

EBAS NGIRALOIS, THE REMED LINEAGE and  
UNKNOWN OWNERS, Defendants-Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS,  
Plaintiff-Appellee

Civil Appeal No. 30

Appellate Division of the High Court

June 24, 1968

*See, also, 3 T.T.R. 303*

Motion to dismiss appeal on ground the notice of appeal was filed out of time. The Appellate Division of the High Court, Robert Clifton, Temporary Judge, held that although filing of notice of appeal within time allowed by Trust Territory Code is essential to jurisdiction of court an exception is recognized where the failure to file is caused by the default of some officer of the court.

Motion to dismiss denied.

1. Appeal and Error-Notice and Filing of Appeal

Filing of notice of appeal within time limited by Trust Territory Code provisions is essential to the jurisdiction of the court upon appeal in the absence of some most unusual circumstance.

2. Appeal and Error-Notice and Filing of Appeal—Excuse for Late Filing

Exception to timely filing of notice of appeal is recognized where the failure to file is the result of default of some officer of the court.

---

*Counsel for Appellants:* FINTON J. PHELAN, JR.

*Counsel for Appellee:* JOHN D. MCCOMISH, *District Attorney*

Before TURNER, *Associate Justice*, CLIFTON, SHRI-  
VER, *Temporary Judges*

CLIFTON, *Temporary Judge*

The Appellee, the Trust Territory of the Pacific Islands, has moved for a dismissal of the appeal in this case on the ground that the notice of appeal was filed more than thirty (30) days after entry of judgment. Counsel for the Appellee has pointed out that the judgment was entered

on October 18, 1967 [3 T.T.R. 303], and that the records of the Clerk of Courts of the Palau District where the case was heard in the Trial Division of the High Court show that the notice of appeal was filed with him on November 24, 1967, more than thirty (30) days from the date of entry of judgment. Counsel for Appellee contends that this Court lacks jurisdiction to hear the appeal because of the provisions of Section 198 of the Trust Territory Code, which in part reads : -

"Any appeal authorized by law may be taken by filing a notice of appeal with the presiding judge of the court from which the appeal is taken or with the Clerk of Court for the district in which the court was held, within thirty days after the imposition of sentence or entry of the judgment, order or decree appealed from, or within such longer time as may be prescribed by rules of procedures adopted by the Chief Justice of the Trust Territory under Section 178."

Counsel for the Appellant has presented an affidavit of his secretary attesting that she mailed the notice of appeal of Appellant Ebas Ngiralois at the Post Office at Agana, Guam, on November 9, 1967, the notice being in an envelope addressed "Clerk of Courts of the High Court of the Trust Territory of the Pacific Islands," and the postage being prepaid.

Inquiry by the Court has shown that the notice was received by the Administrative Officer of the High Court, who is also the Clerk of the Appellate Division of the High Court within a few days of the time it was mailed. He did not deliver it to the Chief Justice, the "presiding judge of the court from which the appeal was taken", nor did he return it to the counsel for Appellant, but mailed it to the Clerk of Courts for the Palau District. He cannot say as to how long he held it before mailing it, and it may be that this possible delay or the delay occasioned by the lapse in plane travel at this time occasioned by the recent typhoon caused or added to the delay so that the notice

did not reach the Clerk of Courts at Palau until November 24, 1967, some 15 days after it was mailed in Guam;

The Rules of Court provides in Section 32b, Rules of Criminal Procedure (applicable to civil matters under Rule 23, Rules of Civil Procedure) : -

"b. Forwarding of notice of appeal. Immediately upon the filing of the notice of appeal to the Appellate Division, one of the original copies thereof (with a notation endorsed thereon of the date of the filing) shall be forwarded by the Clerk of Courts with whom it is filed to the Clerk of Courts for the Truk District, who has been designated to keep the records and dockets of the Appellate Division."

By order of the Chief Justice on August 1, 1967, the rules were amended to provide that the Administrative Officer of the Judiciary was substituted for the Clerk of Courts at Truk as the Clerk of the Appellate Division of the High Court. Therefore, one of the original copies of Appellant's notice of appeal did reach the Clerk of the Appellate Division, although not in the sequence provided in Section 198 or in Rule 32b. It may also be noted that notice of the filing of the notice of appeal is provided for in part of Section 21a of the Rules of Civil Procedure which reads:-

"Notification of the filing of the notice of appeal shall be given by the Clerk of Courts by mailing or delivering copies thereof to the appellee or his counsel, the presiding judge of the court appealed to, and the judge whose judgment is appealed from (unless the notice of appeal was originally filed with that judge)."

