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The Original Package Doctrine

CONSTITUTIONAL LAW

The Original Package Doctrine

A manufacturer contracted to purchase raw materials from foreign and Filipino suppliers through the latter's American agents. The merchandise was identified with and appropriated to the purchase contract from the moment of shipment.[1] The merchandise was consigned to brokers and bankers, part on order, part on straight bills of lading, with instructions to notify the manufacturer;[2] it was cleared through customs in the consignee's name and then reconsigned to the manufacturer. While stored in original packages in a warehouse at the purchaser's factory pending use in the manufacturing process,

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11. James v. Williams, 169 Tenn. 41, 82 S.W. (2d) 541 (1935); In re Clough, 28 Ariz. 204, 236 Pac. 700 (1925).
12. Abandonment. Adoption of McGill, 49 Pa. D.&C. 374 (1943); Petition of Elkendahl, 321 Ill. App. 457, 53 N.E. (2d) 302 (1943); Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907). Drunkenness. Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903).
13. D.C. Code, (1940) tit. 16, c.II, §§16-201 to 16-207.
14. In its reasoning as to the legislative policy the court stated, "'***It goes without saying that such people (illegitimate) are more apt to become a burden upon organized society than cooperating members of it.' Mangold, "Children Born out of Wedlock" (1921) 131." p. 651 n. "'The number of children who are housed in asylums or boarded out at the expense of the public is evidence enough of the problem and of the need.' Information supplied by the Board of Public Welfare of the District of Columbia." p. 650. "It was with all these considerations in mind that congress repealed the old statute and enacted a new one for the District of Columbia***." 6. 650.
15. Pound, "The Spirit of the Common Law" (1921) 189.

1. Ground given in distinguishing Waring v. City of Mobile, 8 Wall. 122 (U.S. 1868) (consignee held to be the importer). See principal case at 876 n. 4.
2. 46 Stat. 721 (1930), 19 U.S.C.A. § 1483 (1) (1934) provides that merchandise imported into the United States "shall be held to be the property of the person to whom the same is consigned." The court did "not deem this provision to be significant." Principal case, at 876 n. 3. " . . . the Constitution gives Congress authority . . . to lay down its own test for determining when the immunity ends." Id. at 878. The Board of Tax Appeals considered the provision. Hooven & Allison Co. v. Evatt, 26 Ohio O. 25 (1943).

the goods were assessed for a nondiscriminatory state ad valorem property tax. The levy was protested under U.S. Const. Art. 1, § 10, cl. 2. State Board of Tax Appeals denied review.[3] State Supreme Court affirmed.[4] Certiorari granted. Held: Imports[5] for manufacture are constitutionally immune from state taxation when "held by the importer[6] in the original packages and before they are subjected to the manufacture for which they were imported."[7] Dissent: Imports for use of the importer are not constitutionally exempt from state taxation "after they have reached the end of their import journey."[8] HOOVEN & ALLISON CO. v. EVATT, Tax Commr., 65 Sup. Ct. 870 (1945).

3. Hooven & Allison Co. v. Evatt, Board of Tax Appeals 26 Ohio O. 25 (1943).
4. Hooven & Allison Co. v. Evatt, 142 Ohio St. 235, 51 N.E. (2d) 723 (1943) (decision on theory that sale occurred after imports arrived or, that at least goods were so incorporated with mass of property of state as to destroy immunity) relying on Waring v. City of Mobile, 8 Wall. 122 (U.S. 1868).
5. "Imports are articles brought into the United States from without the country," i.e. a place not "organized by and under the Constitution." Principal case at 879, 880, 881. The definition of "country" is an application of the doctrines of "incorporation" developed by Justice White in Downs v. Bidwell, 182 U.S. 244 (1900) to rationalize exceptions in the Insular Cases. See Burgess, "The Decisions in the Insular Cases" (1901) 16 Pol. Sci. Q. 486; Coudert, "The Evolution of the Doctrine of Territorial Incorporation" (1926) 40 Am. L. School Rev. 801; Swisher, "American Constitutional Development" (1943) 474-482. Under this definition, articles brought from the Philippines were held to be imports. But see Justice Reed, principal case at 886, defining an import as "an article brought from beyond the sovereignty or jurisdiction of the United States." Query: Is it logically defensible to say that there may be an import from a country to which there cannot be an export? Cf. Dooley v. United States, 182 U.S. 222, 234 (1901).
6. An importer is the person who "is the efficient cause of the importation." Principal case at 876. Under this definition, "the time when the title passes . . . is immaterial." Ibid. Similarly, immaterial in determining where interstate commerce ends. East Ohio Gas Co. v. Tax Commission, 283 U.S. 465 (1930); National Labor Relations Bd. v. Fainblatt, 306 U.S. 601 (1937).
7. Principal case at 877, 878. On the difficulties inherent in the conjunctive test see dissent by Justice Black, principal case at 889. Cf. termination of interstate commerce under a test of "the purpose for which it was imported." General R. Signal Co. v. Virginia, 246 U.S. 500 (1917).
8. Principal case at 888. Justices Black, Rutledge dissenting; Justices Douglas and Murphy joining in the dissent on this point. The suggested test would apply the rule in Brown v. Houston, 114 U.S. 622 (1885), to foreign imports.

