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Constitutional Law - Taxation of Vessels

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Notes

Constitutional Law—Taxation of Vessels

Appellant is a domiciliary of Ohio and operates its boats and barges on the Ohio River. These vessels occasionally stop at a port in the State of Ohio for minor repairs and for fuel, but they do not enter Ohio, because the latter's boundary is the north bank of the Ohio River, the vessels therefore being in Kentucky. Aside from these occasional visits, the appellant's vessels travel only seventeen and one-half miles along waters which border Ohio, their other travel being in and along the borders of Kentucky, Indiana, and other states. The State of Ohio placed a tax on the appellant for the total value of all the latter's personal property and the Supreme Court of Ohio sustained the tax. On appeal, the United States Supreme Court reversed. Mr. Justice Douglas, speaking for the majority, said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of domicile. . . . Otherwise there would be multiple taxation of interstate operations[1] and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."[2] *Standard Oil Company v. Peck*, 72 S. Ct. 309, 96 L. Ed. 271 (U.S. 1952).

The Roman theory of mobilia sequuntur personam, taxation of movables at the owner's domicile, and the later theory of le situs, have contributed to what may be today called the modern rule, that is, "unless it has acquired an actual situs[3] elsewhere, the situs of a vessel for the purpose of taxation is the domicile of the owner."[4] The major question which this rule engenders is just what is an "actual situs elsewhere." The earlier cases lead us to believe that the actual situs depends on the permanency of the vessel within a particular state or the regularity of its travel therein.

In the early history of this problem, the court dealt primarily

1. This phrase tends to show that the Court is basing its decision on the commerce clause and the balance of the brief opinion supports this conclusion. However, the next phrase is couched in traditional language of due process, although the opinion makes no further reference to it.
2. 72 S. Ct. 309, 310 (U.S. 1952).
3. Where the vessel is physically located.
4. 6 A.L.R. 2d 1368 (1949).

with seagoing vessels. It was eventually well settled that the place of domicile[5] would remain the situs for taxation unless an actual situs elsewhere could be established. The fact that the vessel merely touched a state's port to discharge cargo or passengers was not enough to establish a taxable situs[6]—nor was the fact that the vessel remained in the port for a long period of time, provided the reason for this was of an involuntary nature.[7] Furthermore, it was said that "a vessel which never touches the State of domicile does not lose its tax situs in that State by visiting even the port of registry, if such visit is merely in the course of interstate commerce." [8] On the other hand, the court held that a tax situs was established when the vessels remained continuously within a particular state throughout the tax year, despite the fact that this state was not the state of domicile.[9] There have been decisions which imply that for a vessel to have a tax situs within a particular state it must become incorporated with the personal property of that state.[10] Of course this presents the question of what constitutes incorporation into the property of a state. If the cases stopped here it might fairly well be determined that for a vessel to acquire a tax situs other than that of the state of domicile, it must be used consistently in that other state throughout the year.

The problem grows more complex in the light of several railroad cases which held that it was not in keeping with the Constitution for one state to collect all of the taxes for rolling stock, when this property was also being continually used in and protected by other states.[11] However, here too it was considered necessary that the railroad cars establish an actual situs for taxation, that is, a certain specific number, or average, of cars must be proved to have been within the state for the entire taxable year.[12] Due to the impossibility of keeping an accurate account of the number of cars in the state during a given year,

5. Port of registry was also used, but it is not discussed in this note.

6. 6 A.L.R. 2d 1368 (1949). Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

7. Guinness v. King County, 202 P. 2d 737 (Wash. 1949). 6 A.L.R. 2d 1368 (1949). However, financial embarrassment was not considered cause enough to free the owner from the necessity of paying taxes to the state in which his vessel lay. Bush v. State, 140 Fla. 277, 191 So. 515 (1939).

8. New York Central R.R. v. State Department of Taxation and Finance, 137 N.J.L. 288, 293, 59 A. 2d 859, 861 (1948). The court cited as authority for this statement Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911).

9. Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905).

10. Guinness v. King County, 202 P. 2d 737 (Wash. 1949).

11. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

12. New York Central & Hudson River R.R. v. Miller, 202 U.S. 584 (1906).

an assessment basis of taxation was allowed by the court, based on the number of miles of track.[13]

In summary, it has been shown that vessels, until 1949 at least, were required to remain permanently in a non-domiciliary state to acquire a tax situs there, and were otherwise taxable only in the state of domicile. Railroad cars, on the other hand, could establish a situs in foreign states merely by establishing an average amount which pass through that state throughout the tax year. In the only case involving a third media of transportation—by air—the court held that the domiciliary state had the right to tax airplanes to their full value despite the fact that they regularly and continuously spent a majority of their time flying over and landing in other states.[14] This decision follows those which dealt with seagoing vessels, and rejected the theory of apportionment which had been applied to railroad rolling stock.

