Cornell took over the operation, the zoning ordinance was amended and the business continued as a nonconforming use in the district. Neighbors protested the activity and the Commonwealth Court held that the board had continuing authority to place restrictions on a variance or a nonconforming use, citing *Everson v. Zoning Board of Adjustment*, 395 Pa. 168, 149 A.2d 63 (1959).

Realizing that the existence of a construction business within a residential area could be unpleasant to the residents we expected to find in *Cornell* and *Everson* support for the proposition that the conditions imposed by the board were proper, could be enforced and, for failure to comply therewith, the business activity could in effect be shut down. That is not so. In *Cornell* the business was being operated under the special exception with conditions from the time it opened and so the effect of the Commonwealth Court's decision is to affirm that those conditions come under continued scrutiny by the board. In *Everson*, the owner applied for a permit to extend a nonconforming use. The court merely stated that a zoning board did not have power to condition the granting of an extension of a nonconforming use or a variance. This is undisputed. All the Georges are asking for is to continue the use that had existed prior to the time the zoning ordinance was adopted in Washington Township. This they may do and neither the board nor this court can impose conditions upon that use.

In *Press*, in describing the action of the board in imposing the conditions, the Bucks County Court said:

> "The board's error lay in its consideration of the case as one involving a special exception (or possibly even a variance, the latter term being mentioned in its ultimate order which was not without ambiguity)." 8 Bucks at 325.

But Press did not require a special exception or variance or even an extension of the nonconforming use. Neither do the Georges; all they are asking is to use the property as it had been used before the zoning ordinance was adopted.

There is a complicating factor. We have said the zoning board was without authority to impose conditions on the Georges and that such conditions were a nullity. The board has argued, however, that since no appeal was taken from the order of March 14, 1978 which originally imposed the conditions (and such appeal must under the township ordinance be taken within 30 days), the conditions are now unassailable and must be enforced.

An order, in this case the order of the zoning board imposing conditions upon the continued use of Georges' property, is void on its face if one or more of three jurisdictional elements are absent: the board's jurisdiction of the parties; the board's jurisdiction of the subject matter; or the power or authority to render the particular judgment. *Roberts v. Gibson*, 214 Pa. Super 220, 251 A.2d 799 (1969). As stated in 20 Am Jur 2d, Courts Sec.90:

> "what is jurisdictional and what is not jurisdictional error is not always easy to determine."

We have concluded in this case that the board did not have jurisdiction to impose the conditions. This lack of jurisdiction can be raised at any time. 1 Standard Pennsylvania Practice Sec.51, p. 88; 2 Goodrich-Amram Sec.1032.7. The failure of the Georges to act promptly after the board's imposing the conditions could not confer jurisdiction on the board because neither failure to appeal, nor estoppel, nor waiver can confer subject matter jurisdiction. 9 Standard Pennsylvania Practice Sec.48, p. 362-363, citing *Wettengel v. Robinson*, 288 Pa. 362, 136 A. 673 (1927).

ORDER OF COURT

January 28, 1980, the Decision and Order of the Washington Township Zoning Hearing Board entered April 25, 1979 to revoke zoning permit no. NC 1893 issued to David L. George and Frances S. George, his wife, appellants, is declared invalid and is hereby set aside; and

The Decision and Order of the Washington Township Zoning Hearing Officer entered April 27, 1979 issued pursuant to the Zoning Hearing Board's Decision and Order of April 25, 1979 is declared invalid and is hereby set aside; and

That part of the Decision and Order of the Washington Township Zoning Hearing Board entered March 14, 1978 which imposed conditions upon appellants' continued use of the subject property is hereby stricken, the remainder of said Decision and Order to remain in full force and effect.

Each party shall pay his own costs.

QUEEN v. QUEEN, C.P. Franklin County Branch, F.R. 1979-1341

Custody - Uniform Child Custody Jurisdiction Act - Inconvenient Forum

1. Where a child was living with his mother in Maryland and father living in Pennsylvania retained child in Pennsylvania during visitation and thereafter filed petition to retain custody, Pennsylvania is an inconvenient forum under Uniform Child Custody Jurisdiction Act.

2. The Court may retain jurisdiction for the purpose of ordering the father to return the child to the mother and thereafter divest itself of jurisdiction.

Thomas M. Painter, Esquire, Attorney for Petitioner

John N. Keller, Esquire, Attorney for Respondent

OPINION AND ORDER

EPPINGER, P.J., May 9, 1980:

Robert and Ellen Queen are the parents of Robert A. Queen, III. They also have two daughters. Before March 29, 1980, the son was living with his mother in Maryland and visiting with his father in Pennsylvania at set times on weekends under an agreement between the parents. Instead of returning the child to his mother on March 30th, the father kept the boy and the next day went to his lawyer and signed a petition to confirm custody. The papers were filed at 9:48 on Mondy morning, March 31st.

An order attached to the petition placed temporary custody of the boy with his father pending disposition of the matter. Now the mother has filed a petition requesting the court to decline to retain jurisdiction.

The Uniform Child Custody Jurisdiction Act, the Act of 1977, June 30, P.L. 29, No. 20, 11 P.S. Sect. 2301 et seq., was enacted, among other reasons, to avoid jurisdictional competition and conflict with other states in matters of child custody, to assure that child custody cases are heard in states with which the child and his family have the closest connection, and to deter abductions and other unilateral removals of children undertaken to obtain custody awards. While the father's action in this case may not be, strictly speaking, an abduction, it is the employment of a strategy to remove the child from the mother's home with the purpose of obtaining custody.

