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PERSONAL PROPERTY TAXES ON VESSELS REGULARLY ENGAGED IN INTERSTATE OR FOREIGN COMMERCE

JOHN AMBLER

The subjection of vessels regularly engaged in interstate or foreign commerce to personal property taxes will become increasingly important after the present war. The overwhelming majority of vessels capable of being so engaged are now owned by the United States of America and so are not presently subject to the personal property taxes of the various states. It is believed that this situation will be reversed after the present war and the greatly augmented Merchant Marine of the United States will be largely owned and operated by private parties.

The imposition of personal property taxes upon vessels regularly engaged in interstate or foreign commerce presents two rather peculiar problems not often otherwise involved:

1. Where are vessels so engaged taxable?
2. How much should vessels so engaged be taxed?

The solution of the first problem requires the application of legal principles to the factual situation presented in the particular case. The general principles are fairly well established. The solution of the second problem requires a consideration of some legal principles, but more directly involves the policy of the taxing state. The exercise of the taxing power of a particular state must necessarily be tempered somewhat by the fact that the vessel owner may often avoid excessive taxation by simply moving its domicile. Possibly a more lofty reason for special consideration in the taxation of vessels (but often not as practical a reason as the one mentioned above) is the fact that vessels engaged in interstate or foreign commerce should not be taxed by any state on the same basis as other property because, unlike real estate or other property permanently located in the state, vessels so engaged are usually beyond the physical confines of the state for substantial periods.

We will first discuss the first problem suggested above.

WHERE ARE VESSELS REGULARLY ENGAGED IN INTERSTATE OR FOREIGN COMMERCE TAXABLE?

There are eight leading cases in the United States Supreme Court, extending over almost a ninety-year period from 1855 to 1944, which
seem to cover most of the situations arising under this first inquiry. There are a substantial number of decisions of state courts on the subject, but the question being primarily one arising under Federal law, the state decisions must necessarily bow to these leading cases.1

The first important case to come before the Supreme Court of the United States involving the subject was *Hays v. Pacific Mail Steamship Co.*, 17 How. 596 (1855). The company in this case sued to recover personal property taxes paid in California on twelve ships. The company was a New York corporation whose stockholders were residents and citizens of New York, where it maintained its principal office and where the company was taxed on its capital.2 All the vessels were ocean-going craft properly registered in New York. The owner had an agency in San Francisco and substantial repair facilities in California. It was engaged in the transportation of passengers and freight between New York and San Francisco via Panama and also to and from the Oregon Territory. Vessels arrived in San Francisco, discharged, were repaired, refitted, and were ready to leave again generally in ten or twelve days. Recovery of the taxes were allowed. Considerable stress was laid in the opinion upon the registry of the vessels in New York. The court, after quoting the laws on registry, said:

“These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the Port of New York, where they were duly registered and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to state, county, and other local taxes.” (Emphasis supplied.)

The court concluded:

“We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed.

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1 Following this article is a list of state decisions which illustrate some of the problems involved in the taxation of vessels and the views expressed thereon.
2 The reference to the domicile of the stockholders of the corporate owner in the earlier cases is doubtless due to the question raised as to whether the state of incorporation of a corporation or the citizenship of its stockholders governed its citizenship. It was, of course, finally held that the state of incorporation was conclusive of the question. *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black 286 (1862); *McLean Oil Co. v. Ashworth*, 263 Fed. 422 (1922).
for the capital invested, and where the taxes had been paid."

In *St. Louis v. Ferry Co.*, 11 Wall. 423 (1871), the City of St. Louis sued to collect personal property taxes on ferries operated between St. Louis, Missouri, across the Mississippi River, to a point in Illinois. The owner of the ferries was an Illinois corporation whose minor officials, real estate and warehouse were located in Illinois, where its ferries were kept when not in actual use. Stockholders' meetings were generally held in Illinois, though there were no Illinois stockholders. The company paid personal property taxes on ferries and other property in Illinois.

The vessels, on the other hand, were enrolled in St. Louis, Missouri. The principal operating office of the corporate owner was in St. Louis, Missouri, where its directors, officers and a majority of its stockholders lived and where the directors' ordinary business meetings were held. The seal of the company was kept there, the books were kept there, moneys were collected and received and kept there and some disbursements made from there. By a city ordinance the ferries could not stay over ten minutes at the wharf in St. Louis. The court cited the registration laws and said:

"The solution of the question, where her *home port* is, when it arises, depends wholly upon the locality of her owners' residence, and not upon the place of her enrollment." (Emphasis supplied.)

The court denied the right of the city to tax the vessels as the owner was a resident of Illinois where the home port normally would have been. The significance of the above quotation given from this case was apparently not appreciated as the location of the home port irrespective of the domicile of the owner was thereafter often urged as the sole test of taxability.*

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*The vessels of this company on the authority of this case and a later decision of the United States Supreme Court were held taxable in New York. The taxation even covered the amount the owner had invested in vessels then being built for the owner in Delaware. *People ex rel. Pacific Mail Steamship Co. v. Commissioners*, 58 N.Y. 242 (1874).*

*To understand the reference in the cases here discussed to "registration," "enrollment" and "home port," a short review must be given to the laws governing these subjects. Vessels are, generally speaking, "registered" for the foreign trade and "enrolled" for the domestic trade. *Badger v. Guiterrez*, 111 U. S. 734 (1884). Prior to 1925 this was done in the Collection District which included the port "at or nearest to which the owner, if there be but one, or if more than one the * * * managing owner * * * usually resides." *Rev. Stat. § 4141* (46 U. S. C. 17). The port for this purpose might be located in a collection district which embraced more than one state, and such port might be physically located beyond the state of the owner's residence. *Rev. Stat. § 2568* (19 U. S. C. 2); *The Lotus No. 2*, 26 Fed. 637 (1886).

