1938

Constitutional Law--Equal Protection of the Law--Venue Statutes Distinguishing Between Residents and Non-Residents

Dorothy Salmon

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons, and the State and Local Government Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol26/iss3/9

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
power to destroy," it is difficult to find any destructive effect in a requirement that public officers shall pay the same taxes as other citizens. Theoretically, of course, a legislature with unlimited taxing powers might at some future time discriminate against public officers by a higher tax rate than that imposed upon ordinary citizens; but the fact that the power to tax the salaries of officers as income might be abused does not justify a court in holding invalid a tax which does not abuse this power. The possibility of discrimination against the salaries of public officials would not even exist in Kentucky, where it is well established that excises must be uniform, in the sense that classification of taxpayers thereunder may not be arbitrary and unreasonable. Nor does it seem likely that such a tax will have the effect of undermining the principle of separation of powers and the independence of the judiciary. "To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge."

It would scarcely be argued that officers were protected by such constitutional provisions from the necessity of paying property taxes, sales taxes, and the like, though such taxes might be paid out of current income derived solely from an official salary. An attempt might be made to distinguish such a case from the case of an income tax on the ground that such taxes are not levied upon the officer's salary, though they may be paid therefrom. But the income tax itself affects the officer's salary only in a similarly indirect manner; the tax is not upon the salary, but upon net income, and the salary is not even the measure of the tax, as is shown by the fact that two persons whose sole sources of income were from salaries of equal size might pay income taxes of different amounts, because of differences in their exemptions.

On principle, therefore, it is submitted that the instant case is correctly decided, though the numerical weight of authority is decidedly against it.

JOSEPH S. FREELAND

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—VENUE STATUTES DISTINGUISHING BETWEEN RESIDENTS AND NON-RESIDENTS.

Defendants, residents of Mississippi, while driving an automobile through Kentucky, collided with and damaged a truck owned and operated by plaintiff. The accident occurred in Boyle County and plaintiff, a Jefferson County corporation, brought an action in that county and service was made on defendants by serving a copy of the summons.

McCulloch v. Maryland, 4 Wheat. 316, 431 (1819).


Dissenting opinion of Mr. Justice Holmes, Evans v. Gore, 253 U. S. 245, 265.


on the secretary of state, under Sec. 12-1 of the Kentucky Statutes, which provides that the use of the highways of the state by a non-resident motorist is equivalent to appointment of the secretary of state as his agent upon whom process may be served in actions arising out of such use of the highways. Sec. 12-2 further provides:

"Said action may be filed either in the county where the loss or damage may have occurred, or in the county where the plaintiff or one of the plaintiffs may reside . . ."

Since the Kane\(^6\) and Hess\(^7\) cases it is well established that a state, under its police power, may make the use of its highways a basis of jurisdiction for personal actions arising out of such use, subject to the condition imposed in the Wuchter\(^4\) case, that the statute must provide for the sending of notice to the non-resident. The Kentucky court, in Hirsch v. Warren,\(^6\) upheld the statute\(^5\) as satisfying this condition, declaring that the words "if any" in connection with the return registry receipt were not fatal to its validity, since the defendant might refuse to sign the receipt.

The main question presented by this case is whether Section 74 of the Kentucky Code, providing that in the case of resident defendants in actions arising out of the operation of motor vehicles the action may be brought either (a) in the county in which the accident occurred, or (b) in the county in which the defendant resides and Section 12-2 of the Kentucky Statutes, providing that in the case of non-resident defendants, the action may be brought either (a) in the county in which the accident occurred, or (b) in the county in which the plaintiff resides, denies to the non-resident defendants the equal protection of the laws guaranteed by the Fourteenth Amendment?

The Kentucky court, in holding the above statute unconstitutional, based its decision upon the result reached by the Supreme Court in the case of Powers Manufacturing Co. v. Saunders.\(^7\) In that case defendant, an Ohio corporation, maintained a local office at Stuttgart, Arkansas, and plaintiff, also a resident of Ohio, was injured while working at defendant's office in Stuttgart County, Arkansas. The Arkansas statute requires actions for personal injuries received while in the course of employment, if against a domestic corporation, to be brought in any county in which it has its chief place of business, or

---


\(^7\) Hess v. Pawloski, 274 U. S. 352 (1927).

\(^4\) Wuchter v. Pizzutti, 276 U. S. 13 (1928).

\(^5\) 253 Ky. 62, 68 S. W. (2d) 767 (1934).

