TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 140

FRANK R. BRUSHABER, APPELLANT,

vs.

UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 4, 1914.

(24,196)

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No. 1015.

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vs.

UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1914.

a. The President of the United States of America to Union Pacific Railroad Company, Greeting:

[SEAL.]

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity by Frank R. Brushaber, and to further do and receive what the said court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 13th day of March, in the year one thousand nine hundred and fourteen and of the Independence of the United States of America the one hundred and thirty- —.

—— ——, *Clerk.*

DAVIES, AUERBACH & CORNELL,
34 *Nassau Street, Plaintiff's Sol'rs.*

The defendant is required to file its answer or other defense in the above cause in the clerk's office of this court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, JR., *Clerk.*

Filed Mar. 13, 1914.

b I hereby certify, that on the 13th day of March, 1914 at the City of New York, in my District, I served the within subpœna in Equity upon the within named defendant Union Pacific Railroad Company by exhibiting to Alexander Miller as Sec'y of said Co. at his office No. 165 Broadway, N. Y. City the within original and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated March 13th, 1914.

c District Court of the United States for the Southern District of New York.

In Equity.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

Bill of Complaint.

Davies, Auerbach & Cornell, Solicitors for Complainant, 34 Nassau Street, New York.
Julien T. Davies, Joseph S. Auerbach, Frederic J. Fuller, of Counsel.

Filed Mar. 13, 1914.

1 In the District Court of the United States for the Southern District of New York.

In Equity.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

To the Judges of the District Court of the United States for the Southern District of New York:

Frank R. Brushaber, a citizen of the State of New York and a resident of the Borough of Brooklyn, in the City of New York, brings this his bill against Union Pacific Railroad Company, a corporation and citizen of the State of Utah, having its executive office and a place of business in the Borough of Manhattan, in the City of New York, and the Southern District of New York, in his own behalf and on behalf of any and all of the stockholders of the defendant Union Pacific Railroad Company who may join in
2 the prosecution and contribute to the expenses of this suit. Thereupon your orator complains and says:

First. That your orator is a citizen of the State of New York and resides in the Borough of Brooklyn, in the City of New York, and has his principal place of business in the Borough of Manhattan, in the City of New York, and Southern District of New York.

Second. Your orator further shows that the defendant Union Pacific Railroad Company is, and at all the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the Laws of the State of Utah, and a citizen of the State of Utah, and has its executive offices and a place of business at No. 165

Broadway, in the Borough of Manhattan, City of New York, and Southern District of New York.

Third. Your orator further shows that by the Laws of the State of Utah and the By-Laws of the said Company, the general control of the business and affairs of the said Company is entrusted to and conferred upon the directors thereof as a board, acting by the vote of the majority of the directors at a meeting thereof, and by an Executive Committee composed of six members of the Board who possess all the powers of the Board of Directors to manage and control all the business and affairs of the Company, when the Board is not in session.

Fourth. Your orator further shows that now and for some time prior to the filing of this bill, your orator is and was a stockholder of record of the defendant Union Pacific Railroad Company and a holder of five hundred shares of the common capital stock of said Company of the par value of one hundred dollars each.

3 Fifth. Your orator further shows that the defendant Union Pacific Railroad Company is, and at all times hereinafter mentioned was, duly authorized by an act of the Legislature of the State of Utah, approved January 22, 1897, under which Act said Railroad Company was organized July 1, 1897, to purchase or otherwise acquire, hold and obtain and operate railroads in various States of the United States, to mortgage the same by deeds of trust or mortgages and generally to purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property, and any rights or privileges which its said board of directors may think necessary or convenient for the purposes of its business, to purchase and hold the stocks of other railroad corporations, and to operate on lease or by contract lines of railroad of other railroad corporations.

Sixth. That the said Union Pacific Railroad Company was duly authorized to issue shares of capital stock of the par value of $100 each in classes of preferred stock and common stock, and that said Company pursuant to such authority has issued and has now outstanding in the hands of the public shares of preferred stock to the amount in par value of $99,543,500 and shares of common stock to the amount in par value of $216,633,900. That dividends have been declared and paid upon the issued preferred stock and upon the issued common stock for many years last past.

Seventh. Your orator further shows that pursuant to the authority granted by its aforesaid act of incorporation, defendant Union Pacific Railroad Company heretofore and on or about the 1st day of July, 1897, made and executed to Bankers Trust Company of New York as Trustee, its First Mortgage to secure $100,000,000 of 50-Year Gold Four Per Cent Bonds due July 1, 1947, at the

4 Company's office in New York City, interest payable semi-annually on the first day of July and the first day of January. The said mortgage covers as a direct first lien various railroad lines and their appurtenances with a total mileage of 2,009.1 miles. The mortgage also covers either directly or by beneficial ownership, the land and land assets of the Union Pacific Railroad Company and of the Union Pacific Land Company. There

are now outstanding secured by the said mortgage $100,000,000 in par value of said bonds, to-wit, $87,975,500 of coupon bonds and $12,024,500 of registered bonds.

Each of the bonds issued and outstanding under the said mortgage is entitled to the benefit of a covenant and agreement on the part of the Union Pacific Railroad Company that the principal and interest on the said bond are payable without any deduction for any tax or taxes of the United States, or of any state or municipality thereof which the Railroad Company may be required to pay or retain therefrom under any present or future law.

That on or about the 1st day of June, 1908, the defendant Union Pacific Railroad Company made and executed to the Equitable Trust Company of New York as Trustee, its First Lien and Refunding Gold Mortgage, for the purpose of securing its 100-Year, First Lien and Refunding Gold 4's due June 1st, 2008. That the said mortgage was made a first lien upon various lines of railroad whose combined mileage amounts to 1,329.52 miles. That interest upon the said bonds is payable March 1st and September 1st in New York City. That there are now issued and outstanding of bonds secured by the said Mortgage in the hands of the public $31,585,000 coupon (Dollar) bonds, $7,093,000 Registered (Dollar) bonds, $25,922,280 (£5,344,800) coupon sterling bonds, and $485,000 (£100,000) registered sterling bonds, in all $65,085,280.

5 Each of the bonds issued under the aforesaid mortgage is entitled to the benefit of a covenant and agreement on the part of the said Railroad Company that both the principal and interest of the said bond shall be paid without deduction of any tax or taxes which the said Railroad Company may be required or permitted to pay thereon or to retain therefrom under any present or future law of the United States of America or of any state, county or municipality therein.

That on or about the 1st day of July, 1907, the said Union Pacific Railroad Company made and executed to Bankers Trust Company of New York as Trustee, its Twenty-Year Mortgage to secure its Twenty-Year Convertible Gold Four Per Cent bonds due July 1, 1927, of which the interest is payable on the 1st day of January and July at the Company's office in the City of New York. That there are outstanding secured by the said mortgage $36,338,000 coupon bonds, $397,500 of registered bonds, and $700 of scrip.

That each of the said bonds is entitled to the benefit of a covenant and agreement on the part of the said Railroad Company that the principal and interest of the said bond are payable without deduction for any tax or taxes which the said Company may be required to pay or retain therefrom under any present or future law of the United States or of any state, territory, county, or municipality therein.

Eighth. Your orator further avers that by Paragraph A, Subdivision 1, of Section II of an Act of the First Session of the Sixty-third Congress, entitled "An Act to reduce tariff duties and to provide a revenue for the Government and other purposes," which

Act became a law October 3, 1913, and which is popularly known as the Tariff Act, it is provided that there shall be levied,
6 assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to any citizen of the United States, whether residing at home or abroad, and to every person residing in the United States though not a citizen thereof, a tax of one per centum upon such income except as provided in said act, and that a like tax shall be assessed, levied, collected and paid annually upon the entire net income from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere.

That it is further provided by said Paragraph A, Subdivision 2, of Section II of the said Act, that in addition to the said one per centum tax, which is referred to in the said Act and will be referred to herein as the "Normal Income Tax," there shall be levied, assessed and collected annually upon the net income of every individual an additional income tax referred to in the said Act and herein referred to as the "Additional Tax," of one per centum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, two per centum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, three per centum on the amount by which the total net income exceeds $75,000 and does not exceed $100,000, four per centum on the amount by which the total net income exceeds $100,000 and does not exceed $250,000, five per centum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and six per centum upon the amount by which the total net income exceeds $500,000. It is further provided by said Subdivision 2 that all the provisions of said Section II relating to individuals chargeable with the normal income tax so far as they are applicable and not inconsistent with said Subdivision 2, shall apply to the levy assessment and collection of the additional tax. It is further
7 provided by said Subdivision 2 therein that every person subject to the additional tax shall make a personal return of his total net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury. It is further provided by said Subdivision 2 that for the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits if divided or distributed, whether divided or distributed or not, of all corporations, joint stock companies or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed, and the fact that any such corporation, joint stock company or association is a mere holding Company or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such

tax, but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business.