*If the vessel is sold in a district other than the one to which she belongs, a temporary document is issued which is exchanged for a permanent one when she returns to her own district. *Rev. Stat. § 4159* (46 U. S. C. 29). Registry can be changed to enrollment and vice versa as the trade of the vessel varies. Permanent or temporary documentation in the new
In *Morgan v. Parham*, 16 Wall. 471 (1873), a tax was laid by the City of Mobile upon a vessel employed in the coastwise trade between Mobile and New Orleans. The vessel had been registered in New York where her owner resided. She was subsequently enrolled as a coaster at Mobile, where an agent resided who handled the business of the vessel, such as paying off the crew, etc. The vessel was engaged in the transportation of mail, freight and passengers and was a part of a daily service. The court emphasized the ownership of the vessel in New York, stating:

"It was primarily and presumptively taxable under the authority of that State, and of that State only."

The court emphasized that enrollment at Mobile was temporary. The fact that there was no showing that the vessel was taxed in New York was equally immaterial.

"It is not important. She was liable to taxation there. That state alone had dominion over her for that purpose."

The court continued:

"It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the form results, depending upon whether or not the vessel at the time of the change is at the port to which "she belongs." Rev. Stat. § 4323, as amended. (46 U. S. C. 285)."

The law also requires the "home port" to be marked upon the vessel's stern, Rev. Stat. § 4178, as amended. (46 U. S. C. 46). A custom arose of marking on the stern a "home port" other than an actual port of entry. This was legalized in 1884 to permit the "home port" to be "where the vessel is registered or enrolled or the place in the same district where the vessel was built, or where one or more of the owners resides." Act of June 26, 1884, 23 Stat. 58 (46 U. S. C. 47). The purpose of this change was explained in detail in *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409.

It will be noted that the "home port" in *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, was properly in St. Louis as the "port" in the collection district nearest the owner's domicile, but as it was outside the domiciliary state of Illinois, it was disregarded as a test of taxable situs. So, in other cases here discussed, enrollment at a certain port was only temporary. After the passage of the 1884 Act the "home port" and the port of documentation could be different. It was uncertain at which port the preferred mortgage created by the 1920 Ship Mortgage Act should be filed. Act, June 3, 1920, 41 Stat. 1000 (46 U. S. C. 911). Mortgages were invalidated for failure to comply with the new act and serious losses were incurred. The Lincoln Land, 295 Fed. 356, 1924 Am. Mar. Cas. 194 (1924); The Susana, 2 F. (2d) 410, 1924 Am. Mar. Cas. 1389 (1924). In the latter case the court said: "Moreover prior to that Act (Ship Mortgage Act), there can be no question that the law, literally construed, required the ship to be registered at the port nearest the residence of the owner and a ship not registered was not entitled to the status of a vessel of the United States." (Matter in parenthesis supplied.) The Underwriter, 3 F. (2d) 483, 1925 Am. Mar. Cas. 803 (1925).

This confusion led to the passage of the Home Port Act, February 16, 1925, 46 Stat. 947 (46 U. S. C. 18, 1011-1014). After the passage of the "Home Port Act", the "home port" and the port of documentation are always the same and it is fixed by the owner subject to the approval of the government irrespective of the residence or domicile of the owner. See *Burnham, Vessel Documenting and Conveyancing Law and the Necessity of Revision*, 1925 Am. Mar. Cas. 1.

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personal property of that state, but was there temporarily only, and that it was engaged in lawful commerce between the states with its situs at the home port of New York where it belonged and where its owner was liable to be taxed for its value."

In Transportation Co. v. Wheeling, 99 U. S. 273 (1878), a suit was instituted to recover personal property taxes paid by a West Virginia corporation to the City of Wheeling on vessels navigating the Ohio River between Wheeling and Parkersburg in West Virginia via intermediate places on both sides of the river in Ohio and West Virginia. The stock of the company was owned partly in Ohio and partly in West Virginia. The principal office and home port of the vessels were in Wheeling where the vessels started their voyage and laid up during repairs. The tax was attacked as a duty on tonnage and an improper burden on interstate commerce. The court held that the tax was a personal property tax, not a duty on tonnage, and that the vessels were properly taxed in West Virginia because they belonged "to a citizen of the state living within or tributary and subject to her jurisdiction and protected by her laws.* * *

In Old Dominion Steamship Co. v. Virginia, 198 U. S. 299 (1905), the steamship company, a Delaware corporation, was engaged in the transportation of passengers and freight between New York and Norfolk, Virginia, via the Atlantic Ocean. It was the owner of several small vessels and a tug which operated wholly in Virginia waters. These were either feeders of passengers and freight to the ocean-going craft owned by the company or were used in maneuvering the larger craft. A personal property tax on these vessels physically located wholly in the waters of Virginia was upheld despite the fact that they were owned and enrolled outside the State of Virginia. The court pointed out that it was well settled that property used in interstate commerce was not exempt from usual taxation. Concerning the emphasis laid in the Hays and Morgan cases on the "home port," the court used this rather confusing language:

"It is true by Sec. 4141 there is created what may be called the home port of the vessel, an artificial situs, which may control the place of taxation in the absence of an actual situs elsewhere, and to that extent only do the two cases referred to go." (Emphasis supplied.)

The court continued:

"Our conclusion is that where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, they are subject to taxation in that state, although they may have been registered or enrolled at a port outside its limits."

In Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409 (1906), an Illinois corporation owned small craft conveying ties from various
states in interstate commerce to Brookport, Illinois, St. Louis, Missouri, and Duvals Bluff, Arkansas, on the Mississippi and other tributary rivers. The craft were enrolled “for convenience” at Paducah, Kentucky; when the general manager of the owner resided there. The principal office of the company was in Chicago, Illinois, though it had branch offices elsewhere including Kentucky. The craft called occasionally at Paducah for supplies but never to discharge cargo. McCracken County, Kentucky, in which Paducah was located, assessed and tried to collect personal property taxes on these vessels solely on the ground that their home port was in that county and state. The court traced the original documentation act of 1789 and amendments and concluded that either “actual domicile” of the owner or an established “permanent situs” elsewhere were the only tests of taxability.

