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Recent Case Notes

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RECENT CASE NOTES

Constitutional Law — Due Process — Denial of Passports

Upon application for a passport, *P* was notified by the Director of Passports that issuance of a passport to him was precluded by regulations of the Secretary of State forbidding such issuance to Communists or those who had consistently adhered to the Communist Party. *P* was informed of his right to a hearing, but he was further advised that it would be necessary for him to submit an affidavit as to whether he was then or ever had been a member of the Communist Party. *P* refused to submit the affadavit maintaining that any matter unrelated to the question of his citizenship was irrelevant to the consideration of his passport application. *Held*: Congress did not delegate authority to the Secretary of State to adopt regulations denying passports to citizens because of Communist affiliations. *Kent v. Dulles*, 357 U. S. 116 (1958).

From an early date *interstate* travel has been a guaranteed right under the federal constitution. *Edwards v. California*, 314 U. S. 160 (1941); *Crandall v. Nevada*, 73 U. S. (6 Wall.) 39 (1868). Until recently, however, whether foreign travel by a citizen is a "right" or a "privilege" had not been determined. See Comment, 61 YALE L.J. 171 (1952). The lower federal courts have recognized that citizens have the "right" to travel abroad which, like any constitutional liberty, must be free of arbitrary administrative restraint. *Dulles v. Nathan*, 225 F.2d 29 (D.C. Cir. 1955); *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). Even if the "right" is assumed, it has been argued that foreign travel is properly the subject of foreign affairs, and hence those cases which recognize that foreign policy decisions are confined to the political departments of government (*e.g.*, *Chicago & Southern Airlines v. Waterman Steamship Co.*, 333 U. S. 103 (1948); *United States v. Curtiss-Wright Corp.*, 229 U. S. 304 (1936)) preclude judicial review. See Comment, 61 YALE L.J. 171 (1952). However, admitting that foreign travel may involve political questions, actions of the political departments must not be inconsistent with the Constitution. *Boudin v. Dulles*, *supra* at 220. This holding may be explained on the theory that broad policy making properly relates to and may well be considered political, but a denial of the right to travel abroad in the particular case ordinarily has little to do with policy making and hence the constitutional safeguards of due process operate to protect this freedom. *Schachtman v. Dulles*, *supra* at 940. Yet, like other constitutional rights, the right to travel abroad may be restricted under proper circumstances. *Cf. Yakus v. United States*, 321 U. S. 414 (1943).

The major restrictions on foreign travel appeared in the form of passports. Comment, 3 STANFORD L. REV. 312 (1950-51). Initially, they were nothing more than documents of identification and requests for diplomatic protection of American citizens in foreign countries. *Urtetiqui v. D'Arbel*, 34 U. S. (9 Pet.) 692 (1835); HACKWORTH, DIGEST OF INTERNATIONAL LAW 435 (1942). Since a passport was not a legal prerequisite to foreign travel, many federal, state, and local officials issued letters of introduction in the nature of passports. Comment, 61 YALE L. J. 171 (1952). To avoid this practice, Congress enacted what is presently the major passport statute providing that the Secretary of State alone may issue passports under such rules as the President shall designate. 44 STAT. 887 (1926), 22 U.S.C. § 211a (1946). The statute has been interpreted to mean that the legal necessity of a passport remains unchanged (in absence of other legislation) and that their issuance is solely a matter of discretion. HACKWORTH, *op. cit. supra* at 467-68; see 23 OP. ATT'Y GEN. 509 (1901). During times of war, Congress consistently altered these rules by requiring each citizen to obtain a passport as a condition to foreign travel. See, *e.g.*, 55 STAT. 252 (1941), 22 U.S.C. § 223 (1952); 40 STAT. 559 (1918), *as amended* 22 U.S.C. §§ 223-226 (1952); 3 STAT. 199 (1815). Presently, the same requirement exists during any national emergency proclaimed by the President, 66 STAT. 190, 8 U.S.C. § 1185 (1952), and such emergency has been proclaimed and exists at the present time. PROC. No. 3004, 67 STAT. C31 (1953). To implement passport control, regulations of the Secretary of State provide that no passport, except for one limited for direct and immediate return to the United States, shall be issued to those whose travel abroad would be in the furtherance of the Communist cause. 22 C.F.R. § 51.135 (1958 Supp.).

