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Pennsylvania Property Cases of 1959

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JUDICIAL HIGHLIGHT

PENNSYLVANIA PROPERTY CASES OF 1959

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REVERSIONARY INTERESTS

In re Reichard's Petition [1] presented the superior court with the question of whether the appurtenance clause in a deed conveying part of a tract of land is effective in conveying a reversionary interest in another part of the tract. In 1893 a husband and wife conveyed part of their land to a school district, reserving unto themselves, their heirs and assigns, a reversionary interest in the event the land was ever abandoned for school purposes. In 1951 the school district acquired a fee simple in the land under section 2 of the Act of 1937,[2] and in 1955 sold it. Petitioners claimed part of the proceeds under section 3 [3] of the act, asserting that they were successors in title to part of the original tract. They argued that since the appurtenance clause in all the deeds in their chain of title included the words "reversion and reversions," the reversionary interest in the school property passed to them. The court held that the words in the appurtenance clause referred only to the reversions in the premises conveyed and did not effect a conveyance of any interest in other land. Although the court did not discuss it, the case could possibly have been decided on another ground. Petitioners did not acquire ownership of the land until after the school district had obtained a fee in the school property. Consequently, it would appear that they had no standing to bring an action.

The same Act of 1937 was involved in *Long v. Monongahela City School Dist.*[4] In that case a school district had obtained a base fee in land of plaintiff's ancestor. In 1955 the school district acquired a fee simple title to the land under section 2 of the above act. Plaintiff, owner of the reversionary interest, instituted a suit in ejectment against the school district, claiming that the title to the property had reverted to him because the school district abandoned the property by non-user prior to 1955. The supreme court adopted the opinion

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[1] 188 Pa. Super. 130, 146 A.2d 71 (1958).
[2] PA. STAT. ANN. tit. 53, § 1172 (1937).
[3] PA. STAT. ANN. tit. 53, § 1173 (1937).
[4] 395 Pa. 618, 151 A.2d 461 (1959).

of the lower court which held that under the Act of 1949[5] school property is not deemed abandoned until a resolution to that effect is adopted by the board of school directors. Since plaintiff did not aver the adoption of any such resolution his complaint did not state a cause of action. The court went on to state that when a school district proceeds without challenge to acquire a fee simple title under the Act of 1937, owners of a reversionary interest cannot recover in an action of ejectment but must proceed under section 3 of the act.

LIFE ESTATES

In *Bowman v. Brown*[6] the supreme court was asked to decide whether a testator intended to devise a fee simple or a life estate. Testator died in 1931, survived by a wife and four children, two by a prior marriage and two by his present marriage. His will gave all his real and personal property to his wife "as long as she sees fit to remain on the premises and keep said premises in repair and pay taxes on same." The will also provided that in case the wife predeceased him, the estate should be divided equally among his four children. The widow fulfilled the conditions of the devise and died intestate in 1955, survived by the two children she had by testator and two she had by a prior marriage. The two children of testator's prior marriage had predeceased her, but their heirs contended that testator's will had given the widow only a life estate and that, therefore, they were entitled to a share of the property. The widow's children asserted that the devise was a fee simple estate. The court held that when a devise of realty is made with conditions attached there is an indication that the devisor did not intend to give an absolute title. Ownership of property which is conditioned upon living on the premises and paying the taxes hangs on too slender a thread to be consonant with a fee simple estate. Consequently, it must be a life estate and the fact that there is no gift over is immaterial. Testator is presumed to have intended a result that would not disinherit his own flesh and blood in favor of benefiiting others.

CLASS GIFTS

In re Trattner's Estate[7] concerned the construction of a will which provided: "To any grandniece or nephew born after the execution of this will, one-half (1/2) part of the residue, until three (3) parts are consumed." No persons answering this description were born between the date of execution of

[5] PA. STAT. ANN. tit. 24, § 7-708 (1949).
[6] 394 Pa. 647, 149 A.2d 56 (1959).
[7] 394 Pa. 133, 145 A.2d 678 (1958).

the will and the date of testatrix's death. Subsequent to her death three grandnieces and three grandnephews were born and a grandniece and a grandnephew adopted. Of these, two grandnieces were born within one year of testatrix's death. The rest were born or adopted after that time. The court held that testatrix intended to make a class gift and intended the class to close upon her death. Consequently, only those persons born subsequent to the execution of the will and prior to the date of death were entitled to share. The court then held that persons *en ventre sa mere* are considered "born" for inheritance purposes and that the two grandnieces born within one year after testatrix's death are the only ones within the class of takers.

