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Joseph A. Murphy

the filing of a preliminary petition by a citizen spouse to gain nonquota status for her alien husband gave the alien a "status, condition, right in process of acquisition, act, thing, or matter then done or existing . . ." to which the repealed law—under which relator's spouse filed—was continued in force by the savings clause in the new Act. Zacharias was to be deported for lack of good moral character and under the new law, adultery, which was admitted, was conclusive of the charge against him whereas it was not under the old law; relator was thus saved by the change in his status brought about by the filing of the petition alone. By analogy, the filing of the petition by Mrs. Stellas gave relator in the instant case a similar "right in process of acquisition" and this changed his status from a mere parolee to something greater. Therefore, Stellas is no longer subject to treatment as a parolee, *i.e.*, his petition for habeas corpus cannot be dismissed by the mere statement that what Congress has authorized has been done. Rather, the sufficiency of the grounds for his deportation should be tested against the fundamental law of due process.[24]

The majority rejected both approaches. While the court states that relator's case "evokes sympathy"[25] it did not choose to enforce its feelings with logic. The Second Circuit Court of Appeals remains tied to the form of a procedure which "tells a story reminiscent of the 'due process' of the Middle Ages, the Star Chamber—even of the shanghaiing of seamen."[26]

Charles R. Passafiume

ANTITRUST—Money and Finance—Bank Merger Act of 1966—Clayton Act—The Supreme Court has ruled that the Justice Department is not required to base its complaint in bank merger suits on the Bank Merger Act of 1966 and that the burden is on the merging banks to show that the Act's standards clearly outweigh the merger's anticompetitive effects.

United States v. First City Natl. Bank of Houston, 87 Sup. Ct. 1088 (1967).

The First City National Bank of Houston and the Southern National Bank of Houston applied to the Comptroller of the Currency for approval of their proposed merger. The Provident National Bank of Philadelphia and the Central-Penn National Bank made a similar request. In accordance with the Bank Merger Act of 1960,[1] as amended by the

24. 366 F.2d at 271-3.
25. *Id.* at 272.
26. *Id.* at 271.

1. 74 STAT. 129 (1960).

Bank Merger Act of 1966,[2] the Department of Justice and the Federal Reserve Board submitted their views of the mergers to the Comptroller.[3] Both took the position that the mergers' anticompetitive effects outweighed the convenience and needs of the community to be served. The Comptroller's decision, however, was contrary and the mergers were approved. Thereupon, the Department of Justice instituted civil suits to enjoin the mergers under Section 7 of the Clayton Act.[4]

The Texas district court dismissed the government's complaint for failing to state a cause of action, ruling further that the burden was on the government to ". . . prove an anticompetitive result of the merger, and . . . that it is not outweighed by the convenience and needs aspect of the matter."[5] The Philadelphia district court, in a preliminary opinion,[6] ruled that the government's complaint was not required to specifically plead the Bank Merger Act of 1966 but in its final decree, dismissed the complaint for not proceeding under the 1966 Act.[7] On appeal, the United States Supreme Court reversed both decisions; *held*, the Department of Justice is authorized to challenge bank mergers under the Clayton Act without the additional burden of proving that the anticompetitive effects caused will not be outweighed by the public interest factors of the Bank Merger Act of 1966.[8]

Speaking for a unanimous court, Mr. Justice Douglas ruled that the complaints were not defective for ignoring the 1966 Act and proceeding under Clayton 7, that the mergers' proponents have the burden of proving that the community's convenience and needs clearly outweigh the merger's anticompetitive effects, that the courts are to make an independent determination of the issues notwithstanding the Comptroller's opinion, and finally that when a bank merger is challenged, a stay should be granted almost automatically until the litigation is completed. The court made absolutely clear, however, that it was only treating the procedural issues of the case and was reserving for the future an opinion on the merits of the mergers and the justifications advanced for them.[9]

The first issue met by the court was whether the Bank Merger Act of 1966 or the Clayton Act should govern antitrust suits in the bank merger area. The phrasing of the 1966 Act with its many references to the "antitrust laws" clearly meant to Justice Douglas that the only change in the

2. 80 STAT. 7 (1966), 12 U.S.C. § 1828(c) (Supp. 1966).