The latter test was illustrated in the preceding case of *Old Dominion S. S. Co. v. Virginia.*

It was then urged that § 21 of the Act of June 26, 1884, 23 Stat. 58 (46 U. S. C. 47), which defined the word “port” as meaning

“Either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside,”

indicated the intention to permit the owner arbitrarily to fix the home port of the vessel and thus fixed its place of taxation. The court discarded this theory and explained that the change made in 1884 was designed merely to validate a custom which was then prevalent of placing as the “home port” the name of a locality on the stern of a vessel, which was not a port of entry. This had been ruled by government officials to be improper and local pride in small communities resented the limitation upon the selection of a local name. After the 1884 Act, and until the Home Port Act of 1925, the “home port” and the port of documentation need not coincide. The former would be fixed by the owner, the latter was fixed by law as the entry port nearest the residence of the owner.*

In *Southern Pacific Co. v. Kentucky,* 222 U. S. 63 (1911), the Southern Pacific Company, a Kentucky corporation, operated a number of ships in trade between New York, New Orleans, Galveston, Cuba, etc. All the ocean-going vessels were enrolled in New York and that port’s name appeared on the stern of the vessels. The vessels were found to be properly taxed in Kentucky as it was the domicile of the owner. The court said:

“Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. *** The persist-

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ence which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessel had an actual situs elsewhere, is illustrated by the cases of (citing the Hays, Morgan, St. Louis, Old Dominion and Ayer & Lord. Tie Co. cases) To lay down a principle that vessel property has no situs for purposes of taxation other than that of permanent location, would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property." (Emphasis supplied.)

The court thus recognized the difference which should exist between vessels and the taxation of other personal property:

"It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle has become a part of the permanent mass of property in the particular state, and quite another to attribute to a seagoing ship and actual situs at any particular port to which it goes for supplies or repairs or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another, would involve such grave uncertainty as to result often in entire escape from taxation."

The court found that the fact that the vessels in question would never physically enter the State of Kentucky was immaterial.

The foregoing cases establish the following general rules on the personal property taxation of vessels regularly engaged in interstate and foreign commerce.

1. A vessel regularly engaged in foreign commerce between ports in the United States and ports abroad is taxable only in the domicile of its owner.

2. The same rule applies to vessels regularly engaged in interstate commerce.

3. An exception is recognized when the vessel is wholly employed within the limits of the taxing state. If so, then irrespective of ownership and documentation elsewhere, it is taxable by the state.

4. The "home port" of the vessel is immaterial on the question of tax situs.

5. The fact that a "business domicile" or "business situs" has been established by the owner of such vessels in a state other than the domicile of the owners, appears to be immaterial on the subject of their taxation.

The distinction between the taxation of vessels "touching land only incidentally" and "cars or vehicles" traversing "the land only" has been long recognized. Pullman Palace Car Co. v. Penn., 141 U. S. 18 (1891); Yost v. Lake Erie Transportation Co., 112 Fed. 746 (1901).

See also Tacoma Oriental S. S. Co. v. Tallant, 51 F. (2d) 359, 1931 Am. Mar. Cas. 1351 (1931), where the court held that a Nevada corporation,
6. Failure or inability of the vessels to enter physically the domicile of the owner is immaterial on taxation at such domicile.

**NORTHWEST AIRLINES, INC. v. MINNESOTA, 322 U. S. 292 (1944)**

The similarity between vessels and aircraft can be readily seen. Neither vessels nor aircraft operate on rails, roads, or on any other land improvement or land structure. Aircraft in a sense have a home port. With these similarities in mind, the very recent case of **Northwest Airlines, Inc. v. Minnesota**, cited supra, must be considered to determine whether the Supreme Court has indicated in its discussion of the taxation of aircraft any change in its well settled views on the taxation of vessels.

The Supreme Court in this case was called upon to decide under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution whether there was any prohibition against the State of Minnesota laying a personal property tax on the full value of the entire fleet of the airlines company under the following statement of facts:

The airlines company was a Minnesota corporation with its principal place of business in St. Paul where the "home port" of the planes, under the Civil Aeronautics Authority, was fixed. The planes operated on daily schedule in seven states extending from Chicago to the Pacific Coast. The main repair shop for rebuilding and overhauling the planes of the company was located in St. Paul, Minnesota, but maintenance bases were maintained in six cities along the route of the company. All of the planes during the taxable year had touched the State of Minnesota. All planes were engaged in interstate commerce. Fourteen per cent of the fixed route of the airlines was located in Minnesota and sixteen having its business domicile in the State of Washington, was not subject to personal property taxes on its vessels even though they were documented in the State of Washington. The court so held irrespective of the fact that the vessels were not taxed in Nevada, although the court found the owner had been advised that they were subject to taxation in Nevada. This taxability of the vessels in Nevada has been subsequently upheld under similar circumstances in State of Nevada v. United States Lines, 56 Nev. 38, 43 P. (2d) 173 (1936). The rule as to whether a business domicile creates a situs for taxation under the tax apportionment rule is different as regards railroad cars. Johnson Oil Co. v. Oklahoma, 290 U. S. 158 (1933). A vessel regularly engaged in interstate or foreign commerce does not establish a tax situs in a state other than that of the domicile of its owner by a temporary or seasonal layup in such other state. Yost v. Lake Erie Transportation Co., 112 Fed. 746 (1901); County of Los Angeles v. Olympic Steamship Co., 1936 Am. Mar. Cas. 434 (1936); County of Los Angeles vs. Craig, 38 Calif. App. (2d) 58, 100 P. (2d) 818 (1940). See also appended "List of Representative Cases."

