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Taxation of Vessels

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that the court erred in holding that a donation may be tacitly revoked. It seems that in every case the intention to revoke should be clearly and expressly shown, and when the immovable property is concerned, the agreement to revoke should be reduced to writing.

LELAND H. COLTHARP, JR.

**TAXATION OF VESSELS**—For many years W. G. Coyle & Company, a Louisiana corporation, had conducted a marine terminal and water traffic operations at New Orleans. In 1934 it began also to operate as a towing concern on the Gulf Intracoastal Waterway. In 1937 DeBardeleben Coal Corporation, a Delaware corporation, acquired all of the assets of the Louisiana corporation through merger. The marine terminal and towing operations were continued in the trade name used by the Louisiana corporation for those enterprises. These commercial enterprises were carried on in substantially the same manner before and after the merger. At all times New Orleans was the principal operating base of twelve vessels; and they were never in state of Delaware. Many factors clearly distinguished it from their other ports of call, each accentuating the greater importance of New Orleans in the operation of the vessels. Each vessel was regularly engaged in interstate commerce. None of the vessels ever visited

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1. This note is not concerned with the problem presented by eight additional barges which were operated solely within Alabama and were important in the decision of several points of the case. The discussion will be limited to those vessels engaged in interstate commerce between New Orleans and ports in other states. See American Barge Line Co. v. Cave, 68 F. Supp. 30, 40 (E.D. La. 1946).

2. See the trial judge's findings of fact, Nos. 8, 9, 10, 11, 14 (Id. at 51). He found that the Delaware corporation had continued the operations of the Louisiana corporation without material change or interruption, using the name "Coyle Lines" to benefit from the business reputation of the Louisiana corporation. New Orleans was found to be the location of the main office from which Coyle Lines were controlled, the only machine and repair shop, the place where crews were paid and took their weekly twenty-four hour lay-off, the place where vessels were usually fueled, and the place where all scheduled general repairs or minor "voyage" repairs were made. The Coyle Lines common carrier water transportation business was operated out of New Orleans with two Coyle Lines tugs and ten Coyle Lines barges, to which it added approximately eight chartered tugs and many barges, depending upon the tonnage offered for transportation.

3. Id. at 40. It also affirmatively appears from the opinion of the trial judge that each of the vessels were absent from the port of New Orleans for the greater part of the year. Since New Orleans was the only Louisiana port of consequence in the operation of the lines, it would seem to follow, though there is no express finding of fact on that point, that the vessels were each beyond the borders of Louisiana for the greater part of the year. Taking the year 1944 as typical, the court found that of the total number
Delaware. The trial court found that the tax situs of the vessels, while owned by the Louisiana corporation was, under settled principles, in Louisiana at New Orleans. The court said that the Delaware corporation's practice in continuing to conduct the business in the same manner, and in never using the vessels in such a way that they would change their situs, was considered as confirming Louisiana "as the already existent tax situs of all of said movable property, and whatever additions were then or subsequently made thereto, to so remain unchanged, until there was effected the legally-possible establishment of another tax situs for all or a portion thereof, by the permanent removal to another state of all or part of said property."\(^5\)

The Circuit Court of Appeals held that the trial court had properly found the situs of the vessels to be in Louisiana. No reference was made to the confirmed situs doctrine upon which the trial court had apparently based its conclusion, and had of hours in the year, the time spent in New Orleans by each vessel was in no case greater than 38%. One of the tugs spent only 11% of the year in New Orleans. Id. at 42.