A similar problem was presented in *In re Metzgar's Estate*.[8] Testator executed a will in 1914, giving all his estate to his wife for her life and "from and after her death to my brothers and sisters then living share and share alike." The wife died in 1936, survived by testator and two sisters of testator. Testator died in 1955 survived by only one sister, to whom distribution of the entire estate was proposed to be made. The sole heir of the other sister who survived testator's wife excepted and was upheld by the lower court. The supreme court, in affirming, held that testator intended to make a class gift to those of his brothers and sisters who survived the life tenant. Since this intention was clear, the rules of construction in section 14(4) of the Wills Act [9] were held inapplicable. The fact that testator may have anticipated another result and the fact that the will lay unchanged for nineteen years after the life tenant's death are immaterial.

The testator in *In re Dickson's Estate* [10] devised one-half of the residue of his estate in trust for his son, Arthur, for life with remainder to his issue. In the event Arthur died without issue surviving, the fund was to be assigned and transferred to the nieces of testator's wife living "at the time of my death." At testator's death seven nieces were living. Arthur died childless in 1957 survived by two of the nieces. His executor claimed five-sevenths of the principal of the trust on the ground that an intestacy had occurred because five of the seven nieces had predeceased Arthur. The supreme court held that the class of nieces became ascertained at the time of testator's death. Although their interests were contingent on Arthur's dying without issue surviving, they were transmissible and became vested at Arthur's death. In answer to an argument that the "pay and divide" rule be applied, the court said that the rule is henceforth to be taken as abolished.

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[8] 395 Pa. 322, 148 A.2d 895 (1959).

[9] PA. STAT. ANN. tit. 20, § 180.14 (1947).

[10] 396 Pa. 371, 152 A.2d 680 (1959).

POWERS

In re Jeffer's Estate [11] concerned the exercise of a special power of appointment. Decedent was the donee of a general power of appointment under her father's will. In 1949 she released the power, except to appoint to descendants of her father and their spouses and to public, religious or charitable institutions. In her will, decedent did not mention the power but gave her residuary estate in trust for a named charity. The lower court [12] recognized that the law [13] permits a general devise of the residue to operate as an exercise of a general power of appointment. It then held that the partial release of the power limited only the class of appointees but did not limit the manner in which the power could be exercised. The supreme court held that the partial release limited both the class of appointees and the manner of exercising the power. It then held that a general devise of the residue will not effect an exercise of a limited power unless the power is specifically mentioned or unless the residuary devisees include *all* the persons coming within the limited class of appointees. Since the charity named in decedent's will was only one of the possible appointees, the devise did not constitute an exercise of the power.

TESTAMENTARY CONVEYANCES

In re Henderson's Estate [14] involved a widow's election against the transfer of insurance policies on the life of her husband. During the 1920's the husband had taken out three policies of life insurance on his life, payable to the wife, but reserving the power to change the beneficiaries. In 1952 he made two of the policies payable to persons other than the wife. During the same year he created an unfunded revocable insurance trust, and, after making the third policy of life insurance payable to the trustee, he delivered the policy as the only asset of the trust. The wife was not named as cestui. The dispositive provisions of the trust were amended in 1953 and 1957. Upon the husband's death the wife elected to take against the will and to treat the transfers of the insurance as testamentary conveyances. She asserted that by virtue of section 11 of the Estates Act [15] she had acquired a vested interest in the insurance policies which could not be divested by the 1956 amendment to that section [16] or the 1957 amendment to section 8 [17] of the act. The supreme court held as to the first two policies that prior to 1948 a widow had no interest in insurance on her husband's

[11] 394 Pa. 393, 147 A.2d 402 (1959).
[12] 71 Pa. York L.R. 65 (1951).
[13] PA. STAT. ANN. tit. 20, § 180.14(14) (1947).
[14] 395 Pa. 215, 149 A.2d 892 (1959).
[15] PA. STAT. ANN. tit. 20, § 301.11 (1947).
[16] PA. STAT. ANN. tit. 20, § 301.11 (1950).
[17] PA. STAT. ANN. tit. 20, § 301.7a (1957).

life which was payable to a third person, that despite the somewhat ambiguous langauge of section 11 of the Estates Act the legislature did not thereby intend to give a widow any such interest, and that the 1956 and 1957 amendments were merely in clarification of prior existing law. As to the policy conveyed in trust, the court held that it was a "conveyance of assets" within the meaning of section 11 of the Estates Act and would have entitled the wife to elect against it except for the amendments of 1956 and 1957 and the change in the trust made by her husband after these amendments. The rights of the surviving spouse were held to be determined at the time of her husband's death, and since at that time the legislature had denied her the right to elect against a conveyance of insurance policies, she could not do so.

