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## TAXATION OF AIRCRAFT MOTOR FUEL

WILLIAM K. TELL

Taxation of motor fuels used in internal combustion engines was a necessary incident to the demand by motorists for improved highways. The primary purpose of this article is to inquire whether or not such taxes are valid when the motor fuel is consumed in gasoline engines not using the highways, particularly in the case of fuel used by aircraft. Such a result will be accomplished by an analysis of the original purpose of the gasoline tax; by a presentation of the court decisions applying to taxation as they affect interstate and intrastate commerce, and as they affect government instrumentalities; and by showing that air navigation is so closely connected with interstate commerce that it is difficult, if not impossible, to distinguish what is interstate and what is intrastate business.

Before the automobile became a common mode of transportation, the people of the states did not take particular interest in the kinds or types of roads in their communities so long as these roads were passable; and, while the cost to the states for roads was large, it was not so great that it could not be met out of the general revenue of the states. However, the advent of the automobile and a consequent greater usage of the highways brought demands for better roads. The general revenues of the states being inadequate to meet these increased costs of construction, operation, maintenance and control of highways, it was considered by the various legislatures throughout the United States that it was only just that those who used the roads, and thereby received benefits from the improvements, should be required to pay for them. The result of this was the general automobile license tax. But, as the number of people owning automobiles increased, so in direct ratio the demands upon the legislatures increased for more and better roads. The revenue which the states were receiving from the licensing of these automobiles being inadequate to meet the increased costs of highways, it was logical that the legislatures in looking for another source of revenue should turn to the gasoline consumed by these vehicles and tax it. Such a tax was advantageous for two reasons: first, the tax could be collected at the source or at the point of dis-

tribution—namely, from the oil companies; second, it would be a tax directly upon the people who were using the roads in proportion to their use.

The states, in levying this tax on motor fuel, have resorted to devious methods. Some states have levied the tax on gasoline sold in the state under constitutional provisions permitting a sales tax; others have taxed all gasoline manufactured, refined, or received in the state; and still others have imposed the tax as a license tax upon the privilege of the business of distributing gasoline or other motor fuel, which fact can be readily seen from a study of the summary of the gasoline tax laws of the several states listed below. This summary shows the tax rate per gallon, the basis of the tax, the refunds allowed—if any, and the time allowed for filing claims.

SUMMARY OF GASOLINE TAX LAWS				
	<i>Rate per Gallon (cents)</i>	<i>Basis of Tax</i>	<i>Refunds Allowed</i>	<i>Time al- lowed for filing claim</i>
<i>Alabama</i>	4	Selling or withdrawing from storage	None	None
<i>Arizona</i>	5 <sup>1</sup>	Refining, manufacturing, delivering, or importing, used, distributed or sold	Other than used in motor vehicle on highway	1 year
<i>Arkansas</i>	6 <sup>2</sup>	Gas sold in the state for purpose of propelling motor vehicles on public roads in the state	Of 4c if used for any industrial or domestic purpose—not used in motor vehicles on the highway	Within 10 days after use
<i>California</i>	3	Refining, manufacturing, producing, compounded, sold and delivered	Gas not used or sold for use in operating motor vehicles	1 year after purchase
<i>Colorado</i>	4	All gas sold or offered for sale	On all not used in motor vehicles on highway	60 days after purchase
<i>Connecticut</i>	2	All gas sold or used in state	Gas used in motor boats and for commercial or manufacturing purposes not in motor vehicles	Exempt upon making certificate
<i>Delaware</i>	3	Motor fuel sold or used	Gas not used in motor vehicles on highway	Within 90 days after purchase