It is further provided by Paragraph B of said Section II of said Act that subject only to such exemptions and deductions as are thereafter in the Act allowed the net income of a taxable person shall include gains, profits and income derived from salaries, wages

8 or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent.

It is further provided in said Paragraph B that in computing taxable income for the purpose of the normal tax, there shall be allowed as deductions the following items with others: First, the necessary expenses actually paid in carrying on any business, not including personal, living or family expenses. Seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association or insurance company which is taxable upon its net income as provided in said Act; Eighth, the amount of income the tax upon which has been paid or withheld for payment at the source of the income as provided by Section II.

It is further provided by said Paragraph B, that in computing net income under Section II, there shall be excluded the interest upon the obligations of a State or any political subdivision thereof and upon the obligations of the United States or its possessions and the compensation of all officers or employees of a State or any political subdivision thereof except when paid by the United States Government.

That it is provided by Paragraph C of said Section II of the said Act that there shall be deducted from the amount of the net income of each of said persons, ascertained as provided therein, the sum of $3,000, plus $1,000 additional if the person making

9 the return be a married man with a wife living with him, or plus the sum of $1,000 additional if the person making the return be a married woman with a husband living with her; but in no event shall this additional exemption of $1,000 be deducted by both a husband and a wife, provided that only one deduction of $4,000 shall be made from the aggregate income of both husband and wife when living together.

That it is further provided by Paragraph D of said Section II of the said Act that the said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December 31st; provided, however, that for the year ending December 31, 1913, said tax shall

be computed on the net income accruing from March 1st to December 31st, 1913, both dates inclusive, after deducting five-sixths only of the specific exemptions and deductions provided for in said Act, and that on or before the first day of March, 1914, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of the person making it shall be made by each taxable person, except as thereafter provided in said Section, to the collector of internal revenue for the district of residence or place of business of the taxpayer, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income from all separate sources, and from the total thereof deducting the aggregate items or expenses and allowance authorized by the Act, and that all fiduciaries shall make and render a like return of the income of the person for whom they act.

It is further provided that all fiduciaries and other persons and corporations having the control, receipt, disposal or payment of fixed or determinable annual or periodical gains, profits and in-
10 come of another person subject to tax shall, in behalf of such person, deduct and withhold from the payment an amount equivalent to the normal income tax thereon and make and render a return separate and distinct of the portion of the income of each person from which the normal income tax has been thus withheld, containing the name and address of such person or stating that the name and address, or address as the case may be are unknown, but the normal income tax is not required to be withheld at the source prior to November 1st, 1913, and no return of income not exceeding $3,000 is required, and members of partnerships are liable only in their individual capacity for their shares of partnership profits, and persons liable for normal tax only, on their own account or in behalf of another, are not required to make returns of income derived from dividends on the capital stock or from the net earnings of corporations and companies taxable on their net income.

It is further provided by said Paragraph D that if the collector or deputy collector has reason to believe that the amount of any income returned is understated he shall give due notice to the person making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated he may increase the same accordingly.

It is further provided in Paragraph E of said Section II of the said Act that all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the 30th day of June; and to any sum or sums due and unpaid after the 30th day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the
11 sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons.

It is further provided by said Paragraph E that all persons, firms, companies and corporations, including lessees or mortgagors of real or personal property, trustees acting in any trust capacity, executors, administrators, agents, employees and other persons having the control, receipt, custody, disposal or payment of the interest or other fixed or determinable annual gains, profits and income of another person exceeding $3,000 for any taxable year, other than dividends on capital stock or from the net earnings of corporations, and joint stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, are thereby authorized and required to deduct and withhold from such annual gains, profits and income such sum as will be sufficient to pay the normal tax imposed thereon by the Act, and shall pay the tax to the officer of the United States Government authorized to receive the same; and they are each thereby made personally liable for such tax.

It is further provided by said Paragraph E that in all cases where the income tax of a person is withheld and deducted and paid or to be paid at the source, as aforesaid, such person shall not receive the benefit of the deduction and exemption allowed in Paragraph C aforesaid, except by an application for the refund of the tax, unless he shall not less than thirty days prior to the day on which the return of his income is due file with the person who is required to withhold and pay tax for him a signed notice in writing claiming the benefit of such exemption, and thereupon no tax shall be withheld upon the amount of such exemption.

12 It is further provided in said Paragraph E that the amount of the normal tax by said Act imposed shall be deducted and withheld from fixed and determinable annual gains, profits and income derived from interest upon bonds and mortgages, or deeds of trust or other similar obligations of corporations, joint stock companies or associations, whether payable annually or at shorter or longer periods, although such interest does not amount to $3,000, subject to the provisions of said Section II requiring the tax to be withheld at the source and deducted from annual income and paid to the Government, and likewise the amount of such tax shall be deducted and withheld from coupons, checks or bills of exchange for or in payment of interest upon bonds of foreign countries and upon foreign mortgages or like obligations (not payable in the United States), and also from coupons, checks or bills of exchange for or in payment of any dividends upon the stock or interest upon the obligations of foreign corporations, associations and insurance companies engaged in business in foreign countries; and the tax in each case shall be withheld and deducted for and in behalf of any person subject to the tax although such interest, dividends or other compensation does not exceed $3,000 by any banker or person who shall sell or otherwise realize coupons, checks or bills of exchange drawn or made in payment of any such interest or dividend (not payable in the United States), and any person who shall obtain payment (not in the United States) in behalf of another of such dividends and interests by means of coupons, checks or bills of exchange and also any dealer in such coupons who shall purchase the same

for any such dividends or interest (not payable in the United States) otherwise than from a banker or another dealer in such coupons, but in each case the benefit of the exemption and deduction
13 of $3,000 may be had by complying with the provisions of the said Paragraph.

It is further provided in said Paragraph E that nothing in the said Section II shall be construed to release a taxable person from liability for income tax nor shall any contract entered into after the Act takes effect be valid in regard to any Federal income tax imposed upon a person liable to such payment.

Paragraph F of said Section II of the said Act provides that if any person, corporation, joint stock company, association or insurance company liable to make the return or pay the tax aforesaid shall refuse or neglect to make a return at the time or times in said Section specified in each year, such person shall be liable to a penalty of not less than $20 nor more than $1,000.

Paragraph G of the said Section II of the said Act provides that the normal tax by said Section imposed upon individuals likewise shall be levied, assessed and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships, but if organized, authorized or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year. It is provided, however, that nothing in said Section II shall apply to labor, agricultural or horticultural organizations or to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders or associations operating under the lodge system, or for the exclusive benefit of the members of a fraternity itself operating under the lodge sys-
14 tem and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, nor to domestic building and loan associations, nor to cemetery companies, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues, nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual; nor to any civic league or organization not organized for profit but operated exclusively for the promotion of social welfare; provided further, that there shall not be taxed under said Section II any income, derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State, Territory or the District of Columbia.

It is further provided by Paragraph I of said Section II of the

said Act that in case of the refusal or neglect of any person, corporation, company, or association, except in cases of sickness or absence, to make a list or return or to verify the same as therein provided, the Commissioner of Internal Revenue shall add 50 per centum to the tax imposed by the said Act.

Ninth. Your orator avers that the defendant Union Pacific Railroad Company comes within the terms and purview of said Act and that compliance with the provisions of said Act requires said Company to make the returns provided for therein, and to pay said normal tax of one per cent upon its net income, and requires the said Company to deduct and withhold the normal income tax of one per cent upon all coupons and interest upon its aforesaid issues of bonds heretofore paid and hereafter to be paid to individuals who may be the holders and owners of said coupons or entitled to said interest, who may not have filed with defendant notice of claim to the exemption of $3,000 or $4,000, as the case may be, and requires the said Company to pay the said tax of individuals so deducted and withheld.

