in most instances throughout the Pennsylvania coal regions the owner of the surface has no right of support,[6] either because someone in the chain of title has waived his right to subjacent support by conveying the mineral estate while reserving the surface and expressly releasing the right of support,[7] or because the surface was conveyed with a reservation of minerals without liability for damage to the surface caused by the mining of the minerals.[8] In either instance the owner of the mineral estate has the right to mine the minerals under the land without liability for damage caused to the surface owner when the surface collapses. As a result, cave-ins and subsidence of land have caused considerable damage and expense to the owners of homes, commercial buildings, and unseated lands.[9]

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[1] Charnetski v. Miners Mills Coal Mining Co., 270 Pa. 459, 112 Atl. 683 (1921).

[2] Williams v. Hay, 120 Pa. 485, 14 Atl. 379 (1888); Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 Atl. 559 (1905).

[3] Penman v. Jones, 256 Pa. 416, 100 Atl. 1043 (1917).

[4] Smith v. Glen Alden Coal Co., 347 Pa. 200, 32 A.2d 227 (1943).

[5] Jones v. Wagner, 66 Pa. 429 (1870); Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 Atl. 706 (1896); Penman v. Jones, 256 Pa. 416, 100 Atl. 1043 (1917).

[6] Casper, *The Police Power and The Third Estate,* 53 Dick L. Rev. 277 (1949); "Underpinning", *Newsweek,* August 19, 1957, p. 75.

[7] Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 Atl. 764 (1907); Stilley v. Pittsburgh-Buffalo Co., 234 Pa. 492, 83 Atl. 478 (1912).

[8] Madden v. Lehigh Valley Coal Co., 212 Pa. 64, 61 Atl. 559 (1905); Commonwealth *ex rel.* Keator v. Clearfield Coal Co., 256 Pa. 328, 100 Atl. 820 (1917); Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 Atl. 508 (1914).

[9] Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 118 Atl. 491 (1922); Pennsylvania Legislative Journal (1913), pp. 5947-5965; "Underpinning", *Newsweek,* August 19, 1957, p. 75; "Placating Jarred Home Owners", *Business Week,* December 7, 1957, p. 84; SUBSIDENCE COMMITTEE, REPORT TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (Harrisburg, 1957) p. 15.

The Pennsylvania General Assembly first attempted to resolve this problem by making it unlawful to mine anthracite coal in such a manner as to cause the cave-in, collapse, or subsidence of public buildings, streets, roads, bridges, industrial establishments, cemeteries, or private dwellings used as human habitations, except in second class townships and under unseated land.[10] When this act, known as the Kohler Act, was declared unconstitutional by the United States Supreme Court in 1922,[11] the legislature abandoned this approach to the problem of subsidence.

Several minor statutes were enacted between 1923 and 1955.[12] Then, in 1956 the General Assembly created a Subsidence Committee [13] for the purpose of investigating the causes of subsidence and to present recommendations based on its findings. The committee recommended:

1. Amendment by the United States Congress of the Federal Flood Insurance Act of 1956 to provide as an insurable risk subsidence resulting from mining operations.
2. Enactment of legislation establishing a commission in the Department of Mines and Mineral Industries for the purpose of studying subsidence and carrying out flushing programs in the coal regions, together with appropriations and a tax program for carrying out the commission's program.
3. Approval of appropriations to aid municipalities in their acquisition of support necessary to prevent subsidence, as provided by the Act of 1949.
4. Enactment of legislation requiring that every deed of real property conspicuously indicate whether or not it conveys mineral and support rights.[14]

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[10] PA. STAT. ANN. tit. 52, § 661 (1921). Act of 1913 provided that mining, so as to remove necessary support from beneath streets, alleys, and public highways of any municipal corporation, was unlawful. See PA. STAT. ANN. tit. 53, § 2656 (1913), repealed as to third class cities, PA. STAT. ANN. tit. 53, § 37206 (1931).

