Constitutional Law--Privileges and Immunities of Citizens in the Several States--Right of State to Impose Residence Requirements for Distribution of Nonintoxicating Beer

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create uniformity. If a different result is desirable, the change should come from the legislature rather than the court.

E. H. B.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS IN THE SEVERAL STATES — RIGHT OF STATE TO IMPOSE RESIDENCE REQUIREMENT FOR DISTRIBUTORS OF NONINTOXICATING BEER. — H, a nonresident of West Virginia, applies for a writ of mandamus to compel the issuance to him of a license to distribute nonintoxicating\(^1\) beer, contending that the West Virginia statute\(^2\) which makes four years \textit{bona fide} residence in the state a prerequisite to the issuance of such license is violative of the privileges and immunities clause of the Federal Constitution.\(^3\) Held, that the statute was constitutional because the privilege involved was denied only to nonresidents, and the Constitution requires equality only as between citizens. Writ refused. \textit{Hinebaugh v. James}.\(^4\)

The privileges and immunities clause of article 4, section 2, denies to any state the right to discriminate between its citizens and the citizens of other states.\(^5\) Four Supreme Court cases illustrate the view of that tribunal as to the application of this clause to invidiousness between residents and nonresidents of a particular state. In \textit{Blake v. McClung}\(^6\) the Court held a statute unconstitutional which gave "resident" creditors a priority as to the assets of a foreign corporation doing business in the state, because the real intent of the statute was to favor citizens of the state at the expense of citizens of other states. \textit{La Tourette v. McMaster},\(^7\) de-

\(\text{\textsuperscript{1}}\) The West Virginia legislature has declared malt beverages not containing more than five per cent of alcohol by weight to be nonintoxicating. \textit{W. Va. Acts} 1937, c. 12, art. 15, § 2.

\(\text{\textsuperscript{2}}\) \textit{Id.} at § 12(a).

\(\text{\textsuperscript{3}}\) Counsel contended that the statute was invalid under both the privileges and immunities clause of art. 4, § 2, providing: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"; and the privileges and immunities clause of the Fourteenth Amendment, providing: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". The Court dismissed the contention as to the Fourteenth Amendment on the ground that no new rights are conferred by that privileges and immunities clause. There is considerable authority for this proposition; \textit{Slaughter-House Cases}, 83 U. S. 36, 21 L. Ed. 394 (1873); \textit{In re Kemmler}, 136 U. S. 436, 10 S. Ct. 930 (1890); \textit{Bartemeyer v. Iowa}, 85 U. S. 129, 21 L. Ed. 929 (1874); but \textit{Qua So} as to the extent to which the law has been changed in this respect by the recent case of \textit{Colgate v. Harvey}, 296 U. S. 404, 56 S. Ct. 252 (1935).

\(\text{\textsuperscript{4}}\) 192 S. E. 177 (\textit{W. Va.} 1937).

\(\text{\textsuperscript{5}}\) \textit{Slaughter-House Cases}, 83 U. S. 36, 21 L. Ed. 394 (1873).

\(\text{\textsuperscript{6}}\) 172 U. S. 239, 19 S. Ct. 165 (1898).

\(\text{\textsuperscript{7}}\) 248 U. S. 465, 39 S. Ct. 110 (1919).
cided after the Blake case, upheld a requirement that insurance brokers must have been resident insurance agents for two years, on the ground that there was no discrimination against non-citizens. One year later, Travis v. Yale & Towne Mfg. Co.\(^8\) held invalid a provision of a state income tax law which granted to residents exemptions which were denied to nonresidents, the Court saying that the distinction between the words "resident" and "citizen" was important in cases such as La Tourette v. McMaster, but here the discrimination against nonresidents had the necessary effect of including citizens of other states, and, "... if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled." The latest pronouncement of the Court, Douglas v. New York, N. H., & H. R. Co.\(^9\) upheld a statute which denied to a nonresident the right to maintain an action against a foreign corporation not doing business in the state, the basis of the decision being that the courts of that state construed "resident" in the strict sense of the word, hence there was no discrimination against citizens. Mr. Justice Holmes, writing the opinion, indicates that Blake v. McChung must be confined to its particular facts, and "... whatever else may be said of the argument in that opinion ... it cannot prevail over the later decision in La Tourette v. McMaster ..."

Hinebaugh v. James\(^10\) seems to hold that inasmuch as the statute used the word "resident," it must be constitutional, the argument of the court being that it would apply to citizens and non-citizens alike, i.e., a citizen of West Virginia who was not a resident of West Virginia could not procure a license to distribute beer. However, in the Blake and Travis cases discussed above, a nonresident citizen would have been denied the privileges and immunities in question, but these cases reached a result which was antipodal to that reached by the West Virginia court. Hence it would seem that the cases cannot be differentiated on the basis of shibboleths. The true distinction is contained in the Travis case, i.e., "... if there be no reasonable ground for the diversity of treatment ..." then there is an abridgment of privileges and immunities,\(^11\) but, unfortunately, the Travis case befores the issue by prefacing the above clause with a statement to the effect that

\(^8\) 252 U. S. 60, 40 S. Ct. 223 (1920).
\(^10\) 192 S. E. 177 (W. Va. 1937).
the distinction between "residents" and "citizens" becomes important in some cases. It is submitted that the distinction between these words never becomes important, because, no matter which be used, the reasonableness of the ground for the diversity of treatment and the constitutionality of the enactment creating that diversity will stand in direct ratio to each other.

The result in Hinebaugh v. James is indubitably correct. It is too obvious to permit argument that beer, be it termed "intoxicating," or "nonintoxicating," is something that is inherently subject to regulation and control by the state, and it is equally apparent that such control can be more readily exercised over persons standing in some relationship to the state, either as residents or citizens thereof, than over persons between whom and the state there is no mutuality of obligations whatsoever. Hence there is in such a case a reasonable ground for diversity of treatment, and as a basis upon which to rest the principal case, this would be preferable to an attempted distinction between the words "resident" and "citizen."

H. A. W., Jr.

**Equitable Conversion by Will — Right of Residuary Devisee to Rents.** — T died possessed of personalty valued at $265.16, represented by money in the bank, and realty appraised at $15,000. By will she bequeathed general legacies in the aggregate amount of $13,510. The tenth clause of the will read as follows: "All the rest, residue and remainder of my estate, both real and personal. . . . I give, devise and bequeath to my daughter [D] absolutely and in fee simple. This bequest is made in addition to the love and affection which I bear to my said daughter also for the reason that my said daughter has expended a considerable amount...

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13 192 S. E. 177 (W. Va. 1937).