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CONSTITUTIONAL LAW—NATIONALITY ACT OF 1940—LOSS OF CITIZENSHIP UPON CONVICTION OF WARTIME DESERTION.

*Trop v. Dulles* (U.S. 1958)

During World War II, petitioner, a private in the United States Army, escaped from a stockade in French Morocco where he was being held for a breach of discipline. After being gone for a day, he decided to return to the stockade and was subsequently turned over to the military police. Upon conviction of desertion¹ by a general court-martial, petitioner was sentenced, *inter alia*, to a dishonorable discharge. In 1952, petitioner applied for a passport and his application was refused on the ground that he had lost his citizenship under section 401(g) of the Nationality Act of 1940 which provides for loss of citizenship upon conviction of wartime desertion and subsequent dishonorable discharge.² Petitioner, a native born American citizen, then brought this action in the United States district court for a judgment declaring him to be a citizen of the United States. The action was summarily dismissed, and petitioner appealed to the court of appeals which held that under the Nationality Act of 1940, expatriation would follow upon a dishonorable discharge for conviction of wartime desertion. The Supreme Court reversed holding section 401(g) of the Nationality Act of 1940 to be unconstitutional as beyond the war power of Congress, and, therefore, that the imposition of expatriation for wartime desertion was cruel and unusual punishment. *Trop v. Dulles*, 356 U.S. 86 (1958).³

At common law, the doctrine of perpetual allegiance prevailed and one could not change his allegiance without the consent of the sovereign.⁴ Congress, however, passed an act acknowledging expatriation to be a natural and inherent right of all people, exercisable without the consent of the sovereign.⁵ Moreover, the Supreme Court has held that a mere

¹. "Any member of the armed forces who — (1) without authority goes or remains absent from his unit, organization or place of duty with intent to remain away therefrom permanently, . . . is guilty of desertion." 64 Stat. 133 (1950), 50 U.S.C. § 679 (1952).
voluntary performance of the expatriating act itself, and not an expressed renunciation of citizenship, is all that is necessary to result in expatriation; it is not a requisite that one intend to lose his citizenship. Loss of the rights of citizenship, has been upheld as a valid penalty for desertion and draft avoidance, but previous to the decision in the instant case, loss of citizenship, i.e., expatriation, has never been declared a penalty. A penalty has been defined as an exaction imposed by statute as punishment for an unlawful act. An exercise of one of the enumerated powers of the constitution, however, will not be considered a penalty where there is a reasonable relation between the action taken and the power exercised. In all cases, cruelty inherent in the method of punishment is prohibited as being cruel and unusual punishment. Recently, expatriation for voting in a foreign election was held to be constitutionally imposed as a necessary and proper means in the execution of the foreign affairs power. The Court reasoned that the imposition of expatriation prevents embarrassment of the United States in international relations, resulting from Americans voting in foreign elections and having their views interpreted as those of the government, by disassociating those individuals from the United States. In the instant case, the Court held that expatriation was not a means necessary and proper to the execution of the war powers because there was no rational connection between involuntary expatriation and the legitimate exercise of the war powers. It held that expatriation was a cruel and unusual punishment for desertion because it created statelessness.

In the instant case, it would appear that expatriation for wartime desertion bears little relation to the exercise of the war powers by Congress, in that it is related to the waging of war only by virtue of its being a punishment for a military offense. Further, the imposition of expatriation here has slight relation to the exercise of what the Court referred to as the foreign affairs power since, by taking citizenship away for desertion, Congress is in no way regulating the foreign affairs of the nation. Similarly, expatriation for treason, violation of the Smith Act and draft avoidance, seem to be on doubtful constitutional grounds, as being more in the nature of punishment for the offenses committed. However, service in a foreign army, employment by a foreign government, or, as in Perez v.

13. For the effect of statelessness see Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, where an alien who lived in this country for twenty-five years went to Europe to see his dying mother. Upon returning to this country in 1950, after an absence of almost two years he was refused entrance and detained on Ellis Island. Since he was refused entry by all other countries he could not be deported. After three years the Court denied relief and he was doomed to a life on Ellis Island. He was released some months thereafter, only after a Presidential decree.
Brownell, voting in a foreign election, are acts which by their nature tend to cause friction in international relations, and Congress may therefore impose expatriation as a necessary and proper means for the prevention of such friction. This exercise of the power to regulate foreign affairs, though not unconstitutional, is nevertheless harsh, particularly when the expatriate has acted in the best interest of his country. It seems incongruous that, under the power to regulate foreign affairs, the United States should expatriate an individual who might have voted in a foreign election for policies friendly to this country, fought in a foreign army against a power soon to attack the United States, or been employed by an ally of the United States, and yet forbid the imposition of expatriation in cases of treason, draft evasion, sedition, or wartime desertion, as being cruel and unusual punishment. This country could just as easily show its dissatisfaction with the expatriating act by the imposition of some legally accepted penalty. Expatriation could be added in the case of dual nationals committing the expatriating act in the jurisdiction of their other nationality, because by such act, they would be evidencing an intent to choose some other citizenship than that of the United States. Expatriation in this instance would be a necessary and proper means for preventing the international complications attendant upon the status of dual nationality.

John G. Hall

EQUITY—PRELIMINARY INJUNCTION—JURISDICTION OF EQUITY
WHERE TITLE IS IN DISPUTE.

Williams v. Bridy (Pa. 1957)

Plaintiff, the alleged lessee of a culm bank, secured a preliminary injunction restraining defendants from removing the culm. Defendant disputed plaintiff's right to the injunction on the ground that title to the culm was in a third party, the grantee of the original owner of the tract

16. This would include one who acquired dual nationality by the commission of the expatriating act but not a dual national who acts in a third jurisdiction and does not acquire that nationality, e.g., A, a jus sanguinis citizen of the United States and a jus soli citizen of Great Britain, votes in a foreign election in Brazil but does not acquire that nationality. He should not be subject to expatriation since if Great Britain had a similar statute he would become a stateless being.
17. Some of the difficulties which might arise as a result of dual nationality are: whether the United States is under an obligation to press for the release of a dual national from a foreign army after his term of enlistment is up; whether it is under a duty to insist on the right of a dual national to leave a foreign country upon termination of a job in that country's government which entailed handling security information; or, if it should press for the release of a dual national who was arrested for voting in a foreign election because he was a citizen of another country (i.e., the United States).

1. Coal dust or coal slack.
and the culm.\textsuperscript{2} There being no issues of fact,\textsuperscript{3} only the construction of the deeds remained to be determined before a final decree would issue. The supreme court, however, reversed the decree granting the preliminary injunction and certified the case to the law side of the court, holding that since legal title was still in dispute the equity side of the court had no jurisdiction. \textit{Williams v. Bridy}, 391 Pa. 1, 136 A.2d 832 (1957).\textsuperscript{4}

The granting of a temporary or preliminary injunction is within the discretion of the trial court\textsuperscript{5} and on appeal the court will look to see if there are any reasonable grounds for the action of the lower court or if the rules applied are clearly inapplicable.\textsuperscript{6} Where it is necessary to restrain irreparable injury\textsuperscript{7} a temporary injunction may be granted until there is a final determination on the merits.\textsuperscript{8} However, this discretionary power of the court is specifically modified in most jurisdictions,\textsuperscript{9} including Pennsylvania,\textsuperscript{10} by the requirement that the right upon which plaintiff bases his claim be clear and without doubt. In \textit{Hueneme, M. & P.L.A. Ry. v. Fletcher}\textsuperscript{11} therefore, a preliminary injunction was properly denied because plaintiff's right, as evidenced by his title to land, was disputed by evidence of a public easement.\textsuperscript{12} Some jurisdictions, however, have granted preliminary injunctions where plaintiff's right is no more than probable.\textsuperscript{13} Such courts usually look to the circumstances and equities involved in the particular case.\textsuperscript{14} However, even where a clear and doubtless right is

\textsuperscript{2} Culm and coal severed from the realty are personal property and do not pass with title to realty, and therefore would not have passed to defendant with the title to the tract. Llewellyn v. Philadelphia & R. C. & I. Co., 308 Pa. 497, 162 Atl. 429 (1932); Fidelity-Philadelphia Trust Co. v. Lehigh Valley Coal Co., 294 Pa. 47, 143 Atl. 474 (1928).

\textsuperscript{3} Brief for Appellants, p. 16, Williams v. Bridy, 391 Pa. 1, 136 A.2d 832 (1957); Brief for Appellees, p. 2, \textit{ibid}.


