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Recent Case Notes

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RECENT CASE NOTES

Civil Procedure — Venue — Necessary Parties

P sued D1, an individual, and D2, a corporation, in Dallas County, D2's principal office, for injuries sustained as a result of an automobile collision in Titus county in which all parties were involved. D1 filed a plea of privilege to be sued in the county of his residence which P controverted claiming that as D1 was a joint tortfeasor, he was a necessary party to P's suit against D2. Held: A joint tortfeasor is a necessary party to a suit against another joint tortfeasor against whom venue is properly sustained under some exception to the venue statute. Hill v. Melton, 311 S.W.2d 496 (Tex. Civ. App. 1958) error dism. (Although the above statement technically is dictum, it is believed that the apparent conflict existing in this area of law makes the particular point noteworthy.)

The statutes broadly provide that no person who is an inhabitant of this state shall be sued in a county other than the county of his residence. Tex. Rev. Civ. Stat. Ann. art. 1995 (1950). There are, however, certain enumerated exceptions whereby a defendant may be sued in a county other than his residence. Tex. Rev. Civ. Stat. Ann. art. 1995 (1-30) (1950). Under subdivision 29a, in a suit against two or more defendants, if the plaintiff sustains venue against one defendant under some other exception to article 1995, then the suit may be maintained in that county as to all necessary parties. Tex. Rev. Civ. Stat. Ann. art. 1995 (29a) (1950); Pioneer Bldg. & Loan Ass'n v. Gray, 132 Tex. 509, 125 S.W.2d 284 (1939); United States Steel Corp. v. Strong Drilling Co., 727 S.W.2d 791 (Tex. Civ. App. 1954); Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774 (1944) (dictum). The fact that it would be more convenient to try controversies among several parties in a single action, thereby avoiding multiple suits, is not a factor in applying the venue statute and its exceptions, Union Bus Lines v. Byrd, supra; Estate of Borel v. Moody, 273 S.W.2d 673 (Tex. Civ. App. 1954); Whitsett v. Whitsett, 201 S.W.2d 114 (Tex. Civ. App. 1947) error ref. n.r.e.; thus, a defendant may be a proper party to the suit yet not a necessary party within the meaning of subdivision 29a, Crawford v. Sanger, 160 S.W.2d 115 (Tex. Civ. App. 1942); Oakland Motor Car Co. v. Jones, 29 S.W.2d 861 (Tex. Civ. App. 1930).

In view of the positive provisions of article 1995, some of the early cases narrowly defined necessary party as embracing only a
person in whose absence no adjudication of any of the subject matter of the litigation could be had. \textit{First Nat'l Bank v. Pierce}, 123 Tex. 186, 69 S.W.2d 756 (1934); \textit{Reed v. Walker}, 158 S.W.2d 894 (Tex. Civ. App. 1942); \textit{Moore v. Hoover}, 150 S.W.2d 96 (Tex. Civ. App. 1941). A later case held that this construction was too strict, \textit{Pioneer Bldg. & Loan Ass'n v. Gray}, supra, and the prevailing view developed that a co-defendant is a necessary party under subdivision 29a, if the complete relief to which a plaintiff is entitled against the defendant properly suable in the county where suit is brought can be obtained only in a suit in which both defendants are parties. \textit{Pioneer Bldg. & Loan Ass'n v. Gray}, supra; \textit{Commonwealth Bank and Trust Co. v. Heid Bros.}, 122 Tex. 56, 52 S.W.2d 74 (1932); \textit{Kaisiske v. Ekern}, 278 S.W.2d 274 (Tex. Civ. App. 1954); \textit{Cockburn Oil Corp. v. Newman}, 244 S.W.2d 845 (Tex. Civ. App. 1951). Thus, obligors on a joint and several contract are necessary parties on the theory that the plaintiff is entitled to a \textit{joint} as well as a several judgment against each obligor which can be rendered only if both obligors are before the court. \textit{Ramey and Mathis v. Pitts}, 149 Tex. 214, 230 S.W.2d 211 (1950); \textit{Commonwealth Bank and Trust Co. v. Heid Bros.}, supra; \textit{Moody v. Kimball}, 173 S.W.2d 270 (Tex. Civ. App. 1943); \textit{American Seed Co. v. Wilson}, 140 S.W.2d 269 (Tex. Civ. App. 1940). Likewise, injunction proceedings require the presence of all parties in interest in order that a binding decree may be rendered against them, thereby enabling the plaintiff to gain full relief. \textit{Ladner v. Reliance Corp.}, —Tex.—, 293 S.W.2d 758 (1956). However, Texas courts have ruled on numerous occasions that joint tortfeasors are not necessary parties within the meaning of subdivision 29a, reasoning that either defendant would be liable for the damages sustained and the plaintiff could secure full relief by judgment and execution against either. \textit{Tarrant v. Walker}, 140 Tex. 249, 166 S.W.2d 900 (1942); \textit{Mercer v. Wiley}, 252 S.W.2d 984 (Tex. Civ. App. 1952); \textit{Jaques Power Saw Co. v. Womble}, 207 S.W.2d 206 (Tex. Civ. App. 1955); 1 McDonald, \textit{Texas Civil Practice} § 4.36 (1950). Although \textit{Union Bus Lines v. Byrd}, supra, also has been cited for the above proposition, see Comment, 32 \textit{Texas L. Rev.} 441, 448 (1954), this is probably not a correct interpretation of that case because it involved a cross action where a defendant sought to join a co-defendant on the basis of the \textit{Tarrant} rule and, for venue purposes, a cross-claim is treated as an independent suit making the defendant a \textit{plaintiff} as to that portion of the suit.
Under the fact situation, subdivision 29a would not be applicable.

Following the reasoning of Ramey and Mathis v. Pitts, supra, that a plaintiff is entitled to a joint and several judgment to gain full relief against each defendant jointly obligated to perform, the language in the principal case may be justified. It would seem that since joint tortfeasors have a joint responsibility to plaintiff for the damages sustained, the plaintiff can obtain full relief against either defendant only if a joint (and several) judgment can be rendered; this would necessitate the presence of all those jointly liable. However, the principal case ignores this theory and relies upon the Ladner case as authority that the test for a "necessary party" is whether an effectual decree could be rendered without his joinder. The principal case also omits any discussion of Tarrant v. Walker, supra.