\(^6\) Kentucky Statutes (Carroll, 1936), Sec. 12-2: "... It shall then be the duty of said secretary of state to write a letter to the defendant in said petition at the address given in said petition, notifying said defendant of the nature and pendency of said action, and to enclose in said letter said summons and said copy of said petition. Said letter shall be posted in the mails of the United States by prepaid registered mail and bear the return address of said secretary. Said secretary shall thereafter file, with the clerk issuing said process, a report of his action, which shall include a copy of said letter and an answer thereto, together with the return registry receipt, if any."

\(^7\) 274 U. S. 490 (1929).
in which its chief officer resides, but if against a foreign corporation, allows them to be brought in any county in the state. Plaintiff brought the action in D County, Arkansas, and the court held the statute unjustly discriminatory as to foreign corporations, denying them the equal protection of the laws.

The Arkansas statute, which attempts to make a distinction between venue of actions as between domestic and foreign corporations, while dealing with a situation closely analogous to that of resident and non-resident motorists, can, we think, be properly distinguished from the Kentucky statute in two respects.

(1) The Arkansas statute gives the plaintiff an election of bringing his action against a foreign corporation in any one of the seventy-five counties in the state, while the Kentucky statute expressly limits the action against non-resident motorists to one of two counties, i.e., the county in which the accident occurred or the county in which the plaintiff resides, both of which counties have some actual connection with the action.

The defendant in the Powers Case, although a foreign corporation, has a fixed place of business within the state, where it maintains an office (in Stuttgart County) and where process may at any time, without hardship upon the plaintiff, be served upon its agent. Its position is not substantially different from that of a domestic corporation which must be sued either in the county where the accident occurred, or where it resides. Is there any convenience to be served by allowing the plaintiff to summon the defendant to answer his complaint in any one of the seventy-five counties of Arkansas when it could, at all times, be reached in Stuttgart County? The non-resident motorist, having no connection with any county, would not be inconvenienced in one more than in another. It is well established that the pledge of equal protection of the laws does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection. It does however, require that the classification be based on a real or substantial difference, and in this situation, there is no difference.8

(2) The Arkansas statute is concerned with persons having a fixed place of business within the state, who are more or less permanently located there and whose liability might conveniently be determined by the court of the county in which they have their place of business, while the Kentucky statute attempts to regulate the use of its highways by non-resident motorists. The state, in the latter instance, is giving a fair choice to its residents, which choice cannot be given to a non-resident.

What does the equal protection of the laws guaranty of the Federal Constitution mean? Does it mean a literal and precise equality? In Jefferson County Savings Bank v. Garland, et al., the plaintiff bank, a corporation of Jefferson County, Alabama, brought an action

---

*195 Ala. 279, 71 So. 126 (1916).
on a contract made there against defendants (residents of Ohio) who were served with process in C County, Alabama. The Code provides that a resident shall have the right to have a change of venue to the county in which he resides and has his personal effects, but makes no similar provision as to a non-resident. The court held that in the absence of a statutory provision the common law which allowed transitory actions arising within the realm to be laid in any county, would govern. Therefore, we have here not two statutes, as in the principal case, distinguishing between venue in actions against residents and non-residents, but precisely the same situation brought about by a statute and the common law. The court held that there was no denial to the non-resident defendants of the equal protection of the laws, saying:

"The privilege which a resident of this state has, of being sued in the county of his permanent residence, is personal to him. It is conferred by our statute of venue, without which the place of trial would be optional with the plaintiff. But the statute makes no provision as to venue in transitory actions against non-residents. By coming here, however transiently, defendants have submitted themselves to the jurisdiction which every state exercises over all persons within its limits in respect to matters purely personal which, in contemplation of law, have no locality; and we apprehend there is no good reason why they should have the benefit of a personal privilege of mere convenience which the state has conferred only upon persons having permanent residence in this state. Every substantial right they have may, and will, beyond peradventure, be as fairly adjudicated and, for aught we can see, as conveniently in Jefferson County as anywhere else in the state. Due process and equal protection, which respectively, are satisfied by any practice having the sanction of common law usage, and have reference to substance and not form, and do not require that the privilege of localizing actions should be conferred alike on resident and non-resident defendants, though in some states it has been done."