Tenth. Your orator further avers that he is informed and believes that the said defendant Company and its Directors controlling its affairs intend voluntarily in the future, from year to year, to comply with the said provisions of the said Act with respect to making returns of net income and paying taxes imposed upon the net income of the said defendant, with respect to deducting and withholding the normal tax upon coupons and interest paid to individuals who are holders thereof or entitled thereto, and with respect to making returns of the taxes so deducted and withheld and paying said taxes, and that the said defendant either is about to make or has made a return of and with respect to the net income of said Company for the ten months of the year 1913 from March 1, 1913, to January 1, 1914, pursuant to said Act, and to pay such tax upon its net income as may be imposed thereon by the Commissioner of Internal Revenue in accordance with said Act, and that the tax on such net income will greatly exceed the sum of $3,000, and will be greater than the sum of $300,000, and is about to make a return, or has made a return, of and with respect to the amounts of the normal income tax heretofore deducted and withheld by the defendant upon coupons and interest heretofore paid to the individuals entitled thereto who have not claimed the exemption aforesaid of $3,000 or $4,000, and to pay over said normal income taxes so deducted and withheld to the Collector of Internal Revenue, and that the said defendant intends from time to time hereafter to make further returns and to pay further taxes upon its net income and will make further returns with respect to normal income taxes that it may have deducted and withheld with respect to coupons and interest due individuals, and will pay such taxes in pursuance of said Section II of said Act; and your orator is informed and believes that if this Court shall not grant to your orator the relief hereinafter prayed this defendant will, on or before the 30th day of June, 1914, pay such income tax as may be assessed against it for the said ten

months of the year 1913, from March 1, 1913, to January 1, 1914, in accordance with said Act, and will on or before the 30th day of June, 1914, pay over said normal income tax of one per cent deducted and withheld upon coupons and interest paid to individuals entitled thereto who have not claimed the exemption aforesaid of $3,000 or $4,000 and will in ensuing years make such returns and deduct and withhold and pay such taxes as the provisions of said Act purport to require.

Eleventh. Your orator further avers that so much of the provisions of the said Section II of the said Act of October 3, 1913, as seek to impose a tax of one per centum upon any net income of individuals or corporations and of the defendant received and collected prior to the third day of October, 1913, are unconstitutional and void, for the reason that the said Act did not become a law until October 3, 1913, and could not lawfully affect any receipts of the defendant before that date, because such receipts prior to October 3, 1913, had become property and capital of said defendant and had ceased to be income.

17 That said provisions of the said Act in seeking to impose a tax upon any so-called "net income" of the defendant received and collected between March 1, 1913, and October 3, 1913, which in reality was capital and real and personal property of the defendant upon October 3, 1913, when said Act became a law, are unconstitutional and void, for the reasons and in the respects hereinafter stated, to-wit:

(*a*) That such provisions are repugnant to and in conflict with the *Third Clause of the Second Section of Article One* of the Constitution of the United States, in that while such tax purports to be and is designated as a tax upon net income it is in truth and in fact a tax upon the real and personal property represented by and in which were invested the net receipts of the defendant between March 1, 1913, and October 3, 1913, and is a direct tax within the meaning of the aforesaid Clause and is not, as provided in said Clause, apportioned among the several States in the manner prescribed in said Clause and in Article XIV of the Amendments to the said Constitution and such provisions are, therefore, unconstitutional and void.

(*b*) That the provisions aforesaid are repugnant to and in conflict with the *Fourth Clause of the Ninth Section of Article One* of the Constitution of the United States, in that the tax sought to be imposed by such provisions, although such tax purports to be on the net income of the corporation between March 1, 1913, and October 3, 1913, is in truth and in fact a tax upon the real and personal property represented by and in which the corporation had invested its net income received between said March 1st, 1913, and October 3,

18 1913, and is a direct tax within the meaning of such clause, and is not laid in proportion to the census or enumeration directed to be taken in the Constitution, as in such case made and provided, and such provisions are therefore unconstitutional and void.

Twelfth. Your orator further avers that the taxes imposed by said Section II of the Act of October 3, 1913, are unconstitutional and

void in that there are specifically exempted from the imposition of such tax labor, agricultural or horticultural organizations, mutual savings banks not having a capital stock represented by shares, fraternal beneficiary societies, orders or associations, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, domestic building and loan associations, cemetery companies organized and operated exclusively for the mutual benefit of their members, corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, business leagues, chambers of commerce or boards of trade not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual, civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, and income derived from any public utility accruing to any State, territory, or the District of Columbia, or any political subdivision thereof, and that the restricted powers of the
19 Federal Government do not permit of the exemption from the operation of an income tax of any one of the afore-said subjects. That many of the corporations so exempted from the operation of the provisions of the said Act of October 3, 1913, are direct competitors of corporations and individuals subject by its terms to the provisions of the said Act and of this defendant in some of their and its business activities, especially in the investment of moneys and the receipt of income and interest therefrom, and that the said provisions of the said Act fail to impose equality of burden among direct competitors and violate the rule of uniformity and equality and involve unreasonable and arbitrary discrimination and classification, and for those reasons among others are unconstitutional and void and in conflict with the provisions of Article V of the Amendments to the Constitution of the United States and involve the taking of property without due process of law and the taking of property for public use without compensation. That the number of exempted corporations and the amount of their incomes exempted from the operation of the Act is so great as materially to increase the burdens of the Act upon the corporations and individuals remaining subject thereto.

Thirteenth. Your orator further avers that the taxes proposed to be assessed and collected and the provisions of said Section II of the said Act of October 3, 1913, providing for the ascertainment, assessment, levy and collection of such taxes are unconstitutional and void, in that they are inconsistent with and violate the provisions of the said Fifth Amendment to the Constitution of the United States, that property shall not be taken without due process of law and that private property shall not be taken for public use without compensation. That said provisions of said Act, while purporting

to have been enacted by the exercise of the taxing power
20 of Congress, in fact were not the result of a lawful exercise of such power, for the reason that said provisions involve discriminations and classifications of the persons and corporations and of the incomes of persons and corporations within the scope of the said provisions that do not rest upon differences which bear a reasonable and just relation to the act in respect to which the classification is proposed, but are made arbitrarily and without any such basis. That such classifications are arbitrary and not reasonable. That distinctions are made in the burdens imposed by said provisions because of wealth, and that said provisions so far as they make such distinctions involve classification that is arbitrary and not reasonable, and constitute class legislation, and are therefore unconstitutional and in contravention of said Fifth Amendment of the said Constitution. That some of the said numerous unconstitutional, arbitrary and unreasonable classifications for purposes of taxation contained in the said provisions of the said Act are as follows:

(1) The provisions of the said Act provide for the taxation only of incomes of individuals for the year 1913 exceeding $2,500 in amount, and in the case of the aggregate incomes of a husband and wife living together of the amount of $3,333.33, and for subsequent years thereafter provide for taxation only of incomes over $3,000 per annum or $4,000 per annum in the case of a husband and wife living together as their aggregate income.

Your orator avers upon information and belief that the population of the United States on October 3, 1913, was over 90,000,000 persons; that the number of persons who would be liable by reason of possession of incomes to pay tax under the provisions of the said Act is about 499,000.

21 Your orator avers that the said exemption of $3,000 or $4,000, as the case may be, is unreasonable and arbitrary and involves a discrimination and classification founded upon wealth and is unreasonable and arbitrary between those who possess incomes under $3,000 or $4,000, as the case may be, and those possessing incomes above those amounts, and that the provisions of the said Act result in the burden imposed thereby falling upon slightly more than one-half of one per centum of the entire population of the country.

Your orator avers that the said exemptions of $3,000 or $4,000 as the case may be, are exemptions of amounts greatly larger than amounts the tax upon which would about equal the expense of collecting said tax.

Your orator avers that under wise and constitutional legislation, every citizen should contribute his proportion, however small, to the support of the Government; that the only constitutional measure of exemption from taxation is the rule that the expense of collecting the tax upon the amount of the exemption should about equal the amount of the tax thereon, and that an exemption from taxation of an amount as to which the expense of collection of its tax would substantially be less than the amount of said tax involves the taking

of property without due process of law of those who are obliged to pay a tax under an Act containing such an unjust exemption, and of the taking of their property for public use without compensation.

