OFFICIAL PUBLICATION

AMERICAN TITLE ASSOCIATION

TITLE NEWS

VOLUME XXXIV OCTOBER, 1955 NUMBER 10

TITLE NEWS

Official Publication of

THE AMERICAN TITLE ASSOCIATION

3608 Guardian Building—Detroit 26, Michigan

Volume XXXIV October, 1955 Number 10

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LEGAL EFFECT OF FAILURE TO PAY REAL ESTATE TRANSFER TAXES

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Following the first convention of the Pennsylvania Title Association we attended, over a quarter century ago, we remarked it was a post graduate course in the Law of Real Property. Over the years, our then expressed opinion has not been altered by subsequent occurrences at their conventions. It is still a post graduate course in the Law of Real Property.

We are privileged to carry in "Title News," by permission, the manuscripts of four Pennsylvania attorneys. They deal, in large measure, with Pennsylvania law. Yet, there are thought provoking comments (and citations) which our membership can translate into the situation in the reader's state of domicile. Too, these are usable in your training program.

Each manuscript deserves your attention—not only the attention of the recipient but also your staff, notably members of your Legal Division and "Business Risk" Committee.

—Ed.

I am a municipal corporation lawyer of twenty-five years standing. I have been in active practice in municipal corporations; I am not a tax man and I am not a title man.

I want to say something else by way of preamble, because I come here as a long-time worker for Home Rule. I am not going to give you a speech, as Bill Livengood would do, on Home Rule and Local Government, and so on, but I want to say that for twenty-five years I have worked hard for municipal government in Lower Merion Township, the Pennsylvania State Association of Townships, and I have appeared many times before local committees, government committees, and so on. I say that because I am biased and prejudiced; I am not a title man, I am not a tax man; I am a municipal corporations man, and therefore I approach this subject from an entirely different angle than that from which you view it. Maybe that will provoke heckling and discussion.

You know, every year I have to give a report to the Pennsylvania State Association of Township Commissioners, and that is a group like this. If I see anybody who is dozing or looks sleepy, then I start in and talk about more taxes, more taxing authority, more local government power—and everybody sits up and is very happy, "Gee, that fellow Forsythe is a good man,"—so if I get into that routine, I hope you will pull my coat tails, because it's the wrong meeting.

A year ago, today, at exactly this time, George Clothier, of the Philadelphia Bar, spoke to you on the City Stores Case, and the implications of that case insofar as state and local realty transfer taxes are concerned.

George spoke to me a number of times before that meeting. He said, "What are you doing in local government; how are you going to meet the City Stores Case?" and so on.

We were formulating the answers to that, and I told him what the Lower Merion model was, and he reported down here on the conditions in a very good talk, in the midst of great confusion in Pennsylvania. Some of that confusion has been dissipated just by the passage of time—so that hindsight, a year later, is better than foresight, and fore-

sight is better than "Clothier" on this, because I have got a year to tell you what happened.

George reported that 273 municipalities in Pennsylvania had realty transfer taxes. As of two days ago Pennsylvania has 336. I am not a lightning mathematician, but I figured out that that was some 20 per cent increase—and it is going up all the time.

Now, as a municipal corporation man, I dearly love stamp taxes—which should practically throw me out of this room, because I know you hate them. They mean a quarter of a million dollars a year to Lower Merion Township and the School District. We have had ours in operation for almost five years, and there is absolutely no talk about dropping it. In fact, the Board just assumes that we will get that money, and then goes on from there. I think those local taxes are going to be with you for a long time.

Now, my good friend Jimmy Schmidt called me up and asked me to comment on about six difficult questions. When Jimmy figures out a difficult question, it's difficult! And, like any lawyer, I am going to say "No" to practically all of those six questions. But I am supposed to talk here for quite a while, and I can say "No" six times in a lot less than a half an hour, so I am going to postpone my comments on those six questions until I discuss the background, chronologically, of our present situation on realty stamp taxes.

I am going to start where anyone would have to start, with the Sterling Act. I am going to bring it down to two days ago, and I am going to give it a particular slant, as you will see.

In 1932, Philadelphia, hard-pressed, financially, had to do something. The Sterling Act was passed. Now, what did the Sterling Act say? It authorized a council of any city of the First Class—and that always gives me a laugh, there being only one—to levy, assess and collect for general revenue purposes, taxes,—and here is what I want to emphasize—on six things: Persons, Transactions, Occupations, Privileges, Subjects and Personal Property, within the limits of such city.

That wording has been followed through in the later acts, the "Tax Anything Law" and the State Realty Transfer Act, and I want you to focus your attention at the beginning and try to figure out under which head a realty transfer tax should come. You can eliminate right away, Persons, Occupations, Subjects and Personal Property—and that leaves Transactions and Privileges. We all got off on the wrong foot and we taxed Transactions and now we are getting over on the "right foot" and we are taxing Privileges, although Philadelphia is having a hard time to get on the "right foot."

In 1935 the Legislature passed the Pennsylvania Documentary State Transfer Act—five cents a hundred dollars. It lasted only two years. The State missed the boat and let it die. As soon as it died, Philadelphia picked it up, in September, and they passed the Philadelphia Documentary Stamp Tax. I think it was September of 1937—which is the Act that was in effect when the City Stores case was decided. Bear in mind that those early acts tax not only deeds but also bonds. The wording was "certain documents"—not taxes on a "transfer of real estate."

Now let's get down to 1947: In the interim, between '37 and '47 I can assure you that the hard-pressed municipalities looked with envy upon stamp taxes, amusement taxes, mercantile taxes, wage taxes—and they wanted a Sterling Act for municipalities. And after a good deal of work over those years, in which I had some part, we got it in. In 1947 we got the "Tax Anything Law"—the famous Act 481. That Act had the same wording as the Sterling Act. It was patterned after it; it has the same provisions—if the State moves in, you move out—and it had the same six classifications.

I happened to be at the University of Pennsylvania shortly after Governor Duff, the then Governor, signed that bill, and he was speaking to the Institute of Local and State Government, at the graduation exercises, which, believe it or not, takes place

in September, there, I think, instead of everywhere else in June—and Governor Duff wanted to say something which he knew would be very pleasing. So he said, "Gentlemen, the taxes under 481 are the keystone of my legislative program," and if you don't think all the municipal people there, the 400 of them or so that were there, cheered wildly, you are mistaken.

Since 1947, at every session, you know, that Act has been changed and tinkered with and amended. We have followed it as closely as we could. There have been bills in to wipe it out, but, fortunately for us, perhaps not for you gentlemen, it is still on the books—and it looks as if it is going to stay there.

Now, in 1951 Pennsylvania realized that it was missing the boat, so it passed the Realty Transfer Tax Act, as you know, to become effective February 1, 1952. They wanted to get on the bandwagon, again. They put on the 1 per cent tax. Philadelphia was still struggling under the .1 of one per cent.

Now, I had something to do with the legislation at that session, as in other sessions, and some of us in the municipalities woke up, just before the session was over, to the fact that we were going to be out of luck with our Stamp Tax, because when the State moves in, we move out—as you well know. There were frantic telephone calls to Harrisburg, getting hold of the legislators—lobbying and steering committee telephone calls. The result, the Section 10 of the Act of 1951. And that was a typical lawyer's section, very short, and it said "Notwithstanding anything else herein contained in this state act nothing shall affect local stamp taxes heretofore or hereafter in effect."

That was a saving clause, and believe me, we set out to get it. It saved all our local stamp taxes.

Now that was followed, as you all know, by the Sablosky vs. Messner Case in Supreme Court 372 Pa. 47, in 1952. Some enterprising lawyers attacked the State Act as to constitutionality. I won't bore you with all of their arguments. I'll mention just a couple. One of them was that it wasn't clear as to whether or not the tax was on the transferor or on the transferee. The Pa. Supreme Court said "no difference"—"four different states tax both—that's not a good argument." Those attacking the law fussed with value, and claimed it was discriminatory, and all the rest of the usual constitutional attacks. Let's forget them a minute.

What concerned us in the municipalities was the attack on Section 10, and it was a pretty good attack. The attack went something like this: Under constitutional law if you are going to amend present existing acts, you have got to refer to those pre-existing acts in the title, and you have got to spell out in the body of the act the full terms of the amendment. Nobody can argue with that; that's the law.

They then said the '51 State Stamp Tax law amended the Sterling Act, and it amended the "Tax Anything Law" Act 481.

That had us worried. The Supreme Court of Pennsylvania, which is unpredictable, as is the Legislature, gave us a break on that one, and they said "Not a good argument." They said in the first place it would be a good argument only if the resolution were attacked. This is an attack on the State Act, itself. And also they said, while there is no severability clause in the State Act—and why they left it out, I don't know—still you could drop Section 10 out of the Act easily and it wouldn't affect the rest of the Act—which you obviously could do, because Section 10 was stuck in at the last moment by the municipalities' lobby. So, anyway, the tax was saved, and we went merrily on adding to the number of local transfer taxes.

Now let's look at Philadelphia a minute. By this time Philadelphia is a little bit concerned—they are still taxing at 1/20 of 1 per cent. So they pass an ordinance on December 9, 1952, repealing the '37 ordinance, and putting a one per cent tax on again. I think they were a little late in doing it, but, anyway, they finally got around to doing it.

Next, in this historical background is the City Stores Case. George

Clothier took that apart and put it together, last year, so I am not going to say more than this: The Supreme Court didn't do the municipalities any good in what was said and held in that case. In fact, Chief Justice Stern went out of his way to say "It is perfectly all right for you people to avoid a tax, so long as you are doing something that is legal." Well, it was bad enough to make the decision, without saying "It is wonderful to go to Upper Darby." It really did kill us when that came out. That was last year, in March. That dropped a bombshell. And in that case he said, and quite rightly, because it was the same thing that was said in Sablosky vs. Messner two years before, that these taxes or taxes on transactions are not taxes on priveleges.

Now, after March of last year, I can tell you, Montgomery County municipalities had meetings in the Bar Association Building. We had a lot of fussing and furore. In Delaware County they hired Mr. Schnader, and he told them what to do. They wouldn't even tell us what they were going to do. Delaware County said "We'll tell you, if you pay part of his fees." We didn't, but we came up with the same answer he came up with.

Now the City Stores Case brought home to all of us in municipal work the fact that in order to make one of these taxes stick you have got to have it intimately connected with the locality. Somehow you have got to make it tie in with that piece of real estate. So we bluntly met that issue—and I will refer to Lower Merion's ordinance, because I wrote it, after a great many conferences with many others—not with Mr. Schnader, or our dear friends in Delaware County. And we came up with this system:

We said, "Let's now tax privileges and not transactions." And so, we have a four-ply ordinance. First, we tax transactions, the execution and delivery of the deed, which we always did. Next we taxed the privilege of transferring title, which is the $64 point in our opinion. Next we taxed the registration of the deed, and finally we taxed the privilege of accepting possession of the land. But then we have to say "If you collect the tax on one, you don't get it on two; if you do it on two, you don't get it on three," etc. Unfortunately, we can't get 4 per cent! We think it is a better system than Philadelphia has, and I'll tell you why, later. We think we have closed up the gap, because if I live in Texas and make a will covering Pennsylvania real estate, and leave it to somebody in Oregon, it is well established law that Pennsylvania can tax the privilege of inheriting. With that obvious point to go by, we figured "We'll tax the privilege."

Now, Philadelphia has not been as forthright as the municipalities have. They didn't take hold of this thing the way we did—and I think maybe we are better in this slight respect than Philadelphia.

What has Philadelphia done? Our dear friend Mr. Wernick we know has been struggling with this—and I think he would have done better if he had followed our procedure.

I will now mention two recent cases which just came to you in the LEGAL INTELLIGENCER, on May 11th. You are probably all familiar with them. Congoleum Nairn, Inc. In re: North American Rayon Corporation, on April 22nd. I have been trying to find out whether those have been appealed, or what is going to happen. Maybe some of you know.

What were the facts in those cases?

Title to Philadelphia Real Estate—no stamp taxes. The transferrors sought to force the Commissioner of Record of Philadelphia to take the deeds—to record them. He refused to do it, and then they had to buy stamps and pay the tax under protest. They bring suit to get the refund of the tax. They couldn't get it from the Revenue Commissioner. He turned them down. They couldn't get it from the Tax Review Board. They appealed to the Court of Common Pleas. The Common Pleas of Philadelphia said "You can have your tax back." The City Solicitor of Philadelphia tried to get these cases out of the rule of the City Stores Case. No luck. In order to do that he had to

distinguish between the '37 ordinance and the '52 ordinance of Philadelphia —and he really tried to do it. He had various and sundry arguments based on little differences in the wording of the '37 and the '52 ordinances. I won't bore you with those arguments, although I could, very well, but he was straining to say, for instance, that because documents were mentioned in '37 and not in '52—because we talked about "within the city" in '52 and not in '37, that therefore this was a tax on the privilege. Judge Levinthal said "Nothing doing." Then Mr. Wernick pointed to the fact that on December 9, 1954, nine months after the City Stores Case, City Council amended the '52 ordinance in a very cute way, and said that the tax should apply, regardless of where the settlement takes place.

Judge Levinthal said that would be significant if it had been in effect when the settlement took place, but he said "City Council can't pull itself up by its own bootstraps, and City Council in '54 can't say what a City Council in '52 meant," and he is dead right on that principle.

Now, for any transfers after December 9th, 1954, in Philadelphia, we may well wonder whether or not that amendment will be successful. Judge Levinthal very cutely said, "It is significant, but I am not going to give it retroactive effect."

I haven't heard, and I asked Bill Reynolds to find out whether there has been anything definite decided by the City as to exceptions or appeal. They are obviously going to appeal. They are going to try and force that '52 ordinance into the privilege tax category, and I don't think they are going to be successful. I think Judge Levinthal's decision, which I read a number of times is really well reasoned and will probably be sustained.

I am getting to the end of my chronological history of this.

In the last Reports there was an interesting case, reargument refused, on May 4th, Powell vs. Shepard (381 Pa. 405). It was a complaint, a Mandamus against the Commissioner of Records in an effort to compel him to accept for recording a deed without payment of State and Philadelphia tax. Forget the Philadelphia tax, because it wasn't involved in the decision of the Supreme Court. The Attorney-General intervened, filed preliminary objections to the complaint. Judge MacNeille dismissed the objections but he was reversed by the Supreme Court. The theory was that the Commissioner of Records is simply an agent of the Secretary of Revenue.

We all know the Doctrine of Indispensable Party. The Plaintiff had not brought suit in Dauphin County against the Secretary of Revenue; he simply sued in Philadelphia against the Commissioner. The judgment of the Lower Court was reversed, and they said, "You can not bring suit in Philadelphia against the Commissioner of Records, because the Secretary of Revenue is an indispensable party and he isn't here. You have got to go to Harrisburg as the State Realty Transfer Act says."