The present statute under which passports are regulated, 66 STAT. 190, 8 U.S.C. § 1185 (1952), does not expressly grant to the Secretary of State the power to deny passports to Communists, although overall congressional policy in this field indicates that such was intended. See *Report of the Commission of Governmental Security*, 470-73 (1957). During debate in the Senate where certain provisions of the Internal Security Act were under consideration, it was stated that passports were denied to members of Communist political organizations under existing law; therefore, such a provision was not needed in the Internal Security Act. 96 CONG. REC. 14538 (1950). However, the majority opinion in the principal case holds that Congress did not delegate the authority to deny passports because of political beliefs and associations, reasoning that the only grounds for refusal which had heretofore been exercised were related to citizenship or unlawful conduct. 357 U. S. at 127-29. Thus, by its own expression, the Court did not reach the constitutional question; however, the Court did accept the view of the lower federal courts that there is a "right" to travel abroad included within the concept of liberty, see *Dulles v. Nathan, supra; Schachtman v. Dulles, supra; Boudin v. Dulles, supra; Bauer v. Acheson, supra,* and hence, should Congress expressly confer the power to deny passports for political reasons, the constitutional issue is yet to be determined. It seems certain that the Court would uphold the right to restrict foreign travel in time of war upon a showing of the "gravest imminent danger to the public safety," even on the basis of associations or beliefs. See *Korematsu v. United States,* 323 U.S. 214, 218 (1944). However, peacetime denials present a different question. Since the right to travel abroad bears a close resemblence to first amendment freedoms, *e.g.*, a ban on foreign travel may serve to bar a lecturer's freedom of expression or a correspondent's livelihood, it would seem that a showing of *clear and present danger* would be necessary before this right could be totally restricted. *Cf., Schenck v. United States,* 249 U. S. 47 (1919). However, in relation to the Communist conspiracy, a less stringent formula may be applicable: where a *substantial interest* (*e.g.*, national security) is involved, it has been held that the danger need not be imminent. *Dennis v. United States,* 341 U. S. 494 (1951).

Any individual has the right to believe in anything he may choose, subject of course to the dictates of his conscience. It would logically follow that there are definite substantive evils in denying a passport solely on the ground of political beliefs. However, when one engages in *conduct* manifesting these beliefs, it would then seem that his conduct could quite properly be restricted. Therefore, though the mere belief in Communism or the association with others of like beliefs may not afford a basis of denial of a passport in a particular case, it would seem that when a person commits himself to the Communist movement by becoming a member of the Communist party his conduct and activities in futherance of Communism could be restricted, which includes traveling abroad to put these beliefs into practice.

James G. Gregory

Constitutional Law—Separation of Powers—Federal-Municipal Relations

P, a municipality, was granted a license by the Federal Power Commission to construct dams on a navigable stream, and *P* sought to condemn a state-owned fish hatchery within the reservoir area, relying on the power of eminent domain conferred on licensees by the Federal Water Power Act. *D*, the chartering state, opposed issuance of the license on the ground that authority to condemn state-owned land dedicated to a public use had not been granted *P* by its charter or by other state legislation. *D* appealed the Commission's decision (granting the license) to the court of appeals, which affirmed the Commission, and the United States Supreme Court denied certiorari. While the petition for review was pending in the court of appeals, *P* commenced action in the state courts to validate a bond issue to finance the project. *D* successfully intervened with the argument that *P* lacked *legal capacity to act* under the license, even if the license itself was valid. After the state supreme court held for *D*, *P* obtained certiorari to the Supreme Court. *Held*: When the Federal Power Commission issues a license to a municipality to construct a dam and its decision is not reversed on appeal, the Commission's action is conclusive as to the capacity of the licensee both to *receive* and *exercise* the powers granted under the license, and further litigation is precluded. *City of Tacoma v. Taxpayers of Tacoma and the State of Washington*, 357 U.S. 320 (1958).

A municipal corporation, as a creature of its chartering state, performs a dual function: (1) it exercises the powers entrusted to it as an arm of the state government; and (2) it regulates and administers the local affairs of the community within its corporate boundaries. *Trenton v. New Jersey*, 262 U.S. 182 (1923); *Vilas v. Manila*, 220 U.S. 345, 346 (1911); 1 McQuillin, Municipal Corporations § 2.09 (3d ed. 1944). It has only those powers expressly delegated by the legislature or constitution of the state and those additional powers necessary to implement delegated powers or realize the purposes set forth in its charter. *Ottawa v. Carey*, 108 U.S. 110 (1883); *Duncan Parking Meter Corp. v. City of Gurdon*, 146 F. Supp. 280 (W.D. Ark. 1956); 2 McQUILLIN, *op cit. supra* at §§ 10.09, 10.11. Once established, the powers of municipal corporations may be enlarged or diminished by the creator-state, *Worchester v. Street Ry. Co.*, 196 U.S. 539 (1905); 2 McQUILLIN, *op cit. supra* at § 4.05, even to the extent of revoking the charter and incorporating a different city in its place, *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907). Prior to the instant series of cases, it was well settled that state courts are the sole arbiters of the extent and character of the powers and capacities of municipal corporations. *Georgia Ry. and Power Co. v. Town of Decatur*, 262 U.S. 432, 438 (1923); *Claiborne County v. Brooks*, 111 U.S. 400, 410 (1884); see *Newark v. New Jersey*, 262 U. S. 192 (1923) (equal protection of the law not guaranteed by federal constitution).

