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## Recent Case Notes

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## RECENT CASE NOTES

## ADOPTION: ABANDONMENT AND WITHDRAWAL OF CONSENT

*P* sought to adopt her son's illegitimate child against the protests of *D* and wife, adoptive father and natural mother. *D* and wife first sent the child to its natural father for adoption, and then sought to withdraw their consent when *P* instituted the adoption proceedings. *P* lived in Georgia and brought the action in the county where she resided. *D* and wife, citizens and residents of England, filed caveat and by personal appearance protested the adoption. The natural father resided in Florida and was not a party to the case.

Except where the natural parents have abandoned their child, their consent is an essential requirement for a valid adoption; also indispensable is the jurisdictional requirement that the child sought to be adopted must be domiciled in the state. GA. CODE ANN. SUPP. No. 74-403. *Held*: The adoptive father, *D*, forfeited his right to legal custody of the child through cruel treatment, and his sending the child to her natural father for adoption constituted abandonment. *Altree v. Head*, 90 Ga. App. 601, 83 S.E. 2d 683 (1954).

It is generally held that adoption creates the same relation between adoptive parent and child as the relation between a natural parent and child. *McDonald v. Tex. Employer's Ins. Ass'n.*, 267 S.W. 1074 (Tex. Civ. App. 1924) *error ref.* *D*, then, was entitled to the same rights of custody as a natural parent. However, *D* in the principal case released such right to the child's natural father and under Georgia statute the child's domicile became that of the person to whom the parental authority was relinquished. GA. CODE ANN. SUPP. No. 79-404. Since the natural father's residence was in Florida, it would seem that the child was not domiciled in Georgia so as to give jurisdiction over her to a Georgia court. (The child had been living with *P* for a short time with the natural father's consent.) The residence necessary to confer jurisdiction under adoption statutes is legal residence

or domicile as distinguished from a temporary or casual habitation. *Re Webb*, 65 Ariz. 176, 177 P. 2d 222 (1947).

The opinion admits that ordinarily consenting to adoption and placing the child in the temporary custody of the prospective parents for this purpose are not acts constituting abandonment. This is in accord with the view of the great majority of jurisdictions, that abandonment requires a present intent to sever entirely the parental relation. *Nelson v. State*, 77 Ga. App. 225, 48 S.E. 2d 570 (1948). The opinion apparently holds that the cruel treatment by *D* is sufficient to distinguish this case from the ordinary one. Here it should be noted that the only testimony as to cruelty was that of the child. The doubtful probative value of such testimony is shown by the trial judge's refusing to hear further testimony by the child and by his preventing any cross-examination. It seems at best doubtful whether such testimony would be sufficient to prove abandonment by a natural parent.

Another question presented by the decision is the right of parents to withdraw their consent to an adoption of their child. The earlier cases held that consent can be withdrawn at any time before the adoption is finally approved, and that such right is absolute and not dependent upon any particular reason. *Platzer v. Beardsley*, 149 Minn. 435, 183 N.W. 956 (1921). The more recent trend seems to be that consent given freely and knowingly is not arbitrarily revocable if acted upon. *Re Adoption of a Minor*, 144 F. 2d 644 (D. C. 1944).

In no case have the courts gone so far, however, as to deny withdrawal of consent solely because the adopting parents have superior advantages. *Lee v. Thomas*, 297 Ky. 858, 181 S.W. 2d 457 (1944). In the writer's opinion that is in essence what the court has done in the present case. While the child's best interest is the paramount test in custody proceedings where the separation of parent and child is temporary, this is not true in adoption proceedings where the separation is permanent. The child's best interest in the latter situation is often subordinated to the rights of the parents. *Platt v. Moore*, 183 S.W. 2d 682, (Tex. Civ. App. 1944) *error ref.* This case seems to be another unfortunate illus-

tration of the old maxim that "hard cases make bad law," and it will be regrettable if the decision is used to create chaos out of the established rules as to parental rights.

