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Pennsylvania Property Cases of 1960: 2

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JUDICIAL HIGHLIGHTS

PENNSYLVANIA PROPERTY CASES OF 1960: 2*

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BAILMENTS AND GIFTS

Bailments

In *Johnson v. B. & N., Inc.*,[1] plaintiff checked his coat in the check room of defendant's restaurant. Subsequently plaintiff discovered that his coat was missing. In affirming a judgment for the plaintiff the superior court noted that where check room service is an incident of defendant's business and is necessary for the convenience of his patrons, the resultant relationship is a mutual benefit bailment, although no charge is made for the use of the check room. However, even when the bailment is established, coupled with a demand for the return of the coat and a failure to deliver it, the burden of proving the loss through defendant's negligence still remains with the plaintiff. This burden was met when plaintiff showed that the cloak room was a small room, open to the restaurant except for a "half-gate" across the doorway and that the cloak room attendant was absent therefrom at frequent intervals, leaving the contents unguarded.

Swan v. United GMC Truck Inc.[2] likewise dealt with burden of proof in connection with a mutual benefit bailment. In this case a truck and a tractor were bailed to a motor vehicle shop for repairs. A fire subsequently occurred in which the bailed articles were damaged. The superior court set forth the following evidentiary burdens incumbent upon parties plaintiff and parties defendant in such actions: (1) when the alleged bailor has proved the bailment, demand and a failure to redeliver, he has established a prima facie case; (2) to escape liability, the bailee must then show that his failure to redeliver was due to loss by fire, theft or other casualty free from fault on his own part; (3) if the bailee's evidence does not disclose a lack of due care, the bailor must then go forward with evidence to prove that the loss was due to the bailee's negligence; (4) but, if the bailor's case in

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* Part I of the judicial highlight, consisting of cases dealing with future interests, covenants and estates, and zoning appeared in the last issue.

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1. 190 Pa. Super. 586, 155 A.2d 232 (1959).
2. 192 Pa. Super. 176, 159 A.2d 550 (1960).

chief established that the bailed articles were damaged or destroyed by a general fire on the bailee's premises, the bailor must also establish in his case in chief that the bailee was negligent. In the present case the bailors showed in their case in chief that the vehicles were damaged in a general fire, but did not show any negligence on the part of the bailee. In addition, the bailees established by their evidence that the general fire occurred without negligence on their part. The verdict should therefore have been directed for the defendant-bailee.

Taylor v. Philadelphia Parking Authority[3] involved the question whether a car in a garage created a bailment or landlord and tenant relation. A jewelry firm parked its automobiles by the month in defendant's garage. Plaintiff informed defendant that they would lock it and retain the keys. The car was missing from the garage, and when it was recovered, the jewelry had been stolen. In plaintiff's action in assumpsit to recover the value of the jewelry, the granting of defendant's motion for a compulsory non-suit was affirmed by the supreme court on the ground that no bailment existed. The court relied upon the circumstance that plaintiff's retention of the keys prevented defendant's acquiring possession of the car.

Gifts

In re Cochran's Estate[3a] was a case of first impression dealing with the ownership of United States Government Series (E) bonds. These bonds were registered in the name of decedent *or* some other named persons (nieces and nephews). The decedent's husband attempted to have these bonds, which were purchased completely by decedent and kept in her safe deposit box, included in the inventory of the estate. The supreme court, following the majority view, held that they should not become a part of the estate. The treasury regulations provide that upon the death of either co-owner, the survivor will be recognized "as the sole and absolute owner of the bond" and payment will be made only to him. Since these regulations existed at the time of the purchasing of the bonds, they in effect became a part of the contract; the rights of the co-owners arose exclusively from this contract and did not depend upon the existence of a gift from decedent.