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9 Act of June 23, 1938, 52 STAT. 1008 (46 U. S. C. 521) provides for the issuance of a "certificate of registration", which is chiefly concerned with ownership and nationality.

per cent of the mileage was flown in Minnesota. The majority of the court upheld the Minnesota tax.

It is interesting to note that the cases on vessel taxation discussed above were for the most part all unanimous decisions of the court. The divergence in the views expressed in the three opinions of the majority of the court, and the strong dissent of four judges in the case of the Northwest Airlines must all be carefully considered on the present subject.

While the case involves the imposition of a personal property tax on \textit{planes}, it is highly significant on the question of the imposition of such taxes on \textit{vessels}. The line of cases covered above dealing with the latter subject is discussed in \textit{three} of the four opinions in the case.

The majority opinion written by Justice Frankfurter and signed by Justices Douglas and Murphy upholds the Minnesota tax on one positive and two negative grounds.

The State of Minnesota as the domicile of the owner of the planes gave it the power "to be" and "to function." Therefore it has plenary powers of taxation.

The planes in question were \textit{not} "continuously without the state during the whole taxable year."

A "defined" portion of the property involved had \textit{not} acquired "a permanent location, \textit{i.e.} taxing situs, elsewhere."

The majority opinion then brushed off the "tax apportionment" rule urged in the dissenting opinion.\footnote{As regards personal property regularly used over fixed routes in interstate commerce by land carriers, the following cases recognize the right of a fair apportionment of the value for taxation between the taxing states: Marye v. B. & O. R. Co., 127 U. S. 117 (1888); Pullman's Palace Car Co. v. Penn, 141 U. S. 18 (1891); American Refrigerator Co. v. Hall, 174 U. S. 70 (1899); Union Refrigerator Co. v. Lynch, 177 U. S. 149 (1900); Union Refrigerator Co. v. Kentucky, 199 U. S. 194 (1905); Germania Refining Co. v. Fuller, 245 U. S. 632 (1917); Union Tank Co. v. Wright, 249 U. S. 275 (1919); Johnson Oil Ref. Co. v. Oklahoma, 290 U. S. 158 (1933); Nashville etc. Ry. v. Browning, 310 U. S. 362 (1940); See also Western Union Tel. Co. v. Mass, 125 U. S. 530 (1888); Spector Motor Service, Inc., v. McLaughlin, 139 F. (2d) 508 (C. C. A. 2 1944); Remanded 65 S. Ct. 152.}

1. It is applicable primarily to taxes imposed by a "non domiciliary" state.

2. It is a system extended to "old means" of transportation and communication.

3. It has not been applied in "theory nor in practice" to tax units visiting only for fractional periods of the year. For example, it applies only to situations suggesting a continuity somewhat described as follows:

"Coaches *** \textit{daily passing} from one end of the state to the other." (Emphasis supplied.)
4. It is only applicable when "continuous protection by a state other than the domiciliary State—that is, protection throughout the taxable year" is furnished. "And permanent means continuously throughout the year, not a fraction thereof, whether days or weeks."

The majority thus hold that the planes daily flying over and landing in non-domiciliary states are only there for "fractional periods of the year," and do not therefore receive the "continuous protection" throughout the year necessary to invoke the "tax apportionment" rule.

Applying this reasoning to the usual case of vessels engaged in interstate or foreign commerce it is obvious that they, like aircraft, are only within a non-domiciliary state for fractional periods of the year and certainly they do not receive "continuous protection" throughout the "taxable year." Such vessels under the majority opinion are thus not subject to the "tax apportionment" rule.

The majority opinion further states that "excusions to foreign parts" in no way impairs the inherent full taxing power of the domiciliary state.

The majority opinion strongly emphasizes its dislike of introducing "tax apportionment" with its "friction, waste, and difficulties" as a "new doctrine" placing a limitation upon the "hitherto established taxing power of the home state." It again points out that the "apportionment" rule has been involved in working out the "financial relations" between states and interstate commerce "conducted on land" and that it is established in regard to "land commerce."

The emphasis of the majority opinion on the power of the "domiciliary state to tax vessels," is suggestive that the writer of the majority opinion leans to the rule for the taxation of vessels as being the proper one to apply to planes, which as indicated above is that the power of the domiciliary state to tax is exclusive, unless a permanent situs is established elsewhere.12 By abandoning the "tax apportionment" rule it would seem likely for the court, in so far as airplanes are concerned, and in the absence of federal legislation, to adopt the rule of exclusive taxation by the state of domicile.

The majority opinion, however, purports to leave open the taxation of the planes by states other than the domiciliary state, saying:

"The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us."

But, in addition to the general trend of the majority opinion, the following language near the close of the majority opinion would suggest the view of the writer that the planes in their operation had acquired no tax situs outside of Minnesota:

12 "Permanent" as used here of course means merely "throughout the taxable year."
"** * But not to subject property that has no locality other than the state of its owner’s domicile to taxation there would free such floating property from taxation everywhere.” (Emphasis supplied.)

In any event, the majority opinion appears to accept without question the hitherto established rules on the taxation of vessels discussed above.

The concurring opinion of Justice Black “would not in this case foreclose consideration of the taxing rights of states other than Minnesota.” He apparently feared the majority opinion was subject to that construction, which it certainly is.

The concurring opinion of Justice Jackson, on the other hand, declines to accept the majority opinion because “it fails short of commitment that Minnesota’s right is exclusive of any similar right elsewhere.” He does not give as much weight to the power of the domiciliary state to tax as does the majority opinion. He thinks the “tax apportionment” rule for land commerce inapplicable to aircraft on much the same ground that it would seem to be inapplicable to vessels. On this subject he says:

“Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has to acquire from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes.”

His views seem to be influenced by the analogy of the line of cases holding that “the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax.” He leans, however, to what he terms the “home port” doctrine of the earlier cases involving vessel taxation.