*Dawson French.*

#### CRIMINAL LAW — HOMICIDE — INVOLUNTARY MANSLAUGHTER

The accused, in a state of intoxication, was permitted to enter the house of the deceased to seek aid in repairing a damaged automobile. He and his companions set up a rumpus among themselves and engaged in loud and boisterous conduct. Upon request to do so, the accused left the house; he returned shortly and loudly struck upon the door requesting admission. He did not, however, reenter the house. The deceased, suffering from an extreme hypertension, lapsed into unconsciousness and died several days later from a cerebral hemorrhage. *Held*: conviction and sentence of one year in prison for involuntarily manslaughter reversed. *Graves v. Commonwealth*, .....Ky....., 273 S.W. 2d 380 (1954).

The court reached the only logical and fair disposition of the case by reversing the conviction. As the court pointed out, there could at best be mere speculation in determining if the acts of the accused were the proximate cause of the death. The question in this case is not whether the death of the deceased is the natural result of the accused's act, but whether his act is the proximate cause of the death. In *Ex parte Heigho*, 18 Idaho 566, 110 Pac. 1029 (1910), the deceased died of an aneurysm (a rupture of the aorta descending into the vena cava) after witnessing an altercation between her son and the defendant. The court reversed the conviction in that case considering it unreasonable to hold the defendant guilty of the death of a person toward whom he had made no overt act or attack and where there was no finding that the act of the accused was the direct and actual cause of the death. It was pointed out that the result would have been different had the deceased died of terror or fright resulting from an assault on her.

There is authority in Kentucky cases to the effect that one can not escape criminal liability merely because factors other than his own act, such as predisposed physical condition, contributed to the death. *Hopkins v. Commonwealth*, 117 Ky. 941, 80 S.W.

156 (1904). However, it is generally held in Kentucky that in order to uphold a conviction of homicide, the act of the defendant must be the proximate cause of death; if there is an intervening cause, for which the accused is not responsible and without which the death would not have occurred, he is blameless. *Hubbard v. Commonwealth*, 304 Ky. 818, 202 S.W. 2d 634 (1947). It must be remembered that the accused in the principal case was not responsible for the condition of the deceased, and, as was held in *Commonwealth v. Couch*, 32 Ky. 638, 100 S.W. 830 (1908), the sickness and death of the deceased can not by any reasonable stretch of the imagination be considered as probably resulting from being disturbed by the acts of the accused. Cf. *Commonwealth v. Owens*, 198 Ky. 655, 249 S.W. 792 (1923), CLARK AND MARSHALL, LAW OF CRIMES, 314 (2d ed. 1912).

A person simply cannot be held criminally responsible without some degree of culpability being shown and without his act being shown to be the proximate cause of death. Proximate cause, as used in these cases, means the act nearest in casual relation to the death of the deceased. Persons in a poor physical condition which reaches a lethal climax during a crisis or disturbance, such as occurred in the principal case, cannot be said to be the victim of the accused's criminality if there is no act or conduct of the accused which is directed toward the deceased. If the rule were otherwise, the witnessing of everyday social incidents and accidents by those in feeble health, who might ultimately die as a result of the same, would make us all guilty of a crime of homicide of some degree.

*Joe H. McCracken, III.*

#### FEDERAL INCOME TAX — CRIMINAL PROSECUTIONS FOR EVASION — THE NET WORTH THEORY

In a prosecution for income tax evasion using the net worth theory, the government established an "opening net worth" or total value of all of D's net assets at the beginning of the taxable year. The increase of this value during the year was computed, and to this figure were added D's nondeductible expenditures. To the extent that this sum exceeded D's reported taxable income,

the government claimed it to be unreported taxable income. D contended that the increase claimed by the government reflected the expenditure of hidden hordes of cash acquired prior to the taxable year. The government negated this contention with evidence of D's hardship during the period of alleged savings. Further evidence showed that D reported only one-fourth as much profit from his hotel as the previous owner reported in the prior year although the business increased. *Held*: The government need not investigate the claim that income is nontaxable if this matter is peculiarly within D's knowledge, but it must introduce evidence supporting the inference that D's net worth increases are attributable to currently taxable income. Conviction Affirmed. *United States v. Hollands*, 75 Sup. Ct. 127 (1954).