\textsuperscript{5} Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 100 N.J. Eq. 185, 135 Atl. 284 (Ch. 1926); Freseman v. Purvis, 51 Pa. Super. 506 (1912).

\textsuperscript{6} Lindenfelser v. Lindenfelser, 385 Pa. 342, 123 A.2d 626 (1956).


\textsuperscript{10} See, \textit{e.g.}, Diamond Full Fashioned Hosiery Co. v. Leader, 20 F. Supp. 467 (E.D. Pa. 1937); Herr v. Rumisek, 303 Pa. 9, 153 Atl. 728 (1931).

\textsuperscript{11} 65 Cal. App. 698, 224 Pac. 774 (1924).

\textsuperscript{12} See also Herr v. Rumisek, 303 Pa. 9, 153 Atl. 728 (1931), where plaintiff's right as a taxpayer to enjoin expenditure by school authorities was in doubt because of question as to whether expenditure would be over the limit prescribed by law.

\textsuperscript{13} See, \textit{e.g.}, Sinclair Refining Co. v. Midland Oil Co., 55 F.2d 42 (4th Cir. 1932) (injunction granted to maintain the status quo between the parties until final determination of plaintiff's right to title of land be made); Wilentz v. Hendrickson, 133 N.J. Eq. 447, 33 A.2d 366 (Ch. 1943) (doubt of validity of plaintiff's cause of action found no bar to issuance of temporary injunction).

\textsuperscript{14} \textit{Ibid}.
required, if the basis of the right is title to real property, as in a case of continuing trespass, it may or may not be necessary that plaintiff establish his title in an action at law. 15 The court in Miller v. Lynch 16 would not reverse the granting of a preliminary injunction on the ground that title had not been established at law, reasoning that defendant had not presented a serious dispute in regard to plaintiff’s title.

The court in the instant case found, in effect, that defendant had presented a serious dispute to plaintiff’s title by introducing deeds which required construction. While in accord with previous Pennsylvania decisions, 17 an analysis of the rule employed by the court might suggest that a different result should have been reached. The court cites with approval a recent expression of the requisite title for equity to grant a preliminary injunction which expression required such clearness that a judge in a trial at law would not be at liberty, upon the same evidence, to submit the question of plaintiff’s title to a jury. 18 The reason for the rule is that when reasonable men might differ the parties are entitled to have disputed facts decided by a jury. 19 This would also appear to be the reason for the adoption by some courts of the further requirement that no facts be in issue. 20 Where then, there are no disputed facts, as in the instant case, and only the determination of the legal effect to be given the deeds remains, a judge sitting on the equity side of the court can, with as much facility, construe the deeds as he could sitting on the law side, 21 there being no right to a jury trial involved. Plaintiff here, if he can establish his title at a final hearing, has presented a case of continuing trespass which appears to merit immediate equitable relief, for while he would be pursuing a remedy at law, defendant could continue to deplete the culm bank. Where the full determination of the rights of the parties can be had in one equity proceeding, it seems unnecessary to force the plaintiff to seek his remedy first at law, when he must subsequently petition equity in order

16. 147 Pa. 460, 24 Atl. 80 (1892).
21. Thomas v. Morgan, 6 Lack. Jur. 290-91 (C.P., Pa. 1905) (dictum). See also United States v. Sandlass, 34 F. Supp. 81 (D.N.J. 1940); Teacher v. Kijurina, 365 Pa. 480, 76 A.2d 197 (1950), where the Supreme Court of Pennsylvania in reviewing the denial of an injunction held that the lower court erred in deciding that a deed in question set up a joint tenancy, for they ruled on conflicting oral testimony and equity does not have jurisdiction where facts are in dispute. The court, after declaring the oral testimony inadmissible, as to the construction to be given the deed, ruled that as a matter of law the deed created a co tenancy and granted the decree prayed for.
to obtain adequate relief. Where there are no issues of fact, the require-
ment that plaintiff must prove clear and doubtless title thwarts the purpose
of the preliminary injunction and greatly limits the discretionary powers
of the trial court, which should be free to weigh the need of protection
for the plaintiff against the probable injury to the defendant when the
court is satisfied there is a probable right.

Joseph J. Mahon, Jr.

EVIDENCE—ARGUMENTATION OF COUNSEL—USE OF MATHEMATICAL
FORMULA FOR THE ADMEASUREMENT OF DAMAGES
FOR PAIN AND SUFFERING.

Botta v. Brunner (N.J. 1958)

Plaintiff was a passenger in an automobile driven by the defendant
and was injured when it collided with another car. During the trial, plain-
tiff's attorney suggested to the jury in his closing argument a mathematical
formula of fifty cents an hour to aid them in measuring the damages for
pain and suffering. The jury returned a verdict of $5,500. From a denial
of a motion for new trial on the grounds that, inter alia, the award was
inadequate, plaintiff appealed. The superior court found that the trial
court had erred in its charge to the jury on the burden of proof which
the plaintiff was required to satisfy in establishing her injuries, and fur-
ther, that it was error for the trial court to instruct the jury to disregard
plaintiff's suggestion of a mathematical formula for the admeasurement
of damages for pain and suffering, and granted a new trial limited to
the issue of damages. The Supreme Court of New Jersey affirmed the
superior court's finding of error as to the improper instructions on the

22. See Note, Temporary Injunction in Cases Involving Doubtful Questions of
Law, 40 MARQ. L. REV. 191 (1956).
23. Sinclair Refining Co. v. Midland Oil Co., 55 F.2d 42, 45 (4th Cir., 1932),
where the court cautions that "the granting of the temporary injunction does not
determine the rights of the parties . . . and the test on appeal is not whether the
appellate court would have granted or denied the injunction, but whether the record
shows an abuse of authority by the trial judge."

Notwithstanding the rule of equity that complainant must succeed on his own
title not on a weakness of legal right asserted by respondent, Myerdaile & Salisbury
Street Ry. v. Pennsylvania & Md. Street Ry., 219 Pa. 558, 69 Atl. 92 (1907), the fact
that defendant here made no claim to a right in himself to the culm should be con-
sidered in determining whether or not harm will result from granting the injunction
until a final hearing can be made on the legal construction of the deeds.

1. The charge of the trial court was as follows: "I think I have already charged
you with regard to the responsibility of Mrs. Botta to prove by clear, convincing
evidence that her injuries were the result of the accident. . . ." The superior court
held that this was error since the burden cast on plaintiff is to prove that her injuries
resulted from the accident by a preponderance of the evidence and not that she must
do so by clear and convincing evidence. Botta v. Brunner, 42 N.J. Super. 95, 126
A.2d 32, 37 (1956).
burden of proof, and accordingly affirmed the judgment. The court, however, modified the judgment of the superior court in holding, that it was error for plaintiff's counsel, in opening or closing, to suggest to the jury any mathematical formula to be used in calculating compensation for pain and suffering. *Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).*

Most jurisdictions acknowledge that the appreciation of pain and suffering is a unique experience, depending primarily on the nervous sensibilities of the individual, and that no rule or mathematical standard has been developed that can exactly correlate money damages with pain and suffering. The only standard advanced has been that of reasonable compensation. While in agreement that the question of compensation for pain and suffering rests ultimately with the jury, the courts are in conflict as to the right of counsel to comment on the amount of these damages. When presenting his case, an attorney generally has a wide latitude of reference, and may draw any reasonable inferences from the evidence. However, he cannot give independent testimony, or make of himself an unsworn witness, nor express opinions or conclusions on matter not disclosed by the evidence. Reference by counsel to the *ad damnum* clause or to damages in general has been approved by some jurisdictions, while others have expressly condemned such practice. However, few jurisdictions have had the opportunity to offer an opinion on whether a mathematical formula may be suggested to the jury. One state has expressly approved the use of a formula; another has permitted such suggestions

