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Recent Decisions

RECENT DECISIONS

CONSTITUTIONAL LAW—Subversive Activities Control Act —Exclusion of members of Communist-action organization from employment in defense facility without showing member's knowledge of organization's illegal purpose and specific intent to further such illegal purpose is unconstitutional. *United States v. Robel* (Sup. Ct. 1967).

Appellee was charged with violating section 5 (a) (1) (D) of the Subversive Activities Control Act of 1950.[1] On October 20, 1961, the Subversive Activities Control Board's order requiring the Communist Party of the United States to register as a Communist-action organization became final.[2] At the time the Board's order became final, appellee was employed at a Seattle, Washington shipyard as a machinist and was a member of the Communist Party. On August 20, 1962, the shipyard was designated a "defense facility" by the Secretary of Defense by authority delegated in section 5(b) of the Act.[3] Appellee continued his employment at the shipyard and was subsequently indicted for a violation of section 5(a) (1) (D). The indictment was based upon the allegations that the appellee—with knowledge of both the Order against the Party and the designation of the shipyard as a "defense facility"—did "unlawfully and willfully engage in employment" at the shipyard. The United States District Court for the Western District of Washington dismissed the complaint,[4] and the Government appealed directly to the Supreme Court of the United States. The Supreme Court, *held*, affirmed but upon different grounds. The Court decided that Robel's right of association protected by the first amendment was abridged by section 5(a) (1) (D) and that such

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1. Subversive Activities Control Act of 1950, § 5(a)(1)(D), 50 U.S.C. § 784(a)(1)(D) (1964). Section 5(a)(1)(D) reads as follows:

> When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final . . . . (D) if such organization is a Communist-action organization, to engage in any employment in any defense facility. . . .

2. Communist Party of U.S. v. Subversive Activities Control Board, 367 U.S. 1 (1961).

3. Subversive Activities Control Act of 1950, § 5(b), 50 U.S.C. § 784(b) (1964).

4. United States v. Robel, 254 F. Supp. 291 (W.D. Wash. 1965).

an abridgment was unconstitutional. *United States v. Robel*, 88 S. Ct. 419 (1967).

Through the years Congress has passed numerous laws aimed at controlling, diminishing and negating the effects of subversive activities within the boundaries of the United States. In the late 1940's, the United States was gripped by a fear, no less prevalent in the Congress, of Communist world domination. This fear, coupled with a feeling of the inadequacy of existing laws to cope with the clandestine machinations of the Communist conspiracy, resulted in the enactment of the Subversive Activities Control Act.[5] Although a cursory examination of the Act will reveal its restrictive effect upon other areas of Communist activity, this discussion is limited to the Supreme Court's recent interpretation of section 5(a)(1)(D) as unconstitutional. The Act provides, in effect, that no member of a registered Communist-action organization may be employed in any "defense facility" of the United States.

Historically, the states as well as the federal government have had the power to exclude from employment members of subversive organizations.[6] These exclusions were usually based on either the employees' refusal to swear to a loyalty oath,[7] or his refusal to answer questions concerning his membership in certain organizations.[8] The Supreme Court, however, has not acted favorably toward exclusions from employment based on a refusal to swear to a loyalty oath.[9] In 1952, the Court struck down an Oklahoma oath requirement which barred persons who had been members of certain organizations from government employment.[10] In holding that the statute [11] violated due process in that scienter was not made an element of the association, the Court said that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."[12]

5. 50 U.S.C. § 781 *et seq.* (1964). For a more complete discussion of the circumstances surrounding the passing of the Act, *see* 2 U.S. CODE CONG. & AD. NEWS 3886 (1950).

6. *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works. 341 U.S. 716 (1951).

7. *See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

8. *See, e.g.*, Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Educ., 357 U.S. 399 (1958).

9. For a discussion of loyalty oaths as conditions of public employment, *see* COMMENT, *The Loyalty Oath as a Condition of Public Employment*, 19 BAYLOR L. REV. 479 (1967).

10. Wieman v. Updegraff, 344 U.S. 183 (1952).

11. 51 OKL. STAT. §§ 37.1-.8 (1951).

12. Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

This requirement of knowledge of the organization's illegal purposes has been consistently applied in the later decisions dealing with loyalty oaths.[13]

In cases dealing with the dismissal of public employees for failure to testify as to their membership in subversive organizations, the Court has frequently sanctioned such dismissals upon the employees' failure to answer questions concerning their membership in subversive organizations rather than upon the membership itself.[14]

In 1958, the "right of association" emerged from the Court's decision in *NAACP v. Alabama ex rel. Patterson.* [15] In promulgating and defining this right, the Court said:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .[16]

While eager to extend the protection of this right of association to individual liberties in the absence of any controlling governmental justification for not so extending it,[17] the Court has been unwilling to allow subversive organizations and their members to take refuge from the restrictions of subversive activities legislation by asserting a right of association. However, the Court has taken exception to this position in cases in which

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13. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).

