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In the

Supreme Court of the United States

Complete Auto Transit, Inc.,

Appellant,

v.

Charles R. Brady, Jr., Chairman,
Mississippi State Tax Commission,

Appellee.

No. 76-29

Washington, D. C.
January 19, 1977

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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: COMPLETE AUTO TRANSIT, INC., :
: :
: Appellant, :
: :
v. : No. 76-29
: :
CHARLES R. BRADY, JR., Chairman, :
Mississippi State Tax Commission, :
: :
Appellee. :
: :
----- :

Washington, D. C.,

Wednesday, January 19, 1977.

The above-entitled matter came on for argument at
1:06 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALAN W. PERRY, ESQ., Post Office Box 22567, Jackson,
Mississippi 39205; on behalf of the Appellant.

JAMES H. HADDOCK, ESQ., Post Office Box 1033,
Jackson, Mississippi 39205; on behalf of the
Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-29, Complete Auto Transit against Brady.

Mr. Perry, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALAN W. PERRY, ESQ.,

ON BEHALF OF THE APPELLANT

MR. PERRY: Mr. Chief Justice, and may it please this Court:

This case is here on appeal from a decision of the Supreme Court of Mississippi upholding the validity of a State tax levied on interstate commerce, on the privilege of engaging in interstate commerce.

I represent Complete Auto, the appellant, which is seeking to recover these taxes from the State of Mississippi. The State, of course, is a part of this action through Charles R. Brady, the Chairman of the State Tax Commission.

Complete Auto is a Michigan corporation engaged in transporting new motor vehicles, cars and trucks, from the manufacturer to the dealers in 48 States; operates pursuant to authority granted by the Interstate Commerce Commission. It doesn't have any intrastate operating rights from the Mississippi Public Service Commission. It's been engaged in this business in Mississippi since 1940, and engaged in the business of transporting vehicles from the Jackson, Mississippi, railhead around since approximately 1960.

During that period of time it has paid substantial income taxes, franchise taxes, ad valorem taxes and license plate fees.

Since the Tax Commission's main contention is that this activity of Complete Auto constituted intrastate commerce, a brief reference to the undisputed facts concerning the activities of Complete Auto in Mississippi is necessary.

Complete Auto is engaged only in the business of transporting new motor vehicles for General Motors. All of the motor vehicles that were transported by Complete Auto were manufactured in plants outside the State of Mississippi.

General Motors, pursuant to its obligations to its dealers, was responsible for delivering the motor vehicles to the dealer's location. General Motors chose the carrier or carriers to make that delivery. Of course, it was necessary that the delivering or final carrier be a motor carrier, since most dealer's showrooms are not located adjacent to railroad terminal facilities. In many cases, Complete Auto or another motor carrier will transport the vehicles the entire distance from the manufacturing plant to the dealer.

In some cases, however, as in the activities with which we are particularly concerned, General Motors found it more economical to use a rail carrier for a portion of the journey and a motor carrier, such as Complete Auto, to complete the delivery to the dealer.

General Motors made all the transportation arrangements before the vehicles left the plant, at the time each vehicle left the plant, a label was placed in or on the motor vehicle showing the particular dealer to whom it was to be delivered.

The trial court found, as a matter of fact, that once the vehicles were delivered to the carrier, that General Motors had nothing whatsoever to do with the transportation, and the vehicles were in the custody, care and control of the carriers from the time they left the manufacturing plant to the time they left the -- until the time they arrived at the dealer.

And the transportation here at issue, a railroad transported the vehicles from the manufacturing plant to a rail ramp in Jackson, Mississippi; in Jackson, the railway transferred the vehicles to Complete Auto, which completed the transportation to the dealer. Some of the dealers were located in the State of Mississippi, some of the dealers were located outside of the State of Mississippi.

At the trial of this case, and in the Appendix are documents illustrative of the type of transactions we're talking about, they show that, for the documents which are in evidence, the vehicles were shipped from a manufacturing plant in Atlanta, Georgia, by the Southern Railway System, to Meridian, Mississippi, which is in the eastern portion of

the State, and there they were transferred to the Illinois Central Railroad, which carried the vehicles to Jackson, which transferred the vehicles to Complete Auto for continuation to the dealer in the State and out of the State.

The statute at issue in this case provides, in part, as follows:

"There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business", and then it describes the tax to be levied pursuant to certain following sections.

The particular section with which we are concerned provides, in part, that:

"Upon every person operating a pipeline, airline, bus, truck, or other transportation business for the transportation of persons or property for compensation or hire between points within the State, there is hereby levied, assessed, and shall be collected, a tax equal to five percent of the gross income of such business."

Acting pursuant to these statutes, the Tax Commission assessed a tax against Complete Auto on the gross receipts derived by Complete Auto for transporting the vehicles from Jackson, Mississippi, to the dealers in Mississippi. The State Tax Commission did not assess any tax on any portion of the gross receipts earned by Complete Auto in transporting

the vehicles from Jackson, Mississippi, to dealers in other States.

The Commission's position in levying this tax has always been that it considers Complete Auto's activities, in continuing this interstate transportation from the manufacturer to the dealers, to be intrastate commerce. It's our position, however, that the interstate character of the transaction is clearly demonstrated by the undisputed facts. It's undisputed --

QUESTION: Mr. Perry, --

MR. PERRY: Yes, sir?

QUESTION: -- how long has Mississippi had this statute in its present form?

MR. PERRY: The statute was amended to its present form in about 1955, as I recall, Mr. Justice Blackmun. It had a predecessor statute which was in effect, at least in 1949, when this Court decided the Interstate Oil Pipeline case. That tax statute was very similar to the one now in effect.

QUESTION: Did they all speak in terms of privilege?

MR. PERRY: Yes, sir. The statute prior to 1955 said "privilege" once; this statute says "privilege" twice.

It's undisputed that the intention of General Motors/ was that the motor vehicles be transported from the manufacturing plant to the dealer; it's undisputed that the only break in the transportation was for the purpose of trans-

ferring the vehicles from one carrier to another; it's undisputed that after that transfer took place the transportation to the dealer continued; and it's undisputed that General Motors had nothing whatsoever to do with the vehicles after they left its plant.