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5. See, e.g., *Littman v. Bell Telephone, 315 Pa. 370, 172 Atl. 687 (1934).*
11. *Haffe v. Burd, 78 N.D. 278, 49 N.W.2d 282 (1951).*
12. *Tampa Transit Lines v. Cordin, 62 So. 2d 10 (Fla. 1952).*
14. *Graham v. Matroon City R.R., 234 Ill. 483, 84 N.E. 1070 (1908); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944); Dean v. Wabash R.R., 229 Mo. 425, 129 S.W. 953 (1910); Williams v. Williams, 87 N.H. 430, 182 Atl. 172 (1935); Kimball v. Noel, 228 S.W.2d 980 (Tex. 1950).*
16. *Arnold v. Ellis, 97 So. 2d 744 (Miss. 1957) (counsel suggested a rate of twenty cents an hour for the pain and suffering to be endured); Four-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954) (a chart which listed pain and suffering at ten cents per day was used in the opening statement by counsel).* In both of these cases such practice by counsel was expressly limited to opening or closing statements.
for illustrative purposes;\textsuperscript{17} while a third has allowed reference by counsel to the amount of damages claimed for pain and suffering.\textsuperscript{18} New Jersey, in the instant case, is the first jurisdiction to expressly forbid the use of a formula, although Pennsylvania has long condemned any reference to the amount of damages for pain and suffering.\textsuperscript{19}

The courts which allow counsel to suggest an amount of compensation for pain and suffering, assert that such practice is fair argumentation based on inferences and deductions drawn from the evidence of plaintiff's pain and suffering.\textsuperscript{20} Such courts feel that proper instructions by the trial judge will protect the rights of all parties.\textsuperscript{21} An examination of the verdicts where the practice has occurred will reveal that such protection is, in many cases, lacking and that the exact figure suggested by plaintiff's counsel has been accepted, producing excessive verdicts.\textsuperscript{22} The majority in the instant case appears to appreciate the fact that such suggestions by counsel, even under the guise of legitimate inference, has the same effect as evidence, and that no admonition or instruction by the trial court can entirely remove the figures suggested from the minds of the jury.\textsuperscript{23} The admeasurement of damages in dollars and cents is, more properly, a matter of opinion and speculation than of fact, which is in the complete discretion of the jury, and no witness is ever permitted to estimate the amount of damages sustained in a personal injury suit.\textsuperscript{24} There appears to be less reason to allow counsel such privilege since there can be no opportunity for cross-examination or to test the accuracy of these estimates. If counsel is to be allowed the privilege of estimating the damages, such privilege should be limited to elements which are at least susceptible to proof.

\textit{William B. Colsey, III}

\textsuperscript{17} Boutang v. Twincity Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956). It should be noted, however, that in this case the use of a mathematical formula as a yardstick to test the reasonableness of the amount awarded was expressly condemned.


\textsuperscript{20} Aetna v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944); Four-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).

\textsuperscript{21} Four-County Electric Power Ass'n v. Clardy, supra note 20.

\textsuperscript{22} See Braddock v. Seaboard Airline R.R., 80 So. 2d 662 (Fla. 1955); Bullock v. Chester & Darby Telford Road Co., 270 Pa. 295, 113 Atl. 379 (1921); Reese v. Hershey, 163 Pa. 253, 29 Atl. 907 (1894) (reference by the trial judge to the amount of damages claimed by the plaintiff).


\textsuperscript{24} Little Rock M.R. & T. Ry. v. Haynes, 47 Ark. 497, 1 S.W. 774 (1886); Chicago R.I. & P. Ry. v. Tessee, 42 Okl. 188, 140 Pac. 1166 (1914); Bruton v. Severance, 22 Ore. 91, 29 Pac. 200 (1892).
EVIDENCE—DEFENSE OF ALIBI—DEFENDANT HAS BURDEN OF PROVING ALIBI TO THE SATISFACTION OF THE JURY.

Commonwealth v. Gates (Pa. 1958)

Harry Gates, on trial for murder, introduced evidence setting up the defense of alibi. At the trial, the court, after stating that the burden was upon the Commonwealth to prove the guilt of the prisoner beyond a reasonable doubt and that this burden was not changed by the setting up of an alibi as a defense, charged, "but where a person sets up an alibi as a defense, the burden of proving his alibi to the satisfaction of the jury is thrown upon him. If he does not do this his defense of alibi fails completely."1 Upon conviction the defendant appealed urging that the court erred, inter alia, in its charge as to alibi. The Supreme Court of Pennsylvania affirmed, holding that the charge on alibi was proper and sufficient. Commonwealth v. Gates, 392 Pa. 557, 141 A.2d 219 (1958).2

An alibi is when one is present in a place other than where the crime has been committed, and raises the inference that the accused could not have committed the crime.3 It is a denial of a material averment in the indictment,4 and proof tending to support it, while not sufficient to establish the alibi as fact, may be sufficient, when considered in conjunction with the other evidence, to raise that reasonable doubt which would acquit the accused.5 The accused, therefore, does not have the ultimate burden of proving the alibi;6 the burden remains with the prosecution to prove his guilt beyond a reasonable doubt.7 It has therefore been held to be prejudicial error to charge that the defendant must establish his alibi by clear and satisfactory evidence,8 by a preponderance of the evidence,9 or to the jury's satisfaction,10 since these statements tend to place the ultimate burden of proof on the defendant, even though the jury be instructed that the setting up of the defense of alibi does not change the prosecution's burden of proof beyond a reasonable doubt.11 However, such an instruction

6. 9 WIGMORE, EVIDENCE § 2512(c) (3d ed. 1940).
7. Thomas v. United States, 213 F.2d 30 (9th Cir. 1954); Falgout v. United States, 279 Fed. 513 (5th Cir. 1922); People v. Elmore, 277 N.Y. 397, 14 N.E.2d 451 (1938).
8. Cangelosi v. United States, 19 F.2d 923 (6th Cir. 1923).
11. Cangelosi v. United States, 19 F.2d 923 (6th Cir. 1923); Falgout v. United States, 279 Fed. 513 (5th Cir. 1922); State v. McGhee, 137 S.C. 256, 135 S.E. 59 (1926).
which might tend to place the burden of proof on the defendant is cured by a further charge to the effect that the evidence of alibi should also be considered with all the evidence in determining if a reasonable doubt exists as to defendant's guilt. In Pennsylvania it is required that specific instructions be given as to the nature, purpose, and the degree of persuasion necessary to establish alibi. Though it is well settled that the defendant is entitled to an acquittal if he proves his alibi by a preponderance of the evidence, or as sometimes stated, to the satisfaction of the jury, it is equally clear that proof tending to establish the alibi, though not clear, may with other facts of the case raise a reasonable doubt of the guilt of the defendant and also work an acquittal. While in *Commonwealth v. Woong Knee New*, it was held that the jury must be instructed as to this latter point, the court in *Commonwealth v. Richardson* stated that such an instruction is not necessary, the point being adequately covered by the general charge on reasonable doubt. However, it is reversible error if the charge tends to treat the evidence of alibi as being without relevancy if the alibi is not proven by a preponderance of the evidence. Since Pennsylvania recognizes that the defendant is entitled to an acquittal if the evidence of alibi is sufficient with the other facts in the case to raise a reasonable doubt as to his guilt, it cannot accurately be said that the law imposes any burden of proof on the accused concerning this issue. In light of this, it would seem that to allow the jury to be charged that the burden is on the accused to prove his alibi to the satis-


18. 392 Pa. 528, 140 A.2d 828 (1958). See Commonwealth v. Gates, 392 Pa. 528, 141 A.2d 219 (1958); Commonwealth v. Blanchard, 345 Pa. 289, 26 A.2d 303 (1942). See also Commonwealth v. Stein, 305 Pa. 567, 571, 158 Atl. 563, 564 (1932) where the court states its fear that the charge on reasonable doubt might mislead the jury into holding the alibi evidence to a higher standard of proof than is actually required to acquit the accused. See also note 26 infra.


20. See Commonwealth v. McQueen, 178 Pa. Super. 38, 42 n.1, 112 A.2d 820, 821 n.1 (1955). (The necessity of charging the jury that there is such a burden seems to be a question that should be again reviewed by the supreme court.)
faction of the jury is, at the very least, inconsistent and misleading.\textsuperscript{21} While a charge virtually identical with the one approved in the instant case was also approved in \textit{Commonwealth v. Rudy},\textsuperscript{22} the court there did so only because it was immediately followed and modified by the same instruction held necessary in the \textit{Woong Knee New} case.\textsuperscript{23} Relying on the \textit{Richardson} case, a companion decision, the court in the instant case appears to have ignored the absence of such a corrective instruction, although the point was fully discussed in the dissenting opinion of Mr. Justice Musmanno.\textsuperscript{24} The \textit{Richardson} case in turn cited \textit{Commonwealth v. Blanchard},\textsuperscript{25} in which case the court only gave this point cursory mention, citing no authority nor presenting any reasoning to support its statement. The decision in the instant case can only serve to afflict the accused with the very real burden of proving his alibi to the satisfaction of the jury since his defense, the jury is told, is valueless if he fails in his burden.\textsuperscript{26} The cure\textsuperscript{27} which the court in the \textit{Rudy} case found to be so effective in correcting this particular error seemingly is no longer available; its demise appears to have been initiated by the \textit{Richardson} case and consumated by the decision in the instant case.