It would seem that the plaintiff would not gain complete relief against either defendant merely by securing a several judgment as the Tarrant case held. Complete relief for a plaintiff seeking to enforce the joint liability of the defendant properly suable in the particular county would necessarily include a joint judgment which could not be obtained without the presence of all joint tortfeasors in one suit. Certainly, there seems to be no logical basis for differentiating between those jointly liable in tort and those jointly liable upon a contract, which must be done if the holdings in the Tarrant and Ramey cases are to be reconciled. Likewise, the Tarrant case ignores the difference between the rendition of a judgment and satisfaction of that judgment, for it would seem unrealistic to reason that plaintiff has complete relief by securing a several judgment against a defendant without the corresponding satisfaction of that judgment. In this respect, the writer believes the language in the instant case correctly expresses that a joint tortfeasor is a necessary party to a suit in which the plaintiff seeks to enforce the joint liability; however, it would seem that a joint tortfeasor would not be a necessary party to a suit if only the several liability of the defendant is sought to be enforced.

George D. Neal
Conflict of Laws — Legislative Jurisdiction — Enforcement of Support Statutes

D, while domiciled in California, was under a statutory duty to reimburse the state for sums expended for the care of his mother, a patient in a state mental institution. In 1951 D became domiciled in Texas, where, in 1953, California brought suit for all unpaid installments, including those which accrued after D had become domiciled in Texas. Held: Recovery will be permitted for support payments which accrue while an obligor is domiciled in the state seeking enforcement, but foreign statutes can impose no liability for payments which accrue after an obligor becomes domiciled in another state. California v. Corpus, —Tex.—, 309 S.W.2d 227, cert. denied, 356 U.S. 967 (1958).

The Federal Constitution, art. IV, §1, requires a state to give full faith and credit to a valid judgment of another state. Sherrer v. Sherrer, 334 U.S. 343 (1948); Sistare v. Sistare, 218 U.S. 1 (1910). Texas courts have enforced support payments ordered by the court of a sister state, Rumpf v. Rumpf, 150 Tex. 475, 242 S.W.2d 416 (1951), even though a like judgment could not be obtained in Texas, Gard v. Gard, 150 Tex. 347, 241 S.W.2d 619 (1951); Stout v. Stout, 214 S.W.2d 891 (Tex. Civ. App. 1948) error ref., and have held in contempt one who fails to comply with a foreign support order, Ex parte Helms, 152 Tex. 480, 259 S.W.2d 184 (1953). However, since the full faith and credit clause has not been interpreted to require the same recognition of statutes that must be accorded a valid judgment of another state, Alaska Packers Ass’n v. Industrial Acc. Comm’n, 294 U.S. 532 (1935), statutes of one state, as a general rule, have no extra-territorial effect under the Constitution, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Chicago, R.I. & P. Ry. v. Thompson, 100 Tex. 185, 97 S.W. 459 (1906). Every state does have discretion to recognize foreign statutes, and recognition is usually given unless the statute contravenes some public policy of the forum. Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932); Strawn Mercantile Co. v. First Nat’l Bank, 279 S.W. 473 (Tex. Civ. App. 1925). In the absence of statutory pronouncement, the extent of this recognition depends upon the common-law rule of legislative jurisdiction which requires that a state must have jurisdiction over the person in order to impose a duty of support. Restatement, Conflict of Laws § 457 (1934). The Texas statutory pronouncement was made when

The California support provisions involved in the principal case provide that the "children of a mentally ill person . . . shall be liable for his care, support, and maintenance in a state institution." Derring Cal. Code Ann., Welfare and Institutions § 6650. In Texas, the duty to support an indigent inmate of a state institution is imposed only upon a spouse or parent, and then only if concurrent ability to pay is proved. Tex. Rev. Civ. Stat. Ann. art. 3196a, § 2 (1952); State v. Stone, 290 S.W.2d 761 (Tex. Civ. App. 1956) error ref. n.r.e. However, if a spouse or parent is unable, a child may be obligated to maintain an incompetent who has no estate of his own. Tex. Prob. Code § 423 (1956). Under the uniform act, enforceable duties of support "... are those imposed or imposable under the law of any state where the alleged obligor was present . . . or where the obligee was present when the failure to support commenced, at the election of the obligee." Tex. Rev. Civ. Stat. Ann. art. 2328b-3(7) (Supp. 1958). In proceedings under the uniform act, most cases have held that the law of the responding state (Texas), and not the law of the initiating state (California), applies to enforcement of support. Rosenberg v. Rosenberg, 152 Me. 158, 125 A.2d 863 (1956); Daly v. Daly, 21 N.J. 599, 123 A.2d 3 (1956); Pennsylvania ex rel Dep't of Public Assistance v. Mong, 160 Ohio St. 455, 117 N.E.2d 32 (1954).

In the instant case, the provisions of the uniform act were held inapplicable since the procedural steps required to invoke the act had not been met. 309 S.W.2d at 230. The Court recognized that the obligation imposed by the California statute was not contrary to the public policy of Texas and permitted recovery for support payments which accrued while D was domiciled in California. In denying recovery for payments which accrued after D became domiciled in Texas, the Court followed the common-law rule of
legislative jurisdiction, Restatement, Conflict of Laws § 457 (1934), and held that since California no longer had jurisdiction over the person of D, he had no further duty of support. After expressing that the law of Texas does not impose the same duty of support as that of California (relying only on article 3196a, § 2, supra, for this statement), the Court reasoned that to enforce this duty after D became domiciled in Texas would be to deny him equality with all other citizens of Texas. If Texas follows the majority of the jurisdictions which hold that the law of the responding state (Texas) is applied, the result of the instant case possibly could be reached even when the uniform act is applied in view of the Court’s holding that Texas law imposes no duty to support a parent inmate of a state institution. However, since no distinction was made between indigent and incompetent persons, the Court could apply the provisions of the Probate Code and impose a duty of support after one becomes a Texas domiciliary by proof of a concurrent ability to pay. Tex. Prob. Code § 423 (1956); State v. Stone, supra. If “deny him equality with other citizens of the state,” 309 S.W.2d at 229, means that D was denied equal protection of the laws, the Court seems to negative its own argument by later stating that the “... California statutory requirement of support does not... appear prejudicial in any way to the general interest of the citizens of Texas.” 309 S.W.2d at 232. Although the equal protection clause is not amenable to precise definition, Louisville Gas and Elec. Co. v. Coleman, 277 U.S. 32 (1928), it seems settled that a classification is repugnant to this provision only when it is unreasonable, arbitrary, or capricious, Morey v. Doud, 354 U.S. 457 (1957); Barbier v. Connolly, 113 U.S. 27 (1885).

