

opposite direction (like the one in question) after the rail had worked out of alignment, would be derailed. But the argument with respect to the time when the displacement might have been effected, which in any event could not have been very long before the accident, and the contention based on the position of the nuts and bolts, are unavailing in view of the lack of evidence tending to show that the defendant was in any way responsible for the condition which caused the derailment.

There are many details which it is unnecessary to review as they do not affect the essential question. It is sufficient to say that upon a careful examination of the entire record we are unable to discover any basis for a finding of negligence on the part of defendant. The motion for the direction of a verdict in its favor should have been granted. *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; *Gunning v. Cooley*, 281 U. S. 90; *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon*, 284 U. S. 458.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

EASTERN AIR TRANSPORT, INC. v. SOUTH CAROLINA TAX COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 504. Argued February 25, 1932.—Decided March 14, 1932.

A state tax of six cents per gallon on sales of gasoline was added by the seller to gasoline bought by an air-transport company for use in its planes, which traversed the State in interstate commerce and stopped at several places there, but transported no passengers or freight between those places. *Held*:

Whether viewed as a tax on property or as an excise, the tax is not a direct burden on interstate commerce and is within the power of the State. P. 152.

52 F. (2d) 456, affirmed.

APPEAL from a decree of the District Court of three judges denying an interlocutory injunction in a suit to restrain collection of a state tax.

Mr. William Henry White, Jr., with whom *Mr. Christie Benet* was on the brief, for appellant.

Appellant is engaged in the transportation of passengers exclusively by airplanes between Newark, N. J., and Miami, Florida, and, in addition, United States mail between Newark, N. J., and other points, under contract with the Post Office Department, with stops at intermediate points.

Because of the state of the art of flying, and present type of airplane construction, it is impossible for an airplane to make the flight from Newark to Miami, or even a much shorter flight, without refueling at intermediate points. The necessities of appellant's transportation instrumentalities require it, therefore, to fuel in the State of South Carolina, for without so doing, it could not complete its flight or carry the United States mail as required by its contract with the Post Office Department.

The tax is imposed upon the seller, but in fact is passed along to the purchaser, and all of it is remitted by the seller to the State and used solely for state and county highways. Appellant has paid this tax on all gasoline purchased in the State, and has never been able to purchase gasoline in South Carolina except upon its payment. The amount paid is \$5,000.00 or more a year.

The highest court of South Carolina declares the tax to be an "excise" tax. And since it is the public policy of the State to rest the burden upon the ultimate consumer, the practical effect of enforcement is the same as if the law in so many words laid the tax on the ultimate consumer. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218.

It needs little imagination to perceive that such a burden in one State, if repeated in other States through

which appellant must operate its airplanes under its contract to carry the mails of the United States, would soon become so heavy as to be prohibitive. The burden of the tax, though imposed upon the seller by law, falls upon the consumer, and such burden is a direct burden. *Texas Co. v. Brown*, 258 U. S. 466; *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218; *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

A tax intended to fall, and which does fall, upon the ultimate consumer, has precisely the same effect as if laid upon use rather than sale. There can be no use without a previous sale, or purchase. The one leads to the other.

In seeking to treat "sale" as separate and distinct from subsequent use, the court below overlooks the principle decided in such cases as *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; and *Shafer v. Farmers Grain Co.*, 268 U. S. 189, where the act of buying, though performed wholly within a State, was treated as a part of the interstate transaction of shipment. In those cases there was a regular and established business of buying grain in one State for shipment to another State, and the grain so bought was shipped in interstate commerce. The analogy to the present case is complete. Here the appellant buys a special type of gasoline intended for use in airplanes; it intends to use that gasoline, and does in fact use it, only in airplanes engaged exclusively in interstate commerce.

The purchase is a mere incident in the course of regular and consistent interstate business. *Board v. Olsen*, 262 U. S. 1, 35.

The exigencies of a trade determine what is essential to the business or process of interstate commerce in that trade. *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19.