(2) The provisions of the said Act and the decisions of the Treasury Department made in pursuance of the power conferred by said Act in permitting an exemption for the tax year 1913 of
22 $2,500 or $3,333.33, as the case may be, and for other years of $3,000 or $4,000, as the case may be, with respect to the normal tax upon individuals deny such an exemption with respect to the tax of one per centum upon the net income of this defendant and of other corporations. Discrimination and classification are thus made between individuals and corporations with respect to the said exemptions. Such discrimination and classification do not rest upon any difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(3) By the provisions of the said Act the defendant and other corporations indebted upon coupon or registered bonds are required to deduct and withhold at the source one per cent. upon the coupons and registered interest upon said bonds and to make returns to and to pay the taxes so withheld to a Collector of Internal Revenue on the 30th of June of each year. Where the corporation has assumed and agreed to pay the tax directed by the Act to be withheld, compliance with the statute requires it to pay the tax, in cases where the creditor, although entitled to an exemption, fails to file claim to exemption with the debtor corporation, which has no means of either compelling the debtor to claim such an exemption or of ascertaining whether or not in fact the debtor is entitled thereto. In cases of individual holders of coupons or those entitled to registered interest whose entire net income amounts to less than $3,000 the
23 payment of the tax is nevertheless required from the corporation debtor, although it is not justly due to the Government and such payment results in an unnecessary loss to the corporation and to the receipt by the Government of moneys to which it is not entitled. Such must be the inevitable operation of the Act in many cases, without redress to the corporation which has assumed the payment of the tax upon its coupons and registered interest and which pays the tax on account of a creditor against whom by reason of his having an income of less than $3,000 the Government has no lawful claim, and with respect to whom the debtor corporation cannot ascertain that his entire income is less than $3,000. The Act provides no means or machinery by which it can be ascertained by the corporation whether or not an individual entitled to collect coupons or registered interest from a corporation is entitled to an exemption of $3,000 or less on income of less than $3,000 upon which an application to the Government to refund taxes not lawfully due could be founded. Such operation of the Act results in a discrimination between and a classification of those corporations which have assumed to pay the tax upon their coupons and regis-

tered interest (the Act lacking provisions that grant them protection and redress), and such corporations as have not assumed to pay the tax upon their coupons and registered interest. Both classes of corporations are obliged to undertake great labor and go to great expense in connection with the payment of their coupons and registered interest, the filing of claims for exemption, deduction and withholding and payment of taxes thereon, acting as the col-
24 lecting agents of the Government, correspondence with holders of coupons and creditors, and many other matters connected with the subject, although corporations which have not assumed payments of taxes are not exposed to positive loss of taxes withheld and paid, as the loss occasioned by the payment of such taxes in the case of creditors having incomes of less than $3,000 would fall upon such creditors and not upon the corporations. Your orator avers, on information and belief, that the annual additional expenses of the defendant corporation in connection with the performance of its duties of collection of income tax at the source which involves hiring of additional clerks, opening and keeping additional books of record, the making out of many documents and returns, additional bookkeeping, labor of various sorts, correspondence, and other matters, will amount to the sum of at least between five and ten thousand dollars. That the purpose of the aforesaid requirements is to assist the Government of the United States in collecting the said Income Tax, and to give to it information with respect to individuals liable to pay said tax. That compliance with such requirements imposes an additional burden upon this defendant and other corporations over and above the amount of any tax that can be levied and assessed upon them under the terms of said Act, and that the imposition of such a burden is contrary to and violative of the Fifth Amendment to the Constitution of the United States and involves taking of property without due process of law and the taking of private property for public use without compensation. That corporations which are not indebted are not subjected to any such burden.

25 The provisions of the said Act relative to collection at the source create a further discrimination between and a classification of corporations which are indebted upon coupons and registered interest and those corporations which are not so indebted. Your orator avers, upon information and belief, that there are many thousand corporations in the United States which are not indebted upon coupon bonds or upon registered bonds bearing interest, and which are therefore under no obligation or duty to collect taxes upon income of individuals at the source and which are freed from the burdens and expense and labor imposed upon corporations which have outstanding coupon and registered bonds held by individuals. The discriminations and classifications aforesaid are not based upon any differences which bear a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and are not reasonable, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(4) The taxes imposed by the said provisions of said Act of October 3, 1913, and the provisions of the said Act, are unconstitutional and void, and unreasonably and unlawfully classify domestic corporations for the purposes of the tax by providing how said net income may be arrived at from the said gross income of such corporations received from all sources. It is prescribed that there is to be deducted the amount of interest accrued and paid within the year on the indebtedness of such a corporation to an amount of such

indebtedness not exceeding one-half of the sum of its interest

26 bearing indebtedness and its paid up capital stock outstanding at the close of the year, or, if no capital stock, the amount of interest paid within the year on an amount of its indebtedness not exceeding the amount of capital employed in the business at the close of the year, whereby all interest paid by the defendant and other domestic corporations, upon indebtedness that is more than one-half of the total indebtedness of any such corporation and its paid up capital stock is not allowed as a deduction to such corporation, whereas corporations not having indebtedness greater than one-half of their indebtedness and their paid up capital stock are allowed a deduction equal to the entire amount of their indebtedness, with the result that corporations being indebted over and above the amount of one-half of their indebtedness and their paid up capital stock are required to pay such tax upon their net incomes at a higher rate than such other corporations. That in case of a corporation indebted for more than the amount of its capital stock, the result of the operation of the Act is to tax as income of the corporation, monies received and disbursed, not as earnings, but as interest payments to its creditors, and which in the hands of its creditors are again taxed for the same year as income of the creditors, and this is the case even if such corporation in fact has no net income.

The discrimination and classification aforesaid are arbitrary and are not reasonable and are founded upon a difference that does not bear a reasonable and just relation to the act in respect to which the classification is proposed and are not founded upon a difference that

the restricted powers of the Federal Government permit to

27 be the basis of classification, and the said provisions of the Act of October 3, 1913, violate the Fifth Amendment to the Constitution of the United States and involve taking property without due process of law and the taking of private property for public use without compensation.

(5) The aforesaid tax and the aforesaid provisions of said Act of October 3, 1913, are unconstitutional and void, in that while it is provided that domestic corporations generally are to be allowed a deduction in computing their net income of only the interest paid on so much of the corporate indebtedness as does not exceed the amount of one-half of the said indebtedness and the paid up capital stock of such corporations, yet in computing the net income in the case of a bank, banking association, loan or trust company interest paid within the year on deposits or on moneys received for investment and secured by interest bearing certificates of indebtedness

issued by such bank, banking association, loan or trust company is so allowed to be deducted, notwithstanding said deposits constitute part of the indebtedness of such company, and a discrimination between and a classification of banks, banking associations and trust companies and domestic corporations other than banks, banking associations, loan or trust companies are thereby created. That such discrimination and classification are arbitrary and not reasonable and are founded upon a difference that does not bear a reasonable and just relation to the act in respect to which the classification is proposed, and the said provisions of the Act of October 3, 1913, violate the Fifth Amendment of the Constitution of the United States and involve taking property without due process of law and the taking of private property for public use without compensation, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(6) The provisions of the said Act and the decisions of the Treasury Department made in pursuance of the power conferred by the said Act do not require individuals to make return of and pay the normal tax upon the amount received by them as dividends upon the stock or from the net earnings of any corporation, joint stock company or association and insurance company which is taxable upon its net income, and do require corporations, joint stock companies or associations and insurance companies to make return of and pay the tax of one per centum upon the amount received by them as such dividends. The defendant owns stocks of other corporations to the amount of several millions of dollars in value and is directly affected by said provisions, and during the year 1913, received large sums as dividends upon said stocks. Discrimination and classification are thus made between individuals and such corporations, joint stock companies or associations and insurance companies, and a less burden of taxation is laid upon such individuals than upon the other subjects of the Act above named, thus discriminated against. This discrimination is intended to have, and in fact has the effect of penalizing holding companies although lawfully holding stock of other corporations by authority of the statutes of the State of their incorporation. Such discrimination and classification are not founded upon a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(7) The provisions of the said Act providing for additional or progressive taxes, upon individuals by which net incomes exceeding $20,000 and not exceeding $50,000 are taxed one per centum additional, and by which net incomes exceeding $50,000 and not exceeding $75,000 are taxed 2 per centum additional and incomes exceeding $75,000 and not exceeding $100,000 are taxed 3 per centum additional, and incomes exceeding $100,000 and not exceeding $250,000 are taxed 4 per centum additional, and incomes

exceeding $250,000 and not exceeding $500,000 are taxed 5 per centum additional, and incomes exceeding $500,000 are taxed 6 per centum additional, result in establishing different rates of taxation upon the net incomes of those possessing different amounts of net income. Your orator further avers upon information and belief that the population of the United States on October 3, 1913, was over 90,000,000 persons; that the number of persons who would be liable by reason of the possession of incomes to pay tax under the provisions of said Act is about 499,000, of which about 456,500 persons possess taxable net incomes less than $20,000 in amount and about 42,500 persons possess taxable incomes over $20,000 in amount; that the income and revenue for the first year under said Act of October 3, 1913, will be about $82,673,000, of which about $13,000,770, or 16½ per cent of the total amount estimated to be collected, will be paid by the said 456,500 taxpayers, while about $68,000,903, or 83½ per cent of the total amount estimated to be collected by the said Act, will be paid by the said 42,500 persons.