[11] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 28 A.L.R. 1321 (1922). The Court held the act was an unlawful exercise of the police power "so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." Since the source of the damage was not common or public, and the extent of the taking was great, the court said the act was, in effect, taking private property without due process of law. See Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 118 Atl. 491 (1922), for the Pennsylvania Supreme Court decision upholding the statute.

[12] A 1927 Act made it unlawful to mine minerals under public highways and streets without placing permanent artificial support sufficient to uphold the surface within boroughs in the anthracite region. See PA. STAT. ANN. tit. 53, § 13286 (1927), amended PA. STAT. ANN. tit. 53, § 46160 (1951). A 1939 statute made mining bituminous coal in a *negligent* manner so as to cause cave-in, collapse, or subsidence of surface property in second class counties unlawful. See PA. STAT. ANN. tit. 52, § 1407 (1939). In 1949 a statute gave political subdivisions authority to acquire support rights upon paying compensation. See PA. STAT. ANN. tit. 53, § 5209 (1949). However, officials insist the financial condition of their municipality precludes their taking action under this legislation. See SUBSIDENCE COMMITTEE, REPORT TO GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (Harrisburg, 1957) p. 15.

[13] Act of May 31, 1956, P.L. (1931).

[14] SUBSIDENCE COMMITTEE, REPORT TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (Harrisburg, 1957).

Although the bills recommended by the Joint State Government Commission and the Subsidence Committee went no further than a House Committee, four members of the House of Representatives from Allegheny County introduced a bill, which was subsequently enacted with minor amendments on July 17, 1957.[15] In effect, this act serves the same purpose as the fourth recommendation of the Subsidence Committee. Unlike the Kohler Act, it does nothing to provide a remedy for "victims" of subsidence; it is a notice statute only.

The condition giving rise to this statute was that property owners were frequently unaware their deeds did not include, or specifically waived, coal and support rights. Vague language and "fine print" were primary causes of this unawareness.[16] The act removes these causes by placing the burden of clear notice of the purchaser's rights and liabilities on the grantor, vendor, or insurer of the surface.

INSTRUMENTS INCLUDED UNDER THIS ACT

The act encompasses "Every deed, agreement of sale, title insurance policy and other instrument in writing," which has as its purpose the selling, conveying, transferring, releasing, quitclaiming, insuring or agreeing to do the foregoing, with respect to the surface of the land.[17] This language is broad enough to include every type of deed relating to the surface of the land. Obviously, the act does not apply to instruments transferring the mineral estate or the "third estate" without the surface.

Insurance policies which purport to insure the title to the surface of the land, and all agreements of sale involving the surface estate are within the provisions of this act. The act does not define an agreement of sale. However, the General Assembly defined an "agreement of sale" in an earlier notice type statute, as:

> ". . . any agreement, or written instrument [which] provides that title to any property shall thereafter be transferred from one owner to another owner, and shall include inter alia written leases which contain options to purchase the leased property, and leases which provide that the lessee of the property shall acquire title thereto after the payment of a stipulated number of regular rent payments or after a stipulated period of time." [18]

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[15] PA. STAT. ANN. tit. 52, § 1551-1554 (1957).

[16] See note 14 *supra.*

[17] PA. STAT. ANN. tit. 52, § 1551 (1957).

[18] PA. STAT. ANN. tit. 21, § 612 (1955). The primary purpose of this act was to give purchasers notice of the zoning requirements in first class cities. See PA. STAT. ANN. tit. 21, § 611 (1955).

Since both acts are notice type statutes, there seems to be no valid reason for a different definition to apply.