Although it is well established that the *federal government* itself may condemn state-owned land, see *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941); *Minnesota v. United States*, 125 F.2d 636 (8th Cir. 1942), the instant series of cases presents the question of whether or not the federal government, in the exercise of its inherent right of eminent domain, see *Georgia v. City of Chattanooga, Tenn.*, 264 U.S. 472 (1924); *City of Norton v. Lowden*, 84 F.2d 663 (10th Cir. 1936); 11 McQUILLIN, *op. cit. supra* at § 32.11, may delegate this power to a municipal corporation when the state opposes the action. Early cases uphold delegation to *private* corporations in furtherance of interstate commerce, *Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894); *Cherokee Nation v. Southern Ry. Co.*, 135 U.S. 641 (1890), even to the extent of condemning state property previously dedicated to public use and despite state opposition, *Missouri ex rel. Camden Co. v. Union Elec. Light and Power Co.*, 42 F.2d 692 (W.D. Mo. 1930). No case has been found, however, which extends these holdings to municipal corporations. *Compare Missouri v. Union Elec. Light and Power Co., supra, with Portland Ry. Light and Power Co. v. Portland*, 181 Fed. 632 (D. Ore. Cir. 1910); see 11 McQUILLIN, *op cit. supra* at § 32.12. In an analagous case (regarding abridgment of contracts in voluntary bankruptcy proceedings), it was held that the federal government cannot enlarge the powers of a *municipal* corporation even though the state had passed legislation enabling the city to exercise the additional powers, on the theory that such enlargement interferes with the sovereignty of the state in violation of the principal of division of powers between the federal and state governments. *Ashton v. Cameron County Water Improvement Dist.*, 298 U. S. 513 (1936). A possible modification of this holding appeared in *United States v. Bekins*, 304 U.S. 27 (1938), where it was held that a city may take federal bankruptcy *when the state consents*, but the Court expressly declined to say whether the city could act if the state opposes the action. 304 U.S. at 47.

The elements of dispute necessary to gain a judicial decision on this question were presented to the court of appeals in 1953. There, relying on the *private* corporation cases, *e.g.*, *First Iowa Hydro-Elec. Co-op. v. F.P.C.*, 328 U.S. 152 (1946), the court determined that the federal government, despite state opposition, could use a municipal corporation as an instrumentality in building a dam; the theory of the court was that municipal and private corporations have one thing in common, *viz.*, each is a creature of the state. *State of Washington Dep't of Game v. F.P.C.*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954). In a later portion of its opinion, however, the court further declared that it did not "touch the question as to the legal capacity of the city of Tacoma to initiate and act under the license once it is granted." 207 F.2d at 396. It would seem, therefore, that as a result of this apparent ambiguity in the court's holding the question remained unanswered. The Supreme Court, however, as justification for the instant holding (that litigation in the state court was precluded) reasoned that the lower court settled all three questions raised in this series of litigation, *viz.* (1) power of the Commission to issue the license, (2) power of the city to receive the license, and (3) legal capacity of the city to exercise the powers delegated to the licensee. 357 U.S. at 339. Thus, it would seem that a municipality, under the present status of the law, may act without state consent, even to the extent of condemning state-owned property dedicated to public use. The concurring opinion expresses the view that the justification of the principal case is found in the rule that whether the city has legal capacity to act under a federal license presents a federal question. 357 U.S. at 341. If the majority of the Court accepts this view, the principal case represents an exception to the general rule that state courts are the sole arbiters of the extent and character of the powers and capacities of municipal corporations. See *Georgia Ry. and Power Co. v. Town of Decatur, supra; Claiborne County v. Brooks, supra.* Even assuming, however, that a federal question was presented by the principal case, it is doubtful that the private corporation cases are proper authority for the municipality's *capacity* to act, for not only is a city a *creature* of the state but also is an *arm* of the state government. See *Trenton v. New Jersey, supra; Vilas v. Manila, supra.* This distinction from *private* corporation cases is implicit in the first municipal bankruptcy case, *Ashton v. Cameron County Water Improvement Dist., supra,* but in view of the present series of cases, the conclusion seems inescapable that the *Ashton* case is now completely overruled. *Cf. United States v. Bekins, supra.*

