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Constitutional Law--Commerce Clause--Navigable Waters--License to Construct a Dam Therein (United States v. Appalachian Electric Power Co., 61 Sup. Ct. 291 (1940))

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RECENT DECISIONS

CONSTITUTIONAL LAW—COMMERCE CLAUSE—NAVIGABLE WATERS—LICENSE TO CONSTRUCT A DAM THEREIN.—The defendant company is constructing a hydro-electric dam in the New River above Radford, Virginia where it is a riparian owner. The New River passes through Virginia and West Virginia. The Rivers and Harbors Act of 1899 prohibits the construction of a dam in any navigable water of the United States without the consent of Congress.[1] However, the Federal Water Power Act of 1920 created a Commission with authority to license the construction of such dams upon certain conditions—such as concern rates, accounts, control of operation and acquisition of the project by the United States at the expiration of the license.[2] The defendant refused a license containing the statutory provisions, on the ground that its project was not within the Commission's jurisdiction, but was willing to accept a "minor-part" license containing only such terms as would protect the United States' interests in navigation. This offer was rejected. Thereafter, the United States commenced this suit to enjoin the construction of the dam otherwise than under a license from the Federal Power Commission, and in the alternative for a mandatory order of removal. It was alleged that the construction of the dam constituted a violation of the above-mentioned federal statutes, for it would obstruct and impair the navigability of the New, Kanawha and Ohio Rivers, and it would affect the interests of interstate and foreign commerce. The defendant denied the allegations by contending that the New River was not navigable and that, even if it were, the said conditions of the license are unrelated to navigation, are beyond the power of the Commission and without the constitutional power of Congress to authorize. The district court dismissed the bill,[3] because it found: that the New River was not navigable according to the test enunciated in *The Daniel Ball* case,[4] that the dam would not obstruct

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[1] 30 STAT. 1151, 33 U. S. C. A. §§ 401, 403 (1899).
[2] 49 STAT. 838, 16 U. S. C. A. § 791a (1935).
[3] 23 F. Supp. 83 (W. D. Va. 1938).
[4] 10 Wall. 557, 563 (U. S. 1870).
". . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."
The lower courts rejected the government's argument that the court should consider the navigability question in the light of the effect of reasonable improvements on the waterway.

the navigable capacity of any navigable river and that it would not affect the interests of interstate commerce. The circuit court of appeals, one judge dissenting, affirmed the decision of the district court.[5] On *certiorari* to the Supreme Court of the United States, *held,* two judges dissenting, reversed. The evidence of actual use for commerce and private purposes and of the *feasibility of interstate use after reasonable improvements of the obstructed portions* proves that the New River is navigable and, therefore, is subject to federal control and Congress may require a license with the statutory terms for the construction of a dam therein. Also, when the navigability of a waterway of the United States is in issue the Supreme Court may reconsider the facts found by the two courts to determine whether the proper legal test was applied. *United States* v. *Appalachian Electric Power Co.,* — U. S. —, 61 Sup. Ct. 291 (1940).

The commerce clause [6] implies the power of Congress to control the navigable waters which are used or are capable of use in interstate commerce.[7] Formerly, the test of navigability applied by the Supreme Court was that of the tidal flow,[8] but the present rule is navigability in fact. However, in determining whether the water course is navigable in fact, the possibility that it may be made an interstate avenue for commerce after reasonable improvements should not be excluded. The commerce clause empowers Congress not only to maintain and improve the navigability of such waterways [9] but also to protect them against obstructions placed therein by any person or state. It may prohibit or permit the use of or the construction or maintenance of any structures in or across the navigable waters.[10] This plenary power and the dominion of the United States over the flow and energy of the navigable streams enables Congress to prescribe that as a condition to the maintenance and erection of a project in its navigable waters that a license be procured from the proper federal agency.[11] It may, moreover, require that the license contain certain conditions such as are involved in the instant case which are unrelated to navigation, for the power of the legislature is "as broad as the needs of commerce", and, in any event, its plenary power to

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[5] 107 F. (2d) 769 (C. C. A. 4th, 1939).

[6] U. S. CONST. Art. I, § 8, cl. 3 ("The Congress shall have Power * * * To regulate Commerce * * * among the several States").

[7] Gibbons v. Ogden, 9 Wheat. 1, 189 (U. S. 1824); Leovy v. United States, 177 U. S. 621, 632, 20 Sup. Ct. 797, 801 (1900).

[8] The Steamboat Thomas Jefferson, 10 Wheat. 428 (U. S. 1825).

[9] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466 (1936).

[10] Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518 (U. S. 1851); Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421 (U. S. 1855); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1906); Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340 (1911); Sanitary District of Chicago v. United States, 266 U. S. 405, 45 Sup. Ct. 176 (1924).

[11] United States v. Rio Grande Irrigation Co., 174 U. S. 690, 707, 19 Sup. Ct. 770, 776 (1898); Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 268, 35 Sup. Ct. 551, 557 (1915).

exclude structures from the navigable streams authorizes such terms. Furthermore, the provision that gives the United States an option to acquire the licensed project and the riparian rights at less than a fair value does not violate the "due process of law" clause,[12] because this is part of the consideration that the licensee has to pay to procure the privilege to construct and maintain its project in a place where it could be forbidden absolutely, and the United States, having the power to erect a structure in such waters,[13] may constitutionally obtain one already built. Nor does such acquisition constitute an invasion of the states' rights under the Tenth Amendment of the United States Constitution, since the federal government's action is within the commerce clause. The dissenting opinion of the present case is based essentially on the premises that the Supreme Court should accept the factual findings concurred in by the two lower courts and that it should adhere to the rule of *The Daniel Ball* case without considering the possibility of improving the New River.

A. G.

CONSTITUTIONAL LAW—TAX ON PRIVILEGE OF DECLARING DIVIDENDS—DUE PROCESS.—The State of Wisconsin enacted a statute [1] which provided: "For the privilege of declaring and receiving dividends out of income derived from property located, and business transacted, in this state there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) . . ." The remaining provisions of the act refer to the method of computing and collecting the tax and are not pertinent to the issues here involved. The defendant is a foreign corporation licensed to do business in the State of Wisconsin. It receives income in that state, and after whatever tax is levied upon its net profit is paid, such income is forwarded to its home office (New York); from there it is employed in any way the management sees fit; perhaps, some or all of it may be disbursed as dividends. Whether the tax on the privilege of paying such dividends may apply to a foreign corporation licensed to do business in Wisconsin without offending the due process clause [2] is the question raised by this appeal. *Held,* four judges dissenting, the statute is constitutional. The substantial privilege of carrying on business in Wisconsin clearly supports the tax, and the fact that the tax is contingent upon events brought to pass without the state does not destroy

[12] U. S. CONST. AMEND. V.
[13] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466 (1936).

[1] Wis. Laws 1935, c. 505, § 3, as amended by Wis. Laws 1935, c. 552.
[2] U. S. CONST. AMEND. XIV, § 1.