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Pennsylvania Property Cases of 1960: I

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JUDICIAL HIGHLIGHT

PENNSYLVANIA PROPERTY CASES OF 1960: I*

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FUTURE INTERESTS

In *In re Estate of Mikaloff*,[1] the will provided, in essence:
The residue of my estate in trust for thirty years,
the income to (here the instrument named five sons and daughters)
and the principal at the end of the term to (the same beneficiaries).
In the event of the death of any of my said children, then to their children respectively.
If they leave no children surviving them, then to the other residuaries.

Only one child survived the thirty year term which began in 1929 when the testator died; three of the named beneficiaries left children alive at the expiration of the term; the fifth named legatee died before the end of the term with no children surviving.

Certain heirs of the testator, standing to gain only if the estate were to pass under the intestate laws, instituted this suit to declare the gift of principal of the residuary trust violative of the common law rule against perpetuities. However, the court held the gift of principal to the named children to be vested and not subject to the rule. The will gave present vested estates to all the named children when it became effective, subject to divestment if any died within thirty years. In the words of the court, "where a testator gives a present gift of income from specific property with the principal thereof to be given over at a future time to the same taker, even where there is the possibility of divestment . . . the taker takes an immediate vested interest in the principal."[2] Thus, the "event of death" before the expiration of the thirty year term was a condition subsequent and not a condition precedent to taking the principal at the end of the term.

Having held that the named children had vested estates, the court also decided that the gift over in the event of death (a shifting executory devise)

* Part II of this judicial highlight, consisting of cases dealing with eminent domain, personal property, mortgages and liens, and other related subjects, will appear in the next issue.

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1. 400 Pa. 140, 160 A.2d 703 (1960).
2. 160 A.2d at 705.

did not violate the common law rule against perpetuities. This result was based on the fact that each divestment would occur upon the death of a named legatee who qualified as a life in being. This seems to treat the rule against perpetuities as a rule against remoteness of divesting rather than a rule against remoteness of vesting. The result would be no different so far as the claims of the heirs of the testator were concerned—whether the gift over was valid or invalid. This is due to the fact that if the divesting interests were invalid, as was contended, the estate of each of the five legatees would become indefeasible and there would be no intestacy.

The supreme court also had occasion to consider the applicability of the common-law rule against perpetuities in *In re Pruner's Estate*.[3] Extremely bewildering language, in a will effective in 1904, divided the court on the question as to whether it created successive or substitutional interests. Adhering to prior law, the majority construed it as a gift to charity of a fee in certain realty, defeasible upon failure of the purpose in favor of testator's niece, whose heirs claimed the estate on the theory that the purpose of the trust had failed. Since it was decided that the purpose of the trust had failed, there was an intestacy as to the property given to the charity because the gift over to the niece violated the common law rule against perpetuities. Also, the majority thought that the express provision in favor of the niece upon failure of the charitable purpose, even though it was void, excluded the applicability of the cy pres doctrine.

In *In re Hope's Estate*[4] several trusts were created by the will of the testatrix. The first trust was to pay the income:

To Helen for life,
then to her children until the youngest reaches twenty-one years of age,
then to pay the principal to such children who are then living.

Helen survived the testatrix and died, survived by four children, all of whom were alive when her youngest child reached twenty-one. In accordance with the will, each received one-fourth of the principal of Helen's trust.

A second trust was created for Lillian for life and contained the same provisions as the trust for Helen. Lillian survived the testatrix but subsequently died without children. In such an event, there was a provision in the will to the effect that the principal should go to the trust established for Helen's use with the same disposition of principal.

