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CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION OF VESSELS ENGAGED IN INTERSTATE COMMERCE—The Standard Oil Company, an Ohio corporation, owned boats and barges which it employed in transporting oil on the Mississippi and Ohio Rivers. These vessels were registered in Ohio but stopped in Ohio only occasionally for fuel or repairs. The maximum distance traversed by these vessels on waters bordering Ohio was 17½ miles. An *ad valorem* personal property tax levied by the Tax Commissioner of Ohio on all these vessels was upheld by the Supreme Court of Ohio.[1] On appeal, *held,* reversed, Justices Black and Minton dissenting. Since these vessels are subject to the property taxes of other states on an apportionment basis, the domiciliary state is precluded from taxing the entire value of the vessels. *Standard Oil Co. v. Peck,* 342 U.S. 382, 72 S.Ct. 309 (1952).

In a line of cases commencing in 1855 and ending in 1949, the United States Supreme Court had consistently held that vessels employed in interstate commerce were taxable only by the domiciliary state of the owner, whether engaged on the high seas[2] or on inland waters,[3] unless they had been employed wholly within the waters of another state so as to acquire an actual tax situs in that state.[4] This was true irrespective of the vessel's "home port" or place of registration,[5] or the fact that the domiciliary state was physically incapable of receiving the vessel.[6] Different treatment of a railroad's rolling stock was estab-

[1] Standard Oil Co. v. Glander, 155 Ohio St. 61, 98 N.E. (2d) 8 (1951).

[2] Hays v. Pacific Mail Steamship Co., 17 How. (58 U.S.) 596 (1855), where the California personal property tax on vessels owned by a New York corporation and employed between New York and California was held invalid; Morgan v. Parham, 16 Wall. (83 U.S.) 471 (1873).

[3] St. Louis v. Wiggins Ferry Co., 11 Wall. (78 U.S.) 423 (1871), where the St. Louis personal property tax on ferries operating across the Mississippi River was held invalid because the vessels were owned by an Illinois corporation; Transportation Co. v. Wheeling, 99 U.S. 273 (1878); Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 26 S.Ct. 679 (1906).

[4] Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686 (1905).

[5] St. Louis v. Wiggins Ferry Co., supra note 2; Ayer & Lord Tie Co. v. Kentucky, supra note 2.

[6] Southern Pacific Co. v. Kentucky, 222 U.S. 63, 32 S.Ct. 13 (1911), where Kentucky, the domiciliary state, was permitted to tax all the corporation's ocean-going vessels.

lished in *Pullman's Palace-Car Co. v. Pennsylvania*[7] which permitted a non-domiciliary state to levy a tax on an apportionment basis fairly designed to reach the average value of property used in the state during the tax year.[8] Then in 1944 the Supreme Court held in *Northwest Airlines, Inc. v. Minnesota,*[9] by a 5-4 decision, that the domiciliary state could tax the corporation's entire fleet of airplanes engaged in interstate commerce despite the showing that six of the eight states within which the airline operated on fixed schedules had collected an apportioned property tax on these airplanes. The majority opinion in that case expressed a dislike for the apportionment rule[10] although the right of a non-domiciliary state to tax on an apportioned basis was not before the Court.[11] Six years later, the Court, in *Ott v. Mississippi Barge Line Co.,*[12] applied the apportionment rule established in the *Pullman* case for a railroad's rolling stock to vessels used in interstate commerce on inland waters and allowed a non-domiciliary state to tax the vessels' value in the proportion which the mileage of the company's line within the state bore to the mileage of the entire line. This set the stage for the principal case to test whether the domiciliary state could tax the entire value of the vessels used in interstate commerce where there was a basis for a non-domiciliary state to collect an apportioned tax on the same vessels under the ruling of the *Ott* case. In holding that the domiciliary state is precluded from taxing, Justice Douglas stated: "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 the domicile. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."[13] From this it appears that the tax in question runs afoul both of the commerce clause, in that the resulting multiple taxation would place a greater tax burden on interstate operations than would be

[7] 141 U.S. 18, 11 S.Ct. 876 (1891).

[8] The apportionment formula approved here was based on the track mileage within the state as compared to total track mileage. In Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S.Ct. 152 (1933), the proportion was determined by the daily average number of cars within the state during the tax year as compared to the total number of cars. An apportioned tax on rolling stock was also approved in American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 S.Ct. 599 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S.Ct. 631 (1900); Nashville C. & St. L. Ry. Co. v. Browning, 310 U.S. 362, 60 S.Ct. 968 (1940). In New York Central & H. R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714 (1906), the domiciliary state was allowed to tax all of the railroad's rolling stock where it was impossible to prove that any specific cars or any average of cars had established any other tax situs because of their irregular movements.

[9] 322 U.S. 292, 64 S.Ct. 950 (1944), noted in 57 HARV. L. REV. 1097 (1944).

[10] "Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste, and difficulties. . . ." 322 U.S. 292 at 300..

[11] The dissenting opinion expressed the view that the non-domiciliary states should be allowed to tax the airplanes on an apportionment basis which would preclude the right of the domiciliary state to tax the entire fleet since this would result in placing an undue burden on interstate commerce.

[12] 336 U.S. 169, 69 S.Ct. 432 (1949).

[13] 342 U.S. 382 at 384.

placed on intrastate operations, and also of the Due Process Clause of the Fourteenth Amendment, in that the tax exacted by the domiciliary state bears no relation to the benefits bestowed by that state on the property taxed. Where does this decision leave the *Northwest Airlines* case? The answer to this question will not be known until the Court is presented with a case involving the right of a non-domiciliary state to tax the fleet of an airline regularly engaged in interstate commerce on an apportionment basis. However, Justice Douglas states that the apportioned tax approved in the *Ott* case was intended to place "inland water transportation on the same constitutional footing as *other interstate enterprises*,"[14] which would necessarily include interstate air transportation. This suggests that the apportionment rule would be applied to interstate air transportation and would preclude the domiciliary state from taxing the whole fleet under the rule of the principal case. On the other hand, air transportation may be distinguished from water or land transportation and treated sui generis on the theory that the state does not control *usque ad caelum* and the airplanes are actually operating in federally regulated skies and receiving protection from the federal government rather than from the states.[15] Also, the decision in the principal case would not preclude the domiciliary state from taxing the whole fleet in those situations where there is no feasible formula for apportionment, as where the vessel is employed on the high seas or where the interstate travel is only sporadic and occasional.

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[14] Id. at 383.

[15] This was one of the arguments set forth in Justice Jackson's concurring opinion in the Northwest Airlines case. Under this approach, the domiciliary state could tax the whole fleet under the general rule that the situs of personal property for tax purposes is the domicile of the owner as long as no other situs is established. This connection with the taxing state is sufficient to satisfy due process requirements. Greenough v. Tax Assessors, 331 U.S. 486, 67 S.Ct. 1400 (1946); Southern Pacific Co. v. Kentucky, supra note 6.