By these provisions of the act discrimination and classification are made solely upon the basis of wealth. Such discrimination and classification are arbitrary and not reasonable, and are class legislation and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(8) The provisions of the said Act hereinbefore set forth require a deduction at the source, of the tax by corporations and by fiduciaries and by others, upon coupons and interest paid to individuals whereby the owner of such income is deprived of the use and benefit of the moneys so withheld during the period of time between the date of the withholding and the date either of the assessment of said tax against him or the payment of said tax by him. Many of those who are subject to the provisions of the said Act were during the year 1913 and will be in future years in receipt of incomes taxable under the provisions of the said Act, no part of which is or will be withheld at the source, who have not been and will not be deprived by the operation of the Act of the use and benefit of any part of their income during the dates aforesaid. The provisions of the said Act discriminate between and classify into two distinct classes owners of taxable income part or the whole of which is withheld at the source, and owners of taxable income no part of which is withheld at the source. Such discrimination and classification are not founded upon a difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and are arbitrary and not reasonable.

(9) The provisions of the said Act while permitting an exemption in the case of individuals for the tax year 1913 of $2,500 or $3,333.33, as the case may be, and for other years of $3,000 or $4,000, as the case may be, with respect to the normal tax, deny such an exemption with respect to the additional tax; that is to say, that while the owner of taxable income to the amount of $20,000 or less is allowed the exemptions aforesaid, the owner of taxable income above $20,000 as to which an additional

tax is imposed is not allowed any such exemption with respect to the additional tax. Discrimination and classification are thus made between owners of taxable incomes of $20,000 and less and owners of taxable incomes above $20,000. Such discrimination and classification are founded upon wealth alone as a basis and are unreasonable and arbitrary, and are class legislation, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(10) The provisions of the said Act which deny in the assessment of the said additional tax upon individuals the deduction from gross income of income derived from dividends on stock or from the net earnings of corporations, joint stock companies, associations or insurance companies, subject to like tax, discriminate between and classify into two classes those who possess taxable incomes of $20,000 or less and those who possess taxable incomes exceeding $20,000. That such distinction and classification are based solely upon wealth and are arbitrary and not reasonable and are class legislation, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

32 (11) The provisions of the said Act and the decisions of the Treasury Department made in pursuance of the power conferred by said Act provide for the taxation and the inclusion in the return of the individual taxpayer, under the designation of income on which at the source, tax has not been deducted and withheld, of income, upon which the payment of the tax by agreement has been assumed, withheld and set aside for purposes of payment to the Government by debtors from whom such income is derived and paid in compliance with such an agreement, without diminution by the said debtors to the individuals entitled to such income. Compliance with such requirement will necessarily result in the tax being paid twice—once by the debtor who has assumed to pay the tax, and who in legal effect has deducted and withheld the tax at the source, and is liable to pay it to the Federal Government, notwithstanding that in compliance with his covenant he has also included the amount thereof in his payment to the creditor, and secondly by the creditor and individual taxpayer in the assessment which will inevitably be made upon his return. A failure to make such payment by the creditor and income taxpayer would expose him to the punishments and penalties provided in the said Act. Having made such payment of a tax upon income which is also paid by the debtor, who has deducted and withheld the tax at the source, the taxpayer can be reimbursed only by going to the expense and labor of an application for a refund, with the loss of the use and the benefit of the money that he is entitled to have refunded, during the interval of time between his payment thereof and the success of his application. Such provisions

33 of the said Act and said decisions create a discrimination and classification between those whose tax has been deducted and withheld at the source by debtors from whom income is derived, who have assumed the payment of the tax, and owners of

taxable income on which the tax has been deducted and withheld at the source by debtors who have not assumed the payment of the tax, and create an onerous, unnecessary and unjust burden upon those subjected thereto. Such discrimination and classification are not founded upon a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(12) The provisions of the said Act and the decisions of the Treasury Department made in pursuance of the power conferred by said Act restrict the exemption as to normal tax for the tax year 1913 of a husband and wife living together and having separate incomes to a total joint exemption of $3,333.33 on their aggregate income, and for other tax years to a total joint exemption of $4,000 on their aggregate income and provide that an additional tax shall be paid, based upon the aggregate income of husband and wife living together and having separate incomes even if neither one has a separate income in excess of $20,000, while in the case of a husband and wife not living together and having separate incomes an exemption for the tax year 1913 of $2,500 is allowed to each, and
an exemption for subsequent tax years is allowed of $3,000
34 to each, whereby the assessment and payment of a normal
tax by a husband and wife not living together and having separate incomes, would fall upon neither if neither had a separate income of $3,000, and if either had a separate income of $3,000, would fall upon the excess or excesses, if any, over $3,000, and not upon the excess of the aggregate of both incomes over $4,000, and an additional tax by a husband and wife not living together and having separate incomes would fall upon neither if neither had a separate income in excess of $20,000, and if either had a separate income over $20,000 would fall upon the excess, or excesses, if any, over the $20,000 and not upon the excess of the aggregate of both incomes over $20,000. That such discriminations and classifications are based solely upon the circumstance that husband and wife are living together. That such discriminations and classifications do not rest upon any difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(13) The provisions of the said Act to the effect that nothing therein shall be construed to release a taxable person from liability for Income Tax lead to the result that, notwithstanding that the entire income tax of an individual might have been deducted and withheld at the source in pursuance of the requirements of the Act and the regulations of the Treasury Department made in pursuance
of the power conferred thereby, in the event that the fidu-
35 ciary or other person deducting and withholding such a tax
should neglect, or refuse, or be unable to pay the same when it became due, the individual whose normal tax had been deducted

and withheld would nevertheless be compelled to pay the same. In such a case compliance with the statute would result in a loss to the individual taxpayer of twice the amount of the normal tax, first, for the amount of the tax deducted and withheld from him, and, secondly, for the amount of the tax which he would be obliged to pay to the Government on the default of his fiduciary or withholding debtor. The Act, therefore, creates two classes of taxpayers, one, none of whose tax is deducted or withheld at the source, and the other composed of those whose tax is either in whole or in part deducted at the source. The Act imposes upon the latter class the risk of loss of twice the amount of the tax, with the certainty of such loss in the event of the neglect or refusal of the fiduciary or withholding debtor to pay the tax. Such discrimination and classification are founded upon a difference which bears no just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable, and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(14) The provisions of the said Act of October 3, 1913, and the decisions of the Treasury Department made in pursuance of the power conferred by the said Act, while they do not permit an individual who either owns or rents property for family or personal use to deduct the rental value thereof, or rent actually paid therefor, expressly permit such owner to exclude such estimated rental of his home as income. Such a result gives a benefit and ad-
36 vantage to one who owns his home over one who rents it and is an exemption from taxable income of the rental value of a house to the owner thereof, while the renter of a house has no such exemption, as he is obliged to pay a tax on so much of his income as he expends in rent. If the renter cannot deduct as an expense what he pays as rent, the owner, who has no such expense, should be charged with the rental value of his home, to ensure reasonable uniformity and equality. The result aforesaid is substantial, for many individuals in the United States, especially those dwelling outside of the cities, many of whom are engaged in the business of farming, own and occupy homes of such rental value, that the inclusion of the rental value thereof in their taxable income would bring them within the taxable class or substantially increase their taxable incomes, whereas in consequence of the exclusion of such rental value, they are now wholly or partially exempt, while many renters, especially those living in cities or in the neighborhood thereof, are now taxable under said Act, who would be exempt or have their taxable incomes substantially reduced if they could exclude from their taxable incomes the rent they pay for their homes. Such a result effects a discrimination between and a classification into two classes, one of those individuals who own their homes and another of those who rent their homes. Such discrimination and classification are founded upon a difference which does not bear a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable and are not founded upon a difference that the

restricted powers of the Federal Government permit to be the basis of classification.

