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Constitutional Law - Electronic Eavesdropping

RECENT DECISIONS

CONSTITUTIONAL LAW — Electronic Eavesdropping — Recorded bribe attempt admissible at bribery trial at which agent, to whom the attempted bribe was made, testified — Rights under fourth amendment not violated where electronic device was not planted by an unlawful physical invasion of a constitutionally protected area.

Lopez v. United States, 83 Sup. Ct. 1381 (1963).

An Internal Revenue agent, while investigating a possible tax delinquency, was allegedly offered a bribe by petitioner to conceal petitioner's tax liability. The agent feigned acceptance, received money and was invited to return in three days. After reporting the attempted bribe to his supervisors the agent was instructed to follow through with the original plan. Three days later, after having been equipped with a pocket recorder, the agent returned to petitioner's office. The agent and petitioner spoke of the original meeting and petitioner confirmed the first bribe attempt. Further, the agent received more money and received promises of additional gratuities. Each act of attempted bribery was allegedly designed to influence the agent in concealing tax due by petitioner. Petitioner was later indicted on four counts of attempted bribery in violation of 18 U.S.C. § 201,[1] and was subsequently found guilty on three of the four counts. Prior to and during trial, petitioner had filed a motion to suppress the recording as evidence,[2] claiming such recording was obtained in violation of his

1. 18 U.S.C. § 201 provides:
   Whoever promises, offers, or gives any money or thing of value . . . to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function . . . with intent to influence his decision or action on any question, matter, cause, or proceeding which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined . . . or imprisoned . . . or both.
2. Fed. R. Civ. P. 41(e), provides:
   A person aggrieved by an unlawful search and seizure may move . . . for the return of the property and to suppress for use

rights under the fourth amendment.[3] Petitioner asserted that the agent never intended to accept the bribe and therefore had gained access to his office by ruse and that petitioner's oral statements were illegally seized. The motions were denied and the agent's recording was admitted into evidence. The agent also testified as to his conversations with petitioner. The Court of Appeals for the First Circuit affirmed.[4] Certiorari was granted and in a divided opinion the United States Supreme Court held that the constitutional guarantees of the fourth amendment are not such as would prohibit the use of an electronic recording device secretly carried into one's domain by an avowed federal agent who had been there by invitation of the owner or occupant of the premises.

The decision in *Lopez* was bound to follow the decisions which preceded it. Regarded as controlling by the Court were *Olmstead v. United States,*[5] *On Lee v. United States,*[6] *Goldman v. United States*[7] and *Silverman v. United States.*[8] The instant case, however, should not be construed as buttressing or reaffirming its predecessors.

In the *Olmstead* case[9] evidence of a conspiracy was obtained by federal agents secretly tapping telephone company lines connected to the main office and residences of the conspirators. The connections were made in the basement of a large public building and on public streets. No physical entry was made into the office or homes of any of the conspirators. The Court held that obtaining the evidence in this manner and presenting it at the subsequent trial did not violate the defendants' rights under the fourth amendment. The Court stressed that the absence of a physical invasion of petitioners' premises was

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as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, ... The motion shall be made before trial . . . but the court in its discretion may entertain the motion at the trial . . . .

3. The fourth amendment provides:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. Lopez v. United States, 305 F.2d 825 (1st Cir. 1962).
5. 277 U.S. 438 (1928).
6. 343 U.S. 747 (1952).
7. 316 U.S. 129 (1942).
8. 365 U.S. 505 (1961).
9. Olmstead v. United States, *supra* note 5.

a vital factor in its decision. The telephone connections were made with no trespass upon the property of the defendants.[10]

In the *On Lee* case[11] a special employee,[12] acting in an undercover capacity for the United States Bureau of Narcotics, engaged On Lee, a long time acquaintance of his, in conversation in On Lee's laundry shop. The special employee was carrying a concealed radio transmitter and as On Lee talked, making self-incriminating statements involving the traffic in narcotics, his voice was picked up by a federal narcotics agent who was standing outside On Lee's shop, equipped with a radio receiver tuned to the transmitter carried by the special employee. The special employee never testified at On Lee's trial but the agent testified as to what he heard over the radio receiver. On Lee maintained that the evidence was obtained in violation of his rights under the fourth amendment, amounting to an unlawful search and seizure. In a divided opinion, the Court held that the conduct of the Government did not amount to a search and seizure as is proscribed by the fourth amendment. No trespass was committed by the special employee; he went into On Lee's shop with the consent, if not by the implied invitation, of On Lee.[13]

