Louisiana Law Review

Volume 9 | Number 4
May 1949

Constitutional Law - Taxation of Vessels

John A. Richie

sion on this subject important. This latest holding may very well have the effect of increasing the efforts to obtain a more extensive application of Article 862 to the factual situations that arise.

Perhaps this decision is one of public policy. In view of the minor position of water transportation in our present economic system and the wharf facilities that are currently open to the public along our navigable waters, the need for keeping these banks clear has diminished greatly. On the other hand, progressing urbanization and the exploration for oil have brought forth a great demand for this space.

GILLIS W. LONG

CONSTITUTIONAL LAW—TAXATION OF VESSELS—Appellees were nonresident corporations engaged in transporting freight in interstate commerce on inland waterways—The Mississippi and Ohio Rivers. Each maintained an office or agent in Louisiana but had its principal place of business elsewhere. On trips into Louisiana a tugboat brought a line of barges to New Orleans, left them for unloading and reloading, then picked up loaded barges for return trips to ports outside of Louisiana. These "turn-arounds" were accomplished as quickly as possible so that the vessels were within Louisiana for only a short period of time during the year.[1] No regular or fixed schedules were maintained in the operation of the vessels. Louisiana and the City of New Orleans levied ad valorem taxes on these vessels under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of their entire lines.[2] The property was not taxed by the states of incorporation. The circuit court affirmed the judgment of the district court finding the taxes to be a violation of the commerce and due process

1. The district court found that of the total time covered by the appellees' interstate commerce operation in 1943, the approximate amount spent by their vessels in Louisiana or in New Orleans was as follows: American Barge Line's tugboats, 3.8%; Mississippi Valley Barge Line's tugboats, 17.25%; and Mississippi Valley Barge Line's barges, 12.7%. The time so spent in 1944 was found approximately to be as follows: Mississippi Valley Barge Line's tugboats, 10.2%; Mississippi Valley Barge Line's barges, 17.5%; Union Barge Line's tugboats, 2.2%; and Union Barge Line's barges, 4.3%. Ott v. Mississippi Valley Barge Line Co., 69 S.Ct. 432, 433, n. 1, 93 L.Ed. 431 (U.S. 1949).

2. Under La. Act 170 of 1898, § 29, as amended by La. Act 59 of 1944, § 1 [Dart's Stats. (1939) § 8370].

3. American Barge Line Co. v. Cave, 68 F. Supp. 30 (E.D. La. 1946), affirmed by Ott v. DeBardeleben Coal Corp., 166 F.(2d) 509 (C.C.A. 5th, 1948), insofar as the present appellees were concerned. For a discussion of this

clauses of the Federal Constitution.[3] Certiorari was denied,[4] but the case was brought up on appeal. *Held,* reversed, Justice Jackson dissenting. The "apportionment theory" of taxing property employed in interstate commerce may validly be used in the taxation of vessels engaged in interstate commerce on inland waterways. *Ott v. Mississippi Valley Barge Line Company,* 69 S.Ct. 432 (U.S. 1949).

The old Roman principle of *mobilia sequuntur personam,* or taxation at the domicile of the owner,[5] has consistently yielded in modern times to the principle of *le situs,*[6] or taxation in the jurisdiction where the property has a *situs,*[7] because of the vast increase in amount and variety of personal property. Although the concept of "situs" or "actual situs" in modern constitutional law does not admit of exact definition, the basic element in determining the "situs" of tangible personal property is physical presence.[8] Thus a non-domiciliary state may secure jurisdiction for taxing tangible personal property only if the property is physically present within its boundaries.[9] The state of the owner's domicile may, however, tax personal property which has never been physically present within the state and is incapable of being present in the state;[10] but the state of domicile may not tax such property which has acquired a situs outside that state.[11]

The "physical presence" required to establish a situs for tangible personal property has not been conclusively defined. Permanent presence of the property within a state is sufficient to

---

latter case in regard to the DeBardeleben Coal Corporation, see Note (1948) 9 LOUISIANA LAW REVIEW 298.

4. 334 U.S. 858, 859, 69 S.Ct. 1529 (1948).

5. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 20, 11 S.Ct. 876, 878, 35 L.Ed. 613, 616 (1890).

6. Ibid.

7. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 198, 26 S.Ct. 36, 38, 50 L.Ed. 150, 154 (1905).

8. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905); Old Dominion S.S. Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann. Cas. 1100 (1905). See also the dissenting opinion of Chief Justice Stone in Northwest Airlines v. Minnesota, 322 U.S. 292, 318, 64 S.Ct. 950, 963, 88 L.Ed. 1283, 1299, 153 A.L.R. 245 (1944). For an excellent discussion of the treatment of the constitutional requirement that property "in transit" have a "situs" within the taxing state, see Powell, Taxation of Things in Transit, Part I (1920) 7 Va. L. Rev. 167.

