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Pennsylvania Property Cases of 1961

William H. Dodd

Bernard A. Buzgon

Francis J. Leahey Jr.

Franklin E. Poore III

JUDICIAL HIGHLIGHTS

PENNSYLVANIA PROPERTY CASES OF 1961

BY WILLIAM H. DODD*

Assisted by Bernard A. Buzgon, Francis J. Leahey, Jr., Franklin E. Poore, III

PERSONAL PROPERTY

Gifts

In *In re Neglia's Estate*,[1] the decedent, between 1946 and 1952, purchased 13 United States Savings Bonds, Series E. All except the last were purchased before her marriage. Eight of the bonds were issued in the name of decedent or her brother. Four were issued in the name of decedent POD (payable on death) to her brother. The last bond was issued in decedent's married name POD to her brother. During October 1957, the decedent, intending to make a gift to her husband, endorsed and delivered possession of the bonds to her husband. After decedent's death, the bank refused to cash the 13 bonds mentioned above because there had been no compliance with the treasury regulations for transfer and reissuance of bonds.

In a proceeding for a declaratory judgment brought by the personal representative of the decedent's estate, the court was of the opinion that the decedent's husband, the alleged donee, was entitled to the proceeds of the bonds as against the designated co-owner, the brother of the decedent. The court, consistent with *In re Cochran's (Horstman) Estate*,[2] stated that the treasury regulations merely made the designated co-owner a third party beneficiary under the contract between the purchaser of the bonds and the United States Government. All that these regulations require is that payment must be made to such bond-designated co-owner as he is recognized as the sole and absolute owner of such bonds. The impact of the regulations terminates when such payment is made. Subsequently, the court may direct payment of the proceeds to one who is, under state law, equitably entitled to such proceeds.

Stemniski v. Stemniski[3] presented the question of whether U.S. Government Series E Bonds issued in the names of husband "or" wife could be held as tenants by the entireties. The court said the treasury regulation stating that

* Professor of Law, Dickinson School of Law; B.A., Dickinson College; LL.B., Dickinson School of Law.

1. 403 Pa. 464, 170 A.2d 357 (1961). See note, 66 DICK. L. REV. 233 (1962).
2. 398 Pa. 506, 159 A.2d 514 (1960).
3. 403 Pa. 38, 169 A.2d 51 (1961).

upon payment to either co-owner, the other co-owner shall cease to have any interest in the bond,[4] was merely to protect the government and not to control the relationship existing between the co-owners. The regulations are silent on the right of either to possession in a contest. This case is, therefore, consistent with *In re Neglia's Estate*[5] in asserting that the regulations were for the protection of the government.

The court ruled that the bonds were held as tenants by the entireties because the unities of interest, title, time, and possession were present. Since the bonds were in the names of husband "or" wife, either party could cash the securities and receive the proceeds if done in good faith and for the mutual benefit of both. If otherwise, the other co-owner, consistent with the Pennsylvania law of tenancies by the entireties in bank accounts, may sue for an accounting and division.

In re Berdar's Estate[6] involved the determination of title to a joint savings account in a savings and loan association. The decedent had signed a signature card which stated that the account should be in the joint names of Berdar (decedent) and Malutinok (claimant) "as joint tenants with right of survivorship, and not as tenants in common." This, said the court, creates only a prima facie case of an inter vivos gift, and other evidence is admissible to establish the lack of donative intent. The alleged donor was of foreign extraction and did not completely comprehend the English language. Thus, extrinsic evidence was admitted to prove that decedent's creation of the account was solely for his own convenience and not a means for transferring ownership of the account before or after his death. This evidence was held to be sufficiently clear, precise and convincing to overcome the prima facie case of the existence of donative intent established by the signature card.

In *In re Parkhurst's Estate*[7] an uncle had purchased shares of corporate stocks in 1941 and had them registered in his name and that of his niece "as joint tenants with the right of survivorship and not as tenants in common." About a year after he received the certificates he rented a safe deposit box at a bank in his own name and placed the certificates in it. A week later he had the box registered in the joint names of himself and his niece "with either having full rights of entry therein without the presence of the other." The niece entered the box alone on two occasions; the uncle, once. Then the box was surrendered, and the niece delivered the securities in question to the bank and received a receipt stating, "for account of W. P. Parkhurst (uncle) —safekeeping." In 1950 some stocks were sold by the bank on the uncle's written order and the niece's written consent. Other shares were purchased,

4. 31 C.F.R. 313.60(a) (1959).
5. *Supra* note 1.
6. 404 Pa. 93, 170 A.2d 861 (1961).
7. 402 Pa. 527, 167 A.2d 476 (1961).