In *Goldman,*[14] federal agents placed a detectaphone against a wall to enable them to hear conversations taking place in the next room. Petitioner claimed his rights under the fourth amendment had been violated by the federal agents and tried to distinguish his case from *Olmstead,*[15] stating that when one speaks over a telephone he intends that his voice will carry over a long distance but that when one speaks in the privacy of his own home or office, he intends that the sounds remain there. The Court declined to distinguish the cases on their facts and held that because there had been no trespass committed, the defendants' rights under the fourth amendment had not been violated. The Court went on to state that there had been in fact a

10. The Olmstead case was decided well before enactment of § 605 of the Federal Communications Act, which provides in part: "No 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." 47 U.S.C. § 605 (1934). Had Olmstead arisen after the wiretap statute, its facts would most certainly have brought it within the scope of such statute.

11. On Lee v. United States, *supra* note 6.

12. The special employee, from all indications, was a member of the underworld who was himself quite familiar with the traffic in illegal narcotics and who had turned informant.

13. On Lee v. United States, *supra* note 6 at 751, 752.

14. Goldman v. United States, *supra* note 7.

15. Olmstead v. United States, *supra* note 5.

prior physical entry into the petitioners' office for the purpose of installing a different listening apparatus which had turned out to be ineffective.[16] The Court emphasized that this earlier physical trespass was of no relevant assistance in the later use of the detectaphone in the adjoining office.[17]

In *Silverman*[18] officers in an adjoining house inserted a spike, attached to a microphone under a baseboard until it hit a heating duct in the premises occupied by defendants. The heating duct acted as a conductor and the officers were able to hear conversations involving gambling activities. Granting certiorari, the Supreme Court reversed, stating that although a federal statute[19] had not been violated, petitioners' rights under the fourth amendment had. The Court went on to say that *Silverman* was not overruling *Olmstead*[20] or *Goldman*[21] because in the *Silverman* case, there was a physical invasion of the premises occupied by petitioners when the spike mike had been inserted into petitioners' premises. In *Silverman,* the Court states:

> Eavesdropping accompanied by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided court has ruled that eavesdropping accompanied by other electronic means did not amount to an invasion of Fourth Amendment rights.[22]

All of the above cited cases have held for the proposition that electronic eavesdropping, unaccompanied by an unlawful physical invasion of a constitutionally protected area, is not a violation of one's rights under the fourth amendment, but each case was closely divided with strong dissents. In his *Olmstead* dissent, Mr. Justice Brandeis recognized that the fourth amendment is primarily a protection of privacy, pointing out that when the Constitution was adopted, force and violence were the only known means of compelling the production of private papers. He went on to state:

> Subtler and more far-reaching means of invading privacy . . . have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet . . . .

16. In the Goldman case federal agents had actually entered the defendants' premises with a microphone which they secreted inside the premises. This microphone failed to work and it was then that the agents employed the use of the detectaphone from outside the defendants' premises.

17. Goldman v. United States, *supra* note 7 at 134, 135.

18. Silverman v. United States, *supra* note 8.

19. 47 U.S.C. § 605, *supra* note 10.

20. Olmstead v. United States, *supra* note 5.

21. Goldman v. United States, *supra* note 7.

22. Silverman v. United States, *supra* note 8 at 509, 510.

> Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasion of individual security?[23]

Mr. Justice Murphy, dissenting in *Goldman,* stated:

> The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide. It is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.[24]

Mr. Justice Douglas, specially concurring in *Silverman,* stated that he could see no rational difference between the electronic listening devices employed in *Silverman* and *Goldman* and that the invasion of privacy was as great in one case as in the other.[25]

Judge Frank, dissenting in *United States v. On Lee,* saw even a blacker picture if the protection of the fourth amendment was not afforded in a case such as *On Lee.*[26] His rationale was that a secret listening device conducts only an exploratory search for evidence and that such searches should be forbidden, with or without warrant, by the fourth amendment.[27] Further, Judge Frank stated:

> The practice of broadcasting private inside-the-house conversations through concealed radios is singularly terrifying when one considers how this snide device has already been used in totalitarian lands. Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus.[28]

It was against this background of closely divided cases that the *Lopez* case was decided. In the view of the majority, *Lopez* does not involve eavesdropping at all. The federal agent did not use the re-

23. Olmstead v. United States, *supra* note 5 at 473, 474.

24. Goldman v. United States, *supra* note 7 at 138.

25. Silverman v. United States, *supra* note 8 at 512, 513.

26. United States v. On Lee, 193 F.2d 306 (2d Cir. 1951).

27. *Id.* at 313, 314.