3. The FDIC did not submit their views in the Philadelphia case.

4. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 18 (1966).

5. United States v. First City Natl. Bank of Houston, 5 TRADE REG. REP. (1966 Trade Cas.) ¶ 71970 (S.D. Tex. Dec. 2, 1966).

6. United States v. Provident Natl. Bank, 259 F. Supp. 373 (E.D. Pa. 1966).

7. United States v. Provident Natl. Bank, 262 F. Supp. 397 (E.D. Pa. 1966).

8. United States v. First City Natl. Bank of Houston, 87 Sup. Ct. 1088 (1967).

9. *Id.* at 1094, n.1.

antitrust laws intended by Congress was that a new defense or justification be available to the proponents of a bank merger. This interpretation is clearly contrary to what the banking interests desired in their original effort in the Senate to obtain legislative relief after several adverse court decisions.[10] This desire is evidenced by the first bill introduced in Congress which would have not only removed bank mergers from the scope of the antitrust laws but would have also canceled all of the pending bank merger litigation as well.[11] Public Law 89-656, however, which was the bill that finally passed Congress, representated a material change from the original Senate bill.[12] The House Report on the Act pointedly indicates that the antitrust standards were still the norm and the anticompetitive bank merger, the exception.[13] The Department of Justice brought their civil suits in the Houston and Philadelphia cases under this theory but failed to convince either court. The Philadelphia district court, in fact, ruled that "the only suit open to Justice to enjoin a bank merger lies solely within the ambit . . ." of the Bank Merger Act of 1966.[14] The relative ease with which the Supreme Court disposed of this theory indicates their basic reaffirmance of *United States v. Phila. Natl. Bank*,[15] wherein the court disapproved of any argument that bank mergers were immunized from the antitrust laws simply because an Act of Congress directed banking agencies to consider competitive factors before approving them.[16]

With this decided, the court turned its attention to the issue of the burden of proof. To Mr. Justice Douglas it was . . . "plain that the banks carry the burden"[17] since the convenience and needs standard is the exception to the prohibition of an anticompetitive merger and since it is a general rule that the one who claims an exception bears the burden of proof. Support for this conclusion was found in the House Report on

10. In 1963 and 1964, the U.S. Supreme Court voided bank mergers in Philadelphia and Kentucky and in 1965, a federal district court voided a large New York City merger. In regard to the latter decision, Congressman Patman stated: "When they stepped on the toes of the nation's fourth largest bank, the roar from Wall Street was heard in every Congressional District." 111 CONG. REC. Appendix A 5914 (daily ed. Oct. 21, 1965). See United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

11. S. 1698, 89th Cong., 1st Sess. (1965).

12. A brief summary of the proceedings of Senate Bill 1698 in the House is that the Chairman of the House Banking and Currency Committee attempted to allow the bill to die in committee but experienced strong opposition within the committee; after much maneuvering, the Chairman reluctantly agreed to sponsor the final bill. See Large, *The Bank Merger Bill's Zany Journey*, Wall Street Journal, Feb. 8, 1966, p. 16 and Marcus, *The Undermining of an Antitrust Bank Merger Policy*, 16 DEPAUL L. REV. 59 (1966).

13. H.R. REP. NO. 1221, 89th Cong., 2nd Sess., 3-4 (1966).

14. United States v. Provident Natl. Bank, 259 F. Supp. 373, 377 (E.D. Pa. 1966).

15. United States v. Phila. Natl. Bank, 374 U.S. 321 (1963).

16. *Id.* at 348.