Now I think it is time, Mr. Chairman, for me to tell about more and more taxes. Wake everybody up! So much for the history.

I just wanted to mention legislation a minute before I got to these questions which Jimmy submitted. He wasn't in the room, but as I said, before, I can answer all of them very quickly.

Let me say a word about legislation which is up in Harrisburg, right now. House Bill No. 36—extends the State Realty Transfer Tax Act for two years, from May 31, 1937. You know it expires next Tuesday.

When Governor Leader was Senator, he was unalterably opposed to the Stamp Tax for the State. Two days ago the Senate passed the extension for two years. It is now sitting on Governor Leader's desk. Politicians can change their mind, and I'll bet a hundred dollars to a lead nickel he signs it before next Tuesday.

Now, let me tell you a little bit about the efforts of the townships of Pennsylvania to deal, through legislation of the State, with the City Stores Case. Last June, at Bedford Springs, two months after the City Stores decision, we had our convention, as we do every year, and this

problem of dealing with the City Stores Case was one of the hot points of our discussion. We had no trouble in getting the endorsement of the Association, naturally, to an amendment to Act 481, to say, "Local municipalities can tax the transaction, no matter where it takes place, so long as the real estate is within the confines of the municipality."

Last Fall I took that bill to the local government commission, and along with all the other municipalities we presented that as strongly as we could to the local commission, which is composed of five Democrats and five Republicans. We had no trouble whatever in getting Senator Stevenson, Norman Wood and the rest of them to endorse such a bill. They said "It is what the tax-anything law was meant to give us," and said they would do it. That bill was drafted by the Local Government Commission. It hasn't been passed, but it is making good progress. Like all other legislation that I have had anything to do with, as soon as we put a nice bill in somebody tinkers with it, without our knowledge and consent. I just mention that this one has been tinkered with a little bit. I just read one the other day, and what we say is just what Philadelphia has said, that we can tax the transaction, no matter where it takes place, but I see, since I saw the bill, the words "by the Transferror" have been stuck in; "taxed by the Transferror". And then some smart guy put in this, that you can't tax a transfer of real property when the transfer is by will and testate laws. You couldn't do that, anyway, but, anyway, they put it in.

Now I am going to get to Jimmy Schmidt's questions. He is really a bird for thinking up tough questions. I can answer "No" quickly, but I am going to discuss them a bit.

The question is: "Is there any right on the part of a municipality to file a lien against the ground which is sold in event no tax is paid, or not enough tax is paid?"

If I hadn't been invited here to give this talk, I would be a little more circumspect in my answer to this question, because I have been familiar with this question since November of 1950. But since I am a guest of the Title Association, I am going to be frank. I think it is such a late date, anyway, that there is no use in my being cagey, anymore. If anybody in the last five years had called me and said, "Can you file a lien against the property for failure to pay taxes?" I would have said, "Of course, you can." I have put it in every ordinance and I expect to continue to do so.

I remember at the time I put it in, I had grave doubts because I was quite familiar with the Municipal Lien Act. Since 1923 I think I filed thousands of liens, in the twenty-five years, for Lower Merion. I am quite familiar with Act 31 which is not an in rem act; it is a tax on transactions and privileges. It doesn't give the right to tax a real estate. It is an existing tax.

Why did we put in our ordinance that we could file a lien? You know, you do that sometimes with your tongue in your cheek. I put it in thinking, "Well, the Legislature will come to our rescue." And I have been trying to get the Legislature to come to our rescue since 1950. And last Fall, at the local Government Commission I really went to bat and made the most determined effort to try to get them to give us relief on this and make my ordinance super-perfect and holy—and I ran into all kinds of trouble. And I will mention a little about that.

I said to them that the Pennsylvania State Association of Townships has endorsed this amendment for four years and we are getting nowhere, and I suggested that we amend the Lien Act of 1923 and say that not only can we file liens for taxes and for curbing and for sewer and highway and for weeds, but we can file a lien for unpaid realty transfer taxes. I really brought down the house, because Burt Neiden, who is the able Counsel for the Local Government Commission, held forth at great length and said, "Didn't you know it was an excise tax?" and that there was no room for it; it didn't fit the pattern of the Lien Act?

I put up an argument, but didn't

get far with it, because I knew he was right. By definition the Lien Act refers to property, and property is real estate, and the Lien Act is an act in rem—and I can sit and talk all night but can't change the pattern of the Lien Act of 1923.

So then I was thrown back to Act 481 and I said, "How about the right given us to file liens under Act 481?"

"Nothing doing—the right to file a lien doesn't fit the pattern of that Act, either." Which is quite right. It doesn't, because if you are going to file a lien, you ought to do it under the Act of '23. It shouldn't be in the Act of '47. You lawyers all know it. It was a nice try, anyway.

So, Bert said, "We will not sponsor that, but I may be able to get a law through, or a bill into the Legislature, which will say that the local recorders of deeds cannot take for recording any deed that doesn't have the stamps of a municipality that has a stamp tax ordinance in effect."

Well, I thought that was coming out pretty well, but I haven't seen that Act. Maybe it has been introduced. There have been some 1500 or 1700, and I called Bert two days ago to needle him about this act. He sort of promised, but I think somehow or other we are not getting too far in that.

Under the State and Philadelphia Act, as you know, the Recorder is ordered not to take any deed unless the stamps are on it. In the other municipalities we don't have that right. So we are really behind the 8-ball there, but I would love to see such an act, ordering the Recorder of Deeds of Montgomery County not to take a deed unless it has our stamp.

We, needless to say, continue our efforts. Now, I hope the Philadelphia Inquirer doesn't carry a great headline saying "Forsythe says we don't have the right to file a lien," so I think that I have answered the question about as far as I want to go. I would like to be able to say "Yes" —and if you call me on the 'phone next week, I will say "Yes."

Now, Jimmy figured out three other questions, which I am going to answer with a typical lawyer's answer, "No"—and you will get the same answer for all of them.

He was afraid that he hadn't covered the whole field, so he said, "If you don't have the stamps on, or the right amount of stamps on, is title marketable? Is a subsequent owner or mortgagee affected?" Which I think are practically interchangeable. And then he said, "Is the deed accepted in evidence?"

Well, that's a three-barreled question. I am going to answer it by saying to all three of them that in my humble opinion the title is marketable without the stamps or without the right amount in the municipalities other than Philadelphia and the State.

Now, we did a little checking on this problem and we didn't find too much. There is law on the books as to the Federal Stamp Law. Apparently, though, under an old Act of Congress, 1898, the law forbade the admission of evidence into the record of unstamped deeds. That doesn't make any sense to me, because stamp taxes are enacted for the purpose of revenue. Unless the Legislature says that an unstamped deed can't go into evidence I don't think you should pay any attention to it, in the absence of a provision in the Act which says the Recorder cannot record it unless it is stamped. I am talking about all the municipalities outside of Philadelphia in the State. That law has been changed, as to Federal stamps. And now, following a new law of 1914 it is perfectly clear under the decision of Cole vs. Ralph (252 U.S. 286) (1919) that you can introduce deeds in evidence without the Federal stamps. I have a long quotation here from Mr. Justice van Devanter, in which he compares the wording of the 1898 law of Congress and the 1914 law of Congress and he says that it is perfectly clear that Congress changed its mind and that now an unstamped deed can be introduced into evidence and it is valid. Now, of course, that only goes for Federal stamps, but my answer is, on state, and local stamps, particularly, there is nothing in the Legislation which indicates that the

validity would be affected—and until we get something in legislation and decisions I don't think that the title is affected.

Now, under these ordinances of ours we can sue for that money in assumpsit. We can impose heavy penalties. We can put you in jail for thirty days. I don't think that the deed is rendered invalid. So that is another of Jimmy's questions.

Now, he asked about ground rents, and I was all prepared to comment in very learned style on ground rents. But at lunch time, today, my colleague and partner, and "former" good friend—at least he was until I pass all these questions I am going to pass over to him—told me about a ruling on ground rents—so I am skipping that.

I forgot to tell you one thing that I meant to, in connection with liens. I am going to be frank and go "all hog."

Periodically, over the past four years I have asked Clarence Godshall and Abe Hallman at Norristown whether anybody ever filed a lien for stamp tax. They had never heard of it. Two weeks ago I talked to the members of all of the townships in Montgomery County. There were many lawyers there. I talked about this exact point, among others, and I said, "Are there any solicitors here who have filed liens for unpaid stamp taxes?" Not a one had done it. And Sam High got up and said, "I'm afraid to." Maybe you can draw more conclusions from that.

Incidentally, we don't mind suing in Assumpsit for those things, but that is about as far as we have gone. But next Monday, I am going to tell you we can file a lien.

Jimmy Schmidt ended up his letter by saying, "Would it be possible for various townships and school districts to establish a uniform system of regulations applying to the payment of the tax? And a uniform system of tax certification?"

I think he was up in the skies when he said this, but, anyway, it is a nice idea, and he concluded the letter by saying, "Speaking of uniformity, could the title companies cooperate with the various townships in establishing a uniform system of deed registration?"

Well, Jimmy, that was a nice try! On our Lower Merion Board of Commissioners of fourteen men, we labored far into the night to get agreement of fourteen men on a lot easier things than that.

As you know, there are 70 or 71 First-Class Townships in Pennsylvania, there are over 900 Boroughs and over 1600 Second Class Townships, and 2500 School Districts. Now, it would take a good man to get them all together.

I do think that the idea is excellent. I think there should be a uniform set of regulations.

Now let me tell you what we did in Lower Merion, on the stamps. Back in 1950 some of us worked with Warren Light of the Commonwealth Title Company, Philadelphia, and we worked out our set of stamp tax regulations, and the ordinance. It was only one and a half pages long, and I remember working late with our members of the Commission; I argued for one tax. "Nothing doing," said the boys in '50. "Two taxes." So we put in two taxes, and I struggled with that for two years. About a year ago, I said to the Board. "We have got to cut this out. The State has come through and we are the only one that is taxing twice." They went along with me.

In the beginning, they said, "What do you think we are passing this for? We are passing it to get money—we are getting every dime we can." So, we have receded from that, and when the State regulations came out, I think in the Spring of '52, I went over them as every other solicitor did, and rewrote our ordinance and rewrote our regulations, and I patterned Lower Merion's ordinance and regulations after the State, borrowing a bit from Philadelphia, too. I think most municipalities have done that, because it is perfectly ridiculous to me that you fellows should have to fuss with 336 different sets of regulations. It is driving you crazy; you are all getting ulcers. So I don't think you will be having to

do that because we are now following along the line of the State regulations as a model, plus Philadelphia, which are very close. But some are not, as you know.

The only way I think you can approach this problem is through the STATE associations. There is a very active State association—as you know, of First Class Townships. I probably have as much to do with the legislation of that association, and have, through the years, as anybody. There is a very active association of Second Class Townships. "Cappy" Thompson, of Upper Darby, is Executive Secretary. He is an easy man to work with, once you convince him. The Borough Association, with Mr. Crosswaite, is another. And Mr. Greenwood, of the Third Class Cities. I don't know who you work with in the School Districts, but, anyway, the way to get a uniform set of regulations is the way they do with the NIL, in the sales tax, where they get up a uniform set, as a result of work of a committee with these various associations, and then we will all adopt them. I think it is an excellent idea, not only on stamps, but on the registration.

I want to conclude my remarks by pledging my full cooperation for uniformity, and also the cooperation of the First Class Township Association. We meet next week at Buck Hill Falls, in our Annual Conference, and I shall certainly report to that meeting what happened at this meeting, today, and the desire for uniformity in these two fields. And if there is anything I can do to further that, I will be most happy to do it.

Now, gentlemen, you have been more than patient—you have listened to a biased and prejudiced municipal corporation lawyer. I am now going to ask my **former** friend,—I am passing the tough ones to Bill Reynolds—to say a few words about ground rents.

Discussion

MR. WILLIAM REYNOLDS: Jim Schmidt asked one question about how ground rents should be handled. I suppose ground rents are most common in Philadelphia. I don't know whether they occur outside of Philadelphia or not. I don't know whether in title business you run into them outside of Philadelphia.

Generally the regulations that have come down have covered the question of the assignment or extinguishment of ground rents, themselves. The Philadelphia regulations originally went further than that, and treated ground rents as mortgages, so that on a transfer of land the ground rent was considered a lien or encumbrance and the holder of the lien was taxed.

I talked to Bob Benham in the Recorders' office in Philadelphia about it, and he tells me a ruling has now been made to the effect that the tax in Philadelphia is only levied on the amount of the actual consideration that passes, so that the City has backed down and once again has recognized that a ground rent is an interest in real estate. Also, on extinguishment of the ground rent, or assignment, the tax is based on the amount of the consideration that passes.

Now, that leaves open a very nice loop-hole, namely, if you have one of this type of ground rents with an amortizing feature, apparently the greater portion of the ground rent payments can escape taxes in that the tax on assignment is on the actual amount of the unpaid ground rent and the tax on the extinguishment is on the amount paid at time of extinguishment, which may be the last payment in the series of payments.

Generally, I think that is the status with respect to ground rents—at least with respect to Philadelphia—and I think the State is on the same basis.

Does that answer your question?

MR. SCHMIDT: Thank you, very much.

PRESIDENT BURLINGAME: There are a couple of things I would like to draw to your attention, that is, in the title business we don't get ulcers; we give them. Secondly, my mind goes back to the time the Committee on Uniformity of Practice met with certain solicitors of the townships. I think they were probably the townships in Delaware County,—with

the hope that we could arrive at a uniform method of collection, to the end that we wanted to have someone in the courthouse in Media to be responsible for the collection of the tax on behalf of all the municipalities that had then imposed the tax, and I readily understand the problem of uniformity, because there was only one question raised by those solicitors —that was which politician is going to appoint the man to the job who collects the tax?

There must be some questions on both John's and Bill's talks. If you have a question will you please rise and give your name for the Reporter?

MR. HERMAN WASHER: I have a question. Title companies have been raising the question as to the validity of the deed, where a deed has gone on record and doesn't show the township tax has been paid. If this tax is only an excise tax and suit can be had only against the grantor, why raise the question, when they can not attack the title?

MR. FORSYTHE: I guess that is directed to me. I think the answer to that is a laudable superabundance of caution on the part of title companies.

I think I have answered it in saying that outside of the state and Philadelphia, I don't think the title is affected. I can't cite any Pennsylvania case but, after all, I am supposed to give an opinion that is **my** opinion. But if I were a title man I think that I would be cautious and I would hold some money in escrow, or something of that nature.

MR. WASHER: I don't think that answers the question at all.

MR. FORSYTHE: If you want a better answer, I will give you my "Answer-man."