14. Cases cited note 8 *supra.*

15. 357 U.S. 449 (1958). For an extensive discussion of the right of association, *see* Comment, *The Right of Association and Subversive Organizations: In Quest of a Concept,* 11 VILL. L. REV. 771 (1966).

16. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citations omitted).

17. *See, e.g.,* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

both an absence of specific intent and ignorance of the organization's illegal purposes can be shown.[18]

In *Elfbrant v. Russell*[19] the Court invalidated an Arizona loyalty oath which subjected to discharge and prosecution for perjury state employees who took the oath and then became or remained members of the Communist Party. In holding the oath unconstitutional the court said, "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."[20] A similar view was taken in holding certain sections of New York's loyalty statutes unconstitutional.[21]

United States v. Robel,[22] although a consistent continuation of the Court's test of knowledge, intent, and the right to associate, is noteworthy in that it involved the first prosecution under section 5(a)(1)(D) of the Subversive Activities Control Act. In affirming the District Courts dismissal of the indictment, the Court said, "It is precisely because [§ 5(a)(1)(D)] sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment."[23] The Court is quick to add, however, that nothing in their decision should be construed as denying Congress the right to exclude subversives from "sensitive positions" in defense facilities. The legislative means of exclusion, however, must be narrowly drafted so as not to infringe substantially upon first amendment rights.

What the Court appears to be saying is that there are "active" Communists and there are "passive" Communists. "Active" Communists may be excluded from employment in defense facilities, but "passive" Communists may not be so excluded. The question then arises, "How are active Communists to be distinguished from passive Communists?" It is doubtful that Com-

18. *Compare* Elfbrandt v. Russell, 384 U.S. 11 (1966) *with* Scales v. United States, 367 U.S. 203 (1961).

19. 384 U.S. 11 (1966).

20. *Id.* at 19 (citations omitted).

21. Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See* Comment, *Constitutional Law—Loyalty Oaths—Key Sections of New York's Loyalty Statutes Declared Unconstitutional,* 19 S.C.L. REV. 422 (1967).

22. 88 S. Ct. 419 (1967).

23. *Id.* at 423.

munists seeking employment in defense facilities will inform their prospective employers that they are, in fact, "active" Communists seeking the immediate overthrow of the United States' Government. The public is thus forced to rely upon the extensive employee screening processes[24] used by the Department of Defense and the deterrence factors of the severe penalties for espionage and sabotage[25] to keep defense facilities free of those who would imperil the nation's security.

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24. 32 C.F.R. §§155-57.7 (1967).
25. 18 U.S.C. §§792-98 (espionage), §§2151-56 (sabotage) (1964).

CONSTITUTIONAL LAW—Right of Confrontation—The sixth amendment requires that the witness give his actual name and address when requested on cross-examination. *Smith v. Illinois* (Sup. Ct. 1968).

The Supreme Court in this case considered the bounds of a defendant's constitutional right to confront his accuser.[1] The witness whose testimony was in dispute identified himself only as "James Jordan". On cross-examination he admitted that his legal name was not as previously stated; however, prosecution's objections to questions aimed at discovering his real name and place of residence were sustained by the trial court. The Supreme Court, *held*, reversed. The refusal to require answers to these questions was reversible error because it denied the defendant the right to confront the witness against him. This testimony was of particular importance because no one else witnessed the transfer of narcotics for marked money. "James Jordan" was given the money by two policemen who waited outside while the witness went into the restaurant and emerged with the narcotics. The witness testified that he purchased the goods from the defendant who claimed that he directed the witness to someone else. He also claimed that the marked money in his possession was change received from the purchase of a cup of coffee with a $5 bill. *Smith v. Illinois*, 88 S. Ct. 748 (1968).

The Supreme Court relied upon *Pointer v. Texas*[2] in making the sixth amendment right of confrontation applicable to the states by incorporation into the due process clause of the fourteenth amendment. Prior to *Pointer*, *In re Oliver*[3] had held that this right was included in the fourteenth amendment because it was fundamental. The *Oliver* Court applied the due process clause of the fourteenth amendment saying that the right to examine the witness against him was a right "basic in our system of jurisprudence. . . ."[4] The Court thus required in *Pointer* that the state guarantee that right as determined by federal standards laid down in all earlier decisions. The right of confrontation was tied to the right to counsel in holding that testimony of a witness given at a preliminary hearing was inadmis-

1. U. S. CONST. amend. VI. "In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witness against him . . . ." *Accord*, S.C. CONST. art. 1, § 18.