1. Effective January 30, 1931.

2. Effective February 26, 1931.

	Rate per Gallon (cents)	Basis of Tax	Refunds Allowed	Time al- lowed for filing claim
<i>District of Columbia</i>	2	Motor fuel sold or used	All not used in motor vehicles on highways of D. of C.	Within 30 days after purchase
<i>Florida</i>	6	All sold	None	None
<i>Georgia</i>	6	Imported and sold, im- ported and withdrawn for use, manufacturing, refining, producing or compounding, and sold for use and used or consigned by manufac- turer	None	None
<i>Idaho</i>	5	All motor fuel sold or used	Gas not used in motor vehicles on highway	120 days af- ter purchase
<i>Illinois</i>	3	Sale	All lost or not used for operating motor vehicles on highway	6 months
<i>Indiana</i>	4	All gas used in state	All except that used in motor ve- hicles on highways	90 days
<i>Iowa</i>	3	All gas used or sold	All except used in propelling motor vehicles on high- way	Within 90 days after invoice
<i>Kansas</i>	3	All motor fuel on sale or used in state	All except used on highways in motor vehicles	Must be filed within 60 days from last day of quarter
<i>Kentucky</i>	5	All gas sold at whole- sale	None	None
<i>Louisiana</i>	5	All gas or motor fuel sold, used or con- sumed	All lost or de- stroyed	None
<i>Maine</i>	5 <sup>3</sup>	Internal combustion fuel sold and used	$\frac{3}{4}$ of all except used in motor ve- hicles on high- ways	9 months <sup>4</sup>
<i>Maryland</i>	4	Number of gallons of motor fuel used or sold	All except used in motor vehicles on highway	90 days from date of pur- chase

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3. Effective July 3, 1931.

4. Effective March 16, 1931.

	Rate per Gallon (cents)	Basis of Tax	Refunds Allowed	Time al- lowed for filing claim
<i>Massachusetts</i>	3 <sup>5</sup>	Each gallon of fuel sold	All except used in motor vehicles on highway	90 days from purchase
<i>Michigan</i>	3	All gas sold or used in motor vehicles on highway	All other than used in motor vehicles on highway	90 days from purchase
<i>Minnesota</i>	3	All gas used on highway	All other than used in motor vehicles on highway	4 months from purchase
<i>Mississippi</i>	5	All gas used or for sale to be used on streets or highways	None	None
<i>Missouri</i>	2	All gas refined, manufactured, compounded, imported, sold and distributed	All except motor vehicles on highway	90 days
<i>Montana</i>	5	All gas refined, manufactured, produced, imported, sold or distributed	All except used in motor vehicles on highways	6 months
<i>Nebraska</i>	4	All sold	None	None
<i>Nevada</i>	4	All sold or used	All except used in motor vehicles on highways	90 days
<i>New Hampshire</i>	4	All used or sold	All except used in motor vehicles on highways	6 months
<i>New Jersey</i>	3	All sold or issued in motor vehicles on highway	1c per gallon if used in motor boats. Not collected if not to be used on highway	Not shown
<i>New Mexico</i>	5	Gas used or sold	Gas sold to Federal Government	Purchaser of 56 gallons or more may file claim for not less than 200 gallons within 4 months the first purchase being a part of the 200 <sup>6</sup>
<i>New York</i>	2	Sale	All except used in motor vehicles on highway	90 days

