that someone could have innocently spilled the nails and inaccurately replaced them so as to create the recorded short weights and over weights. There are enumerable ways in which tampering could have occurred after the boxes of nails left the control of the defendant. We do not expect the Commonwealth to desprove all possibilities, but it remains its duty to prove the defendant guilty beyond a reasonable doubt, and this Court is unwilling to assume the essential element that the boxes tested were either short weight or over weight at the time they left the possession and control of the corporate defendant and were untampered with during their unknown journey from manufacturer to retail store.

The Commonwealth contends that our insistence that it prove that the boxes of nails were in the same condition at the time they were weighed as when they left the possession of the defendant would require the Department of Agriculture, Bureau of Weights and Measures to promulgate a regulation demanding "tamper-resistant containers", which would put an increased economic burden on the industry and the consumer. If such a regulation is necessary to permit successful prosecutions under the Act, we are not persuaded that would be a valid or viable argument for altering the constitutional burden of proof imposed upon the Commonwealth. However, we do not believe such a regulation need be so burdensome as envisioned by the Commonwealth, for the application of a single seal on the container would seem to suffice. If the seal were found unbroken the Commonwealth would have its proof that there had been no tampering between packaging and the retail shelf. If the seal were broken the retail vendor and the consumer would be on notice of the possibility of tempering.

We are not persuaded that the Court erred in ruling that the burden of the Commonwealth to prove beyond a reasonable doubt that the boxes of nails tested were not tampered with after leaving the defendant's control. "It is the continuing presumption of innocence which is the basis for the requirement that the state has the never shifting burden to prove guilt beyond a reasonable doubt." *Commonwealth v. Owens*, 444 Pa. 520, 524 (1971); 281 A. 2d 861 (1971).

In the absence of evidence that the representations made by the defendant as to the weight of the nails was, in fact, false when made the defendant cannot be held to have violated the above quoted sub-section of the Act.

The final point for consideration involves the weighing procedure followed by the Commonwealth. According to the prosecutor's testimony whenever the scale indicator falls

exactly between two gradations, the Commonwealth rounds off to the even number. Thus, when the scale indicator falls exactly between 2 and 3, the inspector uses the number 2, and if the scale falls exactly between 3 and 4, the number 4 is used. Following this procedure the scale reading would necessarily be more favorable to the Commonwealth part of the time. This has the effect of taking a presumption in favor of the Commonwealth which we are persuaded is constitutionally impermissible under the general rule that whenever conflicting presumptions are raised, the presumption of innocence must prevail.

In the light of our findings as to the lack of evidence on the other points heretofore discussed in this Opinion, we do not feel it necessary to dwell on the point of reading the scale. However, we feel it is important to note that in this prosecution and other similar prosecutions the Commonwealth is necessarily dealing with extremely minute figures and calculations. In the case at bar, the weights involved tenths and hundredths of an ounce short weight. We find it difficult to believe that the Commonwealth cannot establish a testing procedure that would not tilt in favor of the Commonwealth in certain situations. With today's calculators and other technological devices, certianly the Commonwealth need not round off in its own favor.

We conclude the Commonwealth did not in its case in chief prove the corporate defendant guilty beyond a reasonable doubt. There was no evidence as to the identity of the packager, weigher and labeler of the boxes; nor was there any evidence that the boxes of nails remained intact from the time they left the corporate defendant's control until removed from the hardware store counter by the prosecutor. The Commonwealth has not met its burden of proof and the Court correctly sustained the defendant's demurrer to the evidence.

JOHN, et ux. v. GIANT FOOD STORES, INC., et al., C.P. Franklin County Branch, No. A.D. 1978-31

Trespass Action - Petition to Open Default Judgment - Relief Within Sound Discretion of Court - Requirements for Relief - Distinction between Trespass and Assumpsit Actions - Timeliness of Filing - Reasonable Excuse for Failure to Appear before Defualt in the Action

1. A petition to open judgment by default is essentially an equitable proceeding ruled by equitable principles, and is addressed to the sound discretion of the Court.