It is not clear that the act applies to mortgages. It would seem that the act should include mortgages because severance of coal or support rights would directly affect the value of the property and the amount of money loaned to the mortgagor. The question is therefore, whether a mortgage is an "instrument in writing" conveying or transferring land. Pennsylvania court decisions are at variance, some stating a mortgage is a form of conveyance,[19] while others declare it is a bare encumbrance or collateral for payment of an obligation.[20] In view of the doubt created by the cases, and also because the standard mortgage form in Pennsylvania contains the words, "grant, bargain, sell, release, and confirm unto the said party of the second part, his heirs and assigns," followed by a description of the property,[21] it seems that the safest course would be to proceed as though the act specifically included mortgages and to comply with its provisions when drafting a mortgage.

WRITINGS WHICH WILL COMPLY WITH THIS ACT AND THEIR EFFECT

It has been common practice in Pennsylvania for the vendor, grantor, or insurer to use the *exception, reservation,* or *under and subject to* clauses when he did not intend to sell, convey or insure the coal or the right to surface support. The use of this type of clause to retain minerals or the right of surface support in a conveyance of the surface is still sufficient to prevent a transfer of minerals or the "third estate", but it is not in compliance with section 1 of the act, which sets forth the required form of notice in paragraphs A and B.

> "(A) 'This document *may* not sell, convey, transfer, include or insure the title to the coal and right of support underneath the surface land described or referred to herein, and the owner or owners of such coal *may* have the complete legal right to remove all of such coal and, in that connection, damage may result to the surface of the land and any house, building, or other structure on or in such land.' " [22] (Italics added.)

Paragraph B is identical except the word "does" is substituted for the word "may" in the first line, and the second "may" has been eliminated.

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[19] Presbyterian Corp. v. Wallace, 3 Rawle 109 (1831); Hoskin v. Woodward, 45 Pa. 42 (1863); *In re* Helfenstein's Estate, 135 Pa. 293, 20 Atl. 151 (1890); Winthrop v. Arthur W. Binns, Inc., 160 Pa. Super. 214, 50 A.2d 718 (1947).

[20] Knoll v. New York, Chicago & St. Louis Ry., 121 Pa. 467, 15 Atl. 571 (1888); Bulger v. Wilderman, 101 Pa. Super. 168, 172 (1931) (dictum); PA. STAT. ANN. tit. 21, § 655 (1878) recognized a right of the mortgagor to convey title to third persons, when it provided the grantee would not be personally liable for the mortgage unless he expressly assumed liability.

[21] See Form 244T, Mortgage, Interest, Insurance and Scire Facias, Henry Hall, Inc., Indiana, Pennsylvania.

[22] PA. STAT. ANN. tit. 52, § 1551 (1957).

The act permits notice in a form which is *essentially the same as, and which expresses precisely the same meaning* as paragraph A or B. Use of exact language in paragraph A or B will avoid the risk of noncompliance. In addition to certain language, the act requires that the notice be set forth either in *capital letters,* or in type or writing *distinctively different* from the remainder of the instrument, or set apart from the balance of the instrument by *underlining.*

Paragraph B is an express provision written in unequivocal language, which states that the transfer, sale or insurance *does not* include or cover the coal or the "third estate", and the damage, which may result to the surface, caused by a removal of the coal and the supports may occur without liability on the vendor, grantor, or insurer. This language should have the same general effect that an *exception, reservation,* or *under and subject to* clause has in deeds, agreements of sale, and insurance policies. When the vendor or insurance company inserts the "does not" paragraph in a written instrument transferring or insuring the surface, he would never convey the title to coal and the right of support, either because the vendor did not own these estates, or because he never intended to convey them.

Paragraph A provides the document "may not" sell, convey, etc., but if the vendor owned the mineral estate or "third estate", it seems he would convey the same to the purchaser [23] by the insertion of the "may not" paragraph, in the absence of other manifestations of intent by the vendor or grantor. Even if the vendor knows he does not own the coal or support rights at the time of the conveyance, the insertion of the "may not" paragraph would certainly be sufficient to give notice to the purchaser, and hence satisfy the requirements of section 1.