The testamentary character of a trust was the subject of *In re Mason's Estate.*[18] In 1950, Mason created a trust consisting of four parcels of realty. The trustee was to manage the property and pay the net income to Mason during his life, and after his death to distribute it in a manner not pertinent here. Mason reserved the power to alter, amend, revoke, consume part or all of the principal, and limited power to control actions of the trustee. In 1953 Mason executed a will in which he gave specific realty to appellant, an employee, and certain other parties. In 1955 Mason conveyed this realty to the trustee to become part of the trust corpus. Upon Mason's death appellant contended that the trust was testamentary and void. The supreme court held that a conveyance of assets in trust, creating present interests in the beneficiaries and imposing active duties upon the trustee, is a valid inter vivos trust even though the settlor retains a beneficial life estate together with the power to alter, amend or revoke in whole or in part. The fact that the enjoyment of the other beneficiaries of the trust was postponed until settlor's death is immaterial since settlor intended to and did part with legal title.

MYERS.

ZONING

Mandamus and Enforcement of Zoning Ordinance

Where the issuance of a permit is a mere ministerial duty, permitting no discretion, it may be enforced by an action of mandamus.[19] This general rule was followed in *Doyle v. Springfield Township Bd. of Comm'rs,*[20] where a building inspector refused to issue a permit of occupancy for a restaurant with a liquor license. The court held that the proposed transfer of a liquor license was a matter within the jurisdiction of the Liquor Control Board and not within the

[18] 395 Pa. 485, 150 A.2d 542 (1959).
[19] Lened Homes v. Phila. Dept. of Licenses and Inspection, 386 Pa. 50, 123 A.2d 406 (1956).
[20] 349 Pa. 49, 145 A.2d 695 (1959).

purview of the zoning board. Justice Bell concurred, adding that mandamus will lie where interpretation of a building code is in issue. The *Doyle* case was followed in *Dively v. Tanner* [21] where mandamus was held the proper remedy to force issuance of a plumbing permit for expansion of a non-conforming use.

Again, mandamus was held proper in *Borough of Baldwin, Alleg. Co. v. Matthews,*[22] where the zoning board refused to issue a building permit although the proposed building satisfied the zoning ordinance. The board's refusal was based upon possible danger of fire in old mine workings caused by the proposed excavation. Since the applicant had met the zoning requirements, the court ruled that mandamus was the proper remedy, even though the board had utilized its expertise in deciding that issuance was detrimental to public safety.

Mandamus was denied in *Riccardi v. Bd. of Adjustment of Plymouth Township,*[23] where a resident sought to enforce the zoning regulations. The court held that the zoning ordinance contained a built-in remedy in the form of a fine and the extraordinary writ of mandamus would not lie.

An interesting enforcement aspect was involved in *City of Phila. v. Budney,*[24] where the city brought an equity action to enjoin the defendant from violating the zoning ordinance and maintaining a nuisance. The defendant pleaded the defense of a non-conforming use. He had previously been denied a permit on the alternative theories of variance or non-conforming use by the board of adjustment, whose action was affirmed by the court of common pleas. The supreme court upheld the lower court's refusal to receive evidence of a non-conforming use on the ground that "the legislature has provided that zoning matters are to be heard exclusively by administrative tribunals which are created for that express purpose.[25] In effect, the court ruled that the prior action was res judicata in this equity action.

