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Constitutional Law-Privileges and Immunities Clause of the Fourteenth Amendment

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CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.—The Vermont Income and Franchise Tax Act of 1931 imposed an individual income tax of 4 per cent. on income received on account of ownership or use of, or interest in, any interest bearing security, denominated class B income. Excluded from this tax, however, were: (a) corporate dividends earned within the state; (b) interest received on account of money loaned within the state at a rate of interest not exceeding 5 per cent. per annum. Held, that exempting from the tax income from dividends earned within the state did not deny equal protection of the laws, but, that exempting from the tax income from money loaned within the state at not more than 5 per cent. interest, apart from the equality clause, violated the privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution, since the classification was based on a difference having no substantial relation to the revenue objective of the act.¹

There would seem to be no legitimate objection on reason or authority to the court upholding the first exemption, referred to above, as not being in violation of the equality clause of the Fourteenth Amendment.² However,

²⁵ *Morris v. State* (1883), 94 Ind. 565, *Hicks v. State* (1927), 199 Ind. 401, 156 N. E. 548 (voir dire in court's discretion unless harm shown), *Terre Haute Electric Co. v. Watson* (1904), 33 Ind. App. 124, 70 N.E. 993 (Overruling of challenge for cause not reversible error unless peremptory challenges exhausted so as to constitute harm).

¹ *Colgate v. Harvey* (1935), 56 S. Ct. 252.

² Another Vermont tax act imposed a tax of 2 per cent. upon the net income of every corporation for the privilege of exercising its franchise in the state and of doing business therein. In addition to the 2 per cent. franchise tax, all tangible corporate property lying within the state is subject to a property tax. As the court points out, the 2 per cent. franchise tax, especially with the property tax added, has the effect of indirectly imposing a tax burden upon domestic business measurably equivalent to the 4 per cent. tax burden imposed upon dividends realized from out-of-state business. Furthermore, since the 4 per cent. tax is imposed only upon such part of the corporate net income as passes to the shareholders in the form of dividends, and the 2 per cent. tax is measured by the entire net income of the corporation, it may well be that the one tax burden would approximate the other. It seems clear, therefore, that the classification relative to dividends is not arbitrary. It has always been the doctrine of the Supreme Court that, though

the exemption relative to money loaned within the state raises a closer question under the equality clause and apparently also a question under the United States privileges and immunities clause.

In considering the exemption relative to loans made at not more than 5 per cent. within the state the majority opinion first considered the application of the equality clause of the Fourteenth Amendment. The court announced, "We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan." There being no specifically named public purpose supporting this exemption, the court refused to find one other than the obvious but incomplete purpose of revenue, and, therefore, thought it dubious whether or not there was a sufficient basis for this classification.

It is settled law that in passing upon the constitutionality of a tax, if it appears or may fairly be assumed that the tax is for the purpose of promoting a permissible public aim, it cannot be condemned because one class must pay the tax while another does not. So long as the classification reasonably subserves such permissible public aim it is due process of law.³ In fact there must be a clear indication that the purpose is a hostile or oppressive discrimination against particular persons or classes before a tax will be pronounced invalid.⁴ In the instant case there was no serious contention, as pointed out in the minority opinion, of a hostile or oppressive purpose in the exemption in question. However, the obvious answer to the majority view is the apparent purpose of the Legislature to encourage by this exemption loans at a favorable rate of interest within the state.⁵ Since the exemption is not clearly

the equality clause of the Fourteenth Amendment forbids class legislation, it does not forbid classification. Calculated to avoid multiple taxation, the classification is reasonable and is, therefore, due process of law.

See *Kidd v. Alabama* (1902), 188 U. S. 730, 23 S. Ct. 401, *Darnell v. Indiana* (1912), 226 U. S. 390, 33 S. Ct. 120; *Travelers' Insurance Co. v. Connecticut* (1902), 185 U. S. 364, 22 S. Ct. 673, *Watson v. State Comptroller* (1920), 254 U. S. 122, 41 S. Ct. 43, *Lawrence v. State Tax Comm.* (1932), 286 U. S. 276, 52 S. Ct. 556.

With this position, taken by the majority of the court, the minority in its opinion has no quarrel.

³ *American Sugar Refining Co. v. Louisiana* (1900), 179 U. S. 89, 21 S. Ct. 43, *Heisler v. Thomas Colliery Co.* (1922), 260 U. S. 245, 43 S. Ct. 83, *Aero Mayflower Transit Co. v. Georgia Public Service Comm.* (1935), 295 U. S. 285, 55 S. Ct. 709; *Magnano Co. v. Hamilton* (1934), 292 U. S. 40, 54 S. Ct. 599; *Fox v. Standard Oil Co.* (1935), 294 U. S. 87, 55 S. Ct. 333.

⁴ *American Sugar Refining Co. v. Louisiana* (1900), 179 U. S. 89, 21 S. Ct. 43, *Board of Education v. Illinois* (1906), 203 U. S. 553, 27 S. Ct. 171, *Lawrence v. State Tax Comm.* (1932), 286 U. S. 276, 52 S. Ct. 556, *Concordia Fire Insurance Co. v. Illinois* (1934), 292 U. S. 535, 54 S. Ct. 830.

⁵ As put in the minority opinion, "it can hardly be said for that reason to be contravening a Constitution that has known a protective tariff for more than 100 years."

When the exemption of income from loans made within the state was adopted the Legislature had before it the reports of two committees which indicated that the existing system was driving investment capital from the state of Vermont or into secured and non-commercial loans; and that a tax exemption embracing both secured and commercial loans would tend to increase the supply of investment capital for both and to reduce interest rates in Vermont.