It surely will not be denied that a municipal corporation is established for the convenience of the state. Essentially, the dispute in the principal case is between the municipality and the state, seeking determination of the question whether or not it would be convenient for the municipality to act in a given capacity; it is not a controversy between a state and the federal government. Yet, the principle derived from this case extends to such controversies, for it seems indisputable that a state may now govern the powers and capacities of its municipalities only insofar as its rules are not inconsistent with the powers granted by the federal government. The municipality may now condemn state-owned property despite state opposition and surely will be permitted to engage in federal bankruptcy proceedings without the state's consent; only time will set the limits in this field. It is unfortunate that the Supreme Court declined to consider these ramifications at some stage in the instant series of litigation.

George D. Neal

Contracts — Statute of Frauds — Implied Duration of Performance

P orally agreed to represent *D* in developing an exclusive sales territory for *D*'s products. The agreement did not specify the duration of *P*'s employment, but *P* alleged, and the jury found, that a reasonable duration of performance of at least three years was necessarily implied from the character and size of the undertaking, and that *D*'s repudiation prior to that time constituted an actionable breach. *D* agreed that the terms of the contract implied an extended duration but asserted that since the contract was oral, an implication of a reasonable time in excess of one year made the contract unenforceable under the Statute of Frauds. *Held*: Where the jury determines from the nature of an oral contract that a reasonable time for performance is implied and that such time is more than one year, the contract is within the Statute of Frauds and will not be enforced by the courts. *Hall v. Hall*, — Tex. —, 308 S.W.2d 12 (1957).

The Statute of Frauds bars any legal action to enforce a promise or agreement which is not to be performed within one year unless the contract is in writing and signed by the party to be charged with failure of performance. TEX. REV. CIV. STAT. ANN. art. 3995, subd. 5 (1925); 2 WILLISTON, CONTRACTS § 450 (rev. ed. 1936); Annot., 6 A.L.R.2d 1053 (1949). The Statute does not apply, however, if there is unilateral performance, *Kelly-Springfield Tire Co. v. Bobo*, 4 F.2d 71 (9th Cir.), *cert. den.*, 268 U.S. 694 (1925); *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167 (Tex. Civ. App. 1952), or if the term of performance is uncertain in the sense that the contract provides for performance of particular acts which conceivably can be performed within one year. *Sapphire Royalty Co. v. Davenport*, 306 S.W.2d 202 (Tex. Civ. App. 1957) *error ref. n.r.e.; Lennard v. Texarkana Lumber Co.*, 94 S.W. 383 (Tex. Civ. App. 1906). See also *Texarkana Lumber Co. v. Lennard*, 104 S.W. 506 (Tex. Civ. App. 1907) *error ref. Contra, Wagniere v. Dunnell*, 29 R.I. 580, 73 Atl. 309 (1909).

Manifestly, whether or not the Statute of Frauds defeats an otherwise enforceable obligation depends on the terms of the contract itself. *Gulf Ref. Co. v. Boren*, 50 S.W.2d 883 (Tex. Civ. App. 1932). Thus, if performance in less than one year would not satisfy the literal terms of the agreement, *Wewerka v. Lantron*, 174 S.W.2d 630 (Tex. Civ. App. 1943) *error ref. w.o.m.;* see 2 WILLISTON, *op. cit. supra* at § 500, or if it is determined that the parties *intended* continuous performance for a period in excess of one year, the contract is unenforceable unless evidenced by a memorandum, *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (1937); *Dicks v. Clarence L. Boyd Co.*, 205 Okla. 383, 238 P.2d 315 (1951). In practical effect, continuous-performance contracts, *e.g.*, employment agreements, are contracts of definite duration and hence (where the contract is for more than one year) earlier performance would violate the agreement itself. *Cf. Wewerka v. Lantron, supra.* Consistent with these principles, an oral contract for life is enforceable, *Betts v. Betts*, 220 S.W. 575 (Tex. Civ. App. 1920), while an oral contract for thirteen months is not, *Dibrell v. Central Nat'l Bank*, 293 S.W. 874 (Tex. Civ. App. 1927) *error dism.* The contract for life is fully performed upon death, a contingency always possible within one year. See 2 WILLISTON, *op. cit. supra* at § 495. However, if a proponent asserts an oral contract for any period in excess of one year for the purpose of recovering damages, the fact that the contract is sufficiently definite, *i.e.*, not terminable at will, see *Rice v. Thompson*, 268 S.W.2d 481 (Tex. Civ. App. 1954) *error ref. n.r.e.*, is without significance; he will have established the Statute of Frauds defense.