PRESIDENT BURLINGAME: I think, Herman, if you will stop in the middle of John's answer you will find the question was answered. Of course, John occupies a very peculiar position. Here he is speaking to us in the title business. At the same time he represents a municipality and is Chairman of the Legislative Committee of the Township Association.

MR. WASHER: This may not be the proper place for it.

PRESIDENT BURLINGAME: I think that he answered your question pretty much in the major portion of his talk.

Getting back to John, when we have a problem on municipal corporations—now I send my girl over to get '55 "Forsythe", instead of '53 Purdon.

Are there any other questions, particularly on the Levinthal case?

MR. F. M. McDONOUGH (West Jersey Title & Guaranty Company): I would like to direct a question to Mr. Forsythe. As I understand it, you said the tax, or rather the liability for the stamp tax, should not prevent or enable the county clerk to refuse the recording of the instrument anywhere except as it affects the State of Pennsylvania, and the City of Philadelphia. Aren't they refusing them in other counties?

MR. FORSYTHE: I think they are in some counties, yes, by comity or arrangement, but I don't know of anything in the law or of anything that would require that in the law. I do think they cooperate in some counties, but they don't have to—that's my understanding.

PRESIDENT BURLINGAME: It reminds me, I was recently Chairman of the Nominating Committee for the Parent-Teachers organization and was presented with the slate by the Head Master of the School, and someone said, after we had proposed the slate and the nominations were closed, "Aren't there ever any nominations from the floor?" And the answer was, "Not if you want your child to graduate."

The same in the counties—it depends on the man in the courthouse, if he wants his job, he will cooperate.

A question was posed in our shop: "If this is a tax on a privilege, and we have a purchaser under agreement of sale, who assigns the agreement of sale. Is there a double tax? Has a privilege been created there?

MR. FORSYTHE: There is a Supreme Court case and I hope I am

answering this precisely, which says that an agreement or agreements of sale are definitely outside the stamp tax ordinance, or ordinances and resolutions. Many ordinances say they don't cover agreements of sale. An agreement of sale only provides for the future conveyance, and it is the delivery of the deed and the conveyance that is taxed.

You can come back at me and say that as soon as the agreement of sale is executed, the purchaser is equitable owner. I will say "That is true," but under the decisions on these taxes the tax does definitely not apply until there is a conveyance. It does not apply to the agreement.

I read a Supreme Court case on that.

PRESIDENT BURLINGAME: It was Smith vs. Messner.

MR. FAIRFAX LEARY: In the case of Smith vs. Messner isn't it true that there was an assignment of an agreement of sale to the third party, and the facts were that there was an attempt to impose a tax on the agreement of sale and also on the deed, and that half of the Supreme Court's opinion was devoted to the fact that there is an implication against double taxation on the same transaction. Whereas, if the assignment of an agreement of sale is for the purpose of transferring the interest or privilege to a third person thereto at a higher consideration than mentioned in the first agreement of sale, might not a different problem be posed?

MR. FORSYTHE: I certainly agree with you on your statement of the Smith-Messner case—it is definitely correct because it was an attempt to tax an agreement of sale and not an assignment. I can see the logic of the argument. I don't know what the answer is. There isn't any case on that that I know of, so I can't say much about it.

MR. REYNOLDS: There is no case on that. I think there is a practical answer to it. It is a matter of enforcing the collection of the tax on an agreement of sale. But how is the township ever going to know about it? All the township ever sees is a deed—or the State, for that matter. The agreement is never part of the transaction, as far as the township goes.

MEMBER: The title companies sometimes see them.

PRESIDENT BURLINGAME: Ofttimes the title company sees too much.

MR. JAMES M. HART (The Title Insurance Corporation of Pennsylvania): Mr. Forsythe, inasmuch as the tax is on the privilege, would this transfer tax be entitled to any kind of priority of distribution of a fund in a Sheriff's Sale where the stamps are required on Sheriff's deed?

MR. FORSYTHE: That is one of the tough ones that I am going to get my "Answer-man" to say. I don't know the answer to that, whether it would be entitled to priority.

MR. REYNOLDS: Tax collected out of the purchaser, you mean?

MR. HART: Out of the grantor.

MR. REYNOLDS: The Sheriff usually requires the buyer to buy the stamps and put them on the deed.

MR. HART: If the tax is imposed on the buyer; the Sheriff's office is requiring the stamps to be bought at the buyer's expense. If a tax is imposed on the seller the Sheriff's office is saying that is a matter for distribution and the amount of money necessary to buy stamps to place on the deed should come out of the funds in the hands of the Sheriff. I can't see the rhyme or reason for it myself, but since we are on the subject this afternoon, I wanted to see what you thought about it.

MR. REYNOLDS: All I know is the Philadelphia practice. I think somebody else may know.

PRESIDENT BURLINGAME: Maybe we can answer that in a practical manner. Is that in Delaware County?

MR. HART: Yes.

PRESIDENT BURLINGAME: No matter what the law is, in Delaware County they have procedures which are unlike anything else in the United States, particularly where it comes to the collection of taxes.

MR. HART: The tax is being paid, but I wondered if there is any right or justification for it.

MR. WASHER: All I know is the practice in Philadelphia, that the Sheriff will not make it part of his distribution, but will insist that the stamps be on the deed, which makes it that the Sheriff's vendee is the party that pays the tax.

MEMBER: They make a nice distinction in Philadelphia.

MR. SCHMIDT: Certainly the Municipal Claims Act of '23 provides that taxes on property are paid for from distribution and from Mr. Forsythe's comments this is not a tax on property.

PRESIDENT BURLINGAME: There is a man who practices in Brooklyn who once said to me, "You don't fight City Hall."

I would like to pose a question, and that is this: If this is possibly a tax on a transfer, not a tax on a privilege, Mr. Forsythe, are transfers of real estate in Haverford Township made in Lower Merion taxable by Lower Merion?

MR. FORSYTHE: The real estate of course is in Haverford Township and settlement takes place in Lower Merion, I would think they are not taxable in Lower Merion. I don't know whether that is logical or not, but I go back to the question: Where is the real estate located? It was the intention of Act 481 to let the municipality tax transfers of real estate within its boundaries. I would not take that extra step. I don't think Haverford Township real estate could be taxed because the settlement was in Lower Merion, but I admit you get in to all kinds of nice questions when you put all your strength and enthusiasm on the privilege.

INSURANCE AGAINST LOSS BY REASON OF VIOLATION OF BUILDING RESTRICTIONS OR DEVIATION FROM RECORDED PLANS

WESLEY H. CALDWELL, ESQ.

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WESLEY H. CALDWELL, ESQ.: Mr. President, Members of the Association: I have nothing to do with taxes—I don't have the enthusiasm that Mr. Forsythe has for them. They helped to bring on the French Revolution,—so I am not going to talk about taxes. As I told Mr. Twist, "You may not learn anything, but you will hear something."

Perhaps I am here under some sort of a misapprehension or I am laboring under a false misrepresentation. I didn't understand that I was to discuss the Practical Aspects of Title Insurance in Connection with Building Restrictions. Jimmy is at fault, again. Jimmy said would I talk first on something about plan of lots and what happens when the man lays out the estate, and so on? And then, as a sort of encore, would I talk about restrictions. That is sort of like the tail wagging the dog.

And then I read in '52 that he tried that on another fellow from Up-State —he was smarter than I—he said "Either subject would take longer than the time allotted to me," so he ducked the former and he wrote on Restrictions. So I am going to be fairly sketchy and maybe you might get a hint or two about some of these subjects.

WHAT CONSEQUENCES RESULT FROM THE SUBDIVISION BY PLAN OF A TRACT OF LAND ON WHICH STREETS AND OTHER FACILITIES ARE LAID OUT AND LOTS SOLD ACCORDING TO PLAN? ARE THERE ANY PRACTICAL SUGGESTIONS WHICH MAY BE HELPFUL TO THE DEVELOPER?

The general rule of law is that when the owner subdivides his land into lots according to a plan and sells lots by reference to the plan, there is an implied grant or covenant to the purchasers that the streets shall be forever open to the public and are dedicated to public use. The dedication includes the paving, sewers and other improvements shown on the plan. You will note that this dedication is not limited to the purchasers but extends to the public.

It is not necessary that the plan be recorded on the public records. WOODWARD v. PITTSBURGH, 194 Pa. 193. Reference to the plan in the deeds of conveyance is sufficient and the plan need not be signed or sealed. O'DONNELL v. PITTSBURGH, 234 Pa. 401. The dedication takes effect from the date of the first conveyance from the tract. FEREDAY v. MANADICK, 172 Pa. 535. The dedication is irrevocable, GARVEY v. HARBISON-WALKER, 213 Pa. 177. This rule is applicable even if the City Surveyor makes the plan for the owner by adopting the City Plan. DOBSON v. HOHENADEL, 148 Pa. 367.

The holder of a mortgage created by the owner before the plan or subdivision is made will also be bound by the plan later prepared and the dedication of the streets if the mortgagee releases any of the lots by description which refer to the plan. FEREDAY v. MANKADICK. In one case the court held where there was an area on a plan marked reservation and the grantor stated it was to be used in common by the owners of the property on the plan for recreational and park purposes and it had been so used, that it was a dedica-

tion to public use. GREENWOOD HILL ASSN. v. WOODLAWN FARMS, 62 Dauph. 276.

We can now inquire whether the rights obtained by the public and the purchasers of the individual lots can be lost, and if so, how? The Act of May 9, 1889, P. L. 173 (36 P. S. 1961) provides: "Any street, lane or alley, laid out by any person or persons in any village or town plot or plan of lots, on lands owned by such person or persons in case the same has not been opened to, or used by, the public for twenty-one years next after laying out of the same, shall be and have no force and effect and shall not be opened, without the consent of the owner or owners of the land on which the same has been, or shall be, laid out." You will note that this act applies to a village or town plot or plan of lots.

In BARNES v. R. R. CO. 27 Pa. Super. 84, the owner conveyed three adjoining lots on the West side of Second Street with a total frontage of eighty feet. They were described in the conveyances later made to the plaintiff in that case as one-hundred and twenty-one feet nine inches to Philip Street Thirty feet Wide, and bounded by Philip Street. Philip Street belonged to the owner who originally conveyed the three adjoining lots but it was not opened and had not been opened or plotted as a street on the City Plan. The Plaintiff's contention was that the act above mentioned applied and the land lost its character as a street and he became owner of the middle of the same because of the vacation by force of the act above mentioned. The court held that none of the lots or the adjoining land described as Philip Street had been laid out in a town plot or plan within the terms or the act.

The Statute, said the Court, was designed for the benefit of the land owner in such cases to relieve his land from the servitude arising from the dedication to public use that had remained unaccepted for twenty-one years, and was not to enable the owners of abutting lots to seize the interest of the owner of an unopened street. The court further said that if the Statute was construed as automatically operating to vacate streets under such circumstances it would be taking property without due process of law and the Statute gave no indication of such effect in its title. The Statute was before the Supreme Court in the recent case of RAHN v. HESS, 378 Pa. 264, 106 A2 461. In that case the owner of a large tract in Montgomery County in 1926 divided it into a plan of lots known as "Far View Farms" and sold some of the lots according to the plan by lot and block number. The decision does not indicate whether the plan was recorded. Streets were laid out through the tract and the lots sold were described as extending to the sides of the streets and not to the centers. The plaintiffs acquired title to some of the lots on one of the streets and the defendants acquired title to the other lots on both sides of the same street where it intersected with another street. The streets were never physically opened or used by the public for twenty-one years. In 1952 the defendants put barriers across both streets to block the plaintiffs from entrance and exit to their lots and they refused to move the barriers on plaintiff's demands. Plaintiffs brought an action for an injunction to restrain the maintenance of the barriers and from interference from their use of the streets and the **use of the public generally to the streets.** The lower court enjoined the maintenance of the barriers so far as the plaintiffs were concerned but held that the rights of the public had been lost. Both parties appealed. The Supreme Court affirmed. There were three questions involved:—

1. Did the public generally lose its right to the use of the streets?

2. Did the plaintiffs lose their rights to the use of the streets?

3. Did the plaintiffs have any title to the bed of the street on which their lots abutted?

The Supreme Court referred to the general rule that the conveyance, according to the plan, was a public dedication of the streets and said that prior to the Act of 1889 there was no time limit upon which the public authorities could accept dedica-

tion but that Act fixed a time limit and if the offer to dedicate is not accepted within twenty-one years after it is made, the public rights to the street are lost. The Act is actually a Statute of Limitation which applies to all who seek to assert public character to the streets whether they are municipal authorities or lot owners, and the purpose of the Act was to relieve the land from the easements. It decided that the public had lost all right to the streets.

In discussing the plaintiffs' contention that the sub-divider by putting the streets on the plan merely made an offer to dedicate, and at the end of twenty-one years he still has the option to make another offer to dedicate or to retain a fee for himself, the court said the wording of the Act was clear that the streets could not be opened after twenty-one years without the consent of the owner of the land on which the street was laid out.

The question was then . . . Who was the owner, the original sub-divider or the purchaser of the lots? The court held that the Act intended the lot purchasers and said that under the rule of PAUL v. CARVER, 26 Pa. 223, the abutting lot owners acquired title to the middle of the street. In that old case, you will remember, the Supreme Court held that the owner who laid out the streets or alleys and sold property abutting on the same received full consideration for them in the increased value of the lot, and if the streets were vacated it would be of no use to the original owner except to annoy the abutting lot owners and an intention would be found that title passed to the center of the street subject to the right of the public passage. The court compared the street when called for as a boundary as a single line, calling it the "thread of the road" similar to the thread of a creek or stream and said it was a monument or abuttal. The Supreme Court in the Rahn case held that since there was no reservation or restriction respecting the streets by the original subdividers the lot purchasers took to the middle of the street and there was nothing in the Act of 1889 of any intention to change the law in that respect. At that point we may note that the subdivider may, by reservation on the plan, retain title to the street bed. DOBSON v. HOHENADEL, 148 Pa. 367. In discussing the question whether the Act of 1889 terminated the private easements of the lot owners as well as the public right, the Supreme Court said that the precise question had never been passed on previously. It held that there was a distinction between public and private rights and that the latter were private contractural rights resulting as a legal consequence from the implied covenants in the deed and were not affected by the failure of the Municipality to accept the dedication and not dependent upon such action.

The decision is in accordance with the common sense and the law of real property. The Act of 1889 did not purport to affect private easements at all. The lot purchasers obtained those easements when they bought according to the plan, and mere nonuse would not extinguish them. NICHELS v. HAND BAND, 52 Pa. Super. 145; DULANEY v. BISHOFF, 165 Pa. Super. 247.

Are there any practical suggestions that can be made:

1. In the first place the sub-divider can note on the plan that he retains title to the bed of the streets. When the public loses its right by failure to accept the dedication, title remains in the owner although subject to the easement of the lot owners, but if the Municipality later wants to open the streets then he has the right to damages.