   Both the majority and the dissenting opinions purport to be grounded on the rule in Brown v. Maryland, 12 Wheat. 419 (U.S. 1827). See principal case, Justice Stone at 878; Justice Black at 887-888. It is to be noted that further support for Justice Black's contention that his dissent is in accord with Brown v. Maryland supra found that case at 446; "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable

U.S. Const. Art. 1 § 10, cl. 2 provides that "No state shall, without consent of Congress,[9] lay any imposts or duties[10] on imports or exports,[11] except what may be absolutely necessary for executing its inspection laws."[12] So long as articles retain their "character as imports, a tax upon them, in any shape, is within the constitutional

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to the existence of the entire thing, then, as importation itself." See also id. at 448. It is suggested that the emphasis throughout Justice Marshall's opinion is not upon whether the goods were in the original package, nor yet whether they had lost their distinctive character as imports, but whether an act had occurred on the part of the importer by which "it has become incorporated and mixed up with the mass of the property in the country." Id. at 441. Importations were made for the sake of the sale, but the importer might instead keep the article for his own use. The immunity did not continue after the intent to use became manifest. Breaking the package was evidence of the intent to convert to his own use; use by the importer was an alternate evidence that the protected privilege of sale was not going to be exercised. The "character as an import" as the determining factor was apparently developed by Justice Field in Low. v. Austin, 13 Wall. 29, 34 (U.S. 1871) and Welton v. Missouri, 91 U.S. 275 (U.S. 1875). Cf. Kallenbach, "Federal Cooperation with the States Under the Commerce Clause" (1942) 52-60; Sharp, "Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions" (1933) 46 Harv. L. Rev. 593, esp. 604-610.

9. Madison moved to make the prohibition absolute on the ground that if " . . . the States interested in this power by which they could tax imports of their neighbors passing thro' their markets, were a majority, could get consent," it "would revive all the mischiefs experienced from the want of a General government over commerce." Documents of the Formation of the Union of the American States, H.R.Doc. No. 398, 69th Cong., 1st Sess. (1927) 629-631. Also, Warren, "The Making of the Constitution" (1928) 557-559.

   Congressional consent never expressly given. See De Bary and Co. v. Louisiana, 227 U.S. 108 (1913) (consent to impose license tax on dealers selling imported wines implied from the Webb-Kenyon Act).

10. "In the Constitutional Convention, there was question of the meanings of 'duties,' 'imports'. and 'excises'." The question was not answered. Norton, "The Constitution of the United States: Its Sources and Its Application" (6th ed. 1943) 43-47.

    Duties, imposts, and excises have in the constitution been used in antithesis to direct taxes. U.S. Const. Art. 1, § 8, cl. 1 and § 9, cl. 4. All property taxes are at present held to be direct taxes. Pollock v. Farmers' L. & T. Co., 157 U.S. 601 (1895). See note 13 infra.

11. Justice Marshall "supposed the principles . . . to apply equally to importations from a sister State." Brown v. Maryland, 12 Wheat. 419, 441 (U.S. 1827). Overruled in Woodruff v. Parham, 8 Wall. 123 (U.S. 1868) inapplicable to imports from another state).