registered in the same manner, and placed in the uncle's safe-keeping account at the bank. Share certificates issued when some stocks were split were in the names of the uncle and niece jointly and were kept by the bank in the uncle's safe-keeping account. Dividends during the uncle's lifetime were deposited by the bank to the credit of the uncle's checking account. Stock powers or assignments in blank, executed by the uncle and niece, accompanied the certificates. After the uncle's death in 1956 the niece's claim to this stock was resisted by the uncle's administrator. These facts were agreed upon in a stipulation by counsel. The supreme court, one member dissenting, held that by the registration in the joint names and the deposit in a jointly held safe deposit box, to which the niece had exercised the right of access, the uncle had manifested the intent to make an inter vivos gift to the niece and had made such delivery as was consonant with the creation of a joint interest in the stock. By not making claim to dividends during the uncle's lifetime the niece had waived her rights to such dividends.[8]

Miscellaneous

In re Feitz' Estate[9] overruled, in part, *Ryan Estate*.[10] The court agreed with the basic propositions espoused in *Ryan* that (1) no person has a constitutional right to a liquor license and (2) a liquor license, being a personal privilege and not a property right, is not an asset of the deceased holder. The tribunal, however, went on to state that when the decedent, by will, devises to another the right to apply for a transfer of such license, the value of the right is an asset of the decedent's estate. As such it is subject to taxation for inheritance tax purposes. To the extent that *Ryan* was in conflict with this latter proposition, *Ryan* was overruled.

Justice Bell vehemently dissented. Pointing out that the statute (the Liquor Control Act) gives the Liquor Control Board the right in its sole discretion to transfer or not to transfer the license "if, as and when it desires," he concluded that the value of the opportunity to have the Board exercise its discretion at the death of the licensee could be ascertained only by a "wild guess." Since the liquor license is concededly a personal privilege which terminates at decedent's death, at which time the right to apply for a transfer comes into being, he questioned whether the latter can properly be considered something transferred by will of which the decedent died "seized or possessed" within the language of the inheritance tax law. Section 102(17) of the Inheritance and Estate Tax Act of 1961,[11] effective Jan. 1, 1962, provides that "property" or "estate" includes: (*v*) *A liquor license issued by the Commonwealth of Pennsylvania.*

8. See annotation, Fid. Rev., March, 1961, p. 1.
9. 402 Pa. 437, 167 A.2d 504 (1961).
10. 375 Pa. 42, 99 A.2d 562 (1953).
11. Pa. Laws 1961, act 207, § 102(17)(v).

Gilbertson Coal Co. v. Schuster,[12] involved an appeal from an order in the court below refusing to strike from the record a judgment, entered under a warrant of attorney, in an amicable action of ejectment. The record disclosed that the judgment plaintiff entered into a written agreement with the City of Philadelphia (trustee of Girard Estate) wherein the plaintiff, for a consideration, was permitted to carry away materials contained in certain refuse banks in Schuylkill County. The refuse, or culm, was the remnant of the initial processing of coal.

Subsequently, the plaintiff entered into a written agreement with the defendant whereby the latter was to, among other things, clean, wash, and process the coal. The coal was then to be delivered to plaintiff for sale. The contract contained a warrant of attorney empowering an attorney to sign an agreement for the entry of an amicable action and confession of judgment in ejectment against the defendant. Following a breach of the agreement by defendant an amicable action and confession of judgment was entered of record against the defendant. The legality of this judgment is now being questioned.

The court's basic premise was that in an action of ejectment titles to corporeal hereditaments only are adjudicated. It lies to gain possession of real property. The grant from the trustee gave plaintiff a mere license, which is not a possessory interest in land. The culm banks were personal property and the license to remove and carry away personal property is not a corporeal hereditament. Therefore, plaintiff did not have such a possessory interest in land as would entitle him to bring an action of ejectment.

BERNARD A. BUZGON

FUTURE INTERESTS

Testator's will in *In Re Heaton's Estate*[13] gave his residuary estate in trust, the income of which was to be divided into two parts, half to testator's son and half to his daughter. After the son's death, his half of the income was to be divided equally among his three sons (named) and at the daughter's death, her share of the income was to be paid to her son (named). The will further provided that at the death of each grandchild leaving issue, the share of principal of which such grandchild was receiving income should be paid to such grandchild's children or issue per stirpes. In the event that any grandchild should die without issue, the principal of the share of which such grandchild was receiving income was "to continue and thus augment the shares of his or her brothers and sisters. . . ." If a grandchild should die without issue or brothers and sisters, the share of such grandchild was to be

12. 403 Pa. 226, 169 A.2d 44 (1961).
13. 404 Pa. 360, 172 A.2d 293 (1961).

paid "to the persons who would be entitled thereto *as my heirs and next of kin* respectively under the intestate laws of the State of Pennsylvania *in force at the* time of this writing." (Court's emphasis.)