One of Helen's four children had predeceased Lillian, and the court was called upon to decide whether or not the estate of the deceased child should receive a one-fourth share in Lillian's trust. In holding that an interest was so receivable, the court said each of Helen's four children had

3. 400 Pa. 629, 162 A.2d 626 (1960).
4. 398 Pa. 470, 159 A.2d 197 (1960).

a contingent remainder in Helen's trust until he satisfied the condition precedent—being alive at the time her youngest child reached twenty-one. At this time his interest vested in a portion of the trust principal. The court considered the gift over of principal in default of Lillian's remaindermen to pass to Helen's trust, to be paid to the same persons upon the same conditions as provided for the property originally placed in the trust. Accordingly, it refused to hold that the right of Helen's children to share in the corpus of Lillian's trust, being expressly contingent upon Lillian's dying without leaving any children or issue surviving her, required their survival of the happening of that contingency in the absence of language to that effect in the will. In order to share in the corpus of Helen's trust, as well as Lillian's, it was only necessary that any child survive until Helen's youngest child reached twenty-one. Having satisfied this requirement, the child of Helen who predeceased Lillian had an interest in the corpus of Lillian's trust which passed to his executor subject only to the contingency that Lillian die without leaving any children or issue.

An inter vivos trust in *In re Booth's Trust*[5] provided:

To settlor for life,
then to the settlor's daughter for life.
At the death of the survivor, the trust should be divided into seven shares. One share to Mary, or in event of her prior death, to Mary's children in equal shares.

The settlor and her daughter had the power to alter, amend or revoke the trust. After the death of the settlor, the daughter, apparently believing that Mary would outlive her, amended the trust to provide:

To Mary for life,
then to her children who survive her in equal shares.

Mary had two children, both of whom survived her, though one child predeceased the settlor's daughter who died after Mary. The question was whether or not the estate of Mary's deceased child was entitled to take under the amended trust.

It was held that there was a class gift to Mary's "children," who were intended to be ascertained at Mary's death. No reference was made to the daughter's death. Surviving Mary was the only condition, and the court refused to imply a further condition of survivorship. An argument to the contrary was based upon a statement in the trust that no named beneficiary should be presumed to have any interest in the fund, vested, contingent or otherwise, prior to the deaths of the settlor and her daughter. This was, however, construed as merely insuring to the settlor and her daughter the powers mentioned above.

5. 400 Pa. 117, 161 A.2d 376 (1960).

A determination of the meaning of "children" as the word was used in a will directing that the surplus income of a testamentary trust be paid "yearly . . . to my said children then living, and to the children of such of my named children as are then dead, the children of every deceased child taking their parent's share,"[6] was the question involved in *In re Carnegie's Estate.*[7] Here the testatrix had eight children, all of whom survived her. One son, T, had two sons, X and Y. X had two sons, A and B. T and X died. Then Y died without issue. Y's executrix and sole legatee claimed the right to receive the 1/10th share of surplus income of the trust which Y had been receiving prior to his death. A and B opposed this claim contending that they were entitled to this income under the provision quoted above. The supreme court affirmed per curiam on the opinion of the lower court that, in making the bequest of income to the children of deceased children, testatrix had used the word "children" to mean "issue." Therefore, A and B were entitled to receive the income in dispute.

The testator, in *In re Holton's Estate,*[8] directed that payment upon the expiration of a term be made to his son's "children" in a will becoming effective in 1931. It was held that this did not include children adopted by the son subsequent to the death of the testator. Conversely, in *In re Cilley*[9] an unfunded life insurance trust created by inter vivos transfer in 1936 designated as contingent beneficiaries the "lawful issue" of a child of the settlor. The dispositive question was thought to be whether the instrument was effective before or after the first of January, 1948, the effective date of the Estates Act of 1947, since the settlor died in 1958. One of the settlor's children had adopted a child in 1953. Holding that no conveyance occurred until the death of the settlor, the court relied on the fact that the trust was completely subject to the control of the settlor by express provision in the instrument; even more important, the court said, was the language in the trust agreement "that no interests of any kind shall vest in any parties . . . until the date of the death of [the settlor]."[10] One member of the court dissented from this conclusion, but even if it were conceded that the conveyance took effect after the effective date of the Estates Act of 1947, it is somewhat difficult to understand how this justifies the decision that the adopted child was "lawful issue" of the child of the settlor. Section 14(3) of the Estates Act, relied upon by the majority, merely states that a person adopted before the effective date of a conveyance "shall be considered the *children* of his adopting parent. . . ." (Emphasis added.) It does not necessarily follow