(15) The provisions of the said Act of October 3, 1913, and the decisions of the Treasury Department made in pursuance of the power conferred by the said Act, do not require the inclusion in the aggregate of the taxable net income of the taxpayer of the value of any cattle, horses or other domestic animals that may be the offspring of any such animals owned by him and that have been born within the current year, and of the value of any grain, fruits, crops or other farm produce that he may have raised upon his land within the current year, that have not been sold and disposed of for valuable considerations, with the result that while the farmer is allowed a deduction from his net income of the expenses of carrying on his business, he is not obliged to include in his income the value of domestic animals born and produce raised in the year that may have been retained or consumed by his family or upon his farm. The said Act in paragraph B thereof expressly denies the right to deduct from net income "personal, living or family expenses"; nevertheless the farmer who raises during the current year upon his farm sufficient animals and produce to supply his family and who is not obliged to account for the value thereof as part of his net income, in effect is allowed to deduct from his net income his "personal, living or family expenses." The effect aforesaid of such provisions and decisions is to discriminate between and classify into two classes those individuals who pursue farming as a business and those who pursue another or no business. Such discrimination and classification are founded upon a difference which does not bear a reasonable and just relation to the Act in respect to which the classification is proposed, are arbitrary and not reasonable; and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(16) If the provisions of the said Act of October 3, 1913, are held to be unconstitutional and void with respect to individuals, they are equally so with respect to corporations. The said Act does not purport to impose an excise upon the carrying on or the doing of business in a corporate or quasi-corporate capacity, measured by the net income of corporations, but does purport to impose a tax upon the net income of corporations who carry on the same businesses as are carried on by individuals and derive their incomes from the same sources as individuals. A tax upon the net income of corporations alone that did not fall upon the net income of individuals would result in a discrimination between and a classification into two classes for purposes of taxation of corporations and individuals, which would be founded upon a difference which does not bear a reasonable and just relation to the act in respect to which the classification is proposed, and are arbitrary and not reasonable and violate the rule of equality of burden between direct competitors and are not founded upon a difference that the restricted powers of the Federal Government permit to be the basis of classification.

(17) It is provided in the said Act of October 3, 1913, that

the said Section II of said Act shall not apply to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity, itself operating under the lodge system, and providing for the payment of life, sick, accident or other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations. Such provisions of the said Act create a discrimination and a classification in favor of said mutual savings banks, fraternal beneficiary societies, orders and associations, and building and loan associations, as against other corporations which conduct their business solely for the benefit of the members of such corporations and which corporations, under the provisions of the said Act of October 3, 1913, are required to pay a tax upon net income and such discrimination and classification are unreasonable and arbitrary. There is no reason that justifies the exemption of fraternal beneficiary societies, orders and associations from the payment of an income tax that does not require the exemption from an income tax of mutual life insurance companies. A fraternal association has no capital stock and is organized and carried on solely for the mutual benefit of its members and their beneficiaries and not for profit. Mutual life insurance companies have no capital stock, and they are carried on solely for the benefit of the policyholders and beneficiaries. Both classes of companies equally are not engaged in business for gain. The entire assets of mutual life insurance companies belong to the policyholders. The number of fraternal organizations, orders and associations doing business in the United States is large. Their total annual income for many years back has been in excess of $100,000,000; their total yearly disbursements have been in excess of $100,000,000. Said fraternal societies, orders and associations have assets amounting to upwards of $163,000,000 and the business annually conducted by such fraternal associations is in excess of $1,000,000,000. Mutual savings banks, which, by the provisions of the said Act of October 3, 1913, are entirely exempt from the provisions of Section II of said Act, had in June, 1913, total resources of over $4,000,000,000, loans and discounts of over $2,000,000,000, bonds, securities, etc., over $1,800,000,000, and individual deposits of over $3,700,000,000. The building and loan associations of the United States for the year ending 1913 had total assets of over $1,000,000,000. The provisions of the said Act exempting the aforesaid corporations and imposing a tax upon other business corporations creates a discrimination and a classification which are arbitrary and unreasonable. All the aforesaid discriminations and classifications are violative of the Fifth Amendment of the Constitution of the United States.

Fourteenth. That the said Act is invalid in that it unlawfully delegates to the Secretary of the Treasury to decide in certain cases that the accumulation of surplus of the gains and profits of a corporation, joint stock company or association, instead of its being

divided and distributed, is prima facie evidence of a fraudulent purpose to escape the Income Tax, by certification that in the opinion of the said Secretary such accumulation is unreasonable for the purposes of the business. That such provisions delegate judicial authority to the said Secretary to make a decision by certifying his opinion that shall be taken by the courts in pending litigation as prima facie evidence of a purpose to escape the tax. That
41 such delegation of authority is unlawful and in contravention of the provisions of the Constitution of the United States and confers judicial powers on the Secretary of the Treasury for the time being.

Fifteenth. That the aforesaid provisions of said Act of October 3, 1913, constitute one entire independent system of taxation, and inasmuch as said provisions are unconstitutional and void for the reasons and in respect to the matters hereinbefore stated, the said provisions are in all respects unconstitutional and void, and any tax which may be levied thereunder upon the defendant is and will be unconstitutional and void, not only to the extent that it is unconstitutional as to the matters hereinbefore set forth but in each and every respect and as to the whole thereof.

Sixteenth. Your orator further avers that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that your orator has protested to the defendant and to the Directors of said defendant against the compliance by said corporation, and by said Directors, with the provisions of the Act of Congress hereinbefore referred to, and has claimed before said Board of Directors that the said provisions with respect to taxes, both upon the net income of the Union Pacific Railroad Company and coupons and registered interest owned by and payable to individuals, are unconstitutional, and has protested against any action by the Company or its Directors in voluntarily complying with the provisions of said Act and requested that said Company and its Directors should refrain from voluntarily complying with any of said provisions and from voluntarily making any return in pursuance thereof and
42 from voluntarily paying any taxes provided for therein, either upon its own net income or upon such coupons and registered interest, and has claimed to said Directors that the payment of any such taxes would be a waste and misappropriation of the assets of the Company, and has requested that the Company and its Directors should contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and should apply to a court of competent jurisdiction to determine the liability of the Company under said Act and take such steps as should be necessary to protect the rights of the Company's shareholders.

Your orator further avers that the said company has neglected to comply with any of your orator's requests, as aforesaid, and has stated to your orator that it does not feel at liberty to disregard the corporation income tax provisions, and the provisions for the collection at the sources of individual income taxes contained in the

Act of October 3, 1913, and to incur thereby the heavy penalties which might result from such disregard, and has refused specifically each of your orator's aforesaid requests, and said company intends and threatens to comply with the said Act and the provisions thereof in all respects.

That annexed hereto and marked respectively Exhibits A and B are copies of letters, one of which, A, was sent by your orator to said defendant, and the other of which, B, is the reply thereto received by your orator.

Your orator further shows that he has been and is unable to have the said action by the Board of Directors reviewed and rescinded or modified by the general body of stockholders of said corporation and to have such stockholders direct the said Board of Directors

to comply with your orator's demand, inasmuch as no pro-
43 vision is made in the Act of the Legislature of Utah, incorporating the defendant, or by the by-laws of the Company, or general laws of the State of Utah relating to corporations, binding upon the defendant, for such control by the general body of stockholders of the acts of the Board of Directors, and for the further reason that the next annual meeting of said corporation will not take place until the second Tuesday of October, 1914, and by the Act of Congress hereinbefore referred to payment of said taxes is required to be made on the 30th day of June, 1914.

That special meetings of defendant's stockholders by its by-laws can only be had upon order of the Board of Directors or Executive Committee or by written application of stockholders owning not less than one-third in amount of the capital stock. That in view of the position taken by the Executive Committee of defendant set forth in Exhibit B hereto annexed, it would be useless to apply to said Committee or the Board to call a special meeting of stockholders. That in view of the large number of stockholders holding over $300,000,000 of stock, and the necessity of publication of notice of a special meeting for three weeks, it would be practically impossible to obtain the cooperation of a sufficient number of stockholders and the publication of notice aforesaid within any reasonable time in the future, and probably not at all.

Seventeenth. Your orator further avers that the making of the aforesaid returns and payment of the aforesaid taxes will result in a great diversion and misappropriation of the assets of the defendant corporation, and will unconstitutionally lessen and diminish the equity of the shareholders in said corporation and the interest of your orator in said corporation as a shareholder therein will be

greatly and irreparably injured thereby.

44 Eighteenth. Your orator further avers that unless this Court shall grant to your orator the relief hereinafter prayed, the defendant will pay the aforesaid taxes for the past year and each year in the future, and said Company will be obliged to submit wholly to such unconstitutional taxes and to suffer great loss therefrom and to lose the taxes unnecessarily paid for those who are exempt, or in each year to go to great expense to ascertain which of its coupon and interest payees are exempt from the operation of

the Act and to bring numerous suits against the officers of the Government of the United States to recover back the taxes paid as aforesaid. That the issues to be determined in all such suits brought as aforesaid involving the validity of said Act of October 3, 1913, would be substantially identical with those to be passed upon herein and can be determined more speedily and conveniently by the Court in this suit, and the granting of the relief hereinafter prayed will prevent such multiplicity of suits as aforesaid.