Only one of testator's son's three children died with issue surviving (Harry, who died in 1933, leaving three children). (Augustus died in 1936; Perry died in 1954.) Upon Perry's death, Harry's three children received the principal of one-half of testator's trust estate outright. Testator's daughter's son died testate and without issue in 1958 (being the last surviving grandchild).

Harry's three children (appellants) and the residuary legatee of testator's daughter's son (appellee) each claimed the one-half share of principal, the income of which was received by the daughter's son during his life. Appellants asserted that since the last surviving grandchild died without issue that this share of the principal should be paid to testator's heirs, to be determined as of the date of death of the said grandchild. Appellee contended, and the supreme court so found, that "heirs and next of kin respectively under the intestate laws of the State of Pennsylvania in force at the time of this writing" meant that the share of the principal in question "should be paid to the heirs and next of kin of the testator who were to be determined *as of the date that testator wrote his will.*" (Emphasis added.) The court noted that the rule of construction in force in 1900, the year of testator's death, was that a legacy to testator's next of kin meant such persons determined as of the date of his death even though preceded by a life estate.

The "heirs and next of kin" of testator at the time he wrote his will and at his death were his son and daughter. It was consequently decreed that the principal of which the last surviving grandchild was receiving income had devolved one-half to the son's heirs or legatees and one-half to the daughter's heirs or legatees (the appellee thereby being entitled to one-fourth of testator's entire residuary trust estate).

In *In Re Tripp's Estate*,[14] the testator, who died in 1898, devised a tract of land to his son for life unless "he shall have issue born to him capable of inheriting the same, and in that event the life estate in the land shall become an absolute in fee." The will further provided if testator's son should die without issue or descendants of issue that the land given him would "become a part of my residuary estate, and go to my children to whom the same is given, and in that event, my said residuary heirs shall pay the wife of my son, if she still survives, the sum of three thousand dollars." The residuary clause read, "I give, devise and bequeath to my heirs . . . all the rest and residue of my estate . . . the child or children of any deceased child to receive the share of their respective parents." Appellant claimed through the husband

14. 402 Pa. 211, 166 A.2d 619 (1961).

of testator's daughter, who died in 1919 without issue surviving her. Testator's son died in 1957 without ever having had issue born to him. Appellant contended that the remainder interest in the land vested in the testator's children at the date of his (testator's) death subject to being divested should issue be born to testator's son. He cited the general rule of construction which favored a remainder vested rather than contingent, if possible. The supreme court affirmed the lower court's holding that the language gave the remainder to the class designated as testator's "heirs," meaning his children or their issue, who were to be ascertained at the date of death of the testator's son, the life tenant.

Testator's will in *In Re Dinkey's Estate*,[15] created a testamentary trust, the net revenue of which was to be used to pay each of his three named children 400 dollars per month with the balance payable to his wife for life. The will further provided, "Upon the death of my said wife . . . I direct the surviving trustee to divide the trust estate into three equal portions, and to pay the same to my three children . . . . In case of the death of any of my children prior to the distribution of the trust estate . . . I direct that his or her share be paid to his or her surviving children, and if any child shall die without issue surviving his or her share shall be divided equally among my surviving children, or their children, such children together taking a parent's share."

One of testator's sons died childless six years before the life beneficiary, leaving a widow who claimed one-third of the principal of the trust on the theory that the will had given each of testator's three children, including her husband, a remainder interest which vested at the death of the testator. It was argued that the provisions concerning payments to be made in the event of the death of any of the children prior to the distribution of the trust estate referred only to payments of the 400 dollars per month income and did not alter the vested character of the gift of the corpus. The supreme court affirmed the lower court's conclusion that the latter language referred to the principal, and only those children of the testator who survived the testator's widow, or the then surviving children, per stirpes, of deceased children, were entitled.

The question in *In re Johnson's Estate*[16] was whether a proper case had been presented for the issuance of a declaratory judgment by the orphans' court. Petitioner was the personal representative of a decedent who had been bequeathed one-fourth of the remainder of a residuary trust which was to terminate upon the death of the last survivor of two successive life beneficiaries. The trustee was directed to pay the specified share of the corpus to the named legatee "if she shall be living at the time of the distribution of

15. 403 Pa. 179, 168 A.2d 337 (1961).
16. 403 Pa. 476, 171 A.2d 518 (1961).

my residuary estate." One life tenant died in 1955, the other was still living; the decedent died in 1957. Petitioner sought a declaratory judgment that this language created a vested remainder in his decedent upon her surviving the time the residuary estate was distributed to the trustee in 1951.

The supreme court held that the personal representative was entitled to a declaratory judgment on the question whether his decedent took a vested or contingent remainder in spite of the fact that upon the death of the other life tenant the question could be determined at the audit of the trustee's account in the orphans' court at the termination of the trust. The lower court's denial of the remedy was held to be an abuse of discretion.

