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**Court :** US Supreme Court

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**Appeal No. :** 242 U.S. 568

**Appellant :** Merrick

**Respondent :** Halsey and Co.

**Judgement :**

Merrick v. Halsey & Co. - 242 U.S. 568 (1917)

U.S. Supreme Court Merrick v. Halsey & Co., 242 U.S. 568 (1917)

**Merrick v. Halsey & Company**

**No. 413**

**Argued October 16, 17, 1916**

**Decided January 22, 1917**

**242 U.S. 568**

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES*

*FOR THE EASTERN DISTRICT OF MICHIGAN*

## SYLLABUS

The Michigan "Blue Sky Law," Act No. 46, Public Acts, 1915, p. 63, is the same in principle as the laws of Ohio and South Dakota, involved in *Hall v. Geiger-Jones Co.*, ante, [242 U. S. 539](#) , and *Caldwell v. Sioux Falls Stock Yards Co.*, ante, [242 U. S. 559](#) , and is sustained over constitutional objections for the same reasons.

Whether the dealing in stocks and other securities, or sale of their own issues by corporations, require governmental regulation for the prevention of fraud, and whether such regulation should be by executive control or otherwise are questions for the state legislature, and unless its judgment in these regards, or the execution of it, be palpably arbitrary, the courts will not interfere.

It is not a function of this Court to pass upon the expediency or adequacy of legislation.

The purpose of the Michigan statute is to protect investors in securities not from financial loss generally, but from fraud.

In prevention of fraud, the regulatory power of a state is not necessarily confined to those classes of business which by their nature or as generally conducted involve or encourage fraud; it may extend to those in which fraud usually, when it arises, is occasional and

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confined to individual transactions, but which may nevertheless be conducted for fraudulent purposes.

The limitations of the Constitution are not so rigid as to render state legislation inadequate to the changing conditions of life.

Section 3 of the Michigan act, which exempts from its operation securities "listed in any standard manual of information" approved by the securities commission, *held* not to render the act unduly discriminatory or involve unlawful delegation of power.

The act complies with the requirement of the Michigan Constitution that no law shall embrace more than one object, which shall be expressed in its title.

228 F. 805 reversed.

The question in the case is the validity of the Blue Sky Law (using this designation for convenience) of the State of Michigan. The law is almost identical with that of South Dakota, which is the subject of the decision in No. 386, *ante*, [242 U. S. 559](#).

The pleadings are elaborate, and practically defy synopsis. There are direct complainants and intervening complainants, expressing the grievances of dealers in the state and outside of the state, and of persons who would like to be dealers in the state, but are deterred, they allege, by the expense of the undertaking. The law therefore is assailed from all points and in all aspects.

The original bill includes in it as parties corporations, individuals, copartnerships, residents, and citizens of different states, all engaged in the investment banking business and in the business of buying and selling stocks, bonds, and other securities, and offering them for sale in Michigan, and who have contracted from time to time to sell such securities for the owners thereof and for the issuers thereof. They have expended large sums of money in advertising their business and have a valuable goodwill and an extensive clientele, and have acquired valuable information as to the conduct of their business and as to the names and addresses of persons, firms, and corporations who buy the designated securities in Michigan. They send into the state their agents and employees, who there

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solicit orders for the securities and transmit such orders to complainants at Chicago, Illinois, which orders are accepted, and the securities so purchased are transmitted to Michigan. Their representations of the securities are true representations, they allege, and that they have been solicited to sell and have contracted to sell them, but have been informed that they cannot be permitted to sell them without complying with the Michigan statute.

The various provisions of the statute are set out, with details as to the manner of its operation, the irrelevancy of it is asserted, the useless labor of it -- in some cases the impossibility of it -- and in other cases its unreasonableness, and it is further asserted that its exaction of matters of confidence and its requirements invade and destroy property rights, curtail freedom of contract, and otherwise seriously damage complainants' business and property. All of this is alleged with industrious and elaborate detail.

