South Carolina Law Review

Volume 11 | Issue 3 Article 7

Spring 1959

CASE NOTES

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CONSTITUTIONAL LAW — Due Process — Substituted Service on Nonresident Motorist's Liability Insurance Carrier. — The plaintiff, a Texas resident, was injured in a collision in Louisiana while a passenger in an automobile owned by the driver, an Oklahoma resident. The action was brought under the direct action statute in the Louisiana state court directly against the driver's liability insurer, an Oklahoma corporation which had not transacted any business in the State. [LSA-R.S. 22:665 "this right of direct action shall exist whether the policy of insurance sued upon was written or delivered in . . . Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana." LSA-R.S. 13:3475 provides for service of process on the nonresident or his insurer.] When the action was removed to the federal district court, the defendant insurer averred that the statute which allowed a direct action to be brought against foreign insurers was a violation of due process guaranteed by the 14th Amendment. Defendant moved to quash the service and dismiss the action. HELD: motion denied. The Louisiana legislature has the right to provide a forum through substituted service for a suit against a nonresident insurer, even though the insurer's only contact with the state was its "presence on the risk" when the accident occurred. *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E. D. La. 1958).

The direct action statute in the case at bar allows an injured party to bring an action against the insurer of a tort-feasor directly, joining the insurer and the tort-feasor, or an action against the insurer *in lieu* of the tort-feasor. The doctrine of *Pennoyer v. Neff*, 95 U. S. 714 (1878), which states that ". . . no State can exercise direct jurisdiction and authority over persons or property [from] without its territory" has caused great controversy to arise as to where the line of limitation on extra-territorial service of process should be drawn, particularly with respect to foreign corporations. Unquestionably the inroads into the doctrine have been caused by the advent of modern communication; more particularly the automobile. *Olberding v. Illinois Cent. Ry.*, 346 U. S. 338, 341 (1953). It is well established that a judgment in personam rendered against a nonresident who had not been served with process nor appeared in the suit is without validity. *McDonald v. Mabee*, 243 U. S. 90 (1917); *Hanson v. Denckla*, 357 U. S. 235, 246 (1958). Due process of law is

denied by the action of a state court in according full faith and credit to a judgment in personam rendered by a court of a sister state against a nonresident who was not personally served with a summons within the state, and who made no appearance in the action. *Old Wayne Mutual Life Ins. Ass'n v. McDonough,* 204 U. S. 8 (1907); *distinguished, Travelers Health Ass'n v. Virginia,* 339 U. S. 643, 653 (1950). But in the *McDonough* case, *supra,* no notice of this summons was given by the insurance commissioner to the defendant. The judicial trend began to turn when Justice Brandeis said that nonresident motorists are not denied their constitutional rights by the requirement of a New Jersey statute which made them appoint the secretary of state of New Jersey as their agent upon whom process could be served in any legal proceeding caused by the operation of their automobile within the state. *Kane v. New Jersey,* 242 U. S. 160 (1916); *Bomze v. Nordis Sportswear, Inc.,* 165 F. 2d 33, 36 (2d Cir. 1948). It was firmly established that a state could declare the use of its highways as equivalent to the appointment by the nonresident of a state officer as agent for service of process, while allowing for continuances to give the nonresident a reasonable time and opportunity to defend himself. The Court declared this a valid exercise of state police power. *Hess v. Pawloski,* 274 U. S. 352, 356, 357 (1927). The court reaffirmed this in *Wuchter v. Pizzutti,* 276 U. S. 13 (1928), by saying that the statute must contain a provision making it reasonably probable that the notice will be communicated to the person being sued. *Explained, Griffin v. Ensign,* 15 F. R. D. 200, 203 (M. D. Pa. 1953). The qualitative requirements were outlined a little more clearly when the Court said that ". . . a defendant to a judgment in personam . . . [must] have certain minimum contacts with . . . [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (1945). The boundary lines cannot be simply mechanical or quantitative. *Id.,* 326 U. S. 310, 318. In *Lumberman's Mutual Casualty Co. v. Elbert,* 348 U. S. 48 (1954); *followed, Collins v. Amer. Auto Insurance Co.,* 239 F. 2d 416, 418 (2nd Cir. 1956), the Court said that an insurer in an action under the direct action statute is not merely a nominal defendant, but the real party in interest, and that due process is not violated by a state statute compelling a foreign liability insurer, as a condition to doing business in the state, to consent to a direct action being brought against the insurer for injury occurring within the state. *Watson v. Employers Liab. Assurance Corp.,* 348 U. S. 66 (1954);

reh. denied, 348 U. S. 921 (1955). It has been long recognized that states may seize local activities which are part of multi-state transactions and regulate them to protect the interests of their own people. *Osborn v. Ozlin,* 310 U. S. 53 (1940); *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313 (1943); *Alaska Packers Ass'n v. Industrial Accident Comm'n,* 294 U. S. 532 (1935). Even though a liability insurance policy containing a no action clause is valid under the law of the place where the policy was issued, due process is not violated by a state statute which gives the injured person the right of direct action against the insurer before the final determination of the insured's obligation to pay. *Watson* case, *supra.* "Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provision of its laws whether they consent or not." *Id.,* 348 U. S. 66, 74. In the *Watson* case, *supra,* after stating the decisions relied on by the defendant, *e.g. Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,* 292 U. S. 143 (1934), the Court pointed out that situations might arise wherein the state's interest was so important that it could justify non-enforcement of a contract made outside its jurisdiction. The interest of Louisiana in taking care of its people injured within the state was determined to be of this type. Similarly, it had an interest in policies of insurance. The interests of the state wherein the contract was made cannot outweigh the interest of Louisiana in taking care of those injured therein. *Id.,* 348 U. S. 66. Mr. Justice Black in *McGee v. International Life Ins. Co.,* 335 U. S. 220 (1957), a California case in which the policy in dispute was the insurer's only connection with the forum, stated that it was ". . . sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the state." Similar circumstances and *accord, Ross v. Amer. Income Life Ins. Co.,* 232 S. C. 433, 102 S. E. 2d 743 (1958). In the instant case, *Pugh v. Oklahoma Farm Bureau Mutual Ins. Co., supra,* District Judge Wright held that "[i]t is the nature and quality of the contact, and the interest of the state therein which is determinate. . . . Since the accident within the state is sufficient contact to justify maintenance of the suit for damages against the nonresident motorist, it would seem that the same accident should justify the maintenance of suit against his nonresident liability insurer who, after all, is the real party in interest."