6. 397 Pa. 308, 155 A.2d 349, 350 (1959).
7. 397 Pa. 308, 155 A.2d 349 (1959).
8. 399 Pa. 241, 159 A.2d 883 (1960).
9. 400 Pa. 567, 163 A.2d 302 (1960).
10. Compare the effect given to similar language in In re Booth's Trust, 400 Pa. 117, 161 A.2d 376 (1960), *supra* note 5.

that adopted persons shall be considered *issue* or *"lawful issue"* under this provision.

A unique situation arose in *Chew v. Commonwealth*[11] showing another meaning of the word "vest." In 1905 certain land was condemned by a railroad corporation for a right of way, the railroad acquiring a fee simple determinable and the landowner retaining a possibility of reverter which would ripen into ownership in fee in the event the land ceased to be used for railroad purposes. In 1955, the Commonwealth condemned the same land for a highway. Six months prior to the condemnation, the railroad company adopted a resolution authorizing its officers to make application and do all things necessary to substitute bus for rail service over the land in question, and the Public Utility Commission had held hearings in this regard. On February 6, 1956, the Commission approved the application and the rail service was subsequently discontinued on March 22, 1956. As a result, the court was called upon to answer the following question as stated in the Commonwealth's brief: "On the date of condemnation, 1955, was the abandonment by the railroad company of its right of way so imminent as to make the plaintiff's right of reverter a valuable property right for which they would be entitled to compensation from the condemning body?" In answering this question in the affirmative, the court cited *only* the *Restatement of Property,* section 53(c). Thus, the court recognized that a possibility of reverter is an interest in property which is vested in the sense that its owner is entitled to be compensated for its taking under the Constitution, at least where the event upon which the determinable fee hinges will probably occur "within a reasonably short period of time."

Covenants and Estates

In a housing development where the total number of deeds executed was sixty-four, fifty-five of which contained restrictive covenants regarding residential use, no general plan of mutual servitudes or implied covenants could be found to bind the unrestricted lots. Thus, the court, in *Witt v. Steinwehr Development Corp.*,[12] refused to enjoin the construction of a motel on the unrestricted land. Important factors in this determination were the lack of any comprehensive map or plan, the fact that the restricted lots were situated in an area best suited for residential purposes and those unrestricted were on the opposite side of the street in a commercial district, and the strict construction given by the courts to private restrictions on use. An illustration of the last factor is *Siciliano v. Misler.*[13] There, the court held that a restriction against using the burdened land for a "super market"

11. 400 Pa. 307, 161 A.2d 621 (1960).
12. 400 Pa. 609, 162 A.2d 191 (1960).
13. 399 Pa. 406, 160 A.2d 422 (1960).

or for parking patrons' vehicles did not include using the land for the parking lot of a super market which was not located upon the burdened land, but was adjacent to it. In another case the supreme court refused to enjoin a breach of a covenant restricting buildings within fifty feet of the street on the ground that the neighborhood had altered considerably since the original covenant was made.[14]

Subject to greater judicial hostility than restrictions on use are restrictions on the power of alienation. Illustrative of this is *Pavlikowski v. Ehrhardt*,[15] involving a devise effective in 1952 which gave the testator's three children realty in "equal shares, subject . . . not [to] be sold except by mutual agreement." In an action to partition, this restriction was held void. A factor which the court considered important was "the probable discord of having more than one family occupy it [the house]."

In *Flick v. Universal-Cyclops Steel Corp.*,[16] a deed, effective in 1885, conveyed to a railroad *"a right of way through and over"* (court's emphasis) the grantor's property. However, a habendum clause, used the words "to hold the said strip of land . . . so long as . . . required for the . . . purposes of said railroad." This was held to have conveyed an easement and not a base fee. Due to the fact that the railroad discontinued its use, the defendant, who owned the property on both sides of the strip of land in issue, by deeds from the successor of the railroad's grantor, alleged ownership of the strip. Contesting this allegation of ownership was a grantee who, sometime after defendant had acquired his interest in the land, had taken a quitclaim deed to the entire tract from the defendant's predecessor in title. Some of the defendant's deeds described its land as running to the right of way. Nevertheless, the court held that since only an easement was created in the railroad, the conveyances to defendant of the land on either side included the fee to the land over which the right of way was granted.