The Commission's position in this seems to be based solely on its contention that it believes the form of the documents establish that this is somehow intrastate commerce. And the Commission's brief even asserts that this fact is controlling, and the form of the documents is the only pertinent fact that this Court needs to consider.

It's undisputed that separate bills of lading or way bills were prepared for the railway journey and for the truck journey. There were separate bills of lading.

However, it's also undisputed that the reason for that was that the joint tariffs had not been filed for the rail carrier, for the truck carrier. Since there were no joint tariffs for these two carriers, there could be no joint rates; thus, there could be no joint documents.

We have cited numerous cases in our brief holding that the form of the bill of lading or the documents is not controlling, doesn't affect the character or continuity of an interstate movement.

We have also cited numerous cases showing that a mere interchange from one carrier to another doesn't affect an

interstate movement.

And the lack of merit in the Commission's contention, that this Court need look only to the bills of lading, is clearly evident from the peculiar and inconsistent results which it produces.

QUESTION: Well, is your client -- is there an income tax in this suit?

MR. PERRY: Yes, sir. And the record, at Exhibit C-5, shows that Complete Auto -- which is cited in the brief -- shows that Complete Auto paid that tax, the corporate franchise tax, ad valorem taxes, and license plate fees to the State.

QUESTION: And why are those taxes permissible?

MR. PERRY: They are not "privilege" taxes, as we see it, Your Honor. We don't contend that those are privilege taxes by --

QUESTION: Well, if Mississippi just changed its label here and said, We are now putting a tax on transportation?

MR. PERRY: Well, that's somewhat akin to the Railway Express case, where, if they merely -- in Railway Express, you remember, there was an earlier decision where this Court invalidated a Virginia statute, and a few years later, after the Virginia Legislature had revised the statute, the question came up as to whether the amended statute still

levied a privilege tax. And the Court held, in a decision as to which there were some reservations in dissents, that, yes, that was indeed a property tax, or a tax levied in lieu of a property tax, and therefore it wasn't a privilege tax. The question wasn't exactly free from doubt; as I recall, Mr. Justice Brennan expressed some reservations, and Mr. Justice Stewart dissented.

I am not sure that merely excising the word "privilege" from this tax would make it not a privilege tax. I think that you still have to look and see if the State is contending that it's not levied on the privilege of engaging in business, exactly what incident is it levied on.

QUESTION: Well, what's the vice of a privilege tax as opposed to, say, a gross income tax on income derived from transportation within the State of Mississippi?

MR. PERRY: Well, of course, there is the basic argument that the State does not have the power to exclude a company from engaging exclusively in the interstate commerce. That's perhaps a formal argument.

The particular practical problems that such a tax creates is that a privilege tax is more selective than the other taxes, which this Court has held, such as an income tax or property tax.

QUESTION: What if this tax were exactly -- had exactly the same incidents, except it was called a gross income

tax on income derived from transporting property within the State of Mississippi?

MR. PERRY: This Court has chosen, I think, to draw a bright-line test because of the dangers that a privilege tax necessarily has.

QUESTION: It leads to discrimination?

MR. PERRY: Yes, sir. The danger of a selective tax --

QUESTION: If it's on the privilege of doing interstate commerce, that's all it covers: interstate commerce.

MR. PERRY: No, sir, there could be a --

QUESTION: Well, I mean if --

MR. PERRY: -- tax that was applied to -- excuse me, sir.

QUESTION: Well, if the tax, if that's what the tax law says, why, by definition, it would reach only interstate commerce.

MR. PERRY: I'm afraid I don't understand your question, sir.

QUESTION: Well, if the law said that we put a tax on the privilege of engaging in interstate commerce?

MR. PERRY: Yes, sir. Surely, that's prohibited, but the Spector decision, on which our argument is based, goes a lot further than that. In that case it was held that a tax placed on interstate and intrastate commerce, in the form

of a privilege tax, was invalid. It's not just a tax that is levied on interstate commerce that's invalid, it's one that is levied on interstate and intrastate commerce, if it is in fact levied on the privilege of engaging in interstate commerce.

QUESTION: Well, do I understand you, then, to say that if Mississippi changed its label, but imposed the same tax, it would be all right?

MR. PERRY: No, sir. I think that's the Railway Express case again, Your Honor. In that case the tax was reconstructed as a property tax by making it in lieu of the property tax on certain intangible assets of the carrier. I think that if the State of Mississippi were to enact the same statute merely excising the word "privilege", one would have to look at what in fact was being taxed by this statute, looking at the entire structure of the Mississippi taxing system to see if they had in fact found a valid taxable incident upon which they had levied the tax. They could demonstrate -- excuse me?

QUESTION: I have one last question, you said this Court has made a bright line, do you really mean that?

MR. PERRY: Yes, sir, I think Spector is a pretty bright line --

QUESTION: What about Memphis Gas?

MR. PERRY: Of course that predated Spector, and

Memphis Natural Gas was, of course, a franchise tax, and after Colonial Pipeline, those two cases are really -- the corporate franchise incident is a separable incident, as I read the Court's opinion in Colonial Pipeline.

QUESTION: Then you are saying label is important?

MR. PERRY: No, sir. I think that the -- well, the label is important in that it helps us prove in this case that it's not levied on anything except the privilege. If the State merely took out the word "privilege", I think we would have a harder time, but we could still succeed if we established that it was not levied on anything but the privilege.

QUESTION: So, in your mind, then, Memphis Gas and Spector are entirely reconcilable?

MR. PERRY: Well, I'm not going to represent to the Court that I can reconcile every word in both opinions.

QUESTION: Well, you said it was a bright line.

MR. PERRY: Yes, sir. I believe that, to the extent that Memphis Gas is inconsistent with Spector, I believe Spector controls. And I believe that the cases since Spector are certainly consistent with Spector. I think that there are a number of cases in the Thirties and Forties where the Court was struggling with just this question, whether to adopt a test of balancing the burden on interstate commerce against the State's need for revenues, and the benefits

provided to the State, a case-by-case adjudication of the validity of each tax. On the other hand, there were those on the Court who believed that the appropriate test would be a bright-line test, condemning either privilege taxes or sometimes expressed as a direct tax. And I don't see that language in Spector. I think it is not a privilege tax.