As the cases clearly indicate, the constitutionality of the direct action statute is established. An extension of the principles of substituted service statutes can not help but lead to direct action statutes. Sociological contact has been declared sufficient to satisfy due pro-

cess against the defense of full faith and credit to contractual rights arising in other states. This case, like many others, further whittles down the once revered doctrine of *Pennoyer v. Neff*. The attempt is successful because of the flexibility of the meaning given due process. The considerations which moved the court in 1878 (notice, adequate opportunity to defend, and a guarantee of a fair trial) are no longer dependent on physical presence within the jurisdiction. The considerations which move today's courts are a sensible application of the doctrine forum non conveniens and certain minimal contacts which give the state a legitimate interest in the action. The automobile and its attendant good and evil has wrought this doctrinal change. It is possible that these exceptions have gone so far as to obviate the rule; leaving only exceptional cases for its application. See *Hanson v. Denckla*, 357 U. S. 235 (1958). The courts will apparently hold, when a party is a real party in interest who has had adequate and proper notice, with sufficient time to prepare a defense, who is not greatly inconvenienced in traveling to the forum, and who receives substantial justice, that said party shall not have been deprived of due process of law, if there is strict compliance with the statute. The instant situation would not arise in South Carolina as there is no statute which makes possible direct action against foreign liability insurers. As it stands today, the South Carolina substituted service statute, CODE OF LAWS OF SOUTH CAROLINA, 1952, § 46-104, provides for an effective substituted service. With a direct action statute substantially like Louisiana's, South Carolina would be affording much more protection to those injured and killed on its roads and highways. This apparent disregard of contractual rights arising in sister states is nothing new to our federal system, which is flexible, and which must remain so if it is to live. The direct action statute is another step forward in helping to solve the perplexing problems brought about by the automobile. Intelligently applied, this statute would help to advance the cause of those who unfortunately have met tragedy on the highway.

ELLIS I. KAHN.

CONSTITUTIONAL LAW — Illegal Search and Seizure — Admissibility of Evidence Obtained Thereby. — The defendants were arrested in a raid upon a nudist camp pursuant to a warrant against other inhabitants of the camp. While purportedly on business at the camp, the two policemen who took out the warrants had witnessed violations of the Indecent and Open Exposure Statute of Michi-

gan. Over two weeks later the police returned, ostensibly to serve these warrants. They found that "bigger game" was "in the net". Within less than two minutes after a radio call by the two "shocked" officers, three carloads of policemen, conveniently cruising in the neighborhood, arrived on the scene. The defendants were herded before "clicking cameras" like "plucked chickens", hauled away in police cars, and questioned for over five hours. In a criminal action, the defendants were convicted of violations of C. L. S. 730.355a, the indecent exposure statute of Michigan. HELD: In a 4-3 decision, the Supreme Court of Michigan reversed the convictions on the grounds that the search and seizure was illegal. *People v. Hildabridle,* 353 Mich. 562, 92 N. W. 2d 6 (1958).

It is of the essence of a free government that the individual shall be secure in his person, his home, and his property from unlawful invasion, from unlawful search, from unlawful seizure. *People v. Marxhausen,* 204 Mich. 559, 171 N. W. 557, 3 A. L. R. 1505 (1919); *Nueslein v. District of Columbia,* 115 F. 2d 690 (D. C. Cir. 1940). In order to achieve this security, it is necessary that no officer should obtain entry upon another's premises by force or by an illegal threat. The prohibition of the Fourth Amendment of the Federal Constitution is against all unreasonable searches and seizures. *Gouled v. United States,* 255 U. S. 298 (1921); *Weeks v. United States,* 232 U. S. 383 (1914). However, the federal rule which excludes evidence obtained as a result of an illegal search and seizure is not imposed on the states as a requirement of due process. *Wolf v. Colorado,* 338 U. S. 25 (1949); *Stefanelli v. Minard,* 342 U. S. 117 (1951). Many state courts, including South Carolina's, prefer to admit evidence illegally obtained. *State v. Addy,* 210 S. C. 353, 42 S. E. 2d 585 (1947); *State v. Cook,* 204 S. C. 295, 28 S. E. 2d 842 (1944); *State v. Kanellos,* 122 S. C. 351, 115 S. E. 636 (1923); *contra, Blacksburg v. Beam,* 104 S. C. 146, 88 S. E. 441, L. R. A. 1916 E 714 (1916), discussed *infra.* Michigan is one of 21 states that follows the exclusionary rule. Under this rule if it would be unreasonable for a government officer to obtain entrance to a man's premises by force, or by an illegal threat or show of force, and then to search for and seize his private papers, it is impossible to contend that a like search and seizure would be reasonable if admission to the premises was obtained by stealth. *Gouled v. United States, supra; People v. Wilson,* 145 Cal. App. 2d 1, 301 P. 2d 974 (1956). It is necessary that officials, in the exercise of their power and authority, be put under limitations and restraints in order to secure the people, their persons, houses, papers, and effects against all unreasonable