2. In a trespass action, a petition to open a default judgment should be granted only when the defendant (1) has promptly filed his petition to open judgment, and (2) can also reasonably excuse or justify his failure to appear and answer.

3. Unlike assumpsit actions, a meritorious defense need not be demonstrated in order to open a default judgment in trespass if the equities are otherwise clear.

4. There is no exact time limit as to what constitutes promptness in seeking the opening of a judgment, and the circumstances for the delay in each case must be examined.

5. Since no prejudice to plaintiffs by the twenty-eight day delay in obtaining a rule to show cause in this case was established and since the delay was occasioned by a mistake of out of county counsel as to the local Franklin County practice of permitting issuance of a rule to show cause immediately upon the presentation of a petition to the Court and entry of appropriate Order granting the same, and the plaintiffs had actual notice of the pendency of the proceeding some two weeks before counsel for defendants discovered and corrected this error, the first requirement has been met in this case.

6. Negligence or mistake in regard to a belief that one is being represented by legal counsel when he is not, is not sufficient, by itself, to satisfy the second requirement for opening a judgment.

7. In the instant case, however, the individual defendants had a close association with the corporate defendant, of which they were substantial shareholders, and reasonably believed the corporation was handling everything involved with the litigation, and in addition, they promptly handed over the copies of the complaints with which they were served to counsel for the corporation, who, through a musunderstanding, filed an answer only for the corporate defendant, and the plaintiffs are not prejudiced because they will have to go to trial against the corporate defendant, in any event. Such an explanation is sufficient to show a reasonable excuse or justification for the defendants' failure to appear and defend.

Robert D. Meyers, Esq. Attorney for Plaintiffs

Dennis J. Harnish, Esq., Attorney for Defendants

OPINION AND ORDER

KELLER, J., July 18, 1978:

This action in trespass was commenced by the filing of a complaint in the office of the Prothonotary on January 16,

1978. A true and attested copy of the complaint was served upon Lee H. Javitch and Giant Food Stores, Inc. on January 23, 1978 at their place of business. A true and attested copy of the complaint was served upon Phillis M. Lipsett and Jennie E. Javitch at their respective homes on January 24, 1978. A true and attested copy of the complaint was served upon Central Tractor Parts, Inc. on January 21, 1978, at its place of business. A praecipe for default judgment was filed in the Prothonotary's Office at 3:10 P.M., March 9, 1978, and a judgment was entered against the individual defendants, Lee H. Javitch, Jennie E. Javitch and Phillis M. Lipsett. Counsel for the individual defendants presented a petition to open judgment on March 21, 1978, and an order was entered granting a rule upon the plaintiff to show cause why the judgment should not be opened on April 6, 1978. The petition was served by mailing a true copy to counsel for plaintiff on March 21, 1978. An answer to defendant's petition was filed on April 19, 1978, and a true copy served upon counsel for defendant.

Arguments on the petition and answer were heard on June 8, 1978. The matter is ripe for disposition.

FINDINGS OF FACT

1. The individual defendants, Jennie E. Javitch, Lee H. Javitch and Phillis M. Lipsett, are owners of a piece of property located at 1351 Lincoln Way East, Guilford Township, Franklin County, Pennsylvania.

2. On or about July 18, 1961, the individual defendants leased the said property to defendant, Giant Food Stores, Inc.

3. The individual defendants are all substantial shareholders in Giant Food Stores, Inc. Lee H. Javitch is President of Giant Food Stores, Inc., Phillis M. Lipsett is wife of the vice-president of Giant Foods, and Jennie E. Javitch is the widow of the founder of Giant Foods, and Jennie E. Javitch is the widow of the founder of Giant Foods and mother of the other two individual defendants.

4. Defendant, Central Tractor Parts is a sub-lessee of the said property having entered into a sublease with Giant Food Stores, Inc.

5. It is alleged by the plaintiff that in December of 1976 there was an oil leakage from a storage tank on the property owned by the individual defendants and the leakage polluted the plaintiff's spring.

BOOK REVIEW

This is the second part of a summary of **The Supreme Court Review, 1977**, edited by Philip Kurland and Gerhard Casper.