Absent an express provision, a reasonable duration in which the contract can be performed may be implied, with the result that the contract is sufficiently definite and is thus not void for lack of an essential element and is not terminable at will. *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706 (1923); *Cheek v. Metzer*, 116 Tex. 356, 291 S.W. 860 (1927); *Hamilton v. Shirley-Self Motor Co.*, 202 S.W.2d 952 (Tex. Civ. App. 1947) *error ref. n.r.e. But see East Line & R. R. R. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888); *Advance Aluminum Castings Corp. v. Schulkins*, 267 S.W.2d 174 (Tex. Civ. App. 1954). Thus, the jury's finding in the instant case that a reasonable time for performance was three years (which was necessary to establish damages based on three years) made the contract sufficiently definite; however, *P* argued that such finding was not so definite as to preclude an inquiry into whether or not there was a "possibility" that the contract could have been performed within one year and was thus not unenforceable under the Statute of Frauds. This argument overlooks the implications inherent in implied contractual provisions. The finding of an implied duration of three years (*the* reasonable time for damage purposes) made the agreement in fact one of three years. See *Cheek v. Metzer, supra*. Therefore, the jury's finding of this *implied* provision was tantamount to finding that the parties *intended* performance to extend beyond one year. See 308 S.W.2d at 16. It would seem that this is but an application to the unusual facts of the traditional rule that the courts will respect the intention of the parties even though the contract thus becomes unenforceable because of the Statute of Frauds. See *Dicks v. Clarence L. Boyd, supra; First Nat'l Bank v. Trinity Patrick Lodge No. 7, K. of P.*, 238 S.W.2d 576 (Tex. Civ. App. 1951) *error ref. n.r.e.; Ellison v. Halff*, 94 S.W.2d 528 (Tex. Civ. App. 1936) *error dism.* If *D* had employed *P* to perform a specific act, *e.g.*, to accomplish the task of developing a defined area (although there is some doubt whether a promise *to develop* is sufficient consideration for another promise, *cf. International Shoe Co. v. Herndon*, 135 S.C. 138, 133 S.E. 202 (1926), Annot., 45 A.L.R. 1197 (1926)), rather than a contract of continuous employment, the principal case probably would have been decided consistently with those cases holding that contracts for a specific act are not within the Statute if the act possibly could have been completed within one year. See the *Sapphire Royalty Co.* case, *supra.* The distinguishing factor in the principal case that apparently induced the Court (although not completely clear in the opinion) to treat the contract as one for three years' continuous performance (a contract of *time*) rather than a contract to perform a particular *act* within three years is that *P* was employed to *represent D* in developing the sales territory. It would seem that the crucial issue in a continuous-performance contract is the length of the intended duration; whereas, in a contract to perform a specific act, the decisive factor is whether or not *D* breached the contract before the act was completed.

It is difficult to justify the Court's position in the instant case in the light of the fact that *P* probably would be considered to *represent D* whether the contract was one for continuous employment for a definite period or one for the performance of a specific act. If *P* actually alleged a specific act, then it would seem that the Court applied the wrong rule of law, *i.e.*, the question would be whether the act possibly could have been performed within one year, not that the parties *intended* a definite duration of continuous performance, a conclusion which precludes the "possibility" question. In the future, a proponent faced with a similar fact situation should carefully plead an oral contract of a particular undertaking. In this manner, he may avoid the fatally inconsistent argument adopted by *P*, *viz.*, that a contract is definite insofar as recovery of damages is concerned, yet indefinite for purposes of the Statute of Frauds.

Malcolm L. Shaw

Oil and Gas — Leases — Production Under Habendum Clause

Lessee completed a gas well capable of producing in paying quantities six months before termination of the one-year primary term. The well was shut in and diligent efforts were made to find a purchaser for the gas. Nine months after expiration of the primary term a purchaser was found, but lessor prevented installation of a pipeline. Lessor brought suit to quiet title contending that the lease had expired by virtue of lessee's failure to produce gas within the primary term. *Held*: The habendum clause of a lease, requiring "production" in order to extend the lease beyond the primary term, does not necessitate the marketing of gas from a well completed within the primary term. *McVicker v. Horn, Robinson and Nathan*, — Okla. —, 322 P.2d 410 (1958).