At the hearing the father maintained that the action was justified under Sect. 2304(3)(ii), that it was necessary in an emergency to protect the child from abuse or mistreatment. To sustain this contention a photograph was offered

to show that the boy had some bruises on his legs, bruises which the father says were inflicted when the boy was kicked by the mother's paramour. Young Robert and his sister Christi testified that there had been an episode in which the two of them were squabbling over a toothbrush and that the paramour had "kicked" and spanked Robert on the behind. The boy attributed the bruises to his falling down. Both the boy and his sister testified without the parties or other witnesses being present. We found at the hearing that there was no emergency in which it was necessary to protect the child from mistreatment or abuse.

The father's only other contention is that a Dr. Horowitz, psychiatrist at Brook Lane Psychiatric Center, Leitersburg, Maryland, has examined the boy and would be available to testify in Pennsylvania. This was stated to support the proposition that this court should retain jurisdiction because substantial evidence is available in this state concerning the child's present or future care and protection. Sect. 2305(2)(ii). Dr. Horowitz would be equally available to testify in a proceeding in Maryland.

The mother maintains that this is an inconvenient forum under Sect. 2308(c). In determining this, we may take into account whether another state is or recently was the child's home state or has closer connections with the child and his mother or whether the exercise of jurisdiction by this court would contravene any of the purposes of the Act.

We find that the state of Maryland is the child's recent home, that Maryland has closer connections with the child and his mother and that the exercise of jurisdiction by this court would contravene the purposes of the Act.

As noted, we have already made an order in this case placing temporary custody of the boy in his father. The mother is asking us to order the father to return the boy to her and since the father submitted to the jurisdiction of this court for the purposes of having us make the order, it would seem to be within the court's power to require him to return the boy to the mother.

The father, in a supplemental memorandum, states that there is nothing in the Uniform Child Custody Jurisdiction Act which authorizes or prohibits the entry of such an order, but argues that it would be incongruous for the Court, on the one hand, to decline jurisdiction and on the other to order the child placed with his mother. The memorandum rec-

ognizes that if young Robert is not returned to Maryland under our order, there may be a jurisdictional problem in a Maryland proceeding. It is stated that the father would submit to Maryland jurisdiction. However, it must be apparent that if we do not return the child to his mother, she will have to initiate proceedings in Maryland when, from the view of the Court, since she had custody of the child under an agreement of the parties and the father had what might be called visitation rights, if these arrangements are to be changed it should be by his taking appropriate action.

The problem is not as complex as it may appear. We will simply retain jurisdiction for the purpose of ordering the father to return the child to his mother, thus annulling our earlier order giving him authority to keep the child. When that act is completed, we will divest ourselves of jurisdiction. This is an orderly process which carries out the intent of the Uniform Child Custody Jurisdiction Act. This is not a new situation; we have done it in other similar cases.

ORDER OF COURT

May 8, 1980, it is ordered that Robert A. Queen, III be returned by his father, Robert A. Queen, Jr., to the custody of his mother, Ellen Darlene Queen, on Sunday, May 11, 1980, at 2:00 o'clock P.M., by the mother coming to the home of Robert A. Queen, Jr. to pick up the child. When this transfer of custody is completed, thus nullifying the provisions of our order of March 31, 1980 stating that pending disposition of this matter, custody of the child shall be with the father, we decline to retain jurisdiction in the case for the reason that the state of Maryland is a more appropriate forum. The proceedings with regard to the custody of Robert A. Queen, III are dismissed, the costs to be paid by Robert A. Queen, Jr.

APPEAL OF R. EUGENE SNIDER FROM THE AUDITORS' REPORT OF ST. THOMAS TOWNSHIP, C.P.O.D., Franklin County Branch

Second Class Township - Street Lighting - Federal Revenue Sharing Funds

1. The use of Federal Revenue Sharing Funds for street light purposes is a proper and lawful use under 53 P.S. Sec. 65702.

Edward I. Steckel, Esq., Solicitor for St. Thomas Township.

Frederic G. Antoun, Jr., Esq., Counsel for Appellant.

OPINION AND ORDER

KELLER, J., April 29, 1980:

On April 25, 1979, R. Eugene Snider, appellant, filed his appeal objecting and excepting to the Auditors' of St. Thomas Township report filed with the Clerk of the Courts of Franklin County, Pennsylvania on March 12, 1979 on the grounds that:

> (a) The audit does not indicate that any assessment for lighting was made as required by the Second Class Township Code, Act of May 1, 1933, P.L. 103 Art. VII, Sec. 702, 53 P.S. 65702, as amended.
>
> (b) The audit does not indicate the collection of any assessment for the expense and maintenance of street or yard lights furnished by the Township to private property owners.
>
> (c) The auditors failed to surcharge the Township supervisors for the loss resulting to the Township from their failure to assess and/or failure to collect assessments for the maintenance of street or yard lights furnished by the Township to private property owners.
>
> (d) The cost of street lighting provided to private property owners was improperly paid from Township general funds or revenue sharing funds.
>
> (e) The auditors failed to surcharge the St. Thomas Township Supervisors for the loss incurred when the Township bore the cost of said lighting rather than assessing the cost against private property owners as mandated by the Second Class Township Code.

The appellant filed his Recognizance in the amount of $500.00 to prosecute his appeal with effect, and to pay all costs accruing in the event he fails to obtain a final decision more favorable to the St. Thomas Township than that awarded by the Auditors.

On May 15, 1979 the Board of Supervisors of St. Thomas Township filed its answer, and in response to the appellant's exceptions alleged: