



Supreme Court of the United States
Washington, D.C.

January 27, 1941

No. 82.- United States v. Darby Lumber Co.

Dear Justice Stone:

You have written a strong opinion, again setting forth with suitable elaboration the general principles which we have held should govern the exercise of the commerce power. Of course, there is much that could be said with respect to the indefiniteness of the present statute, as a criminal statute, because of the failure of Congress to define the phrase "production for commerce". Congress gives a sweeping definition of "production" and of "goods" but not of "production for commerce"

In attempting to give some appropriate content to this loose phrase, I think that the test should be as objective as possible and should not be centered on the mere intent or expectation of the employer apart from the usual and normal course of business or actual transactions.

You state this on page 8 of your opinion at the close of the first full paragraph where you say that "he moves his product with the intent or expectation that in the normal course of his business all or some segregated part of it will be selected for shipment to those customers". I should prefer to see the words "according to" instead of "in" before the words "the normal course of his business", in order to sharpen the point.

I should like to see the same phrase, at the end of the

RECEIVED
JAN 28 1941
LIBRARY OF CONGRESS

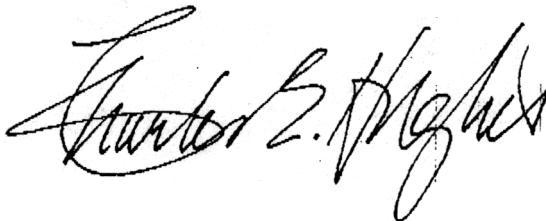
last paragraph on page 8, so that it should read "the employer intends or expects to move in interstate commerce according to the normal course of his business". I also suggest the omission of the last clause on that page - "although, through the exigencies of the business, the goods may not thereafter actually enter interstate commerce". It seems to me that that starts a line of inquiry which is not necessary to suggest in the present case.

I also suggest that a similar insertion should be made on page 4, towards the close of the first full paragraph, so as to read "which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business".

Even with the best possible test, the statute is a highly unsatisfactory one, but as it is a border line case I should prefer not to write.

I am holding your opinion so that I may have it before me when you circulate No.330, which presents some additional considerations which I think important.

Faithfully yours,

A handwritten signature in cursive script, reading "Charles E. Hughes". The signature is written in dark ink and is positioned to the right of the typed name "Mr. Justice Stone".

Mr. Justice Stone.