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Tax Situs of River Boats in a Non-Domiciliary State--Reeves v. Island Creek Fuel and Transportation Co.

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of the child and has imputed the negligence of one parent to the other, probably because, under the wrongful death statute, both parents will benefit. How does the court logically distinguish the *Hale* case from these parent-child cases upon the custody question? The court does not try to make distinction, and there seems to be no logical one. It merely says that those cases are clearly distinguishable from this case.

It is submitted that in the *Hale* case the Court of Appeals seems to repudiate the custody-agency concept of the parent-child cases by refusing to utilize agency principles for imputing the negligence of the careless father to the plaintiff mother, the court permits the mother to recover the amount to which she is entitled, while at the same time the father can recover nothing.

This case points the way to a reversal of the Kentucky doctrine which in the parent-child-custody situation has been used to bar recovery under our statute.²⁶ A majority of jurisdictions have applied a less harsh rule in those cases barring recovery only to the extent that it will inure to the benefit of the negligent parent-beneficiary.²⁷

CECIL D. WALDEN

TAX SITUS OF RIVER BOATS IN A NON-DOMICILIARY STATE — REEVES V ISLAND CREEK FUEL AND TRANSPORTATION CO.

A case recently decided by the Kentucky Court of Appeals seems to import an extension of the principles now used to determine the tax situs of river boats and barges in a non-domiciliary state. In *Reeves v. Island Creek Fuel and Transportation Co.*,¹ the Commonwealth of Kentucky instituted omitted tax assessment proceedings in the courts of certain counties bordering the Ohio River to assess and collect from the appellee ad valorem property taxes on river boats and barges. Appellee obtained a permanent injunction enjoining further prosecution, and this appeal was taken. The Island Creek Co., a Maine corporation, was almost exclusively engaged in shipping coal by barge on the Ohio River between Huntington, West Virginia, and Cincinnati, Ohio, on behalf of its parent company. Although the domiciliary state was Maine, the boats and barges had never been there, nor was there any prospect of their being there in the future. The company had operated its two tugs and fifty-four barges over this route, which is 94.6% in Kentucky,² during the years in question with rela-

²⁶ Unless this is true the Kentucky court finds itself faced with a curious anomaly. Where a father kills his child, recovery is allowed. Where a third party kills the child and the father is negligent a recovery is denied. It is possible that considerations of "policy" lead the Court of Appeals to such a result. If a suit is brought against a parent for a negligent injury, an insurance company indemnitor is no doubt always in the background, and the burden of payment of the judgment is spread. This might not be true where the defendant is a third party.

²⁷ See Note, 2 A. L. R. 2d 785, at 799.

¹ 313 Ky. 400, 230 S.W. 2d 924 (1950).

This case seems to be decided in terms of route mileage. However, the actual mileage traveled in Kentucky bore the same proportionate relationship to the total mileage traveled as that part of the route in Kentucky bore to the full route. See brief on behalf of Campbell County, Kentucky, as amicus curiae, page 39. Had this not been reasonably true the result might have been unfair, or might well have been different.

tively a few interruptions throughout each year. The court held that 94.6% of the value of the property in question was taxable in Kentucky and that each county and school district was entitled to its proportionate share of that part on a mileage basis.

The right of a state to tax river boats on an apportionate basis was recognized for the first time in *Ott v. Mississippi Valley Barge Line Company*.³ Prior to that case it had been argued that boats were taxable only in their state of domicile⁴ unless they had acquired situs elsewhere by remaining within the taxing jurisdiction throughout the entire tax year.⁵ In the *Ott* case, however, an analogy was drawn between the barge lines concerned and railroads, and Louisiana was allowed to tax the property on the same basis. The basis in the railroad cases which indicates the proportionate amount of the property in regard to the whole that the state may tax may be either the number of miles operated in the state in relation to the number of miles operated by the company,⁶ or the average number of cars in the state during the year if there is no regular schedule or run.

The *Island Creek Fuel* case applies certain general rules concerning the tax situs of personal property. As a practical matter they are drawn from the railroad cases, but there is no attempt to make an analogy. The problem is treated as a new one, and in so doing Kentucky appears to have injected a variation on a concept well established in the railroad cases. From the apportionment cases has evolved a specialized interpretation of the permanency required to give personal property tax situs since no specific railroad car is likely to remain in the state throughout the tax year. The fact that a certain portion of the property as a whole is within the state throughout the tax year is said to be sufficient even though no particular unit stays within the state for the entire period;⁸ but permanency thereby modified remained essential to the establishment of tax situs. It was argued in both the *Island Creek Fuel* case and the *Ott* case that the visits of the boats were irregular, sporadic, and for fractional periods of the year only, and therefore, lacking in the permanency necessary to establish tax situs. No doubt this was intended to point out that at certain times there were no units within Louisiana, for as was indicated previously no one unit need remain within the state so long as there is continuous protection afforded a portion of interchangeable units. The issue was not decided in the *Ott* case, however, because Louisiana acknowledged that the tax was only on the boats and barges permanently within the state "and by permanently is meant throughout the taxing year."⁹ Up to this point the most pertinent dicta seemed to indicate that the concept of "continuous protection" required at least some units to remain within the state at all times during the tax year.¹⁰ In *Northwest Airlines v. Minnesota* the court said by way of dictum, in a decision allowing the domiciliary state to tax all the planes of a

³ 336 U.S. 169 (1949).