The instant case, of course, leaves unanswered the question whether, once the procedural requirements of the uniform act are met, Texas will follow the majority rule that the law of the forum applies and thus will refuse to enforce support payments of other jurisdictions on the basis of the holding in the principal case that Texas imposes no such obligation of support. If the majority rule is followed, it would seem that the primary purpose of the act will be thwarted. However, the instant case does hold that Texas will deny enforcement in common-law actions independent of the uniform act of payments accruing after the obligor has left the initiating state. This would not seem to effectuate the purpose of the uniform act since such act provides that the remedies are in addition to and do not supplant common-law remedies. The legislature unequivocal-
ly expressed the public policy of Texas by its passage of the uniform act. Thus, whether or not the procedural requirements of the act are met, the policy of Texas is to enforce support obligations imposed by other jurisdictions. This writer believes the position of the Court in the instant case is an unfortunate one, especially so since the question was one of first impression, and the public policy of Texas could have found expression in the case law. In this age of mobility when people easily can and often do change their domicile, there must be co-operation among the states for any jurisdiction to have effective support laws.

Larry L. Bean

Constitutional Law — Citizens — Denationalization

P, a native-born American citizen, was court martialed and dishonorably discharged from the Army in 1944 for desertion in time of war. In 1952, P's application for a passport was denied on the authority of the Nationality Act of 1940 which provides for loss of the citizenship of a native-born citizen upon conviction by court martial of desertion in time of war. In 1955, P brought this action seeking a declaratory judgment that he is a citizen. Held: Congress cannot deprive a native-born citizen of his citizenship because of desertion from the armed forces. (Four Justices of the majority expressed the opinion that Congress is without the power to denationalize a native-born citizen against his will under any circumstances, and, in the alternative, that denationalization is a cruel and unusual punishment prohibited by the eighth amendment; a fifth Justice concurred in the decision, but on the theory that denationalization is not reasonably calculated to achieve the ends which Congress is authorized to achieve under the war powers of the Constitution.) Trop v. Dulles, 356 U.S. 86 (1958) (5-4 decision).

It is well established that the Constitution confers an absolute right of citizenship only upon native-born persons. U.S. Const. amend. XIV, § 1; United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898). The question of whether or not Congress has the power to take away citizenship arose when early legislators argued that the power to naturalize, U.S. Const. art. I, § 8, cl. 4, necessarily implied the power to withdraw citizenship, see Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25 (1950).
This argument was conclusively rejected by Mr. Chief Justice Marshall who expressed that the power to naturalize extended only to prescribing uniform rules of naturalization which, when exercised, was exhausted. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 827 (1824). This language, along with the decision in *Wong Kim Ark*, *supra* (that the Chinese Exclusion Act did not apply to persons of Chinese descent born in this country) has led some courts to express (usually by dictum) that Congress is without power to deprive a citizen of his citizenship. See *Perri v. Dulles*, 206 F.2d 586, 591 (3d Cir. 1953); *Acheson v. Maenza*, 202 F.2d 453 (D.C. Cir. 1953); *Terada v. Dulles*, 121 F. Supp. 6 (D. Hawaii 1954); *Okimura v. Acheson*, 99 F. Supp. 587 (D. Hawaii 1951), rev'd, 342 U.S. 899 (1951); Note, 40 CORNELL L.Q. 365 (1955).

In an effort to overcome this early limitation on the power of Congress to take away citizenship, the Court asserted in *Mackenzie v. Hare*, 239 U.S. 299 (1915), that the power of the national government to regulate foreign affairs necessarily includes the power to denationalize, but limited this power to those cases in which the citizen concurred in his own denationalization, although it was conclusively presumed that the citizen did concur if he voluntarily engaged in an act designated in the statute which was deemed tantamount to voluntary expatriation. Accord, *Savorgnan v. United States*, 338 U.S. 491 (1950); *Perkins v. Elg*, 307 U.S. 325, 329 (1939); *Acheson v. Maenza*, *supra*.

The constitutional basis for implying a power to denationalize from the power to regulate foreign affairs, see *Mackenzie v. Hare*, *supra*, seems to have been established firmly in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), where it was asserted that, since the federal powers of external sovereignty could not be granted by the states (which never possessed such sovereignty), the complete powers of national sovereignty which are necessary to the existence of any nation do not depend upon any affirmative grants in the Constitution. Presumably upon the authority of the *Mackenzie* and *Curtiss-Wright* cases, Congress has enumerated certain acts which, if voluntarily done by the citizen, furnish the necessary concurrence required to denationalize the citizen, regardless of his subjective intent, *Immigration and Nationality Act of 1952*, 66 Stat. 163 (1952), 8 U.S.C. § 1481, and the courts have continued to uphold Congress' power to denationalize without seriously challenging the constitutionality of that power, see *Perez v. Brownell*, 356 U.S. 44 (1958); *Burnet v. Brooks*,
In Perez v. Brownell, supra, decided on the same day as the instant case, the Court affirmed the congressional power to declare forfeiture of citizenship a consequence of voluntarily voting in a foreign election pursuant to the Immigration and Nationality Act, supra, §1481(a)(5). The majority in Perez first expressed that the only issue to be determined in such cases is whether the means (loss of citizenship) is reasonably related to an end which is within the power of Congress to achieve, viz., avoidance of embarrassment and conflict in the conduct of our foreign affairs, but the majority later expressed that such means must be reasonably calculated to actually effect the end. Compare this language with Mackenzie v. Hare, supra. In the instant case, four Justices of the majority (the dissenters in the Perez case) concurred in an opinion expressing that citizenship is not subject to the general powers of the national government and, therefore, cannot be divested by Congress; however, they recognized that citizenship may be voluntarily relinquished by appropriate language and conduct which shows the citizen's concurrence. 356 U.S. at 87. Though the principal case may appear inconsistent with Perez v. Brownell, supra, and previous cases, there are two distinguishing factors which seem to indicate that the instant case does not conflict with the Court's position in Perez. Unlike Perez, the principal case involved a criminal act (desertion), and four Justices reinforced their opinion with the expression that denationalization imposed as a penalty for a criminal act is cruel and unusual punishment prohibited by the eighth amendment. Of greatest significance, however, is Mr. Justice Brennan's concurring opinion, in which he affirms Congress' power to denationalize, 356 U.S. at 105, but considers deprivation of citizenship as not reasonably calculated to achieve Congress' legitimate purpose, viz., strengthening allegiance and discipline in the armed forces in time of war under the war power of the Constitution, U.S. Const. art. I, §8, cl. 14. For Mr. Justice Brennan, the fifth and decisive member of the Court, the essential factor in the test employed by the majority in Perez is whether the act of denationalization is reasonably calculated to terminate the problem arising from a citizen's doing the act in question, rather than merely
whether denationalization is reasonably related to that end which is within the power of Congress to achieve (which was sufficient for the other four Justices of the majority in Perez who dissented in the principal case). This test seems to both extend and restrict the more general test applied by the majority in Perez.

