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CONSTITUTIONAL LAW—TAXATION—EQUAL PROTECTION—PRIVILEGES AND IMMUNITIES UNDER THE FOURTEENTH AMENDMENT—Reports having shown that Vermont capital for investment purposes was, due to the existing tax system, being driven out of the state, and that it was difficult to obtain capital from outside at low rates, a statute was enacted which was expected to remedy the difficulties by providing that interest up to five per cent on loans made within the state should be exempt from taxation while income from loans made outside the state should be taxed at a set rate. In a proceeding to test the validity of the measure, the state court upheld the tax,[1] but on appeal to the United States Supreme Court it was *held* (Justices Stone, Brandeis and Cardozo dissenting) that the classification in the statute was arbitrary and bore no substantial relation to the object of the legislation, and therefore it violated the equal protection clause; but that quite apart from this clause the statute violated the privileges and immunities clause of the Fourteenth Amendment because it denied the plaintiff the right, as a citizen of the United States, to make lawful loans of money in other states. *Colgate v. Harvey*, 296 U. S. 404, 56 S. Ct. 252 (1935).

While the decision of the majority on the equal protection aspect has not

[1] Colgate v. Harvey, 107 Vt. 28, 175 Atl. 352 (1934).

[2] See 45 YALE L. J. 926 (1936); 13 N. Y. UNIV. L. Q. REV. 496 (1936).

escaped criticism,[2] as a whole it is believed merely to follow general principles well established. The division of the Court, as recourse to earlier decisions tends to show,[3] seems to be based on fundamentally different approaches to the question of how much latitude will be given to the state legislatures in classifying for tax purposes; [4] and whatever may be the personal response in respect to the view of the majority, that opinion finds strong support in past decisions.[5] It is the reliance upon the almost forgotten privileges and immunities clause of the Fourteenth Amendment that presents the really important feature of the case.[6] Although the Court has recognized heretofore that certain privileges, protected by this article, exist,[7] and the claim of infringement has many times been advanced,[8] this is believed to be the first decision in the federal courts expressly based upon a violation by a state of this provision of the amendment.[9] The explanation of this seeming phenomenon lies in the extremely narrow limitations originally placed upon the scope of these words. At the time of the adoption of the Fourteenth Amendment, this clause was believed by many to be a guarantee to all citizens of the protection by the Federal Government of those fundamental privileges which are said to belong of right to citizens of all free governments; [10]

[3] Royster Guano Co. v. Virginia, 253 U. S. 412, 40 S. Ct. 560 (1920); Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260 (1926); Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423 (1928).

[4] Thus, the majority proceed upon the principles that while classification and its counterpart, exemption, are not forbidden, they must be reasonable and must rest on some ground of difference having a fair and substantial relation to the object of the legislation [Royster Guano Co. v. Virginia, 253 U. S. 412, 40 S. Ct. 560 (1920)], and that discriminations of unusual character must be given careful consideration to determine whether they be obnoxious to constitutional provisions. Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423 (1928). Under such a test the statute in the instant case failed, because the Court could find no object either within or without the words of the act which reasonably could have any substantial relation to the classification made. The minority, on the other hand, proceed upon the view that out of respect for the legislature, and following out the oft-repeated assumption that the legislature is acting within its constitutional limits, no classification should be deemed invalid unless it is impossible to conceive that those consequences which would justify the discrimination will result. Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252 (1935). On this basis the statute could be upheld.

[5] Stebbins v. Riley, 268 U. S. 137, 45 S. Ct. 424 (1926); Middleton v. Texas Power & Light Co., 249 U. S. 152, 39 S. Ct. 227 (1919); and see cases cited in note 3, supra.

[6] Wide comment has greeted this part of the decision, and more may be expected. See 84 UNIV. PA. L. REV. 655 (1936); 30 ILL. L. REV. 953 (1936); 45 YALE L. J. 926 at 929 (1936); 49 HARV. L. REV. 935 (1936); 36 COL. L. REV. 669 (1936).

[7] See LIEN, PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES 80-81 (1913), for a list.

[8] The dissenting justices cite forty-four cases in which the issue was raised, but decided against the existence of the claimed privilege.

[9] See McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 IOWA L. BUL. 219 at 223 (1918).

