

Argument for Appellant.

PACIFIC TELEPHONE & TELEGRAPH CO. *v.*
GALLAGHER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 213. Argued December 12, 13, 1938.—Decided January 30, 1939.

California use and storage tax on telephone and telegraph company in respect of equipment, apparatus, materials and supplies purchased outside and shipped into the State in operation, maintenance and repair of its interstate system, *held* constitutional, upon the authority of *Southern Pacific Co. v. Gallagher*, *ante*, p. 167.

23 F. Supp. 197, affirmed.

APPEAL from a decree of a three-judge district court refusing a permanent injunction and dismissing the bill in a suit to restrain enforcement of the California Use Tax. The court below had at first overruled a motion to dismiss and granted an interlocutory injunction.

Mr. Francis N. Marshall, with whom *Messrs. Alfred Sutro* and *Eugene M. Prince* were on the brief, for appellant.

The tax is bad as a direct tax upon the operation of instrumentalities of interstate commerce, falling indiscriminately and without apportionment upon interstate and intrastate use. *Helson & Randolph v. Kentucky*, 279 U. S. 245; *Bingaman v. Golden Eagle Lines*, 297 U. S. 626; *Cooney v. Mountain States Telephone Co.* 294 U. S. 384, 393.

The trial court's ruling that the tax may be applied to the storage of property prior to interstate use does not support the decree as to the specific order equipment which is not stored prior to its use in intermingled interstate and intrastate commerce. Likewise, in the case of the stand-by property, there is no preliminary intrastate storage separable from use in the intermingled com-

merce, since it is true in every practical sense, as the trial court specifically found, that the stand-by service in this case is itself a necessary use of the property in the appellant's intermingled interstate and intrastate business.

There is in this case no intrastate enterprise, transaction, or use which is separable from the interstate use of the property. The tax upon the use of the property, either in the immediate rendition of service (specific order equipment) or in a stand-by capacity (stand-by facilities), is, therefore, a direct tax upon interstate commerce. The state statute, properly construed, did not intend to impose such a tax, but if it is otherwise construed, it is unconstitutional in that respect.

The appellees attempt to distinguish the *Helson* case, upon the assumption here of some separable intrastate transaction affecting the property to which the tax applies, is answered by the fact that there is no storage or withdrawal from storage of the specific order equipment. No storage occurs in the moments when the property is temporarily set down in the course of unloading or installation. These are necessary and incidental interruptions of movement. Furthermore, it is settled that a momentary storage comprising a mere temporary interruption of the course of a non-taxable interstate event does not itself acquire an intrastate character and become taxable on that account. *Carson Petroleum Co. v. Vial*, 279 U. S. 95; *Champlain Co. v. Brattleboro*, 260 U. S. 366.

To the suggestion that the installation of the equipment may bear the tax, the answer is that the statute does not tax installation. If it did purport to do so it would be invalid in this case. A tax on installation for use is in effect a tax upon the use itself, and would defeat the ends of the constitutional protection. The maintenance of interstate telephone and telegraph lines and repairs in the operation of interstate pipe lines—

necessarily involving the installation of repair parts and improvements—are not separable intrastate activities authorizing the imposition of a state excise tax. *Ozark Pipe Line v. Monier*, 266 U. S. 555, 565; *Atlantic Lumber Co. v. Commissioner*, 298 U. S. 553, 557.

Installation for interstate use, like loading for interstate shipment, is essentially the act of putting the property in position for interstate activity, and is exclusively in furtherance of the interstate commerce. It is settled that a State can not tax such a closely related incident of interstate commerce as the loading of goods in position for interstate shipment,—*Puget Sound Co. v. Tax Comm'n*, 302 U. S. 90; *Hughes Bros Co. v. Minnesota*, 272 U. S. 469,—even where the work is done by a separate concern hired for the purpose.

With respect to stand-by facilities, appellees' claim seems to be that this property is part of the general mass of property in the State and hence is subject to the State's general taxing laws. But the performance of the stand-by function, as the facts show and as the trial court held, is use of the property in the interstate-intrastate business; and while all the rest of appellant's plant in use is part of the general mass of property in the State and may be subjected to property taxes, yet the State may not tax the use of that plant in interstate commerce, nor any part of the privilege of intermingled interstate and intrastate use without apportioning the tax to the amount of intrastate use.

The interstate and intrastate business of appellant are inseparably intertwined; the property involved is wholly used in inextricably intermingled interstate and intrastate commerce; and appellees have demanded the tax for the storage, use, or other consumption, of all of the property at the rate of 3% of the purchase price of all of it, without any apportionment for the division of use between interstate and intrastate commerce. Since

there is no transaction separable from the intermingled use, and since the tax necessarily, therefore, falls on the intermingled use, and since the measure of the tax is unapportioned by any allocation of the use, it is plain that the tax is not laid upon the intrastate use alone.

The case coincides with the *Cooney* case. Cf. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27. Appellant is compelled to purchase more property by reason of the interstate business than it would if it were engaged in intrastate commerce alone; so that the tax, a fixed percentage of the purchase price of the property, is greater by reason of the interstate business done. *Raley & Bros. v. Richardson*, 264 U. S. 157, distinguished.

