Fordham Law Review

Volume 9 | Issue 2 Article 5

1940

Taxation of Interstate Sales-The Berwind Case

Samuel J. Warms

as *Gould v. Gould*,[12] *Glaser v. Glaser*,[13] and the *Krause* case, reveal that whether the judicial exceptions are based upon considerations of equitable preclusion or an actual change in policy, there is no longer the same demand that foreign divorce decrees not measuring up to our standard be rejected. In a current article, Professor Howe has carefully retraced the course of the New York cases to show that recent decisions of the Court of Appeals have been predicated on theories of jurisdiction in divorce other than status and domicile.[14] In this connection it is interesting to note that in the *Krause* case both parties in the invalid Nevada divorce, which is indirectly given effect, were and continued to be residents of the State of New York and that the defendant in the Nevada action did not appear and was not personally served.

Possibly very little remains of the concept of public policy that was stated in the *Baker* case, because the so-called *mores* of that day are no longer ours. The change in *mores* in New York may have been indicated in a more liberal rule for marriage annulments,[15] in the statutory amendment which virtually added incurable insanity as another ground for divorce,[16] or in a certain degree of laxity in the granting of absolute divorce on the ground of adultery. Concerning the failure of the New York Courts to apply the principle of comity with respect to foreign decrees of divorce, and the consequent anomalous results, the Court of Appeals in the *Baker* case stated that it was

"better by an adherence to the policy and law of our own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict."[17]

If recent New York cases involve not merely the relaxation of the general principle, but an abandonment of the old concept of public policy, it seems that the "clash" and "conflict" have been given up.

FREDERICK L. KANE†

TAXATION OF INTERSTATE SALES—THE BERWIND CASE

Broad language and well-respected *dicta* for many years buttressed a firm belief that sales in interstate commerce could not be taxed by the state of ultimate delivery without violation of the commerce clause of the Constitution,[1]

12. 235 N. Y. 14, 138 N. E. 490 (1923).

13. 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

14. *The Recognition of Foreign Divorce Decrees in New York State* (1940) 40 COL. L. REV. 373. *Cf.* Davis v. Davis, 305 U. S. 32 (1938) discussed in Vreeland, *Obligatory Interstate Recognition of Divorce Decrees—A New Trend?* (1939) 8 FORDHAM L. REV. 80.

15. Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N. E. 60 (1933).

16. N. Y. DOM. REL. LAW (1928) § 7 (5).

17. People v. Baker, 76 N. Y. 78, at 87.

† Professor of Law, Fordham University, School of Law.

1. See Brown v. Maryland, 12 Wheat. 419, 447 (U. S. 1827); Robbins v. Shelby County Taxing District, 120 U. S. 489, 497 (1887); Bowman v. Continental Oil Co., 256 U. S. 642, 648 (1921); Sonneborn v. Cureton, 262 U. S. 506, 509 (1923).

though from a technically factual point of view it was impossible to point to a single condemnatory holding. None the less the barrier to taxation was more real than chimerical. Recent decisions indicate a gradually accelerating process of eroding the foundations of the principle. The disintegration became complete with the Supreme Court's decision in *McGoldrick v. Berwind-White Coal Mining Co.*,[2] where the court upheld the taxation by the state of delivery, New York, of an interstate sale of goods of a kind obtainable only in the state of shipment. Such a tax, the Supreme Court reasoned, did not constitute an infringement of congressional power to regulate interstate commerce, since it neither prohibited the commerce nor discriminated against it in competition with intrastate commerce. The delivery within the taxing state was said to be a taxable event; and there are implications in the opinion[3] that no other event in the interstate transit could be so considered, thus avoiding the danger of multiple taxation. Imposition of the tax was properly said to have no different effect upon interstate commerce from the burdens of use taxes sustained in previous decisions.[4] This realistic argument, by ignoring principle and viewing only result, has the possible advantage of placing substance above form and the disadvantage, in so doing, of inviting taxation in interstate spheres not involved in the facts of the case at bar. Though the majority of the court insisted that the delivery only was the taxable event, the dissenters, led by the Chief Justice, expressed the apprehension that by permitting a tax upon one component of the interstate transit it must logically follow on principle that the other parts, *i.e.*, shipment and transit, would be taxable by states in which they would take place. While this argument of the dissenters is potent, it loses some of its force if the implications of the majority opinion may be taken as a guarantee against further extensions of the *Berwind* case into other aspects of interstate commerce. Moreover, it is fair to assume that the minority would join the majority in rejecting further encroachment by the states into the field of interstate commerce.[5] Of course, since the dissent was based upon principle rather than result, it is possible that the minority in a future case may feel bound by the new principle inherent in the majority opinion to extend that principle to the spheres which cause them concern, rather than to sacrifice the logic which they state makes such extension imperative.[6]