5. Effective May 1, 1931 to April 30, 1933.

6. Effective March 12, 1931.

	Rate per Gallon (cents)	Basis of Tax	Refunds Allowed	Time al- lowed for filing claim
<i>North Carolina</i>	5	Sold, distributed or used	All except used in motor vehicles on highway if purchased in 10 gallon lots or more	90 days
<i>North Dakota</i>	4 <sup>7</sup>	All motor fuel	All except used in motor vehicles on highway	Each quarter
<i>Ohio</i>	4	All sold or used	All except used in motor vehicles on highways	90 days
<i>Oklahoma</i>	5 <sup>8</sup>	Gas consumed	Any not consumed in state, or if purchased in 50 gallon lots for operating farm tractors or stationary engines is exempt	30 days
<i>Oregon</i>	4	All gas, used, sold or distributed	All except used on highways in motor vehicles. 1% withheld on refunds for gas used in aircraft <sup>9</sup>	1 year
<i>Pennsylvania</i>	3	All sold	None	None
<i>Rhode Island</i>	2	Fuel sold or used	All not to be used in motor vehicles on highway	120 days from purchase
<i>South Carolina</i>	6	All gas sold, consigned, used, shipped, or distributed for sale in state	None	None
<i>South Dakota</i>	4	All motor vehicle fuel used in state	All except used in motor vehicles on highways	1 year
<i>Tennessee</i>	5	Each gallon of gas sold or distributed	None	None
<i>Texas</i>	4	All sold	All except gas used in motor vehicles on highways	6 months must report by 25th of next month
<i>Utah</i>	4 <sup>10</sup>	All motor vehicle fuel sold or used	None	None

7. Effective July 1, 1931.

8. Effective March 26, 1931 to December 31, 1931.

9. Effective June 5, 1931.

10. Effective March 24, 1931.

	Rate per Gallon (cents)	Basis of Tax	Refunds Allowed	Time al- lowed for filing claim
<i>Vermont</i>	4	All sold or used. May pay upon receipts less 1% thereof <sup>11</sup>	None	None
<i>Virginia</i>	5	All sold, used or delivered	All except used in motor vehicles on highways	30 days
<i>Washington</i>	4 <sup>12</sup>	Sold	All except used in motor vehicles on highway	30 days
<i>West Virginia</i>	4	Sold, purchased or used	All except used in motor vehicles on highway	60 days
<i>Wisconsin</i>	4 <sup>13</sup>	All sold, used or distributed	All except used in motor vehicles on highways	Following quarter
<i>Wyoming</i>	4	Sold	None	None

Taxation must be for a public purpose.<sup>14</sup> A legislature has no rightful power to impose taxes on the people for any other than a public purpose, and the fact that the public benefits only incidentally is not sufficient to sustain a tax.<sup>15</sup> The test of what is a public use and purpose depends largely upon the facts and circumstances surrounding the particular subject matter in regard to which character of the use is questioned.<sup>16</sup> It has been held, however, that the power of taxation is exerted for a public purpose when the money raised is to be applied to the construction and maintenance of public roads.<sup>17</sup> The guaranty of the equal protection of the laws does not deprive the states of the power to adjust their systems of taxation in accordance with their own ideas of public policy. They may, therefore, tax certain classes of property to the exclusion of other classes so long as the classification is reasonable and founded upon a real distinction and not a mere arbitrary basis.<sup>18</sup> Thus, persons following the same calling may be classified for taxation according to the amount of their business. After the legis-

11. Effective March 10, 1931.

12. Effective April 1, 1931.

13. Effective April 1, 1931.

14. *Cooley*, Taxation, 4th Ed. Vol I, Sec. 174.

15. *Lowell v. Boston*, 111 Mass. 454 (1873).

16. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896).

17. *State v. Marion*, 82 N. E. 482 (1907); *Prince v. Crocker*, 166 Mass. 347 (1896).

18. *Johnston v. City of Macon*, 62 Ga. 645 (1879); *Cook v. Marshall*, 196 U. S. 261 (1905).

lature and the executive have both decided that the purpose for which a tax is laid is public, nothing short of a moral certainty that a mistake has been made can warrant the court in overruling the decision.<sup>19</sup>

Therefore, a state statute declaring the purpose of a gasoline tax to be the construction, maintenance, and care of highways is a valid tax in that there is a public benefit. If the question were raised whether there was a sufficient number of people to be benefited so that the purpose would be public, the court could properly take notice of the present economic and social structure of society to sustain the tax. However, we have no quarrel with a tax on motor vehicle fuel used in automobiles upon the highways, and especially is this true when the enabling statute either exempts gasoline consumed in machines not using the highways—such as aircraft, motor boats, gasoline propelled railroad cars, tractors, and stationary engines, or when there is provision for a refund for gasoline so used; but when the statute provides for no exemption or refund and the users do not directly benefit by the improved roads, et cetera, a question of major importance is immediately presented: to wit, why should such users of gasoline pay a tax thereon when the purpose for which the tax is levied is to provide for highways?