In Re Little's Estate[17] and *In Re Scholler's Estate*[18] both involved the question whether a valid charitable trust had been created. In the former the residuary clause in testator's will provided: "The balance of my estate . . . is to be deposited . . . in a fund. From this fund there must be a suitable memorial for my saintly brother (named) and my wonderful parents (named). I entreat my executors to seek advise [sic] from my good friend (named) as to the nature of the memorials. However I do not want this money to be governed or used by social workers in any manner whatsoever . . . ." There was no language in the clause imposing specific duties on the trustees or enumerating the specific uses to be made of the funds. The testator's heirs contended that because of this the trust was a dry trust which failed, thereby causing the testator to die intestate as to his residuary estate. The supreme court affirmed the lower court's decree recognizing that by the language contained in the residuary clause and the will in its entirety, plus the circumstances attending the execution of his will, testator had created a charitable trust for such uses as his trustees should determine would provide suitable memorials to his deceased parents and brother. Two justices dissented.

In *In re Scholler's Estate*, the settlor of an expressly irrevocable and unamendable inter vivos trust established, in his words, "a charitable trust to be known as The Scholler Foundation." However, after reciting various general charitable purposes the terms of the trust originally provided that it was "specifically" for the purpose of providing hospitalization, medical care, and educational, literary and recreational facilities for employees of named corporations of which for practical purposes the settlor was the sole shareholder. These provisions were subsequently deleted through amendment by the settlor and the trustee upon their learning that because of them the trust might not constitute a tax exempt charity under the laws of Canada. The heirs of the settlor upon his death contended that the deleted provisions

17. 403 Pa. 247, 168 A.2d 738 (1961).
18. 403 Pa. 97, 169 A.2d 554 (1961).

nullified the charitable nature of the trust and that, such being the case, the rule against perpetuities was violated. Affirming on the opinion of the lower court, the supreme court held that the trust was charitable and hence not subject to the rule against perpetuities. In so holding, the court determined that the settlor's provision for the employees was subsidiary to his overall charitable intent and would not affect the charitable nature of the trust because of a severability clause. The deed of trust by its terms was irrevocable and unamendable. However, the settlor and trustee deleted the questionable provisions by subsequent amendment. This was held by the court to be effective to *reform* the instrument on the basis that the settlor, in including a provision contrary to his intent, made a unilateral mistake. The Attorney General, counsel for the trustee-appellees, had made no objection to the reformation of the trust deed on behalf of the beneficiaries.

In *Catherwood Trust*,[19] the supreme court, overruling three prior cases, held that the Principal and Income Act of 1947 may constitutionally be applied to trusts created prior to its passage. Recognizing that the effect of its decision was to abolish prospectively the Pennsylvania rule of apportionment, the court stated, "The legislative enactment did not modify or extinguish any vested property rights. There is no vested property right in a court-made rule of apportionment."[20]

In Re Ryan's Estate[21] involved an application by a life beneficiary of a spendthrift trust under Section 2 of the Estates Act of 1947[22] for an allowance from principal to supplement the income received from the trust which had become inadequate to cover his living expenses. Affirming on the opinion of the lower court, the supreme court upheld the order entered under the above mentioned section allowing the widower of testatrix a monthly payment from principal of 100 dollars in addition to medical, nursing and hospital expenses reasonably necessary for his comfort. All parties in interest did not agree to the invasion, for which the terms of the trust made no provision. However, the court noted that the statute did not require the consent of all interested parties so long as they had received notice of the application.

FRANCIS J. LEAHEY, JR.

EMINENT DOMAIN

In *Wolf v. Commonwealth*,[23] the supreme court held that "just compensation" as provided for by the constitution of Pennsylvania[24] in eminent

19. 405 Pa. 61, 173 A.2d 86 (1961).
20. See Fid. Rev., Aug. 1961, p. 1; Fid. Rev., Sept. 1961, p. 1; Fid. Rev., Oct. 1961, p. 4.
21. 404 Pa. 229, 172 A.2d 584 (1961).
22. PA. STAT. ANN. tit. 20, § 301.2 (1950).
23. 403 Pa. 499, 170 A.2d 557 (1961).
24. PA. CONST. art. 1, § 10 (1874).

domain proceedings requires that the Commonwealth, like other condemnors, pay interest on the award from the date thereof until the time of payment. Thus, the Commonwealth lost its favored position of immunity as announced in *Culver v. Commonwealth*,[25] now overruled. The court, in considering whether the condemnee was the cause of the delay, hence working a forfeiture of the detention damages, ruled that the landowner's expert's valuation totaling 400,000 dollars in excess of the Commonwealth's was not binding on the property owner. The fault thus did not lie with the plaintiff. The court noted that the judgment n.o.v. (entered three months subsequent to the jury award) properly included detention damages on the jury award from the time of taking of the property through to the date of such judgment. Upon this amount, stated the court, "interest should run until the date of final payment thereof by the Commonwealth. . . ."