The Court wrestled with that problem apparently for a number of years, and came down on the bright-line test, perhaps in the interest of affording certainty to the taxpayer, perhaps in recognition that the difficulty of a taxpayer proving that a particular tax burden on interstate commerce is almost insurmountable.

QUESTION: But, if you were to prevail, I suppose your Legislature could do what the Louisiana Legislature did in Colonial Pipeline and set up alternative incidents, as they did there, and then go on and tax you?

MR. PERRY: They could not choose the valid incident which the Louisiana Legislature used, and which this Court sustained, which was the corporate --

QUESTION: But those were alternatives, weren't they? Three of them.

MR. PERRY: Yes, sir. I don't read Colonial Pipeline as justifying all three, but merely the privilege of doing business in corporate form. The State of Mississippi has a corporate franchise tax which is levied on that incident, and

I'm not sure that they could tax it again, without it really being a privilege tax.

QUESTION: Sometimes the Court has at least had discussion, if not inquiry into what it is that the taxpayer is getting for the money he is paying out.

Is it your position that the taxes you are already paying, the various taxes you mentioned, balance out all that you are getting and that you get nothing for this tax?

MR. PERRY: It's the difficulty that answering that question presents that I believe justifies the bright-line rule. We pay substantial taxes. I'm not sure that anyone can quantify or that a court can quantify the cost to the State of providing the benefits, or the value of the benefits which that taxpayer receives. And we have not tried to, in this case, argue that we only received X amount of benefits, but we pay Y amount of dollars.

That is a problem, but one that we would have to address if the Court were to overrule Spector or the bright-line test.

QUESTION: The real problem is that you say Mississippi is getting too much tax money?

MR. PERRY: No, sir, I think that --

QUESTION: Well, you agreed to pay the other taxes.

MR. PERRY: Yes, sir, we agreed to pay the other taxes.

QUESTION: You didn't dispute those. That's your real problem, isn't it?

MR. PERRY: No, sir, I don't think that we have said that we can quantify the amount we're paying, and that that exceeds the amount of benefits that the State has been --

QUESTION: No, I didn't say that. I said, isn't your real -- you admit you're subject to taxes by the State of Mississippi.

MR. PERRY: Yes, sir.

QUESTION: Your objection is this is too much.

MR. PERRY: No, sir, our objection is that this is a privilege tax, and that --

QUESTION: That it's too much.

MR. PERRY: No, sir. Our objection also is that this is not a tax that we would have paid if the State had been entitled to levy it in 1968 through 1972. This tax would have been passed along to General Motors, presumably to its dealers, and presumably to new car customers during 1968 to 1972.

We relied on the bright-line test. It's too late to pass the tax along.

In essence, by relying on Spector, we are now -- we have no remedy -- the thing that's taxed, we would not have been required --

QUESTION: Just for myself, you would do better by

just talking about Spector, instead of talking about the bright line.

MR. PERRY: I'm sorry, sir, I didn't --

QUESTION: I know. Go ahead.

QUESTION: Well, what decision is it you say that you relied on the Spector case?

MR. PERRY: Yes, sir. That case held that a State may not levy a privilege tax on interstate commerce, even if the tax is nondiscriminatory and fairly apportioned. But --

QUESTION: Well, do you think -- go ahead, finish your answer.

MR. PERRY: Of course, that decision was in 1951, I believe, in 1954 there was the first Railway Express case, and since that time the rule has been recognized in other decisions of this Court, not the basis of a holding.

QUESTION: Well, do you think it's necessarily a basis of a sort of reliance that you are going to assert in a constitutional sense, to pick out the case that's most favorable to you and say, We relied on that; and, in effect, ignore the Memphis Gas case?

MR. PERRY: Well, a taxpayer in the situation of Complete Auto cannot afford to say, well, maybe yes and maybe no; they have got to make a decision as to whether to pass this tax along or not.

The decision was made to rely on the latest cases, all of which are after the earlier cases that might indicate that there's some doubt as to the invalidity of this tax. They would --

QUESTION: Aren't you -- as I read your brief, you are, in effect, saying that if the Legislature is foolish enough to say we're levying this tax expressly upon the privilege of doing an exclusively interstate business -- and that's all they say -- that it's unconstitutional under Spector and that line of cases? That's the end of the whole inquiry.

MR. PERRY: Yes, sir, I think the State would have a difficult time contending that a --

QUESTION: No, but isn't that what your argument is, based on what we said last term in Colonial?

MR. PERRY: Yes, sir, I think that there is a difference between the label and the incident of the tax. As we pointed out, I believe the privilege tax presents dangers that other taxes that a more aptly worded statute would avoid. If you have a privilege tax, there is always the possibility --

QUESTION: Well, even though all this is so, if Spector -- if you're right in relying on Spector, once you establish that that's what this tax is, and that's the way the tax statute is written, you're entitled to win?

MR. PERRY: Yes, sir.

QUESTION: That's what I thought.

MR. PERRY: That's our position.

QUESTION: It would be bright line, isn't it --

QUESTION: But, I take it -- do you read the Mississippi Supreme Court as saying that -- as conceding or accepting that this transportation was the last leg of an interstate journey?

MR. PERRY: We read the Supreme Court as conceding that this was interstate commerce. The tax mentioned even --

QUESTION: Yes. It's not saying that this last leg was not part of interstate commerce, it did not say that?

MR. PERRY: No, sir. Even the Tax Commission's brief concedes that, at best -- they didn't say "at best" -- that the Supreme Court found it unnecessary to decide the issue. They certainly made no holding that it was intrastate commerce.

And the Chancery Court's opinion is even clearer, Your Honor, I think it's apparent -- although he doesn't say this is interstate commerce, that that's the substance of his opinion.

Well, the form of the documents is really the only question, Mr. Justice White, on whether this is interstate or intrastate. They argue that because the goods were consigned

to General Motors in care of Complete Auto, that that makes this somehow intrastate commerce, and, indeed, they even suggest that General Motors took possession of the --

QUESTION: Well, that isn't what the Mississippi courts held, though.