searches and seizures under the guise of law. *Weeks v. United States, supra; Silverthorne Lumber Co. v. United States,* 251 U. S. 385 (1920). The necessity for such limitations and restraints has resulted in the requirement that, in most instances, warrants based upon probable cause must be issued before searches and seizures may be undertaken. *People ex rel. Clapp v. Listman,* 84 App. Div. 637, 82 N. Y. Supp. 784 (1903); *State v. Williams,* 45 Ore. 314, 77 Pac. 965, 67 L. R. A. 166 (1904). If such a requirement is to obviate the tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, then it follows that the warrant must be valid and follow lawful procedure before it can become an agency of lawful entry. *Weeks v. United States, supra; Boyd v. United States,* 116 U. S. 616 (1885). The character of the subject of the search does not affect the question of what procedure conforms to the conditions prescribed by the Constitution upon which warrants for search and seizure issue. *People v. Marxhausen, supra.* This protection reaches all alike, whether accused of crime or not. *Giordenello v. United States,* 357 U. S. 480, (1958); *Jones v. United States,* 357 U. S. 493, (1958); *Kremen v. United States,* 353 U. S. 346, (1958); *Weeks v. United States, supra.* In order for a warrant to be valid, the purpose for its procurement must coincide with the reason for its issue. If a warrant ostensibly obtained for one purpose is in reality procured to achieve a different result, then it is invalid as to the different result. *Gouled v. United States, supra; People v. Wilson, supra.* Thus, a search is unreasonable and unlawful where the warrants purportedly to be served were obtained as a subterfuge for gaining entrance to the premises and without the intent of making the specific arrests for which they called. *Gouled v. United States, supra; People v. Wilson, supra.*

Should evidence obtained as the result of an illegal search and seizure be admissible in a criminal prosecution of those persons towards whom it was unlawful? The authorities who support admission feel that the fact that it was obtained by means of an unlawful search and seizure should not reward the criminal and set him free to prey on society again. *A Symposium on Law and Police Practice,* 52 NORTHWESTERN L. REV. 46 (1957); 8 WIGMORE, EVIDENCE, §§ 2183-2184 b (1940). Other authorities who prefer exclusion feel that this is the only effective method of restraining overzealous police officials. *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513 (1955); 52 NORTHWESTERN L. REV. at 72 (1957); Assoc. of American Law Schools, SELECTED WRITINGS ON EVIDENCE

AND TRIAL, pp. 303-304 (1957) (generally); Chafee, 35 HARVARD L. REV. 673 (1922). While in the great majority of cases, South Carolina has followed the common-law rule of admissibility, in the case of *Blacksburg v. Beam, supra,* the South Carolina Supreme Court stated the following:

> It is fundamental that a citizen may not be arrested and have his person searched by force and without process in order to secure testimony against him. . . . It is better that the guilty shall escape, rather than another offense shall be committed in the proof of guilt.

In so far as this case holds that the evidence obtained by an unlawful search is inadmissible, it is opposed to the great weight of authority. However, the case has never been expressly overruled or distinguished from the other South Carolina cases. The fact that the Supreme Court has a precedent in accord with the exclusionary rule assumes greater significance in view of the trend which is toward the exclusionary rule. A moderate approach to the question of admissibility would seem most satisfactory. While it may be argued that an unlawful arrest should not entitle a citizen to an acquittal from an offense which he committed, it is equally arguable that only where unlawfully acting officers know that the prosecution cannot profit from a wrongful search and seizure will unreasonable police practices be curbed. The courts should treat the question of admissibility on a case by case basis. After weighing the relative merits of both interests, the court should either allow the evidence or reject it as would best serve the ends of justice. However, the efforts of the courts to bring the guilty to punishment, praiseworthy as they are, should not be allowed to override the great principle of constitutional protection of individual liberty. Thus there would be a presumption that illegally obtained evidence should not be admitted in a criminal prosecution. This presumption would be rebuttable only by a showing to the satisfaction of the court that the public interest in conviction was sufficiently strong to outweigh the rights of the individual. It is only where the court is clearly convinced that the better interests of society are to be served, that illegally obtained evidence should be allowed in the prosecution of an accused.

HARRY M. LIGHTSEY, JR.

DOMESTIC RELATIONS — Divorce — Motion to Reopen Default Divorce Judgment Denied Where Plaintiff Remarried. — Defendant wife suffered a judgment by default in a divorce proceeding

and made a motion to vacate the decree on the ground of excusable neglect. Defendant made this motion almost six months subsequent to the time that her attorneys learned of the decree. Plaintiff husband remarried five months after the decree of divorce was filed and was living with his second wife when the motion to vacate was made. The trial court denied motion to vacate the judgment and defendant appeals. HELD: It is not an abuse of discretion to refuse to vacate a default judgment where the explanation of the delay in making the motion to vacate is not satisfactory, and the rights of an innocent third person have been placed in jeopardy during the delay. *Grant v. Grant,* 233 S. C. 433, 105 S. E. 2d 523 (1958).

Vacation of judgments is a power conceded by common law to all the courts. *Kemp v. Cook,* 18 Md. 130, 79 Am. Dec. 681 (1861); *Ladd v. Stevenson,* 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748 (1899). In most jurisdictions statutes have been enacted authorizing the courts to vacate or set aside judgments rendered against a litigant through his surprise, mistake, inadvertence, or excusable neglect, *e. g.* CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1213. These statutes have been held to embrace default judgments in divorce proceedings. *Stevens v. Stevens,* 253 Ala. 315, 45 So. 2d 153 (1950); *Chambers v. Chambers,* 206 Ga. 796, 58 S. E. 2d 814 (1950), *aff'd,* 207 Ga. 582, 63 S. E. 2d 359 (1951); *Brock v. Brock,* 225 S. C. 261, 81 S. E. 2d 898 (1954). Notwithstanding the existence of the power to vacate, there is a manifest reluctance to disturb a final judgment of divorce, *Maker v. Title Guarantee & T. Co.,* 95 Ill. App. 363, 157 A. L. R. 25 (1901); *Bussey v. Bussey,* 95 N. H. 349, 64 A. 2d 4, 12 A. L. R. 2d 151 (1949), and the power to so vacate should be exercised with great caution. *Bussey v. Bussey, supra; Nichells v. Nichells,* 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515 (1895). The motion to vacate should not be granted unless there is a prima facie showing of a meritorious defense. *Zani v. Zani,* 325 Mass. 134, 89 N. E. 2d 342 (1949); *Savage v. Cannon,* 204 S. C. 473, 30 S. E. 2d 70 (1944); McKay, *Survey of South Carolina Law: Practice and Procedure,* 9 S. C. L. Q. 91, 97 (1956). On the other hand, some courts are inclined to the view that a default decree of divorce will be set aside more readily than default judgments in other actions, their reasons being to preserve the marital status of the persons involved and to prevent fraud. *Smith v. Smith,* 64 Cal. App. 2d 415, 148 P. 2d 868 (1944); *Foxwell v. Foxwell,* 122 Md. 263, 89 Atl. 494 (1914). It is almost universally held that the remarriage of the spouse who obtained a divorce is not of itself a sufficient reason for denying relief to the other spouse, *Swift v.*

