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CONSTITUTIONAL LAW - PRIVILEGES AND IMMUNITIES - COMMERCE CLAUSE-PROPRIETARY INTEREST OF STATE IN ITS NATURAL RESOURCES

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CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — COMMERCE CLAUSE—PROPRIETARY INTEREST OF STATE IN ITS NATURAL RESOURCES— Plaintiffs, residents of Georgia, sued to enjoin the enforcement of a South Carolina statute imposing on shrimp boats a license fee one-hundred times greater for nonresident owners than for resident owners,[1] and requiring all shrimp to be unloaded, packed, and stamped in South Carolina before shipments into other states.[2] The suit was based on the alleged contravention of the privileges and immunities and commerce clauses of the Constitution of the United States.[3] Plaintiff's petition was dismissed by the trial court.[4] On appeal, *held*, reversed. The disparity in resident and nonresident license fees constituted discrimination against nonresidents in violation of interstate privileges and immunities; to require that all shrimp be unloaded, packed, and stamped in South Carolina burdened interstate commerce in a manner forbidden to the states. *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948).

The privileges and immunities clause guarantees to nonresidents of a state equal privileges with residents, and thereby protects nonresidents from the disabilities of alienage.[5] Early cases, though never precisely listing the privileges and immunities of state citizenship, declared them to be fundamental[6]

[1] S.C. Code (1942) § 3379 as amended by an Act of May 19, 1947 (25 dollars for residents; 2,500 dollars for nonresidents.)

[2] S.C. Code (1942) § 3414.

[3] U.S. Const., Art. IV, § 2; Art. I, §§ 8 and 10.

[4] (D.C. S.C. 1947) 73 F. Supp. 371. See decision note in 46 MICH. L. REV. 559 (1948).

[5] Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165 (1898); Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1868); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 40 S.Ct. 228 (1920).

[6] Corfield v. Coryell, 4 Wash. (C.C. 3d) 371, Fed. Cas. No. 3,230 (1823); Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165 (1898); United States v. Miller, (D.C. Ky. 1936) 17 F. Supp. 65 (ingress and egress); Shaffer v. Carter, 252 U.S. 37, 40 S.Ct. 221 (1920) (immunity from higher taxation); McKneit v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 54 S.Ct. 690 (1934) (access to the courts); Ward v. Maryland, 12 Wall. (79 U.S.) 418 (1870); Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522, 39 S.Ct. 366 (1919) (doing business within a state).

as determined from the facts of each case.[7] More recently, however, the court's use of the clause has shifted from classifying certain incidents as privileges and immunities of state citizenship to emphasizing the protection of nonresidents from discrimination by a state in favor of its own citizens.[8] On this basis, the Supreme Court has held that no state is permitted to discriminate against nonresidents by license legislation.[9] Notable exceptions to this doctrine exist, however, in cases where the state is legitimately exercising its police power to control a purely local interest,[10] or where the natural resource protected by the license is the common property of the state's citizens.[11] Although recognizing this latter exception, the court in the principal case found that it could not justify the nonresident license fees in question. The decision in *McCready v. Virginia*,[12] where the exclusion of nonresidents was upheld for the reason that fish as a resource are owned by the state in trust for its citizens, was distinguished on the ground that the shrimp affected by the South Carolina statute in the principal case were freely-swimming fish located in coastal waters. By placing commercial shrimping in the category of privileges and immunities of state citizenship, the court greatly weakened the doctrine of state ownership of animals *ferae naturae*.[13] Some discrimination is permitted, however, if based on valid independent reasons other than mere nonresidence,[14] and charging nonresidents higher license fees as their share of upkeep of shrimp beds is such a reason when the upkeep is initially financed by resident tax funds. Since the court found no basis for the use of the police power and discovered no reasonable relation between the high degree of discrimination and any independent reason South

[7] Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 40 S.Ct. 228 (1920).

[8] Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954 (1939); Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

[9] Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522, 39 S.Ct. 366 (1919); Ward Baking Co. v. City of Fernandina, Florida, (D.C. Fla. 1928) 29 F. (2d) 789; 12 AM. JUR., Constitutional Law, § 463. For an annotation, see 61 A.L.R. 337 (1929) and 40 L.R.A. (n.s.) 279 (1912).

[10] District of Columbia v. Brooke, 214 U.S. 138, 29 S.Ct. 560 (1909); Crowley v. Christiansen, 137 U.S. 86, 11 S.Ct. 13 (1890) (liquor); Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529 (1908) (diversion of water); Keeley v. Evans, 257 U.S. 667, 42 S.Ct. 184 (1922) (professional licenses).

[11] Corfield v. Coryell, 4 Wash. (C.C. 3d) 371, Fed. Cas., No. 3,230 (1823); McCready v. Virginia, 94 U.S. 391 (1876); In re Eberle, (C.C. Ill. 1899) 98 F. 295.

[12] 94 U.S. 391 (1876).

[13] The members of the court differed as to the applicability of the privileges and immunities clause. Justices Frankfurter and Jackson felt that the disparity in license fees violated the commerce clause, and they deemed the McCready case a controlling exception to the privileges and immunities clause. See 19 L.R.A. (n.s.) 297 (1909) and 28 L.R.A. (n.s.) 265 (1910) for a discussion of license discrimination as violative of the commerce clause. The McCready doctrine was further weakened in the very recent case of Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138 (1948), where the Court held that state ownership of fish in coastal waters was insufficient ownership to exclude alien residents from fishing off California.

[14] Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281 (1914).

Carolina might have had for even slight discrimination, the license fee on non-resident shrimpers was held unconstitutional. The decision that the section requiring all shrimp to be unloaded, packed and stamped in South Carolina violated the commerce clause was consistent with the rule that states are prohibited from using conservation regulations to achieve unconstitutional purposes, and that the results of state legislation must be within the residuary powers of a state,[15] and therefore cannot constitute a regulation of interstate commerce. The principal case is in accord with a prior decision of the court which, although recognizing state ownership of natural resources, prohibited state regulation after the individual had reduced the shrimp to possession and placed them in interstate commerce.[16] The case apparently does not go so far as to place shrimp within the rule of *Pennsylvania v. West Virginia*,[17] where the court said that a state could not interfere with the right of its citizens to export natural resources because such interference would be a violation of the commerce clause. As a result of the principal decision, however, the fiction of state ownership of its wildlife can no longer be used to defeat the fundamental intent of either the privileges and immunities or commerce clauses.

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[15] Thompson v. Dana, 285 U.S. 529, 52 S.Ct. 409 (1932).

[16] Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1 (1928), where a statute requiring that all shrimp be cleaned in Louisiana before shipment in interstate commerce was held unconstitutional as it constituted a burden on interstate commerce by attempting to create a shrimp cleaning monopoly within the state. A similar purpose is implicit in the South Carolina statute. However, Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896), is apparently contra, but both the Foster and the principal cases are distinguishable on the ground that the statute involved in the Geer case did not contemplate the shipment of game in interstate commerce as did the statutes in the other two cases. That indicates that the doctrine allowing a state to decide when game becomes an article of interstate commerce is still valid. Rupert v. United States, (C.C.A. 8th, 1910) 181 F. 87.

[17] 262 U.S. 553, 43 S.Ct. 658 (1923).