MR. PERRY: No, sir. I was going to point out that we're not convinced, and neither of the Mississippi courts were convinced, and we think your Court, this Court should agree with the Mississippi courts and conclude that this is interstate commerce. And the only question is whether a privilege tax can be levied.

There's no question that this is a privilege tax. It's been consistently construed as a privilege tax by the Mississippi Supreme Court. There's no question that the tax is a condition precedent to compliance with the statute. It's a condition precedent to engaging in business in interstate commerce in Mississippi, although we don't think it would be controlling whether it were or not. The Tax Commission's brief made the argument that it's not a condition precedent, and, of course, our brief cites the statute which we believe establishes that it definitely is in interstate commerce, -- excuse me, that it definitely is a condition precedent to engaging in business.

Our original brief discussed at length the recognition which we think that Congress has afforded to

Spector. It's reviewed this entire area of State taxation in interstate commerce. We believe that here we have the sort of positive inaction that this Court recognized in Flood v. Kuhn,[?] and if this case -- if, Mr. Justice Blackmun, Spector is an aberration, referring to your opinion in Colonial Pipeline, we think that it's an aberration that's been so long recognized by Congress and so much relied on by the taxpayers that this Court should leave it to Congress to correct any of the problems that might be apparent or not apparent in the rule.

By that we do not mean to concede --

QUESTION: You mean you relied upon them in the sense you just ignore the State tax?

MR. PERRY: We did not ignore the State tax, I think that --

QUESTION: Well, you said you wouldn't pay it.

MR. PERRY: Well, yes, sir, I suppose we would have had to either ignore the Constitution or the State tax, and we chose to rely on the Constitution.

QUESTION: At least you relied on it in the sense you didn't pass it on.

MR. PERRY: Yes, sir. And, of course, if you're going to tack a cost like that on, you've got to tack it on so the dealer can pass it along to his customers, or else someone is going to be left absorbing the burden of it, that

otherwise shouldn't.

If you had just one customer and he was going to absorb it one way or the other, it might not be such a difficult problem.

For the reasons stated, that this is transportation in interstate commerce and that the State may not levy a privilege tax on interstate commerce, we suggest that the decision of the Supreme Court of Mississippi is totally inconsistent with the opinions of this Court. It didn't cite Spector, it didn't cite Railway Express, it didn't cite Colonial Pipeline. Either we were not eloquent in urging those cases, and we discussed them at length, or else the court deliberately chose to ignore their precedent.

For reasons stated, we think the decision should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Haddock.

ORAL ARGUMENT OF JAMES H. HADDOCK, ESQ.,

ON BEHALF OF THE APPELLEE

MR. HADDOCK: Mr. Chief Justice, and may it please the Court:

I think the facts are most important in this case precisely as to how this activity took place, and I first might add that the Mississippi sales tax is required by

statute to be passed on to the consumer at the time of sale, by adding the appropriate amount of the tax to the bill. And if this Court follows the majority opinion in the Joseph B. McGoldrick vs. Berwind-White Company, in which, in the majority opinion, they stated that a tax of this nature -- and the New York tax in that case was exactly like the tax in Mississippi -- and the court, by a majority opinion, found that the incidence of the tax was on the consumer. This is a consumer tax, it's to be the sales tax in Mississippi -- which, incidentally, was the first State to have a workable sales tax, that we passed in 1932.

It is a consumer tax. It says that it is a privilege tax, and we don't doubt -- we don't deny that it is a privilege tax. But it is a tax placed on the privilege of conducting certain intrastate events, which are listed: the sale of property or the sales of services which are performed exclusively within the State of Mississippi.

In the case of the truck lines, the travel from one point within Mississippi to another point within Mississippi.

In this particular case, we might look at the actual transaction, as the exhibits indicate, and determine our position as to why we think this is clearly intrastate commerce that has been taxed, or an intrastate activity at the conclusion or the termination of the shipment from a consignor in one State to a consignor in -- to the consignee

in another State.

There is just the same situation that you would have if somebody would send freight in by rail line to a merchant, and he hired somebody to go down to the railroad and pick it up and bring it to his business. It's an exclusively intrastate activity, that the dealers, General Motors wanted to be sure that the property was sent from the railhead to the dealer's front door, and the dealer wouldn't be required to go pick it up himself, that this service was performed.

QUESTION: Mr. Haddock, on the facts of this case, these vehicles go to Meridian and they are changed from one railroad to another, well, why don't you tax the Meridian-to-Jackson part of it?

MR. HADDOCK: There was no sale of a service on that charge. That was on a through bill of lading, from the assembly plant --

QUESTION: Then you rely on the bill of lading?

MR. HADDOCK: Well, to a degree, yes, sir, we rely on a bill of lading, because in today's complexities of modern business you've got to rely on some kind of commercial transactions in tax matters.

QUESTION: Well, my other question is that, if, on these trucks, they have three vehicles to be delivered in Mississippi and two to go to Louisiana, all on the same

truck.

MR. HADDOCK: We do not tax those going from Mississippi, from a consignor --

QUESTION: Well, what right do you have to tax those if you don't tax the others? They are all on the same truck. And they all are using Mississippi roads.

MR. HADDOCK: They all use -- they are using Mississippi roads, but we don't feel that a shipment from a point in Mississippi to a point in another State is exclusively intrastate commerce.

QUESTION: Even though it's the same vehicle being used?

MR. HADDOCK: Regardless -- yes, the same vehicle could be used.

In this particular case, General Motors shipped their automobiles from General Motors assembly plant in Georgia to General Motors Assembly Division in Jackson, Mississippi, as the consignee, by rail on a rail bill of lading. They were then unloaded onto a large lot, and the Mississippi Supreme Court said that up until that particular point General Motors had control of this property, they could do with it as they saw fit. They could sell it to somebody else, they could transfer it to another dealer. The consignment was shipped to themselves as consignee.

As a matter of fact, in the Convoy case, Convoy vs.