In *Earl M. Kerstetter, Inc. v. Commonwealth*,[26] it was held that the lower court erred by admitting into evidence the original and revised plans of appellant's subdivision, thereby allowing the jury to know the difference in the number of lots before and after condemnation, and then permitting condemnee's president to testify as to the selling prices of homes on nearby land. The reason assigned for so ruling was that the property should be valued as a *tract* and not by taking into consideration the number of lots into which the property might be divided and the residential worth of each lot separately. Allowing testimony as to the cost of a particular type of fencing along the right of way was also held to constitute error. However, the fact that fencing was necessary in order to use the remaining land would have been competent evidence.

McArthur v. Township of Mount Lebanon,[27] involved the construction of a provision of the First Class Township Code[28] permitting a complaint which questions the legality of any township ordinance or resolution, if filed within 30 days after such becomes effective, to be made to the court of quarter sessions, its determination and order to be deemed conclusive. The purpose of the provision, as the court viewed it, was to provide a fast and efficient method whereby to question the *procedure* surrounding the adoption of an ordinance, and was not designed to prevent later appeals involving the constitutional application of the ordinance after the 30 day period. Hence, the court of quarter sessions was without power to decide that the township lacked statutory authority in enacting an ordinance condemning part of plaintiff's land for a walkway.

25. 348 Pa. 472, 35 A.2d 64 (1944).
26. 404 Pa. 168, 172 A.2d 163 (1961).
27. 402 Pa. 78, 165 A.2d 630 (1960).
28. PA. STAT. ANN. tit. 53, § 56502 (1959).

In *In Re Condemnation of Certain Interests in Lands of Lenik*,[29] a right of way 700 feet long and 150 feet wide, with trimming rights over 50 foot strips on either side, was condemned by a power company for its power lines. The record revealed that the valuations of damages by the landowner and his expert were twice that of the condemnors because of a mistaken belief that the use of the 250 foot strip as a nursery had been terminated. The jury's verdict for an amount in excess of all the experts' assessments and only a little lower than the amount claimed by the owner was held to be against the weight of credible evidence.

In *Recht v. Urban Redevelopment Authority*,[30] the question presented was whether an attorney could assert an equitable charging lien against a judgment recovered after a jury's verdict in a trial de novo on the client's appeal from a viewers' award in a condemnation proceeding. The attorney took no part in the preparation or trial of the appeal, and there was no agreement that he would look to the fund recovered by the client for his fee. However, he had represented the condemnee before the board of viewers which awarded the client a sum amounting to slightly more than half the jury's verdict on appeal. The supreme court reversed the superior court, indicating that it was error to consider the viewers' proceeding and the trial on appeal as one proceeding producing the "fund." Even though the viewers' proceeding was a prerequisite to the award secured on appeal,[31] the determination in the viewers' proceeding was extinguished as a result of the appeal.

In *Griggs v. County of Allegheny*[32] plaintiff petitioned for appointment of viewers to assess damages against the county for its alleged taking of his land. Since 1952 the county had owned and operated an airport. Aircraft of various air lines in taking off or landing at the airport flew over part of plaintiff's 19-acre residential tract at less than 500 feet, the lowest limit of navigable air space at the time. The proximity of the aircraft, their noise and lights, substantially interfered with plaintiff's use of the land. The county excepted to the viewers' award of damages to the plaintiff, from which the plaintiff himself had appealed, on the ground that the viewers' findings of fact failed to show there had been a taking of plaintiff's property by the county. The supreme court reversed the order of the lower court dismissing these exceptions, two members dissenting. The majority said the record failed to show that the county was the cause of the flights over plaintiff's land below the navigable air space since there was no proof that the county owned, operated or controlled the aircraft involved. Also the county's drafting and submitting a "Master Plan" to the CAA for approval, which showed an

29. 404 Pa. 257, 172 A.2d 316 (1961).
30. 402 Pa. 599, 168 A.2d 134 (1961).
31. PA. STAT. ANN. tit. 53, § 37842 (1951).
32. 402 Pa. 411, 168 A.2d 153 (1961). See Note, 66 DICK. L. REV. 107 (1961).

"approach area" for a runway over petitioner's land, did not give the county an easement or deprive plaintiff of any use of his property. The majority suggested that plaintiff should resort to an action against the owners or operators of the aircraft involved in the flights which were interfering with plaintiff's use of his land.

ZONING

Constitutionality and Construction of Zoning Ordinances

In *Lally Zoning Case*,[33] the lower court's order affirming the denial by the Board of Zoning Adjustment of an application for a variance to use a triangular-shaped property located in an "A-Residential" district for an auto-repair shop was upheld by the supreme court. Although there were some commercial uses and a cemetery nearby, the court upheld the validity of the ordinance and said that the enforcement of the residential use as to appellant's property was not unreasonable or confiscatory. The court pointed out that there must be lines of demarcation between zones, and this is a matter within the power of the municipal authority, the exercise of which will not be interfered with by the courts unless the classification bears no substantial relationship to the police power objectives.