The end sought to be achieved in Perez was avoidance of embarrassment in foreign affairs occasioned by an American citizen voting in a foreign election, which might result in a charge that the United States was interfering in the internal affairs of the foreign country. Thus, denationalization itself was reasonably calculated to avoid such embarrassment since termination of the citizenship terminated the problem at the instant the person voted; he was no longer an American citizen, and the United States could not be held responsible for his action. In the instant case, denationalization neither prevented the injurious consequences of desertion in time of war nor bore any reasonable relation to such prevention, and thus, in Mr. Justice Brennan's view, was not reasonably calculated to achieve the desired end. Therefore, the end to be achieved must be within the powers of Congress (whether under the foreign affairs or the war powers), and the denationalization itself must be reasonably calculated to achieve that end, and not merely related to the particular power. It seems that denationalization would not, for example, alleviate the consequences of treason or going abroad in time of war to escape military service, both of which are enumerated in the present statute but which would not be effectively curtailed by taking away the actor's citizenship. With the present membership of the Court, it appears that this test applied by Mr. Justice Brennan will prevail in future cases arising under the statute.

Ray Besing

Insurance — Securities — Variable Annuity Contracts

D, regulated by the District of Columbia Superintendent of Insurance, was authorized to issue contracts called variable life annuities under which the premiums paid to D were to be invested in securities. The variable annuity's benefit payments, based in part on mortality and actuarial computations, would vary in amount each period according to D's investment experience. The sale of variable annuity contracts was D's principal business. The Securities Exchange Commission, claiming that these contracts were securi-
ties and that \( D \) was an investment company, brought suit to en-
join the issuance of these policies until \( D \) fulfilled the registration
requirements of the Securities Act of 1933 and the Investment
Company Act of 1940. Held: When variable annuity contracts are
subjected to supervision by a state insurance commissioner, such
contracts, being insurance in legal contemplation, are exempted
from the Securities Act and the Investment Company Act and
subject to exclusive state regulation (which includes the District
of Columbia) by virtue of the McCarran Act of 1945. SEC v.
Variable Annuity Life Ins. Co., 257 F.2d 201 (D.C. Cir. 1958),
cert. granted, CCH FEDERAL SECURITIES LAW REP. No. 661 (1958).

Interstate business transactions are subjected to federal regula-
tion under several statutes designed to protect the public from fraud.
Loss, SECURITY REGULATION 83 (1951). The Securities Act of
1933 requires an issuer or underwriter of securities to disclose cer-
tain information concerning the security, the issuer, and the un-
derwriter in a registration statement before the security is offered
A “security” as defined by the act includes any investment contract
or any certificate of interest or participation in any profit-sharing
agreement. 48 STAT. 74 (1933), 15 U.S.C. § 77b(1) (1952). The
SEC has no authority to approve or disapprove a security; its func-
tion is to assure that the registration statement is accurate and
complete. (The issuer is subject to civil and criminal liabilities
for failure to register, material misstatements, or omissions.) Loss,
SECURITY REGULATION 83-4 (1951). A corporation or issuer which
is engaged or proposes to engage primarily in the business of in-
vesting, reinvesting, or trading in securities, is also subject to the
regulative provisions of the Investment Company Act of 1940.
The typical investment company is one in which funds of relatively
small investors are pooled in order to secure the benefits of expert
investment planning and diversification of investments. Note, 41
COLUM. L. REV. 269 (1941). In addition to requiring full dis-

closure of the company’s activities through registration, the act
forbids certain organizational and operational practices, fortifying
these prohibitions with both injunctive relief and criminal penalties.
54 STAT. 797 (1940); 15 U.S.C. §§ 80a-35, 80a-36, 80a-48 (1952).
Although interstate insurance business is not beyond the regula-
tive powers of the federal government, United States v. South-Eastern
Underwriters Ass’n, 322 U.S. 533 (1944), Congress disavowed the
desire to so regulate in the McCarran Act of 1945, which declares that no act of Congress shall be construed to impair, invalidate, or supersede state insurance laws unless such act expressly relates thereto. 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-15 (1952). However, jurisdiction under federal acts which are not expressly related to insurance is not precluded as to those insurance matters which the state has not subjected to its regulation. FTC v. American Hosp. & Life Ins. Co., 357 U.S. 560 (1958) (misleading advertising). The Securities Act exempts insurance contracts and annuity contracts from its registration requirements, 48 STAT. 74 (1933), 15 U.S.C. § 77c-3(a)(8) (1952), while the Investment Company Act exempts from its regulation any insurance company primarily engaged in the business of insurance and regulated by a state insurance commissioner, 54 STAT. 797 (1940), 15 U.S.C. §§ 80a-2(a)(17), 80a-3(c)(3) (1952). It has been held that an exemptive provision should be construed narrowly, Spokane & Inland Empire R.R. Co. v. United States, 241 U.S. 344 (1916), and that any person claiming an exemption has the burden of proving he belongs to the exempted class, SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

The problem of whether variable annuity contracts come within the scope of federal regulation necessarily involves a construction of these statutes and an analysis of the variable annuity contract. The Securities Act and the Investment Company Act, being remedial, are to be construed broadly so as to afford the investing public the full measure of protection and to give effect to the purpose of the two acts. SEC v. Payne, 35 F. Supp. 873 (D.C.N.Y. 1940). However, statutory language should be construed in accordance with its meaning at the time of the statute's passage rather than a meaning subsequently acquired. Westerland v. Black Bear Mining Co., 203 Fed. 599 (8th Cir. 1913). In determining whether a scheme is subject to regulation, form is disregarded for substance, and emphasis is placed on economic reality. SEC v. W. J. Howey Co., 328 U.S. 293 (1946); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943). Although a variable annuity does contain certain insurance features, viz., life contingency factors, guaranteed mortality factors, etc., it also contains elements characteristic to a security, viz., investment risk borne by the purchaser rather than the issuer, and extended authority of the issuer to invest in equities of other companies. Hauserman, The Security in Variable Annuities, 1956 Ins. L.J. 382; Johnson, The Variable Annuity:
What It Is and Why It Is Needed, 1956 Ins. L.J. 357. The conventional annuity issuer, unlike the issuer of variable annuities, traditionally invests in secured long-term debt obligations and provides fixed and guaranteed benefits to the annuitant. See, e.g., Flarsheim v. United States, 156 F.2d 105 (8th Cir. 1946).

