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# The Original Package—A Factor, Not a Test

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the right to compete with other citizens for government employment is a constitutional right, upon which government may impose only such qualifications as are reasonably related to the employment sought.

## THE ORIGINAL PACKAGE—A FACTOR, NOT A TEST

By invoking the import-export clause of the United States Constitution,[1] plaintiff sought to enjoin the imposition of state personal property taxes upon unsold portions of imported shipments of greenheart pilings and timber. The lumber was stacked in plaintiff's storage yard, according to existing orders or length. Plaintiff contended that each piece of greenheart, bearing identification stamped at the point of origin of the shipment, constituted an original package and was therefore immune from state taxation. The trial court entered judgment for defendant tax officials on the ground that, when imports are inherently incapable of being packaged, the unit of transportation or importation constitutes the original package, which is "broken" when offered for sale to the general public. On appeal, a majority of the Supreme Court of Florida voted to reverse. *Held:* The unsold remainder of imported lumber stacked in a storage yard according to existing orders or length, with the pieces physically unaltered, is immune from state personal property taxation under the import-export clause of the United States Constitution. *Florida Greenheart Corp. v. Gautier*, 172 So. 2d 589 (Fla. 1965), *cert. denied*, 382 U.S. 825 (1965).

The original package test was first stated in 1827 by Mr. Chief Justice Marshall in *Brown v. Maryland*:

> While remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon [the thing imported] is too plainly a duty on imports, to escape the prohibition in the constitution.[2]

[1] "No State shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . . ." U.S. CONST. art. I, § 10, cl. 2.

[2] 25 U.S. (12 Wheat.) 419, 442 (1827). The records of the Constitutional Convention indicate that one primary purpose for the absolute prohibition against state taxation of imports was the protection of the inland, non-importing states from their importing neighbors. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 441, 442 (1911). Chief Justice Marshall, in *Brown*, thus referred to the intent of the framers of the Constitution:

> Yet the framers of our constitution have thought this a power which no state ought to exercise . . . . A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states . . . . 25 U.S. (12 Wheat.) at 440.

The original package test was never the *sole* criterion for determining at what point in time, for purposes of taxation, foreign imports lose their immunity. From the time of *Brown v. Maryland* to the present, the Supreme Court has held that the immunity from state taxation of imported goods was also lost when they were sold or put to the use for which they were imported.[3] Since 1959, imported goods have lost their immunity upon becoming part of the "current operational needs" of the manufacturing process for which they were imported.[4] In those cases in which the original package test is employed, there is wide disagreement among the courts as to what constitutes an original package, how it is "broken," and what circumstances call for application of the test.[5] The principal case is but one example of this disagreement.

The majority reasoned that, since the lumber had not been put to the use for which it was intended, *i.e.* sale, the original package test was to be applied. In the opinion of the majority, state taxes are prohibited[6] so long as the imported goods remain in their original *form* or package;[7] therefore, unsold portions of imported shipments of lumber are immune from state taxation while they remain in the possession of the importer awaiting sale and without physical alteration. The dissent, relying on a rule announced by a California District Court of Appeals in *E. J. Stanton & Sons v. Los Angeles County*,[8] concluded that the shipment as a whole constituted an original package which was broken when portions were sold and the remnants were mixed with new shipments. The dissent also indicated doubt as to whether the purpose of importation was sale, as opposed to offering for sale, a point made by the trial court.

An original package is generally regarded as that package or aggre-

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[3] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 657 (1945).

[4] Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

[5] See Trickett, *The Original Package Ineptitude*, 6 COLUM. L. REV. 161 (1906).

[6] The court in the principal case did not consider whether personal property taxes are included within the prohibited "imposts or duties." Low v. Austin, 80 U.S. (13 Wall.) 29 (1871), rejected the argument that, because a state ad valorem property tax represents a *quid pro quo* for such state services as fire and theft protection, it should not be included under the constitutional prohibition. However, Professor T. R. Powell has suggested that a reconsideration of whether property taxes should be regarded as imposts or duties might be valuable. Powell, *State Taxation of Imports—When Does an Import Cease to be an Import*, 58 HARV. L. REV. 858, 874-75 (1945).

[7] The phrase "original form or package" was employed by Marshall without elaboration. This combination formula was applied and followed in subsequent cases. Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928); Mexican Petroleum Corp. v. Louisiana Tax Comm'n, 173 La. 604, 138 So. 117 (1931).