The other charges of invalidity against the act are: (1) it is in violation of the Constitution of Michigan, which provides that no law shall embrace more than one object, which shall be expressed in its title, with specifications; (2) it offends against the Fourteenth Amendment of the Constitution of the United States, especial stress being put upon the exceptions of the statute, which are asserted to be discriminations in violation of the equal protection of the laws guaranteed by that Amendment; (3) it imposes a burden on interstate commerce in violation of 8, Article I, of the Constitution of the United States.

Under the latter objection, there is elaborate specification of particulars which exhibit, with the specifications under the other objections, every shade of meaning, purpose, or effect that ingenuity can ascribe to the statute -- indeed, every provision of the statute is reviewed and charged with some form of illegality. However, the attacks may be condensed in the charge that the statute is a violation of the prohibitions of the Fourteenth Amendment

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of state action because of its restrictions or prohibitions of a lawful business, and a violation of the commerce clause of the Constitution because the designated securities are articles of commerce, and, as such, entitled to unmolested transportation between the states, and that the statute is a direct burden upon them in many cases, prohibitive in others, with the addition that the statute delegates legislative power to the commission created by it, inflicts cruel and unusual punishments, and imposes penalties whose object is to deter from a test of its validity, and inflicts cruel and unusual punishments, in violation of the

## Constitution of Michigan.

It is also alleged that in a suit entitled *Alabama & N. O. Transp. Co. v. Doyle*, in the District Court for the Eastern District of Michigan, the statute, of which the statute under review is an amendment, was declared unconstitutional and void, the opinion in which case is reported in 210 F. 173, and that the statute there passed upon is similar in all illegal particulars to the present statute. A remedy in equity is asserted because of alleged irreparable injury and on account of the penalties imposed, and an injunction is prayed against the enforcement of the act.

At the same time that the bill outlined above was filed, another bill was filed by the Weis Fibre Container Corporation, a corporation of South Dakota, whose purpose is to manufacture, buy, and sell paper or fiber containers and similar products. It is not an investment company, but a manufacturing company. Its securities are not supervised or regulated by any public service board or commission, and the proceeds from the sale of its stocks and securities are employed in the prosecution of its business, and are not otherwise invested. The corporation is duly authorized to do business in Michigan; its stock is valuable, and it has offered it for sale in Michigan directly and through agents and employees, and it is alleged that the

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representations made in regard thereto are true. It has solicited various persons in Michigan to offer its stock for sale, and they have informed it that its stocks cannot be sold in Michigan unless full compliance is made with the statute.

The bill attacks the statute for the illegalities detailed in the other bill, and, considering that the only remedy is in equity, prays an injunction against the enforcement of the act.

A restraining order was issued entitled in both cases. Subsequently, on September 16, 1915, a partnership, organized and existing under the laws of the State of Ohio, having the name of Otis & Company, and composed of citizens of Colorado and Ohio, filed a petition in intervention.

That company is a dealer in bonds and other securities in Michigan, and such bonds and securities are of the kind which the statute of the state regulates. It also sends agents into the state to solicit orders for such securities and transmits orders to its offices in Cleveland, Ohio.

It asserts identity of situation with the complainants in the other bills, and adopts their charges against the statute, and prays to be made a party complainant to the cause, and for the benefit of the restraining order issued therein, and for such other relief as the court may deem meet.

A demurrer was filed to the bills and a motion made for injunction. The company was given the benefit of the restraining order and a like benefit was given to all others who might petition to intervene, the restraining order to continue until the disposition of the motion which had been made for injunction. The injunction was subsequently granted (228 F. 805), and to review it, this appeal is prosecuted.