Nineteenth. Your orator further shows the amount of the taxes upon the net income of the defendant for the year 1913 exceeds the amount of $300,000 and that the taxes heretofore deducted and withheld and payable by defendant in conformity with the provisions of the said Act on the thirtieth day of June, 1914, on behalf of holders of coupons and payees of registered interest on its bonds aforesaid, who have not claimed exemption and with respect to whom the defendant has covenanted to pay taxes required to be withheld amount to over the sum of $6,000; that the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of $3,000. Inasmuch, therefore, as your orator has no adequate remedy at law for its aforesaid grievances and can have relief only in equity,

45 your orator files this bill of complaint in behalf of himself and behalf of all other shareholders who may come in and join in the prosecution and contribute to the expense of this suit, and prays for equitable relief as follows:

(1) That the provisions relating to making returns of net income and payment of taxes imposed upon the net income of corporations, joint stock companies or associations and insurance companies, contained in the said Act of Congress of October 3, 1913, and particularly with respect to the period between March 1st, 1913 and October 3d, 1913, so far as any tax is sought to be imposed thereby upon the defendant Union Pacific Railroad Company, may be adjudged unconstitutional and void.

(2) That the defendant may be perpetually restrained from voluntarily making or causing to be made any return or statement pursuant to said provisions and voluntarily paying or causing to be paid any tax that may be imposed thereunder and particularly from voluntarily making or causing to be made any such return or statement and from voluntarily paying any tax for the period between March 1st, 1913 and October 3d, 1913, and from voluntarily paying any taxes upon income received as dividends upon the stocks of corporations held by it, which are subject to taxation under said Act.

(3) That the provisions relating to deducting and withholding taxes upon income of individuals arising or accruing from coupons or registered interest and making returns with respect to such amounts so withheld and paying such amounts to any Collector of Internal Revenue of the Government of the United States, or any other person, contained in the Act of Congress aforesaid, may be adjudged unconstitutional and void.

46 (4) That the defendant may be perpetually restrained from voluntarily making or causing to be made any return

pursuant to said provisions relative to said taxes upon coupons or registered interest payable to individuals, and from deducting or withholding any such tax or voluntarily paying any such taxes to any Collector of Internal Revenue or any other officer of the United States Government.

(5) That pending such final decree as this Honorable Court may see fit to make herein, a temporary injunction may issue, restraining the said defendant from voluntarily doing or performing any of the aforesaid acts with respect to which a final decree is hereinabove prayed.

(6) That the above named defendant may be required to answer all and singular the matters above stated.

(7) That a writ of subpœna may be granted to your orator, to be directed to the Union Pacific Railroad Company, thereby requiring said defendant personally to appear on a certain day before the Court, then and there full, true, direct and perfect answer to make (but not under oath, which is hereby expressly waived) to all and singular the premises, and further to perform and abide by such further order, direction or decree thereof as to the Court may seem meet.

(8) That your orator may have such other and further relief as the Court may deem proper and equitable, and your orator will ever pray, etc.

DAVIES, AUERBACH & CORNELL,
Solicitors for Complainant.

JULIEN T. DAVIES,
JOSEPH S. AUERBACH,
FREDERIC J. FULLER,
Of Counsel.

47 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Frank R. Brushaber, being duly sworn, deposes and says that he is the above-named complainant; that he has read the foregoing bill of complaint, and the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FRANK R. BRUSHABER.

Sworn to before me this 13th day of March, 1914.

AMOS J. PEASLEE,
Notary Public, County of New York,
State of New York, No. 3059. *New York County Register No.* 5138.

My Commission expires March 30, 1915.

48 EXHIBIT A.

FEBRUARY 27, 1914.

To the Union Pacific Railroad Company and to the Board of Directors Thereof.

SIRS: I am a stockholder of record of the Union Pacific Railroad Company and am informed that the Company intends to voluntarily comply with the requirements of the provisions of the so-called Income Tax imposed by Section 2 of the Act of Congress of the United States entitled "An Act to reduce tariff duties and to provide revenue for the Government and for other purposes," which Act became a law October 3, 1913 and is known as the Tariff Act. I am further informed that the Company intends to make returns pursuant to and in compliance with said Act and to pay such tax as may be assessed upon it in accordance therewith. I am also informed that the Company has withheld and intends in the future to withhold the normal tax of one per cent. imposed upon the coupon and registered interest owned by and payable to individuals, and to make returns to the Government with respect to said taxes and to pay said taxes.

I desire to notify you that I claim that the provisions of said act of Congress in respect to such taxes, both upon the net income of the Union Pacific Railroad Company and said coupons and registered interest owned by and payable to individuals, are unconstitutional. As a shareholder in said Company, I hereby protest against any action by the Company and its Directors in voluntarily complying with the provisions of said Act, and I request that said Company and its Directors shall refrain from voluntarily complying

49 with any of said provisions and from voluntarily making any return in pursuant- thereto and from voluntarily paying any taxes provided for therein, either upon its own net income or upon such coupons and registered interest.

I further claim that the payment of any such tax would be a waste and misappropriation of the assets of the Company.

I further request that the Company and its Directors shall test the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act, and take such steps as shall be necessary to protect the rights of the Company's shareholders.

Unless I shall be informed within a reasonable time that it is your purpose to comply with my requests herein made, I shall consider that you have refused so to do and shall feel justified in alleging your refusal as a basis for any independent action that I may take to protect the interests of the Company and its shareholders in the premises.

I remain, very truly yours,

FRANK R. BRUSHABER.

50

EXHIBIT B.

Copy.

Union Pacific Railroad Company,

Law Department,

165 Broadway,

NEW YORK, *March* 6, 1914.

Henry W. Clark, Counsel.
George Adams Ellis, Assistant Counsel.

Mr. Julien T. Davies, 34 Nassau St., City.

DEAR SIR: Referring to communication received from you, dated February 27, 1914, signed by Mr. Frank R. Brushaber a stockholder of this Company.

This Company does not feel at liberty to disregard the corporation income tax provisions and the provisions for the collection at the source of individual income taxes contained in the Act of October 3, 1913, and to incur thereby the heavy penalties which might result from such disregard. The Company has therefore been making returns to the Collector of Internal Revenue of interest payments, taxes withheld thereon, etc., and purposes to make return of its net income as a corporation under the provisions of subsection G of the Act.

The course which is being followed by the officers of the Company has received such sanction from the Executive Committee of the Board of Directors after consideration of the Income Tax Act that the various requests contained in Mr. Brushaber's letter must be specifically refused.

Very truly yours,

HENRY W. CLARK.

B

51 United States District Court, Southern District of New York.
In Equity.

Docket No. E-11-121.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

To the Clerk of the United States District Court for the Southern District of New York:

Please enter my appearance as solicitor for the defendant in the above entitled cause.

April 4, 1914.

HENRY W. CLARK,
Solicitor for Defendant.

Office and Post Office Address, 165 Broadway, New York City, N. Y.

(Filed Apr. 4, 1914.)

52 United States District Court, Southern District of New York.
In Equity.

Docket No. E 11, p. 121.

FRANK R. BRUSHABER, Complainant;
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant and moves that the bill of complaint herein be dismissed upon the ground that Section 2 of the Act of the First Session of the Sixty-third Congress, which became a law on October 3, 1913, generally known as the "Tariff Act", and set forth in the bill of complaint herein, is constitutional and valid, and that the complainant has not in and by said bill made or stated such a cause as doth or ought to entitle him to any such relief as is therein sought and prayed from or against this defendant; and said motion will be brought on for hearing before this Court at a term thereof to be held in the United States Post Office Building in the Borough of Manhattan, City of New York, on the 24th day of April, 1914, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, April 20, 1914.

HENRY W. CLARK,
Solicitor for Defendant,
165 *Broadway, New York City.*

To Davies, Auerbach & Cornell, Solicitors for complainant, 32 Nassau Street, New York City.

Due and timely service of the foregoing notice of motion this 21st day of April, 1914, is hereby admitted.

(Signed) D., A. & C.,
Solicitors for Complainant.

(Filed Apr. 25, 1914.)

53 In the District Court of the United States for the Southern District of New York. In Equity.

Docket No. E 11, p. 121.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

This cause came on to be heard at the April Term of this Court, 1914, and thereupon, after hearing counsel, and upon consideration thereof, it was

Ordered, adjudged and decreed that the motion of the defendant to dismiss the bill of complaint herein, upon the ground that Section 2 of the Act of the First Session of the Sixty-third Congress, which became a law on October 3, 1913, generally known as the "Tariff Act" and set forth in the bill of complaint herein, is constitutional and valid and that the complainant has not in and by said bill made or stated such a cause as doth or ought to entitle him to any such relief as is therein sought and prayed from or against this defendant, be and the same hereby is granted, and that the said bill of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk.