Vendor and Purchaser

Return of Deposit

In *Tieri v. Orbell*[4] the vendee successfully recovered his deposit money. The agreement was conditional upon the vendee's ability to obtain financing, but was silent as to the type of financing thus required. In permitting parol

3. 398 Pa. 9, 156 A.2d 525 (1959).
3a. 398 Pa. 506, 159 A.2d 514 (1960).
4. 192 Pa. Super. 612, 162 A.2d 248 (1960).

evidence to clarify the type of financing envisaged by the agreement, the court held that reasonable efforts to obtain a twenty year mortgage were sufficient, and vendee could not be forced to accept a six per cent, eleven year purchase-money mortgage offered by the vendors. The court took judicial notice that twenty year mortgages on similarly priced homes are customary.

Rykaczewski v. Kerry Homes, Inc.[5] likewise allowed the vendee to recover his deposit money. The agreement was also conditional upon the vendee's ability to obtain financing, but no financing could be obtained. However, the holder of the escrow funds had subsequently absconded. In allowing recovery, the court pointed out that the escrow agent was selected by the vendor, stationed in the vendor's sample home, and authorized to secure the mortgage and accept deposits. Liability must therefore be borne by the vendor.

Where the contract of sale called for construction of a house "substantially similar" to a sample home nearby and the jury found the house as constructed to be "substantially similar," the vendee's attempt to recover his deposit money was denied in *Laughlin v. Baltalden, Inc.*[6] The superior court also stated that a deposit of 1900 dollars, which was less than nine per cent of the purchase prise, was not a sufficiently large amount to be considered a penalty rather than liquidated damages.

DAVID G. SENGER

CONCURRENT OWNERSHIP

Tenancy by the Entireties

The rights of a judgment creditor concerning land owned by the judgment debtors as tenants by the entireties were considered in *Swope v. Turner.*[7] About two years after the judgment was entered by confession on a note signed by both the husband and wife, the husband was discharged in bankruptcy. After more than five years had elapsed plaintiffs instituted scire facias proceedings to revive the lien of the judgment against property which the debtors owned by the entireties at and since the date the judgment was originally entered. Since the bankruptcy proceeding involved only the husband, under prevailing law the entireties property did not become part of the bankrupt estate. Therefor, the husband's discharge from all personal liability on the judgment in the bankruptcy proceeding would not affect the lien of the judgment against the land owned by the entireties. Although the lien was gone after the lapse of five years from the date the judgment was

5. 192 Pa. Super. 461, 161 A.2d 924 (1960).
6. 191 Pa. Super. 611, 159 A.2d 26 (1960).
7. 193 Pa. Super. 217, 163 A.2d 714 (1960).

entered, nevertheless, the court held that it was subject to revival against the entireties property.

In *Kern v. Finnegan,*[8] the husband and wife entered into an agreement whereby the property which they held as tenants by the entireties would thereafter be held by each of them as tenants in common having undivided one-half interests and, in the event of the wife's death, her one-half interest in the property would pass to her sister-in-law. After the wife died the husband brought an action in equity to have the agreement stricken from the records and cancelled. The superior court, in adopting the opinion of the lower court, held that since the agreement did not contain the words "grant and convey," or either of them, it was not effective to pass a fee simple. The court also doubted that husband and wife by written declaration could convert a tenancy by entireties into a tenancy in common "with the same force and legal effect as though this had been done by deed duly executed by the parties and recorded."

MINERALS

The case of *Highland v. Commonwealth of Pennsylvania*[9] involved the ownership of oil and gas rights. The decision depended upon a complex chain of title.[10] The important thing to note is the supreme court's application of the "Dunham Rule." The "Dunham Rule" is that in a reservation or exception of minerals in a conveyance, a rebuttable presumption arises that the word "minerals" was not intended to include oil or natural gas. The court held that the "Dunham Rule" applies not only to reservations and exceptions but also to grants.

Two cases illustrated different techniques for dealing with dormant mineral leases which were making title unmarketable.

In *White v. Young*[11] the lessor brought an action in equity to terminate an oil and gas lease. The term of the lease was for "ten years and as long thereafter as oil and gas were found in paying quantities or rent was paid." The complaint alleged an abandonment of the lease in that the ten year term expired in 1955 and for three years thereafter neither oil nor gas was extracted nor was the rent paid. The superior court rejected the defendant's contention that the plaintiffs had in ejectment an adequate remedy at law, and held that "equity had jurisdiction to require defendant to surrender the lease and to plug the well."