In *Travaglia v. Weinel*[17] the superior court approved a slight extension of the rule, first enunciated in *Rahn v. Hess*,[18] that the Act of 1889,[19] which terminates public rights in streets that have been laid out on a development plan but not opened or used or accepted by public authority within twenty-one years, does not affect private easements in such streets created by conveyance by reference to such plan.

In *46 South 52nd Street Corp. v. Manlin*[20] plaintiff owned and operated a clothing store at the corner of 52nd and Chestnut Streets in Philadelphia.

14. Snyder v. Plankhorn, 398 Pa. 540, 159 A.2d 209 (1960).
15. 192 Pa. Super. 373, 161 A.2d 652 (1960).
16. 397 Pa. 698, 156 A.2d 832 (1959).
17. 191 Pa. Super. 323, 156 A.2d 597 (1959).
18. 378 Pa. 264, 106 A.2d 461 (1954).
19. PA. STAT. ANN. tit. 36, § 1961 (1889).
20. 398 Pa. 304, 157 A.2d 381 (1960).

Opposite plaintiff's show windows near the curb line of the sidewalk on 52nd Street, defendant maintained and operated a newsstand which utilized forty per cent of the width of the sidewalk. Plaintiff requested defendant to remove his newsstand to the sidewalk on the Chestnut Street side of the store. Defendant refused to do so, and plaintiff sued to enjoin the operation of the newsstand. It was conceded that plaintiff owned the fee to the center of the street, including the sidewalk, subject to an easement in the public. The court was divided four to three on the question of whether or not a city ordinance exempting stands for the sale of books, magazines and newspapers from the ban on the use of stands for sidewalk sales authorized the use of the sidewalk for newsstands as a type of public use. A majority thought it did not, and that, in the absence of affirmative authorization of such use of the sidewalks, defendant's maintenance of his newsstand without plaintiff's permission constituted a trespass which could be enjoined.

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ZONING

Validity of Zoning Ordinance and Amendments Thereto

Although an insignificant amendment to a proposed zoning ordinance subsequent to advertisement and a public hearing does not require a re-advertisement and public hearing, such re-advertisement and public hearing will be required where the amendment is *substantial* in relation to the ordinance as a whole.[21] In *In re Appeal of Hawcrest Association*,[22] this rule was applied to allow an amendment to the zoning ordinance without public notice or a hearing. The ordinance as originally proposed permitted private and noncommercial clubs whose major purpose was of a civic nature. After advertisement and public hearing, it was amended to permit athletic, eating, drinking and residential facilities on the premises of such clubs. The court decided that for an amendment to be "substantial" within the "Schultz" rule, "there must be a significant disruption of the continuity of the proposed legislation or some appreciable change in the overall policy of the bill."[23] As no permitted use was added or deleted, no boundary was altered, nor any regulations varied, the amendment was not deemed substantial.

In *Eves v. Zoning Board of Adjustment of Lower Gwynedd Twp.*[24] an amendment to the general zoning ordinance providing for a new "F-1 limited industrial" zoning district was held invalid. Such classification, since it could be attained only on a case-to-case basis by decision of the Township Board of Supervisors after review and recommendation by the

21. Schultz v. City of Philadelphia, 385 Pa. 79, 82, 122 A.2d 279, 281 (1956).
22. 399 Pa. 84, 160 A.2d 240 (1960).
23. *Id.* at 87, 160 A.2d at 242.
24. 401 Pa. 211, 164 A.2d 7 (1960).