Dated, this 24th day of April, 1914.

H. G. WARD,
United States Circuit Judge.

Notice of settlement waived:
DAVIES, AUERBACH & CORNELL,
Solicitors for Complainant.

(Filed Apr. 25, 1914.)

54 In the District Court of the United States for the Southern District of New York. In Equity.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

To the judges of the District Court of the United States for the Southern District of New York:

The above-named complainant considering himself aggrieved by the decree made and entered by the above-mentioned court in the

above entitled cause, on the — day of April, 1914, wherein and whereby it was ordered, adjudged and decreed that the motion of the defendant to dismiss the bill of complaint be sustained and that this cause be dismissed, does hereby appeal to the United States Supreme Court from said decree; and complainant prays that this his appeal may be allowed and that a transcript of the record and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, April 24th, 1914.

DAVIES, AUERBACH & CORNELL,
Solicitors for Complainant.

Appeal allowed.
H. G. WARD, *U. S. J.*

(Filed Apr. 25, 1914.)

55 In the District Court of the United States for the Southern District of New York.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY Defendant.

Assignment of Errors.

Now comes the complainant and files the following assignment of errors upon which it will rely upon its appeal from the decree made by this Honorable Court on the — day of April, 1914, in the above entitled cause:

First. That the court erred in granting the motion made by the defendant to dismiss the bill of complaint herein and in holding that the said bill was without equity.

Second. That the court erred in adjudging that Section 2 of the Act of the First Session of the Sixty-third Congress, which became a law on October 3, 1913, generally known as the "Tariff Act", set forth in the bill of complaint herein, is constitutional and valid and that the said section was not violative of the third clause of the Second Section of Article I. and the fourth clause of the Ninth Section of Article I. and the first clause of the Eighth Section of Article I.

56 and the implied limitations and restrictions upon the taxing power of the United States contained in the Constitution of the United States and of Articles IV., V. and X. of the Amendments to the Constitution of the United States.

Third. That the court erred in adjudging that the provisions of Section 2 of the Act hereinabove referred to, set forth in the bill of complaint herein, relating to making returns of net income and payment of taxes imposed upon the net income of corporations, joint stock companies and associations, or insurance companies, so far as any tax is sought to be imposed thereby upon the defendant Union Pacific Railroad Company, are constitutional and valid.

Fourth. That the court erred in adjudging that the provisions of Section 2 of the Act hereinabove referred to, set forth in the bill of complaint herein, relating to making returns of net income and payment of taxes imposed upon the net income of corporations, joint stock companies or associations and insurance companies, so far as any tax is sought to be imposed thereby upon the property of the defendant Union Pacific Railroad Company, acquired through the receipt of income prior to the passage of said Act, are constitutional and valid.

Fifth. That the court erred in adjudging that the provisions of Section 2 of the Act hereinabove mentioned, set forth in the bill of complaint herein, relating to making returns of net income and payment of taxes imposed upon the net income of corporations, joint stock companies or associations and insurance companies, so far as any tax is sought to be imposed thereby upon the income of
57 the defendant Union Pacific Railroad Company, received as dividends upon the stocks of corporations held by it which are also subject to taxation upon their net income under said Act, are constitutional and valid.

Sixth. That the court erred in adjudging that the provisions of Section 2 of the Act hereinabove referred to, set forth in the bill of complaint herein, relating to deducting and withholding taxes upon income of individuals arising or accruing from coupons or registered interest, and making returns with respect to such amounts so withheld, are constitutional and valid.

Seventh. That the court erred in holding that the provisions of Section 2 of the Act hereinabove mentioned, set forth in the bill of complaint herein, relating to deducting and withholding a certain proportion of the indebtedness of corporations arising or accruing from coupons or registered interest, so far as the duty is sought to be imposed thereby upon the defendant Union Pacific Railroad Company of making such deductions from the amounts payable for coupons or registered interest, and of paying the same to the Collector of Internal Revenue of the government of the United States, or any other person, irrespective of the taxable status of the income of the persons receiving such registered or coupon interest, and without knowledge or means of knowledge of the taxable status of the income of such persons, are constitutional and valid.

58 Eighth. That the court erred in not decreeing that the complainant was entitled to the relief prayed for or some part thereof.

Ninth. That the court erred in dismissing said bill with costs.

Wherefore, the appellant, complainant in the court below, prays that the decree of said court may be reversed; and in order that the foregoing assignment of errors may be part of the record the complainant presents the same to the court and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

DAVIES, AUERBACH & CORNELL,
Solicitors for Complainant.

Filed April 25, 1914.

5—1045

59 In the District Court of the United States for the Southern District of New York.

In Equity.

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

On motion of Messrs. Davies, Auerbach & Cornell, solicitors for the complainant, it is

Ordered that the appeal to the Supreme Court of the United States from the final decree filed and entered herein on the 24th day of April, 1914, be and the same hereby is allowed, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the United States Supreme Court, at Washington, D. C.; and it is further

Ordered that the bond on appeal be fixed at the sum of $250.00—the same to act as a supersedeas bond and also as a bond for any costs and damages on appeal.

Dated, April 24th, 1914.

H. G. WARD,
Judge of the District Court of the United States for the Southern District of New York.

(Filed Apr. 25, 1914.)

60 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

In Equity.

FRANK R. BRUSHABER, Complainant-Appellant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant-Respondent.

Bond on Appeal.

Know all men by these presents, That Frank R. Brushaber as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Union Pacific Railroad Company in the sum of Two Hundred Fifty ($250.00) Dollars to be paid to the said Union Pacific Railroad Company for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 24th day of April 1914.

Whereas, the above named Frank R. Brushaber has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Frank R. Brushaber shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By L. M. C. ADAMS,
Resident Vice-President.

Attest:

E. M. McCARTHY,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, 191–, before me personally came the within named —— —— to me known, and known to me to be the individual described in and who executed the within bond and — acknowledged that — executed the same.

—— ——.

61 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of April 1914 before me personally came L. M. C. Adams, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Frank R. Brushaber as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Frank R. Brushaber is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Ceompany, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signiature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto sub-

scribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of two million dollars.

L. M. C. ADAMS.
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 24th day of April 1914.

WM. M. WEAVER,
Notary Public, etc.

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, 191–, before me personally came ——; to me known, who, being by me duly sworn, did depose and say that he resides in —; that he is the — of the — the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

—— ——.

[Endorsed:] District Court of United States, Southern District of New York. Frank R. Brushaber, Complainant-Appellant, against Union Pacific Railroad Company, Defendant-Respondent. Bond on Appeal. Surety, National Surety Company. Filed April 25th, 1914. Attorney for —. I approve of the *written* Bond, and of the sufficiency of the surety thereon. H. G. Ward, U. S. J.

62 UNITED STATES OF AMERICA, ss:

The President of the United States to Union Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington within thirty days from the date of this writ, towit on the 4th day of May pursuant to an appeal allowed by a Judge of the District Court of the United States for the Southern District of New York in the Second Circuit, filed in the Clerk's office of the District Court of the United States for the Southern District of New York, in a cause wherein Frank R. Brushaber is appellant and you are appellee, to show cause, if any, why the decree entered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. H. G. Ward, Judge of the District Court of the United States for the Southern District of New York in the Second Circuit at the Borough of Manhattan in the City of New York, in the District and Circuit above named, this 24th day of

April in the year of Our Lord One thousand nine hundred and fourteen.

H. G. WARD, *U. S. J.*

(Filed Apr. 25, 1914.)

Endorsed.

(Service admitted this 25th day of April, 1914.
HENRY W. CLARK,
Solicitor for Appellee.)

63 United States District Court, Southern District of New York.

FRANK R. BRUSHABER, Complainant,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, April 29, 1914.

DAVIES, AUERBACH & CORNELL,
Attorneys for Complainant.
HENRY W. CLARK,
Attorney for Defendant.

(Filed April 30th 1914.)

64 UNITED STATES OF AMERICA,
Southern District of New York, ss:

FRANK R. BRUSHABER, Complainant,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 30th day of April in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 24,196. S. New York D. C. U. S. Term No. 1045. Frank R. Brushaber, appellant, vs. Union Pacific Railroad Company. Filed May 4th, 1914. File No. 24,196.