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TAXATION - INTERSTATE COMMERCE -COMPENSATING USE TAX

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TAXATION — INTERSTATE COMMERCE — COMPENSATING USE TAX — The California Use Tax Act of 1935 [1] imposed an excise tax on the storage or use of personal property purchased in other states and brought into California. Plaintiff railway, engaged in both intrastate and interstate commerce, purchased supplies out of the state and imported them for the purpose of adding to and replacing worn out and broken equipment necessary for the operation of its offices and road. Some of the property acquired was stored a short period of time before it was used and some was used immediately on arrival for the purpose for which it had been imported. The action was to enjoin enforcement of the tax. *Held*, that the state tax is not an unreasonable burden on interstate commerce, and is constitutional as applied to such property. *Southern Pacific v. Gallagher*, (U. S. 1939) 59 S. Ct. 389.

Plaintiff corporation operated an intrastate and interstate telephone and telegraph business, part of that business being done in California. It brought into the state equipment necessary for the maintenance of the system. Part of the goods were unloaded from interstate carriers and immediately installed, while other goods were stored for a short while before being made a part of the system. Plaintiff sued to enjoin enforcement of the California Use Tax Act of 1935.[2] *Held*, that the case is not distinguishable from *Southern Pacific Co. v. Gallagher*, and as the tax was constitutional as applied to the shipments in question, the injunction should not issue. *Pacific Telephone & Telegraph Co. v. Gallagher*, (U. S. 1939) 59 S. Ct. 396.

The first time that the *Southern Pacific Co.* case was before the district court it was held that as the imported shipment was to go into service immediately upon being brought into the state, a state tax on the use of the property was an unreasonable burden on interstate commerce.[3] In this *Review* [4] it was suggested that the facts of this case brought it within the principle of *Nashville, C. & St. L. R. R. v. Wallace*,[5] and thus the tax should be held valid as being

[1] Cal. Stat. (1935), c. 361, p. 1297, Gen. Code (Deering, Supp. 1938), Act 8495a.

[2] Id.

[3] Southern Pacific Co. v. Corbett, (D. C. Cal. 1937) 20 F. Supp. 940. This decision was in favor of the petitioner on a motion to grant an interlocutory injunction against enforcement of the act. On argument for making the injunction permanent the court dismissed the suit. Southern Pacific Co. v. Corbett, (D. C. Cal. 1938) 23 F. Supp. 193. The principal case is an appeal from this decision, as allowed by Judicial Code, § 266, 28 U. S. C. (1934), § 380.

[4] 36 MICH. L. REV. 1031 (1938).

[5] 288 U. S. 249, 53 S. Ct. 345 (1933). See also, Edelman v. Boeing Air Transport Co., 289 U. S. 249, 53 S. Ct. 591 (1933); and Kauper, "State Taxation of

laid on the storage of equipment within the state prior to the time that it actually became a part of interstate commerce. The writer felt that the fact that in the *Southern Pacific Co.* case, "[the property] stored was already set apart, devoted, and predetermined for use in interstate commerce before it entered the state," [6] and that in the *Wallace* case it was not, was not a significant distinction.[7] In the principal case the court points out that there are two lines of authority, one prohibiting the imposition of state taxes directly on the privilege of using the instrumentalities of interstate commerce [8] and the other allowing state taxation of events preliminary to actual use of the property in interstate commerce.[9] The facts of the instant cases are brought within the second line of authority, the Court saying that even though there was no storage of the goods as a separate intrastate transaction, there was a moment between the importation of the goods and their employment in plaintiff's interstate business when the state tax on the retention and exercise of the right of ownership could become effective.[10] The effect of the decision is to broaden the scope of the state use tax to some extent. However, while importers must pay the tax on property they intend to devote to interstate commerce, the rule that states may not tax instrumentalities already engaged in such commerce seems to retain all of its original vigor.[11]

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Interstate Motor Carriers," 32 MICH. L. REV. 1 at 25 ff. (1933). These cases make it clear that a privilege tax may constitutionally be levied on the storage of goods within a state as a preliminary step to employment in interstate commerce.

[6] Southern Pacific Co. v. Corbett (D. C. Cal. 1937) 20 F. Supp. 940 at 949.

[7] 36 MICH. L. REV. 1031 at 1033 (1938).

[8] Helson v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1929); Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 56 S. Ct. 624 (1936), noted in 34 MICH. L. REV. 1260 (1936).

[9] Nashville, C. & St. L. R. R. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933).

[10] "We think there was a taxable moment when the former [goods in transit] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." Justice Reed in Southern Pacific Co. v. Gallagher, (U.S. 1939) 59 S. Ct. 389 at 393.

The Court distinguished Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S. Ct. 184 (1924), by saying that there the Court construed the tax to be levied on the privilege of engaging in a general interstate business, while here the tax was on the use of property, which, as interpreted by the Court, was purely intrastate. To distinguish Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90, 58 S. Ct. 72 (1937), which held a state tax on freight handling of interstate shipments to be unconstitutional, it was pointed out that the loading and unloading of interstate cargoes is a part of interstate commerce, while retaining property for a "taxable moment" prior to employing it in interstate commerce is not.

[11] Cases cited in note 8, above. An exception to this rule exists in the case of a tax on gasoline brought into the state by interstate motor carriers when it appears that the tax is by way of compensation for use of the state highways. Dixie Greyhound Lines, Inc. v. McCarroll, (D. C. Ark. 1938) 22 F. Supp. 985, noted in 37 MICH. L. REV. 681 (1939).