Construction of Zoning Ordinance

The court, in reviewing the decision of the zoning board will concern itself entirely with the question of an abuse of discretion by the board.[26] This rule was followed in *Boreth v. Phila. Zoning Bd. of Adjustment,*[27] where the board had refused to issue a use registration permit to appellant to operate a beauty shop in her basement within an area zoned residential. A beauty shop was not

[21] 189 Pa. Super. 635, 151 A.2d 665 (1959).
[22] 394 Pa. 57, 145 A.2d 698 (1959).
[23] Riccardi v. Bd. of Adjustment of Plymouth Township, 394 Pa. 624, 149 A.2d 50.
[24] 396 Pa. 87, 151 A.2d 780 (1959).
[25] *Id.* at 88, 151 A.2d at 781.
[26] Appeal of Kupina, 396 Pa. 109, 151 A.2d 625 (1959).
[27] 396 Pa. 82, 151 A.2d 474 (1959).

listed as a permitted use under the regulations. Appellant contended that a beauty shop was a "home occupation," which was permitted by the ordinance. The supreme court followed *Gold v. Zoning Bd. of Adjustment,*[28] a case with similar facts, which held that a home occupation must be of the type incidental to and customarily conducted in the home. Therefore, the board did not abuse its discretion in refusing the permit.

The zoning board was upheld in *Tidewater Oil Co. v. F. S. Poore* [29] when it refused to change zoning after Tidewater Oil had purchased the land, even though the area was a peninsula of farm land in a heavily industrialized area. The supreme court, in reversing the Delaware County Court of Common Pleas, stated that the function of the court was to prevent abuse of discretion, not to rezone, and as no abuse of discretion was shown, the decision of the zoning board must be final.

In *Van Sciver v. Zoning Bd. of Adjustment* [30] appellant applied for a registration permit to install a laundromat. The zoning board granted the permit with conditions attached. On appeal the supreme court *interpreted the zoning ordinance* and decided the appellant was entitled to the permit under the existing regulations. Therefore, the conditions could not be attached unless on the basis of health, public welfare, and safety. Justice McBride further stated that the board could not base these conditions on health, safety, and public welfare as "the zoning board must base its findings of fact from evidence in the record only" [31] and there was no evidence of this type to be found on the record. Prior to the *Van Sciver* case the supreme court in *Fifty-fourth St. Center v. Zoning Bd. of Adjustment* [32] had discussed the applicability of attaching conditions to the issuance of permits or certificates as opposed to the attaching of conditions to the granting of variances and concluded that conditions on certificates were a valid exercise of police power. It appears that in the *Fifty-fourth St.* case the board based its decision on administrative expertise. It was not held to be arbitrary or unreasonable to base findings on evidence not of record when affirmed by the supreme court.

Variances and Exceptions

Before a variance may be granted by the board it must be shown that the circumstances that affect the land are unique and applicable to that land alone

[28] Gold v. Zoning Bd. of Adjustment, 393 Pa. 401, 143 A.2d 59 (1958).
[29] 395 Pa. 89, 149 A.2d 646 (1959).
[30] 396 Pa. 646, 152 A.2d 717 (1959).
[31] *Id.* at ——, 152 A.2d at 722.
[32] 395 Pa. 338, 150 A.2d 335 (1959).

and are not conditions that affect the whole neighborhood. Only a hardship peculiar to the applicant's property merits the allowance of a variance. If there is a general hardship, the situation should be remedied by a revision of the general zoning regulation, not by the grant of a special privilege to single owners.[33]

In 1959 the supreme court refused variances in the following cases:

(1) Where applicant sought a variance to make a two family dwelling into a three family dwelling and to replace a legally existing wooden addition with a stone structure, the variance was refused by the board on the basis of the lack of a side yard (10′ 6″ v. the required 14′) and an open court (8′ v. the required 14′). Since there were at least four other multiple dwellings on the block, appellant contended a literal enforcement of the provisions of the ordinance would be an unnecessary hardship. The supreme court upheld the board stating that the applicant had failed to show unnecessary hardship *and even if the zoning regulations were no longer adequate, the proper remedy is a complete rezoning of the area, not by rezoning piecemeal with variances.*[34] This case was followed in *English v. Zoning Bd. of Adjustment of the Borough of Norristown,*[35] where Justice Cohen stated "this need of rezoning does not permit the grant of a variance to a single property." [36]

(2) Where applicant desired a variance for enclosing his front porch to improve the physical condition of his wife and son who suffered from asthma and a severe respiratory ailment respectively, the zoning board refused to allow the requested 3½ foot encroachment on the 30 foot setback requirement. The Court of Common Pleas of Montgomery County reversed and the board appealed. The supreme court, upholding the board, reiterated the position that the hardship must be *peculiar to the property* and the hardship on the applicant's physical condition will not suffice to grant a variance.[37]

(3) Where a grange society purchased land, formerly a church, to be used as a meeting house in an area zoned residential, excluding club or fraternity houses, the board refused to grant a variance in the face of evidence that property, if not used for this purpose, was practically worthless. The supreme court, in upholding the board's refusal, agreed the hardship was without merit as the grange had purchased the land with actual or constructive knowledge of the zoning ordinance, therefore, the injury was self-inflicted.[38]

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[33] Michener Appeal, 382 Pa. 401, 115 A.2d 367 (1955).

