



4-1976

# Casenote: The "Import-Export" Clause Reexamined

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### Recommended Citation

Warnken, Byron L. (1976) "Casenote: The "Import-Export" Clause Reexamined," *University of Baltimore Law Forum*: Vol. 6: No. 4, Article 10.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol6/iss4/10>

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that prior to the filing of the case two policy decisions must be made by the lesbian mother. The first decision is whether or not anyone should be told of the mother's lesbianism. On the one hand, custody determinations are never final, and if someone later finds that the mother is a lesbian, it would be relatively easy to establish a material change in circumstance justifying the revocation of the mother's custody. On the other hand, a mother who is 'straight' has a much better chance of being awarded custody of her children than a lesbian mother. Thus the choice must be made between having an easy custody fight and risking a later challenge on the basis of a discovery of lesbianism, and revealing the facts at the beginning and facing a much tougher case.

The second big decision is whether or not the client should mention a lover. It is quite clear that a judge is more likely to award custody to a lesbian mother where she is not practicing lesbianism; however, one must consider that a healthy, well-adjusted mother will be best for her children, and part of being healthy and well-adjusted is having an outlet for sexual and emotional fulfillment.

As a practical matter, the key to winning a lesbian mother custody fight is to keep the case out of court. This is especially important when one realizes the very broad discretion which a trial judge has in determining the issue of custody; the standard which is used in determining the issue is simply the best interests of the child, however measured by the court, and a custody determination will not be overturned on appeal save for grave abuse.

There are several tactical maneuvers which should be used in attempting to keep the fight out of court. The primary method for accomplishing this goal is to settle. Before attempting a settlement however, the motives of the challenging party, usually the father, should be evaluated. Once these motives have been determined, it will be easier to offer a compromise which will satisfy them and give the mother custody. For example, where the father's actions are motivated by pecuniary considerations, a lesbian mother may be faced with a

deal such as limiting or eliminating child support in exchange for the father's promise not to challenge her custody. Each lesbian mother will have a different compromise level, but before rejecting what seems to be an extremely prejudicial offer, the dangers of a judicial determination of custody should be stressed.

If the challenging party refuses to settle, the panelists advocate a course of action which they termed "fighting fire with fire." This consists of collecting all of the dirt one can find on the challenging party, to be used as evidence at trial in determining the best interests of the child. Of course one should make clear to the other side that such dirt is available and perhaps then some equitable settlement may be arranged.

If no settlement is possible and the case comes to trial, the primary thing to remember is that a custody case is won or lost at the trial level. As stated before the only ground for reversal of a custody determination on appeal is grave abuse of discretion by the trial judge. Such abuse is unlikely to be found in most custody determinations, but especially unlikely in cases involving a lesbian mother.

At trial, the attorney for the lesbian mother should not allow the judge to focus on the mother's sexual preferences. It should be argued that no evidence of lesbianism should be admitted unless it can be shown by the opposition that there is a nexus between the mother's sexual conduct and an adverse effect on the well being of the children. Unless such a connection can be shown, evidence of lesbianism is irrelevant to the issue of the best interests of the children.

If it is decided that evidence of lesbianism will be admissible the panelists stressed that the mother's attorney should be the first to make it an issue. This tactic is considered preferable to allowing the opposition to bring it up because it avoids embarrassing questions which the judge or opposing counsel may pose to the mother. In bringing up the issue of lesbianism, the speakers suggested that an expert psychiatric witness should be produced. The witness should have previously interviewed the mother and children and should be pre-

pared to testify as to the relationships between them. He should be prepared to testify as to the causes of lesbianism, the similarities between lesbian mothers and "straight" mothers, and as to specific information about the particular family unit and its acceptance of the situation.

Both speakers acknowledged the difficulties involved in this type of custody litigation. Both admitted that in many cases a child may be stigmatized by a mother's open display of homosexuality. In spite of these difficulties, the panelists thought that in many cases the children's interests will best be served by allowing them to remain with their mother. In such cases there is an overwhelming need for competent attorneys who are willing and able to give the same quality of representation to a lesbian mother as is given to her "straight" counterpart.

## The "Import-Export" Clause Reexamined

by Byron L. Warnken

The Supreme Court, in an 8-0 decision in *Michelin Tire Corp. v. Wages, Tax Comm'r.* 96 S.Ct. 535 (1976) (Mr. Justice White, concurring in the judgment), held that a nondiscriminatory ad valorem property tax levied against a wholesale inventory of imported tires was not an "impost" or "duty" on imports, as prohibited by the "import-export" clause, art. I, § 10, cl. 2 of the constitution. In the process, the Court overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871), which one hundred years earlier had held that such a tax was constitutionally forbidden until such time as the imports became incorporated into the general mass of property within the state.