Swift, 239 Iowa 62, 29 N. W. 2d 535 (1947); *Taylor v. Taylor,* 159 Va. 338, 165 S. E. 414 (1932), especially where the second marriage was a hasty one. *Nichells v. Nichells,* 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515 (1895); *Taylor v. Taylor, supra.* However, at least one jurisdiction, Kentucky, holds that the court cannot vacate a divorce, even during the term in which the judgment was entered, if either party had remarried, unless there was fraud in invoking the court to grant the divorce. *Sheffer v. Speckman,* 305 Ky. 627, 205 S. W. 2d 305 (1947); *Moran v. Moran,* 281 Ky. 739, 137 S. W. 2d 418 (1940); *Newcomb v. Newcomb,* 13 Bush 544, 26 Am. Rep. 222 (Ky. 1877). The court should manifest reluctance to vacate a judgment of divorce where a second marriage has occurred, *State v. Watson,* 179 U. S. 679 (1898); *Swift v. Swift,* 239 Iowa 62, 29 N. W. 2d 535 (1947), and the court should carefully ascertain whether laches affects the right to relief. *Brockman v. Brockman,* 133 Minn. 148, 157 N. W. 1086 (1916); *Nixon v. Nixon,* 329 Pa. 256, 198 Atl. 154 (1938). If the defendant sought to have the judgment vacated with reasonable diligence after discovering the existence of the default decree, he is not guilty of laches even if the other party has remarried. *Rivieccio v. Bothan,* 27 Cal. 2d 621, 165 P. 2d 677 (1946) (six year delay; one child born from second marriage); *Williams v. Williams,* 57 Cal. App. 36, 206 Pac. 650 (1922). A diligent weighing of the evidence is required where there is issue or possible issue from the second marriage, *Swift v. Swift,* 239 Iowa 62, 29 N. W. 2d 535 (1947); *Bussey v. Bussey,* 95 N. H. 349, 64 A. 2d 4, 12 A. L. R. 2d 151 (1949), but the procreation of children in the second marriage does not constitute an insurmountable obstacle to vacating the judgment in equity. *Newcomb v. Newcomb,* 13 Bush 544, 26 Am. Rep. 222 (Ky. 1877); *Taylor v. Taylor,* 159 Va. 338, 165 S. E. 414 (1932) (eighteen year delay; five children born from the second marriage). Where the second marriage occurs before the first wife learns of the default judgment, a delay in asking that the judgment be vacated would not be grounds for denial, as the delay would not be the cause of the second wife's unfortunate situation. *Caswell v. Caswell,* 120 Ill. 377, 11 N. E. 342 (1887) (fourteen year delay); *Leathers v. Stewart,* 108 Me. 96, 79 Atl. 16 (1911) (fifteen year delay). The question whether the court ought to set aside a default divorce decree after the remarriage of one of the parties rests within the sound discretion of the trial court, *Johnson v. Johnson,* 81 Cal. App. 2d 686, 185 P. 2d 49 (1947), whose ruling thereon will not be disturbed unless abuse of the discretion is clearly shown, *Miller v. Miller,* 56 Ohio L. Abs. 280, 91 N. E. 2d 804

(1949), which is the same rule applied in other cases of default judgments. *E. g., Pruitt e v. Burns,* 212 S. C. 325, 47 S. E. 2d 785 (1948); *Savage v. Cannon,* 204 S. C. 473, 30 S. E. 2d 70 (1944).

The point of law in this case is not new. Courts have held before that a default divorce decree will be upheld where the rights of an innocent third party have intervened, and the party making the motion to vacate is guilty of unsatisfactorily explained laches. However, two statements of the Court here prove to be unique. Where it was said, "She had every right to assume that plaintiff had been lawfully divorced. An examination of the record in the Clerk's office would have disclosed no defect," the Court seemed to draw an analogy between the second wife and a bona fide purchaser for value without notice seeking shelter behind the Recording Statute. Whether or not a second wife and even children by the second wife are proper or necessary parties to the proceeding is a question not raised or involved in this case but which will need to be answered in the future. ANNOT., 12 A. L. R. 2d 171 (1950). The decision of a case in this area of the law necessarily depends on the facts in that particular case, and the decision is rightly subjected to the sound discretion of the court. Any jurisdiction which tries to predict the outcome of the law in this field or which tries to lay down concrete rules pertaining to the vacating of default judgments in divorce proceedings is doomed to failure.

ARTHUR LEE GASTON.

LANDLORD AND TENANT — Condemnation of Leasehold — Landlord's Right to Rent Accruing Subsequent Thereto. — The major portion of the leasehold was condemned so as to make the remainder untenantable. The lessee surrendered possession to the condemnor, and the lessor sued the lessee for rent accruing subsequent to the surrender but prior to the time the lease was to terminate. The trial court gave judgment for the defendant and plaintiff appeals. HELD: Affirmed. Condemnation of the major portion of the premises so as to make the remainder untenantable terminates the lease and the lessee's obligation to pay the rent. *Farr v. Williams,* 232 S. C. 208, 101 S. E. 2d 483 (1957).