2. 308 U. S. (No. 475), 60 Sup. Ct. 388 (1940). Accord: McGoldrick v. Felt & Tarrant Mfg. Co., 308 U. S. (Nos. 45, 474), 60 Sup. Ct. 404 (1940); McGoldrick v. A. H. Du Grenier Inc., 308 U. S. (Nos. 45, 474), 60 Sup. Ct. 404 (1940); Jagels, "A" Fuel Corp. v. McGoldrick, 308 U. S. (No. 603), 60 Sup. Ct. 469 (1940).

3. See Powell, *New Light on Gross Receipts Taxes—The Berwind-White Case* (1940) 53 HARV. L. REV. 909, 926 *et seq.*

4. Bowman v. Continental Oil Co., 256 U. S. 642 (1921); Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932); Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934); Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939); Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939).

5. See Powell, *loc. cit. supra* note 3.

6. There is substantial authority antedating the *Berwind* case holding unconstitutional a tax by the state of shipment. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939) (both cases involved gross receipts rather than sales taxes); Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68 (1904).

The leading authority on the question of interstate commerce and sales taxation prior to the *Berwind* case was *Wiloil Corp. v. Pennsylvania.*[7] The case differed somewhat from the *Berwind* case because the subject of sale was oil of a kind obtainable in the local market; the *Berwind* case involved an unique kind of coal obtainable only at the seller's mine in Pennsylvania. In the *Wiloil* case the court upheld a Pennsylvania tax on oil *priced* f.o.b. Wilmington, Delaware, and shipped from Wilmington to Pennsylvania. In so doing, the court reasoned that since the contracts did not require an interstate shipment, they could have been fulfilled without breach by local shipment and that therefore any tax on the transaction constituted a burden upon interstate commerce too remote to infringe the constitutional prohibition. The *obiter* in the case clearly indicated that the state of delivery could tax an interstate sale so long as the interstate commerce was not contractually mandatory, even though interstate channels were the only practical means open for consummation. Immunity from state tax was presaged where interstate commerce was a contractual requisite. While the case set up an objective standard, facile of application, the employment of its *dictum* in a case where interstate transit was practically essential, would have bordered upon the absurd.[8] Similarly, if a contract requiring interstate shipment would have freed the transaction of tax, the way would have been opened for indulgence in the avoidance device of a contractual stipulation involving a slight extra-territorial deviation in the route of transit in a sale otherwise intrastate.[9]

Viewed solely on its facts, the *Berwind* case could have been decided within the framework of the *Wiloil dictum,* since there was no contractual requirement of interstate commerce in the former case. Yet the court preferred to state a broader rule and withhold the protection of the commerce clause even from those transactions where interstate commerce is required by contract. The course is still open for a reversion to the *Wiloil dictum* without violation of the rule of *stare decisis,* should a case involving a contractual requirement of interstate transit arise for adjudication.

While the *Wiloil* case must be viewed as a major assault on the state tax immunity assumed to be afforded by the commerce clause, its *ratio decidendi* had a basis in a previous decision.[10]

The *Berwind* case has indeed rendered unnecessary the artificial distinctions brought forth by the Supreme Court in the past to sustain its destruction of the interstate commerce barrier against state sales taxation. A doubt remains,

7. 294 U. S. 169 (1935).