Township Planning Commission, did not comply with the legislative zoning directives enacted for second class townships. The objections to this amendment were two-fold: it was not enacted "in accordance with a comprehensive plan" as required by statute; and, the amendment placed upon the township supervisors duties beyond those outlined for them in the enabling legislation. Therefore, the building permits for the construction of an industrial plant and sewerage treatment plant issued under this amendment were invalid.

The recipient of a validly issued building permit acquires a vested right which can not be lightly set aside. Any legislative attempt to subsequently illegalize such permit constitutes special legislation, which is constitutionally prohibited.[25] In *Yocum v. Power*[26] the First Lettish Baptist Church of Philadelphia applied for and received a zoning use permit for the construction of a church in a district in which the construction of ecclesiastical structures was permitted. In addition, the Church had already purchased land, employed an architect and an engineer, purchased materials, sold the old church, and moved the pastor to this new area. The zoning use permit was held valid and irrevocable despite the fact that it was issued upon an application made immediately after announcement of a public hearing on proposed legislation to reclassify the area to exclude new churches. However, the permit was issued more than three months before the proposed legislation became law.

Two situations of comparable interest, although not involving zoning ordinances as such, are *Commonwealth v. Hanzlik*[27] and *Township of Whitehall v. Oswald*.[28]

In the former, Lower Saucon Township, pursuant to the powers granted to it by the Second Class Township Code,[29] enacted an ordinance declaring the storage of abandoned or junked automobiles to be a nuisance per se and hence prohibited. Defendants were convicted, in summary proceedings, of violating the ordinance. But the supreme court upheld the reversal by the Court of Quarter Sessions of Northampton County, declaring the ordinance invalid because it was "unreasonable, arbitrary and prohibitive." The legislature gave second class townships power to prohibit nuisances, in which category might be included the storage of abandoned or junked automobiles, but only where such storage would constitute a nuisance *in fact*.

In the latter case the township passed an ordinance providing that no person shall occupy a trailer for living purposes outside of a duly permitted trailer park. Without any attempt to enforce the ordinance against two

25. Shapiro v. Zoning Board of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954).
26. 398 Pa. 223, 157 A.2d 368 (1960).
27. 400 Pa. 134, 161 A.2d 340 (1960).
28. 400 Pa. 65, 161 A.2d 348 (1960).
29. PA. STAT. ANN. tit. 53. § 65712 (1957).

violators, the Township filed a petition in the court of common pleas for a declaratory judgment passing on the constitutionality of the ordinance. The court declared the ordinance constitutional. However, the supreme court reversed, denying the authority of the court of common pleas to take jurisdiction in such a case. The majority thus found it unnecessary to consider the ordinance's constitutionality, but in a strong dissent by Justice Bell, Justice Musmanno joining, it was argued that the court of common pleas properly assumed jurisdiction, but that the ordinance in question was unconstitutional.

Construction of Zoning Ordinance

In re Application of Phi Lambda Theta House Ass'n[30] deals with a situation where the omission of a comma in the zoning ordinance played a pivotal role in the ordinance's construction. The ordinance in question permitted a "Club, fraternity house, or lodge when authorized as a special exception." The supreme court held that the absence of a comma after "lodge" meant that the subsequent clause requiring a special exception referred only to "lodge," whereas if a comma had been inserted, the clause would refer to "Club, fraternity house, or lodge." The court therefore decided that the fraternity was entitled to a certificate of occupancy without the authorization of a special exception. The court further held that the issuance of this certificate would also be authorized by another section of the same ordinance under which "multiple dwellings" were permissible uses in the zoning district in question. Since twenty-four boys slept in the bedrooms and ate in a common dining room, the fraternity house could be considered a "multiple dwelling" within the meaning of the ordinance.

In construing the Philadelphia Zoning Ordinance of 1933,[31] the supreme court reiterated the rule set forth in *Darling v. Zoning Board of Adjustment,*[32] that where a nonconforming use has changed (in the present situation, from a storage place for barrels, boxes, and other packing containers to a storage place for structural steel in connection with an ornamental iron works[33]) the new use must conform to the current restrictions for that district, or a variance must be obtained.