If the net worth method is used it is essential that the cost of all assets owned at the beginning and at the end of the taxable year be established within a reasonable degree of certainty. *Sasser v. United States*, 208 F. 2d 535 (5th Cir. 1953). In that case the taxpayer had no records and was unsuccessful in claiming that his opening net worth should have included large sums of hidden cash. There are two apparently conflicting views as to who has the burden of proving these net worth estimates. One view is that the government must exclude every possible source of nontaxable income, *United States v. Fenwick*, 177 F. 2d 488, 491 (7th Cir. 1949), and the evidence must exclude every reasonable hypothesis other than the defendant's guilt. *Bryan v. United States*, 175 F. 2d 223 (5th Cir. 1949). The other view is that the government is not required to prove a negative or refute all possible speculation as to the source of the defendant's funds, *Gariepy v. United States*, 189 F. 2d 459 (6th Cir. 1951), and when the government has made out a prima facie case the burden of proof shifts to the defendant to show that the income was nontaxable. *United States v. Link*, 202 F. 2d 592 (3rd Cir. 1953).

Convictions were reversed in the *Bryan* and *Fenwick* cases; in the former the government's auditor admitted that he did not know if he had included in the defendant's opening net worth all of his assets, and in the latter the government failed to check claims by the defendant that he owned war bonds, stock, and in-

surance not included in his opening net worth. The *Fenwick* case is criticized in *Remmer v. United States*, 205 F. 2d 277 (9th Cir. 1953), and limited to facts in *United States v. Yeoman-Henderson*, 193 F. 2d 867 (7th Cir. 1952). See also *Brodella v. United States*, 184 F. 2d 823, (6th Cir. 1950) for a discussion of the *Bryan* and *Fenwick* cases.

The opinion in the principal case impliedly approves of the holding in the *Bryan* and *Fenwick* cases by requiring the government to investigate all "leads" furnished by the defendant reasonably susceptible of being checked. The government is relieved of this obligation, however, if the matter is peculiarly within the defendant's knowledge. This is an attempt, on the one hand, not to put an impossible burden of proof on the government, and, on the other hand, not to subject the defendant to possible prejudice before the jury by requiring him to prove his claims where to do so might reveal a fraud on his creditors, past illegal transactions, etc.

The opinion expressly places the burden on the government to prove every element of the offense beyond a reasonable doubt. After the government has made out its prima facie case, however, the defendant remains silent at his peril, *Yee Hem v. United States*, 268 U. S. 178 (1925). The principal case injects an element into prosecutions of this type that has not previously been stressed—the government must introduce evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income. In this case there was evidence that the defendant had substantially under-reported the income from his hotel business. It is probable that the government in most cases will be able to point out a source of currently taxable income to which the jury can attribute the net worth increases. It is conceivable, however, that the government could negative non-taxable sources, and yet fail to point out a possible taxable source. In such a case, if the matter is peculiarly within the defendant's knowledge, he should be deemed to have remained silent at his peril.

*Dawson French.*

## MONOPOLIES — LIVE PRESENTATIONS OF LOCAL EXHIBITIONS AS CONSTITUTING TRADE OR COMMERCE WITHIN THE SHERMAN ACT

In two recently decided cases, *U. S. v. International Boxing Club*, 75 Sup. Ct. 259 (1955), and *U. S. v. Shubert*, 75 Sup. Ct. 277 (1955), it appears that the United States Supreme Court has receded from its former position of considering live athletic exhibitions as not subject to 15 U. S. C. A. § 1, 2, 4 (Sherman Anti-Trust Act); 15 U. S. C. A. § 29 (Expediting Act). Both cases were handed down the same day, and both opinions were rendered by Chief Justice Warren.

