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Comments and Digests

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COMMENTS AND DIGESTS

AVIATION—COMMERCE—TAXATION BY STATE OF GASOLINE USED IN INTERSTATE COMMERCE.—Plaintiffs operate an air transport business from points within the State of Oklahoma to points outside of that State, and at the same time operate an intrastate transport business wholly within the State of Oklahoma, it being admitted that the two lines are so interdependent and intermingled that the interstate lines could not be maintained efficiently without the intrastate line. Plaintiffs bring this action to restrain the defendant, as State Auditor, from collecting the state excise tax of four cents per gallon on all gasoline consumed within the State, it being contended by plaintiffs that the statute imposing the tax is unconstitutional as being an invasion of the exclusive right of control over interstate commerce vested in Congress. *Held*: granting a permanent injunction, that the statute is unconstitutional and void as applied to air transport companies engaged in interstate commerce, and that the intrastate line is so mingled with, and interdependent on, the interstate lines that the gasoline used in the intrastate business likewise is not subject to the tax. *United States Airways v. Shaw, State Auditor*, 43 Fed. (2d) 148 (Okla., Aug 13, 1930).

All of the Congressional power to regulate interstate commerce is given to it by U. S. Const., Art. I, § 8(3), wherein it is said: "Congress shall have power . . . to regulate commerce . . . among the several States . . ." *Van Winkle v. State*, 27 Del. 578, 91 Atl. 385 (1914). Generally, it is beyond the power of the States to burden, prohibit or interfere with interstate commerce: *Rosenberger v. Pacific Express Co.*, 241 U. S. 48, 36 Sup. Ct. 510, 60 L. Ed. 880 (1915); or rights flowing directly therefrom. *Circular Advertising Co. v. American Mercantile Co.*, 66 Fla. 96, 63 So. 3 (1913). The interference must be direct and substantial and not merely incidental. *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 358 (1914); *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900). It is generally held that taxation of interstate commerce is a burden and not a mere regulation, regardless of the purpose. *Kansas City, Fort Scott & Memphis Ry. v. Kansas*, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617 (1916). It may well be contended, therefore, that the tax in the instant case was a direct and substantial burden on interstate commerce and not to be justified when imposed by a State. This contention is sustained by the leading case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158 (1884), wherein it was held that a State could not impose an excise tax on the privilege of carrying on interstate commerce within its limits, the tax being in effect a direct tax on the commerce involved. It is maintained that the court in the instant case was correct in holding the tax to be an excise tax, although levied on all gasoline "consumed," as when a tax is laid on certain goods as marked out by their use the tax is in effect on that use, the intent to tax that use only being indicated by the levying of the tax only on that part of the particular goods engaged in that use. This excise tax must be distinguished from a property tax, it being admitted that a State may tax property having a situs within its limits. *Pullic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127 (1913); *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790 (1888). In the case of *Helson v. Kentucky*, 279 U. S. 245, 49 Sup. Ct. 279, 73 L. Ed. 683 (1929), where a State placed a tax on all gasoline used or consumed within the State, it was held that the tax, when applied to gasoline used by a ferry company in running boats from one State to another was invalid as a violation of the exclusive power of Congress over interstate commerce. This case, it is submitted, is directly in point with the instant case and was properly taken as controlling by the instant court. This case has also apparently been the authority for the holding in the