9. American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S.Ct. 631, 44 L.Ed. 708 (1900). Cf. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905).

10. Southern Pacific Co. v. Commonwealth of Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96 (1911).

11. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905).

establish a situs within that state[12] but mere temporary presence is not.[13] Difficulty arises in determining the jurisdiction of a state to tax property employed in interstate commerce. In some such cases, though the same pieces of property are not within the state continuously, different units of similar property belonging to the same owner pass in and out of the state throughout the year. In considering this situation with regard to the taxation of railroad cars the court has evolved a doctrine of apportionment, whereby an average amount of the rolling stock of railroads habitually employed in a non-domiciliary state throughout the tax period is deemed to have a situs within that state for purposes of taxation.[14] In *Pullman's Palace Car Company v. Pennsylvania*[15] the court described the situation it found to establish this situs in the following terms:

> "The cars were *continuously and permanently employed* in going to and fro *upon certain routes of travel.* If they had never passed beyond the limits of Pennsylvania, it would not be doubted that the state could tax them, like other property within its borders .... The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, *particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its prop-*

12. Old Dominion S.S. Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann. Cas. 1100 (1905).

13. Morgan v. Parham, 16 Wall. 471, 21 L.Ed. 303 (1873); Hays v. Pacific Mail S.S. Co., 17 How. 596, 15 L.Ed. 254 (1855).

14. Marye v. Baltimore & Ohio R. Co., 127 U.S. 117, 8 S.Ct. 1037, 32 L.Ed. 94 (1888); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1890); American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S.Ct. 631, 44 L.Ed. 708 (1900); Germania Refining Co. v. Fuller, 245 U.S. 632, 38 S.Ct. 63, 62 L.Ed. 521 (1917); Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602 (1919); Johnson Oil Co. v. Oklahoma, 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238 (1933); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). This average may be determined by an extrinsic formula which must be reasonable [Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602, (1919)], but it need not be mathematically exact [Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940).

erty; and it is distinctly found, as a matter of fact, *that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state."*[15] (Italics supplied.)

This description of the facts constituting a taxable situs led to some question as to whether the principle might be applied in those instances where the instrumentalities sought to be taxed were within the state for only a fractional part of the year.[16] Although this question was in part resolved within a decade after the *Pullman's Palace Car* case (in *American Refrigerator Transit Company v. Pennsylvania*[17] and *Union Transit Company v. Lynch*[18]) by the extension of the doctrine to the taxation of refrigerator cars which were moved about the various states indiscriminately so that those within any particular state were constantly changing,[19] it does not appear that the court has ever

15. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 27, 11 S.Ct. 876, 879, 35 L. Ed. 613, 617 (1890).

16. In the case of New York Central R. Co. v. Miller, 202 U.S. 584, 597-598, 26 S.Ct. 714, 717, 50 L. Ed. 1155, 1160 (1906), Justice Holmes, in speaking for the court in distinguishing the facts of the Pullman case from those of the case at hand, said: ". . . in that case, it was found that the 'cars used in this State have, during all the time for which the tax is charged, been running into, through, and out of the State.' The same cars were continuously receiving the protection of the State, and, therefore, it was just that the State should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied, was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by varying orders of particular shippers and the arbitrary convenience of other roads."

The latest expression of this idea is to be found in Northwest Airlines v. Minnesota, 322 U.S. 292, 297, 64 S.Ct. 950, 953, 88 L.Ed. 1283, 1287, 153 A.L.R. 245, 248 (1944), wherein Justice Frankfurter, speaking for the court in upholding a *full-value* tax upon aircraft by the state of the owner's domicile, said: ". . . the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instance, 'The coaches of the company . . . are daily passing from one end of the state to the other,' in *Pullman's Palace Car Company v. Pennsylvania.* . . .) The continuous protection by a state other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been formed and administered." For a criticism that Justice Frankfurter may have been overstating the principles and facts of the railroad cases, see note by Powell, State Taxation of Airplanes—Herein also of Ships and Sealing Wax and Railroad Cars (1944) 57 Harv. L. Rev. 1097, 1100-1101.

17. 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899 (1899).

18. 177 U.S. 149, 20 S.Ct. 631, 44 L.Ed. 708 (1899).