12. 28 Am. Jur. 850, "Inspection Laws" § 2. Invalid where fee imposed is excessive. D. E. Foote & Co. v. Stanley, 232 U.S. 494 (1914). Whether charge is excessive is a Congressional question. Neilson v. Garza, 17 Fed. Cas. 1302 No. 10,091 (E.D. Tex. 1876), approved Patopsio Guano Co. v. North Carolina Bd. of Agriculture, 171 U.S. 345 (1898).

prohibition."[13] Thus, the original package doctrine[14] was developed as a test of the "point of time when the prohibition ceases, and the power of the state to tax commences."[15] Early decisions restricted the doctrine to foreign commerce and the imports-and-exports clause,[16] after developing the relation of the commerce clause to state taxation,[17] the Court extended the doctrine to interstate commerce.[18]

The application of the original package rule under the imports-and-exports clause and the commerce clause is not uniform.[19] Substantially, two rules exist: both operate to render invalid state taxation of the privilege of selling imported goods while they are in the hands of the importer and in the original packages.[29] Under the

13. Low v. Austin, 13 Wall. 29, 34 (U.S. 1871); Willicuts v. Bunn, 282 U.S. 216 (1930), 71 A.L.R. 1260, 1268 (1931) E.g.: Property tax on article, Webber v. Virginia, 103 U.S. 344 (1880). License tax on importer, Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933); Brown v. Maryland, 12 Wheat. 419 (U.S. 1827). Occupation tax on auctioneer measured by commissions on sales of imports, Cook v. Pennsylvania, 97 U.S. 566 (1878). Stamp tax on bill of lading for goods, see Almy v. California, 24 How. 169, 174 (U.S. 1860). Fine for unlawful possession, People v. Buffalo Fish Co., Ltd., 62 N.Y.S. 543 (1899), 164 N.Y. 93, 58 N.E. 34 (1900).

14. Original packages consist of the boxes, cases, or bales in which the goods are shipped and not the smaller packages therein contained. May v. New Orleans, 178 U.S. 496 (1900); Mexican Petroleum Corp. v. South Portland, 121 Me. 128, 115 Atl. 900 (1922), 26 A.L.R. 965, 971 (1923).

"According to the celebrated original package doctrine . . . importation is not over so long as the goods are in the original package. Hence, a state has no power to tax imports until the original package is broken or there has been one sale while the goods are still in the original package." Willis, "Constitutional Law of the United States" (1936) 268-269. See statement of the rule in Low v. Austin, 13 Wall. 29, at 34 (U.S. 1871). Or one sale, introduced in Watring v. The Mayor, 8 Wall. 110 (U.S. (1868).

15. Brown v. Maryland, 12 Wheat. 419, at 441 (U.S. 1827). Marshall insisted that the prohibitory clauses had reference to taxing power of states and not to their power to regulate commerce. Gibbons v. Ogden, 9 Wheat. 1, at 198 (U.S. 1824). Willis, "Gibbons v. Ogden, Then and Now" (1940) 28 Ky. L. J. 280. Both the commerce clause and the imports-and-exports clause determined the decision in Brown v. Maryland, supra at 448.

16. Woodruff v. Parham, & Wall. 123 (U.S. 1868). Note 11 supra.

17. License Cases, 5 How. 504 (U.S. 1847); Woodruff v. Parham, 8 Wall 123 (U.S. 1868); Hinson v. Lott, 8 Wall. 148 (U.S. 1868). It is suggested that the holding in Woodruff v. Parham, supra in so far as it overruled Marshall's definition of imports, began the divergence in the original-package rules between interstate and foreign commerce.

18. Austin v. Tenn., 179 U.S. 343 (1900); Leisy and Co. v. Hardin, 135 U.S. 100 (1890). For the relation of the extension to the development of the police power of the states see Grant, "State Power to Prohibit Interstate Commerce" (1937) 26 Calif. L. Rev. 34.