In the *IBC* case the complaint grew out of the control which the International Boxing Club has over fighters in the major boxing centers of the country. This control exists by virtue of ownership of the available premises at which boxing exhibitions can be given. The government contended that the sale of television, radio, and film rights to these exhibitions was of such magnitude as to constitute trade or commerce within the meaning of the Act. The defendants, relying on the old case of *Federal Baseball Club v. National League*, 259 U. S. 200 (1922), and the more recent case of *Toolson v. New York Yankees*, 346 U. S. 356 (1953), contended that live local exhibitions of an athletic nature were not the subject of commerce. This defense was bottomed on the theory that the sale of such rights was merely incidental to the exhibition and could not color the character of the exhibition so as to convert it into "commerce" within the meaning of the Act. In a 7 to 2 decision the complaint was upheld, and this defense was rejected.

A similar result was reached in the *Shubert* case, which involved the performance of live shows in the legitimate theatre. Again the government contended that by control of the major theatres in the Northeastern section of the country the defendants were violating the Act. Jurisdiction was predicated upon the movement of large amounts of stage equipment across state lines, and the interstate nature of the promotion of these shows. The defendants, here, as in the *IBC* case, relied upon the *Toolson* case as exempting live local exhibitions from the terms of the Act. The court in this case was unanimous in holding that the complaint stated a cause of action, basing its decision on the case of *Hart*

*v Keith Vaudeville*, 262 U. S. 271 (1923). It should be noted that in both the *IBC* case and the *Shubert* case the only question involved was the sufficiency of the complaint.

Examining the decisions relied upon by the court, the first case of modern importance on the subject is that of *Federal Base Ball*, wherein Justice Holmes held that the transportation of players across state lines did not transform the sport into interstate commerce. He stated that "... the transport is a mere incident, not the essential thing." This case was construed shortly thereafter in the *Hart* case, which subjected vaudeville companies to the terms of the Act where their activities were interstate. Justice Holmes again wrote the opinion. He distinguished the *Federal Base Ball* case by stating "... that it may be what, in general, is incidental, in some instances may rise to a magnitude that requires it to be considered independently." Thereby the proposition was laid down that in some cases interstate activities, usually incidental to a live presentation, may rise to a status which will subject the whole exhibition to the Act.

In the most recent case, *Toolson v. N. Y. Yankees*, the plaintiff contended that professional baseball was interstate commerce and relied upon the above statement from the *Hart* case. He also relied upon the lower court's opinion from *Gardello v. Chandler*, 172 F. 2d 402 (1949), which held that the nature of radio and films, and the advent of television have impressed upon professional baseball an element now so intrinsic to the sport that the sale of such rights colors the whole. This case was ignored and professional baseball was again exempted from the terms of the Act.

With this background of decisions, the court in the *IBC* case reasoned that as the court in the *Toolson* case expressly stated that the decision was made without a re-examination of the underlying issues, that case did not re-affirm the application of the *Federal Base Ball* case other than as it applied specifically to professional baseball. Chief Justice Warren was of the opinion that if it were not for the prior decisions in *Federal Base Ball* and *Toolson* he would have no trouble in subjecting the *IBC* to the terms of the Act.

He distinguished the two cases by stating "Surely there is nothing in the *Hart* case to suggest, even remotely, that the Court was

drawing a line between athletic and non-athletic entertainment"; the controlling consideration in the *Federal Base Ball* and *Hart* cases was "... instead a very practical one—the degree of interstate activity involved in the particular business under review." Again in the *Shubert* case he relegates the decision in the *Toolson* case to a narrow application of the rule of *stare decisis*.