[8] 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied*, 332 U.S. 766 (1947).

gate of goods which is delivered as a unit by the foreign shipper.[9] When individual packages or articles are shipped as units in larger containers, those larger containers are usually held to be the original package.[10] But individual articles, or goods in small volume units, packed in individual packages within larger containers, have been held to constitute original packages.[11] When packaging is inherently impossible, as in the principal case, the holdings are widely split. In some cases, the entire aggregate of goods shipped,[12] or even ships together with their contents,[13] have been held to constitute the original package. In other cases in which actual packaging is impossible, the "original form" is emphasized, and unsold imports are held immune from state taxation until they are physically altered.[14]

In still other cases in which imported goods are inherently incapable of being packaged, the original package rule is considered inapplicable and the question becomes whether the goods have been commingled with other property in the state.[15] Chief Justice Marshall, in *Brown v. Maryland*, immediately prior to stating the original package test, first formulated a general rule to determine when imported goods cease to be imports for tax purposes:

> When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the

[9] See E. J. Stanton & Sons v. Los Angeles County, *id.;* Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), *aff'd,* 179 U.S. 343 (1900).

[10] Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912) (a large case containing smaller boxes each of which contained a bottle filled with malt liquor was held to constitute the original package); May v. New Orleans, 178 U.S. 496 (1900) (boxes containing separate parcels of dry goods imported for resale by merchants were held to be original packages, "broken" when opened by merchants in order to sell the separate parcels).

[11] Askren v. Continental Oil Co., 252 U.S. 444 (1920) (although tank car loads of gasoline were the usual units of importation, barrels and packages containing two 5-gallon cans of gasoline were held to constitute original packages); Leisy v. Hardin, 135 U.S. 100 (1890) (one-quarter and one-eighth barrels of beer and cases containing bottles of beer were held to be original packages).

[12] *E.g.,* E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied,* 332 U.S. 766 (1947).

[13] Mexican Petroleum Corp. v. South Portland, 121 Me. 128, 115 Atl. 900 (1922).

[14] Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928) (fish which had been beheaded, gutted, or washed and re-iced were held to have lost their character as imports); Mexican Petroleum Corp. v. Louisiana Tax Comm'n, 173 La. 604, 138 So. 117 (1931) (imported crude oil which had been pumped from tankers into storage tanks on shore was held to have retained its character as an import on the ground that it remained in its original form).

[15] Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070 (1940) (imported cattle which were kept on importer's ranch, together with "domestic" cattle, for the purpose of grazing, fattening and breeding them prior to resale were held taxable by the state because they were thus commingled with the mass of property in the state).

> country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state . . . .[16]

Subsequent Supreme Court decisions have omitted Marshall's qualifying "perhaps."[17] It has been suggested that "so acting upon the thing imported that it has become incorporated and mixed up with the mass of property in the country" is not a genuine criterion, but only a figure of speech, particularly since imported articles generally retain indicia of their foreign make.[18] However, in the context of Marshall's opinion the following order of inquiry presents a logical progression: 1) When may imported goods be taxed by the states? When they cease to be "imports." 2) When do imported goods cease to be "imports"? When the importer has so acted upon them that they have become incorporated and mixed up with the mass of property in the country. 3) When has the importer so acted upon them? When he has broken the original package[19] or changed the original form, or when he has sold the goods,[20] utilized them in a manufacturing process,[21] or otherwise put them to the use for which they were intended.[22]

The original package doctrine thus appears less as an independent test than as an example of how an importer could so act upon im-

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[16] 25 U.S. (12 Wheat.) 419, 441-42 (1827).

[17] May v. New Orleans, 178 U.S. 496 (1900); Low v. Austin, 80 U.S. (13 Wall.) 29 (1871). "The slight hesitation in announcing this rule as indicated by the word 'perhaps' has entirely disappeared in subsequent decisions, and the general rule there announced has often been reiterated in substantially the same essence, though in varying form." Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 Atl. 900, 901-02 (1922).

[18] Trickett, *The Original Package Ineptitude*, 6 COLUM. L. REV. 161, 166 (1906). See 19 U.S.C. § 1304 (1965), which provides that every article of foreign origin, or its container, imported into the United States shall be marked so as to indicate to the ultimate purchaser the country of origin.

[19] *Cf.* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 549 (1959), in which the Court classified the breaking of the original package as merely one factor in determining whether goods have been put to the use for which they were intended.

[20] "It is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property." Waring v. The Mayor, 75 U.S. (8 Wall.) 110, 122 (1868). As authority for this rule *Waring* cites Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1866). Although *Pervear* is often cited to this effect and does explicitly state that the sale of merchandise while remaining in the original packages renders the merchandise subject to state taxation, this is only dictum. "Merchandise in original packages, once sold by the importer, is taxable as other property. But in the case before us there was no importation." *Id.* at 479.

[21] Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) (iron ore which was stored in importer-manufacturer's storage yard was held to have lost its tax immunity because it was being used to supply the current manufacturing needs of the importer).