Washington [sic], which was decided after Spector, that was an identical case to this, on fact in law, and fact involved, the only difference was that Ford Motor Company was the manufacturer of the automobiles and Convoy was the shipper of the cars. There was no difference. All of the other facts of any importance were exactly the same; the same procedure was used.

And in that case, the Ford officials said that they used this method of shipment in order to protect themselves in case a dealer should go bankrupt after the cars were shipped, prior to the shipment in Mississippi, or, in the case that they wanted to demand a cash payment for the cars when they shipped them out of Jackson by the carrier.

They maintained control, and the Mississippi Supreme Court said that they maintained control up to that point, because they had shipped them the cars from themselves out of State to themselves in the State.

QUESTION: What if each of the dealers had sent some kind of a vehicle to this point in Mississippi and taken the cars to their own distribution point themselves, would there be -- could you levy any extra tax on them?

MR. HADDOCK: Levy the same tax on them, yes, sir.

If the dealer, the Mississippi dealer sent -- yes, sir, we would levy the same tax on them.

QUESTION: Do any of them do that, do you know?

MR. HADDOCK: Well, yes, sir, I can tell you from experience, I used to own a dealership -- not exactly to this extent, but my property was sent to the railroad and I sent -- I unloaded it and had it brought to my plant. And if I engaged somebody to do it, and was used regularly, I paid them the sales tax on this transportation.

There is a fine line of demarcation, and everybody realizes just where interstate commerce breaks, there is no way that anybody can actually tell, and you have to use some kind of different solution in every case that's dependent on the facts in the situation that is existing there, which clearly indicate the purposes of intent from the paperwork that's involved.

Now, our position has always been, and we think that the Mississippi Supreme Court said, that this was intrastate commerce, that this was a local activity. It may have been related to or connected with it in some way, but it was not interstate commerce. The reason they could not have found that it was interstate commerce is that they based their opinion in this case, and they say that three cases control this case.

QUESTION: Well now, what you're saying now is contrary to what is said in your brief. And I'll read it: "It is abundantly clear that the Mississippi court found it unnecessary to determine the question of interstate or intra-

state commerce."

MR. HADDOCK: Well, I think it is.

QUESTION: And now you just told us that you think they held it was intrastate.

MR. HADDOCK: Well, may I rephrase that?

QUESTION: Yes.

MR. HADDOCK: I think, first, they decided that this was a local intrastate activity that was taxed. This is evident on page 108 of the Appendix here, in which they are talking about the -- let's see -- "The local activity taxed must be one that does not lend itself to repeated exactions in other States."

"The general rule is that a State may tax a local activity affecting or related to interstate commerce, if the local activity is sufficiently separate from the out-of-State aspects of interstate commerce."

I think that no other reading of this opinion by the court -- first established that this was a sufficiently separated activity from the aspects of interstate commerce conducted exclusively within the State of Mississippi --

QUESTION: But, Mr. Haddock, on the next page they rely on a -- using their own language, "a case involving the final leg. of an interstate shipment, in McKeigney v. Dunn"--

MR. HADDOCK: Yes.

QUESTION: -- which sounded to me as though they are

taxing the -- that's what they are talking about.

MR. HADDOCK: Well, I will agree that that does sound like it on the face of it. But then if you consider the three cases on which they base their decision, and they say "The present case is controlled by cases arising in this State. Interstate Oil Pipe Line Company vs. Stone involved the first leg of an" --

QUESTION: "Of an interstate shipment."

MR. HADDOCK: -- interstate commerce. But the Mississippi Supreme Court themselves had held that the fact -- under those facts, that that was intrastate commerce in that case.

The same thing as in Dunn Brothers, which involved --

QUESTION: But they held that before the United States Supreme Court called it the first leg of an interstate shipment, didn't they?

MR. HADDOCK: Sir?

QUESTION: Didn't the United States Supreme Court call it the first leg of an interstate shipment? And, for purposes of deciding what is interstate and what is intrastate, are we governed by the State court's decision or --

MR. HADDOCK: Yes, sir, but I think they are using a leg of an interstate shipment as the courts in these other cases used the leg: as being a movement from a local within the State, the first leg being an intrastate activity prior

to the time that it is actually shipped in interstate commerce.
these --

QUESTION: Well, what about the facts of Spector, weren't there pickups from points of origin and then delivery to terminals within Connecticut and then shipment out of State?

MR. HADDOCK: I'm not sure about that, but in that case, that involved through shipments from a consignor out-of-State to a consignee in-State. There was no local activity whatsoever, no local commercial transactions within the State of Connecticut. And I think Spector is one of our strongest supporters, actually, in what the Court said.

The Court looked for the local incident of the local activity, the presence of that activity, on which to base their decision.

But they couldn't find it. There was no local activity in Spector. They had no commercial transactions involved in -- except for the movement of commerce from one point in Connecticut to a point outside the State of Connecticut.

QUESTION: What's the commercial activity here?

MR. HADDOCK: The commercial activity is the transportation of the automobiles from the railhead after they had arrived in Mississippi in the hands of the owner-consignor, and he ships them out within the State of Mississippi.

He is the shipper himself. General Motors ships the automobiles --

QUESTION: Was there a General Motors agent in Jackson, Mississippi, to handle this?

MR. HADDOCK: Yes, General Motors has a big operation in Jackson.

QUESTION: Is there anything in the record to show that anybody did anything? Or was this just a routine thing, within the same --

MR. HADDOCK: Well, --

QUESTION: What would have happened if it had been a railroad from Jackson to wherever this went? It would be no problem, would it?

MR. HADDOCK: There would be no problem except that the dealer would have to get the cars off of the railhead and bring them to his place of business.

QUESTION: No, sir, my story is --

MR. HADDOCK: Sir?

QUESTION: -- one of these cars, one of these vehicles was delivered to Biloxi, Mississippi, by this truck. If a railroad had picked this up at Jackson and delivered it in Biloxi, no tax?

MR. HADDOCK: No, sir, that part of the shipment would not --

QUESTION: Is that right?

MR. HADDOCK: That's correct. It would not, to get to Biloxi. But, now, if somebody --

QUESTION: Would there be any tax between Jackson and Biloxi?

MR. HADDOCK: No, sir, not if it came --

QUESTION: Well, then, why do you tax the truck?