The Sun Oil Company, equitable owner of a tract of land fronting 151 feet on a main traffic artery, contended, in *Sun Oil Co. v. Zoning Bd. of Adjustment*,[34] that a provision in the zoning ordinance requiring that vehicular "access points" be limited, wherever possible, to intervals of not less than 300 feet on major thoroughfares was unconstitutional. It was argued that the restriction was vague, bore no reasonable relation to public safety or general welfare, and was confiscatory in that a larger land investment would be required, in providing the minimum distance between access points, than was economically feasible. The supreme court upheld both the ordinance and the Board's refusal to issue a building and occupancy permit (the latter's ruling having been based on the Planning Commission's disapproval of the oil company's site plan). In so deciding, the court held that the regulation was substantially related to public safety on major traffic arteries since contributing to the maintenance of a continuous flow of traffic and the prevention of vehicular collisions. The provision concerning "access points" authorized the Commission, in considering site plans, to endeavor to assure safety and orderly traffic movement both within the site and in relation to access streets, and to secure the beneficial relationship of structures and uses on the site. This was held to be a constitutionally valid delegation of legislative power because sufficient standards were provided to control determinations of the Commission.

33. 404 Pa. 174, 171 A.2d 161 (1961).
34. 403 Pa. 409, 169 A.2d 294 (1961).

In *Puno v. Norristown Borough*,[35] the supreme court upheld a borough zoning ordinance amendment converting an area from "residential" to "secondary business" so as to allow additional acreage for expansion of an existing shopping center. The challenging owners contended that due process was lacking because the personal notice required by the zoning ordinance was not given to interested parties in the area affected, and also, that the borough's action amounted to "spot zoning." The latter contention failed, according to the court, because the amendment added acreage to an already established "secondary business" area which, like other areas of this kind, "followed main traffic arteries," thus demonstrating the existence of a comprehensive plan. The former contention was dismissed since notice of the hearing as published in the local newspaper was in conformity with the *enabling act*. The notice provisions of the borough zoning ordinance were merely directory, and failure to comply therewith did not invalidate the amendment.

In *Mignatti Appeal*,[36] the court concluded that the lower court erred when it construed the provisions in an ordinance prohibiting "asphalt manufacture or refining" as referring only to the process of refining crude petroleum to produce asphalt. This, said the court, may be the technical meaning of "asphalt," but the ordinance embodied also the common meaning of the word, and thus prohibited the making of bituminous concrete for use in the construction of "asphalt" roads.

Amending Zoning Ordinance After Issuance of Building Permit

In *Hyde v. Pittsburgh Zoning Bd. of Adjustment*,[37] permittee (a corporation), intending to make improvements for commercial use, bought land in 1954 and 1956 in an area where numerous commercial uses existed under prior zoning classifications. It secured a building permit in 1957, the issuance of which was appealed by adjoining landowners through the Board to the county court wherein no further action was taken. Several contracts were made and work was done under the permit before the area was re-classified residential in 1958. Subsequently, a subordinate inspector revoked the permit, but it was later reinstated by the superintendent of the Bureau of Building Inspection. The adjoining landowners appealed the reinstatement to the Board of Adjustment and then to the county court, both of which affirmed the action of the superintendent. In affirming the lower court, the supreme court held that the evidence sustained the findings that the permittee had met the nonconforming use requirements of "substantial construction," "substantial establishment," or "contract for construction let" contained in the new ordinance. The court also noted that, though the appellant's prior appeal

35. 404 Pa. 475, 172 A.2d 828 (1961).
36. 403 Pa. 144, 168 A.2d 567 (1961).
37. 403 Pa. 415, 169 A.2d 547 (1961).

to the county court of the issuance of the original permit forced permittee to proceed with construction at his own risk, appellant's unnecessary delay in prosecuting or withdrawing that appeal was "clearly not conducive to the fair and equitable administration of building and zoning laws and is to be condemned."

Variances

In *Joseph B. Simon & Co. v. Zoning Bd. of Adjustment*,[38] Justice Bell (now Chief Justice) enunciated the time honored formula and policy considerations used by the supreme court in testing factual situations surrounding applications for variances, when he said:

> In order to establish a right to a variance an applicant must prove (1) unnecessary hardship upon and which is unique or peculiar to the applicant's property, as distinguished from the hardship arising from the impact of the Zoning Act or regulations on the entire district; and (2) that the proposed variance is not contrary to the public safety, health, morals or general welfare. . . .
>
> In many zoning cases there is considerable merit on the side of both the applicant, who is generally desirous of developing a community or a piece of ground or a building to meet the needs and the progress of our increasing and expanding population, and the protestants, who generally speaking wish their respective properties or their community to retain its old residential or neighborhood character.
>
> It must be apparent to anyone who gives thoughtful consideration to these vexing problems (a) that the Supreme Court of Pennsylvania is not, should not be and, realistically speaking, cannot be a super Board of Adjustment; (b) that we must allow the Board of Adjustment and/or the lower Court wide discretion in zoning matters; and (c) we should reverse only for a clear abuse of discretion or an error of law.