The purchase of gasoline in South Carolina is just as indispensable to the uninterrupted conduct of appellant's interstate business as the sales at the Chicago stockyards—which *per se* were local transactions but were held by the Court in *Stafford v. Wallace*, 258 U. S. 495, to be so intimately associated with interstate commerce as to be a part thereof—were essential to the continuity of the flow of cattle from the ranges in the west to the markets in the east. The State of South Carolina, therefore, had no power to tax these sales, just as in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 120, the State of Pennsylvania could not impose a license tax upon a railroad company engaged in interstate commerce for the privilege of maintaining an office in the State.

That an event subsequent to a sale may convert the sale into an interstate transaction is decided by *Federal Trade Comm. v. Trade Assn.*, 273 U. S. 52.

Cf. *Helson v. Kentucky*, 279 U. S. 245; *Station WBT, Inc. v. Poulnot*, 46 F. (2d) 671; *U. S. Airways, Inc. v. Shaw*, 43 F. (2d) 148; *Mid-Continent Air Express v. Lujan*, 47 F. (2d) 266; *Boeing Air Transport v. Edelman*, 51 F. (2d) 130; *Central Transfer Co. v. Commercial Oil Co.*, 45 F. (2d) 400; *N. J. Bell Tel. Co. v. State Board*, 280 U. S. 338.

Messrs. John M. Daniel, Attorney General of South Carolina, and *J. Fraser Lyon* were on the brief for appellees.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought to restrain the collection of a tax, imposed by the State of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that State and used by complainant in interstate commerce. The complainant charged that the state Act

placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the Federal Constitution. Art. I, § 8. The District Court, composed of three judges as required by statute, denied an interlocutory injunction, 52 F. (2d) 456, and the complainant appeals to this Court. Jud. Code, § 266; U. S. C., Tit. 28, § 380.

From the findings of the District Court it appears that the complainant is a Delaware corporation operating, in interstate commerce, air transport lines across the State of South Carolina; that its planes make regular stops at various points in the State but do not carry freight or passengers between such points, and practically its entire business is interstate in character; that it purchases gasoline in South Carolina for the use of its planes and that the seller adds to the price the amount of the state gasoline tax which the seller is required to pay under the Act in question, and thus complainant has to pay six cents a gallon more than it otherwise would, the excess amounting to about \$5,000 a year.

The tax is described in the statute¹ as a license tax, which, as applied in the instant case against the dealer,

¹ Act of February 23, 1922, as amended (South Carolina Acts, 1922, pp. 835-838; 1929, pp. 107-112). Section 1 provides: "That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. . . ."

is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Co. v. Query*, 166 S. C. 117; 164 S. E. 588, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold,² its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce.³ "It is elementary," said the Court in *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346, "that a State may tax property used to carry on interstate commerce." Treating the tax as an excise tax upon the sales⁴ does not change the result in the instant case, as the sales are still purely intrastate transactions. *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395. Undoubtedly, purchases of goods within a State may form part of trans-

² *Brown v. Maryland*, 12 Wheat. 419, 444; *Welton v. Missouri*, 91 U. S. 275, 278; *Kehrer v. Stewart*, 197 U. S. 60, 65.

³ *Coe v. Errol*, 116 U. S. 517, 525; *Adams Express Co. v. Ohio*, 165 U. S. 194, 220; 166 U. S. 185, 218; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 227; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 167; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259; *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 509, 515; *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395.

⁴ *Panhandle Oil Co. v. Knox*, 277 U. S. 218, 222; *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 574, 575.

actions in interstate commerce and hence be entitled to enjoy a corresponding immunity.⁵ But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

In *Helson v. Kentucky*, 279 U. S. 245, upon which the appellant relies, the tax was laid by Kentucky with respect to gasoline purchased by the plaintiffs in error in Illinois and used within Kentucky in the operation of a ferry boat on the Ohio River between the two States. The Court found that the tax was laid directly upon the use of the gasoline in interstate transportation. The Court said that "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, p. 252. Such a tax is manifestly different from a general property tax or a tax upon purely local sales.

Decree affirmed.

⁵ *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 291; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Stafford v. Wallace*, 258 U. S. 495, 516; *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 198.