2. If the sub-divider does not wish to develop the entire tract at one time, or it is advisable to develop it in sections, he should not lay out the plans on the entire tract but lay it out in sections as he develops it. In that way he can retain part for later development without subjecting it to easements in favor of the purchasers from the first tract.

3. The First Class Township Code and the Borough Codes of 1947, P.L. 362 and 1621, 53 P.S. 19092-3066 and

53 P.S. 13731, gives the Townships and Boroughs the right to adopt Ordinances regulating land sub-divisions. The purpose of this grant by the Legislature is, as stated in the Codes, to insure sites suitable for building and human habitation, harmonious development, coordination of streets, etc., with the Township Plan, open spaces for traffic, recreation, light and air, distribution of population, health, safety, morals and general welfare. Many of the Townships and Boroughs have passed Ordinances pursuant to the legislative grant of authority. In both Codes the subdivider is required to submit his plan to the engineers or the appropriate Committee for approval and have it approved. When it is approved it must be recorded in thirty days. There is a penalty for sub-dividing without filing a plan and having it approved. This is a misdemeanor which carries two years imprisonment or a $2000 fine, or both. The Code permits, however, the subdivider to note on the plan that the streets, parks, sewers and other improvements are not offered for dedication and in that case the Municipality, if it wants to acquire them, has to resort to condemnation and pay for them. LUKENS v. UPPER MORELAND TOWNSHIP, 82 D & C 308. The streets, curbing, paving, etc. may note on the plan be offered for dedication and until they are so offered they are deemed private streets. The Borough and the Township if the plan contains provision for paving, curbing, sewer, etc. may require the owner to file a Guaranty Bond that these improvements will be made and paid. In the LUKENS case the court required the Commissioners to approve the plan for sub-division with a notation of reservation on it where it in all other respects met the requirements of the Ordinance. The sub-divider can take advantage of the provisions of the Act and protect his rights to the various facilities and prevent them from becoming public property. However, I do not believe that the notation on the plan that they are not offered for dedication will affect the rights of the private lot owners under the covenant in the deed where the lots are sold according to the plan.

4. I see nothing to prevent the developer, however, from sub-dividing his lots according to a plan and describe the lots in the deeds to the purchasers according to a survey containing no reference to the plan, and if the plan has not been recorded the rule which we have just discussed respecting the private easements and public dedication would not apply. If the sub-divider, however, in offering the lots for sale sold them according to a plan which he showed to the purchasers a very interesting question will arise whether even though the deed did not refer to the plan the general rule applies. The purchaser of course of such a lot would want some guarantee from the seller that street improvements would be made and the street would be physically opened.

Conditions and Covenants Respecting Buildings and the Use (Restrictions) Effect of Breach

When conditions are expressed in the deed to an estate they are annexed to it and qualify it. Upon breach the estate may be forfeited by the Grantor, his heirs or Assigns, since they are the reversioners, exercising their right of entry which is enforced by an action in ejectment. SOPER v. GUERNSEY, 71 Pa. 219. They usually begin with such words as "so that," "provided that if," "upon pain of forfeiture of," etc. Determinable estates such as qualified or base fees also are terminated when the property is no longer used for the specific purpose expressed in the grant and a reversion may be declared.

They differ from limitations which terminate the estate without any further action and which are usually expressed in such words as "so long as," "during," "while," etc. and when the estate expires by limitation the next in remainder is vested with the estate.

A covenant on the other hand is a contact of a solemn nature, the breach of which gives the right only to an action for damages or for specific performance.

It is sometimes difficult to distinguish between a condition and covenant. If the clause reads "Provided always and it is hereby agreed" it is both a covenant and a condition, and if a forfeiture and right of entry is reserved in the deed it is clearly a condition.

The courts lean against construing language as a condition because of the forfeiture attendant on a breach. STANTON v. PITTSBURGH, 257 Pa. 361. A convenantor is not liable in damages for a breach if it occurs after he has parted with title. GOLDBERG v. NICOLA, 319 Ap. 189. Covenants which are purely such, which relate to the structures which can be erected on land and the use of the same (commonly called Building Restrictions) run with the land (they concern or touch the thing demised, SPENCER'S CASE 5 Coke.) and bind all grantees as well as the original covenantor. Upon breach the remedies are an action for damages or specific performance but if they provide for a forfeiture, the breach will give the right in the reversioner to determine the estate. If, however, there is another remedy available beside forfeiture, the court will usually decline to declare a forfeiture.

The right of entry for a breach to declare a forfeiture is barred after five years. ACT of April 22, 1865, P.L. 532, 12 P.S.

Covenants which are intended only to benefit the covenantee and not add benefits to or burdens on the land are only personal and do not run with the land. DE SANNO v. EARLE, 273 Pa. 265.

Forfeiture of Title for Breach of Condition of Determinable Fees

The courts endeavor to avoid forfeitures for breach. See Fidelity Ins. Tr. Co. v. Fridenberg, 175 Pa. 500. It will be interesting to look at a few decisions in which forfeitures were sought.

In McKISSICK v. PICKLE, 16 Pa. 140, the grant was "provided always nevertheless" if the property should be converted into any other use than a school house, meeting house, etc. it shall revert. The grant was to trustees who permitted a poor widow with her sick husband and children to use it for their home but no part was altered or changed. The lower court held the condition violated but the Supreme Court reversed holding the case involved a "condition of fact" not of law and there was no permanent misuser.

In ABEL v. GIRARD TRUST CO., Pa. 34, 73 A2 682, the grant was to a corporation for charitable purposes to be used as a public park. There was no express provision for forfeiture. The court said the expression of the purpose for which it was to be used, did not debase the fee and it was a grant to charitable use and could not be forfeited. The Supreme Court in GRAYBILL v. MANHEIM SCHOOL DISTRICT, 175 Pa. Super. 415, 106 A2 629, held a conveyance for a school purpose was not a base fee but a grant in fee simple, which was not subject to forfeiture.

In STANTON v. PITTSBURGH, 257 Pa. 361, land was conveyed to the City on the express condition that it would be used only for a public market. It was used as a playground and the City contributed funds for such use. The court found that this was without the knowledge of City Council and refused to declare a forfeiture.

In clear cases, however, forfeiture will be declared:

In SLEGEL v. HERBINE, 148 Pa. 236, the grant was to County Commissioners for the specified purpose and "no other" of an eight foot strip of land adjoining the County jail to be kept open as yard unbuilt on forever to prevent prisoners from escaping over the wall to a contigious building and the property was to revert when the specified use ceased. The jail was sold and built in another location. The court held that it was a base fee and that the property reverted.

Similarly forfeiture was declared in SCHNYDER v. ORR, 149 Pa. 320, where the grant was on condition that vendee pay a judgment subject to which the property was conveyed and in RINGROSE v. RINGROSE,

170 Pa. 593 where the grant was upon condition that the grantee support the grantor.

Breach of Covenants Respecting Buildings and Their Use (Restrictions)

This gives rise to an action for damages or specific performance, the latter being the usual proceeding. The title is not forfeit. A judgment for damages may be uncollectible while a decree for specific performance if not observed puts the defendant in contempt of court. There are generally two kinds of restrictions (1) Those respecting the use to which the property may be put; and (2) Those respecting the kind of building which may be erected. Restrictions, the Supreme Court has said, are violated only if they are plainly disregarded and they are redressed as contractural obligations regardless of the effect of the violation on others than the parties bound by the covenant.

Whether they are use restrictions or building restrictions depends entirely on their wording and in some cases the line of difference is very narrow. If the covenant expresses the intent that it is annexed to the purpose to which the permitted structure is restricted it is a use restriction. A few of the decided cases will illustrate the difference in the two types of restrictions.

The recent case of KAUFFMAN v. DISHLER, 380 Pa. 63, 110 A2 389, illustrates the distinction. In that case the restriction was "not more than one house, same to be detached or semi-detached and private garage to be used in connection therewith shall be erected on each lot with a frontage of at least 24 feet". The plaintiffs were the owners from the builder of fourteen semi-detached two story houses on Thouron Avenue between Gorgas Lane and Vernon Road. The two end houses of the row, one at the corner of Thouron Avenue and the other at the corner of Vernon Road, were the properties involved in this suit. They were constructed so as to have three apartments, one in the basement and one on each of the upper two floors. Plaintiffs sought to enjoin the completion of these houses.

The lower court granted the injunction but the Supreme Court reversed. It said that a restriction against the erection of a building other than a house or dwelling house is a restriction only respecting the type of construction and not against its subsequent use and that if it is intended to cover the use it must be plainly expressed and not left to implication. It held that the three story apartment was a house as much as the other houses in the block even though occupied by two or three families and conformed to the popular notion of a house. The court said it was not like a large apartment building which in the popular sense is never regarded as a house. The court said the difference between a large apartment building and a three family apartment house is but one of degree but most legal problems are problems of degree rather than of kind.

In conclusion the court said the plaintiffs were endeavoring to make the restriction read as if it said not more than one (single family) house could be erected on each lot which would be a use restriction and if intended should have been expressed. It said finally that by the word "one house" was meant merely "one edifice."

In the course of the opinion the court referred to HOFFMAN v. PARKER, 239 Pa. 398, in which the restriction limited buildings to dwellings but which the court held did not restrict the use of the basement for a grocery store as the restriction was not against the use but the erection of the building and since the building complied with the restriction there was no violation because of the subsequent use as a store.

The lower court had relied on BENNETT v. LANE HOMES, INC., 369 Pa. 509, 87 A2 273. The same restriction was involved in that case and the Supreme Court distinguished that case from KAUFFMAN v. DISHLER on the ground that the issue there was a building restriction. The defendant in that case proposed to erect a 34 apartment building on a

lot 151 feet x 160 feet. The court held that this would violate the restriction that not more than one house could be erected on each lot of 24 feet in front and said the building would cover 9 lots on one street and 6 on the other. It said the issue was whether an apartment house of that size was a house contemplated by the restrictions. Normally, said the court, a house or dwelling house restriction does not forbid an apartment house but the restrictions intended to limit the house to a house for the personal, private, exclusive occupancy of the owner, viz:—a private home as indicated by the provision for the construction of a private garage, one house on each 24 foot lot, and the restriction of a $4000. minimum cost. This, said the court, was so out of proportion to the cost of a large apartment building as to dispel any idea such a building was contemplated. The court finally said the restriction meant what it said, one house on each lot.

GERSTELL v. KNIGHT, 345 Pa. 83, 26 A2 329, was another case involving use restrictions. It was a 4-3 decision reversing the lower court which refused an injunction. It was a very close case and it is difficult to determine whether it was a use or building restriction. In my judgment, the dissenting opinion pointed out the real issue and the majority have failed to follow the unbroken rule that a restriction against use must be clearly expressed and they based their opinion on the inference they drew from the word "residence." The restriction was **"one** residence **only** shall be built" on the tract. The defendants bought the land and constructed a residence which complied with the restriction but later proposed to alter it into a residence for two families. The court held that the use of "one and only" limited the meaning of residence and their use indicated that the covenant was an agreement that only one place of abode should be built for occupancy of one person alone or with his family. To make it clear that the covenant was a use restriction the court said: "If they had not intended so to limit the use of the land they would have used less restrictive words." The court followed TAYLOR v. LAMBERT, 279 Pa. 514 where the restrictions were "private dwelling house" and it was held to prohibit alterations for a two family residence. The dissenting opinion by Judge Maxey and Judge Parker stated the restriction was ambiguous and could be interpreted as a restriction on the building rather than use. Judge Horace Stern in his dissent said it was clear to him that it was restriction on the building and not for the use of it.

In SMYTHE v. McCARROLL, 76 Pa. Super. 142, a restriction forbidding the erection of any building except for residential purpose was held not violated by the erection of a private garage for the use of the occupants of the house as under modern conditions it was an essential for residences. In SCZEPANIAK v. McGLONE, 163 Pa. Super 11, 60 A2 382, a restriction providing for a single dwelling house to be used as such was held violated by the conduct of a store in the property but the court refused the injunction only because the plaintiff had consented to such use. HOFFMAN v. PARKER, 239 Pa. 398, was not cited. There sale of food in the basement was permitted as the restriction related only to the building and offensive use. In THACKARAY v. CRAGER, 43 D & C 301, the court enjoined the use of a property as a Tourist House with illuminated signs where the property was restricted to a private dwelling.

Contrasted with use restrictions are those which relate to the building of which BENNETT v. LANE HOMES, INC., above mentioned is an illustration. In addition are the cases holding that restrictions to "one dwelling" and "a single dwelling" were not violated by duplex apartment houses. HAMNETT v. BORN, 247 Pa. 419; ROHRER v. TRAFFORD REALTY CO., 259 Pa. 297, and HARMON v. BUROW, 263 Pa. 188. In FOX v. SUMERSON, 338 Pa. 545, 13 A2 1 and PEHLERT v. NEFF, 152 Pa. Super. 84, 31 A2 446, a two family apartment house violated restrictions to a "single dwelling house" and a

three family apartment on a 50 foot lot violated a restriction to "private residence and not more than one to each 20 feet."

Restrictions requiring set backs from the street were involved in BINSWANGER v. HYMAN, 271 Pa. 296, in which porches were excepted and the erection of a porch three stories high was not a violation but it could not be enclosed as a room. In DEWAR v. CARSON, 259 Pa. 599, an extreme case where the restriction prohibited any building within forty feet of the street, lowering the grade of the lot and constructing a street railway loop with wires, was a violation.

There is also the case of LAVAN v. MANAKER, 280 Pa. 591, of restriction of building cost in which a $2000. building violated a $5000. minimum cost.

Do Restrictions Imposed on Land Conveyed Bind Other Land Retained By the Grantor Which Adjoins the Land Conveyed?

Normally there is no implication that the restrictions extend to the land retained even if in close proximity to that restricted and the court has held they are not to be extended merely by implication but there must be some express agreement of the parties or evidence of conduct showing the intent to extend them. The leading case is SPRINGFIELD REAL ESTATE CO. v. KELLETT, 281 Pa. 398. The rule deducible from that case is if lots are sold according to a plan indicating a scheme of general development the restrictions imposed on the lots sold will bind those retained and even if there is no plan it may be shown that there were limitations applicable to all the land included in a scheme of general development as a result of which purchases were made and the grantees will then be entitled to the equitable protection of the restrictions. The latest case on the subject is BAEDERWOOD, INC. v. MOYER, 370 Pa. 35, 87 A2 246. See PRICE v. ANDERSON, 358 Pa. 209, 56 A2 215.

In KESSLER v. SCHOOL DISTRICT OF LOWER MERION, 346 Pa. 305, 30 A2 117, the court, because of the vagueness of the restrictions imposed on one acre of a nineteen acre tract which were claimed to bind the whole tract, refused to enforce them against the remaining eighteen acres which were conveyed to the School District on which it intended to construct an athletic field with a track, grandstand, etc., since there was no clear intention that the restrictions on the one acre piece were intended to cover the entire tract. There were no restrictions in the deed to the School District.