19. Dowling and Hubbard, "Divesting an Article of Its Interstate Character" (1921) 5 Minn. L. Rev. 100, 253. E.g. property, use,

commerce clause state property taxation of goods imported from another state is valid if the goods have reached their destination or are at rest, whether in the original package or not, unless the tax discriminates against the goods solely because of their origin or otherwise burdens interstate commerce.[21] Under the imports-and-exports clause not even a property tax can be levied on goods imported from outside the country so long as they remain in the original packages and are in the hands of the importer.[22] Even under the imports-and-exports clause, the original package doctrine obviously is inapplicable to certain kinds of property.[23] In such cases, the determining factor in deciding whether the property has lost its status as an import appears to be "whether it has become mingled with other property in the state."[24]

The difference has been rationalized as the resultant of an absolute tax prohibition as opposed to a prohibition against regulation effected through taxation.[25] The dissenting opinion, by implication, construes the imports-and-exports clause as another recurrence to the national prerogative to regulate foreign commerce contained in the commerce clause.[26] Accordingly, a substantive test for the termina-

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and sales taxes. Brown, "Federal and State Taxation" (1933) 81 U. of Pa. L. Rev. 247.

20. Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1932), 85 A.L.R. 699, 735 (1933) (interstate); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933) (foreign).

22. Brown v. Houston, 114 U.S. 622 (1885); Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1934); Edelman v. Boeing Air Transport, 289 U.S. 249 (1932). The fact that a state tax is nondiscriminatory and general in its operation does not save it from being declared invalid if it directly burdens interstate commerce. See J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 117 A.L.R. 429, 444 (1938).

22. May v. New Orleans, 178 U.S. 496 (1900).

23. E.g. timber, cattle, oil, gas. Trickett, "The Original Package Ineptitude" (1917) 22 Dick L. Rev. 63; Foster, "What is Left of the Original Package Doctrine?" (1916) 1 So. L. Q. 303.

24. Cf. Marshall's test cited supra note 8. Tres Titos Ranch Co. v. Abbott, 44 N. M. 556, 105 P(2d) 1070 (1940), 130 A.L.R. 963, 969 (1941).

25. "The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article, because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce." Sonneborn Bros. v. Cureton, 262 U.S. 506, at 508 (1922); American Steel and Wire Co. v. Speed, 192 U.S. 500 (1903); Baldwin v. G. A. Seelig, 294 U.S. 511 (1935), 101 A.L.R. 55, 64 (1936). Cf. Marshall's position, supra note 15. The act of laying and collecting taxes, duties, imposts and excise is an exercise of the taxing power and not of the power to regulate commerce. Cox v. Lott (State Tonnage Tax Cases), 12 Wall. 204 (U.S. 1870). It is submitted that this identification with the taxing power is the result of the struggle to harmonize the commerce clause and the taxing power. See arguments of cases cited supra note 16.

26. Principal case at 888. Cf: "The power is buttressed by the express provision of the Constitution denying the States authority to lay imposts and duties on imports and exports." University

tion of the tax immunity would consider the effect of the tax upon foreign commerce[27] rather than an immunity intrinsic to an article because of its form as an original package. The reason for two original package rules ceases to exist.

A novel feature of the instant decision is the recognition of the immunity of an import for manufacture in the hands of the ultimate consumer.[28] The rule was laid down in relation to imports for sale,[29] justified on the theory that the person who paid the duties purchased a tax-immune privilege to sell.[30] It was not intended that the importer who brought in goods "for his own use" should thereby be enabled to "retain much valuable property exempt from taxation."[31] Since 1827, the purpose of importation has changed as a concomitant of the shift from an agricultural to an industrial society.[32] Present business practices leave the bulk of imports in the hands of importers

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of Illinois v. United States, 289 U.S. 48, at 56 (1932); " . . . the taxing power is a distinct power; that . . . is distinct from the power to regulate commerce." Id. at 58; " . . . the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power." Id. at 58. See also, Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment" (1941) 25 Minn. L. Rev. 432; Gavit, "The Commerce Clause of the United States Constitution" (1932) Appendix A; Kallenbach, op. ct. supra note 8, 377; and supra note 9.