All private parties including the owner hold their land subject to the sovereign's inherent power of eminent domain. *U. S. v. Jones,* 109 U. S. 513 (1883); *Marin County Water Co. v. Marin County,* 145 Cal. 586, 79 P. 282 (1904); *Stark v. McGowan,* 1 Nott & McC. 387, 9 Am. Dec. 712 (S. C. 1818). There is a constitutional right to

"just compensation" when a private owner's land is taken for public use, *Phelps v. U. S.*, 274 U. S. 341 (1927); *Pacific Tel. & Tel. Co. v. Eshelman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C 822 (1913), and a tenant is an "owner" in the constitutional sense and entitled to share in the compensation to the extent of his interest if the land is taken during the term of the lease. *A. W. Duckett Co. v. U. S.*, 266 U. S. 149 (1924); *Pasadena v. Porter*, 201 Cal. 381, 257 P. 526, 53 A. L. R. 679 (1927); *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 (1893). Taking of the demised premises by the sovereign under the power of eminent domain is not a technical eviction; *Corrigan v. Chicago, supra; Schmid v. Thorsen*, 89 Or. 575, 170 P. 930 (1918); therefore, the lessee has no action against the lessor for breach of a covenant of quiet enjoyment. *Hinnicks v. New Orleans*, 50 La. Ann. 1214, 24 So. 224 (1898); *Frost v. Earnest*, 4 Whart. 86 (Pa. 1839); *Parks v. Boston*, 15 Pick. 198 (Mass. 1834). The divesting of title under power of eminent domain is more related to a taking by paramount title, *Corrigan v. Chicago, supra;* where the obligation of the lessee to pay the rent is extinguished. *Morse v. Goddard*, 13 Metc. 177, 46 Am. Dec. 728 (Mass. 1847); *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364 (1855). If the premises are taken in their entirety, the title of both lessor and lessee is extinguished, *Corrigan v. Chicago, supra; Lodge v. Columbia Packing Co.*, 162 F. Supp. 483 (D. Mass. 1958), but this is not true if the entire premises are taken by the state for a temporary period not to extend beyond the termination of the lease. *Carlstrom v. Lyon Van & Storage Co.*, 152 Cal. App. 2d 625, 313 P. 2d 645 (1957); *Leonard v. Autocar Sales & Service Co.*, 392 Ill. 182, 64 N. E. 2d 477, 163 A. L. R. 679 (1945). In absence of statute, a lease may be made for any period of time which the parties select, *U. S. v. Shea*, 152 U. S. 178 (1894); *Monbar, Inc. v. Monaghan*, 18 Del. Ch. 395, 162 Atl. 50 (1932); *Columbia Rwy., Gas & Elec. Co. v. Jones*, 119 S. C. 480, 112 S. E. 267 (1921), and a contingent limitation of the term is valid and enforceable. *Stewart v. Pier*, 58 Iowa 15, 11 N. W. 711 (1882); *In re Savin Hill Yacht Club Assoc.*, 246 Mass. 75, 140 N. E. 299 (1923); 3 THOMPSON, REAL PROPERTY § 1178 (2d Ed. 1939). The terms of the lease may provide that the tenant's liability for rent will cease when the title to the whole of the premises passes to the condemnor, *United Cigar Stores of America v. Norwood*, 124 Misc. 488, 208 N. Y. S. 420 (1925); *Levine v. Horwitz*, 373 Pa. 277, 95 A. 2d 540 (1953), or that the tenant will not be relieved of liability until he is actually evicted. *Phyfe v. Eimer*, 45 N. Y. 102 (1871); *Goldstein v. Stad-*

ler's Shoes, Inc., 159 Misc. 804, 288 N. Y. S. 793 (1936); *Rhode Island Hospital Trust Co. v. Hayden,* 20 R. I. 544, 40 Atl. 421 (1898). In the absence of statute or terms in the lease, the cases are undecided as to when the lessee's liability for the rent terminates, with some of the cases saying (often contrary to prior rules of their own jurisdiction) that in order for the lessee to remain liable the premises must remain tenantable. *Baltimore v. Latrobe,* 101 Md. 621, 61 Atl. 203, 4 Ann. Cas. 1005 (1905); *Yellow Cab Co. v. Stafford-Smith Co.,* 320 Ill. 294, 150 N. E. 670, 43 A. L. R. 1173 (1926); *Yellow Cab Co. v. Howard,* 243 Ill. App. 263 (1927). Other cases say that passage of title to the condemnor rather than suitability for occupation is the test. *Leonard v. Autocar Sales & Service Co., supra; Lodge v. Columbia Packing Co., supra.* The common law rule, when the entire leasehold is condemned, is that the lease is terminated and the tenant's liability for the rent ceases. *Corrigan v. Chicago, supra; Lodge v. Columbia Packing Co., supra; Levine v. Horwitz, supra;* 32 AM. JUR., *Landlord and Tenant* § 491 (1941); 52 C. J. S., *Landlord and Tenant* § 483 (1947). *Contra: Foote v. Cincinnati,* 11 Ohio 408, 38 Am. Dec. 737 (1842). If only a portion of the premises are taken, the majority rule is that the lessee is not relieved of his liability for the rent, *Pasadena v. Porter, supra; Stubbings v. Evanston,* 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839 (1891); *Dyer v. Wightman,* 66 Pa. 425 (1870), nor is the lessee entitled to have the rent apportioned or abated. *Gluck v. Baltimore,* 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515 (1895). (*But Compare: Baltimore v. Latrobe, supra*); *Stubbings v. Evanston, supra; McDonald Co. v. Hawkins,* 287 Mass. 71, 191 N. E. 405 (1934). However, there is limited authority to the effect that if only a portion of the leasehold is condemned, the rent will be apportioned *pro tanto. Levee Com'rs. v. Johnson,* 66 Miss. 248, 6 So. 199 (1889); *Biddle v. Hussman,* 23 Mo. 597 (1856); *Uhler v. Cowan,* 192 Pa. 443, 44 Atl. 42 (1899). (*But Compare: Dyer v. Wightman, supra;* ANNOTS.) 43 A. L. R. 1173 (1926); 53 A. L. R. 686 (1928); 163 A. L. R. 679 (1946).