In "Vertical Restraints: Schwinn Overruled," Yale's Robert Bork examines the Supreme Court's inconsistent attitude toward vertical market restraints and argues such restraints should not be considered antitrust violations. According to the former Attorney General, the alternative is for the course to proceed as usual, create and tolerate inconsistencies within the law, and destroy in the process many socially valuable means of distribution.

Operating under the assumption that defense of pending criminal prosecution usually furnishes adequate remedy for a violation of a defendant's federal rights, the Supreme Court in 1971 restricted federal courts from interfering in state prosecutions. Focusing on the inability of criminal courts to grant interlocutory, prospective, or class relief, Chicago's Douglas Laylock in "Federal Interference with State Prosecutions: The Need for Prospective Relief" reveals that this crucial assumption is invalid. Fred Morrison, in "The Right to Fish for Seacoast Products: Gibbons v. Ogden Resurrected," analyzes **Douglas v. Seacoast Products Inc.** (1977) and the surprising application of the Gibbons rule by Mr. Justice Thurgood Marshall. The Minnesota law professor asserts that this case provides a clear example of the current erosion of state regulatory powers in the face of federal preemption.

Richard Danzig of the Stanford Law School argues in "How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion" that Frankfurter, in his opinion in **Minersville School District v. Gobitis,** used the technique of "inflating" the significance of the question at hand. Danzig demonstrates how a judge might preserve the legal and logical purity of an opinion while at the same time injecting personal beliefs into the premises from which the opinion proceeds.

State and federal courts have struck down many state statutes disadvantaging aliens since **Graham v. Richardson** (1971). Gerald M. Rosberg questions in "The Protection of Aliens from Discriminatory Treatment by the National Government" this federal discrimination. After examining past legal challenges, plenary federal powers, and alienage as a "suspect classification," the Michigan law professor concludes that the Court has failed to confront the hardest questions raised by federal government discrimination.

With its emphasis on the history, difficulties, and repercussions of a Supreme Court opinion, as well as its insights into the strengths and weaknesses of individual justices, **The Supreme Court Review, 1977** joins its prodecessors in this series as an indispensable resource for lawyers, judges, political scientists, and other individuals interested in the Supreme Court.

HUGH E. JONES

6. A complaint was filed against the individual defendants and both corporate defendants on January 16, 1978.

7. The complaints served on the individual defendants and on Giant Food Stores, Inc. were turned over to Steven P. Krell, Vice-President, Finance at Giant Goods, who was in charge of obtaining legal aid for the corporation.

8. Mr. Krell contacted Edward C. First, Jr., Esq., of the law firm of McNees, Wallace & Nurick and requested him to represent Giant Good Stores, Inc. The representation as to the individual defendants was not specifically stated.

9. The law firm very rarely, if ever, represented the individual defendants and Mr. First was aware of this.

10. Mr. First planned to be away from his office and delegated the duty of preparing the answer to Dennis J. Harnish, Esq., who had just become associated with the firm of McNees, Wallace & Nurick, and knew little about the relationship between Giant Food Stores, Inc. and the individual defendants.

11. Two extensions were requested and granted for Giant Food Stores, Inc. to plead to the complaint and thus the date for answering was extended to March 8, 1978.

12. On February 28, 1978 Mr. Harnish contacted the attorney for the plaintiff, Robert D. Meyers, Esq., and inquired if he knew who represented the individual defendants. Mr. Meyers advised that he had no knowledge of who represented them.

13. The answer and new matter on behalf of Giant Food Stores, Inc. was filed on March 8, 1978.

14. No answer was filed or appearance entered on behalf of the individual defendants.

15. On March 9, 1978 a default judgment against the individual defendants was entered.

16. The attorney for Giant Food Stores, Inc. received notice of the default judgment on March 14, 1978.

17. The firm of McNees, Wallace & Nurrick specifically undertook to represent the individual defendant on March 16.

18. On March 17, the plaintiffs' counsel refused to remove the default judgment voluntarily.

19. A petition to open the default judgment against the individual defendants was filed in the office of the Prothonotary of Franklin County. No order for the issuance of a rule to show cause why the judgment should not be opened was attached to the petition, and the petition was not presented to the Court. Copies of the petition were promptly served upon all parties.