It may be interesting to you to discuss some of the cases dealing with use which were intended to violate offensive use covenants in the deeds. There are not too many decisions in the Appellate Courts in which these restrictions were construed. The early decisions appear to be based on the fact that the use constituted a nuisance and most of them deal with public garages and junk yards.

In PHILLIPS v. DONALDSON, 269 Pa. 244, the restriction was against "any noxious or offensive trade, business or employment to the hurt, damage or annoyance of any of the parties who had purchased from the tract. The defendant contemplated building a public garage. The court below refused an injunction but the Supreme Court reversed and ordered an injunction. In its opinion the court said a public garage is not a nuisance per se. A lawful business is never a nuisance if conducted with due regard to the health and peace of others and that a public garage is a nuisance in a residential district regardless of restrictions but not in a business section, but where the district is partly residential and partly business it depends on the facts in each case. The court then said it was not necessary for it to find the garage was a public nuisance as the plaintiffs were seeking to have the covenant in the deed enforced and the restrictions were for their benefit. The evidence, said the court, showed noise and daily annoyance to the plaintiffs and although there were some business establishments in the neighborhood it is mainly resi-

dential with fine homes and if the garage were permitted it would result in business creeping into the district and ruin it. You will not that the discussion indicates that the issue was resolved on the basis of a public nuisance.

In NEFF v. GORMAN, 303 Pa. 186, the restrictions prohibited offensive business, etc. The property involved was in Bala and was one of a number of lots on Bala Avenue. Some of the lots were not restricted and the wording in the deeds to the others was not precisely the same. The court found a general intent against offensive use. The defendants were operating a service station which the court said interferes with the comfort, convenience and rest of the plaintiffs. It cited WALNUT & QUINCE, INC. v. MILLS, 303 Pa. 25, where the erection of a marquise over a city sidewalk was enjoined. Restrictions were not involved in that case which was a proceeding to question the validity of the Act of 1919 giving the Art Jury power to regulate what a property owner could place over a street. The court in that case said however, an eyesore is as much a nuisance as a disagreeable noise or odor and the difference was not one of kind but only a difference in degree. The decision seems to be based on the nuisance theory.

In PIERCE v. KELNER, 304 Pa. 509, the court enjoined a large garage proposed to be erected where the restrictions were against offensive use and occupation. The court discussed nuisances and said the garage was not a nuisance per se, but it might be from the way it was conducted. It then said it was not only a question of a nuisance but the limitation imposed by the covenant in the deed. You will note the reliance on the nuisance theory was not as strong as in the other cases. Again in TODD v. SABLOSKY, 339 Pa. 504, 15 A2 677, where the restrictions were against, among other things, carrying on of business causing offensive smells or injuriously affecting the health and comfort of the neighborhood nor for any purpose which for any reason would in law be a nuisance an injunction was granted against a parking lot. The court said the evidence showed a parking lot would affect the health and comfort of the plaintiffs and noise and lights would affect residents of the neighborhood and result in a nuisance. The decision was apparently laid on the nuisance theory because the restrictions made that the test of offensiveness. In MARINER v. ROHANNA, 371, Pa. 615, 92 A2 219, the restrictions were against any noxious or offensive trade or business including place for handling second hand automobiles or other junk and the plaintiff asked for an injunction on the ground it violated the restrictions and was a nuisance. The court said it had stated in PHILLIPS v. DONALDSON, that it was not so much a question of nuisance as that of hurt, damage or annoyance. This is the first time, however, (since HUNTER v. WOOD, 277 Pa. 150, which the court did not cite) the court held that the plaintiffs were not required to establish a technical nuisance and to do so the restrictions would be superfluous. It found that the premises were used in an obnoxious and offensive trade and granted the injunction.

In McCAHAN v. ROTH, 39 Del. Co. Reports 256, where the restriction was against "trade or business" the court refused to enjoin the use of the property for a beauty salon and said it was not a trade or business but a profession or art.

The rule in the offensive cases which now seems to be the law is that laid down in the MARINER case. If the restrictions are against offensive use or business, those who are entitled to enforce the covenant need not prove either a public or private nuisance but merely have to show that they have been hurt or annoyed by the violation.

PRESIDENT BURLINGAME: Mr. Caldwell, we want to thank you very much for this learned discussion, particularly on building restrictions. The discussion on streets I don't think was quite as learned.

Discussion

MR. CALDWELL: I thought that was the best.

PRESIDENT BURLINGAME: At this time I am going to mention this: The requirement to record plans of sub-divisions is not new. Since 1895, the act as amended in 1899, it has been a requirement subject to penal provision. The First Class Township Code, Borough Code and Second Class Codes are almost identical at this time, even the City of Philadelphia, under its charter. There is a peculiar piece of legislation affecting counties, with which I am a little familiar.

It occurs to me and it is my firm belief that the act sub-dividing land, laying out streets, parks and playgrounds, is now a subject of municipal control. There is one part of our county act which is very important in my mind, and that is the section which says that all purchasers of lots are presumed to have notice of all reports, public plans and so forth. It occurs to me, and I firmly believe, and I hope Johnny backs me up—(he and I disagree on so many things)—that unless a man, or a sub-divider, rather, specifically reserves, and notes no dedication or no intent to dedicate any streets, lanes, highways, crosswalks, head walls, and so on, presents his plan to the township, borough or second-class township and then to the county planning commission if one has been activated, he has made a preliminary offer of dedication. The county or the township is not obligated to accept dedication for the reason that it cannot be obligated to take the streets, lanes or highway until completed in accordance with the standards of the municipality or county. Therefore, it is my firm belief if the man has made a preliminary offer of dedication that upon completion of the streets and acceptance or indication of acceptance by the municipality abutting the property owners have no rights to the bed of the street. There I stand.

MR. CALDWELL: Well, I didn't quote the ordinance or the statute in full, but in the first place, I would say that streets are not under municipal control until that control is exercised. They may be the subject of municipal control in these plans, I'm speaking of. But my recollection is that the statute said as to improvements that if they are offered for dedication then they become or are public property and can be accepted. Whether they are still bound by the Act of 1889, the 21 year limitation, I don't know. I don't know whether this code is modified by that or not. But unless he so offered it I think I said it is considered to be private.

I think this is what I had in mind even if I didn't express myself right, so far as the public is concerned what you say I would agree with, but as to the purchasers of the individual lots I think they would gain rights under the contract.

PRESIDENT BURLINGAME: Except, as I remember, the Act of '37 says that those purchasers are bound to notice of all their reports and plans even though not recorded.

MR. CALDWELL: Right.

PRESIDENT BURLINGAME: Therefore, they are bound, with notice of preliminary action of construction of streets to be offered upon completion in accordance with the municipal standards for public acceptance and dedication. What I am getting at is a problem from the title standpoint—I don't think they are proper parties to a deed of dedication. Johnny, am I wrong?

MR. FORSYTHE: May I keep out of this private fight?

MR. CALDWELL: I don't think, Mr. President, that you can affect the right of easement or travel of the individual lot owners by a reservation against dedication. I think that's a public matter. As to the bed of the streets, I am not prepared to either disagree or to agree with you. If the old rule in Paul and Carver is still in effect and the lots are described as bounding on the street, the purchaser of any lot would take to the middle of the street; the public may not exercise any rights by the reservation in the plan. I don't think the notice—the Act of '37, that puts the purchaser on notice—that anything in the plan goes any further than informing that there is no public dedication.

PRESIDENT BURLINGAME: Oh, wait a minute. Well, I am not going to drag this out. You and I will argue this some other time, because the report of sub-division carries the right of dedication.

Are there any other questions?

MR. JOHN P. TREVASKIS: If there had been lots sold on an old recorded plan would subsequent municipality approval of change of streets in the remaining part of the tract that had been undeveloped be sufficient to take away rights from the people that had originally purchased according to a recorded plan? Could the borough or municipality have that right?

MR. CALDWELL: I don't think so.

PRESIDENT BURLINGAME: In the old White Case, it was a zoning case, but it was primarily a filling station case, it said when the municipality had zoned it in a certain way that was the act of all the people of Cheltenham Township, therefore they had agreed with the violation of the building restriction. In Pennsylvania we draw our logic like a kitten out of a silk stocking at times.

I would like to draw your attention on this sub-division thing to the problem in the Third Class cities that have the right to lay out public parks and playgrounds and streets, etc., within seven miles of the boundary of the city and they lay out parks way out in the country, we sometimes wonder what happens when somebody else wants to build other properties.

"CLOSE SESAME—ESCROWS"

By FREDERICK C. FIECHTER

Attorney-at-law, Philadelphia, Pa.

Mr. President, and Gentlemen: From the comments that some of you made I think I had better invite any of you who need an excuse for doing it, to come out to my house in Plymouth Meeting and re-read the "Thousand and One Nights", or any number of them. I am not going to deal with more than one of them, of the "Arabian Nights."

Mr. Sheridan's comments which were very apt, make me tempted to tell you more about Ali Baba and the Forty Thieves than I had intended. I will just hit the high spots because I know you would all prefer to hear in detail from Sheherizada as well as to see her dance, but you may recall that Ali Baba was the poor devil with a brother who was pretty wealthy, and Ali Baba happened to be out with his asses when he heard some horsemen coming and he knew they were marauders, typical of the Arabian Desert, even then, and he climbed up in a tree and from that point of observation heard the magic words "Open Sesame." He saw the forty thieves go into their cave of riches amassed over years of marauding, and when they came out he heard the Chief say, "Close Sesame." Then, you remember how the rest of the story went; the thieves discovered that Ali Baba had gotten into the "know" of the thing and they wanted to do away with Ali Baba. And the most interesting character in this whole drama—maybe Sheherizada had herself in mind in describing this character — was Ali Baba's handmaiden Morgianna. These forty thieves would have done away with Ali in no uncertain terms had it not been for Morgianna, who somehow knew when the thieves were about to make a move. And she finally, you know, poured hot oil on the 38 remaining thieves who were in the jars and which were tied to the donkeys in Ali Baba's back yard when he was acting as host to the Chief—and by that time was posing as an oil merchant.

Mr. Sheridan and gentlemen, the function, as I envisage it—particular-

ly in the subject of Closings that I am going to try to deal with—the function of the title company is "Morgianna." You may have "Ali Baba," the lawyer, up in the tree, trying to size the whole situation up and moving things to this advantage or his family's advantage, his client's advantage, but he in practically every instance is a large matter or a small matter—because every matter is consequential for somebody—would find himself if not "dead," at least staying awake all night without Morgianna to stay awake for him—and that is what the title companies do in this subject of settlements, or as you fellows from New York call it, and we in Pennsylvania, I guess everywhere else, call it a "closing," when it gets big enough.

In talking about this subject I immediately thought of the story which I think is attributed to Cory, Pa., which you may have heard as occurring in another location, of the Swiss jeweler and watchmaker who had a chronometer in his window and he had observed over many years an individual at a certain time every morning stopping in front of the shop, taking out his watch, and checking it with the chronometer, and then going on his way. One time when the individual came into the shop to do some business, the watchmaker said, "You don't mind my asking you this, do you, but I will bet for ten years, every day, I have noticed you stop in front of my window and look at the chronometer. Why did you always do that?"

The fellow said, "Well, you know, I work down at the boiler works, and it is part of my responsibility to see that the whistle is blown at the right time and therefore, I want to make sure my watch is correct."

The watchmaker said, "Now, isn't that a coincidence. You know I frequently check that chronometer with your whistle."

The bar and more particularly the courts make their law according to what you want and the "laboratory" for what you want is just such a meeting as this. And while the courts may lag occasionally or the courts may fail to recognize what is your best thinking or what is your majority thinking, almost invariably what the courts have done is a consequence of your thinking, because you know what is necessary ever so much more than do the courts. And I have up in my room a briefcase literally full of citations of what the courts have said in Pennsylvania, and a few elsewhere, on this subject of closings, of settlements—but I was afraid if I brought that briefcase down the word would get around, and I would have a briefcase and a chairman and a reporter, and no audience. So I thought it would be better to leave that briefcase right where it is, and talk with you and give you what I understand the courts have said on the subject, and if any of you want to test me, I would be glad to give you citations, and I would be glad to show you a very good example of a four and a half million dollar Metropolitan Life Insurance Company bank-manufacturer closing, with the full agenda and index.

If there are any thoughts that I would like to leave with you as my considered final judgment on this subject—well, there are two: one is of paramount importance for the impresario, the man who is running the closing, and I never think of the Settlement Clerk as that man. He is the Master of Ceremonies but he is not the fellow who puts on the show. And the man who puts on the show is frequently a lawyer, and it is his business, and maybe the "M.C." should remind him occasionally to have an agenda.

In military aviation and perhaps in civilian aviation, although I have never seen it on an air transport, every Navy plane at least, has a check-list that is covered with isinglass, Lucite, or Plexi-glass, right on the dashboard of all the steps involved in getting that plane off the ground and back on the ground again, and of course the pilot, with thousands of hours is frequently tempted not to look at the check-list, and then his horn begins to blow and he finds the landing gear is not down, and other things are brought to his attention, but no matter how careful

he is, the really careful man takes a look, a quick glance, at the check-list.

That, of course, is the function of the agenda. I have been surprised how very competent and experienced lawyers and men in closings, come to a closing—a simple mortgage assignment—a simple sale of a property—on which their client holds a mortgage, and they come with a mimeographed—I haven't seen a printed check-list, but a formal check-list, of what it is their client wants accomplished at that closing. And, quite obviously where you get into a more complex closing, with more parties involved, the check-list has to be much longer and much more detailed, and, most important, it should be gotten up in sufficient time that everybody who is concerned with the documents involved, has had a chance to go over what his function is, in the closing. When your closing is very consequential—and I don't necessarily mean large—there had better be a closing at a particular time, because maybe you have a syndicate waiting for its share of the proceeds or because ten other things like the ordering of steel for the building to be built, and so on, are all dependent on the closing really being accomplished at a given moment. Then, as in the case of any important piece of machinery, you had better have a dry run. You had better have everybody go through the motions in sufficient time before the final transaction so that you can get the "bugs" out of it; get the "kinks" out of what is needed, so that when your appointed time comes to finalize the whole business, it can be completely accomplished.

Now, so much for the first point of the check-list. No matter how simple it is, there had better be a check-list.

The second point is so obvious that the more experienced you are, the more you are learning more and more about less and less; so that after a while you know everything about nothing, the more apt you are to miss this, consciously, at least. Subconsciously you all have it in mind. That is, as someone said, "The sweetest treasure mortal times afford is a spotless reputation," and of course, many of your closings are with people who have no reputation, spotless or otherwise. But, after a while, you get to know the fellows who are just plain, downright dependable and those who are not quite just plain, downright dependable, and your treatment should vary. And, of course, to a large subconscious extent it does vary, but very consciously it ought to vary.

