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Constitutional Law—Privileges and Immunities Clause—Validity of Statute Charging Higher Fees to Territorial Nonresident Fishermen

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RECENT CASES

Constitutional Law—Privileges and Immunities Clause—Validity of Statute Charging Higher Fees to Territorial Nonresident Fishermen. *P* brought an action against the Commissioner of Taxation for the Territory of Alaska to obtain a declaration that a statute imposing a $50 license fee on nonresident commercial fishermen as compared to a $5 fee on residents was unconstitutional. *D* answered that 90% of the cost of collecting fees was incurred in collecting the nonresident fees. District court held for *D*. Court of Appeals reversed. On certiorari, *Held:* Affirmed. The statue violates the privileges and immunities clause of Art. IV of the U. S. Constitution, which clause is made applicable to Alaska by the Organic Act. The amount of the tax on nonresidents which exceeds that charged residents is void. *Mullaney v. Anderson,* 342 U. S. 415 (1952).

The case is important for two reasons. First, the decision casts doubt upon the constitutionality of the provisions of the Washington Fisheries Code which impose higher license fees on nonresident commercial fishermen than on residents. The Code provides that the fees for a fishing guide and for each article of fishing equipment, except purse seines and lampara or round haul nets, shall be exactly five times higher for nonresidents than for residents. RCW 75.28.090, 75.28.110—.270 [REM. SUPP. 1949, §§ 5780-505, 5780-507(1)—(17)].

The discrimination in fees would not make the Washington provisions unconstitutional *per se,* as the U. S. Supreme Court has said that a state may charge nonresidents a higher fee in order to compensate for any added enforcement burden caused by the nonresidents. *Toomer v. Witsell,* 334 U. S. 385 (1948). The *Mullaney* case points out that one attacking a statute which provides for different fees need not show that the differential will more than compensate the state; rather, the burden of proving the validity of the discrimination is upon the state imposing the tax. It will not suffice for the state to prove that there is a higher cost in collecting the nonresident fees. The state must go further and show that there is some reasonable relation between the higher fees and the higher costs.

In a comment in 24 WASH. L. REV. 274 (1949), it was suggested that on the basis of *Toomer v. Witsell, supra,* in which a South Carolina statute imposing a $2,500 fee on nonresidents and a $25 fee on residents was held unconstitutional, the Washington provisions would also be held unconstitutional if the matter were ever tested. The *Mullaney* case presents added support for this belief.

Mullaney v. Anderson, supra, is important for a second reason in that prior to this case the privileges and immunities clause, in the absence of statute, had never been recognized as applying to the territories. In fact, in an earlier case, which was somewhat similar to the *Mullaney* case, the Supreme Court expressly rejected such a proposal. *Haavik v. Alaska Packers' Ass'n,* 263 U. S. 510 (1924). In the *Haavik* case the territorial legislature had imposed a $5 fee on nonresident fishermen without placing any tax on residents. When the constitutionality of this statute was attacked, the Supreme Court upheld the provision and stated that under the Organic Act the territorial legislature had the same power of taxation as Congress. The court further stated that the privileges and immunities clause was not applicable, because, even though the residents of the territory were preferred, the citizens of every state were treated alike.

It might have been expected that the court would apply the same reasoning in the *Mullaney* case due to the similarity of facts. But, on the contrary, in the instant case the court said that it could not presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states. The decision to apply the privileges and immunities clause was based on two sections of the Organic Act of Alaska: "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." 37 STAT. 512 (1912), 48 USC § 23 (1946); "The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." 37 STAT., 514 (1912), 48 USC § 77 (1946).

In 1947 Congress extended the privileges and immunities clause to Puerto Rico. 61 STAT. 772 (1947), 48 USC § 737 (1946, Supp. 4). By the *Mullaney* case it is applied to Alaska. And since the same two sections of the Organic Act of Alaska, cited in the *Mullaney* case, are also found in the Organic Act of Hawaii, it may be expected that the privileges and immunities clause will be extended to Hawaii should the question arise in the future. 36 STAT. 443 (1910), 48 USC § 495 (1946) and 31 STAT. 150 (1900), 48 USC § 562 (1946).

The decision represents a development which is taking place by which the territories are beginning to be treated more like states and the citizens of the territories, to be treated more like citizens of the states. In 1940 Congress specifically exended the "diversity of citizenship" jurisdiction of the federal courts to include citizens of the territories. 54 STAT. 143 (1940), 28 USC § 41(1) (1946). The Supreme Court sustained the validity of the 1940 statute, as applied to the District of Columbia, in the case of *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582 (1949). The *Mullaney* case illustrates that the Supreme Court now interprets the privileges and immunities clause to be applicable to the territories under the Organic Acts. The next step in this development would seem to be that of allowing citizens of the territories to claim the same rights under the privileges and immunities clause as are now available to citizens of the states.

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Constitutional Law—Unreasonable Search and Seizure. A member of the Metropolitan Police of Washington, D.C. entered the hotel room of *A* and *B* for the purpose of subjecting it to a search. *A* and *B* were absent and no search warrant had been obtained. Narcotics, which had been stored there by *D* without knowledge of *A* or *B*, were found and later turned over to a federal agent. *D* was arrested and convicted of violating federal narcotics laws. 43 STAT. 328, 26 U.S.C. § 2553(a) (1924); 43 STAT. 657, 21 U.S.C. § 174 (1924). Prior to trial, *D* moved to suppress the use, as evidence, of the property seized. The motion was denied. The Court of Appeals held this motion should have been granted and therefore reversed the conviction. On certiorari, *Held:* affirmed. *U.S. v. Jeffers*, 342 U.S. 48 (1951).

U.S. CONST., AMEND. IV prohibits "unreasonable searches and seizures." The Supreme Court in numerous decisions has held that evidence which is gained as a result of such searches and seizures is inadmissible in federal criminal prosecutions. *Weeks v. U.S.*, 232 U.S. 383 (1913); *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1919); *Gouled v. U.S.*, 255 U.S. 298 (1920); *Agnello v. U.S.*, 269 U.S. 20 (1925). Rule 41(e) of the Federal Rules of Criminal Procedure codifies this doctrine.

It appears from the cases that, as a general rule, the procurement of a search warrant is a prerequisite to compliance with the constitution. *Taylor v. U.S.*, 286 U.S. 1 (1932); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Amos v. U.S.*, 255 U.S. 313 (1921). In