MR. HADDOCK: Because of the fact that --

QUESTION: Because it's a truck and not a train?

MR. HADDOCK: Because there is a shipment, an intrastate shipment of the owner of the property who has possession and control of the property in Mississippi to a consignee also located in Mississippi.

This is a situation that could exist in any -- if a manufacturer or a big organization had a warehouse in some State and they manufactured goods, the total purpose being to sell those goods, and they shipped from out-of-State to that warehouse, the intention is that they go on to other places when they are shipped in there.

QUESTION: My final question: If they find it cheaper to get Complete Auto Transit to ship them from Meridian to Jackson, what then?

MR. HADDOCK: Well, if they send them to Complete Auto or to the dealer or to somebody else --

QUESTION: The same deal was made.

MR. HADDOCK: If they had the same deal, and shipped

them to Meridian and they hired Complete Auto to take them from Meridian to the dealer, it would be the same proposition.

QUESTION: They would be taxed?

MR. HADDOCK: They would be taxed.

QUESTION: And they would be doing the exact same thing that the railroad is doing now, without tax.

MR. HADDOCK: No, sir.

QUESTION: Yes. They're delivering them from point to point.

MR. HADDOCK: There would be a different situation --

QUESTION: Yes, one's a truck and one's a railroad.

MR. HADDOCK: Well, maybe I misunderstood your question. But there's a different --

QUESTION: At the present time the cars are shifted in Meridian and delivered to another railroad, and they are delivered by railroad to Jackson, and they are not subject to this tax. Suppose they find it would be cheaper to transfer these from -- in Meridian, to a truck of the Complete Auto Transit Company and ship to Meridian. They would be taxed.

MR. HADDOCK: They would not be taxed, no, sir, because they would be shipping them from themselves on a continuation, the property would not change hands. They would still be continuing to ship them from themselves to themselves. It would be a movement from out-of-State to a movement in-

State.

QUESTION: Well, this is Meridian, Mississippi, to Jackson, Mississippi.

MR. HADDOCK: That would be all right. As long as there is a continuous movement from a person who owns the property --

QUESTION: Well, what's the difference between picking up in Meridian and picking them up in Jackson?

MR. HADDOCK: There's no difference in the location, there's a difference in the commercial transaction that --

QUESTION: Well, you said you couldn't tax the first one, but you could tax the second one.

MR. HADDOCK: Yes, it is, but you have to go back and look at the shipper -- you have to go back and look at the shipper and the person who is receiving the goods, and the transaction that takes place. If it's a commercial transaction, shipping property from one person in Mississippi, as consignor, to another person in Mississippi, as consignee; that transaction is taxable.

But if it is a movement of property belonging to a person from out-of-State location, who is shipping goods to Jackson, Mississippi, and he ships it to Meridian, to himself, from himself out-of-State to himself in Jackson, and it comes through by rail and then by truck, and it's still his property, there's no title change, there's no possession

change, there's been no other activity, there would not be a taxable activity on which you could tax.

QUESTION: Is this -- do I understand, Mr. Haddock, in your answers to the questions of my brother Marshall, that you concede that this is -- that if what is involved in this case is interstate commerce, then your State has no power to tax it?

MR. HADDOCK: I would say if it is interstate commerce --

QUESTION: Then your State has no power to tax it, that's what you've just told Justice Marshall, I think.

MR. HADDOCK: No, sir, I don't think so. I don't --

QUESTION: What have you told him?

MR. HADDOCK: It may have been -- I think that we possibly could have taxed it anyway, but we do not, we do not make a practice of taxing interstate shipments from a consignor out-of-State to a --

QUESTION: And why don't you make that practice of doing it under the law?

MR. HADDOCK: Well, because we --

QUESTION: The law requires you to tax it unless it's unconstitutional to do so, doesn't it?

MR. HADDOCK: Well, there's such a fine line in interstate commerce that we have always considered, it's been a basic principle of ours, that, under our law, we could not

tax transportation that was coming from a point outside the State to a point inside the State.

QUESTION: Because it's interstate commerce?

MR. HADDOCK: Generally, yes, sir, I would say that this would be --

QUESTION: So that if this is interstate commerce, you could not tax this? Do you concede that?

MR. HADDOCK: I will concede it, unless this is a local activity that is so related to it, that is apart from the interstate commerce and would not be a burden on it, would not be discriminatory --

QUESTION: Well, Justice Marshall's hypothetical case, that he asked you about, was a purely local activity, a continuation of interstate commerce. It goes by rail to Meridian and by truck from Meridian to Jackson. And he was --

MR. HADDOCK: Well, it would depend on --

QUESTION: -- talking about the segment from Meridian to Jackson, Mississippi by truck.

MR. HADDOCK: Well, it would depend on the business transactions, the local activity that was involved, and that would depend on the tractions, I think.

QUESTION: Well, then --

MR. HADDOCK: That is the proposition that I don't know --

QUESTION: -- you wouldn't tax, or you do not tax --

you would not tax that --

MR. HADDOCK: We don't tax --

QUESTION: -- transaction embodied in Mr. Justice Marshall's question. That's what you told him.

MR. HADDOCK: Well, --

QUESTION: Didn't you?

MR. HADDOCK: The principle -- possibly so, but it's very difficult to answer that question, because you don't know how they handle that transaction in Meridian, you don't know how -- whether they have control of it, what the shipping documents say, who the property belongs to at that particular time. It would be very difficult to say without looking at the documents.

QUESTION: Well, I understood your answers to Justice Marshall's questions to boil down to conceding that if this is interstate commerce involved in this case, you do not have power to tax it under your statute, and you tell me if I'm mistaken --

MR. HADDOCK: No, sir, that general statement I do not agree with; no, sir.

QUESTION: Well, then why don't you -- why wouldn't you tax the truck trip from Meridian to Jackson, in his question?

You have an absolute duty to apply this tax uniformly and fairly, except when you cannot constitutionally

do so, don't you?

MR. HADDOCK: Yes, sir, I would think so. But there --

QUESTION: Then why wouldn't you tax that?

MR. HADDOCK: You would have to look at the facts.