20. The petition to open judgment was not presented to the Court until April 6, 1978, when the rule to show cause was issued.

21. The petition alleges the existence of three defenses available to the individual defendants, and a proposed answer containing new matter is attached to the petition as an exhibit.

DISCUSSION

A petition to open judgment by default is essentially an equitable proceeding ruled by equitable principles, and is addressed to the sound discretion of the Court. *Richmond v. A. F. of L. Medical Service Plan of Philadelphia*, 415 Pa. 561, 204 A. 2d 271 (1964); *Toplovich v. Spitman*, 239 Pa. Super. 327, 361 A. 2d 425 (1976). As stated by Justice Jones in *Kraynick v. Hertz*, 443 Pa. 105, 111, (1971):

> "In determining whether a default judgment is to be opened and a defendant let into a defense, we bear in mind two principles of the law: (a) that entry of a judgment by default finds its authority in the law (Pa. R.C.P. 1037, 1047, 1511) and (b) that, even though authorized by the law, such judgments are subject to opening if equitable considerations so demand. In determining whether a judgment by default should be opened we must ascertain whether there are present any equitable considerations in the factual posture of the case which require that we grant to a defendant, against whom the judgment has been entered, an opportunity to have his 'day in court' and to have the cause decided on its merits. In doing we act as a court of conscience."

A petition to open a default judgment should be granted only when both of the following requirements have been fulfilled; (1) the defendant has promptly filed his petition to open judgment and (2) the defendant can reasonably excuse or justify his failure to appear and answer. *Balk v. Ford Motor Co.*, 446 Pa. 137, 285 A. 2d 128 (1971); *Day v. Wilkie Buick Co.*, Pa. Super. 361 A. 2d 823 (1976). Unlike assumpsit actions, a meritorous defense need not be demonstrated in order to open a default judgment in a trespass

action if the equities are otherwise clear. *Kraynick v. Hertz*, supra.

As to the first requirement, the defendants filed their petition on March 21, 1978, which was twelve days after the default judgment was entered. The plaintiff claims that the defendants did not file effectively on March 21, because a rule to show cause based upon the petition was not presented to the Court and issued until April 6, 1978, which was twenty-eight days after the default judgment. The plaintiffs agree that twelve days is prompt filing, but contend that a twenty-eight day delay does not satisfy the promptness requirement.

The defendants state their reason for delay in filing the rule to show cause was because they were waiting for the answer of the plaintiff to the petition prior to requesting the rule to show cause. This was not in conformity with the long standing local practice of this court which permits the issuance of a rule to show cause on order of the court prior to the filing of an answer to the petition in order to expedite the matter. After learning of the procedure the defendant filed the order for a rule to show cause the next day.

In *Texas & B. H. Fish Club v. Bonnell Corp.*, 388 Pa. 198 (1957), the court held that a three week delay in filing did not satisfy the promptness requirement. The court based its decision on the fact that the defendant gave no reasonable excuse for the delay and that to allow the opening of the judgment would be prejudicial to the plaintiff. In *Balk et al. v. Ford Motor Co.*, 446 Pa. 137, 285 A. 2d 128 (1971), a nine month delay was held not to be an undue delay where the reason for the delay was that actual notice to the defendants was not obtained until twelve days before they filed the petition.

From these two cases as well as the cases cited by the parties and the product of our independent research, it is clear that there has never been an exact time limit as to what constitutes promptness. The circumstances for the delay in each case must be examined. As stated by the Pennsylvania Supreme Court in *Quatrochi v. Gaiters*, Pa. Super. , 380 A. 2d 404, 407 (1977):

> "While our court does not employ a bright line test for determining whether a petition to open judgment has been promptly filed, we will focus on two factors: (1) the length of delay between discovery of the entry of a default judgment and filing the petition to open the judgment and (2) the reason for the delay. (citations omitted)."