It is hard to understand the reasoning on this latter point as the only significance of “home port” even in the earlier cases would seem to be as tending to show the domicile of the owner, although it must be admitted that some language in the earlier cases is confusing. To allow a taxpayer to fix a “home port” without regard to domicile is now permissible for vessels. This makes the “home port” increasingly immaterial on the question of taxability. Both concurring opinions suggest the advisability of Congressional action on the subject.

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18 See supra, n. 7.

14 The dislike of a court for a rule whereby a taxpayer can by a “consensual” act create artificial tax results is illustrated in the recent case of Commissioner v. Harmon, 65 S. Ct. 103, decided Nov. 20, 1944.

18 Act, July 3, 1944, c. 398, 58 Stat. 723 was passed to carry out the recommendations suggested by some members of the court in this case. It provides that the Civil Aeronautics Board shall consult with the appropriate authorities of the various states and other taxing bodies: “with a view to the development of means for eliminating and
The dissenting opinion written by Chief Justice Stone and signed by Justices Roberts, Reed and Rutledge, discusses the subject in detail, both under the commerce clause and under the due process clause of the Fourteenth Amendment to the Federal Constitution and expresses the view that the tax as upheld by the majority is violative of the commerce clause of the Constitution. The dissenting opinion says:

"Obviously interstate business bears no undue part of the burden if the personal property tax imposed on it by a given state is—like a tax on real estate located there—exclusive of all other property taxes imposed by other states, as is the case with the taxation of vessels * * * or if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state, as has until now been the rule as to railroad cars." (Emphasis supplied.)

The dissenting opinion points out that the majority by not expressly making the Minnesota tax exclusive may have left the planes subject to taxation in the states over which they are used in "regular routes" as the "apportionment tax" cases hold that they establish a situs for taxation in those states; that in fact the planes are taxed now in six of the seven states "through which they fly."

Chief Justice Stone emphasizes his view that under the Fourteenth Amendment to the Constitution "physical presence" of tangible property, not the domicile of its owner, is the basis for ordinary tangible property taxation. The rule is otherwise in the taxation of intangible property. Under the Fourteenth Amendment he believes that tangible property is taxable by a state other than the domicile of its owner when it is physically located in such other state. On the other hand, the domicile of the owner cannot tax tangible property unless it is physically within its borders. Under the Fourteenth Amendment, the writer of the dissenting opinion feels, the planes "in some measure" are subject "to the taxing power of every state in which they regularly stop on their interstate mission" if the "tax apportionment" rule applies as he thinks it should. "Tax apportionment" saves the tax from being an undue burden under the commerce clause.

The dissenting opinion cites the cases discussed above involving vessel taxation as not following the "tax apportionment" rule because the vessels are

"* * * so sporadically and irregularly present in other states that they acquire no tax situs there * * * and hence

avoiding, as far as practicable, multiple taxation of persons engaged in air commerce * * * which has the effect of unduly burdening or unduly impeding the development of air commerce."

The Board is to report to Congress within 180 days after the date of approval the results of its consultations and its recommendations, including recommendations for legislation by Congress if that appears necessary or appropriate.
remains taxable to their full value by the state of the domicile because they are not taxable elsewhere. But that is not the case as to any of the planes here involved. And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends on their physical presence, and it is neither added to nor subtracted from because the taxing state may or may not happen to be the state of the owner's domicile."

Parenthetically, it is a little hard to understand how the movement of the planes of the Northwest Airlines differs materially from the daily ferries between St. Louis and the shore of Illinois involved in \textit{St. Louis v. Wiggins Ferry Co.}, supra, and the daily service between New Orleans and Mobile involved in \textit{Morgan v. Parham}, supra. Neither seem sporadic or irregular.

Again, the dissenting opinion distinguishes the cases involving vessel taxation in a footnote as follows:

"The rule, generally applied, that vessels are taxable only by the domicile is no exception to these rules (having to do with apportionment). For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. But where the vessels operate wholly within the waters of one state they have been held to be taxable there, and not at the domicile, a result which like the rule of apportionment in taxing rail-road cars, avoids the burden of multiple taxation." (matter in parenthesis and emphasis supplied.)

The dissenting opinion takes exception to any particular weight being given in a discussion on the power to tax tangible property operated, as were the planes here, to "home port," or "business domicile." "Physical presence" is the proper test for the establishment of a taxation situs and the dissenting opinion urges that such physical presence is attained for the taxation of instruments of transportation by their operation in every state over which a "regular schedule" over a "fixed route" is maintained. The dissenting opinion strongly objects to extending multiple taxation allowed in the case of intangibles to tangible property such as planes, saying:

"To extend to airplanes moving interstate over fixed routes on regular schedules, the rule that intangibles may be taxed at the business domicile whether or not taxed elsewhere; and to revive the abandoned doctrine that vessels may be taxed in full at their home port, while rejecting the correlative rule that they are exempt from taxation elsewhere, is to disregard the teachings of experience and of precedent." (Emphasis supplied.)
It seems logical to believe that the general rules on vessel taxation laid down by the seven leading cases discussed above have not been changed in any respect by this recent case. Three opinions in the case discussed and accepted as settled the rules of the vessel taxation cases.

"Tax apportionment" has never been applied to vessels. The obvious distaste of the majority of the court to the extension of the rule of tax apportionment and the clear recognition of the dissenting opinion that in the absence of the rule of apportionment, taxation by the state of domicile must be exclusive, would indicate that the court has no intention of changing the present rule of taxation of vessels. In any event it is believe that in the interest of stability the court would wait for Congress to change the present well settled rules on vessel taxation if they are to be changed. As Justice Black said, in his concurring opinion in the case, the court "should enter the field with extreme caution."