QUESTION: Well, you told him you wouldn't tax it.

MR. HADDOCK: Well, we may not -- we probably wouldn't tax it, because we wouldn't know about all of the -- we don't know about all the transactions, that we can't determine the facts in every case of shipment in every situation that comes up.

We have adopted the principle, in the Tax Commission, that we will not tax any part of transportation from a consignor out of the State to a consignor in the State.

QUESTION: Well, may I ask again: Why have you adopted that policy?

MR. HADDOCK: Well, because it is uncertain, it has been so uncertain as to just what part of a transportation cost that you could tax. The law -- it has not been firmly established in my mind as to just what point of demarcation -- now, as to property tax, as to State tax, income tax, the Court has been very agreeable to go along with it. But in the field of transportation, it gets to be, as the Court says, a thorny problem. You can't really decide where the line of demarcation is, but the Court has, I believe, --

QUESTION: Between what and what?

MR. HADDOCK: Sir?

QUESTION: Between local commerce and interstate commerce.

MR. HADDOCK: Yes, sir.

QUESTION: And if it's interstate commerce, you can't tax it; is that right?

MR. HADDOCK: Well, basically, you couldn't tax it if the incidence of this tax was on the privilege of doing an interstate business. I think this Court has established that. If it's for some other purpose, I think you can.

Now, our question --

QUESTION: This has nothing to do with the purpose for which the revenues are used, does it? That's not any criterion, is it?

MR. HADDOCK: Well, I think --

QUESTION: Whether they are used for free school lunches or for building roads --

MR. HADDOCK: You're getting into --

QUESTION: That makes no difference, does it?

MR. HADDOCK: You're asking me a philosophical question here.

QUESTION: Well, does it make any difference constitutionally? That's the question I ask you now.

MR. HADDOCK: Well, constitutionally, in my opinion,

I have to start with the basic premise that interstate commerce should pay its own way. It should be treated exactly like any other commerce, so long as there's not a barrier thrown up to prevent the free flow of trade.

Now, actually, as far as my philosophy is concerned, I think that interstate commerce should pay its own way, and there's only two philosophies: one, that it pays its own way; or one that you can't put any tax on and you can't burden it and you can't do anything with it.

You can't -- but the Court has a very difficult problem, they would have to look at each case individually to arrive at a satisfactory method of handling the cases. They don't have too much guidance from Congress on it, they just have one simple statement there.

QUESTION : Well, on your theory, an over-the-road trucker that just is hauling cargo from one end of your State to the other, just going through your State would be subject to this tax.

MR. HADDOCK: No, sir, he would not.

QUESTION: Well, I know, but he would -- under your theory, under your private theory, you would -- the State would have the power --

MR. HADDOCK: I would say that he should pay his fair share. Now, what that is, and how it should be --

QUESTION: Well, I understand, but you would say that

you should be able to, under this very tax, to say to that trucker who doesn't do anything in Mississippi except drive through it, to pay a privilege for doing business in Mississippi.

MR. HADDOCK: No, sir, I do not say that.

QUESTION: Well, I know, you don't do it under your law, I know; but under your private philosophy --

MR. HADDOCK: No, sir, I don't think that you should do it on the privilege of doing business under any circumstances, really, if that is where the tax is -- to pay a license, to pay a thousand dollars for the privilege of going through the State, I would certainly not buy that.

QUESTION: Well, how about for the privilege of originating shipments out of the State and shipping them direct to an automobile dealer in the State?

MR. HADDOCK: On shipments out-of-State to an in-State dealer, --

QUESTION: Yes.

MR. HADDOCK: -- we charge no taxes.

QUESTION: I know you don't, but how about -- is that constitutional for you to do it?

MR. HADDOCK: Yes, sir, I think so. But --

QUESTION: Even though you call it a privilege?

MR. HADDOCK: Yes, sir. I think that the privilege tax in this case -- if you go by where the incidence of this

tax -- I don't agree with that. This is not the basic philosophy of the constitutional question, I'll assure you, because I recognize the fact that you go back to the old feudal system and the danger of the landlords putting taxes on property for the privilege of passing through there. I would be the first one to protect that constitutional right.

QUESTION: Unintentionally, I am sure, you've confused me, Mr. Haddock.

Let me give you this concrete hypothetical case. Suppose this appellant sent its -- whatever kind of vehicles they have, up to Detroit, picked up a load of cars, had a whole convoy of them and dropped them off at various dealers in Mississippi. Would you tax that?

MR. HADDOCK: No, sir. No.

QUESTION: But you don't think --

MR. HADDOCK: Because there's not a -- we couldn't tax it under the sales tax law, because there is no intrastate -- exclusively intrastate sale from two points within the State of Mississippi. This transaction has to be completely within, not from without to within.

QUESTION: Yes if that truck buys gas in Mississippi, the State could certainly charge a tax on the gas purchased, can't it?

MR. HADDOCK: They certainly can.

QUESTION: Well, why can't it charge it on the portion

of the journey -- the revenue derived from the portion of the journey that takes place inside Mississippi?

MR. HADDOCK: I think -- my personal opinion is that they certainly could. But under the opinions of the Supreme Court, we have been fearful of attempting to tax that portion, especially in view of the language in the dissenting opinions in the cases, and the philosophies that were involved in them.

It's a very close question that we are cognizant of, and we have tried our best not to get over into the question of taxation of a shipment from without the State to within the States, from the point -- from a consignor out of the State to a consignee within the State.

QUESTION: Mr. Haddock, is the case that troubles you the most the Spector case?

MR. HADDOCK: Sir?

QUESTION: Is the case that troubles you the most the Spector case?

MR. HADDOCK: No, sir, I think Spector is right in line with what we are saying.

QUESTION: It's what you're doing, but are you -- you're not asking us to overrule Spector, I guess?

MR. HADDOCK: I think Spector, personally, should be -- well, I'll say this, that it's a very critical -- I don't like the aspects, because I think they were doing business

in the State that would give the State of Connecticut an opportunity to impose this tax. They were operating a big business here with 126 employees, they were operating trucks running around town. As far as I'm concerned, they were doing business in the State. But they were not -- this was a convenience that they were doing, picking up goods and taking them to the point of shipment. They were not doing a commercial transaction -- conducting a commercial business transaction.

