

61-121

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.

150278

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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.

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IN THE 1
District Court of the United States

FOR THE SOUTHERN DISTRICT OF
NEW YORK.

<p>FRANK R. BRUSHABER, Complainant,</p> <p>AGAINST</p> <p>UNION PACIFIC RAILROAD COMPANY, Defendant.</p>	}	<p>In Equity.</p> 2
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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 Brook-
lyn, in the City of New York, brings this his bill
against Union Pacific Railroad Company, a cor- 3
poration 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 Rail-
road Company who may join in the prosecution and

- 4 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.

- 5 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.

- 6 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.

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. 7 8

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. 9

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 Company's

10 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.

11 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.

12 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.

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. 13

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. 14

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. 15

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

16 levied, 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.

17 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.

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It is further provided by said Subdivision 2 there- 19
in 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 pre-
ceding 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 Sub-
division 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 corpora-
tions, joint stock companies or associations how- 20
ever created or organized, formed or fraudu-
lently availed of for the purpose of preventing the
imposition of such tax through the medium of per-
mitting such gains and profits to accumulate in-
stead 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 be-
yond 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 21
of a purpose to escape the said tax in such case un-
less 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 there-
after in the Act allowed the net income of a
taxable person shall include gains, profits and
income derived from salaries, wages or com-
pensation for personal services, of whatever
kind and in whatever form paid, or from profes-

22 sions, 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.

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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.

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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 the return be a married man with a wife living with

him, or plus the sum of \$1,000 additional if the 25
 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 ag-
 gregate 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, 26
 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 Com- 27
 missioner of Internal Revenue, with the approval
 of the Secretary of the Treasury, shall prescribe,
 setting forth specifically the gross amount of in-
 come 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 re-
 turn 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 determina-
 ble annual or periodical gains, profits and income of

- 28 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
- 29 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

30 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

sum of 5 per centum on the amount of tax unpaid, 31
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 in-
solvent persons.

It is further provided by said Paragraph E that
all persons, firms, companies and corporations, in-
cluding lessees or mortgagors of real or personal
property, trustees acting in any trust capacity, ex-
ecutors, 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 32
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 re-
quired to deduct and withhold from such annual
gains, profits and income such sum as will be suf-
ficient 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 person-
ally liable for such tax.

It is further provided by said Paragraph E that 33
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 re-
ceive the benefit of the deduction and exemption
allowed in Paragraph C aforesaid, except by an ap-
plication 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.

34 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
35 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
36 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 exemp-

tion and deduction of \$3,000 may be had by com- 37
plying 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 38
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 exist- 39
ing 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 system and providing for the payment

40 of life, sick, accident and other benefits to the mem-
 bers of such societies, orders or associations and de-
 pendants of such members, nor to domestic build-
 ing and loan associations, nor to cemetery com-
 panies, organized and operated exclusively for the
 mutual benefit of their members, nor to any cor-
 poration or association organized and operated ex-
 clusively for religious, charitable, scientific or edu-
 cational purposes, no part of the net income of
 which inures to the benefit of any private stock-
 holder 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
 41 of which inures to the benefit of the private stock-
 holder or individual; nor to any civic league or
 organization not organized for profit but operated
 exclusive for the promotion of social welfare; pro-
 vided further, that there shall not be taxed under
 said Section II any income, derived from any pub-
 lic utility or from the exercise of any essential gov-
 ernmental function accruing to any State, Terri-
 tory, 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 re-
 42 fusal or neglect of any person, corporation, com-
 pany, 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 In-
 ternal 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 Com-
 pany 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 43
 and withhold the normal income tax of one per
 cent. upon all coupons and interest upon its afore-
 said 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 in- 44
 formed and believes that the said defendant Com-
 pany and its Directors controlling its affairs in-
 tend 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 in-
 come and paying taxes imposed upon the net in-
 come 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 re-
 turn of and with respect to the net income of said 45
 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 in-
 terest heretofore paid to the individuals entitled

- 46 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
- 47 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.
- 48 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.

That said provisions of the said Act in seeking to 49
 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 de-
 fendant upon October 3, 1913, when said Act be-
 came 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 Constitu-
 tion of the United States, in that while such
 tax purports to be and is designated as a tax 50
 upon net income it is in truth and in fact a tax
 upon the real and personal property repre-
 sented 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 pre-
 scribed 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 51
 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 provi-
 sions, 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 prop-
 erty represented by and in which the corpora-
 tion had invested its net income received be-
 tween said March 1st, 1913, and October 3,

52 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 Federal Government do not permit of the ex-

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emption from the operation of an income tax of 55
any one of the aforesaid 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 indi-
viduals 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 56
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 prop-
erty for public use without compensation. That
the number of exempted corporations and the
amount of their incomes exempted from the opera-
tion 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 57
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 incon-
sistent 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

58 power of Congress, in fact were not the result of a
lawful exercise of such power, for the reason that
said provisions involve discriminations and class-
ifications 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 rea-
sonable 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 rea-
sonable. That distinctions are made in the bur-
dens imposed by said provisions because of wealth,
59 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 contra-
vention of said Fifth Amendment of the said Con-
stitution. That some of the said numerous uncon-
stitutional, arbitrary and unreasonable classifica-
tions 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
60 husband and wife living together of the amount
of \$3,333.33, and for subsequent years there-
after 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 per-
sons; 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.