Liability for Noncompliance

Section 2 provides that the statutory remedy of "damages in an action of assumpsit, based upon implied contract, shall be to the same extent as if he had expressly agreed, warranted and insured", the coal and right of support.[24] The wording of section 2, in the light of prior legislation, would preclude any right of the grantee or vendee to rescind the deed or agreement of sale.[25]

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[23] Even if the "may not" paragraph was considered ambiguous, the estates would be conveyed to the purchaser because the paragraph would be construed most strongly against the grantor; Hughes v. Westmoreland Coal Co., 104 Pa. 207 (1883); McKinley v. Ulery, 47 Pa. Super. 353 (1911).

[24] PA. STAT. ANN. tit. 52, § 1552 (1957).

[25] PA. STAT. ANN. tit. 46, § 156 (1806).

Apart from this act the measure of damages generally recoverable by a vendee under an agreement of sale, where the vendor cannot convey good title to all he has covenanted to convey, in the absence of fraud or bad faith, is the amount of the hand money paid with interest, and necessary expenses incurred upon faith of the contract.[26]

A grantee, who sues the grantor for breach of a covenant, will have several measures of recovery, dependent upon the type of deed and the particular covenant breached.[27] For our purposes it is only necessary to examine the measure of damages applicable where the grantor warrants that he has conveyed all the realty described in the deed, when in fact he has not. The grantee may recover the relative value of the part to which title fails as compared with the value of the whole property, taking into consideration the peculiar advantages or disadvantages of the part not passing with reference to the whole of the land purportedly conveyed, with a maximum limit being the entire purchase price.[28]

The damages recoverable under a title insurance policy depend entirely on the provisions of the particular policy. However, barring any provisions in the policy to the contrary, the general rule is that the insurer is liable to the extent of the actual loss incurred by reason of the defect, on the theory the policy is a contract of indemnity.[29] Assume a conveyance purported to include the right of support as well as the surface, but in fact the right of support was not included. By analogy, when the buildings on the land subsided because the coal was rightfully removed by a third party, who actually owned the "third estate", the insured could recover from the insurer the cost of repairing the buildings, as necessary additional expenditures caused by a partial failure of title.

As seen from the above, the measure of damages was different, depending upon whether the person, firm or entity: (a) agreed to convey, (b) warranted, or (c) insured the title to realty. Note that section 2 imposes liability "to the same extent as if he had expressly agreed, warranted, *and* insured." [30]

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[26] Paul v. Grimm, 183 Pa. 330, 38 Atl. 1017 (1898); Rayman v. Klare, 242 Pa. 448, 89 Atl. 591 (1913); Frey v. Nakles, 380 Pa. 616, 112 A.2d 329 (1955).

[27] Covenant of seisin, Swaydis v. Rogowski, 52 Lack. Jur. 9 (1950); covenant against encumbrances, Mezza v. Beiletti, 28 West. Co. 211, *rev'd* on other grounds, 161 Pa. Super. 213, 53 A.2d 835 (1947); covenant of general warranty, Lipsie v. Dickey, 381 Pa. 600, 114 A.2d 129 (1955).

[28] Beaupland v. McKeen, 28 Pa. 124 (1857); Fuller v. Mulhollan, 40 Pa. Super. 257 (1909); Clark v. Steele, 255 Pa. 330, 99 Atl. 1001 (1917).

[29] Narbeth Bldg. & Loan Ass'n v. Bryn Mawr Trust Co., 126 Pa. Super. 74, 190 Atl. 149 (1937); Pennsylvania Laundry Co. v. Land Title & Trust Co., 74 Pa. Super. 329 (1920). In the latter case the court permitted damages for the value of the ground not conveyed plus the resulting increased cost of construction.

[30] PA. STAT. ANN. tit. 52, § 1552 (1957).

If we construe the word "and" in its ordinary meaning, as a conjunctive, it would be possible for the vendee or grantee to recover to the same extent as if his vendor or grantor had insured the realty. Thus in a situation where the vendee takes possession under an agreement of sale, the vendee would recover not only the purchase money paid and the actual expenses incurred in buying the realty, but any actual loss he might sustain by virtue of the fact he made improvements on the land prior to the purported conveyance of same.