28. *Id.* at 317.

corder to listen in on conversations he could not otherwise have heard. Instead, the device was used to obtain corroboration of the conversation in which the Government's agent participated and was entitled to disclose. Further, Mr. Justice Harlan, delivering the opinion of the Court, states:

> [T]he device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.[29]

In a special concurring opinion,[30] Mr. Chief Justice Warren, although agreeing with the result reached by the majority, felt that the instant case should not be construed as reaffirming the result in *On Lee*. Rather he thought that the two cases were distinguishable on their facts, reasoning that the use and purpose of the radio transmitter in *On Lee* was not to corroborate the testimony of the undercover employee, but rather to preclude the necessity of having him take the stand. The Chief Justice stated that although it was permissible to permit secretly recorded statements to be introduced as evidence to corroborate an agent's testimony, he could not sustain the introduction of the same type of evidence, used independently, so as to conceal substantial factual and legal issues concerning the rights of an accused and the administration of criminal justice.

In a vigorous dissent[31] Mr. Justice Brennan also was of the opinion that the result in *On Lee* was wrong, but he could not see any factual difference between *On Lee* and the instant case. His view was that On Lee's trial may have been less fair than that accorded Lopez because of the withholding of the special employee as a witness but that the invasion of freedom was the same in both cases. He thought that the device employed in *Lopez* was too serious an intrusion upon one's fundamental and basic right of privacy.

The overriding theme of Mr. Justice Brennan's dissent and the dissents in the cases treated by the Court as controlling on Lopez[32] is that the uncontrolled use of electronic eavesdropping by law enforcement officers will destroy all semblance of anonymity and pri-

29. Lopez v. United States, 83 Sup. Ct. 1381, 1388 (1963).

30. *Id.* at 1390, 1391.

31. *Id.* at 1392.

32. Olmstead v. United States, *supra* note 5; On Lee v. United States, *supra* note 6; Goldman v. United States, *supra* note 7 and Silverman v. United States, *supra* note 8.

vacy. Further, the failure of the Court to enforce rigidly the standards of the fourth amendment will make it a party to this official lawlessness.

The decision in *On Lee,* the case most analogous to the instant case, has never been overruled, modified or limited by the Supreme Court.[33] It has been followed by the courts of appeal which have considered it.[34] *Lopez,* however should not be considered as a reaffirmance of *On Lee.* One distinction between *On Lee* and *Lopez* is that in *On Lee,* the immediate recipient of On Lee's spoken words did not testify and thus could not be cross-examined, whereas in *Lopez,* the agent to whom petitioner spoke testified and was cross-examined. The distinction is an important one since even the most innocuous conversation can sound incriminating if the setting and mood of the conversation is not apparent. The inflection in one's voice may not be noticeable to one who is listening by way of an electronic device. The look on one's face may belie the words he utters, but this would never be known by the listener to a recording or a radio-transmitted conversation.

Another distinction between the two cases is that in *On Lee* the special employee appeared to be on a fishing expedition for those who directed his activities. The agents were endeavoring to procure more evidence of On Lee's trafficking in narcotics. In *Lopez,* the agent was there with a specific purpose — to obtain the most trustworthy and accurate corroboration available of the attempted bribe, which had already been communicated to the agent. The only discernible difference between a person's testimony in regard to a conversation in which he participated and an electronic recording of the same conversation is that the recording has the advantage of furnishing trustworthiness to the person's testimony. The risk of disclosure is always present, regardless of eavesdropping by any third person.[35]

There is in the instant case, as perhaps there is in most such cases, an unspoken suggestion that the use of electronic eavesdropping to secure evidence is per se improper, that it is a *dirty business,* and that the intrusion of the recording device taints the law enforcement activity. The proponents of electronic eavesdropping maintain that

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33. See Silverman v. United States, *supra* note 8 at 508.