**How Much Should Vessels Regularly Engaged in Interstate or Foreign Commerce Be Taxed?**

For some years the three Pacific Coast states have recognized that personal property taxes imposed by a state on vessels regularly engaged in interstate or foreign commerce must be reasonable to attract owners to establish their operations on the Pacific Coast. Personal property taxes on such vessels in two of the Pacific Coast states are now limited to taxes for "state purposes" only and in the third to a fraction of the regular tax. To limit the tax to that levied for "state purposes" or to a fraction of the regular tax is a recognition that vessels are often out of the state for long periods. It is also a recognition that when the vessel is in state waters it is often moved from port to port within the state. The operation of the vessel is a "state" rather than a county or municipal venture. A tax at the full rate of legal taxation applied to such a vessel is an injustice. The huge sums involved make the subject one of paramount importance to a shipowner. The difference between the normal tax rate in many states and the fraction of the normal rate demanded by the Pacific Coast states, for example, in the case of a medium-sized freighter will annually involve many thousands of dollars. The transitory nature of vessels and the comparative ease by which they may escape taxation has often led tax officials to overlook such property when taxes are levied. In the post-war period vessels will probably not escape taxation so easily and they should be taxed. A fair tax program seems to be the logical answer.

**State of California**

In *San Francisco v. Talbot*, 63 Calif. 485 (1883), it was decided that a vessel registered at Port Townsend in the Territory of Washington, where the "ship's husband" resided, and where the vessel had been taxed by the Territory, was not taxable in the State of California
where the vessel only called to receive and discharge cargo. This was held despite the fact that nine-tenths of the vessel was owned in San Francisco and only one-tenth was owned in Washington Territory. Part ownership in California was found not sufficient to make the full value of the vessel taxable there. It will be recalled that this is in line with the rule that where there are several owners the vessel may be registered at the domicile of the ship's husband as was done in this case. Rev. Sat. 4141 (46 U. S. C. 17).16

In Olson vs. San Francisco, 148 Cal. 80, 82 Pac. 850 (1905), suit was brought to recover taxes paid under protest on the lumber schooner "Oliver J. Olsen" for the years 1901-2. The vessel was owned by several persons, some of whom resided in California and others in the State of Washington. The vessel was built in the State of Washington and was given temporary registry in that state, her documents describing the vessel as "of San Francisco." The managing owner of the vessel lived in San Francisco. The vessel proceeded to Australia under temporary registration and on March 1, 1901, the taxing date, had never physically ever been in the State of California. The court referred to the difference between "temporary" and "permanent" documentation, emphasizing that the latter could only be granted at the owner's domicile. The California tax on the vessel was upheld as it was the domicile of the managing owner and under the registry laws of the United States the permanent port of documentation. The physical absence of the vessel from the state was immaterial as the vessel had established no permanent situs elsewhere. It was argued in the case that the vessel might be considered as exempt under certain California laws. The court, however, stated that such a special statutory exemption of vessels would be unconstitutional.17

To remedy this last situation on November 3, 1913, the voters of the state adopted the following constitutional amendment:

Article XIII, Sec. 4. "All vessels of more than fifty (50) tons burden registered at any port in this State and engaged in the transportation of freight or passengers, shall be exempt from taxation except for State purposes until and including the 1st day of January, 1935." (Emphasis supplied.)

On November 8, 1932, this constitutional amendment was reen-

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16 In a very early case the right of the State of California to tax vessels owned and documented in another state, if engaged wholly in state waters, was recognized. Minturn v. Hays, 2 Cal. 591 (1851).

17 In California Shipping Co. v. County of San Francisco, 150 Cal. 145, 88 Pac. 704 (1907), vessels engaged in interstate and foreign commerce owned by a California corporation and registered in San Francisco were held taxable there despite their absence on the assessment date. No actual situs having been acquired outside the state the fact the vessels were never physically in the state was immaterial.

In actual practice there has been no levy on such vessels since 1910. Because of California sales tax revenue there is no present state levy and no future levy is anticipated although the state retains the right.
acted by the voters to extend the exemption until January 1, 1955, which is its present expiration date.18

Other phases of the subject have been likewise considered by the courts of California.19

STATE OF OREGON

The subject of vessel taxation was considered by the courts of the State of Oregon in *Callender Navigation Co. v. Pomeroy*, 61 Ore. 343, 122 Pac. 758 (1912). A Washington corporation owned certain vessels regularly engaged in interstate commerce on the Columbia River and its tributaries between ports in Washington and Oregon. The articles of incorporation of the company fixed Knappton, Washington, as the principal place of business and originally the stockholders of the company lived in Washington. Later the shares of stock of the corporation were sold to Oregon interests and the operation and business office were centered in Astoria, Oregon, where the vessels were documented as their home port. Astoria in Oregon was the nearest entry port to the Washington residence of the owner. It was decided that Clatsop County, Oregon, could not tax these vessels as their tax situs was in Washington, the domicile of the owner, and there only could they be taxed.20

Not to be outdone by the 1913 amendment to the California Constitution granting vessels engaged in interstate and foreign commerce a special tax rate, the State of Oregon on November 7, 1915, amended Article IX, Section 9, of the Oregon Constitution by a referendum measure reading as follows:

1-b. “All ships and vessels of fifty tons or more capacity engaged in either passenger or freight coasting or foreign trade, where home ports of registration are in the State of Oregon, shall be and are hereby exempted from all taxes of every kind whatsoever excepting taxes for state purposes until the first day of January, 1935.” (Emphasis supplied.)


20 See supra n. 4.
In 1925 a statute of the State of Oregon made another great concession to owners of ocean-going vessels as follows:

"All ocean-going vessels, whether sail, steam or motor driven, whose home ports for registration or enrollment are in the State of Oregon shall be taxed at only one-fiftieth of the state tax on buildings and improvements on real estate levied in the same tax year as the tax herein provided for is levied."

(Emphasis supplied.)