17. United States v. First City Natl. Bank of Houston, 87 Sup. Ct. 1088 (1967).

the Bank Merger Bill[18] and most importantly in the remarks of Congressman Wright Patman, sponsor of the bill that was finally enacted, who placed the burden of proof on the banks and who interpreted "clearly outweighed" to mean ". . . outweighed by the preponderance of the evidence."[19] Much can be read into the court's reliance on Congressman Patman, for his statements were made, as one commentator has stated, in "an effort to provide a legislative history which would minimize the changes the bill wrought."[20] There is indeed a vast amount of testimony and statements in direct opposition to Congressman Patman's position.[21] However, by ignoring this legislative history and emphasizing that of a strong antitrust legislator, the court seems to be reinforcing its own position as a vigorous antitrust court and also seems to be indirectly chastising those banking interests who strenuously lobbied for special congressional relief after several adverse court decisions.

Another section of Mr. Justice Douglas' opinion is also of special significance, i.e., its holding that the Comptroller's decision is not in the same category as other administrative rulings which are sustained on the substantial evidence principle. In arriving at this conclusion, the court stated that there was no indication in the Bank Merger Act of 1966 that Congress intended to change the past procedure of placing little presumptive weight on administrative approvals of bank mergers, especially since the 1966 Act's mandate of identical standards is not an expression of the conventional substantial evidence rule.[22] With this decided, the court proceeded to interpret a critical phrase of the Bank Merger Act: ". . . review *de novo* [of] the issues presented."[23] It was this very phrase which during oral argument was subjected to three different interpretations by the Department of Justice, the Comptroller and the banking attorneys.[24] Mr. Justice Douglas, however, experienced little difficulty

18. H.R. REP. No. 1221, 89th Cong., 2nd Sess., 3-4 (1966).

19. 112 CONG. REC. 2333-2334 (daily ed., Feb. 8, 1966).

20. Marcus, *The Undermining of an Antitrust Bank Merger Policy*, 16 DEPAUL L. REV. 59, 76 (1966). It seems that the device of deliberately making legislative history seldom succeeds, and, therefore it would not be an understatement to say that few expected such success in the instant cases.

21. *E.g.*, the remarks of Senator Robertson, 112 CONG. REC. 2538, 2541 (daily ed., Feb. 9, 1966).

22. The Act reads in pertinent part: ". . . the standards applied by the court shall be identical with those that the banking agencies are directed to apply . . ." 80 STAT. 7 (1966), 12 U.S.C. § 1828(c)(7)(B) (Supp. 1966).

23. 80 STAT. 7 (1966), 12 U.S.C. § 1828(c)(7)(A) (Supp. 1966).

24. The Justice Department argued that there should be a complete new trial of all the issues in the court action. The Comptroller argued that the substantial evidence rule should be followed with both parties being allowed to introduce new facts in the district court. The banking attorneys argued that the Comptroller's judgment as to the weight given the public interest factors should be accepted but the district court should be able to relitigate all issues of fact de novo. 35 U.S.L.W. 3297 (U.S. Feb. 28, 1967).

with the phrase and, in fact, again quoted Congressman Patman to support his conclusion that it meant that the courts were required to make an independent determination of all of the issues, especially since the Comptroller neither holds hearings nor creates a record in its customary sense.[25]

The Constitutional validity of this interpretation was then placed in question since the Philadelphia district court clearly rejected this view as violative of Article III of the Constitution.[26] Mr. Justice Douglas' solution was to cite three factors: (1) the long administration by the courts of the "rule of reason,"[27] (2) the familiar judicial task of determining "effect on competition" within the meaning of Clayton 7 and (3) the relationship, though perhaps remote, of the convenience and needs of the community standard to the well known failing-company doctrine.[28] By taking this approach, the court is no doubt accepting the responsibility of making value judgments which may go beyond the ordinary limits of judicial competence; it can only be hoped that it will not grow weary of the economic extravaganzas which will ultimately appear before it.[29] Of course, it must be realized that the court's interpretation of the convenience and needs standard (that it must *clearly* outweigh the anticompetitive effects) will ease the burden somewhat. However, sharply divided courts are certain to exist.