It is not true that the sale and use taxes are both paid by the purchaser. The California Retail Sales Tax Act of 1933, (Cal. Stats. 1933, p. 2599, ch. 1020) imposes upon retailers, for the privilege of selling tangible personal property at retail, a tax equal to 3% of the gross receipts from their retail sales. In *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.*, 11 Cal. 2d 283; 79 P. 2d 380, the Supreme Court of California held that the sales tax is a tax on the retailer and not on the purchaser, and that the provisions for passing the tax on to the purchaser were invalid except in so far as the latter might consent thereto, either expressly or impliedly. It is merely optional with the retailer whether he shall attempt to reimburse himself from the consumer; he may waive the right, *Roth Drug, Inc. v. Johnson*, 13 Cal. App. 2d 720, 736; 57 P. 2d 1022, 1029, (approved in the case last cited). The Use Tax Act, on the other hand, makes the tax a direct obligation of the consumer, who must pay the tax—to the retailer if the latter maintains a place of business in California, otherwise directly to the State Board of Equalization.

Obviously, the sales and use taxes are not mutually complementary; moreover, the California tax scheme cre-

ates a heavier deterrent to interstate commerce than to intrastate commerce, because the consumer can not escape the 3% use tax on his purchases interstate, but may escape the 3% sales tax on his purchases intrastate.

Mr. H. H. Linney, Deputy Attorney General of California, with whom *Messrs. U. S. Webb*, Attorney General, and *James J. Arditto*, Deputy Attorney General, were on the brief, for appellees.

By leave of Court, *Messrs. G. W. Hamilton*, Attorney General of Washington, and *R. G. Sharpe*, Assistant Attorney General, filed a brief, as *amici curiae*, in support of appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This case involves the same questions as *Southern Pacific Co. v. Gallagher*, ante, p. 167. The appellant sought to restrain the State Board of Equalization of the State of California, its members, and the Attorney General of the state from enforcing the Use Tax of 1935. A three-judge court granted an interlocutory injunction. Later, it denied a permanent injunction and dismissed the appellant's bill¹ for the reasons stated in *Southern Pacific Co. v. Corbett*, 23 F. Supp. 193.

The appellant, a California corporation, operates a telephone and telegraph system in interstate and intrastate commerce. The same plant, facilities and organization are devoted to both interstate and intrastate business. In the necessary operation, maintenance and repair of its system, the appellant purchases outside California large amounts of equipment, apparatus, materials and supplies which are shipped to it in interstate commerce at various points within the state. The tangible

¹ *Pacific Tel. & Tel. Co. v. Corbett*, 23 F. Supp. 197.

personal property which the appellees threaten to tax is of two general classes: specific order and stand-by equipment. The first consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines, which are purchased on specific order for installation at a particular place in the system. The second comprises goods bought from time to time for holding as stand-by supplies to meet fluctuating demands and emergencies and to make repairs.

The specific order equipment is shipped to the appellant at the place of use. Its representative receipts for the goods at the dock or breaks the seal of the railroad car, and its employees unload the goods from the dock or car into its trucks. In most instances the trucks are driven directly to the building where the equipment is to be installed; in some, to distributing centers for reloading into other trucks which are driven to the place of installation. Occasionally, private branch exchange switchboards must be held by the appellant until the place of installation is ready. There is no holding in warehouses. The stand-by supplies which constitute a reserve to meet current requirements are replenished by monthly orders. The appellant's trucks pick them up at the dock or railroad depot and carry them to storage places at points on the system suitable for prompt distribution. When needed, the stand-by facilities are taken out of the stores and installed.

The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co. v. Gallagher*, ante, p. 167.

The decree of the lower court dismissing the appellant's bill is

Affirmed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

CITY OF TEXARKANA *v.* ARKANSAS LOUISIANA
GAS CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

No. 294. Argued January 4, 5, 1939.—Decided February 6, 1939.

1. A franchise granted to a utility company by the City of Texarkana, Texas, contained a section (§ IX) providing that if the company should "be finally compelled to, or should voluntarily, place in any rates" for the adjacent City of Texarkana, Arkansas, less than those fixed by the franchise, then such lower rates should apply also in the Texas city and the company "shall not be authorized or permitted to charge and collect any higher rate." *Held:*

(1) The section was not invalid as a delegation or abdication of the power of the Texas city under its charter to regulate the business and fix the rates of public utilities. P. 196.

(2) By the law of Texas, the section was binding on the utility company, although, because of the reserved power to raise or lower the rates, not binding on the municipality. P. 197.

Grant of the franchise is consideration for the undertaking of the utility to maintain the prescribed rates until they are altered by the exercise of the reserved power of the municipality to regulate the rates. P. 200.

(3) Earlier decisions of this Court to the effect that under the law of Texas a municipality could not validly make a rate contract with a public utility because inconsistent with its reserved power to regulate rates are inapplicable because (a) the state supreme