QUESTION: So you do think Spector ought to be overruled?

MR. HADDOCK: Yes, sir, I sure do.

QUESTION: Although you think it's very helpful to you in this case, you told us?

MR. HADDOCK: Well, I say that it does -- I will say this, that it does not hurt our position. It goes along, actually, with our --

QUESTION: I think a little earlier you said you found your greatest support in that case.

MR. HADDOCK: Well, maybe I was just --

QUESTION: Perhaps that was a little hyperbole.

MR. HADDOCK: Maybe I was a little. Our greatest support comes from Interstate Oil Pipe Line, which involved the first leg from Stone vs. Dunn Brothers, which is exactly the same case, where a man shipped goods from California,

shipped his own goods from California to himself in Mississippi, he was building a pipeline across the State; there is no difference in that case exactly, which came to this Court, which you took for lack of a federal -- you refused to lack of a federal question, after Spector came along and after Convoy in the State of Washington came along.

QUESTION: Let me reverse my hypothetical to you. Suppose that it went to the -- the cars came by truck to Detroit to Meridian or Jackson, and then, because of bad roads or other reasons, they shipped it -- they took them off the trucks and put them on a railroad and took them the rest of the way. Would you tax the rail journey?

MR. HADDOCK: Yes, sir, I think -- if those cars were shipped from General Motors, at their assembly plant, to General Motors themselves in Meridian, Mississippi. And then they had another transaction and shipped those cars from General Motors in Meridian, Mississippi, if they had -- to some other point, that that shipment would be intrastate shipment. It would be an intrastate commercial activity.

And one in which only Mississippi could tax, no other State could duplicate it. The whole activity is directly related -- anybody else would be obliged to pay the tax for the same proposition. It does not discriminate against anybody.

QUESTION: What this comes down to, really, then, if

Detroit has the good judgment to make out a bill of lading to -- with the consignee, the dealer, then they are going to be free of the tax. They can get around your tax very easily, under the laws in your State --

MR. HADDOCK: Yes, sir, I'll admit they can get around it very easily, under the rules that I think that the Court --

QUESTION: As you point out, your statute -- and that's because of the wording, perhaps, of your statute, which purports to tax only transportation between points within this State.

MR. HADDOCK: That's right.

QUESTION: Perhaps it doesn't --

MR. HADDOCK: Yes, sir.

QUESTION: -- purport to tax to the limit of Mississippi's constitutional authority.

MR. HADDOCK: It does not. No, sir. We are limited by our statute.

QUESTION: Well, any shipment from outside the State, as soon as it crosses the border of Mississippi, has come to a point in Mississippi.

MR. HADDOCK: Yes, sir, but it wouldn't be taxable under our sales tax law.

QUESTION: Why not -- well, --

MR. HADDOCK: Because --

QUESTION: -- it could be, but from that point on to the destination, it's transportation between two points in Mississippi.

MR. HADDOCK: It is, but there is no commercial transaction made. We have no provision for --

QUESTION: Well, that isn't what the law says. You say there has to be a commercial transaction.

MR. HADDOCK: Yes, on which to base this tax. And there is no commercial -- in such a case there is no provision with our law for apportioning the tax between our State and another State.

QUESTION: Between the points within the State, that has been given a particularized meaning under the statute.

MR. HADDOCK: Yes, sir.

QUESTION: There has to be a transaction either in -- at least the delivery at one end or --

MR. HADDOCK: It has got to be from an owner to a consignee, or from -- there's got to be a shipment and a delivery.

QUESTION: How about a transshipment by the same -- say, delivery from one railroad to another?

MR. HADDOCK: No, sir. They would be handled the same way, it would be between two points, yes, sir.

QUESTION: I see. I see.

QUESTION: Mr. Haddock, it isn't easy, in my view,

for either you or your opposition to take a positive stand in the light of the decisions of this Court, and if you are confused, I merely say that I am, too.

QUESTION: Well, don't admit it!

[Laughter.]

QUESTION: By all means, admit it.

MR. HADDOCK: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Perry?

REBUTTAL ARGUMENT OF ALAN W. PERRY, ESQ.,
ON BEHALF OF THE APPELLANT

MR. PERRY: Just for a moment, Your Honor.

I think it's apparent that this whole case turns on the form of the documents. If you have two bills of lading, you are taxable; if you have one bill of lading, you're not.

QUESTION: You're not conceding that?

MR. PERRY: That's his opinion.

No, sir, we don't concede that at all. I hope that it's apparent that we think that that has absolutely no merit at all. But that's the only factor that the Commission has looked at, and it's really the only one that the Commission has advanced to this Court.

QUESTION: Well, at least you have a curbstone opinion as to how you can avoid the tax, in the future.

MR. PERRY: Yes, sir. But the tax has even been

repealed now, since 1972. We're talking about money we're out of pocket for 1968 through 1972.

Mr. Justice Marshall asked whether General Motors had any one present at the point where the vehicles were transferred from the railroad to the motor carriers. They did not. The testimony is clear that they didn't, and the chancellor specifically found, on page -- in his portion of the opinion on page 100 of the Appendix, that General Motors had absolutely nothing further to do with the vehicles after they were transported.

Nevertheless, Mr. Haddock said in his brief, and said again here today, that somehow or another the transportation ended in Jackson, because the consignee was General Motors in care of Complete Auto. We think, in light of the undisputed facts, that that contention has no merit.

Finally, with regard to Mr. Haddock's argument about local activity, which he defines as the transportation itself, it seems to me -- and he talks about a commercial activity -- it seems to me that's just another way of saying this was intrastate commerce. What he tries to carve up is no more than a portion of the interstate journey. He's conceded this tax is not levied on any such local incidents as the use of property, purchase of fuel, ownership of property, or incidents which the tax would be validly levied on.

Thus, we submit it's clear that this tax isn't

levied on any local incidents.

There are a number of incidents that the State of Mississippi could and does tax. This tax just isn't one of those taxes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:05 o'clock, p.m., the case in the above-entitled matter was submitted.]

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