[34] Spadaro v. Zoning Bd. of Adjustment, 394 Pa. 375, 147 A.2d 159 (1959).

[35] 395 Pa. 118, 148 A.2d 912 (1959).

[36] *Id.* at 119, 148 A.2d 914.

[37] *In re* Klines Estate, 394 Pa. 645, 148 A.2d 916 (1959).

[38] Appeal of Upper St. Clair Township Grange, 397 Pa., 152 A.2d 768 (1959).

The supreme court granted variances in the following cases:

(1) Where applicant desired to build an extension on an apartment house already non-conforming in both use and dimension, the supreme court affirmed the zoning board's grant of a variance while on the facts it appears to be an extension of a non-conforming use. The court further stated that the record clearly showed unique and undue hardship to the property unless the use was permitted. Justices Bell and Cohen dissented.[39]

(2) Where appellee, desiring to erect a gas station on land zoned residential, introduced evidence that the land was virtually worthless as zoned, the zoning board granted the variance and the supreme court affirmed on the grounds that the zoning ordinance would make the residents "land poor" due to the decreased value of their property.[40] The facts do not reveal the character of the neighborhood. In this case the court seems to be saying that a small decrease in value is not enough to warrant a variance, but if the land as zoned is virtually worthless, a variance will be in order. This makes it difficult to determine when a property has decreased enough in value to merit a variance, and does violence to the supreme court's prior statements such as, "This court has repeatedly held that where all that is shown is that the hardship is economic alone, a variance cannot be granted." [41] It also seems to violate the general rule concerning piecemeal zoning by the use of variances where the need for rezoning is shown.

In *Kotzin v. Plymouth Township Bd. of Adjustment* [42] the supreme court upheld the zoning board's refusal to grant an exception for the opening of a non-commercial swimming club. The court upheld the board on the ground that even though the zoning ordinance listed this type of operation as a possible exception, the grounds of public health, safety and morals were sufficient reason for denial and not such an abuse of discretion as to warrant reversal.

Expansion of Non-conforming Use

In *Bennett v. Zoning Bd. of Adjustment* [43] the zoning board ruled on an action brought by neighbors that defendant violated the zoning ordinance in expanding his non-conforming use gas station into the business of rental of trailers. The supreme court affirmed, holding that rental of trailers was not incidental to the selling of gasoline.

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[39] *In re* Grubbs Appeal, 395 Pa. 619, 151 A.2d 599 (1959).
[40] Ferry v. Kownads, 396 Pa. 283, 152 A.2d 456 (1959).
[41] Spadaro v. Zoning Bd. of Adjustment, 394 Pa. 375, 147 A.2d 159 (1959); Pincus v. Power, 376 Pa. 175, 101 A.2d 914 (1954).
[42] 395 Pa. 125, 149 A.2d 116 (1959).
[43] 396 Pa. 57, 151 A.2d 439 (1959).

An expansion of a non-conforming use was granted in *Appeal of Klein,*[44] where appellant constructed a greenhouse after obtaining a permit. The property was zoned residential but a use of the premises for "farm" purposes was permitted. After operation of the greenhouse began the zoning ordinance was modified to delete the "farm" use. The zoning board revoked appellant's license, the court of common pleas reversed, and the supreme court affirmed the lower court, holding a valid non-conforming use and also stating that in the right to grow flowers was inherent the right to sell flowers.

The right to attach conditions to the expansion of a non-conforming use was upheld in *Everson v. Zoning Bd. of Adjustment of Allentown,*[45] where applicant desired to expand his business area onto land held by applicant at time of ordinance. The supreme court held that the conditions requiring paving of a dirt parking lot and the planting of trees were a valid exercise of police power in promoting public health, safety and morals.