If you have the proper check-list and if all the parties to the transaction have had a crack at it, if all the documents have been approved preliminarily, by those concerned in writing it, and if the proper amount of time is given, then there is not much room for making any mistake, and the closing itself is pretty strictly a mechanical situation, with elements that you men take for granted. Usually the closing is in your shop and usually it is at a time that seems to be satisfactory to all concerned—but don't hesitate to point out even to the experienced lawyer some things he might forget. He perhaps figures a closing would be nice at twelve o'clock because he knows a nice bank and you can all have lunch afterwards at one o'clock, and if you have the closing later you will miss lunch. Or you will want it at a certain time so that the Street gets knowledge of the closing. You may even schedule closings at certain times oblivious of the fact that the trains from Boston don't get in in time or that it is not in Philadelphia, it is outside of Philadelphia, for transfer tax reasons that we heard about yesterday, or he overlooks a little time factor, or even the possibility that weather may delay the train.

So you not only want to have a convenient place for your closing, but you want to have a place that tax consequences being the same will let people get in and back to Boston or Washington or Scranton at a decent time and, if at all possible you want that closing to be at a time you can get the banker, or the fellows who have to put up the money.

I have been at a closing which was very carefully prepared, and it in-

volved 30 people, coming from Pittsburgh and Boston and New York, and several very busy, important bank officials from Philadelphia. Everybody wanted to get there and get it over with, and everybody was there promptly at 10 o'clock. But there came up in a $6,000,000 transaction just a little matter of $30,000, and that reared its ugly head at about 11:30. It looked as though by after lunch the $30,000 would have found its way out to Ardmore, but by two o'clock it hadn't found its way out. In fact, nobody had said exactly where the $30,000 was coming from and these very important bankers and important corporation officials were beginning to look at their watches. The impresarios were anxious to get back to supper in Scarsdale, or wherever. The difficulty was that the man that had to put up the money didn't have the banker at the other end of a wire. There were officials, but nobody else would take the responsibility. The individual wasn't there.

I consider it a most important item of preparation in this type of transaction—and I call it a "transaction" advisedly rather than a "deal"—that the banker who has the authority to speak for the money be at the other end of the telephone.

Now, the other mechanics you all know. Most of what I am giving you is what I have learned from your blowing of the whistle. I have been to closings with a good many of you, and I am probably giving you back what I learned from you at those closings.

There are all kinds and types of closings. It has been my opportunity to have been at the ordinary real estate—be it residential or industrial —closing and the municipal closings, and corporate mortgage closings. Whether there was real estate connected with it or not, they all differ. For example, in a partnership loan that I happened to be at the other day, I learned that I was representing the vendor of a sizeable piece of property. The bank that was taking the mortgage from the partnership insisted that all of the partners sign the bond. As a matter of fact, the partnership agreement very clearly stated that one of the partners could obligate the partnerships for anything—and that threw a monkey wrench into the machinery, because one of the partners happened to be in Princeton, taking an examination—but it nonetheless involved going up there. And the title company or the counsel for the mortgagee bank was dead right—under Pennsylvania law —in requiring all of the partners, in spite of the partnership agreement, to sign.

In no case, from the impresario's point of view or of anybody connected with the settlement will over-preparation ever do any harm in a closing. The time lost and the embarrassment arising from under-preparation, is the only thing that anyone has to fear —anyone who is trying to do an honest job. And in that connection I am greatly reminded of the story they tell of Von Moltke, in 1870, who was awakened to be told the French were advancing, and he said, "Well, the plans are in the third drawer, down in that cabinet," and then went back to sleep. Gravity did the rest. Everything was prepared. And that is, of course, your goal in the mechanics of the closing. There are numerous check-lists.

I have written out a couple of typical agendas which I don't think I will bore you with by reading now. They usually cover the question of the "What?". What is the loan? The "who?"—Who is connected with it? What is the general nature of the transaction? The "when?" of the transaction, and the "where?".

And then they should have some kind of an omnibus provision that the execution and delivery of the documents to be enumerated and their legal effectiveness is all conditioned on all the documents being properly executed and properly delivered, and if any one of the documents is not so executed and properly delivered the legal effectiveness of all the other documents that have been handed around, executed and delivered, is nugatory or at least held in abeyance.

Then the agenda might close, with an approval right on the agenda by

all of the parties who made any move in connection with the closing; that all the documents enumerated on the agenda had been properly executed and delivered, and they were happy with the whole closing.

I think that is a worthwhile move. It is very simple when everyone is there, everyone is happy. I think it is good from the standpoint of the title company. I think it is good from everyone else's standpoint.

Now I wouldn't have you think that I would take such a long run for such a short slide in every garden variety of closing, but that is where your discretion and the spotless reputation, or otherwise, comes in to play. For the reason that the genius of this whole business that we are talking about, the wonderful romance of it, is contained in the proposition that it is an honest-to-goodness closing or settlement. "This winds up the transaction; this is 'Finality'." And everybody concerned wants it to be that way.

Occasionally, of course, it isn't that way. You can just imagine the electric atmosphere that prevailed in that Otis-Kaiser-Frazer c l o s i n g which didn't close. You remember, they said, "All right, we will go ahead—we will go through with this agenda," and Mr. Eton said,—you will remember his words, I guess, at the closing, that he would rather lose his money in court. He wasn't going to lose his money in this way, there wasn't going to be any closing, and there wasn't any closing. The ostensible reason given at the time was that a suit had been started somewhere in the Middle West, and one of the qualifications in connection with the closing was that there was a representation on the part of Kaiser-Frazer that no suits, no stockholder suits, would be started. Mr. Masterson, a stockholder, started his suit and therefore said to these bankers, "We are not going to go through with it because this representation isn't being lived up to." As a result, the District Court in Manhattan said that the bankers had promoted the suit and that there should have been a closing. Then the Circuit Court said "We don't even have to consider that question because under the Securities and Exchange regulations there was supposed to be a full disclosure." And Kaiser-Frazer for the month of December, 1947, said they made three million dollars net, when actually they made only $600,000 net. There was a miscalculation there. Kaiser-Frazer said, "Yes, our Accountants mis-stated our inventory." But the bankers knew that perfectly well, and the Circuit Court said, "Well, the bankers were going to retail this to the public and the Securities Act was enacted for the benefit of the public and therefore we will let the bankers off the hook because they didn't have to go through with the closing, even though at the time they didn't have to go through with the closing they didn't know why they didn't have to go through with closing." There was a closing that didn't quite take place.

I have had experience with what I call the Termite Case, where there has been an agreement of sale with an integration clause saying everything is here in the agreement. Then there has been a closing, and then the termites appeared. The purchaser says "There has been a misrepresentation." There has been fraud. I bought a house I was supposed to live in. Everybody knew it. Now the building inspector says that unless I shore up the living room floor I am going to have to vacate. I want a recision, I want the closing opened up." Or sometimes he says, "I want damages, to shore up the floor and do all the necessary things."

And I have been successful in such a case in opening the closing on the basis of constructive fraud—and there have been other cases. The case called LaCross vs Kessel, decided by the Supreme Court of Pennsylvania, on whose back I rode in this termite case, involving a representation on zoning, out in Bala Cynwyd. There was an integration clause in the agreement, there was a closing, and the closing was opened.

A similar case is Namey vs Black —and the other name slips my mind —involving a representation on what fair rent was for the property. And mind you, in those cases the purchas-

er had an opportunity to check the zoning. He had an opportunity to check the fair rent, he had an opportunity, if you will, to check the existence or non-existence of termites, but unless the court states as in the La Cross vs Kessel case that they didn't go as far as constructive fraud, the court said we will open the transaction.

The closing, then, may not be definitive, in certain situations, regardless of all the efforts of the people at the closing to finalize it. Therefore, in taking the mechanical steps with someone of less than spotless reputation, all of the future possibilities had best be kept in mind.

One of the grounds that is particularly a basis for opening a closing is a violation of the laws of the United States or something which contravenes public policy. Very few of those cases are evident from the surface.

There are several little points which I would like to remind you of, things which you tell us lawyers about. For instance, where you want certified checks rather than cashier's checks. Those of you who remember what happened to the cashier's checks when the bank failed in the early 30's know the reason why. The certified check is "trust fund" and is not subject to the claims of general creditors of the drawee, of the bank on which it is drawn, whereas that bank's cashier's check is good, so long as it purports to be good, or so long as the bank is good, but is no good when the bank is bad.

Jimmy Schmidt and I tried to calculate what the interest on one million dollars for one day is. We did and have forgotten it. It is a sizeable sum, and if you were dealing with it for two days, it would at least take care of the closing, so you want to have funds available at the place of the closing.

Then when you come to your corporate closings, or, for that matter, be they corporate or partnership, or any other closings, if your principals aren't there, you want to know that the people involved are competent, that they are of age, and that these situations are all they purport to be.

And now it is common in the corporate closing to have resolutions of directors and frequently of stockholders where it is an increased stock issue or increased corporate indebtedness. A good deal of this is what some of us in Pennsylvania might think was unnecessary falderol, in view of your provisions in the 1933 Corporation Code, which have been construed pretty strongly against the corporation. You don't need, in order to hold the corporation in these transactions, this stockholder authority. There are cases that say that the President, even w i t h o u t the authority of his Board of Directors, may do these things, in the first instance, and certainly where he has been in the habit of doing them. The only thing is none of us knows or few of us know, all the corporation laws right in Pennsylvania, and when dealing with any closing outside of Pennsylvania we either have to have opinion of local counsel of what their corporation laws are or else take a risk which is an unnecessary risk, since these corporation laws are available, if asked for in time. Therefore, we get everything authorized and verified and certified to the extent that we can.

Now, let's suppose that the Secretary certifies to a meeting which never took place. In Pennsylvania it is still as though the meeting had taken place. There is a case squarely on that—and suppose we have a bylaw which requires two officers to sign in a certain type of transaction, and the President is Tom Jones, and the Treasurer is Tom Jones, and the Secretary, let's say, is Mary Smith, but for some reason unavailable. Tom Jones may sign both as President and Treasurer and that is a good signature. But he must sign as both President and Treasurer. The fact that he is both President and Treasurer is not enough —he must be designated as such.

Pennsylvania seems to be on the fence on the question of a recitation of consideration, under the "one dollar in hand paid," etc. That is a condition where we don't have a sealed instrument. But occasionally we have

instruments that are not sealed, even corporate instruments, although certainly whenever you are dealing with a corporation I would say more important than anything else is that corporate seal. But if there isn't any seal, corporate or otherwise, and there is a recitation of this consideration, but, as a matter of fact, this consideration was not paid, what then?

Pennsylvania has said that the fellow who recites that he has received the consideration may not subsequently deny having received it. But there have been some later cases straddling the issue, and the majority or, if not the majority, certainly the better opinion in what we are talking about here, in lawyer's evidence, is the Parole Rule. That has been criticized and the position is taken if a recited consideration wasn't paid it may be denied and to the benefit of the man receiving it. In the case of the utilities, certainly the P.E. and Bell Telephone, when they get an easement to put up a pole or any kind of easement, and you grant them such an easement, and you recite one dollar, or five dollars, or ten dollars "in hand, paid"—whatever it is; they pay it to you—they actually make the payment.

CO-INSURANCE AND RE-INSURANCE

L. R. BINGAMAN, ESQ.

General Counsel, Berks Title Insurance Company, Berks, Pa.

L. R. BINGAMAN, Esq.: Ladies and Gentlemen of the Pennsylvania Title Association: According to the program promulgated in advance for the governing and guidance of the discussional proceedings of this Association, we have now reached the concluding item. It is needless to say that I have greatly enjoyed the proceedings to this point—as I have those of every meeting of this Association since the year 1936 when I attended my first convention of this Association. Those were the days of Uncle John R. Umsted and Henry R. Robbins, who delighted in calling this convention, "THE PENNSYLVANIA ACADEMY OF REAL PROPERTY LAW." I wish to congratulate the present leaders of this group for maintaining and continuing the high standard set by those and other founding fathers.

The concluding discussional item on the program is an open forum on the subject of CO-INSURANCE AND RE-INSURANCE, over which I have been asked to preside. That means that you will do most of the talking while I attempt to steer the discussion to either conclusion or confusion, or both.

To avoid complete confusion, however, it seems that the first thing we should share in common is an understanding of our terms. What do we mean by CO-INSURANCE AND RE-INSURANCE? Let us define our terms:

According to the dictionary the prefix "co" as employed in co-insurance, means "with", "together", "jointly" or "in conjunction". The original and broad meaning of the term co-insurance therefore applies to situations in which two or more insurers join together at the same time to cover the same risk or subject matter.

In other categories of insurance, the term has acquired a different meaning, as in the field of fire insurance, where the term co-insurance is almost exclusively used to describe the situation where the owner of property himself bears a portion of the risk. We have all heard of the 80% and 100% co-insurance clauses found in many fire insurance policies. It is not my understanding that that is the type of co-insurance we are considering here, today.

We of the title insurance profession have committed ourselves to a policy by which we will insure only

the full value of the property or the obligation thereagainst. We do not welcome the insured as a co-insurer for obvious reasons resting upon the fundamental differences between title insurance and other types of insurance. We, therefore, will adopt the broad meaning of the term and will discuss co-insurance as being where two or more title insurance companies jointly and initially insure the same risk. This implies that all of the Insurance Companies joining in the insurance will be directly and immediately bound and liable to the insured under a joint policy which will be issued in the names of all of the insurers. The liability under such a policy could be joint only or joint and several, depending upon the contract made with the insured. Such an arrangement would have the advantage of marshalling the assets of several companies behind a single risk and would permit the joint writing of larger risks than any single company would feel free to write.

It would have the disadvantage of diluting the premium to the originating company, and might give rise to complications in case of claims on the policy. It would follow that **Co-insurance Treaties or Compacts** could be worked out, under which two or more companies could agree that each will and does in advance jointly insure any risk originated by any one of the companies in the future in excess of a stipulated amount and under stipulated conditions. So much for co-insurance except that to my knowledge it has not been widely employed in the field of title insurance.

Now let us look at Re-insurance. Again the dictionary indicates that the prefix "re" as employed in "re-insurance", connotes the meaning of "again" or "repetition". Thus, before we can have re-insurance we must already have had an initial effective insurance. It can be defined generally as a contract whereby one company for a consideration agrees to indemnify another, wholly or partially, against loss or liability by reason of a risk the latter has already assummed under a separate and distinct contract as insurer of a third person. Here the companies are not joint or coinsurers, each originally liable on the risk, as in the situation just discussed with reference to coinsurance, but one company originates a risk and issues its policy to the insured whereupon one or more additional companies agree to indemnify it against all or a portion of the risk it has already assumed. The reinsuring companies are legally indemnitors of the originating company. The insured receives his policy from the originating company with which he had his dealings, and his rights are in no way adversely affected by the reinsurance contract.