Congress has been given exclusive control and regulation on interstate commerce by the Constitution of the United States,<sup>20</sup> and it is a well settled rule that a state law which directly burdens such commerce by taxation, or otherwise, constitutes a regulation beyond the power of a state.<sup>21</sup> To come within the rule, the interference must be direct and substantial and not merely incidental,<sup>22</sup> and the states may under their reserved police powers enact laws which will be valid although they may incidentally affect interstate commerce.<sup>23</sup> The determination of how far a state may go in legislation which affects interstate commerce without violating the Constitution is a problem which is always difficult. A statute imposing a tax upon freight accepted within the state to be shipped to a point without the state or accepted without the state and taken to a point within the state was held to constitute a regulation of

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19. *Perry v. Keene*, 56 N. H. 514 (1876).

20. U. S. Constitution, Art. I, Sec. 8, Clause 3.

21. *Rosenberger v. Pacific Express Co.*, 241 U. S. 48 (1916); *Adams Express Co. v. Kentucky*, 214 U. S. 218 (1909).

22. *Hendrick v. Maryland* 235 U. S. 610 (1915); *Minnesota Rate Cases* 230 U. S. 352 (1913).

23. *Austin v. Tennessee* 179 U. S. 343 (1900); *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618 (1904).

interstate commerce in conflict with the Constitution.<sup>24</sup> A state is without power to impose a tax on a person securing or seeking to secure the transportation of freight or passengers in interstate commerce.<sup>25</sup> Likewise a statute requiring a license for the privilege of selling steamship tickets or orders for transportation to or from foreign countries was held invalid as a direct burden on interstate commerce.<sup>26</sup>

In *Minot v. Philadelphia Wand B. R. Co.*,<sup>27</sup> a state tax on rolling stock of a railroad was held invalid on the ground that the statute constituted a regulation of interstate commerce. The court said, "It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, by taxing the *use of the means* of transportation, every other state may do likewise; thus commercial intercourse between states remote from each other may be destroyed."<sup>27a</sup> However, in *Hump Hairpin Manufacturing Co. v. Emmerson*,<sup>28</sup> the court stated, "while a state may not use its taxing power to regulate or burden interstate commerce," citing *U. S. Express Co. v. Minnesota*, 232 U. S. 335, and *International Paper Co. v. Massachusetts*, 246 U. S. 135, "on the other hand it is well settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal Constitutional rights. As coming within this latter description taxes have been repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, and that the principles of the cases so holding must be regarded as a settled exception to the general rule.<sup>29</sup> The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of it or restraint upon it, or whether it affects it only incidentally or re-

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24. *Case of State Freight Tax*, 15 Wall. 232 (1873).

25. *McCall v. California*, 136 U. S. 104 (1890).

26. *DiSanto v. Commonwealth of Pennsylvania*, 273 U. S. 34 (1927).

27. 2 Abb. (U. S.) 323.

27a. Italics ours.

28. *Maine v. Railway Co.* 142 U. S. 217 (1891).

29. The cases cited by the court are: *Wisconsin & Michigan R. R. Co. v. Powers*, 191 U. S. 379 (1903); *Flint v. Stone Tracy Co.* 220 U. S. 107 (1911); *U. S. Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68 (1913).

motely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

These cases, which modify the broad general rule laid down in *Minot v. Philadelphia B. R. Co.*,<sup>30</sup> might be cited in support of a state tax on all gasoline although some of it may have been consumed by aircraft flying in interstate commerce. The argument being that the tax is not an unjust burden on commerce because it affects it only remotely and indirectly, that it is not levied with the purpose of defeating Federal Constitutional rights, and that since the tax is for a public purpose it is therefore valid. Such a line of reasoning, however, would still leave open the question as to whether the tax could be lawfully collected where the gasoline is not used on the highways.