34. *See e.g.,* Anspach v. United States, 305 F.2d 48 (10th Cir. 1962), *cert. denied,* 371 U.S. 826 (1962); Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), *cert. denied,* 368 U.S. 989 (1962); United States v. Kabot, 295 F.2d 848 (2d Cir. 1961), *cert. denied,* 369 U.S. 803 (1962); United States v. Finazzo, 288 F.2d 175 (6th Cir. 1961), *cert. denied,* 368 U.S. 837 (1961); *cf.* Carnes v. United States, 295 F.2d 598 (5th Cir. 1961), *cert. denied,* 369 U.S. 861 (1962).

35. *Cf.* Rathbun v. United States, 355 U.S. 107 (1957).

there is nothing inherently objectionable about the use of such recording devices as long as the prying for which they substitute is not offensive. Their cry is that it is a necessary weapon to use in the war against crime as it exists in today's modern world.[36]

The opponents plead that the resulting deprivations of privacy, brought on by the use of electronic surveillance, reeks of totalitarianism.[37]

Even though the Supreme Court affirmed the conviction of petitioner, the importance of the *Lopez* decision is not that the Court has extended or even followed closely settled law as established in the leading cases in the electronic eavesdropping field, but rather that the force, authority and vitality that *Olmstead, Goldman, Silverman,*[38] and especially *On Lee,*[39] once had, has been diminished. The majority apparently refuses to acknowledge that *Lopez* entails eavesdropping per se, thereby skirting somewhat the issue involved in the *On Lee* case. The special concurring opinion and the dissent categorically state the decision in *On Lee* was wrong. The Supreme Court is aware that with the tremendous scientific advances in electronic listening devices, the age of privacy is rapidly disappearing. By extending the protection of the fourth amendment to flagrant abuses in the electronic eavesdropping field the Supreme Court will be assuring that respect for the Constitution and the law will be greatly enhanced.

Lopez has brought the Supreme Court one step closer to applying the sanctions of the fourth amendment to these type of cases. This is not to say, however, that all cases involving electronic eavesdropping should be banned by the fourth amendment, but as Mr. Chief Justice Warren states in *Lopez*:

> However, I do not believe that as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods. One of the lines I would draw would be between this case and *On Lee.*[40]

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36. Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View,* 44 MINN. L. REV. 835, 844 (1960).

37. Hennings, *The Wiretapping-Eavesdropping Problem: A Legislator's View,* 44 MINN. L. REV. 813 (1960).

38. Olmstead v. United States, *supra* note 5; Goldman v. United States, *supra* note 7; Silverman v. United States, *supra* note 8.

39. On Lee v. United States, *supra* note 6.

40. Lopez v. United States, *supra* note 29 at 1389.

CORPORATIONS — Stock Transfer Restrictions — First option agreement providing for nominal option price unrelated to fair value at the time of agreement.

In re Mather's Estate, 410 Pa. 361, 189 A.2d 586 (1963).

In 1939 three of the four shareholders of a closely held family corporation entered into a written agreement which required that upon the death of any party, or in the event any party desired to offer his shares for sale during his life, such party's shares be offered to the others in equal proportions at one dollar per share. In the event such shares were not purchased by the others, then the holder or his personal representative would have the right to sell them upon the open market.[1] The fair value of each share at the time of the agreement was fifty dollars or more.

One of the parties died in 1953 and the other two availed themselves of the option as provided for by the agreement. In 1959 one of the two remaining parties died and the survivor tendered to the personal representatives $501 for the purchase of 501 shares held by the decedent. At the time of tender each share had a book value $599.33, and its fair value was not less than $1,060. The personal representatives refused to comply with the agreement and the surviving shareholder brought this action for specific performance. The trial court granted the requested relief. On appeal, *held,* affirmed, one justice dissenting. The court held that the agreement was a limited and not an absolute restriction on sale and was therefore not an unreasonable restraint on alienation, and, where made between mature members of a family would not be invalidated or its specific performance defeated because of discrepancy between the sale price and fair value without overreaching, fraud or deceit.

Shareholders' agreements restricting the transfer of shares are commonly employed. Such agreements have been enforceable in Pennsylvania[2] "if in essence and substance, the object they had in view was neither unreasonable nor opposed to public policy."[3] "Such provisions are usually viewed as reasonable 'ground rules' in the management of corporations, especially those of the small closely held

1. This type of agreement is referred to as a first option agreement or the right of first refusal.

2. Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488 (1903); Lindsay's Estate, 210 Pa. 224, 59 Atl. 1074 (1904); Beechtold v. Coleman Realty Co., 376 Pa. 208, 79 A.2d 661 (1951); Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. 78 (1909); Haase Estate, 79 Montg. Co. L. R. 250, 27 Pa. D. & C.2d 106 (1962).

3. Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. 78, 86 (1909).

type. On the other hand, unqualified restrictions upon alienation are not permitted . . . ."[4] An unqualified restriction which is permanent or unconditional is repugnant to the established public policy which forbids absolute restraints on the alienability of property, and is inconsistent with "the concept of ownership as it exists and operates in the law."[5]

However, in enforcing stock transfer restrictions in the form of first option agreements, the courts have generally failed to carefully analyze the effect of the option price on the alienability. In granting specific performance of a first option agreement, the Supreme Court of Massachusetts has said:

> It is equally well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced.[6]

The United States Court of Appeals, Fifth Circuit, has looked to the price to determine only if the agreement is unconscionable or indicates the presence of fraud or mistake.[7]

Prior to its present decision,[8] the Supreme Court of Pennsylvania had never been presented with an option agreement in which there was no relationship between the option price and the fair value at the time of agreement. It had been held that the price could be that which could be obtained from a third party,[9] a fair price fixed by agreement,[10] a price based on book value,[11] a price based on net worth,[12] or a price arrived at by appraisal.[13]

In 1957 the Court of Appeals of New York was confronted with a case involving the disparity between the option price and the fair

4. Hasse Estate, 79 Montg. Co. L. R. 250, 253, 27 Pa. D. & C.2d 106, 109 (1962).

5. *Id.* at 253, 27 Pa. D. & C.2d at 110.

6. New England Trust Co. v. Abbot, 162 Mass. 148, 155, 38 N.E. 432, 434 (1894).

7. Palmer v. Chamberlain, 191 F.2d 532 (5th Cir. 1951).

8. *In re* Mather's Estate, 410 Pa. 361, 189 A.2d 586 (1963).

9. Aiken v. Dickinson, 305 Pa. 176, 157 Atl. 471 (1931).

10. Hacker v. Price, 367 Pa. 250, 71 A.2d 851 (1950).

11. Lindsay's Estate, 210 Pa. 224, 59 Atl. 1074 (1904).

12. Mawry v. McWherter, 365 Pa. 232, 74 A.2d 154 (1950).

13. *Ibid.*

value *at the time the option was exercised.*[14] There a by-law provision gave the corporation a first option to repurchase a decedent's stock at the price at which it had been issued to him. The lower court granted specific performance. The appellate division reversed,[15] holding for the executors, but the Court of Appeals of New York reversed the intermediate court stating:

> As the cases thus make clear, what the law condemns is, not a *restriction* on transfer, a provision merely postponing sale during the option period, but an effective *prohibition* against transferability itself. Accordingly, if the by-law under consideration were to be construed as rendering the sale of stock impossible to anyone except the corporation at whatever price it wished to pay, we would, of course, strike it down as illegal. But that is not the meaning of the provision before us.[16]

The court went on to say:

> In sum then, the validity of the restriction on transfer does not rest upon any abstract notion of intrinsic fairness of price. To be invalid more than mere disparity between option price and current value of the stock must be shown.[17]

The Supreme Court of Pennsylvania relied upon the holding in the *Biltmore*[18] decision in determining that specific performance should be granted in favor of the surviving shareholder in the present case.[19] While it is true, as pointed out in the court's opinion,[20] that the decedent availed himself of the option agreement upon the death of his brother at the option price of one dollar per share, it must be readily apparent that where an agreement is invalid because it is in violation of public policy, no amount of compliance with it by the parties can ever make such agreement binding or enforceable.

The agreement then must be examined as of the time of its execution to determine its validty. In *Biltmore*[21] at the time the agree-

14. Allen, Ex'rs v. Biltmore Tissue Corp., 2 N.Y.2d 534, 161 N.Y.S.2d 418, 141 N.E.2d 812 (1957). *But see* Annot., 61 A. L. R. 2d 1309 (1958) and 72 HARV. L. R. 555 (1959).