It appears that the probable intention of the legislature was not to create a measure of damages different than that normally awarded when a breach of an agreement of sale or warranty deed occurred. The act specifically included these instruments in section 1, and the verbs used in section 2 correspond with the instruments—in an agreement of sale the *vendor agrees,* in a deed the *grantor warrants,* and in an insurance policy the *insurer insures.* Since the word "and" may be construed as a disjunctive when necessary to effectuate the intent of the legislature,[31] it is suggested that section 2 of this act should be construed as providing liability for noncompliance with section 1 to the same extent as if the person, firm, or entity had expressly agreed, warranted, *or* insured that coal and the right of support were included therein.

A quitclaim deed is a release to the grantee of all right, title, interest, claim and demand whatsoever in the lands released.[32] By its very nature it requires no covenant of title.[33] Hence, prior to this act, there was no liability on the grantor for failure to convey a part or all of the realty described in the quitclaim deed. However, a probable basis of liability would be that the grantor, by virtue of the act, expressly warranted the coal or the right of support to be included in the quitclaim deed if he failed to comply with the provisions of the act. The measure of damages would be the same as if the deed were a warranty deed.

A sheriff's deed and a treasurer's deed are within the scope of this act. In both types of deed, the whole estate of the real owner is transferred.[34] Since these officers act in a ministerial capacity when transferring an interest in land, and can pass only the prior owner's interest, the rule of caveat emptor

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[31] Abrweiler v. Board of Supervisors of Mahenska County, 226 Iowa 229, 283 N.W. 889, 892 (1939); Kassarich v. Unemployment Compensation Bd. of Review, 139 Pa. Super. 599, 602, 12 A.2d 823, 824 (1940); Burges v. Philadelphia County, 169 Pa. Super. 23, 25, 82 A.2d 561, 563 (1951).

[32] PA. STAT. ANN. tit. 21, § 7 (1909).

[33] Coleman v. Reynolds, 181 Pa. 317, 37 Atl. 543 (1897); Greek Catholic Congregation of Borough of Olyphant v. Plummer, 347 Pa. 351, 32 A.2d 299 (1943).

[34] PA. STAT. ANN. tit. 12, § 2550 (1905); Dunn v. Milanovick, 305 Pa. 401, 157 Atl. 906 (1931); Taylor v. Bailey, 323 Pa. 278, 185 Atl. 699 (1936).

has generally been applied.[35] No covenants are demandable by the grantee.[36] One Pennsylvania court expressed the opinion that a covenant voluntarily entered into by an officer of the court would not personally bind him.[37] For these reasons, prior to the enactment of this statute, the officer could not be held liable for a breach of warranty in the deed. Since this act expressly states that a person who does not comply with section 1 shall be liable "as if he had expressly . . . warranted", it seems the officer would not be liable for failure to comply with the act.

Effect of Notice of Severance

There are three basic types of notice: actual, implied, and constructive. A party has actual notice when the existence of a defect or encumbrance on the title is expressly made known to him.[38] Implied notice exists whenever a party is put on inquiry, which would lead to a knowledge of the facts by the exercise of ordinary diligence, provided the inquiry becomes a duty.[39] If a deed or encumbrance is recorded, there is constructive notice of its contents to those who are bound to search for it (purchasers, mortgagees, and creditors).[40] Constructive notice may also exist when a third party is in actual, visible, and exclusive possession under an unrecorded deed.[41]

Because the Act Requiring Notice of Coal or Support Severance in a deed places liability for noncompliance on the basis of an express warranty, the prior law in regard to notice must be examined. In accordance with prior law, even though the grantee had actual, implied, or constructive notice of the defect, he could still recover for breach of warranty, if the covenant or warranty was intended to extend to the defect.[42] The fact that the grantee or the grantor had notice of the defect was applicable only to the question of whether the warranty was intended to extend to the particular defect.[43] This prior law is still applicable.