Under the habendum clause of a lease (which normally provides that the lease shall remain in force for a term of years and as long thereafter as oil or gas is produced from said lands) "production" is interpreted to mean "production in paying quantities." 2 SUMMERS, OIL & GAS § 293 (2d ed. 1938). Generally, this means more than mere discovery, SULLIVAN, HANDBOOK OF OIL AND GAS LAW § 41 (2d ed. 1956), and requires actual production through the marketing or storage of discovered minerals, BROWN, THE LAW OF OIL AND GAS LEASES § 5.04 (1958). Consequently, as actual production is a condition precedent to the extension of the lease beyond the primary term, SUMMERS, *op. cit. supra* at § 300, the failure to create royalty income through the marketing or storage of discovered minerals within the primary term normally causes the lease to terminate automatically under the habendum clause, *Home Royalty Ass'n v. Stone*, 199 F.2d 650 (10th Cir. 1952); *Hanna v. Shorts*, — Ohio —, 125 N.E.2d 338 (1955); *Stanolind Oil & Gas Co. v. Barnhill*, 107 S.W.2d 746 (Tex. Civ. App. 1937) *error ref. But see Parks v. Sinai Oil & Gas Co.*, 83 Okla. 295, 201 Pac. 517 (1921); *South Pa. Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S.E. 961 (1912).

Gas is more difficult to market than oil, for it cannot be economically stored above the ground and a pipeline from the well head to the consumer is the most practicable means of marketing. See *Severson v. Barstow*, 103 Mont. 526, 63 P.2d 1022 (1936). Thus, if the habendum clause is interpreted to require *actual* production in paying quantities prior to expiration of the primary term, a lessee who discovers gas may sustain an extensive financial loss. See *Home Royalty Ass'n v. Stone, supra;* BROWN, *op. cit. supra* at § 5.02. Admittedly moved by these equitable considerations, an early West Virginia gas case extended the lease beyond the primary term by interpreting the habendum clause to mean that *discovery* alone vests the the lessee with the right to produce and that this right is not lost as long as operations are diligently continued after the primary term and marketed production is eventually obtained. *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S.E. 836 (1909). (This interpretation was later followed in a case involving discovered, but nonmarketed, *oil. South Pa. Oil Co. v. Snodgrass, supra.*) An early

Oklahoma case extended the lease in favor of a lessee who had discovered gas, but reached this result by finding an ambiguity in what is now a standard habendum clause, *Strange v. Hicks,* 78 Okla. 1, 188 Pac. 347 (1920), a theory that was subsequently considered unsound, *Anthis v. Sullivan Oil & Gas Co.,* 83 Okla. 86, 203 Pac. 187 (1921). Several recent gas cases have adopted a purely equitable theory in reaching similar results, *viz.,* that if the lessee diligently seeks a market, the lease will be extended for a reasonable time. *Bristol v. Colorado Oil & Gas Corp.,* 225 F.2d 894 (10th Cir. 1955); *Christianson v. Champlin Refining Co.,* 169 F.2d 207 (10th Cir. 1948); *Fey v. A. A. Oil Corp.,* 129 Mont. 300, 285 P.2d 578 (1955). *Compare Bain v. Strance,* 256 S.W.2d 208 (Tex. Civ. App. 1953) *error ref. n.r.e. with Sellers v. Breidenbach,* 300 S.W.2d 178 (Tex. Civ. App. 1957) *error ref.* However, in emphasizing the equitable considerations, these cases tend to ignore the habendum clause as making production in paying quantities a *condition precedent* to the continuation of the lease beyond the primary term. SUMMERS, *op. cit. supra* at § 300. Some courts recognize this factor and hold that the lease terminates, notwithstanding the fact that the lessee may experience extreme hardship in the event he discovers gas instead of oil, this question being considered irrelevant when applying the express provisions of the lease. *Smith v. Sun Oil Co.,* 172 La. 655, 135 So. 15 (1931); *Town of Tome Land Grant, Inc. v. Ringle Dev. Co.,* — N. Mex. —, 240 P.2d 850 (1952); *Sellers v. Breidenbach, supra; Francis v. Pritchett,* 278 S.W.2d 288 (Tex. Civ. App. 1955) *error ref.*