The facts noted above which show that the notice of appeal did within the thirty (30) day period reach the Clerk of the Appellate Division who would have been the ultimate repository under Rule 32b above noted, plus the fact that he, an officer of the Court, or the typhoon, or a combination of both may have caused the delay in filing with the Clerk of Courts for the Palau District, certainly constitute unique circumstances which bring this case un-

der the rule in the cases of *Hill v. Hawes*, 320 U.S. 520, 64 S.Ct. 334 (1944). *Reconstruction Finance Corporation et al. v. Prudence Securities Advisory Group et al.*, 311 U.S. 579, 61 S.Ct. 331 (1941). *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283 (1962).

In *Hill v. Hawes*, supra, the clerk of the district court failed to notify the parties of the entry of judgment and so the plaintiff failed to appeal within the twenty (20) days allowed by court rule. However, the district judge vacated the former judgment and entered a new judgment so that the appeal could be filed in time. Although Chief Justice Stone and Justice Murphy dissented on the ground that appeal within the required time was jurisdictional, the court held that the action of the district court was proper, although not precisely under provisions of the rules allowing vacation of a judgment to relieve a party from mistake, inadvertence or excusable neglect. The Supreme Court there said : —

"It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistaken inadvertence, surprise or excusable neglect. See Rule 60 (a), (b). These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77 (d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to en-

tel' a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as *was in the interest of justice to a party to the cause.*" (Emphasis added)

In *Reconstruction Finance Corporation et al. v. Prudence Securities Advisory Group et al.*, supra, the Appellant had attempted to appeal from an order granting and refusing allowances of compensation in a reorganization proceeding under the Bankruptcy Act, and had filed a notice of appeal in the District Court but had failed to apply to the Circuit Court of Appeals for an order allowing the appeal. The Supreme Court there said, at p. 331 of 311 U.S.

"The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. Cf. *Taylor v. Voss*, 271 U.S. 176, 46 S.Ct. 461, 70 L.Ed. 889, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London v. O'Dougherty*, supra. This conclusion does not do violence to *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U.S. 172, 57 S.Ct. 680, 81 L.Ed. 986. As we indicated in *Dickinson Industrial Site, Inc. v. Cowan*, supra, the *Shulman* case stated the rule of permissive appeals which was carried over into section 250. The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. Cf. *Alaska Packers Ass'n v. Pillsbury*, 301 U.S. 174, 57 S.Ct. 682, 81 L.Ed. 988."

It may be argued that this decision only applies to bankruptcy cases. However, it may be noted that Justice Reed

in a concurring opinion (and although he felt that the filing of the notice within the required time was jurisdictional). concurred in the result because the situation presented "a rare instance" of circumstances which justified the denial of the motion to dismiss the appeal. He said:-

"I am of the opinion that timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and that the practice followed in this case cannot be reduced to a mere procedural irregularity. *Farrar v. Churchill*, 135 U.S. 609, 612, 613 10 S.Ct. 771, 772, 34 L.Ed. 246; *Old Nick Williams Co. v. United States*, 215 U.S. 541, 30 S.Ct. 221, 54 L.Ed. 318; *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U.S. 172, 57 S.Ct. 680, 81 L.Ed. 986. However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London v. O'Dougherty*, 2 Cir. 102 F.2d, 524. *In these unique circumstances* I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. *Watts, Watts and Co. v. Unione Austriaca*, 248 U.S. 9, 21, 39 S.Ct. 1, 2, 63 L.Ed. 100, 3 A.L.R. 323; *Montgomery Ward and Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 196, 85 L.Ed. 147, decided December 9, 1940. In rare instances such as the case at bar this power is appropriate for curing even jurisdictional defects. *Ct. Rorick v. Commissioners*, 307 U.S. 208, 213, 59 S.Ct. 808, 811, 83 L.Ed. 1242. (Emphasis added)

In the recent case of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, supra, the district court judge, because of the absence of a party's general counsel who was in Mexico, granted leave to extend the time to appeal beyond the thirty-day limit prescribed by Fed. Rules Civ. Proc. rule 73 (a), 28 U.S.C.A. In vacating an order of the Court of Appeals dismissing the appeal the Supreme Court said in its opinion:-

