SHIPPING CONTAINERS AS ORIGINAL PACKAGES: ARE CONTAINERIZED IMPORTS IMMUNE FROM STATE TAXATION?

I. INTRODUCTION

The prohibition against state imposition of property taxes on imports arises out of the constitutional admonition that "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports."[1] Cases specifically applying this provision to state taxes levied on imported goods have held that it prohibits the taxation of imported goods in their original packages while still in the hands of the original importer.[2] Since the adoption of this "original package" doctrine, cases developing it have been confined to application of the doctrine to specific imported items, focusing upon whether the imports were in their original packages when taxed, and whether the imports were held by the original importer when taxed. Today the doctrine is the subject of a moderate amount of litigation, confined mostly to the state courts.[3]

Within the past decade, however, the technological innovation has occurred in the shipping industry which may soon be the source of widespread litigation involving the application of the original package doctrine. This innovation is the development of the concept of containerized shipping, involving the use of large reusable metal containers and mechanized cargo handling devices in transferring, handling, stowing, discharging and delivering cargo.[4] Because of the comparative efficiency and low labor costs of this method in relation to traditional methods, which required the packing and stowing of separate items of cargo, containerized shipping has become the preferred method of transporting goods by sea.[85]

The shipping containers themselves are similar to the semitrail-

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[1] U.S. CONST. art. I, § 10 [hereinafter cited as the import-export clause].

[2] [W]hile remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442 (1827). The case did not deal with a property tax, but with a license tax imposed on importers.

[3] The last pronouncement by the Supreme Court on the subject appears in Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964).

[4] Containerships are vessels in which the cargo is carried preloaded in containers usually 8' x 8' x 40' or 8' x 8' x 20'. Instead of the traditional cargo hold arrangement the containership hold is fitted with container guides into which the preloaded containers are fitted.

Farrel Lines, Inc. v. Federal Maritime Comm., 475 F.2d 1332, 1333 n.2 (D.C. Cir. 1973).

[5] An excellent summary of the container process may be found in Simon, *The Law of Shipping Containers*, 5 J. MAR. LAW & COM. 507 (1974).

ers which are commonly seen on the highways and are constructed with retractable or removable wheels, thus permitting loading and unloading by dockside cranes, as well as the stacking of the containers inside the ships. Upon arrival at the point of entry, the vans are removed from the vessel, wheels are lowered or attached, and the containers are connected to motor cabs for transportation to the importer's warehouse. There the goods (in boxes or cases of their own) are removed, and the container is returned to the shipper.

Prior to the advent of containerization, the intermediate steps of this process were nonexistent. The only packages involved were the actual boxes or cases in which the goods were shipped. After arrival at the warehouse of the importer, if these boxes or cases were broken, and the goods inside were exposed or removed, the "original package" was held to have been broken, and the goods became subject to state taxation. Containerization, however, introduces another step in the process—the aggregation of the packages into a larger receptacle. If this larger receptacle can also be characterized as the "original package" in which the goods are imported, then the removal of the goods from the shipping container creates an event in the importation process where states can assert their power to assess property taxes free of the constitutional prohibition.

It is not the purpose of this article to engage in the detailed analysis of either the development of the original package doctrine, or of the characteristics of state *ad valorem* taxation. Rather, the article will focus on the narrow question of whether a shipping container is the original package of importation of goods imported in that mode, for the purpose of determining the constitutional immunity of those goods from state taxation. Analysis of this narrow question is hampered by the paucity of legal commentary on the subject. The containerization process itself is of recent origin, and its relation to state taxation has become an issue in only two reported decisions: *Volkswagen Pacific Inc. v. City of Los Angeles*,[6] in which a California appeals court held that shipping containers were original packages, and *Michigan State Tax Commission v. Garment Corp.*,[7] holding that containers were not original packages.

II. The Original Package Doctrine

At the inception of the federal union, it was a matter of concern to many that to permit the several states to regulate their foreign

[6] 12 Cal. App. 3d 689, 90 Cal. Rptr. 902 (1970).