15. Allen, Ex'rs v. Biltmore Tissue Corp., 1 N.Y. App. Div. 2d 599, 153 N.Y.S. 2d 779 (1957).

16. Allen, Ex'rs v. Biltmore Tissue Corp., *supra* note 14 at 542, 161 N.Y.S. 2d at 423, 141 N.E.2d at 816.

17. *Id.* at 543, 161 N.Y.S.2d at 424, 141 N.E.2d at 817.

18. Allen, Ex'rs v. Biltmore Tissue Corp., *supra* note 14.

19. *In re* Mather's Estate, *supra* note 8.

20. *Ibid.*

21. Allen, Ex'rs v. Biltmore Tissue Corp., *supra* note 14.

ment was executed, the option price did have some relationship to the fair market value; in fact, the option price was the price paid by the decedent which presumably was the fair value at the time. The option price in the agreement entered into by the decedent in the *Mather* case[22] had no relationship to any value. This is apparent from the fact that on the same day as the agreement in question was executed the corporation entered into a buy and sell agreement with the decedent's sister, who owned the shares not included in the first option agreement, for a price of fifty dollars per share. The Pennsylvania Supreme Court failed to discuss this fact in its opinion, and, therefore, apparently failed to recognize that the agreement involved more than a mere disparity between option price and fair value. The agreement is essentially similar to that which the Delaware Court struck down as against public policy saying:

> In the instant case, the restraint is not against aliening to any one person or to a narrow few . . . . In substance it borders close upon a restraint against transferring the property to anyone in the whole world except the corporation.[23]

The agreement in question effectively creates an absolute restraint against any transfer other than to the remaining shareholders. It provides for an option price which is unconscionably nominal with relation to the value of the shares at the time the agreement was executed.

The brief for the appellant, personal representatives, fittingly sums up the effect of the lower court's decision which has been affirmed by the Supreme Court of Pennsylvania.

> If the lower court's view were sustained, the effect would be that the existing decisions which hold invalid consent restraints and restraints prohibiting the sale of stock to other than a limited group would be obsolete, since a far more effective means of preventing alienability is now available. It is merely necessary for shareholders to agree in a by-law or separate agreement not to sell their stock without first offering it to the other stockholders at a small fraction of its value. If the effect of such an agreement upon transferability and its reasonableness as a restraint are not subject to examination, an attorney would have a ready answer to those who ask for an iron-clad prohibition against transfer of corporate stock, albeit a device in conflict with the tradi-

22. *In re* Mather's Estate, *supra* note 8.

23. Greene v. E. H. Robbins, 22 Del. Ch. 394, 403, 2 A.2d 249, 253 (1938).

> tional policy of free alienability. The attorney would simply advise his clients that they can agree that no stock can be transferred without offering it for a dollar to the other stockholders, explaining that this constitutes no 'forfeiture' or no 'prohibition' because there is a ready escape, i.e., in the event that the other stockholders do not elect to purchase at a dollar, the selling stockholder is free to sell. Such a result it is submitted, would represent a solid victory of form over substance, legal niceties over logic and common sense.[24]

Apparently form has triumphed over substance in the Supreme Court of Pennsylvania. This decision now makes it possible for first option agreements to provide in effect that if the corporation or other stockholders do not desire to have a gift made to them, the shareholder wishing to dispose of his stock is free to sell it on the open market.

EMINENT DOMAIN—Reasonable Probability of Rezoning—Valuation testimony may be premised upon a reasonable probability of rezoning—Evidence supporting the probability must not be remote or speculative.

Snyder v. Commonwealth, 412 Pa. 15, 192 A.2d 650 (1963).

Under the power of eminent domain, an unimproved parcel of land owned by George Snyder and Edward Boone was condemned by the Commonwealth of Pennsylvania for highway purposes. This property contained 1 7/10 acres and was zoned residential at the time of the taking.

Being dissatisfied with the Commonwealth's offer of compensation, the plaintiffs petitioned for appointment of a board of viewers to hear testimony and make an award of damages for the taking. The board of viewers awarded plaintiffs $12,745.37. Both sides appealed to the Court of Common Pleas where the jury returned a verdict of $40,000.00 plus $7400.00 for delay in payment.

The Commonwealth appealed from the jury award, arguing that the condemnee should not have been permitted to introduce evidence of market value which was based on the theory that the property had a reasonable probability of being rezoned at the time of the taking. The main thrust of this argument being that there was not suf-

24. BRIEF FOR APPELLANTS, p. 19.