APPENDIX.

In *Davis* v. *Portland Seed Co., ante,* p. 403, *Mr. John F. Finerty,* as counsel for Davis, Agent etc. and Director General of Railroads, took a position respecting important questions involved differing from that advanced by counsel representing the railroads. The following summary is taken from his supplemental briefs.

1. Under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or because greater than the aggregate-of-intermediates, but, in either such event, a shipper may make claim for damages under §§ 8 or 16 of the act. Under no circumstances is the charging and collecting of such published rate an overcharge in violation of § 6 but, on the contrary, it is made mandatory by § 6 itself.

2. There is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) The long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) The aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

3. While there is thus a distinction as to what constitutes a violation of the respective clauses, once a viola-

tion of either is established the measure of damages is substantially the same.

That is, in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

4. There is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

5. Even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause, the higher through rate, is unreasonable under § 1, or discriminatory or unduly prejudicial under §§ 2 and 3.

6. The Director General should not be held to have been subject to the Fourth Section, because that section

in providing for application to the Commission as a condition precedent to the publication of lawful rates departing from the long-and-short-haul and aggregate-of-intermediates prohibitions of that section, is in direct conflict with the unrestricted powers conferred upon the President by § 10 of the Federal Control Act, to initiate lawful rates by merely filing them with the Interstate Commerce Commission.