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. 61

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. 62

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. 63

(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

64 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 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.

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(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

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than \$3,000 the payment of the tax is 67
 nevertheless required from the corporation
 debtor, although it is not justly due to
 the Government and such payment re-
 sults in an unnecessary loss to the cor-
 poration 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
 who 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 68
 claim, and with respect to whom the debtor
 corporation cannot ascertain that his entire in-
 come is less than \$3,000. The Act provides no
 means or machinery by which it can be ascer-
 tained by the corporation whether or not an in-
 dividual entitled to collect coupons or register-
 ed 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 69
 classification of those corporations which have
 assumed to pay the tax upon their coupons
 and registered interest (the Act lacking
 provisions that grant them protection and re-
 dress), and such corporations as have not as-
 sumed to pay the tax upon their coupons and
 registered interest. Both classes of corpora-
 tions are obliged to undertake great labor
 and go to great expense in connection with the
 payment of their coupons and registered inter-
 est, the filing of claims for exemption, deduc-
 tion and withholding and payment of taxes
 thereon, acting as the collecting agents of the

70 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 book-keeping, 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.

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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 inter-

- 76 est 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.
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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 be the basis of classifica-

tion, 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. 79

(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 80 81

82 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

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a difference that the restricted powers of the Federal Government permit to be the basis of classification. 85

(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 86 87

88 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.

89 (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 90 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 91
 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 al-
 lowed 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 in-
 comes above \$20,000. Such discrimination 92
 and classification are founded upon wealth
 alone as a basis and are unreasonable and arbi-
 trary, 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 in-
 surance companies, subject to like tax, discrim- 93
 inate 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 differ-
 ence that the restricted powers of the Federal
 Government permit to be the basis of classifi-
 cation.

94 (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

95 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

96 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 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. 97 98

(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 to each, whereby the 99

100 assessment and payment of a normal tax by
a husband and wife not living together and hav-
ing 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 aggre-
gate of both incomes over \$4,000, and an addi-
tional tax by a husband and wife not living to-
gether and having separate incomes would fall
upon neither if neither had a separate income
in excess of \$20,000, and if either had a sep-
101 arate 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 in-
comes 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 reason-
able, and are not founded upon a difference
that the restricted powers of the Federal Gov-
ernment permit to be the basis of classifica-
102 tion.

(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 fiduciary or other person deduct-

ing and withholding such a tax should neglect, 103
 or refuse, or be unable to pay the same when it
 became due, the individual whose normal tax
 had been deducted and withheld would never-
 theless 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 de- 104
 ducted 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 classi-
 fication 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 105
 powers of the Federal Government permit to
 be the basis of classification.

(14) The provisions of the said Act of Octo-
 ber 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 ex-
 clude such estimated rental of his home as in-
 come. Such a result gives a benefit and advan-

106 tage 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.

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(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

112 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.

113 (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.

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(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;

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118 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.

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120 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 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. 121

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. 122

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 from voluntarily 123

124 paying any taxes provided for therein, either upon
121 its own net income or upon such coupons and regis-
122 tered interest, and has claimed to said Directors
123 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 im-
proper 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.

125 Your orator further avers that the said com-
pany 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 dis-
regard 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 pro-
visions thereof in all respects.

126 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 corpora-
tion and to have such stockholders direct the said
Board of Directors to comply with your orator's
demand, inasmuch as no provision 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. 127

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. 128
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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.

130 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 interests 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
131 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,

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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: 133

(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. 134

(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. 135

(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.

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(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.

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(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.

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(7) That a writ of subpoena 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.

Julien T. Davies
Joseph S. Auerbach
FredERIC J. FULLER

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

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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.

Sworn to before me, this 13th day of March, 1914. } Frank R. Brushaber.

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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

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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 with any of said

provisions and from voluntarily making any re- 145
turn in pursuant thereto and from voluntarily
paying any taxes provided for therein, either upon
its own net income or upon such coupons and regis-
tered 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 Di-
rectors shall test the constitutionality of said Act
and prevent an unconstitutional and improper di-
version of the assets of the corporation in the pay-
ment of any such tax, and shall apply to a court
of competent jurisdiction to determine the liability 146
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 re-
quests herein made, I shall consider that you
have refused so to do and shall feel justified in al-
leging 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 147

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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.

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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.

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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.