From an analysis of the variable annuity, it would seem that the security elements outweigh the insurance features and to that extent it could be argued that the contract is in substance a security subject to regulation under the Securities Act. See SEC v. W. J. Howey Co., supra. If the statutory exemption of annuities is construed in accordance with its meaning at the time of the passage of the statute rather than with a meaning subsequently acquired, Westerlund v. Black Bear Mining Co., supra, it would seem that a variable annuity would not be exempted, for the conventional annuity was at the time of the passage of the act and still is the predominant annuity contract, Hausserman, The Security in Variable Annuities, supra. If the variable annuity is in substance a security, D, whose primary business is issuing variable annuities, would be subject to regulation under the Investment Company Act. If the variable annuity is not construed as a security in substance, the possibility of federal regulation would seem to depend on whether or not the concepts of "insurance" and "security" are mutually exclusive categories. If they are mutually exclusive and the contract is found to be essentially insurance, the McCarran Act would preclude federal regulation, if D's business is subjected to state insurance regulation. Cf. FTC v. American Hosp. & Life Ins. Co., supra. However, it is doubtful that Congress intended by its passage of the McCarran Act to surrender regulation of the security or non-insurance elements of the contracts to the several states, cf. United States v. Sylvanus, 192 F.2d 96 (7th Cir. 1951), cert. denied, 342 U.S. 943 (1951), which would indicate that the two concepts are not mutually exclusive. Therefore, it would seem that concurrent regulation would be possible.

The Securities Act and the Investment Company Act have one common purpose, viz., the disclosure of pertinent information concerning the security and its issuer to the investor. However, regulation under the Investment Company Act seeks to prevent other potential abuses invited by the highly liquid character of investment companies with which states have scarcely attempted to cope, e.g., sale of control of the investment company, acquisition of control of other companies, interlocking directorates, reorganizations,
and excessive compensation to management. If the investor and the public are denied the protection afforded by these federal acts, which is the result of the holding of the principal case with respect to variable annuities, they would have to rely solely on the good faith of the issuer and the quality of supervision afforded by the state insurance commissioner which in many instances is inadequate. Had the court not conceived that the concepts of "insurance" and "security" are mutually exclusive categories, concurrent jurisdiction may have been reached. Hence, it would seem that the Supreme Court in reviewing the case should be concerned with what the court in the principal case failed to do, viz., isolate the non-insurance or security elements of these contracts and ascertain if concurrent jurisdiction is possible.

James Weaver Rose

Labor Relations — Collective Bargaining — Pre-Strike Ballot Clause

The employer, engaged in the negotiation of a new labor contract with the union, insisted that a pre-strike ballot clause be included in the contract. This clause would provide that if any nonarbitrable dispute was not settled within the specified negotiation period a secret vote of all employees would be taken, rejecting the employer's last offer, before calling a strike. The union offered to accept the employer's proposals on subjects requiring mandatory bargaining if the employer would not require the "ballot" clause to be included in the contract. Upon the employer's refusal to omit the "ballot" clause, the union filed charges with the National Labor Relations Board contending that the employer's insistence upon such clause as a condition precedent to any contract was an unfair labor practice. Held: A pre-strike ballot clause is not within the definition of mandatory collective bargaining; insistence, even in good faith, upon non-mandatory matter as a condition precedent to any labor contract is tantamount to a refusal to bargain. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (5-4 decision).

The Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1952), provides that it is an unfair labor practice for an employer or the representative of the employees to refuse to bargain collectively about certain topics. This duty to bargain collectively requires the
employers and the employees' representatives to confer in good faith with respect to "... wages, hours, and other terms and conditions of employment...." This statutory language outlines the area of mandatory bargaining, *i.e.*, concerning these subjects the parties *must* bargain; but they are not required to agree on any proposal or to make a concession. Taft-Hartley Act § 8(d), *supra*. Thus, in this area of mandatory bargaining, any proposal may be insisted on to the point of impasse by either party, the single qualification being that such insistence is in good faith. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). This area includes such subjects as an employee stock-purchase plan, *Richfield Oil Corp. v. NLRB*, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956), a profit-sharing retirement plan, *NLRB v. Black-Clawson Co.*, 210 F.2d 523 (6th Cir. 1954), and group insurance, *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949). Parties may bargain concerning non-mandatory items, *i.e.*, items not within the area of mandatory bargaining, and these items may be included in the labor contract if agreed on. *NLRB v. Dalton Tel. Co.*, 187 F.2d 811 (5th Cir.), *cert. denied*, 342 U.S. 824 (1951). Certain topics, however, which violate the purposes of the act, cannot be proposed or included in the contract even by mutual agreement and therefore are illegal per se. See, *e.g.*, *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (contract to be oral only); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (individual contracts with employees not to bargain for closed shop or signed agreement).

A provision under which the union agrees not to strike during the term of the contract, *i.e.*, a "no-strike" clause, has been held to be within the area of mandatory bargaining and thus employers may refuse to contract without it. *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948); see also *NLRB v. American Nat'l Ins. Co.*, *supra* at 408 n. 22. The Seventh Circuit has held that that a "pre-strike" ballot clause and a "ratification" clause requiring a vote of employees to affirm the position of their representative are also within the area of mandatory bargaining and may thus be insisted upon if done so in good faith. *Allis-Chalmers Mfg. Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954). Subsequently, it was held that "ratification" clauses are non-mandatory items which are legal and valid if agreed to, but as employers are required to bargain concerning mandatory bargaining subjects and can do so only with the employees' representative, Taft-Hartley Act § 9(a), *supra*, an employ-
er's insistence on such ratification as a condition to the validity of the contract undermines the representative status of the union and thus is sufficient for a finding of bad faith. *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956); see also *NLRB v. Corsicana Cotton Mills*, 178 F.2d 344 (5th Cir. 1949). The lower courts have held that certain non-mandatory items which are valid if agreed to may not be insisted upon as a condition precedent to the contract because such insistence amounts to a refusal to bargain collectively over the mandatory items, e.g., *NLRB v. Pechur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), cert. denied, 347 U.S. 973 (1954) (demand that union call off strike); *NLRB v. Dalton Tel. Co. supra* (demand that union comply with state licensing requirement); *Allis-Chalmers Mfg. Co. v. NLRB*, supra at 376 (dictum); see also *NLRB v. Taormina*, 244 F.2d 197 (5th Cir. 1957) (demand that union post performance bond). The principal case represents the first time the Supreme Court has found it necessary to decide the effect of insistence upon non-mandatory matters as a condition precedent to any contract.

