

prevents the domiciliary state from taxing the full value of the vehicles.¹⁴

In *Northwest Airlines, Inc. v. Minnesota*,¹⁵ the first case decided by the Supreme Court involving state taxation of flight equipment, airplanes flying on fixed routes through eight states were held taxable for their entire value by Minnesota inasmuch as that state was the domicile of the owner and it was not shown that the planes had acquired a taxable situs in any other state; on the contrary, they were only shown to have acquired a taxable situs within the taxing domiciliary state. The principal case, the second decision concerning state taxation of planes, involves the taxation of that proportion of aircraft acquiring a tax situs within a taxing non-domiciliary state. The power of a state to levy such an apportioned ad valorem tax on an instrumentality of commerce, other than airplanes, was previously held valid with¹⁶ and without reference¹⁷ to the Due Process Clause of the Fourteenth Amendment. The holding in the principal case that eighteen stops per day in Nebraska were sufficient contact for the planes to acquire a tax situs within that state is a reasonable application of the previous cases.¹⁸ The benefits and opportunities of an interstate air carrier doing business within, and operating through, a state are no less than those afforded to interstate land and water carriers.

CONSTITUTIONAL LAW—USE TAX—JURISDICTION TO REQUIRE OUT-OF-STATE VENDOR TO COLLECT USE TAX

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954)

Maryland's use tax statute requires the vendor, whether he is located in or out of state, to collect and remit to the State of Maryland the use tax on all goods sold to Maryland residents for use in Maryland.¹ Miller Brothers Company, a Delaware corporation, sold goods to Maryland residents only at its store in Delaware. Some of the goods were carried home by the purchasers; others were delivered in Maryland by Miller Brothers' trucks. This was Miller Brothers' only

14. Nor can a non-domiciliary state tax the full value of vehicles merely because they have a tax situs within that state. *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158 (1933).

15. 322 U.S. 292 (1944).

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

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

18. The doctrine of *Standard Oil Co. v. Peck*, *supra* note 13, would probably prevent the domiciliary state from levying a tax on the entire value of flight equipment engaged in interstate commerce even though the aircraft have a tax situs within the domiciliary state if the aircraft are shown to have acquired a tax situs in other states.

1. MD. ANN. CODE GEN. LAWS art. 81, §§ 368 to 396 (1951). See especially §§ 368(b), 368(k), 369 and 371. Of course, if the state sales tax has been paid, the use tax need not also be paid. *Id.* § 370(a).

contact with purchasers in the State of Maryland. When Miller Brothers failed to collect the use tax, Maryland attached one of the company trucks to satisfy a claim for use taxes on all sales by the company to the residents of Maryland. The United States Supreme Court, four justices dissenting, held that Maryland had no jurisdictional base by which to make Miller Brothers its tax collector; therefore, the attachment to satisfy the tax was a violation of due process.²

The Supreme Court has defined the applicability of the use tax rather precisely. Its constitutionality was first upheld in 1937 in *Henneford v. Silas Mason Co.*³ Two years later, in *Felt and Tarrant Mfg. Co. v. Gallagher*,⁴ a state was allowed to impose on an out-of-state vendor the duty of collecting a use tax for the state. In *Nelson v. Sears, Roebuck & Co.*,⁵ the Supreme Court ruled that a mail order company was bound to collect Iowa's use tax on mail order purchases by Iowa residents from mail order houses located outside Iowa. The company also had houses doing business in Iowa. The Court reasoned that since Iowa had extended to the company the privilege of doing business in Iowa, it could require the company to collect the use tax on all sales to Iowa residents. The Court said the fact that Iowa could not enforce collection if the company were not qualified to do business in Iowa would merely be the result of "impotence of state power"⁶ (rather than the lack of a constitutional right to impose the duty). The next significant case was *General Trading Co. v. State Tax Commission*,⁷ decided in 1944. A Minnesota corporation had not qualified to do business in Iowa, and had no office there; it hired traveling salesmen as agents to solicit orders in Iowa and send them to Minnesota for acceptance. The Court held that Iowa could compel General Trading Company to collect the tax as a retailer having a place of business in the state.⁸

2. *Miller Bros. Co. v. Maryland*, 347 U. S. 340 (1954). The Maryland Court of Appeals had held the company liable for the tax. *Miller Bros. Co. v. State*, 201 Md. 535, 95 A.2d 286 (1953).

3. 300 U.S. 577 (1937). The Constitutional objections were that the tax was upon the operations of interstate commerce, and also that it discriminated against interstate commerce. The court held that it was not a tax upon commerce but upon the privilege of use after commerce was at an end, and that it did not discriminate against interstate commerce because taxation fell equally on goods purchased in or out of state.

4. 306 U.S. 62 (1939). In that case the vendor, an Illinois corporation which had not qualified to do business in California and had no offices there, received orders through soliciting agents, traveling salesmen, for acceptance in Illinois. The company did, however, pay the rent of the salesmen's offices. The Supreme Court affirmed California's determination that the Illinois corporation was doing "a retail business in the state" and was therefore bound by the statute to collect the use tax.