"The Court of Appeals initially denied a motion of respondent to dismiss the appeal, and called for briefs on the merits. The court thereafter reconsidered and dismissed the appeal, holding that a showing of 'excusable neglect based on a failure of a party to learn of the entry of the judgment,' Fed. Rules Civ. Proc., 73 (a), had

did not reach the Clerk of Courts at Palau until November 24, 1967, some 15 days after it was mailed in Guam;

The Rules of Court provides in Section 32b, Rules of Criminal Procedure (applicable to civil matters under Rule 23, Rules of Civil Procedure) : -

"b. Forwarding of notice of appeal. Immediately upon the filing of the notice of appeal to the Appellate Division, one of the original copies thereof (with a notation endorsed thereon of the date of the filing) shall be forwarded by the Clerk of Courts with whom it is filed to the Clerk of Courts for the Truk District, who has been designated to keep the records and dockets of the Appellate Division."

By order of the Chief Justice on August 1, 1967, the rules were amended to provide that the Administrative Officer of the Judiciary was substituted for the Clerk of Courts at Truk as the Clerk of the Appellate Division of the High Court. Therefore, one of the original copies of Appellant's notice of appeal did reach the Clerk of the Appellate Division, although not in the sequence provided in Section 198 or in Rule 32b. It may also be noted that notice of the filing of the notice of appeal is provided for in part of Section 21a of the Rules of Civil Procedure which reads:-

"Notification of the filing of the notice of appeal shall be given by the Clerk of Courts by mailing or delivering copies thereof to the appellee or his counsel, the presiding judge of the court appealed to, and the judge whose judgment is appealed from (unless the notice of appeal was originally filed with that judge)."

The facts noted above which show that the notice of appeal did within the thirty (30) day period reach the Clerk of the Appellate Division who would have been the ultimate repository under Rule 32b above noted, plus the fact that he, an officer of the Court, or the typhoon, or a combination of both may have caused the delay in filing with the Clerk of Courts for the Palau District, certainly constitute unique circumstances which bring this case un-

der the rule in the cases of *Hill v. Hawes*, 320 U.S. 520, 64 S.Ct. 334 (1944). *Reconstruction Finance Corporation et al. v. Prudence Securities Advisory Group et al.*, 311 U.S. 579, 61 S.Ct. 331 (1941). *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283 (1962).

In *Hill v. Hawes*, supra, the clerk of the district court failed to notify the parties of the entry of judgment and so the plaintiff failed to appeal within the twenty (20) days allowed by court rule. However, the district judge vacated the former judgment and entered a new judgment so that the appeal could be filed in time. Although Chief Justice Stone and Justice Murphy dissented on the ground that appeal within the required time was jurisdictional, the court held that the action of the district court was proper, although not precisely under provisions of the rules allowing vacation of a judgment to relieve a party from mistake, inadvertence or excusable neglect. The Supreme Court there said : —

"It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistaken inadvertence, surprise or excusable neglect. See Rule 60 (a), (b). These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77 (d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to en-

tel' a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as *was in the interest of justice to a party to the cause.*" (Emphasis added)

In *Reconstruction Finance Corporation et al. v. Prudence Securities Advisory Group et al.*, supra, the Appellant had attempted to appeal from an order granting and refusing allowances of compensation in a reorganization proceeding under the Bankruptcy Act, and had filed a notice of appeal in the District Court but had failed to apply to the Circuit Court of Appeals for an order allowing the appeal. The Supreme Court there said, at p. 331 of 311 U.S.

"The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. Cf. *Taylor v. Voss*, 271 U.S. 176, 46 S.Ct. 461, 70 L.Ed. 889, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London v. O'Dougherty*, supra. This conclusion does not do violence to *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U.S. 172, 57 S.Ct. 680, 81 L.Ed. 986. As we indicated in *Dickinson Industrial Site, Inc. v. Cowan*, supra, the *Shulman* case stated the rule of permissive appeals which was carried over into section 250. The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. Cf. *Alaska Packers Ass'n v. Pillsbury*, 301 U.S. 174, 57 S.Ct. 682, 81 L.Ed. 988."