PRESCRIPTIVE EASEMENTS

In *Stevenson v. Williams* [46] a suit to enjoin defendant from building a carport on what had been a common driveway, the undisputed facts showed that defendant's property line covered seven-twelfths of the driveway and plaintiff's property line covered the other five-twelfths. Plaintiff based his plea for an injunction on an easement by prescription, stating that his use of the driveway since 1944, tacked on to his predecessor's use satisfied the requirement of twenty-one years as an adverse user. Defendant pleaded a permissive use. The superior court, Judge Gunther speaking, held the use to be permissive and denied the injunction. The court based its decision on testimony of plaintiff's predecessors, who stated that "everything was all right" and that the use of the driveway was amicable, although permission by defendant was never shown. This case seems contrary to the general rules applicable to an adverse user in that after plaintiff pleads an easement by prescription and shows a user for over 21 years the burden is on the defendant to establish the permissive use. The fact that the defendant said nothing to the adverse user will not make it permissive. This general rule is reaffirmed in *Steel v. Yocum* [47] where the court stated, "[T]he burden is on the owners to show that the easement is used under permission or contract, not consistent with an adverse use." [48] It should be noted in the *Stevenson* case,

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[44] 395 Pa. 157, 149 A.2d 114 (1959).
[45] 395 Pa. 168, 149 A.2d 63 (1959).
[46] 188 Pa. Super. 49, 145 A.2d 734 (1959).
[47] 189 Pa. Super. 522, 151 A.2d 815 (1959).
[48] Elias v. Scott, 164 Pa. Super 329, 334, 64 A.2d 508, 510 (1949).

where the crucial issue was the affirmative defense of permission, that the superior court reversed the common pleas court.

DiVirgilio v. Ettore [49] was an action to enjoin alleged encroachment on an alley. The facts show that one-half of the three foot alley was on defendant's land next to his fence. When defendant discovered this fact, he moved his fence eighteen inches to the place where it should have been originally in accordance with his deed. Plaintiff, who owned land on the opposite side of the alley, brought this action to enjoin the movement. The superior court held that plaintiff had acquired a prescriptive easement over the portion of the alley on defendant's land. In reaching this decision, the court stated: "[W]here one uses an easement whenever he sees fit, without asking leave *and without objection,* the use is adverse and by such an uninterrupted adverse enjoyment for twenty-one years, the user acquires a title by prescription." [50]

SURFACE WATER

Pennsylvania cases long have held that an owner of land has a right that surface water shall drain from his land through natural channels upon the land of a lower owner.[51] They have also recognized that reasonably necessary increases in the quantity of water flowing upon the lower land, which result from the natural and reasonable use and development of the upper tract, are within the scope of this right of drainage, provided the water is not collected and drained through an artificial channel.[52] In *Westbury Realty Corp. v. Lancaster Shopping Center, Inc.*[53] plaintiff sought to enjoin defendants from discharging surface water upon its land and to require them to provide a system of disposal of such water. The complaint alleged that defendants had erected a rural shopping center and macadamized an area of seventeen acres, which prevented natural seepage of surface water into the soil. This substantially increased the flow upon the lower land of the plaintiff. There was no averment that defendants were negligent nor that they had collected the water and discharged it through an artificial channel. The lower court sustained preliminary objections in the nature of a demurrer, and the supreme court, one member dissenting, reversed. The majority said that such large shopping areas as this were not contemplated when concepts of water flow were developed, and that they required "new attitudes both on behalf of the developers as well as the court." The court indicated

[49] 188 Pa. Super. 526, 149 A.2d 153 (1959).

[50] *Id.* at 529, 149 A.2d 156.

[51] Rau v. Wilden Acres, Inc., 376 Pa. 493, 103 A.2d 422 (1954).

[52] Leiper v. Heywood-Hall Constr. Co., 381 Pa. 317, 113 A.2d 148 (1955); Lucas v. Ford, 363 Pa. 153, 69 A.2d 114 (1949).

[53] 396 Pa. 383, 152 A.2d 669 (1959).

that the owners of the shopping center should provide drainage so that the increased flow would not be upon plaintiff's land. Plaintiff had alleged this could be done for $9,600, a sum which, considering the total investment in the shopping center, the majority thought "rather significant."

SURRICK

DEDICATION

In the case of *In re Warnock Street* [54] a dedication of a road bed to the City of Philadelphia was made by deed. More than sixty-five years elapsed before the municipality physically opened the street. The court recognized that while an implied dedication effected by a sale of land with reference to a plat must, under the Act of 1889,[55] be accepted within twenty-one years, the act had no application to a dedication expressly made by deed and that mere formal acceptance of the deed by the municipality was sufficient.