This type of insurance is no stranger to the field of title insurance. It is most frequently employed in cases where the face amount of the policy is in an amount disproportionately high to the capital position or assets of the insuring company, so that a total or substantial loss thereon would denude the insurer of its assets and of its ability to continue in business. In Pennsylvania a title insurance company may legally issue a policy on a single risk up to ten times its capital and surplus, yet it is realized that this right, if frequently exercised, could be very embarrassing financially in case of substandtial loss.

Furthermore, many customers such as the large lending institutions flatly refuse to accept the policy of a company in a sum exceeding or even approaching its financial strength, and in most cases demand that the insurer reinsure its liability over and above a certain amount with another or other insurance companies. By so doing the financial strength and responsibility of several companies are marshalled behind the policy of one.

This is ordinarily accomplished by a written instrument called a "contract of re-insurance" under the terms of which the obligations, rights and privileges of the original insurer and the re-insurers are clearly fixed and determined and to which a copy of the original policy of insurance is attached and incorporated. The originator of the business and initial insurer is usually considered as assigning or ceding a portion of its business and liability to the re-insuring com-

panies and is uniformly called the "ceding company". The indemnifying companies are called the "re-insuring companies". The ceding company pays a portion of its premium to the re-insuring companies as consideration for their willingness to share in its risk. The insured or policy holder has no direct rights against the re-insuring companies except in certain cases involving the insolvency of the ceding company. It should also be pointed out that the ceding company, upon which the burden of defending all claims against the policy initially falls, normally retains full and complete liability for an initial sum or amount of liability before the reinsuring companies may be called upon to pay anything. This initial sum of primary liability retained by the ceding company is called the "primary retention", which may be in any sum satisfactory to the insured and agreed to by the re-insurers. The amount of this primary retention by the ceding company normally determines the rate paid to the re-insuring companies. Thus in a policy written for a million dollars, the primary retention of the ceding company could be $250,000.00 up to which amount the re-insuring companies could not be asked to share, the liability of the re-insuring companies accruing in favor of the ceding company only after liability in excess of said primary retention of liability has been established. The balance of residual liability after the primary retention may be divided or shared in any manner or proportion the ceding and reinsuring companies may agree upon themselves, and frequently the ceding company may join with the re-insuring companies in sharing the residual risk.

It would follow that Re-insurance Treaties or Compacts could and have frequently been worked out by which two or more companies could agree that each will and does in advance re-insure any risk taken by any one of the companies in the future in excess of a stipulated amount and under stipulated conditions.

I now believe that we have defined the subject and terms of this discussion and I am ready to entertain remarks from the floor, with reference to the general subject.

Discussion

PRESIDENT BURLINGAME: Thank you, Mr. Bingaman; that was wonderful. Are there any questions, because if you don't have, I have got one right off the bat.

I would like to ask this of Mr. Bingaman, or maybe he can duck it and pass it on to someone else: In a contract of co-insurance or excess re-insurance, where liability of the co-insuring or re-insuring company flows directly to the insured, can a company participate unless it is registered in the state in which the real estate is situated or the policy is issued?

MR. BINGAMAN: I know it has been done.

I have knowledge of cases where companies spotted throughout the United States have entered into re-insurance contracts involving the insurance of large risks—one in Florida I can think of—and I don't think all of those companies were registered to do business and qualified in the State of Florida. But on the general question, sir, other than that it has been done, I don't know. There are some questions that pop into my mind, but I wonder if anybody has got any ideas on that subject?

MR. FAIRFAX LEARY, JR.: Might there not be a distinction between what you have defined as co-insurance in this situation and what you have defined as re-insurance. In other words, in terms of experience I have had in the fire field, it quite frequently is not necessary for the excess loss re-insurer to be qualified to do business, whereas co-insurance would involve the necessity of the insured having direct rights?

MR. BINGAMAN: I think there is a valid distinction there and the cases I know of were clear cases of re-insurance. That is excess loss re-insurance. In the case of co-insurance I see no distinction between that and the issuance of an original, initial policy. And in co-insurance, if you could not legally issue a policy in the State of North Dakota I don't think

that you could legally join as a co-insurer with another company in the State of North Dakota.

The problem I think is different, however, if a North Dakota company takes that risk; retains a substantial primary retention, and then solely by virtue of the agreement between that initial insurer and other insurance companies throughout the country it agrees to indemnify itself against its loss, which is re-insurance. There is a distinction, and the latter, I think, is probably okay.

MR. LEARY: Then, would it or not, sir,make a difference as to whether the initial policy was or was not in excess of the statutory limit or retention of the originating company? In other words, a Pennsylvania Company could lawfully, itself, with a capital of $250,000 minimum surplus total $375,000 issue a $750,000 policy and assume that risk. If, however, it is issuing a policy in excess of that amount and re-insurers are not admitted in Pennsylvania, might not the Pennsylvania Department refuse to consider the lay-off?

MR. BINGAMAN: I think it is highly possible that the Pennsylvania Department might not.

MR. LEARY: In a subsequent examination they might raise an issue.

MR. BINGAMAN: I don't know the answer, but I do see questions. On the whole subject, as I have gradually thought over this thing, since Mr. Frankhouser said he had received a call from Mr. Schmidt and wondered perhaps whether or not I would lead an open forum on this, I have naturally been thinking about it, but most of my thoughts have ended up in the question-mark category. I have not made an extensive study into the field and have not gone outside of the state, and I don't propose as I initially said, to be able to answer the question.

But this is an open forum so I would like very much to hear what the rest think about it.

MEMBER: The spirit of the law is to protect the insured rather than the insurer; therefore what Mr. Leary says would seem to be quite true, under Mr. Burlingame's question. The Insurance Department would say, "Now, look, that re-insurer does not measure up to our standards, and to protect you we are going to make the insurer come to the mat—the first insurer that is—because he doesn't carry through on his initial contract and when it comes to a loss and an attempt by the insured to recover from the re-insurer, I don't see who would block him.

MR. LEARY: As a matter of fact I think it varies a little bit.

Again, we have the situation where title insurance is sort of following along behind. We don't have our statutes thoroughly worked out with reference to such insurance. There is a considerable varition in the other states as to whether or not the insurance departments would accept a lay-off to a non-admitted insurer, and in Pennsylvania the re-insurance regulation of the Insurance Company Law of '21, simply provides for approved re-insurers. They will permit you to decrease your premium reserve by the amount of layoff in the non-admitted company provided that particular company meets their general standards.

MR. BINGAMAN: Do they have an approved list?

MR. LEARY: I don't think there is an official list; you can find out who is approved, though. It varies from time to time by the solvency of the company.

PRESIDENT BURLINGAME: I would like to go a step further and ask you or other gentlemen in the room who have had contact with this business, isn't it true that the insureds, particularly the large investors, want the contract of insurance or the re-insurance, to run directly to the investor? Isn't that generally one of their requirements? They want the excess companies directly liable to the insured. Have any of you found that they want the re-insuring companies or the co-insuring companies directly liable to them?

MEMBER: They try to get both.

PRESIDENT BURLINGAME: That is why I raise the question, sir, whether or not some of the companies who are entering into this

field in Pennsylvania and becoming co-insurers, even though it is excess co-insurance, are not required to register in Pennsylvania or in the absence of registration isn't the insured subject to a tax?

MR. BINGAMAN: It would be my thought, on the curbstone, once you get into the category of the second and third companies becoming directly responsible to the insured, if that is what they want, then I don't—under the classical definitions that I have attempted to set forth here—think you have re-insurance—whether you call it that or not. I think then you have co-insurance, and co-insurance involves direct liability, the same as you would have in the issuing of one initial policy to John Doe and I think that company would then have to qualify as any other company would have to, to issue a straight policy in title insurance in Pennsylvania. You can call it re-insurance or "Monkey Insurance", but I think that is just plain co-insurance.

MR. LEARY: To suggest a vertical look-see at your definition as well as a horizontal, don't we have this situation, then, that we can have co-insurance and re-insurance and we can have what they call in other fields quota share vs excessive loss.

MR. BINGAMAN: I am not familiar with those terms.

MR. LEARY: A quota share is where each of the companies on the treaty share in accordance with the percentage quota in each and every loss.

It seemed to me your definition of co-insurance to some extent limited co-insurance to the quota share type, that each company was assuming a certain percentage of each and every loss. That is not necessarily the law of the Medes and Persians, and certainly in the case of other insurances it isn't so, that you may have the co-insurance both on a quota share basis—that is, a share in each and every loss, but can also have co-insurance in the sense of direct liability to the policy holder on the basis of primary and excess loss. You can have excessive loss each, and overloss, as they call it, or have catastrophe coverage. The excessive loss each and overloss means on each and every loss the claim is made, an amount over a stipulated amount will be paid by the co-insuring company directly to the policy holder or then again it can be re-insuring. That is, the first claim is made—if only small the primary takes it all. If larger, it is only the excess in the second claim, that the co-insurer pays. The third claim comes along and if below the limit, the primary takes it all. On the catastrophe coverage, it mounts up; it is a combination, and after the primary company has paid an aggregate of claims equalling the fixed sum, then all claims thereafter become the responsibility of the excessive loss co-insurer.

MR. BINGAMAN: What does the policy look like that is issued under those circumstances? Are the names of all parties to the risk in the policy, or is the policy issued by one company?

MR. LEARY: In the fire field the policy is customarily issued only by one company and the direct liability to the policy holder is assumed in the co-insuring treaty.

MR. BINGAMAN: Are there any schedules or any definitions of that type of risk on file with the Insurance Commissioner; in order to qualify to do that kind of business must they get the approval of those treaties or contracts with the Insurance Department?

MR. LEARY: I think that varies a bit from state to state. In Pennsylvania, you must file with the annual report all co-insurers and re-insurers' names and general terms. The only advance approval I know of, where you have to do it in advance, is where there is a re-insurance of all or substantially all your business, in which case you must obtain department approval before it goes in effect.

MR. BINGAMAN: I think what you said is contemplated when I said a co-insurance contract could be worked to cover stipulated matters under stipulated conditions. Now, that seems like a rather complicated stipulation, with lots of conditions to make a policy like that work, and to

make it well-understood to the insurer as well as the insuring companies, to understand and find just exactly where under any set of circumstances liability may be.

MR. LEARY: It is a very complicated point.

MR. BINGAMAN: I think it could be worked out. It is beyond my poor power to conceive, never having seen one in operation, but I think the possibility is there and I believe if careful work is done in the title field that such arrangements could be worked out and I think the experience in other lines of insurance would definitely be the Pole Star to guide what you would like to do with reference to title insurance.

Frankly, in my title insurance ex-experience I have had some in re-insurance and none in this state in co-insurance at all. And I don't believe there has been much in the line of co-insurance considered in this state except perhaps in some instances I heard of yesterday in Philadelphia.

PRESIDENT BURLINGAME: I believe, Mr. Bingaman, whether others will agree with me, I don't know, that increasingly we find the investor wants the co-insuring or re-insuring company on the liability so that the investor can go directly to the re-insuring or co-insuring companies, basically because I am led to believe that they are afraid that the insolvency of the insuring company would bar them from proceeding against the re-insuring companies, unless there is some direct connection. And maybe they are right or maybe they are wrong. I don't know. But I seem to think most of the large investors want the co-insuring companies directly liable for the full amount and they want the re-insuring companies or co-insuring companies liable jointly and severally. And the question has always come up in my mind whether or not those of us who buy this insurance—and most of us now do—shouldn't we be rather careful to see that the companies from whom we buy the excess insurance are duly qualified to do a title insurance business in Pennsylvania?

Are there any other remarks?

MR. ELMER S. CARLL: Is there any difference in your re-insurance policy or agreement? In some instances you give right in the instrument the right for the insured to sue, if necessary, the underwriters. That, I mean, is requested in some instances. Now, I was wondering if there was a real difference in their right to sue, whether it is granted them or not, and in those cases where you grant it and you are underwriting an agreement, you normally attach a copy of the underwriting agreement and give it to the insured.

PRESIDENT BURLINGAME: Elmer, the right to sue the excess insurer is the thing that you raise, and doesn't that create a direct responsibility on the excess insurer to the insured?

MR. CARLL: I think it makes co-insurance out of it.

PRESIDENT BURLINGAME: Maybe we are laboring the point but it is becoming increasingly popular to have this insurance and I know many of us are using on these excess insurance deals policies in states we are not qualified to do insurance business. Maybe I am wrong, but I think it is something to which we should give deep thought.

MR. BINGAMAN: Yes, if you are going to go into it, you should certainly give it considerable thought. Co-insurance and re-insurance is a clear concept, I think, but it is indicated that what is being asked is a sort of hybrid proposition. If so, I think instead of getting into anything clear and defined, which I think the companies are interested in, if you go into too many hybrid propositions there is a grave question where you are going to stand. I think if you are going to get into the field of co-insurance at the demand of the customer, you ought to appoint a committee, with people having knowledge on this sort of thing and try to work out some kind of general plan that you can sell to the trade.

MR. CARLL: Don't you have a slight difference where your insured

requests underwriting and where you voluntarily lay it off? If you voluntarily lay off it has nothing to do with your policy, it seems to me and that then you can select most any company, whether they are qualified to do business in Pennsylvania or not. On the other hand, if the insured has requested it so that he has it written into the underwriting agreement, you can go back to co-insuring or co-insurance.

MR. BINGAMAN: I think that is the thing you do.

PRESIDENT BURLINGAME: I think you are right, Elmer. I have noticed this tendency within the last six months. Maybe you have reluctance on the part of some of the investors to be put in the position of not being able to pick the insurance companies to participate in the excess insurance, and so there has grown up, sir, a term which is probably what you refer to, and that type of insurance today is called "excess co-insurance."

MR. BINGAMAN: That is a hybrid.

MR. LEARY: That is the vertical, you see.

PRESIDENT BURLINGAME: That is what I'm wondering about, and I would suggest that the Insurance Code Committee of our Association give very deep consideration to this problem and come up with some sort of answer because I am a little bit worried about it.

MR. JOHN F. CONNOR: I have a case of this sort where regardless of whether co-insurance or re-insurance the right to sue has accrued under the terms of the policy or contract to the insured. A claim arises and he decides to sue the re-insurer or co-insurer, who is not qualified in the state where the property is located. What rights do the re-insurer and co-insurer have to defend themselves in the states in which they are not qualified to do business?

MR. BINGAMAN: I have a clear answer for that—"I don't know."

PRESIDENT BURLINGAME: There is another collateral problem with that, John, that I refer to. Perhaps Mr. Bingaman knows the answer to this, or Mr. Leary, or some of you. I think there is a "gimmick" in the Pennsylvania law whereby if you accept an insurance policy from an unqualified issuer the purchaser of the insurance is subject to tax.