The minority opinion recalls to attention the "salutory principle of decision,

invidious, but rather is clearly adapted to a legitimate purpose, the equal protection clause of the Constitution should have no application.

The court in the instant case, however, did not prefer to assign its decision to the equality clause, but, as indicated above, rested it on the privileges and immunities clause of the Fourteenth Amendment.⁶ Said the court, "But assuming that the state of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment."

Herein the court reversed a policy which had continued from the time of the Slaughter House Cases of 1873.⁷ Though that case was a five to four decision, it has remained the law, and the Supreme Court has confined the scope of the United States privileges and immunities clause to the protection of only those interests which grow out of the relationship between the citizen and the national government.⁸ The peculiar privileges incident to United States citizenship are few in number. Among them may be named access to the seat of government and to the seaports, protection on the high seas, peaceable assemblage, petitioning the government for redress, the writ of habeas corpus, use of navigable waters, state citizenship by residence, the immunity from slavery, and the right to due process.⁹ Furthermore, as observed in the minority opinion, the privileges and immunities clause "created no new privileges and immunities of United States citizenship,¹⁰ and as they are derived exclusively from the Constitution and laws enacted under it, the states were powerless to abridge them before the adoption of the Fourteenth Amendment as well as after."¹¹

The court's reluctance¹² to enlarge the scope of the privileges and immunities clause has been well understood since the Slaughter House Cases in which the issue was fought out. If extended so as to more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action to an extent sufficient to cause serious apprehension for the rightful independence of local government.

The majority of the court in the principal case seemingly restrict the application of the privileges and immunities clause to those inequalities in

that, out of decent respect to an independent branch of the government, legislative acts must be taken to be based on facts which support their constitutional validity unless the contrary reasonably appears."

⁶ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

⁷ 16 Wall. 36.

⁸ Hugh E. Willis (1936), "Constitutional Law of the United States," p. 927

⁹ Slaughter-House Cases (1873), 16 Wall. 36, *Crandall v. Nevada* (1867), 6 Wall. 35. Hugh E. Willis (1936), "Constitutional Law of the United States," p. 192.

¹⁰ *Bartmeyer v. Iowa* (1873), 18 Wall. 129, 133.

¹¹ See *Crandall v. Nevada* (1867), 6 Wall. 35.

¹² Forty-four cases have been appealed to the Supreme Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until the instant case no decision held that state legislation infringed that clause.

taxation which are considered to be arbitrary and unreasonable. If this is so, it is difficult to understand why the exemption in question does not clearly merit condemnation as a denial of the equal protection clause, which extends to all "persons" including citizens of the United States, and "nothing can be added to the vehemence of the denunciation by invoking the command of the privileges and immunities clause."

If on the other hand the privileges and immunities clause may be invoked against even reasonable classification, then the door is completely open to the literal protection of both the fundamental rights, powers, privileges and immunities of the Bill of Rights,¹³ and all the fundamental rights, powers, privileges and immunities of the common law. Thus a protection would be accorded the privileges and immunities clause and those privileges and immunities selected by the court, in excess of that which has been deemed needful or desirable for the protection of the contract clause, the commerce clause, and the due process clause. This is substantially the position taken by Mr. Justice Stone in the dissenting opinion, in which Mr. Justice Brandeis and Mr. Justice Cardozo concurred.

It is submitted that the true significance of this novel protection of the "privilege of acquiring, owning, and receiving income from outside a state" is the further protection of personal liberty against social control, and, on the authority of this decision as a precedent, a possible boundless protection of personal liberty against social control. In this case social control was denied the state. In *Schechter Poultry Co. v. United States*¹⁴ and in *Railroad Retirement Board v. Alton R. R.*¹⁵ social control was denied to the federal government. Any expansion of the social control allowed to the states by these two decisions was more than swallowed up by the decision in the instant case.¹⁶

C. Z. B.

FRAUD.—The appellee's amended complaint alleged that appellant and three others, officers of the Marion County Sand and Gravel Company, conspired to perpetrate a fraud upon the appellee by inducing him to purchase from two of the defendants, fifty shares of worthless stock of said gravel company. It further alleged that in consideration of appellee's promise to pay a note of the company to the appellant then overdue, to cancel an obligation owed by the company to appellee, and to make another loan to the company,

¹³ Those basic privileges and immunities secured against federal infringement by the first eight amendments have never been held to be protected from state action by the privileges and immunities clause. See *Walker v. Sauvinet* (1875), 92 U. S. 90; *Presser v. Illinois* (1886), 116 U. S. 252, 6 S. Ct. 580; *O'Neill v. Vermont* (1892), 144 U. S. 323, 12 S. Ct. 693; *Maxwell v. Dow* (1900), 176 U. S. 581, 20 S. Ct. 448; *Twining v. New Jersey* (1908), 211 U. S. 78, 29 S. Ct. 14; *Hurtado v. California* (1884), 110 U. S. 516, 4 S. Ct. 111; *West v. Louisiana* (1904), 194 U. S. 258, 24 S. Ct. 650.

¹⁴ (1935) 295 U. S. 495, 55 S. Ct. 837.

¹⁵ (1935) 295 U. S. 330, 55 S. Ct. 758.

¹⁶ For a full discussion of the view see Hugh E. Willis (1936), "Constitutional Law of the United States," at p. 927.

The principal case has probably occasioned less comment in the newspapers and periodicals because it doesn't concern a three letter governmental agency. However, its constitutional, social and economic importance should merit quite as much consideration.