




1954

Constitutional Law--State Taxation of Interstate Commerce

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Recommended Citation

Brafford, William C. Jr. (1954) "Constitutional Law--State Taxation of Interstate Commerce," *Kentucky Law Journal*: Vol. 43 : Iss. 2 , Article 10.
Available at: <https://uknowledge.uky.edu/klj/vol43/iss2/10>

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pose, it is said that a full pardon gives a new character to the person convicted and re-establishes his credibility as a witness.¹⁸ The jurisdictions which do not admit a pardon to rehabilitate an impeached witness, say that unless the pardon expressly states that it is based upon a finding of innocence, it throws no new light upon a witness' credibility.¹⁹

It is submitted that the better solution to this problem of rehabilitation by explanation of a conviction would be to give the trial judge considerable discretionary powers.²⁰ To attempt to state a rule which will meet and satisfy the many situations herein mentioned would be an almost insurmountable task. The trial judge is aware of the situation which is present in the case before him, and he can best determine the solution to that problem. He is better able to observe the counsels and witnesses, and also to evaluate the effect of their actions on the jury. Lastly, the trial judge is the one best able to determine the extent, if any, of diverting the court from the real issue of the case.

GEORGE B. BAKER, JR.

CONSTITUTIONAL LAW— STATE TAXATION OF INTERSTATE COMMERCE

The City of Chicago, by ordinance, imposed a "license tax" on trucks operated "within the city" for hire. The tax was graduated according to the size of the trucks, ranging from \$8.25 on a truck of no more than two ton capacity to \$16.50 on a truck of four ton capacity or more.¹ Respondent, an Illinois corporation, with its place of business in Chicago, owned a fleet of trucks which it employed to transport goods within Chicago, and between Chicago and points in other states. One truck often made both intrastate and interstate

¹⁸ *Bryant v. U.S.*, 257 F. 378 (5th Cir. 1919).

¹⁹ 4 WIGMORE, EVIDENCE sec. 1116(3) (1940).

²⁰ *U.S. v. Boyer*, 150 F. 2d 595 (D.C. Cir. 1945).

¹ "Every . . . truck . . . which shall be operated . . . for the purpose of transporting . . . goods . . . within the city for hire or reward shall be deemed a cart . . ."

"Any person engaged in the business of operating a cart shall be deemed a carter.

"An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

"Automotive vehicles—

Capacity not exceeding two tons	\$ 8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.20
Capacity exceeding four tons	16.50"

Municipal Code of Chicago, Ch. 163 (January 14, 1949).

deliveries. Chicago applied the tax to respondent's trucks which carried intrastate and interstate commerce inseparably commingled. The Supreme Court of Illinois held that the tax was an unconstitutional burden upon interstate commerce, as applied to respondent's trucks, because it could not separate its loads nor could it discontinue any part of the service.² On certiorari, the judgment was reversed.³

The Court held that no showing was made that the tax burdened interstate commerce, and it was "clearly unassailable" under the authority of *People ex rel New York Central & H. R. Co. v. Miller*,⁴ and *Northwest Airlines, Inc. v. Minnesota*.⁵ In the *Miller* case the Court had sustained a franchise tax⁶ on a *domestic* corporation computed upon the basis of the whole of its capital stock employed within the state, including a considerable proportion of its cars which were almost continuously out of the state. On this ground, it was contended that this proportion should be deducted from its entire capital. The tax was sustained on the basis that a state may tax its *own* corporations for all their property within the State at any time during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months. This decision was held to be controlling by the majority opinion in the *Northwest Airlines* case. There the taxpayer, a Minnesota corporation, used St. Paul as the "home port" for all its planes. The rebuilding and overhauling was done in St. Paul. Minnesota assessed its general personal property tax against the airline on the basis of the entire fleet. The Supreme Court sustained the tax as satisfying both the commerce clause and due process requirements. Mr. Justice Frankfurter announced the conclusion and judgment of the court and delivered an opinion to the effect that Minnesota, by virtue of its "predominant contacts" with the planes, i.e., as both the domiciliary state and the locus of its main place of business, had the right to levy such a tax, since none of the planes, due to their transitory nature, had acquired a permanent taxing situs elsewhere, and all were in Minnesota at some time during the tax year.

Although the tax in the principle case is not clearly a property tax, the Court frequently relies on the property tax as an analogy when other types of taxes touching interstate commerce are chal-

² *Chicago v. Willett Co.*, 409 Ill. 480, 101 N. E. 2d 205 (1951). The Court cited *Osborne v. Florida*, 164 U. S. 650 (1896) and *Pullman Co. v. Adams*, 189 U. S. 420 (1903). These cases held in effect that only when a separation, in fact, of intrastate and interstate business exists can a like separation be recognized of the power of a state to tax.

³ *Chicago v. Willett Co.*, 344 U. S. 574 (1953).

⁴ 202 U. S. 584 (1906).

⁵ 322 U. S. 292 (1944).

⁶ Although this was a franchise tax on all property employed within the state, the court treated the exaction as a property tax.

lenged.⁷ Together the cited cases might suggest that the domiciliary state has a somewhat larger latitude to tax, but it is not clear that the Court intended to limit power to tax to the state of incorporation.