In the case under discussion, the Court quotes from ORGEL, VALUATION UNDER EMINENT DOMAIN § 121 (2d. Ed. 1953) at p. 521: "At common law the prevailing rule, when the entire premises have been condemned *or when they have been rendered untenantable by the taking of a part,* is that the lessee's obligation to pay the rent ceases". (emphasis added). According to the great weight of authority, the taking of a part only does not affect the lessee's liability for the rent. However, the Court proceeds to quote the majority rule as

stated in *Corrigan v. Chicago*: "Where the *entire* tract of land or lot is taken the effect is to abrogate the relation of landlord and tenant". (emphasis added). This latter statement was not applicable to the principal case, which was concerned with the taking of a portion only. To add to the confusion, after determining that the case was not controlled by statute or terms of the lease, the Court said: "We must have recourse, then, to the common law rule in such cases, under which the lease is deemed terminated and with it the lessee's obligation to pay further rent." (232 S. C. at 213). The result of all this seems to be that the Court was misled by the quotation from Orgel. Thus, the question arises as to what rule will be applied in future cases — the true common law rule, or the rule of the present case? Furthermore, what rule will be applied to cases where a portion only is taken but the premises remain tenantable? Since the lessee's liability for rent completely terminates when the premises are only partially taken but the remainder left wholly untenantable, it seems reasonable that he should be entitled to an apportionment of the rent if a portion is taken but the remainder is left untenantable. If the Court should so hold, this would again place it in the minority, for although the Court states that they are adopting the common law rule, the decision, under the facts of the case, clearly falls under the minority rule. The better rule would be that the lessee is relieved of liability only in the case of a taking of the entire premises. If less than that, the lessee should look to the condemnation proceedings for his compensation. If these rules were followed, the question of what portion of the premises must be condemned before the lessee is relieved of liability would be avoided.

D. KENNETH BAKER.

PRACTICE AND PROCEDURE — Conduct of Trial — Note-taking by Jurors. — Defendant was convicted of murder and appealed on three grounds, one of them being that the court erred in refusing a motion for new trial predicated on the fact that two of the jurors had taken notes of the testimony and charge. No evidence was presented as to the extent of this note taking, but the trial judge, the solicitor, and one of the attorneys for the defendant all conceded that they had observed this during the course of the trial. However, counsel for defendant said that he did not observe such during the charge. HELD: Affirmed. Even if note taking by a juror is unlawful, defendant's counsel waived any objection thereto by not raising it at trial. However, subject to the discretion of the trial

judge, jurors have the right to take notes on their own initiative without prior permission to do so. *State v. Trent,* 234 S. C. 26, 106 S. E. 2d 527 (1959).

The question as to a juror's right to take notes has arisen under three factual situations: Where he takes notes (1) on his own initiative, without prior authorization of the court to do so, or (2) with the court's permission after counsel has moved to allow such, or (3) at the trial judge's suggestion given without any request therefor by counsel. It is generally held to be proper for jurors to take notes on the proceedings, either without prior authorization, *e. g., Denson v. Stanley,* 17 Ala. App. 198, 84 So. 770 (1919), or with authorization granted by the court upon motion of counsel, *e. g., Cahill v. Baltimore,* 129 Md. 17, 98 Atl. 235 (1916). Other courts have held it to be a matter within the discretion of the trial court, particularly in those cases which would not work prejudice to either party. *State v. Keehn,* 85 Kan. 765, 118 Pac. 851 (1911); *Miller v. Commonwealth,* 175 Ky. 241, 194 S. W. 320 (1917). Particular circumstances in a case might even make such note taking desirable. *Omaha Fire Insurance Co. v. Crighton,* 50 Neb. 314, 69 N. W. 766 (1897) (jury permitted to list an extensive number of articles alleged to have been destroyed in a fire); *Gasparovic v. Reed,* 5 Pa. D. & C. 531 (1922) (note taking allowed in a personal injury action on amounts plaintiff had to expend for various medical treatments). On the other hand, despite these cases allowing note taking either without authority or upon motion of counsel, it was held to be prejudicially erroneous when, over objection of the litigants, the trial judge on his own initiative told the jurors they might take notes. *Corbin v. City of Cleveland,* 144 Ohio St. 32, 56 N. E. 2d 214, 154 A. L. R. 874 (1944). Note taking during criminal actions is now permitted by statute in nine states, a list of which may be found in *United States v. Campbell,* 138 F. Supp. 344 (N. D. Iowa 1956).

Some few cases have found such note taking to be inherently improper and that no error was committed by the trial court in suppressing it. In *United States v. Davis,* 103 Fed. 457 (6th Cir. 1900), aff'd 107 Fed. 753 (6th Cir. 1901), the court said that it gave the juror who took notes on the proceedings an undue influence in discussing the cases with other jurors who relied on their memory. It was further pointed out that without ill purpose they might be inaccurate and deficient, and that with corrupt motivation they might become instruments of deceit. *Cheek v. State,* 35 Ind. 492 (1871) pointed out that counsel might use the device of note taking to divert the attention of the jurors. It was stated in *Corbin v. City of Cleve-*

land, supra, that permission to take notes might easily be interpreted by the jurors as part of their duty, even though they might lack ability to do so adequately. The argument that such note taking might supply written evidence to impeach the jury's verdict and might thereby tend to destroy the sanctity surrounding the jury deliberations was advanced in *Gasparovic v. Reed, supra,* but was rejected. However, in cases where the action of the juror in taking the notes was held to be reasonably discoverable by the appellant, failure to object during the trial was held to constitute a waiver, even though the act may have been in error. *Swift & Co. v. Bleise,* 63 Neb. 739, 89 N. W. 310 (1902); *Commonwealth v. Tucker,* 189 Mass. 457, 76 N. E. 127 (1905).

The question of whether jury members should be allowed to take notes during trial proceedings presents a dilemma, both horns of which seem based on possibilities rather than certainties. In some instances such note taking might clearly work prejudice and heighten the possibilities of error. In others, some form of memorandum could presumably become a necessity so that jurors might base their verdict on all the facts rather than on partial recollections. There is no rule which could group certain types of cases firmly within either category. Clearly, then, if such note taking is to properly be allowed or denied, it must be a question of discretion. The trial judge is in the best position to exercise this choice. A partial dissent in this case agreed that such note taking was clearly a matter of the trial judge's discretion, but stated that under no circumstances should it be allowed on the charge. By its nature, a mistake by the juror with regard to the charge might wreak greater havoc than a mistake with regard to a certain fact. But any such difference would seem one of degree and not of kind. Therefore, again it would seem to be a question of discretion — discretion as to the entire proceeding and not merely portions of it.