[7] 32 Mich. App. 715, 189 N.W.2d 72, *cert. denied*, 404 U.S. 992 (1971).

commerce would be to allow the maritime states to benefit from the imposition of duties on imports and exports, to the detriment of commerce in the inland states.[8] Coupled with this was the desire to place power to control foreign commerce in the federal Congress, without interference from states seeking to advance their provincial interests at the expense of the commercial health of the country as a whole.[9]

Chief Justice Marshall referred to these concerns in *Brown v. Maryland*,[10] but also recognized that an overbroad interpretation of the import-export clause, permanently immunizing an import from taxation, would result in depriving the states of substantial and necessary revenue.[11] Marshall chose to draw the line at that point where "the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country."[12] That point, Marshall decided, is not reached until the original package used in importation is broken.[13]

Subsequent cases focused upon the question of what constitutes an original package within the holding of *Brown*. A characteristic case was *Low v. Austin*[14] in which the Court held that imported bottles of wine were not subject to a state *ad valorem* tax while remaining in the original cases, unbroken and unsold, even when those cases were offered for sale in the store of the importer.

Reversing the Supreme Court of California, the Court focused on Marshall's language in *Brown*. The state had argued that since the wines were offered for sale in the warehouse of the importer along with domestic wines, they had become, under *Brown*, "incorporated and mixed up with the mass of property" in the state and, therefore, were subject to the tax. The Court rejected this argument stating:

> [T]he goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not the extent of the tax, or its

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[8] Letter from James Madison to Professor Davis, 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 518-19 (1911).

[9] *Id.*

[10] 25 U.S. (12 Wheat.) at 438-40.

[11] *Id.* at 441.

[12] *Id.*

[13] *Id.*

[14] 80 U.S. (13 Wall.) 29 (1871).

> equality with respect to taxes on other property, but as to the power of the State to levy any tax.[15]

This apparent rejection of the "incorporation" formula seemed to establish the package concept as the only standard for judging the taxability of imports remaining in the hands of the original importer.

In order to take full advantage of the original package doctrine, some importers adopted the device of having goods imported in very small packages, which, in turn, would be packed in larger boxes. In this manner they hoped to assert the immunity of each separately packaged item from state taxation. Such a practice was the issue in *May v. New Orleans*.[16] The imports which were the subject of the dispute were dry goods enclosed in small paper packages, which were, in turn, packed in wooden cases. The importer would break open the cases, and offer the small packages, still unbroken, for sale to his customers.[17] When the city tried to levy a tax on these goods, May argued that each small package was the "original package" of import, and thus was immune from the tax.

Recognizing the adverse effects which would flow from accepting this argument, the Supreme Court stated:

> The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them . . . .It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders, seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.

Thus impressed by the doctrine's susceptiblilty to abuse, the Court struggled with the formulation of some rule which would qualify the doctrine in a way that would prevent such abuse. Unable to discern a method for distinguishing the reasonable from the unreasonable, the Court fell back upon the previously discredited "incorporation" language in *Brown*, holding that the plaintiffs, in breaking open the wooden cases and exposing the separate packages for sale, had so acted upon the goods as to incorporate them into the mass of property in the state.[19] In what seemed an obvious retreat from the

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[15] *Id.* at 34.
[16] 178 U.S. 496 (1900).
[17] *Id.* at 498.
[18] *Id.* at 503.
[19] *Id.* at 508.

package analysis in *Low v. Austin*, the Court failed to make any reference to that case in its opinion.

In the next term, the Court undertook to refine somewhat the concept of an "original package" in *Austin v. Tennessee*.[20] Although the case dealt with interstate commerce rather than with imports, and involved a criminal statute rather than a taxing statute, it is nevertheless considered to be authoritative in the application of the original package doctrine to problems created by state taxation of imports.[21] As in *May*, the case turned on the "package within a package" problem. Here, the goods involved were cigarettes packaged ten each in small paper packages, which, in turn, were loosely packed in large baskets. In holding the baskets to be the original packages, the Court focused upon the problem of the size of the original package, and analyzed prior original package cases in this aspect. Although the Court characterized the case as being wholly within the rule of *May*, it again sought to formulate some standard of reasonableness, a task it was unable to accomplish in *May*. The result was a test of commercial reasonableness:

> The real question in this case is whether the size of the package in which the importation is actually made is to govern; *or, the size of the package in which bona fide transactions are carried on* . . . . We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.[22]

The Court's continuing reliance on the nature of the import transaction was evident in *Hooven & Allison Co. v. Evatt*, [23] a case which extended the original package doctrine to cover imported goods held by a manufacturer pending their use in the manufacturing process.[24] Only when the original packages were broken, or when the

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[20] 179 U.S. 343 (1900).