\textit{Herbert H. Brown

**EVIDENCE—WIRETAPPING—ADMISSIBLE AS EVIDENCE IN STATE COURT.**


The defendant was convicted upon an indictment charging him with pool selling and book making in violation of the Pennsylvania penal code.\textsuperscript{1} The only evidence supporting the verdict was the testimony of a city detective who had, without authorization from the sender, listened in on the telephone calls entering and leaving a cafe. Defendant contended that this testimony was inadmissible because it constituted a divulgence of

\begin{itemize}
  \item \textsuperscript{21} See Cangelosi v. United States, 19 F.2d 923 (6th Cir. 1923) (charge is inconsistent and confusing); Commonwealth v. Barrish, 279 Pa. 460, 146 Atl. 553 (1929) (a trifle incongruous); State v. McGhee, 137 S.C. 256, 135 S.E. 59 (1926) (such a charge is illogical, inconsistent, and calculated to mislead the jury).
  \item \textsuperscript{22} 128 Pa. 500, 18 Atl. 344 (1889).
  \item \textsuperscript{23} "The jury must also be instructed that 'evidence in support of the alibi may, with the other facts in the case, raise the reasonable doubt of guilt which entitles a defendant to acquittal.'" Commonwealth v. Woong Knee New, 354 Pa. 188, 213, 47 A.2d 450, 464 (1946).
  \item \textsuperscript{24} Commonwealth v. Gates, 392 Pa. 557, 569, 141 A.2d 219, 225 (dissenting opinion).
  \item \textsuperscript{25} 345 Pa. 289, 26 A.2d 303 (1942).
  \item \textsuperscript{26} Of course "fails completely" does not really mean just that. More properly, it means "that it failed as an independent defense, not that the evidence was insufficient to raise a reasonable doubt." Commonwealth v. Barrish, 297 Pa. 160, 171, 146 Atl. 553, 556 (1929). See note 18 \textsuperscript{supra}.
  \item \textsuperscript{27} See text at note 23 \textsuperscript{supra}.
\end{itemize}

The United States Supreme Court has held that section 605 of the Federal Communications Act prohibits the admission of evidence gained by means of wiretapping in a federal court. Section 605 has been further construed as prohibiting the use of wiretap evidence in a state court when such was procured by federal officials. Intrastate messages, as well as those interstate, have been found to be within the provisions of section 605. Since the jury is free to speculate that the act of wiretapping itself is further evidence of the defendant's criminal activities, the Court, in Benanti v. United States, held that evidence procured by means of wiretapping is inadmissible in a federal court even if it were obtained by state officials. The Court reasoned that:

"... [H]ad Congress intended to allow the States to make exceptions to Section 605, it would have said so. ... [W]e find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

However, section 605 has not been found to prohibit the admission in a state court of evidence obtained by state officials. Prior to the instant case, the Pennsylvania Supreme Court had approved the admission of wiretap evidence procured by state officials. The same question has also been decided in the same manner by other states.

It should be noted that all the decisions concerning the admissibility of wiretap evidence in state courts when such evidence was procured by state officials were handed down prior to the decision in the Benanti case.

2. 48 STAT. 1103, 47 U.S.C. 605 (1934) which provides: "... [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. ..."
8. Id. at 99.
The only judicial interpretation of the effect of the Benanti decision upon this question is Matter of Interception of Tel. Comm.\textsuperscript{12} where the New York court held that the act makes wiretapping illegal even though the state officials have an order to do such pursuant to a New York statute which permitted wiretapping. In fact, the federal government is presently instituting criminal prosecutions in federal courts for wiretapping.\textsuperscript{13} It would seem to be an anomaly, therefore, for the state courts to permit the use of evidence which involves a possible federal crime in its procurement. The Pennsylvania legislature has recognized this, and has passed a statute prohibiting the introduction of evidence secured by a wiretap in any court of the Commonwealth. This statute, however, was enacted subsequent to defendant's trial and conviction, and therefore was not applicable to the present case.\textsuperscript{14}

David Moskowitz

**FUTURE INTERESTS—RULE AGAINST PERPETUITIES—APPLICATION OF THE “WAIT AND SEE” RULE TO OPTIONS.**


The parties to this action were engaged as partners in a restaurant and cabin business on land, the title to which was in the defendant. While so engaged, they entered into an agreement in writing, acknowledged and recorded, by which it was stipulated that the plaintiff, her heirs, executors, administrators and assigns, should at all times in the future have an option to purchase the land used in the business for a certain sum. The option was exercised within six years, and, on refusal of the defendant to honor it, plaintiff sought specific performance. The defendant filed preliminary objections in the nature of a demurrer, contending that the option was wholly void as in violation of the common law rule against perpetuities, and that the amendments thereof embodied in the Estates Act of 1947,\textsuperscript{1} which adopted the “wait and see” rule, were inapplicable to any but family settlement and gift transactions. The court rejected these contentions, holding that the option was valid because it had actually been exercised within the lives of the parties. *Mumma v. Hinkle*, 138 Legal Intelligencer No. 47, p. 1, col. 1 (Pa. C.P. Dauph. March 10, 1958).\textsuperscript{2}

\textsuperscript{12} 9 Misc. 2d 121, 170 N.Y.S.2d 84, 85 (Sup. Ct. 1958).
\textsuperscript{13} See, e.g., Massicot v. United States, 254 F.2d 58 (5th Cir. 1958).
\textsuperscript{14} PA. STAT. ANN. tit. 15, § 2443 (Supp. 1957).

\textsuperscript{1} PA. STAT. ANN. tit. 20, § 301.4 (1947): “(a) GENERAL. No interest shall be void as a perpetuity except as herein provided. (b) VOID INTEREST — EXCEPTIONS. Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in a class the membership of which is then subject to increase shall be void.”

Prior to the statutory revision of the rule against perpetuities in 1947, the common law rule had been applied in the case of options to purchase land so as to hold void an option which might be exercised at any time. While the number of cases so holding is substantial, courts have not often been called upon to determine the validity of an option which could be exercised within the long periods possible under the rule, such as an option to purchase land exercisable during the lives of any of the descendants of Queen Victoria living at the time when the option was granted and for twenty-one years thereafter. A few cases which have dealt with the related problem of preemptive rights to purchase land at a fixed price, have held that a right which may not be void under the rule against perpetuities may nevertheless be obnoxious to the rule against restraints on alienation. The committee of the American Bar Association, which has been formed to aid in the reform of the rule against perpetuities, has recommended that options of this type, known as options in gross, be void to the extent that they may be exercised beyond twenty-one years. The present case decided in effect that all options not otherwise limited in time will be valid during the lives of the parties and for twenty-one years thereafter.

The social interest which requires some limitation to be placed upon excessively long family settlements is not necessarily the same as that which requires the application of some rule of reasonable duration to option contracts involving the right to purchase an interest in land. The problem is not one of suspension of the power of alienation, because the parties