TENANCY BY THE ENTIRETIES AND JOINT TENANCY

In *Lindenfelser v. Lindenfelser* [56] plaintiff-husband brought an action against his wife, from whom he was estranged but not divorced, to enjoin her from collecting rentals from properties held as tenants by the entireties, to obtain the appointment of a receiver and to determine the support due his wife. In reversing the decree dismissing plaintiff's complaint, the court stated that although each spouse owns the whole and not an equal part in an estate held by the entireties, the modern rule is that where a husband and wife are separated but not divorced, and where one of them is in complete enjoyment of the entireties property to the exclusion of the other, an accounting of the property so held may be ordered and the property or proceeds divided equally between them.

In *Bove v. Bove* [57] an action of ejectment was brought to recover title and the right to possession of an undivided one-half interest in certain tracts of real estate. Title to the land was in the names of plaintiff's testator and defendant as husband and wife and purported to create in the two of them an estate in the subject property "as tenants by the entireties." The persons named in the deed as husband and wife were, in fact, never married. The court stated that although the deeds were ineffective to create a tenancy by the entireties, they were not wholly invalid and a declared intention to own the property as tenants by the entireties was equivalent to stating that there should be a right of survivorship.

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[54] 189 Pa. Super. 624, 152 A.2d 789 (1959).
[55] PA. STAT. ANN. tit. 31, § 1961 (1889).
[56] 396 Pa. 530, 153 A.2d 901 (1959).
[57] 394 Pa. 627, 149 A.2d 67 (1959).

Hence, a joint tenancy with the right of survivorship was created in the property and upon testator's death defendant owned the entire estate. The court, citing *Teacher v. Kijurina,*[58] declared it to be wholly irrelevant that defendant contributed no part of the purchase price for either of the two properties.

The question in *Sheridan v. Lucey* [59] was whether an action for partition of real estate held by joint tenants with the right of survivorship abates upon the death of the complainant before judgment has been entered by the court. Complainant's decedent, as a joint owner of certain realty, filed a complaint in partition and died during the pleading stage of the action. The administrator was substituted and the trial court, after argument, entered judgment in favor of the remaining joint tenant. The supreme court, in affirming the lower court's action, stated that a joint tenancy in real estate with the right of survivorship is severable by an act, voluntary or involuntary, of either of the parties, but the act must be of sufficient manifestation that the actor is unable to retreat from his position of creating a severance. The court ruled that pendency of a partition proceeding, before the issues have been formulated, is such a premature act that the complainant can elect to continue to judgment or discontinue and thereby leave the joint tenancy in a status quo. The death of the complainant leaves the parties where they were at the time of his death.

The court held that the survival of actions provided for in the acts of 1807 [60] and 1949 [61] were procedural, and that these statutes did not provide for a cause of action to survive where the right was effectively extinguished by death. Procedural statutes cannot abrogate substantive interests of the survivor.

JOINT ACCOUNTS

In *In re Rogan's Estate* [62] the balance in decedent's checking account was transferred from an account in his name to one in the names of decedent and his daughter-in-law. Subsequent to decedent's death the balance was withdrawn by the daughter-in-law. Upon a petition and citation by decedent's executor, a preliminary objection was made that the orphans' court had no jurisdiction over the matter. The supreme court, in affirming the orphans' court's dismissal of the preliminary objection, held that the Orphans' Court Act of 1951, as amended,[63] enlarged the jurisdiction of that court in that it conferred upon it the authority to determine title to personalty where the personalty was registered in the name

[58] 365 Pa. 480, 76 A.2d 201 (1950).
[59] 395 Pa. 305, 149 A.2d 444 (1959).
[60] PA. STAT. ANN. tit. 12, § 11 (1807).
[61] PA. STAT. ANN. tit. 20, § 320.601 (1949).
[62] 390 Pa. 137, 145 A.2d 530 (1958).
[63] PA. STAT. ANN. tit. 20, § 2080.301 (1951).

of the decedent or his nominee or where the personal representative alleged that decedent possessed the personalty at the time of his death. In construing the word "registered," the court stated that the legislative intent was to include personalty in the name of the decedent at the time of his death, whether in his name alone or in the names of other persons and/or the decedent. The court refused to restrict its meaning to those types of personalty where actual "registration" occurs, *i.e.* motor vehicles and securities.