[10] This conception finds support in the dissenting opinion of Justice Field in the Slaughter-House Cases, 16 Wall. (83 U. S.) 36 at 97, 21 L. Ed. 394 at 415 (1873).

but in the famous *Slaughter House Cases* [11] it was settled that the clause protected only those privileges and immunities which owed their "existence to the Federal government, its National character, its Constitution and its laws." [12] Such an interpretation was necessary in order to avoid upsetting the balance of power between the states and the Federal Government; but it had the practical effect of making this portion of the Fourteenth Amendment a mere duplication of other provisions of the Constitution.[13] One loophole was, however, left by this decision; for from the interpretation there advanced and from other statements made, it is apparent that the Court then considered the clause to protect inferential or implied privileges as well as those conferred expressly by statute and Constitutional provisions.[14] In the instant case the dissenting justices seek to close this gap by construing the provision to protect only those interests growing out of the relationship between the citizen and the national government "created by the Constitution and federal laws." [15] The majority, however, accept the idea of implied privileges and, summarizing the original interpretation in the general statement that the clause prevents state interference with all the privileges of national citizenship, therefore include those privileges [16] thought to arise from the theory that for all the great purposes for which the Union was formed we are considered one people with one common country [17] and no state may at-

[11] 16 Wall. 36, 21 L. Ed. 394 (1873).

[12] Slaughter-House Cases, 16 Wall. 36 at 79, 21 L.Ed 394 (1873). This is not the only interpretation of this clause found in the cases. It is, however, the view which gave the direction for future cases, for those decisions which purport to vary from the conception cited above appear to be in the way only of cutting the meaning down still more. See McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 IOWA L. BUL. 219 (1918), where various views are set out.

[13] Art. IV, § 2.

[14] See McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 IOWA L. BUL. 219 at 234 (1918), for discussion.

[15] Colgate v. Harvey, 296 U. S. 404 at 444, 56 S. Ct. 252 (1935). It is difficult to estimate whether such gap ever was closed by the decisions. The most popular phraseology for describing the privileges here protected is the statement that the clause covers only those privileges which "arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." Twining v. New Jersey, 211 U. S. 78 at 97, 29 S. Ct. 14 (1908); McPherson v. Blacker, 146 U. S. 1 at 38, 13 S. Ct. 3 (1892). Everything seems to hinge on the meaning of the phrase "nature and essential character of the National Government," but since this definition is traceable to the headnote in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (1873), it would probably receive the same interpretation as found in that case.

[16] One such privilege, it is pointed out, is that found in Crandall v. Nevada, 6 Wall. (73 U. S.) 35, 18 L. Ed. 745 (1867), the right of moving freely from one state to another, a second is that found in Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427 (1897), the right of making contracts in other states, and a third, the court finds in Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252 (1935), is the right of transacting business in every place in the Union without being discriminated against either by the state into which the citizen goes or the state in which he resides.

[17] Crandall v. Nevada, 6 Wall. (73 U. S.) 35 at 48, 18 L. Ed. 745 (1867), quoting from the dissent of Chief Justice Taney in the Passenger Cases, 7 How. (48 U. S.) 283 at 492, 12 L. Ed. 702 at 790 (1849).

tempt to place itself in economic isolation.[18] The precise effect of this decision is difficult to fathom. Unquestionably it comes as a surprise to the profession, which looked upon the privileges and immunities clause as practically a dead letter; and its appearance under conditions which suggest it was unnecessary to the disposition of the case,[19] plus statements of the majority that such an important section of the Constitution cannot lightly be dismissed as forgotten or as a mere duplication,[20] might seem to portend an undesirable revival and expansion of the clause, giving the Federal Government a third device in its arsenal of methods to review and censure state action. Everything considered, however, it does not seem to have opened the door to any immediate enlargement of this provision of the Fourteenth Amendment. The Court must still be shown that the asserted privilege arises out of the concept of national unity, and that would seemingly block most claims of infringement of privileges heretofore raised.[21] But future cases alone can disclose the meaning of the majority.

J. B. B.

[18] Baldwin v. Seelig, 294 U. S. 511, 55 S. Ct. 497 (1935).

[19] This seems so because the Court had already disposed of the issue by its discussion of the equal protection clause. If this first part of the decision means anything, then the discussion of privileges and immunities seems, as the dissenting justices said, a "gratuitous labor of supererogation." Colgate v. Harvey, 296 U. S. 404 at 447, 56 S. Ct. 252 (1935). Only by saying that the second part of the decision prohibits all discrimination even though the classification be reasonable can anything startling be derived from this section of the case; but then the discussion on the equal protection angle would seem superfluous. The Court could then have dismissed that by suggesting that in the view it took of the case the question of reasonableness of classification need not be discussed. It is this inability to understand what the Court means, discussed by the dissenting justices, which presents the truly disconcerting feature of the case. It seems to forecast a mass of litigation to clear up what has been left undone.

[20] Colgate v. Harvey, 296 U. S. 404 at 431, 56 S. Ct. 252 (1935).

[21] On the other hand, a moment's thought will reveal that this concept is capable of growth, and this presents one source of danger in the adopted approach. As an original question, it might be wondered whether the Court has not expanded that concept in the instant case. If the theory of state sovereignty is to mean anything, certainly the levelling process which the idea of national solidarity involves must not be carried too far.