3. See note 1 supra.
4. Barton v. Thaw, 246 Pa. 348, 363, 92 Atl. 312, 316 (1914). The court reasoned as follows: “there is no present fixed right of future enjoyment in any of this land in anybody, under the option. The event upon which the estate is to arise, to wit, the acceptance of the option to purchase is uncertain, being unconfined as to limit of time. The interest created by this option, therefore, is not vested, but contingent, and is within the rule against perpetuities.”
7. Cases where the right of preemption permits the holder to acquire the property for a fixed sum as distinguished from the right to refuse the land at the owner’s price or at its then current value, are in effect indistinguishable from option contracts. It is settled in England that such preemptive rights are invalid as unreasonable restraints on alienation. In re Rosher, 26 Ch. D. 801 (1884); Hutt v. Hutt, 24 Ont. L.R. 574 (1911). The American cases are few and divided. Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451 (1877); Kerschner v. Hurburt, 277 S.W.2d 619 (Mo. 1955). Contra: Roomhild v. Jones, 239 F.2d 492 (8th Cir. 1957); Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926). See American Law of Property § 26.66 (Casner ed. 1952); Simes AND Smith, THE Law OF Future INTERESTS § 1134 (2d ed. 1956).
may at any time join to convey a good title. 10 When an option is held by a person not in possession of land as against an owner in possession, the latter will tend to be discouraged from improving the land. 11 The community, which in the end formulates and enforces the law, is interested in the maximum development of this basic resource. 12 That this is the true reason for the rule is reflected in the refusal of courts to apply the rule against perpetuities to an option appurtenant to a leasehold interest by which the tenant is enabled to acquire the fee. 13 Having such an option, a tenant will be encouraged to make improvements in keeping with the demands of the time which he would hesitate to make for the sole benefit of the reversioner. 14 Those courts which apply the rule against restraints on alienation to supplement the rule against perpetuities have seen that the problem is not exclusively one of restraining alienation. 15 If the true purpose of the rule is to remove impediments to the improvement of the land, the period of twenty-one years suggested by the committee of the American Bar Association is certainly too long unless it is intended to be supplemented by the rule against restraints on alienation. In the instant case, the option was actually exercised within a relatively short time, although the land had no doubt greatly increased in value during the period. 16 The method employed by the court, if limited to the period before it, is consistent with the recommendation that the rule be applied only to void the excess. 17 The option was held by a person who, as a

11. This is the view expressed by Morris and Leach, op. cit. supra note 9. Professor Simes characterizes the rule as designed to prevent the fettering of the power of alienation. Simes and Smith, The Law of Future Interests 159 (2d ed. 1956). This is also the view of the Restatement. Restatement, Property, §§ 370, 393-95 (1936).
15. "Does the instant contract unreasonably restrain alienation? That rule is based upon (among other things) the desirability of 'keeping property responsive to the current exigencies of its current beneficial owner' and upon the desirability of avoiding the retardation of the natural development of a community by removing property from the ordinary channels of trade and commerce." Kershner v. Hurlburt, 277 S.W.2d 619, 623-24 (Mo. 1955).
16. The option agreement was undated, but was acknowledged August 24, 1950, and recorded. Notice was given that the plaintiff would be prepared to close at any time after February 17, 1956.
17. See note 8 supra.
partner in the business conducted on the land, had a present possessory interest therein, at least in equity, and thus had an immediate interest in the improvement of the land. These factors may well justify the particular decision, but the sweep of the opinion indicates a need for a re-examination of the Estates Act of 1947.

Leon A. Mankowski

INSURANCE—Variable Annuities—Regulation by the Securities and Exchange Commission.


The defendant insurance company (VALIC) was authorized by the District of Columbia to sell life insurance, including variable annuity policies. Because the premiums paid on a variable annuity policy are predominantly invested in common stock, and because the amount of payments to the annuitant on maturity of the policy are uncertain, the Securities and Exchange Commission sought to enjoin the sale of variable annuity policies by the defendant until the policies were registered as securities under the Securities Act of 1933, and until the defendant registered as an investment company under the Investment Company Act of 1940. The trial court found that the variable annuity contract was within the purview of the 1933 Act and that the defendant (VALIC) was within the scope of the 1940 Act, but held that the McCarran-Ferguson Act barred federal regulation. The circuit court affirmed the judgment but held that the defendant came within the exclusory clauses of the 1933 Act and the 1940 Act, as well as being exempted from federal regulation by

18. The court did not investigate the state of the title at this stage of the proceedings.

19. The partner holding the option would have an interest in developing the land as actually in possession, and would presumably be unable to secure the cooperation of the other partner, without releasing the option, if onerous.


6. 54 Stat. 798 (1940), 15 U.S.C. § a-3(c)(3) (1952). " . . . [N]one of the following persons is an investment company . . . (3) Any bank or insurance company . . . ."
The variable annuity differs from the conventional annuity, which pays a fixed amount out of funds invested in debt securities, in that its premiums are invested in common stock and it pays fluctuating benefits. It is distinguished from a mutual fund in four significant ways: (1) the annuitant is guaranteed a life income rather than facing the possibility of outliving his investment in the mutual fund; (2) the policy cannot be surrendered for its cash value after maturity whereas an interest in a mutual fund is always saleable; (3) no direct benefits are received until maturity of the policy, while a participant in a mutual fund gets dividends soon after his investment; (4) an Internal Revenue ruling delays taxation of the annuitant until his policy matures, whereas in a mutual fund, the security-holder pays his tax currently. The purpose of the variable annuity is to cushion the effect of inflation on the purchasing power of the dollar; the theory being that the common stock fund will increase in value as the cost of living rises, permitting a higher number of annuity dollars to be paid. The 1933 act which the S.E.C. sought to apply to the variable annuity, guarantees to security purchasers a truthful disclosure of the nature of the securities sold in interstate commerce. Excluded from its coverage, however, are insurance policies and annuity contracts because the business world did not regard them as securities at the time of enactment. Also relied on was the 1940 act which protects inexperienced investors by requiring investment companies to register with the S.E.C., and by giving the S.E.C. certain regulatory powers. However, insurance companies are also excluded from the coverage of this act because they were already adequately supervised by state agencies in 1940. Lastly, the defendant sought the protection of the McCarran Act which expresses the congressional intent to leave regulation of insurance companies to the states unless Congress expressly enacts legislation relating to the business of insurance.

The variable annuity plan is a hybrid which has some features of both a security and an annuity. It would be almost impossible to place

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9. Id. at 80, 81.
it exclusively in either category so as to determine who should regulate it.\textsuperscript{17} There is, moreover, little possibility of explicit regulatory legislation in the near future unless by public demand.\textsuperscript{18} As a result it remains for the Supreme Court to determine the type of regulation which will best protect the public interest.\textsuperscript{19} If the S.E.C. is found to be the proper regulatory agency, upon compliance with its regulations by the defendant, the public would still be left to decide whether the variable annuity plan is adequate.\textsuperscript{20} For example, the common stock fund could be composed of highly speculative securities and as long as the defendant fully disclosed this, the S.E.C. would not bar the sale of the policy. Conversely, the District of Columbia regulatory body investigates the variable annuity policies before they are sold and determines whether they are safe for the public.\textsuperscript{21} In the above illustration, should the insurance superintendent believe that the common stock fund is too speculative, he could prevent the policy from issuing. It would seem that the latter system, if enforced, is a more effective safeguard than S.E.C. regulation for the individual who purchases a variable annuity policy because he lacks knowledge of the relative stability in different common stock issues.\textsuperscript{22}

\textit{Joseph P. Kelly}

\section*{INTERNATIONAL LAW—TRUSTEESHIP AS FOREIGN COUNTRY—STATUS OF KWAJALEIN UNDER THE FEDERAL TORT CLAIMS ACT.}

\textit{Callas v. United States (2d Cir. 1958)}

This was a tort action, brought in the district court of Brooklyn, under the Federal Tort Claims Act,\textsuperscript{1} for injuries to a child of an officer in the United States Navy, stationed on the island of Kwajalein. Kwajalein

\begin{itemize}
  \item \textsuperscript{17} See 56 Mich. L.R. 656, 658. But see, Comment, 33 N.Y.U.L. Rev. 76, 82 (1958).
  \item \textsuperscript{18} It is common knowledge that the 1933 act and the 1940 act were passed because of numerous frauds perpetrated on the investing public. There is no indication to date that defendant (VALIC) has engaged in such activity.
  \item \textsuperscript{19} The Supreme Court has granted certiorari. N.Y. Times, Oct. 14, 1958, p. 54, col. 8.
  \item \textsuperscript{20} Every security prospectus issued after S.E.C. registration states: "These securities have not been approved or disapproved by the Securities and Exchange Commission nor has the Commission passed on the accuracy or adequacy of the prospectus." See 48 Stat. 87 (1933), 15 U.S.C. § 87z (1952).
  \item \textsuperscript{21} The salient regulatory powers of section 35 of the District of Columbia Code are: (a) each annuity contract must be approved by the insurance superintendent; (b) to do business VALIC is required to deposit one hundred thousand dollars in securities (it has deposited two hundred thousand); (c) the insurance superintendent may refuse to renew the annual certificate of authority to do business if public interest is adversely affected, and he may revoke the certificate for enumerated improprieties; and (d) VALIC must submit an extensive annual report to the insurance superintendent.
  \item \textsuperscript{22} Of course, it would be possible for both the S.E.C. and the insurance superintendent to regulate the variable annuity. However, as has been set forth here, there appears to be no urgent need for S.E.C. regulation.
\end{itemize}
is an island in the Marshall group, which is part of the trusteeship administered by the United States under a trust agreement with the United Nations. The district court found that plaintiff's claim was within the section of the Federal Tort Claims Act excluding claims which occur in a foreign country, and the action was therefore barred under the doctrine of sovereign immunity. On appeal, the circuit court affirmed, holding that the United States was not sovereign over the trust territory, and therefore Kwajalein was a foreign country within the meaning of the Federal Tort Claims Act, and no action could be maintained under the act against the United States for injuries sustained on that island. Callas v. United States, 253 F.2d 838 (2d Cir. 1958).