It appears that the Court in the *IBC* case is formulating a doctrine which heretofore has been applied only in the lower court's decision in the *Gardello* case. The doctrine now enunciated will characterize live presentations of local exhibitions as constituting interstate commerce, within the meaning of the Sherman Act, if the exhibition is coupled with incidents of an interstate character and such incidents are of a magnitude so as to color the entire exhibition. Such a doctrine is clearly one of degree, and the sole exception apparently will be professional baseball. However, this exception seems hard to justify upon legal principle, in view of the *IBC* case, and it is this writer's view that should professional baseball become as scandal ridden as professional boxing federal control will be imposed forthwith. The *IBC* case is another caveat to the states that unless they keep their houses in order there will be another invasion of their so-called states rights.

R. W. Hemingway

#### MUNICIPAL TAXATION: CLASS SUITS FOR RELIEF FROM DISCRIMINATORY PROPERTY VALUATION

In a class action, a group of taxpayers brought suit against a municipality and its tax officials to enjoin the city from collecting taxes based on illegal methods of property valuation. The injunction was granted by the trial court on the ground that arbitrary, illegal and fundamentally wrong methods used by the tax officials had resulted in a lack of uniformity and equality of taxation to the taxpayer's substantial injury. The court of civil appeals affirmed the trial court's decision, but the Supreme Court reversed and remanded. *Held*: If the contention is that the evaluation for tax purposes is discriminatory, proof of excessiveness of substantial injury is required of every taxpayer who seeks relief; an injunction will not lie in favor of a class of taxpayers who fail to

show individual injury. *City of Arlington v. Cannon*, .....Tex. ...., 271 S.W. 2d 414 (1954).

The court of civil appeals in affirming the trial court stated that if the methods of a tax board result in discriminatory valuations and unequal assessments, proof of the specific amount of injury to each taxpayer "is impractical if not impossible to be shown in a class suit." Thus an injunction will be granted as the proper remedy. The Supreme Court agreed with the lower court that the procedures used by the tax board were unlawful, and that the courts will grant relief in cases where the application of a fundamentally wrong standard or method results in substantial injury to the complainant. See: *Druesdow v. Baker*, 229 S.W. 493 (Tex. Civ. App. 1921); *Rowland v. Tyler*, 5 S.W. 2d 756 (Tex. Civ. App. 1928); *Lubbock Hotel Co. v. Lubbock Ind. School Dist.*, 85 S.W. 2d 776 (Tex. Civ. App. 1935). However, the Supreme Court reversed the court of civil appeals, holding that *each* taxpayer contesting the board's action must show that he has been injured by the illegal method before an injunction will lie. Query: What must the complainant show in order to prove substantial injury in this situation?

In deciding this question, the court relied almost exclusively on the recent decision in *State v. Whittenburg*, .....Tex....., 265 S.W. 2d 569 (1954), wherein the court ruled that the necessary showing of substantial injury can only be made by proof that a substantially higher amount was assessed against the complainant's property than was assessed against property interests of equal or greater market value owned by others.

Such cases as *Montgomery County v. Humble Oil & Rfg Co.*, 245 S.W. 2d 326 (Tex. Civ. App. 1951) *error ref, n.r.e.*, and *State v. Whittenburg* illustrate the principle that Texas courts are strict in refusing to enjoin tax collections based on illegal methods of property valuation unless the taxpayer is able to produce proof of substantial injury. The principal case extends this policy to requiring *each* taxpayer in a class action to show *individual* injury.

The court admits that it is practically impossible for the taxpayers as a class to produce the proof necessary to entitle them to relief under the rule of the *Whittenburg* case. The taxpayers

did produce evidence of specific acts of discrimination and disparities, but did not prove that each individual taxpayer had his property assessed substantially higher than property of equal or greater market value owned by others in the city.

The result of this case seems harsh. Under this ruling each taxpayer will be forced to bring his own suit in order to show that his property valuation is excessive within the test of the *Whittenburg* case. The cost of individual suits is so prohibitive that it is unlikely that many taxpayers will sue individually to save the few dollars of taxes. The court, by denying equitable relief in the only practical action that can be brought to contest a tax board's decision, is in effect denying all relief.