The present law of Oregon on this subject provides in brief that vessels of fifty tons and over handling passengers and freight, whose home ports of registry are in Oregon, shall be taxed ten per cent of the current consolidated tax levy for all purposes in the district where the tax is assessed. If such vessels are engaged in the intercoastal or foreign trade, whether the vessel is actually engaged or is laid up, the tax is one per cent of the current consolidated tax levy for all purposes of the district where the tax is assessed.

The law contains a proviso that to and including 1945 the one per cent tax applies to vessels of fifty tons or more intended for intercoastal or foreign services if such vessels are under construction but this special tax does not apply on materials used in construction unless in place in the constructed part of any such vessel.


22 Ore. Laws 1941, c. 392, p. 669. Unlike the constitutions of the States of California and Washington, the Constitution of the State of Oregon has been held to permit special consideration by the legislature of the taxation of vessels. Portland v. Kozer, 108 Ore. 327, 217 Pac. 833 (1923); Corporation of Sisters of Mercy v. Lane County, 123 Ore. 144, 261 Pac. 694 (1927); McPherson v. Fisher, 143 Ore. 615, 23 P. (2d) 913 (1933).

The attorney general of the State of Oregon has had occasion to pass on the subject on two occasions. On December 4, 1931, he ruled (O's. Att'y Gen., Oregon, 1930-32, p. 460) as follows:

1. Dredges moving under own power between coastal points within the state;
2. Dredges towed between coastal points in the state;
3. Power-propelled ocean-going fishing vessels, and
4. Power-propelled tow boats towing between coastal points in the state;

were all capable of documentation and were all within the special tax provisions of Ore. Code (1930) §§ 60-207, allowing special taxes on such vessels irrespective of whether the vessels were actually documented.

Again in 1935 (O's. Att'y Gen., Oregon, 1934-35, p. 515) the attorney general considered the following subject:

The ocean-going steamer "Lansing," a floating cannery, owned by a California corporation and registered in San Francisco, was anchored for the fishing season of several months duration off North Bend in Coos County, Oregon. A fleet of small boats were carried with the vessel which would go over the bar and seine for pilchards which were then reduced to fish meal and oil in the cannery located aboard the vessel. Citing several decisions and Cooley, Taxation (4th ed.) § 453, the attorney general held that the vessel was not subject to taxation in Coos Bay County, Oregon, because it was not there on the assessment date nor had the vessel established a tax situs in the state of a sufficiently permanent character.

Clearly influenced by the increase in floating canneries the 1939 Act
The history of the taxation in the State of Washington of vessels engaged in interstate or foreign commerce follows the coast pattern. In 1907 the legislature of the State of Washington decided to encourage shipping in the state and passed the following addition to the tax laws of the state:

"* * * Provided, that the ships or vessels registered in any custom house of the United States within this state, which ships or vessels are used exclusively in trade between this State and any of the islands, districts, territories, states of the United States, or foreign countries, shall not be listed for the purpose of or subject to taxation in this State, such vessels not being deemed property within this state * * *." (Emphasis supplied.)

This provision was involved in Pacific Cold Storage v. Pierce County, 85 Wash. 626, 149 Pac. 34 (1915), where a Washington corporation owned a vessel engaged exclusively in interstate commerce. The vessel was registered at Tacoma, in Pierce County, Washington. No attempt had been made to tax the vessel elsewhere. Of course, in the absence of the exemption statute the vessel was clearly taxable in the State of Washington under the rules discussed above. The court said:

"This property is owned by a citizen of the State having its domicile within the state. The place of the owner's domicile is the registered as well as the home port of the vessel."

A tax by Pierce County on the vessel was upheld on the ground that the state statute attempting to exempt the vessel from taxation was unconstitutional as the state constitution did not permit special exemptions or classifications of this character.

In November, 1930, the voters of the State of Washington approved Amendment Fourteen to the State Constitution allowing classification of property. A few months later the legislature adopted the following statute which is now the law of the State:

"Section 1. All ships and vessels whose home ports of registry are in the State of Washington, engaged in interstate commerce, foreign commerce and/or commerce between the ports of the State of Washington and the high seas, shall be and are hereby made exempt from all taxes of every kind whatsoever, except taxes levied for any state purpose.

"Sec. 2. All ships and vessels under two hundred tons burden, whose home ports of registry are in the State of Washington, shall be and are hereby made exempt from all taxes of every kind whatsoever, except taxes levied for any state purpose."

referred to in note 21, supra, limiting the taxation of vessels contained elaborate procedure for taxes on reduction or processing plants moored in state waters.

22 Wash. Laws 1907 c. 48, p. 69.
purpose and twenty per centum of taxes levied for all other purposes." (Emphasis supplied.)

Under the present so-called Forty Mill Tax Law of the State of Washington this law limits the tax on most vessels here under consideration to about two mills. The courts of the State of Washington have considered other phases of the subject.

GENERAL DISCUSSION

It will be observed that the Constitution of the State of California and the Laws of the States of Oregon and Washington having to do with special taxes on vessels engaged in interstate or foreign commerce base the exemption upon the fact that such vessels are documented within the state. This would appear to be a somewhat unnecessary qualification unless the owner is domiciled in the state, or the vessels are permanently located in the waters of the state, as other vessels under present rules normally cannot be taxed there. The reason for the insistence on documentation within the state is probably a survival of the so-called "home port" theory, and also an effort to encourage local documentation for advertising purposes, as the state and its ports necessarily receive some advertising benefit from having vessels in other ports of the United States and the world bearing on their sterns the name of a local port.