However, the primary purpose of the Act Requiring Notice of Coal or Support Severance is to give the transferee notice of the severance of in-

[35] Wells v. Van Dyke, 106 Pa. 111 (1884); Taylor v. Bailey, 323 Pa. 278, 185 Atl. 699 (1936).
[36] Cases cited note 35 *supra.*
[37] Shontz v. Brown, 27 Pa. 123 (1856) (dictum).
[38] McCray v. Clark, 82 Pa. 457 (1877).
[39] Hottenstein v. Lerch, 104 Pa. 454 (1883); *In re* Taber Street, 26 Pa. Super. 167 (1904); Pennsylvania Range Boiler Co. v. City of Philadelphia, 344 Pa. 34, 23 A.2d 723 (1942).
[40] Pa. Stat. Ann. tit. 21, § 444 (1775); Finley v. Glenn, 303 Pa. 131, 154 Atl. 299 (1931); Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135 (1901).
[41] Smith v. Miller, 296 Pa. 340, 145 Atl. 901 (1929); Lazarus v. Lehigh & Wilkes-Barre Coal Co., 246 Pa. 178, 92 Atl. 121 (1914).
[42] Funk v. Voneida, 11 S. & R. 109 (1824); Wilson's Appeal, 109 Pa. 606 (1885); New York & Cleveland Gas Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657 (1910); Wood v. Evanitzsky, 369 Pa. 123, 85 A.2d 24 (1952) (dictum).
[43] New York & Cleveland Gas Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657 (1910).

terests. If the transferee already has *actual* knowledge, there seems to be no reason for imposing liability under the act for failure to give notice.

Effect of Other Provisions

Section 2 also provides that failure to comply with the provisions in section 1 will not in any manner convey the right of surface support, affect any waiver of surface support given by the vendee, grantee, or insured to the vendor, grantor, or insurer, or enlarge any title, interest, or estate in land.[44] When a third party actually owns the coal or the right of support, or when the grantor, vendor, or insurer excepts or reserves the same, failure to comply with this act will not convey or insure title to these estates. Failure to comply will merely give rise to a cause of action in assumpsit and will in no way affect any available defenses to the action, such as a waiver or release of damages. No deed, agreement of sale, title insurance policy or other instrument in writing executed prior to July 1, 1958, will be affected by the act.[45]

Evaluation

When evaluating this act with a view toward its specific purpose, we must ask ourselves why the purchaser did not have actual notice prior to the enactment of this statute. If the reason for his unawareness was failure of the grantor or vendor to insert language in the instrument, or failure of the purchaser to understand the language used, this statute will undoubtedly solve the problem. The grantor or vendor is now required to place either the "may not" or "does not" paragraph in the instrument when there has been a severance. The language of either paragraph gives clear indication that the coal and/or the right of surface support is not, or may not be, included, and damage may result therefrom. However, if the reason was the failure of the purchaser to read the instrument in the first instance, neither this act nor any other would solve the problem. The legislature cannot effectively force the purchaser to read the instrument. It can only hope the purchasers will be more prone to read a "prominently" placed, and "distinctively" different paragraph.

This statute is of no help in solving the already existing subsidence problems. The solution to those problems necessarily involves the owner of the surface and the coal companies, who mine the coal, not the grantor and grantee, the vendor and vendee, or the insurer and insured. This statute is

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[44] Pa. Stat. Ann. tit. 52, § 1552 (1957).
[45] Pa. Stat. Ann. tit. 52, § 1554 (1957).

a step forward in the field of clear notification of rights and liabilities with respect to the land purchased, but this is a very insignificant part of the problem in the coal regions. The Act does nothing to prevent future loss of lives, or damage to property due to mining methods which leave inadequate surface support, nor does it provide any method to compensate the victims of subsidence.

RICHARD L. MCCANDLESS.