The notion of sovereignty is inextricably woven into the concept of what is a foreign nation, early decisions having defined a foreign country as one without the sovereignty of the United States. Nations holding trusteeships generally do not consider themselves sovereign over such territories. The administering nation, nevertheless, is given certain incidents of sovereignty over the trust territory, which include, inter alia, the management of internal affairs, the provision for external defense, and the right to demand allegiance from the inhabitants. However, the administering nation may not cede or annex the territory; nor administer it except within the framework of the trust agreement. Conversely, the United States generally considers itself to be sovereign over its territories, and therefore claims against the federal government have been successfully litigated in the territories under the Federal Tort Claims Act. However, a base leased from Great Britain in Newfoundland, though a possession of the United States for purposes of the Fair Labor Standards Act, was held to be a foreign country for purposes of the Federal Tort Claims Act. The Court in the latter instance determined that the legislative purpose in excluding claims in foreign countries was to avoid subjecting the United States to claims that would be adjudicated under law not common to the United States and its territories. Okinawa, occupied by the United States since

2. For the territorial extent of the United States trusteeship, see U.S. DEPT OF STATE PUB., UNITED NATIONS INFORMATION SERIES 18, The United States and Non-Self Governing Territories (1947).
9. Ibid.
13. Id. at 221.
World War II, has also been held foreign for purposes of the Federal Tort Claims Act; the Court reasoned that since its final disposition had been left in suspension by the treaty of peace with Japan, the United States was not sovereign, even though it had full administrative control over the island.\textsuperscript{14} In addition, Saipan, an island in the trust area, had been declared without the sovereignty of the United States for purposes of the Federal Tort Claims Act, prior to the assumption of the trust by the United States, on the ground that occupation and possession were not alone sufficient to incorporate the island into United States territory.\textsuperscript{15} There was dictum in the case to the effect that Saipan would still be foreign after it became a trusteeship, since the United States would hold only for an indefinite period on behalf of the United Nations.\textsuperscript{16}

Under principles of international law, Kwajalein would appear to be without the sovereignty of the United States. The control exercised by the United States, although substantial, lacks many indicia of sovereignty, for example, ability to annex or cede. But the dissenting opinion points out "that 'foreign country' as used in the Federal Tort Claims Act is not a term of art, and that 'its construction is dependent on the intent of Congress in excluding claims arising in foreign countries from the remedial provisions of the Act.'"\textsuperscript{17} The court in the instant case, although agreeing that the legislative intent of Congress in excluding foreign countries was to prevent the United States from being subjected to claims which would be based on law not common to it and its territories, is in conflict as to the actual state of the internal law of Kwajalein. While the majority of the court found that the internal law of Kwajalein is the primitive local law, which contains relatively few negligence concepts, the dissenting opinion indicates that the internal law to be applied should be that law basic to the United States and its territories.\textsuperscript{18} The latter view would seem to be supported by the United States Department of the Interior.\textsuperscript{19} However inadequate the latter concepts might seem, they would appear preferable to a juridical vacuum where there exists no remedy for negligence because of the underdevelopment of tort law. Further, by the terms of the trust agreement, the United States not only has the power to apply to the trust territory such laws of the United States as it deems appropriate,\textsuperscript{20} but has the obligation to provide a system of law for the territory which will

\footnotesize{\textsuperscript{14} Cobb v. United States, 191 F.2d 604 (9th Cir.), cert. denied 343 U.S. 917 (1951).  
\textsuperscript{15} Brunell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948).  
\textsuperscript{16} Id. at 71.  
\textsuperscript{17} Callas v. United States, 253 F.2d 838, 842 (2d Cir. 1958).  
\textsuperscript{18} Id. at 844.  
\textsuperscript{19} The Director of the Office of Territories of the Department of the Interior has stated that the law of the trust territory includes the common law of England and all the statutes of Parliament in force on July 3, 1776. Callas v. United States, 253 F.2d 838, 843 (2d Cir. 1958).  
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protect the rights and fundamental freedoms of all elements of the population without discrimination. The application of legal concepts fundamental to the United States territories, and as a result, the application of the Federal Tort Claims Act, would seem to be a step towards satisfying this obligation.

Peter G. Nyhart

JURISDICTION—IN PERSONAM JUDGMENT AGAINST NONRESIDENT—CONTRACTUAL APPOINTMENT OF SECRETARY OF STATE TO RECEIVE PROCESS.

Green Mountain College v. Levine (Vt. 1958)

The defendants made a promissory note in the state of Vermont payable to the plaintiff. In the note the defendants, as nonresidents of the state, appointed the Secretary of State of Vermont to accept service in their behalf in connection with any litigation which might arise pertinent to the note. Service of process was effected by the sheriff delivering the writ to the Secretary of State of Vermont and the Secretary sending a copy to the defendants' home in Brooklyn, New York. The attorney for the defendants made a special appearance to contest the jurisdiction of the court over the person of the defendants and filed a motion to dismiss the action. The trial court overruled the motion to dismiss on the ground that the motion had been signed by the defendants' attorney and not personally endorsed by the defendants as required. On appeal of the denial of the motion to dismiss, the Supreme Court of Vermont, two justices dissenting, affirmed the lower court's ruling and held that by appointing the Secretary of State as an agent to receive process the defendants had waived their right to personal service and the lack of capacity of the Secretary to act as process agent and the danger that notice might not be forwarded to the defendants were risks that the defendants undertook in appointing the Secretary of State to receive service for them. Green Mountain College v. Levine, 139 A.2d 822 (Vt. 1958).

A personal judgment against a nonresident who is not personally served within the state and who does not waive the necessity of service by a general appearance is usually unenforceable. However, a nonresident may voluntarily appoint a resident as his agent to receive service for him in a particular transaction, or this agency may arise by implication of

The most typical of the latter are the nonresident automobile statutes which provide that the nonresident in using the state highway appoints the secretary of state or other public official as his agent to receive process for him in any litigation that arises from his use of the highways of that state. These statutes have been upheld as a valid exercise of the police power of the state in protecting the welfare of its citizens by regulating the use of a dangerous instrumentality. The police power of the state was also the ground for upholding an Iowa statute which permitted substituted service on a seller of securities, since the selling of stocks and bonds was subject to state regulation. Many states have similar statutes requiring a nonresident corporation to appoint a public official to receive process within that state as a reasonable condition upon the exercise of a nonresident's right to do business within that state's boundaries. The maker of a promissory note, moreover, may appoint any attorney of any court of the state wherein the note was made to appear and confess judgment against him for the amount of the note, thus consenting to a waiver of personal service. When parties to a contract agree to abide by the decision of a foreign court or arbitration board, they have given the foreign state personal jurisdiction over themselves and have waived their right to be personally served in that jurisdiction. A recent federal case held

4. Davidson v. Doherty & Co., 214 Iowa 739, 241 N.W. 700 (1932) (service on agent in charge of agency of defendant gave court jurisdiction, even though defendant was nonresident).
10. Gotham Credit Corp. v. Powell, 22 N.J. Misc. 301, 38 A. 2d 700 (1944); Hazel v. Jacobs, 78 N.J.L. 459, 75 Atl. 903 (1910). See also Bowles v. Schmitt & Co., 170 F.2d 617 (2d Cir. 1948). Even when a state will not recognize such a confession of judgment in its own jurisdiction, it will enforce the judgment of another jurisdiction if such a confession was valid under the law of the other state. Turner v. Alton Banking & Trust Co., 181 F.2d 899 (8th Cir., cert. denied 340 U.S. 833 (1950); Carroll v. Gore, 106 Fla. 582, 143 So. 633 (1932); Whittier v. Riley, 104 Neb. 805, 178 N.W. 762 (1920); Morris v. Douglass, 237 App. Div. 747, 262 N.Y. Supp. 712 (1st Dept. 1933); accord Cohn, Baer & Berman v. Bromberg, 185 Iowa 298, 170 N.W. 478 (1919).
that the one appointed as agent to receive notice of a claim need not be aware of his appointment of agency until he is notified of the claim, it being sufficient that a third party claimant has reasonably relied on the principal's direction to give notice to his agent.\(^\text{13}\)