more recent case of *Western Air Express, Inc. v. Welling, Secretary of State* [1931], 231 C. C. H. 2005 (Utah, 1930), wherein the Utah Court enjoined the collection of a state gasoline tax on gasoline used by the plaintiff company in interstate commerce. Many other States have statutes similar to that in the instant case, and these statutes may be divided into four classes. (1) Those that are a direct tax on the gasoline as property, when located within the State. It is submitted that in such cases the statutes will be held valid under the general principle that a State may tax property having a situs within the State although such property is engaged in interstate commerce; (2) those imposing a tax, as in the instant case, on the consumption and use of gasoline. It is contended that in this class of cases the statute will be held invalid as being an excise tax on interstate commerce. The United States district court for New Mexico in the case of *Mid-Continent Air Express Corp. v. Lujan, Comptroller*, 47 Fed. (2d) 266 (D. C. N. M. 1931), on facts similar to those of the instant case, held such a tax to be an unlawful interference with interstate commerce. The same result has been predicted under similar statutes in *Opinion of Attorney General of Michigan to Secretary of State* [1931], 231 C. C. H. 1501 § 3002 (Oct. 17, 1930), and in *Opinion of Attorney General of Illinois* [1931], 231 C. C. H. 2002 §5004 (Dec. 8, 1930), wherein it is also said that under such a statute the provision for collecting the tax and refunding it to companies engaged in interstate commerce does not amount to an interference with interstate commerce, but is a reasonable method for the prevention of fraud. An interesting statute of this nature is that recently adopted by the State of Arkansas: Senate bill No. 88, § 6 [1931], 231 C. C. H. 2010, 2011-2012 (1931) 2 JOURNAL OF AIR LAW 220, 222-223, § 5020; wherein provision is made for the refunding of the tax to certain exempt air transport classes, among which is "any established interstate airline operating on a regular time schedule." The use of the word "established" in this statute would seem to be open to objection. (a) It may mean "lines now operating," as distinguished from those entering the field in the future—an interpretation which is clearly open both to practical objections, since it fails completely to cover the field, and to constitutional difficulties under the equal protection clause. (b) The word may be used as an unnecessary synonym of "operating on a regular schedule." But, it is submitted, it is doubtful if any discrimination between airlines "operating on a regular time schedule" and lines not so operating can be maintained. Query: Suppose the airline makes only occasional interstate flights on a temporary schedule? Can the tax apply to the gasoline used therein? It is submitted that constitutionally it cannot, but under the statute the airline clearly would be liable for the tax. (3) Those wherein the tax is imposed on the sale of the gasoline. It is contended here that the statute will be held valid, as a sales tax is to be considered as a tax on the dealer and not on the consumer. *Orange County Oil Co. v. Amos, State Comptroller*, 130 So. 707 (1930); See: (1930) 4 So. Cal. L. Rev. 417. That this will be the holding in such cases is expressed in *Opinion of Attorney General of Florida* [1931], 231 C. C. H. 2002, § 5005 (Nov. 25, 1930, Nov. 26, 1930). (4) Those wherein the statute imposes a tax on the storage of gasoline in the State. A conflict is to be expected in this class of cases. In *Opinion of Attorney General of Florida* [1931], 231 C. C. H. 2014, § 5023 (Dec. 19, 1930), it is said that the Florida storage tax would not apply to gasoline brought into the State and stored there for use in interstate commerce; while in *Opinion of Attorney General of Alabama* [1931], 231 C. C. H. 2003, § 5006 (1930), in discussing a similar tax statute, it is said that the fact that the gasoline is sold to air transport companies is immaterial since the interstate character of the gasoline has been lost by the storage within the State. It is contended that this is the logical view, as, having lost its character as interstate commerce, any tax laid on it may be justified, either as a property tax or as an excise-storage tax. The upholding of such a statute, however, must be based on a clear finding that the gasoline has lost its character as interstate commerce by the storage within the state limits, the tax then being similar

in nature to a sales tax, imposed on the one storing it, and having no relation to the intended use. For a further discussion of the principles involved herein see, *William K. Tell*, Taxation of Aircraft Motor Fuel, (1931) 2 JOUR. OF AIR LAW, 342.

CARLOS R. MANGHAM.

CONSTITUTIONAL LAW—STATE AIR TRAFFIC REGULATIONS—CONSTITUTIONALITY OF AS APPLIED TO FLIGHTS WHOLLY INTRASTATE.—A New York statute [N. Y. Gen. Bus. Law (Cahill's Consol. Laws 1930, c. 21), § 245(7)] establishes a local height of flight rule for that State. Defendant was charged with a violation of this rule during an intrastate flight. He demurred to the information, on the ground that the statute was unconstitutional as an interference with the Congressional power over interstate commerce. *Held*, that since (1) statutes must be construed so as to sustain their constitutionality if possible; (2) defendant was not engaged in any type of "commerce"; (3) defendant's flight was wholly intrastate; and (4) there is nothing to show that the rule laid down by this statute constitutes a burden upon, or an interference with, interstate commerce, the demurrer must be overruled and the constitutionality of the statute upheld. *People v. Katz*, 249 N. Y. S. 720 (Spec. Sess. Queens Co., March 31, 1931).

The principles involved in the instant case will be discussed in detail in a subsequent issue of the JOURNAL.