27. E.g. "whether the tax challenged regulates or burdens (foreign) commerce." See again note 25 supra.
The majority opinion professes concern for "matters of substance not of form" and recognizes that the "extent of . . . immunity from state taxation turns on the essential nature of the transaction; considered in the light of the constitutional purpose, and not on . . . formalities . . . " Principal case at 876. See, however, the basis given for regarding the presence of original wrappings as substance rather than form. Id. 877.

27. See principal case, Stone at 875-876; Black at 887-888. It is obviously impossible to determine to what extent tax assessors have treated the two types of imports uniformly. The practice which has prevailed will determine the immediate effect of the instant decision.

29. Brown v. Maryland, 12 Wheat. 419, at 441 (U.S. 1827).

30. Id. at 443; Low v. Austin, 13 Wall. 29 (U.S. 1871); Coe v. Errol, 116 U.S. 517 (1885).

31. Brown v. Maryland, 12 Wheat. 419, at 422 (U.S. 1827). See note 7 supra.

32. In 1830, 72.4% of the imports were manufactured articles; In 1940, 72.9% of the total imports were crudes or semi-manufactures. Figures based on Table 588, "Statistical Abstract of U.S." H.R. Doc. No. 411, 77th Cong. 1st Sess. (1941) 533. For comparable changes in value of imports, see id. Tables 569, 589. It is of interest that imports for manufacture totalling $1,853,513,000, in 1939, constituted only 5% in value of the raw materials used in manufacturing. Figures based on Census reports of Chief American Manufactures, 1939, quoted in "The World Almanac, 1942" (1942) 285-287.

for manufacture.[33] The original justification for the rule was based on a consideration of the commercial nature of the transaction and the effect of the tax upon commerce.[34] The justification is, however, not logically applicable to imports for manufacture. The dissenting opinion repudiates the extension.[35] It is submitted that an extension in this case is to make the test of an original package "an ultimate principle[36] and that the balancing of the interest of the states in revenue[37] with the tax immunity granted under the imports-and-exports clause is best achieved by resort to a substantive rather than to a formal test for the duration of the immunity.

CONSTITUTIONAL LAW

STATE REGULATION AND ENCLAVED FEDERAL TERRITORY

Army officers on a military reservation within the boundaries of a dry state forwarded orders for liquor through a club secretary to an outstate dealer. While in transit by common carrier under a uniform bill of lading, the shipment was seized by state officers for confiscation and destruction under the Oklahoma Permit Law.[1] A state law made

33. E.g. less than 1/10 of 1% of the Hooven & Allison Co. purchases of imports were spot purchases. Hooven & Allison Co. v. Evatt, Tax Commr., 142 Ohio St. 235, 237 (1943).

34. See arguments developed in cases cited note 30 supra. Notice the preservation of protection for the privilege of selling as retained in the commerce clause under other tests. See citations note 10 supra.

35. Principal case at 888.

36. Cf. " . . . the test of the original package is not an ultimate principle. It is an illustration of a principle . . . What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Seelig, 294 U.S. 511, at 526-527 (1935) (interstate commerce).

37. The total revenue from real and personal property taxes in 1941 was 4 billion, 5 million; the states' share being 250 million and the remainder going to political subdivisions. "Statistical Abstract for 1943" (1943) 282. Estimated at an average of state ad valorem tax rates of 6 mills to the dollar, $15,263,936 taxes would have accrued to the states in 1940 had the rule been enforced in accord with the minority opinion.

A possible solution of the definition of the termination of the immunity of an import lies in legislation along the line of the Wisconsin exemption of "merchandise placed in storage in original package in a commercial storage warehouse or public wharf." Wis. State (1943) tit. X, c. 70 § 11(37). See also C.C.H. "State Tax Guide Service" (1941) ¶ 52-000.

1. Okla. Stat. Ann. (1941) tit. 37§ 41-48.

Amendment XXI, § 2, gives a dry state the power to forbid all importation of intoxicating liquor into the state or to adopt a lesser degree of regulation than total prohibition. State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936); Mahoney v. Joseph Triner Corp., 304, U.S. 401 (1937). A state may also require a permit for the transportation of intoxicants in interstate commerce through the state as a means of establishing the identity of transporters, their routes and points of destination and of enabling local officers to take appropriate