5. Id. at 49. But the trial judge permitted the taxpayer to recover under La. Act 330 of 1938 [Dart's Stats. (1939) §§ 8444.1-8444.3], providing for payment under protest and action to recover taxes improperly assessed. His conclusion was apparently based on the fact that the assessment included the eight barges which remained in Alabama for the entire tax year (see note 1, supra) and the fact that the tax was levied under a statute providing for apportionment (La. Act 170 of 1898, § 29, as last amended by La. Act 59 of 1944, § 1), taxes on vessels not normally being apportioned. See trial judge's conclusions of law, Nos. 7-9. 68 F. Supp. 30, 52. As to these conclusions, the Circuit Court of Appeals said: "The fact that the amount assessed against DeBardeleben was arrived at by including the eight barges in Alabama is not ground for declaring the assessment against that company void." Ott v. DeBardeleben Coal Corp., 166 F.(2d) 509, 514 (C.C.A. 5th, 1948). "The erroneous inclusion of property in an assessment is ground for reduction, not cancellation." Id. at 515.

The Circuit Court of Appeals noted the contention of DeBardeleben that the tax on a proportionate basis was void when levied on vessels (Id. at 511), and, in connection with vessels belonging to other litigants, observed that "so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or inland waterways (Id. at 514)." It did not, however, state any reason for differing with the trial court's conclusion that the assessment of so many of DeBardeleben's vessels that had their sole situs in Louisiana (under the trial court's confirmed situs theory quoted above) was void, if the assessment was made under the Louisiana statute which clearly provides for apportionment. In any event, there seems to be little merit to a contention of nullity on that ground. If Louisiana may tax the full value of the vessels, as it could do if it were their sole situs, no constitutional objection would appear to prevent the taxation of a portion of their value under the statute.

Since the Circuit Court of Appeals rejected these reasons for holding the tax invalid, and agreed with the trial court that the tax situs was in Louisiana, it held that the tax was properly imposed.
discussed at some length in its opinion.\textsuperscript{6} Ott \textit{v. DeBardeleben Coal Corporation}, 166 F. (2d) 509 (C.C.A. 5th, 1948).\textsuperscript{7}

Elementary principles of constitutional law place jurisdictional limitations on the power of a state to tax.\textsuperscript{8} These are embodied in the doctrine of situs. A situs within the state is indispensable to its power to tax. The term is given literal application in the case of immovable property, the fixed location of

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\item \textsuperscript{6} American Barge Line Co. \textit{v. Cave}, 68 F. Supp. 30, 48-49 (E.D. La. 1948). This confirmed situs doctrine was not repeated as an articulate conclusion of law at the end of the opinion. The only articulate conclusion of law which mentioned the tax situs of the DeBardeleben vessels simply stated:

"6. The tax situs of all the DeBardeleben Coal Corporation's Coyle Lines watercraft employed in its common carrier water transportation operations out of the port of New Orleans, was in the state of Louisiana alone." Id. at 52.

It seems probable that this conclusion was reached on the theory that the pre-merger situs was confirmed by operations after merger similar to those before merger, for the trial court included in its articulate findings of fact four statements concerning the pre-merger operations of the business. Findings of fact Nos. 5-8. Id. at 51.

These included the following: "8. From 1937 on, the said Coyle operations were continued without interruption or material change under the name of the Coyle Lines, as the Marine Division of said DeBardeleben Coal Corporation was designated by it, in order to benefit by the long-established worldwide business reputation enjoyed by W. G. Coyle, Inc."

These findings of fact, coupled with the discussion of the theory of confirmed situs in the opinion, make it apparent that the theory was an important, if not the decisive factor in influencing the decision of the trial court that the situs of the vessels was in Louisiana.

\item \textsuperscript{7} Certiorari denied 68 S.Ct. 1529 (U.S. 1948). These were eleven consolidated cases, involving similar issues but presenting substantially different facts. Though footnote reference will be made hereafter to the courts' opinions on points involving several of the cases, this note is primarily concerned with the tax liability of DeBardeleben Coal Corporation, and that only with regard to the vessels which moved between New Orleans and ports of other states. For that reason, the highly complicated facts in the other cases and the other issues in the DeBardeleben case will not be restated. It is felt that their omission will not hinder an accurate analysis of the problem around which this note is centered.

\item \textsuperscript{8} "All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident." Marshall, C.J., in \textit{McCulloch v. Maryland}, 17 U.S. 316, 429, 4 L.Ed. 579, 607 (1819).