The jurisdiction of a state over nonresidents who make contracts or commit torts within its boundaries has been considerably extended\(^\text{14}\) since the decision of *Pennoyer v. Neff*.\(^\text{15}\) The changes have been statutory and found not to be violative of due process\(^\text{16}\) if the defendant has notice of the suit pending against him. A Vermont statute allows substituted service on a foreign corporation doing business in Vermont by service upon the secretary of state.\(^\text{17}\) It appears that the plaintiff and defendants, as individuals, were attempting to establish by contract a method of service which would have been the normal procedure had the defendants been a corporation.\(^\text{18}\) The majority of the court based its decision on the contractual arrangement, but the dissenting justices thought that the service was invalid since the Secretary of State had no authority by statute to accept service in this situation and the element of consent was lacking for a true agency relationship.\(^\text{19}\) It is questionable that this relationship should be determinative in the instant case. The agency in the nonresident automobile statutes and similar statutes is a fictitious one and not based on the actual consent of the nonresident to such a mode of service.\(^\text{20}\) Although the Secretary of State of Vermont was not authorized by statute to accept service in the situation presented, neither was he prohibited by statute from doing so. It is submitted that the defendants are not imposing a duty on a public official as suggested by the dissenting justices\(^\text{21}\) but rather are assuming the risk that notice of process may or may not reach them through service upon the Secretary of State. An agreement such as the one in the instant case has the advantage that a nonresident is more likely to carry out the terms of his contract knowing an action can be brought

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17. VT. STAT. 1947 § 1562. "If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such contract or tort."


against him by substituted service on a public official. However, a difficulty would arise if such contracts became commonplace. The secretary of state or an other public official designated as agent to receive service might become burdened with writs of service. In such an event, the problem might be handled by a statute to the effect that substituted service upon a public official of the state in his official capacity is valid only when authorized by statute.

John J. Guilfoyle, Jr.

LABOR LAW—FAILURE TO BARGAIN COLLECTIVELY—BALLOT CLAUSE NOT A MANDATORY BARGAINING SUBJECT.

N.L.R.B. v. Wooster Div. of Borg-Warner Corp. (U.S. 1958)

Plaintiff, a certified International Union, presented defendant corporation with a collective bargaining agreement. Defendant offered the counterproposal that as to all non-arbitrable issues, there should be a thirty day negotiation period after which, before any strike could be called by the union, there would have to be a secret ballot taken among the employees, union and non-union, on the defendant’s last offer. Should a majority of the employees reject this last offer, the company would have the opportunity to make a new proposal within seventy-two hours and have a vote taken on that proposal prior to the calling of any strike by the union. Despite the union’s refusal to accept this ballot clause, the company insisted to the point of impasse that it be included in the agreement. The union then filed charges with the National Labor Relations Board that the company, by refusing to bargain collectively, was guilty of an unfair labor practice in violation of Section 8(a)(5) of the Taft-Hartley Act. The Board found that the employer’s insistence upon inclusion of the ballot clause in the agreement as a condition precedent to acceptance amounted to a refusal to bargain collectively. Upon appeal, the circuit court reversed, holding that the ballot proposal came within the mandatory bargaining subjects of section 8(d) and the company therefore could insist upon its inclusion in any bargaining agreement. The Supreme Court, however, reversed the decision of the court of appeals, holding that the

1. Non-arbitrable issues included modification, amendment, or termination of the contract.
2. 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1952). This section provides that it is an unfair labor practice for the employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a). That section provides that representatives, designated for the purposes of collective bargaining by a majority of the employees in an appropriate unit for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

http://digitalcommons.law.villanova.edu/vlr/vol4/iss1/5
ballot clause did not come within Section 8(d) of the Taft-Hartley Act, and the employer's insistence upon it to the point of creating an impasse in the negotiations was a refusal to bargain collectively concerning mandatory subjects. The court further found that the good faith motives of the employer were irrelevant in the face of his insistence upon the inclusion of subjects not within section 8(d). *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 78 Sup. Ct. 718 (1958).

The purpose of the National Labor Relations Act is not to compel agreements between employers and employees' representatives, but to compel the parties to at least negotiate concerning certain mandatory subjects in an effort to secure industrial peace. This purpose has been carried over into the Taft-Hartley Act. Moreover, it has been found that insistence that matters outside section 8(d) be included in an agreement as a condition precedent to acceptance, is a refusal to bargain concerning the other mandatory bargaining subjects. In the above instances, the courts have reasoned that such action by employers evidence a refusal to bargain, per se, and at least one court has condemned such as bargaining in bad faith.

That the strike ballot clause or other similar ballot clauses are within section 8(d) has been the subject of conflict among the courts. In *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, strike ballot and ratification clauses were found by the Court of Appeals for the Seventh Circuit to be within the scope of collective bargaining.
the scope of section 8(d) and the employer could therefore insist upon their inclusion in the bargaining contract even to the point of creating an impasse in the negotiations; the court rejected the plea of the union that the acceptance of the employer's proposal would permit interference into the internal affairs of the union. In *N.L.R.B. v. Darlington Veneer Co.*, 12 however, the Court of Appeals for the Fourth Circuit concluded that the employer by insisting that the contract become effective only upon ratification by a secret vote of the employees, was attempting to bargain, not with respect to the subjects within section 8(d), but with respect to the authority of the duly certified representatives, a matter specifically fixed by the Taft-Hartley Act. 13 The court in that case found bad faith on the part of the employer because the subject of bargaining was not mandatory and therefore could not be insisted upon to the point of creating an impasse in the negotiations.

It can be seen from the instant case that if it be found that the subject upon whose inclusion the employer is insisting is not within section 8(d), and that the employer's insistence on its inclusion creates an impasse in the negotiations, then the employer is necessarily bargaining in bad faith, and no further determination as to his good faith motives is material. Further, there is authority to the effect that the employer, by ignoring the employees' representatives, and negotiating with the employees directly, violates the duty imposed by the Taft-Hartley Act to bargain collectively with the representatives of his employees. 14 It would seem that the inclusion of the ballot clause in the instant case would accomplish this same result. Though, to be sure, the clause provides for initial negotiation between the union and the employer; the opportunity afforded the employer of by-passing the union and dealing directly with the employees is so substantial as to render the initial negotiations no more than a pretence for satisfying the collective bargaining requirements of the act. In addition, by enabling the employer to submit a new proposal to the employees within seventy-two hours after the rejection of the old, the union would be deprived of its most effective bargaining weapon, the right to an immediate strike. Clearly, the Taft-Hartley Act was never intended to encourage the circumvention of the union in labor negotiations, when one of the express purposes of the act is to place employers in a more nearly equal position with unions in collective bargaining. 15

Edward O'Malley

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12. 236 F.2d 85 (4th Cir. 1956).
TORTS—SOVEREIGN IMMUNITY—MUNICIPAL CORPORATIONS NOT IMMUNE TO COUNTERCLAIMS WHEN ACTION IS BROUGHT UNDER THE FEDERAL TORT CLAIMS ACT.

Newark v. United States (3d Cir. 1958)

An ambulance owned by the city of Newark collided with a United States mail truck while both vehicles were being operated on official business within that city. Newark brought an action against the United States under the Federal Tort Claims Act for the damage to the ambulance, and the United States filed a counterclaim for the damage to the mail truck. The district court found both drivers guilty of negligence and denied the counterclaim of the United States. The court held that the New Jersey case law under which sovereign immunity prevents a private defendant from raising the defense of contributory negligence in a suit by a municipality was applicable to the federal government under the terms of the Federal Tort Claims Act; and therefore, the contributory negligence of the ambulance driver did not bar Newark's suit. Nevertheless, the trial court dismissed Newark's suit, finding that the ambulance driver's negligence amounted to active wrongdoing and thus was imputable to the city under New Jersey law. On appeal the circuit court affirmed the decision of the district court but did so, however, on the ground that the United States could use the defense of contributory negligence in a suit against it by a New Jersey municipality. Newark v. United States, 254 F.2d 93 (3d Cir. 1958).