2. 380 U.S. 400 (1965).

3. 333 U.S. 257 (1948).

4. *Id.* at 273.

sible since the defendant had not had counsel to cross-examine the witness.

Confrontation involves two steps. The primary one is the testing of evidence by cross-examination, and the second is providing the trier of fact an opportunity to observe the witness as he presents his testimony to afford insight into his credibility. Cross-examination is an essential element, but observation may be omitted. Confrontation as included in the sixth amendment means giving the accused the right to cross-examine.[5]

The companion case to *Pointer*, *Douglas v. Alabama*,[6] provided one guideline for defining confrontation. In this case the prosecution read an alleged confession of an accomplice who refused any comment on grounds of self-incrimination. The confession, read sentence-by-sentence, as the prosecution asked the witness to admit authorship, was incriminating to the defendant who had no opportunity for legitimate cross-examination since the witness never testified. *Smith v. Illinois*[7] provided one more step in defining the vague term "confront" as used in the sixth amendment. At the trial defendant had an opportunity to meet the witness face-to-face and to cross-examine him in regard to the incident for which the accused was arrested. He was only denied the opportunity to learn the legal name and place of residence of the witness.[8]

The Court quoted extensively from *Alford v. United States*[9] in which it had pointed to the importance of the place of residence as a part of cross-examination. The first value is to place the witness in his proper environment so that the jury may better weigh his statements. "The purpose of such evidence is to identify the witness and to some extent give proper background for the interpretation of his testimony."[10] The second value of knowing a place of residence is facilitating out-of-court investigation. "Its permissible purposes, among others, are that the

5. 5 J. WIGMORE, EVIDENCE § 1365 (3d ed. 1940).

6. 380 U.S. 415 (1965).

7. 88 S. Ct. 748 (1968).

8. *Id.* at 751. The majority ignored the testimony that the accused had known the witness casually for a few years and that his counsel had once represented the witness. J. Harlan, dissenting, pointed this out and contended that this makes the error harmless or, at least, causes the case to be inappropriate for constitutional adjudication. J. White, concurring in the decision, pointed out that neither party may have known the real name or address of the witness at the time of the trial.

9. 282 U.S. 687 (1931).

10. Alford v. United States, 41 F.2d 157, 160 (9th Cir. 1930).

witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood."[11] Though the accused and counsel might have known the answers, the most expeditious method of informing the jury was to have it come from this witness who knew best.

The defense is not required to know where the line of questioning might lead when he begins. In its very nature, cross-examination is exploratory. Counsel searches for something that will discredit the witness or his testimony; therefore, counsel must be permitted wide latitude.[12] The trial judge retains discretion to limit his examination if it appears that the questions are intended to harass, annoy, or humiliate,[13] but the trial judge in *Smith* acted beyond the bounds of his discretion because the questions had not approached the proscribed limitations.

Though there was little or no prejudice accruing from the error made, the Court applied the rule of automatic reversal stated in *Brookhart v. Janis*[14] in connection with the right of confrontation. It adopted counsel's contention that, " '[I]f there was here a denial of cross-examination without waiver, it would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' "[15] This decision will affect South Carolina law. In *State v. Smith*[16] the Court held that the burden was upon the appellant to satisfy the court that there was prejudicial error.

The case at hand should be distinguished from those cases which involve the right of the accused to know the name of the informer whose disclosure led to the defendant's arrest.[17] In none of those cases was the informer a witness at the trial so that his testimony would influence the jury. The privilege of withholding identity does not belong to the informers but to the government. It stems from the public policy of making police work easier by encouraging citizens to inform of crime by assuring them that their actions will remain anonymous.[18]

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11. Alford v. United States, 282 U.S. 687, 691 (1931).
12. Alford v. United States, 282 U.S. 687 (1931).
13. 5 B. JONES, EVIDENCE § 2316 (2d ed. 1926).
14. 384 U.S. 1 (1966).
15. *Id.* at 3.
16. 230 S.C. 164, 94 S.E.2d 886 (1956).
17. *E.g.*, McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).
18. *See* Roviaro v. United States, 353 U.S. 53 (1957).

As a result of this decision the right to confront the witness which is guaranteed in all courts after *Pointer* is further defined. Confrontation now includes the obligation of the witness to give his proper name and place of residence. If he is not required to do this, there is reversible error even if no prejudice ensues. As a constitutionally guaranteed right, confrontation deserves absolute protection by the courts.

WALKER D. SPRUILL

CRIMINAL PROCEDURE—Right to Counsel at Probation Revocation Proceedings—A probationer is entitled to be represented by court-appointed counsel at proceedings to revoke probation and to impose sentence when sentencing is deferred following a guilty plea in state court. *Mempa v. Rhay* (Sup. Ct. 1967).