5. 312 U.S. 359 (1941). See also the companion case, *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).

6. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 364 (1941).

7. 322 U.S. 335 (1944).

8. The Court said the *Felt and Tarrant* case, *supra* note 4, was indistinguishable, despite the fact that the company in *Felt and Tarrant* paid the salesmen's

In view of this line of decisions the instant case seems difficult to support. The general issue here, as in the other cases, was whether there was a jurisdictional base by which Maryland could make Miller Brothers its agent to collect the use tax.⁹ The specific issue in this case depended on whether the continual physical presence of Miller Brothers' trucks in Maryland provided such a jurisdictional base. From a factual analysis, the continued presence within the state of company trucks which were needed in order to consummate a large number of the sales made to Maryland residents appears to be at least as sufficient a base as the presence of the soliciting agents in the *General Trading Co.* case.¹⁰ Also, in the principal case as in the *Sears, Roebuck & Co.* case, there were physical instrumentalities of the company within the state through which the state had the ability to compel collection of the tax.¹¹ Underlying the whole problem is the growing need for revenue with which to operate a modern state government. This factor indicates the merit of court cooperation with state efforts to enforce tax laws.¹²

office rent; the court also said the fact that the company in the *Sears, Roebuck & Co.*, case, *supra* note 5, had retail outlets in the state was not constitutionally material. On the same day the court decided *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944). In that case a Tennessee corporation was doing business in Arkansas by a method substantially identical to that in the *General Trading Co.* case. The Court held that Arkansas could not force the Tennessee corporation to collect the Arkansas sales tax on sales which agents solicited in Arkansas. These two cases establish the proposition that the same transaction may give rise to a collector's liability for a use tax but not for a sales tax.

9. Justice Jackson appears to be incorrect in saying that the issue is the same, practically and legally, as if the statute imposed the payment of a sales tax on the Delaware company. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954). His reasoning was that there would be no use tax without a Delaware sale; therefore, to make Miller Brothers collect a use tax is to make it pay a sales tax on a Delaware sale. In this statement, Mr. Justice Jackson seems to be in error in three respects. First, the Court has consistently drawn a distinction between use and sales taxes; see *General Trading Co. v. State Tax Commission* and *McLeod v. Dilworth Co.*, *supra* note 8. Second, although there can be no use tax without a Delaware sale, there also can be no use tax unless the goods are imported and used in the taxing state. Thus, although the sale does make possible the collection of the use tax, the tax still is in no way a tax on the sale. The third point can best be understood in the light of Justice Jackson's dissent in the *General Trading Co.* case. In that case he said a state has no constitutional right to make a tax collector of one whom it has no right to tax. 322 U.S. 335, 339 (1944). This same idea is found, though not explicitly, in the instant case. This overlooks the fact that there may be a different jurisdictional base for making one a tax collecting agent than for making him a taxpayer.

10. Justice Jackson's attempt to distinguish the *General Trading Co.* case is far from convincing. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 346 (1954). His treatment of the *General Trading Co.* case can best be understood by the fact that he dissented in that case. *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 339 (1944). See note 8 *supra*.

11. It is to be remembered that the significance of *Sears* being qualified for business in Iowa was that it gave Iowa the ability to compel payment of the tax which they could constitutionally require. See text supported by note 6 *supra*.

12. This is the theme of the dissent. Also, the particular facts in the principal case vividly illustrate the need of a state to be able to enforce its use tax. Maryland occupies an unusual geographical position. It is a very small state surrounded by the District of Columbia, Virginia, Delaware and Pennsylvania. A

The instant case, however, may not foreclose a state's ability to compel collection by an out-of-state vendor who delivers goods within the state. Maryland's assessment of taxes against Miller Brothers included taxes on sales where the customer brought the goods back himself.¹¹ The trial court held Maryland had no jurisdiction to compel the vendor to collect the tax on such purchases, though it did have jurisdiction to compel collection on goods which the vendor delivered.¹⁴ The Maryland Court of Appeals, however, upheld the entire assessment.¹⁵ The assessment on the goods which the purchaser brought back himself appears to have been given significance in the United States Supreme Court decision.¹⁶ On argument Justices Jackson and Frankfurter asked a number of questions about the assessment on those sales.¹⁷ This point might help to explain why Justice Frankfurter, who wrote the opinion in the *General Trading Co.* case, apparently changed his position in the instant case and joined in the majority opinion written by Justice Jackson, who had dissented in the *General Trading Co.* case. If Maryland had presented to the Supreme Court the clean-cut issue of the tax collection only on the goods delivered by the vendor,¹⁸ the persuasive dissent might well have been

very substantial portion of Maryland's population lives in south-central Maryland, adjacent to Washington, D.C., and naturally tends to shop in Washington. The eastern portion of the state is isolated from Baltimore, the only large city in the state, by Chesapeake Bay, and the people in that part of the state have gone to Wilmington, Delaware and Philadelphia to shop.