8. See Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays its Way* (1938) 38 COL. L. REV. 49, 59.

9. That one deliberately plans his actions to avoid taxation has been said to be immaterial as a determinant of taxability. See Bullen v. Wisconsin, 240 U. S. 625, 630, 631 (1916); Superior Oil Co. v. Mississippi, 280 U. S. 390, 395, 396 (1930).

10. Ware & Leland v. Mobile County, 209 U. S. 405 (1908) (license tax on dealers in cotton futures valid because seller was at liberty to acquire cotton in market where delivery was required though some was obtained out of state). The principle had been rejected previously in Rearick v. Pennsylvania, 203 U. S. 507 (1906) (ordinance requiring salesmen to be licensed voided as to one engaged in solicitation of orders fulfilled by out of state shipment, though contracts silent as to such requirement).

which must be clarified by future decisions of the Supreme Court, whether the *Berwind* case opens up the possibility of multiple-state taxation of interstate sales.[11]

SAMUEL J. WARMS†

A RE-EXAMINATION OF THE WINKFIELD CASE

The *Winkfield*[1] case established the modern rule declaring the respective rights and liabilities existing within the legal triangle involving a bailor, the bailee and a third party who damages or converts the bailor's property while in the bailee's possession. A collision between the steamships *Mexican* and *Winkfield* had resulted in the loss of the *Mexican* with some of the mail she was carrying. The owners of the *Winkfield* paid a certain amount into court to cover the loss. The issue framed was whether the British Postmaster-General might recover out of that sum the *full* value of the letters, etc., in his possession as bailee, which had been lost through the collision. The Probate Court, relying on the authority of *Claridge v. South Staffordshire Tramway Co.*,[2] decided that since the Postmaster-General, as representative of the crown, was not under any liability to the parties interested in the lost letters, etc., he was precluded from recovering for their value. The Court of Appeal reversed this holding, and decided that " . . . in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, though he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed."[3] The court herein expressly overruled the *Claridge* case, declaring the position taken by that tribunal to be untenable.[4] That case had decided that a bailee who was under no liability to his bailor for any damage to the property bailed could not recover for the value of the property.[5]

11. See Powell, *loc. cit. supra* note 3.

† Member of New York Bar.

1. [1902] P. 42 (C. A.). See (1902) 15 HARV. L. REV. 585; (1900) 13 HARV. L. REV. 411.

2. [1892] 1 Q. B. 422, later criticized in Meux v. Great Eastern Ry., [1895] 2 Q. B. 387, 394. See (1892) 6 HARV. L. REV. 156.

3. The Winkfield, [1902] P. 42, 54 (C. A.). Accord: Chamberlain v. West, 37 Minn. 54, 33 N. W. 114 (1887). See also Russel v. Butterfield, 21 Wend. 300, 303 (N. Y. 1839); Mechanics Bank v. National Bank, 60 N. Y. 40, 52 (1875).

4. The Winkfield, [1902] P. 42, 54 (C. A.).

5. Formerly, in cases of bailments, it was explained that the bailee's right to recover the full amount was predicated on his liability over to the bailor. 2 BL. COMM. * 395; 2 KENT, COMM. (14th ed. 1896) 585; HOLMES, THE COMMON LAW (1881) 167. Judge Story had expressed the opinion that a gratuitous bailee could maintain an action of trespass or trover against a wrongdoer if the bailee would be liable over to the bailor. STORY, BAILMENTS (9th ed. 1878) 248. See also Rooth v. Wilson, 1 Barn. & Ald. 59, 106 Eng. Reprints 22 (1817) (requiring that bailee be liable over to bailor before he could recover); Barker v. Miller, 6 Johns. 195 (N. Y. 1810). This notion of liability over was manifest as late as the *Claridge* case. The bailee, under the circumstances, was not liable to the owner; therefore, the court held he could recover only for the value of his interest.

The *Claridge* case also argued that a bailee in possession having suffered no loss, could not