The purpose of the National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), was to facilitate the organization of labor unions and to establish the collective bargaining process, but the growth of strong unions and the increase in collective bargaining have stimulated government regulation of the terms of an agreement in addition to these organizational aspects. Cox and Dunlop, *Regulation of Collective Bargaining by the NLRB*, 63 Harv. L. Rev. 389 (1950). In order to reduce strikes and balance the power between unions and employers, the Taft-Hartley Act as proposed in the House of Representatives included in a list of permissible subjects of bargaining a pre-strike vote clause which was to prevent the union from striking without the employees' consent. *Hearing before Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 562-65, 572-78, 586-89 (1947).* The Senate rejected the list of permissible subjects and substituted the good-faith test of section 8(d). H. R. Rep. No. 510, 80th Cong., 1st Sess. 34-35 (1947). Although the general trend of decisions has been toward a broadening of the area of mandatory bargaining, see, e.g., Cox and Dunlop, *supra* at 397; Annot., 12 A.L.R.2d 265 (1950), this case declares the "ballot" clause to be a non-mandatory subject of bargaining. The "ballot" clause was distinguished by the Court from the mandatory "no-strike" clause by a finding that the latter regulates only the relation-
ship between the union and the employer, while the former regulates the relationship between the union and the employee, i.e., it determines the method of striking, an internal function of the union. 356 U.S. at 350. The Court reasoned that the employer's insistence on non-mandatory matters as a condition to acceptance of mandatory provisions upon which there is agreement, amounts to a refusal to bargain altogether because, in order to validate the contract, the union must accept matters upon which there is no duty to bargain. 356 U.S. at 349. This reasoning requires the determination of whether the clause insisted on (the "ballot" clause) is a mandatory or non-mandatory subject of bargaining. But see NLRB v. American Nat'l Ins. Co., supra at 408-09, where it was said that it is not the function of the NLRB to pass on the substance of the contract or desirability of terms; these are for determination across the bargaining table. If there had been no finding of good faith in the instant case, the Court could have followed NLRB v. Darlington Veneer Co., supra, and held that insistence on this clause to the point of impasse indicated bad faith. Such a holding might have been approved by the dissenters in the instant case, who thought that the ultimate test should be whether or not the parties' insistence on the non-mandatory "ballot" clause was in good faith and that, while insistence in good faith on a non-mandatory topic may require another to bargain over it, this would be due to the economic position of the parties and should not affect the Court's construction of the act. 356 U.S. at 357-58.

In view of the general trend of decisions, this Court's holding that the pre-strike ballot clause is non-mandatory was unexpected. The Court's distinction between a no-strike clause and a pre-strike ballot clause seems hardly adequate to justify placing the former within the loosely defined and ever-broadening area of mandatory bargaining and the latter without. In both cases the employees waive their right to strike under the statute; in the former at the inception of the contract for its duration; in the latter the right is conditionally waived after negotiation for a subsequent contract ends. If the employer has the right to bargain in one instance, he would seem entitled to such a right in the other. It may well be that to avoid the effect of this decision, bargaining agents will be advised not to agree on mandatory bargaining subjects until the proposals on non-mandatory items are accepted. If an astute bargaining agent submits an unacceptable proposal on the mandatory subjects (yet not so unacceptable as to show bad
faith) in all probability there will be no agreement on the mandatory bargaining subjects and hence insistence on non-mandatory provisions could not be a condition precedent to the contract. A subsequent acceptance of non-mandatory proposals would be followed by agreement to mandatory bargaining subjects. Only a finding of bargaining in bad faith could support a charge of refusal to bargain and this would be extremely difficult to prove. In the last analysis, the Court may be forced to adopt the test of the dissent (good faith) which seems better able to carry into effect the legislative intent of free negotiation.

Cecil A. Ray, Jr.

**Municipal Corporations — Zoning Ordinances — Abutter's Right of Access**

P erected a ten-story parking garage at the corner of Soledad and Houston Streets in San Antonio and constructed a driveway across the sidewalk on Soledad Street. Subsequently, the city denied P a permit to build a driveway across the Houston Street sidewalk. The following month the city council enacted an ordinance forbidding the issuance of permits to construct driveways along a portion of Houston Street which included P's property. P sought to compel issuance of the permit by writ of mandamus. **Held, mandamus denied:** A municipal ordinance which prohibits construction of an additional driveway by an abutting property owner is, if reasonable, a valid exercise of the municipality's police power and not a "taking" of the owner's right of access under the power of eminent domain. **San Antonio v. Pigeonhole Parking**, —Tex.—, 311 S.W.2d 218 (1958).

It has long been established that the right of ingress and egress from a public highway is an incident to the ownership of land abutting thereon. **Anzalone v. Metropolitan Dist. Comm'n**, 257 Mass. 32, 153 N.E. 325 (1926); **Story v. N.Y. Elevated Ry.**, 90 N.Y. 122 (1882); **McQuillen, Municipal Corporations** § 30.63 (3d ed. 1950). This right or easement of access exists whether the fee to the highway is in the city or in the abutting owner, **Johnson v. Watertown**, 131 Conn. 84, 38 A.2d 1 (1944); **Southwestern Tel. and Tel. Co. v. Smithideal**, 104 Tex. 258, 136 S.W. 1049 (1911); **Donahue v. Keystone Gas Co.**, 181 N.Y. 313, 73 N.E. 1108 (1905), and includes the owner's right to construct driveways in order to

As the right of ingress and egress is private property, *Allen v. Reed and Presbrey*, 50 R.I. 53, 144 Atl. 888 (1929); *Story v. N.Y. Elevated Ry.*, supra; *Gulf Refining Co. v. Dallas*, 10 S.W.2d 161 (Tex. Civ. App. 1928), it cannot be "taken" by the municipality for public purposes pursuant to the power of eminent domain unless just compensation is paid to the property owner, U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 17; *Powell v. Houston & T.C. R.R.*, 104 Tex. 219, 135 S.W. 1153 (1911). The courts have experienced difficulty in determining what constitutes a "taking," but it is settled that "taking" is not restricted in meaning to a physical appropriation of the land. *McQuillin*, supra at § 32.26.

Any action by the municipality which materially interferes with the right of access, e.g., the lowering of a street, the effect of which places the abutting property in a cul-de-sac, *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943), or the erection of a subway or barrier in front of the abutting property, *Rose v. State*, 19 Cal. 2d 713, 105 P.2d 302 (1940); *Royal Transit, Inc. v. West Milwaukee*, 266 Wis. 271, 63 N.W.2d 62 (1954), has been held to constitute a "taking" of the right.