In 1947 Maryland passed a sales and use tax. MD. ANN. CODE GEN. LAWS art. 81, §§ 320 to 396 (1951). In 1947, however, none of the areas adjacent to Maryland had either sales or use taxes; Maryland's sales tax was thus an added incentive for Maryland residents to shop in the adjacent areas. The loss of potential revenue to Maryland occasioned by its citizens shopping in other states totaled hundreds of thousands of dollars. Source of information: Letter dated October 21, 1954, from Edward F. Engelbert, Assistant Director of Retail Sales Tax Division, Comptroller of the Treasury, State of Maryland. Unless the state could enforce collection of the use tax on out-of-state purchases, many citizens would enjoy the benefits of living in the state without paying taxes to provide for them; this would magnify an already heavy financial burden on the state. The Comptroller's office of Maryland instituted the action against Miller Brothers in the principal case to test the validity and enforceability of the use tax as applied to outstate vendors who would not cooperate in collecting the tax.

13. Brief for Appellant, p. 5, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

14. *Id.* at 7, 8.

15. *Id.* at 10. *Miller Bros. Co. v. State*, 201 Md. 535, 95 A.2d 286 (1953).

16. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341, 344 (1954). Counsel for Miller Brothers considered this point to be very helpful to them in obtaining a reversal of the state court decision. Source of information: Letter dated October 25, 1954, from William L. Marbury, Piper & Marbury, Baltimore, Maryland, Counsel for Appellant, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

17. Source of information: Letter dated October 21, 1954, from Edward F. Engelbert, Assistant Director of Retail Sales Tax Division, Comptroller of the Treasury, State of Maryland.

18. The issues could have been separated at several points. First, the Comptroller could merely have made the assessment on those sales which the vendor delivered. Second, the attorney for the state could have brought his action merely for the tax on those sales. Third, the state court of appeals could have held the

the majority opinion in the case. Thus, if the issue is in the future presented squarely to the Court, the principal case would be distinguishable, and the use tax may be upheld; however, it will be quite difficult to obtain such a holding in the face of the principal decision.

WILLS—GENERAL PECUNIARY LEGACIES—VALUATION WHEN IN
TERMS OF FOREIGN MONETARY UNITS

In re *Wirth's Estate*, 132 N.Y.S.2d 98 (Surr. Ct. 1954)

A testator living in New York bequeathed 5000 gold marks to a former servant, a resident of Germany. At the time the will was executed the gold mark was not a unit of currency, but was a term denoting a certain amount of gold having a definite value recognized in the financial world. After the will was executed, but prior to the testator's death, Germany went off the gold standard with the result that the term "gold mark" had no monetary significance at the time of probate. In proceedings to compel payment of the legacy, the court held that the amount bequeathed should be measured by the value of the gold mark on the date the will was executed.¹

The amount of a general pecuniary legacy² is ordinarily measured by the value of the monetary unit at the time payment is due,³ and is payable in the current legal tender of the country where the will was executed. An annuity of £80 bequeathed by a will made in England, for example, was held payable in English and not in Irish pounds even though the testator's estate was located in Ireland.⁴ If the legatee is a resident of a country other than the one in which the will is executed, however, payment is made in the legal tender of such other country, according to the current rate of exchange.⁵ Accordingly, a legatee domiciled in England and entitled to the sum of 30,000 rupees by the terms of a will executed in India was held entitled to that amount of English currency which would purchase 30,000 rupees in India on the date the legacy was payable.⁶

vendor liable only for the tax on goods delivered. Fourth, counsel for the state could have stressed the difference between the two taxes before the Supreme Court in order to save part of the assessment.

1. *In re Wirth's Estate*, 132 N.Y.S.2d 98 (Surr. Ct. 1954). The action was instituted by the Attorney General of the United States who, as successor to the Alien Property Custodian, vested the interest of the German legatee in the estate.

2. A "general pecuniary legacy" may be defined as a legacy of a specified sum of money without a designation of the fund from which it should be paid. 4 PAGE, WILLS § 1393 (Lifetime ed. 1941).

3. *In re Manus' Estate*, 200 Misc. 441, 106 N.Y.S.2d 102 (Surr. Ct. 1951); 4 PAGE, WILLS § 1587 (Lifetime ed. 1941).

4. *Wallis v. Brightwell*, 2 P. Wms. 88, 24 Eng. Rep. 652 (1722); accord, *Pierson v. Garnet*, 2 Bro. C.C. 38, 29 Eng. Rep. 20 (1786).

5. *In re Manus' Estate*, 200 Misc. 441, 106 N.Y.S.2d 102 (Surr. Ct. 1951).

6. *Cockerell v. Barber*, 16 Ves. Jr. 461, 33 Eng. Rep. 1059 (1810).