These were the arguments presented to the United States Supreme Court in *Helson & Randolph Co., Partners, v. Kentucky*,<sup>31</sup> where the validity of the Kentucky gasoline tax which provided for no exemptions was brought to the court for interpretation. The gasoline in question was used in a motor to propel a ferry boat operating between Illinois and Kentucky. The lower court and the state supreme court sustained the tax on the theory that it was an excise tax which affected interstate commerce only indirectly. The United States Supreme Court in reversing the decision of the state court stated, "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat would present an exact parallel. *And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce.* If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states.'"<sup>32</sup>

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30. *Supra.*

31. 279 U. S. 245 (1929).

32. *Glouster Ferry Co. v. Pennsylvania*, 114 U. S. 214 (1885) Italics ours.

This case shows that while the court might have held that the tax on gasoline was only such an indirect burden and incidentally affected interstate commerce, as might have been deduced from *Hump Hairpin Manufacturing Co., v. Emmerson*, they took the other attitude and held that such a regulation went too far and the tax is within the class prohibited to the states.

The conclusions reached in the *Helson* case lead to the inevitable result that since gasoline used may be an instrumentality of interstate commerce, therefore gasoline consumed in aircraft flying in interstate business should be exempt from a state tax on the product. This was the result reached in *U. S. Airways Inc., et al. v. Shaw*.<sup>33</sup> The State of Oklahoma had an excise tax on all gasoline consumed in the state levied for the construction and maintenance of highways and bridges. It was claimed that the interstate and intrastate business of the company were so commingled and related that the tax could not be apportioned between them, therefore the plaintiff denied all liability for the tax. The court held that the plaintiffs were concededly engaged in interstate commerce and that if the legislature intended by the statute to tax gasoline used in interstate transportation then, whether the consumption occurred within or without the state, the tax would operate as a burden on interstate commerce—which is invalid because the states have no power to control or regulate such commerce.<sup>34</sup> Since the interstate and intrastate business of the plaintiff was actually found to be so commingled that the tax could not be properly apportioned, the whole tax was held unenforceable.<sup>35</sup>

These decisions of the court are undoubtedly correctly decided in the light of the rule that a state cannot levy a tax on interstate commerce in any form,<sup>36</sup> and also due to the added fact that in the opinions of the judges the gasoline consumed is as much an instrumentality of commerce as is the aircraft itself. This proposition is again asserted and successfully maintained in *Transcontinental and Western Air Inc. v. Asplund*,<sup>37</sup> in which the Federal District Court held that the New Mexico gasoline tax of five cents per gallon is not applicable to gasoline purchased for use in aircraft engaged entirely in interstate commerce and for use in motor

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33. 43 Fed. (2d) 148 (1930).

34. United States Constitution, Art. I, Sec. 8, Clause 3.

35. See, also, *Boeing Air Transport, Inc. v. Wm. H. Eddleman*, a case on similar facts which is now being argued before the U. S. District Court of Wyoming.

36. *Leloup v. Port of Mobile*, 127 U. S. 640 (1888); *Lying v. Michigan*, 135 U. S. 161 (1890); *Ozark Pipe Line v. Monier*, 266 U. S. 555 (1925).

37. New Mexico District Court, U. S. Daily, Dec. 31, 1930, P. 8.

trucks at the airport in connection with that interstate commerce. The company does no intrastate business and its only stop in the state is at Albuquerque. The purpose of the location of the airport at such point was that it was an advantageous site at which to refuel planes in their flights. The court held that the tax was a direct burden on interstate commerce and was therefore in the class prohibited to the states. Thus, it may be considered as settled law that a state cannot tax gasoline consumed by aircraft in interstate commerce nor can it tax gasoline used by a corporation engaged in inter- and intrastate commerce when the business is so commingled that the tax cannot be apportioned between them, and where the taxing statute shows that the purposes of the act are the construction, operation, and maintenance of highways.