[21] *See, e.g.*, Annot., 89 L. Ed. 1279, 1288 (1945); 15 AM. JUR. 2d, *Commerce*, §§ 44-45 (1964). Presently, general application of the original package doctrine as a bar to state regulation of goods in interstate commerce is regarded as unsound. Whitfield v. Ohio, 297 U.S. 431 (1936).

[22] 179 U.S. at 359 (emphasis added).

[23] 324 U.S. 652 (1945). The "packages" in this case were bales of hemp imported from the Philippine Islands.

[24] Previous cases which applied the package concept of *Brown v. Maryland* all proceeded upon the assumption of Chief Justice Marshall in that opinion that "the object of importation is sale." 25 U.S. (12 Wheat.) at 442. The Court in *Hooven* recognized, however, that the original package doctrine was also capable of application to goods imported for utilization in a manufacturing process. 324 U.S. at 666.

goods were subjected to manufacturing, would their immunity as imports end.[25] In discussing the difficulty of ascertaining in a particular case when the original package is broken, the Court noted that "this supposed difficulty does not seem to have baffled judicial decision" since the original package doctrine was formulated *Brown*.[26] In reconciling the competing demands of the constitutional immunity and of the state's power to tax, courts should be governed by considerations of practicality,[27] and should focus on the essential nature of the import transaction, rather than on the formalities of the importation process.[28]

The cases heretofore discussed all dealt with imported goods which were commonly "packaged" in the ordinary sense of that word. Lower courts, however, were faced with a conceptual dilemma in applying the test of "original package" to commodities which are not imported in a package form, such as cattle,[29] oil,[30] and fertilizer.[31] Adapting their reasoning to a doctrine based on packages, these courts developed a rule which characterizes the entire shipment or aggregation of goods as an abstract sort of "package."[32]

In *E.J. Stanton & Sons v. Los Angeles County*[33] the California appeals court was concerned with the application of the original package doctrine to the plaintiff's imported lumber. Each shipment which plaintiff received was unloaded from the ship and transported to its storage yard, where the lumber was sorted by size, thickness, etc. However, each shipment was stacked as a discrete unit, and was not comingled with lumber from other shipments. Plaintiff then sold a portion of each stack prior to the date on which the tax was assessed. When the county levied a tax on the remaining lumber, the

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[24] Although the *Hooven* case extended immunity to goods imported for use while in their original packages, the opinion contained a basis for its own limitation in Mr. Justice Stone's reservation of the question of whether an amount of inventory sufficient to meet current operating needs could be considered to be in use as part of the manufacturing process. 324 U.S. at 667.

[25] The question was answered in Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), holding that an amount of goods essential to meet current operating needs was sufficiently incorporated into the manufacturing process to lose their immunity as imports.

[26] 324 U.S. at 668.

[27] *Id.*

[28] *Id.*

[29] Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070 (1940).

[30] Galveston v. Mexican Petroleum Corp., 15 F.2d 208 (S.D. Tex. 1926); Mexican Petroleum Corp. v. South Portland, 121 Me. 128, 115 A. 900 (1922).

[31] In re Taxes, Pacific Guano & Fertilizer Co., 32 Haw. 431 (1932).

[32] *See, e.g.*, Columbus Steel Supply Co. v. Kosydar, 38 Ohio St. 2d 258, 313 N.E.2d 389 (1974); E.J. Stanton & Sons v. Los Angles County, 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied*, 332 U.S. 766 (1947).

[33] 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied*, 332 U.S. 766 (1947).

plaintiff paid under protest, and later brought an action to recover the tax on the theory that the lumber was rendered immune from the tax by the import-export clause.