In this case the supreme court affirmed the order of the court below upholding the Board's refusal of a variance to permit premises zoned "D" Residential to be used for a gasoline station. The Board did not abuse its discretion or commit an error of law and the requisite hardship was not established where appellant bought the triangular-shaped land with knowledge of the zoning restrictions and where testimony before the Board as to its suitability for residential use was conflicting.

The supreme court also refused variances in the following cases:

(1) In *Magrann v. Zoning Bd. of Adjustment*,[39] the court affirmed the lower court's determination that the Board had abused its discretion in granting a variance allowing premises zoned "D-Residential" to be used

38. 403 Pa. 176, 168 A.2d 317 (1961).
39. 404 Pa. 198, 170 A.2d 553 (1961).

for a gasoline station, where the only evidence in support of the variance was that appellant would suffer economic hardship if the variance was not granted. The essence of appellant's contention was that though his land was suitable for the erection of conforming residences, the requested variance should be granted in order to enhance the value of his lot, notwithstanding the fact that such use might depreciate the value of neighboring properties.

(2) In *Lally Zoning Case*,[40] the court, in reply to the owner's contention that the unusual triangular shape of the lot prevented the permitted use, observed that the evidence showed that construction of a dwelling satisfying all zoning requirements was feasible and that the hardship, if any, was self-inflicted. Apparently, the shape of the property was conceived to provide frontage for the commercial use desired, at a minimum expenditure, in disregard of the zoning regulations.

(3) In *Heller v. Zoning Bd. of Adjustment*,[41] the supreme court affirmed the order of the court below which upheld the Board's refusal of a building permit to add another apartment to a building converted from a single-family to a nine-apartment structure under a variance from the side yard requirements which had been granted in 1959. Appellant contended that the addition merely required a *permit*, on the theory of a continuing right to the variance since no external change, decreasing the size of the yard, was involved. Justice Bok pointed out that the application was properly treated as involving a new request for a variance, the denial of which was proper on the following grounds: (a) the record supported the finding that the granting of the permit would adversely affect the health, morals, safety and general welfare of the neighborhood, and (b) the earlier variance for conversion to a nine-apartment structure did not require issuance of a permit for an additional apartment since there was no identity between rights to operate nine-family and ten-family establishments.

Special Exceptions

Justice Cohen said of special exceptions in *Blair v. Bd. of Adjustment*:[42]

> A special exception is issued for an exceptional use which may be permitted within a particular district if the board of adjustment determines its availability. Such uses are made available as a *privilege*, not as of right, assuming that the requisite facts and conditions detailed in the ordinance are found to exist . . . . Since its allowance is predicated on the exercise of prudent discretion by the Board, only a manifest abuse of that discretion will cause reversal on appeal. (Court's emphasis.)

This appeal concerned the refusal of the Board to grant special exceptions to

40. *Supra* note 1.
41. 404 Pa. 8, 171 A.2d 44 (1961).
42. 403 Pa. 105, 169 A.2d 49 (1961).

two property owners who intended to use their properties for the operation of gasoline stations in a district zoned for retail business. If the exceptions had been allowed, five service stations would have been located within a radius of 350 feet. The supreme court upheld the Board, reversed the lower court, and held that the Board had not abused its discretion in refusing the special exceptions, where the refusal was based on the anticipation of abnormal traffic patterns creating danger and congestion in the retail zone, considerations of the effect of the proposal on the "character of the neighborhood," conservation of the value of existing buildings, and the encouragement of "the most appropriate use of the land" as required by the ordinance.

In *Upper Providence Township Appeal*,[43] the applicant sought a special exception to operate a club in an "Agricultural-Residential" zone under a provision allowing non-commercial clubs, providing services for members and guests only, upon approval of the Board of Adjustment. There were no sanitation facilities for members and no plan for adequate, all-weather parking facilities as specified by ordinance. Access to the premises was gained by a dirt road (apparently private) in violation of the ordinance requirement that all lots abut a public street for at least fifty feet. Certain members of the club made a modest profit (*e.g.*, $26.25 for twenty-nine hours work) from the sale of food, and the informal plan submitted by the club did not meet the ordinance requirement of a "plan drawn to scale." The Board's refusal of the special exception was held not to be an abuse of discretion and its action was affirmed.