In the case at bar, we conclude that the defendants have promptly filed their petition. Whether we take the filing to be effected in twelve days or twenty-eight days is really not important in reaching our conclusion, for several reasons. First, the plaintiff has not shown that he was prejudiced in any way by the delay. Second, the defendant was able to present a reasonable explanation for the delay. There is no evidence that the defendants were acting in bad faith or in any way intentionally attempting to delay the proceeding. As soon as counsel for defendants realized his mistake as to the local practice, he immediately had his order for the rule presented. Finally, the plaintiffs received service of the petition on March 21, 1978. Thus, they were well aware of the defendants' petition for a rule to show cause why the default judgment should not be opened before the rule was finally issued.

The second requrement that must be met in order for the court to grant a petition to open a default judgment is whether the defendants can reasonably excuse or justify the failure to appear and answer. The defendants primary reason for failing to appear or file a responsive pleading is that they thought they were being represented by the counsel for Giant Food Stores, Inc. In *Barron v. William Penn Realty Company*, 361 A. 2d 805, 807, the Superior Court of Pennsylvania, in discussing what is needed to justify a failure to answer, stated:

> "It is well-established that the moving party, in order to gain relief from a default judgment, is required to reasonably explain, excuse, or justify his failure to answer. (citations omitted). A mere allegation of negligence or mistake will not, *by itself* satisfy the requirement; the moving party must advance in argument a factual basis to support his plea for relief." (emphasis ours).

Thus, in *Barron*, the appellee's petition to open the default judgment was denied when in support of the petition to open the appellee's only averment was that the insurance company did not provide legal representation because of an oversight and/or inadvertence. The court was clear in its holding that negligence or mistake, by itself, is not a justifiable excuse. However, all that appears to be needed is some factual basis, i.e., a reasonable explanation of what transpired that led to the negligence or mistake. In *Barron* the appellee said only that there was an oversight. "Apellee offered no further explanation for the failure to answer the complaint." *Barron*, supra, p. 807. Thus, the Superior Court overruled the lower court and denied the petition to open the default judgment.

The court in *Barron* cited with approval the decisions in *Balk v. Ford Motor Company*, 446 Pa. 137, 283 A. 2d 128 (1971), and *Kraynick v. Hertz*, 443 Pa. 105, 277 A. 2d 144 (1971), in which the court found that the justifications for not answering were reasonable. In *Balk* the explanation of the defendant was that the insurance carrier negligently lost the defendant's court papers because of the heavy mail rush in the company's claims office due to the New Year's holiday period. In *Kraynick* the explanation that was held to be reasonable was that an overworked employee failed to notify the insurance carrier of the plaintiff's suit until after entry of the default judgment. The fact that the default judgment was entered early in the morning on the twenty-first day was also taken into consideration by the court in *Kraynick*.

In the case at bar, if the defendants had only stated that they believed they were being represented by Giant Food's counsel, then we might find that they had failed to meet the standards set forth in *Barron*. However, the defendants also explained why they were negligent. First, there is the defendants' close association with Giant Food Stores, Inc. All three defendants are substantial shareholders in the corporation, and one of them is the president, another is the wife of the vice-president, and the third is the mother of the other two, and widow of the founder of the corporation. In addition, the defendants have not been in possession of the property since 1961, and all maintenance and care of the property had been the responsibility of Giant Food Stores, Inc. Any repairs necessary to stop the oil leakage which is the alleged cause of this action were to be taken care of by Giant Foods. Therefore, when this litigation commenced the defendants reasonably felt that the corporation was handling everything.

When the individual defendants were served with the complaints, they promptly turned them over to Steven Krell, a Vice-President with Giant Foods, who was in charge of obtaining legal aid for the corporation. Unfortunately, there was a misunderstanding between Mr. Krell and Attorneys First and Harnish of the law firm of McNees, Wallace & Nurick. An answer was filed for Giant Food Stores, Inc., but not for the defendants. Attorney Harnish, who filed the answer, was new to the law firm and knew nothing about any prior arrangements between Giant Food Stores, Inc., the defendants, and the law firm. We do note that the law firm rarely, if ever, previously represented the individual defendants, but we find that it was not unreasonable for the defendants to feel that they were being represented by the corporate defendants' counsel under the circumstances of this case.