The court reasoned that the object of wrapping goods in a package was to unify them as a single import and to prevent their loss and destruction. This was seen as the concept behind the package analysis in *Brown*, rather than any requirement that the goods be enclosed in a tight or sealed container.[34] Applying this modified package concept to the lumber, the court reasoned that:

> [T]he conclusion is irresistable [sic] that the unit of importation is the original package . . . . Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with a silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package.[35]

Applying this reasoning to the facts of the case, the court found that the "invisible gossamer" which made each shipment of lumber an original package was broken when portions of each shipment were sold, even though the remainder was left undisturbed.[36]

The original package doctrine, in its present form, is susceptible to a mechanistic application since it focuses on the physical characteristics of the package, and on whether or not it has been altered or acted upon in some way so as to be "broken." Even where the goods are not physically packaged, and where no mechanical "breaking" can be discerned, the test is still applied, by analogy, to the aggregate or entire shipment. Nevertheless, even when applying this mechanistic reasoning, courts have not lost sight of the policy behind the doctrine, and have refused to adhere to a strictly mechanical analysis where the bona fide nature of the transaction depends upon the commercial reasonableness of the mode or unit of import.

III. The Containerization Process

Before considering the effect of the original package doctrine on the containerization process, some pertinent characteristics of that process should be noted.

The containers themselves are articles of transport equipment that are constructed and intended for repeated use, and are designed to be utilized for the storage of goods inside a ship. They may be

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[34] *Id.* at 186, 177 P.2d at 807.

[35] *Id.* at 188, 177 P.2d at 807-8.

[36] *Id.*

transported by either rail or truck without unloading and reloading the goods themselves.[37] They are usually owned by the shipowner.[38] Goods are stowed in the containers by the shipper in the same manner as are goods conventionally stowed in the holds of ships, using the proper braces, shoring, etc., so as to prevent the cargo from shifting with the rolling of the ship.[39]

As a consequence of the sturdy construction of the container, it is no longer necessary for the shipper to package the goods with the same degree of care. Consequently, the shipper may choose to use corrugated cardboard or other inexpensive packaging material for goods which required packaging in sturdy wood cases or casks when shipped conventionally.[40]

The container transportation process begins with the shipper packing the goods in suitable boxes or other packaging material. These packages are then stowed by the shipper in a container provided by the carrier. The container is then sealed, and transported to the port facility by motor cab or by rail. Upon arrival at dockside, the container's wheels are either removed or retracted, and the container is loaded by crane into compartments of the ship specially designed with tracks or channels to receive and hold the container.

Upon arrival at the port of entry, the process is repeated in reverse, and the container is transported to the warehouse, factory, or terminal of the importer. There the packages are unloaded from the container by the importer and are stored in the importer's facility. The container is then returned to the carrier.[41]

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[37] 49 C.F.R. § 420.3(c) (1970) provides:

(c) "Container" means an article of transport equipment (liftvan, portable tank, or other similar structure including normal accessories and equipment when imported with the container), other than a vehicle or conventional packaging—

(1) Of a permanent character and accordingly strong enough to be suitable for repeated use;

(2) Specifically designed to facilitate the carriage of goods by one or more modes of transport, without intermediate unloading;

(3) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;

(4) So designed as to be easy to fill and empty; and-

(5) Having an internal volume of 1 cubic meter (35.3 cubic feet) or more.

[38] Simon, *supra* note 5, at 513.

[39] *Id.* at 515.

[40] *Id.* at 514-15.

[41] The process outlined is necessarily a generalization, since the specific procedures will vary among different importers, carriers, and shippers. Outlines of specific methods may be found in cases involving the containerized shipping process. *See, e.g.*, Leather's Best, Inc. v. S.S. Mormanclynx, 451 F.2d 800 (2d Cir. 1971); Serrano v. United States Lines Co., 238 F. Supp. 383 (S.D.N.Y. 1965); Michigan State Tax Comm. v. Garment Corp. of American, 32 Mich. App. 715, 189 N.W.2d 72, *cert. denied*, 404 U.S. 992 (1971).

