NOVEMBER 30, 1959

HON. SALVATORE A. BONTEMPO
*Commissioner of Department of*
*Conservation and Economic Development*
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 24

DEAR COMMISSIONER:

You have requested our opinion as to the constitutionality of R.S. 23:4-31 providing as follows:

> "No unnaturalized foreign-born person shall hunt for, capture or kill in this State, a wild bird or animal, either game or otherwise, of any description, excepting in defense of person or property, and to that end he shall neither own nor be possessed of a shotgun or rifle of any make. A person violating this section shall be liable to a penalty of twenty dollars for each offense. In addition to the penalty, all guns of the kind herein mentioned found in possession or under control of such person, shall upon conviction of such person be declared forfeited to this State, and shall be sold by the board as hereinafter provided. This section and sections 23:4-32 to 23:4-35 of this title shall not apply to an unnaturalized, foreign-born person who owns real estate in this State to the value of two thousand dollars above all encumbrances."

It is our opinion that this section is valid. The outstanding case on this subject is *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914). There Justice Holmes upheld a Pennsylvania statute rendering it unlawful for any unnaturalized foreign born resident to kill any wild bird or animal other than in the defense of person or property or to have possession of a shotgun or rifle for these purposes. The alien's Fourteenth Amendment objections that he had been deprived of property and had been singled out for invidious discrimination were deemed insufficient. Though the *Patsone* case has been distinguished, *Takahashi* v. *Fish and Game Comm'n,* 334 U.S. 410, 421 (1948), never having been overruled we treat it as conclusive of the federal questions raised by R.S. 23:4-31. See also *Truax* v. *Raich,* 239 U.S. 33 (1915). Further, we are of the opinion that the Supreme Court of New Jersey would follow *Patsone* in construing the due process and special legislation clauses of the New Jersey Constitution. Constitution of 1844, Art. 1, par. 1, Art. 4, §7, par. 9; Constitution of 1947, Art. 1, par. 1, Art. 4, §7, par. 8. As recently as 1956 the Court in *Guill* v. *Hoboken,* 21 N.J. 574, 582 (1956) cited and paraphrased the *Patsone* decision with approval.

The provision in R.S. 23:4-31 providing that the section is inapplicable to aliens owning real estate in New Jersey of $2,000 in value above encumbrances does not establish an unreasonable classification. There are two bases for the $2,000 exemption. Firstly, real property taxes bear a large percentage of the burden of government; therefore, an alien owning a substantial amount of property makes a contribution to the State not shared by nonproperty owning foreigners and thus shoulders a prime obligation of citizenship. The distinction between real and personal property is

reasonable because as a matter of administrative practice, personalty is rarely taxed in New Jersey. As noted in the Sixth Report of the New Jersey Commission on State Tax Policy, p. XV (1953):

> "The personal property tax has completely broken down. While locally assessable at its 'true value' for over a hundred years, it has been the practice from the beginning to assess such property either at a small fraction of its value or not at all."

It is no answer to say that the Legislature could have achieved a similar result by directing the charging of higher fees for licenses for aliens not owning realty in New Jersey. If the Legislature adopts means likely to reach a permissible goal, the courts cannot void its product on the ground that other means are equally well suited to the ends. *Robson* v. *Rodriquez,* 26 N.J. 517 (1958). Secondly, the exemption may be sustained because of the dangerous nature of hunting. *Cf. Davis* v. *Hellwig,* 21 N.J. 412 (1956). If an alien injures a New Jersey resident the latter may have no recourse to our courts because of the alien's unavailability to receive process. If, however, he has real property in this State it may be attached to satisfy the plaintiff's claim. Laws of 1948, c. 358, N.J.S. 2A: 26-2. While it is true that when R.S. 23:4-31 was enacted no attachment could be secured in a tort action without showing that the defendant had committed an outrageous battery akin to mayhem, see Laws of 1901, c. 74, *Messina* v. *Petroli,* 11 N.J. Misc. 583 (Cir. Ct. 1933), in determining the reasonableness as opposed to formal validity of R.S. 23:4-31, we look to existing circumstances. See *Egan* v. *Erie R.R. Co.,* 29 N.J. 243 (1959); *cf. Four-G Corp.* v. *Rutta,* 56 N.J. Super. 52 (App. Div. 1959); *Crecca* v. *Nucera,* 52 N.J. Super. 279 (App. Div. 1958); *Kelley* v. *Curtiss,* 16 N.J. 265 (1954); *Prudential Ins. Co.* v. *Laval,* 131 N.J. Eq. 23 (Ch. 1942). Other Legislatures have recognized the importance of providing redress for residents as against absconding nonresident tortfeasers. See *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673 (Sup. Ct. 1957). R.S. 23:4-31 similarly facilitates redress in our own courts for injuries committed here.

The distinction between aliens and nonresident American citizens is, of course, meaningful. It is one thing to require a New Jersey citizen to pursue a defendant to another State with the availability of federal jurisdiction in cases where the claim is in excess of $10,000, 28 U.S.C.A. §1332 (Supp. 1959); it is quite another to remand him to a foreign court. And the distinction between realty and personalty is vital. Personalty is removable and its ownership is not easily established. On the other hand realty is fixed and its ownership is ordinarily a matter of record. See Laws of 1947, c. 275, N.J.S.A. 46:16-1; R.S. 54:4-29, 30.

Very truly yours,

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