Therefore, "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Case of the State Tax on Foreign-Held Bonds, 82 U.S. 300, 319, 21 L.Ed. 179, 186 (1873).

The principle seemed so elementary that no constitutional provision was thought necessary to form its basis. Decisions on the point antedate the Fourteenth Amendment, which would appear necessary to its application to the states. [See \textit{Hays v. Pacific Mail Steamship Co.}, 58 U.S. 596, 15 L.Ed. 254 (1855), striking down a tax imposed by California on a vessel plying between ports of California, Oregon and New York. The vessel was owned by a domiciliary of New York.] Of \textit{Saint Louis v. Wiggins Ferry Company}, 78 U. S. 423, 20 L.Ed. 192 (1871); \textit{Morgan v. Parham}, 83 U. S. 471, 21 L.Ed. 303 (1873); and \textit{Northern Central Railway Company v. Jackson}, 74 U. S. 262, 19 L.Ed. 88 (1869), Thomas Reed Powell writes: "The three cases just considered were decided after the fourteenth amendment was a part of the constitution. . . . There is no hint in the opinions that the court was using
which makes it immune to the multitude of problems which beset the determination of the tax situs of movables. In an effort to simplify their solution, the Roman rule *mobilia sequuntur personam* was extended beyond its original scope\(^9\) to apply to the field of taxation. This fiction of law fixes the location of the movable at the domicile of its owner. In the taxation of corporeal movables, need for its application usually arises where the movable has been moved from one state to another during the tax year. Even in those cases a series of decisions has substantially modified the doctrine by creating an exception permitting apportionment of taxes among states in which the movable remained for a part of the year. It is settled that this exception applies to the rolling stock of railroads and land transportation enterprises,\(^{10}\) so the largest class of movables likely to move from one state to another at frequent intervals has been excluded from what formerly was the general rule, but now has been so limited as to make it more in the nature of an exception. Two large classes of movables commonly crossing state lines remain aircraft and vessels. The doctrine has never been applied to vessels,\(^{11}\) and a decision of the United States Supreme Court makes its application to aircraft improbable.\(^{12}\)

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\(^9\) "The rule or fiction of law that personal property, more especially choses in action, has no situs away from the domicil of the owner at which it is deemed to be present, originated, according to Savigny, in Rome. . . . It was never invented with a view to its being used as a rule to govern and define the application and scope of taxation, nor was it intended to have any other meaning than that, for the purpose of the sale and distribution of property, any act, agreement, or authority which is sufficient in law where the owner resides, shall pass the property as the place where the property is, more especially to facilitate the distribution of decedents' estates by enabling owners to dispose of their property without embarrassment from their ignorance of the laws of the country where it is." Bouvier, Law Dictionary (Baldwin's Student ed. 1934) 1164.

\(^{10}\) Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1890) established this doctrine and has been consistently followed.


\(^{12}\) "The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these States. Although a part of the taxing system of this country, the rule of apportionment is beset with difficulties, but at all events it grew out of and has established itself in regard to land commerce." Frankfurter, J., in Northwest Airlines v. Minnesota, 322 U.S. 292, 300, 64 S.Ct. 960, 964, 88 L.Ed. 1283, 1288 (1948), upholding a full-value, unapportioned tax on aircraft by the state of the owner's domicile, though the planes were out of the state for a substantial part of the tax year."
Where, as in the instant case, a vessel has been engaged in interstate or foreign commerce during the tax year, the general rule of *mobilia sequuntur personam* applies and the vessel may be taxed only at the domicile of the owner.13 Prior to the De-Bardeleben decision this rule was thought to be subject to one exception: a vessel which remained within the confines of a single state for the entire tax year was taxable in that state, irrespective of the owner's domicile or its employment in interstate commerce.14 Such factors as registration,15 "home port"16 and failure or inability of the vessels physically to enter the state of the owner's domicile17 have been expressly held to be immaterial.