The apparent distinctions between traditional packaging[42] and the shipping container are therefore several. The container is provided by the carrier; a package is provided by the shipper. The container is reusable, while traditional packages are not. Title to the container remains with the carrier, while title to packages normally passes to the importer along with title to the goods. Finally, containers are utilized not only for protection of goods and ease of handling (as are packages), but also as an integral part of the mode of transport.[43]

IV. Is the Container an Original Package?

A. *Volkswagen Pacific, Inc. v. City of Los Angeles.*[44]

In the first case to consider the question of the effect of containerization on the immunity of imports from state taxation, containers were held to be original packages.

The case dealt with the imposition of a business license tax by the city on the sales activities of the plaintiffs, a Porsche distributor and a Volkswagen distributor. Although the primary issues of the case were the extent of the plaintiffs' business activities and the taxability of imported automobiles,[45] the court did consider the taxability of automobile parts imported in containers, or "sea vans" as they were referred to in the opinion.

The Porsche distributor ordered parts directly from the German manufacturer, who packaged the parts separately and placed them in the container, which was then transported by truck to the ship. Upon arrival of the ship in this country, the containers were unloaded from the ship and transported by truck to the Porsche distributor's ware-

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[42] a "bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand." It denotes "a thing suitable for transportation or handling." As ordinarily understood in the commercial world, it means a shipping package or unit.
Aluminos Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152 (2d Cir. 1968).

[43] The question of whether a container is a package has been a central problem in cases arising under § 4 (5) of the Carriage of Goods at Sea Act [hereinafter cited COGSA], 46 U.S.C. § 1304 (1971), which provides a $500 per package limitation on the liability of the carrier for goods damaged while in his care. *Cf.*, Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

[44] 12 Cal. App. 3d 689, 90 Cal. Rptr. 902 (1970).

[45] The taxability of the autos centered about the application of the original package doctrine to "a situation where packaging is inherently impossible or impracticable." Citing *Stanton*, the court ruled the entire shipment to be the original package, and held the autos taxable as soon as separted from the rest of the shipment. 12 Cal. App. 3d at 699-700, 90 Cal. Rptr. at 909-10.

house. There the container was opened, the contents removed, and the container returned to the carrier. Each shipment of parts was comprised of several containers.[46]

Evidently, the court did not consider the issue as presenting a question quite so complex as the others in the case, and summarily found the containers to be "original packages" on the sole authority of *May v. New Orleans*.[47] Consequently, the court held the contents to be subject to an *ad valorem* tax after their removal from the shipping container. Other than a short quotation from the opinion in *May*,[48] further analysis on the issue is absent.

That the court's conclusory language is unfounded is clear. The opinion's absolute reliance upon the excerpt from *May*, without giving any indication that it recognized the special circumstances in that case,[49] and the subsequent clarification in *Austin v. Tennessee*,[50] greatly undermines the opinion's value as persuasive authority.

B. *Michigan State Tax Commission v. Garment Corp.*[51]

In the only reported case to date which focuses upon the "container as an original package" question to any extent, a Michigan court of appeals held that a container was not an original package. The court in *Garment Corp.* was concerned with the levying of the Detroit property tax on imported industrial garments located in the plaintiff's warehouse. The garments were manufactured in Puerto Rico,[52] where they were compressed and packed into large heavy-duty cardboard cases. After being sealed with tape and reinforced with steel strapping, the cases were packed into containers thirty-five feet long. Upon arrival in port, the containers were transported to the plaintiff's warehouse by motor cab.[53]

Originally, the city recognized the immunity of these goods, but in 1968 sought to tax them, arguing that their removal from the

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[46] 12 Cal. App. 3d at 699, 90 Cal. Rptr. at 909.

[47] *Id.*

[48] In our judgment, the "original package" in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of goods lost its distinctive character as an import and became property subject to taxation by the state as other like properties situated within its limits.

. 12 Cal. App. 3d at 699, 90 Cal. Rptr. at 909 quoting 178 U.S. at 508.

[49] *See* text at note 17, *supra*.

[50] *See* text at note 20, *supra*.

[51] 32 Mich. App. 715, 189 N.W.2d 72, *cert. denied*, 404 U.S. 992 (1971).