In re Colligan's Appeal[34] is concerned with an application for a building permit where the property in question satisfied all minimum area, side

30. 400 Pa. 60, 161 A.2d 144 (1960).

31. This ordinance provided that a non-conforming use shall be considered as such until it complies with the regulations of the district wherein it is located, that it shall not be changed to a use designated for a district having less restrictive regulations, and that when discontinued, it may be resumed as the same class of use but not as a non-conforming use of a lower class.

32. 357 Pa. 428, 54 A.2d 829 (1947).

33. Luciany v. Zoning Board of Adjustment, 399 Pa. 176, 159 A.2d 701 (1960).

34. 401 Pa. 125, 162 A.2d 652 (1960).

and rear yard, and similar requirements of the zoning ordinance and had a frontage of 122 feet on a street which was the property's only means of ingress and egress. The street had been dedicated, but subsequently was vacated by the borough. The supreme court upheld the county court's reversal of the board of adjustment, thus granting the permit, even though the ordinance provided that no permit should be issued unless the lot abuts a dedicated street. In arriving at its decision, the court stated that the proposed residential dwelling will have no detrimental effect on the health, safety and welfare of the residents of the borough, nor will it be contrary to the interests of the adjacent property owners. Therefore a zoning ordinance prohibiting the erection of such a building would not be a valid exercise of the police power, and would in fact be unconstitutional as to this particular parcel of property concerned.

Procedural Aspects

An unusual situation is presented by *Appeal of Rowswell.*[35] This was an appeal from the Allegheny County Court of Quarter Sessions which passed upon the legality of a zoning ordinance of the Borough of Bethel. The Borough Code provides that any complaint concerning the legality of any ordinance shall be made to the court of quarter sessions, and that court's determination shall be conclusive. Where a statute so provides, appeal may be had by narrow certiorari only.[36] Only the supreme court can exercise such narrow certiorari. In fact, in its disposition of this appeal, the superior court states that in light of *Bell's Appeal*[37] it has no jurisdiction of this matter, but "the Supreme Court has entered an order certifying the case to us for disposition, we are under direction to dispose of it, which, of course, we shall do."[38] The appeal was then quashed because it failed to come within the prescribed time limit.

In re Application of Chambers[39] concerns the filing of a petition for a variance directly with the zoning board. The zoning board denied the petition, but this result was reversed by the court of common pleas. Since the zoning board has no position or standing to appeal, the township appealed from this decision. The basis of the appeal was that neither the zoning board nor the court of common pleas had jurisdiction over the subject matter, since the zoning ordinance clearly states that the power of the zoning board is exercisable *only on appeal.* The supreme court held that since no appeal had been taken to the zoning board from the decision of an administrative official (the building inspector in this case), the procedure necessary

35. 191 Pa. Super. 473, 157 A.2d 755 (1960).
36. Bell Appeal, 396 Pa. 592, 152 A.2d 731 (1959).
37. *Ibid.*
38. 191 Pa. Super. at 475, 157 A.2d at 756.
39. 399 Pa. 53, 159 A.2d 684 (1960).

to obtain jurisdiction had not been followed and subsequently no jurisdiction could have been acquired. This is the result despite the fact that such a request to the building inspector might have been futile and that the jurisdictional question was not argued in the lower court.

In *Esso Standard Oil Co. v. Taylor*[40] the appellees appealed to the court of common pleas from an adverse decision of the board of adjustment refusing their petition for a variance. The appeal was uncontested and a rule *nisi* was issued, to become final within twenty days, the time allowed for the filing of exceptions. On the last day of this period, a group of the neighboring property owners asked to have the hearing re-opened. The lower court refused on the grounds that the property owners were guilty of laches. In reversing, the supreme court held that the property owners had sufficient interest to intervene within Pa. R.C.P. 2327(4). Since petitioners' interests had not been adequately presented at the first hearing and there had been no testimony allowed when the petition to intervene was presented, the factual matters necessary to support a finding of laches were lacking on the record. The order of the lower court was therefore an abuse of its discretion.