The petitioner, Mempa, was convicted in the Spokane County Superior Court of Washington of the offense of "joyriding." The conviction was based on his plea of guilty which was entered with advice of court-appointed counsel. Mempa was then placed on probation for two years and the imposition of sentence was deferred. About four months later Mempa appeared before a hearing to revoke his probation. He was not represented by counsel and was not asked whether he wished to have counsel appointed for him. The court revoked Mempa's probation and sentenced him to ten years in the penitentiary.

Petitioner Walking was brought before the Thurston County Court for a hearing on a petition to revoke his probation, and a continuance of a week was granted to enable him to retain counsel. When the hearing was called, Walking appeared and informed the court that he had retained an attorney who was supposed to be present. After waiting fifteen minutes, the court proceeded without petitioner's counsel and without offering to appoint counsel for him. The court revoked probation and imposed the maximum sentence of fifteen years. Petitioners were denied petitions of habeas corpus by the Washington Supreme Court.[1] On certiorari the United States Supreme Court consolidated the cases and, *held*, the state court proceedings to revoke probation and to impose a deferred sentence were invalid because petitioners' rights to court-appointed counsel were violated. *Mempa v. Rhay*, 389 U.S. 128 (1967).

Prior to *Mempa* there was little conflict on the question of whether a probationer had a right to court-appointed counsel. The general view of the federal courts was that probation was purely a matter of judicial discretion and that since a convicted person had no constitutional right to probation, he had very few rights when probation was being revoked. In accordance with that view the hearing to revoke probation was considered to be administrative, and no right to counsel was afforded.[2] Most

1. Mempa v. Rhay, 68 Wash. 2d 882, 416 P.2d 104 (1966).

2. *See, e.g.*, Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946); Cupp v. Byington, 179 F. Supp. 669 (S.D. Ind. 1960).

state courts adhered to these views, but the idea that an indigent defendant has a right to court-appointed counsel in such a procedure was accepted by a small minority of state courts.[3]

Rather than delving into the past on this precise point the Supreme Court chose to examine its precedents in closely related areas. The Court in *Townsend v. Burke*[4] held that the Pennsylvania Court—after receiving a guilty plea and prior to sentencing—violated due process by reading the defendant's record of previous offenses because the defendant was not represented by counsel during sentencing. This was accompanied by the fact that the court accepted assumptions about his criminal record which were materially untrue. In *Moore v. Michigan*[5] the Court stated, "The right to counsel is not a right confined to representation during the trial on the merits."[6] There the defendant had been prejudiced by the absence of counsel at a hearing following his guilty plea to determine the degree of the crime. Then in *Hamilton v. Alabama*[7] the Court decided that failure to appoint counsel at arraignment violated due process because of the critical nature of the arraignment stage.

These cases carved out exceptions to the general rule established by *Betts v. Brady*.[8] In this decision the Court ruled that the sixth amendment applied only to trial in federal courts and that "due process of law" of the fourteenth amendment did not obligate states to furnish counsel in every criminal case in which the accused was unable to obtain counsel. However, in *Gideon v. Wainwright*[9] the Court specifically overruled *Betts* and held that the sixth amendment guarantee of counsel was a fundamental right and thus was made obligatory upon the states by the fourteenth amendment. The Court in *Mempa* considered that once the bonds of *Betts* were stripped away by *Gideon*, the cases of *Townsend*, *Moore*, and *Hamilton* stand for the proposition that appointment of counsel for an indigent is

3. *See, e.g.*, Hoffman v. State, 404 P.2d 644 (Alas. 1965); Williams v. Commonwealth, 350 Mass. 732, 216 N.E.2d 779 (1966); Blea v. Cox, 75 N.M. 265, 403 P.2d 701 (1965); People v. Hamilton, 26 App. Div. 2d 134, 271 N.Y.S.2d 694 (1966); *cf.* Commonwealth *ex rel.* Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 450 (1964).

4. 334 U.S. 736 (1948).

5. 355 U.S. 155 (1957).

6. *Id.* at 160. The case was reversed on the grounds that the defendant did not intelligently and understandingly waive counsel before pleading guilty.

7. 368 U.S. 52 (1961).

8. 316 U.S. 455 (1942).

9. 372 U.S. 355 (1963).

required at every stage of a criminal proceeding in which substantial rights of a criminal accused may be affected.