[52] Goods from territories of the United States are imports for the purposes of the import-export clause. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 669-79 (1945).

[53] 32 Mich. App. at 717, 189 N.W. 2d at 72-73.

shipping container constituted a "breaking" of the original package, which stripped the goods of their constitutional protection. The state tax commission sustained this argument.[54]

In rejecting this analysis, the Michigan appellate court recognized the distinction between containers and conventional packages. As vans normally used in over-the-road transportation, reasoned the court, the containers were the property of the carrier.[55] Recognizing containerization as an innovation in the mode of transportation rather than a new form of packaging, the court stated:

> It can only be concluded that the vans and trailers are, in fact, vehicles, or at least instruments of transportation, and the mere use of a new technology in shipping does not destroy the tax immunity of the property shipped.[56]

Moreover, relying on language in *Hooven*,[57] the court pointed out that the container method of shipment did not alter the essential nature of the transaction through which the goods were imported. Rather, it pertained merely to the formalities of transportation.[58]

The fact that the Michigan court's analysis of the problem was more thorough than that of the California court in *Volkswagen Pacific* gives its opinion greater persuasive effect. However, both opinions can be faulted in their failure to analyze the problem in terms of fitting the container concept into the framework of cases interpreting the original package doctrine. A convincing resolution of the problem requires such an analysis.

C. *A Suggested Analysis*

At the outset, it must be recognized that shipping containers are articles of transport equipment and not conventional packages. The functional differences between containers andconventional packaging have already been discussed.[59] Furthermore, most courts which have considered other legal aspects of containerization have recognized the

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[54] *Id.* at 717, 189 N.W.2d at 73.

[55] *Id.* at 718, 189 N.W.2d at 74.

[56] *Id.*

[57] The language quoted from *Hooven* read:

When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. 324 U.S. 652, 663.

[58] 32 Mich App. at 720, 189 N.W.2d at 74.

[59] See Section III, *supra*.

distinction.[60] Applying this characterization of the container process to the analysis of the problem raised under the original package doctrine necessarily results in supporting the conclusion that containers, in most cases, are not "original packages."

The same result is compelled when the problem is viewed in light of the test of commercial reasonableness developed in *Austin v. Tennessee*. Since bona fide transactions between foreign shippers and domestic importers are usually carried on in units of boxes, cases, cartons, etc., which are the traditional units of importation of goods, it would seem that these are the original packages, and not the container used by the shipper. Stated in another way, the original package would be the form in which the shipper delivers the goods to the carrier, before they are place inside the shipping container. This result is not inconsistent with the holdings in *May v. New Orleans* or in *Austin v. Tennessee*, since the immunity of small packages imported by container would depend upon whether the packages were commercially reasonable units in which bona fide transactions between shipper and importer are normally carried on.[61]

Likewise, the use of containers for the importation of commodities which were not traditionally capable of packaging should create little difficulty if the container is not regarded as a package. If the package is considered to be the form in which the goods were delivered to the carrier, containerization would have no effect on the application of precedent. For example, if bulk lumber were imported in a container, the aggregate of lumber could still be argued to be the original package according to the reasoning of cases like *Stanton*.

In each of these examples, since the "essential nature of the transaction"[62] between importer and shipper is not altered by the

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[60] [P]ackage is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be "contained."

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F. 2d 800, 815 (2d Cir. 1971). *See also*, DuPont de Nemours International S.A. v. S.S. Mormacvega, 493 F.2d 97 (2d Cir. 1974); Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

[61] An acceptable standard or definition of what constitutes a commercially reasonable unit of importation is suggested by the following:

"Commercial unit" means such unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

UNIFORM COMMERCIAL CODE § 2-105(6).

[62] Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945).

utilization of the container process by the carrier, the analysis under prior case law of the tax immunity of the individual packages should not be altered by the fact that they were stowed in shipping containers while in the possession of the carrier.