In the principal case, Chicago, Illinois, was the corporation's domicile, but the case, if carried to its logical limits, affords an avenue by which interstate operations of both foreign and local corporations could be reached by a local tax. One of the grounds on which the majority sustained the tax, over commerce clause objections, was that the taxing jurisdiction was the "business home" of the taxed corporation and furnished protection to the taxpayer. Here the interstate business, by increasing the number of trucks operated by the taxpayer, increased the amount of the tax. Interstate business under this theory, was reflected in the tax. It was for that reason that Mr. Justice Douglas dissented, and stated that this was an "occupational tax" for the privilege of engaging in interstate commerce and invalid under the rule of *Sprout v. City Of South Bend*,⁸ and *Spector Motor Service Inc. v. O'Connor*.⁹ In the *Spector* case Connecticut imposed its franchise tax on a foreign corporation. The tax was measured by that part of the carrier's net income reasonably attributable to activities within

⁷ No mention was made in the principal case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949). This case gave a considerably different complex to the former rules governing the taxation of watercraft. For the past eighty years the rule was that only the state in which the owner of the vessel is domiciled had power to tax, *St. Louis v. The Ferry Co.*, 11 Wall 423 (U. S. 1870), unless the vessel acquires an actual situs elsewhere, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905). In *Ott*, an ad valorem tax on a barge line of a foreign corporation operating interstate on inland waters in the taxing state was sustained when there was an apportionment under a formula like that used for taxing rolling stock of interstate railroads. Although the taxing state was not the domicile of the barge company, the tax was upheld over both due process and commerce clause objections. That vessels moving in interstate operations, certainly in inland waters, are now taxable by the same standards as those applied to railroads used in interstate commerce is further shown by the recent case of *Standard Oil Co. v. Peck*, 342 U. S. 382 (1952). There we find a corollary of the rationale of the *Ott* opinion. The domiciliary state of Standard Oil was not permitted to tax the whole value of its crafts used in interstate transportation of oil, since they were subject to taxation on an apportionment basis in several other states where they operated. The taxation of all of Standard Oil's boats and barges by the state of the domicile was prohibited by the due process clause as multiple taxation of interstate operations. There was no showing in Standard Oil that other states had taxed the barges in question, but the court decided that the mere existence of the power to do so limits the state of domicile to its proportionate share of the value. Thus, it would seem that the actual effect of the present decision is either to over-rule the *Northwest Airlines* case or to acknowledge that two rules are now in operation: as to airplanes and inland vessels. No distinction seems apparent between the two, and the Standard Oil decision may indicate that the court has withdrawn from its position in the *Northwest Airlines* case that the domiciliary state has the power to impose property tax on all the property of the corporation. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 91 (1953).

⁸ 277 U. S. 163 (1928).

⁹ 340 U. S. 602 (1951).

the state, but was deemed a levy on the privilege of doing interstate business and held invalid without regard to its amount, computation, or economic effect. The Court declared the tax was invalid no matter how fairly it was apportioned to business done within the state, in literal application of the long-established rule that even the state of the domicile may not impose a tax on the very privilege of engaging in interstate commerce.¹⁰

In the *Willett* case, two members of the Court, while concurring in the conclusion that the tax was valid, would have nothing to do with the "business home" basis for upholding tax because it does intrastate business on the streets of Chicago. Neither the fact that it is an Illinois corporation, nor the fact that its trucks are sometimes out of the state was regarded as controlling. If the concurring opinion has any meaning, it is that the majority thought that the city could levy a tax on some basis other than for use of the streets. The majority opinion reenforces this impression by declaring that:

[Respondent's business] . . . is fed by terminals for rail and sea transportation which the City provides. It receives, much more continuously than did the airline in the *Northwest Airlines* case or the railroad in the *Miller* case, the City's protection, and its benefits from the City's public services.¹¹

Under the "business home" approach used by the majority, even a foreign corporation doing business that is exclusively interstate could have a "business home" for local tax purposes. But that approach apparently conflicts with the *Spector* case and earlier decisions denying the right to impose a franchise tax on foreign corporations engaged exclusively in interstate commerce. Has the Court modified this long established doctrine? Since the same tax in the *Spector Motor Co.* case would have been sustained if levied as compensation for use of the state highways,¹² it seems that undue weight was accorded the label. Thus, if the tax is an "occupational tax" levied on the privilege of engaging in interstate commerce as Justice Douglas in his dissent contends, it might be concluded that the Court has changed its position from the "label approach" to one of "economic effect," and will therefore uphold such a tax if it does not put an unreasonable burden on interstate commerce.

What seems to be established by the principal case is that a state may require payment of a tax for the privilege of engaging in a local

¹⁰ *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203 (1925); *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389 (1952).

¹¹ *Supra* note 3 at 580.

¹² See *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495 (1947); *Bode v. Barrett*, 344 U. S. 583 (1953).

business or occupation, although mingled with interstate business, when no showing is made that the tax burdens interstate commerce. Whether it likewise opens the doors under the "business home" theory for local transportation centers to tax wholly interstate business because their "business home," is located there, is a question which remains unanswered at this time.

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