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## CONSTITUTIONAL LAW--COMMERCE CLAUSE--DUE PROCESS-- STATE TAXATION OF INTERSTATE BARGES

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—DUE PROCESS—STATE TAXATION OF INTERSTATE BARGES—Action was brought to recover ad valorem taxes assessed and collected by the City of New Orleans and the State of Louisiana on plaintiff's freight barges used in interstate commerce. Plaintiff was a foreign corporation, and its barges were enrolled at ports outside Louisiana but were not taxed by the state of incorporation. They moved, without a fixed schedule, on the Mississippi River. The tax was apportioned on the basis of miles travelled in Louisiana to miles travelled everywhere. Plaintiff argued that the tax violated the due process and commerce clauses of the Constitution because the vessels acquired no tax situs in Louisiana, and obtained a finding to this effect in the federal district court which was affirmed in the circuit court of appeals. *Held*, reversed. The tax is fairly apportioned and does not permit cumulative burdens on interstate commerce. It is therefore valid as applied to vessels engaged in inland travel, even though levied by a non-domiciliary state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432.

The instrumentalities of interstate commerce may be made to pay their way by bearing a nondiscriminatory share of the tax which each state is entitled to impose on the property within its borders.<sup>1</sup> The plaintiff's contention that its barges were not to be found for tax purposes within the borders of the non-

<sup>1</sup> *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546 (1937).

domiciliary state would seem to be borne out by some earlier cases. A case decided nearly a hundred years ago held that California, a non-domiciliary state, could not tax ocean-going vessels registered in New York and owned by a New York corporation.<sup>2</sup> Subsequently the same rule was applied to invalidate a tax on ferries plying between St. Louis, Missouri (the non-domiciliary state seeking to impose the tax) and Illinois, the owner of the ferries being an Illinois corporation.<sup>3</sup> The same rule has been applied to coastwise vessels.<sup>4</sup> On the other hand, the Court, at an early date, sustained a tax imposed by the state of domicile of the owner (the so-called "home port"), though the tax was assessed on the full value of the property, which was steam-vessels that moved constantly in and out of the state.<sup>5</sup> An exception developed which permitted taxation in a non-domiciliary state if special circumstances, such as constant presence within the state, created a permanent actual situs within the state. This situs was then deemed to take priority over the artificial domiciliary or "home port" situs.<sup>6</sup> However, apart from such special circumstances, it was deemed settled by the decisions that the sole right to impose a tax on shipping moving in and out of the state lies in the state of domicile.<sup>7</sup> Furthermore, by a five to four decision, the same rule was applied to the taxation of commercial air lines.<sup>8</sup> Meanwhile, however, by another line of decisions, the Supreme Court has developed a different theory respecting the taxation of facilities engaged in interstate land transportation. In *Pullman's Palace Car Co. v. Pennsylvania*,<sup>9</sup> and a long line of other decisions, the Court has sustained a "tax apportionment" rule which permits the non-domiciliary state to compel interstate commercial rail transportation to pay its way, by levying on this commerce a tax apportioned to the proportion of average property values kept within the state during the year, presumably causing a corresponding reduction in the state of domicile. The principal case, for the first time, applies this rule to vessels engaged in interstate trade, and enunciates once again the view that a tax on interstate commerce, though constituting a direct burden thereon, can be levied by non-domiciliary states provided it is fairly apportioned and therefore not discriminatory against interstate commerce. The result seems sensible, for there would seem to be no good reason why the states should be precluded from exacting a tax from interstate commerce in exchange for the benefits of protection conferred by them on that commerce.

E. Blythe Stason, Jr.

<sup>2</sup> *Hays v. Pacific Mail Steamship Co.*, 17 How. (58 U.S.) 596 (1855).

<sup>3</sup> *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (78 U.S.) 423 (1870).

<sup>4</sup> *Morgan v. Parham*, 16 Wall. (83 U.S.) 471 (1872).

<sup>5</sup> *Transportation Co. v. Wheeling*, 99 U.S. 273 (1878).

<sup>6</sup> *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299, 25 S.Ct. 686 (1905).

<sup>7</sup> *Southern Pacific Co. v. Kentucky*, 222 U.S. 63, 32 S.Ct. 13 (1911). See Ambler, "Personal Property Taxes on Vessels Regularly Engaged in Interstate or Foreign Commerce," 20 WASH. L. REV. 1 (1945).

<sup>8</sup> *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). See 57 HARV. L. REV. 1097 (1944).

<sup>9</sup> 141 U.S. 18, 11 S.Ct. 876 (1891).