In view of the rather broad use that the Court has made of its precedents in deciding this case, it would appear that the Court in *Mempa* is stating a very broad rule meant to impose upon the states strict standards for the appointment of counsel for indigents in probation revocation proceedings. However, after stating sufficient grounds for establishing a broad rule, the Court considers how the rights of Mempa and Walking might have been affected under Washington law. In the case of a guilty plea followed by probation, an appeal may be taken only after probation is terminated and sentence imposed,[10] so absence of counsel at this time might result in a loss of the right to appeal. Also, at any time prior to the imposition of sentence, a guilty plea may be withdrawn and other pleas entered.[11] Thus the probationer is given a chance to withdraw a guilty plea, which might well have been entered upon inducement of probation, when probation is being revoked.

Unfortunately, the United States Supreme Court has failed to establish precise standards for the states to follow. The Court has made it difficult to ascertain whether the standard that it established is broad in light of its view of *Townsend*, *Moore*, and *Gideon*, or whether it is narrowed to a situation in which a guilty plea may be withdrawn or an appeal taken for the first time, as under Washington law. The first interpretation of the *Mempa* doctrine came within a month. In *United States v. Hartsell*[12] the defendant pleaded guilty to violations of federal internal revenue laws. Imposition of sentence on two of the five counts was suspended and Hartsell was placed on probation following incarceration on three of the counts. His probation was revoked in absence of counsel, and sentence was imposed on the remaining two counts. Hartsell requested a reduction in sentence[13] which the district court denied. The court, having quoted *Mempa*, stated,

> At first blush, the foregoing language might be accepted as holding that a federal probationer, such as Mr. Hartsell, who admits in a revocation hearing the violation of, or is

10. State v. Farmer, 39 Wash. 2d 675, 237 P.2d 734 (1951).
11. WASH. REV. CODE § 10.40.175 (1959).
12. 277 F. Supp. 993 (E.D. Tenn. 1967).
13. *See* FED. R. CRIM. P. 35.

> found judicially to have violated, the conditions of his probationary sentence, and as a consequence is sentenced, is entitled to the benefit of retained or appointed counsel. Such is not the holding, however.[14]

Here the court stated that it chose to follow the precedents established by the federal courts of appeal[15] and distinguished *Mempa* on the probationers' ability to withdraw their guilty pleas prior to sentencing.

An opposite view of *Mempa* was taken in *People ex rel. Combs v. LaVallee*.[16] Here the Supreme Court of New York, Appellate Division, stated,

> In *Mempa*, . . . the court enunciated the principle . . . 'that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.'[17]

Combs involved revocation of parole rather than probation, but the court did not view the difference as significant with respect to right to counsel.

The differing views of *Mempa* taken by these courts probably exemplify the reception that *Mempa* will receive in the state courts. It might be suggested, however, that the Supreme Court was attempting to establish a broad standard in regard to the right to counsel to indigents in state court proceedings revoking probation in which substantial rights of the probationer were affected. The *Mempa* Court enunciated that standard, and in dealing with the specific state law the Court was simply attempting to show the kind of substantial rights that would constitute a violation of this standard.

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14. 277 F. Supp. 993, 994-95 (E.D. Tenn. 1967).
15. Cases cited note 2 *supra*.
16. 286 N.Y.S.2d 600 (1968).
17. *Id.* at 603.

INSURANCE—Construction of Policy Provision—In an inclusionary clause, which is to be given a broad and liberal construction, a "relative resident of the same household" is one other than a temporary or transient visitor who lives with others in the same house for a period of some duration. *Buddin v. Nationwide Mutual Insurance Company* (S.C. 1967).

Alton E. Buddin, Jr., had a wreck while operating an uninsured automobile belonging to a friend. Plaintiff Aetna Casualty Insurance Co. had paid $2,000 under the uninsured motorist clause of the policy on the injured's automobile to the two occupants of the car Buddin negligently hit. Aetna then instituted this suit to determine whether Buddin was an additional insured under the inclusionary clause of a policy respondent had written insuring Buddin's uncle, Horace E. Buddin. The policy provided protection to "any relative resident of the same household." At the time of the accident, Buddin was living in his uncle's house which had been bought from the estate of Buddin's father. In the two years preceding the accident, Buddin had lived for varying periods at several other places. For two months prior to the accident and for several months after the accident, Buddin lived in the uncle's house. He paid a small amount of rent when he was working and had free use of the house. On occasion, he ate groceries bought by the uncle. His uncle exerted little control over him. Neither considered the arrangement permanent. His uncle felt some responsibility for Alton and sought occasionally to advise him. At trial it was agreed that the only issue was "Were Horace E. Buddin and Alton E. Buddin, Jr., relative residents of the same household on the date of the accident?" The lower court allowed the jury to decide. The jury found in the negative. Plaintiff's timely motions for directed verdict and judgment *non obstante veredicto* were overruled.