In *Stangl v. Stangl* [64] the supreme court affirmed its view that where a joint savings account is opened in the name of depositor and another "as joint tenants with right of survivorship and not as tenants in common," and a signature card so stating is executed by both parties, these facts are prima facie evidence of a gift inter vivos by the depositor to the other and of the creation of a joint tenancy with right of survivorship. However, a deposit accompanied by such a writing and nothing more is so incomplete as to permit the admissibility of parol evidence. The requirement that such evidence, in order to prevail, must be clear, precise and indubitable was fully met by testimony of the recipient of the alleged gift that no gift was intended.

Air Carrier's Liability for Negligence

In *Melnick v. Nat'l Air Lines* [65] it was held that the limits of an air carrier's liability for loss of luggage are determined under Federal law,[66] which upholds that limit even where the carrier is negligent. The common law rule that a common carrier may not contract to relieve itself from liability for the consequences of its own negligence is no longer applicable to air carriers.

Eminent Domain

In *Waugh v. Commonwealth* [67] the supreme court affirmed the "Whitcomb Rule," [68] which states in an eminent domain case where an award of detention money is proper that the rate will be the normal commercial interest rate during the period of detention, but in the absence of any evidence of the normal commercial rate of interest during the period of detention, a presumption arises that such rate is the legal rate of six percent (6%). The superior court in *Tresen v. General State Authority* [69] refused to follow condemnee's contention that under

[64] 394 Pa. 156, 146 A.2d 303 (1958).
[65] 189 Pa. Super. 316, 150 A.2d 566 (1959).
[66] Civil Aeronautics Act, 52 Stat. 980; 49 U.S.C.A. 401 *et seq.* (1938).
[67] 394 Pa. 166, 146 A.2d 297 (1958).
[68] Whitcomb v. City of Philadelphia, 264 Pa. 277, 107 Atl. 765 (1919).
[69] —— Pa. Super. ——, 154 A.2d 325 (1959).

the General State Authority Act [70] it was entitled to six percent (6%) interest as just compensation in addition to detention money.

In answering landowner's argument that there can be no compromise of damages for condemnation where the figures alleged by both sides are based upon two incompatible sets of fundamental assumptions, the court in *Harmony Realty Co. v. Commonwealth* [71] held that the jury is not bound to accept either plaintiff's or defendant's figures in arriving at a just sum in condemnation cases, and that an amount between the two extremes is not a compromise but an ascertainment of fact.

Schuster v. Pennsylvania Turnpike Comm'n [72] held that the interest in the right of use of the surface necessarily incident to a grant of a right of removal of coal from beneath that surface was such a property right that its condemnation was compensable.

In considering the element of severance damages the supreme court, in *In re Elgart's Appeal,*[73] refused to apply the "unity of use" doctrine where the properties are contiguous.

In *In re Widening of State Highway Route No. 199* [74] the Commonwealth entered a timely appeal from an award of viewers to the court of quarter sessions rather than to the court of common pleas as prescribed by the Act of 1945.[75] Although the time during which an appeal could be made had expired, the Commonwealth was allowed leave to have the appeal certified to the proper court nunc pro tunc on the basis that the law favors the right of appeal and the fact that the landowner neither alleged nor demonstrated that any prejudicial harm had occurred.

In *Dyer v. Commonwealth,*[76] subsequent to the Commonwealth's condemnation, the landowner removed a building thereon to a portion of his uncondemned property. In refusing the Commonwealth's contention that the measure of damages should be the difference in value of the entire property before the condemnation, including the building, and the value of the remaining tract after the condemnation, including the relocated building, the court held that the true rule for establishing the measure of damages was the difference between the

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[70] PA. STAT. ANN. tit. 71, § 1707.12 (1949).
[71] 394 Pa. 65, 145 A.2d 541 (1958).
[72] 395 Pa. 441, 149 A.2d 447 (1959).
[73] 395 Pa. 343, 149 A.2d 641 (1959).
[74] 190 Pa. Super. 11, 151 A.2d 805 (1959).
[75] PA. STAT. ANN. tit. 36, § 670-303 (1945).
[76] 396 Pa. 524, 152 A.2d 760 (1959).

value of the land immediately before the taking and the value of the land immediately after the taking, as affected by the taking. The court stated that the Commonwealth would have to seek recoupment through another form of action for the value of the building removed by landowner.

NABORS