19. The doctrine was also extended under similar facts to cover the taxation of tank cars in Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S.Ct.

passed upon a case where the facts concerned "multistate *intermittent* vehicular migrants."[20]

In the taxation of vessels, the court, prior to the case under discussion, had followed the rule that vessels were taxable only at the domicile of the owner, save where they had acquired an "actual situs" elsewhere and they did this when they operated wholly on the waters within another state.[21] In no case concerning vessels, however, was there involved an apportioned tax,[22] and in no such case had the court said that a situs might be acquired in a non-domiciliary state *only* by continuous presence within that state throughout the taxing period.[23]

Therefore, in extending the doctrine of apportionment to taxation of vessels engaged in interstate commerce on inland waters, the court has acted consistently with the general principles it has recognized for constitutional taxation of tangible movables. As to the class of transportation involved, it would be difficult to make a valid logical and practical distinction between carriers which pass back and forth through the states on regular routes on inland waters, often on fixed schedules, and those which pass back and forth on steel rails. The court was specific in confining its findings to transportation on inland waters;[24] and, in view of the established principles of law, it appears likely that ocean carriage will continue to be taxable only at the domicile of its owner.[25]

276, 63 L.Ed. 602 (1919), although the formula used was held to be unconstitutional.

20. See Powell, supra note 16. To this extent at least it seems that Justice Frankfurter's statement (quoted in note 16, supra) must be conceded to be accurate.

21. Ott v. Mississippi Valley Barge Line Co., 69 S.Ct. 432, 434 (U.S. 1949). The following cases concerned vessels: Hays v. Pacific Mail S.S. Co., 58 U.S. 596, 15 L.Ed. 254 (1855); Saint Louis v. Wiggins Ferry Co., 78 U.S. 423, 20 L.Ed. 192 (1871); Morgan v. Parham, 83 U.S. 471, 21 L.Ed. 303 (1873); Old Dominion S.S. Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann. Cas. 1100 (1905); Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 209, 26 S.Ct. 679, 50 L.Ed. 1082 (1906); Southern Pacific Co. v. Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96 (1911). For a discussion of these cases see Ambler, Personal Property Taxes on Vessels Regularly Engaged in Interstate and Foreign Commerce (1945) 20 Wash. L. Rev. 1, and Powell, Taxation of Things in Transit (1921) 7 Va. L. Rev. 167, 245, 429, 495.

22. Ott v. Mississippi Barge Line Co., 69 S.Ct. 432, 434 (U.S. 1949); Rottschaefer, Constitutional Law (1939) 645.

23. See note 21, supra.

24. Ott v. Mississippi Barge Line Co., 69 S.Ct. 432, 434 (1949). It is interesting to note that here for the first time the court divided its discussion of the cases concerning vessels on the basis of whether inland or ocean carriage was concerned.

25. The policy involved is "that if they were not taxable at the domicile they might not be taxable at all" as they do not remain in any port for a sufficient length of time to acquire a taxable situs. See note 21, supra.

This case seems to indicate also that the court has extended the doctrine of apportionment to instrumentalities of interstate commerce which visit a state sporadically and for only fractional periods of the year.[26] Perhaps the only guides in the future application and possible extension of the doctrine are (1) under the commerce clause, what portion of an interstate organization " 'may appropriately be attributed to each of the various states in which it functions,' "[27] and (2) under the due process clause, " 'whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state.' "[28]

JOHN A. RICHIE

DIVORCE AND SEPARATION—INTERSTATE AND INTRASTATE JURISDICTIONAL BASES—DOMICILE OF WIFE—Husband and wife were married in 1930, established their matrimonial domicile in Ascension Parish, and lived together in that parish until 1947. In July, 1947, the wife left her husband and moved to the home of her sister in Orleans Parish. In April, 1948, she filed a suit for separation from bed and board in the Civil District Court for the Parish of Orleans, alleging cruelty. Citation issued, and the husband was served at his domicile in Ascension Parish. Exceptions to the jurisdiction ratione materiae and ratione personae of the Orleans District Court were sustained. Plaintiff filed a motion for rehearing, alleging that her husband's cruelty had privileged her to establish a separate domicile in Orleans Parish; that she had taken with her to that parish the marital *res* (marital relationship); and therefore that the Orleans Parish Court acquired jurisdiction over the marital status, regardless of the domicile of the

26. "It is said in this case that the visits of the vessels to Louisiana were sporadic and for fractional periods of the year only and that there was no average number of vessels in the state every day. The District Court indeed said that there was no showing that the particular portion of the property sought to be taxed was regularly and habitually used and employed in Louisiana for the whole of the taxable year." Ott v. Mississippi Valley Barge Line Co., 69 S.Ct. 432, 435 (U.S. 1949). See note 1, supra. The court would not resolve this question (or these contentions) on the ground that the appellees had not exhausted their state administrative and judicial remedies. See also headnotes 1 and 3, p. 432.

27. Ott v. Mississippi Valley Barge Line Co., 69 S.Ct. 432, 434 (U.S. 1949).

28. Ibid. In view of (1) the conclusion of the court under the facts involved, (2) the broad language of the court (e.g., at p. 435, "We can see no reason which should put water transportation on a different constitutional footing than any other interstate enterprises."), and (3) the concurrence if eight members of the court in contrast to the four diverse opinions of the Northwest case, it seems likely that the doctrine of apportionment will be extended also to the taxation of the remaining important instrumentality of interstate commerce—aircraft.