On appeal, the Supreme Court of South Carolina, *held*, reversed. Plaintiff's motion for a directed verdict should have been granted since the facts allowed only one reasonable inference, that Horace and Alton Buddin were relative residents of the same household at the time of the accident. *Buddin v. Nationwide Mutual Insurance Company*, 157 S.E.2d 633 (S.C. 1967).

The court reaffirmed the rule that the refusal of the trial judge to grant a directed verdict and judgment *non obstante*

veredicto, the court will view the evidence most favorably to respondent.[1]

Because there were no apposite fact situations in South Carolina cases, the court relied upon persuasive authority from other jurisdictions. The provision under interpretation was an inclusionary clause designed to extend coverage. Inclusionary clauses are widely held to be construed broadly in favor of the insured, such extension being the presumed intention of the parties.[2] Correspondingly, exclusionary clauses are given a narrower interpretation.[3] "This is necessary because in both situations the courts favor an interpretation of coverage."[4] For example, when an exclusionary clause denies coverage to a member of a family resident within a household, the narrower construction of who is resident will allow recovery in a greater number of cases.[5]

"The touchstone is that the phrase 'resident of the same household' has no absolute or precise meaning. . . ."[6] Household has often been interpreted to include those dwelling together "as a family."[7] However, many courts give household a broader meaning than family in the sense of those related by blood or marriage.[8] Household has been said to include domestic servants.[9] One court has said that residents of the same household do not always have to live in the same house.[10] In that case a husband and wife occupied separate houses on the same lot with the son freely visiting the father after separation proceedings; the father maintained both houses. The purpose of the clause often aids in determining its meaning.[11] Thus the South Carolina court interpreted a family-household clause to exclude

1. *E.g.*, Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966); Kelley v. City of Aiken, 245 S.C. 503, 141 S.E.2d 651 (1965); Jennings v. McCowan, 215 S.C. 404, 55 S.E.2d 522 (1949).

2. Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 146 S.E.2d 410 (1966); American Universal Ins. Co. v. Thompson, 62 Wash. 2d 595, 384 P.2d 367 (1963).

3. Cartier v. Carier, 84 N.H. 153 A 6 (1931).

4. Buddin v. Nationwide Mut. Ins. Co., 157 S.E.2d 633, 635 (S.C. 1967).

5. Island v. Fireman's Fund Indem. Co., 30 Cal. 2d 541, 184 P.2d 153 (1947).

6. Buddin v. Nationwide Mut. Ins. Co., 157 S.E.2d 633,637 (S.C. 1967).

7. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. James, 80 F.2d 802 (4th Cir. 1936).

8. *E.g.*, Hoff v. Hoff, 132 Pa. Super. 431, 1 A.2d 506 (1938).

9. *E.g.*, Engebretson v. Austvold, 199 Minn. 399, 271 N.W. 809 (1937).

10. Mazilli v. Accident & Cas. Ins. Co., 35 N.J. 1, 170 A.2d 800 (1961).

11. Hunter v. Southern Farm Bureau Cas. Ins. Co., 241 S.C. 446, 129 S.E.2d 59 (1962).

members of the domestic circle from coverage since the purpose of the clause was to avoid sympathetic suits.[12] However, in the absence of ambiguity, insurers are entitled to a construction of the policy according to the plain meaning of the words.[13]

The Court found three specific issues not determinative of whether Alton Buddin was a resident of his uncle's household. The first of these was the payment of board while a resident of his uncle's household;[14] Second, the absence of control by the uncle over the nephew;[15] and third, the lack of permanence in the living arrangements.[16] The facts were that Alton Buddin had no other place of residence and could not be classified as an independent boarder or as a guest of his uncle. The court quoted with approval the definition in *Hardware Mutual Insurance Co. v. Home Indemnity Co.*: "We think that a resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently."[17]

It should be noted that the same provision under construction here appears in the standard form insurance policy of the South Carolina Code in these words: "The term '*insured*' means the named insured and, while *resident of the same household*, the spouse of any such named insured and *relatives* of either . . . ."[18] In *Pacific Insurance Co. v. Fireman's Fund Insurance Co.*,[19] the South Carolina Supreme Court held this section applicable to all liability policies issued within the state. The court felt this to be the intention of the legislature in passing the 1963 amendments.[20]

12. *Id.*

13. *E.g.*, Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953).

14. *See* Teems v. State Farm Mut. Ins. Co., 113 Ga. App. 53, 147 S.E.2d 20 (1966); Morris v. State Farm Mut. Auto. Ins. Co., 88 Ga. App. 844, 78 S.E.2d 354 (1953); Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953).

15. Hardware Mut. Ins. Co. v. Home Indem. Co., 241 Cal. App. 2d 303, 50 Cal. Rptr. 508 (1966).

16. Newcomb v. Great Am. Ins. Co., 260 N.C. 402, 133 S.E.2d 20 (1963); Hardware Mut. Ins. Co. v. Home Indem. Co., 241 Cal. App. 2d 303, 50 Cal. Rptr. 508 (1966).