Michelin Tire Corp. (petitioner) im-



Chris Michael

ported tires and tubes, for which it was assessed an ad valorem property tax on its wholesale inventory, allegedly still in the original package. In an action for declaratory and injunctive relief brought in state court against the county tax commissioner, Michelin was successful in its contention that the "import-export" clause prohibited such taxation. The Supreme Court of Georgia affirmed in part and reversed in part, holding that, while the tubes in corrugated shipping cartons were free from ad valorem taxation, the tires had been sorted, commingled with other tires, and arranged for sale. without addressing the issue of whether these tires had lost their import status, the Supreme Court affirmed. In overruling *Low v. Austin*, the Court held that a nondiscriminatory ad valorem tax against imported tires is not within the constitutional prohibition against laying duties on imports.

About one-fourth of the tires and tubes in question were manufactured in Nova Scotia and imported in tractor trailers packed and sealed in Nova Scotia. The other three-fourths were packed and sealed in France or Nova Scotia, from which they were imported in sea vans (tractor-hauled trailers from which the wheels are removed during sea shipment). Without being packaged or bundled, the tires were packed in bulk in the trailers and vans. Upon arrival at the wholesale distribution point, the tires were sorted and stacked by size and style, ready for sale and shipment to retailers.

Both Georgia courts found the tax constitutionally infirm by relying on *Low v. Austin*, a decision based upon the Court's interpretation of the landmark case of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). In *Brown*, Chief Justice Marshall stated that "...while [the

thing imported remains] the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Id.* at 442. Mr. Justice Brennan, speaking for the Court in *Michelin*, stated:

"Our independent study persuades us that a nondiscriminatory ad valorem tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an impost or duty and that *Low v. Austin*'s reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced." 96 S.Ct. at 539.

The Court reasoned that the framers of the Constitution committed exclusive power to the federal government to lay imposts and duties on imports because (1), the government should speak with one voice when regulating commercial relations with foreign governments, (2), the federal government should be the recipient of revenue from imports, and (3), harmony among the states could be better maintained if the advantage of seaboard states to collect import taxes was neutralized. The Court found that none of the ills for which the "import-export" clause was designed to remedy were promoted by a nondiscriminatory ad valorem property tax imposed upon imported goods no longer in transit. Such right of taxation does not give seaboard states an advantage over interior states, nor does it affect the federal government's exclusive rights as regulator of foreign commerce and recipient of revenue therefrom.

Distinguishing the tax at issue from the prohibited "imposts" and "duties," the Court succinctly explained not only why such a tax was not unconstitutional, but why it was a rational and equitable taxing device.

"Unlike imports and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apports the cost of such services as police and fire protection among

the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it can not be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies." *Id.* at 541.

The court readily admitted that such a tax is likely to increase the cost of the goods at the consumer level. However, it suggested that this is no different from resultant increased cost of similarly taxed domestic goods. In essence, the cost of police and fire protection, as well as other services provided by the state, are passed on to the ultimate consumer in the same manner as transportation costs, insurance costs, etc.

Concluding its discussion of the effect of nondiscriminatory ad valorem taxation, in light of the framers' intent regarding imports, the Court noted that

"...since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the clause — Imposts or Duties — is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the clause was specifically intended to eliminate." *Id.* at 544.

The *Michelin* Court prefaced its overruling of *Low v. Austin* with an examination of *Brown* and an understanding of how *Low v. Austin* misapplied it. In *Brown*, the Court adopted the "original package" doctrine as the test for determining when goods are imports constitutionally protected from "imposts" and "duties."

"...[W]hen the importer has so acted upon the thing imported, that

it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." 25 U.S. (12 Wheat.) at 441-42.

In declaring unconstitutional a state law requiring importers and their wholesalers to obtain a \$50 license as a prerequisite to doing business, the Court in *Brown* declared that:

"...the tax intercepts the import, as an import, on its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State." *Id.* at 443 (Emphasis added).

*Low v. Austin* expanded the "original package" doctrine of *Brown* to prohibit any imposition, such as a nondiscriminatory ad valorem property tax, as long as the goods still met the doctrine's definition of an import.

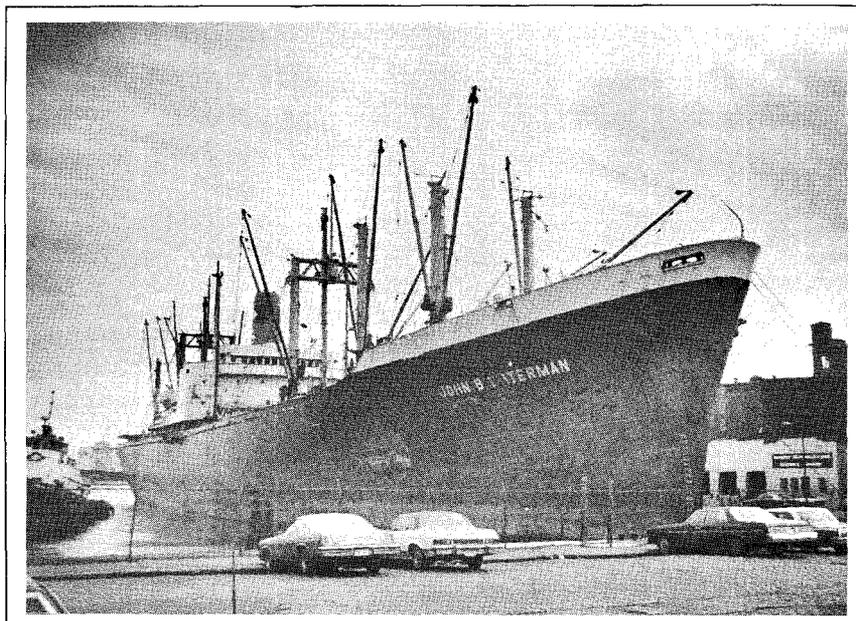
The *Low v. Austin* Court failed to heed the *Brown* warning that