The abutter's easement of ingress and egress is subject, however, to reasonable regulation by a municipality in pursuance of its police power. For example, reasonable traffic ordinances may be imposed when required by the public safety and welfare. *Commonwealth v. Nolan*, 189 Ky. 31, 224 S.W. 506 (1920); *Jones Beach Blvd. Estate v. Moses*, 268 N.Y. 362, 197 N.E. 313 (1935). Although such regulation may cause inconvenience or loss to the abutter, he is entitled to no compensation, for his loss is "damnum absque injuria." *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560 (1927). It has been recognized that the municipal authority may, pursuant to its police power, *regulate* the manner in which the abutter may use or construct driveways. *Brownlow v. O'Donoghue*, 276 Fed. 636 (D.C. Cir. 1921). The courts have not been in accord, however, as to whether the municipality may without payment *prohibit* the construction or use of a driveway. The majority of cases have held that an absolute prohibition is a "taking" of the abutter's right of access for which just compensation must be paid. *Howell v. Board of Comm'rs*, 169 Ga. 74, 149 S.E. 779 (1929); *Newman v. Mayor of Newport*, 73 R.I. 385, 57 A.2d 173 (1948);
Courts adhering to this view have considered immaterial the fact that the abutter has other means of ingress and egress. See, e.g., *Newman v. Mayor of Newport*, supra; Annot., 22 A.L.R. 942 (1923). A minority of jurisdictions, however, regard such a prohibition as a legitimate exercise of the police power, provided that the abutter has access to his premises from another street. *Tilton v. Sharpe*, 85 N.H. 138, 155 Atl. 44 (1931); *Breinig v. County of Allegheny*, 332 Pa. 494, 2 A.2d 842 (1938).

The principal case was one of first impression in committing Texas to the minority view. The Court recognized that the owner of land abutting on a public way has an inherent right of ingress and egress to the way, see *Adams v. Grapotte*, 69 S.W.2d 460 (Tex. Civ. App. 1934), aff'd, 130 Tex. 587, 111 S.W.2d 690 (1938); *Gulf Refining Co. v. Dallas*, supra, but reasoned that if, to promote public safety, the municipality prohibits the owner from constructing an additional driveway, the prohibition, if reasonable, is a mere police-power regulation rather than a “taking” of the right of access. The apparent dichotomy which results from holding that a prohibition which effectively destroys an admitted property right is not a “taking” is difficult to justify. Attempting to avoid this complication, one court held that the right of ingress and egress extended only to one means of access to the premises, and that if one means exists, the abutting owner has no right to an additional means of access. *Fowler v. Nelson*, supra. Since there is no right to construct an additional driveway, a prohibition of this construction cannot infringe upon any right. Other jurisdictions reach the same result by recognizing that the right exists, but reasoning that once an abutter has a driveway to his premises, his right to construct an additional driveway is subordinate to the superior right of the public to use the street for purposes of travel and transportation. *Breinig v. County of Allegheny*, supra; Wood v. *City of Richmond*, supra; ROTTSCHEFER, CONSTITUTIONAL LAW § 299 (1939). Thus, a city may, pursuant to its police power, prohibit him from constructing the additional driveway if the object of such prohibition is to promote the public safety and convenience. *City of Shawnee v. Robbins Bros. Tire Co.*, 134 Okla. 142, 272 Pac. 457 (1928).

Public policy undoubtedly requires that a municipality have the power to prohibit construction of driveways in congested areas in the interest of public safety. The crucial question, however, is whether the municipality should be compelled to compensate property own-
ers whose rights are effectively destroyed by the exercise of such power. Under the holding of the principal case, compensation is not required if the prohibition is "reasonable." It would seem that the issue of whether or not the abutting owner is to be compensated should be determined by the degree to which the action of the municipal authority impairs the rights of the owner rather than by balancing the benefit to the public against the harm caused to the owner, i.e., by the "reasonableness" of the action. Although the majority view, requiring compensation if the property right is effectively destroyed, seems the more logical one, the rule of the principal case (that an abutter has a right to construct additional driveways, subject only to reasonable regulation by the city) does provide the property owner somewhat more protection than is provided in some other minority jurisdictions. In those jurisdictions which hold that there is either no right to an additional driveway or that such right is subordinate to the public’s right to use the street, the owner would be entitled to no compensation even though, as to him, a prohibition might be clearly unreasonable.

Lester V. Baum

Oil and Gas — Leases — "Cessation of Production"
Under the Dry Hole Clause

In 1950 P lessor executed in favor of D lessee an "unless" type oil and gas lease having a ten-year primary term and containing a dry-hole clause providing that if, after discovery of oil or gas within the primary term, the production thereof should cease, the lease would not terminate if the lessee resumed payment of delay rentals. Lessee completed a producing well in 1952; however, by 1954 the well had ceased to produce in paying quantities. Reworking of the well in 1955 failed to increase production and the lessee did not resume payment of delay rentals. Lessor brought an action claiming that the lease had terminated because of the lessee’s failure either to produce in paying quantities or to pay delay rentals. Held: Failure of the lessee to produce oil in paying quantities during the primary term does not terminate the lease under the dry-hole clause when he, in good faith and with reasonable diligence, produces marketable oil in any amount. Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N.W.2d 245 (1958).

The "primary term" of a modern oil and gas lease is a period
for exploration of usually ten years. 2 Summers, Oil and Gas §§ 281-307 (perm. ed. 1938). While this term is one of definite duration, it is often limited by the inclusion of an "unless clause," see e.g., Humble Oil & Refining Co. v. Davis, 296 S.W. 285 (Tex. Comm. App. 1927); under this type clause, the lessee must either drill within a stipulated period, usually one year, or pay annual "delay rentals" for the privilege of deferring such drilling to a later date; failure to do one or the other causes the lease to terminate automatically, even though the primary term has not yet expired. Guerra v. Chancellor, 103 S.W.2d 775 (Tex. Civ. App. 1937) error ref.; cf. Cox v. Miller, 184 S.W.2d 323 (Tex. Civ. App. 1944) error ref. If the lessee does drill, the inclusion of a "dry-hole clause" permits him to return to delay rentals or additional drilling (1) if a "dry hole" is drilled prior to discovery of oil or gas, or (2) if there is "cessation of production" after discovery of oil or gas. Braly, Problems Presented by Operations During the Primary Term of an Oil and Gas Lease, Southwestern Legal Foundation Sixth Annual Inst. on Oil & Gas L. & Tax. 189, 193-222 (1955); Masterson, A Survey of Basic Oil and Gas Law, Southwestern Legal Foundation Fourth Annual Inst. on Oil & Gas L. & Tax. 219, 268-70 (1953); cf. Superior Oil Co. v. Stanolind Oil & Gas Co., 150 Tex. 317, 240 S.W.2d 281 (1951). However, when the dry-hole clause is inapplicable, the lessee is not required to return to delay rentals or additional drilling, Sohio Petroleum Co. v. V.S. & P.R.R., 222 La. 383, 62 So. 2d 615 (1952); cf. Baker v. Huffman, 176 Kan. 554, 271 P.2d 276 (1954); Discussion Note, 3 Oil & Gas Rep. 1665, although he usually desires to engage in some sort of activity to prevent a ruling of abandonment, Texas Co. v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601 (1923). The habendum clause, on the other hand, provides for a period subsequent to the primary term which continues for as long as there is production which, by the majority view, means production in paying quantities, Comment, 11 Sw. L.J. 340 (1957); under it, permanent cessation of production in paying quantities after the primary term automatically terminates the lease, Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783 (1941); W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929). Although temporary cessation, due to mechanical difficulties or sudden stoppage, does not terminate the lease, Scarborough v. New Domain Oil & Gas Co., 276 S.W. 331 (Tex. Civ. App. 1925) error dism., if the contract expressly
states in a "continuous-drilling clause" that after the primary term the lease will terminate upon cessation of production unless the lessee commences additional drilling or reworking within sixty days, any cessation of production of more than sixty days will be considered "permanent" regardless of mitigating circumstances,木son Oil Co. v. Pruett, 281 S.W.2d 159 (Tex. Civ. App. 1955) error ref. n.r.e., Discussion Note, 4 Oil and Gas Rep. 2002; Haby v. Stanolind Oil and Gas Co., 228 F.2d 298 (5th Cir. 1955); McQueen v. Sun Oil Co., 213 F.2d 889 (6th Cir. 1954).