[22] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 665 (1945) (bales of imported hemp stored in importer's warehouse prior to their use in importer's manufacturing process were held not subject to state taxation because they had not yet been put to the use for which they were intended).

ported things that they would become incorporated and mixed up with the mass of property in the country.[23] The Supreme Court's 1959 decision in *Youngstown Sheet & Tube Co. v. Bowers*[24] extended the "use for which intended" test to strip state taxation immunity from goods necessary for the "current operational needs" of the importer's manufacturing process. This decision also appeared to open the door to an application of the new "current operational needs" test to goods held by the importer awaiting sale.[25] The majority opinion in *Youngstown* explicitly stated that breaking the original package is only *one* of the ways by which packaged goods which have been imported for use in manufacturing can lose their character as imports.[26] It is disappointing that the Supreme Court, in denying certiorari to the principal case and others like it, has declined to take advantage of opportunities to bring the state courts up to date.

In both the principal case and *E. J. Stanton & Sons v. Los Angeles*

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[23] While Chief Justice Marshall did not undertake definitely to state just what acts or conduct of the importer would be deemed to have "so acted upon the thing imported" as to cause it to be "mixed up with the mass of property in the country [and to lose] its distinctive character as an import," he did specify some of the acts that would so result. He held that the goods lose their character as imports when the importer (1) "sells them," or (2) "[breaks] up his packages, and [travels] with them as an itinerant pedlar." ... More important to the question confronting us, he also held (3) that goods brought into this country by an importer "for his own use" and here "used" by him are to be regarded as a part of the "common mass" of property and are not immune from state taxation.

Youngstown Sheet and Tube Co. v. Bowers, 358 U.S. 534, 541-42 (1959).

In May v. New Orleans, 178 U.S. 496, 508 (1900), the Supreme Court considered the original package test within the context of the imported goods' incorporation with the mass of property in the state:

> So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the State, and bring them, while in their possession, within the range of local taxation.

Thus, the breaking of the original package was merely a factor in deciding whether the importers had so acted upon the goods that they had become incorporated with the mass of property in the state.

"It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive...." City of Galveston v. Mexican Petroleum Corp., 15 F.2d 208 (S.D. Tex. 1926).

[24] 358 U.S. 534 (1959).

[25] In Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), it was stated that when imported goods are stored in their original packages awaiting manufacture, they will enjoy immunity *for the same reason* that imports prior to sale are immune. In his dissenting opinion in *Youngstown Sheet & Tube*, Mr. Justice Frankfurter cautioned that the current operational needs test favored by the majority might be just as well applied to goods imported for sale. However, an attempt to do so failed in Tricon, Inc. v. King County, 60 Wn. 2d 392, 374 P.2d 174 (1962), *cert. denied*, 372 U.S. 908 (1963), in which the Washington Supreme Court held that goods which were imported for resale and which remained in original containers did not lose their tax immunity when they became part of the importer's current inventory of goods held for sale.

[26] 358 U.S. at 548 (1959).

*County*,[27] the state courts attempted to apply the original package test to factually similar situations in which there were, in fact, no "packages," while apparently ignoring the broader question of whether the importer had so acted upon the goods that they had been incorporated with the mass of property in the country. This narrow approach has resulted in conflicting decisions which fail to shed light on the basic question: when, for purposes of state taxation, do imported goods cease to be imports?

## ACQUITTAL OF RECKLESS DRIVING DOES NOT BAR PROSECUTION FOR VEHICULAR HOMICIDE

After being involved in a fatal automobile collision, defendant was charged by information, in a court of limited jurisdiction, with the misdemeanor of reckless driving.[1] Trial by a three judge panel resulted in acquittal.[2] Subsequently, an indictment was returned by county grand jury charging defendant with vehicular homicide, a felony requiring proof of driving in a "reckless or culpably negligent manner, whereby a human being is killed."[3] Defendant contended that the prosecution for vehicular homicide would subject him to double jeopardy. The Appellate Division of the New York Supreme Court granted an order prohibiting the trial, agreeing that it would necessarily be a retrial of the charge of reckless driving.[4] On appeal, although no more than three members of the New York Court of Appeals could agree on a basis of decision, four of the seven judges voted for reversal. *Held:* Acquittal of the misdemeanor of reckless driving, in a court of limited jurisdiction, will not necessarily bar subsequent prosecution in a court of greater jurisdiction for the felony of vehicular homicide, even though the latter crime requires proof that defendant drove in a "reckless or culpably negligent manner." *Martinis v.*

[27] 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied*, 332 U.S. 766 (1947).

[1] N.Y. VEHICLE AND TRAFFIC LAW § 1190, provides: "Reckless driving shall mean driving or using any motor vehicle . . . in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway. . . ."

[2] The acquittal of reckless driving received both local and national publicity, in part because defendant's father was then a judge of the court in which the trial took place, though not a member of the panel that tried him. The trial also involved conflicts in testimony which resulted in investigations of possible perjury. See New York Times, July 2, 1963, p. 1, col. 3; New York Times, Aug. 3, 1963, p. 1, col. 3.

[3] N.Y. PEN. LAW § 1053-a provides: "A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death."

[4] *In re* Martinis, 20 App. Div. 2d 79, 244 N.Y.S.2d 949 (1963).