Less likely to be as sharply divided as a result of the instant decision are the Department of Justice and the Comptroller of the Currency.[30] Their past differences on the anticompetitive effects of bank mergers is well documented.[31] Congress avoided a decision as to which view should prevail by providing in the 1966 Act that the Comptroller could intervene in any court-challenged bank merger case. While this may have resulted in the anomaly of two arms of the government on opposite

25. See remarks of Congressman Patman, 112 CONG. REC. 2335 (daily ed., Feb. 8, 1966).

26. Quoting from 4 DAVIS, ADMINISTRATIVE LAW § 29.10 (1958), the Philadelphia district court stated: "If the function performed by an agency is 'administrative' or 'legislative' and if a federal court is required to do all over again what the agency has done, the system of review violates the Article III of the Constitution."

27. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

28. See Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act*, 35 FORDHAM L. REV. 425 (1967).

29. *E.g.*, see the district court's opinion in United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964) (Wyzanski, J.).

30. BUS. WEEK, April 1, 1967, p. 23. Note also that Senator Robertson, Chairman of the Senate Banking and Currency Committee was defeated in the 1966 Virginia Democratic Primary.

31. Since 1960, over 700 bank mergers were approved, of which 470 were considered to have anticompetitive effects by the Department of Justice. *Hearings on S. 1698 Before the Sub-Committee on Domestic Finance of the House Committee on Banking and Currency*, 89th Cong., 1st Sess. 175 (1966).

sides of the same case, at least it presented both departments the opportunity to test the antitrust validity of their respective positions. And even though the Supreme Court only dealt with the procedural aspects of the Houston and Philadelphia mergers, it appears that the court has given its approval to Justice's stricter interpretation of a merger's anticompetitive effects. There is no doubt that the Comptroller and the Department of Justice may continue to disagree on this issue but it is submitted that these occasions will most probably be minimal and short-lived, especially in view of the lack of presumptive weight assigned to the Comptroller's decision by the present court.

The final question discussed by the Supreme Court was whether the lower courts properly dissolved the statutory stays when they dismissed the complaints. Indicating that the *status quo* must be maintained until the antitrust litigation has run its course, the court ordered the bank mergers at hand stayed, citing the extreme difficulty in "unscrambling" two or more banks after their merger.[32] In the absence of a frivolous complaint by the Justice Department, Mr. Justice Douglas indicated that ordinarily a stay will be essential until the judicial remedies have been exhausted. By thus interpreting the 1966 Act, it is suggested that the court is creating a time period which indeed could be so lengthy that it alone could dissuade many banks from merging.[33] This may not necessarily be an evil, however, if anticompetitive effects would be the alternative.

While it is important to reiterate that the court reached no substantive issue in the cases before it, some examination of their merits seems imperative. The critical issue is whether the banks will be able to sustain their burden of proving that the convenience and needs of the community *clearly* outweighs the anticompetitive effects of the merger. On remand, the attorneys for the Philadelphia banks face a difficult task of determining what factors the Comptroller, himself, took into account in arriving at his decision;[34] indeed, they are also faced with the strong

32. United States v. First City Natl. Bank of Houston, 87 Sup. Ct. 1088 (1967). Among the congressional figures cited by the court in support was that of Senator Robertson. A good example of the difficulty of unscrambling a bank merger was that of the Lexington Bank case, United States v. First Natl. Bank & Trust Co. of Lexington, 376 U.S. 665 (1964). See First Security Natl. Bank & Trust Co. v. United States, 382 U.S. 34 (1965).

33. The Philadelphia district court in the present case stated: "A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense." United States v. Provident Natl. Bank, 262 F. Supp. 397, 400 (E.D. Pa. 1966).