*Robert K. Pace.*

STATUTES: USE OF A LATER STATUTE AS AN EXTRINSIC AID IN  
INTERPRETING AN EARLIER STATUTE

In *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954), \$665 was paid to a New Jersey state trooper in lieu of meals served at trooper stations. The Bureau of Internal Revenue contended that under the 1939 Code this amount represented compensation for services rendered and was includible in gross income; the trooper maintained that the amount was not includible by virtue of the "convenience of the employer" rule. In holding the amount not to be includible, the court rejected the Bureau's contention that committee reports during formulation of the 1954 Code should be taken into consideration in construing the meaning of the 1939 Code. These committee reports revealed that the House Ways and Means Committee believed this type of expense to be compensation for services and includible in gross income; the committee then proceeded to recommend such payments be exempted (which was done in Section 120, 1954 Code). The Circuit Court stated at page 775, "The general rule is that later statutes may not be used as an aid in the interpretation of earlier acts. It is the legislative intent at the time of enactment and not its afterthoughts which should be controlling." The court cited 1 MERTENS, LAW OF FEDERAL INCOME TAXATION § 3.28 (1942) as authority for this rule. Mertens, in turn, replied principally on

*Penn Mutual Life Insurance Co. v. Lederer*, 252 U.S. 523 (1920), in which it was held that no aid can possibly be derived from legislative history of an act passed subsequent to the act being construed by that court. *Accord: American Exchange Securities v. Helvering*, 74 F.2d 213 (2d Cir. 1934).

Diametrically opposed to this concept is a considerable body of authority. See *Great Northern Railway Co. v. United States*, 208 U.S. 452 (1908), which held that "[i]t is settled that subsequent legislation may be considered in the interpretation of prior legislation of the same subject." *Accord, Hubbell v. Commissioner*, 150 F.2d 516 (6th Cir. 1945).

In *Estate of Shedd v. Commissioner*, 23 TC \_\_\_\_ No. 8 (Oct. 15, 1954), it was held that the commissioner properly determined a deficiency based on the 1939 Code, in that the interest of decedent's widow in a trust created by decedent's will did not qualify for the marital deduction under Section 812 (e) of the 1939 Code. In rejecting the executor's contention that Section 2056 of the 1954 Code should be resorted to as an extrinsic aid in interpreting its counterpart in the 1939 Code, the court was careful to point out that if the section of the 1939 Code had been ambiguous, the 1954 Code and committee reports thereon could have been used in interpreting the 1939 Code. The court simply felt that there was no ambiguity in the case.

The general rule obtained from recent cases thus seems to be that a court will follow the "plain meaning rule" in interpreting the old code if there is no ambiguity present. The prevailing philosophy of the highest court in the land, as well as of most inferior courts, is that unless a statute is susceptible of but one plain meaning, all manner of extrinsic aids may be utilized, even an occasional speech on the floor of Congress. (*Cf. F.H.E. Oil Co. v. Commissioner*, 150 F.2d 854 (5th Cir. 1945), holding a joint resolution of Congress may properly be used as an aid in interpreting an earlier statute on the subject). Similarly, all of the statute law pertaining to a particular subject should be regarded as a unified system. Therefore, it is submitted that when a particular section of the 1939 Code is susceptible of more than one plain meaning, consideration should be given to the corresponding

section in the 1954 Code as well as to the attendant committee reports in arriving at the true meaning of the 1939 Code.

When it is remembered that there is no statute of limitations on civil fraud in tax matters and a full six-year limitation on criminal fraud, it becomes apparent that the 1939 Code will remain a fruitful source of litigation for many years hence. Usually large individual and corporate taxpayers consent to the waiver of the three-year statute of limitations so the Commissioner may have ample time to audit the return. In many cases the ultimate liability is not determined for eight or ten years, and refund or deficiency is predicated on the existing code at the time of filing the return. It therefore is inescapable that construction of the 1939 Code will remain a problem for many years.

*Lee V. Williams, Jr.*