Prior to the case of *Panhandle Oil Co. v. State of Mississippi*,<sup>38</sup> it was thought that a tax of a certain rate per gallon on the occupation of distributing gasoline was valid even though the distributor was able to pass the tax on to the consumer, and that the distributor would be liable for the tax even though he sold the gasoline to governmental instrumentalities. However, in that case, the court determined otherwise. The State of Mississippi had a tax of four cents per gallon upon the distributors of gasoline as a privilege tax, which the distributors added to the purchase price. They refused to pay the tax on gasoline which had been sold to United States Government instrumentalities and when the state sued for the tax they defended that the tax was unconstitutional. Their contention was upheld by a majority of the United States Supreme Court under the reasoning of a line of cases holding that "the states may not burden or interfere with the exertion of national power or make it a source of revenue or tax the means used for the performance of federal functions."<sup>39</sup> While Mississippi may impose charges upon the plaintiff for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures things needed for its governmental purposes. To use the number of gallons sold the United States is in substance and in legal effect to tax the sale,<sup>40</sup>

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38. 277 U. S. 218 (1928).

39. The court cited: *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842); *Ohio v. Thomas*, 173 U. S. 276 (1899); *Indian Oil Co. v. Oklahoma*, 240 U. S. 522 (1916); *Johnson v. Maryland*, 254 U. S. 51 (1920).

40. The court cited: *Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Frick v. Pennsylvania* 268 U. S. 473 (1925).

and that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state.”<sup>41</sup>

Mr. Justice Holmes said in his dissent that, in the majority opinion, an imperfect analogy with taxation that affects interstate commerce is relied upon—but that obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the government, who is willing to pay the price which includes the tax.

From this case, it may be reasoned that, if a tax upon a distributor which, in turn, is passed on to the consumer, is invalid when that purchaser is an agency of the government, then a tax would likewise be invalid which applied to gasoline sold for use in aircraft engaged in interstate commerce where the number of gallons sold was the measure of the privilege tax, and where it was in effect a sales tax. However, when it is considered that aircraft travel with such high speeds and can cross state lines in such a short space of time, it would seem that practically any flight might be of an interstate nature. The decisions are innumerable which hold that as soon as there is a crossing of a state line in a commercial undertaking, there is interstate commerce which is controlled by the federal government. There is a distinction to be noted, however, in states where the tax imposed on gasoline consumed in aircraft is levied for the specific purpose of erecting beacon lights, of building public airports, and of promoting aviation in general. In such cases the decisions of the court in relation to gasoline taxes as applied to interstate busses would be analogous.

In *Hendrick v. Maryland*,<sup>42</sup> it was said, “The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends upon good roads, the construction and maintenance of which are exceedingly expensive. . . . In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulation thereof of all motor vehicles—those moving in interstate commerce as well as others and it does not constitute a direct and material burden on interstate commerce.” In *Red Ball Transit Co. v. Marshall*,<sup>43</sup> we have the following: “While it has been settled beyond peradventure that a state which has furnished special facilities, such as public high-

41. *Panhandle Oil Co. v. State of Mississippi*, 277 U. S. 218 (1928).

42. 235 U. S. 610 (1915).

43. 8 Fed. (2d) 635 (1925).

ways, for the use of those engaged in intrastate and interstate commerce, may exact compensation therefor, and if the charges are reasonable and uniform they constitute no burden on interstate commerce yet, on the other hand, the burdens so imposed must of necessity be reasonable. The amount of the license fee or privilege tax imposed need not necessarily be limited, even to those engaged in interstate traffic to the actual cost of regulation, but may include reasonable compensation for the use of the highways and repairs thereof. *Liberty Highway Co. v. Michigan P. U. C.*, 294 Fed. 703 (1923); *W. U. T. Co. v. New Hope*, 187 U. S. 419, (1903)."