In some cases, however, the question of commercial reasonableness may be complicated by the effect of containerization on the method of packaging the goods for export. As discussed above,[63] construction of the containers permits the shipper to use less expensive and less substantial packaging in the preparation of goods for shipment. As a result, these packages may not be "in the ordinary form in which from time to time immemorial, foreign goods have been brought into the country."[64] For example, goods traditionally packaged in heavy wooden crates or in cases might now be packaged in lightweight cardboard boxes or in paper wrappers. Presented with a radical departure from traditional packaging, a court might find the determination of commercial reasonableness made more difficult by the dissimilarity between the new packages and packages commonly utilized in bona fide transactions in the past.

A possible resolution of this problem would be to apply a "functional economics test" similar to that employed in *Royal Typewriter Co. v. M/V Kulmerland*[65] to determine whether the container was a "package" within the meaning § 4 (5) of the Carriage of Goods at Sea Act.[66] That case involved the loss overboard of three shipping containers, each containing 350 typewriters. The court noted that before containerization typewriters were shipped in heavy wooden cases containing twelve to twenty-four typewriters each. However, when prepared for shipment by container, the typewriters were packaged individually in lightweight cardboard cartons.

In resolving the question of whether these cartons were packages under § 4 (5), the test employed focused upon whether the cartons were functional packing units: unless the individual cartons would have been suitable for conventional break-bulk shipment, the burden is on the shipper to show by other evidence that his units are themselves "packages" under § 4 (5). In *Royal Typewriter*, the shipper was unable to meet that burden.[67]

Applied to the original package doctrine, the test would be that unless the individual cartons or cases were substantially similar to

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[63] See Section III, *supra*.

[64] Austin v. Tennessee, 179 U.S. 343, 359 (1900).

[65] 483 F.2d 645 (2d Cir. 1973).

[66] 46 U.S.C. § 1304 (1971).

[67] 483 F.2d 645, 649. *But see*, Simon, note 5 *supra*, at 520-30.

traditional (pre-container) packaging units, the importer would be required to show that the units of import were commercially reasonable units in which bona fide transactions between foreign shippers and domestic importers are commonly carried about. The fact that the test focuses upon practical commercial considerations would seem to find support in both *Austin v. Tennessee*,[68] and *Hooven & Allison Co. v. Evatt*.[69]

V. CONCLUSION

Although the immunity of imports from state taxation has, since 1827, focused upon the package concept, courts have found that to limit consideration solely to the nature of the package can lead to a result which is clearly absurd in the light of the policies behind the original package doctrine. In *May v. New Orleans* the Supreme Court recognized that holding the small packages to be immune from state taxation would be unwarranted in the light of the objectives of the import-export clause, even though such a result would be valid under the broad language of *Brown v. Maryland*. It seemed obvious to the Court that the framers did not intend imported goods to be forever beyond the reach of the states' taxing power.

Likewise, in *Austin v. Tennessee*, the immunity was held to apply only to bona fide and commercially reasonable units of importation. Again the Court recognized that the size or form of the package should not be the basis of the constitutional immunity, but that the doctrine should be applied to protect those commercial interests which the framers thought worthy of protection.

Finally, in *Hooven & Allison Co. v. Evatt*, the Court made clear that the constitutional immunity from taxation should not depend upon the formalities of the importation, but upon the essential nature of the transaction. Again, the Court choose a practical application of the doctrine rather than a rigid formalized one.

It is in this framework that the container process should be viewed, and it should be recognized that the process is fundamentally concerned only with the mode of transportation of the goods and does not alter the essential nature of the transaction. Goods imported in commercially reasonable units, in a bona fide transaction, should not lose their immunity from state taxation merely because of the mode of transport which the shipper and carrier happen to choose. The formalistic approach of the *Volkswagen Pacific* case would lead to

[68] 179 U.S. 343 (1900).

[69] 324 U.S. 652 (1945). *See also* note 24, *supra*.

the anomalous result of rendering one import immune from taxation, while stripping another, in the same form, of its immunity. As an example, wine imported in cases by the traditional break-bulk method would be entitled to immunity under *Low v. Austin*, but identical cases imported in containerships would not be immune under the analysis of *Volkswagen Pacific*.

Consequently, containerization should not have a direct impact upon the tax immunity of goods imported by that method. Rather, the immunity should be determined on the same basis as it has always been: with reference to the form of the packages in which the shipper prepares his goods for export.

William J. Kelly, Jr.