17. Hardware Mut. Ins. Co. v. Home Indem. Co., 241 Cal. App. 2d 303, 50 Cal. Rptr. 508, 514 (1966), *as quoted in* Buddin v. Nationwide Mut. Ins. Co., 157 S.E.2d 633, 636 (S.C. 1967).

18. S.C. CODE ANN. § 46-750.31 (Supp. 1967). (emphasis added).

19. 247 S.C. 282, 146 S.E.2d 273 (1966).

20. *Id.*

This case is significant for two reasons. First, the court has held that neither payment of rent by a boarder, lack of control over activities, nor lack of permanency of the residency militated against a finding of residency in a household. Moreover, since the term "relative resident of the same household" is not ambiguous, it appears the facts of a case will have to be capable of the inference that a disputed additional insured is a resident of more than one household before a jury will be allowed to determine actual residence. Secondly, the court adopted a broad definition of household, indicating that "household" is not equated with "family". *Buddin* is in keeping with, and may be viewed as an extension of, the general rule of construction in South Carolina that policies will be broadly construed in favor of the insured.

WILLIAM M. FOSTER

MONOPOLIES—Bank Mergers—If a proposed bank merger does not comply with the usual antitrust analysis, then, as provided by the 1966 Bank Merger Act, the merger may be sustained if it meets the additional requirement that the benefits to the community outweigh the anticompetitive disadvantages. *United States v. Third National Bank.* (Sup. Ct. 1968).

Congressional dissatisfaction with the Supreme Court's interpretation of the 1960 Bank Merger Act[1] in several decisions[2] led to the enactment of the Bank Merger Act of 1966[3] in order to effectuate substantial changes in the law applicable to this field. The second case decided by the Court under the 1966 Act, *United States v. Third National Bank*,[4] commenced with the United States filing suit to enjoin consummation of a merger between the Third National Bank and the Nashville Bank and Trust Company. Third National was the second largest bank in Davidson County, Tennessee, and owned 33.6% of the total bank assets in that county while Nashville Bank, the county's fourth largest bank, possessed 4.8% of the total bank assets. In agreeing with the findings of the Comptroller of the Currency, the district court denied the injunction, holding that the merger would not tend substantially to lessen competition and that any anticompetitive effect would be outweighed by the "convenience and needs of the community to be served." On direct appeal the Supreme Court, *held*, judgment reversed and remanded. The United States established that this merger would tend to lessen competition, and also that the district court applied an erroneous standard which did not demonstrate community benefits in terms of "convenience and needs" sufficient to outweigh the anticompetitive impact. *United States v. Third National Bank*, 88 S. Ct. 882 (1968).

While federal supervision of banking has been called "the outstanding example in the federal government of regulation of an entire industry through methods of supervision,"[5] it was not until 1963 that the Supreme Court first considered the application of the antitrust laws to commercial banking.[6] The first

1. 12 U.S.C. § 1828(c) (1964), *as amended,* (Supp. II, 1966).

2. United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

3. 12 U.S.C. § 1828(c) (Supp. II, 1966).

4. 88 S. Ct. 882 (1968). *United States v. First City Nat'l Bank,* the first case decided under the 1966 Act, is discussed *infra* n. 7.

5. 1 K. DAVIS, ADMINISTRATIVE LAW § 4.04, at 247 (1958).

6. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

decision under the 1960 Bank Merger Act dealt only with the competitive aspects of the merger and failed to consider its benefits to the community. To negate the decision, Congress passed an amendment to the Bank Merger Act in 1966.

United States v. First City National Bank, [7] the first case decided by the Supreme Court under the 1966 Act, recognized that the burden of proof fell upon the banks to establish that an anticompetitive merger came within the "convenience and needs of the community" exception, since it is a general rule that one who claims to come within an exception to a statute must bear the burden of proof. In addition the Supreme Court held that the language of the Act requiring courts to "review *de novo* the issue presented" meant that an independent determination of all issues should be made. Since *Houston Bank* disposed of only procedural issues, the Court in *Third National Bank* had to decide the previously reserved substantive issues of the bank mergers.

As demonstrated by Congressional debate, the "competitive factor" under the Act "is drawn directly from the Clayton Act section 7 and Sherman Act section 1 . . . [which means that] all of the principles developed . . . in regard to these statutes, such as the definition of relevant market and the failing company doctrine are . . . unchanged . . . ."[8] At this point it is necessary to consider briefly the positions of the two banks in the Nashville community.