WILLIAM BANKS LONG, JR.

RELEASES — Joint Tort-Feasors — Release of One Joint Tort-Feasor Held Not to Release Others Unless So Intended. — The plaintiff Real Estate Broker sued a purchaser for commissions lost as alleged result of conspiracy between the vendor and the purchaser. In a prior action the broker had sued the vendor and after extensive litigation the broker had settled with the vendor for a portion of his commission. The vendor was released by the broker. The broker now sues the purchaser for the rest of his commission and alleges

that the purchaser and the vendor conspired in excluding the broker from his lawful commission. The purchaser's main contention is that the release of the vendor in the prior action automatically released him and therefore this action is barred. The trial court held for the purchaser and dismissed the broker's complaint. The appellate court reversed. On appeal, the Supreme Court, HELD: Affirmed. The release of one joint tort-feasor does not release others unless so intended. *Breen v. Peck,* 28 N. J. 351, 146 A. 2d 665 (1958).

Under the English common law, the rule is that the release of one joint tort-feasor operates as an automatic release of all others. *Cocke v. Jennor,* Hobart 66, 80 Eng. Rep. 214 (K. B. 1614); *accord, Tompkins v. Clay St. Hill R. Co.,* 66 Cal. 163, 4 Pac. 1165 (1884). This is the prevailing view in most American courts today. 76 C. J. S., *Releases* § 50, p. 681 (1952); *Braswell v. Morrow,* 195 N. C. 127, 141 S. E. 489 (1928); *McWhirter v. Otis Elevator Co.,* 40 F. Supp. 11 (W. D. S. C. 1941); *Parker v. Bissonette,* 203 S. C. 155, 163, 26 S. E. 2d 497 (1943) (common law rule apparently recognized). However, this English release rule has been under vigorous attack in the United States for many years. See Wigmore, *Release to One Joint Tort-feasor,* 17 ILL. L. REV. 563 (1923). Some courts have gotten around this rule by construing the release as a covenant not to sue. *Duck v. Mayeu,* 2 Q. B. 511 (1892); *Judson v. People's Bank and Trust Co. of Westfield,* 17 N. J. 67, 110 A. 2d 24 (1954). To determine the nature of the instrument it is necessary to look at its terms. *Rector v. Warner Bros. Pictures,* 102 F. Supp. 263 (S. D. Cal. 1952). The courts all agree, however, that if the consideration paid by one tort-feasor for the release is full satisfaction for the injury, the other tort-feasors are discharged. *Pitkin v. Chapman,* 121 Misc. 88, 200 N. Y. Supp. 235 (1923); *Slade v. Sherrod,* 175 N. C. 346, 95 S. E. 557, 50 A. L. R. 1060 (1918). Also most courts hold that if the settlement was not for the whole injury, the remaining joint tort-feasors may show the sum received from the other joint tort-feasor as a satisfaction pro tanto. *Louisville Gas and Electric Co. v. Beaucond,* 188 Ky. 725, 224 S. W. 179 (1920); *accord, McWhirter v. Otis Elevator Co., supra.* In a number of states the common law release rule has been enunciated, changed, or replaced by statutes. *Hosler v. Ireland,* 219 Fed. 489 (C. C. A. Cal. 1915); *Bee v. Cooper,* 217 Cal. 96, 17 P. 2d 740 (1932). Many jurisdictions hold that it is not material whether the instrument be considered a release or a covenant not to sue, if the agreement expressly reserves the plaintiff's rights against the other joint tort-feasor. *McKenna v. Austin* 134 F. 2d 659, 148 A. L. R.

1253 (D. C. Cir. 1943); also see PROSSER, TORTS 246 (2nd Ed. 1955); RESTATEMENT, TORTS § 885, comment b (1939). Other courts hold that it is the right of an injured party to accept satisfaction in part from one joint tort-feasor, release him, and proceed against the others; the express reservation of this right is not necessary and the release need not take the form of a covenant not to sue, *Steenhuis v. Holland,* 217 Ala. 105, 115 So. 2 (1927); *Louisville and Evansville Mail Co. v. Barn's Adm'r.,* 117 Ky. 860, 79 S. W. 261 (1904), the view being that the essential question is whether the plaintiff's claim has been satisfied in full; and this is clearly a matter of intent of the parties. See 24 So. CAL. L. REV. 466 (1951). Thus, there is a respectable minority of authority to the effect that releasing one joint tort-feasor does not necessarily release the others unless this was the intent of the parties. *Gronquist v. Olson,* 242 Minn. 119, 64 N. W. 2d 159 (1954); *Black v. Martin,* 88 Mont. 256, 292 P. 577 (1930); *Daily v. Somberg,* 28 N. J. 372, 146 A. 2d 676 (1958).

Under the theory of the essential unity of the injury in the early common law, the whole cause of action was discharged upon the release of one joint tort-feasor. It was accordingly held that the release of one joint tort-feasor released all. At once this old, arbitrary rule seems most unreasonable. It is often used as a trap for the unwary. The injured party is sometimes taken advantage of by giving, in good faith, a release to one joint tort-feasor, not knowing that it will also release the other tort-feasors, at the insistence of a shrewd defendant who connives to help his co-tort-feasor. The common law rule would operate unjustly in this situation. The common law rule should be overturned at every opportunity by the courts, as it was in the instant case. Perhaps even legislation would be in order to change the law in this respect. Rather than quibbling about unity of injury in regard to releases, the essential question should be whether the plaintiff's claim has been satisfied, and this is a matter of intent of the parties. This intent should be determined by the language used in the instrument, the amount paid for the release, and the surrounding circumstances.

JAMES Z. HOWEY.