In *Pape v. Hughes*[12] the lease provided a term of five years and for

8. 192 Pa. Super. 611, 162 A.2d 93 (1960).
9. 400 Pa. 261, 161 A.2d 390 (1960).
10. For a discussion of this case, see 65 DICK. L. REV. 159 (1961).
11. 191 Pa. Super. 338, 156 A.2d 579 (1959).
12. 398 Pa. 436, 158 A.2d 547 (1960).

such additional longer period as minerals could be found which would be commercially profitable to mine. The lessor brought an action to quiet title. Upon appeal, the supreme court affirmed the lower court's determination that, although there had been no abandonment, the lease expired at the end of the five year term when minerals were not found that could be removed profitably for commercial purposes.

The recent case of *Wingert v. T. E. Phillips Gas & Oil Co.*[13] provides a good example of the care a lessee must take when leasing property which is held in trust. In this case T. W. Phillips, Jr., in 1917, leased land from William Wingert for a period of twenty years and for as long thereafter as oil or gas was produced in paying quantities or for as long as operations for oil or gas were being conducted. William Wingert died in 1925 leaving this land to his executors to hold in trust for such period as they should in their discretion determine, not however to exceed fifty years. The executors, as trustees, were given power to lease, sell or develop all mineral land. In 1936 the trustees reexecuted the same lease with the defendant, T. W. Phillips Gas & Oil Co. In 1952 the trustees sold the property to the plaintiffs. After having received notice from plaintiffs that the lease was terminated, defendant drilled a well on the land which produced over four and one-half million cubic feet of gas per day. The supreme court held that the sale of the property terminated the trust, and since the lease no longer served the trust, it too was terminated. The plaintiffs were entitled, on the basis of the doctrine of unjust enrichment, to an accounting by defendants for one-eighth of the total production of the gas well.

ROBERT J. WOODSIDE

MORTGAGES AND LIENS

In *Marx Realty Improvement Co. v. Boulevard Center, Inc.*,[14] the court held that the six month period within which the mortgagee must file a petition to fix fair value under the Deficiency Judgment Act[15] is computed from the date of delivery of the deed rather than the date of the sheriff's sale.

In *Home Unity Savings and Loan Association v. Balmas*,[16] one of two tracts of realty covered by a blanket mortgage was sold at a judicial sale subject to the mortgage. The mortgagee later released the remaining parcel from the mortgage and alleged that the whole unpaid balance of the mortgage was a lien on the first parcel sold at the judicial sale. The court held the

13. 398 Pa. 100, 155 A.2d 92 (1959).
14. 398 Pa. 1, 156 A.2d 827 (1959).
15. PA. STAT. ANN. tit. 12 §§ 2621.1-2621.11 (1941).
16. 192 Pa. Super. 542, 162 A.2d 244 (1960).

first was liable only for paying that proportion of the mortgage debt which the value of that part bore to the value of the total mortgaged realty.

Charging Liens

An attorney sought to impose a charging lien for professional services rendered against an award made to his client on an appeal to the court of common pleas in condemnation proceedings in *Redevelopment Authority of City of Clairton.*[17] Petitioner was retained by the plaintiff's brother to represent both parties in the viewer's proceedings. Petitioner made necessary trial preparations, hired real estate experts, attended the view, and conducted the trial on behalf of the plaintiff and his brother before the board of viewers. Although plaintiff was present at the trial before the viewers, he never told petitioner that he did not desire his services. The court found that plaintiff did hire the petitioner. The plaintiff retained another attorney to prepare and try the appeal which resulted in a verdict for the plaintiff. Since the viewer's hearing was a requisite step in obtaining the ultimate verdict of the jury, the court held that the charging lien should be allowed.