This view is supported by dictum in the case of Cincinnati St. Ry. Co. v. Snell, where the court said:

"It is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

This view is reiterated in Suncrest Lumber Co. v. N. C. Park Comm., and is an extension of Morrimec Veneer Co. v. McCall, which holds that a statute providing for a change of venue to a resident

---

96 Ohio St. 297, 117 N. E. 219 (1917).
30 Fed. (2d) 121 at 127 (1929).
129 Miss. 671, 92 So. 317 (1922).
citizen who is sued out of the county of his household and residence, and denying such change to a corporation, does not violate the equal protection of the laws clause, as it does not affect any vital right, and is a mere matter of practice for the convenience of natural persons who are householders and residents of the county, for the state may provide different rules as to venue between citizens and corporations where it does not affect any material defense or liability.

A Wisconsin statute very similar to the one under consideration provides that where a party against whom a judicial examination is sought is a resident (individual or corporation), the examination must be had in the county of his residence. If a non-resident individual, it can be had in the state only if personal service was had upon him and then only in the county in which served. If against a non-resident corporation the examination may be had in any county in the state, regardless of whether or not there is personal service. That portion of the statute which distinguishes between non-resident individuals and non-resident corporations was held to be discriminatory in *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, but the portion of the statute distinguishing between residents and non-residents was not there considered. However, the distinction between residents and non-residents is not so harsh as that between non-resident individuals and non-resident corporations and had it been considered, we believe the dissenting opinion, expressed by Mr. Justice Holmes and Mr. Justice Brandeis, to the effect that the equal protection clause does not prevent a state from molding the details of its judicial procedure to accord with the requirements of justice, would have been applied.

Closely similar to the venue statutes are the non-resident motorist statutes relating to service of process mentioned in the first part of this note, which it is conceded at the present time do not deny the equal protection of the laws to this class of persons. The mode of service of process and giving notice, it is true, are different, but when the final result is evaluated, it is apparent that there is no real inequality of protection. Actually, the statutes operate to place resident and non-resident motorists on the same footing and if the different problems presented in securing jurisdiction over resident and non-resident motorists require a different form of procedure as to service of process or venue, literal and precise equality is not demanded by the Fourteenth Amendment.

The primary object of all these regulations as to venue and of the Constitution with which they must comply, is to secure to parties a fair and impartial trial of their causes and when this is accomplished, fundamental justice has been attained. There is no denial of equal protection of the laws merely because a state has seen fit to direct, under particular conditions, a trial of a cause in one forum instead

---

26 U. S. 544 (1922).

of another, when in both forums equal laws are applicable and an equal administration of justice is obtained.25

The distinction in the Kentucky statutes relating to venue as against non-residents and residents is, undoubtedly, a legitimate one, which works no hardship upon the defendant. It is designed to secure rights of the injured plaintiff which may otherwise be completely lost, and the statute should be declared constitutional.

DOROTHY SALMON.

MOTION FOR JUDGMENT ON THE PLEADINGS IN KENTUCKY OTHER THAN FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The Kentucky Code provides: "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him".1 In view of this rather broad and general statement, which would seem to include judgment on the pleadings in any situation in which the pleadings are insufficient, the paucity of cases in Kentucky relating to motion for judgment on the pleadings is surprising. In other states this motion is not infrequently used in practice under the reformed codes of procedure.2 Nevertheless, even in these states it is not always looked upon with favor by the courts.3

The highest court of Kentucky has indulged in a great deal of loose language in discussing judgments on the pleadings, so that it is difficult to ascertain by a reading of the cases whether the court is speaking of judgment given on the pleadings on motion therefor, or peremptory instructions, demurrers, or judgments notwithstanding the verdict. However, the propriety of this motion for judgment on the pleadings would seem to be established by a few cases which, upon careful perusal, appear to bear upon this point with some degree of exactitude. The case of Miller v. Hart4 squarely upholds a judgment given on such a motion. In this case the defendant had promised, for a consideration, to let the plaintiff have her life estate in certain land, and relying on this promise the plaintiff had purchased defendant's grandchildren's reversionary interest in the land. The defendant then refused to abide by the agreement and the plaintiff brought suit. The defendant answered, denying the allegations of the petition, and afterwards entered a motion for judgment in her favor on the pleadings. Her position was that the contract was within

---

1Kentucky Civil Code (Carroll, 1932), section 386.
2Finley v. Tucson, 7 Ariz. 108, 60 Pac. 872 (1900); Botto v. Vandament, 67 Cal. 322, 7 Pac. 753 (1885); Steinhauer v. Colmar, 11 Colo. App. 494, 56 Pac. 291 (1898); Grimmett v. Grimmett, 80 Okla. 176, 195 Pac. 133 (1921); Robinson v. Anderson, 88 Okla. 136, 212 Pac. 121 (1922).
4122 Ky. 494, 91 S. W. 698 (1906).