⁴ *St. Louis v. Ferry Co.*, 11 Wall. 423 (U.S. 1870); *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1911).

⁵ *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299 (1905).

⁶ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891).

⁷ *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149 (1900); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899).

⁸ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899); *Commonwealth v. Union Pacific Railroad Co.*, 214 Ky. 339, 283 S.W. 119 (1926).

⁹ *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 175 (1949).

¹⁰ *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292 (1944).

regularly scheduled airline operating out of it, "But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting [the non-domiciliary state] for fractional periods of the taxing year."¹¹ It is not the bare statement, but the facts to which it refers, that makes it significant in the light of the present problem.

In the *Island Creek Fuel* case the Kentucky court was forced to decide whether this permanency could be interpreted in a more liberal sense. The Kentucky Court first pointed out that permanency meant use and employment in a state with consistent continuity. Then starting with the parent company and working down to the operations of the appellee's boats and barges the court said:

"We, therefore, do not limit our view to the accidents of appearance but look at all the facts which have inherent or relative significance. But correlating and coordinating these facts, we find a consistent, ordered and coherent whole. The fact then remains that the tugs and barges, an indispensable part of the whole as designed by appellee or its parent company in the operation of its business, are as necessarily present in Kentucky as the loading and unloading facilities have their situs in Ohio and West Virginia, respectively. This continuity and consistency of presence in Kentucky attaches such permanency as to take it out of the zones of mere transiency or a sporadic and temporary presence. The parts of this whole receive the protection of this state. We conclude that they have acquired a tax situs here."¹²

The fact that these boats and barges were at no time in the domiciliary state leaves undetermined the right of the non-domiciliary state to tax when part of the barge run is in the domiciliary state. The power of the domiciliary state to tax all units when the visits by them out of the state are for fractional periods of the year only has been upheld, whether such visits were regularly scheduled or not.¹³ The taxing power of the states visited by units which have already been taxed by the domiciliary state has apparently never been directly ruled on by the courts, nor does the present case control its solution.¹⁴

The handling of the problem presented in the *Island Creek Fuel* case does not strike one as being unjust or unreasonable. It is likely that an average barge line regularly and necessarily passing through a state in the course of its business will not have barges in the state at all times throughout the year; it is likely that a railroad regularly passing through a state in the course of its business will have some cars in the state at all times. Yet the reason for taxing the railroad applies with equal force to the regularly operating barge line. Each should bear its fair share of the tax burden; the property of each receives the protection of the state throughout the year.¹⁵ The fact that the barge line may not have boats in

¹¹ *Id.* at 297.

¹² *Reeves v. Island Creek Fuel and Transportation Co.*, 313 Ky. 400, 406, 230 S.W. 2d 924. — (1950).

¹³ *New York Central Railroad v. Miller* 202 U.S. 584 (1906); *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292 (1944).

¹⁴ Although there would be permanency of the sort found in the *Island Creek Fuel* case, the problem of double taxation would arise since the domiciliary state could tax the entire value.

¹⁵ *Commonwealth v. Union Pacific Railroad Co.*, 214 Ky. 339, 283 S.W. 119 (1926).

the state *continuously* is a mere superficial difference under these circumstances.¹⁶

The barge line in the *Island Creek Fuel* case travels a single route almost exclusively and does so consistently, even though not on a rigid schedule. The position of a barge line which is an independent contract carrier without taxable units in the state at all times is, therefore, not necessarily determined.

In the railroad cases it was held not to matter that the company had no offices, no regular schedule or runs in the state so long as the cars as a whole received the protection of the state continuously throughout the tax year. The average number of cars used in the state during the year was found to be the proper basis for determining the tax.¹⁷ With the concepts of permanency and continuity suggested in the *Island Creek Fuel* case it could be that barge lines following no regular route but whose boats and barges consistently pass through the state in the conduct of its business are in an analogous position and subject to a tax apportioned on the basis of the average number of units. But to lift these concepts without the accompanying facts might result in the distortion of a reasonable fiction.

The *Island Creek Fuel* case does not hold that personal property can acquire tax situs merely by temporary and irregular, though repeated, visits. But rather it holds that visits which appear to be temporary and irregular when viewed separately may be sufficiently necessary, repeated and certain to constitute permanency when viewed as a whole. The same could probably be found true of an independent carrier under some circumstances, as where the line could operate logically or profitably only in a certain trade or between certain points, or as where a base of operations made it necessary for the barges to travel in part of the state on all trips. If this be granted, somewhere beyond a line must be drawn. Just how far the court would have been willing to carry this fiction is not indicated, but a reasonable application as such criteria as *repeated*, *necessary* and *certain* would seem to be determining.

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¹⁶ It might, however, allow the domiciliary state to tax the entire value. Under *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1900) the domiciliary state was found to have the power to tax property out of the state during the entire year if it had not acquired tax situs elsewhere. If, therefore, the domiciliary state refused to acknowledge the property's acquisition of out of state situs, it would possibly retain its power to tax the property.

¹⁷ *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149 (1900); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899).