While the vessels of a foreign owner generally receive no benefit from the special tax provisions outlined above, the vessels of a resident owner, if documented within the state, do receive substantial benefit. However, by reason of the specific requirement that such vessels be documented in the state, the owner is prevented from catering to the local pride of ports in other states at which its vessels may call. For example, if a California corporation operating in the coastwise trade between San Francisco, California, and Portland, Oregon, decides that one of its vessels should have its "home port" in Portland as a recognition of the value of that port in the service of the company, it must

26 Northwest Lumber Co. v. Chehalis, 25 Wash. 95, 64 Pac. 909 (1901) and North American v. Taylor, 56 Wash. 565, 106 Pac. 162 (1910) recognized the right of the state to tax the full value of tugs operating solely in state waters, even though they are owned and documented in another state. See also McRae v. Bowers Dredging Co. (W. D. Wash.) 90 Fed. 360 (1898). In United States v. King County, 96 Wash. 434, 165 Pac. 70 (1917) the court went a step further to hold that whaling vessels, not being common carriers, by being laid up during the off season in the waters of the state, thereby establishing taxing situs in the State of Washington though owned and documented in some other state. In Petroleum Navigation Co. v. King County, 1 Wn. (2d) 489, 96 P. (2d) 467 (1939), the court emphasized the general rule which we have pointed out above that the domicile of the owner controls the taxable situs of the vessel rather than the home port of the vessel when the latter is not located at the domicile of the owner.
give up its tax benefit under the California law and it would receive no benefit from the Oregon law. Thought might be given to removing this requirement now attached to these special provisions that the vessel in each instance must be documented in a port in the taxing state.

The laws of the various states in respect to the imposition of personal property taxes upon vessels regularly engaged in interstate or foreign commerce show little or no uniformity except on the Pacific Coast. Provisions run from total exemption from personal property taxes in Maryland to a full tax in Nevada.\(^2\) Between these extremes may be found the special taxes in New Hampshire and Wisconsin.\(^2\) Other states may do well to consider the constructive tax program in effect for such vessels on the Pacific Coast.

\(^2\) Exemption in the Maryland law from state, county and city direct taxes is clear and particularly well phrased. The exemption is as follows: [1943 SUPP. ANN. CODE, MD., p. 825, Art. 81 (26)]: "All ships or other vessels, including aircraft, which are regularly engaged in commerce, in whole or in part, outside the territorial limits of this state." The taxation of vessels engaged in foreign trade on the same basis as other personal property in the state was upheld in State of Nevada v. United States Lines, 56 Nev. 38, 43 P.(2d) 173 (1935).

\(^8\) REV. STAT. OF NEW HAMPSHIRE, 1942, c. 73, § 22, p. 298, provide that ships in the foreign carrying trade for at least ten months of the year preceding the annual assessment, or built during the year for that trade, are not included as personal estate but are taxed on "net yearly income."

WISC. STAT., 1943, § 70-15, provides that vessels in interstate commerce pay a sum equal to one per cent per net ton of registered tonnage in lieu of other taxes.

LIST OF REPRESENTATIVE CASES

The following list of some of the leading state cases, will illustrate the various questions presented in the taxation of vessels, and the rulings made thereon.

*National Dredge Co. v. State,* 99 Ala. 462, 12 So. 720 (1893). A dredge, tug boat and scows, for a number of years engaged in a government job in the state, had acquired thereby a situs for taxation.


*Shannon v. Streckfus Steamers, Inc.*, 279 Ky. 649, 131 S.W.(2d) 833 (1939). The non-resident owner of a vessel, documented outside the state, still must pay excise taxes for activities conducted on the vessel.

*Thompson v. Day,* 143 La. 1086, 79 So. 870 (1918). A wrecked vessel sunk in local waters loses its identity as a vessel and is taxable like other property.


*Hooper v. Mayor,* 12 Md. 464 (1859). A vessel registered in a city is not subjected thereby to city taxes when the owner lives in the county.

Baltimore Steam Packet Co. v. Baltimore, 161 Md. 9, 155 Atl. 158, 1931 Am. Mar. Cas. 1229 (1931). A vessel plying between Baltimore and Norfolk is not entitled to such statutory tax exemption because the latter port is not beyond “Chesapeake Bay and its tributaries” as the statute requires.

Atlantic Maritime Co. v. City of Gloucester, 228 Mass. 519, 117 N.E. 924 (1917). Fishing vessels, owned in another state, by refitting, etc., in Massachusetts do not thereby establish a tax situs.

Barker v. Town of Fairhaven, 265 Mass. 333, 163 N.E. 901 (1928). A yacht is taxable at the place of the owner’s residence.


State v. Haight, 50 N. J. L. 428 (1883). Ferries of a foreign corporation registered in another state are not taxable merely because they call in New Jersey in their interstate business.

Tennant v. State (N. J.), 95 N. J. L. 465, 113 Atl. 254 (1921). A tug owned and registered in New York is not taxable in New Jersey merely because it is held there temporarily for sale, as it does not thereby acquire a taxable situs away from its owner’s domicile.

People ex rel Pacific Mail S. S. Co. v. Commissioners, 58 N. Y. 242 (1874). Vessels of a domestic corporation registered in the state are taxable though never in the state as are monies invested in vessels being built in another state.

Commonwealth v. American Dredging Co., 122 Pa. 356, 15 Atl. 443 (1886). Capital stock of a local corporation represented by vessels built and used outside the state is taxable in the state unless vessels are to be permanently kept beyond the state.

Commonwealth v. Clyde S. S. Co., 268 Pa. 262, 110 Atl. 522 (1920). The capital stock of a foreign corporation owning vessels calling in interstate commerce, while it may not be taxed on the valuation of the vessels, may be taxed on the amount represented by office furniture, equipment and loading and discharging gear, permanently located in the state thus used in its interstate operations.

City of Newport News v. Commonwealth, 165 Va. 635, 183 S.E. 514 (1936). Ferries are taxable at the owner’s domicile.

Wisconsin v. Village of Williams Bay, 207 Wis. 265, 240 N.W. 136 (1932). Winter lay-up for six months on shore creates a taxable situs for small vessels.

See also “Situs as between different states or countries of tangible chattels for purposes of property taxation.” 110 A. L. R. 707.