34. During oral argument, it was brought out that the Comptroller of the Currency merely declared: "Pursuant to the 1966 amendment to the Bank Merger Act, we find that the merger of Provident National Bank and Central-Penn National Bank clearly conforms to the statutory criteria and is in the public interest." 35 U.S.L.W. 3301 (Feb. 28, 1967).

factor of a history of consolidations, acquisitions and mergers in the four-county Philadelphia area, to which both banks have contributed in the past.[35] Counsel for the Houston banks has already indicated that their merger may be abandoned as a result of the court's decision.[36] Counsel for the other cases affected are probably not in much better positions, for theirs will also be the difficult task of defining and clearly proving the superiority of the convenience and needs of the community. No such identification of these factors will be suggested here, especially since factors similar to the convenience and needs of the community standard were presented to the court in *Phila. Natl. Bank*[37] and were easily disposed of. It is also suggested that little hope exists in believing that the elimination of the Clayton Act's phrase, "in any line of commerce," from the 1966 Bank Merger Act will force the Supreme Court to abandon its *Philadelphia* philosophy.[38] First, confusion exists as to the true congressional motive in omitting this phrase.[39] Secondly, the position of the Department of Justice is that the omission is inadvertent and of no particular consequence.[40] Thirdly, it must be remembered that the Bank Merger Act of 1966 is now the only exception to the antitrust norm, i.e., the Clayton Act, wherein the line of commerce phrase is clearly stated.[41]

Assuming, finally, that these difficulties can be overcome, another obstacle exists, i.e., the *Phila. Natl. Bank* decision.[42] The court there held that a merged bank may not control more than thirty per cent of the commercial bank business in its relevant geographic market.[43] A perti-

35. See 5 TRADE REG. REP. (1966 Trade Cas.) ¶ 45066 (case 1893).

36. BUS. WEEK, April 1, 1967, p. 23.

37. 374 U.S. 321 (1963). Those affirmative justifications were: (1) that only through mergers can banks follow their customers to the suburbs and retain their business; (2) that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state banks for very large loans; (3) that the Philadelphia area needed a larger bank to bring business to the area and stimulate its economic development.

38. Mr. Justice Fortas was particularly interested in this omission during oral argument. 35 U.S.L.W. 3300 (Feb. 28, 1967).

39. See dissenting report of Congressman Todd, H.R. REP. No. 1221, 89th Cong., 2nd Sess. (1966).

40. 35 U.S.L.W. 3300 (Feb. 28, 1967).

41. 38 STAT. 730 (1914), as amended, 64 STAT. 1125 (1950).

42. 374 U.S. 321 (1963).

43. The court there stated:

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . .
>
> Without attempting to specify the smallest market share which would still be

nent question after the instant decision is whether evidence of the convenience and needs of the community is of any relevance when a merger violates this figure, the theory being that such a merger could never be in the public interest. It would seem that such evidence would indeed be meaningless if the 1966 Act is viewed, as Mr. Justice Douglas did, as merely creating an affirmative defense. It is also noteworthy in this regard that those authorities cited by the court in support of the stated percentage advocate an even lower market figure.[44] Mr. Justice Brennan avoided the problem in the *Phila. Natl. Bank* decision but did not expressly reject the figures. Conceivably, then, the day may arrive when such low figures as twenty per cent are adopted by the court, thereby reducing the number of occasions on which banks may show that the convenience and needs of the community outweigh the anticompetitive effects of the merger. The Bank Merger Act of 1966, therefore, does not seem to be the panacea which the banking interests desired.

In summary, the Supreme Court has indicated by its present decision that very little antitrust law has substantially changed as a result of the Bank Merger Act of 1966; and even though faced with a contrary congressional intent, the court has undoubtedly preserved the *status quo* of the Department of Justice's prima facie case against bank mergers. The extent to which it will be employed by that Department to effect the broad antitrust policies of the Sherman and Clayton Acts most certainly depends on a realization by the banking community that in the merger area there are "other values" which must be considered. Two of the more important ones are: (1) that corporate growth by internal expansion is socially preferable to growth by acquisition,[45] and (2) that where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.[46] It is submitted that legislation to change the importance of these values when applied to bank mergers must be much better drafted and more far-reaching than the Bank Merger Act of 1966.

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considered to threaten undue concentration, we are clear that 30% presents that threat. *Id.* at 363-364.

44. *Id.* at 364, n.41.

45. *Id.* at 370.

46. *Id.* at 365, n42.