It may be argued that this decision only applies to bankruptcy cases. However, it may be noted that Justice Reed

in a concurring opinion (and although he felt that the filing of the notice within the required time was jurisdictional). concurred in the result because the situation presented "a rare instance" of circumstances which justified the denial of the motion to dismiss the appeal. He said:-

"I am of the opinion that timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and that the practice followed in this case cannot be reduced to a mere procedural irregularity. *Farrar v. Churchill*, 135 U.S. 609, 612, 613 10 S.Ct. 771, 772, 34 L.Ed. 246; *Old Nick Williams Co. v. United States*, 215 U.S. 541, 30 S.Ct. 221, 54 L.Ed. 318; *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U.S. 172, 57 S.Ct. 680, 81 L.Ed. 986. However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London v. O'Dougherty*, 2 Cir. 102 F.2d, 524. *In these unique circumstances* I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. *Watts, Watts and Co. v. Unione Austriaca*, 248 U.S. 9, 21, 39 S.Ct. 1, 2, 63 L.Ed. 100, 3 A.L.R. 323; *Montgomery Ward and Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 196, 85 L.Ed. 147, decided December 9, 1940. In rare instances such as the case at bar this power is appropriate for curing even jurisdictional defects. *Ct. Rorick v. Commissioners*, 307 U.S. 208, 213, 59 S.Ct. 808, 811, 83 L.Ed. 1242. (Emphasis added)

In the recent case of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, supra, the district court judge, because of the absence of a party's general counsel who was in Mexico, granted leave to extend the time to appeal beyond the thirty-day limit prescribed by Fed. Rules Civ. Proc. rule 73 (a), 28 U.S.C.A. In vacating an order of the Court of Appeals dismissing the appeal the Supreme Court said in its opinion:-

"The Court of Appeals initially denied a motion of respondent to dismiss the appeal, and called for briefs on the merits. The court thereafter reconsidered and dismissed the appeal, holding that a showing of 'excusable neglect based on a failure of a party to learn of the entry of the judgment,' Fed. Rules Civ. Proc., 73 (a), had

not been made out to the motion judge, that there was hence no basis for waiving the 30-day limit, and that the appeal was untimely filed and had to be dismissed for lack of appellate jurisdiction. 7 Cir., 303 F.2d 609.

"The District Court properly entertained the motion here in question to extend petitioner's time to appeal to the Court of Appeals before the initial 30 days allowed for docketing the appeal had elapsed. Fed. Rules Civ. Proc., 73 (a), which governs here, is not limited to motions made after the 30 days have expired. See 7 Moore, Federal Practice (2d ed. 1955), paragraph 73.09 (3) ; *North Umberland Mining Co. v. Standard Ace. Ins. Co.*, 193 F.2d 951, 952 (C.A. 9th Cir., 1952) ; *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 276, 277 (C.A. 3d Cir., 1962). The standard applicable on such a motion, whether it is made before or after the 30 days have run, is that the movant must show 'excusable neglect based on a failure of a party to learn of the entry of the judgment,' Fed. Rules Civ. Proc., 73 (a). Compare 7 Moore, supra, paragraph 73.09(3); Notes of Advisory Committee on 1946 Amendments to Rule 73 (a), quoted in 7 Moore, supra, paragraph 73.01 (5), at page 3111; *Knowles v. United States*, 260 F.2d 852, 854 (C.A. 5th Cir., 1958). In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of *unique circumstances* sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. The judgment is vacated and the case is remanded to the Court of Appeals so that petitioner's appeal may be heard on the merits." (Emphasis added)

We also are mindful of the rule which may apply to the fact that in this case the Clerk of the Appellate Division had the notice of appeal in his hands well within the thirty-day period, that many cases hold in regard to filing papers, or making a return of service of a paper, that it is the *fact* of filing or the *fact* of service which controls rather than the clerk's notation of the filing or in the other situation rather than the affidavit or certificate of service.

**[1, 2]** We do not, by our action here, wish to indicate that in a proper case the Court should not refuse to dismiss an appeal which was not filed within the thirty-day period and should grant a dismissal, such as the dismissals in *You v. Gaamen*, 2 T.T.R. 264, and in *Carlos v. Aguon v. Rogomon*, 2 T.T.R. 258. It may be noted that in his opinion in the latter case Chief Justice Furber said:-

"Filing of notice of appeal within the time limited by the Code provisions is essential to the jurisdiction of the court upon appeal in the absence of some most unusual circumstance. Exception is recognized where the failure to file is the result of default of some officer of the court.

Almost identical language is contained in the opinion in *You v. Gaamen*, supra.

We must hold that under the unusual circumstances here present that the motion to dismiss must be denied; **It is**

Ordered that the motion to dismiss be and the same hereby is denied.