It is well settled that the United States can sue a state without its consent. The consent of the states to suits against them by the federal government is inherent in the constitutional plan, whereby the supreme sovereignty is vested in the federal government. Since the sovereign immunity of a municipal corporation is derived from that of the state, a

2. Miller v. Layton, 133 N.J.L. 323, 44 A.2d 177 (1945); Paterson v. Erie R. Co., 78 N.J.L. 592, 75 Atl. 922 (1910). New Jersey is practically the only jurisdiction in which this rule is applied.
3. In order to avoid the harshness of the rule that contributory negligence cannot be imputed to a plaintiff city, New Jersey courts permit contributory negligence to be imputed to a municipality, if such negligence amounts to active wrongdoing, and not merely a careless omission. Hartman v. City of Brigantine, 42 N.J. Super. 247, 126 A.2d 224 (1956), affirmed, 23 N.J. 530, 129 A.2d 876 (1957). See also Cloyes v. Township of Delaware, 23 N.J. 324, 129 A.2d 1 (1957); Casile v. Housing Authority of Newark, 42 N.J. Super. 52, 125 A.2d 895 (1956).
4. It is interesting to note that the court went out of its way to determine this point. Since on the facts of the case, New Jersey law permitted the negligence of the driver to be imputed to the city, there was no need to decide the general availability of the defense of contributory negligence.
municipality can have no greater immunity than a state. Although the federal government is similarly immune from suits by a state or private person, under the terms of the Federal Tort Claims Act, the United States waives its sovereign immunity in certain specific cases and consents to be sued as a private individual in like circumstances. The question here is whether the United States will be treated as a private person in determining its right to file a counterclaim or other defense against a sovereign body bringing suit against the United States under the Federal Tort Claims Act. When California sued the United States under this act, state immunity was held to be no bar to a cross-complaint by the United States. However, the court based its decision on the right of the federal government to sue a state and did not consider whether the United States should be treated as a private individual under the Federal Tort Claims Act. Sovereign immunity, however, prevented the United States from filing a third party complaint against Arizona, in a suit brought by a private individual against the United States, the circuit court holding that in such a situation the United States should be treated as a private person.

The main case illustrates the necessity of interpreting an act of Congress according to the intention of the lawmakers and not the letter of the statute. The primary purpose of the Federal Tort Claims Act is to provide a just and adequate remedy to those injured through the fault of any government employee acting within the scope of his employment and to free Congress from the burden of introducing private bills granting permission to sue the United States. Some courts feel that any waiver of sovereign immunity should be strictly construed. Others insist that sovereign immunity is an archaic principle and any statute waiving such immunity should be liberally interpreted because of its beneficent purpose. Perhaps the wisest course is not to worry about any rule of strict or liberal construction but to construe the act so as to make it internally consistent and equitable. In the instant case, the court understood the obvious unfairness of permitting Newark to take advantage of the federal government’s waiver of immunity under the Federal Tort Claims Act, while at the same time using its own immunity as a shield against a valid defense of the United States; the court recognized the defense of contributory negligence even though a literal interpretation of the act would bar such in New Jersey. This decision was probably more in keeping with the

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11. United States v. Arizona, 214 F.2d 389 (9th Cir.), rehearing denied, 216 F.2d 248 (9th Cir. 1954).
spirit of the Federal Tort Claims Act, for Congress could hardly have foreseen such an unusual situation as this and clearly never intended this act to increase the sovereign immunity of municipal corporations.

Patrick M. Ryan

TRADE REGULATIONS—Restraint of Trade—Sherman Act: Per See Illegality of Tying Agreements.

*Northern Pacific Ry. v. United States* (U.S. 1958)

Defendant is owner in fee simple of extensive landholdings, most of which is currently under lease.¹ Many of the lease agreements contain preferential routing clauses, requiring the lessees to ship via the Northern Pacific providing that its rates and services are equal to those of competing lines.² The United States filed suit in a federal district court for an injunction restraining the enforcement of the agreements on the grounds that such tying agreements³ were unlawful restraints of trade under Section one of the Sherman Act.⁴ On the government's motion, the district court entered summary judgment and the defendant appealed to the Supreme Court. Adopting the district court's reasoning the Supreme Court affirmed, holding that the defendant's exertion of substantial economic power, by virtue of its extensive landholdings, as a lever to induce large numbers of lessees and grantees to enter such agreements was a per se unreasonable restraint of trade and as such violated Section one of the Sherman Act. *Northern Pacific Ry. v. United States*, 78 Sup. Ct. 514 (1958).⁵

In *Henry v. A. B. Dick Co.*, a 1912 patent infringement case, the Sherman Act was held not to be applicable to tying contracts.⁶ In 1914, however, Congress enacted the Clayton Act⁷ which was relied upon in overruling the *A. B. Dick* case.⁸ It has been held under the Clayton Act that the illegality of a tying agreement can be found from either a showing of dominance by the seller in the market of the tying product or a restraint

¹. The Northern Pacific was the recipient of a Congressional land grant of some 40 million acres of land which consisted of every alternate section of land in a belt twenty to forty miles wide on either side of the tracks through the several states and territories from Lake Superior to the Puget Sound. They still retain fee simple ownership of 2,700,000 acres most of which is currently under lease, and mineral rights in another six million acres.

². Many of the agreements of sale covering the acreage already disposed of contained similar clauses and they too are the subject of the present action.

³. The *tying* product in the present case is the land and the *tied* product is the freight, i.e., shipment of all products produced on or taken from the land in question.


⁶. 224 U.S. 1, 28-35 (1912).


of an appreciable volume of business by him in the market of the tied product. The criteria of illegality under the Sherman Act are not as simple as it requires a conjunctive test of the above two elements. It is not every restraint of trade that is illegal under the Sherman Act but only that which is unreasonable. In general those restraints which have been held to be unreasonable are those which are so substantial as to affect market prices, and those which foreclose competition from a particular market. The Sherman Act, however, does not demand that there be competition, but only that competition not be foreclosed from a market by unreasonable restraints of trade such as tying agreements. The essence of illegality in tying agreements is the wielding of a dominant economic position in one market as a lever to obtain an advantage in the market of a second product. Prior to 1947, tying agreements were found to be illegal under the simple test of the Clayton Act because of their pernicious effect on commerce in the market of the tied product. However, in 1947 in *International Salt Co. v. United States*, a case involving a vendor who owned patents on the tying product and who had a substantial effect on commerce in the market of the tied product, that a tying agreement was held to be a per se unreasonable restraint of trade under the conjunctive test of the Sherman Act. A per se violation of the Sherman Act was also found in the absence of patents on the tying product where the undisputed facts of comparable market data established the defendant's dominance in the market in such goods. In *Times-Picayune Publishing Co. v. United States* the court refused to find a per se violation in the absence of either vendor's ownership of patents on the tying product or comparable market data that would establish his dominance in the market of the tying product.

The present suit was brought only under section one of the Sherman Act with both parties relying on the *Times-Picayune* and *International Salt Co. v. United States*. Here the undisputed facts were that defendant was the owner of the sole movie house in many towns and the sole outlet for films in some areas comprising several towns.
Salt cases. Justice Black, writing for the Court in the instant case,\(^\text{20}\) found that the requirement of market dominance in the tying product spoken of in the *Times-Picayune* case was only general language and that the *Times-Picayune* case did not limit the holding of *International Salt* to cases where there are patents or copyrights on the tying product. However, in the absence of a patent or copyright on the tying product there must be comparable market data in the record which establishes defendant's dominance in the market of the tying product.\(^\text{21}\) In the present case the lower court ignored the dominance test and made the validity of the tying agreements depend entirely on the commercial restraints accomplished by them. Sole proof of market dominance in the tying product in the instant case was defendant's fee simple ownership of the land, and his ability to obtain the leases with preferential routing clauses. The record is void of facts regarding the landholdings of the defendant in relation to others in the same market and there is no market defined.\(^\text{22}\) Nor was there any discussion of the uniqueness of land which of itself might define the market and prove the necessary dominance or control. The same criticism is true of the Court's handling of the second element, *i.e.*, restraint of an appreciable volume of business in the market of the tied product, the lower court merely stating that the amount of freight shipped from such landholdings is substantial.\(^\text{23}\) There was no mention of the amount of shipping presently being handled by competition. The present finding of a per se violation based solely on section one of the Sherman Act in the absence of a patent on the tying product or comparable market data from which the dominance of defendant in the market of the tying product can be inferred, changes the criteria for violations of section one of the Sherman Act to the disjunctive test of the Clayton Act and leaves the outcome of future litigation on the subject questionable.

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