TORTS — Insurance — Insurance Company Has Duty To Use Reasonable Care To Ascertain Insurable Interest. — Mrs. Earle Dennison procured three life insurance policies on her two-year-old niece-in-law (daughter of her deceased husband's sister) from defendant

insurance companies. In order to collect the insurance, Mrs. Dennison murdered the child. For this crime she was tried, convicted, and executed. *Dennison v. State,* 259 Ala. 424, 66 So. 2d 552 (1953). The plaintiff, father of the child, sued the defendant insurance companies under the wrongful death statute, Ala. Code tit. 7, § 119 (1940), on the theory that the death resulted from the wrongful acts of the defendants in issuing policies on the life of the child to one who did not have an insurable interest in the life. The lower court submitted the question of negligence to the jury, resulting in a verdict for plaintiff and judgment entered for $75,000. On appeal, HELD: Affirmed. An insurance company is under a duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has no interest in the continuation of the life of the insured. *Liberty Nat'l Life Ins. Co. v. Weldon,* 267 Ala. 171, 100 So. 2d 696, 61 A. L. R. 2d 1346 (1957).

The English "Gaming" statute, passed in 1774, made all insurance policies issued to a beneficiary without insurable interest null and void. 14 Geo. III, c. 48 (1774). There is a dispute as to the effect of this statute on the common law. 1 COOLEY, BRIEFS ON INSURANCE § 1(a), Chap. III (1st ed. 1905). Some cases say that prior to the statute, an insurable interest in the life of the insured was not required. *Vivar v. Supreme Lodge Knights of Pythias,* 52 N. J. L. 455, 20 Atl. 36 (1890); *Hurd v. Doty,* 86 Wis. 1, 56 N. W. 371 (1893). Other cases say that the statute was merely declaratory of the common law. *Lord v. Dall,* 12 Mass. 115, 7 Am. Dec. 381 (1815); *Ritter v. Smith,* 70 Md. 261, 16 Atl. 890 (1889). In any event, it is settled law today that an insurable interest is required in life insurance to prevent a policy taken by one person on the life of another from being unenforceable and void. *Helmetag's Administrator v. Miller,* 76 Ala. 183, 52 Am. Rep. 316 (1884); *Henderson v. Life Insurance Co. of Va.,* 176 S. C. 100, 179 S. E. 680 (1932). Some states require an insurable interest by statute. VANCE, INSURANCE § 31 (3rd ed. 1951); PA. STAT. ANN., tit. 40 § 512 (1954). Other states have adopted the rule as part of their common law. *Lord v. Dall, supra; Crosswell v. The Conn. Idemnity Ass'n,* 51 S. C. 103, 28 S. E. 200 (1897). What amounts to an insurable interest has been a problem to the courts. Perhaps a complete definition has yet to be devised, but the following language by Justice Field seems to have been adopted as the test: "[It is] such interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit

from the continuance of his life." *Warnok v. Davis,* 104 U. S. 775 (1882). It is generally recognized that close relationships, such as parent and child, brother and sister, and grandparent and grandchild, standing alone, are sufficient to provide an insurable interest. VANCE, INSURANCE § 31 (3rd ed. 1951); *Holloman v. Life Ins. Co.,* 192 S. C. 454, 7 S. E. 2d 169 (1940) (son took out policy on his mother without her consent). Remote relationships, such as niece and aunt, standing alone, do not create an insurable interest. *Elmore v. Life Ins. Co.,* 187 S. C. 504, 198 S. E. 5 (1938) (policy on aunt by nephew held insufficient interest); *Wharton v. Home Security Life Ins. Co.,* 206 N. C. 254, 173 S. E. 338 (1934). *A fortiori,* it is universally held that one cannot procure valid insurance on the life of another based only on a relation by marriage, i. e., in-laws. VANCE, INSURANCE § 31 (3rd ed. 1951); *Chandler v. Mut. Life and Industrial Ass'n,* 131 Ga. 82, 61 S. E. 1036 (1908). Policies issued where an insurable interest does not exist are said to be "wagering" contracts and void as against public policy, the theory being that they violate the law prohibiting wagering or gaming. *Commonwealth Life Ins. Co. v. George,* 248 Ala. 649, 28 So. 2d 910 (1947); *Moseley v. American Nat'l. Ins. Co.,* 167 S. C. 112, 166 S. E. 94 (1932). Another reason the courts give in explaining the rule requiring insurable interest is that insurance without such interest offers a temptation to the beneficiary to murder the insured. *Nat'l Life and Accident Ins. Co. v. Ball,* 157 Miss. 163, 127 So. 268 (1930); *Henderson v. Life Ins. Co. of Va.,* 176 S. C. 100, 179 S. E. 680 (1932). It is said that the rule exists not to protect the insurance companies, but to protect human life. *Henderson v. Life Ins. Co., of Va., supra; Brockway v. Mutual Benefit Life Ins. Co.,* 9 Fed. 244 (W. E. Pa. 1881). Applying the rule to the protection of children, some courts have said that the law is especially careful to protect helpless children from the dangers imposed by insurance without insurable interest. *Prudential Ins. Co. v. Jenkins,* 15 Ind. App. 247, 43 N. E. 1056 (1896); *Hack v. Metz,* 173 S. C. 413, 176 S. E. 314 (1934). In an action for damages brought by plaintiff against defendant insurance company for issuing a policy to her son without her consent, the South Carolina Supreme Court in *Holloman v. Life Ins. Co.,* 192 S. C. 454, 7 S. E. 2d 169 (1940) raised the issue as to whether or not an insurance company might be liable for issuing a policy to a beneficiary without insurable interest. The Court did not rule out the possibility of such liability, although the issue of insurable interest was not presented in the case.

The law for many years has recognized that a policy without insur-

able interest places the insured in a dangerous situation. Up to the time of the leading case, the rule making such contracts void had been a narrow rule in the law of insurance, but there is no reason for such limitation. The law requires all members of society to use reasonable care not to create an unreasonable risk. And insurance companies are held to a higher duty of care than are most other businesses. *See* Note, 10 S. C. L. Q. 444, 478 (1958). An insurance policy issued on a person makes him the subject of a contract without his consent and tends to invade his right to be left alone. The court correctly decided that an insurance company has the duty to use reasonable care in investigating insurable interest.

LOWELL W. ROSS.