There was a partnership under the name of Remick, Hodges, & Company, Remick and Hodges being residents of New York and March a resident of New Jersey, having their office at the City of New York and engaged in buying

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and selling stocks, bonds, and other securities. Their business is known as investment banking and is carried on in New York and by their agents there and elsewhere, and by mail with various corporations, associations, and persons throughout the United States and in the State of Michigan. They own many of such securities which they have offered and are offering for sale, and desire to continue to offer to their customers in the State of Michigan. They have no place of business in the state, and are not at the present time sending agents into the state, but are endeavoring to sell securities there; but the volume of such business is not sufficient to justify them to attempt to comply with the statute of the state, and the statute, if enforced against them, will have the effect of preventing them from making any further offers in the state, and from attempting to establish or develop any business therein, and they are excluded thereby from interstate

commerce in such securities which they have heretofore enjoyed.

They allege themselves to be in like situation with complainants, and adopt the allegations of complainants' bills, and especially complain of the penalties which may be enforced against them and their agents, and pray to come into the suit as parties.

The causes were subsequently consolidated by a *nunc pro tunc* order.

The injunctions restrained the defendants from enforcing the act and from beginning or instituting any action, civil or criminal, against complainants, "based upon or pursuant to such act."

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MR. JUSTICE Mc KENNA, after stating the case as above, delivered the opinion of the Court.

The statute of Michigan is the same as the statutes of South Dakota and Ohio, and our reply to the attacks made upon it might be rested upon our discussion of those statutes.

But in the present case, as we have said elsewhere, the arguments, while fundamentally the same, are in some respects more circumstantial. All the supposed consequences of the law are dilated upon -- wherein, as it is contended, it meddles with or burdens a business asserted to be legitimate, wherein it prohibits or gives power to an executive officer to arbitrarily prohibit such business, and wherein it confuses legislative and executive powers, and in these ways and other ways, as it is further contended, transgresses the Constitution of the United States. Many cases are cited to support the contentions, and publicists are avouched to the same end. In our discussion we cannot be as elaborate in details as counsel, nor is it necessary. There are certain outside propositions upon which all others may be regarded as dependent. These propositions were considered in the other cases, and we need now only supplement what was there said.

The appellants justify the law by the police power of the state and its comprehensive reach. Replying, appellees urge against it the limitations of the Fourteenth Amendment

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and the national supremacy over interstate commerce, and applying the Fourteenth Amendment, assert in many ways (we select one and upon it the changes are rung) that the issue of the securities "is in effect the making of contracts *proper and necessary and essential' to the pursuit of lawful livelihoods or avocations,*" and cannot be "made the subject of discretionary executive license," controlling thereby individual transactions.

The assertion encounters immediately many cases in which laws have been sustained limiting the making of contracts and regulating business through executive agencies and necessarily controlling individual transactions. Indeed, there are too many for even marginal citation. They, however, are attempted to be distinguished or restricted. It is said by counsel that they "deal with administrative control over matters of public right or public grant or existing at public sufferance." And it is admitted that "the legislature may deal drastically with many matters of private right, to prevent or redress individual wrongs." It is further admitted that "drastic remedies may be prescribed *by law* [italics ours] for evils deemed by the legislature to require them." Excluding the proposition so expressed from application to the Michigan law, it is insisted that the business to which it applies

"neither requires nor justifies nor is susceptible of administrative or executive control for the purpose of preventing a wrong or injury by one individual to another."

Of course, the implication, if not the direct assertion, is that the business of dealing in securities has not that character. Neither the principle nor the assertion is very tangible. The first incidence of any evil from a business or conduct is upon some individual, and through the individual (let us say individuals, for necessarily there are more than one) upon the community; nor can it be affected in any other way.

Besides, it is for the state to judge in such circumstances, and the judgment and its

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execution would have to be palpably arbitrary to justify the interference of the courts. Counsel, indeed, frankly concedes the evil of "get-rich-quick" schemes and quotes the banking commissioner of the State of Kansas for the statement that the "Blue Sky" law of that state had saved the people of the state \$6,000,000 since its enactment, and that between 1,400 and 1,500 companies had been investigated by the department, and less than 400 of the number granted permits to sell securities in the state. Counsel also quotes the confidence of the commissioner in the efficacy of the law, and that it will "eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised."

Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation "into the soundness, good faith, and prospects" of companies. Upon this difference in views we are not called upon to express an opinion, for, as we have said, the judgment is for the state to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the state has determined that the business of dealing in securities shall have administrative supervision, and twenty-six states have expressed like judgments.

Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice

Matthews, in *Hurtado v. California*, [110 U. S. 516](#) , [110 U. S. 530](#) , is the "peculiar boast and excellence of the common law." It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer in *Muller v. Oregon*, [208 U. S. 412](#) , [208 U. S. 420](#) , that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action." This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples, to guide us. So guided and so informed, we think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed.

But counsel say that the conditions imposed either are not adequate to such purpose or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared

purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character.

It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked,

"Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business -- a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?"

And, quoting from *People ex Rel. Tyroler v. Warden*, 157 N.Y. 116:

"It is a novel legislation, indeed, that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it."

To the latter we say the right to do business is not taken away; the other we have already answered, and need only add that we cannot, upon such considerations, limit the power of the state. The state must adopt its legislation to evils as they appear, and is not helpless because of their forms.

*Engel v. O'Malley*, [219 U. S. 128](#) , was not decided because fraud was incidental to the business of banking by individuals or partnerships, but because fraud could be practised in it, and that hence it could be licensed. Nor was it decided in *Allen v. Riley*, [203 U. S. 347](#) , that the transfer of patent rights was of itself illegal, or that any particular transfer would be deceptive, but that some transfers might be, and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business, and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This Court sustained

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the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. *Brazee v. Michigan*, [241 U. S. 340](#) . See also

*Brodnax v. Missouri*, [219 U. S. 285](#) . Other cases might be cited of similar import.

It may be that there are better ways to meet the evils at which the statute is directed, and counsel have felt it incumbent upon them to suggest a better way. We can only reply that it is not our function to decide between measures, and, upon a comparison of their utility and adequacy, determine their legality.

The contentions upon the discriminations of the statute we rest upon the comment made on like contentions in the other cases. A special emphasis, however, is put by appellees upon the adoption by the Commission of "so-called "standard manuals of investment." The adoption of these manuals, it is said, is justified by the Commission under 3, which enumerates the securities that are exempt from the law, among others, "(h) securities which are listed in any standard manual of information approved by said Commission." The provision is attacked as "the Michigan idea" of providing an easy way out of the act at all times." And further: "It is not so much an exemption of existing standard securities as a working exemption available for new offerings to be listed as issued." And again: "It is to be a permanent means of exempting new securities from the act." Even this, it is asserted, is not all of the power that is given for discrimination, for it is pointed out that the Commission may call for additional information than that contained in the manuals, and may, pending the filing of the information, suspend the sale of the securities, and may also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the Commission shall find that the sale of such securities would work a fraud upon the purchasers thereof.

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The exemption and the provision are declared to be unconstitutional, and it seems to be intimated that in the flexibility of what is considered their subterfuge a vicious character is not only given to the act, but constituted its inducement, and therefore brings the act down with it, for without it, it is insisted, the statute would not have been enacted. We cannot agree either to the characterization of the provision or

its effect. The first would attribute a sinister purpose to the legislation of which there is no indication; the second would give too much importance to a subordinate provision, one that is only ancillary or convenient to the main purpose.

The contentions based on the exemption and provision are a part of that which accuses the law of conferring arbitrary discretion upon the Commission, and committing to its will the existence or extinction of the business. The accusation is formidable in words, but it is the same that has been made many times. It is answered by the comment and the cases cited in the opinion in the other cases. Besides, we repeat, there is a presumption against wanton action by the Commission, and if there should be such disregard of duty, a remedy in the courts is explicitly given, and if it were not given, it would necessarily be implied.

Objection is made that the title of the act does not indicate its provisions, and that the act hence violates the Constitution of Michigan. The objection is untenable, and does not call for particular notice.

Answer to the contention that the statute is an interference with interstate commerce we leave to our opinion in Nos. 438, 439, and 440, *ante*, [242 U. S. 539](#) .

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE Mc REYNOLDS dissents.