In 1949, in *Ott v. Mississippi Valley Barge Line Company*[15] the assessment theory, or apportionment theory, of taxation of railroad rolling stock was applied to barges traveling up and down the inland rivers. The apportionment theory is based on two concepts: first, that it must be determined "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions,"[16] which is one of the problems under the commerce clause, and second, that there is a desire under the due process clause to grant the states the right to tax in proportion to the benefits and protection bestowed by them on the property subject to tax.[17]

The present case arose when the state of domicile sought to tax the entire value of the vessels, which in effect is the reverse of *Ott v. Mississippi Valley Barge Line Company*,[18] where a non-domiciliary state successfully taxed an apportioned share of the owner's property. Justice Minton, in the instant case, points out that no other state had taxed the property in question and that no actual situs outside the domiciliary state has been proved, and his statement is correct. He bases his dissent on the opinion rendered in *Southern Pacific Company v. Kentucky*,[19]

13. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).
14. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).
15. 336 U.S. 169 (1949).
16. Nashville v. Browning, 310 U.S. 362, 365 (1940).
17. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).
18. Ibid.
19. 222 U.S. 63 (1911).

wherein it was decided that since the property in question had not established an actual situs elsewhere it was subject to taxation by the state of domicile, despite the fact that it had never been in or touched that state. This theory was originally predicated on the reasoning that if the property was not subject to taxation by the state of domicile it could completely avoid all taxation, since it might not necessarily have established a situs in any other state. Furthermore, as Justice Minton persuasively argues, this doctrine was seemingly reinforced as recently as 1944 when applied to air transportation in the *Northwest Airlines* case.[20] Upon what theory was that decision based? Was it because the court felt that the planes were actually operating in federally regulated skies and therefore received their protection from the federal government and not the particular state over which they were flying? This would seem to be a complete disregard for the geographical boundaries of the states. Perhaps the court felt that airplanes were in a class all their own and thus preferred to treat them as analogous to the seagoing vessels, rather than to railroad cars. This seems to be the more logical answer. However, if this be the reason, then the authority that this case had would apparently be dissolved by a statement in the opinion of the instant case, referring to *Ott v. Mississippi Barge Lines Company*,[21] that "In that way we placed inland water transportation on the same footing as *other interstate enterprises*." [22] (Italics supplied.) If the court meant merely railroads, presumably it would have said so; therefore some significance must be attached to the fact that it said "other interstate enterprises," which necessarily includes air travel. While this statement fails actually to overrule the airline case, it does suggest a disregard for the decision.

The Court seems to feel that as long as the property is within the jurisdiction of other states and not necessarily another *particular* state, its taxes should be apportioned according to the benefits received. There seems to be little or no concern over the fact that the property would not be taxed until the various foreign states decide to exercise their right of taxation; nor was there much concern expressed over Justice Minton's belief that it would be hard to establish an actual situs for taxation due to the fact that the vessels would invariably be crossing the thread

20. 322 U.S. 292 (1944).
21. 336 U.S. 169 (1949).
22. Standard Oil Co. v. Peck, 72 S. Ct. 309, 310 (U.S. 1952).

of the stream when following the channels of the river,[23] thereby making it rather difficult to ascertain how much time was spent in a particular state. In the writer's opinion this case establishes an entirely new angle as to the rights of the states to tax, and it brushes aside the belief than an actual situs must first be proved in order to deprive the domiciliary state of her tax rights, in favor of a doctrine which merely requires the possibility of taxation by other states on an apportionment basis.

Robert Lee Curry III

TORTS—LIABILITY OF AUTOMOBILE OWNER FOR DRIVER'S NEGLIGENCE

Defendant and his friend, after eating dinner at the home of a relative of defendant, drove to a liquor store in defendant's automobile and purchased whiskey to be used in making egg nog. During their return to the relative's residence, defendant permitted the friend to drive the car, as the latter had never operated an automobile equipped with overdrive and "he wanted to see how it handled." The friend, in the course of the journey, negligently struck plaintiff's car and the plaintiff brought suit to recover damages. *Held*, negligence of the driver was imputed to defendant owner, inasmuch as both were participating in a joint venture or joint enterprise. *Buquet v. St. Amant*, 55 So. 2d 645 (La. App. 1951).

While the doctrine of joint enterprise is not new in the field of automobile law, its purpose at its inception was in marked contrast to the role it seems destined to assume. At the outset the doctrine represented a partial revival of the rule of "imputed negligence" as voiced by the classic English case of *Thorogood v. Bryan*.[1] Under both doctrines the negligence of the driver is imputed to the passenger on some theory of agency,[2] but joint enterprise is definitely an exception to the broad theory of negligence which the *Thorogood* case represents. The great majority

23. Id. at 311.
1. 8 C.B. 115 (1849).
2. On the point that the basis of joint enterprise doctrine is some theory of mutual agency, see Farthering v. Hepinstall, 243 Mich. 380, 220 N.W. 708 (1928); Bloom v. Leech, 120 Ohio St. 239, 166 N.E. 137 (1929); Robinson v. Oregon-Washington R.R. & Nav. Co., 90 Ore. 490, 176 Pac. 594 (1918). Of course, in all these cases no actual agency exists, for if one did exist there would be no need to resort to a theory other than respondeat superior to obtain the desired result.