In the instant case, the district court recognized that the tax situs of the vessels had been in Louisiana prior to the merger of the Louisiana and Delaware corporations.18 This was doubtless true, because the vessels were engaged in interstate com-


15. Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 26 S.Ct. 679, 50 L.Ed. 1082 (1906); 2 Cooley, Taxation (4 ed. 1924) § 453. See also Southern Pacific Co. v. Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96 (1911); 7 Fletcher, Cyclopaedia Corporations (1921) § 4614.

16. Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 26 S.Ct. 679, 50 L.Ed. 1082 (1906) clarified the law on this point. Previously courts had loosely used the term "home port" where the port was at the domicile of the owner, and their language might be interpreted to indicate that the "home port" was a controlling factor. In the cited case the two were in different states, and the conflict was resolved in favor of the state of domicile. This is noted by Stone, C.J., dissenting in *Northwest Airlines v. Minnesota*: "That vessels were to be taxed exclusively at the home port, whether or not it was the domicile was rejected in Ayer & Lord Tie Co. v. Kentucky ... and Southern Pacific Co. v. Kentucky ... and has never been revived." 322 U.S. 292, 314, 64 S.Ct. 950, 961, 88 L.Ed. 1283, 1297(n) (1948). See also Saint Louis v. Wiggins Ferry Co., 78 U.S. 423, 431, 202 L.Ed. 192, 194 (1871), in which the court said: "The solution of the question, where her home port is, when it arises, depends wholly upon her owner's residence."


18. At the time of the merger Louisiana was "the already existent tax situs of all of said movable property ... ." American Barge Line Co. v. Cave, 68 F. Supp. 30, 49 (E.D. La. 1946).
merce and the domicile of their owner was Louisiana. That rule and no other could justify their taxation in Louisiana. Consistent application of the same rule would render them taxable solely in Delaware when the two corporations merged and the Delaware corporation survived, for then the domicile of the owner would be in Delaware. But the district court held that the continued operation of the vessels in the same manner as before the merger had the effect not only of continuing this existing situs of the property belonging to the Louisiana corporation before the merger, but also fixed in Louisiana the tax situs of "whatever additions were then or subsequently made thereto." Apparently this situs would continue "until there was effected the legally-possible establishment of another tax situs for all or a portion thereof, by the permanent removal to another state of all or a part of said property." This language would seem to indicate that the fiction of law which located the property in Louisiana for tax purposes solely because Louisiana was the domicile of the owner could not operate to remove the tax situs to Delaware when that state became the domicile of the owner. The power of Delaware to tax and the double taxation of an instrumentality of commerce which would result was not before the court, but it would seem that Delaware's power to tax is unquestionable under settled principles of law.

The Circuit Court of Appeals interpreted the district court's opinion as follows: "With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that . . . its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tugboats and barges having a tax situs there could be taxed by the City of New Orleans." Another part of the opinion stressed the fact that "None of the Coyle Lines watercraft ever permanently left the original situs in Louisiana." Was this fact controlling the finding of the Circuit Court of Appeals that "the Court below was correct in holding that the tugboats and barges of DeBardeleben . . . were properly taxed there?" In this connection it should be noted that the Circuit Court of Appeals recognized that

19. Ibid.
20. See note 17, supra.
22. Id. at 512. Italics supplied.
23. Id. at 514.
24. The following excerpts are found in 166 F.(2d) 509, 514.
"Under the decisions the regular or irregular stops at ports in nondomiciliary States of watercraft moving in interstate commerce do not establish tax situs in such states, and such watercraft remain taxable only by the State of the owner's domicile."

"Neither enrollment of a vessel at a particular port, even though the vessel makes regular calls at the port of enrollment, . . . nor benefits received at a port, such as fire protection and wharves for loading and unloading accorded to every vessel, of themselves confer the power to tax upon the State of the port."

"The fact that none of the watercraft owned by . . . DeBardeleben has been within the State of Delaware, the State of the owner's domicile, does not of itself control the right of that State to tax the property. Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries."