MR. LEARY: That is so on all kinds of insurance.

PRESIDENT BURLINGAME: In fact, I think there is a bill in the present Legislature to raise that to 4 per cent. It is now 2 per cent of the face of the policy.

MR. LEARY: If you have reports, the state can collect it. If somebody is not admitted, then the insurer is liable for the tax of the Commonwealth.

MEMBER: You mean to say that if somebody accepts one of the mail insurance company's policies, he will be liable for the tax?

MR. LEARY: It is possible. I think the answer is that in all those cases you must draw a distinction between whether you might be violating or not. How could a company be heard in court, to set up a defense by an innocent insured? It seems to me the court would definitely hold that you were estopped from pleading that illegality. It wasn't the kind of illegality where they would say, "These are both bad boys, let them stew in their own juice," they would say, "We are only going to spank your wrist"—but I don't think the company could ever set up a defense that this was a policy issued where "We were not permitted to do business".

PRESIDENT BURLINGAME: Supposing it was the Buttercup Life Insurance Company, qualified in Pennsylvania and it accepts a policy of title insurance from a company not qualified in Pennsylvania. I don't think the Buttercup Life Insurance Company is liable for a tax on the policy issued by a non-qualified insurer.

MR. LEARY: I think that is possible.

PRESIDENT BURLINGAME: Well, you can see there is enough to give some of us concern, and I hope it will be considered.

MEMBER: I would like to ask whether or not the state has made an attempt to standardize charges

for this type of insurance, either in the field of fire or field of title insurance?

MR. BINGAMAN: I have personally heard of no state activity in that respect. I do believe there is, however, a national rate, which has more or less been established, validly or legally or not, among the various companies that do enter into re-insurance contracts, as to what the fee shall be on each one thousand dollars of insured risk.

MR. LEARY: But most state regulatory acts exclude re-insurance on the ground that the companies are big boys, now, and ought to be able to take care of themselves and that the only fellow we have to protect in rates is the little fellow.

RECIPROCAL DISASTER CONTRACT

In "Title News," September, 1955, issue, we carried copy of a contract between two title companies drawn for the purpose of protecting one against disaster by permitting it the use of the title plant and records of the surviving company. This was described as Contract No. 1. The parties in interest instructed us to withhold the names and locations.

This contract has now been redrafted. It is shown in full below. For purposes of later references, we shall describe it as Contract No. 3 although we stress it is a re-draft of Contract No. 1 previously in effect.

—Ed.

CONTRACT NO. 3

AGREEMENT

THIS AGREEMENT made and entered into at ..... this .....day of ....., 1955, by and between ....., a corporation, party of the first part and ....., a corporation, party of the second part, WITNESSETH:

WHEREAS each of the parties own or control for the Counties of .....in the State of ..... complete sets of records, abstract books, maps, indices, and other equipment used in compiling abstracts of title to real property and furnishing title information for title insurance purposes, and

WHEREAS each of the parties desires to be protected, so far as possible, against the hazard of total or partial destruction or damage of such records and equipment by reason of fire or other casualty or accident.

NOW, THEREFORE, in consideration of the premises and the mutual promises and undertakings of the parties, it is agreed as follows:

1. In the event of total or partial destruction or damage as aforesaid, the party so damaged will be permitted access to the records and equipment of the other party and the use of the same for the purpose of making such notes, copies, or photographs therefrom as the damaged party may deem necessary. The damaged party shall obtain such information at such reasonable times and places and in such manner that the business of the other party will not be interfered with. If the damaged party desires to make use of said records outside of business hours, it may do so provided it pays the cost of a supervisor to be selected by the other party.

2. The damaged party agrees to replace its destroyed or damaged records as expeditiously as possible,

and when that has been accomplished, the right to use the records of the other party shall cease unless and until similar damage is again incurred.

3. This agreement shall continue for a term of ten years and thereafter unless and until the agreement is terminated by one of the parties, after the expiration of the ten-year period, giving the other party written notice that the agreement shall be considered terminated at the end of a period of 180 days from the date of the service of such notice. However, if during said period of 180 days, said records of either party are destroyed or damaged as aforesaid, the damaged party shall have such time as is reasonably required to replace its destroyed or damaged records and during such time may use the records and equipment of the other party to the extent herein provided.

4. Binding upon successors, etc.

IN WITNESS WHEREOF, etc.

ABSTRACTERS SECTION 14 POINT PROGRAM

(Revised)

1.—Adopt an adequate dues schedule, preferably on a sliding scale, based on the amount of abstract and title business done.

NOTE: Unless its dues income is adequate, the State Association cannot function efficiently. Money makes the wheels turn. The experience of the National Association in courageously adopting a sliding scale dues schedule shows that this is a good method of increasing income. It need not make for hardship on the member with small receipts, but gets an increased amount of dues from the member whose business is of such size as to warrant a greater contribution. It collects on the ability to pay theory, and recognizes the fact that the larger the business of the member the more he profits by the Association's Activities.

2.—Make membership in the American Title Association compulsory by including the National dues with State Association dues.

NOTE: The National Association is composed of members of State and Regional Associations. No abstracter can belong to the National Association except through membership in a State or Regional Association if there is one in his jurisdiction. The National Association continuously contacts the various users of abstracts urging the use of members of the National Association. It watches harmful and ill advised legislation—issues periodically bulletins keeping its membership advised of what's going on elsewhere—silently and effectively watching the welfare of the titlemen of all associations. Then why shouldn't each State Association make membership in the National Association compulsory? If you care to and will actively collect them, you can add to the State dues the amount of National dues required. Title problems are no longer confined to the borders of a State. What affects one State may directly or indirectly affect every abstract state.

3.—Attempt to attain more uniform and more stringent qualifications for membership in State Associations.

NOTE: An association worth belonging to means something. Caution should be used to keep the irresponsible, fly-by-night, unethical, incompetent abstracter out of the ranks. Let the public know when they patronize a member they will receive prompt, courteous and fair treatment —if a loss occurs, that such member will pay it promptly; that abstracts will be properly compiled (not

stuffed) and the charges will be the same to all alike, and reasonable. Let the members know that this will be expected and see that the reputations of worthy members will not be jeopardized by anyone unworthy.

4.—Have a Planning Committee as one of the standing Committees of the Association.

NOTE: Every President, when elected, wants to do his best for his Association. But often, even though he has been active in Association affairs, he is uncertain of a proper program to formulate and execute. His own personal affairs severely limit the time he can give to planning, and he should have some help from a proper committee. A planning committee, required to meet promptly after the annual election to lay out the year's work, would be of great assistance to the officers, and would insure a continuity of effort not usually possible with changing personnel in the offices of the Association. This committee could also be charged with a thoughtful planning of the program for the State Convention.

5.—Have at least one State Association Officer at each ATA Mid-Winter meeting, and at each ATA National Convention, preferably at State Association expense.

NOTE: How can a State Association be kept better informed than by having at least one of its officers at each Mid-Winter meeting and at each National Convention? It is in these meetings that plans are made for the successful operation of the National Association, and where the problems of the State Association and of the individual abstracter are discussed. The Mid-Winter meeting is not properly a convention—it is primarily a meeting of the Board of Governors, National Association Officers and Regional and State Representatives of the National and State Associations, but all are welcome to come and attend. Lately the interest in this meeting has been so intense that it has been deemed wise to have prepared programs for the sessions, but the chief attractions are the members' open forums. These "Round Table Discussions" consider almost every problem the State Association and the individual raises, and almost always one finds that the perplexing problem confronting him back home has been solved by some one some where. The National Convention is of course the big meeting of the year. Here the programs are only a little more formal than at the Mid-Winter meeting, and the open forum is the big thing. Without stressing the fine fellowship of both of these meetings, and the accurate information imparted by those who know whereof they speak, your State Officer should be there for the primary benefit of your members who cannot come themselves. He can and will accumulate a vast amount of valuable information which he can pass on to your non-attending members through his reports.

6.—Have at least one National officer at each State Convention.

NOTE: Every officer of the American Title Association is elected because he is outstanding in more than one respect. It is a part of the duty of his office to render such service to state Associations as they may request. Demands upon his time and energy permitting, he will be glad to accept an invitation to attend your convention and appear on your program, and he will always contribute much to your conferences. His outlook is national, and he can bring much information which will be of value to your members.

7.—Adopt a Uniform Certificate for certification of abstracts and Standard Forms for abstracting and give benefits therefrom as much publicity as possible.

NOTE: Abstracters are "rugged individualists" and they do things in their own respective ways. As a result, unless there is a uniformity in certificates and in abstracting sponsored by the Association and agreed upon and used by the members, there are as many forms of certificates and abstracts as there are abstracters. Every examiner of abstracts welcomes the certificate and the abstract

which bears the official stamp of a State Association. Not only does this stamp insure the quality of the work in the abstract, but it eliminates for him the tedious task of construing, word by word, the certification. Properly drawn, the Uniform Certificate will also eliminate the requirements of customers whose business is national in scope, of special certificates on their own forms.

8.—Organize the Past Presidents of the Association into a special group to counsel with and serve the Association.

NOTE: Such an organization will compose a powerful force for good in Association affairs. While they may and probably will prefer to remain in the background, they can do much by their moral suasion to help in the guidance of the Association's work. They could counsel in the selection of officers, in the appointments of committees, in the working of committees, and should be available as "trouble shooters" should occasion arise. They should elect their own officers and have at least one meeting of their own at each convention, perhaps a breakfast, at which they can discuss the Association's problems among themselves. The endorsement of such a group would help a President immensely in his program.

9.—Divide the State into Districts or Regions and hold at least one District or Regional meeting in each annually.

NOTE:— By doing this No. 7 is more easily put into effect. Many abstracters do not attend State Conventions—many do not belong to State Associations, and cannot be reached at a State Convention. Divide the State into districts. Keep in mind the accessibility of the point where the regional meeting is to be held. Appoint a Chairman of each district —hold meetings once or twice a year. Not only invite but GET ALL abstracters in the district to attend, members and non-members alike. Don't have any "long-winded speeches" by an outsider. Better still, have no one present but abstracters. Sit around the table and frankly discuss the lack of uniform practices of all character. Use tact (and plenty of it). See that everyone present takes part. You'll be surprised how quickly "misunderstandings" become "mutual understandings". The spirit of fellowship soon develops into friendship. Several such meetings may be necessary, but the final results will be both profitable and surprising. Don't overlook the importance of Regional Meetings. They will stimulate State Convention attendance and increase your membership.

10.—Issue monthly a State Bulletin in which State Court reports are briefed, carrying news items and articles of interest to the membership.

NOTE: Any State Association issuing a worthwhile monthly bulletin for its members is a "live association," or at least above the average. Without this popular means of contact with its members how else can you let the membership know "what's going on". Who doesn't like to see his or her name in print? There is something of interest taking place in the title world daily. The monthly bulletin is a splendid medium for exchange of ideas. It will stimulate State Convention attendance—and the collection of association dues. It ties the membership into one big family —all with common problems. The cost isn't prohibitive. Several states use a "Volunteer Editor" for each month with the Secretary's office as a clearing house. It provides a simple way for the officers and various Committees to contact the members when necessary. It has proven of great value to the many state associations publishing a monthly bulletin.

11.—Invite constructive criticism of the customs and practices of abstracters by the Creation of a Public Relations, or similar committee, whose duty it will be to contact associations of Realtors, Mortgage Companies, Building and Loan Associations, Bankers, Bar Associations, Oil Companies, Lease and Royalty Associations, Federal Land Bank Offices, and others using the product of the abstracter, and to explain the

purpose, the objects and benefits of a State Association.

NOTE: Maybe you don't agree with a customer, but isn't it worth while to know the customer's viewpoint? This can be best obtained by the activities of a Public Relations Committee. The abstracter can avoid much criticism by contacting the various groups using his product, and soliciting frank expressions of constructive criticism from them. It might be surprising to learn that there are many small irritating matters irking the customer which slight adjustments by the abstracter could eliminate. Such contacts will provide excellent opportunities for the explanation of the problems of the abstracter and will evidence a sincere desire on his part to meet his customer far more than half way.

12.—Sponsor an educational program in each county in which as often as possible local speakers will appear before the various civic and professional groups to discuss the title business or some phases thereof.

NOTE: This will be a real Good Will builder. The average citizen is the fellow who eventually pays all our fee bills, and as a rule he is almost entirely uninformed about what he is paying for. The local abstracter is the fellow who can explain the complexities of our work, and short talks before civic and professional groups, school and college classes, clubs and associations will dispel the fog of ignorance concerning us which is almost universal. Whether or not he is a skilled public speaker makes no difference. He should tell the story in his own way, in his own words and in all sincerity. Out of his own personal experience he can, with a little thought, assemble a wealth of interesting information which his audience will literally gobble up. And each time, he should bring in the story of the State Title Association, its membership requirements, its standards of ethics and fair dealing, and all the other things it stands for. Every such speaker will find the effort well worth while, for it will increase his own personal stature in his community as well as that of the State Title Association.

13.—Make available to State Association members leaflets bearing the State Association imprint, bearing the member's name if desired, for his distribution to his customers, explanatory of the abstract business and of the State Association's membership requirements and qualifications.

NOTE: A good looking leaflet explaining the abstract of title is one of the best publicity mediums possible. It should be prepared with much care by a competent committee with the assistance of an experienced advertising man. It should be attractive to look at, interesting to read and accurate in its statements. When produced in the quantities which your members can use for their private distribution, the cost is not prohibitive by any means. We all know how little information the public has about us and our business, and this is an easy and reasonably cheap way to make them better informed.

Other forms of publicity can be made available to your members in this way, also. Blotters, small advertising novelties, pencils, and all sorts of things can be had, and if the State Association buys in large quantities, the cost per item will be held down. We use too little of this sort of thing because of the high cost of quality merchandise, and this is a good way to overcome the problem. The imprint of the State Association upon each and every item will help the customer realize that the member of the State Association is the abstracter to do his work.

14.—Make available to all employees of members of State Associations, a title course covering all phases of abstracting.

NOTE: There is no better way to raise the standard of abstracting than to raise the standard of the abstracter. A thorough title course will help do this. In every state there are practical abstracters capable of preparing such a course. (Copies of courses may be obtained from the American Title Association). Cover as completely as possible the whole

field of knowledge required of a competent abstracter. Have one lesson on the subject of state title registration, and another on title insurance. Word the lessons in plain, everyday, ordinary language rather than in technical terms. Establish an Educational Committee which will give written examinations to students of this course, grade their work, and finally issue to them a Certificate of Satisfactory Completion of the course. Embryo abstracters will appreciate such an opportunity to become proficient in their work, and it will make them conscious of the importance of the State Association. Remember, those employees will some day be running the abstract businesses in the state.