The court in the principal case reasoned that "marketing" is not included in the definition of "production" in gas leases, all of which leads to the logical inference that *discovery* of gas in paying quantities is sufficient to meet the "production" requirement of the habendum clause. 322 P.2d at 413. This equation of production to discovery necessarily follows the West Virginia rule, an adherence not without precedent in Oklahoma law. See *Roach v. Junction Oil & Gas Co.,* 72 Okla. 213, 179 Pac. 934 (1919); SUMMERS, *op. cit. supra* at § 300. The court in the *Roach* case, confronted with an habendum clause which required only that minerals be *found,* logically held that a discovery of minerals in paying quantities vests the lessee with a right to a reasonable time within which to market. This rule was subsequently extended in a case in which the court, faced with an habendum clause requiring *production,* held that mere discovery in paying quantities was sufficient to extend the lease beyond the primary term, apparently overlooking the difference in meaning between "found" and "production" in the express habendum clause requirements. *Parks v. Sinai Oil & Gas Co., supra;* SUMMERS, *op. cit. supra* at § 293. See also *Gypsy Oil Co. v. Marsh,* 121 Okla. 135, 248 Pac. 329 (1926). Several recent cases have cited the *Roach* case as controlling, but extended the leases on other grounds. See, *e.g., Henry v. Clay,* — Okla. —, 274 P.2d 545 (1954) (lessee actually marketed in paying quantities); *Bain v. Portable Drilling Corp.,* 200 Okla. 569, 198 P.2d 207 (1948) (extended under commence-drilling clause in lease). All of these cases indicate an adherence to the majority view that "production" is "production in paying quantites," but under the Oklahoma view (as under the West Virginia rule) "production in paying quantites" peculiarly means that quantity of minerals which, *if marketed,* would pay a profit to the lessee over operating expenses. See *Woodruff v. Brady,* 181 Okla. 105, 72 P.2d 709 (1937). The opinion in the principal case, by its repeated reminders that it is faced with a gas case, may indicate an intent to limit its rule to situations involving discovered gas. This is significant as there have been previous indications of an Oklahoma conflict in this regard in cases of discovered, but non-marketed, oil. *Compare Gypsy Oil Co. v. Marsh, supra, with Pine v. Webster,* 118 Okla. 12, 246 Pac. 429 (1926).

The court's ruling firmly commits Oklahoma to the West Virginia rule, at least where gas is discovered instead of oil. While the equitable considerations may be persuasive in the situation where the lessee has the comparative misfortune of discovering gas rather than oil, there appears to be little logic in interpreting the term "production" to require actual marketing where oil is discovered but nothing more than diligent operations where gas is discovered. Consequently, it is suggested that the holding in the principal case may also commit Oklahoma to the liberal rule in the case of discovered oil. The holding, therefore, will have a much needed settling effect on Oklahoma law. While this view may afford less protection to lessors under the lease, the interests of both the lessee and lessor may best be served through the flexible Oklahoma rule requiring "diligent operations" within a "reasonable time" rather than the unwavering termination of the lease at a fixed date under all circumstances.

Richard B. Williams

Torts — Negligence — Insurer's Duty to Determine Insurable Interest

D issued insurance policies to an aunt-in-law on the life of the insured in whom she had no insurable interest. The aunt-in-law subsequently murdered the insured. It was proven that she had contemplated murder when the policies were written and that the proceeds of the policies were the motive for the murder. The father of the insured sued the insurance companies under the wrongful death statute for negligence in issuing the policies to one with no insurable interest. *Held*: An insurance company has a duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has no insurable interest in the life of the insured, and the insurer may be held liable if it is found that issuance of the policy in violation of this duty is the proximate cause of murder committed to obtain the proceeds. (The jury awarded *P* $75,000 based on a statute permitting punitive damages in wrongful death actions). *Liberty Nat'l Life Ins. Co. v. Weldon*, — Ala. —, 100 So. 2d 696 (1957).

A policy taken out by one person on a life in which he has no insurable interest is illegal and void since a wager on the life of another is repugnant to public policy, *Helmetag's Adm'x v. Miller*, 76 Ala. 183, 186 (1884); *Washington v. Atlanta Life Ins. Co.*, 175 Tenn. 529, 136 S.W.2d 493 (1940), and since such policies might be an incentive for murder, *Grigsby v. Russell*, 222 U.S. 149, 155 (1911); *Commonwealth Life Ins. Co. v. George*, 248 Ala. 649, 28 So. 2d 910 (1947). An insurable interest may be defined as a reasonable ground, either pecuniary or through blood or affinity, to expect some benefit or advantage from the continuance of the life of the insured. *Insurance Co. v. Schaefer*, 94 U. S. 457, 460 (1876); *Biggs v. Washington Nat'l Ins. Co.*, 275 S.W.2d 566 (Tex. Civ. App. 1955). While husband-wife relationships are everywhere recognized as insurable, and parent-child and brother-sister relationships are found to be insurable by a growing minority of cases, PATTERSON, INSURANCE LAW § 40 (2d ed. 1957), the kinship relation of aunt to niece is not in itself sufficient to provide an insurable interest, *Commonwealth Life Ins. Co. v. George*, *supra;* Annot., 170 A.L.R. 1032 (1947). Because such policies are considered void, the insurer in most jurisdictions is permitted to escape from its apparent obligation on the policy. PATTERSON, INSURANCE LAW § 43 (2d ed. 1957). However, in Texas the policy is valid, but the proceeds are payable to the executor of the deceased's estate. *Cheeves v. Anders*, 87 Tex. 287, 28 S.W. 274 (1894); *John Hancock Mutual Life*

Ins. Co. v. Sally, 163 S.W.2d 651 (Tex. Civ. App. 1942). Thus, the public policy against wagers on human life is enforced by denying profit to an improper beneficiary.