"...the boundary between the power of the States to tax persons and property within their jurisdictions and the limitations on the power of the State to impose imposts or duties with respect to 'imports' was a subtle and difficult line which must be drawn as the cases arise." E96 S.Ct. at 547.

Despite the Court's noting that it "...might be premature to state any rule as being universal in its application..." *Id.*, *Low v. Austin* did just that, prohibiting any imposition upon goods still in their original package.

The Court in *Low v. Austin* also misused the language of the *License Cases*, 46 U.S. (5 How.) 504 (1847), which directly answered the issue of *Low v. Austin*, as well as *Michelin*.

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a



June Chaplin

part of foreign commerce, and is not introduced into the general mass of property in the State. 46 U.S. (5 How.) at 576.

Although it can be argued that the Court in *Michelin* did nothing more than follow an 1847 precedent, the significance is in its overruling of *Low v. Austin*, an action which is demonstrative of the modern trend requiring commerce to "pay its own way." *of., Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975). Since all taxes place some burden upon commerce, the courts are beginning to look less to the burden and more to the benefits that inure as a result of the tax, such as fire protection, police protection, etc. It appears that the tax will be upheld as long as it is not discriminatory and provided that the benefits received as a result of the tax outweigh the burdens it places upon commerce. When commerce pays its own way through nondiscriminatory taxation, commerce, although theoretically burdened, is actually promoted, as a result of the benefits that tax dollars provide.

The *Michelin* Court addressed the issue of whether a nondiscriminatory ad valorem property tax was an "impost" or "duty," yet failed to take advantage of the opportunity to refine the "original package" doctrine. In devising the doctrine, the Court in *Brown* realized that the line between import and non-import status may indeed be a fine one and recommended that the line be drawn as each demands. This was appropriate, since an 1827 court could not possibly have foreseen the complexities of defining that line in a world of commerce where tires have no package other than the huge container in which they are shipped, and that the container adds and deletes wheels and tractor cabs as necessary to enable it, without a transfer of goods, to surround the goods, perhaps as their "original package," almost from the point of manufacture to the point of sale. In his concurring opinion, Mr. Justice White, without explaining his reasons, did find that the goods in this case had lost their import status, subjecting them to ad valorem taxation. Thus he found the same result without the need to overrule *Low v. Austin*.

The practical effect of this case may well be that as long as the state imposes the now approved nondiscriminatory tax, without regard to import or non-import status, against goods no longer in transit, a determination of the exact moment when the goods lose their import status is of little importance, since the tax will be upheld regardless, based upon the authority of *Michelin*.

## University of Baltimore Hosts Regional Client Counseling Competition

by Byron L. Warnken

The University of Baltimore School of Law served as host school for the regional client counseling competition on Saturday, March 6, 1976. The nine schools from Region Two participating were American University Law School, Catholic University Law School, Delaware College of Law, Dickinson University Law School, Duquesne University Law School, Georgetown University Law School, University of Baltimore Law School, University of Maryland

Law School, and Villanova University Law School. The winner of the competition was the University of Maryland, which now advances, along with eight other regional winners, to the national client counseling championship competition, scheduled for Saturday, March 27, at Notre Dame University, in South Bend, Indiana.

The Region Two competition was coordinated by Assistant Dean William I. Weston, with the help of ten students from the Student Bar Associations. The nine participating teams drew lots and competed in three groups of three, with the three morning winners advancing to the afternoon. The morning winners were Georgetown (Group A), Duquesne (Group B), and Maryland (Group C), with Maryland winning the afternoon session. The three morning rounds and the round in the afternoon were each judged by a separate panel, with each panel consisting of three active practitioners from the Bar Association of Baltimore City. Following the morning session, a buffet luncheon was served in Langsdale Library to all participants, coaches, representatives from the competing schools, and judges.

The problem for this year's regional competition involved contract litigation and its alternatives, coupled with professional responsibility. The two-person teams received a terse two paragraph memorandum from the "secretary," reflecting information received from a phone call, during which the secretary