In *Gage Zoning Case*,[44] the supreme court affirmed the lower court's order which reversed the Board of Adjustment's refusal to grant a special exception for a convalescent home in a predominantly residential municipality. Justice Musmanno, expressing the opinion of the court, wrote:

> The appellant contends that one of the objectives of the Zoning Ordinance was to conserve the value of the existing properties in the Township. We do not so read the ordinance, but if it could be shown that in some degree a . . . house in the immediate vicinity . . . would now sell for less because of the convalescent home's proximity, we would still say that that would not be an adequate reason for prohibiting the use . . . .

The Board's action in refusing the exception was erroneous because it misapprehended the purpose of an exception when it also based its refusal on a finding that appellee had not expended enough effort to find a purchaser desirous of using the property as a private residence, since a showing of unnecessary hardship is not a prerequisite to the obtaining of an exception.

43. 403 Pa. 50, 169 A.2d 47 (1961).
44. 402 Pa. 244, 167 A.2d 292 (1961).

Certificates of Use or Occupancy

The Zoning Board's denial of an application for a certificate which would have allowed the remaining portion of the land upon which a gasoline station was situated to be used for the sale, rental, and storage of automobiles and trailers, and as an open parking lot, was affirmed by the supreme court in *Suhy v. Zoning Bd. of Adjustment.*[45] The land, zoned "A" Commercial, was not in the center of the commercial area but was a corner property which fronted residences on three sides. The court felt that the increased activity would result in more racket, dust, smells, and traffic hazards affecting the health, safety, and welfare of nearby homeowners.

In *Haas v. Zoning Bd. of Adjustment,*[46] the Board granted two certificates—one to permit a 158-bed convalescent home and the other for use of part of the land as a parking lot. The area was zoned "A" Residential and could be used for a convalescent home by the terms of the ordinance, provided a zoning certificate was obtained. The order of the lower court sustaining the issuance of the certificate was affirmed on the basis that a convalescent home would not per se have an adverse effect upon the health, safety or welfare of the protesting neighbors, nor was there evidence that the proposed use would in fact have that effect.

Nonconforming Uses

In *Mignatti Appeal,*[47] the supreme court approved the Zoning Board of Adjustment's refusal to grant a special exception to allow appellees to erect and operate a bituminous concrete mixing plant at their quarry and stone-crushing plant, which was a nonconforming use in an area having the highest residential classification. The court said this was not merely accessory to, or a reasonable expansion of, the existing use. It was a use different in kind, rather than degree, and involved independent operations severable from the industry of quarrying and crushing stone. The lower court, relying on its decision in a prior unappealed case that production of bituminous concrete was an accessory use,[48] had reversed the Board.

The evidence before the Board in *Stokes v. Zoning Bd. of Adjustment*[49] was that ten years before an ordinance was enacted which located the property in a "C" Residential district, appellant bought the property and used it for storage of horses, wagons, and contractors' equipment. A blacksmith shop

45. 402 Pa. 657, 169 A.2d 62 (1961).
46. 403 Pa. 155, 169 A.2d 287 (1961).
47. *Supra* note 4.
48. M. & M. Stone Co. v. Lower Salford Township Zoning Bd. of Adjustment, 16 Pa. D.&C.2d 584 (1958), which relied on Cheswick Borough v. Bechman, 352 Pa. 79, 42 A.2d 60 (1945), was distinguished by the court, from the present facts, because the installation of a rotary screen to sift sand and loam extracted *from the quarry* in that case would have resulted in a true accessory use.
49. 402 Pa. 508, 167 A.2d 316 (1961).

was built on the premises, but the testimony conflicted as to whether this was before the enactment of the ordinance and as to whether, in addition to the shoeing of horses and the repair of equipment kept on the premises, the general public was served. Eighteen years after the enactment of the ordinance the building burned, was later rebuilt, and machinery for the repair of tractor treads and heavy earth-moving equipment moved in. The supreme court ruled that the evidence sustained the finding of the Board that the original blacksmith shop was a use accessory to the business of storing and leasing contractors' equipment. Therefore, appellant was not entitled to a permit for a shop to repair contractors' equipment because an *accessory use* cannot be the basis for the establishment of a nonconforming *principal use.*

The question involved in *Eitnier v. Kreitz Corp.*[50] was whether an existing nonconforming use (trucking terminal) could be continued, where the continuance would result in construction of a new building partially enclosing the place where the prior use had been carried on in the open air. The supreme court held that the Board had not abused its discretion in granting a permit for such construction, although the facts showed that the nonconforming use was established almost entirely by tenants and a gratuitous licensee or permittee's predecessor in title. The zoning ordinance provision concerning nonconforming uses expressly recognized and allowed nonconforming uses to continue. The lower court's conclusion that the erection of the building for the trucking terminal was a natural growth and expansion of a nonconforming use was held to be justified by the evidence.

FRANKLIN E. POORE, III

50. 404 Pa. 406, 172 A.2d 320 (1961).