"That no tax has been assessed by the State of the owner's domicile has no bearing upon the right of another State to tax. It is only when the personal property has acquired a tax situs within a State other than the owner's domicile that it may be taxed there."

What, then, was the basis of the decision? Was it the failure of the vessels permanently to leave Louisiana, as seems to be suggested by the language first quoted in this paragraph?25 Previously, the power of the non-domiciliary state to tax was thought to be based not upon failure of the vessel permanently to leave, but rather upon the continuous, uninterrupted presence of the vessel within the borders of the taxing state.26 Otherwise, the

25. See note 21, supra.
26. "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," Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 309-310, 25 S.Ct. 686, 689-690, 49 L.Ed. 1059, 1063 (1905).

"As, in the case at bar, the owner of the vessels was domiciled in Illinois and the vessels were not employed exclusively in commerce between points in the state of Kentucky, but were engaged in traffic between that state and the ports of other states, including Illinois, it seems obvious that, as a question of fact, they had no permanent situs in the state of Kentucky. . . ." Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 423, 26 S.Ct. 679, 683, 50 L.Ed. 1082, 1087 (1906).

"If a vessel is engaged in traffic between the ports of two or more states, more or less continuously, it would seem that it can acquire no actual situs other than the home port, i.e., the domicile of the owner." 2 Cooley, Taxation (4 ed. 1924) § 451.
vessel would remain liable to taxation by the domiciliary state, applying a rule of taxation thus restated by the Supreme Court in a footnote to *Northwest Airlines v. Minnesota*, a case involving airplanes: "[N]o judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks." (Italics supplied.)

Perhaps the decision was grounded upon the reason advanced by the district court and not repeated by the circuit court of appeals: that a change of domicile would not effect a change of tax situs of the vessels so long as the vessels were used in the same manner as they had been prior to the change of domicile. This seems illogical if the sole basis for taxation is domicile. The extension of the power to tax to additions made to the property subsequent to the change of domicile is even more wanting in theoretical foundation.

It is possible, however, that without accepting the reasoning of the district court, the Circuit Court of Appeals thought it unwise to assume that the law provided that a vessel engaged in interstate commerce could not acquire an actual situs in any non-domiciliary state which it left for any part of the tax year. There had been continuous presence in the non-domiciliary state in *Old Dominion Steamship Company v. Virginia*, in which the Supreme Court had found a situs away from the domicile. Perhaps actual situs may be obtained by something less than continuous, uninterrupted presence, yet more than the aggregate of facts found to be inadequate in the decisions which have refused to find a situs away from the domicile. Though no

27. See note 13, supra.
30. 2 Cooley, Taxation (4 ed. 1924) § 451, quoted in note 26, supra.
32. See note 23, supra.
33. See notes 15-17, supra. In the latest expression of the Supreme Court on the subject, the court, rejecting the contention that the actual situs of vessels was in the state of registration in which was located the home port at which each vessel regularly called, said: "The facts which have been..."
standard for future guidance appears in the opinion, the *DeBardeleben* case may be the first of a series which will come to redefine the point at which situs is acquired in the non-domiciliary state. This development would seem desirable. If the power of taxation is to be "exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property," it seems clear that a distant state which has done no more than suffer a corporate owner to exist has less justification for taxing property than has the state in which the property has remained for a substantial part of the year.

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relied upon to show an actual situs of these ships in the port of New York . . . fall short of the facts relied upon for a like purpose [in a number of previous cases], where the judgments were that they were insufficient to create a taxable situs other than that of the owner. The facts shown by no means bring the case under the authority of Old Dominion S.S. Co. v. Virginia, where it was held that the ships had acquired an actual situs." Southern Pacific Co. v. Kentucky, 222 U.S. 63, 77, 32 S.Ct. 14, 18, 56 L.Ed. 96, 102 (1911). Does this indicate that there is a middle ground in which an actual situs might be found between the facts of the *Old Dominion* case and the "insufficient" facts relied on in the other cases?

34. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202, 26 S.Ct. 36, 37, 50 L.Ed. 150, 153 (1905).