The principal case presents the novel problem of whether the insurer may be held liable if it fails to discover that an insurable interest does not exist. General tort principles define negligence as conduct which falls below the standard established for the protection of others against unreasonable risks of harm. RESTATEMENT, TORTS § 282 (1934). Before the conduct will constitute actionable negligence, there must be a breach of a duty of reasonable care owed to the injured party, PROSSER, TORTS §§ 35-36 (2d ed. 1955), and the negligence must be the actual and proximate cause of the injury suffered, *Houston & T. C. Ry. Co. v. Werline,* 84 S.W.2d 288 (Tex. Civ. App. 1935) *error dism.;* RESTATEMENT, TORTS § 430 (1934). There is no proximate cause if some *unforeseen* cause comes into active operation in producing the result after the negligent act or omission has occurred. *Benenson v. National Surety Co.,* 260 N.Y. 299, 183 N.E. 505 (1932); *Dallas Ry. & Terminal Co. v. Hendrix,* 261 S.W.2d 610 (Tex. Civ. App. 1953). Thus, when the injury results from the criminal act of another, the negligent party *may* be relieved of liability. *Benenson v. National Surety Co., supra.* If however, the negligent conduct creates a situation which affords an opportunity for the crime, and the negligent party could have foreseen that the criminal act might occur, the negligence may be the proximate cause of the subsequent injury. *Lillie v. Thompson,* 332 U.S. 459 (1947); *Jesse French Piano Co. v. Phelps,* 105 S.W. 225 (Tex. Civ. App. 1907); *State v. Sims,* 130 W. Va. 623, 46 S.E.2d 90 (1948); RESTATEMENT, TORTS § 448 (1934).

In applying these principles, the decision in the instant case does not alter the general rule that lack of insurable interest voids the policy; it merely holds the insurance company liable for damages which result from the negligent issuance of such a policy. In order to hold the company liable, the court must find as a matter of law, PROSSER, TORTS § 36 (2d ed. 1955), that an insurance company owes to the insured a duty of due care to discover lack of insurable interest. The court in the instant case based its holding on the theory that there is a duty on all men to exercise reasonable care not to cause physical injury to another. 100 So. 2d at 708. However, this in itself is not sufficient to constitute duty, which must be based upon a foreseeable danger to the injured party. *McPherson v. Buick,* 217 N.Y. 382, 111 N.E. 1050 (1916); *Heaven v. Pender,* (1883) 11 Q.B.D. 503. The court discusses foreseeability in connection with proximate cause and concludes that since one reason for the insurable interest rule is to prevent murder, *Grigsby v. Russell, supra,* the jury could have found that the murder of insured could have been foreseen. The same argument might be used to determine that there is a foreseeable danger and hence a duty. Once a foreseeable danger has been established, whether or not a court will find duty is dependant upon whether public policy requires protection of the interest which was injured. Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1, 15 (1953). Since there is unquestionably a public policy against murder, it seems that, although the court does not discuss it, this requirement of duty is met. However, the mere fact that duty is established does not mean that there will be liability. Such liability could only be predicated upon proof of a causal connection between the negligence of the company and the death of the insured. *Houston & T. C. Ry. Co. v. Werline, supra.* This creates no problem in the instant case, since the insurance proceeds were the motive for the murder.

It should be emphasized that recovery in the instant case is based on negligence, and not absolute liability for violation of the insurable interest rule. Although some might fear that this decision would place an undue burden on insurance companies, this does not appear to be the case. When an insured dies, the company seeks evidence of lack of insurable interest in order to escape from its obligation on the policy. Would it be a greater burden to use reasonable care to discover this lack of insurable interest at the time the policy is issued? Since the insurance contracts in the instant case provided that the company could require proof of insurable interest at any time, prior to the issuance of a policy the company could require a beneficiary to submit a statement of his relationship with the insured along with the names of one or more persons who could verify this relationship. In this way the insurance company would be giving the same protection to the insured that it affords itself. Such a requirement would not place an unreasonable burden on the insurance company, and would probably satisfy the duty of reasonable care to discover lack of insurable interest.

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