When considering the dry-hole and continuous-drilling clauses it is apparent that questions of defining "production" arise since their applicability depends upon (1) the drilling of a "dry hole" before discovery in the dry-hole clause, or (2) "cessation of production" after discovery in both clauses. Failure to state in the habendum clause that production "in paying quantities" is required does not, by the majority view, alter the effect of that clause since "production" under that view is held to mean production in paying quantities. Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942); Gypsy Oil Co. v. Marsh, 121 Okla. 135, 248 Pac. 329 (1926). But see Clifton v. Koontz, 305 S.W.2d 782 (Tex. Civ. App. 1957) error granted ("production" held not to mean production in paying quantities where the lessee could operate at a profit, even though for a substantial period he did not). In determining whether a well is producing in paying quantities, the test is whether or not the lessee has realized a profit after deducting current operating costs and royalties paid to the lessor. Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. Civ. App. 1923) error dism. It has been argued that the test and definition of "production" as used in the habendum clause should be applied to the dry-hole clause. Braly, supra at 206, 216; Kerr, Maintaining the Lease in Effect Other than by Payment of Delay Rentals and Shut-in Royalties, Southwestern Legal Foundation Fifth Annual Inst. on Oil & Gas L. & Tax., 337, 362-68 (1954). If so applied, a well incapable of producing in paying quantities would be a dry hole, and when a well ceases to produce in paying quantities, the lease would terminate if the lessee failed to resume payment of delay rentals or commence additional drilling. The principal case is the first to make affirmative statements with respect to this particular argument. See Walker, Defects and Ambiguities in Oil and Gas Leases, 28 Texas L. Rev. 895, 905-07 (1950).

Prior to the principal case, it had been held that the dry-hole
 clause was inapplicable where a well capable of producing in paying quantities had not actually produced. *Rogers v. Osborn*, 152 Tex. 540, 261 S.W.2d 311 (1953) (no production because of efforts to "clean" the well); *Sohio Petroleum Co. v. V.S. & P.R.R.*, supra (shut in for lack of a market). The argument has been made that the decisive factor in the *Rogers* case was the fact that the well was capable not only of production, but also of production in paying quantities. *Braly*, supra at 196. However, the principal case, favoring a literal construction, rejected the argument that "production" when used in the dry-hole clause means production in paying quantities as it does in the habendum clause, and defined "production" as used in the dry-hole clause according to its plain meaning. Cf. *Baker v. Huffnian*, supra; *Cox v. Miller*, supra; *Murphy v. Garfield Oil Co.*, 98 Okla. 273, 225 Pac. 676 (1923) (holding a well not producing in paying quantities not a dry hole). Distinguishing between the purpose of the primary term (to secure full development of the mineral estate) and the purpose of the period subsequent thereto (to allow both parties to reap the benefits of the venture), the court in the principal case concluded that the habendum clauses has no application during the primary term and, therefore, its definitions do not necessarily apply. Consequently, the court, desiring that the purpose of the primary term be accomplished without fear of termination, held that the dry-hole clause is wholly inapplicable when the lessee in good faith and with reasonable diligence produces marketable oil in any quantity. 89 N.W.2d at 255-56. Thus, the principal case is authority for the meaning of "production" as used in the dry-hole clause, but is not authority for the meaning of "production" as that term may be used in provisions which operate subsequently to the primary term, e.g., "cessation of production" phrase in the continuous-drilling clause. However, the similarity of wording in the dry-hole clause (operative *during* the primary term) and the continuous-drilling clause (operative *after* the primary term) often leads to a merger of the two clauses into one provision as in the lease form involved in the principal case, and the incorporation of the two distinct concepts into one clause could lead to substantive difficulties. Since the courts have interpreted "production" when used in the habendum clause to mean production in paying quantities, it is implicit that "production" when used in the continuous-drilling clause, whether this clause is incorporated with the dry-hole clause into one provision or not, also means production in paying quanti-
ties. See Garcia v. King, supra; Woodson Oil Co. v. Pruett, supra. Thus, if the definition of "production" as used in the principal case were improperly applied to that term as used in the continuous-drilling clause, the lease might terminate under the habendum clause for lack of a "saving" provision where production falls below paying quantities but does not cease altogether.

While the lessee's good faith and reasonable diligence probably were not decisive in the principal case, a lessee would be wise to exercise both. Nevertheless, it seems that the holding in the principal case allows the lessee considerable latitude in that he is permitted to maintain the lease during the primary term by producing marketable oil or gas in any quantity, rather than in paying quantities; however, it should be remembered that it is the lessee who bears the risk and the expense if the well is dry. The rule in the principal case could be circumvented by the lessor if the "cessation of production" phrase as used in the dry-hole clause were expanded to read "cessation of production in paying quantities." Whether this may be done will depend largely upon the lessor's bargaining power and his ability to effect a change in the printed lease forms in common use today. Otherwise, the decision of the principal case formulates a workable rule which will lead to the fulfillment of the purpose of the parties as expressed in the present lease form, provided that the ambiguity surrounding the relation of the dry-hole clause and the continuous-drilling clause could be resolved, possibly by placing the dry-hole clause and the continuous-drilling clause in separate provisions of the lease form.

Edward Copley, Jr.