Taxation--State Tax on Gasoline Consumed in State as Burden on Interstate Commerce

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The court cites Marks v. Gates as authority for the statement, and that case was one in which, along with gross inadequacy of consideration, there was the additional factor of improvidence on the part of the party defending in specific performance.

Therefore, it seems reasonably clear that the court's words are in accord with prior adjudications; and, in view of the circumstances of the case, such weight should be given them.

—Sidney J. Kwass.

**TAXATION—STATE TAX ON GASOLINE CONSUMED IN STATE AS BURDEN ON INTERSTATE COMMERCE.**—In the case of United States Airways, Inc., et al. v. Shaw, State Auditor in which the facts as agreed, were: The plaintiff operated an interstate and intrastate air mail and passenger line, using gasoline as motive power for its
give much weight to inadequacy when coupled with other evidence of hardship as some degree of inequality, improvidence, etc."

Also see Walsh, Treatise on Equity (1930), 482 et seq; Fry, Specific Performance (6th ed., Northcote, 1921), c. 7; Pomeroy, Specific Performance (2d ed. 1897), 271 et seq; Clark, Principles of Equity (1919), 171, § 128. For requisites to obtain a decree of specific performance, see 4 Pomeroy, Equity Jurisprudence (2d ed. 1919) 3330, § 1405.

154 Fed. 481, 483, 14 L. R. A. (N. S.) 317, 12 Am. & Eng. Ann. Cas. 120, (1907), where the court used the following language:

"... in general that mere inadequacy of consideration is not of itself ground for withholding specific performance unless it is so gross as to render the contract unconscionable. But where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have."

Also see the notes to the case as reported in L. R. A. and Am. and Eng. Ann. Cases.

In addition to the grounds discussed above the court stated that there was another reason for denying the decree which was that defendant had contracted to serve the company personally, and that it would not enforce only a part of the contract except where it could be enforced without changing the contract in any essential particular, and that here the part providing for defendant's personal services was unenforceable and indivisible from the rest of the contract.

The West Virginia cases, too, seem in accord with the general weight of authority, though some of them deal with rescission of contracts on grounds of inadequacy of consideration plus other factors, and others are merely dicta. See: Hale v. Wilkinson, 21 Gratt. 75 (Va. 1871); Conway v. Sweeney, 24 W. Va. 643 (1884); Duncan v. Duncan, 104 W. Va. 600, 140 S. E. 689 (1927); Garten v. Layton, 76 W. Va. 63, 84 S. E. 1058 (1915) (recession); Crotty v. Effler, 60 W. Va. 255, 266, 54 S. E. 345 (1906); Whittaker v. S. W. Va. Improvement Co., 34 W. Va. 217, 12 S. E. 507 (1890); Pennybacker v. Laidley, 33 W. Va. 624, 639, 11 S. E. 39 (1890) (recession).

airplanes. The State of Oklahoma levies an excise tax on all gasoline consumed within the State. It was agreed that the interstate and intrastate operations were so interdependent and commingled that the tax could not be apportioned between the two classes of traffic. The plaintiff sought to restrain the collection of any part of the tax. Held: Restrained as being a burden on interstate commerce.

It would seem that the case is correctly decided, for the statute only purports to levy a tax on gasoline consumed within the state, and thus gives no authority to levy a tax on any gasoline consumed outside the state, regardless of whether purchased within the state or not. It seems unfortunate that this case was submitted on agreed facts, for as a practical matter, in view of the modern systems of cost accounting in force among the larger carriers by airplane, every item is accorded its proper place in operating costs. Regarding it in this light, it seems that very little trouble would be encountered in apportioning the tax accurately. However, since it is agreed that the tax cannot be apportioned, and the statute only authorizes a tax on gasoline consumed within the state the whole tax as applied to the plaintiff must fail, for in Bowman v. Continental Oil Company, it was held that where one part of a tax is enforceable but so commingled with another part which is unenforceable, that the proportionate parts of the tax cannot be identified, the whole becomes unenforceable. It seems that the court might have decided the principal case without regard to the question of interstate commerce, on the basis of the rule laid down in the above case, and the logical application of the Statute, since it could only mean to tax gasoline consumed within the state.

The case relied on by the court in support of its decision, in which Kentucky, by statute levied an excise tax on all gasoline sold or consumed within the State; Kentucky attempted to enforce this statute against the owners of an interstate ferry boat, on gasoline purchased in Illinois, 75% of which was consumed within the territorial limits of Kentucky, according to the admitted facts, would seem to be exactly in point on the question as regards interstate commerce, but decided wrongly, in that a state may, in the absence of Federal regulation (as in this case) regulate interstate commerce of a local nature, not requiring uniform regulation by a

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3 256 U. S. 642, 41 S. Ct. 606 (1921).
And the use of the gasoline was admitted to be capable of accurate apportionment between the two jurisdictions. This would seem sufficient to support a contrary finding in that case. The Kentucky statute in that case levied a tax on the sale as well as consumption of gasoline within the state. The sale clause could not operate for the gasoline had been sold in Illinois, but it would seem for reasons pointed out above that the consumption clause in the Statute was sufficient to support the tax.

The Legislature of the State of Oklahoma could have avoided the result in the principal case by simply including in the Statute the words "or sold" in addition to "consumed", in conformity with the almost universal practice among the states, for it is well settled that a state may impose a tax on sales made within the state, specifically on gasoline where sold in quantities to suit the customer, and not in the original packages, even tho imported from other states in interstate commerce, but the sales are not taxable where the gasoline is imported from other states in interstate commerce and sold in tank cars or other original packages in which it was brought into the state; inasmuch as such a tax is construed to be a burden on interstate commerce. Even if not produced locally, under the cases cited, the only way the plaintiff could escape taxation on their purchases of gasoline would be to buy it in the original packages.

—Marc Wiseman.

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7 See for example W. VA. CODE (1931) c. 11, art. 14, § 3; WIS. STAT. (1939) c. 78; VA. CODE ANN. (1930) § 2154 (24); Complete TEX. STAT. (1938) § 7005; PA. STAT. (Supp. 1928) § 20459b-3.
8 Hinton v. Lott, 8 Wall 151, 19 L. ed. 387 (1869).
10 Supra n. 3.