R. K.

INSURANCE—INCONTESTABLE CLAUSE—DEATH WHILE ENGAGED IN AERIAL NAVIGATION.—Defendant issued its policy, agreeing to pay to plaintiff-beneficiary, on the death of her husband, the insured, \$2,000. The policy contained clauses providing for forfeiture in case of non-payment of premiums and limiting the company's liability to the return of premiums paid in case: (1) the insured, within five years from the date of the policy, should engage in any military or naval service in time of war and should die in the service within six months thereafter or during the war; (2) the insured should commit suicide within one year from the date of the policy; and (3) "In the event of the death of the insured arising, in whole or in part, directly or indirectly, from engaging in aerial navigation, except while riding as a fare paying passenger in a licensed commercial aircraft provided by an incorporated common carrier for passenger service, and while such aircraft is operated by a licensed transport pilot and is flying in a regular civil airway between definitely established airports." The policy contained, also, an "incontestable clause" reading: ". . . such contract shall be incontestable after it shall have been in force, during the lifetime if the insured, for one year from the date of the policy, except for non-payment of premium or for violation of the conditions of the policy relating to military or naval service in time of war." The insured met his death while engaged in aerial navigation under circumstances not within the saving exception of the clause in the policy, but after the policy had been in force for more than one year. *Held*, that plaintiff may recover the face value of the policy, because: ". . . the effect of the incontestable clause is to select from the original conditions of the policy only two qualifications affecting the principal obligation of the defendant . . . these two exceptions being non-payment of premiums and violation of the military and naval service clause. In other words, before the lapse of one year all the conditions and qualifications mentioned in the policy affect the agreement of the company, but after the policy has been in force for one year only two of these conditions have any force, and the condition relative to aerial navigation is not found among these two." *Leidenger v. Pacific Mutual Life Ins. Co. of Cal.*, 135 So. 85 (La. Ct. of App. June 8, 1931).

It is well settled in most jurisdictions that "The incontestable clause bars every defense not excepted expressly therein saving want of insurable interest . . . But the insurer is not precluded from showing that a loss suffered was due to an excepted risk, not covered by the policy." Vance

on Insurance, 2nd ed., 818. The real problem in the instant case was, thus, whether the aerial navigation clause was a condition, made incontestable by the lapse of one year, or was an exception from the risks covered by the policy. The result reached seems proper, not only in view of the limited construction placed on incontestable clauses by the Louisiana courts (especially in *Brady v. Fidelity Mutual Life Ass'n.*, 13 Orl. App. 35, cited and relied on by the court in the instant case), but also in view of the peculiar wording of the incontestable clause itself, which, by making express reference to the analagous military and naval service clause, would seem, under the *expressio unis* doctrine, intentionally to have excluded the aerial navigation clause from its operation.

In an earlier case arising in New York, where a more liberal interpretation of the incontestable clause is adopted, it was held that a rider reading: "Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy; . . ." was not in conflict with, nor affected by an incontestable clause reading in the same manner as the one in the instant case. *Metropolitan Life Ins. Co. v. Beha*, 226 App. Div. 408, 235 N. Y. S. 501 [1929], U. S. Av. Rep. 92 (1929), (discussed in (1930) 1 Air L. Rev. 150) *aff'd*, *Metropolitan Life Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642 [1930], U. S. Av. Rep. 114 (1930). This case the court in the instant case expressly refuses to follow.

R. K.

WORKMEN'S COMPENSATION—AIRPORTS—PILOTS—FLYING INSTRUCTOR AS A PERSON EMPLOYED IN A "FACTORY" OR "WORKSHOP" WITHIN THE MEANING OF THE ACT.—Petitioner was employed by the defendant airport operator as an instructor, with incidental duties as commercial pilot and as assistant to the mechanic in a repair shop maintained by the airport for purpose of servicing and repairing planes. He was injured while on a flight with a pupil (the Commission finding, against the contention of the employer, that he was engaged in instruction at the time of the accident and had not, as claimed, deviated from this purpose to pursue another objective). The Oklahoma Workmen's Compensation Act (Okla. Comp. Stats. 1921, § 7283, as amended by Okla. Laws 1923, c. 61, § 1) sets forth a list of occupations to which the Act applies, this list being exclusive. Among the occupations set forth are: "Factories, cotton gins, mills and workshops where machinery is used . . ." These terms are defined by the Act (Okla. Comp. Stats. 1921, § 7284 as amended by Okla. Laws 1923, c. 61, § 2). *Held*, that, under the statutory definitions, the airport was a "factory" and petitioner, even when engaged in flying, was employed in a "workshop where machinery is used." *Fort Smith Aircraft Co. v. State Industrial Commission*, 1 Pac. (2d) 682 (Okla. July 7, 1931).

A discussion of the problems raised by this case will be presented in a subsequent issue of the JOURNAL.

R. K.