Another recent case involving an attorney's charging lien is *Syme v. Bankers National Life Insurance Company.*[18] Plaintiff's attorney sought to have the lien imposed on a life insurance policy. The bulk of the proceeds of the policy were held by the insurance company and payable in monthly installments over a period of years. Plaintiffs had agreed to pay the attorney who represented them in their suit on the life insurance policy a contingent fee of twenty-five per cent payable out of the total insurance proceeds. The court refused the charging lien upon the ground that "there is no fund in existence, or payable at the present time by defendants to plaintiffs, in which the appellants have any interest."

Although this seems a sufficient basis for the denial of the charging lien, the court proceeded to discuss the provision of the insurance policy forbidding assignment of proceeds by the beneficiary and the applicable statute prohibiting the assignment by a beneficiary when the proceeds are held by the company at maturity.

EMINENT DOMAIN

In the case of *Rosenblatt v. Pennsylvania Turnpike Commission,*[19] plaintiffs brought an action of ejectment to conditionally eject the Pennsylvania Turnpike Commission from land upon which the Commission had already built highway approaches and ramps, allegedly without first legally condemning the property. By a resolution passed by the Commission on

17. 191 Pa. Super. 404, 156 A.2d 877 (1959).
18. 400 Pa. 74, 161 A.2d 29 (1960).
19. 398 Pa. 111, 157 A.2d 182 (1959).

March 4, 1952, a right of way 200 feet wide was taken across plaintiff's land aggregating 9.18 acres, "together with such additional lands deemed necessary for ramp approaches . . . gasoline stations, restaurants . . . and other facilities needed for the construction, operation, and maintenance of the Turnpike . . . ." A bond was delivered and accepted by plaintiffs covering the described land. Approximately one year later the Commission mailed plaintiff a letter with a new description of the property being appropriated, which included an additional 68 acres for an interchange, and instructed him to insert the new description in the bond. After the alteration was made on the bond, work was commenced by the Commission. In this action plaintiffs contended that the additional land was never legally condemned.

The Pennsylvania Supreme Court cited the *Gitlin* case[20] for the proposition that "the taking of the highway as described in the resolution of March 4, 1952, and the subsequent appropriation of additional land for an interchange, according to the revised plan delivered to the property owner, came equally within the intended scope of the resolution's condemnation." It was further stated that the additional acres for an interchange would be encompassed in the term "engineering detail," as defined in *Foley v. Beech Creek Extension R.R. Co.*,[21] and thus a part of the condemnation. In regard to the date when damages would be assessed, the additional property was deemed to have been taken on the date when the Commission delivered its amended bond to secure payment. Judgment for plaintiff in the ejectment action was reversed and the complaint dismissed.

The Pennsylvania Turnpike Commission was ordered to pay interest of six percent on an award of viewers in the case of *Lichtenstein v. Pennsylvania Turnpike Commission.*[22] In construing the applicable statutes, the court refused to equate the Turnpike Commission with the Commonwealth as far as being exempt from liability for interest. Although the Commission is an instrumentality of the Commonwealth, it is not its alter ego.

A number of cases involved the measure of damages in condemnation proceedings. In *Frontage, Inc. v. County of Allegheny,*[23] the property in question abutted a parkway which the Governor and Secretary of Highways had indicated they intended to designate as a limited access highway. Such action, however, not having taken place at the date of the condemnation the court held it should not affect the measure of damages.

In *Sgarlat Estate v. Commonwealth*[24] the land being condemned was used as a source of supply in the owner's sand and gravel business and

20. Gitlin v. Pennsylvania Turnpike Commission, 384 Pa. 326, 121 A.2d 79 (1956).
21. 283 Pa. 588, 129 Atl. 845 (1925).
22. 398 Pa. 415, 158 A.2d 461 (1959).
23. 400 Pa. 249, 162 A.2d 1 (1960).
24. 398 Pa. 406, 158 A.2d 541 (1960).

allegedly had no market value. There was evidence that all (not just the parcel being condemned) of the land was intrinsically worth a computed figure in relation to this business *before* the taking, and a computed lesser value *after* the condemnation. The court reiterated that it is the person's *property* which is condemned, not his *business acumen.* Accordingly, the value of the land for business purposes was not relevant.