Further, we do not find that the plaintiffs would be prejudiced if we open the default judgment. With or without the individual defendants, the plaintiff still will be required to prove their case against the two corporate defendants. We do not find any evidence that the defendants are intentionally trying to delay the proceedings or impede the plaintiffs in establishment of their claims; nor do we find any evidence of bad faith in the defendants' conduct.

The cases cited by the plaintiffs where petitions to open were denied because there was no justifiable excuse for not answering can all be distinguished from the case at bar. Either there was no explanation given for the negligence or mistake that occurred, or the court simply failed to believe the excuse given was reasonable. Here, we feel that the defendants have shown a reasonable excuse or justification for their failure to appear and answer.

In conclusion, we find that the defendants have (1) promptly filed their petition to open judgment, and (2) the defendants have reasonably justified their failure to appear and answer. As previously noted, the defendants need not demonstrate a meritorous defense where, as we have found in the case at bar, the equities are otherwise clear. We also conclude that the prejudice to the defendants in not opening the judgment would be out of proportion and greater by far than that caused to the plaintiff if we order the judgment to be opened.

Equitable principles are involved where the opening of a judgment is sought. We find that the equitable considerations applicable to this case demand that the defendants be given their day in court. Thus, we hold that the petition to open the default judgment should be granted.

ORDER

NOW, this 18th day of July, 1978, the petition of Jennie E. Javitch, Lee H. Javitch and Phillis M. Lipsett, individual defendants, to open the default judgment entered March 9, 1978, in the above captioned matter is granted.

Exceptions are granted the plaintiffs.

COMMONWEALTH v. ALLOWAY, C.P. Franklin County Branch, Misc. Doc. Vol. W, page 254

Miscellaneous - suspension of driver's license - Pennsylvania Vehicle Code, 75 P.S. 615 (a)(2) - effect of appeal from conviction.

1. Upon receipt of a certification of a driver's conviction of a felony involving a motor vehicle, the Secretary of the Department of Transportation of Pennsylvania has the duty to impose an immediate revocation of the driver's operating privileges.

2. The legislative intent of the Pennsylvania Vehicle Code, 75 P.S. 615 (a)(2), is to remove immediately from the highways one who has been convicted of a felony involving a motor vehicle.

3. In the absence of an order staying the suspension of operating privileges, the fact that an appeal from the conviction of a revocation offense is pending does not preclude immediate suspension.

Harold H. Cramer, Assistant Attorney General, Attorney for the Commonwealth

Stewart L. Kurtz, Esq., Attorney for Appellant

OPINION AND ORDER

KELLER, J., October 13, 1975:

On October 5, 1973, appellant herein was tried for the crime of burglary in the Fulton County Branch of the 39th Judicial District of the Court of Common Pleas, and the jury returned a verdict of guilty. On March 17, 1975, sentence was imposed. The conviction was certified by the Clerk of the Courts of Fulton County on March 31, 1975. On April 15, 1975, the appellant filed with the Prothonotary of the Superior Court of Pennsylvania an appeal from the judgment of sentence entered on March 17, 1975. By order dated June 26, 1975, and received by appellant on June 28, 1975, his operating privileges were revoked for a period of one year, effective July 31, 1975. Mr. Alloway petitioned for appeal from the order suspending operating privileges on July 22, 1975, and an order was entered the same date granting a hearing on the petition and directing that the appeal should act as a supersedeas of the revocation order. On August 20, 1975, Harold H. Cramer, Assistant Attorney General for the Commonwealth of Pennsylvania entered his appearance in the matter.

A hearing on the revocation appeal was held on September 18, 1975 at which time Mr. Cramer for the Commonwealth and Mr. Kurtz, counsel for the appellant, stipulated that a vehicle was used in the commission of the alleged offense and that an appeal is pending from the judgment of sentence before the Superior Court of Pennsylvania, and that the appeal does act as a supersedeas to the execution of the sentence. Counsel also stipulated that Commonwealth's Exhibit 1, consisting of the