Both the district court and the Supreme Court recognized that the two merging banks played significantly different roles in the Nashville community. Until 1956 Nashville Bank and Trust had been largely a trust institution, but in that year changed its focus in an attempt to become a full service commercial bank. While this venture was successful at first, the district court demonstrated that Nashville Bank and Trust was severely handicapped by the advanced age of its management and its lack of physical facilities for expansion.

On the other hand, the Comptroller of the Currency characterized Third National as one of the strongest and best managed banks in the nation. Third National had fourteen branch

7. 386 U.S. 361 (1967).
8. 112 CONG. REC. 2451 (1966) (remarks of Congressman Minish).

banks to Nashville Bank's one. Third National served as correspondent bank for smaller institutions in the central south, but Nashville Bank had no such program. Nashville Bank, however, did have considerable size: Its total assets were $50,900,000, and deposits totaled $45,500,000 representing 4.8% of the entire Nashville banking business.

Applying the standards of section 7 of the Clayton Act,[9] the Supreme Court concluded that this merger would lessen competition for several reasons. First, as a result of the merger the market share of the three largest banks rose from 93% to 98%, and the merged banks alone had 40% of the Nashville banking market. Second, Nashville Bank and Trust was an important competitive element in many facets of Nashville banking since it offered somewhat different services from those of other banks. Moreover, Nashville Bank and Trust could in no way be considered a "failing company" since its absolute size had increased steadily since 1956 and in the year 1963 alone it had after-tax earnings of $368,000.

Since the lower court erroneously concluded that the merger would not tend to lessen competition, any required balancing test obviously would be suspect. "To weigh adequately one of these factors against the other requires a proper conclusion as to each."[10] Thus, the Supreme Court reversed and remanded the case so that the district court could again perform the balancing test.

The Court, however, found a second reason for remanding. It held that the district court "misapprehended" the meaning of the phrase "convenience and needs of the community". Under the Bank Merger Act the intent of Congress was that public interest be the ultimate test imposed for determining the validity of a merger. Congressional intent demonstrated further that a merger should be judged in terms of its overall effect upon the public interest so that if a merger "posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed

9. 15 U.S.C. § 18 (1964). The United States appealed only from the dismissal of the Clayton Act charge. Section 1 of the Sherman Act was not considered by the Court.

10. 88 S. Ct. 882, 890 (1968).

and decisions was to rest on which alternative better served the public interest."[11]

United States v. Philadelphia National Bank,[12] decided under the 1960 Act, rejected the contention that the combined bank would be better able to serve Philadelphia by making larger loans which previously had to be obtained from New York banks. One purpose of the amended Act was to give such factors, not previously relevant, suitable weight. The Supreme Court found in the present case, however, that because the district court was not specific in describing the "beneficial consequences" of the combined bank's assets to the Nashville community, "the increased lending capacity of the new bank" was of little value to it on appeal.[13]

The securing of better banking service for the community and the solving of managerial problems are both proper elements for consideration in weighing convenience and need against lessening of competition. Indeed, the Act requires consideration of managerial as well as financial resources in weighing a proposed merger. The Court stated, moreover, that "it was incumbent upon those seeking to merge . . . to demonstrate that they made reasonable efforts to solve the management dilemma . . . short of merger with a major competitor . . . ."[14] The lower court failed to require this since it did not ascertain what efforts were taken toward recruitment of new management. The conclusion, then, is that a merger should not be approved under the Act unless the benefits conferred upon the community by the merger could not reasonably be achieved in other ways.

In a concurring opinion Justice Harlan disagreed with the "numbers game" test for determining Clayton Act violations, but considered himself bound by precedent. His principal disagreement with the majority opinion was his belief that the lower court record revealed adequate findings that the benefits to the community could not have been reasonably achieved by

11. *Id.* at 891. *Cf.* 112 CONG. REC. 2449 (1966) (remarks of Congressman Multer) in which it is stated that:

> [I]t was the intention of Congress originally in 1960 when we enacted the Bank Merger Act that the public interest should be paramount in making any determination with reference to a merger. The words 'in the public interest' are again written into this bill now and will remain in the law so that there will be no question but that the courts and the agencies must take the public interest into account.

12. 374 U.S. 321 (1963).

13. 88 S. Ct. 882, 892 (1968).

14. *Id* at 893.

any other means. While he agreed with the majority that a Clayton Act violation had been made out, under his rationale the only question for the district court to decide would be whether the antitrust violation should yield to other factors bearing on public "convenience and needs."

Under the Bank Merger Act of 1966, even if the courts find that a proposed merger would lessen competition, they may nevertheless uphold the merger if the "needs and convenience" outweigh the anticompetitive disadvantages. In determining the benefit to the public, such factors as overall public interest, better banking service, and alternatives short of merger must be considered.

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