Variances and Exceptions

"A variance may be granted only after the applicant clearly proves two factors: (1) that an unnecessary hardship, unique to the particular property, will result if the variance is not granted; and (2) that the proposed use will not be contrary to the public interest."[41]

A variance was granted by the supreme court in a case where the applicant desired to erect a one-story addition to his preserve canning factory exclusively for warehousing purposes. The board of adjustment found the necessary hardship present, but nevertheless refused the petition because the proposed use would be contrary to the general welfare. In reversing, the supreme court stated that although the existing factory might be a present nonconforming use, there is no need to consider whether the proposed use could qualify as an extension of that nonconforming use. This was based on the fact that there was no evidence whatsoever on the record to justify the board's finding that a granting of the petition would be contrary to the general welfare. The lower court's decision was therefore arbitrary and capricious and had to be set aside.[42]

In a case where an applicant had purchased a two-and-a-half story abandoned school house situated in a "one and two family dwelling" district

40. 399 Pa. 324, 159 A.2d 692 (1960).

41. Sylvester v. Zoning Board of Adjustment of Pittsburgh, 398 Pa. 216, 157 A.2d 174 (1959).

42. Friedman and Sons, Inc. v. Zoning Board of Adjustment, 398 Pa. 494, 159 A.2d 4 (1960).

where light industrial and commercial uses were prohibited, his attempt to convert and divide both floors into apartments failed because of the zoning regulation. He therefore applied for a variance to use the second floor as an office for a coin vending corporation. The applicant had also purchased one acre of adjoining land (under the same zoning restrictions) and had obtained the permission of adjoining landowners (as provided in the zoning ordinance) to construct a garage to house ten trucks and to store supplies. He applied for a variance to enlarge the permitted use of the existing garage also. The supreme court affirmed the denial of such variances. Mere hardship or economic hardship is not sufficient to necessitate the granting of a variance; an "unnecessary hardship" must be shown. Since applicant purchased the property in question with knowledge of the zoning ordinances and since evidence on the record shows that the land can be used for other purposes, there is sufficient evidence present to support the findings of the court below.[43]

A requested variance was also denied where an applicant had erected a discount house on one side of a street in a "Light Industrial" zone and a parking lot directly across the street in a "Residential" zone before acquiring a variance to permit such parking lot. The applicant knew the situation before he constructed the parking lot and took his chances. The hardship which he faced was a mere economic hardship since it was admitted by the applicant that the land could be used for some type of low-cost housing. The prerequisite "unnecessary hardship" was not present as mere economic hardship is insufficient to justify the granting of a variance. The supreme court therefore reversed the lower court, with instructions to deny the variance.[44]

Extension of Non-conforming Use

The supreme court found an invalid extension of a non-conforming use in each of the following cases:

(1) Where a grocery store was existing as a non-conforming use in a residential district, an attempt to extend this use to the sale of beer, malt beverages, and soft drinks in the basement of the building which housed the grocery store was denied.[45] The legislature and the courts have for years drawn a distinction between food and beer. Beer is classified and controlled not as food, nor as liquor, but as a malt beverage. The sale of beer is certainly not a customary item of the grocery or food business. This is the result even though the applicant had previously procured a license from the liquor control board. This attempted use was therefore not a valid extension of the non-conforming use.

43. Sylvester v. Zoning Board of Adjustment of Pittsburgh, *supra* note 21.
44. In re Cresko, 400 Pa. 467, 162 A.2d 219 (1960).
45. In re Appeal of Lance, 399 Pa. 311, 159 A.2d 715 (1960).

(2) Where a warehouse used for the storage of barrels, boxes and other packing containers was converted into a warehouse for structural steel, this was found to be an invalid extension of the former non-conforming use. A variance was likewise denied, since the only hardship shown was an economic hardship which is insufficient for the granting of a variance.[46]

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46. Luciany v. Zoning Board of Adjustment, 399 Pa. 176, 159 A.2d 701 (1960).