States have power to impose excise or privilege taxes for use of their roads for costs of maintenance, construction, or improvement without violating the commerce clause of the Federal Constitution,<sup>44</sup> and since the Fourteenth Amendment simply requires that the state legislatures treat all alike, a state tax on gasoline for the privilege of using the roads is a valid constitutional tax.<sup>45</sup>

The decision of the supreme court of Tennessee in *Interstate Transit Co., Inc. v. Lindsey*,<sup>46</sup> in which it is held that the imposition of a tax on gasoline consumed in interstate busses for hire and profit for the privilege of using the state roads is not an undue burden nor an infringement of the interstate commerce power of the federal government. These decisions point to a conclusion that a specific tax on gasoline consumed in aircraft would not be a burden on interstate commerce if the funds so raised were levied to build airports, etc., and such was the opinion of the Attorney General of Michigan, when the question was presented to him for consideration.<sup>47</sup>

The question has been raised, in those states where the tax is placed on gasoline withdrawn from storage, whether or not the tax could be collected when the gasoline was to be used in interstate commerce. This question was answered by the Attorney General of Alabama in his opinion to the State Tax Commissioner dated September 30, 1930, in which he says, "Gasoline imported by the distributor from another state but used in the conduct of its business, loses its interstate character and may be subject to the excise, consistently with the commerce clause. *Bowman v. Continental Oil Co.*, 256 U. S. 642 (1921). When gasoline is imported and comes

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44. *Interstate Busses Corp. v. Holyoke Street Ry. Co.* 273 U. S. 45 (1926).

45. *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. (2d) 635 (1922).

46. 29 S. W. (2d) 257 (1930).

47. Decision of October 17, 1930.

to rest within the state and is withdrawn from storage it has passed out of interstate commerce and is subject to the gasoline tax. The fact that it is afterwards sold to airships for their own use while engaged in interstate commerce does not violate the commerce clause of the Constitution."<sup>48</sup> This opinion might lead one to believe that in a state where the tax was on the withdrawal of the gasoline from storage, even though a fuel was used in interstate flying, the tax would not be a violation of the commerce clause. The result would be true from the standpoint of the tax being an unjust burden on the producer, the oil company, and is a perfectly logical deduction from the line of cases pertaining to coal, lumber, and other products which, after having been a part of interstate commerce, have finally come to rest within a state and taxed by that state without a violation of the commerce clause. However, it would appear that the Attorney General of Alabama may have erred in deciding that the gasoline tax did not burden aviation. While the tax may not be a burden on the vendor, the oil company, still, from the vendee's position, a different problem arises. If the tax is proportionate to the number of gallons sold and consumed, it is immediately reflected in the cost of operation of the transportation facility and therefore is directly connected with the rates that the public must pay for such transportation. It would be difficult to deny that there is direct correlation between the cost of operation and the rates charged and, this being established, a tax by a state upon the motive power would seem to constitute an unjust burden on interstate commerce.<sup>49</sup>

Some states have had bills pending before their respective legislatures which would require aviation gasoline to be colored,<sup>50</sup> such gasoline to be exempt from taxation. On all such gasoline sold by the oil companies they would not be required to pay the tax in the first instance upon the statement of the purchaser that the gasoline was to be used in aircraft. There probably would have been a great abuse of the privilege of purchasing gasoline without paying the tax by those who ostensibly, but not actually, purchased gasoline for use in aircraft. Fortunately, none of these bills have been passed to date.

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48. *Peterson Oil Co. v. Frary*, 192 N. W. 366 (1923).

49. *Helson & Randolph v. Kentucky*, *supra*.

50. See the tabular list of Pending State Aeronautical Legislation, 2 JOUR. AIR LAW 216.