In *Gilleland v. New York State Natural Gas Corp.*[25] the court held that, for purposes of damages, speculative prospects could not be considered. Vague and indefinite evidence was introduced at the trial to the effect that the landowner had entertained thoughts about developing his tract into home sites at some time in the future. The Pennsylvania Supreme Court held that a landowner "may expect compensation for reasonable certainties inherent in the present, not for chances or future possibilities." A similar result was reached in the case of *MacFerree v. New York State Natural Gas Corp.*,[26] where the landowner had made no definite plans for development except "in my mind."

The permitted cross-examination of a corporate vice-president regarding the capital-stock tax return valuation of property being condemned was held to be erroneous in *B. & K., Inc. v. Commonwealth.*[27] Since the actual value of the land reported on the tax return was greater than the value claimed at trial, the return was not a declaration against interest. Secondly, since the "actual value" reported included a total value for the numerous tracts owned by the corporation, such evidence permitted the jury to speculate on the portion attributable to the tract being condemned. In *Olson & French, Inc. v. Commonwealth*[28] the same evidential problem was resolved in keeping with the *B. & K.* case. The court added, however, that the capital stock return reported not actual value but depreciated book value of property purchased twelve years before the condemnation. Being an arbitrary accounting figure, it had no bearing on the issue of fair market value.

Another case on valuation was *Lehigh Valley Trust Co. v. Pennsylvania Turnpike Commission,*[29] where condemnee's land was divided into two tracts by a highway. In the condemnation proceedings, condemnee initially chose to treat the land as one integrated tract for the determination of damages. By making this initial election, he thereby waived all rights to introduce evidence regarding damages to the land considered as two distinct and separate tracts.

25. 399 Pa. 181, 159 A.2d 673 (1960).
26. 399 Pa. 188, 159 A.2d 677 (1960).
27. 398 Pa. 518, 159 A.2d 206 (1960).
28. 399 Pa. 266, 160 A.2d 401 (1960).
29. 401 Pa. 135, 163 A.2d 86 (1960).

In *In re: Approval of Bond of Peoples Natural Gas Co.*,[30] petitioner desired to amend its approved bond to show the correct description of a right of way. The condemnor had marked and staked the property in question, but had inserted an erroneous property description in the bond. It was held that only one strip was ever intended to be taken, and that was the strip marked and staked. The condemnor's petition was not due to a "change of mind," a change of location or an attempted diminishment of damages; on the contrary, it was mere correction of a mistake of description and would harm neither party.

In *Commonwealth v. Appointment of Viewers, Etc.*[31] the Commonwealth exercised its power of eminent domain to take a strip of claimant's land for slope purposes in connection with construction of curbing. Due to the curbing, ingress and egress to landowner's business property were so impeded that it necessitated relocation of the buildings. The Commonwealth sought to differentiate between its construction of the curbing as an exercise of its police power and the taking of the land for slope purposes as an exercise of its power of eminent domain, and thus escape liability for the relocation of the buildings. Taking a narrow strip of land and constructing curbs were held to be one transaction, and this, in its entirety, was an exercise of the power of eminent domain. It was further held that the relocation damages were direct and not consequential, and were, therefore, compensable.

An optionee of condemned land was held to be entitled to damages for the loss of his right to purchase in *In re Governor Mifflin Joint School Authority Petition*.[32] The contract, entitled "Agreement of Sale", was conditioned upon the land being rezoned from residential to business. If the land were rezoned, optionee was obligated to pay the balance of the purchase price in ten days; failure of the rezoning attempts gave the purchaser an option to purchase within twenty days or consider the contract void. Efforts to rezone were unsuccessful, but before either party took any further action, the land was condemned. The court held that since there was no obligation to purchase after the failure of the borough to rezone, the agreement was an option which terminated when the land was condemned. An unexercised option does not, in this instance, work an equitable conversion; the landowner was entitled to full compensation. The case was remanded for the determination of the value of the option.

ROBERT M. HIGH

30. 399 Pa. 226, 160 A.2d 391 (1960).
31. 399 Pa. 586, 160 A.2d 715 (1960).
32. 401 Pa. 387, 164 A.2d 221 (1960).